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Wills and the Legal Effects of Changed Circumstances

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ALBERTA LAW REFORM INSTITUTE

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SUMMARY

In its Final Report on *Wills*, the Alberta Law Reform Institute (ALRI) makes a number of recommendations for reform of the *Wills Act*. In summary, the main recommendations are:

Changes that Alter or Revoke a Will

ALRI recommends retaining the current law that changes on a holograph will must meet the formalities for making a holograph will. Similarly, changes on a formal will must meet the formalities for making a formal will. However, ALRI's proposed dispensing power will allow courts, in appropriate cases, to give effect to changes that do not meet those formalities.

It is also recommended that changes made by markings on a will (typically, revocation or substitution by drawing a line through words) should meet those same formalities, as should any change made by obliteration. The dispensing power should apply to markings and obliteration too. But if the original text needs to be determined because the attempted changes have failed, the court should be free to determine the original text by any means acceptable to it.

ALRI also recommends giving statutory form to the common law principle that any changes on a will are presumed to have been made after the testator signed the will, subject to contrary evidence.

Where revocation is attempted by an incomplete act of burning, tearing or other act of destruction, a court should be able to validate that revocation in appropriate cases.

Revocation by Law

Historically, wills statutes operated to automatically revoke the wills of people who married, as a protective measure to safeguard the new spouse. Today, spouses are much less vulnerable and have recourse to remedies unavailable in earlier times. Moreover, such revocation may now cause more harm than good when applied to second marriages occurring later in life. This "blunt instrument"

which revokes the entire will also disinherits beneficiaries such as non-relatives and charities who are unprotected by intestacy and dependants relief legislation. ALRI recommends that the *Wills Act* should no longer provide that all existing wills are revoked by marriage or by entering an adult interdependent partnership agreement.

When a marriage ends by divorce or is found to be void or a nullity, any interest or appointment of a former spouse under the will should end by operation of law. The best way to achieve this is to deem the former spouse to have predeceased the testator. Rather than having the gift fall into intestacy or the residue, it should pass according to ALRI's proposed distribution scheme for failed gifts (summarized below).

The same legal effect should occur when an adult interdependent partnership ends. There are several ways such relationships can terminate but this legal effect should apply to all. However, an exception should be made where the partners are related by blood or adoption. Because of the family relationship, partial revocation by operation of law would be inappropriate here.

Reviving a Revoked Will

ALRI recommends that a revoked will be revived by a will meeting the requirements of the *Wills Act*. Additionally, the court must be satisfied that the testator intended to revive the will. While the *Wills Act* should not provide for revival by re-execution, it should expressly state that a will that is executed more than once may be admitted to probate. ALRI recommends against having special rules governing revival of sequentially revoked wills.

Case law prevents the revival of a will revoked by destruction but this seems at odds with the common law's willingness to reconstruct missing wills. In today's world, multiple copies of wills are common. Therefore, ALRI recommends that revival of a destroyed will should be allowed if the court is satisfied that clear and convincing evidence exists to reconstruct the will.

The *Wills Act* would benefit from an express statement that revoking a will does not revive any earlier wills revoked by that will.

Admission of Extrinsic Evidence

Case law is inconsistent and confusing concerning when a court may consider extrinsic evidence to interpret a will and when it is restricted solely to the wording of the will. ALRI recommends major reform in this area. The rules of evidence should not constrict a court's search to give effect to a testator's intention. When interpreting a will, a court should be able to consider all extrinsic evidence, including evidence of the testator's intention. As a safeguard against self-serving evidence, though, evidence in estate actions needs to be corroborated by other material evidence. Admissibility of extrinsic evidence should also extend to establishing a contrary intention to rebut a statutory rule of construction.

Rectification

Courts currently have only a limited ability to rectify any accidental drafting mistake made in a will. Words or provisions can be deleted, but a court cannot add any words to the will. ALRI recommends that this be changed. A court should be empowered to delete or add characters, words or provisions if the court determines that the will fails to carry out the testator's intention due to an error arising from an accidental slip, omission or misdescription, a misunderstanding of the testator's instructions or a failure to carry out the testator's instructions. Extrinsic evidence should be admissible. However, applications for rectification must be brought within six months of the grant of probate or administration with will annexed.

Failed Gifts – Beneficiary Issues

Testamentary gifts can fail for many reasons, including lapse (beneficiary predeceased the testator), disqualification (beneficiary witnessed the will), forfeiture (beneficiary killed the testator), disclaimer (beneficiary declined the gift) and non-compliance of the beneficiary with a condition of the gift. When a gift fails due to the action of the beneficiary, the gift passes according to the will's residue provision. If none, a partial intestacy occurs and the gift passes accordingly. An exception is made only in the case of lapse where the predeceased

beneficiary is a family member. That gift will pass to the deceased beneficiary's family.

ALRI recommends that, subject to a testator's contrary intention, these failed gifts should instead pass according to a single statutory distribution scheme in the *Wills Act*. It should be presumed that testators do not want to disentitle alternate beneficiaries named in the will even if the reason why a gift fails is not contemplated in the will. It should also be presumed that testators wish to benefit the issue of their own issue who fail to take a gift. Another presumption is that testators intend any failed gift to increase the residue shared by the residuary beneficiaries they have named, rather than be distributed to heirs on intestacy.

ALRI proposes that failed gifts should pass in this order of priorities:

(1) to the alternate beneficiary named in the will whether or not the cause of failure is contemplated in the will;
(2) to the issue of the primary beneficiary who is unable to take the gift, if that beneficiary is also the issue of the testator;
(3) to the issue of the alternate beneficiary who is unable to take the gift, if that beneficiary is also the issue of the testator;
(4) to the residue, if any, shared by all residuary beneficiaries in proportion to their interests.

This statutory distribution scheme should apply to all classes of gifts. But it should be a default provision only. Any contrary intention of the testator, whether expressed in the will or established by admissible extrinsic evidence, should override it.

Ademption by Conversion

Testamentary gifts also fail when specifically named property in a gift no longer forms part of the testator's estate at the date of death. According to the common law doctrine of ademption by conversion, the gift fails. ALRI recommends retention of this doctrine but proposes some exceptions to it. The current statutory exception for equitable conversion should continue and be even more clearly worded, so that the beneficiary will take instead the testator's right or

interest in receiving any outstanding proceeds of disposition of that asset, including proceeds of insurance or expropriation. But the provision should not be extended to cases where the proceeds were already received by the testator before death, even if those proceeds are still traceable. Where there are multiple beneficiaries of a single chose in action, the proceeds should be allocated proportionally.

The *Adult Guardianship and Trusteeship Act* contains a special anti-ademption provision to protect beneficiaries when a trustee (as substitute decision-maker) sells an asset of a represented person which is the subject of a specific gift under that person's will. This protection should be extended to similar actions by an attorney under an enduring power of attorney.

Legal Discrimination Against Children Born Outside Marriage

In three previous reports, ALRI has recommended that Alberta enact status of children legislation to end discrimination in the law against children born outside marriage. Alberta has chosen instead to enact piecemeal provisions to end such discrimination in specified areas (such as the law of intestacy) but this is not sufficient. For example, this piecemeal approach leaves in place the common law rule of construction that words of relationship in a will refer only to relationships traced from legitimate births. Section 36 of the *Wills Act* also remains problematic by explicitly removing barriers only for an illegitimate child's claim to inherit through the mother. ALRI renews its call for status of children legislation or, in the alternative, recommends that the *Wills Act* be amended to provide equal treatment for all children regardless of birth status.

Common law discrimination may also jeopardize the inheritance rights of an illegitimate child in the womb at the date of the testator's death. Even a legitimate child in the womb may not inherit under certain common law rules. The *Wills Act* should enact a provision recognizing the inheritance rights of any child in the womb at the date of the testator's death who is born alive after the testator's death. Such provisions are already found in intestate and dependants relief legislation.

TABLE OF ABBREVIATIONS

LEGISLATION

Canada

Alberta Act	*Wills Act*, R.S.A. 2000, c. W-12.
Alberta Intestate Act	*Intestate Succession Act*, R.S.A. 2000, c. I-10.
British Columbia 1996 Act	*Wills Act*, R.S.B.C. 1996, c. 489.
British Columbia 2009 Act	*Wills, Estates & Succession Act*, S.B.C. 2009, c. 13 (not yet in force).
Manitoba Act	*The Wills Act*, C.C.S.M. c. W150.
New Brunswick Act	*Wills Act*, R.S.N.B. 1973, c. W-9.
Newfoundland Act	*Wills Act*, R.S.N.L. 1990, c. W-10.
Northwest Territories Act	*Wills Act*, R.S.N.W.T. 1988, c. W-5.
Nova Scotia Act	*Wills Act*, R.S.N.S. 1989, c. 505.
Nunavut Act	*Wills Act*, R.S.N.W.T. 1988, c. W-5 as duplicated and deemed to be the law of Nunavut by the *Nunavut Act*, S.C. 1993, c. 28, s. 29.
Ontario Act	*Succession Law Reform Act*, R.S.O. 1990, c. S.26.
Prince Edward Island Act	*Probate Act*, R.S.P.E.I. 1988, c. P-21.
Saskatchewan Act	*Wills Act, 1996*, S.S. 1996, c. W-14.1.
Uniform Wills Act	Uniform Law Conference of Canada, *Uniform Wills Act* (as amended to July 1, 2010).
Yukon Act	*Wills Act*, R.S.Y. 2002, c. 230.

Australia

Australian Capital Territory Act	*Wills Act 1968* (A.C.T.).
New South Wales Act	*Succession Act 2006* (N.S.W.).
Northern Territory Act	*Wills Act* (N.T.).

Queensland Act	*Succession Act 1981* (Qld.).
South Australia Act	*Wills Act 1936* (S.A.).
Tasmania Act	*Wills Act 2008* (Tas.).
Victoria Act	*Wills Act 1997* (Vic.).
Western Australia Act	*Wills Act 1970* (W.A.).

New Zealand

New Zealand Act	*Wills Act 2007* (N.Z.).

England

England Act	*Wills Act, 1837* (U.K.), 7 Will IV & 1 Vict., c. 26.

LAW REFORM PUBLICATIONS

Alberta 1994 Report	Alberta Law Reform Institute, *Effect of Divorce on Wills*, Final Report No. 72 (1994).
Alberta 2000 Report	Alberta Law Reform Institute, *Wills: Non-Compliance with Formalities*, Final Report No. 84 (2000).
Alberta 2009 Report	Alberta Law Reform Institute, *The Creation of Wills*, Final Report No. 96 (2009).
Australia Uniform Report	National Committee for Uniform Succession Laws, *Consolidated Report to the Standing Committee of Attorneys General on the Law of Wills*, Queensland Law Reform Commission Miscellaneous Paper 29 (1997).
British Columbia 1981 Report	Law Reform Commission of British Columbia, *Report on the Making and Revocation of Wills*, Report No. 52 (1981).
British Columbia 1982 Report	Law Reform Commission of British Columbia, *Report on Interpretation of Wills*, Report No. 58 (1982).

British Columbia 1989 Report	Law Reform Commission of British Columbia, *Report on Wills and Changed Circumstances*, Report No. 102 (1989).
British Columbia 2006 Report	British Columbia Law Institute, *Wills, Estates and Succession: A Modern Legal Framework*, Report No. 45 (2006).
British Columbia Working Paper	Law Reform Commission of British Columbia, *The Making and Revocation of Wills*, Working Paper No. 28 (1980).
England 1973 Report	Law Reform Committee (England), *The Interpretation of Wills*, 19th Report (1973).
England 1980 Report	Law Reform Committee (England), *The Making and Revocation of Wills*, 22nd Report (1980).
Manitoba Report	Manitoba Law Reform Commission, *Wills and Succession Legislation*, Report No. 108 (2003).
New South Wales Report	New South Wales Law Reform Commission, *Wills - Execution and Revocation*, Report No. 47 (1986).
Saskatchewan Report	Law Reform Commission of Saskatchewan, *Report on Revocation of Wills* (2006).
Scotland Report	Scottish Law Commission, *Report on Succession*, No. 215 (2009).

SECONDARY SOURCES

Feeney	J. MacKenzie, ed., *Feeney's Canadian Law of Wills*, 4th ed., looseleaf (Markham, Ont.: Butterworths Canada Ltd., 2000).
Hawkins	Roger Kerridge, *Hawkins on the Construction of Wills*, 5th ed. (London: Sweet & Maxwell, 2000).
Oosterhoff	A.H. Oosterhoff, *Oosterhoff on Wills and Succession: Text, Commentary and Materials*, 6th ed. (Toronto: Thomson Carswell, 2007).
Parry & Clark	Roger Kerridge, *Parry & Clark*: *The Law of Succession*, 11th ed. (London: Sweet & Maxwell, 2002).

Williams 1995	C.H. Sherrin et al, *Williams on Wills*, 7th ed. (London: Butterworths, 1995) at 595-597.
Williams 2008	Francis Barlow et al., eds. *Williams on Wills*, 9th ed. (London: LexisNexis Butterworths, 2008).

RECOMMENDATIONS

CHANGES THAT ALTER OR REVOKE A WILL

REVOCATION BY LAW

REVIVING A REVOKED WILL

ADMISSION OF EXTRINSIC EVIDENCE

RECTIFICATION

FAILED GIFTS – BENEFICIARY ISSUES

ADEMPTION BY CONVERSION

LEGAL DISCRIMINATION AGAINST CHILDREN BORN OUTSIDE MARRIAGE

CHAPTER 1. INTRODUCTION

A. The *Wills Act* in Alberta

[1] The current Alberta *Wills Act*[1] (like those of most Canadian jurisdictions) is based on the Uniform Wills Act originally proposed by the Uniform Law Conference of Canada.[2] This uniform model incorporated the most important reform aspects introduced into succession law by the English *Wills Act, 1837*[3] but also went further by incorporating some important Canadian reforms. Alberta adopted the uniform model in 1960,[4] replacing its existing wills legislation.[5]

[2] In the 50 years which have passed since then, the Alberta Act has not been frequently amended. The most important amendments added anti-lapse provisions,[6] lowered the age of testamentary capacity from 21 years to 18 years,[7] clarified the rules concerning power of sale[8] and signature on behalf of a testator,[9] added uniform provisions concerning international wills,[10] and extended the

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[1] *Wills Act*, R.S.A. 2000, c. W-12 [Alberta Act].

[2] The Uniform Law Conference of Canada was formerly called the Conference of Commissioners on Uniformity of Legislation in Canada. It created a *Uniform Wills Act* in 1929, which was revised and reissued in 1953: *Proceedings of the Twelfth Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada* (1929), Appendix B at 323; *Proceedings of the Thirty-fifth Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada* (1953), Appendix D at 41.

[3] *Wills Act, 1837* (U.K.), 7 Will. IV & 1 Vict., c. 26 [England Act].

[4] *The Wills Act, 1960*, S.A. 1960, c. 118.

[5] Alberta relied on the received law of the 1837 England Act until it enacted its first provincial wills statute in 1927 (*The Wills Act*, S.A. 1927, c. 21).

[6] *An Act to amend The Wills Act, 1960*, S.A. 1968, c. 104 and *The Attorney General Statutes Amendment Act, 1973*, S.A. 1973, c. 13, s. 13.

[7] *The Age of Majority Act*, S.A. 1971, c. 1, s. 1.

[8] *An Act to amend The Wills Act, 1960*, S.A. 1970, c. 114, s. 2.

[9] *An Act to amend The Wills Act, 1960*, S.A. 1969, c. 116. "Testator" means a person who makes a will.

[10] *The Attorney General Statutes Amendment Act, 1976*, S.A. 1976, c. 57, s. 8.

statute's application beyond married spouses to include unmarried opposite-sex and same-sex adult interdependent partners.[11]

[3] While these occasional amendments have improved the Alberta Act, there has not been a systematic or comprehensive policy review of the whole statute since 1960. The Alberta Law Reform Institute has undertaken such a review as part of our ongoing Succession Project.[12] Following our previous examination of issues related to the creation of wills,[13] ALRI now releases this Final Report on other issues central to reform of the Alberta Act.

B. Methodology of Report

[4] The Alberta Law Reform Institute has reviewed the Alberta Act by regarding changed needs and conditions in society and in the law, reviewing reform initiatives proposed or enacted in other jurisdictions, consulting the public and the professionals who use the statute, and assessing whether statutory reform is warranted.

[5] This Report appears at first glance to address many disparate topics and issues in the law of wills. However, there is an underlying theme to all its

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[11] *Adult Interdependent Relationships Act*, S.A. 2002, c. A-4.5, s. 80.

[12] Over the years, ALRI's Succession Project has reviewed many aspects of the law of succession and made many recommendations for reform. Previous ALRI Reports which are currently relevant to succession law are:

Report No. 47, *Survivorship* (1986)
Report No. 60, *Status of Children: Revised Report, 1991* (1991)
Report No. 68, *Beneficiary Designations: RRSPs, RRIFs and Section 47 of the Trustee Act* (1993)
Report No. 72, *Effect of Divorce on Wills* (1994)
Report No. 78, *Reform of the Intestate Succession Act* (1999)
Report No. 83, *Division of Matrimonial Property on Death* (2000)
Report No. 84, *Wills: Non-Compliance with Formalities* (2000)
Report for Discussion No. 14, *The Matrimonial Home* (1995)
Report for Discussion No. 17, *Division of Matrimonial Property on Death* (1998)
Report for Discussion No. 19, *Order of Application of Assets in Satisfaction of Debts and Liabilities* (2001)
Report No. 87, *Report on a Succession Consolidation Statute* (2002)
Report No. 92, *Exemption of Future Income Plans on Death* (2004).

[13] Alberta Law Reform Institute, *The Creation of Wills*, Report for Discussion No. 20 (2007); *The Creation of Wills*, Final Report No. 96 (2009) [Alberta 2009 Report].

chapters – what is or should be the legal effect of changed circumstances? All kinds of factors can change between the date a will is created and the date it takes effect on the testator's death. The testator may make some alterations to the will or perhaps revoke it or revive it after revocation. Beneficiaries may predecease the testator. Property will be disposed of and added to the estate. The testator may marry, divorce or have children who are born during the testator's lifetime or after the testator's death.

[6] Within this theme of intervening change, ALRI also addresses two recurring reform issues which often come into play. First, what evidence can a court look at in order to determine the meaning of the will or the testator's intention? Second, what role should be played by various common law presumptions or rules of construction? Is it time to modernize these aspects, rationalize their application or displace them by statute?

[7] In order to have our recommendations ready for the legislative window made available by Alberta Justice, ALRI has modified the consultation process which preceded this Final Report. Instead of conducting a passive consultation by issuing a Report for Discussion and waiting for responses, we moved instead to an active consultation model. On various key issues (including revocation and extrinsic evidence), ALRI sought out targeted individuals and groups with specific expertise in the area and obtained their input through round table meetings and directed questions. As always, this input greatly assisted ALRI in reaching our final recommendations.

C. Outline of Report

[8] This Final Report is divided into nine chapters. Chapter 1 is introductory and discusses our methodology and consultation process. Chapter 2 addresses changes that alter or revoke a will. Chapter 3 explores revocation by law when testators marry or divorce. Chapter 4 discusses revival of a revoked will.

[9] The admission of extrinsic evidence is considered in Chapter 5, while a court's ability to rectify accidental drafting mistakes in a will is addressed in Chapter 6.

[10] Chapters 7 and 8 examine gifts that fail by action of a beneficiary or by disposition of property during the testator's lifetime, respectively.

[11] Finally, Chapter 9 reiterates ALRI's previous call for status of children legislation and explores the discriminatory effects against illegitimate children of certain common law constructions in the law of wills.

CHAPTER 2. CHANGES THAT ALTER OR REVOKE A WILL

A. Introduction

[12] As circumstances change, a testator may wish to change their will. The change might be to revoke certain words or provisions in the will. Or the change might be to revoke certain words or provisions and replace them with new ones. Or the change might be to add entirely new words or provisions into the will. In all instances, the key is to ensure that the change was intended by the testator and was not made by a fraudulent third party.

[13] If the changes are extensive, the best course for the testator to follow may be to revoke the entire will and create a new one. However, there are several methods that a testator may use to change a will. The changes may be made through a separate document. The changes may also be made directly on the will itself. For example, a testator may write on the will to add something in (interlineation) or to take something out (deletion or obliteration) or a combination of both. The testator might also destroy part or all of the will. This chapter considers each of these approaches and the formalities that apply to protect against fraudulent or accidental change. While the methods for changing a will may be simpler options for the testator than starting over with a new will, their ease of use also creates the opportunity for fraud by a third party, or the possibility of a dispute as to what was intended.

B. Changes Made By Separate Testamentary Document

[14] A will may be changed by a separate document. The writing may amount to a complete will or may be what is often referred to as a codicil to an existing will. The effect is the same. Provided that the writing shows that the testator intended to change an existing will and is made in accordance with the relevant formalities for creating a will, it will be a valid means of changing the existing will.[14]

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[14] Alberta Act, ss. 16(a), 19. See Alberta 2009 Report for a discussion of the formalities for creating wills.

See also *Succession Law Reform Act*, R.S.O. 1990, c. S.26, s. 15 [Ontario Act]; *Probate Act*, R.S.P.E.I. 1988, c. P-21, s. 72 [Prince Edward Island Act]; *Wills Act*, R.S.B.C. 1996, c. 489, s. 14

(continued...)

[15] Changes made by a later will are not tied to the formalities that govern the existing will. A holograph will can be used to alter a formal will and vice versa. This flexibility is in contrast to the formalities that apply when changes are made by writing on an existing will, as discussed later in this chapter.

[16] The change made by a separate testamentary document may be express or implied. The classic example of express change is the practice of including a general revocation clause in any new will. A general revocation clause typically states "I revoke all former wills and other testamentary dispositions made by me." Expressly revoking all previous wills leads to a simpler result than having to reconcile multiple wills. However, where there are multiple wills, an inconsistency between two or more wills may amount to an implied change. For example, if a will provides "I give my house to Jack" but a later will states "I give my house to Jill", the two gifts are inconsistent. The later will prevails as the most recent expression of what the testator intended.

C. Changes Made on the Will

1. What formalities should govern changes on a holograph will?

[17] The Alberta Act provides for two types of will – formal and holograph – and requires that changes on a will must follow the same formalities for creating that type of will.[15] For holograph wills the Act imposes two formalities – testator's signature and own writing.

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[14] (...continued)
[British Columbia 1996 Act] and *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13, s. 54-55 (not yet in force) [British Columbia 2009 Act]; *Wills Act*, C.C.S.M. 1988, c. W150, s. 16 [Manitoba Act]; *Wills Act*, R.S.N.B. 1973, c. W-9, s. 15 [New Brunswick 2009 Act]; *Wills Act*, R.S.N. L. 1990, c. W-10, s. 11 [Newfoundland Act]; *Wills Act*, R.S.N.S 1989, c. 505, s. 19A [Nova Scotia Act]; *Wills Act*, R.S.N.W.T. 1988, c. W-5, s. 11 [Northwest Territories Act]; *Wills Act*, S.S. 1996, c. W-14.1, s. 16 [Saskatchewan Act]; *Wills Act*, R.S.Y. 2002, c. 230, s. 10 [Yukon Act].

[15] Alberta Act, s. 19; *Re Cottrell*, [1951] 4 D.L.R. 600 (Alta. S.C. (T.D.)). Briefly stated, formal wills are the more common type and must be signed by the testator and two witnesses Holograph wills must be wholly in the testator's own writing and signed by the testator. See Alberta 2009 Report for further discussion.

a. Testator's signature

[18] Changes on holograph wills must be signed by the testator.[16] The signature of the testator is rarely problematic. Case law accepts that the testator's initials are sufficient and that a full signature is not required on every change.[17] Initialling changes is also consistent with common commercial practice.

b. Testator's own writing

[19] Changes on holograph wills must also be in the testator's own writing.[18] This requirement rarely causes problems. The dramatic example would be a testator on the verge of death who dictates changes and signs the changes mere seconds before dying. These changes would not be valid under current Alberta law as they were not in the testator's handwriting. However, they would be valid under the Newfoundland Act which allows changes in writing other than the testator's.[19]

[20] Relaxing the testator's own writing requirement for purposes of changing a will might benefit a small number of testators, particularly those with limited capacity to write. However, the narrow benefit of adopting a provision such as that used in Newfoundland is countered by the increased opportunity for fraud. Further, ALRI has recently repeated our recommendation that a holograph will must be wholly in the testator's own writing.[20]

c. Witnesses not required

[21] In contrast to changes on a formal will, changes on holograph wills need not be witnessed in Alberta.[21] However, some other jurisdictions require that any

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[16] Alberta Act, s. 7. See also Manitoba Act, s. 19(2); Ontario Act, s. 18(2); New Brunswick Act, s. 18(2); Newfoundland Act, s. 12(2).

[17] *In the Goods of Blewett* (1880), 5 P.D. 116; *Re McVay Estate* (1955), 16 W.W.R. 200 (Alta. S.C.(T.D.)) at 204.

[18] Alberta Act, s. 7; *Re Cottrell,* [1951] 4 D.L.R. 600 at 603 (Alta. S.C. (T.D.)).

[19] Newfoundland Act, s. 12(2).

[20] Alberta 2009 Report at 88-93.

[21] Moreover, changes on a holograph will are not invalidated if they happen to be witnessed.

changes on a will must be witnessed, regardless of whether the will is holograph or formal.[22] We do not recommend this additional variation.

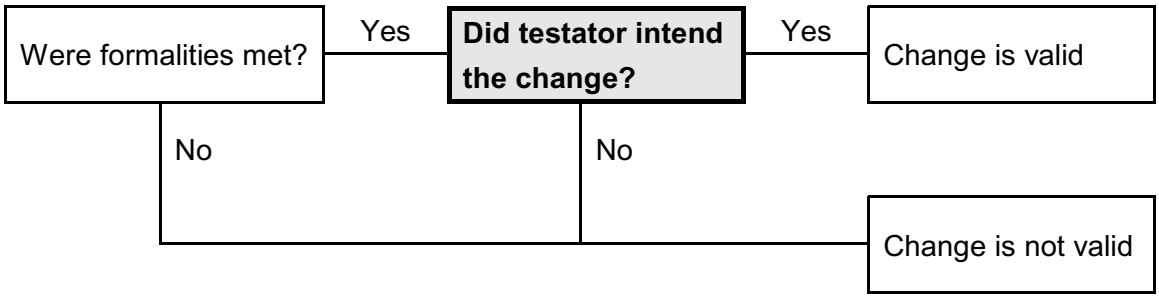
d. Application of the dispensing power

[22] There is a further underlying requirement that a will and any changes must reflect the testator's intent.[23] As McKenzie in Feeney describes:

> ...In some circumstances, a person may not intend what he or she has written and signed to be a will, even in cases where the document is expressed to be a will. He or she may not intend it to be more than either a guide for a will or a statement imparting information about his or her future intentions regarding his or her will. In other situations, absent real undue influence, a person may make a "will" only to appease someone, not having any serious intention of conferring any benefit on that person.[24]

Where the formalities are met, the change will generally be accepted as valid and the court will not inquire further into the testator's intent. Consequently, evidence that the testator intended to change a will is most often raised where the formalities were not met. However, under the current law, it is the very fact that the formalities were not met that prevents the court from giving effect to the testator's intended change as shown in the chart below.

Intention and formalities: Current law



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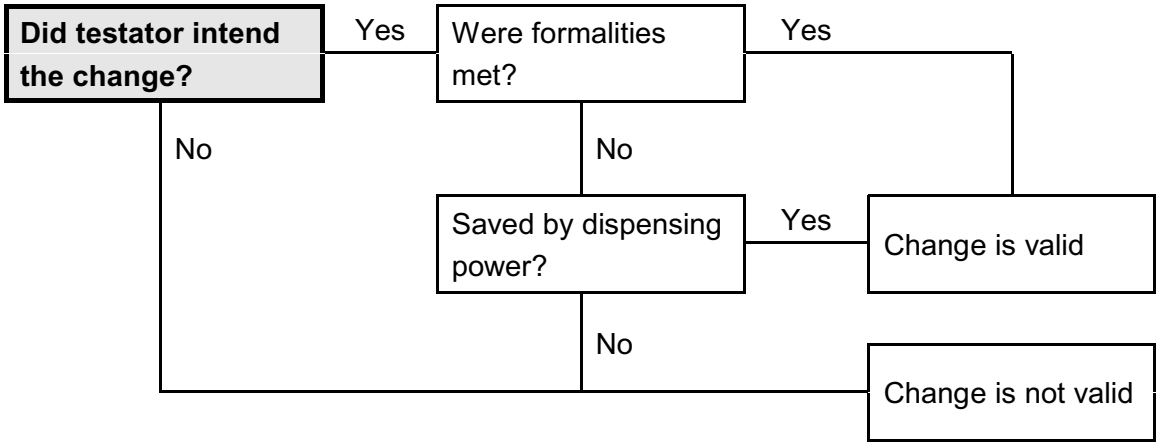
[22] For example, see Nova Scotia Act, s. 20; Northwest Territories Act, s. 12(2); Yukon Act, s. 11(2); *Wills Ac*t, R.S.N.W.T. 1988, c. W-5 as duplicated and deemed to be the law of Nunavut by the *Nunavut Act*, S.C. 1993, c. 28, s. 12(2) [Nunavut Act].

[23] The Alberta Act, s. 16(c)(d) also refers to the intent to revoke where the change amounts to revocation.

[24] J. MacKenzie, ed., *Feeney's Canadian Law of Wills*, 4th ed., looseleaf (Markham, Ont.: Butterworths Canada Ltd., 2000) at § 1.11 [Feeney]. For the creation of wills and changes short of revocation, intent is a common law requirement. Intent to revoke a will is required under the Alberta Act as discussed later in this chapter.

[23] ALRI has previously considered the problems that arise where non-compliance with formalities precludes giving effect to the testator's intention. To remedy the situation, ALRI has proposed a general dispensing power that will allow the courts to consider the testator's intent.[25] If the court is satisfied on clear and convincing evidence that the testator intended to adopt the change as part of the will, the court can give effect to it even though the formalities may not have been met. The effect of this proposal is that the testator's intent is given priority over the formalities, as shown in the chart below.

Intention and formalities: Proposed reform with dispensing power



[24] This chart is not meant to suggest that evidence of the testator's intent must be established before the formalities may be considered. To do so would be a significant change to current probate practice. Rather, the chart is meant to highlight that changes are inevitably invalid if they are not the result of the testator's intent. However, where there is clear and convincing evidence of the testator's intent, the court can assess the need for compliance with the formalities as a guard against fraud. In areas where the "formalities" become less formal, as happens with changes by marking, obliteration or destruction, it is helpful to keep this determinative nature of intent in mind.

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[25] Alberta Law Reform Institute, *Non-Compliance with Formalities*, Final Report No. 84 (2000) at 45 [Alberta 2000 Report]; Alberta 2009 Report at 6. The draft dispensing power is set out in footnote 45 of this chapter.

e. Is reform needed?

[25] The existing formalities for changing holograph wills work well and should be continued. To the extent that there are problems with the formalities, most, if not all, can be resolved by adopting the dispensing power previously recommended by ALRI.

RECOMMENDATION No. 1

a. Changes on a holograph will should continue to be made in accordance with the existing formalities for holograph wills.

b. Adopting the general dispensing power will allow courts to give effect to changes that do not meet the formalities.

2. What formalities should govern changes on a formal will?

[26] Changes on formal wills are subject to two formalities under the Alberta Act. They must be signed by the testator and two witnesses.

a. Testator's signature

[27] As with holograph wills, the requirement that the testator sign any changes on a formal will is rarely problematic.[26]

b. Two witnesses

[28] Courts have insisted on the requirement that changes on a formal will must be signed by two witnesses. One witness is not sufficient.[27] However, the more frequent problem is that of no witnesses at all.[28] The problem arises due to possible confusion with the law concerning holograph wills. A testator may make an entire

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[26] However, see *Cheese v. Lovejoy* (1877), 2 P.D. 251 at 252 where the testator drew lines through portions of his will and wrote "All these are revoked" on the back but did not sign the changes; and *Re White* [1991] Ch. 1 where the testator failed to sign the changes despite having them witnessed.

[27] *Re McVay Estate* (1955), 16 W.W.R 200 (Alta. S.C. (T.D.)).

