Part 1 – Definitions and Interpretation

- Part 1 establishes the definitions that apply throughout the Act.
- Many definitions are new. Some definitions have been carried forward from the various Acts that the *Wills, Estates and Succession Act* replaces.

SECTION 1

- Section 1 has definitions to support interpretation of other sections.
- This section has been amended by section 1 of the *Wills, Estates and Succession Amendment Act, 2011* to move definitions from section 12 and to add additional definitions.
- The definition of "nominee" has been amended by section 2 of the *Wills, Estates and Succession Amendment Act, 2011*.
- The definition of "participant" has been amended by section 3 of the *Wills, Estates and Succession Amendment Act, 2011*.
- The definition of "spousal home" has been amended by section 5 of the *Wills, Estates and Succession Amendment Act, 2011*.

Table of Concordance:

Definition	Origin
Beneficiary	New
Benefit	New
Benefit plan	New
Chief executive officer	*Wills Act* - No change
Court	*Wills Variation Act* (no change) *Estate Administration Act* (minor change)
Declarant	New
Descendant	*Estate Administration Act* (formerly "issue" in s. 81)
Designated beneficiary	New
Designation	New
Estate	*Estate Administration Act* (similar to s.81 definition – differs from s.1 definition, which distinguished pre-1921 estates)
Foreign grant	New
Foreign personal representative	New
Gift	New
Instrument	New
Intestate	*Estate Administration Act* (no change)
Intestate estate	New
Intestate successor	New
Land	New

Nisga'a citizen	*Estate Administration Act* and *Wills Variation Act* (no change)
Nisga'a Final Agreement	*Estate Administration Act* and *Wills Variation Act* (no change)
Nisga'a Lands	New
Nisga'a law	*Estate Administration Act* and *Wills Variation Act* (no change)
Nisga'a Lisims Government	*Estate Administration Act* and *Wills Variation Act* (no change)
Nisga'a Village Government	New
Nominee	New
Participant	New
Personal property	New
Property	*Estate Administration Act* (similar to definition of "estate" found in s.81)
Registrable charge	New
Representation grant	New
Security interest	New
Spousal home	*Estate Administration Act* (modified)
Spouse	*Estate Administration Act* and *Wills Variation Act* (modified) – see section 2
Taxing treaty first nation	New
Testamentary instrument	New
Will	Change from *Estate Administration Act*
Will-maker	"testator" in *Estate Administration Act*
Will-maker's signature	New

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.

Part 3 – When a Person Dies Without a Will

- Part 3 corresponds to Part 10 of the *Estate Administration Act* – Distribution of Intestate Estate.
- The provisions in this part set out rules governing how a deceased's property is to be distributed when there is no will. There are special rules governing the spousal home.

Division 1 – Distribution of Estate When There is No Will

- Division 1 carries forward many sections from Part 10 of the Estate Administration Act, with only minor changes for clarity. However, there is a significant change in the law.
- The current scheme of intestate distribution set out in Part 10, which is based on degrees of kinship, has been replaced. Part 3 uses the parentelic system.
  - Differences emerge only where it is necessary to distribute among next of kin more remote than siblings of the deceased. The differences will be most noticeable when comparing section 23 of this Act to section 89 of the *Estate Administration Act*, which applies to relatives more remote than nieces and nephews.

SECTION 19

- Section 19 carries forward section 99 of the *Estate Administration Act* and promotes uniformity with laws with other provinces.
- This section is useful if the deceased owns property (particularly land) in more than one province. If this occurs, it is desirable to ensure that the rules governing the distribution of estate property in each province are applied as uniformly as possible, to prevent contrary results and disputes.

SECTION 20

- Section 20 carries forward the current rule found in section 83 of the *Estate Administration Act* and ensures that a surviving spouse takes the entire intestacy estate where the deceased leaves no surviving issue.
- This default rule is justified as it is most likely the wish of the deceased.

SECTION 21

- Section 21 significantly increases the share of the estate to which a spouse is entitled, when compared with the distribution that is currently mandated by section 85 of the *Estate Administration Act*.
  - Contemporary views in British Columbia favour generous treatment of a surviving spouse. If there is no will, it is thought fair that the spousal share should be $300,000, plus half of the remainder of the estate.
  - There is a smaller spousal share ($150,000 plus half the remainder) where all the children of the deceased are not also children of the spouse. The reason for the smaller spousal share in blended families is that it is assumed that the children of the spouse will be treated differently than those who are only the deceased's children. The smaller share increases the possibility that some assets will be available to the non-common children.
    - Children of the surviving spouse are likely to succeed to the spouse's share of the deceased's estate on the spouse's death. Also, the surviving spouse is more likely to use their share of the estate to confer benefits on their children while alive.
    - Where the children of the deceased are not also children of the surviving spouse, the likelihood of these children receiving a share of the estate after the spouse's death or a benefit during the surviving spouse's life is much smaller, and the possibility of a competition between the surviving spouse and the non-common children is much greater.

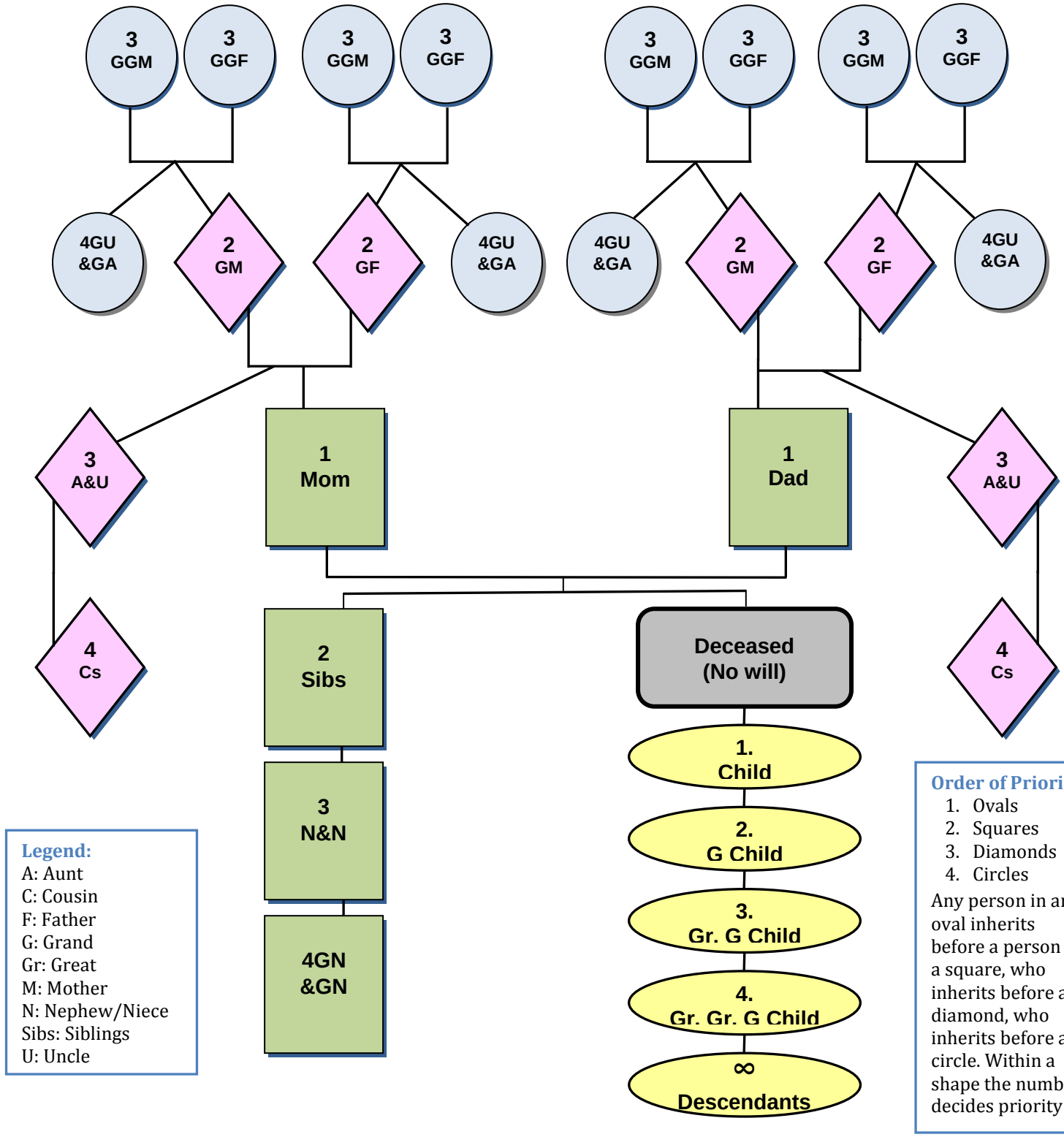
SECTION 22

- Section 22 carries forward the policy currently expressed in section 85.1 of the *Estate Administration Act*.
- The fact that persons can be spouses for the purposes of this Act in the absence of a legal marriage raises the possibility that two or more persons could be spouses of a deceased person without a will for the purposes of succession. In such a case, the determination of their respective entitlements is left to the court, if the parties cannot agree.
- The new definition of spouse in section 2 makes it unlikely there will be multiple spouses; nonetheless, the possibility remains. Therefore, it makes sense to maintain the overall policy represented by section 85.1, as this section has been successful in providing a mechanism for settling disputes between spouses. The changes in section 22 simply provide clarification that the spouses can agree to a distribution without the necessity of a court order.

SECTION 23

- Section 23 uses the parentelic system to determine who inherits a person's property.
  - Under the parentelic system, the line of the closest common ancestor is exhausted before other relatives will share in the estate.
    - First, the issue (children, grandchildren, etc.) of the deceased inherit.
    - Failing this, the estate passes to the parents of the deceased.
    - If the parents of the deceased are already dead, then the issue of the intestate's parents (the deceased's brothers and sisters) inherit.
    - If there are no surviving siblings, then the estate is divided between the grandparents; or, if they are already dead, then their issue (i.e., aunts and uncles of the deceased).
    - If the deceased is not survived by grandparents or their issue, the estate is divided between the great-grandparents or their issue (great-aunts and great-uncles of the deceased).
  - The following chart provides a visual representation of the distribution described scheme above; this chart is only included for explanatory purposes and only presumes the deceased had two parents. It is important to note that the distribution scheme in section 23 recognizes the potential that the deceased may have had more than two parents.
- Section 23 replaces the current scheme of intestate distribution set out in sections 84 and 86 to 90 of the *Estate Administration Act*, which is based on degrees of kinship.
  - In many cases the parentelic system will produce the same result as the degrees of kinship system. Differences emerge only where it is necessary to distribute among next of kin more remote than siblings of the deceased.
  - There are two reasons for changing to the parentelic system,
    1. First, descendants of the nearest common ancestor will **always** take before descendants of a more remote ancestor. This is desirable as it can be very expensive to search for relatives of a deceased person and the expense usually rises with the level of remoteness involved.
    2. Second, the parentelic system tends to divide the estate more evenly between the different branches of a deceased's family.
- In subsection 23(2), paragraphs (c), (d) and (e) are replaced in accordance with section 468 of the *Family Law Act*.
  - This amendment supersedes the amendment to subsection 23(2)(e) contained in section 12 of the *Wills, Estates and Succession Amendment Act, 2011*.
  - The changes to paragraphs (c), (d) and (e) address the possibility that a deceased person may have more than two parents under the *Family Law Act*.

Parentelic Distribution under Section 23 of the *Wills, Estates and Succession Act*



Legend:
A: Aunt
C: Cousin
F: Father
G: Grand
Gr: Great
M: Mother
N: Nephew/Niece
Sibs: Siblings
U: Uncle

Order of Priority:

1. Ovals
2. Squares
3. Diamonds
4. Circles

Any person in an oval inherits before a person in a square, who inherits before a diamond, who inherits before a circle. Within a shape the number decides priority

This chart is based on one created by Alberta's Ministry of Justice and Solicitor General.

The *Wills, Estates and Succession Act* came into force on March 31, 2014. This document was developed by the Ministry of Justice to support the transition to the *Wills, Estates and Succession Act*. It is not legal advice and should not be relied upon for those purposes.

- In accordance with subsection (3), no inheritance rights are recognized beyond the fourth degree of kinship (cousins, grand-nieces and -nephews, grand-uncles and -aunts). The reason for this cut-off is that it is time consuming and expensive to locate distant relatives. The cut-off prevents depletion of the estate by the expense associated with searching for remote relatives of the deceased.
  - In most cases the deceased will have had no relationship with and may not even be aware of these distant relatives. If a person has formed a special relationship with a more remote relation and wishes to benefit that person on death this can still be done by a will.
  - If there is no surviving relative within the fourth degree, the estate would pass to the Crown and under the *Escheat Act*. However, under section 5 of the *Escheat Act* a remote relative may petition the Attorney General, asserting a moral claim on the deceased's property and asking to be given the estate.
- Subsection (4) exempts an intestate's descendant's (i.e., children, grandchildren, etc.) from the cut-off in subsection (3). This means that in the unlikely circumstance a deceased was only survived by a great-great-great grandchild (or more remote grandchild) that "grandchild" would be entitled to inherit, despite the fact they are more remote than four degrees of kinship.
- Subsection (5) sets out rules for how to determine the degree of kinship between two related persons. While degree of kinship is not being used to determine how an estate is to be divided it is still useful for identifying the point at which intestate succession rights are cut off.

