Part 4 – Wills

- Part 4 replaces the *Wills Act*.
- Key changes from the *Wills Act* include:
  - The ability for the court to recognize a document as a will despite the fact that it does not comply with the formal requirements set out in this Part.
  - The ability for a court to permit a gift to a witness of a will, despite the general prohibition on such gifts.
  - The ability for the court to correct a will where it can be shown that the will does not accomplish the will-maker's intention.
  - The ability for a court to allow outside evidence where there is a term in a will that is ambiguous or meaningless.
  - A will is no longer revoked by marriage.
  - Specific gifts of land must be used to pay the debts of the estate on an equal basis with specific gifts of personal property (such as bank accounts, cars or jewels).

Division 1 – Making a Will

- Division 1 of Part 4 sets out the requirements for making a valid will.
- If a will appears to comply with the requirements set out in Division 1 then it is presumptively considered to be a will, until evidence is provided to prove that the requirements have not been complied with or there are other issues with the will aside from compliance with the formal requirements (such as undue influence or a lack of capacity).

SECTION 36

- Section 36 allows anyone over the age of 16 to make a will.
  - The current *Wills Act* provides that a person acquires testamentary capacity at 19 (the age of majority) with an exception for minors who are married or for persons on military service or mariners.
- There are a number of benefits to the proposed change:
  1. The current exceptions would be better served by a general rule:
     - Unmarried minors can also have children; therefore, rather than an exception for married minors it is better to allow any minor of potentially child-bearing or child-fathering age to make a will.
     - Military service is only one of many dangerous occupations that a minor may begin at the age of 16. Minors who work in other dangerous jobs (e.g., forestry) should also be able to make wills.

2. The change is also beneficial for estate planning:
    - Minors often own valuable assets such as cars. Transfer of such assets on death is easier if the assets pass under a will.
    - Minors may also have interests under an estate plan, which could be upset by an unexpected death and intestacy.
        - For example, a child of divorced parents may have property placed into that child's name for tax purposes by one parent and the property is intended to revert to that parent under the terms of that plan.
3. The change also simplifies the law by eliminating the need for exceptions to a general rule.

SECTION 37

- Section 37 carries forward the rules in section 3 and 4 of the *Wills Act*, which provide that a will must be in writing and signed at its end in the presence of at least two witnesses.
- In general, writing provides certainty as to the identity of the will-maker and is evidence that the will-maker carefully set out their intent.
- However, subsection (2) allows for a will that is not in writing or signed or witnessed properly to be recognized as valid under the curative power introduced by section 58 and to be recognized under the laws of another country in accordance with section 80 or any other provision of this Act.

SECTION 38

- Section 38 carries forward section 5 of the *Wills Act* and allows a member of the military to make an informal will.
- A "military will" that complies with this section will be presumptively valid, meaning a surviving spouse would not have to apply for a court order under section 58 in order to apply for a grant of probate.
- However, the ability to make an informal will is not carried forward for mariners.
    - Contrary to the Canadian Forces who make their personnel aware of the existence of an informal will-making ability, there is no similar education for mariners.
    - If necessary, descendants of mariners will be able to rely on section 58 if a mariner does make an informal will.
    - Court registry staff cannot recall any descendants of a mariner ever submitting a will based on section 5 of the *Wills Act*.

SECTION 39

- Section 39 maintains the present law from section 6 of the *Wills Act* with respect to the requirement for signatures and other formalities involved in the creation of a conventional will.
- While, subsection (1) sets out the formalities involved in the creation of a conventional will more generally than section 6(1) of the current *Wills Act,* the effect of the section is the same.
- Subsection (1) has been amended by section 19 of the *Wills, Estates and Succession Amendment Act, 2011* to use consistent wording with the rest of the legislation.

SECTION 40

- Subsection 40 (1) specifies that a witness to a will must be 19 years old.
  - While there are valid policy reasons to allow a person as young as 16 to make a will (as is done in section 36) these same reasons do not extend to witnesses.
  - Allowing minors to witness wills will not provide a significant benefit to a will-maker, as generally adults will be available to witness.
    - Where adult witnesses are unavailable and a 'will' **is** witnessed by minors (e.g., a bunch of 16-year-olds camping and a life-threatening accident occurs) the 'will' could still be upheld by the court, using the curative power in section 58.
  - It is more likely a 16-year-old will appreciate the significance of their actions if it requires the participation of adults than if it were something they could do with just their friends.
- Subsection (2) carries forward the present law under section 11 of the *Wills Act* that a will is not invalidated because a beneficiary under a will witnessed it.
- Subsection (3) also carries forward section 10 of the present *Wills Act*,
  - This provision is justified by the fact that the competence of a person at any particular time may be difficult to ascertain,
  - In the absence of other suspicious circumstances, inquiries of this nature are not necessary to ensure that a will expresses the genuine testamentary intent of the will-maker.
- Subsection (3) has been amended by section 20 of the *Wills, Estates and Succession Amendment Act, 2011* to clarify that a will **is** invalid if a signing witness was less than 19 years of age.

Division 2 – Legal Effect of a Will

- Division 2 of Part 4 addresses how a will is to be interpreted and general rules that apply to a will.