[28] For example in *Bell v. Matthewman* [1920] 480 O.L.R. 364 (H.C.) at 266-267, the testator wrote "cancelled July 22, 1910" across a formal will and signed next to the writing. Despite evidence that the testator intended to revoke the will, the court rejected the change as the witness requirement was not met.

will under the testator's own writing and signature.[29] Changes on holograph wills may also be made in the testator's own writing and signed by the testator alone.[30] However, courts have consistently refused to accept signed but unwitnessed changes on a formal will even though such changes might be valid to change a holograph will.[31]

c. Is reform needed?

[29] Examples of the testator's intent being frustrated by failure to comply with the formalities are more frequent in cases involving formal wills. Courts often outline internal and external evidence showing intent to change. Where there is sufficient evidence of intent, courts will even try to find that unwitnessed, handwritten changes amount to a separate testamentary document in holograph form, i.e. a holograph codicil. However, to stand as a testamentary instrument, the attempted changes must be able to stand on their own. For example, in *Re Cottrell* the testator purported to reduce a gift to his son by replacing one "thousand" dollars with one "hundred."[32] The court held that changes of this nature were not sufficient to establish a testamentary instrument. Some additional words indicating an intent to create or revoke a will are required.[33] For example, in *Re McLeod* the change provided "This property to go to my daughter" and this was sufficient.[34]

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[29] Alberta Act, s. 7.

[30] Alberta Act, s. 19(2).

[31] *Re Cottrell*, [1951] 4 D.L.R. 600 (Alta. S.C. (T.D.)).

[32] *Re Cottrell,* [1951] 4 D.L.R. 600 (Alta. S.C. (T.D.)) at 601-602. Attempted deletions and interlineations were also rejected in *Re Schlee* (1976), 1 Alta. L.R. (2d) 93 (Surr. Ct.). However, see *Bishop Estate v. Reesor* (1990), 39 E.T.R. 36 (Ont. H.C.) the testator wrote "cancelled" on each page of a formal will and signed each page, although without witnesses. The court held that the writing amounted to holograph will that revoked the will on which it was written.

[33] At a minimum, to stand on its own, the changes on the will should identify the property, use some dispositive words, and identify the beneficiary. See for example, *Re Schlee* (1976), 1 Alta. L.R. (2d) 93 (Surr. Ct.).

[34] *Re McLeod* (1964), 47 D.L.R. (2d) 370 (Alta. S.C. (T.D.)). Similarly, in *Re Manuel Estate* (1960), 30 W.W.R. 516 (Alta. S.C. (T.D.)) it was sufficient that the change stated "revoked." More extensive changes (eg. complete paragraphs), were held to be holograph codicils in *Harvie v. Watch Tower Bible & Tract Society Inc*. (1957), 21 W.W.R. 139 (Alta. C.A.); *Pears v. Pears* (2001), 301 A.R. 162 (Q.B.); *Manning Estate* (2004) 12 E.T.R. (3d) 76 (Alta.Q.B.).

[30] However, the net effect of the holograph codicil approach is merely to trade the formalities for altering a formal will for the more rigorous formalities for creating a separate holograph will. Ultimately, the question to ask is whether the formalities for changing a formal will need reform. In particular, should the Alberta Act authorise holograph changes to formal wills?

[31] Some argue that once a testator chooses a formal will, the testator is bound to that form during the life of the document. Any alterations must follow formalities for formal wills. The aim of this approach is to reduce the potential for fraud. Allowing unwitnessed changes (that may not be in the testator's own writing) would increase the opportunities for fraud.

[32] On the other hand, the Alberta Act recognises that a formal will may be changed, revoked or revived by a separate document that meets the formalities for holograph wills.[35] Thus, it may seem inconsistent to prevent holograph changes on a formal will. As such, the requirement that changes on a formal will must be witnessed "may be tantamount to laying a trap for lay persons who know about holograph wills and naturally extend that knowledge to handwritten interlineation of non-holographic wills and codicils."[36]

[33] In general, there are two approaches for addressing unwitnessed changes on a formal will. One approach is to broaden the formalities to expressly allow for holograph changes on a formal will. The other is through a dispensing power that applies to changes that do not meet formalities.

i. Broaden the formalities

[34] Some jurisdictions take a broad approach and allow formal wills to be altered without witnesses. The Saskatchewan Act provides:

> 11(3) A will may be altered by a testator without any requirement as to the presence of or attestation or signature by a witness or any further formality if the alteration is wholly in the handwriting of, and signed by, the testator.

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[35] Alberta Act, ss. 16(b) and (c) [revocation] and 20(1)(b) [revival].

[36] Manitoba Law Reform Commission, *Wills and Succession Legislation*, Report No. 108 (2003) at 25 [Manitoba Report].

The Manitoba Law Reform Commission has recently recommended a provision based on the Saskatchewan model.[37] The Newfoundland Act is similar but does not require that the changes be in the testator's own writing.[38] While the Newfoundland provision would allow the testator to direct someone else to make changes for the testator to sign, it also creates a greater opportunity for fraud.

ii. Apply the dispensing power

[35] The dispensing power previously proposed by ALRI would also allow a court to grant relief from the consequences of failing to comply with the formalities. The proposed dispensing power addresses the objectives of giving effect to the testator's intentions and reducing fraud. Moreover, the dispensing power would allow the court to consider whether changes that do not meet the holograph codicil test which requires words of disposition, gift or revocation, nevertheless reflect the testator's intention. If the court is satisfied on clear and convincing evidence that the testator intended to adopt the changes as part of the will, the court can give effect to them even though the formalities have not been met. Accordingly, ALRI again affirms the adoption of a general dispensing power.

RECOMMENDATION No. 2

a. Changes on a formal will should continue to be made in accordance with the existing formalities for formal wills.

b. Adopting the general dispensing power will allow courts to give effect to changes that do not meet the formalities.

3. What formalities should govern changes made by marking on a will?

a. The distinction between writing and marking

[36] Up to this point, this chapter has not drawn a distinction between changes made by writing and those made by marking on a will. However, the Alberta Act

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[37] Manitoba Report at 26.

[38] Newfoundland Act, s. 12(2).

> 12(2) A will with an alteration is considered to be executed where the signature of the testator, or the testator's signature and that of the witnesses, is made in the margin or on some part of the will opposite or near to the alteration....

sometimes appears to imply a distinction.[39] In other jurisdictions, the distinction is express. It is important to clarify whether the distinction is a meaningful one and whether any consequences flow from it.

[37] Generally speaking, "writing" requires words.[40] Without more, merely drawing a line does not amount to "writing." While the Alberta Act requires that a will must be in writing,[41] this requirement does not always extend to changes made on a will. While s. 16 requires "*a writing declaring an intention to revoke* and made in accordance with the provisions of this Act governing the making of a will" [emphasis added],[42] s. 19(1) only requires "*an alteration* ... made in accordance with the provisions of this Act governing the making of a will" [emphasis added]. Section 19 also allows for changes by obliteration and thus, arguably, would include changes made by marking rather than writing. Indeed, in other jurisdictions changes made without writing are expressly included. For example, the Saskatchewan Act refers to "obliteration, interlineation, cancellation by *drawing lines* across a will or any part of a will, or other alteration [emphasis added]."[43]

[38] There is no value in maintaining a distinction between revocation by writing and alteration by marking, if alterations may have the effect of revoking all or part

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[39] With reference to revocation, the Alberta Act s. 16(c) provides for "*a writing declaring an intention to revoke* and made in accordance with the provisions of this Act governing the making of a will" [emphasis added]. In contrast, s. 19(1) provides for "*an alteration* that is made in a will after the will has been made is made in accordance with the provisions of this Act governing the making of a will" [emphasis added].

[40] For example, the *Interpretation Act*, R.S.A.2000, c. I-8, s. 28(1)(jjj) states that, "'writing', 'written' or any similar term includes words represented or reproduced by any mode of representing or reproducing words in visible form." See also *Black's Law Dictionary*, 8th ed., which defines "writing" as "[a]ny intentional recording of words in a visual form, whether in the form of handwriting, printing, typewriting, or any other tangible form."

[41] Alberta Act, s. 4.

[42] Section 16 will apply to both changes made on a will and changes made by a separate document.

[43] Saskatchewan Act, s.11. See also Nova Scotia Act, s. 20; Northwest Territories Act, s. 12; Nunavut Act, s. 12.; Yukon Act, s. 11.

of a will.[44] While writing and the meaning conveyed by words will generally make it easier to understand what the testator intended, where the testator can accurately convey intent by markings there should be no prohibition against doing so. The overriding objective is to ensure that any changes on a will reflect the testator's intention. The best guarantee of that is to require that all such changes be made in accordance with the formalities that govern the will.

b. Application of the dispensing power

[39] As initially worded, the dispensing power proposed by ALRI refers only to "writing."[45] Although the meaning of "writing" was previously discussed by ALRI, the focus of that discussion was whether "writing" should include electronic records or oral communication.[46] Thus, the question of markings was not addressed in the Alberta 2000 Report.

[40] Whether the dispensing power is limited to "writing" or extends to other markings is significant in discussing changes on a will. Consider the following examples of how a testator might attempt to indicate a change on a formal will:

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[44] The reason for this distinction between revocation by writing and alteration by marking has a historic basis. Formerly, a provision in a will disposing of land, could only be revoked by "some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing or obliterating the same by the testator, or in his presence and by his directions and consent": *Statute of Frauds* (U.K), *1677*, 29 Car. II, c. 3, s.6.

These methods of revocation were carried forward into the *Wills Act, 1837* (U.K.), 7 Will. IV & 1 Vict., c. 26. [England Act] but they were separated into two sections: see *Copy of the Fourth Report Made To His Majesty By The Commissioners Appointed To Inquire Into The Law of England Respecting Real Property* (House of Commons, April 25, 1833) at 25-26. "Burning" and "tearing" were put into the revocation section. "Obliteration" was moved to the alteration provision. However, "cancellation" was omitted without explanation, giving rise to a line of cases prohibiting revocation by mere cancellation. (See for example *Bell v. Matthewman* (1920), 48 O.L.R. 364 (H.C.) discussed earlier). To add to the confusion, "cancellation by drawing lines"was reinserted in the alteration provision in some jurisdictions.

[45] Alberta 2000 Report at 51.

> **Dispensing with formal requirements**
> **20.1(2)** The Court may, notwithstanding that a *writing* was not made in accordance with any or all of the formal requirements, order the *writing* to be valid as a will of a deceased person or as the revocation, alteration or revival of a will of a deceased person if the Court is satisfied, on clear and convincing evidence, that the deceased person intended the *writing* to constitute the will of the deceased person or the revocation, alteration or revival of a will of the deceased person, as the case may be [emphasis added].

[46] Alberta 2000 Report at 10.

Original: I give $5,000 to Jack and Jill.

Changes:

(a) I give $5,000 to Jack **XXXX**.

(b) I give $5,000 to Jack ~~and Jill~~.

(c) I give $5,000 to Jack [redacted].

If each example were signed and witnessed, each would be a valid change. If each example were only signed by the testator, each might be found valid under the dispensing power as the testator's signature satisfies the requirement for writing. However, if the changes are neither signed or witnessed, the dispensing power is of limited value if it is confined to writing. None of the examples listed above would trigger the dispensing power as none is made by writing. Without the dispensing power the changes will fail for non-compliance with the formalities.

[41] The question of whether the dispensing power should be expanded beyond "writing" was considered in the British Columbia 1981 Report.

> Where a will is altered by extensive interlineation, or by an additional paragraph, then there is writing. Can the same be said when, for example, a clause of the will is simply scratched out? In such a case there are no marks on the page which might fairly be called writing, and an amending section which merely permitted alterations which complied with our Recommendation 5 [providing a dispensing power for the creation of wills] would be ineffective. The threshold requirement of writing would arguably not be satisfied by a mere obliteration.
>
> This is a difficult issue. Initially it is tempting to draw a distinction between obliteration and alterations of a more extensive nature, on the ground that the latter contain more reliable indicators of the testator's hand. However, to frame the question in such a manner highlights the nature of the problem. It is basically one of evidence. We have every confidence that British Columbia courts are well able to rule on matters such as the identity of the testator and the genuineness of a will, and that they will undoubtedly carefully scrutinize alterations, whether in writing, by way of codicil, or otherwise.
>
> We are buttressed in this conclusion by the Manitoba Law Reform Commission, which also concluded that the dispensing power they recommended should "be worded so as to apply to defects in ... alteration." Moreover, courts are increasingly willing to recognize that testators often chose unusual methods of altering wills, and are prepared to consider the effect of the testator's action on the balance of his will. ...
>
> ...
>
> ...The word "writing" implies the use of words. Such a threshold requirement is therefore inappropriate insofar as the alteration of wills is concerned. A will may be altered by simply striking out words. We have therefore concluded

> that insofar as the dispensing power applies to alterations, it should not require writing.[47]

To address the problem of the writing requirement, the British Columbia 1981 Report recommended a separate dispensing power for alterations which included the threshold requirement that the testator had signed the change.[48]

[42] However, a more recent report has extended the earlier British Columbia recommendation to expressly include markings. The British Columbia Law Institute's 2006 Report proposed a general dispensing power that would apply to making, changing, revoking and reviving wills.[49] The report also dropped the threshold requirement for the testator's signature.[50] While the report did not address the specific possibility that an unsigned mark might be effective to change a will, the report again expressed confidence in the courts to ensure that the testator's intent was protected:

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[47] Law Reform Commission of British Columbia, *Report on the Making and Revocation of Wills*, Report No. 52 (1981), at 64 [British Columbia 1981 Report]. This Report cited the Manitoba Law Reform Commission *Report on "The Wills Act" and the Doctrine of Substantial Compliance*, Report No. 43 (1980) in support of its recommendation. While the Manitoba report endorsed the application of the dispensing power to changes on a will, that report did not expressly consider the meaning of "writing."

[48] British Columbia 1981 Report at 65:

> 17(1) An alteration made in a will is of no effect, except to invalidate words or meanings it renders no longer apparent, unless the alteration:
> (a) is made in accordance with the provisions of this Act governing the making of a will: or
> (b) *is signed by the testator, and*
> (i) the testator dies after this subsection comes into force, and
> (ii) *the court is satisfied that the testator knew and approved of the alteration, and intended it to have testamentary effect* [emphasis added].

In requiring a signature the British Columbia recommendation retained a writing requirement even though the substantive change may have been made through markings.

[49] British Columbia Law Institute, *Wills, Estates and Succession: A Modern Legal Framework*, Report No. 45 (2006) at 25 and 151-152 [British Columbia 2006 Report].

[50] British Columbia 2006 Report at 150. The British Columbian 2009 Act implements this recommendation:

> **Court order curing deficiencies**
> 58(3) Even though the making, revocation, alteration or revival of a will does not comply with this Act, the court may, as the circumstances require, order that a record, or document or *writing or marking* on a will or document be fully effective as though it had been made ...
> (b) as an revocation, alteration or revival of a will of the deceased person... [emphasis added].

> A court will rarely be convinced that an unsigned document embodies the degree of finality and authenticity needed to treat it as a will, but should not be prevented from treating it as one when the circumstances show it to be a reliable record of testamentary intentions.[51]

This recommendation was implemented in the new *Wills, Estates and Succession Act*:

> 58(3) Even though the making, revocation, alteration or revival of a will does not comply with this Act, *the court may, as the circumstances require, order that a* record or document or writing or *marking on a will or document be fully effective as though it had been made*
>
> (a) as the will or part of the will of the deceased person,
>
> (b) *as a revocation, alteration or revival of a will of a deceased person*, or
>
> (c) as the testamentary intention of the deceased person [emphasis added].[52]

c. Recommendation for reform

[43] When viewed from the perspective of how testators are likely to make changes on a will, it is appropriate to require not only that the relevant formalities should apply to changes made by markings but also that the dispensing power should apply where the formalities are not met. A testator who wants to revoke or substitute certain words or provisions will generally begin by drawing a line through the text in question. To ensure that such markings reflect the testator's intent rather than the accidental slip of a pen or the fraud of a third party, changes made by markings should be made in accordance with the formalities that govern the will. To allow the court to consider evidence of the testator's intent where the formalities are not met, the dispensing power should be extended to apply to markings.

RECOMMENDATION No. 3

a. Changes made by markings on a will should be made in accordance with the formalities that govern the will.

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[51] British Columbia 2006 Report at 25.

[52] British Columbia 2009 Act, s. 58(3). The new British Columbia dispensing power is much broader than that proposed by ALRI in other ways such as its application to records [includes electronic documents, s. 58 (l)(a)] and testamentary instruments [includes the designation of a beneficiary outside of a will, s. 4 (2)].

b. As with other circumstances where formalities govern changes on a will, the dispensing power should apply to changes made by markings.

4. What formalities should govern changes that obliterate text on a will?

[44] The Alberta Act also provides for a special category of changes that amount to obliteration. An obliteration is a change that makes it impossible to read the original text of the will. For example, if a will appears as "I give $5,000 to [redacted]", the name of the beneficiary is considered to be obliterated. This result may be achieved by over-writing, gluing paper on top of the text, applying correction fluid, cutting a hole in the document or similar means. The change is effective for the very reason that the obliterated text is unreadable.[53] No formalities are required, provided that the original text is "no longer apparent."[54]

a. Text that is no longer apparent on the will

[45] Courts have held that "no longer apparent" means that the words are not optically evident on the face of the will.[55] Words are not apparent if they can only be discovered through extrinsic evidence or by physically interfering with the will. Thus, courts have refused to accept oral testimony by a third party regarding the

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[53] Alberta Act, s. 19:

> **19(1)** Subject to subsection (2) [formalities for changing a will], unless an alteration that is made in a will after the will has been made is made in accordance with the provisions of this Act governing the making of a will, the alteration has no effect except to invalidate words or meanings that it renders no longer apparent.

Similar provisions to s. 19 are found in all Canadian jurisdictions, as well as England, New Zealand and Australia: Ontario Act, s. 18(1); Prince Edward Island Act, s. 73; British Columbia 1996 Act, s. 17(1); Manitoba Act, s. 19(1); New Brunswick Act, 18(1); Newfoundland Act, s. 12(1); Nova Scotia Act, s. 20; Saskatchewan Act, 11(1); Yukon Act, R.S.Y., s. 11(1); Northwest Territories Act, s. 12(1); England Act, s. 21; *Wills Act 2007* (N.Z.), s. 15(c) [New Zealand Act]; *Wills Act 1968* (A.C.T.), s. 12(1) [Australian Capital Territory Act]; *Wills Act 1936* (S.A.), s. 24 [South Australia Act]; *Wills Act 1997* (Vic.), s. 15(2) [Victoria Act]; *Wills Act 1992* (Tas.), s. 16(1) [Tasmania Act]; *Wills Act 1970* (W.A.), ss. 10(1), (3) [Western Australia Act]; *Succession Act 2006* (N.S.W.), s. 14(2) [New South Wales Act]; *Wills Act* (N.T.), s. 16(3) [Northern Territory Act]; *Succession Act 1981* (Qld.), s. 16(2) [Queensland Act].

[54] MacKenzie helpfully describes obliteration as "non-executed alterations" in Feeney at § 5.16.

[55] *In the Goods of Horsford* (1874), L.R. 3 P. & D. 211 at 216; Roger Kerridge, *Parry & Clark: The Law of Succession*, 11th ed. (London: Sweet & Maxwell, 2002) at 143 [Parry & Clark].

original text,[56] to use chemicals to remove ink, correction fluid or paper glued on top of text,[57] or to accept infra-red photographs.[58]

[46] However, if the words are apparent, s. 19(1) of the Alberta Act does not apply. Words are apparent if the original text can be read by limited means such as holding the page up to a light or by using a magnifying glass.[59] If the words are apparent, the original text is still valid unless the change also complies with the relevant formalities.

[47] Adding to the confusion, words that are not apparent also remain valid if the testator did not intend to obliterate them.[60] However, in contrast to the limited means that can be used to determine whether the original text is still apparent, the court may use any means to determine original text that was unintentionally obliterated.[61]

[48] The question of whether text is apparent or not apparent is an awkward fit with the surrounding law. Elsewhere in the Alberta Act, the validity of changes is determined on the basis of testator's intent and compliance with formalities. However, formalities and testator's intent are not governing factors in the area of obliteration. Formalities and intent do not even determine whether the court is restricted in the means it can use to restore text to the will. The various results that flow from giving priority to whether text is apparent are set out in the following chart.

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[56] *Douglas Estate Re,* (1986), 64 Nfld. & P.E.I.R. 48 (Nfld. S.C.).

[57] *In the Goods of Horsford* (1874), L.R. 3 P. & D. 211; *Douglas Estate Re* (1986), 64 Nfld. & P.E.I.R. 48 (Nfld. S.C.).

[58] *In the Goods of Itter*, [1950] P. 130.

[59] *Ffinch v. Combe*, [1894] P. 191; *Re Mitchell Estate* (1960), 32 W.W.R. 337 (Alta. S.C. (T.D.)).

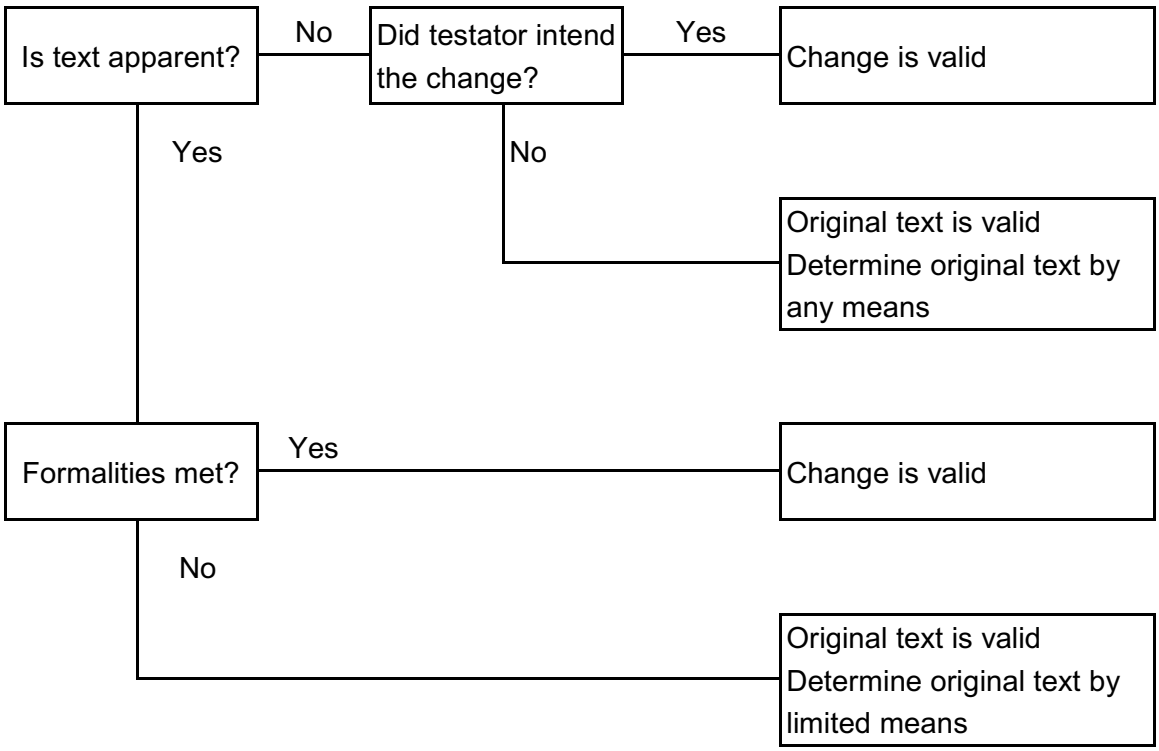
[60] As noted by Roger Kerridge, Parry & Clark, at 145, footnotes omitted:

> The testator must make the alteration which renders part of the will not apparent with an intention to revoke that part. A testator who accidentally obliterates part of his will by, for example, spilling ink over it does not, therefore, revoke that part.

See also Feeney at § 5.60.

[61] For example, the British Columbia 2009 Act, s. 58(4) allows the court to "reinstate the original word if there is evidence to establish what the original word or provision was."

Obliteration: Current law



b. Recommendation for reform

[49] The current law regarding obliteration is out of date with modern reality. The technology for determining the original text in an obliterated part of a will has advanced immeasurably since 1837 when the provisions in s. 19 were first codified.[62] In modern practice, there will usually be multiple copies of a will in contrast to the single, scribe-written original of centuries past.[63] Words that have been obliterated on one copy can still be read on others. ALRI has also recommended that courts should be allowed to admit extrinsic evidence to interpret a will and to determine the testator's intent.[64] This recommendation will increase the court's access to evidence regarding the original text of the will.

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[62] See England Act, s. 21. It is worth noting that carbon paper, fountain pens and typewriters were futuristic technology when the England Act first came into force.

[63] *In the Goods of Re Horsford* (1874), L.R. 3 P. & D. 211 is an obliteration case involving a single copy will.

[64] See Chapter 4.

[50] It should also be noted that technologies for removing inks or glues have advanced making it easier to restore the original text. Thus, former challenges to discovering the original text will generally be solvable. Indeed, courts are already using technology to resolve a variety of wills-related issues. For example, chemical evidence and infra-red and ultra-violet photography have been used to ascertain when codicils were written.[65] It makes little sense that courts are willing to use technology to give effect to the testator's intent for some purposes but reject the same technologies to give effect to intent for others.

[51] As there are fewer barriers against discovering the original text of a will, the validity of an obliteration should not rest on whether the text is apparent. Rather, the validity of an obliteration should be determined on the same basis as any other change to a will – on the basis of testator's intent and compliance with formalities. If intent is missing, the original text will stand and the court may use extrinsic evidence to determine the original text. If intent is present and the testator complied with the formalities, the change is valid.

[52] However, if intent is present but the testator did not comply with formalities, the court should be able to apply the dispensing power.[66] Having recourse to the dispensing power is consistent with its application in all other circumstances where formalities govern changes on a will. If, for some reason, the change cannot be saved under the dispensing power, then the original text will stand, provided that it can be determined. A summary of these reforms is set out in the following chart.

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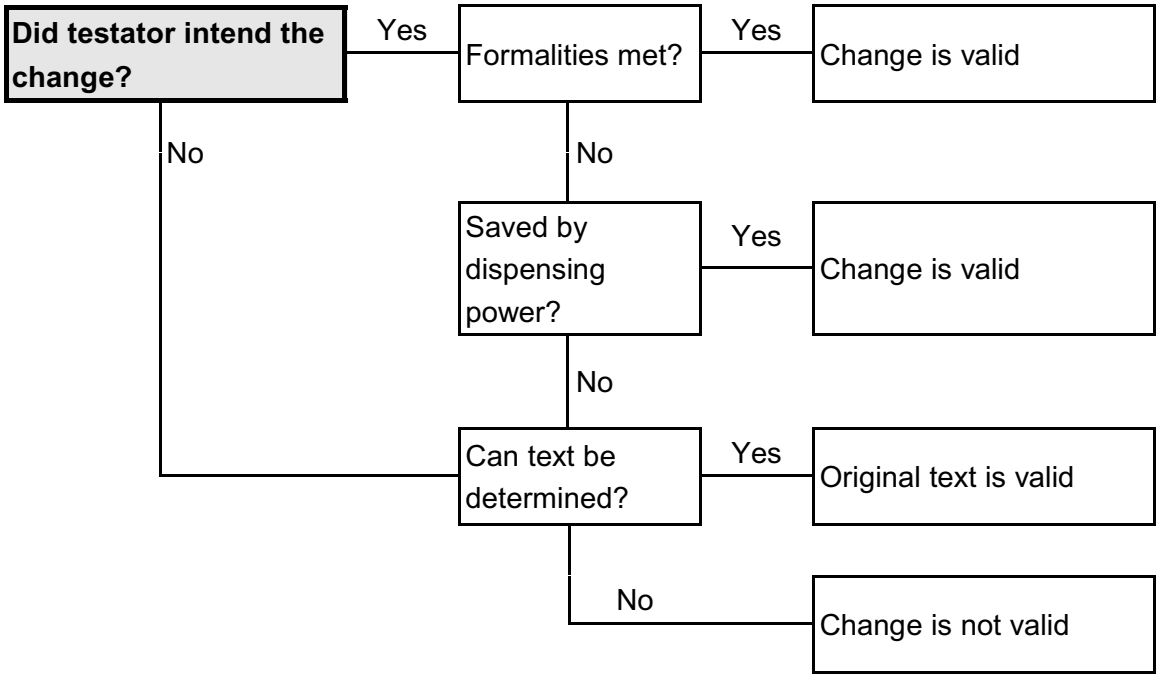
[65] *Harvie v. Watch Tower Bible & Tract Society Inc*. (1957), 21 W.W.R. 139 (Alta. C.A.).

[66] See, for example, *Re Swanson Estate* (2002), 220 Sask. R.13 (Q.B.). Based on the testator's intent to change a formal will, the court gave effect to near obliterations that were signed by the testator but not witnessed.

Obliteration: proposed reform



[53] However, even if the obliteration was not intended by the testator or made in accordance with the formalities, there will still be rare instances where the original text cannot be discovered. As the South African Law Commission concluded, "If the deletion is regarded as invalid it does not help much if it is not possible to determine what the original wording was."[67] Thus, as noted in the above chart, obliteration may still be effective if it is impossible to determine the original text.

RECOMMENDATION No. 4

a. Changes that obliterate text in a will should be made in accordance with the formalities that govern the will.

b. As with other circumstances where formalities govern changes on a will, the dispensing power should apply to changes made by obliteration.

c. Where the formalities are not met and the change is not valid under the dispensing power, the original text should be determined by any means acceptable to the court.

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[67] South African Law Commission, *Review of the Law of Succession: Alteration and Revocation of Wills*, Working Paper 17 (1987) at 8.

[54] If it is not possible to determine the obliterated text, the obliteration will not be a valid change but may still be an effective change.

5. Should changes on a will be presumed to have been made after the will was signed by the testator?

a. Common law presumption

[55] The law currently provides that any changes on a will are presumed to have been made after the will was signed by the testator. This is a common law presumption and is not included in the Alberta Act.[68]

[56] The presumption operates to protect against fraud. For example, a will reads "I give ~~$100~~ $10,000 to Jack" and the $10,000 change is neither signed nor witnessed. If the presumption were reversed and the changes were presumed to have been made before the testator made the will, there would be increased risk for fraud. Consequently, the law presumes that the change was made after the testator signed the will and something more will be needed to include the change as part of the will. However, a testator will sometimes make amendments on a will before signing. In this situation, the testator's intent may be frustrated as the presumption operates to exclude the amendments. Without more, the pre-signing amendments will be treated the same as post-signing changes.

[57] What more is needed to give effect to pre-execution amendments? The amendment can be signed by the testator and witnessed in accordance with the Alberta Act. It is also standard practice to record any amendments in the affidavit of execution sworn by witnesses.[69] In other words, the presumption can be rebutted by evidence that the amendment was part of the will as originally made.[70]

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[68] See Parry & Clark at 141, citing *Cooper v. Bockett* (1846) Moo. P.C. 419 and *In the Goods of Adamson* (1875) L.R. 3 P. & D. 253; Feeney at § 4.65 citing *In the Goods of Re Sykes* (1873), L.R. 3 P. & D. 26.

[69] Under the *Surrogate Rules*, Alta. Reg. 130/1995, form NC 8, "Affidavit of witness to a will", contains the following provision "Before the deceased signed the will, the deceased made the following changes to it."

[70] Parry & Clark: at 141-2. For example, in *Cooper v. Bockett* (1846) Moo. P.C. 419 there was evidence that some changes were made before the ink was dry on the will. In *Re Letwinetz Estate* (1983), 27 Sask. R. 59 (Surr. Ct.), the court considered holograph changes on a holograph will. Based on the wording and intent of the will, the court was satisfied that changes were merely amendments made before the will was signed.

b. Recommendation for reform

[58] While the law in this area operates well, as a common law principle it is difficult to access and put into practice. In the interest of increasing knowledge of this principle and allowing testators to understand its operation, it is recommended that the principle be codified. The Alberta Act should state that any changes on a will are presumed to have been made after the will was signed by the testator. The presumption can be rebutted by contrary evidence. Otherwise, the validity of the change will be determined by compliance with the formalities.

RECOMMENDATION No. 5
The *Wills Act* should state that any changes on a will are presumed to have been made after the will was signed by the testator, subject to contrary evidence.

D. Changes Made by Destruction

[59] A will may also be revoked, in whole or in part, by destruction. As with the current law of obliteration, revocation by destruction does not require the testator's signature or witnesses.