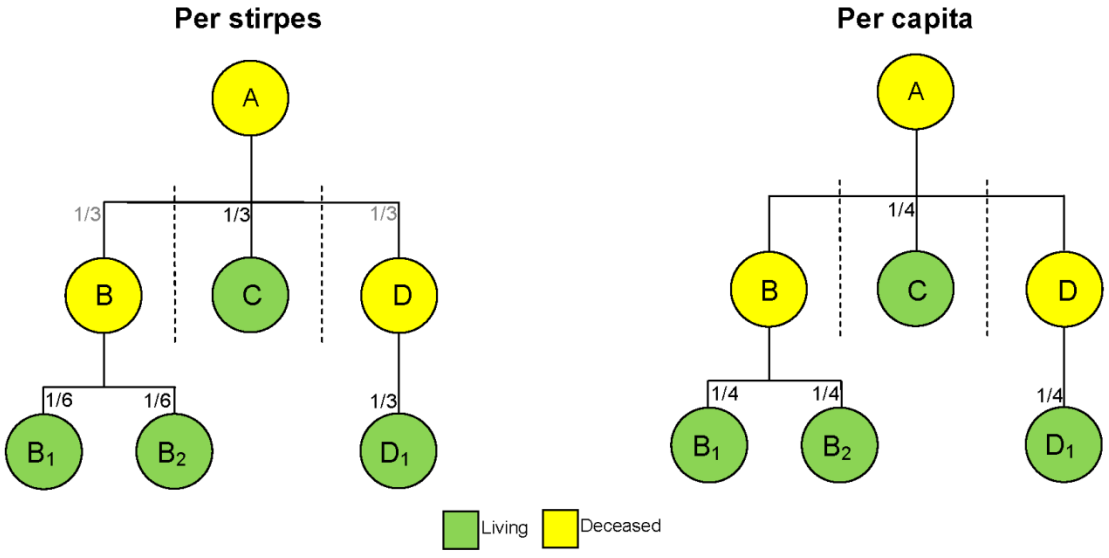
SECTION 24

- Section 24 carries forward s. 84 of the *Estate Administration Act*, which provides that distribution to the issue of a deceased person is to be on a *per stirpes*, rather than a *per capita*, basis.
  - Section 24 does not change the law; however, rather than merely stating "the person's estate must be distributed per stirpes among the issue[,]" the section explains how a *per stirpes* distribution works, by providing a formula that can be used.
  - There are multiple methods of *per stirpes* distribution. The method of distribution described in subsections (1) and (2) is one that is commonly followed. The initial division of the estate occurs in the first generation following the deceased person in which there are living members. Children (or more remote issue) who take in whole or in part the share that would have gone to a parent (or other ancestor) are said to take "by representation."
- Subsection (3) carries forward a prohibition found in sections 87 (2), 88, and 89 of the *Estate Administration Act* on 'taking by representation' beyond the level of the children of brothers and sisters of the intestate. In other words, nephews and nieces may take their deceased parent's share,

but more remote relatives may not do so. Instead, what would have been the deceased parent's share would go to increase the size of the shares taken by the other successors in the same generation as the parent or an earlier generation.
    - Subsection (3) serves to limit the fragmentation of estates and avoid long and expensive searches for remotely related successors who may have had little or no connection with the intestate during the intestate's life.
- This section has been amended by section 13 of the *Wills, Estates and Succession Amendment Act, 2011* to modify wording.

The difference between a *per stirpes* and *per capita* distribution

- Both *per stirpes* and *per capita* distribution methods apply when a person who would have received a portion of the deceased's estate under the rules set out in section 23 died before the person to whom section 23 is being applied. If this person was a parent then their children and grandchildren can inherit their share of the estate.
- Under a *per stirpes* distribution, the share of the estate that a deceased parent would have been entitled to receive is divided among the children of the deceased parent. Each surviving child receives an equal share. The process of division is repeated in the case of deceased children who have living descendants.
- Under a *per capita* distribution each living member of the issue receives an equal share, regardless of the generation to which the member belongs.



SECTION 25

- Section 25 clarifies that all of division 2 applies on a partial intestacy, which is where there is a will that does not deal with all of the will-maker's property.

Division 2 – Spousal Home

- Division 2 establishes a new regime to replace the 'life estate' a spouse has in the spousal home under section 96 (2) (a) of the *Estate Administration Act*.
- The reason for the life estate is to ensure the surviving spouse is adequately provided for (i.e., that they continue to have somewhere to live). However, when section 26 is combined with section 21, a surviving spouse is better off:
  - First, a more generous preferential share of the estate gives a spouse the ability to acquire the spousal home outright, rather than merely having a life interest.
  - Second, the option to choose not to acquire the house may better suit the needs of a spouse, given the change in circumstances that might flow from the deceased's death (such as a decision to move into a smaller home or an apartment).
- The following are problems that have been identified with the life estate:
  - There are disputes about the division of responsibility in relation to the property between the spouse with the life estate and the person with the underlying interest in the property, for example:
    - Who is responsible for upkeep, such as fixing the roof? The usual rules for apportionment (which divide responsibility equally between owners) are not a good fit with the statutory life estate.
  - There are questions involving how to allocate estate assets?
    - What relation does the life estate bear to the preferential share of the surviving spouse?
      - Does the spouse get their share from the other estate assets **and** get a life estate in the spousal home? If so, this means the burden of the life estate falls wholly on the other beneficiaries. Or, is there some proportionate way that the estate is divided between the spouse and children, including the spousal home, which means the spouse owns a portion the spousal home and has a life estate in the remainder?
  - Valuation issues are raised by the existence of the life estate.
    - A life estate is not marketable, as the duration of the spouse's life is potentially lengthy and necessarily uncertain.

SECTION 26

- Section 26 establishes a new regime to allow a spouse to retain the spousal home on intestacy. It entitles the spouse to require that the family home be given to the spouse to satisfy part or all of the spouse's share of the deceased's estate (as provided for in section 21); for example:
  - An estate is worth $700,000, and the spouse was also the mother of all the deceased's children. Therefore, the spouse is entitled to $500,000 of the estate. If the house is worth $400,000 the spouse can advise the administrator that they want the house. The spouse would receive the house and would also be entitled to $100,000 in other assets.

SECTION 27

- Section 27 requires the personal representative to inform the spouse of the right to receive the spousal home in satisfaction of part or all of his or her share of the estate. This notification ensures that the surviving spouse has a fair opportunity to exercise their right to the house.
- Requiring a spouse to decide whether they want the spousal home within 6 months of the personal representative receiving the grant to administer the deceased's estate balances the interest for an estate to be settled quickly with the interest of giving a spouse sufficient time to decide upon their future.
  - If a spouses requires more time to make their decision they may apply to the court to have the six-month period extended.
- Section 27 is made explicitly subject to section 18.3, to make it clear that a spouse cannot choose to acquire the spousal home if the spousal home is located on Nisga'a or Treaty First Nation land, and the spouse is not permitted to hold Nisga'a or Treaty First Nation land under the laws of the applicable nation.
- This section has been amended by section 13 of the *Wills, Estates and Succession Amendment Act, 2011* to add subsection (2.1).
  - Subsection (2.1) requires a personal representative to notify the spouse that they may not be entitled to acquire a spousal home, if the personal representative knows the spousal home is located on Nisga'a or Treaty First Nation lands.

SECTION 28

- Section 28 requires a personal representative to wait approximately six months from the date they receive the grant of probate or administration before selling or otherwise disposing of the spousal home.
  - This ensures that the surviving spouse has a fair opportunity to decide whether they want the spousal home.

- The house may be sold before the six-month period expires, but only if the spouse consents in writing or the sale is necessary to pay debts.
  - The intention is that the house should only be sold as a last resort. A spouse may prefer to take ownership of the house, even if it is necessary for the personal representative to place additional charges on the home in order to pay off the debts of the estate.

SECTION 29

- Section 29 ensures all interested parties are informed if the surviving spouse decides to acquire the spousal home.
- The spouse's share of the deceased's estate is a dollar value and if the spouse is to claim the spousal home as part of their share of the estate, a value must also be placed on the spousal home.
- It is intended that an initial figure for the value of the home be proposed by the spouse and set out in the notice respecting the spouse's decision to acquire the spousal home. If the personal representative agrees, this is the figure used.
  - Providing notice to the other beneficiaries ensures these other beneficiaries have the opportunity to make their views on the valuation known to the personal representative and even challenge the valuation of the spousal home, if necessary.
- If the personal representative and the spouse do not agree on the valuation of the spousal home then the value is set by court order in accordance with section 30.
- This section has been amended by section 15 of the *Wills, Estates and Succession Amendment Act, 2011* to modify wording.

SECTION 30

- Section 30 provides a guide as to how the value of the spousal home is to be determined, if it is in dispute, and provides a mechanism to resolve a conflict of interest where the spouse is the personal representative.
- It is in the interest of all parties that the mechanism for valuation be easy and inexpensive, provided there are sufficient safeguards to prevent the house from being undervalued. There are a variety of methods to value a property, including:
  - property tax assessments,
  - a realtor, or
  - a professional evaluator used by financial institutions.
- The personal representative acts in the interest of the estate and would be liable to the other beneficiaries if he or she was negligent in agreeing on the valuation of the spousal home. Therefore, the personal representative has a vested interest in ensuring that there is an objective valuation of the spousal home, and the legislation does not need to prescribe how the house is to be valued.

- Not setting out how to value the spousal home in the legislation gives people flexibility and allows the spouse and personal representative to use mechanisms for valuing the spousal home that government may not have considered.

- Agreement is the first option; therefore, the section is designed to promote a mechanism where the spouse and personal representative can agree to a valuation. In the absence of agreement, recourse to an independent and impartial third party (the court) is necessary.
  - As agreement between the spouse and personal representative provides the basis for the consensual valuation of the home, it is necessary to provide a mechanism to resolve a conflict of interest if the spouse is also the personal representative. If the spouse is also the personal representative then section 30(3) addresses this conflict.
- Subsection (4) allows a beneficiary (or Public Guardian and Trustee) to force a spouse who is also the sole personal representative to apply to court for an order determining the value of the deceased person's interest in the spousal home.
  - This subsection addresses situations where it is apparent that the house is the primary asset in the estate and the spouse will have to pay money into the estate (for distribution to the descendants) in order to acquire the spousal home. In such a situation the spouse has no incentive to value the spousal home or move forward with the administration of the estate.
- Subsection (3) has been amended by section 16 of the *Wills, Estates and Succession Amendment Act, 2011* to require that the Public Guardian and Trustee consent where the beneficiary is a minor.
- Subsection (4) has been amended by section 16 of the *Wills, Estates and Succession Amendment Act, 2011* to allow the Public Guardian and Trustee to apply for a court order determining the value of the spousal home where the beneficiary is a minor.

SECTION 31

- Section 31 ensures the spouse has a right to purchase the home from the other successors at fair market value if the value of the spouse's preferential share is not sufficient for a full appropriation of the home.
  - The spouse's right to purchase the home should not be frustrated by a lack of a sufficient interest in the estate if the spouse can find other means to make up the deficiency between their share of the estate and the value of the spousal home.
- It is further clarified that the spouse's right to purchase is not affected by the fact that he or she is also a personal representative of the deceased.
  - Given the fact that it is common for surviving spouses to also be personal representatives of a deceased spouse's estate, the surviving spouse's right to purchase the home should not be frustrated by other rules of law restricting the purchase of trust property by a trustee.

- Subsection (3) has been amended by section 17 of the *Wills, Estates and Succession Amendment Act, 2011* to have the method of providing financial information set out in the Supreme Court Civil Rules (rather than a prescribed form).

SECTION 32

- Section 32 places a responsibility on the spouse to pay the expenses of the spousal home prior to electing whether to purchase the home.
- As a general principle the spouse should be responsible for their own lodging expenses, regardless of whether they remain in the spousal home or move to a new location.
  - If a spouse could live in the house rent (and expense) free up to six months after the grant was obtained, then even if a spouse knew that they did not wish to acquire the spousal home they may still delay their decision in order to have the estate pay for their lodgings for six months.
- This section has been amended by section 18 of the *Wills, Estates and Succession Amendment Act, 2011* to insert a comma, so that the section reads properly, and to allow the government to prescribe taxes that the spouse will not be responsible for during the period between the death of the deceased and the disposition of the spousal home.

SECTION 33

- Section 33 addresses situations where it would be a financial hardship for a spouse to "purchase" the spousal home in accordance with section 31 and where it would clearly be a hardship for the spouse to be required to leave the spousal home.
  - Despite increasing the value of the spouse's preferential share there may still be circumstances where it would be unreasonable to expect a spouse to use their share of the estate (and possibly their own money) to acquire the spousal home.
    - For example, a couple may have purchased a modest home in West Vancouver a number of years ago. Despite the fact that they survive on a modest pension they end up living in a million dollar home. In such circumstances a deceased spouse may have few other assets of value; without the consent of the children the spouse would likely have an insufficient share of the estate to acquire the spousal home outright and may be unable to come up with sufficient assets to make up the outstanding difference.
- Unlike a life estate, which the spouse can claim by right, section 33 requires the spouse to satisfy the court that it is reasonable for him or her to remain living in the house. The children are essentially placed in the position of lenders to the spouse and their interest is secured by being registered in the land title office.