SECTION 41

- Subsection 41 (1) carries forward section 2 of the *Wills Act*. The section maintains the present law that a person may make a gift of any property (regardless of the interest) acquired before or after the date of the will.
    - This ensures that everything that the deceased owns can be distributed by a will, regardless of when it was acquired.
- Paragraphs (a) – (c) from section 2 of the present *Wills Act* have **not** been carried forward. They are not necessary because the effect is the same by simply stating positively what the law is.
    - These paragraphs were originally added to displace specific common-law rules. However, the fact they are no longer carried forward should not lead to the revival of the unwanted common-law rules. Section 35 (1) (a) of the *Interpretation Act* provides that the repeal of an enactment does not revive an enactment or thing not in force immediately before the repeal. Moreover, the section continues to broadly state the law so there should be no room for misinterpretation.
- Subsection (2) and (3) restate the general principles currently found in sections 11 and 10 of the *Wills Act* more simply and have the same effect.

SECTION 42

- Section 42 simplifies the wording of existing sections 25 and 26 of the *Wills Act*; which direct how a distribution is to be made where a will simply makes gifts to "heirs" or "next of kin."
- This section ensures that gifts to issue under a will are distributed in the same manner as a distribution to issue on intestacy.
    - There is no reason that heirs' entitlements should be determined differently depending on whether or not there is a will.
- A will-maker can always specify a different method for determining their heirs' entitlement in the will.

SECTION 43

- Section 42 addresses the invalidity of gifts to witnesses and retains a presumption found in section 11 of the *Wills Act* that a gift to a beneficiary (or spouse of a beneficiary) attesting the will is void if they witnessed the will.
- However, a flexible mechanism for saving gifts to witnesses has been added:
    - The person seeking to uphold the gift to the witness must satisfy the court that the will-maker knew and approved of the gift.

- The current rule is a safeguard against fraud and undue influence, but it can also operate harshly and unfairly. Therefore, if a person can satisfy a court that there was no fraud or undue influence involved in the making of the will there is no reason that the gift should be void; as this would defeat the will-maker's actual intentions.

- Subsection (4) has been amended by section 21 of the *Wills, Estates and Succession Amendment Act, 2011* to clarify that the court may declare a gift is not void if a beneficiary's spouse witnessed the will.

SECTION 44

- Section 44 clarifies what happens if the will does not direct how certain property is to be distributed.
  - The effect of section 44 is that the property not dealt with in the will (the residue) is to be distributed as if there were no will. Part 3 of the *Wills, Estates and Succession Act* will then govern the distribution of that property.
- Section 44(b) provides that if there are no persons entitled to the property under Part 3 of the *Wills, Estates and Succession Act* then the residue passes to the Crown (government of British Columbia) under the common-law principles of *escheat* or *bona vacantia*.
  - Having the property pass to the Crown changes the law that is currently expressed in section 31(2) of the *Wills Act*. The effect of current section 31(2) of the *Wills Act* is for the estate to go to the executor if there are no persons who would be entitled to take on intestacy.
  - This change was recommended by the British Columbia Law Institute. The rationale being, that if there are no persons entitled to take on an intestacy then having the residue pass to the Crown rather than to the executor prevents a conflict of interest arising.
    - The executor's job is to find more remote heirs; however, if the executor is entitled to the remainder of the estate they have little incentive to find remote heirs.
    - Section 5 of the *Escheat Act* will permit any person having a legal or moral claim to the residue to assert that claim to the Attorney General and ask to be awarded the estate on that basis.

SECTION 45

- Section 45 addresses the problems an executor faces if a will contains a gift of land to more than one beneficiary, without specifying that the beneficiaries are to take the land in some form of co-ownership and where the land cannot be subdivided.
- Section 45 solves the problem by deeming the beneficiaries to take the land as tenants in common, in proportion to the interests the will-maker specified. This allows the executor to transfer the land into the beneficiaries' names.

SECTION 46

- Section 46 sets up a scheme of priority among potential alternate takers for gifts that fail because the original beneficiary predeceased the will-maker.
- Section 46 replaces sections 21 and 29 of the *Wills Act* and makes the following changes:
- Section 46 (1) provides that if a gift fails for a reason not contemplated by the will-maker the gift goes to the alternative beneficiary.
    - Currently (per section 21 *Wills Act*) the gift goes into the residue.
    - The reason for change is that it is more likely the will-maker would want the gift to go to the alternative beneficiary rather than to the residuary beneficiaries.
    - This new default rule may always be displaced by a contrary intention apparent from the will.
- Section 46 (1) does not apply to gifts to groups of people, known as "class gifts."
    - Section 29 of the *Wills Act* currently applies (per paragraph (a)), whether a beneficiary takes as an individual or as a member of a class.
    - The reason for change is that a class gift implies intent by the will-maker that the remaining members of the class should be alternate beneficiaries, rather than one designated by the Act.
- Section 46 (2) displaces case law in Canada, which currently holds that the relevant time for determining entitlement is the death of the beneficiary.
    - This change was recommended by the British Columbia Law Institute. A provision similar to subsection (2) has been suggested by the Manitoba Law Reform Commission.
- Section 46 does not carry forward section 29 (2) of the *Wills Act*, which gives a person the right to take a gift given to their deceased spouse.
    - Section 29 (2) of the *Wills Act*, lets the spouse of a predeceasing beneficiary take a gift if the beneficiary had no issue (children). For example, under section 29 (2) a gift to a childless sister who predeceases the will-maker would go to the sister`s husband.
    - The reason for change is that it is believed a will-maker would prefer that a gift go to the residuary beneficiaries instead of a spouse of the predeceasing beneficiary. Will-makers very seldom want to benefit in-laws.

SECTION 47

- Currently, section 30 of the *Wills Act* makes the beneficiary of mortgaged land primarily liable for payment of the whole of the mortgage debt, so that the beneficiary only acquires the interest in land net of that debt.
- Section 47 extends the principle of the section 30 to registered security interests in personal property as well as land.
    - At the time that section 30 was drafted, the Personal Property Registry had not been created to register interests against personal property.