1. Complete destruction

[60] The Alberta Act provides:

> **16** A will or part of a will is revoked only by ...
>
> (d) burning, tearing or otherwise destroying it by the testator or by some person in the testator's presence and by the testator's direction with the intention of revoking it.[71]

While s. 16 refers to "burning, tearing or otherwise destroying", case law additionally requires that the destruction must be complete, not partial or symbolic.[72] If the will is only partially destroyed, it is not revoked unless the surviving parts of the will cannot stand on their own. For example, in *Cheese v.*

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[71] See also British Columbia 1996 Act, s. 14; Manitoba Act, s. 16; New Brunswick Act, s. 15; Newfoundland Act, s. 11; Northwest Territories Act, s. 11; Nova Scotia Act, s. 19; Nunavut Act, s. 11; Ontario Act, s. 15; Prince Edward Island Act, s. 72; Civil Code of Quebec, S.Q., art 767; Saskatchewan Act, s. 16; Yukon Act, s. 10; Uniform Law Conference of Canada, *Uniform Wills Act*, s. 15 [Uniform Wills Act]; England Act, s. 22; Australian Capital Territory Act, s. 21; South Australia Act, s. 22; Tasmania Act, s. 15; Western Australia Act, s. 15.

[72] Parry & Clark at 129.

Lovejoy, the testator crossed out parts of his will, wrote "This is revoked" on the back, crumpled it up and threw it in the garbage.[73] The housekeeper removed the will from the garbage and placed it on a desk where it remained for several years. The attempted destruction was found to be incomplete even though there was evidence that the testator intended to revoke the will.

2. Giving effect to the testator's intent

[61] The central theme of this chapter and of international reforms is that the testator's intent should not be frustrated by failure to comply with formalities. In the context of revocation by destruction, the problematic "formality" is the insistence on total destruction. Other jurisdictions have relaxed the total destruction requirement by allowing courts to consider the testator's intention even if the will has not been totally destroyed. For example, the Australian National Committee for Uniform Succession Laws proposed the following provision in the Draft Wills Bill 1997:

> How a will may be revoked
>
> 13. The whole or any part of a will may be revoked only:...
>
> (e) by the testator, or some person in his or her presence and by his or her direction, writing on the will or *dealing with the will in such a manner that the Court is satisfied from the state of the will that the testator intended to revoke it* [emphasis added].[74]

The uniform provision replaces the acts of "burning, tearing or otherwise destroying" by a general reference to "dealing with the will." Revocation will be valid if the court is satisfied "from the state of the will" that the testator intended to revoke it. The reference to the state of the will implies incomplete destruction, so that there is still at least part of the will left to consider. It also suggests that the court may be limited as to the evidence it may consider to determine the testator's intent and may only look to the state of the will. The Australian report does not

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[73] *Cheese v. Lovejoy* (1877), 2 P.D. 251 (C.A.).

[74] National Committee for Uniform Succession Laws, *Consolidated Report to the Standing Committee of Attorneys General on the Law of Wills*, Queensland Law Reform Commission Miscellaneous Paper 29 (1997) at 28-29 [Australia Uniform Report]. The Committee's proposal was based on the *Wills, Probate and Administration Act 1898* (NSW), s. 17.

clarify this point. The uniform provision has been adopted in four Australian states.[75]

[62] Similarly, the new British Columbia 2009 Act also extends the revocation provision to address incomplete destruction:

> 55 (1) A will or part of a will is revoked only in one or more of the following circumstances:...
>
> (c) by the will-maker, or a person in the presence of the will-maker and by the will-maker's direction, burning, tearing or destroying all or part of the will in some manner with the intention of revoking all or part of it;
>
> (d) by an order of the court under section 58 [court order curing deficiencies], if the court determines that the *consequence of the act* of burning, tearing or destroying all or part of the will in some manner *is apparent on the face of the will, and the will-maker intended to revoke all or part of the will* [emphasis added].

In comparison to the Australian model, the British Columbia provision more clearly requires the court to consider the testator's intent. This suggests that the court may hear oral evidence regarding what the testator may have said while attempting to destroy the will. Similarly, new legislation in New Zealand provides for revocation where the "will-maker does anything else in relation to the will that satisfies the High Court that the will-maker intended to revoke the will."[76]

3. Recommendation for reform

[63] The Alberta Act should allow the court to consider evidence of the testator's intent where an act of destruction is incomplete. This result is in keeping with our recurring recommendation that, where the formalities for making, changing or revoking a will are not met, the court should be able to make a decision based on clear and convincing evidence of what the testator intended. It should not make a difference whether the testator writes or marks on the will or uses other physical acts to make the change. In all cases, the court should be allowed to consider the testator's intent.

[64] However, as acts of destruction can only result in the revocation of all or part of a will, it is appropriate to deal with partial destruction within the revocation

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[75] New South Wales Act, s. 11; Northern Territory Act, s. 13; Queensland Act, s. 13; Victoria Act, s. 12.

[76] New Zealand Act, s.16(g).

provision, rather than within the general dispensing power. The general dispensing power also extends to the creation of wills and the alteration or addition of provisions to within existing wills. As destructive acts cannot be used to create, alter or add to a will, it is more appropriate that their effects be dealt with in the narrower context of revocation.

RECOMMENDATION No. 6
The revocation provision of the *Wills Act* should allow the court to give effect to the testator's intent where destruction is incomplete.

CHAPTER 3. REVOCATION BY LAW

A. Introduction

[65] The previous chapter reviewed how a testator can change or revoke a will by an intentional act. This chapter considers the circumstances where a will is revoked by operation of law. Under the present law in Alberta, a will is revoked when a testator marries or enters into an adult interdependent partnership by agreement. However, there is no comparable provision for adult interdependent relationships established by the passage of time or by the birth of a child. Further, while some wills are revoked by the creation of a relationship, there are no parallel provisions to change a will when a relationship ends. This chapter considers whether the law in this area should be changed to reflect current social realities. The chapter also considers the interaction between changes to a will by operation of law and the recommendations made by ALRI with respect to failed gifts.

B. Historical Background

[66] The history of the law on revocation of wills can be traced back to at least the 17th century. At that time under the common law, the will of a woman was revoked when she married.[77] The rationale for this was that women lost testamentary capacity when they married.[78] In contrast, revocation of a man's will was tied to common law rules that presumed an intention to revoke a will in certain circumstances. Marriage followed by the birth of an heir was one such circumstance. The law regarding presumed intent was very complicated and uncertain.[79] In 1833, the report which formed the basis of the England Act recommended that the presumption of an intention to revoke should be abolished in all circumstances.[80]

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[77] New South Wales Law Reform Commission, *Community Law Reform Program: Wills - Execution and Revocation,* Report No. 47 (1986) at 9.2 [New South Wales Report].

[78] Alberta Law Reform Institute, *Effect of Divorce on Wills*, Report No. 72 (1994) at 3 [Alberta 1994 Report].

[79] Alberta 1994 Report at 3.

[80] *Copy of the Fourth Report Made To His Majesty By The Commissioners Appointed To Inquire Into The Law of England Respecting Real Property* (House of Commons, April 25, 1833) at 32.

[67] The England Act abolished the presumption of an intent to revoke in all circumstances apart from marriage. Marriage by the testator revoked a will except when the will was made in contemplation of marriage or in exercise of a power of appointment. The England Act provided that marriage revoked the wills of both men and women and that married women's wills were not valid. In Alberta, married women were granted testamentary capacity in 1886.[81] The social policy reasons behind revocation were very different for women as opposed to men. Revocation of a woman's will was a result of her loss of capacity to deal with property on marriage. For a man, the law reflected a policy that a wife and children should be provided for. This policy was achieved by ensuring that until a new will was made after marriage a man's estate passed by intestacy. However, given that there was nothing to prevent a man from disinheriting his wife or children in a will and no equivalent to family relief legislation, this policy was not very effective.

[68] The England Act did not mention divorce. It is probable that the effect of divorce on wills was not an issue that was considered. At the time, it was only possible to get a divorce by an act of Parliament and the divorce rate was approximately one divorce per year.[82] Therefore, divorce did not revoke a will and the issue of the impact of divorce on wills was only considered infrequently in the case law.[83]

C. Current Law

[69] The Alberta Act contains provisions on revocation by marriage which are very similar to the England Act. The Alberta Act also provides for revocation of a will when a testator enters into an adult interdependent partner agreement. Section 16 provides:

> **16** A will or part of a will is revoked only by
>
> (a) the marriage of the testator, subject to section 17,
>
> (a.1) the testator's entering into an adult interdependent partner agreement, subject to section 17.1.

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[81] Then the Northwest Territories. North-West Territories, *An Ordinance to Facilitate the Conveyance of Real Estate by Married Women*, No 6 of 1886, s. 1(2).

[82] Law Reform Committee (England), *The Making and Revocation of Wills*, 22nd Report (1980) at 19 [England Report].

[83] Alberta 1994 Report at 4.

[70] Sections 17 and 17.1 set out the exceptions to revocation by marriage or entry into an adult interdependent partner agreement:

> **Revocation by marriage**
>
> **17** A will is revoked by the marriage of the testator except when
>
> (a) there is a declaration in the will that it is made in contemplation of the marriage, or
>
> (b) the will is made in exercise of a power of appointment of real or personal property that would not in default of the appointment pass to the heir, executor or administrator of the testator or to the persons entitled to the estate of the testator if the testator died intestate.
>
> **Revocation by entering into an adult interdependent partner agreement**
>
> **17.1** A will is revoked by the testator's entering into an adult interdependent partner agreement except when
>
> (a) there is a declaration in the will that it is made in contemplation of entering into an adult interdependent partner agreement, or
>
> (b) the will is made in exercise of a power of appointment of real or personal property that would not in default of the appointment pass to the heir, executor or administrator of the testator or to the persons entitled to the estate of the testator if the testator died intestate.

[71] Finally, s. 18 provides that a will is not revoked by the presumption of an intention to revoke it.

> **No revocation by presumption**
>
> **18** A will is not revoked by presumption of an intention to revoke it on the ground of a change in circumstances.

[72] As in Alberta, all other common law provinces and territories in Canada have a provision that revokes a will when a testator marries.[84] However, British Columbia has recently taken steps to abolish revocation by marriage.[85] In England and Wales, marriage results in the revocation of a will, unless the will was made in

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[84] British Columbia 1996 Act, s. 15; Manitoba Act, s. 17; New Brunswick Act, s. 15.1; Ontario Act, s. 16; Saskatchewan Act, s. 17; Northwest Territories Act, s. 11; Newfoundland Act, s. 9; Nova Scotia Act, s. 17; Yukon Act, s. 10; Prince Edward Island Act, s. 68; Nunavut Act, s. 11. See also, Uniform Wills Act, s. 16.

[85] British Columbia 2009 Act, s. 55.

contemplation of marriage. This rule in followed in most other common law jurisdictions.[86] In Scotland, marriage has no effect on a will.[87]

[73] Presently in Alberta, the end of a marriage has no effect on a testator's will. The same principle applies to the end of an adult interdependent relationship.[88] As a result, unless a testator takes some positive action to change or revoke a will, it will remain in effect even after a divorce is final and the division of matrimonial property is complete. In contrast, many other common law jurisdictions have provided for partial revocation on divorce.[89] Under partial revocation, any gift to the testator's former spouse is revoked as though the former spouse predeceased the testator. Partial revocation generally takes effect when the appeal period for a divorce judgment expires. Partial revocation also applies if the marriage is ended by a decree of nullity or is found to be void.[90]

D. Should a Will be Revoked When a Testator Marries?

1. Arguments in favour of revocation by marriage

[74] There are various arguments which support retention of revocation of a will when a testator marries. Upon marriage, a person's responsibilities fundamentally change. An individual has new financial and personal commitments. It is likely that some or all of the provisions of a pre-existing will are rendered inappropriate. In addition, revocation brings into play the rules on intestate succession which protect the testator's new spouse until a new will is executed.[91] Inheritance through

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[86] Scottish Law Commission, *Report on Succession*, No. 215 (2009) at 87 [Scotland Report].

[87] Scotland Report at 87.

[88] Of course, if the testator remarries or the adult interdependent partner marries or enters into another adult interdependent partnership agreement with another person, a will is revoked as outlined above. See Alberta Act, s. 17.1.

[89] This includes some American states, England, Australia, and New Zealand. In Canada, legislation in Saskatchewan, Ontario, British Columbia, Manitoba and Prince Edward Island provides for partial revocation upon divorce. In addition, this approach was proposed by the Uniform Law Conference of Canada in 1978. See Law Reform Commission of Saskatchewan, *Report on Revocation of Wills* (2006) at 15 [Saskatchewan Revocation Report]; Alberta 1994 Report at vi.

[90] Alberta 1994 Report at 5-8.

[91] Under the *Intestate Succession Act*, R.S.A. 2000, c. I-10, ss. 2-3, the spouse takes a preferential share [Alberta Intestate Act].

intestacy is less costly than recourse to the courts and family relief legislation.[92] Another argument in favour of retention of the present rule is that revocation by marriage is currently the law in all common law provinces in Canada.[93] In addition, the rule has been in place for such a long time that if the law were changed, there might be a danger that some testators would not be aware of the change in the law and leave their current wills in place.[94] There is a perception that the current rule has worked well over the centuries.[95]

2. Arguments against revocation by marriage

[75] On the other hand, there are many arguments as to why a will should not be revoked by marriage. Unlike many other rules which are subject to a contrary intention on the part of the testator, this rule operates without reference to the intention of the testator. It applies regardless of the surrounding circumstances or the intentions of the testator. This contradicts the fundamental purpose of interpreting a will which is to ascertain and give effect to the subjective intention of the testator.[96] Indeed, the rule applies without the knowledge of many testators as it is not generally known by the public.[97]

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[92] New South Wales Report at 9.10.

[93] British Columbia 1996 Act, s. 15; Manitoba Act, s. 17; New Brunswick Act, s. 15.1; Ontario Act, s. 16; Saskatchewan Act, s. 17; Northwest Territories Act, s. 11; Newfoundland Act, s. 9; Nova Scotia Act, s. 17; Yukon Act, s. 10; Prince Edward Island Act, s. 68; Northwest Territories Act, s. 11. See also Uniform Wills Act, s. 16.

[94] England Report at 11-12; New South Wales Report at 9.10.

[95] Manitoba Report at 18.

[96] A famous statement of this purpose is contained in Lord Denning's dissent in *In Re Rowland,* [1963] 1 Ch. (C.A.) at 9-10.

[97] British Columbia 2006 Report at 33; Law Reform Commission of Nova Scotia, *Reform of the Nova Scotia Wills Act*, Final Report (2003) at 29 [Nova Scotia Report]; Saskatchewan Revocation Report at 12. There are conflicting reports in England. The English Law Reform Committee in the England Report at 11 concluded that the public was aware that marriage revoked a will; however, the Law Commission in *Cohabitation: the Financial Consequences of Relationship Breakdown,* Report No. 307 (2007) at 132 concludes that awareness is low.

[76] In striking a blow against testamentary freedom, the rule does so as a "blunt instrument."[98] The rule revokes the whole will and may disinherit beneficiaries who have no rights under intestacy or family relief legislation. Bequests to friends or charities may be affected, as well as the appointment of personal representatives and guardians. It can result in unintended intestacies.[99]

[77] In addition to the matrimonial property remedies available during the testator's lifetime, some jurisdictions now also provide for the division of matrimonial property on death.[100] A further argument raised against revocation by marriage is that, while offering useful protection for younger spouses and children, it may do more harm than good when applied to a second marriage occurring later in life.[101] It is also problematic that the test for capacity to marry is lower than the test for capacity to make a will. Consequently, where the testator marries very late in life, the testator may not be able to make another will.

[78] Moreover, the rule reflects legal disabilities imposed on married women that have not been in place since the end of the 19th century. Children and spouses are now protected from disinheritance by family relief legislation. In addition, today a will may not be the primary way in which testators protect the interests of their families.[102]

3. Is reform needed?

[79] This issue has been examined by a number of law reform agencies over the years. Many of these agencies have been critical of the rule but have opted to

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[98] New South Wales Report at 9.11.

[99] New South Wales Report at 9.11.

[100] Saskatchewan Revocation Report at 9; ALRI has made a similar recommendation in our Alberta 1994 Report.

[101] Saskatchewan Revocation Report at 13.

[102] British Columbia 2006 Report at 33-34.

retain it.[103] Some of these agencies have made preliminary recommendations that the rule be repealed and have withdrawn the recommendation after consultation.[104]

[80] Some jurisdictions do not have a rule that marriage revokes a will. The United States' *Uniform Probate Code* does not contain this rule.[105] In addition, revocation of a will by marriage is not part of Scottish law. The Scottish Law Commission has considered whether this should be changed on two occasions, most recently in 2009.[106] On both occasions, the Commission has concluded that revocation by marriage should not be part of Scottish law.[107] The primary reason for this is that the rule might defeat the intentions of a testator who could well think that a will was valid until personally revoked. The Commission also felt that revocation of the whole will was a "disproportionate response to the mischief that such a rule would be designed to address."[108] The frequency of second marriages was also a factor, as testators might not wish to have bequests to children of previous marriages affected.[109]

[81] In Canada, the British Columbia Law Institute recently recommended that marriage should not revoke a will. The Institute pointed out that a will's revocation by marriage is not generally known by the public. This results in unplanned intestacies. In addition, today a will is often not the primary means by which testators provide for spouses and children. Life insurance or RRSPs are commonly used instead. Family relief legislation and matrimonial property legislation also provide protection that was not available when the England Act was enacted. Also, the Institute pointed out that today many relationships are not based on marriage. The protection only applies to a portion of society, namely, wives and children

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[103] England Report at 12; Saskatchewan Revocation Report at 18; Nova Scotia Report at 30; Manitoba Report at 19.

[104] British Columbia 1981 Report; New South Wales Report at 9.20.

[105] New South Wales Report at 9.16.

[106] Scotland Report.

[107] Scotland Report at 87; Scottish Law Commission, *Report on Succession*, No. 124 (1990) at 49.

[108] Scotland Report at 87.

[109] Scotland Report at 87; Scottish Law Commission, *Report on Succession*, No. 124 (1990) at 49.

within legal marriage.[110] The Institute concluded that "the archaic nature and untoward effects" justified abolition of the rule.[111] This recommendation has been followed in the recently enacted succession legislation which does not include revocation of a will by marriage.[112]

[82] ALRI is in broad agreement with the conclusions of the British Columbia Law Institute. In our view, the rule that marriage revokes a will is contrary to the principle of testamentary freedom. It is a very blunt instrument that often does more harm than good. The rule was based on the significance of the change in circumstances engendered by marriage. However, in today's society it is no longer clear why the rule should operate. Marriage no longer represents such a significant change. Many couples live together before getting married. In 2006, more individuals were unmarried than married. Common law families represented 15.5% of families and 26% of families were headed by a single parent.[113] For Alberta in 2003, 40% of marriages had ended in a divorce within 30 years of marriage. Statistics Canada estimates that over 16% of divorces are redivorces for one or both spouses.[114] In any event, the principle only affords minimal protection to the new spouse. Our recommendation is that the rule in the Alberta Act be repealed.

RECOMMENDATION No. 7
The *Wills Act* should no longer provide that all existing wills are revoked by law when a testator marries.

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[110] British Columbia 2006 Report at 34. It should be noted that in Alberta, revocation also applies to adult interdependent partner agreements: Alberta Act, s. 17.1.

[111] British Columbia 2006 Report at 34.

[112] British Columbia 2009 Act, s. 55. The current *Act* provides for revocation by marriage, see British Columbia 1996 Act, s. 15.

[113] CBC News, "Married people outnumbered for first time: census" online: <http://www.cbc.ca/canada/story/2007/09/12/census-families.html?ref=rss>.

[114] Vanier Institute of the Family, "Divorce: Facts, Causes and Consequences," online: <http://www.vifamily.ca/library/cft/divorce_05.html/#True>.

E. Should a Will be Revoked When a Testator Becomes an Adult Interdependent Partner?

1. Current law

[83] The Alberta Act provides that any existing wills are revoked when a testator enters an adult interdependent partnership agreement.[115] An adult interdependent partnership agreement must be in a prescribed form, signed by the parties, dated and also signed by two witnesses.[116] The prescribed form notifies the parties that their wills may be revoked by the agreement. Adult interdependent partners are given the same priority as spouses under the Alberta Intestate Act.[117]

[84] In contrast, an adult interdependent partnership established by ascription has no effect on a testator's will. An adult interdependent partnership by ascription is established when two people share a relationship of interdependence and have either lived together for more than three years or have lived together for a lesser period of time but there is a child of the relationship.[118] It is likely that the difficulties in establishing when such a partnership by ascription was established in many cases justified the exclusion of these types of partnerships from revocation by law when the *Adult Interdependent Relationships Act* was passed in 2002. Aside from partnerships that are established by the birth of a child, it may be difficult to determine when the testator became an adult interdependent partner and consequently, when the testator's will was revoked. In contrast to revocation by marriage or adult interdependent partnership agreement, there is no formal, witnessed, dated document to determine the relationship's legal beginning.[119]

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[115] Alberta Act, s. 16(a.1).

[116] *Adult Interdependent Relationships Act*, S.A. 2002, c. A-4.5, s.7; and *Adult Interdependent Partner Agreement Regulation*, Alta. Reg. 141/2003.

[117] Alberta Intestate Act, ss. 2-3.1.

[118] *Adult Interdependent Relationships Act*, R.S.A. 2000, c. A-4.5, s. 3.

[119] The Law Commission cited "serious difficulties of proof" as the basis for not extending revocation to the ending of cohabitation relationships. England, Law Commission, *Cohabitation: the Financial Consequences of Relationship Breakdown,* Report No. 307 (2007) at 132-33.

[85] Under the current law, if adult interdependent partners later marry each other, their wills will be revoked by the marriage.[120] This is unfair to adult interdependent partners for two reasons. First, it is the second time that their wills will be revoked by the same relationship. Second, even if they made wills to benefit each other as adult interdependent partners, revocation by marriage will again leave them intestate.

[86] Two other provinces have addressed this situation. The Manitoba model builds on the exception for wills made in contemplation of marriage. If the will contains a declaration that it was made "in contemplation of the testator's common-law relationship with the person the testator subsequently marries," marriage will not revoke the will.[121] In contrast, the Saskatchewan model provides that revocation by marriage "does not apply where the testator marries a person with whom he or she is cohabiting and has cohabited in a spousal relationship continuously for two years."[122]

2. Is there a need for reform?

[87] Under the current law, adult interdependent partners are not treated equally by the law in terms of revocation of a will. It is only where there is an adult interdependent partnership by agreement that an existing will is revoked.[123] As well, adult interdependent partners by agreement or ascription will have their existing wills revoked if they marry each other.[124] The law should treat adult interdependent partners equally in all respects.

[88] The same arguments put forward above as to why wills should not be revoked by marriage apply to adult interdependent partners. The rule is contrary to the principle of testamentary freedom. It is a very blunt instrument that often does

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[120] Alberta Act, s. 16.

[121] Manitoba Act, s. 17. However, Manitoba does not provide for revocation by law when the testator becomes a common law partner.

[122] Saskatchewan Act, s. 17.

[123] Alberta Act, s. 16.

[124] Alberta Act, s. 16.

more harm than good. The rule was based on the significance of the change in circumstances. However, in today's society it is no longer clear why the rule should operate.

RECOMMENDATION No. 8
The *Wills Act* should no longer provide that all existing wills are revoked by law when a testator enters into an adult interdependent partnership agreement.

F. Should a Will be Revoked When a Testator's Marriage Ends?

1. Gifts to former spouse

[89] At present, the end of a marriage has no effect on a testator's will. As a result, unless a testator takes some positive action to change or revoke the will, it will remain in effect even after a divorce is final and the division of matrimonial property is complete. In comparison, many other common law jurisdictions have provided for partial revocation on divorce.[125] Under partial revocation, any gift to the testator's former spouse is revoked as though the former spouse predeceased the testator. Partial revocation generally takes effect when the appeal period for the divorce judgment expires. Partial revocation also applies if the marriage ended by a decree of nullity or is found to be void.

[90] ALRI has previously consulted on and made recommendations on whether ending a marriage should have an effect on a testator's will.[126] A recent consultation conducted by Alberta Justice shows that there continues to be strong support from both the public and legal professionals for revoking gifts to a former

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[125] This includes some American states, England, Australia, and New Zealand. In addition, this approach was proposed by the Uniform Law Conference of Canada in 1978, Uniform Wills Act, s. 17(2). See Saskatchewan, Revocation Report at 15; Alberta 1994 Report at vi; British Columbia 1996 Act, s.16; Ontario Act, s. 17(2); Manitoba Act, s. 18; Saskatchewan Act, s. 19; Nova Scotia Act, 19A; Prince Edward Island Act, s. 69(1). The British Columbia 2009 Act, s. 56 continues partial revocation on divorce.

[126] Alberta 1994 Report at 10-11, 31.

spouse.[127] Accordingly, we take this opportunity to reiterate our previous recommendation in favour of partial revocation.

[91] We had recommended that partial revocation would be subject to specific exceptions. One of those exceptions was that partial revocation would not apply if it appeared from the will that the testator intended the provision to be construed in the same manner that it would have been if the marriage had not ended. However, since that 1994 recommendation, ALRI has done further work regarding the use of extrinsic evidence to determine the testator's intent. In light of that later work, we would revise our earlier recommendation and would not limit the exception to require some form of declaration in the testator's will. The court should be able to examine extrinsic evidence to assist in determining the testator's contrary intention.[128]

2. Appointments giving the former spouse control over property

[92] In addition to recommending revocation of gifts, ALRI also recommended that any appointment of the testator's former spouse as executor or trustee or any power of appointment in favour of the former spouse should also be revoked. We reiterate these recommendations.[129]

RECOMMENDATION No. 9

Subject to contrary intention of the testator, where the testator's marriage ends in divorce or is found to be void or a nullity, any provision in the testator's will that

a. gives a beneficial interest in property to the former spouse,

b. appoints the former spouse as executor or trustee, or

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[127] Alberta Justice, *Succession Law Reform Stakeholder Consultation: Summary of Input* (October, 2009) online at <http://justice.alberta.ca/initiatives/Pages/default.aspx>. ALRI held consultations with members of the Canadian Bar Association Wills, Estates and Trusts subsection and there was strong majority support for revocation on the end of marriage or the end of an adult interdependent partnership agreement.

[128] See Chapter 5.

[129] Alberta 1994 Report at 31.

c. gives the former spouse a general or special power of appointment

should be construed as if the former spouse has predeceased the testator.

3. Partial revocation on the end of marriage and failed gifts

[93] As discussed in Chapter 7, ALRI has proposed a statutory scheme that would substitute another beneficiary should a gift fail. A gift fails if the intended beneficiary is unable to inherit for various reasons, including that the beneficiary has predeceased the testator. As discussed in this chapter, partial revocation operates by deeming the former spouse to have predeceased the testator.[130] This section considers whether the proposed distribution scheme should apply to find a substitute beneficiary when a former spouse is deemed to have predeceased the testator.

[94] For example, Henry and Yvonne have been married for ten years. They have two daughters. Henry also has a son from a previous relationship. Yvonne's will leaves her entire estate to Henry but if Henry predeceases her then her estate goes to her brother George in trust for her two daughters. Henry's will gives ¾ of his estate to Yvonne and ¼ to his son. Henry's will divides any residue equally among his three children.

[95] If Henry and Yvonne divorce, each spouse will be deemed to have predeceased the other. If ALRI's proposed distribution scheme applies, Yvonne's estate will pass to the alternate beneficiary, namely, to her brother George in trust for her two daughters. In contrast, Henry has not named an alternate beneficiary and so the gift to Yvonne passes into residue to be divided among the three children.[131] As a result, each daughter will inherit ¼ of the estate and Henry's son will inherit ½ the estate. If the proposed distribution scheme does not apply, the results would also be the same. The goal of the distribution scheme is to follow the

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[130] Alberta 1994 Report at 31.

[131] The distribution scheme gives priority first to an alternate beneficiary. If there is no alternate, the next level of the distribution scheme only applies if the predeceased beneficiary was also the testator's issue. In the current context, this category is not relevant given the prohibitions on marrying one's own issue: *Marriage (Prohibited Degrees) Act*, S.C. 1990, c. 46.

testator's intention while filling gaps that the testator did not anticipate. Thus, there is no reason to exclude the proposed distribution scheme when a former spouse is deemed to have predeceased the testator.

RECOMMENDATION No. 10
The proposed statutory distribution scheme for failed gifts should apply when a former spouse is deemed to have predeceased the testator.

G. Should a Will be Revoked When a Testator Ceases to be an Adult Interdependent Partner?

1. End of an adult interdependent relationship

[96] An adult interdependent partnership may be ended in one of the following ways:[132]

- One of the partners marries another person.
- One of the partners enters an adult interdependent partnership agreement with another person.
- The partners live separate and apart for at least one year, provided that one or both intends to end the partnership.
- The partners have a written separation agreement declaring their intent to live separate and apart without the possibility of reconciliation.
- One or both partners obtain a declaration of irreconcilability under the *Family Law Act*, s. 83.

Under the current law, the first two situations already revoke a testator's will in its entirety. However, that will not be the case under ALRI's proposed recommendation with respect to revocation by marriage. The question to be discussed below is how the end of an adult interdependent partnership, whether by agreement or ascription, should affect a testator's will.

[97] Ending an adult interdependent partnership by living separate and apart may make it difficult to determine when revocation may affect the testator's will. However, evidentiary problems are not a sufficient reason to differentiate between

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[132] *Adult Interdependent Relationships Act*, S.A. 2002, c. A-4.5, s. 10.

types of relationships. Further, revocation by living separate and apart is already provided for in other jurisdictions. In Manitoba, the testator's will is revoked if the parties have lived separate and apart for at least three years.[133] Similarly, in Saskatchewan a testator's will is revoked if the testator has "ceased to cohabit in a spousal relationship for at least 24 months."[134] If Alberta were to extend partial revocation to adult interdependent partnerships, the corresponding time period could be as short as one year. This result may seem somewhat short in comparison to the two or three years allowed in Manitoba and Saskatchewan respectively. However, under the *Adult Interdependent Relationships Act*, one year of living separate and apart is sufficient to end the partnership, provided that at least one of the partners has the intent to end the partnership.[135]

[98] In contrast to the evidentiary problems associated with living separate and apart, written separation agreements and declarations of irreconcilability are formal, dated documents. As such, it is an easy matter to determine whether and when revocation may affect the testator's will. However, written separation agreements and declarations of irreconcilability are also available to married couples and their use will not have any effect on a testator's will. The reason for this is that these documents do not end a marriage – they are only interim steps.[136] With respect to adult interdependent partnerships, however, they are final documents that legally end the partnership. While it might appear inconsistent to provide that separation agreements and declarations of irreconcilability will trigger revocation in adult interdependent partnerships but not marriage, the distinction is based on the legal result that the documents have on the relationship.

[99] Regardless of how they are created, Alberta legislation treats adult interdependent partnerships equally. Just as there is no basis for treating adult

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[133] Manitoba Act, s. 18(4).

[134] Saskatchewan Act, s. 19.

[135] *Adult Interdependent Relationships Act*, S.A. 2002, c. A-4.5, at s. 10. British Columbia 2009 Act, ss. 2(2) and 56 will see revocation by law apply where one partner terminates the relationship. No period of living apart is required.

[136] Further, as marriage is a matter of federal jurisdiction, marriage cannot be ended by means provided in provincial legislation such as the *Family Law Act*, S.A. 2003, c. F-4.5.

interdependent partnerships differently in wills law based on how they are created, neither should they be treated differently based on how they are ended. Nor is there any basis to distinguish between adult interdependent partnerships and marriages with respect to the consequences of ending the relationship. In all cases, the legal ending of the relationship should have the effect of revoking any gifts to the former adult interdependent partner. Moreover, any appointment giving the former adult interdependent partner power over property should be revoked. Following the recommendation we made in the context of divorce, partial revocation at the end of an adult interdependent partnership should be achieved by deeming the former partner to have predeceased the testator.

RECOMMENDATION No. 11

Subject to contrary intention of the testator, where an adult interdependent partnership has ended under the *Adult Interdependent Relationships Act,* any provision in the testator's will that

a. gives a beneficial interest in property to the former partner,

b. appoints the former partner as executor or trustee, or

c. gives the former partner a general or special power of appointment

should be construed as if the former partner has predeceased the testator.