The benefits of this scheme over the life estate are as follows:

1. The court can balance the interests of the spouse and children.
2. The order clarifies the value of the varying interests in the house.
    - The surviving spouse can use his or her equity in the home as security and benefits from any appreciation of the home – under a life estate it is less clear, but in general it seems the children get the appreciation.
    - Children, have a clear entitlement to a specified sum (a principal amount which is secured against the house), plus interest at a prescribed rate until the house is sold. The child's interest is transferable to a third party and the clarity of the interest means the child's entitlement is likely a more marketable asset and subject to less of a discount by a purchaser.

Section 33 is only necessary in the following circumstances:

1. The deceased must not have made a will.
2. The deceased and spouse must not have put the spousal home into joint tenancy.
3. The spouse must not have a good relationship with the deceased's children (this is more likely for second spouses, who have the smaller $150,000 preferential share). If there was a good relationship then the spouse and children could come to a similar arrangement as this section provides on a voluntary basis.
4. The spousal home must be worth more than $300,000 (or $150,000 in the case of a second or third spouse) than all the other assets in the estate combined. Otherwise the spousal share of the estate should be sufficient to allow the spouse to acquire the home as their share of the estate. For example:
    - The house is worth $500,000 and there is $200,000 in other assets in the estate, so the estate is worth $700,000 in total.
    - A spouse who is also the parent of all the deceased's children would be entitled to a $300,000 preferential share, plus one-half the remainder of the estate:
        - $700,000 - $300,000 = $400,000 ÷ 2 = **$200,000**,
    - If the preferential share ($300,000), plus the spouse's share of the remainder of the estate ($200,000) add up to $500,000, the spouse would be expected to acquire the spousal home using their share of the estate and this section should not be necessary.
5. In cases where there is a shortfall between the value of the spousal home and the spousal share of the estate, the spouse must not have assets that could be used to make up any shortfall, or use of such assets would unfairly prejudice the spouse.
    - The spouse should not have to sell off **all** the RRSPs in their name to stay in the family home. However, it may be reasonable for a spouse

to sell some RRSPs (or other investments) to acquire the home so that the deceased's children do not have their inheritance delayed indefinitely.

SECTION 34

- Section 34 provides that, if a spouse is allowed to stay in the spousal home in accordance with an order under section 33, then the children of the deceased are entitled to register a charge against the title to the spousal home (much like a mortgage is registered against title).
- This section provides default rules on when a registrable charge may become payable and how a registrable charge may be discharged.
- Section 34 ensures the proper operation of the order by preventing the spouse or the spouse's representative from prejudicing the interests of the descendants by delaying the sale of the home.
- The section also preserves the spouse's interest by allowing the spouse to discharge the descendant's interest by paying the descendants to what the section 33 order specifies they are entitled (much like paying off the principle of a mortgage, though likely as a lump sum).
- Section (2) gives the descendants (or a subsequent owner of the registrable charge) the same abilities as a mortgagee has under the *Land Title Act*. This further serves to protect the children's rights and make the interest marketable to third parties.
- Section (3) requires the registration of the charge in accordance with the *Land Title Act* to ensure that notice of the charge is provided to third parties.
- Section (4) is similar to obligations placed on mortgagees to discharge a mortgage once it has been paid.

SECTION 35

- This section allows a descendant to apply to have the court order that a registerable charge ordered under section 33 become payable if there is a reasonable concern that the action or inaction of the spouse is likely to prejudice the descendant's interest.
- Subsection (6) allows a descendant to transfer their interest secured by the registrable charge. One of the key benefits of this new system over the life estate is that it will be easier for a child to get money for their interest in the house immediately, rather than having to wait until the spouse dies or leaves the house, although it is still uncertain what the market will pay for such interests.
- Subsection (7) protects the spouse and the spouse's estate from the children's interest in the spousal home. The children only are entitled to claim against the spouse's interest in the spousal home.
    - In the unlikely event that the spousal home depreciates in value to the point that the children's entitlement to principle and interest cannot be

paid from the sale of the home the children cannot pursue the spouse (or the estate of the spouse). This places children with a registrable charge in somewhat of a less preferential position as a “regular” mortgagee who likely would have such a right. However, this is a very unlikely scenario.

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.

Part 5 – Benefit Plans

- The intent of Part 5 is to harmonize the treatment of non-insurance products with insurance products;
- However, these provisions are intended to complement – not replace – *Insurance Act* provisions.

SECTION 84

- Section 84 establishes that Part 5 applies regardless of the provisions in a benefit plan. (i.e., this legislation trumps the terms of the benefit plan).
- Section 84 ensures that designations involving registered retirement savings plans that are administered by insurance companies are governed by the *Insurance Act*.
    - This would likely be the case even without section 84; as the *Insurance Act* applies specifically to insurance products, where these provisions apply to beneficiary designations more generally.
    - Section 84 is simply included for clarity.
- While this legislation provides general rules, if it is inconsistent with other legislation (either B.C. or Federal) then that legislation applies.

Division 1 – Designation Requirements

- Division 1 of Part 5 sets out the requirements for making a valid beneficiary designation. These requirements are not as stringent as those for making a valid will.
- Default rules for designating several beneficiaries, as well as provisions giving a person the ability to make an irrevocable designation are also included in this division.

SECTION 85

- Section 85 sets out the mechanics of designating a beneficiary.
- This section has been significantly amended by section 29 of the *Wills, Estates and Succession Amendment Act, 2011* to clarify the section.
- Subsection (1) provides a participant with the authority to designate another person as a designated beneficiary and gives the right to alter or revoke the designation (unless it is made irrevocable in accordance with section 87).
- Subsection (2) specifies the requirements for making an effective designation.
    - Paragraph (a) sets a lower standard for making a designation than for making a will. While the designation must be in writing, and must be signed, there are no witnessing requirements

- Paragraph (b) permits a designation to be made or changed in a will, but requires that the designation relate expressly to a benefit plan.

- Subsection (3) allows a representative with powers over a person's financial affairs to make, change or revoke a designation if permitted to do so by the court.
  - Currently the authority of a designated person to make such changes is in doubt. This change clarifies the law while providing some protection by requiring the court to authorize the change.

SECTION 86

- Section 86 is based on section 52 (2) of the *Insurance Act* (now section 63 (2)). It provides a default rule that will apply when a participant designates two or more beneficiaries as being entitled to take the benefit.
  - Having a default rule will reduce the need for people to resort to the court to decide what happens.
  - This rule also harmonizes the law in relation to insurance designations and retirement plan beneficiary designations on this point.
- The default rule will not apply if the participant expressly provides in the designation that the beneficiaries are to take in shares that are not equal, or if the participant designates two or more beneficiaries who are to take as alternatives to one another.

SECTION 87

- Section 87 changes the law to allow a person to make the designation of a beneficiary (e.g., a Registered Retirement Savings Plan) irrevocable, without the beneficiary's consent.
- The section is modelled on section 49 of the *Insurance Act* (now section 60), as irrevocable designations are already possible under insurance contracts.
- NOTE: While this section applies to benefit plans generally, it will not apply to benefit plans that are governed by pension legislation, as the legislation governing pensions has specific requirements which will supersede this general rule.
- There are two reasons for this change:
  1. This provision simply adds another tool to aid in estate planning.
     - Irrevocable designations will most likely be used in connection with separation agreements, as interests in benefit plans often constitute family assets.
  2. Enacting this provision harmonizes the treatment of retirement plan designations with designations under insurance policies.
     - There is really no principled reason why similar products offered by insurance companies should allow irrevocable designations while other benefit plans do not.

SECTION 88

- Section 88 is related to section 87. It describes the effect of making a beneficiary designation irrevocable.
- Subsection (1) clarifies that once a beneficiary designation is made irrevocable the participant may not alter or revoke the designation without the consent of the beneficiary.
- Subsection (2) clarifies that if a beneficiary designation is made irrevocable, then it is not subject to the control of the participant and does not form part of the participant's estate; therefore, a participant's creditors have no claim on the benefit.

Division 2 – Other Benefit Plan Provisions

- Division 2 of Part 5 addresses other issues surrounding the making of benefit plan designations and payment of a benefit.

SECTION 89

- Section 89 ensures that, in the event of a conflict between the legislation and a plan, Part 5 will prevail over the terms of a plan, unless payments under the plan have commenced.
- While the general intent is to give flexibility to plan participants, allowing a participant to change a designation after payments have begun is considered to be unfair to the plan provider – who may have calculated benefits based on the characteristics (age, health, etc.) of the original beneficiary.

SECTION 90

- Section 90 grants a person authorized to manage a person's financial affairs the limited authority to sign, on behalf of the participant, a new designation that is identical in substance to the participant's previous designation.
    - The authority conferred by this section does not extend to making a designation that is different from the previous designation or that in any way alters the previous designation.
- The authority granted by this section supersedes legal formalities that prevent the representative from making what is essentially an administrative change, for example:
    - A person has a Registered Retirement Savings Plan (RRSP). They become incapacitated and their spouse becomes their guardian, with control over their finances. When the person reaches 71 they are required to collapse their RRSP. The spouse wants to convert the RRSP into a Registered Investment Fund (RIF).
    - Or an incapacitated person has an RRSP and the spouse wants to move the RRSP from one financial institution to another.

- In both cases, as long as the beneficiary of the benefit plan stays the same, then there should be no concern that the guardian has changed the location of the benefit plan or has converted the plan from an RRSP into a RIF, which is likely beneficial from a tax consequence.

SECTION 91

- Section 91 is based on section 52 (2) of the *Insurance Act* (now section 63 (2)). It specifies what happens if a specified beneficiary dies before the participant in a benefit plan and provides a hierarchy of alternative beneficiaries, concluding with the participant's estate.
- The prescribed hierarchy will most likely correspond to the deceased's wishes.
- Moreover, it is merely a default hierarchy and can be displaced by the plan holder specifically describing the order in which alternative beneficiaries are to take.

SECTION 92

- Section 92 is modelled on section 51 of the *Insurance Act* (now section 62). It permits a participant to appoint a trustee for a beneficiary under a plan.
  - This will harmonize the law of retirement plan designations with insurance designations.
  - This change also provides greater flexibility in estate planning.
    - Currently, the *Law and Equity Act* is silent on the possibility of appointing a trustee for a beneficiary. As a result, it is difficult to convince plan administrators to accept a beneficiary designation that appoints a trustee. This can frustrate some estate planning strategies.
- Subsection (2) provides protection to plan administrators by discharging them from any further liability when they make a payment under the plan to a trustee.

SECTION 93

- This section provides the necessary statutory authority to allow a beneficiary (or a trustee of the beneficiary, if one has been appointed) to take action to enforce an entitlement to the benefit.
- A statutory rule is necessary; otherwise the common-law rule 'privity of contract' would operate to prevent a beneficiary from taking action to enforce payment of the benefit under the plan.
  - The principle of privity of contract is commonly summarized using a quote from the English Case Tweedle v. Atkinson [1861] EWHC QB J57
    ". . . no stranger to the consideration can take advantage of a contract, although made for his benefit."

- A retirement plan beneficiary designation is a classic example of a type of contract made between two persons for the benefit of a third party, who is a "stranger to the consideration." Person A, the plan participant who makes contributions, enters into a contract with Institution B, the financial institution that administers the plan, to pay the proceeds of the plan to person C upon person A's death. Clearly there is no contractual connection between B and C; nonetheless, the payment of the benefits should be enforced.

SECTION 94

- Section 94 provides protection for plan administrators who transfer a benefit in accordance with the plan to a beneficiary of record.
- This section is necessary because sections 85 and 97, allow a person to change a beneficiary designation in their will. This means that a plan administrator may have a beneficiary designation in their records that has been superseded by a designation made in a later will.
- There are two reasons to protect plan administrators in this manner:
  1. Allowing plan administrators to rely on their records achieves a reasonable balance between protecting the interests of the true beneficiary and administrative convenience on the part of a plan administrator.
  2. This provision is also of practical assistance to beneficiaries, who might be kept waiting if plan administrators believed that they could not rely on their records, and instead had to make further inquiries to determine if the person in their records was the true beneficiary.

SECTION 95

- Section 95 is based on section 54 (1) of the *Insurance Act* (now Section 65). It clarifies that a benefit payable under a plan on the death of a participant is not part of the participant's estate and not subject to the claims of the participant's creditors. There are the following exceptions to this protection:
  - the deceased's estate is the designated beneficiary; or
  - the benefit falls into the deceased's estate, as there is no designated beneficiary or the designated beneficiary predeceases the plan participant.
- There are two reasons for section 95:
  1. It resolves uncertainty in this area of the law,
     - It is likely that a benefit paid directly to a beneficiary is safe from creditors now. However, there have been no authoritative court cases on this point; thus, without statutory authority uncertainty remains.
  2. The clarification promotes uniformity between benefit plans (Registered Retirement Savings Plans) and insurance products.

Division 3 – Designated Beneficiaries in a Will

- Designating a beneficiary of a benefit plan in a will results in certain questions.
  - There are different requirements for designating a beneficiary as opposed to making a valid will; so, if a will is invalid, how does this impact a beneficiary designation made in that will.
  - Actions taken to repeal or revive a will could be considered to impact beneficiary designations made in the will; so, if a will is revived, how does this impact a beneficiary designation made in that will.
- Division 3 of Part 5 sets out rules intended to prevent issues from arising from the ability to designate beneficiaries in a will.

