

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.

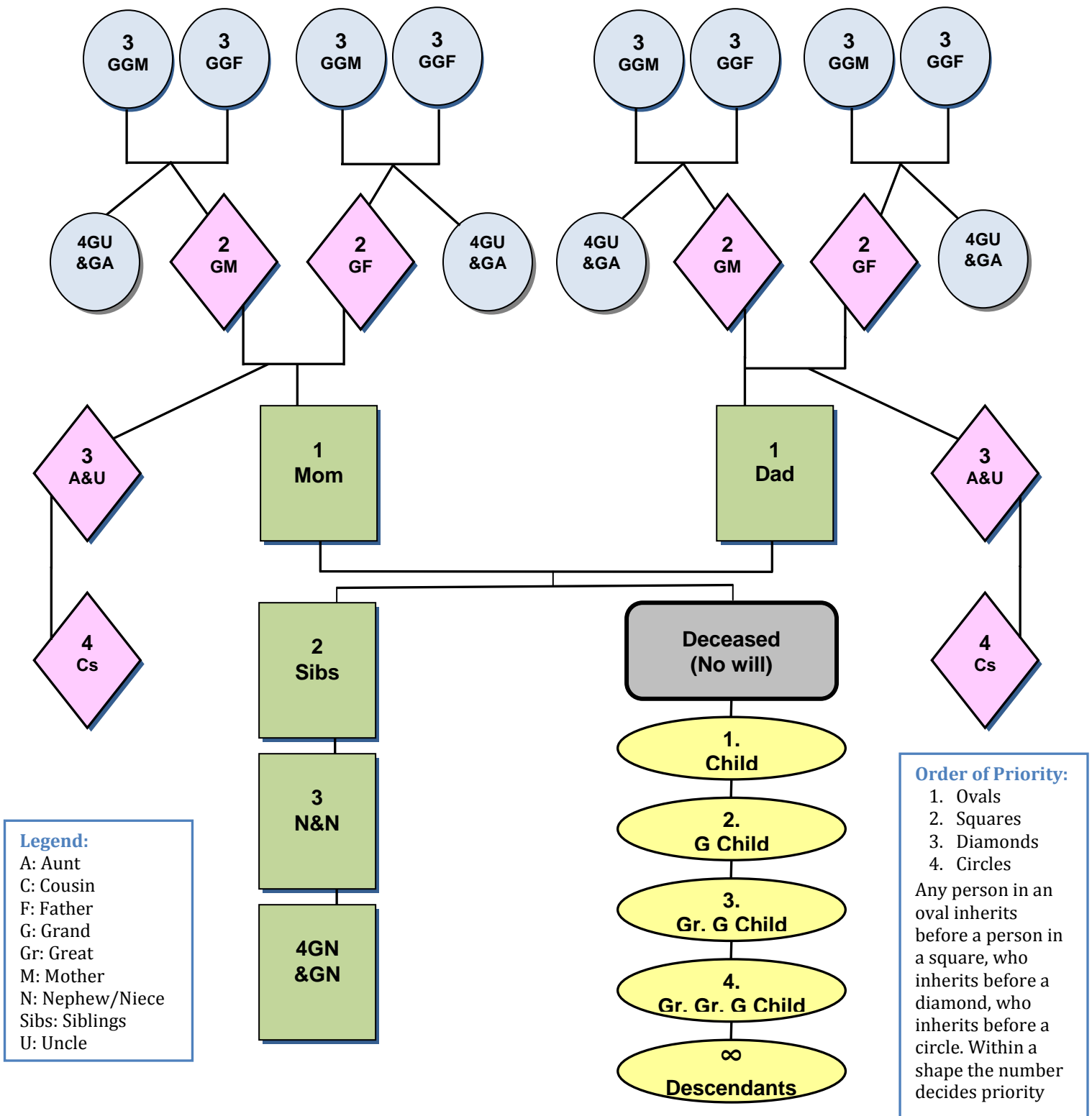
SECTION 22

- 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*



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-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

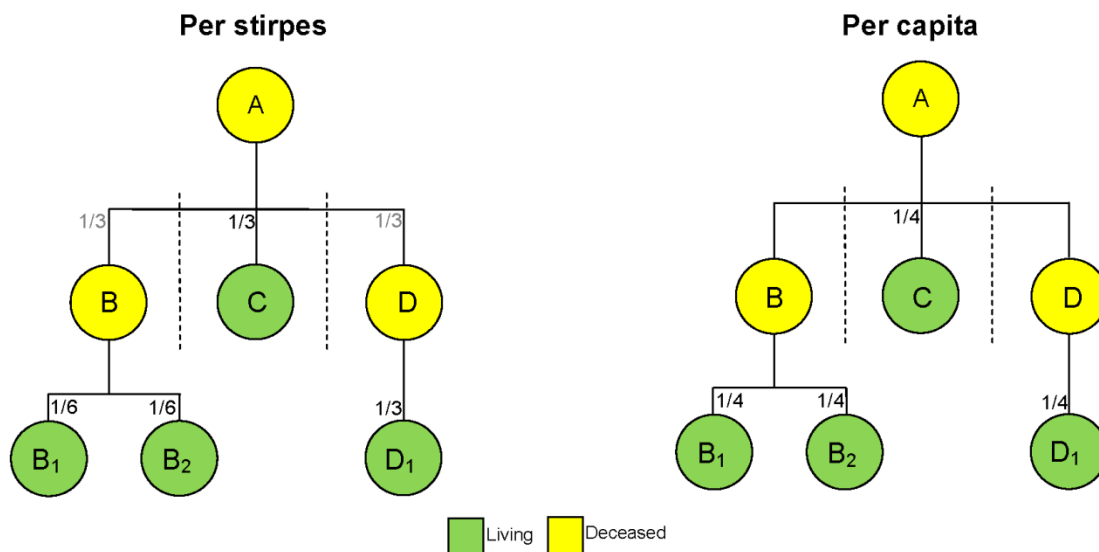
- Section 24 carries forward [s. 84 of the Estate Administration Act](#), which provides that distribution to the issue of a deceased person is to be on a [per stirpes, rather than a per capita](#), basis.
 - Section 24 does not change the law; however, rather than merely stating "the person's estate 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:
 - $\$700,000 - \$300,000 = \$400,000 \div 2 = \mathbf{\$200,000}$,
 - 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.