2. Failed gifts and former adult interdependent partners

[100] As discussed earlier, ALRI has proposed a statutory scheme that would substitute another beneficiary should a gift fail. A gift will fail where a former adult interdependent partner is deemed to have predeceased the testator. Where this occurs it is appropriate to resort to the distribution scheme to find a substitute beneficiary. The scheme will operate the same way for former adult interdependent partners as it does for former spouses. Accordingly, there is no reason to exclude the proposed distribution scheme when a former partner is deemed to have predeceased the testator.

RECOMMENDATION No. 12
The proposed statutory distribution scheme should apply when a former adult interdependent partner is deemed to have predeceased the testator.

[101] However, as discussed in the next section, the proposed distribution scheme will not be triggered where the former adult interdependent partners are also relatives by blood or adoption as they will not be deemed to have predeceased each other.

3. Partial revocation and former adult interdependent partners who are relatives by blood or adoption

[102] While Alberta legislation treats adult interdependent partnerships equally and, in most respects, treats adult interdependent partnerships and marriages equally, there is an important area of difference that needs to be considered. While marriage is prohibited between certain family members, there is no such prohibition for adult interdependent partnerships.[137] To the contrary, the *Adult Interdependent Relationships Act* expressly allows relatives by blood or adoption to become adult interdependent partners by agreement.[138] Accordingly, there will be instances where former adult interdependent partners continue to share a family relationship after the partnership ends. Should partial revocation apply to revoke any gifts or appointments in favour of such family members?

[103] Succession law extends rights to family members that are not available to others outside the family unit. While spouses and adult interdependent partners are accorded rights under the Alberta Intestate Act and the *Dependants Relief Act*, those rights are contingent on their status as spouse or partner. When that status

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[137] The *Marriage (Prohibited Degrees) Act*, S.C. 1990, c. 40 codifies Canadian law regarding the prohibition of marriage between family members. Section 5.2(2) of the Act only prohibits marriage between parties who are "related lineally, or as brother or sister or half-brother or half-sister, including by adoption."

[138] The *Adult Interdependent Relationships Act*, R.S.A. 2000, c. A-4.5 states:

> 3(2) Persons who are related to each other by blood or adoption may only become adult interdependent partners of each other by entering into an adult interdependent partner agreement under section 7.

ends so too does their entitlement.[139] However, a former adult interdependent partner who is a relative by blood or adoption may still have a claim under the Alberta Intestate Act or the *Dependants Relief Act* by virtue of their family status. Indeed, aside from writing a will, there are few options available that would allow someone to sever the family relationships that are the basis for intestate succession and dependants relief.[140]

[104] On balance, we consider that it would be inappropriate for partial revocation to apply where former adult interdependent partners are also relatives by blood or adoption. In reaching this conclusion, we recognise that succession law accords specific rights to family members. It would be inconsistent to provide that ending an adult interdependent partnership should revoke any gifts or appointments that benefit a family member. Indeed, in some cases that result would lead to hardship and would require the "disinherited" family member to bring a claim for dependants relief. If the testator wishes to revoke any gifts to the family member, the testator will have to deliberately change the will.

RECOMMENDATION No. 13
Where adult interdependent partners are relatives by blood or adoption, they should not be deemed to have predeceased each other if they cease to be adult interdependent partners.

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[139] Neither the Alberta Intestate Act nor the *Dependants Relief Act*, R.S.A. 2000, c. D-10.5 extend to former spouses or adult interdependent partners.

[140] And those that do exist are strictly limited. See for example the *Child, Youth and Family Enhancement Act*, R.S.A. 2000, c. C-12, s. 73.1 re termination of adoption orders.

CHAPTER 4. REVIVING A REVOKED WILL

A. Introduction

[105] A will that has been revoked may be brought back into existence by revival. Section 20 of the Alberta Act provides:

> **Revival of will**
>
> **20(1)** A will or part of a will that has been in any manner revoked is revived only
>
> (a) by re-execution of it with the required formalities, if any, or
>
> (b) by a codicil that has been made in accordance with this Act that shows an intention to give effect to the will or part that was revoked.
>
> (2) Except when a contrary intention is shown, if a will which has been partly revoked and afterward wholly revoked, is revived, the revival does not extend to the part that was revoked before the revocation of the whole.

[106] This provision is substantially the same as the original England Act provision.[141] Revival has attracted little law reform attention since 1837. Where law reform agencies have considered it, they have opted for its retention with only cursory discussion.[142]

[107] This chapter considers revival within the framework used to discuss changes to wills in Chapter 2 and that of wills creation.[143] Where revival involves reviving a revoked testamentary document, with alterations, it has much in common with the law that governs changing a will. Revival also brings a will into existence and must satisfy the formalities for will creation.

[108] Under the current Alberta wills legislation, testators have only two options for reviving a will. One, revival by a codicil made in accordance with the formalities for execution showing the testator's intention to give effect to the revoked will. Two, revival by re-executing the will with the prescribed formalities

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[141] England Act, s. 22.

[142] See for example Australia Uniform Report at 38.

[143] Albert Report 2009.

for making a will. This chapter reviews each of these options and also considers whether each satisfies the formalities for creating a will. This chapter also considers the effect of reviving a will that has been destroyed. Finally, it considers whether a statutory warning is needed to clarify that the revocation of a will does not revive any preceding testamentary document which that will revoked.

B. Should the *Wills Act* Provide for Revival by Will or Codicil?

[109] As noted above, s. 20(1)(b) of the Alberta Act provides for revival by a codicil executed with the relevant formalities under the Act. In contrast to Alberta, wills legislation in other Canadian jurisdictions provides for revival either by codicil or by will.[144] While historically codicils were distinct from wills and other testamentary documents, that distinction has eroded over time. Under the current Alberta Act, the formalities for execution of a codicil are the same as those required for the creation of wills. Accordingly, ALRI considers that the distinction between a "will" and a "codicil" in s. 20 of the Alberta Act is no longer justified.

[110] Further, the definition of "will" under the Act is broad and includes a codicil or other testamentary disposition. ALRI considers that there is no reason to distinguish between a revival by a "will", "codicil" or other testamentary writing provided the formalities under the Act are met. For this reason, the term "will" as currently defined in s. 1(b) of the Alberta Act will be used throughout this chapter to refer to the reviving document.

[111] Section 20(1)(b) of the Alberta Act also requires that the codicil "show" an intention to revive. Before the English Act, a mere reference in a codicil to a revoked will was sufficient to revive the revoked will.[145] This led, however, to unintended consequences and was addressed by adding the requirement that the codicil show an intention to revive.[146] Elsewhere, the Alberta Act uses clearer language than "show" to ensure that evidence of intention is found within the will

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[144] British Columbia 1996 Act, s. 18; British Columbia 2009 Act, s. 57; Saskatchewan Act, s. 20; Manitoba Act, s. 20; Ontario Act, s. 19; New Brunswick Act, s. 19.

[145] Lord Mackay of Clashfern, ed., *Halsbury's Laws of England*, 4th ed. reissue, vol. 50 (London: Lexis Nexis Butterworths, 2005) at "Wills", at § 402, n. 1.

[146] A.H. Oosterhoff, *Ooterhoff on Wills and Succession: Text, Commentary and Materials*, 6th ed., (Toronto: Carswell, 2007) at 358 [Oosterhoff].

itself.[147] Nevertheless, the courts have interpreted "show" in s. 20 as requiring an intention that is expressed on the face of the codicil.[148]

[112] This raises the question as to whether wills legislation should require that an intention to revive be limited to the reviving document or whether extrinsic evidence of the testator's intent should be considered. In keeping with recommendations made in Chapter 5 of this Report, ALRI considers that extrinsic evidence should be considered to determine whether the testator had the intention to give effect to a revoked will. This conclusion is also consistent with our previous recommendation that the dispensing power should apply to revival.[149] Accordingly, we recommend that a court must be satisfied on clear and convincing evidence that the testator intended to give effect to the revoked will.

RECOMMENDATION No. 14
The *Wills Act* should provide that a revoked will can be revived by a will that
a. is made in accordance with the Act, and
b. satisfies a court that the testator intended to revive the revoked will.

C. Should the *Wills Act* Provide for Revival by Re-execution?

[113] In addition to revival by a codicil, s. 20 provides that a revoked will in Alberta may be revived by re-execution in accordance with "the required formalities, if any."[150]

[114] In Canada, the provinces of Nova Scotia, Prince Edward Island and Newfoundland and Labrador and all three territories provide similarly that a will

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[147] For example, Alberta Act ss. 21-28, 30 and 33-37 all require a contrary intention expressed in or by the will. See also ss. 16-17.1, which require a declaration in the will.

[148] See *MacDonnell v. Purcell* (1894), 23 S.C.R. 101; *McKay Estate, Re* (1953), 9 W.W.R. (N.S.) 612, [1953] 3 D.L.R. 224 (B.C.S.C).

[149] Alberta 2000 Report at 46.

[150] Revival by re-execution is also allowed by Ontario Act, s. 19; Nova Scotia Act, s. 21; Prince Edward Island Act, s. 74; Newfoundland Act, s. 13; Northwest Territories Act, s. 13; Nunavut Act, s. 13; Yukon Act, s. 12.

may be revived by re-execution.[151] The England Act also provides for revival by re-execution.[152] The same is true in all Australian jurisdictions.[153]

[115] Conversely, in British Columbia, Saskatchewan, Manitoba, Ontario and New Brunswick, re-execution has no effect on a previously revoked will. Instead, a will may only be revived by another will or a codicil showing "an intention to give effect to the will or part that was revoked."[154] There is little written on what has driven these jurisdictions to move away from revival by re-execution, but the statutes do not prohibit probate of wills which have been executed more than once.

[116] In 2007, the New Zealand government amended its wills legislation replacing revival by re-execution with revival by a will that "complies with s. 11 [formalities for execution] again."[155] As such, the statute has detached itself from the concept of "re-execution." Instead, it allows for probate of a will which has complied with the formalities for execution of a valid will on more than one occasion.

1. Formalities for re-execution

[117] The first question to consider is whether the formalities for the re-execution of a will are any different from those required to execute a will? The Alberta legislation does not define re-execution or execution of a will; rather, it outlines the prescribed formalities which must be observed to create a valid will. The Alberta Act imposes different formalities depending on the type of will.

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[151] This chapter refers to this as the Alberta approach; it permits revival by re-execution and by a codicil showing intention to revive: Alberta Act, s. 20(1); Nova Scotia Act, s. 21; Prince Edward Island Act, s. 74; Newfoundland Act s. 13(1); Northwest Territories Act, s. 13(1); Nunavut Act, s. 13.1; Yukon Act, .S.Y. 1986, c. 179, s. 12(1).

[152] This, in addition to revival by a codicil showing intention to revive: England Act, s. 22.

[153] Australian Capital Territory Act, s. 22(1); New South Wales Act, ss. 15(1), (3); Northern Territory Act, s. 17(1); Queensland Act, ss. 17(1), (3); South Australia Act, s. 25(1); Tasmania Act, S. 27(1); Victoria Act, s. 16(1); Western Australia Act 2, s. 16(1).

[154] British Columbia 1996 Act, s. 18(1); British Columbia 2009 Act, s. 57(1); Saskatchewan Act, s. 20(1); Manitoba Act, s. 20(1); Ontario Act, s. 19(1) and New Brunswick Act, s. 19(1). See also, Uniform Wills Act, s. 19(1).

[155] New Zealand Act, s. 17(1)(a). There are no cases dealing with the interpretation of this provision.

[118] As discussed in Chapter 2, formal wills may only be changed in accordance with the formalities for formal wills and holograph wills in accordance with holograph formalities.[156] In order to be consistent and to avoid the potential for fraud, if we insist that testators follow the formalities for their chosen type of will in order to make changes, those same formalities should apply if the testator wants to bring a will or parts of a will back into existence. Anything that falls short of meeting the formalities under the Act would have to be considered under the dispensing power to take effect.

2. Intent to revive

[119] The second question to consider is that of intent. Evidence of intent is not required for revival by execution, in stark contrast to revival by will or codicil: "...the fact of re-execution shows the testator intended to revive it."[157] Consequently, revival will occur on re-execution, unless a contrary intention is proven.

[120] The question of what the testator intended underlies the potential for confusion between re-execution for revival and re-execution for other means. For example, a will may be re-executed simply to change the date from which it is effective.[158] Or a testator may choose to re-execute a will with new witnesses if the original witnesses are also beneficiaries under the will. However, by virtue of s. 20, since no evidence of intention is required, re-execution for other purposes may still result in revival.

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[156] For a formal will, a testator must sign the will in the presence of two witnesses who themselves must sign in the presence of the testator (Alberta Act, s. 5). For a holograph will, a testator must re-sign the will.

[157] Lord Mackay of Clashfern, ed., *Halsbury's Laws of England,* 3rd ed., vol. 39 (London: Butterworth & Co. , 1962) at "Wills" § 1371, cited with approval in *Re MacKinlay Estate* (1993), 50 E.T.R. 136 at para. 17 (N.S.S.C) .

[158] For example, the Alberta Act, s. 2 allows a testator to re-execute, republish or revive a will by codicil in order to bring forward the date of the will so that it falls within the Act's application. While little use is made of re-execution for this purpose today as the Act has been in effect since 1960, re-execution will again be a common means to bring forward a will's date when new wills legislation is passed. Other jurisdictions also apply re-execution more broadly to allow for bringing forward the date of a will for purposes other than the application of a specific act. See for example British Columbia 1996 Act, s. 20; Manitoba Act, s. 22; New Brunswick Act, s. 21; Ontario Act, s. 21.

3. Probate

[121] A document executed with the prescribed formalities under the Alberta Act becomes a valid will on the date of execution. This is true whether the will is a newly generated document or a re-executed document. At probate, however, a will created by re-execution is treated differently from a newly generated will concerning alterations and concerning sequentially revoked wills.

a. Revival of an altered will

[122] A special rule has developed for wills revived by re-execution which contain alterations on their face.

[123] The general rule of construction presumes that any alteration on the face of a valid will was made after the will was executed.[159] As such, to be probated as part of the will, the alteration must be executed with the prescribed formalities for execution. As discussed in Chapter 2, this aids in protecting a will from unintended or fraudulent changes to content.

[124] The same protection, however, does not extend to wills created by re-execution. Where a previously revoked will is revived by re-execution, the common law presumes that the testator adopts all alterations on the face of the previously revoked will – even those which were originally ineffective because of problems with execution.[160] The rationale behind this difference in treatment is difficult to explain, but appears to have developed for historical reasons related to the time and cost involved in changing a will.

[125] ALRI considers that in today's context, with the widespread use of computers, it is unlikely that unexecuted alterations to a will are intended to form part of that will. A testator wishing to revive a will including alterations can do so either by ensuring the alterations are executed in accordance with the formalities (creating a presumption of intent) or by creating a new document encompassing the changes.

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[159] Oosterhoff at 346. See also Parry & Clark at 141.

[160] See *Neate v. Pickard* (1843) 2 Notes of Cases 406, as cited in Parry & Clark at 149.

b. Revival of sequentially revoked wills

[126] When a testator executes a will, the testator acknowledges its contents and approves the document in the form in which it appears.[161] This leaves little doubt as to intent at the time of execution. At probate, "the intention of the testator is to be collected from the will as a whole, read in its context."[162] The document history is irrelevant to its interpretation – portions of the will drafted first are of no more force and effect than those portions drafted last, so long as all portions are included in the will at the time of execution.[163] This what-you-see-is-what-you -get approach best reflects the testator's intention at the time of execution.

[127] Where a testator re-executes a previously revoked will, however, the what-you-see-is-what-you-get approach no longer applies. Section 20(2) of the Alberta Act states:

> **20(2)** Except when a contrary intention is shown, if a will which has been partly revoked and afterward wholly revoked, is revived, the revival does not extend to the part that was revoked before the revocation of the whole.

This provision presumes that a testator intends to revive only that portion of the document which was most recently revoked unless a contrary intention is shown in the document.

[128] In order to demonstrate a contrary intention, the testator would have to recall or be aware of the document's history. Such history would be obvious where the revocations are marked on the face of the document, but this may not always be the case and could lead to unintended consequences. For example, a testator executes a will in 1950 benefiting his ten siblings in equal shares. Over the next five years, he makes numerous changes to the will by way of codicils, revoking some gifts and substituting others. In 2001, he marries, at which time his will is automatically revoked. In 2005, intending to leave his estate to his ten siblings in equal shares, the testator re-executes his 1950 will, with the prescribed formalities.

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[161] Oosterhoff at 178. If a testator intends to adopt only a portion of the document as a will, the testator must show this intention on the face of the will.

[162] A.H. Oosterhoof, *Oosterhoff on Wills and Succession: Text, Commentary and Materials*, 5th ed. (Scarborough, Ont.: Carswell, 2001) at 417.

[163] This excludes alterations which will take place after the will is executed. For a more detailed discussion of alterations, see Chapter 2.

He does not remember all the previous revocations, nor the order in which some portions of the will were revoked. His intent is to adopt the 1950 will in the form in which it appears, but the end result is that, because of the legislative provision, only the most recently revoked portion becomes the testator's will.

[129] In today's context, the legislative provision for reviving sequentially revoked wills is as likely to work against the testator's intention as it is to fulfill their actual testamentary intention.

[130] ALRI recommends treating all valid wills the same. To achieve this, re-execution as a separate concept should be abolished and replaced with the single unified concept of execution. This means that a will would not be revived by re-execution but rather, would be valid because executing a document for a second time creates a new valid will. A will that is executed more than once may be admitted to probate provided it meets the requirements of the Act. Thus, a document, whether newly drafted or previously revoked, begins its life on the date of execution.

[131] ALRI considers that abolishing re-execution as a separate concept would also do away with the anomalous treatment given to alterations on a re-executed will. A testator wishing to revive a will including alterations can do so either by ensuring the alterations are executed in accordance with the formalities (creating a presumption of intent) or by creating a new document encompassing the changes. Alterations which are not validly executed would not be revived.

[132] ALRI considers that there should be no special rule for revival of sequentially revoked wills.

RECOMMENDATION No. 15

a. The *Wills Act* should not provide for revival by re-execution.

b. The *Wills Act* should expressly provide that a will that is executed more than once may be admitted to probate.

c. The *Wills Act* should not contain a special rule for revival of sequentially revoked wills.

D. Should the *Wills Act* Allow for Revival of a Will Revoked by Destruction?

[133] The Alberta Act states that revival applies to wills "...in any manner revoked...." The same language can be found in s. 22 of the England Act. The courts, however, have held that revival does not apply to a will that has been revoked by destruction.[164] The reasoning reflected the realities of a time when there would only have been one copy of a will and valid revocation demanded total destruction. A will revoked by total destruction could not be revived as there was no physical document to revive.

[134] Today, however, there are likely to be multiple copies of a will and the rationale behind this decision is less compelling. The Manitoba Law Reform Commission considered the modern day application of this rule.[165] They also noted that the case law on this point was at odds with the common law concerning missing wills, which allows for reconstruction of such wills from available evidence.[166] They recommended that the wills legislation "should explicitly permit the revival of wills that have been revoked by destruction if copies or adequate evidence is available to the court to reconstruct the will."[167] To date, their recommendation has not been implemented.

[135] The restriction that one cannot revive a will previously revoked by destruction is equally outdated in Alberta as in Manitoba. Today, individuals and their lawyers keep multiple copies of a will or have other means of reproducing the original will. Accordingly, ALRI recommends amending the Alberta provision in a similar manner to that proposed by the Manitoba Commission.

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[164] *Halsbury's Statutes of England and Wales*, 4th ed. Reissue, (London: LexisNexis Butterworths, 2006) vol. 50, "Wills" at § 20, p. 759.

[165] Manitoba Report at 31.

[166] Manitoba Report at 31.

[167] Manitoba Report at 31.

RECOMMENDATION No. 16
The *Wills Act* should provide that a will revoked by destruction may be revived if the court is satisfied that clear and convincing evidence exists to reconstruct the will.

E. Should the *Wills Act* Include a Warning Provision Regarding Non-revival of Wills?

[136] A will which has been revoked by a later will cannot be revived by the subsequent revocation of that later will. In other words, if Will B revokes Will A, and Will B is then revoked, Will A is not revived.[168] The rationale behind this rule is that a negative act cannot result in a positive effect. If it is the testator's intention to revive Will A, then they should not only express that intention, but take the necessary steps to execute Will A. Although the courts have consistently applied this rule, this is the most common issue to arise before the courts in the revival context.[169]

[137] In *Re Hodgkinson,* the testator executed a will.[170] Some time later, he executed a second will, which revoked the first will. He then destroyed the second will, revoking it with the intention to revive the first will.[171] The court held that the first will was not effectively revived.[172] In essence, a revoked will cannot be revived by destroying the will that revoked it.[173]

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[168] It is important to note that this situation is distinct from the situation where Will B purports to revoke Will A, but Will B is invalid. In such a case, Will A was not effectively revoked and will continue to be in effect. Will B is of no force and effect.

[169] Feeney's at § 6.16.

[170] *Re Hodgkinson*, [1893] P. 339 (C.A.).

[171] See also *Re Ott*, [1972] 2 O.R. 5 (Surr. Ct); *Re Janotta Estate*, [1976] 2 W.W.R. 312 (Sask. Surr. Ct.).

[172] A similar principle operates within statutory interpretation. The *Interpretations Act*, R.S.A. 2000, c. I-8, s. 35(1)(a) provides: "When an enactment is repealed in whole or in part, the repeal does not revive an enactment or thing not in force or existing immediately before repeal takes place."

[173] This is in keeping with s.20(1) of the Alberta Act.

[138] Although this issue has arisen in most common law jurisdictions, none have legislated an express warning provision. Similarly, the issue has had no other law reform consideration. Nonetheless, we recommend adopting a provision with respect to the non-revival of wills. It will serve as a warning to testators and their counsel and may reduce the number of cases on this issue.

RECOMMENDATION No. 17
The *Wills Act* should include a provision expressly stating that revoking a will, which revoked an earlier will, does not have the effect of reviving the earlier will.

CHAPTER 5. ADMISSION OF EXTRINSIC EVIDENCE

A. Introduction

[139] The admission of extrinsic evidence by the court can be very important to the interpretation of a will. The law in Alberta on admission of extrinsic evidence is based on the common law. From the earliest period in the development of the common law to the present day, the common law has wrestled with balancing the intention of the testator as evidenced by the language in the will and the goal of giving effect to the intentions of the testator. An integral part of this struggle has been the extent to which evidence of surrounding circumstances or statements made by the testator should be allowed to shed light on the wording used in the instrument itself.

[140] For over 200 years, two different approaches to the interpretation of wills and the admission of extrinsic evidence have co-existed in the case law. These approaches differ in the extent to which it is felt appropriate to look at evidence of surrounding circumstances at the time of the making of the will. Under both approaches, the admission of evidence of the testator's intentions is severely restricted. To complicate matters further, the fact that there are two approaches has not always been clearly understood by the courts and the legal profession. Some courts have used one approach or the other consistently, while other courts have wavered between the two approaches.

[141] This is an area in which the need for reform has been recognized for many years. This chapter will discuss the options for reform of the law and make recommendations.

B. Historical Background

1. Introduction

[142] In interpreting a disputed will, any discussion of the parameters of the admission of extrinsic evidence or indeed, whether extrinsic evidence should be admitted at all, is intimately tied to the overall approach to construction taken by the court. To a large extent, the nature of the admissible extrinsic evidence governs

the extent to which a court may search for and arguably, give effect to, the intentions of the testator.

[143] As already noted, two approaches have been favoured by English and Canadian courts. One approach focuses on attempting to give similar results in similar cases. This is the literal, objective or strict constructionist approach. Under this approach, the court concentrates its attention on the ordinary meaning of the words used by the will-maker and tends to exclude extrinsic evidence. The other approach, termed the subjective or intentional approach, concentrates on giving effect to the intentions of the testator and favours admission of extrinsic evidence. In this chapter, the terms "objective" and "intentional" will be used to describe these two approaches.

[144] It has been clear since the mid-19th century that the two approaches were being used by the courts, either singly or in combination.[174] The objective approach was logically articulated by Sir James Wigram in his classic treatise on the admission of extrinsic evidence in 1831.[175] The intentional approach was outlined by Francis Hawkins in the mid-1860s.[176] Many English courts in the 17th century followed an intentional approach, but the objective approach gained ground in the 18th century. From the early 19th century, most judges in England seemed to prefer the objective approach.[177] The preference for the objective approach may have been due in part to the vagaries of the 19th century court system which allowed a will to be litigated numerous times in different courts and left

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[174] Francis Hawkins published a lecture on the topic in the mid 1860s. Roger Kerridge & Julian Rivers, "The Construction of Wills" (2000) 116 Law Q. Rev. 287 at 287.

[175] James Wigram, *An Examination of The Rules of Law, respecting the Admission of Extrinsic Evidence in aid of the Interpretation of Wills*, 5th ed. by Charles Percy Sanger (London: Sweet and Maxwell, 1914). Wigram's propositions were first published in 1831. United Kingdom, Law Reform Committee, *Interpretation of Wills*, 19th Report (1973) at para 4 [England 1973 Report].

[176] See above at note 174. Hawkins also published a book on the construction of wills in the mid-1860s.

[177] Roger Kerridge, *Hawkins on the Construction of Wills*, 5th ed. (London: Sweet and Maxwell, 2000) at 20 [Hawkins].

construction questions to be decided by juries in many cases.[178] However, while the English courts showed a preference at times for one of the two approaches, neither approach was ever followed consistently by all courts. Further, in many instances, courts ostensibly following the objective approach adopted the intentional approach to avoid injustice. The reverse was also true. Courts holding out an adherence to the intentional approach would interpret a will objectively.[179]

[145] The result, it is fair to say, is a body of case law which is illogical and inconsistent. The situation is summed up very well by Roger Kerridge.

> A relatively small group have consistently adopted a literal approach; a smaller group have consistently adopted an intentional approach, but most have either shifted between the two approaches in what may seem to be a haphazard fashion or, worse still, have attempted to apply both approaches at the same time or to pretend that one of the two approaches is the same as the other. This is completely confusing.[180]

[146] Many disputes over the meaning of a will arise because one party takes an objective approach and the other party adopts an intentional approach.[181] Conflicts are often about the alleged intentions of the testator versus the ordinary meaning of the words used in the will. In many cases, admission of extrinsic evidence under either approach will lead to the same result. However, this is not true for all cases and the ultimate outcome may be determined by the available evidence.[182]

[147] As discussed in more detail later in this chapter, the confusion over the proper approach has extended to Canada. It can be argued that the case law from the Supreme Court takes a traditional objective approach. The trend in recent case law, particularly in western Canada, has been to favour an intentional approach.[183]

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[178] Law Reform Commission of British Columbia, *Report on Interpretation of Wills*, Report No. 58 (1982) at 16-17 [British Columbia 1982 Report].

[179] Hawkins at 23.

[180] Hawkins at 22.

[181] Roger Kerridge & Julian Rivers, "The Construction of Wills" (2000) 116 Law Q. Rev. 287 at 288.

[182] Hawkins at 22.

[183] Feeney at §10.7; Oosterhoff at 482-483.

However, a leaning toward the objective approach still prevails, most notably, in recent decisions of the Newfoundland and Labrador Court of Appeal.

[148] The uncertainty in the law led to the English Law Reform Committee to call for reform in 1973. Other law reform agencies have also outlined the necessity for legislative change. In Canada, both the Manitoba and British Columbia law reform agencies have concurred with the need for law reform.

[149] In 1982, England passed legislation which appeared to mandate an intentional approach to construction. This legislation has provided the model for law reform in other common law jurisdictions.[184] However, it can be argued that the objective approach still holds sway in England and that the *Administration of Justice Act 1982* did little to change the prevailing mode of interpretation.[185]

[150] The uncertainty in the case law mandates that some form of legislation should be enacted in Alberta to clarify the circumstances in which extrinsic evidence may be admitted as an aid to the interpretation of wills. However, there are a number of different options and underlying policy choices.

2. The objective approach

> What is literalism? This is straightforward. The tyrant Temures promised the garrison of Sebastia that no blood would be shed if they surrendered to him. They surrendered to him. He shed no blood. He buried them all alive.[186]

[151] The focus of the objective approach is on the language used in the will. It is presumed that the intention of the testator can be found by looking at the language

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[184] New South Wales Act, s. 32; New Zealand Act, s. 32; Northern Territory Act 2000, s. 31; *Succession Amendment Act 2006* (Qld.), s. 33C; Victoria Act, s. 36; Western Australia Act s. 28A; British Columbia 2009 Act, c. 13.

[185] *Administration of Justice Act 1982* (U.K.), c. 53, s. 21; Hawkins at 28.

[186] William Paley, *The Works of William Paley* (1838) Vol. III at 60, as paraphrased by Johan Steyn, "The Intractable Problem of the Interpretation of Legal Texts" (2003) 25 Sydney L. R. 5 at 7.

of the will.[187] Sir James Wigram clearly outlined the objective approach in 1831.[188] As the English Law Reform Committee said "... Wigram's propositions are the nearest approach to codification of this branch of the law ever achieved."[189]

[152] Wigram outlined the law under seven propositions. The first two propositions state that the words in the will must be given "their strict and primary acceptation" subject to the dictionary principle. The meaning of the words in the will is that which would be given to them by the ordinary person.[190] Under the dictionary principle, if it is clear from other parts of the will that the words have been used in a different sense, then the words may be interpreted in that way.[191] Under the third proposition, where words do not have any effect, a popular or secondary meaning can be used.[192] The fourth proposition covered wills drafted in foreign languages. The use of the "armchair rule" was outlined under the fifth proposition. Here, evidence of the circumstances surrounding the testator at the date of the making of the will could be admitted to establish a link between the word and a person or object.[193] Under the sixth and seventh propositions, evidence of a testator's dispositive intent could be admitted to resolve latent ambiguities, for example, where the will left a gift to "my niece Anne Smith" and the testator had two or more nieces named Anne Smith.[194]

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[187] Feeney at §10.3.

[188] James Wigram, *An Examination of The Rules of Law, respecting the Admission of Extrinsic Evidence in aid of the Interpretation of Wills,* 5th ed. by Charles Percy Sanger (London: Sweet and Maxwell, 1914).

[189] England 1973 Report at para. 4.

[190] Hawkins at 25.

[191] Hawkins at 29.

[192] England 1973 Report at paras. 5-6.

[193] Hawkins at 33.

[194] Oosterhoff at 474; England 1973 Report at para. 7.

[153] With respect to the "armchair rule," surrounding circumstances were only looked at to establish a reference point.[195] Once a person or object satisfying the description in the will was found, no further evidence of surrounding circumstances was accepted.[196] However, this principle has been extended in the case law to include evidence of surrounding circumstances to determine the sense of a word as well as its reference.[197]

[154] *Theobald on Wills* is often quoted as to the appropriate procedure under the objective approach:

> The procedure is not – first ascertain the surrounding circumstances and with that knowledge approach the construction of the will, but first construe the will; if the meaning is clear, surrounding circumstances cannot be looked at to throw a doubt upon that meaning, or to give the will a different meaning.[198]

[155] A classic example of the operation of the objective approach can be found in *Re Hodgson*. In that case, the testatrix had an estate composed primarily of stocks and shares. She was illegitimate and knew that any part of her estate that was not disposed of under the will would go to the Crown. Her gifts used the term "money." The court held that the ordinary meaning of the word "money" meant cash and did not include stocks and shares.[199]

3. The intentional approach

[156] The basic premise of the intentional approach is that the object of the construction exercise should be to determine the testator's subjective intent. The court considers the words of the will in conjunction with the surrounding circumstances. The extrinsic evidence is used to explain the testator's words. It is

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[195] Roger Kerridge & Julian Rivers, "The Construction of Wills" (2000) 116 Law Q. Rev. 287 at 295.

[196] Feeney at §11.47.

[197] England 1973 Report at para 5; Francis Barlow *et al.*, eds. *Williams on Wills*, 9th ed. (London: LexisNexis Butterworths, 2008) at v. 1, 611 [Williams 2008].

[198] Quoted with approval by the Supreme Court of Canada in *Tottrup v. Patterson*, [1970] S.C.R. 318 at para. 11.