    - As with land, a beneficiary who receives personal property encumbered by debts should be liable for the debt (provided the security relates to the acquisition, improvement, or preservation of the property).
- If the debt was not incurred for the purpose of acquiring, improving or preserving the property (land or personal property) then the property is merely collateral. In this case, the debt should, in fairness, be treated as a general debt of the estate, and the interests of the other beneficiaries should also contribute to its payment.

SECTION 48

- Section 48 provides relief from "ademption," which occurs when a specifically bequeathed item of property (e.g., a car) is sold and can no longer be given to the intended beneficiary under the will. Currently, when this happens, the gift fails, and the beneficiary who was to receive the item has no claim to an equivalent benefit under the will.
- However, when the disposition is carried out by a "guardian" (such as a property guardian, a representative, or a person acting under an enduring power of attorney) the underlying basis for ademption is not present because the disposition is not a conscious or even inadvertent decision of the will-maker to revoke the gift.
    - The policy underlying ademption is that a will-maker should remain free to deal with property during life and to change testamentary plans. If a bequeathed item is not part of the estate at death, the will-maker is presumed to have intended to revoke the gift.
    - However, a Guardian has no right to review a person's will. Therefore, the Guardian cannot know what property is the subject of a specific gift under the will. Often an incapacitated person's assets are sold to help pay for that person's care; particularly assets that they may no longer need, such as a car. In such a case, it is possible that the Guardian may sell property without knowing it was subject to a gift under a will.
- Subsection (1) has been amended by section 22 of the *Wills, Estates and Succession Amendment Act, 2011* to clarify that the beneficiary is entitled to the 'gross' proceeds from the sale of property subject to a specific gift .
    - It is important to make this clear in the legislation to prevent disputes about how much money the beneficiary is to receive in lieu of the gift.
    - Without specifying 'gross' proceeds it would be open to an executor to argue that the beneficiary should only receive the 'net' proceeds from the disposition of the gift. The net proceeds are determined after deducting any costs associated with a disposition, for example:
        - a car is sold for $10,000 but the Guardian only receives $7,500 from the sale because they paid to have the car washed and cleaned and also paid a commission to an agent. The 'gross' proceeds from the sale are $10,000 and the net proceeds are $7,500.

- Subsection 48 is now clear that the beneficiary is to receive $10,000 in lieu of the car. This is justified as that is the value of the gift that they did not receive.

How Section 48 Works:

- If a specifically bequeathed item of property is disposed of, then the beneficiary who was to receive that item will be able to claim an amount equivalent to the proceeds of the disposition of the asset.
- Essentially, the gift changes from a specific legacy (a gift of an item or account) to a pecuniary legacy (i.e., a gift of a specific dollar amount without a specified source).

SECTION 49

- Section 49 carries forward section 8 of the *Wills Act*.
- This section provides relief from requirements associated with a power of appointment that are more burdensome than the usual requirements for making a will.
- The policy behind the section is that, if a power of appointment permits a person to exercise the power in a will, the person exercising the power should not be compelled to meet a higher standard than would otherwise be required to have a valid will. For example:
  - The document setting out the power of appointment might specify that if a person wants to exercise their power of appointment under a will that they must have three witnesses.
  - Section 49 says that, regardless of what the document setting out the power of appointment says, the power will be deemed to have been validly executed if the will is made in accordance with this Act (and only has two witnesses).

SECTION 50

- When gifts must fail, in whole or in part, because they are needed to pay debts of the deceased, the gifts are said to 'abate'.
- Section 50 prescribes new rules concerning the order of abatement of testamentary gifts:
  - It allows real property (land or interests in land) to abate together with personal property.
  - It reduces the number of distinctions made between categories of gifts, so that the application of assets of the estate towards payment of debts will be substantially simpler.
- Currently, highly archaic common-law rules specify the order in which assets must be sold to pay off debts, unless the will directs differently.
  - The reasons why (under the common law) real property abates after personal property are purely historical. Formerly, real property did not pass to the personal representative but passed directly to those entitled

by will, or directly to the heir at law in intestacy. Therefore, the personal representative simply did not have access to land to pay the debts.
    - However, since 1921 in British Columbia, real property passes to the personal representative the same as personal property. Therefore, the foundation for the distinction made between real and personal property in the order of abatement has vanished.

SECTION 51

- Section 51 abolishes the common-law doctrine of "election."
    - The doctrine of election currently applies where a will-maker makes a gift that is conditional on performance of an implied obligation on the beneficiary to give property belonging to the beneficiary to another. The beneficiary must perform the obligation to get the will-maker's gift. For example:
        - The will says "I give my Picasso to A and the Da Vinci to B."
        - However, the will-maker does not own a Da Vinci and B does own one.
        - Under the doctrine of election, in order to get the Picasso, A must give the Da Vinci to B.
        - If A elects to keep his Da Vinci, the gift of the Picasso fails and the Picasso falls into the residue of the estate, unless the will directs otherwise.
- The doctrine of election in effect allows a will-maker to make a gift by will of property that the will-maker does not own.
    - In almost all cases where it the doctrine of election would operate, a mistake would have been made. However, the mistake could not be rectified under section 58. This is because the wording of the will would coincide with the will-maker's actual intention, although this intention was based on a mistaken assumption of ownership.
    - 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.
- A person may still make a conditional gift in their will; and this will have a very similar result to the doctrine of election. However, the gift must specifically state the obligation the will-maker is placing on the beneficiary. For example:
    - "I give my car to my daughter, Snow White, if Snow White gives her car to her daughter, Rose Red."
    - Similar to the earlier example of the gift of the paintings, Snow White must choose whether to give her car to Rose Red in order to get the gift of the car from the deceased. However, the difference is that, in this example, there is clearly no mistake as to ownership and the obligations on the beneficiary are specific.