SECTION 96

- Section 96 sets out the mechanics of designating a beneficiary and deals with some consequences of allowing designations in a will.
- This section resolves potential conflicts between designations in a will that are not expressly revoked by a later designation in a signed instrument.
- The language of section 96 also furthers the uniform treatment of insurance beneficiary designations and retirement plan designations.

SECTION 97

- Section 97 accomplishes the following objectives:
  - It guards against the possibility of accidental or mistaken revocations.
  - It resolves any conflicts that may exist when a later designation is made in the absence of an express revocation of an earlier one.
  - It clarifies the effect of revocation of a will on a designation in that will.
  - It ensures that revocation of a designation does not revive an earlier designation.
- The provisions in section 97 provide clear and explicit rules for retirement plan beneficiary designations.
  - Subsection (1) guards against the possibility of accidental or mistaken revocations by virtue of the rule that a later will revokes an earlier one.
  - Subsection (2) resolves any conflicts that may exist when a later designation is made in the absence of an express revocation of an earlier one.
    - Subsection (2) must be cross referenced to section 37, which sets out the formalities that apply to the making of a will.

SECTION 98

- Section 98 sets out several special rules that govern the relationship between beneficiary designations contained in a will and the general law of making a will.

    - A designation (or revocation of a designation) can be found valid even if the document in which the designation is found is not valid as a will.
- The key to section 89 is the rules for a valid beneficiary designation set out in section 85.
    - The requirements for a beneficiary designation to be valid under section 85 are less stringent than the requirements for a document to be valid as a will (for example, no witnesses are required).
    - Section 98 ensures that as long as a designation complies with the requirements of section 85 the designation will be valid.
- Subsection (2) provides for the revocation of a designation contained in the defective will referred to in subsection (1).
- The rules set out in section 98 are necessary to ensure that the intentions of will-makers are not defeated.
    - Because a designation does not require the same formalities as a will it is not necessary for a purported will to be valid for the designation to be valid.
        - Just because the designation appears in a document that was intended to be a will does not mean that the designation should have to meet higher requirements for validity than section 85 requires.
- This section is also consistent with the broader policy goals of permitting participants to designate beneficiaries in instruments that do not meet the formalities required of a valid will (see section 85 (2)) and aligning the designation of non-insurance beneficiaries with designations under the *Insurance Act*.

SECTION 99

- Section 99 guards against the inadvertent revival of a revoked beneficiary designation contained in a will upon the execution of a codicil that revives that will.
    - This is done by codifying the test in *Royal Trust Co. v. Shimmin* (1932) 46 B.C.R. 273.
- This special rule is necessary to ensure that the intentions of will-makers are not defeated through inadvertence.

Background - *Royal Trust Co. v. Shimmin* (1932) 46 B.C.R. 273

- A codicil is a document that explains, modifies or revokes a will (or part of a will). In most cases a codicil will provide for the republication of the original will. The problem that this may pose for a beneficiary designation is illustrated by the fact pattern in *Royal Trust Co. v. Shimmin.*
    - In this case a person made a will that contained a beneficiary designation.
    - At a later time they revoked the designation and made a new designation in a signed instrument.

    - Then, still later, the person executed a codicil that made changes to the will unrelated to the designation and which had the effect of republishing the will.
        - An argument could be made that republication of the will revives the first designation that was contained in that will, even though the codicil had nothing to say about the designation.
- In *Shimmin*, Macdonald J. concluded that the proper test was one that gave effect to the will-maker's intention.

> *There is no doubt that a codicil to a will operates as a revival of the will, as if the will-maker had made a new will at the time. While the will was republished by the codicil and thus for many purposes the date of the original will was, as it were, shifted to the date of the codicil, still the republication did not necessarily make it operate for all purposes "as if it had originally been made at the date of the republishing instrument; a contrary intention may be shewn.*
>
> *The rule is subject to the limitation that the intention of the will-maker is not to be defeated thereby:"*

SECTION 100

- Section 100 modifies the rule that a will is to be interpreted as having been drafted just before death. Section 100 provides that a beneficiary designation contained in a will is effective from the date that the will is signed.
    - This rule is necessary to ensure that the intentions of will-makers are not defeated.
    - Designations are, by their nature more specific than gifts under a will, therefore, different rules must apply to them.

Part 6 Administration of Estates

- Part 6 replaces much of the *Estate Administration Act* and replaces the *Probate Recognition Act*.
  - *Part 10 of the Estate Administration Act* is addressed in Part 3 of the *Wills, Estates and Succession Act*.
  - Much of section 112 of the *Estate Administration Act* – Notice of application for probate or administration – has been moved to the new Part 25 of the Supreme Court Civil Rules, as it deals with procedural matters.
- Division 2 of Part 6 – Small Estate Administration – is not being brought into force at this time.

Division 1 – Application of this Part and Vesting of Property

- Division 1 of Part 6 establishes basic rules applicable to the administration of estates.
- As the title suggests, the provisions in Division 1 set out the application of Part 6 and also address where property vests in the interim between a person's death and the appointment of an administrator (where there is no will).
- Division 1 sections also set out the authority for opposing an application for probate or administration (and other forms of grant) and the authority to compel an executor to apply for probate.

SECTION 101

- Section 101 describes what and to whom Part 6 of the Act applies.
- Section 101 is based on accepted conflict of laws principles.
- Paragraphs (a) and (b) declare that the *Wills, Estates and Succession Act* applies to the estate of a British Columbia resident or domiciliary, and to property of a deceased person situated in this province.
  - Being "ordinarily resident" or "domiciled" are technical terms referring to a person usually living in a certain location or having a special connection with a certain location, even if the person doesn't live there most of the time:
    - Both terms are used as there are slightly different indicators to determine if a person is ordinarily resident as opposed to domiciled in unusual circumstances, for example:
      - Where a person has just moved to a new location with an intention to live there indefinitely.

        - Where a person is living in another location for an extended period of time, but with an intention to return.
        - A person who spends the majority of their time out of British Columbia, but who has the majority of their financial and family connections within the province, such as a worker on an offshore oil rig.
    - It is an excepted principle of law that, if a person is ordinarily resident or domiciled in a particular territory, this gives the courts in that territory jurisdiction over the administration of the deceased's estate.
- Paragraph (c) indicates the *Wills, Estates and Succession Act* applies to all personal representatives acting in British Columbia, including foreign ones intending to administer assets located within the boundaries here.

SECTION 102

- Section 102 carries forward the present law with respect to treatment of intestacy estates from section 3 of the *Estate Administration Act*. It ensures there is no gap in who is responsible for the deceased's estate.
    - If there is a will, then, technically, the executor's responsibility for the estate arises on the date of death. If there is no will, then the court has responsibility for the assets until it recognizes an applicant for administration.
- The wording of section 102 has changed from section 3; however, the effect of the section is the same.
    - The change in wording merely clarified that the estate first vests in the court and then vests in the personal representative once that representative assumes office.

SECTION 103

- Section 103 carries forward the policy of section 8 AND section 10 of the *Estate Administration Act,* and provides for the appointment of a "caretaker" administrator while a legal action challenging the validity of a will or the right to act as a personal representative of the estate is in progress.
    - The court needs to be able to appoint an independent party to care for the estate where there is an issue of the validity of a will or prior grant, and, in turn, the appropriateness of an executor or administrator under that grant is brought into question.
- Subsection (2) specifies the powers of an administrator who is appointed pending legal proceedings. Subsection (2) also makes such "caretaker" administrators eligible to receive compensation for their services, like other personal representatives. However, subsection (2) allows the court to impose special terms regarding the compensation.

- Compensation for these administrators is justified because they are generally providing the same services as any 'normal' personal representative.
    - The compensation provisions have been added to this section for ease of reference and administrative convenience.
- Giving the court the authority to vary the default compensation provisions is reasonable as it allows the court to take into account the unique circumstances of the estate and the duties the administrators have been asked to take on.
    - In certain cases the caretaking may be very straightforward; therefore, compensation should be less. In other cases the legal proceedings may be very complex and the estate in disorder and, therefore, the administrator may be entitled to receive more.

SECTION 104

- Section 104 generally carries forward section 24 of the *Estate Administration Act*; allowing an executor or co-executor to renounce in favour of another person
- However, adding the words "unless the court orders otherwise" to subsection (2) changes the law and allows a person to apply to renounce their right to be an executor on a conditional basis and/or have the court give them the right to re-assert their right to be executor.
    - A person named as executor in a will may do this if the alternate whom they intended to administer the estate after they renounce does not assume the role of executor or if that alternate does not complete the administration of the estate.
- Conditional renunciation may be useful and justifiable where the named executor is ill or elderly and would prefer the estate be administered by another specific person.

An example of how section 104 would operate:

- A will names the will-maker's spouse as the executor without an alternate.
- When the will-maker dies, the spouse is very elderly and finds the prospect of having to administer the estate to be onerous.
- The spouse wishes to renounce in favour of another person (e.g., a family friend or adviser) who would find it easier to discharge those duties, but does not wish to lose the right to take out probate if that person is unwilling or unable to act.
- The court could order that the spouse's renunciation be conditional on the other person identified by the spouse applying for administration with the will annexed.

SECTION 105

- Section 105 carries forward section 25 of the *Estate Administration Act*, although it has been rewritten in an effort to improve clarity.
- Section 105 provides that, if an executor dies before receiving a grant of probate or does not respond to a court application requiring them to obtain a grant of probate, they no longer have a right to be the executor and another person can apply for probate as if that person had not been appointed executor.
  - The reason for section 105 is, if the executor does not take probate (and does not inform the court that they wish to conditionally renounce their right), then that person should no longer have a right to be executor and the estate should be administered by any alternate executor or in accordance with the principles of intestacy.

SECTION 106

- Section 106 carries forward section 109 of the *Estate Administration Act*, and allows a person to oppose a person's application for a grant or probate or administration.
- The section has been reworded to improve clarity; however, the process will still be the same – a person will still file a document with the court registry to oppose the issuing of a grant. The name of the document will be "Notice of Dispute."
- Subsection (2) of the *Estate Administration Act* has not been carried forward because the process that subsection (2) describes no longer occurs, because the court registry's computer system now links the various court registries.

SECTION 107

- Section 107 clarifies two principles:
  1. After the court has issued a representation grant, no one other than a person to whom that grant was made may act as executor of the will or administrator of the estate to which the grant relates.
  2. If an executor does not join in an application for a representation grant, the executor is not responsible for the assets of the estate, whether or not power is reserved to apply for a subsequent grant.
- The reason for section 107 is that giving exclusive authority to those named in a representation grant avoids confusion and disputes over authority to administer an estate, especially where there are people named as co-executors in a will who do not join an application for a grant.
- If a person named as executor does not join in an application for a representation grant, then that person has no authority over the assets of the estate (regardless of whether power is reserved to apply for a

subsequent grant), and, in turn, that person should not be liable for the actions of others in respect of the assets of the estate.

SECTION 108

- Section 108 creates specific legislative authority for the ability to compel a person to apply for probate if they are named as executor in the will.
  - This is known as 'citing' an executor.
  - Currently, the ability to 'cite' an executor is based on common-law rules and the ability of the Court to control its own processes.
- Giving specific statutory authority adds clarity to this area of the law and increases the likelihood of a lay person becoming aware of this ability.
  - At the moment, a person must look to the Supreme Court Civil Rules to learn they have the ability to 'cite' an executor to accept or refuse probate.

Division 2 – Small Estate Administration

- Division 2 of Part 6 (Sections 109 to 120) of the *Wills, Estates and Succession Act* is not being brought into force.
- It is not believed that the small estate procedure is needed.
- The benefit of the small estate procedure was that it would be simpler and faster.
- The new probate rules have prescribed forms very similar to the small estate declaration proposed by the British Columbia Law Institute.
- The new probate rules make a distinction between simple and complex applications and ensure that the processing of an application is dependent upon the complexity of an application, rather than the value of the estate.
- Therefore, there is not any advantage to these provisions, because under the new probate rules **all** applicants will get the same benefits – those with simple applications in particular. For example, where:
  - there is no apparently later will that needs to be explained;
  - there are no issues surrounding the signing of the will;
  - there are no hand written alterations to the will; and
  - there are no documents referred to in the will that appear to be missing.
- The fact Division 2 is not being brought forward will not affect probate fees. If the estate is worth less than $25,000, then applicants still will not have to pay probate fees.

Division 3 – Application for Grant of Probate or Administration

- The provisions in Division 3 of Part 6 set out the rules surrounding applications for a grant of probate or administration.

SECTION 121

- Section 121 roughly corresponds to section 112 of the *Estate Administration Act*.
- It sets out a general obligation to give notice of an application for a grant of probate and administration.
  - An applicant is protected from liability for a loss suffered by a person who did not receive notice if they are found to have made reasonable efforts to learn of their existence or whereabouts.
    - An exception to this protection is where the claim is to recover property or enforce an order under a will variation proceeding.
- Certain procedural requirements that were in section 112 have been moved to the Supreme Court Civil Rules.
  - Procedural requirements are more appropriate for rules and regulations, given the fact that processes and procedures may change over time.
- Section 121 has been amended by section 34 of the *Wills, Estates and Succession Amendment Act, 2011* to clarify that claims to recover property or enforce an order must be under Division 6 of Part 4. Otherwise the section 121 provides a personal representative with virtually no protection.