[199] *Re Hodgson,* [1935] All E.R. 161 (Ch. D.) 203.

only possible to give effect to an intention which is express or implied. The court cannot write the will for the testator.[200]

[157] Francis Hawkins advocated an intentional approach in a lecture given in 1860 and in a text published in 1863.[201] The lecture strongly advocated the intentional approach, but his views were ignored for many years. In the textbook, he used very careful language, with the result that many lawyers thought he was in support of the traditional objective approach.[202] His fourth proposition was the central one. It stated that:

> ...the intention of the testator, which can be collected with reasonable certainty from the entire will, with the aid of extrinsic evidence of a kind properly admissible, must have effect given to it, beyond, and even against, the literal sense of particular words and expressions. The intention, when legitimately proved, is competent not only to *fix* the sense of ambiguous words, but to control the sense of even clear words, and to supply the place of express words, in cases of difficulty or ambiguity [emphasis in original].[203]

[158] Prior to the *Administration of Justice Act 1982*, English courts taking an intentional approach often did so under the guise of using the Wigram rules, letting in evidence of surrounding circumstances to determine the "sense" of the wording in the will.[204] Canadian courts have developed their own version of the intentional approach. Under this approach, the will itself is the "guiding star."[205] The meaning of words is to be found in the meaning the words had for the testator. This is in accordance with general theories of language that "[l]anguage can never be understood divorced from its context."[206] However, under this approach, technical

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[200] British Columbia 1982 Report at 9.

[201] The lecture was published in either 1863 or 1865. Roger Kerridge & Julian Rivers, "The Construction of Wills" (2000) 116 Law Q. Rev.287 at 287; Hawkins at 21. The text was called Concise Treatise on the Construction of Wills. Hawkins at 21.

[202] Hawkins at 37.

[203] Hawkins at 37.

[204] Hawkins at 31-32.

[205] Feeney at §11.103.

[206] Johan Steyn, "The Intractable Problem of The Interpretation of Legal Texts" (2003) 25 Sydney L. Rev. 5 at 6.

legal words and statutory definitions are construed in accordance with their usual meaning.[207] The admission of evidence of surrounding circumstances is not dependent upon a finding of an ambiguity on the face of the will as in the objective approach. The court takes account of surrounding circumstances either before or after studying the language of the will.[208]

[159] Thus, an ambiguity not apparent on the face of the will may be found in the surrounding circumstances.[209] Two examples illustrate how this might occur. A testator leaves his estate "to mother." When the testator dies, his mother is alive. An examination of the surrounding circumstances shows that he habitually referred to his wife as "mother." In another example, the testator leaves her estate to her three children: A, B and C. Between the time of the making of the will and the testator's death, C changes his name to D. In both these hypotheticals, the wording of the will would seem clear until the surrounding circumstances were looked at.

[160] Proponents of the intentional approach take the view that unless the words of the will are read in conjunction with the surrounding circumstances, a court may not give effect to the testator's intentions.[210] The proper approach to be taken under the intentional approach was articulated in *Re Burke*:

> Each judge must endeavour to place himself in the position of the testator at the time when the will was made. He should concentrate his thoughts on the circumstances which then existed and which might reasonably be expected to influence the testator in the disposition of his property. He must give due weight to those circumstances in so far as they bear on the intention of the testator. He should then study the whole contents of the will and, after full consideration of all the provisions and language used therein, try to find what intention was in the mind of the testator.[211]

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[207] Feeney at §10.3.

[208] A.H. Oosterhoff, *Oosterhoff on Wills and Succession: Text, Commentary and Materials,* 6th ed. (Toronto: Thomson Carswell, 2007) at 477.

[209] Doug Surtees, "Procedure B is for Bayda" (2007) 70 Sask. L. Rev. 259 at 260.

[210] Feeney at §11.67.

[211] *Re Burke* (1959), [1960] O.R.26 at 30 (C.A.).

4. Admission of evidence of surrounding circumstances

[161] Under the common law, whether the court uses the objective approach or the intentional approach, evidence of surrounding circumstances is admitted where appropriate. This is often called the "armchair rule." The court sits in the armchair of the testator in order to assess the surrounding circumstances.

[162] What type of extrinsic evidence may be admitted under the armchair rule? The evidence must concern surrounding circumstances at the time the will was made. Thus, circumstances not known to the testator at the time the will was made are inadmissible. The evidence which can be looked at includes:

> ... the character and occupation of the testator; the amount, extent and condition of his or her property; the number, identity and relationship to the testator of his or her immediate family and other relatives; and the persons who comprised his or her circle of friends and any other natural objects of his or her bounty.[212]

Other specific examples of evidence that may be admitted include: the fact that a person named in a will was dead, the fact that a person was called by a nickname, the testator's knowledge that certain family members were more affluent than others, the fact that the testator habitually described certain property inaccurately, and the surname or Christian name of a person named in the will.[213] In general, if there is a mistake in a will in describing an object or a beneficiary, evidence of surrounding circumstances may be admissible when it is clear on the face of the will that there has been a mistake. However, evidence that a name has been omitted is inadmissible.[214]

5. Admission of evidence of the testator's intent

[163] In contrast to the position in probate court, evidence of the testator's intention is inadmissible in a court of construction under the common law, subject to a few exceptions. For example, declarations by the testator concerning the testator's intention or written instructions given by the testator to the solicitor are

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[212] Oosterhoff at 474. See also: A. Sean Graham, "Evidence in Estate Litigation and What to Watch for as The Drafting Solicitor: Key Issues and Update" (2008) 40 Estates and Trusts Reporter (3d) 214 at 220; Feeney at §11.56-11.58.

[213] Feeney at §11.56-11.58.

[214] Williams 2008 at 615. This goes to rectification and the probate court has always been able to exclude words, but this does not allow the court to alter or add to the words in the will. Hawkins at 3.

usually inadmissible.[215] This rule is justified on the basis that as a written document, the intention of the testator should be found within the four corners of the document.[216]

[164] The major exception is in the case of an equivocation or latent ambiguity. This occurs where the words apply equally to more than one person or object as found in the surrounding circumstances. In this case, evidence of the testator's intention will be admitted to resolve the issue.

> There is no latent ambiguity where part of the description applies to one subject and another part to another subject, or in cases from the context of the whole will, or by aid of any canon of construction applicable to the will, or from the circumstances of the case properly admissible in evidence, it can be gathered which of the different subjects was intended.[217]

[165] It can be difficult to determine what is a patent ambiguity present on the face of the will and what constitutes a latent ambiguity. As an illustration, a gift to "John's son" is probably a latent ambiguity in a situation where John has more than one son. In the same circumstances, where the testator forgot or neglected to fill in a blank with the beneficiary's name, a gift to "_____, John's son" would probably be classified as a patent ambiguity. Are the two phrases so different as to require the use of restricted extrinsic evidence in one case and not in the other?[218]

[166] The Alberta Court of Appeal commented in *Daniels v. Daniels Estate* that the exclusionary rule with respect to admission of evidence of the testator's intent had been the subject of judicial musings, although the Court in that case did not decide when such evidence should be admitted.[219] Other Alberta cases have stated

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[215] Recent cases where evidence of the testator's intent were excluded in Canada include: *Johnson Estate v. Forbes* (2007), 216 Man R. (2d) 156 (Q.B.); *Re Murray Estate*, [2007] 34 E.T.R. (3d) 1035 (B.C.S.C.); *Krezanoski v. Krezanoski* (1992), 136 A.R. 317 (Q.B.).

[216] Feeney at §10.27.

[217] Williams 2008 at 618.

[218] British Columbia 1982 Report at 13.

[219] *Daniels v. Daniels Estate* (1991), 120 A.R. 17 (C.A.).

that extrinsic evidence of the testator's intent is admissible only in the case of a latent ambiguity.[220]

[167] There is some Canadian authority that evidence of the testator's intent is admissible where the testator has given a gift to an individual who was dead when the will was made and the testator knew the individual was dead.[221] In addition, where there is an equitable presumption, such as the presumption of satisfaction, evidence of the testator's intent is admissible.[222]

C. Interpretation of Wills

1. Current law in Canada

a. Introduction

[168] The case law in Canada is mixed with some courts using an objective approach and other courts using an intentional approach. Supreme Court case law has also been interpreted as taking both approaches. The leading textbook writers state that the case law now favours an intentional approach with respect to the use of extrinsic evidence of surrounding circumstances.[223] This approach, as discussed earlier, allows the admission of evidence of surrounding circumstances whether or not there is an ambiguity found on the face of the will.

b. Supreme Court case law

[169] A number of Supreme Court cases have discussed the proper approach to be taken in construing a will.[224] In discussing the proper approach, the majority of cases have appeared to adopt an objective approach. In two cases, the Court said "that the grammatical and ordinary sense of the words is to be adhered to unless absurdity, repugnancy or inconsistency should result" and this is the "primary and

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[220] *National Trust Co. v. Montague* (2000), 264 A.R. 68 at para. 26 (Surr. Ct.); *Lindblom Estate v. Worthington* (1999), 252 A.R. 17 (Surr. Ct.); *Krezanoski v. Krezanoski* (1992), 136 A.R. 317 (Q.B.).

[221] Feeney at § 11.96- § 11.97, citing *Re Walker* (1923), 53 O.L.R.(S.C.) and *Re Perry,* [1941] 2 D.L.R. 690 (Ont. C.A.).

[222] Hawkins at §27-01.

[223] Feeney at §10.7; Oosterhoff, at 482-483.

[224] The author was able to find six cases.

cardinal rule of interpretation."[225] Along similar lines, in *Re Tyhurst*, the Court stated that surrounding circumstances could be looked to when the words of the will were ambiguous.[226]

[170] In *Lucey v. Prince Albert Catholic Orphanage*, the question was whether a devise to "Reverend William Bruck o.m.i. St. Patrick's Orphanage" was a bequest to the Reverend or to the orphanage. The Supreme Court said that the first task of the court was to interpret the words in their "grammatical and ordinary sense." Extrinsic evidence of surrounding circumstances had been properly admitted in the court below, but had made no difference to the meaning as the words "St. Patrick's Orphanage" simply described the place where the minister lived.[227] It was not entirely clear whether the court below had found the phrase in question to be ambiguous, but it is likely given the comment of the Supreme Court.

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[225] *Meagher v. Meagher* (1916), 53 S.C.R. 393 at 405. In this case, a will devised all the testator's real and personal property to his two daughters upon trust to make certain payments and then

> to hold all my property in lots eight and nine ...for my said daughters ... for themselves and to make such disposition thereof from time to time among my children or otherwise as my said daughters decide to make, they my said daughters in the meantime to have all the rents and profits therefrom. [page 394]

The Court held that the two daughters took a beneficial life interest in the property and that the words "or otherwise" where they occurred gave them an unfettered power of disposition which they could exercise in favour of any person including themselves. At page 405 the Court stated:

> This case is governed by that primary and cardinal rule of interpretation, that the grammatical and ordinary sense of the words is to be adhered to unless absurdity, repugnancy or inconsistency should result – a rule too often disregarded in order to give effect to some technical and artificial rule of construction ... never meant to be invoked where the language is plain and ordinary and there is neither ambiguity or obscurity in it. A testator's clearly expressed intention, not unlawful or impossible of performance, must be carried out.

In *Crawford v. Broddy* (1896), 26 S.C.R. 345 at 345, the S.C.C. held that:

> ... general rule as to construction according to the ordinary grammatical meaning of the words used by the testator, and that, as there would be no absurdity, repugnance or inconsistency in such a construction of the will in question, the subsequent clause limiting the estates bequeathed by an executory devise over must be interpreted as referring to the property devised to the testator's sons and daughters by all the preceding clauses of the will.

[226] *Re Tyhurst*, [1932] S.C.R. 713 at 719: "In construing the language of the testator where it is ambiguous, we are entitled to consider not only the provisions of the will, but also the circumstances surrounding and known to the testator at the time when he made the will, and adopt the meaning most intelligible and reasonable as being his intention."

[227] *Lucey v. Catholic Orphanage of St. Albert,* [1951] S.C.R. 690 at 693: "Our first task is to interpret the words, in which the testatrix expressed herself, in their grammatical and ordinary sense."

[171] In *Tottrup v. Patterson*, an appeal from Alberta, the appellant claimed that the words of a residuary clause were words of substitution and not limitation. The Supreme Court held that the words "to hold unto him, his heirs, executors and administrators absolutely and forever" were words of limitation. The court quoted Theobald as to the proper approach when the meaning was clear: "surrounding circumstances cannot be looked at to throw a doubt upon that meaning, or to give the will a different meaning." The Court concluded by saying, "In my view, the meaning of the will is clear; it contains no patent ambiguity; if the facts surrounding its execution recited above are considered they do not disclose any latent ambiguity and they are consequently irrelevant."[228]

[172] In *Marks v. Marks*, the devise was to "my wife" where the testator had married two women. The Supreme Court looked at the surrounding circumstances and held that the reference was to the wife with whom the testator was living at the time of his death. The Court followed *Charter v. Charter*: "The court has a right to ascertain all the facts which were known to the testator at the time he made the will, and thus to place itself in the testator's position in order to ascertain the bearing and application of the language he uses."[229] The case of *Marks v. Marks* has been used as authority for the adoption of the intentional approach in Canada.[230] With respect, this may not be entirely clear. The fact situation in *Marks* involved a contest between a lawful wife and a bigamous one. Under English

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[228] *Tottrup v. Patterson* (1969), [1970] S.C.R. 318 at 318. Frank Ottewell named his brother Fred as residuary legatee. Fred predeceased Frank and his estate went to Frank. The appellant was the only daughter of Fred.

[229] *Marks v. Marks* (1908), 40 S.C.R. 210. A devise claimed by two women, with both of whom the testator had lived in the relationship of husband and wife. The appellant alleged she was the first wife, married in 1873. The respondent was married to him in 1902 and lived with him until his death in 1904. The court stated, at 212-213 and 220:

> In other words, it is claimed that there cannot be any one who can answer to that description 'my wife' except the one person who may in law be decided to be such. I do not think the law so binds us. The case of *Charter v. Charter* L.R. 7 H.L. 365 illustrates better than any other I know of, how these expressions may be correctly used and applied. When they have been so applied as to exclude the surrounding circumstances, I cannot find such application to have been material or necessary for the determination of the case there in hand.... I prefer to follow the warning implied in so many cases not to reduce the meaning of the language used to an absurdity.

[230] Feeney at §11.52. *Marks v. Marks* (1908), 40 S.C.R. 210, was cited in *Haidl v. Sacher* (1979), 2 Sask. R. 93 (C.A.).

authority, evidence of surrounding circumstances was admissible in such cases to resolve the issue.[231]

[173] In summary, it appears that the case law from the Supreme Court on the whole adopts the traditional objective approach to the construction of wills. For surrounding circumstances to be admitted, the words of the will must be ambiguous.

c. Recent Alberta case law

[174] A survey of recent Alberta cases discussing the proper approach to construction indicates that the majority of courts in Alberta are following the intentional approach laid down in *Haidl v. Sacher*.[232] In *Decore v. Decore*, the Queen's Bench stated that "in any case where there is an apparently legitimate contest over the construction of a testamentary instrument, armchair evidence is likely to assist in resolving the dispute and should be received."[233] In *Re Davis Estate*, the Court stated that evidence of surrounding circumstances was admissible from the beginning of the process of construction.[234] Further, the Alberta courts have stated that the evidence is admissible whether or not there is an ambiguity on the face of the will.[235] However, some Alberta cases appear to continue to adopt an objective approach. A recent example is *McNeil v. McNeil Estate*, in which the court held that where the words of the will were clear, there was no need to resort

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[231] *In Re Smalley* (1928), [1929] 2 Ch. 112 (C.A.).

[232] *Decore v. Decore* (2009), 12 Alta. L.R. (5th) 221 at para. 7 (Q.B.); *Matchett v. Matchett Estate* (2007), 43 A.R. 384 at paras. 6-7 (Q.B.); *Re Eisert-Graydon* (2003), 333 A.R. 95 (Q.B.); *Re Hartum Estate* (2002), 321 A.R. 270 at para. 32 (Q.B.); *Re Smith Estate* (2002), 313 A.R. 169 at para. 15 (Surr.Ct.); *Re Boudreault Estate* (2001), 290 A.R. 116 at para. 18 (Surr. Ct.); Sykes v. Herron, 2000 ABQB 417 at para. 12 (Surr. Ct.); *Krezanoski v. Krezanoski* (1992), 136 A.R. 317 at paras. 11-12 (Q.B.); *Re Gardner Estate* (1991), 85 Alta. L.R. (2d) 119 at para. 9 (Surr. Ct.); *Re McLean Estate* (1986), 73 A.R. 155 at paras. 9-12 (Surr.Ct.); *Re Emerson Estate* (1986), 75 A.R. 206 at paras. 6-10 (Surr.Ct.); *Re Davis Estate* (1983), 51 A.R. 377 at para.7 (Q.B.).

[233] *Decore v. Decore* (2009), 12 Alta. L.R. (5th) 221 at para. 7 (Q.B.).

[234] *Re Davis Estate* (1983), 51 A.R. 377 at para. 7 (Q.B.).

[235] *Re Smith Estate* (2002), 313 A.R. 169 at para. 15 (Surr.Ct.); *Krezanoski v. Krezanoski* (1992), 136 A.R. 317 at para. 7 (Q.B.); *Re Hartum Estate* (2002), 321 A.R. 270 at para. 32 (Surr.Ct.).

to evidence of surrounding circumstances.[236] There are also cases where it is unclear what approach the court is adopting.[237]

d. Other provinces

[175] A survey of recent Court of Appeal decisions[238] across Canada indicates that the intentional approach is being followed by the appeal courts in British Columbia, Saskatchewan, Manitoba and Ontario.[239] A number of these decisions rely on the 1959 Ontario Court of Appeal decision in *Re Burke*.[240]

[176] The leading case in Canada on the intentional approach is the Saskatchewan case of *Haidl v. Sacher*, a 1979 Court of Appeal decision.[241] In *Haidl*, the question for the court was whether the testator intended a per capita or per stirpital distribution of the residue. The testator had a numbered list of seven individuals followed by number eight on the list as "the Children of, Hebert Haidl." The court below had admitted evidence of the relationship of the beneficiaries to the testator and had decided that the intent of the testator was a per stirpital distribution.

[177] The question for the appeal court was whether the evidence of surrounding circumstances had been properly admitted. The court reviewed the objective versus intentional approaches to interpretation and Canadian authorities, most notably, the

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[236] *McNeil v. McNeil Estate* (2006), 408 A.R. 144 at paras. 112-113 (Q.B.). Other recent cases appearing to take an objective approach are: *National Trust Co. v. Montague* (2000), 264 W.R. 68 (Surr. Ct.); *Lanterman Estate v. Lanterman* (1997), 202 A.R. 285 at paras. 12-13 (Surr. Ct.); *Penlington v. Penlington* (1995), 68 Alta. L.R.(3d) 341 at para. 23 (Surr. Ct.); *Re Allan Estate* (1994) 161 A.R. 292 at paras. 10, 20 (Surr.Ct.); *Re Omilusik Estate* (1988), 92 A.R. 283 at paras. 8-10 (Surr. Ct.).

[237] *Re Goldstein Estate* (1984), 51 A.R. 341 (C.A.); *Re Johnson Estate* (1985), 63 A.R. 84 (Q.B.); *Callies Estate v. Callies,* [1986] A.J. No. 154 (Surr. Ct.).

[238] In British Columbia, Saskatchewan, Manitoba, Ontario, Newfoundland and Nova Scotia. The search was for case law discussing the proper approach.

[239] *Kordyban v. Kordyban* (2003), 13 B.C.L.R. (4th) 50 (C.A.); *Davis Estate v. Thomas* (1990), 40 E.T.R. 107 (B.C.C.A.); *Ratzlaff Estate v. Ratzlaff* (2002), 217 Sask. R. 284 (C.A.); Haidl v. Sacher (1979) 106 D.L.R. (3d) 360 (Sask. C.A.) [*Haidl*]; *Re Burke* (1959), [1960] O.R. 26 (C.A.); *Faucher v. Tucker Estate* [1993] M.J. No. 589 (C.A.).

[240] *Re Burke* (1959), [1960] O.R. 26 (C.A.).

[241] *Haidl*, note 239.

Supreme Court case of *Marks v. Marks*.[242] The Court concluded that the intentional approach was the best approach and the one favoured by Canadian case law. The Court stated: "In my respectful view, it is the approach most likely to elicit the testator's intention and for that reason is the more desirable approach. After all, ascertaining the testator's true intention is the real and only purpose of the whole exercise."[243]

[178] In contrast, the appeal courts in Newfoundland and Nova Scotia appear to lean towards the traditional objective approach. In *Dunn v. Dunn Estate*, the Newfoundland Court of Appeal stated that meaning must first be sought in the wording of the will and when that is not possible, then surrounding circumstances are to be looked at.[244] In both *Bussey v. Maher* and *Jayaraman v. DeHart*, the issue raised was a partial intestacy. The courts held that the armchair rule should be used only if the wording of the will cannot be construed so as to result in a complete disposition.

[179] In *Bussey v. Maher*, the Newfoundland and Labrador Court of Appeal referred to *Dunn v. Dunn Estate* for the importance of first construing the words of the will. The armchair rule "properly applies in the case of ambiguity."[245] The trial judge had erred in not first considering that the disputed land under the will may not have been disposed of in the will. The issue of a partial intestacy had to be considered first. The Court said "[i]t was appropriate for the trial judge to turn to a consideration of the armchair rule and the surrounding circumstances only if Harry Bussey's intention could not be discerned from the language of the will."[246] In the

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[242] *Marks v. Marks* (1908), 40 S.C.R. 210. It is notable that the Court in *Haidl* did not refer to *Tottrup v. Patterson* (1969), [1970] S.C.R. 318.

[243] *Haidl*, note 239, at para. 21.

[244] *Dunn v. Dunn Estate* (1990), 81 Nfld. & P.E.I.R. 170 at para. 12 (Nfld. C.A.).

[245] *Bussey v. Maher* (2006), 259 Nfld. & P.E.I. R. 314 at para. 16 (N.L.C.A.).

[246] *Bussey v. Maher* (2006), 259 Nfld. & P.E.I. R. 314 at para. 19 (N.L.C.A.). Feeney at § 10.46 states: "the Newfoundland Court of Appeal has made the interesting suggestion that the presumption [against intestacy] may be used to resolve a possible ambiguity in the text of a will and preclude the use of surrounding circumstances and the armchair rule." This interpretation is questionable as the case clearly states that an ambiguity must be looked for first.

result, there was no ambiguity in the language and the armchair rule had no application.

[180] In contrast, in *Jayaraman v. DeHart*, the Newfoundland and Labrador Court of Appeal found an ambiguity and looked to the surrounding circumstances.[247] However, the Court explained the proper approach as being that the first question to be answered was whether or not there was ambiguity in the language of the will. "This is the first question to answer, because if there is no ambiguity, questions concerning the presumption against intestacy and use of external aids are irrelevant."[248]

[181] In Nova Scotia, *Re Murray Estate* favoured the approach taken in *Haidl* in *obiter* comments.[249] However, in the later case of *Smithers v. Mitchell Estate*, the Nova Scotia Court of Appeal stated that where the intention was apparent from the will there was no need to assess the language in light of the surrounding circumstances. The Court noted that if surrounding circumstances had been taken into account, the result would have been the same.[250]

[182] While the current law in Canada is based on the common law, that is poised to change as British Columbia has recently enacted legislation to reform the common law. This legislation, not yet in force, follows the model set by reform in England in the early 1980s. The impact of this reform will be discussed below.

2. Possible approaches to reform

a. An objective approach

[183] It would not be unreasonable for Alberta to adopt legislation mandating an objective approach as this approach is still used by some courts in Canada and England. As already discussed, the required formalities for making a will support

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[247] *Jayaraman v. DeHart* (2007), 284 D.L.R. (4th) 183 at paras. 20, 22 (N.L.C.A.).

[248] *Jayaraman v. DeHart* (2007), 284 D.L.R. (4th) 183 at para. 9 (N.L.C.A.).

[249] *Re Murray Estate* (2001), 191 N.S.R (2d) 63 at para. 23 (C.A.).

[250] *Smithers v. Mitchell Estate* (2004), 228 N.S.R. (2d) 295 at paras. 28-29 (C.A.).

the use of an objective approach.[251] These formalities are in place in an attempt to ensure that the will carries out the testator's intentions.[252] The required formalities have an evidentiary function in providing some protection against fraud and giving some certainty to dispositions.[253]

[184] One possible model would be to adopt a version of the parol evidence rule. This would align the interpretation of wills with other written documents. Under the parol evidence rule,[254] the cardinal rule is that "if the language of the written contract is clear and unambiguous, then no extrinsic parol evidence may be admitted to alter, vary or interpret in any way the words used in the writing."[255] The plain ordinary meaning is used unless it would result in an absurdity.[256] An absurdity is a patent ambiguity and extrinsic evidence is admitted.[257] Under the parol evidence rule, a wider category of evidence of surrounding circumstances is admitted than in the interpretation of wills.[258]

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[251] House of Commons, *Copy of the Fourth Report Made To His Majesty By The Commissioners Appointed To Inquire Into The Law Of England Respecting Real Property* (April 25, 1833) at 14; Manitoba Report at 50.

[252] British Columbia 1982 Report at 14; Andrew G. Lang, "Formality v. Intention – Wills in an Australian Supermarket" (1985-1986) 15 Melbourne U.L. Rev. 82 at 87.

[253] House of Commons, *Copy of the Fourth Report Made To His Majesty By The Commissioners Appointed To Inquire Into The Law Of England Respecting Real Property* (April 25, 1833) at 14.

[254] This is a basic summary, with emphasis on the elements that relate to wills.

[255] G.H.L. Fridman, *The Law of Contract in Canada*, 5th ed. (Toronto: Thomson Carswell, 2006) at 443 [footnotes omitted]; Edwin Peel, *Treitel: The Law of Contract*, 12th ed. (London: Sweet & Maxwell, 2007) at 213.

[256] G.H.L. Fridman, *The Law of Contract in Canada,* 5th ed. (Toronto: Thomson Carswell, 2006) at 455.

[257] G.H.L. Fridman, *The Law of Contract in Canada*, 5th ed. (Toronto: Thomson Carswell, 2006) at 445-446.

[258] The extrinsic evidence which may be admitted includes evidence of surrounding circumstances before, at the time, and subsequent to the making of the contract. The factual background may be explained with this extrinsic evidence but not the parties' intentions. This seems to mean that the subjective intentions of one party unknown to the other is not admitted. However, the parties' subjective intentions in relation to the identity of the subject matter are admissible. G.H.L. Fridman, *The Law of Contract in Canada*, 5th ed. (Toronto: Thomson Carswell, 2006) at 452-453, 488; Edwin Peel, *Treitel: The Law of Contract*, 12th ed. (London: Sweet & Maxwell, 2007) at 218-219.

[185] The use of an objective approach, whether modelled on the parol evidence rule or not, would give the law an illusion of certainty. To some extent the words used would have the same meaning across wills, namely, the ordinary meaning. Testators would be presumed to have chosen their words carefully and meant what they said. There would be no issue of the court attempting to write the will for the testator or looking at matters which may never have been contemplated by the testator.[259] For the court, there would likely be little evidence outside the will itself.[260]

[186] However, any perceived certainty would be an illusion. Words only have meaning from the sense in which they are used.[261] The use of an objective approach "leads to interpreting all wills as though they had been drafted by lawyers."[262] Resort by the courts to the numerous construction rules which impose fixed meaning on particular expressions might be more frequent.[263] An arbitrary meaning placed on the ambiguous words of one testator would be imposed on the ambiguous wording of the will in question.[264]

[187] The objective approach is not suited to the interpretation of wills. This was recognized in 1833 by the Commissioners who examined the law of wills prior to the enactment of the 1837 *Wills Act* in England:

> It has been suggested (as the best remedy for diminishing the litigation occasioned by Wills) that the strict rules by which the language of Deeds is interpreted, should be extended to Wills ... we would only here observe, that while we must acknowledge the great advantages which would be obtained by such a regulation, we cannot recommend its adoption, because we consider that it would impose too great a restraint upon the power of testamentary disposition. Cases must frequently occur in which it is desirable that Wills should be made, when there is not time to procure any

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[259] Hawkins at 23-24.

[260] England 1973 Report.

[261] Johan Steyn, "The Intractable Problem of the Interpretation of Legal Texts" (2003) 25 Sydney L. Rev. 5 at 6.

[262] Hawkins at 26.

[263] These construction rules were developed to implement the objective approach.

[264] Sir William Holdsworth, *A History of English Law*, v. VII (London: Sweet and Maxwell,1978) at 394.

> professional assistance, as on a death-bed, in the event of accident or sudden illness; and there is a disposition in many persons, both to delay until the latest moment the making of a Will, and to do it in secrecy, to which the Law must, we think, have regard.[265]

[188] The objective approach has operated to defeat the fairly evident intentions of testators on many, many occasions. A famous statement outlining this is found in the dissenting judgment of Lord Denning in *Re Rowland*:

> ...In construing a will, "It is not what the testator meant, but what is the meaning of his words." That may have been the nineteenth century view; but I believe it to be wrong and to have been the cause of many mistakes. I have myself known a judge to say: "I believe this to be contrary to the true intention of the testator but nevertheless it is the result of the words he has used." When a judge goes so far as to say that, the chances are that he has misconstrued the will. For in point of principle the whole object of construing a will is to find out the testator's intentions, so as to see that his property is disposed of in the way he wished."[266]

[189] A frequently cited case illustrating how the objective approach may defeat the testator's intentions is *Higgins v. Dawson*.[267] The testator's estate at the time he made his will consisted primarily of two mortgage debts. The will left a number of money gifts and then disposed of "the residue and remainder" of the two mortgage debts after payment of debts and funeral expenses. The House of Lords held that the will was unambiguous on its face and the monetary gifts failed because there was not enough money outside the mortgage debts to satisfy them. The House of Lords refused to consider extrinsic evidence that the testator's intent was that the mortgage debts be used to satisfy the monetary legacies.

b. An intentional approach

[190] The intentional approach adopted by Canadian courts has been outlined above. The major advantage of the intentional approach is that it more likely gives effect to the testator's intention. This avoids the apparent injustices present in the case law taking the objective approach. The intentional approach is easier to use as there is no need to search for an ambiguity on the face of the will before taking

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[265] House of Commons, *Copy of the Fourth Report Made To His Majesty By The Commissioners Appointed To Inquire Into The Law of England Respecting Real Property* (April 25, 1833) at 3.

[266] *Re Rowland,* [1962] 3 W.L.R. 637 at 642 (C.A.).

[267] *Higgins v. Dawson*, [1902] A.C.1 (H.L.).

into account surrounding circumstances. There is no need to worry about the meanings given to certain words in the case law.[268]

[191] A criticism of the intentional approach is that its use might lead to an increase in litigation such that every will might be litigated. In this regard, most testators would not be happy with the prospect that their will would be interpreted by a court. An additional criticism is the danger that the court may defeat the testator's intention by placing too much emphasis on surrounding circumstances.[269] The fears with respect to increased litigation do not seem to be well founded as this approach has been used by courts in Canada for over 25 years without any discernable increase in litigation. For example, since the mid-1980s, there have been 23 cases in Alberta which have discussed the proper approach to interpreting a will. This works out at less than one case per year before the courts.

[192] The defect in this approach is its stance on admission of evidence of the testator's intent. Presently, like the objective approach, evidence of the testator's intent is only admitted in the case of a latent ambiguity in the wording of the will. Determining what is a latent ambiguity can be a difficult exercise for the court. The result can be the exclusion of evidence based on slight differences in wording. It does not seem logical or fair to base the exclusion of evidence of the testator's intent on such a tenuous basis. In addition, the major fear expressed with respect to the admission of this evidence is a concern with increased litigation.[270] This does not seem to be an appropriate policy basis for excluding evidence. The intentional approach as presently crafted by the Canadian courts is not an appropriate model in its entirety.

D. Law Reform

[193] As neither of the approaches currently being used in Canada is an ideal model for law reform, it may be questioned whether a more suitable approach has been suggested by other law reform initiatives.

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[268] Hawkins at 27.

[269] A. Sean Graham, "Evidence in Estate Litigation and What to Watch for as The Drafting Solicitor: Key Issues and Updates" (2008) 40 E.T. R. (3d) 214 at 221.

[270] British Columbia 1982 Report at 7.