SECTION 52

- Section 52 reverses how the law treats allegations of undue influence in relation to a gift under a will.
    - This change was made for two reasons:
        - It better protects the wishes of the deceased.
        - It brings the law of undue influence for gifts under a will in line with the law of undue influence for gifts during a person's life.
- Under section 52, if a person challenging a gift under a will can show that the beneficiary was in a position of influence over the will-maker during the time the will was made, then there is a presumption that the gift was the result of undue influence and the beneficiary has the obligation to convince the court that the gift was made by the will-maker free from undue influence.
- This section has been amended by section 23 of the *Wills, Estates and Succession Amendment Act, 2011* to replace references to "an action" with references to "a proceeding."
    - This change increases the flexibility in how issues be commenced. The change to "proceeding" allows matters to be commenced by Requisition or Petition, rather than only by action.

Background

- The current law of undue influence in relation to wills is based on common-law presumptions established as part of the practice of the ecclesiastical courts.
    - The ecclesiastical courts believed in the sanctity of a will. If a document complied with the requirements to be found to be a will then the ecclesiastical courts were very reluctant to interfere with the wishes expressed in that will. Therefore, a person alleging that a gift under a will was the result of undue influence must actually prove that the beneficiary exercised their influence to 'overbear' the intention of the deceased.
- The law of undue influence in relation to gifts under a will currently operates in contrast to the law of undue influence in relation to lifetime gifts.
    - For lifetime gifts, if the challenger can show that the beneficiary was in a position of influence at the time the gift was made, then it is presumed that the gift was the result of undue influence and the beneficiary has the obligation to rebut this presumption.

Division 3 – Abrogation of Common-Law Rules

- Division 3 of Part 4 is a one section division that abolishes a number of rebuttable common-law presumptions concerning the effect of gifts and transfers of property during a will-maker's lifetime.
- The British Columbia Law Institute considered these common-law presumptions outdated or unhelpful as aids to interpretation under contemporary conditions.

- In many cases the presumptions acted contrary to common expectations.
- A related change is that section 92 of the *Estate Administration Act* has not been carried forward. Section 92 is a codification of the common-law "hotchpot" rule. Essentially, it provides that if a person who dies without a will has given their child a gift of money during life, then that gift may be deducted from the amount the child receives in accordance with the intestacy provisions regarding distribution.

SECTION 53

- Section 53 abolishes a number of rebuttable common-law presumptions concerning the effect of gifts and transfers of property during a will-maker's lifetime.

Division 4 – Altering, Revoking and Reviving Wills

- Division 4 of Part 4 carries forward, with modification, sections 14 and 16 to 18 of the *Wills Act*.
- However, Section 15 of the *Wills Act* has not been carried forward and therefore a marriage that occurs after the drafting of a will no longer revokes that will.
    - Section 15 of the *Wills Act*, provides for automatic revocation of a will if the will-maker marries after the will is executed (although there are two exceptions).
    - Section 15 is not being carried forward for two reasons:
        i. Few members of the general public are aware that marriage revokes a will, or of the exceptions to this rule and how to take advantage of them. This rule results in unintended intestacies. An unintended intestacy can disrupt careful estate planning to meet obligations the will-maker intended to fulfil. For example:
            - A will-maker may have created a testamentary trust for a disabled relative in her will. Intestacy would overturn the trust and possibly benefit an independently wealthy second spouse at the expense of the disabled person.
        ii. The original purpose of revocation by subsequent marriage was to protect the will-maker's spouse and children. However, a will-maker's family can be protected by other means, such as:
            - designating beneficiaries under life insurance policies or a retirement savings plan;
            - launching an action under the *Wills Variation Act*;
            - invoking matrimonial property rights under the *Family Law Act* against an estate if a separation took place prior to the death.

SECTION 54

- Section 54 generally carries forward section 17 of the *Wills Act*, which provides for alteration of wills.
- The primary change is that the section provides that the requirements for alteration of a will are subject to the curative power under section 58.
    - So, if a will is altered in a manner that does not comply with the requirements for making a will, then an applicant can apply to have the court recognize the alterations.

SECTION 55

- Section 55 generally carries forward the terms of section 14 of the *Wills Act* with regard to revocation of wills.
    - However, under paragraph (1) (c), acts (such as burning, tearing or destroying), which indicate the will-maker intended to revoke a will, but which do not amount to the complete destruction of the will, can be deemed sufficient by the court to revoke a will.
- Subsection (1) (d) is repealed and replaced by section 24 of the *Wills, Estates and Succession Amendment Act, 2011*.
    - Paragraph (d) has been clarified. Its purpose is to allow a court to find additional acts, not referred to in paragraph (c), to have revoked a will.

Rationale for Change

- People who make wills do not always destroy them when they wish to revoke them.
    - Practitioners find that will-makers sometimes mark wills, for example, by crossing out or obliterating portions of them, in the mistaken belief that these steps amount to revocation of the entire will or particular parts of it.
- When the will-maker's intent to revoke is clear, it would be perverse for the court to enforce the will regardless of the will-maker's wishes merely because the will-maker was mistaken about the formal procedure for revoking the will.
    - If the court can be persuaded from the appearance of the will that the will-maker intended to revoke it all or in part, the court should be able to give effect to that intention

SECTION 56

- Section 56 carries forward the policy expressed in section 16 of the *Wills Act* that a gift under a will to a spouse is deemed to be revoked when the spousal relationship ends.
- The primary change is to extend the deemed revocation of a gift in a will to marriage-like relationships, as well as legal marriages.