SECTION 122

- Section 122 corresponds to section 111 of the *Estate Administration Act*.
- It sets out an obligation for an applicant to determine the property and liabilities of the deceased person.
- The section only requires assets and liabilities that pass to the personal representative to be disclosed on an application for grant.
  - A change is that, if the deceased was not normally resident in B.C., then only their property in B.C. need be disclosed, provided the foreign property will be administered by a foreign personal representative or otherwise under the law of a foreign jurisdiction.
  - Requiring disclosure of assets and liabilities that are situated elsewhere and are being administered under foreign law would create confusion about the assets over which the grant extends.
    - In numerous civil law jurisdictions, there is no equivalent to a personal representative to whom assets pass until distribution.

- This section has been amended by section 35 of the *Wills, Estates and Succession Amendment Act, 2011* to allow the form of application for a grant of probate or administration to be set out in the rules of court.
- Disclosure of the assets and liabilities of the deceased is a requirement of probate procedure for a variety of reasons:
  1. It ensures that executors and administrators search diligently for assets and debts.
  2. It discourages concealment and misappropriation.
  3. It allows potential will variation claimants and creditors to make informed assessments of the value of their rights.
  4. It provides a basis for fixing the amount of security.

SECTION 123

- Section 123 expands the current powers under section 113 of the *Estate Administration Act*.
  - The section now applies to estate documents and assets.
- Section 123 empowers the court to compel production of testamentary writings and attendance by a witness with knowledge of the document. It also allows the production of documents or assets belonging to an estate in response to a subpoena issued by the registrar.

Reason certain provisions are not carried forward:

- Sections 113 (2), 113 (3), and 114 (3) of the *Estate Administration Act* emphasize the duty of a person to answer questions and interrogatories, and liability for contempt in default.
  - These sections are not carried forward because they simply state consequences that flow from the general law of contempt of court.
- Sections 114 (1) and (2) of the *Estate* Administration Act allow the registrar to issue subpoenas.
  - The provisions are not carried forward because they are covered by the Supreme Court Civil Rules, currently Rule 21-5(56) and, when the Wills, Estates and Succession Act is in force, Rule 25-12.

SECTION 124

- Section 124 carries forward the policy of subsections 112 (5.1) to (5.3) and (8.1) of the *Estate Administration Act*
  - It provides that if a person is a minor or mentally incapable the court cannot grant administration until an applicant for probate and administration provides written comments from the Public Guardian and Trustee.
- Section 124 ensures that the Public Guardian and Trustee has an opportunity to uphold their statutory responsibility to protect minors or people who are mentally incapable.

SECTION 125

- Section 125 allows the Public Guardian and Trustee (PGT) to have certain applications be "sealed."
- The effect of such a designation is to direct the court registry that access is not to be provided to a file for 6 months without the permission of the PGT or by an order of the court.
- The PGT may apply to court to extend the sealing for up to an additional 18 months. The maximum amount of time an application may be sealed is ~~2~~ two years.
- The ability to seal a file is balanced by the following factors:
  - All known beneficiaries will receive notice from the PGT (and a copy of the will, if any, and a list of heirs) as part of the application process.
  - The existence of a file will still be noted in the court registry; it is only the contents of the file that will be sealed.
  - If a person does not receive notice and believes they have a claim on the estate, then they may obtain access to the file by making a request to the PGT or apply to the court for access.

SECTION 126

- Section 126 generally compels the Public Guardian and Trustee to pay heirs directly.
- The Public Guardian and Trustee has discretion to pay the inheritance to a third party; however, it is likely that the Public Guardian and Trustee will only do this if it is satisfied that this is clearly in the best interests of the heir.

SECTION 127

- Section 126 gives the Public Guardian and Trustee immunity for the exercise of its discretion to seal an application (s.125) and any decision to pay (or not pay) a third party directly (section126).

SECTION 128

- Section 128 significantly modifies the requirement that applicants for administration provide security. Security will only be mandatory if a minor or a mentally incapable adult is interested in the estate.
  - Currently, under section 16 of the Estate *Administration* Act, security is always required and the applicant must apply to have the requirement for security waived, in accordance with section 17 of the *Estate Administration Act*.
- Subsection (1) paragraph (b) states that the court may order that security be provided if there is an application requesting security by an interested party.

- Subsection (2) gives the court the ability to assign an administration bond or other security to a third party.
  - Typically this will be a beneficiary or intestate successor who is willing to pursue a defaulting administrator to recover losses to the estate for the benefit of all interested persons.
  - The third party is entitled to collect the administration bond or security if there is a default by the executor or administrator.
- Section 128 has been amended by section 36 of the *Wills, Estates and Succession Amendment Act, 2011* to make it clear that security may be in any form acceptable to the court and specify that, in lieu of security, the court has the ability to restrict the powers of the administrator that may be exercised without prior approval of the court or the Public Guardian and Trustee.
  - An example of a restriction on authority is that the administrator may have to obtain the approval of the court before selling the deceased's house.
- Security has been changed from being mandatory to only required on application (unless a minor or mentally incapable child is interested) for the following reasons:
  - The present legislation does not reflect actual practice – the default is that security must be provided; however, in practice security is usually dispensed with by the court.
    - This is because of the cost of security, which is payable out of the estate, and because administrators are often members of the deceased's family and get consent.
  - Requiring a person to either provide or dispense with security adds complexity and delay, increasing the overall cost of an administration.
  - While claims on security do occur, it is fairly infrequent.
- Section 128 recognizes that there are a variety of ways to safeguard the assets of the estate:
  - There is no reason to prescribe a form of security as long as the security is acceptable to the court.
  - The court also may be satisfied that sufficient safeguards can be accomplished by placing restrictions on the estate, rather than requiring security.
    - Even where security is presumptively required, the court may be satisfied that the prospective administrator's financial solvency is sufficient and that no additional safeguards are required.
  - Assigning the security to an interested beneficiary allows collection of the bond without imposing a cost on the government. For example:
    - a person applying for administration is required to use their car as security. The car remains in possession of the person but can be seized if they breach their responsibilities as executor. If a breach occurs the court may assign the security to a beneficiary and that beneficiary is responsible for the costs of seizing the car.

Division 4 –Grant of Probate or Administration

- The provisions in Division 4 of Part 6 addresses issues related to the issuing of a grant of probate or administration.

SECTION 129

- Section 129 sets out the grounds on which a grant of probate or administration may issue from a British Columbia court.
- This section is essentially a codification of the common-law.
  - It is useful to explicitly address conflict of laws issues to clarify the law and prevent uncertainty and litigation.
- This section has been amended by section 37 of the *Wills, Estates and Succession Amendment Act, 2011* to add subsection (3), which permits a registrar of the court to issue a grant of probate or administration, provided the application is unopposed.
- Subsection (1) relates to the generally recognized grounds of jurisdiction in relation to succession, which is the residence or domicile of the deceased or the presence of assets requiring administration within the territory of the court.
- Paragraph (1) (b) (iii) has been added to account for situations in which a personal representative must be appointed for the purpose of bringing or defending a legal proceeding in British Columbia.
  - Paragraph (1) (b) (iii) 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.
- Subsection (2) gives a residual discretion to the court to grant probate or administration even if there is no property belonging to the estate in British Columbia and the deceased was not resident or domiciled here.
  - While such a grant might not be recognized abroad, it may be necessary for an estate to be represented for a domestic purpose, for example:
    - The deceased lived in a foreign country and has no assets in British Columbia. However, the deceased's business interests require a representative to carry out some legal act in British Columbia, such as the execution of a document.

SECTION 130

- Section 130 sets out an order of priority among potential administrators.
  - Currently, there is no statutory priority regime and, if there is a priority dispute, it is settled in accordance with the court practices.

- The priority regime specifically allows beneficiaries to nominate people to act upon their behalf.
- A statutory hierarchy of applicants for a grant of administration has been added to the legislation for the following reasons:
  1. It is thought that a statutory hierarchy of applicants for a grant of administration will reduce uncertainty for families.
     - There should be less scope for conflicts of interest to produce discord between administrators and intestate successors if there is an established order of priority.
     - Success often depends on the measure of consent that an applicant can obtain from the beneficiaries at a similar level of priority. This should also minimize the potential for conflict.
  2. A hierarchy of potential administrators is a feature of 'estates' legislation in a number of other provinces and territories:
     - Alberta
     - Newfoundland and Labrador
     - Saskatchewan
     - Northwest Territories
     - Nova Scotia
     - Nunavut
- The hierarchy includes "whom the court sees fit to appoint" as the final category of potential administrators for the following reasons:
  1. If a sufficient consent to be appointed as administrator is not obtainable by a successor who is not included in the hierarchy, then there is little benefit in having further rankings of applicants.
     - If there is no agreement, then the court might as well appoint anyone with evident integrity who is able and willing to get the job done.
  2. Having this category also results in a relatively compressed, simple hierarchy.

SECTION 131

- This section establishes criterion for the priority given to applicants for a grant of administration with will annexed.
  - This is a situation where the deceased has made a will but either the will does not name an executor or all executors and alternate executors named in the will are dead or are unable or unwilling to administer the estate.
- In these circumstances priority is based on the level of consent the applicant has from other beneficiaries.
  - The level of consent that confers priority to a grant is the consent of the beneficiaries who collectively hold "a majority in interest" of the estate, (i.e., more than 50 per cent of the value).
- The court is given residual authority to appoint any person they deem to be fit if no beneficiary applies or if no beneficiary can obtain the necessary consents.
- By establishing a criterion for the priority given to applicants for a grant of administration, there should be less room for conflict between the

members of the deceased's family about who is the right member to take out the grant.
  - A criterion of unanimous consent is impractical, as it favours obstructive and self-serving behaviour.
  - Requiring the consent of the beneficiaries who hold collectively "a majority in interest" of the estate prevents an individual with a small interest in the estate from exerting a disproportionate influence on the selection of the administrator.

SECTION 132

- Section 132 gives the court the power to reject an application from a person who would otherwise have priority under sections 130 and 131, and appoint another person whom the court considers appropriate.
- It may be necessary for the court to have this discretion in certain circumstances, for example:
  - The deceased had a "blended family" with children from the first and second marriages and there is clear evidence of animosity between the children from different marriages. Even though a child has the consent of the beneficiaries with a majority in interest this may simply represent the consent of their full siblings. In such a circumstance, the court may wish to appoint a neutral third party to administer the estate to protect the children from the other marriage.

SECTION 133

- Section 133 clarifies that if a person dies leaving a will and the will does not dispose of all of that person's estate, then a grant of probate (or a grant of administration with will annexed) operates as a grant of administration for the part of the estate that is not disposed of by the will.
  - This is known as a "partial intestacy" and it is relatively uncommon – because a will usually has a "residue" clause, which ensures that all property not specifically dealt with is divided among specified beneficiaries.
- Granting administration of estate property not disposed of under the will to a person who is already applying to administer the estate that passes under the will is convenient, efficient and likely corresponds with the will-maker's wishes.

SECTION 134

- Section 134 carries forward section 12 of the *Estate Administration Act*.
- The section accomplishes three objectives:
  1. It allows the court to appoint a guardian or other suitable person in place of a minor who is the sole executor under a will.

- Because a minor is not competent at law to act as an executor, there needs to be a mechanism for another person to step into the minor's place. Guardians are the first logical choice to do so because they are entrusted to act in the best interest of the minor.

2. It allows the court to revoke the grant to the guardian and grant probate to the former minor when they reach majority.
   - This upholds the will-maker's intent.
   - The grant will only be revoked if the minor requests it. If the minor is satisfied with the guardian continuing to administer the estate, then the grant will not be revoked.
3. It gives the court the authority to limit the grant of administration or place terms on the grant.
   - Giving the power to place limitations on a grant of administration granted to a guardian or other person in place of a minor allows the court to protect the minor's interests.
   - The guardian can be authorized to handle urgent matters, such as the payment of debts and disposition of perishables, but the collection and distribution of the high value assets can wait for the minor to come of age.

SECTION 135

- Section 135 accomplishes two objectives:
  1. Subsection (1) carries forward the present policy of section 5 of the *Estate Administration Act*.
     - Without subsection (1), a personal representative would have no ability to sue for losses to the estate arising prior to being appointed executor or administrator,
  2. Subsection (2) codifies a limited extension of the doctrine of "relation back".
     - It adds a new provision codifying the rulings of the Supreme Court of Canada in *Davis v. Auld* 1938 CanLII 26 (SCC) and of the British Columbia Supreme Court in *Re Phillips Estate,* 1997 CanLII 3154 (BCSC).
     - These rulings relieve a personal representative from liability for loss and damage to the estate occurring before the grant of administration, when the personal representative lacked authority.
- However, despite section (1), the personal representative will be liable for a loss if liability would have been present regardless of whether a grant had issued or not, for example:
  - If the personal representative intermeddled in the estate (i.e., dealt with the deceased's assets) and this resulted in a loss, then subsection (1) will not provide relief; for example:
    - Person A and Person B are named as executors in a will. After the will-maker dies A and B jointly decide to sell the deceased's car to pay off a debt. Person B decides not to join the application

for probate and Person A is the only one who is appointed as an executor. The beneficiaries satisfy the court that the car was a classic and was significantly undervalued when it was sold. Both A **and** B would be personally liable for the loss associated with the sale of the car.