1. Law reform agency recommendations

[194] In 1973, the English Law Reform Committee published its 19th report, *Interpretation of Wills*.[271] The Committee adopted a "broadly intentional approach" to interpretation.[272] The majority felt that admission of extrinsic evidence should be widened, noting the trend in the case law toward an intentional approach. In the majority's view, extrinsic evidence of any kind should be admissible to interpret a will, apart from admission of evidence of the testator's intention.[273] The minority disagreed, taking the view that all evidence including evidence of the testator's intention should be admissible, with the caveat that there had to be a "peg" before evidence of intention would be admitted.[274]

[195] The report is subject to criticism in that, while it recognizes the confusion in the case law, it never clearly states that there are two approaches. The report also states that there was general agreement that the function of the court was to find the testator's meaning. An advocate of the objective approach would only have agreed with this statement in so far as the testator's meaning could be found in the ordinary meaning of the words of the will.[275] However, in advocating an intentional approach, the report was very influential. The result was the enactment of the *Administration of Justice Act 1982* which allows the admission of evidence of surrounding circumstances and of the testator's intent. The specific provisions and nature of this legislation will be discussed below.[276]

[196] Australian law reform agencies have also recommended that wills legislation be changed to widen the circumstances in which extrinsic evidence can be admitted. In 1980, the Chief Justice's Law Reform Committee in Victoria recommended that the intentional approach should be adopted with respect to the admission of evidence of surrounding circumstances. However, the Committee felt

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[271] England 1973 Report.

[272] Hawkins at 49.

[273] England 1973 Report at 18.

[274] England 1973 Report at 20.

[275] Hawkins at 47-49.

[276] See below at paras 205-211.

that evidence of a testator's intention should not be admissible except in cases of latent ambiguity.[277] In 1994, a further report recommended that the approach taken by the English *Administration of Justice Act 1982* be adopted.[278] Other states recommending adoption of the English legislative approach during the 1990s included Queensland, the Northern Territory and New South Wales.[279]

[197] In 1997, the New Zealand Law Commission recommended that wills legislation in New Zealand be amended to provide for admission of extrinsic evidence based on the English model. More specifically, it recommended adoption of the wider Australian Capital Territory *Wills Act* provision which allowed admission of extrinsic evidence in cases of ambiguity and uncertainty.[280]

[198] The use of extrinsic evidence in the interpretation of wills has been examined by two law reform agencies in Canada. British Columbia has issued two reports which have recommended that the law surrounding the admission of extrinsic evidence be clarified. In 1982, the Law Reform Commission of British Columbia recommended that extrinsic evidence should be admissible in all cases to assist the court in interpreting a will. The Commission found that the distinction between patent ambiguities and latent ambiguities was unwieldy and therefore, both evidence of surrounding circumstances and evidence of the testator's intent should be admissible. The Commission recommended that legislation specifically provide that the purpose of such evidence is to find the meaning of the words used by the testator.[281]

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[277] Victoria, Chief Justice's Law Reform Committee, *Report on the Construction of Wills* (May 8, 1980) at 9.

[278] Parliament of Victoria Law Reform Committee, *Reforming the Law of Wills: Report Upon An Inquiry into the 1991 Draft Wills Bill,* Report No. 82 (May 1994) at 178.

[279] Queensland Law Reform Commission, *The Law of Wills*, Report # 52 (December 1997) at 75-79; Northern Territory Law Reform Committee, *Report on Proposals for the Reform of the Law of Wills in the Northern Territory*, Report No.19 (1999) at 14, 33-34; New South Wales Law Reform Commission, *Uniform Succession Laws: The Law of Wills,* Report No. 85 (1998) at 124.

[280] The Australian Capital Territory Act was amended in 1991. New Zealand, Law Commission, *Succession law: A Succession (Wills) Act,* Report 41 (1997) at 4, 32-33.

[281] British Columbia 1982 Report at 23-25.

[199] In 2006, the British Columbia Law Institute revisited the issue. The Institute was in general agreement with the previous report that the law needed to be clarified. The Institute noted that the Court of Appeal had endorsed the intentional approach and evidence of surrounding circumstances was able to be admitted initially to assist the court.[282] However, the Institute was not in favour of admission of evidence of the testator's intent in all cases for policy reasons. They felt that litigation might increase with greater numbers of spurious claims. Therefore, the recommendation was that legislation be enacted along the lines of the English *Administration of Justice Act 1982*.[283] The recommendations have resulted in the enactment of legislation in British Columbia.[284]

[200] In 2003, the Manitoba Law Reform Commission issued a report which discussed the admission of extrinsic evidence. The Commission agreed that reform of the law was necessary and suggested adoption of legislation on the English model, with the addition of a provision that the new rules were not a complete code.[285] The draft section is worded as follows:

> **Extrinsic evidence admissible**.
>
> 22 (1)Where any part of a will is meaningless, or ambiguous either on its face or in light of evidence other than evidence of the testator's intention, extrinsic evidence, including statements made by the testator or other evidence of his intent, may be admitted to assist in its interpretation.
>
> **Saving**
>
> (2) Nothing in this section renders inadmissible extrinsic evidence that is otherwise admissible by law.[286]

[201] Since the enactment of the *Administration of Justice Act 1982*, all law reform agencies examining the use of extrinsic evidence have recommended that similar legislation be adopted. It is fair to say that the law reform agencies have

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[282] British Columbia 2006 Report at 40.

[283] British Columbia 2006 Report at 41.

[284] British Columbia 2009 Act.

[285] Manitoba Report at 56.

[286] Manitoba Report at 109.

advocated the adoption of the English approach without discussing the pros and cons of the legislation or whether the legislation has actually changed the law.[287]

2. Legislative reform in common law jurisdictions

a. England

i. Law prior to the *Administration of Justice Act 1982*

[202] As stated earlier, prior to the enactment of the *Administration of Justice Act 1982*, most lawyers and judges in England tended to prefer an objective approach, at least in theory.[288] This was despite some leading case law which adopted an intentional approach.

[203] In *Perrin v. Morgan*, the testator had drafted her own will in which she left all her money to her nieces and nephews.[289] The problem arose because her "money" consisted of stocks and shares. The traditional definition of money was "cash." The House of Lords reversed the earlier case law. Two of the Law Lords found a wide meaning of the word under the dictionary principle. However, the majority held that the word "money" had no strict and primary sense. Lord Simon said: "[T]he fundamental rule in construing the language of a will is to put on the words used the meaning which, having regard to the terms of the will, the testator intended."[290]

[204] Despite this case, the objective approach continued to prevail and this was illustrated by *Re Rowland*.[291] The testator and his wife had drafted their own wills in similar terms. The testator left all his property to his wife with the proviso that if his wife's death preceded or coincided with his own, his property was to go to his brother and nephew. The testator and his wife both died in a shipwreck. The majority in the Court of Appeal gave the word "coinciding" its legal meaning of "at the same time." As the wife was slightly younger, she was presumed by law to

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[287] See for example: British Columbia 2006 Report at 39-42; Queensland Law Reform Commission, *The Law of Wills,* Report No. 52 (1997) at 74-78.

[288] Hawkins at 28.

[289] *Perrin v. Morgan*, [1943] 1 All E.R. 187 (H.L.).

[290] *Perrin v. Morgan*, [1943] 1 All E.R. 187 at 190 (H.L.).

[291] *Re Rowland*, [1962] 3 W.L.R. 637 (C.A.).

have survived her husband and thus inherited his estate with the result that his estate went to her relatives. Lord Denning dissented and wrote his famous dissent outlining the intentional approach. It was against the background of this case that the Law Reform Committee undertook its work and recommended that the law be reformed.

ii. Scope of s. 21 of the *Administration of Justice Act 1982*

[205] In s. 21 of the *Administration of Justice Act 1982*, the government set out rules for admission of evidence of surrounding circumstances and evidence of the testator's intent. For extrinsic evidence to be admitted, there must be an ambiguous or meaningless provision on the face of the will or an ambiguity in the surrounding circumstances which makes the language in the will ambiguous. If such an ambiguity is present, all evidence is admitted, including evidence of the testator's intent. The provision reads:

> 21: **Interpretation of wills – general rules as to evidence**.
>
> (1) This section applies to a will –
>
> (a) in so far as any part of it is meaningless;
>
> (b) in so far as the language used in any part of it is ambiguous on the face of it;
>
> (c) in so far as evidence, other than evidence of the testator's intention, shows that the language used in any part of it is ambiguous in the light of surrounding circumstances.
>
> (2) In so far as this section applies to a will extrinsic evidence, including evidence of the testator's intention, may be admitted to assist in its interpretation.[292]

iii. A change in the law?

[206] Twenty-six years after the *Administration of Justice Act 1982* came into force, the ambit and effect of the legislation is still unclear.[293] The latest edition of Williams discusses the sections of the Act in terms of its similarity to the previous common law. For example, s. 21(1)(b) is likened to the existing law on patent ambiguities, with the addition of an ability to admit evidence of the testator's

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[292] *Administration of Justice Act 1982* (U.K.), c. 53, s. 21.

[293] The Act came into force on January 1, 1983; *Administration of Justice Act 1982* (U.K.), c. 53, s. 76 (11)

intent.[294] Roger Kerridge states that most academic writers think the objective approach still prevails.[295] There is limited case law, much of which does not discuss in any detail the scope of the legislation,[296] although some of it appears to take an intentional approach.[297]

[207] An often cited case on s. 21 is *Re Williams*.[298] The English Court of Chancery admitted as evidence a letter written by the testator with respect to her homemade will. The will contained no directions as to the proportion of the estate three groups of beneficiaries were to receive. The Court stated that s. 21 was concerned with the admission of extrinsic evidence to aid construction. When it was admitted to assist in construing ambiguous language in the will itself, the Court commented:

> The evidence may assist by showing which of two or more possible meanings a testator was attaching to a particular word or phrase. 'My effects' and 'my money' are obvious examples. That meaning may be one which, without recourse to the extrinsic evidence, would not really have been apparent at all. So long as that meaning is one which the word or phrase read in its context is capable of bearing, then the court may conclude that, assisted by the extrinsic evidence, that is its correct construction. But if, however liberal may be the approach of the court, the meaning is one

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[294] Williams 2008 at 622.

[295] Hawkins at 28.

[296] Aside from *In Re Williams* (1984), [1985] 1 All E.R. 964 (Ch. D.), see: *Re Benham's Will Trusts,* [1995] S.T.C. 210 (Ch.), (the court interpreted s. 21 as justifying an intentional approach and the extrinsic evidence confirmed the court's interpretation); *Re Freeman's Will Trusts* (10 July 1987, unreported) (extrinsic evidence of intention was admissible both under the old law and under the statute where it was difficult to determine the testator's intention); *Cook v. Saxlova* (18 Oct 1988, unreported) (admissibility under AJA as under old law was that language of the will "must still have more than one meaning after the process of construction is complete"). The above two unreported cases are discussed in Williams 2008 at 620; *Frear v. Frear*, 2009 W.T.L.R. 221 (attendance note made by testatrix's solicitor showed that she believed she was disposing of the whole of the beneficial interest and was admissible under 21(1)(c). Language of disposition of residuary estate was latently ambiguous in the light of surrounding circumstances); *Tyrrell v. Tyrrell*, 2002 WL 31962024 (Ch. D.) (admission of surrounding facts did not assist in resolving meaning of clause. Under s. 21 evidence may be admitted of the testator's actual intention. Evidence by legal clerk who took directions from the testator was admitted);*Westland v. Lilis*, 2003 WL 21554659 (Ch. D.) (on basis that codicil is either meaningless or ambiguous, court is entitled under s. 21 to admit extrinsic evidence. This evidence was insufficient to show what the testator had intended by the codicil); *Solem v. Guyster*, 2001 WL 34008545 (ambiguous codicil and extrinsic evidence admitted).

[297] Roger Kerridge & Julian Rivers, "The Construction of Wills" (2000) 116 Law Q. Rev. 287 at 314.

[298] *Re Williams* (1984), [1985] 1 All E.R. 964 (Ch.).

> which the word or phrase cannot bear, I do not see how, in carrying out a process of construction (or interpretation, to use the word employed in s. 21), the court can declare that meaning to be the meaning of the word or phrase. Such a conclusion, varying or contradicting the language used, would amount to re-writing part of the will....[299]

[208] In the result, the letter did not assist the Court in construing the will. The Court did not decide that the ambiguity found on the face of the will was an ambiguity within s. 21(1)(b). The Court divided the estate equally among all the beneficiaries despite a lack of evidence that this was the testatrix's intent.[300] It may be argued quite persuasively that this is a case where the Court wrote the will for the testator despite the Court's comments above.

[209] The effect of s. 21 has been stated as follows:

> The overall pattern of section 21 is that section 21(1)(a) covers cases where the testator has used a word or phrase which appears to have no meaning; section 21(1)(b) covers cases where he has used a word or phrase which appears to have several meanings; and 21(1)(c) covers cases where he has used a word or a phrase which has an ordinary meaning or meanings, in circumstances which indicate that he may have intended it to bear not its ordinary meaning, or one of its ordinary meanings, but some other idiosyncratic meaning.[301]

[210] Williams likens s. 21(1)(c) to the case law on latent ambiguities but says that it appears that the section applies in wider circumstances and that evidence of the testator's intent may be admitted before all other modes of construction have been exhausted.[302] In general, it seems that where the wording of the will is unambiguous and there is nothing else but evidence of the testator's intent to contradict it, that evidence would not be admitted.[303] The extrinsic evidence which may be admitted appears only to be admissible with reference to the part of the

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[299] *Re Williams* (1984), [1985] 1All E.R. 964 at 969 (Ch.).

[300] *Re Williams* (1984), [1985] 1All E.R. 964 at 969-970 (Ch.).

[301] Hawkins at 53.

[302] Williams 2008 at 622-623.

[303] Hawkins at 54.

will in which the ambiguity is found.[304] Also, it appears that where evidence would be admitted under the older case law, it may still be admitted.[305]

[211] Although it is not entirely clear, the section appears to legislate an objective approach with two major changes. First, an ambiguity may be found in the surrounding circumstances which renders the language of the will ambiguous. This contrasts with the intentional approach of the Canadian courts which allows the surrounding circumstances to be examined in all cases. Second, once an ambiguity has been found, all evidence is admissible. This eliminates the need to find a latent ambiguity before evidence of the testator's intent can be admitted. The difficulty is that the court must still find ambiguous language in the will before extrinsic evidence is admitted. This takes the focus of the court away from a determination of the testator's intentions. The concern of the court still remains with the language used by the testator rather than with what the testator meant by that language.

iv. Contextualism

[212] English law has adopted a contextual approach to the construction of legal documents in the commercial area.[306] There are signs that England may be moving towards this approach in the interpretation of wills. The approach seems to mark a move to a greater willingness to rectify documents and a relaxation of the rules regarding the admissibility of extrinsic evidence.[307]

[213] Five governing principles were outlined by Lord Hoffman in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*.[308] The first

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[304] Parliament of Victoria Law Reform Committee, *Reforming the Law of Wills: Report Upon An Inquiry into the 1991 Draft Wills Bill*, Report 82 (1994) at 177.

[305] Williams 2008 at 620.

[306] There have been a number of decisions of the House of Lords in this regard. See for example: *Prenn v. Simmonds,* [1971] 3 All E.R. 237 (H.L.); *Reardon Smith Line Ltd v. Hansen-Tangen* (The Diana Prosperity), [1976] 5 All E.R. 570 (H.L.); *Mannai Investment Company Ltd. v. Eagle Star Life Assurance Co. Ltd.,* [1997] 3 All E.R. 352 (H.L.).

[307] Emily Campbell, "The Interpretation of Wills and Trusts: A Modern Approach" (2004) 5 Private Client Business at 290-291.

[308] *Compensation Scheme Ltd. v. West Bromwich Building Society* (1997), [1978] 1 All E.R. 98 (H.L.).

principle is that the meaning of the document is to be found through the point of view of a reasonable person possessing the background knowledge of the parties at the time of the making of the document. Secondly, the background knowledge or "factual matrix" includes everything that could have affected the understanding of the language by the reasonable person. Under the third principle, evidence of prior dealings and statements of subjective intent not known to the other party are not admissible. The fourth principle states that the meaning of the words is not the same thing as the meaning taken by the reasonable person. The fifth proposition outlines that words should be given their natural and ordinary meaning. It is common sense that people do not normally make linguistic mistakes in formal documents.[309]

[214] The process was described in *Sirius International Insurance Co v. FAI General Insurance Ltd*:

> The aim of the inquiry is not to probe the real intentions of the parties but to ascertain the contextual meaning of the relevant contractual language. The inquiry is objective: the question is what a reasonable person, circumstanced as the actual parties were, would have understood the parties to have meant by the use of specific language. The answer to that question is to be gathered from the text under consideration and its relevant contextual scene.[310]

[215] The five principles are to be considered together.[311] Contextualism in the commercial context has been adopted not only in England, but in New Zealand, Hong Kong and partially in Australia.[312]

[216] There are some lower court English decisions in the field of wills or trusts which mention this "modern approach to construction."[313] In a 2002 Privy Council

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[309] *Compensation Scheme Ltd. v. West Bromwich Building Society* (1997), [1978] 1 All E.R. 98 at 114-115 (H.L.).

[310] *Sirius International Insurance Co v. FAI General Insurance Ltd* (2004)], [2005] 1 All E.R. 191 at 200 (H.L.).

[311] Sir Kim Lewison, *The Interpretation of Contracts* (London: Sweet & Maxwell 2007) at 17.

[312] Sir Kim Lewison, *The Interpretation of Contracts* (London: Sweet & Maxwell, 2007) at 4-5.

[313] *Blech v. Blech*, [2002] W.T.L.R. 483 at para. 13 (Ch. D.): "Had the matter been free of authority I

(continued...)

decision concerning construction of a will from the Bahamas, Lord Hoffman stated:

> The interpretation of a will is in principle no different from that of any other communication. The question is what a reasonable person, possessed of all the background knowledge which the testatrix might reasonably have been expected to have, would have understood the testatrix to have meant by the words she used.[314]

[217] The result of these decisions may be that any relevant extrinsic evidence, including evidence of the testator's intent, may be admissible whether or not it comes within the ambit of s. 21 of the *Administration of Justice Act 1982* or was admissible under the prior case law.[315]

b. Australia and New Zealand

[218] Some Australian states and New Zealand have adopted the model of the *Administration of Justice Act 1982*. In Australia, legislative action came first in 1991 when the Australian Capital Territory enacted a wider version of the English model. The legislation provided for the introduction of extrinsic evidence not only in cases of meaningless or ambiguous provisions, but uncertain provisions as well.[316] This was followed by legislation in Victoria in 1997 and the Northern

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[313] (...continued)
would have been inclined to adopt the approach of Lord Denning MR in *Re Allsop*... (emphasis added) It also seems to me more in keeping with the modern approach to construction [in *Mannai*] which favours the rejection of dictionary meanings when it appears that the maker of the document has used the wrong word.") Also mentioned in *Harrison v. Tucker,* [2003] W.T.L.R. 883 (Ch.).

[314] *Charles v. Barzey* (2002), [2003] W.T.L.R. 343 at para. 6 (P.C. (Dom.)).

[315] Williams 2008 at 606-607.

[316] Australian Capital Territory Act, s. 12B:

> 12B **Extrinsic Evidence:**
> In proceedings to construe a will, evidence, including evidence of the testator's dispositive intention, is admissible to the extent that the language used in the will renders the will, or any part of the will —
> (a) meaningless; or
> (b) ambiguous or uncertain on the face of the will; or
> (c) ambiguous or uncertain in the light of the surrounding circumstances;
> but evidence of a testator's dispositive intention is not admissible to establish any of the circumstances referred to in paragraph (c).

Territory in 2000.[317] In 2006-2007, New South Wales, Queensland and Western Australia enacted legislation.[318] Only Victoria followed the wider model adopted in the Australian Capital Territory. In Tasmania, the *Wills Act 2008* also contains a provision modelled on the English legislation.[319]

[219] One commentator in Australia stated that the English model legislation "seems to encapsulate what is desirable in the law that has emerged from decided cases, but without going beyond that law."[320] Another commentator views the legislation as a response to the previous restrictive rules by extending admission of evidence of the testator's intent to ambiguous wording.[321]

[220] In 2007, New Zealand's *Wills Act* was enacted, following the English model on this issue, as recommended by the Law Commission in 1997.[322] An academic writer views the Act as "a rejection of the literal approach in favour of an intentional approach, further emphasizing Parliament's aim of giving better effect to testamentary intentions."[323]

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[317] Victoria Act, s. 36; Northern Territory Act, s. 31.

[318] New South Wales Act, s. 32; Queensland, *Succession Amendment Act 2006*, s. 33C; Western Australia Act, s. 28A.

[319] Tasmania Act, s. 46

[320] Neville Crago, "Reform of the Law of Wills" (1995) 25 U.W.A. L. Rev. 255 at 263.

[321] Ruth Pollard, "Testamentary Intentions: New laws on wills and probate commence" (March 2008) Law Society Journal 49 at 51.

[322] New Zealand Act, s. 32:

> **32 External Evidence**
>
> (1) This section applies when words used in a will make the will, or part of it, –
>
> (a) meaningless; or
>
> (b) ambiguous on its face; or
>
> (c) uncertain on its face; or
>
> (d) ambiguous in the light of the surrounding circumstances; or
>
> (e) uncertain in the light of the surrounding circumstances.
>
> (2) The High Court may use external evidence to interpret the words in the will that make the will or part meaningless, ambiguous, or uncertain.
>
> (3) External evidence includes evidence of the testator's testamentary intentions.
>
> (4) The court may not use the testator's testamentary intentions as surrounding circumstances under subsection (1)(d) or (e).

[323] Nicola Peart, "New Zealand's Succession Law: Subverting Reasonable Expectations" (2008) 37

(continued...)

[221] Two important changes to the English model have been made in some of the Australian and New Zealand legislation. They appear to have changed the English model so that admission of extrinsic evidence is not tied to the part of the will in which the ambiguity is found. They have provisions allowing admission of extrinsic evidence where the words used make the will or any part of it ambiguous.[324] In addition, Victoria, the Australian Capital Territory and New Zealand allow admission of extrinsic evidence with respect to an uncertainty in the wording.[325] This is not insignificant because ambiguous words must be capable of more than one meaning. If words are uncertain, the meaning is unknown.[326] Thus, under this legislation, extrinsic evidence may be admitted where words have no meaning, more than one meaning or an unknown meaning.

c. British Columbia

[222] In Canada, the English approach has been adopted in the recently enacted wills legislation in British Columbia. Section 4 reads:

> 4(2) Extrinsic evidence of testamentary intent, including a statement made by the will-maker, is not admissible to assist in the construction of a testamentary instrument unless
>
> (a) a provision of the will is meaningless,
>
> (b) a provision of the testamentary instrument is ambiguous
>
> (i) on its face, or

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[323] (...continued)
C.L. World Rev. 356 at 378. The same commentator has stated that:

> evidence of the testator's intentions can be admitted only after the Court has established that there are words in the will that make it meaningless or make the will on its face ambiguous or uncertain. The Court can not use the testator's intentions as surrounding circumstances from which to deduce that the words make the will ambiguous or uncertain. The ambiguity or uncertainty must be apparent from the face of the will, for example because the words are capable of more than one meaning in the context of the will.

Nicola Peart, "Where There Is A Will, There Is A Way – A New Wills Act For New Zealand" (2007) 15 Waikato L. Rev. 27 at 45-46.

[324] See for example, New Zealand Act, s. 32; Parliament of Victoria Law Reform Committee, *Reforming the Law of Wills: Report Upon An Inquiry into the 1991 Draft Wills Bill*, No. 82 (1994) at 177.

[325] New Zealand Act, s. 32; Victoria Act, s. 36; Australian Capital Territory Act, s. 12B.

[326] Uncertain - "not known or fixed, or not completely certain" and ambiguity - "when something has more than one possible meaning and may therefore cause confusion,"*Cambridge Advanced Learner's Dictionary*, *s.v*. "uncertainty" and "ambiguity" online Cambridge: Dictionary on line <http://dictionary.cambridge.org/>.

(ii) in light of evidence, other than evidence of the will-maker's intention, demonstrating that the language used in the testamentary instrument is ambiguous having regard to surrounding circumstances, or

(c) extrinsic evidence is expressly permitted by this Act.[327]

d. Should Alberta adopt the English legislative approach?

[223] As discussed earlier, the extent to which the English legislation has actually changed the law remains unclear. The objective approach seems to still hold sway as the textbooks discuss the legislation in terms of its similarity to the previous law. In addition, the limited case law suggests that the legislation may only rarely be invoked. It does not seem appropriate to adopt legislation which appears to legislate the objective approach. The many problems with the objective approach were outlined above. Further, the legislation does not seem an appropriate model as its meaning is still uncertain more than 25 years after its enactment.

e. Should Alberta adopt a contextual approach?

[224] While the contextual approach does admit evidence of surrounding circumstances, this approach seems unsuited to the interpretation of wills. Under this approach, documents are interpreted as if they had been drafted by a reasonable person and the admissible evidence reflects this. The factual matrix is the information that a reasonable person would need in order to interpret the language. This is completely at odds with the search for the subjective intent of the testator. Testators do not have to be reasonable in disposing of their property. The evidence that is relevant is the personal circumstances and intentions of the testator.

E. Reform Recommendations

[225] The goal of the law should be to provide all litigants with equal access to justice. The current law on admission of extrinsic evidence does not achieve this aim. Two approaches to the admission of evidence of surrounding circumstances are used by the courts. The use of either approach by a judge is not incorrect as both approaches have a long history in the case law. However, the result in a particular case may be determined by the individual judge's preference for the

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[327] British Columbia 2009 Act.

objective or intentional approach. The admission of evidence of a testator's intent is restricted to cases of latent ambiguity in the wording of the will regardless of whether the court takes an objective or intentional approach. Whether or not a latent ambiguity is found may depend on slight differences in wording.

[226] The current law does not meet the goal of providing all litigants with equal access to justice. The goal of law reform in this area should be to meet this aim. It should also seek to promote the goal of giving the courts the best opportunity of determining the testator's intention. The courts have consistently articulated that the goal in interpreting a will is to ascertain the intention of the testator. The task for the court is to interpret the will to ensure that the testator's property is disposed of in the way that the testator would have wished. A court has the best chance of actually determining the intention of the testator if it is able to consider all the available evidence.

[227] All of the existing approaches, including the law reform which has taken place to date, do not fully support the aim of finding the testator's intention. The objective approach has defeated the intentions of testators on numerous occasions as the wording of a will may seem clear when in actual fact there is an ambiguity in the surrounding circumstances. The intentional approach as crafted by the Canadian courts does admit evidence of surrounding circumstances in all cases. However, under this approach, admission of evidence of the testator's intention is still confined to cases of latent ambiguity. Law reform initiatives to date have adopted the approach taken by the English *Administration of Justice Act 1982*. However, it seems unwise to follow this model given its lack of clarity and concentration on continuing an objective approach.

[228] The recommendation of ALRI is that a court should be able to consider all the extrinsic evidence in every case, including evidence of the testator's intention. With implementation of this recommendation, the law would be simple and clear. The admission of evidence would not depend on the individual judge's view of the current law. All litigants would have the same opportunity to have all the available evidence considered. A court would have the best opportunity to ensure that a testator's intentions were carried out.

[229] In the past when admission of all extrinsic evidence has been considered by other law reform agencies, the major reason for rejecting such a proposal has been the fear of increased litigation. Certainly, the admission of evidence of all surrounding circumstances in every case under the Canadian intentional approach does not seem to have led to such an increase.[328] In addition, the admission of an expanded category of evidence of the testator's intent under the English *Administration of Justice Act 1982* has not appeared to have increased the numbers of wills being litigated.[329]

[230] In our view, the safeguards presently in place make this concern unfounded. Firstly, the will still acts as the guiding star. Extrinsic evidence is only an aid to interpretation. The court cannot write the will for the testator. Secondly, the *Alberta Evidence Act* requires that evidence in actions against deceased persons be corroborated.[330] To ensure that this requirement applies to all proceedings interpreting wills, ALRI recommends that a similar provision be placed in the *Wills Act*. Thirdly, it has always been the job of the court to determine the relevancy and weight of evidence and immaterial or irrelevant evidence would be excluded.

RECOMMENDATION No. 18
The *Wills Act* should provide that extrinsic evidence, including evidence of the intention of the testator, is admissible to aid in the interpretation of a will.

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[328] The Alberta case law survey conducted for this paper found 23 decided cases in 25 years. See above at notes 232-237.

[329] See above at para. 206.

[330] *Alberta Evidence Act*, R.S.A. 2000, c. A-18, s. 11: "In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposed or interested party shall not obtain a verdict, judgment or decision on that party's own evidence in respect of any matter occurring before the death of the deceased person, unless the evidence is corroborated by other material evidence." The stipulation that the evidence must be material follows the basic rule of evidence that it must be relevant to a material issue in a proceeding. Material evidence is evidence that is "directed at a matter in issue in the case." David M. Paciocco, *The law of evidence*, 5th ed. (Toronto: Irwin Law, 2008) at 27 [footnotes omitted]. Under the Alberta Rules of Court, an "action" is defined as including any issue "directed to be tried." Alta Reg. 390/68, s. 5(1).

[231] We propose the following draft provision for implementing this recommendation:

> Extrinsic evidence, including evidence of a testator's intention, which assists in establishing the testator's intention is admissible to interpret a will.

It the provision, it seems appropriate to use the term "extrinsic evidence" which means "evidence relating to matters referred to in a document that is not itself included in that document" [331] and has been used in other Canadian legislation including the recent British Columbia legislation. The English legislation and other legislation modelled on it does not provide assistance as admission of extrinsic evidence is tied to the finding of ambiguities in the will or surrounding circumstances. The use of the language "assists in establishing the testator's intention" is to ensure that the evidence admitted is relevant and material, although the rules of evidence should take care of this.

RECOMMENDATION No. 19
The *Wills Act* should provide that evidence in actions concerning the estate of a deceased person must be corroborated.

[232] We propose the following draft legislation for implementing this recommendation:

> In any action or proceeding concerning the estate of a deceased person, a party shall not obtain a judgment or decision on that perty's own evidence in respect of any matter occurring before the death of the deceased person, unless the evidence is corroborated by other material evidence.

The draft provision follows the outline of s. 11 of the *Alberta Evidence Act* but uses plainer language in some respects.

F. Statutory Construction Rules

1. Introduction

[233] The Alberta Act contains numerous statutory rules of construction which are subject to a contrary intention appearing by the will.[332] Section 26 pertaining to gifts of real property is typical:

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[331] *Oxford Dictionary of Law*, 7th ed., *s.v.* "extrinsic evidence".

[332] See: Alberta Act, ss. 21-28, 30, 33-36.

> **26** Except when a contrary intention appears by the will, if real property is devised to a person without words of limitation, the devise passes the fee simple or the whole of any other estate that the testator had power to dispose of by will in the real property.

[234] These statutory rules set out default rules which help to prevent partial intestacies or provide for items likely forgotten by the testator. They are often used when the testator has not made any provision for a change in circumstances since the making of the will. A frequent example is where a beneficiary predeceases the testator and the testator has not specified what is to happen in such an event. The statutory rule of construction on anti-lapse sets out a scheme of succession. A finding of a contrary intention on the part of the testator prevents the operation of the statutory rule. Traditionally, the courts have required that the contrary intention be found in the wording of the will itself and have not looked at any extrinsic evidence.

[235] Other statutory construction rules in the Act, such as the provisions with respect to revocation and revival are framed in terms which appear to allow consideration of extrinsic evidence. For example, s. 20(1) with respect to revival merely stipulates that a contrary intention must be shown.[333] The intention to revoke a will is found in a writing declaring an intention to revoke or by burning, tearing or otherwise destroying the will with an intention to revoke.[334] These matters are dealt with by the probate court and the probate court is not subject to the restrictions on admission of extrinsic evidence that are imposed on the court of construction.[335] In addition, the provision with respect to a disposition of mortgaged property is framed in terms which allow the court to look at extrinsic evidence.[336]

[236] The law on the admissibility of extrinsic evidence to find a contrary intention on the part of the testator originated in the early common law. It is not an

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[333] Alberta Act, s. 20(1).

[334] Alberta Act, s. 16.

[335] See for example, Hawkins at Ch. 1.

[336] Alberta Act, s. 37(1).

issue which has been extensively considered by law reform agencies or legal commentators. Perhaps as a result, recent law reform has continued the traditional rule that the contrary intention must be found on the face of the will. However, the case law in Canada is mixed, with some courts not following the traditional rule and admitting evidence of surrounding circumstances.

[237] It will be argued in this report that the courts should be able to look at extrinsic evidence. An understanding of the historical roots of the restriction and an examination of the difficulties in the case law supports this view. Finally, the primacy of the intentions of the testator in the interpretation of wills provides the key reason why the courts should be able to look at extrinsic evidence. Rules which were enacted to give effect to the intentions of a testator should not be used to defeat those intentions.