    - The reason for this change is that the current law places a former non-marital spouse of the will-maker in a better position than a former or separated marital spouse.
- Section (3) clarifies that a subsequent reconciliation does not revive a gift revoked by the operation of the legislation.
    - The reason for this change is that allowing reconciliation to revive a previously revoked gift to a spouse would result in too much uncertainty. It might lead to disputes over whether the spouses had actually reconciled or whether the reconciliation persisted at death. If restoration is intended following reconciliation, it is open to the will-maker to make a new will or a codicil restoring the gift.
- Under section (4) a gift to a third party that is related to the life of the deceased's spouse (an *estate pur autre vie*) is not revoked, even if the deceased divorces their spouse after making the gift in the will.
    - Such gifts should not automatically be revoked by the end of the spousal relationship because it is not certain that the will-maker intended the gift to be related to the fact of marriage.
    - Example: To my friend "Ted" my motorbike for as long as my wife "Susan" lives, and upon her death to my son "Rick."

SECTION 57

- Section 57 makes two small changes to section 18 of the *Wills Act*,
    - It makes the rules regarding revival subject to curative power under section 58.
    - It clarifies when a will is revived and the effect of a revival on the effective time of a will.
- This section ensures a will-maker's true attempts to revive a will are not frustrated by technical requirements.

Division 5 – Curing Deficiencies and Rectification of Wills

- Five other Canadian provinces have curative provisions:
    - Saskatchewan
    - Manitoba
    - Quebec
    - New Brunswick
    - P.E.I.
- All the Australian jurisdictions have curative provisions
- The cases decided in other provinces and in Australia under similar provisions indicate curative powers are VERY cautiously applied.
    - Courts insist on a high level of proof of the finality of a document with testamentary wishes before giving it effect under the curative power.
- Legislation giving courts broader powers to rectify wills has been enacted in England and five Australian states (no other Canadian jurisdictions).
    - This provision is narrower than in the other jurisdictions

SECTION 58

- Section 58 allows the court to provide relief if a person has failed to comply with all the formal requirements of making, altering, revoking or reviving a will.
    - The court must be satisfied that the document in question embodies the testamentary wishes of a deceased person.
- The reason for change is that rigid enforcement of the formal requirements for making a will is often self-defeating.
    - The formal requirements are designed to uphold testamentary intent by ensuring authenticity and guarding against fraud.
    - If there is no question as to authenticity of the will and the formal requirements have been violated due to ignorance or inadvertence, then not recognizing the will merely defeats the will-maker's last wishes without serving a redeeming protective purpose.
- Type of documents that **MAY** be recognized as wills (these are merely provided as examples and is not intended to be a complete list):
    - holograph wills;
    - wills that are improperly witnessed;
        - for example the witnesses were not both present when the will-maker signed or when each witness signed;
    - stationery store wills that are improperly completed;
    - wills stored electronically.
- There is no requirement for a minimum level of compliance with formalities in order for a document to be given effect as a will.
- Subsection (2) sets special criteria for exercising the curative power in relation to an electronic document. Under the requirements in subsection (2) a videotaped oral will would not be able to be 'cured'.

SECTION 59

- Section 59 expands the very limited powers the court now has to correct errors in a will, so that the will-maker's genuine testamentary intention can be given effect.
- Clerical slips are largely what this section addresses.
- The reason for change is that currently judges are forced to go to considerable lengths within the current narrow rules to preserve the will-maker's intent as far as possible.
- Currently, the default rule is that extrinsic evidence (information outside of the will) is not permitted to aid in the interpretation of a will. Subsection (2) declares that such evidence is admissible, as the circumstances listed in subsection (1) can only be proven by extrinsic evidence.
- Subsections (3) to (5) are aimed at ensuring that issues surrounding rectification of a will do not delay the administration of an estate unduly.
    - Similar provisions are found in the English legislation.

Division 6 – Variation of Wills

- Division 6 of Part 4 carries forward provisions that are currently found in the *Wills Variation Act*.
- Division 6 allows "equity" to be done where a deceased has not adequately provided for his spouse or children.
- Unlike other areas of reform, there was no consensus on the British Columbia Law Institute's recommendations to substantially change the *Wills Variation Act* to exclude self-sufficient adult children.
- Therefore, the provisions in Division 6 are relatively unchanged; although there are some minor amendments to improve the process for wills variation proceedings.

SECTION 60

- Section 60 reproduces section 2 of the *Wills Variation Act*.
- It confers a statutory jurisdiction on the court to alter the distribution of an estate mandated by a will if it does not make adequate provision for eligible claimants.
- This section has been amended by section 23 of the *Wills, Estates and Succession Amendment Act, 2011* to replace references to "an action" with references to "a proceeding".
    - This change increases the flexibility in how issues be commenced. The change to "proceeding" allows matters to be commenced by Requisition or Petition, rather than only by action.

SECTION 61

- Section 61 reproduces section 3 of the *Wills Variation Act*,
    - It has been changed to require notice within 30 days of commencing a proceeding.
- Section 61 provides a time limit for commencing a proceeding to vary a will (approximately 6 months) and requires notice to be provided to the executor within 30 days of the expiry of this six-month period.
    - A time limit ensures that a proceeding is commenced within a reasonable amount of time to allow the estate to be administered and distributed.
        - A filed notice of civil claim remains in force for 12 months and can be renewed for a further 12 months. The case cannot proceed until notice has been given to the defendant; therefore, a person who has filed a notice of civil claim respecting a will variation application can effectively hold an estate hostage. This is because a personal representative will often be reluctant to distribute any of the estate when uncertainty remains about whether the court will alter the distribution.