Background – Doctrine of "Relation Back"

- As an executor is appointed under the will, a grant of probate is considered to relate back to the time of death and to confirm the executor's title and authority from the point of death. In contrast, an administrator's title and authority stem only from appointment by the court and therefore only arises at the time the grant is issued.
- However, because an administrator only gets authority when the grant is issued, they would have no authority to sue for losses to the estate arising between the time the person died and the time the grant was issued, or to recover estate assets that may have been dispersed during this time.
  - To address this issue, court judgments gave limited effect to the 'relation back' doctrine to prevent the possibility of unrecoverable loss to estates subject to grants of administration.

SECTION 136

- Section 136 clarifies that after the court has issued a representation grant no one other than a person to whom that grant was made may act as executor or administrator.
  - Giving exclusive authority to those named in a representation grant avoids confusion and disputes over authority to administration of an estate, especially where there are non-proving executors.
- The section makes specific reference to the fact that power may be reserved to another person to apply for a subsequent grant.
  - This is in accordance with section 104(2) - Renunciation of Executorship.

SECTION 137

- Section 137 corresponds to sections 22 (1) and 23 of the *Estate Administration Act* and protects a third party who makes a transfer of property or a payment in good faith, relying on a grant that is defective or irregular.
  - The reason for section 137 is that innocent third parties should not suffer a loss or face consequences for actions taken in reliance on a grant that is defective.
- Section 137 extends the principles in sections 22 and 23 of the *Estate Administration Act* to include transfers of property, as well as payments.
  - There is no principled reason why the protection should be limited to payments and not property

- In order to claim the benefit of this section, the payment or transfer would have to be made before the third party received notice of revocation of the grant.

Division 5 – Foreign Personal Representatives, Resealing Foreign Grant and Ancillary Grant

- Division 5 relates to foreign grants and foreign personal representatives.
- It carries forward provisions currently found in the *Probate Recognition Act* and the Supreme Court Civil Rules.
- The new power to 'cure' defective wills is extended to foreign wills brought to British Columbia.

SECTION 138

- Subsections (1) to (3) of section 138 carry forward the principles of the *Probate Recognition Act* and allow a foreign grant from a recognized jurisdiction to be 'resealed' by a British Columbia court.
  - 'Resealing' means that the court in British Columbia simply confirms that a foreign court has issued a grant; it does not look behind the grant and determine whether it was proper to issue the grant.
  - The following jurisdictions are prescribed by regulation as jurisdictions that can have their grants resealed:
    - the United Kingdom,
    - all Commonwealth jurisdictions with common-law legal systems similar to that of British Columbia,
    - Hong Kong, and
    - all U.S. states
- There are two important differences in subsections (1) to (3) from the *Probate Recognition Act*:
  1. There is no requirement for reciprocity from recognized jurisdictions.
  2. If the deceased was not domiciled in British Columbia (e.g., they were a German national who spent most of the year in Germany, but had a vacation home in Whistler), then the person applying to reseal the grant is only required to disclose assets and liabilities situated in British Columbia that are to be administered under the authority of the resealed grant.
- Subsection (4) moves authority for ancillary grants from the Supreme *Court Civil Rules* (Rule 21-5 (59)) to legislation. It allows an ancillary grant to be issued when a foreign grant cannot be resealed.
  - Moving authority for ancillary grants from the *Court Rules* makes this authority easier to locate and makes the grant of authority consistent with other similar types of authority, such as the authority to reseal a grant.

SECTION 139

- Section 139 carries forward the court's ability under Supreme Court Rule 21-5 (59) to grant administration of assets located in British Columbia to a person appointed by a foreign personal representative under a power of attorney.
  - This power is useful because it may not be practical for the foreign personal representative to travel to British Columbia to administer assets here.
  - Because this is a substantive right, it is appropriate to relocate the authority in legislation.

SECTION 140

- Section 140 affirms that the curative power (in section 58) may be used in relation to a will that is the subject of a resealing application or another application under this Division.
- It is necessary to specify that the curative power applies to foreign wills because the sections providing for the recognition of a foreign will presume that the document **is** recognized as a will. Therefore, the court may first need to recognize the foreign document as a will using its curative power before issuing grant. For example:
  - A holograph will (a completely handwritten document which is not witnessed) is executed in Alberta, where such wills are valid, and the estate includes a condominium at Whistler. Because the condominium is immovable property (land), succession to it is governed by the law of the place where it is located, which is British Columbia. Under present law, the Ontario probate of the holograph will could not be resealed in British Columbia, nor could an ancillary grant or original grant be obtained. The foreign representative would have to apply for administration in British Columbia, as if the deceased died without a will.
  - The introduction of the curative "dispensing power" in section 58 allows the court the discretion to admit a document to probate despite formal defects if the court is satisfied the document embodies the deceased's final testamentary wishes. Rather than requiring the applicant to make a new application for probate in B.C. in order to utilize the curative power of section 58, it is preferable to allow them to simply reseal the foreign grant.

Division 6 – Revocation of Grant of Probate or Administration

SECTION 141

- Section 141 protects a grant which issued when notice was not provided to all persons entitled, but after the applicant had made reasonable efforts to ascertain the existence or identity of a person entitled to notice and locate that person.
  - Section 141 reverses the decision in *Re Hoicka and Royal Trust Corporation of Canada*, 1984 CanLII 390 (BC SC). In Re Hoicka, the court held that a grant of probate or administration is potentially defective if notice of the application was not given to a person entitled to receive notice.
  - The reason for reversing this decision is that, revoking a grant of probate or administration creates problems; because a new grant will have to be obtained and issues of liability may arise in connection with steps taken in good faith under the initial grant before its revocation.
- If the applicant has made reasonable efforts to ascertain the existence or identity of a person entitled to notice and locate that person, then, on balance, it is less harmful to potentially prejudice the person entitled to notice than to prejudice the applicant who acted in good faith in obtaining the grant.
  - As well, section 155 provides protection to an unknown person entitled to notice, because they can still seek their share of the estate from the other beneficiaries.
    - Seeking their share from the other beneficiaries is reasonable because the other beneficiaries received more than their share, due to the fact the unknown person did not receive their share.
- Section 141 has been amended by section 38 of the *Wills, Estates and Succession Amendment Act, 2011* to clarify subsection (2).

Division 7 – Personal Representatives – Powers, Duties and Liabilities

- Division 7 of Part 6 sets out the authority and protection given to personal representatives.

SECTION 142

- Section 142 (1) gives personal representatives the same powers to deal with the estate as the deceased had.

    - This ability, to do anything the deceased could, is fettered by subsection (2), which requires the personal representative exercise their authority in the best interests of the beneficiaries.
- A will-maker can override any of these default provisions and choose to limit a personal representative's power by expressing a contrary intention in the will.

SECTION 143

- Section 143 describes when the *Trustee Act* applies to personal representatives.
- Currently, the *Trustee Act* and the *Estate Administration Act* both contain provisions which apply to personal representatives. This is useful because the obligations of trustees and personal representatives are similar. However, it can result in confusion as to which Act is intended to operate.
    - An effort has been made to move any provisions that only apply to personal representatives to this Act.
    - However, some provisions that apply to both trustees and personal representatives continue to be located in the *Trustee Act*. Section 143 clarifies which sections of the *Trustee Act* apply and when those sections apply.

SECTION 144

- Section 144 reproduces section 10 of the Trustee Act and abolishes the rule first established in the case of *Allhusen v. Whittel*.
    - Section 10 has been relocated to the *Wills, Estates and Succession Act* because it only applies to personal representatives.
- The rule in *Allhusen v. Whittel* only applies when there is a life tenant.
    - Life tenants will be less common under the *Wills, Estates and Succession Act*, as spouses no longer acquire a life estate in the spousal home.
    - Because life estates will only arise under the will of a deceased, it remains open to a will-maker to choose to have the rule in *Allhusen v. Whittel* apply.
- While the rule in is *Allhusen v. Whittel* is intended to provide a fairer result between a life tenant and a person who has a remainder interest, the complicated calculations required are generally not deemed worth the effort.

SECTION 145

- Section 145 carries forward section 64 of the *Estate Administration Act*.
- Section 145 provides for a chain of representation when an executor dies without having completed the administration and distribution of an estate. For example:
  - A dies and his will appoints B as his executor.
  - B applies for and receives a grant of probate and starts administering A's estate.
  - Before completing the administration of the estate B dies.
  - B's will appoints C as her executor and C becomes the executor of B's estate.
  - Section 145 allows C to also step in as the executor of A's estate and complete the administration on behalf of B.
    - The alternate executor under A's will can apply to remove C and be appointed as executor of A's estate.
- It is advantageous to have the administration of an estate continue seamlessly, despite the death of an executor.
- NOTE: The chain of representation provided for in section 145 does NOT apply to administrators of an intestacy.

SECTION 146

- Section 146 carries forward section 66 of the *Estate Administration Act*.
- Section 146 accomplishes three objectives, it:
  1. provides a limitation period within which a claim must be brought against an estate;
  2. sets out the procedure by which a personal representative may take advantage of the limitation period; and
  3. exempts from the limitation period two types of claim against the estate:
     1) a claim by a beneficiary or intestate successor to recover a beneficial interest which they claim to be entitled; and
     2) a will variation claim.
- This section balances the rights of creditors and claimants against the estate with the interest of the personal representative and successors of the deceased in completing the administration of the estate within a reasonable time.
  - The limitation period is:
    - six months after the notice is given, if the claim or a part of it is due at the time the notice is given;
    - within six months of the time the claim or a part of it falls due, if no part of it is due at the time the notice is given.
- This section has been amended by section 39 of the *Wills, Estates and Succession Amendment Act, 2011* to modify wording.

SECTION 147

- Section 147 carries forward section 67.1 of the *Estate Administration Act*.
- Section 147 allows for property bequeathed to a beneficiary who cannot be found or who neglects to take delivery to be sold and the proceeds held in trust, or forwarded to the beneficiary if his or her whereabouts are known.
- It is necessary to provide a mechanism which allows the personal representative to settle the estate, while protecting the interests of a beneficiary who cannot be found or who neglects to take delivery of a bequest.
- This section does not prevent a personal representative from applying to the court for an order under section 39 of the *Trustee Act*, which would allow the personal representative to distribute the gift among other beneficiaries entitled under the same gift, or from applying for an order presuming the missing beneficiary to be dead under the *Presumption of Death Act.*
  - The *Survivorship and Presumption of Death Act* will be renamed the *Presumption of Death Act* when this Act comes into force
  - Section 2 of the *Survivorship and Presumption of Death Act*, which addresses survivorship, will be moved into this Act, as section 5.
- A will-maker may exclude the operation of this section through a specific direction in their will.

SECTION 148

- Section 148 carries forward the policy of section 57 of the *Estate Administration Act*,
- Section 148 ensures that, if an executor renounces probate, any dispositions made by the executor(s) who do obtain probate are completely effective and not subject to challenge because the renouncing executor did not participate.
- Section 148 extends the effect of section 57 of the *Estate Administration Act*. Section 57 only applied to land and section 148 applies to any property.
- Section 148 also removes a reference to 'trusts for sale,' which are no longer used. The 'trust for sale' was required at a time when land did not pass automatically to the personal representative.

Division 8 – Personal Representatives – Legal Liability and Legal Proceedings

SECTION 149

- Section 149 makes a personal representative generally liable to creditors and other claimants in respect of valid claims enforceable against the deceased's estate, but only to the extent of estate assets actually coming into the personal representative's hands.
- Subsection (2) clarifies that a personal representative who renounces the office (or a person whose rights to apply for probate are reserved in accordance with an order under section 104(2)), is not liable to claimants, provided they did not actually have possession and control of the assets of the estate.
    - In order to claim the protection from liability in subsection (2) a person must not have intermeddled in the estate, (i.e., they must not have dealt with the assets of the estate in any manner or held themselves out as being authorized to represent the estate).

SECTION 150

- Section 150 carries forward principles found in sections 58, 59, 63, 68, 69 and 71 of the *Estate Administration Act*
- Section 150 allows a personal representative to bring an action that the deceased could have brought if alive and allows actions to be brought against the deceased's estate.
    - The rationale for this section is that valid claims should not be barred by the death of the deceased.
- Section 150 is balanced by section 146, which allows the personal representative to give notice to potential claimants, requiring them to commence an action within 6 months of notice.
- While this section largely reflects existing law, it removes an ambiguity in section 59 (6) of the *Estate Administration Act* as to whether an action may be commenced against an estate for a cause of action that is not based on tort (such as a claim based on breach of contract) if no personal representative has yet been appointed.
    - Section 150 clearly permits such an action to be commenced.
- Section 150 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 150 has also been amended by section 40 of the *Wills, Estates and Succession Amendment Act, 2011* to replace the word "party" with

two paragraphs that better describe a person who does or may have a cause of action.
  - Because the word “party” is used in other legislation to describe a person who is part of a legal proceeding, the use of “party” in this section may be narrowly interpreted to mean that a cause of action is only preserved if a legal proceeding has **already** been commenced.
  - It is intended that the cause of action be preserved regardless of whether it has been commenced.