2. Historical roots

[238] Many of the statutory construction rules originated in the English *Wills Act 1837*. These rules include the provision that a will speaks from the time of death, provisions on lapse, provisions on general devises and general gifts, the provision on construction of devises without words of limitation, and the provision on the construction of the words to "die without issue" or to "die without leaving issue."[337]

[239] During the early development of the common law, there was great concern on the part of the courts that the terminology in legal documents be given a fixed meaning. It was thought that the meaning of the words within a document had an unchangeable meaning which applied to all documents. Over time, the case law articulated rules of construction which imposed a fixed meaning on certain words and phrases.[338] In the construction of wills, the outcome of this process has been summarized as follows: "Decisions as to the true construction of the ambiguous words of one testator were cited as authorities for putting a similar construction

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[337] England Act, ss.XXIV-XXIX, XXXII, XXXIII as reproduced in Thomas Jarman, *A Treatise on Wills*, 8th ed. by Raymond Jennings (London: Sweet & Maxwell, 1951) at v. 3, Appendix B.

[338] Sir William Holdsworth, *A History of English Law*, v. VII (London: Sweet & Maxwell, 1996) at 393-394.

upon the ambiguous words of another testator....”[339] Initially, the case law was useful in that it served as a guide to the wording necessary to achieve a particular result.[340] However, as the rules of construction and other law multiplied, the focus of the courts was taken away from the intentions of the testator and the law became very complex.[341]

[240] The impetus for the enactment of the *Wills Act 1837* in England was the fact that the law was operating to defeat the intentions of many testators. The statutory construction rules were placed in the Act to change the common law.[342] This aim can be clearly seen in the 1833 report by the commissioners appointed to look into reform of the law of real property.[343] For example, the report stated with respect to the time from which a will should speak:

> The usual intention of the Testator is to dispose, not of the property which he has when he makes his Will, but of the property which he may have at his death, and if Wills were to be construed with reference to the property comprised in them, both real and personal, as speaking at the Testator's death, unless a contrary intention appears, the rule would get rid of the greatest part of the intricate laws relating to revocation and republication.[344]

[241] As a further example, with respect to the lapse of gifts due to the death of the beneficiary in the lifetime of the testator, the report concluded:

> The rule, that gifts lapse if the person to whom they are made dies in the lifetime of the Testator, sometimes operates with great hardship and defeats in many cases the intention of the Testator ... We believe that in most cases

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[339] Sir William Holdsworth, *A History of English Law*, v. VII (London: Sweet & Maxwell, 1996) at 394.

[340] Sir William Holdsworth, *A History of English Law,* v. VII (London: Sweet & Maxwell, 1996) at 397-398.

[341] Sir William Holdsworth, *A History of English Law,* v. VII (London: Sweet & Maxwell, 1996) at 393-394.

[342] Hawkins at 73; Law Reform Commission of British Columbia, *Interpretation of Wills*, Working Paper No. 32 (1981) at 56 [British Columbia Working Paper].

[343] House of Commons, *Copy Of The Fourth Report Made To His Majesty By The Commissioners Appointed To Inquire Into The Law Of England Respecting Real Property* (April 24, 1833).

[344] House of Commons, *Copy Of The Fourth Report Made To His Majesty By The Commissioners Appointed To Inquire Into The Law Of England Respecting Real Property* (April 24, 1833).

> a Testator would prefer the families of the persons to whom he gives estates of inheritance in land, or an absolute property in personalty....[345]

Thus, it can be seen that the purpose of the statutory rules of construction in the 1837 Act was to change the prevailing law that defeated what was regarded as the likely intention of most testators.[346]

3. Nature of statutory construction rules

[242] A statutory construction rule is akin to a general rule of construction. It is simply a legislated rule of construction. The nature of a rule of construction has been explained as follows:

> A rule of construction may always be reduced to the following form - Certain words or expressions, which may mean either *x* or *y*, shall, prima facie be taken to mean x. A rule of construction always contains the saving clause, 'unless a contrary intention appear by the will': though some rules are much stronger than others, and require greater force of intention in the context to control them.[347]

[243] Under the common law, whether or not extrinsic evidence is available to assist in finding the intention of the testator under a rule of construction varies. There are rules of construction which appear to not allow any inquiry at all as to the intent of the testator.[348] Some rules may be rebutted by extrinsic evidence which suggests another reasonable meaning. Other rules can only be rebutted by a contrary intention found in the wording of the testamentary instrument.[349]

[244] At present the statutory construction rules function as very strong rules of construction in that any contrary intention to refute a rule must be found within the wording of the document itself.[350] In this sense, they set out presumptions that the testator must work around in order to avoid. This is best accomplished by careful

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[345] House of Commons, *Copy Of The Fourth Report Made To His Majesty By The Commissioners Appointed To Inquire Into The Law Of England Respecting Real Property* (April 24, 1833).

[346] Parry & Clark at 255.

[347] Hawkins at 57.

[348] British Columbia Working Paper 47-48.

[349] British Columbia Working Paper at 47-48.

[350] Law Reform Commission of British Columbia, *Testamentary Intent and Unexpected Circumstances*, Working Paper No. 57 (1987) at 2.

consideration of each statutory rule and use of explicit language indicating a contrary intention.

4. Admission of extrinsic evidence

[245] The rule that a contrary intention to rebut a statutory rule of construction must be found within the document itself is based on the early 19th common law. At that time, the common law took a very restrictive view of admission of extrinsic evidence to interpret a will. This was based in large part on the codification of the law in this area by Sir James Wigram. Under the objective or literal approach to interpretation, the focus was on the wording of the will itself. Evidence of surrounding circumstances was admitted only to determine the reference of a word to the outside world. Evidence of the intention of the testator was admitted only in the case of a latent ambiguity. As already discussed, a less strict version of this approach is still favoured by some courts in Canada today.

[246] Initially, the cases held that the contrary intention had to be found in express wording on the face of the will. However, by the end of the 19th century, the contrary intention could be found by implication: "it is not necessary that such contrary intention should be expressed in so many words, or in some way quite free of doubt, but it is to be gathered by adopting, in reference to the expression used by the will-maker, the ordinary rules of construction applicable to wills."[351]

5. Current law in Canada

[247] The case law in Alberta is mixed with respect to whether extrinsic evidence can be taken into account in determining the testator's intention under these statutory rules. The vast majority of the cases are concerned with finding a contrary intention in the will to prevent the operation of s. 35 concerning lapse.[352]

[248] In four cases, the court examined the wording of the will and did not mention the use of any extrinsic evidence.[353] For example, *Re Rosychuk Estate*

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[351] British Columbia 1982 Report at 36.

[352] Alberta Act, s. 35.

[353] See also: *Re Kvellestad Estate* (1985), 65 A.R. 361 (C.A.) (lapse); *Strohschein v. Hill* (1985) 59

(continued...)

concerned a gift to a brother who had predeceased the testator. The court found that the gift did not lapse and s. 35 applied. The court stated that the will did not "contain any wording which could be seen as the basis for a contrary intention sufficient to oust the operation of s. 35."[354]

[249] ALRI consulted with wills and estates practitioners in Calgary and Edmonton to obtain their views on our recommendation.[355] The written responses we received were overwhelmingly in favour of allowing the court to consider all extrinsic evidence as an aid in interpreting a will. One respondent said: "The current law is a mess. It is unclear when a court can (i.e. should) look into surrounding circumstances." Another correspondent stated that our recommendation "will make the playing field level when lawyers go into courts."

[250] In five cases, the court examined extrinsic evidence under the armchair rule to find a contrary intention.[356] In *Martini Estate v. Christensen*, the Alberta Court of Appeal stated with respect to the use of extrinsic evidence that:

> Although s. 22 requires a contrary intention to appear "from the will" itself, courts have sometimes gone outside the will and also looked at the surrounding circumstances, in determining whether a contrary intention is present.....
>
> Often, the other circumstances considered are those extant when the will was written...Even if consideration should be given to these [surrounding] actions, I am not convinced that they are sufficient to overcome the

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[353] (...continued)
A.R. 396 (C.A.) (lapse); *Re Foss Estate* (1940), 4 D.L.R 791 (AB.S.C.) (real property devised without words of limitation); *Re Rosychuk Estate* (2005), 387 A.R.196 (Q.B.).

[354] *Re Rosychuk Estate* (2005), 387 A.R. 196 (Q.B.).

[355] Consultations were held with the Society of Trusts and Estates Planners (February 24, 2010); the Wills and Estates section of the Canadian Bar Association in Calgary (March 12, 2010) and with a focus group of wills and estates practitioners in Edmonton (March 17, 2010). We received 19 written responses and 18 of those responses were in favour of our recommendation.

[356] *Re Wudel* (1982), 22 Alta. L.R. (2d) 394 (Q.B.); *Re Seal Estate* (2001), 40 E.T.R. (2d) 254 (AB.C.A). See para. 32: "Even if I were not persuaded that s. 26 ... is dispositive ... a consideration of surrounding circumstances strongly militates in favour of the same result."; *Blumhagen v. Blumhagen Estate* (1985), 63 A.R.216 (Q.B.); *Re Fossen Estate* (2002), 319 A.R. 190 (Q.B.); *Martini Estate v. Christensen* (1999), 232 A.R. 229 (C.A.).

> presumption that the will speaks from death and that he intended to devise the interest he then had.[357]

[251] A survey of case law from other provinces leads to the same result, with some courts admitting extrinsic evidence and other courts stating that the contrary intention must be found in the language of the will itself. In the majority of cases outside Alberta reviewed for this chapter, the courts held that the contrary intention must be found in the will itself. These decisions include cases of ademption, lapse, devises of land without limitation, and disposition of a mortgaged debt.[358] In another group of cases, the court looked at extrinsic evidence when the language of the will was ambiguous.[359] There are also cases in which there is no discussion on the admission of extrinsic evidence.[360]

[252] In contrast, there are a significant number of cases which state that surrounding circumstances may be looked at in every contested will.[361] Two recent cases from Ontario have discussed the reasons why extrinsic evidence should be admitted. *Campbell v. Shamata* concerned the provision in the Ontario *Estates*

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[357] *Martini Estate v. Christensen* (1999), 232 A.R. 339 at paras. 38-39 (C.A.).

[358] See for example: *DiMambro Estate v. DiMambro* (2002), 48 E.T.R. (2d) 2200 (Ont. Sup. Ct.(H.C.J.)); *Re Billard Estate* (1986), 22 E.T.R. 150 (Ont. S.C. (H.C.J.)); *Re Deans*, [1973] O.R 527 (S.C.(H.Ct.J.)); *Dexter v. Murphy* (2004), 270 N.B.R. (2d) 44 (C.A.); *Smith Estate v. Davis* (2002), 46 E.T.R (2d) 135 (Ont. Sup. Ct.J.); *Mackie Estate v. Harris* (1986), 54 O.R. (2d) 784 (S.C.(H.Ct.J.)) (*obiter* comments); *Perry v. Hicknell* (1982), 34 O.R. (2d) 246 (S.C.(H.Ct. J.)); *Olson v. Olson*, [1995] 2 W.W.R. 732 (Sask. Q.B.); *Doucette v. Fedoruk Estate* (1992), 83 Man. R. (2d) 179 (C.A.). The exclusion of extrinsic evidence in *Re Billard Estate* is criticized in T.G. Youdan, "The Meaning of 'Contrary Intention Appears By the Will'" (1986) 22 E.T.R. 151.

[359] *Cameron v. Gold* (1982), 14 Sask. R. 220 (C.A.); *Bartrop v. Blackstock* (1957), 10 D.L.R. (2d) 192 (Sask. C.A.); *Smithers v. Mitchell Estate* (2004), 228 N.S.R. (2d) 295 (C.A.).

[360] *Adams v. Tardif* (1997), 155 Sask. R. 78 (Q.B.); *Chancey v. Chancey* (1980), 25 Nfld. & P.E.I.R. 281 (Nfld. S.C.(T.D.)); *Gislason v. Gillis* (1988), Man. R. (2d) 39 (C.A.); *Connery Estate v. Novotny* (2006) 209 Man. R. (2d) 126 (Q.B.).

[361] See for example, *Therres v. Therres* (2006), 275 Sask. R. 47 (C.A.); *Wittick Estate v. Williams Estate* (2009), Man. R. (2d) 58 (Q.B.); *Batten v. Batten Estate* (2002), 212 Nfld. & P.E.I.R 348 (N.L. S.C.(T.D.)); *Wettlaufer Estate v. Wettlaufer Estate*, [1993] O.J. No. 4507 (Ct. Gen. Div.); *Sarkin v. Osipov Estate* (1989), 36 E.T.R. 139 (B.C.S.C.); *Canada Trust v. Off Estate* (1999), 30 E.T.R. (2d) 185 (Sup.Ct. J.); *Rudling Estate v. Rudling*, [2007] O.J. No. 4705 (Sup. Ct. J.) *Campbell v. Shamata,* [2002] O.J. No. 99 (Sup. Ct. J.); *Resnick v. McGuire* (2007), 39 E.T.R. (3d) 298 (Ont. Sup. Ct. J.); *Tonon v. Vendruscolo* (1986), 25 E.T.R. 201 (Ont. S.C.(H.C.J.)); *Re Coughlin* (1982), 36 O.R. (2d) 446 (H.C.J.); *Dodge v. Girard* (1993), 15 O.R. (3d) 422 (Ct. Gen. Div.).

Administration Act that estate debts are to be paid out of the residue "except so far as a contrary intention appears from the person's will."[362] While the court found that the provision was not applicable to the particular facts, the court's position was that the case law did not establish that the ordinary rules for construction of wills did not apply. Depending on the wording of the will, surrounding circumstances should be able to be taken into account when appropriate. The court stated:

> It would be odd to apply entirely different canons of construction to a particular clause of a will depending upon whether one is interpreting it generally for purposes of administration of an estate, or more specifically to determine whether it constitutes an exception under s. 5 of the *EAA*. The so-called "armchair rule" for the interpretation of provisions of a will has been part of the common law for a very long time. It would take clear statutory language to displace it. There is no such language in s. 5 of the *EAA*.[363]

[253] In *Resnick v. McGuire*, the issue for the court was whether a lapsed residuary gift passed on intestacy to the next of kin or went to the surviving residuary beneficiaries. In Ontario, such a gift passes as on intestacy, unless there is a contrary intention in the will. There was no contrary intention found on the face of the will and it was only by considering surrounding circumstances that the court was able to conclude that the gift should pass to the surviving residuary beneficiaries. The court followed *Campbell v. Shamata* and concluded that it was permissible to consider surrounding circumstances under the armchair rule. The basic rule of construction is to determine the "true intention of the testator in light of all the surrounding circumstances." From the uncontradicted evidence as to the surrounding circumstances, the court held that the gift went to the surviving beneficiaries.[364]

[254] In England and Ireland, it appears that the courts confine themselves to the wording of the will in searching for a contrary intention.[365] In Australia and New Zealand, it seems that the courts apply the normal rules on admission of extrinsic

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[362] *Campbell v. Shamata*, [2002] O.J. No. 99 (Sup. Ct. J.) at para. 5.

[363] *Campbell v. Shamata*, [2002] O.J. No. 99 (Sup. Ct. J.) at para. 7.

[364] *Resnick v. McGuire* [2007] O.J. No. 1281 (Sup. Ct. J.).

[365] C.H. Sherrin *et al.*, *Williams on Wills*, 7th ed. (London: Butterworths, 1995) at 595-597; Albert Keating, *The Construction of Wills* (Dublin: Round Hall, 2001) at 196-199.

evidence when searching for a contrary intention and look at evidence of surrounding circumstances when appropriate.[366]

6. Finding a contrary intention

[255] It is not easy for the courts to find a contrary intention, especially when the search is confined to the four corners of the will. The result is a body of case law which one commentator has described as confused.[367]

[256] The English courts continue to insist that the contrary intention be found in the language of the will.[368] The Manitoba Court of Appeal case of *Doucette v. Fedoruk Estate*[369] contains an extensive review of the English law which outlines the requirements for a finding of a contrary intention. The Court summarized the requirements as follows:

> From the authorities I have cited above, I conclude that in order to exclude the operation of s. 25.2, there must be words or language in the will which, in all of the circumstances, indicate a clear and positive intention to do so. A contrary intention will not be found by "picking out little circumstances." There must be more than mere inference or conjecture; there must be circumstances which "carry conviction to the mind of the court" that the testator intended a result inconsistent with the statutory provision.[370]

The circumstances referred to by the court are the other provisions of the will. The Court concluded in this case that there was no contrary intention on the basis of the wording of the will as a whole.

[257] The English case law considering the statutory rule of construction on the time that a will takes effect illustrates the difficulties in finding a contrary intention on the face of the will. This rule states that a will takes effect as if it had been executed immediately before the death of the testator, subject to a contrary intention appearing in the will.

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[366] I. J. Hardingham, M.A. Neave & H.A.J. Ford, *The Law of Wills* (Sydney: The Law Book Company, 1977) at 165.

[367] Clive V. Margrave-Jones, ed., *Mellows: The Law of Succession*, 5th ed. (London: Butterworths, 1993) at 162.

[368] C.H. Sherrin et al, *Williams on Wills*, 7th ed. (London: Butterworths, 1995) at 595-597.

[369] *Doucette v. Fedoruk Estate* (1992), 83 Man. R. (2d) 179 at para 23 (C.A.).

[370] *Doucette v. Fedoruk Estate* (1992), 83 Man. R. (2d) 179 at para. 23 (C.A.).

[258] Many wills contain descriptions of property in terms such as "the car I now possess." Does the use of the word "now" indicate a contrary intention that trumps the statutory rule? The courts have taken three approaches. In some cases, the word is simply ignored and the devise is construed as "the car I possess." In other cases, the word has been construed to refer to the date under the statutory rule, namely, immediately before death. In other cases, the use of the word "now" has been held to indicate a contrary intention. For example, where there was a gift of "my house and land where I now reside" and more land was acquired, the court held that the additional land was not included under the gift.[371] It is difficult to reconcile the different outcomes based on similar wording.

[259] The above situation may be contrasted with the seemingly more just result if the court looks at surrounding circumstances. In three Ontario lapse cases, interpreting almost identical wording, there was a contrary intention found in one case, but not in the other two cases. The question in the cases concerned the effect of wording similar to "for his own use absolutely."

[260] In *Tonon v. Vendruscolo*, the court considered the previous wills drafted by the testator to find there was no contrary intention expressed.[372] In *Re Coughlin*, the surrounding circumstances included the fact that the surviving beneficiary named in the will had been raised by the testatrix and the nephew who would take under intestacy was not close to the testatrix. From these circumstances, the court found a contrary intention.[373] In *Re Dodge and Girard*, the court looked at the family circumstances in determining that there was no contrary intention.[374] The court stated:

> In approaching this matter it is the function of the court to ascertain the intention of the Testator from the language used in the Will together with the surrounding circumstances which might assist the court in the clarification of that intention. Reference to other authorities and indeed to alleged tests published for the assistance of solicitors is not in my view exceedingly

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[371] Clive V. Margrave-Jones, ed., *Mellows: The Law of Succession*, 5th ed. (London: Butterworths, 1993) at 162-164.

[372] *Tonon v. Vendruscolo* (1986), 25 E.T.R. 201 (Ont. S.C.(H.C.J.)).

[373] *Re Coughlin* (1982), 36 O.R. (2d) 446 (H.C.J.).

[374] *Dodge v. Girard* (1993), 15 O.R. (3d) 422 (Ct. Gen. Div.).

> helpful. Indeed one can only compare the decision in *Tonon v. Vendruscolo* ... with the decision in *Re Coughlin*.... In each of these cases similar language to the one before this court was considered, and in one case a contrary intention was found to exist while in the other case a contrary intention was found not to exist. Again, it depends on the totality of the Will, the language used in the Will, and the circumstances surrounding the creation of the Will to determine the necessary intention of the testator.[375]

[261] Like the English cases, these decisions construe similar wording to find a contrary intention in some circumstances and not others. The key difference is that they are decided on their own facts.[376] There is no obvious reason for the different results in the English cases where the interpretation is ostensibly confined to the wording of the will. The best explanation is that the courts were trying to achieve what they saw as a just result. A more principled and consistent approach can be seen in the Ontario cases. Looking at the extrinsic evidence of surrounding circumstances allows the court to interpret the will from the perspective of the particular testator. Such an approach is far more likely to ascertain the intention of the testator. This has to be a more desirable result.

7. Law reform and recent legislation

[262] The Law Reform Commission of British Columbia examined the issue of admission of extrinsic evidence with respect to statutory rules of construction in the early 1980s. The Commission made a detailed examination of both the rules of construction and the statutory construction rules. The Commission recommended that statutory rules should be treated no differently from other rules of construction and that a contrary intention should be able to be established by extrinsic evidence.[377] In 2006, the British Columbia Law Institute recommended that the contrary intention should appear in the will unless the provision states that other extrinsic evidence may be admitted. The Institute did not discuss the reasons for this decision.[378]

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[375] *Dodge v. Girard* (1993), 15 O.R. (3d) 422 at paras. 9-11 (Ct. Gen. Div.).

[376] Suzana Popovic-Montag, "Revisiting Section 31 Of The Succession Law Reform Act - The 'Anti-Lapse Provision'" (2003-2004) 23 E.T.P.J. 266 at 275.

[377] British Columbia 1982 Report at 37; British Columbia Working Paper at 57.

[378] British Columbia 2006 Report at 142.

[263] The Manitoba Law Reform Commission reviewed the issue in 2003. The draft proposed by the Commission recommended that admission of extrinsic evidence should be considered on a rule-by-rule basis. Where it is felt appropriate, specific statutory rules should be revised to allow extrinsic evidence to be admitted. In the draft act, only the provision on the effect of divorce provided for the admission of extrinsic evidence.[379]

[264] The recently enacted British Columbia legislation[380] has retained the traditional scheme. The wording used is that "a contrary intention appears in a will."[381] The Act states:

> 40(1) If this Act provides that a provision of this Act is subject to a contrary intention appearing in an instrument, that contrary intention must appear in the instrument or arise from a necessary implication of the instrument.[382]

[265] In Australia, the question was examined by the Standing Committee of Attorneys General in 1997. The Committee recommended that extrinsic evidence be admissible with respect to provisions designed to prevent partial intestacies.[383] The Committee felt that other sections which were more concerned with establishing a statutory succession scheme should retain the traditional restriction. This applied to sections such as lapse and survivorship. For example, with respect to lapse, the Committee's view was that the testator should not be able to disinherit a grandchild except by a express provision in the will. Allowing extrinsic evidence

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[379] Manitoba Report at 55, 105.

[380] At the date of the writing of this memorandum, this legislation was not yet in force. British Columbia 2009 Act.

[381] The sections to which this applies include lapse, that the will speaks from death, gifts of real property, gifts to heirs, words importing failure of issue, property encumbered by a security interest, relief from disposition of property, insufficient assets and revocation of gifts to spouses. British Columbia 2009 Act, ss. 41, 42, 45, 46, 47, 48, 50, 56.

[382] British Columbia 2009 Act, s. 4(1). A necessary implication in the context of wills is "[w]here it is clear on the face of a will that the testator has not accurately or completely expressed his meaning by the words he has used, and it is also clear those are the words which he has omitted, those words may be supplied in order to effectuate the intention as collected from the context." *Re Omilusik Estate* (1988), 92 A.R.283 at 4 (Surr. Ct.).

[383] This was applicable to the provisions concerning effect of a will, property not effectively disposed of, general dispositions of property and land, and devises of real property without words of limitation. See Australia Uniform Report at 63-64.

outside the four corners of the will could lead to admission of evidence of the intention of the testator and the Committee felt this would be undesirable.[384] The views of the Committee were endorsed by the Queensland and New South Wales law reform commissions.[385]

[266] Recent legislation passed in Australia also follows the traditional rule. The Queensland *Succession Amendment Act 2006* provides that the contrary intention "appears in the will."[386] The recent legislation enacted in New South Wales and Western Australia is similar.[387]

[267] The New Zealand *Wills Act 2007* appears to restrict evidence of a contrary intention to the wording of the will. The sections use the language "if the will makes it clear that the testator intended." Each section is drafted with reference to the specific situation. For example, in s. 20 dealing with the effect on the will of the testator dying, the section provides:

> 20(1) A will's words disposing of property apply to circumstances as they are when the will-maker dies.
>
> (2) Subsection (1) does not apply if the will makes it clear that the will-maker intended the words to apply to circumstances as they are at a different time.

Again in s. 23 dealing with lapse of gifts to children, the section provides:

> 23(2) The will must be read as disposing of the property — (a) to the grandchild; or (b) among the grandchildren in equal shares, if more than 1 is alive when the will-maker dies.
>
> (4) Subsection (2) does not apply if the will makes it clear that the will-maker intended to dispose of the property other than to the grandchild or grandchildren.

8. Should the traditional restriction on admission of extrinsic evidence be retained?

[268] As can be seen from the above discussion, recent legislation in British Columbia, Australia and New Zealand has reaffirmed the traditional rule that the

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[384] Australia Uniform Report at 62-63.

[385] Queensland Law Reform Commission, *The Law of Wills*, Report No. 52 (1997) at 79-80; New South Wales Law Reform Commission, *Uniform Succession Laws: The Law of Wills,* Report No. 85 (1998) at 111-112.

[386] Queensland, *Succession Amendment Act 2006*, ss. 33B, 33D-P.

[387] New South Wales Act. See for example s. 36(2) which states: "This section does not apply if a contrary intention appears in the will."; Western Australia Act 2007, s. 27.

contrary intention to rebut a statutory rule should appear in the will itself. This legislation was enacted in the face of opposition by some of the law reform agencies who have considered the question.[388] It is difficult to understand the decision to keep the status quo. The arguments in favour of allowing the admission of extrinsic evidence are persuasive.

[269] The first and foremost reason for allowing extrinsic evidence to find a contrary intention is based on the primary rule of construction. The object of the court is to determine the intention of the testator.[389] While the wording of the will provides good evidence of the intention of the testator, words can never be understood apart from their context.[390] It seems obvious that the court will be better able to determine the testator's intent if it can look at all the available evidence in addition to the words in the will.

[270] The criticisms of the general rules of construction focus on the fact that they operate to discourage the court from searching for the intention of the individual testator. They often operate as objective standards which were not their original purpose. The intention being imposed is an arbitrary one which may have little to do with the testator's actual intention.[391] This is why it is often insisted that they should only be used when the testator's intent cannot be determined from the will or allowable extrinsic evidence.[392]

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[388] British Columbia 1982 Report; British Columbia Working Paper; Manitoba Report at 55, 105; Australia Uniform Report; New South Wales Law Reform Commission, *Uniform Succession Laws: The Law of Wills,* Report No. 85 (1998) at 111-112; Queensland Law Reform Commission, *The Law of Wills*. Report No. 52 (1997).

[389] John G. Ross Martyn *et.al*., eds., *Theobald on Wills*, 16 th ed. (London: Sweet & Maxwell, 2001) at 1217.

[390] Johan Steyn, "The Intractable Problem of The Interpretation of Legal Texts" (2003) 25 Sydney L. Rev. 5 at 6.

[391] Law Reform Commission of British Columbia, *Report on Wills and Changed Circumstances*, Report No. 102 (1989) at 1 [British Columbia 1989 Report].

[392] California Law Revision Commission, *Recommendation: Rules of Construction for Trusts and Other Instruments* (2001) v. 31 at 173-174.

[271] The original statutory rules of construction were enacted to reverse the common law which had been defeating the intentions of many testators. The aim of the commissioners in 1833 was not to introduce any new restrictive rule of evidence. The admission of extrinsic evidence for the statutory rules of construction simply mirrored the prevailing rules on admission of such evidence.[393] The limited admission of extrinsic evidence under the objective or literal approach to construction was a product of the early common law and the early 19th century approach to admission of extrinsic evidence. The major criticism of this approach has always been that it has operated to defeat the intention of testators and has produced clearly unjust results.[394]

[272] In any event, an objective approach seems to be inappropriate to the interpretation of a will. A will is a personal and potentially idiosyncratic document. Testators do not have to be reasonable, logical or objective. Wills are often prepared under difficult circumstances. Even if a will is prepared when the testator is healthy, the testator is necessarily focussing on their own death. The circumstances often lead to the execution of documents with gaps and ambiguous language.[395]

[273] Further, it does not seem practical to require testators to express any contrary intent within the wording of the will. For a start, they must be knowledgeable as to the content of the statutory rules. They must also express the contrary intent as clearly as possible. When testators prepare their own wills, it is highly unlikely that the language will adequately express any contrary intent. Even with legal advice, the wording may be inadequate due to negligent advice.

[274] Retention of this restriction for statutory rules of construction is out of step with legislative reform expanding the admissible extrinsic evidence to construe a

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[393] T.G. Youdan, "The Meaning of 'Contrary Intention Appears By the Will'" (1986) 22 E.T.R. 151 at 152-153.

[394] See the famous criticism of the approach by Lord Denning in *In Re Rowland* (1962), 2 All E.R. 837 at 840-842 (C.A.).

[395] British Columbia Working Paper at 21.

will in general.[396] It contradicts Canadian case law which views the admission of extrinsic evidence of surrounding circumstances as necessary to determine a contrary intention on the part of a testator.[397]

[275] It has been argued that any expansion of admissible evidence should only apply to provisions which are characterized as being designed to prevent partial intestacies.[398] Provisions characterized as imposing a statutory scheme of succession should retain the traditional restriction. However, the history of these provisions shows that the purpose was not to impose a statutory scheme of succession, but to avoid defeating the intentions of testators.[399] Further, the creation of statutory schemes of succession within wills legislation may not be appropriate given the common law focus on testamentary freedom. It is arguable that schemes of statutory succession should only be present under intestate succession legislation.

9. Should the admissible extrinsic evidence include evidence of the intention of the testator?

[276] It may be questioned whether the admission of extrinsic evidence to rebut a statutory rule of construction should include all extrinsic evidence or be confined to evidence of surrounding circumstances under the armchair rule. With respect to

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[396] *Administration of Justice Act 1982* (U.K.), c. 53, s. 21; Victoria Act, s. 36; Northern Territory Act, s. 31; New South Wales Act, s. 32; *Succession Amendment Act 2006*, s. 33C; Western Australia Act, s. 28A; Tasmania Act, s. 46; New Zealand Act, s. 32; British Columbia 2009 Act, s. 4.

[397] *Re Wudel* (1982), 22 Alta. L.R. (2d) 394 (Q.B.); *Re Seal Estate* (2001), 40 E.T.R. (2d) 254 (Alta. Q.B.); *Blumhagen v. Blumhagen Estate* (1985), 63 A.R. 216 (Q.B.); *Re Fossen Estate* (2002), 319 A.R. 190 (Q.B.); *Martini Estate v. Christensen* (1999), 232 A.R. 339 (C.A.); *Therres v. Therres* (2006), 275 Sask. R. 47 (C.A.); *Wittick Estate v. Williams Estate* (2009), 241 Man. R. (2d) 58 (Q.B.); *Batten v. Batten Estate* (2002), 212 Nfld. & P.E.I.R 348 (N.L.S.C. (T.D.)); *Wettlaufer Estate v. Wettlaufer Estate*, [1993] O.J. No. 4507 (Ct. J.(Gen. Div.)); *Sarkin v. Osipov Estate* (1989) 36 E.T.R. 139 (B.C.S.C.); *Canada Trust v. Off Estate* (1999), 30 E.T.R. (2d) 185 (Ont. Sup.Ct. J.); *Rudling Estate v. Rudling*, [2007] O.J. No. 4705 (Sup. Ct. J.) *Campbell v. Shamata* [2002] O.J. No. 99 (Sup. Ct. J.); *Resnick v. McGuire* (2007), 39 E.T.R. (3d) 298 (Ont. Sup.Ct.J.); *Tonon v. Vendruscolo* (1986), 25 E.T.R. 201 (Ont. S.C. (H.C.J.)); *Re Coughlin* (1982), 36 O.R. (2d) 446 (H.C.J.); *Dodge v. Girard* (1993), O.R. (3d) 422 (Ct. Gen. Div.).

[398] Australia Uniform Report; New South Wales Law Reform Commission, *Uniform Succession Laws: The Law of Wills,* Report No. 85 (1998); Queensland Law Reform Commission, *The Law of Wills*. Report No. 52 (1997).