- The section clarifies that the Nisga'a and a Treaty First Nation are entitled to notice if a member's estate is the subject of a will variation application.
    - The Nisga'a and Treaty First Nations are entitled to notice because they may have specific interests in property in the estate.
- This section has been amended by section 23 and 25 of the *Wills, Estates and Succession Amendment Act, 2011* to replace references to "an action" with references to "a proceeding."
    - This change increases the flexibility in how issues be commenced. The change to "proceeding" allows matters to be commenced by Requisition or Petition, rather than only by action.

SECTION 62

- Section 62 reproduces section 5 of the *Wills Variation Act*.
- Section 62 allows the court to consider evidence of the reasons a will-maker made the will and give weight to those reasons.
- This section has been amended by section 23 of the *Wills, Estates and Succession Amendment Act, 2011* to replace references to "an action" with references to "a proceeding".
    - This change increases the flexibility in how issues be commenced. The change to "proceeding" allows matters to be commenced by Requisition or Petition, rather than only by action.
- The reason for section 62 is if the court is considering varying a will for equitable purposes, it is important to enable the court to consider any relevant evidence about the reasons the will-maker had for the distribution in the will.

SECTION 63

- Section 63 reproduces section 6 of the *Wills Variation Act*.
- It empowers a court to :
    - attach conditions to an order varying a will; or
    - refuse to grant an order, where the court finds that the character or conduct of the claimant disentitles them to such an equitable remedy.

SECTION 64

- Section 64 reproduces section 7 of the *Wills Variation Act*.
- It allows the court to make a lump-sum payment or periodic payments.
    - While lump-sum payments are the most convenient and likely the most common award in these types of cases, in certain instances periodic payments may be appropriate, such as where the variation order is to replace payments of maintenance or support that the beneficiary was receiving during life.

SECTION 65

- Section 65 reproduces section 8 of the *Wills Variation Act*.
- It provides that if the will is varied, the default rule is that the entitlement of all other beneficiaries is decreased by an equal amount in order to satisfy the claimant's entitlement.
- However, it is open to the court to make a specific order about how the estate is to be reapportioned.
    - The default rule ensures that all affected beneficiaries are treated equally. However, if the court finds that one beneficiary benefits disproportionately under the will, it is open to the court to decide to reapportion solely or primarily from that beneficiary's interest in the estate.
- The section also clarifies that such an order can only apply to assets within the court's jurisdiction.
    - In some cases a deceased may have assets outside of British Columbia. Where this occurs the court can only order reapportionment of the assets within its jurisdiction.
    - For example, beneficiaries that take the proceeds from the sale of the deceased's land in Germany could not be affected by an order of a British Columbia court that diminishes the interests of beneficiaries of the deceased's estate in British Columbia.
    - This would not prevent a court from considering the assets distributed outside of British Columbia when determining a fair redistribution of the assets within British Columbia.

SECTION 66

- Section 66 reproduces section 9 of the *Wills Variation Act*.
    - It allows the court to exempt part of an estate from the outcome of proceedings.
- This section facilitates administration of an estate, even in the face of an undecided application to vary a will.
- It is appropriate to allow the court to recognize that certain property is unlikely to be necessary to satisfy a claim, for example:
    - A deceased had three children and the estate is $300,000.
    - Under the will two children get $150,000 and one gets nothing.
    - The court may be able to quickly decide that the child applying to vary the will is clearly not entitled to receive more than the other two children.
        - At most the child left out of the will would be entitled to one-third of the estate (or $100,000).
    - Once this has been determined the court may exempt $200,000 from the will variation proceeding:
        - This would allow $100,000 to be distributed to each child who did receive a gift under the will.

        - Leaving $100,000 as the amount that must not be distributed until the claim is decided.
            - This makes sense, because $100,000 is the maximum amount the disappointed child could receive if their claim is successful.

SECTION 67

- Section 67 carries forward section 10 of the *Wills Variation Act*.
- Similar to section 66, section 67 provides flexibility by ensuring that there is sufficient money secured to pay a person whose application to vary a will is successful, while allowing beneficiaries to receive their share of the estate.
    - It allows beneficiaries to pay money (either a lump sum or periodic payments so that they may receive property out of the estate.
    - Effectively it allows the court to order a beneficiary wishing to receive their share of the estate to provide security.

SECTION 68

- Section 68 carries forward section 11 of the *Wills Variation Act*.
- It clarifies that an order of the court preventing sale of the deceased's property (to preserve it in the event of a successful claim to vary the distribution of the estate) does not bind land unless the order is registered as a charge against the land in the Land Title Office.
    - This is appropriate as registration in the Land Title Office provides notice to third parties who may otherwise innocently purchase the encumbered land.