SECTION 151

- Section 151 overcomes a gap in the present law, by allowing a beneficiary or an intestate successor to bring or defend proceedings on behalf of the estate in the name of the personal representative.
  - Approval of the court is required.
- Currently a beneficiary or an intestate successor is not permitted to bring or defend proceedings on behalf of the estate if the personal representative refuses or is unable to do so.
  - Therefore, if a beneficiary wishes to bring an action and is faced with a refusing personal representative, the beneficiary must apply to remove the personal representative.
- While a personal representative can be removed in accordance with section 158, it may not be convenient or useful to remove a personal representative in order to bring or defend a proceeding. The personal representative may be doing a fine job of administering the estate, but may simply have differing views than the family of the deceased on the risk and return of bringing or defending an action. For example:
  - The personal representative is primarily concerned with preserving and distributing the estate. Therefore, they may be more risk adverse than the beneficiaries and more conservative in their assessment of the potential for success in bringing an action. However, the beneficiaries may be willing to pursue an action, either for non-monetary reasons or because the potential return is deemed worth the risk;
  - With respect to defending an action the personal representative may feel that settling an action against an estate is more cost effective than defending the claim, as again their primary concern is preserving the estate. Whereas, family members may believe that it is worthwhile to defend the good name of the deceased even though there may be a potentially higher cost in doing so.
- The procedure contemplated by section 150 is similar to the derivative action in company law. Sections 232–33 of the *Business Corporations Act* permit a shareholder or director to bring or defend proceedings on behalf of a company in certain circumstances.
- NOTE: Any person, not only a beneficiary or intestate successor, may be given control of the conduct of the proceeding under subsection (4).

SECTION 152

- Section 152 corresponds to section 72 of the *Estate Administration Act* and provides a means by which the personal representative can free the estate from ongoing liabilities.
  - However, section 152 differs from section 72 because it extends to **any** contract binding the estate that requires obligations under it to be performed in the future (i.e., any "executory contract"), not only to leases entered into by or assigned to the deceased.
- Section 152 and allows for the distribution and settling of the estate in a timely manner.
  - The personal representative addresses ongoing liabilities under an executory contract by assigning it to a third party, paying the liabilities due under the contract up to the time of the assignment, and setting aside a reserve adequate to meet any proven sum payable under the contract by the deceased.

SECTION 153

- Section 153 provides that the interest of a beneficiary who is a minor must be held by the Public Guardian and Trustee until the beneficiary reaches majority, unless the will appoints a private trustee for the minor's interest.
- Section 153 corresponds to section 75 of the *Estate Administration Act*; however, section 153 is expanded to include property in which a minor has an interest other than money.
  - It makes sense to expand the section to include property other than money because all property should be protected from misappropriation.
- As section 153 includes property other than money, the section also gives the Public Guardian and Trustee the discretion to convert non-monetary assets into money or to transfer the non-monetary assets to the minor beneficiary in kind.
  - The ability to convert or transfer non-monetary property is necessary because such property may decrease in value and there are practical limitations on the ability of the Public Guardian and Trustee to preserve and maintain some kinds of property for the entire period of minority (such as an exotic animal).
- Subsection (2) also allows the Public Guardian and Trustee to decline to accept a non-monetary asset in which a minor is interested and recommend that the court appoint a private trustee.
- Subsection (3) relieves a personal representative from having to transfer the interest of a minor to the Public Guardian and Trustee if the court appoints a private trustee to take charge of the interest until the minor reaches majority.
  - A competent and willing private trustee is often preferable to the beneficiary and the family of the deceased.

SECTION 154

- Section 154 changes the present requirement for notice to creditors, which is found in section 38 of the *Trustee Act*, by removing the requirement to publish notice in newspapers.
  - Under section 154 only a single advertisement in the British Columbia Gazette is required.
- The requirement that creditors, or other persons having claims against the estate, present their claims within a specified period of time has been extended from 21 days to 30 days from the date of publication.
  - After this time the personal representative will be free to distribute the estate without liability for claims that have not been brought forward.
  - The section does not apply to will variation claims, which have their own limitation periods specified in Division 6 of Part 4 (Variation of Wills).
- Dispensing with newspaper advertisements is justified because such advertisements are extremely expensive and are not considered to be effective for the following reasons:
  - Many newspapers circulate in only one city, or even only circulate in certain municipalities within a larger metropolitan area; whereas, a deceased's creditors may be spread across the province.
  - It would be unreasonable to require a personal representative to advertise in multiple newspapers, whereas, advertising in only one cannot realistically be expected to bring a death to the attention of all creditors.
  - In addition, the intervals between newspaper advertisements that are required by section 38 give rise to several weeks' delay.
- Requiring the personal representative to only advertise in the Gazette simplifies the procedure to the advantage of both creditors and the personal representative; as a search for the advertisement would only need to be conducted in one source.
  - To facilitate access to creditors, Part I of the Gazette (where notices and advertisements of this kind are published) will be searchable electronically by reference to the name of a deceased person without a subscription fee.

SECTION 155

- While section 155 is phrased as a prohibition on distributing an estate within 210 days (approximately seven months), its effect is to relieve a personal representative from liability if they distribute the net estate after seven months have passed since the issuance of the grant.
- However, subsection (2) prevents the distribution even after 210 days if a proceeding has been commenced that may alter the distribution of the estate.
  - If a proceeding has been commenced then a court order is required before a personal representative may distribute the estate.

SECTION 156

- Section 156 clarifies that a personal representative granted administration with will annexed is also the trustee of any trusts under the will, if the will does not appoint a trustee.
  - This section merely codifies what is generally considered to be the effect of a grant of administration with will annexed if there are will trusts and the will does not appoint a trustee.
- The presumption in section 156 is subject to a contrary direction by the court.
  - Therefore, an interested party can apply to court to argue that the personal representative should not be the trustee of any (or certain) trusts under the will.
    - For example, a beneficiary may do this where the personal representative would be in conflict of interest if they were a trustee.

Division 9 – Discharge, Removal and Substitution of Personal Representatives

SECTION 157

- Section 157 continues the principle found in section 27 of the *Estate Administration Act* that a personal representative cannot unilaterally withdraw from office. Section 157 requires a personal representative to apply to the court to be discharged from their responsibilities as personal representative.
- Section 157 (1) no longer refers to being discharged as trustee, as is done in section 27. This is to better separate the responsibilities of a person as a personal representative and responsibilities as a trustee, where their duties cover both.
  - A person wishing to be relieved of their obligations as trustee will need to apply under the *Trustee Act*, although this can be done in a joint application.
- Subsection (3) contains a significant new feature, allowing a personal representative to obtain a discharge without notice (desk order) in certain circumstances.
  - Subsection (3) reduces costs when there are no outstanding issues that would require the persons interested in the estate to be notified.
  - Subsection (3) has been amended by section 41 of the *Wills, Estates and Succession Amendment Act, 2011* to clarify that notice is to be provided to the guardian responsible for the minor's financial affairs or a nominee of the guardian.
- Subsection (5) corresponds to section 29 (3) of the *Estate Administration Act*. The order of discharge operates as a release from liability for acts

and omissions of the former personal representative while serving in that office, but only if the estate accounts have been passed or consented to.
    - However, the order does not operate as a release of claims arising from misfeasance, misappropriation or breaches of trust that have been concealed.
        - This means that if an executor has stolen from the estate and concealed this information when obtaining their discharge, they cannot rely on the discharge to protect them from liability.
- Subsection (6) further clarifies that a discharge obtained under section 157 only operates to discharge the applicant as a personal representative, not as a trustee.
    - In conjunction with the change in subsection (1), section (6) reinforces the separation between the role of personal representative and the role of trustee.

SECTION 158

- Section 158 is new. It specifies that a person with an interest in the estate can apply to have the court remove or "pass over" a personal representative.
    - To "pass over" means to grant probate or administration to a co-executor or alternate executor or to appoint someone ranking lower in the hierarchy of potential administrators, as set out in sections 130 and 131.
    - The court has been given flexibility to remove or pass over on grounds other than those specifically listed.
        - This authority preserves the existing non-statutory jurisdiction on which the Supreme Court currently relies to remove a personal representative
- In subsection (2), the words "A persons having an interest in an estate" is intended to at least include all beneficiaries or intestate successors, as well as creditors and co-executors or co-administrators.
- Paragraph (3) (e) provides that, if the personal representative is the sole beneficiary, then a conviction for an offence involving dishonesty and bankruptcy are not grounds for removal, unless there is also a creditor who is owed more than $10,000 (which is specified by regulation).
    - If the personal representative is also the sole beneficiary, then their bad character is not a concern, for they will be acting solely in their own interest (i.e., they are not going to use their position as personal representative to steal from themselves).
    - However, there would be a concern if the interests of a creditor could be prejudiced.
- Subsection (4) clarifies that removal under this section is only removal from the office of personal representative not as trustee.

- Paragraph (3) (g) provides that, if a person is a committee under the *Patients Property Act,* then this is a reason they may be passed over or removed.
  - While the paragraph is drafted broadly it is intended to address personal representatives who assume that role through the operation of Section 17 of the *Patients Property Act*, which automatically vests in the committee of a mentally incapable person all the powers that person had as a personal representative.
  - Given that the committee may be a stranger to other beneficiaries, there should be a mechanism to allow these beneficiaries to argue that the committee should be removed or passed over.
- Section 158 brings British Columbia in line with Ontario and lays groundwork for amendments to the *Trustee Act* proposed by the British Columbia Law Institute.

SECTION 159

- Section 159 corresponds to section 30 of the *Estate Administration Act*. It authorizes the appointment of a replacement for a personal representative who is discharged or removed.
- Paragraph (1) (b) makes it clear that the substitution of a personal representative as a testamentary trustee would be carried out under the authority of the *Trustee Act*, although it could be done concurrently with the appointment as personal representative under the *Wills, Estates and Succession Act*.
  - Having the substitution of a testamentary trustee carried out under the provisions of the *Trustee Act* (even if done concurrently with the appointment of a personal representative) further clarifies the separation of the personal representatives and trustees.
- Subsection (3) clarifies the powers and status of the replacement personal representative. Paragraph (3) (c) makes it easier for the replacement personal representative to deal effectively with the estate and the new grant prevents confusion as to who is entitled to represent the estate.
  - These changes should minimize cost and delay in administration.
- Subsection (4) clarifies the law by providing that a new appointment operates to revoke the prior grant. This introduces more certainty as to the authority of a grant made to a personal representative who is later discharged (or who is removed and replaced).
  - Under current law, removal of a personal representative from office by the court is not generally considered to be a ground for revocation of a grant of probate or administration. Instead, the usual remedy is the appointment of a judicial trustee.
  - This current process can result in confusion, because a grant confirms a named individual or individuals as having authority to administer an estate. Therefore, if it is not revoked then the judicial trustee must provide third parties they are dealing with both the grant (in the original

trustee's name) and the order appointing them as judicial trustee in that person's place.

SECTION 160

- Section 160 clarifies the divestiture of the estate from former personal representatives and its vesting in newly appointed ones.
  - This section works with section 158.
  - It is beneficial to clarify what happens upon the discharge, removal, addition or substitution of the personal representative.
- Section 160 emphasizes that vesting is as complete as if the title to the estate had actually been transferred to the new personal representative by the former one.
- The effect of subsection (5) is that section 260 (2) of the *Land Title Act*, which requires that land be registered in the name of the personal representative before further dealings in the land may be registered, applies to a vesting of land under section 160.

SECTION 161

- Section 161, particularly subsection (1), is aimed at encouraging the proper handover of property and records to a replacement personal representative.
  - The experience of practitioners is that when personal representatives are replaced against their will, the new personal representative often encounters difficulty in obtaining custody of assets and documents relating to the estate and its administration.
  - Given that there may be some ill will held by the personal representative being replaced, there needs to be clear obligations to ensure the proper handover of property and records to a replacement personal representative.
- Subsections (2) and (3) recognize that transferring control of an estate may require execution of various documents by the retiring or former personal representative so that the new personal representative's authority will be evident to third parties who have been dealing with the former personal representative.
- Subsection (3) reverses the position under section 22 (2) of the *Estate Administration Act* and prevents a former personal representative, whose grant has been revoked by reason of discharge or removal, from retaining funds out of the estate to reimburse expenses incurred.
  - The present section 22 (2), which permits such retention of estate funds, is seen as facilitating misappropriation.
  - A former personal representative is still entitled to be reimbursed for expenses incurred; they are just not allowed to retain estate funds to do so.

- It is open to the former personal representative to seek an order from the court allowing retention of amounts sufficient for reimbursement of proper expenses.

Division 10 – Devolution of Land

SECTION 162

- For the most part, section 162 preserves the existing law in British Columbia on devolution of real property on death as set out in section 77 and section 78 of the *Estate Administration Act*
- However, section 162 makes one significant change. Unlike section 77 of the *Estate Administration Act*, real property (land) and personal property are applied equally towards the payment of funeral and administration expenses, debts and legacies; although, a contrary intention may be expressed in a will.
  - There are three reasons for changing the presumption in section 77 that land be applied equally toward the payment of debts:
    1) The basis for the rule in section 77 is no longer applicable.
       - Historically, land was not available to the personal representative for payment of the deceased's debts (because it passed to the beneficiaries directly). Section 77 perpetuated the distinction between the application of land and personal property towards debts, despite the fact that the law changed and land vested in the personal representative.
    2) The historic significance of land as a form of wealth has not persisted.
       - In modern times, other forms of wealth (such as securities) may be equally or more significant, both in value and in relative importance to the will-maker and the beneficiaries.
    3) The distinction between land and personal property is not fair.
       - For example, an estate consists solely of a painting worth $100,000 given to A and a house worth $500,000 given to B. If the will-maker died owing $100,000, the beneficiary who is to receive the painting would receive nothing because the painting, as an item of personal property, must sold be applied towards debts before the house is sold.

SECTION 163

- Section 163 corresponds to subsections 79 (2) and (3) of the *Estate Administration Act*. It permits a personal representative to transfer land to a beneficiary or intestate successor subject to debts of the estate.
  - This is a useful technique to employ when a person entitled to the land is willing to accept a transfer of the land subject to a charge (to pay the estate debts), rather than having the land sold to satisfy the debts and actually inheriting only the value of the equity in the land.
  - Section 163 is particularly important given the change in section 162, which makes land equally liable for the debts of the estate. For example:
    - A will gives Child A land worth $250,000 (clear of any mortgages) and Child B specific securities and other personal property worth $250,000.
      - The rest of the assets form the residue of the estate and are to be divided equally.
    - When all the property in the residue of the estate is sold the estate still has $100,000 in debts.
      - The land represents 50 per cent of the estate and therefore must cover 50 per cent ($50,000) of the debt.
    - The land could be sold to cover the $50,000 debt and Child A could receive $200,000. Or under section 163, Child A could consent to receiving the land with a $50,000 charge on it.
- The reason the balance of section 79 of the *Estate Administration Act* is not carried forward is that it mainly concerns “assents” and assents are considered obsolete:
  - The purpose of an assent is to signify that the personal representative does not need to apply the value of the devised land towards the payment of debts of the estate and confirm the beneficial interest in the devised land could therefore pass to the devisee.
  - The Director of Land Titles has indicated that assents are seldom, if ever, seen.
- In accordance with section 163 (2), if a personal representative transfers land to a beneficiary or intestate successor subject to debts of the estate, then the personal representative is no longer personally liable to pay those debts. However, an exception to the presumption created under section 163 is where the personal representative became personally liable to a creditor (for example, under a contract they signed with the creditor) prior to the transfer.

Division 11 – Public Guardian and Trustee

- Division 11 carries forward Part 5 of the *Estate Administration Act*.
- Division 11 has been updated to reflect the fact that official administrators have been replaced by a Public Guardian and Trustee, which is a corporate entity.
  - Official administrators used to be individual people appointed by the government to act on behalf of children and mentally incompetent people, and to be the administrator of last resort for estates within specific geographic areas.

SECTION 164

- Section 164 carries forward section 40 of the *Estate Administration Act* and enables the Public Guardian and Trustee to act as the "administrator of last resort" if there is no one willing or able to act as executor.
- Subsection (2) has been amended by section 42 of the *Wills, Estates and Succession Amendment Act, 2011* to clarify that the Public Guardian and Trustee may apply to administer an estate if the executor has died leaving a will without appointing an executor whose whereabouts are **known**. The intention is that the Public Guardian and Trustee will only act if there are no executors or if the location of the executor is unknown.

SECTION 165

- Section 165 carries forward section 41.1 of the *Estate Administration Act*.
- The section gives the Public Guardian and Trustee the ability to decline to administer estates that are less than a minimum size, due to the fact that the PGT's fees and associated expenses would likely deplete the estate.

SECTION 166

- Section 166 carries forward section 42 of the *Estate Administration Act*.
- The section clarifies that if the Public Guardian and Trustee is granted administration of an estate that the corporate entity has the same rights and responsibilities as any other person who is granted administration.

SECTION 167

- Section 167 carries forward section 51 of the *Estate Administration Act*.
- The section has been expanded to clarify the rights and abilities of the Public Guardian and Trustee and to reflect the fact that the PGT is a corporate entity with agents and employees acting for it.

SECTION 168

- Section 168 carries forward section 53 of the *Estate Administration Act*.
- This section gives the court the power to grant administration of an estate to another person, despite a grant having already been made to the Public Guardian and Trustee.
  - An efficient system to transfer a grant of administration is desirable, as the Public Guardian and Trustee is the administrator of last resort and it is preferable to have an interested party assume responsibility.

Division 12 – Insolvent Estates

- If there are not enough assets (money and saleable property) in a deceased's estate to pay all of the debts the deceased had, then the estate is referred to as "insolvent."
- Division 12 of Part 6 sets out rules to address how the money in the estate is to be applied to pay off the debts.

SECTION 169

- Section 169 carries forward the definition of 'insolvent estate' currently found in section 100 of the *Estate Administration Act*.
- A definition of 'secured creditor' has been added due to its extensive use in division 12.

SECTION 170

- Section 170 carries forward section 101 of the *Estate Administration Act*.
- The section sets out a list prioritizing how a personal representative must apply the proceeds realized from an insolvent estate.
- Section 170 has been updated, so that the list of claims is harmonized with section 136 of the federal *Bankruptcy and Insolvency Act* ("BIA").
  - While the lists in this Act and the BIA are not identical, they achieve a similar priority. The list of preferred claims has been updated to reflect current monetary amounts and other features found in section 136 of the BIA that are not found in section 101 (1) of the *Estate Administration Act*.
    - For example, accelerated rent is not currently allowed by section 101 (1) (e) of the *Estate Administration Act*.
- This section has been amended by section 43 of the *Wills, Estates and Succession Amendment Act, 2011*.
  - The amendment clarifies that a personal representative may only give priority to legal expenses incurred in the administration of the estate (i.e., not legal expenses incurred pursuing legal action on behalf of the deceased).

- The amendment also adds the taxing rights of the Nisga'a and Treaty First Nations to the priority list.

SECTION 171

- Section 171 establishes that a creditor is entitled to claim against the estate a debt owing and payable at the time of death of the deceased, or owing at the time of death but not yet payable.
  - The policy is that a creditor should not be precluded from recovering money owed due to the death of the debtor, as the debt either directly or indirectly increased the size of the deceased debtor's estate and the beneficiaries would unfairly benefit from the unpaid debt.
- Subsection (1) corresponds to section 102(1) of the *Estate Administration Act*.
- Subsections (2) and (3) are new.
  - Subsection (2) provides that the rebate of interest for a debt owing but not payable at the time of death is to be calculated at a prescribed rate (which is set at five per cent by the Wills, Estates and Succession Regulation).
  - Subsection (3) provides that if the estate is insolvent the right to recover interest ends at the date of death, except in the unlikely circumstance that a surplus remains after all creditors and other claimants have been paid.
- Section 102 (2) of the *Estate Administration Act* has not been carried forward.
  - It provides that persons who have paid debts of the deceased for which they were liable as sureties may stand in the place of the creditor and prove the debt in the administration of an insolvent estate.
    - For example, a parent acts a surety for a loan taken out by their adult child. The child dies. Rather than waiting for an administrator to be appointed the parent chooses to pay the debt, as surety. If the parent pays the debt, they step into the position of the debtor to be compensated by the estate.
  - The ability for a surety to be able to seek compensation from the primary debtor (or their estate), after paying a debt on the debtor's behalf, is considered such a fundamental part of the law of sureties that it is not necessary to be stated in legislation.

SECTION 172

- Section 172 replaces section 103 of the *Estate Administration Act* with a section modelled on section 135 of the *Bankruptcy and Insolvency Act*.
  - The reason for this change is that section 103 was considered complex and cumbersome, whereas the approach in section 135 minimizes delay and avoids the complexity and pitfalls of calculating a reserve.
- Section 172 prescribes the following process:

- It requires a personal representative to fix a value for a conditional, contingent or unliquidated claim, and to notify the creditor of the amount at which the claim is valued.
- It treats the value fixed by the personal representative as the value for which the claim is deemed to have been proved unless the creditor or claimant applies to the court.
- It gives the court the authority to re-determine the value of the claim as fixed by the personal representative or confirm the value fixed by the personal representative.

- This section now reflects other tasks the personal representative must perform in deciding whether to accept claims as valid or dispute them.
  - Recourse to the court is only necessary if a creditor disputes the personal representative's valuation.

SECTION 173

- Section 173 corresponds to section 106 of the current *Estate Administration Act*.
- A secured creditor is required to place a value on the security and the total value of the claim. The secured creditor is allowed to prove as an unsecured creditor for the balance not realized on the security, up to the value of the claim.
- If, in the unlikely event, the security is surrendered to the personal representative and becomes part of the estate, the secured creditor can prove as an unsecured creditor for the entire amount of the debt.
- Section 106(2) was not carried forward – as it does not correspond to current bankruptcy law.

SECTION 174

- This section is based on section 108 of the *Estate Administration Act* and is similar to 142 (4) of the *Bankruptcy and Insolvency Act*.
- The section allows a partnership debt, for which the deceased was indirectly liable as partner, to be recovered from the deceased's insolvent estate only after exhaustion of the property of the partner by whom, or the partnership on behalf of which, the debt was contracted.
- The rationale for section 174 is, while partners are jointly and severally liable for debts contracted in relation to the partnership, it would be unfair for creditors of the deceased in an individual capacity to have the deceased's estate diminished by the claims of partnership claimants, if the deceased did not contract those debts and is liable for them only indirectly.

Division 13 – Deceased Worker's Wages

- Division 13 deals with worker entitlements on death.

SECTION 175

- Section 175 carries forward the definition of "worker" from section 120 of the *Estate Administration Act* and includes a person who was a worker within the scope of Part 1 of the *Workers Compensation Act*.

SECTION 176

- Section 176 carries forward section 121 of the *Estate Administration Act* without change.
- This section ensures that wages that accrued to the worker prior to their death are paid to the surviving spouse.

SECTION 177

- Section 177 carries forward section 122 of the *Estate Administration Act* without change.
- This section ensures that wages that accrued to the worker prior to their death are not dealt with as part of the estate, which means the spouse can receive the money more easily and quickly.

SECTION 178

- Section 178 carries forward section 123 of the *Estate Administration Act* without change.
- This section provides some formalities that need to be complied with for the spouse to claim the wages owing to the deceased spouse.
  - The requirements are minimal and help prevent fraud.

SECTION 179

- Section 179 carries forward section 125 of the *Estate Administration Act* without change.
- The section relieves an employer from liability if they rely on an affidavit provided by a person purporting to be the surviving spouse.
  - This protection for employers is necessary to ensure that an employer is willing to rely upon a spouse's affidavit.

SECTION 180

- Section 180 carries forward section 126 of the *Estate Administration Act* without change.
- The section addresses what happens if there is a situation where there is more than one person purporting to be the surviving spouse.
  - The matter is to be resolved by an application to court.
  - It is efficient for the court to continue to have the authority to address this situation
  - Such applications will remain relatively rare and requires a decision by an impartial and independent third party.

Division 14 – Other Matters and Regulations

SECTION 181

- Section 181 is new. It states how notices and consents under this legislation may be validly given where the person entitled to receive them is mentally incapable.
  - It is necessary to provide a mechanism for notice to mentally incapable adults that works with the various provisions governing the representation of mentally incapable adults.
  - Not every representation agreement confers the kind of authority contemplated by section (1) of section 181. For example:
    - Section 7 (1) (b) of the *Representation Agreement Act* allows an adult to make a representation agreement authorizing a representative to assist the adult in making decisions or making decisions on behalf of the adult about "routine management of the adult's financial affairs." What is contemplated by subsection (2) would likely be considered beyond the representative's authority.

SECTION 182

- Section 182 is new. It requires notice be given to each guardian of the minor.
  - Giving notice to the guardian of a minor beneficiary ensures the interests of that beneficiary are protected.
- Normally the parents of a minor will be joint guardians of the minor's person and estate. Thus, a notice could be addressed to both parents. However, if the parents are living separately and still remain joint guardians, each of them must be given notice under subsection (1).
- Section 182 (2) is repealed by section 470 of the Family Law Act.
  - This amendment supersedes the amendment to section 182(2) proposed by section 44 of the *Wills, Estates and Succession Amendment Act, 2011*.

SECTION 183

- Section 183 carries forward section 118 of the *Estate Administration Act* without change.
- The section sets out the procedure for a personal representative to access a safety deposit box.
  - It requires a personal representative to prepare an inventory of the safety deposit box.
  - The inventory must be kept for one year in the safety deposit box and by the person in control of the premises where the box is located.
  - The inventory left in the safety deposit box may only be removed within the one year if the lease or rental of the safety deposit box is terminated.
- The procedure established by section 183 is a worthwhile protection for financial institutions, personal representatives and those beneficially interested in estates. It also assists in standardizing the practices concerning the opening of safety deposit boxes after death.

SECTION 184

- Section 184 empowers the government to make regulations to support the operation of the Act.
- While there are not many regulations, this section is necessary because certain procedural requirements are being moved from the legislation to the regulations or rules of court.
- This section has been amended by section 45 of the *Wills, Estates and Succession Amendment Act, 2011* to clarify the authority to make regulations.