SECTION 69

- Section 69 carries forward section 12 (2) of the *Wills Variation Act*.
- It provides restrictions for registering a transfer of title in the land title office.
    - If the deceased gifted specific land to a beneficiary, the personal representative cannot register a transfer of title to that beneficiary until the period for applying to vary the will has passed.
        - A charge cannot be registered in the land title office until after 210 days (approximately seven months). This is to give a potential claimant 180 days to make their claim plus an extra 30 days to give notice to the executor.
- The only exception is if a will variation application has already been made and the court has already made an order under section 66 or 67.
- This restriction preserves the deceased's estate, so that if a person does apply to vary the will that there will be sufficient assets to redistribute.
    - In many estates land may be the most valuable asset and if it were to be no longer to be part of the estate then, as a practical matter, it

becomes more difficult to redistribute the estate, regardless of what the court orders. For example:

- There is an estate worth $300,000. The house is worth $250,000 and the rest of the estate is worth $50,000.
- There are two children. The will directs that the house be given to one child and that the rest of the estate be divided equally.
- If the house is transferred to the child, then there would only be $50,000 to award the disappointed child. It is better to preserve the land upfront, rather than trying to undo the transfer later.

SECTION 70

- Section 70 carries forward section 13 of the *Wills Variation Act*.
- This section prevents a claimant from anticipating provision and taking steps to obtain money from third parties prior to judgment in exchange for the right to any award received under the *Wills Variation Act* action.
- Preventing the anticipation of provision under *Wills Variation Act* actions serves two purposes:
  1. It protects third parties from extending money to an eligible claimant who may ultimately not receive a benefit.
  2. It protects a claimant from themselves
     - i.e., it prevents a claimant from discounting their ultimate entitlement too much or entering into transactions which are ill advised if they do not receive a benefit or the amount they expected.

SECTION 71

- Section 71 carries forward the terms of section 14 of the *Wills Variation Act*.
- It allows the court to reconsider an order of periodic payments, to take into account a change in circumstances.
- The rationale for this section is that a court's original order for periodic payments was only based on the information available to it at the time. Therefore, it is important to allow the court to vary the order if there has been a change in circumstances.
- This section has been amended by section 26 of the *Wills, Estates and Succession Amendment Act, 2011* to limit the court's discretion to amend will variation orders to orders that involve periodic payments or the investment of a lump sum.

SECTION 72

- Section 72 carries forward the terms of section 15 of the Wills Variation Act.
- It clarifies that any person affected by an order has a right to appeal.

- This section is likely not necessary. It is carried forward out of an abundance of caution, as it removes all doubt.

Division 7 – Registration of Notice of Wills

- Division 7 carries forward provisions currently found in Part 2 of the *Wills Act*
- The present voluntary registration scheme was continued, as it serves a useful purpose.

SECTION 73

- Section 73 carries forward section 32 of the *Wills Act* and allows the location of a will to be filed with the Vital Statistics Office.
  - The section requires a person to use the electronic service or hard-copy will notice provided by the Vital Statistics Office to file their notice.
- This section has been amended by section 27 of the *Wills, Estates and Succession Amendment Act, 2011* to change "notice of the will" to "notice of will."

SECTION 74

- Section 74 carries forward, without change, section 33 of the *Wills Act*.
- It allows a person to register a notice that they've revoked a will, regardless of whether they have registered the existence of the will.
  - Even if a will has not been registered, registering a revocation provides the executor and beneficiaries with information about whether a will they find is a valid will.
- It is not mandatory to register the revocation of a will, even if a will has been registered.

SECTION 75

- Section 75 carries forward, without change, section 34 of the *Wills Act*.
- This allows a person to file a notice that the location of their will has changed.
- It is useful to be able to update information about the location of a will.
  - Perhaps the will-maker has changed solicitors or the location of their safety deposit or they have moved to a new house.

SECTION 76

- Section 76 carries forward section 35 of the *Wills Act*.
- The purpose of the section is to give authority for the chief executive officer to create a system for recording information about the existence and location of wills or the fact that a will has been revoked.

- If there is an ability to file a will notice there must be authority to create a system to create and maintain a system that facilitates the filing and searching will notices.

SECTION 77

- Section 77 carries forward the principle of section 36 of the *Wills Act*.
- This section has been amended by section 28 of the *Wills, Estates and Succession Amendment Act, 2011*.
    - The Vital Statistics Agency will no longer provide a certificate for **each and every** notice filed for the person named in the application.
    - Rather, the Vital Statistics Agency will now provide a certificate for the **last** notice filed, along with the search results showing a list of **all** notices filed for the person named in the application.
    - In the vast majority of cases only the last notice will be required.
        - If there is an issue and there is concern that the document referred to in the last will notice is not a valid will or a will cannot be found, then the applicant will be aware of the existence of the other earlier filings (from the list of all notices that was provided) and can request the next most recent certificate from the Vital Statistics Agency free of charge.
- Section 77 allows lawyers to search the will registry and places restrictions on non-lawyers who wish to search the registry. A member of the public must provide a death certificate to search the wills registry to satisfy the registry that the inquiry relates to a person who has died.
    - Lawyers are allowed to access the registry without restriction as they may be required to update wills and a lawyer will want to ascertain if there are any other wills in existence so that these wills can be collected and destroyed to minimize the possibility that an out-of-date will is relied upon. However, the general public is restricted to looking for information about wills to prevent potential heirs from using the registry to locate wills so they can learn whether (or how much) they benefit under a will.

SECTION 78

- This section carries forward the principle of section 37 of the *Wills Act*.
- It specifies that the filing of a will notice (or failure to file) has no impact on the validity of a will.
- The present registration scheme is voluntary and it has been determined that it continues to serve a useful purpose.
- The British Columbia Law Institute considered and rejected a suggestion that the registration of a wills notice be made compulsory. There were four reasons for this decision:
    1. It will increase cost, and may deter people from making a will.

- Wills are a relatively low-cost service offered by lawyers and making registration of wills mandatory will add a cost.

2. People making a will without a lawyer (e.g., using a will kit) may not know that they need to register a will.
3. It would result in a number of otherwise valid wills having to be given affect by the court through its curative power.
   - The general direction of the Act is to reduce formalities where practical; if a will was required to be registered then unregistered wills would have to be invalid.
4. The transition to mandatory registration would be a problem.
   - How would all the currently unregistered wills be treated? There would have to be a very long transition period, where old unregistered wills would likely continue to be considered valid, whereas more recently drafted wills, meeting the same formalities, would be considered invalid if they were not registered.

Division 8 – Conflict of Laws

- Division 8 of Part 4 addresses issues that arise when a deceased person has assets in another country and or has made their will in another country.
- The general intent of Division 8 is to attempt to find a will valid if it would be found valid under the laws of any country that the deceased has a connection with.

SECTION 79

- Section 79 makes two changes to the current common-law rules governing conflict of laws in relation to wills:
  1. Subsection (1) abolishes the doctrine of *renvoi*.
     - It requires a British Columbia court to consider only the internal law (i.e., NOT the conflict of laws rules) of the foreign jurisdiction if British Columbia conflicts rules point to a foreign legal system as being applicable to an issue arising in connection with a will.
     - The reason for abolishing the doctrine of *renvoi* is that it is a confusing principle and paradoxical situations can arise;
       - Moreover, the law is not even settled as to what theory of *renvoi* should be applied in Canadian courts;
       - It is simpler to enact rules that allow a will to be upheld if it is valid under a wide range of legal systems with which the will or the will-maker is connected (as is done in section 80).
  2. Subsection (2) prevents certain secondary formal requirements under foreign law from being elevated into matters of essential validity for the purposes of BC law.
     - Subsection (2) furthers the overall policy that formalities should not override testamentary intent when there is no question as to the authenticity of the will.

Explanation of *Renvoi*

- *Renvoi* typically arises in wills-related cases because reference to foreign law is often necessary to determine the validity of wills.
    - The validity of a will with respect to movables is governed by the law of the will-maker's domicile at death, and by the law of the place where the immovable (land or things attached to land) is located (the *situs*).
- *Renvoi* is employed to find a way to apply a system of law under which a will might be upheld if the making of the will did not conform to the law of the final domicile or the situs of immovable property.
- British Columbia's conflict of law rules require a court to take account ALL of the laws of the other jurisdiction, including the conflict of laws rules of that other jurisdiction.
- If the conflicts rules of the other jurisdiction refer back to the law of the originating forum (British Columbia), this is a *renvoi.*
- Depending on the theory of *renvoi* which is applied, the courts in British Columbia may either accept the *renvoi* and apply B.C. law (or the law of the third jurisdiction), or reject the *renvoi* and put itself in the position of the foreign court applying all of the foreign law to an issue, including the foreign conflicts rules (double *renvoi*).

SECTION 80

- Section 80 maintains the policy underlying section 40 of the *Wills Act* and provides guidelines on when a will is recognized as being valid and therefore admissible to probate.
- The section specifies a number of instances where a will made outside of British Columbia will be recognized as valid.
- Section 80 departs from the current section 40 by expanding the list of legal systems under which the formal validity of a will could potentially be upheld in a British Columbia court.
    - The policy underlying all subsections is to allow a will that states the will-maker's true intentions to be upheld wherever possible.
    - A will should not be defeated on the ground that it lacks formal validity if it would be valid under some legal system with which it, or the property it affects, or the will-maker, was connected.
- Section 80 only applies to the **formal** validity of a will (i.e., this is validity that is related to the question "will a document be admitted to probate?").
- Matters of **essential** validity (i.e., questions such as, does the document properly dispose of the property or are there allegations of undue influence or fraud?) continue to be governed by non-statutory conflict of laws rules: by the law of the will-maker's last domicile for movables (personal property), and the law of the *situs* for immovables (land).
    - For example, if the issue arises of whether a clause in a will excluding one of the will-maker's two children from any share in the will-maker's immovable property is valid and enforceable, it would be decided according to the law of the place where the immovable (land) is located.

SECTION 81

- Section 81 carries forward section 42 of the *Wills Act*, with one change:
- It includes the law of the will-maker's 'habitual residence' as a body of law which may be consulted, as well as the law of the will-maker's 'domicile'.
- The reason for change is that habitual residence is a broader concept than domicile and habitual residence has become widely used as a connecting factor in framing choice of law provisions in legislation and treaties.

SECTION 82

- Section 82 carries forward section 43 of the *Wills Act* with a modification – references to "parcels of land" have been replaced by the term "immovable."
    - The reason for change is that "immovable" is the term used in the conflict of laws cases to refer to interests in or connected with land.
    - Because "immovable" is the term that practitioners and courts are familiar with, it makes sense that this term be used in a section specifically directed to conflict of law.
    - An example of an "immovable" is irrigation equipment for a farm. While such equipment may not be attached to the land; its use is connected to the land.

Division 8 – Adoption of Convention Providing a Uniform Law on the Form of an International Will

- Division 8 of Part 4 relates to the 'Convention Providing a Uniform Law on the Form of an International Will'.
- The convention is intended to help harmonize will making requirements between jurisdictions; however, in general it simply augments jurisdiction's will-making requirements, which are generally not as onerous.
- Someone meeting the requirements set out in the convention can be sure that their document will be recognized as a will in all ratifying jurisdictions.

SECTION 83

- Section 83 makes the 'Convention Providing a Uniform Law on the Form of an International Will' domestic law in British Columbia.
    - The convention simply provides yet another means by which a will can be recognized as valid in British Columbia.
- This convention has no impact on the validity or invalidity of wills made in B.C.