[399] T.G. Youdan, "The Meaning of "Contrary Intention Appears By The Will" (1986) 22 E.T.R. 151 at 153-154.

the general admission of extrinsic evidence, ALRI recommends that all evidence should be admitted. We cannot find any principled reason why the same concept should not apply to the statutory rules. If the object of the exercise is to determine the intention of the testator, then it does not make sense to deprive the court of the opportunity to consider all the evidence.

10. Recommendation for reform

[277] The original aim of the statutory rules of construction was to reverse the prior law which had been defeating the intentions of many testators. The restriction on admission of extrinsic evidence was a product of the law at that time. The retention of the traditional rule which does not admit any extrinsic evidence to rebut a statutory rule of construction is at odds with the aim of the court of construction to determine the testator's intention. Rules which originated in an attempt to give effect to the intention of the testator should not be used to defeat that intention.

[278] The traditional rule has not been followed by some Canadian courts. It does not accord with the current trend in legislation outside the area of statutory construction rules which has been to expand the admission of extrinsic evidence for the interpretation of wills.[400]

[279] In order to best find the intention of the testator, Alberta should adopt legislation which allows the admission of all extrinsic evidence to find an intention to rebut a statutory rule of construction.

RECOMMENDATION No. 20
The *Wills Act* should provide that extrinsic evidence is admissible to establish a contrary intention to rebut a statutory rule of construction.

[280] Draft legislation for implementing this recommendation is proposed as follows:

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[400] As already discussed, this legislation has followed the model found in the English *Administration of Justice Act 1982* which allows the admission of extrinsic evidence in the case of meaningless or ambiguous provisions in the document or ambiguity in the surrounding circumstances.

> Subject to a contrary intention found in the will or in extrinsic evidence admissible under s. ___.

The language of "found in the will" is more modern than "appearing by the will." This provision would replace the current wording in the various statutory construction rules of "a contrary intention appears by the will." The general provision with respect to admission of extrinsic evidence outlined above is insufficient. It is necessary to specify that extrinsic evidence is admissible in each section because under rules of statutory interpretation a specific provision will apply over a later general provision.[401]

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[401] Hawkins at 73 and Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, Ont.: Lexis Nexis Canada, 2008) at 343.

CHAPTER 6. RECTIFICATION

A. Introduction

[281] This chapter considers accidental mistakes that arise when a drafting error has occurred in a will. These mistakes may include clerical errors, misunderstood instructions between the testator and the drafter or a failure by the drafter to carry out the testator's instructions.[402]

[282] Where the words in a will do not express the intention of the testator, courts have limited jurisdiction to rectify the mistake.[403] The equitable power to rectify written instruments which do not accurately record what was agreed to by those who were parties to the instrument enables a superior court to correct a legal instrument. However, this doctrine of rectification that applies to contracts does not apply in the same manner to wills.[404] Thus, how do the courts remedy a situation when the words in the will do not carry out the intention of the testator because of a drafting mistake?

[283] This chapter reviews the court's current limited ability to correct drafting mistakes in wills and considers whether that power should be expanded. Having concluded that the court's ability to correct drafting mistakes should be expanded, the chapter then addresses what evidence should be allowed to assist the court in rectification and whether time limits should be imposed on making such applications.

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[402] A mistake in a will can arise in a number of circumstances. A mistake in a will may have been induced by the fraud of someone else or may simply have been an accident. Fraudulent mistakes may occur when a testator is told a lie which motivates the testator to dispose of her property in a certain manner. Accidental mistakes have been grouped into three broad categories. First, a mistake may arise where a testator makes a gift relying on a mistaken fact or belief. Second, a mistake may arise when a drafting error has occurred. Third, a mistake may arise where the testator has executed the wrong instrument; see Feeney at § 3.22.

[403] Hawkins at 3.

[404] Hawkins at 3; British Columbia 2006 Report at 36.

B. Current Law in Alberta

[284] Where the words in the will do not carry out the testator's intention due to a drafting mistake, the testator and the drafter are unaware of the mistake. It is only after the death of the testator that the mistake become apparent. How do the courts deal with these circumstances? As a starting point, there is a presumption that a will is only valid if the testator knew and approved of the contents of the will. At one time, there was a strict rule that if a testator read over and executed his will, it should be conclusive evidence of the testator's knowledge and approval of the contents of the will. In the case of *Guardhouse v. Blackburn,*[405] the court refused to strike out words inserted by mistake by a solicitor on the justification that the testator had read over and therefore approved of the words in the will. However, the strict application of this "grave and strong" presumption seems to have been reduced in subsequent cases. The modern view is that the fact the will was read over by or to the testator is not conclusive evidence of knowledge and approval but merely relevant evidence.[406] Ultimately, the court may refuse to probate any part of a will if it was inserted by mistake, on the basis that the part was not known and approved by the testator.

[285] Traditionally, a court can delete words included in a will by mistake on the basis that these words were never intended by the testator to form part of the will. A court has the power when admitting a will to exclude words which were inserted without the testator's knowledge and approval. This power allows the court to omit words from a will but does not allow the court to alter or add words into a will.

[286] Generally, the court will omit words if the omitted words do not alter the rest of the will. The court may omit a house number or an amount in a will. In *Binkley Estate v. Lang,* the testator made minor changes to her will.[407] When the will was re-typed, the amount of $25,000 was mistakenly typed instead of $2,500 in a clause providing a gift to each of three beneficiaries. The court held that the

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[405] *Guardhouse v. Blackburn* (1866), L.R. 1P&D at 109.

[406] *Re Morris* (1969), [1970] 1 All E.R. 1057 (P.); *Re Reynette-James*, [1975] 3 All E.R. 1037 (Ch.D.); T. G. Youdan, "*Re Rapp Estate*", Case Comment, (1992) 42 E.T.R. 229.

[407] *Binkley Estate v. Lang* (2009), 50 E.T.R. (3d) 44 (Ont. S.C.).

mistake was a clerical error and deleted the mistaken words so that the gifts were $2,500 to each of the three beneficiaries.

[287] The court may also order the omission of distinctly singular provisions of a will such as a mistaken revocation clause or a residuary gift. In *Balaz Estate v. Balaz*, the testator had instructed her lawyer to create a spousal trust for her husband in her will.[408] Her lawyer mistakenly included provisions in the will dealing with the powers of the trustees that tainted the spousal trust intent of the testator. The result was that the will did not create a valid spousal trust within the meaning of the *Income Tax Act*. The court held that the provisions were mistakenly included without the knowledge and approval of the testator and deleted the offending provisions from the will to give effect to the spousal trust.

[288] While the court may delete mistaken words from a will, it has no power to add words into a will to give effect to the intention of the testator. In *Alexander Estate v Adams,* the testator named beneficiaries in Canada, the United States, Spain and England.[409] The testator intended that if any of the named residuary beneficiaries failed to survive her, the residue of her estate would be divided in equal shares among the surviving residuary beneficiaries. She did not leave any gift to her niece who was her closest surviving relative and expressly stated in her will that no portion of her estate was to pass on intestacy. Her lawyer mistakenly included a clause in the will that caused the gifts to the predeceased residuary beneficiaries to fail resulting in an intestacy. The sole person entitled to the estate on intestacy was the niece. The court held that it could not add words to the will to give effect to the clear intention of the testator. The court found that "in the absence of legislative change, the longstanding rule in Canada should apply."[410]

[289] In *Krezanoski v. Krezanoski*, the testator gave instructions to his lawyer that the residue of the estate was to be left to Robert Krezanoski.[411] The typist

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[408] *Balaz Estate* v. *Balaz*, [2009] O.J. NO. 1573 (Ont. S.C.).

[409] *Alexander Estate v. Adams* (1998), 51 B.C. L.R. (3d) 333 (S.C).

[410] *Alexander Estate v. Adams* (1998), 51 B.C. L.R. (3d) 333 at para 25 (S.C.).

[411] *Krezanoski v. Krezanoski* (1992), 136 A.R. 317 (Q.B.).

inadvertently left out the residue clause and the will was signed in the presence of two secretaries before the lawyer had an opportunity to check the will. The testator kept the will in his possession. The court held that it had no jurisdiction to add a clause to a will and therefore could not add the residue clause. As the residue was not disposed of in the will, it passed on intestacy.

C. Should the Court Authority to Rectify Wills Be Expanded?

1. English law reform

[290] The English Law Reform Committee in 1973 recommended that the court should be given some power to rectify a will in order to make it accord with the testator's intention.[412] The Committee identified situations where a testator's will may fail to give accurate effect to the testator's intentions including where a clerical error occurs or where the drafter misunderstands the testator's instructions.[413] The Committee recommended that the court should be given a power to rectify a will in any case where there are clerical errors or a failure to understand the testator's instructions by the drafter.

[291] The Committee also considered whether there should be any special conditions in the application of the doctrine of rectification to wills. They identified four issues. First, should there be any special restrictions on the admissible evidence in these cases? Second, should any special significance be attached to the fact that the will was read over by the testator before execution? Third, should there by any time limit on applications to rectify a will? Fourth, should there be any special protection for solicitors?[414]

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[412] England 1973 Report at 3, 12, 23.

[413] The Committee identified three other situations where a testator's will may fail to give accurate effect to his intentions including where the testator fails to appreciate the effect of the words he uses in his will; where the testator's will leaves it uncertain what the testator mean and where the testator never had any intention relevant to the situation that actually occurred. However, the Committee did not extend the power to rectify to a testator's failure to appreciate the effect of the words he used on the basis that the doctrine of rectification is confined to altering the language used by the instrument and can go no further. As well, the Committee did not apply a rectification power where the will is uncertain as to what the testator meant or the testator had no intention relevant to what actually occurred. See England 1973 Report at 10-11.

[414] England 1973 Report at 11.

[292] While the Committee recognized that there "may be a temptation for those whom a will disappoints to 'have a go' on insufficient material"[415] they rejected any restriction on admissibility of evidence, finding that it would be impracticable. Thus, evidence related to the instructions for the will, arising before the execution of the will or any other written evidence, should be admissible.

[293] The Committee also concluded that there should be no special significance given to the fact that the testator read over the will prior to execution. Reading over may be one factor considered by the court but it should have no conclusive effect.[416]

[294] However, the Committee did recommend that a time limitation should be imposed to provide reasonable security to executors and beneficiaries and to avoid stale claims. The Committee recommended that an application to rectify a will should not be made later than six months after the date on which the representation grant is issued without leave of the court.[417]

[295] Finally, in regard to any special protection for solicitors, the Committee recognized that solicitors may have to "keep fuller records of their instructions and correspondence" for a longer period of time.[418] However, no concerns were expressed to the Committee that this would unreasonably increase the responsibilities of solicitors. Ultimately, any practical difficulties would be outweighed by the advantage of reforming the law in this area.[419]

[296] The Committee's recommendations were enacted as s. 20 of the *Administration of Justice Act 1982*.[420]

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[415] England 1973 Report at 11.

[416] England 1973 Report at 12.

[417] England 1973 Report at 12-13.

[418] England 1973 Report at 13.

[419] England 1973 Report at 13.

[420] *Administration of Justice Act 1982* (U.K.), c. 53, s. 20 reads:

20 (1) If a court is satisfied that a will is so expressed that it fails to carry out the

(continued...)

2. Canadian law reform

a. British Columbia

[297] In 1982, the Law Reform Commission of British Columbia issued Report No. 58, *Interpretation of Wills*. The 1982 report considered the English Law Reform Committee's recommendations and concluded that the power to correct clerical errors and mistakes in drafting resulting from misunderstood instructions did not go far enough.[421]

[298] The 1982 report recommended a much broader power to rectify a will. The recommendation included a rectification power that also applied if there was a failure of the testator to appreciate the effect of the words used in the will (an error of expression).[422]

[299] The 1982 recommendations were revisited by the British Columbia Law Institute in the British Columbia 2006 Report. The 2006 report was unwilling to recommend a statutory rectification power as broad as the Commission. They recommended that the rectification power be closer to the power to rectify wills given to the English courts.

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[420] (...continued)

testator's intentions, in consequence –

(a) of a clerical error; or

(b) of a failure to understand his instructions,

it may order that the will shall be rectified so as to carry out his intentions.

(2) An application for an order under this section shall not, except with the permission of the court, be made after the end of the period of six months from the date on which representation with respect to the estate of the deceased is first taken out.

(3) The provisions of this section shall not render the personal representatives of a deceased person liable for having distributed any part of the estate of the deceased, after the end of the period of six months from the date on which representation with respect to the estate of the deceased is first taken out, on the ground that they ought to have taken into account the possibility that the court might permit the making of an application for an order under this section after the end of that period; but this subsection shall not prejudice any power to recover, by reason of the making of an order under this section, any part of the estate so distributed.

[421] Law Reform Commission of British Columbia, *Report on the Interpretation of Wills*, Report No. 58 (1982) at 46-49 [British Columbia 1982 Report].

[422] British Columbia 1982 Report at 49.

[300] Section 59 of the British Columbia 2009 Act[423] allows an application for rectification if the will fails to carry out the testator's intention because of an error arising from an accidental slip or omission or a failure to carry out the testator's instructions, and also a misunderstanding of the testator's instructions. However, it does not extend to failure of the testator to appreciate the effect of the words used in the will (an error of expression).[424] The British Columbia Law Institute opined that a broader statutory power to allow rectification would "force the court into an overly subjective exercise of guessing what the testator's understanding had been" and "the danger of unintentionally remaking a will would be too great."[425]

b. Manitoba

[301] In 2003, the Manitoba Law Reform Commission considered the issue of correcting mistaken wording in wills. The Commission considered the recommendations of the British Columbia 1982 Report.

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[423] Act comes into force by regulation British Columbia 2009 Act, s. 270.

[424] British Columbia 2009 Act, s. 59 states:

> 59 (1) On application for rectification of a will, the court, sitting as a court of construction or as a court of probate, may order that the will be rectified if the court determines that the will fails to carry out the will-maker's intentions because of
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> (a) an error arising from an accidental slip or omission,
>
> (b) a misunderstanding of the will-maker's instructions, or
>
> (c) a failure to carry out the will-maker's instructions.
>
> (2) Extrinsic evidence, including evidence of the will-maker's intent, is admissible to prove the existence of a circumstance described in subsection (1).
>
> (3) An application for rectification of a will must be made no later than 180 days from the date the representation grant is issued unless the court grants leave to make an application after that date.
>
> (4) If the court grants leave to make an application for rectification of a will after 180 days from the date the representation grant is issued, a personal representative who distributes any part of the estate to which entitlement is subsequently affected by rectification is not liable if, in reasonable reliance on the will, the distribution is made
>
> (a) after 180 days from the date the representation grant is issued, and
>
> (b) before the notice of the application for rectification is delivered to the personal representative.
>
> (5) Subsection (4) does not affect the right of any person to recover from a beneficiary any part of the estate distributed in the circumstances described in that subsection.

[425] British Columbia 2006 Report at 38.

[302] The Commission also considered s. 12A of the Australian Capital Territory Act which gives an almost unfettered power of rectification. In referring to s. 12A, the Manitoba Commission noted that "such a provision comes perilously close to permitting the court simply to re-write the testator's will and is, for that reason, undesirable."[426]

[303] The Manitoba Commission ultimately recommended adopting the approach in the British Columbia 1982 Report to meet the need to empower the court to carry out the intention of the testator and the need to ensure that wills cannot be varied other than in accordance with the wills legislation. These recommendations have not been implemented.

3. Australian law reform

[304] Legislation giving courts broader powers to rectify wills has also been enacted in Australia.[427] Seven states have enacted rectification provisions that are similar to the recommendation of the English Law Reform Committee. They provide a power for the courts to rectify clerical errors or wills that do not give effect to the testator's instructions. However, the Australian Capital Territory has enacted an extremely broad rectification provision. Section 12A allows the court to rectify a will to give effect to the probable intention of the testator in relation to circumstances that happen before or after the death of the testator.[428]

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[426] Manitoba Report at 55.

[427] Australian Capital Territory Act, s. 12A; New South Wales Act, s.27 ; Northern Territory Act, s.27; Queensland Act, s. 33; South Australia Act, s. 25AA;Tasmania Act, s. 42 ; Victoria Act, s.31; Western Australia Act, s. 50.

[428] Australian Capital Territory Act s.12A reads:

> 12A(1) If the Supreme Court is satisfied that the probate copy of the will of a testator is so expressed that it fails to carry out his or her intentions, it may order that the will be rectified to carry out the testator's intentions.
>
> (2) The Supreme Court may order that the probate copy of the last will of a testator be rectified to give effect to the testator's probable intention if satisfied that –
>
> (a) any of the following apply in relation to circumstances or events (whether they existed or happened before, at or after the execution of the will):
>
> (i) the circumstances or events were not known to, or anticipated by, the testator;
>
> (ii) the effects of the circumstances or events were not fully appreciated by the testator;

(continued...)

[305] As noted by the New South Wales Law Reform Commission, the Australian Capital Territory provision:

> ...is not confined to giving effect to the testator's intention, but would permit the court to rectify a will to give effect to the "probable intention" of the testator, in light of circumstances not even known by the testator and even occurring after the testator's death.[429]

4. New Zealand law Reform

[306] In 1997, the New Zealand Law Commission recommended a rectification power similar to the English Law Reform provision.[430] This recommendation was implemented in s. 31 of the New Zealand Act 2007.[431]

5. Scottish law reform

[307] In 1990, the Scottish Law Commission issued *Report on Succession Rights*.[432] The Commission recommended the courts be given the power to rectify a will prepared by someone other than the testator where the will fails to give effect to the testator's instructions.

[308] The Scottish Law Commission also noted:

> A problem which gave us some difficulty was whether rectification should be available in relation to an error of expression made by a testator in writing out or typing his own will. We pointed out that in such a case there would be no independent instructions with which the will could be compared. It would

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[428] (...continued)

> (iii) that circumstances or events arose or happened at or after the death of the testator; and
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> (b) because of the circumstances or events, the application of the provisions of the will according to their tenor would fail to give effect to the probable intention of the testator if the testator had known of, anticipated or fully appreciated their effects.

[429] New South Wales Law Reform Commission, *Uniform Succession Laws: The Law of Wills*, Report 85 (1998) at 104.

[430] Law Commission of New Zealand, *Succession Law: A Succession (Wills) Act*, Report No. 41 (1997) at 44.

[431] Section 31 of the New Zealand Act gives the court the power to correct a will where a will does not carry out the will-maker's intention because of a clerical error or a failure to give effect to the will-maker's instructions.

[432] Scottish Law Commission, *Report on Succession Rights*, No. 124 (Edinburgh: Her Majesty's Stationary Office, 1990).

> be inconclusive and possibly undesirable to lead evidence of the testator's general intentions. He might have changed his mind. He might not have been frank about what he intended to put in his will.[433]

[309] The Commission noted that those opposed to rectifying an error of expression made by the testator included the Law Society of Scotland and the Sheriffs' Association. The Commission also noted that some of those who favoured this error of expression rectification power also remarked it would be very difficult to obtain sufficient evidence to satisfy a court of the need to rectify in these cases. Ultimately, the Commission recommended a power to rectify that did not extend to correcting an error of expression made by the testator.

[310] In 2009, the Scottish Law Commission confirmed their earlier recommendations.[434]

D. Recommendations

1. What errors should a court be able to rectify?

[311] Should an Alberta court have the power to rectify mistakes in wills by deleting or adding in characters, words or provisions where the will fails to carry out the testator's intention because of a drafting mistake?

[312] ALRI recommends that the rectification power in Alberta should be expanded to allow the court to correct the following accidental errors:

(a) an error arising from an accidental slip, omission or misdescription,

(b) a misunderstanding of the testator's instructions, or

(c) a failure to carry out the testator's instructions.

During consultation, we received input from trust and estates planners, including lawyers, all of whom agreed with extending court authority to rectify errors.

[313] On balance, we prefer a rectification power that applies to the three types of errors identified by British Columbia. This provides for a statutory rectification power which allows the court to add in or substitute characters, words or

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[433] Scottish Law Commission, *Report on Succession Rights*, No. 124 (Edinburgh: Her Majesty's Stationary Office, 1990) at 47.

[434] Scotland Report.

provisions to correct drafting mistakes in addition to deleting drafting mistakes. This appears to be the most common sense approach. In addition, this approach respects testamentary freedom but avoids the court rewriting the will. It gives clear effect to the intention of the testator.

[314] In this respect, then, we do not agree that there should be an additional power to correct a will where the testator does not appreciate the effect of the words used (an error of expression). Although this approach was recommended by the Law Reform Commission of British Columbia and the Manitoba Law Reform Commission, we note that this was later rejected by the British Columbia Law Institute and not implemented in British Columbia or Manitoba.

[315] Similarly, ALRI does not support a rectification power such as that in the Australian Capital Territory. This approach permits the court to rectify a will to give effect to the "probable intention" of the testator including circumstances not known to the testator and those occurring after the testator's death. This approach appears to empower the court to rewrite the testator's will and interferes too greatly with testamentary freedom.

RECOMMENDATION No. 21

The *Wills Act* should provide that the court may order that a will be rectified by deleting or adding characters, words or provisions if the court determines that the will fails to carry out the testator's intentions because of

a. an error arising from an accidental slip, omission or misdescription,
b. a misunderstanding of the testator's instructions, or
c. a failure to carry out the testator's instructions.

2. What evidence can be used to support rectification?

[316] Historically, the courts have admitted extrinsic evidence in rectification to determine the testator's intention with regard to dispositions in the will. A lawyer is a compellable witness in cases where the succession of property turns on the

existence, interpretation or validity of a will.[435] A court can review evidence which is relevant to the issue of whether or not words included in the will have been included with the knowledge and approval of the testator. This evidence can include copies of earlier wills as well as notes and evidence of the lawyer who prepared the will.[436] We recommend that the court should be able to admit extrinsic evidence to rectify drafting mistakes.

RECOMMENDATION No. 22
The *Wills Act* should provide that extrinsic evidence, including evidence of the testator's intention, is admissible to prove the existence of a circumstance giving rise to rectification.

3. Should there be a time limit for bringing an application?

[317] We recommend a time limit for an application for rectification of a will. We agree with the English Law Reform Committee that a time limit is needed to provide reasonable security to executors and beneficiaries and to avoid stale claims. We recommend a time limit that requires an application for rectification within six months from the grant of probate or grant of administration with will annexed. This time limit is the same as the time limit for making an application for dependants relief in Alberta. Section 15 of the *Dependants Relief Act* requires an application under that Act to be made within six months from the grant of probate of the will or of administration.[437] In addition, this time limit is consistent with time limits for rectification of a will in England (six months) and British Columbia (180 days).

[318] Finally, we do not recommend that any protection from liability for a personal representative be included in the *Wills Act*. This is not an issue that applies solely to rectification but applies in general to the distribution of the estate.

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[435] *Goodman v. Geffen* (1991), 2 S.C.R. 353; *Russell v. Jackson* (1851) 68 E.R. 558 (Ch.D.); *Stewart v. Walker* (1903),2 O.W.R. 990 (C.A.); *Re Ott* (1972), 2 O.R, 5 (Surr. Ct); see also Alberta Regulation 130/95, Surrogate Rules, section 85(2).

[436] *Alexander Estate v. Adams* (1998), 51 B.C.L.R. (3d) 333 (S.C.).

[437] *Dependants Relief Act*, R.S.A. 2000, c.D-10.5, s. 15.

Any recommendations relating to this issue may be considered in relation to recommendations for reform to the *Administration of Estates Act*.[438]

RECOMMENDATION No. 23
The *Wills Act* should provide that an application for rectification of a will must be made no later than six months from the issue of the grant of probate or grant of administration with will annexed unless the court grants leave to make an application after that date.

[438] *Administration of Estates Act*, R.S.A. 2000, c. A-2.

CHAPTER 7. FAILED GIFTS – BENEFICIARY ISSUES

A. Introduction

[319] A failed gift under a will is a gift that cannot take effect. When a gift fails as a result of a cause pertaining to the beneficiary (as in lapse, disqualification, forfeiture, disclaimer or non-compliance with a condition), the question is who should then inherit the gift? Answers to that question have either given rise to incomplete legislative solutions or results-driven judicial decisions designed to avoid unfair outcomes. This chapter describes the current situation in Alberta and outlines the issues to be addressed: (1) Is a statutory intervention necessary? (2) Who are suitable substitute beneficiaries? (3) In what order of priorities should failed gifts be distributed? and (4) Should a testator's stated intention trump a statutory distribution scheme?

B. Current Law in Alberta

[320] Gifts made in wills may fail for a number of reasons. In some cases, the gift cannot take effect because the particular asset is no longer part of the estate at the time of the testator's death.[439] In other cases, the gift is available, but still fails due to circumstances related to the beneficiary.

[321] Those circumstances may also vary. For example, a gift generally fails when the intended beneficiary has died before the testator (lapse), witnessed the will (disqualification), killed the testator (forfeiture), declined the gift (disclaimer) or not met a condition placed on the gift by the testator (non-compliance with a condition). In any of these situations, a new beneficiary must be found.

1. The beneficiary predeceases the testator

[322] If a beneficiary under a will does not survive the testator, the gift fails. It does not pass to the beneficiary's estate. This is called the doctrine of lapse. The doctrine of lapse is based on the principle that a testator intends those who are named or described beneficiaries to take their gifts personally. This shows a preference for a living beneficiary over a deceased beneficiary. Thus, if the

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[439] See Chapter 8.

beneficiary predeceases the testator, the gift "passes back" into the testator's estate.

[323] Section 23 of the Alberta Act provides that lapsed gifts of both real and personal property fall into the residue of the testator's estate. The lapse provision partially deals with the failure of gifts by including a lapsed gift in the residue but does not, however, cover failed gifts of residue. Hence, if there is no residuary clause in a will or a gift that fails is a residuary one, the gift is distributed as if the testator had died without a will in regard to that property (partial intestacy).

[324] Sections 34 and 35 of the Alberta Act create a statutory exception to the general rule of lapsed gifts where there is a gift to specific relatives of the testator. The anti-lapse provisions apply where a predeceased beneficiary is the child, other issue, brother or sister of the testator and leaves living issue. In these cases, the general rule of lapse does not apply but the gift passes directly to the persons and in the shares that would have applied if the predeceased beneficiary had died intestate without debts immediately after the death of the testator.[440]

[325] However, the lapse provision in s. 23 and the anti-lapse provisions in ss. 34 and 35 do not apply if a contrary intention appears in the will.[441]

2. The beneficiary is disqualified

[326] If a beneficiary under a will is disqualified by operation of the law, the gift also fails. The disqualification (or incapacity) of a beneficiary may occur in various situations.[442]

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[440] *Rosychuk Estate, Re* (2005), 387 A.R. 196 (Q.B.); *Fossen Estate, Re* (2002), 319 A.R. 190 (Q.B.); *Rothstein Estate* v. *Rothstein* (1996), 11 E.T.R. (2d) 125 (B.C.S.C.).

[441] For instance, a joint gift, a class gift or an alternate gift may be construed as expressing a contrary intention in those contexts. See *Wallocha v. Lethbridge Community Foundation* (2005), 28 Alta. L.R. (4th) 388 (Q.B.).

[442] The capacity of a beneficiary under a will has been called into question in various circumstances, such as illegitimacy, adoption, foreign beneficiary, non-charitable purpose trusts, witness, fraud and undue influence and others. See Oosterhoff. The Alberta Law Reform Institute has also recommended that where a testator's marriage or adult interdependent partnership ends, the spouse beneficiary or adult interdependent partner beneficiary should be deemed to have predeceased the testator (except if the adult interdependent partners are relatives by blood or adoption). Where the former spouse or adult

(continued...)

[327] For example, s. 13(1) of the Alberta Act states that a gift in a will is void if it is made to a witness or witness's spouse or adult interdependent partner. Section 13(2) allows exceptions if the will is witnessed by at least two other people who are not subject to disqualification or did not need attestation anyway (holographic will or exempt will).

[328] ALRI has previously recommended that the sometimes harsh effects of disqualification under s. 13(1) should be ameliorated. Alberta courts should be given the discretion to validate, in appropriate circumstances, a testamentary gift to a witness or witness's spouse that would otherwise fail.[443] ALRI has also recommended statutory disqualification and failure of any gift made to an interpreter or a person who signs the will on behalf of and at the direction of the testator. Court validation could also be sought for these disqualifications.[444]

[329] Section 23 of the Alberta Act provides that if a gift is void as being contrary to law or otherwise incapable of taking effect, it is included in the residue of the will, if any. This would include gifts void by reason of the witness-beneficiary rule.

[330] As noted above, however, s. 23 does not deal with gifts of residue and does not apply if there is no residue clause in the will.[445]

[331] Sections 34 and 35 only apply if the beneficiary predeceases the testator, but not if the beneficiary is disqualified.[446]

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[442] (...continued)
interdependent partner is deemed to have predeceased, the gift fails and the distribution scheme would apply. See Chapter 3.

[443] Alberta 2009 Report at 144.

[444] Alberta 2009 Report at 153.

[445] As indicated, s. 23 neither applies when the testator makes a class gift, a joint gift or an alternate gift. In the latter case, even if the disqualification of the primary beneficiary is not contemplated as a condition for the alternate beneficiary to take the gift.

[446] See for instance, *Bird Estate, Re* (2002) 8 B.C.L.R. (4th) 135 and *Brown Estate v. Bon* (2003), 263 N.B.R. (2d) 287 (Q.B. (T.D.)).

3. The beneficiary commits a criminal wrongdoing

[332] It is a rule of public policy that an individual should not be allowed to profit from their own criminal wrongdoing.[447] Accordingly, a beneficiary who kills the testator cannot take under the will.[448] The same rule applies to an intestacy.[449] Parties claiming under the criminal beneficiary are also excluded, even though they are innocent of the crime, unless they have alternative or independent rights (and "clean hands").

[333] The forfeiture rule applies to murder as well as most cases of manslaughter and assisted suicide where the death results from an unlawful act. On the other hand, it is not clear whether it applies to criminal negligence or other types of crimes.[450]

[334] The crime must, however, have some connection to the receipt of the inheritance to debar the criminal wrongdoer from taking the gift (for example, the forfeiture rule would not apply to a criminal convicted of sexual assault).[451]

[335] Subject to a contrary intention, a gift that fails due to forfeiture falls into the residue by operation of s. 23, except when there is no residuary clause in the will or the gift is a residuary one.[452]

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[447] *Brissette Estate v. Westbury Life Insurance Co.*, [1992] 3 S.C.R. 87; *Oldfield v. Transamerica Life Insurance Co. of Canada*, [2002] 1 S.C.R. 742.

[448] However, it is generally accepted that a killer who is legally insane is not prevented from benefitting from the victim's death inasmuch there is no *mens rea*, so that no crime is committed.

[449] *Re Sigsworth*, [1935] Ch. 89; *Nordstrom v. Baumann*, [1962] S.C.R. 147.

[450] *Lundy v. Lundy* (1895), 24 S.C.R. 650; *O'Hearn v. Yorkshire Insurance Co.* (1921), 67 D.L.R. 735 (Ont. C.A); *Whitelaw v. Wilson*, [1934] O.R 415 (S.C.(H.C.J.)); *Shaw v. Gillan* (1982), 40 O.R. (2d) 146 (S.C. (H.C.J)); *Ellis Estate v. Pilot Insurance Co.*,[1992] I.L.R 1583 (Ont. C.J. (Gen. Div.)); *R. v. Creighton*, [1993] 3 S.C.R. 3; *O'Meara v. Hall* (2006), 384 A.R. 144 at para. 7 (C.A.). In the U.K., the *Forfeiture Act, 1982*, c. 34, s. 2 now allows a wrongdoer convicted of unlawfully death, other than murder, to be granted relief from forfeiture of inheritance rights.

[451] *Oughton Estate, Re* (1991), 40 E.T.R. 296 (B.C.S.C.).

[452] See note 441 for examples of what may be construed as expressing a contrary intention in this context.

[336] As indicated, ss. 34 and 35 only deal with one contingency, which is the beneficiary predeceasing the testator, and do not apply when the cause of failure is forfeiture.

[337] Problems also occur when a testator provides for an alternate beneficiary but does not contemplate forfeiture as a cause of failure. For instance, if the beneficiary is debarred from inheriting because he has killed the testator, the condition for the alternate to take the gift is not met.

[338] Canadian courts have dealt with this question in various cases. Several competing approaches exist as to the effect of the forfeiture rule on an alternate gift, and where entitlements fall in such cases: (1) the deemed death approach where the court deems the criminal to have predeceased the testator, allowing the alternate beneficiary to take the failed gift,[453] (2) the implied intention approach where the court ignores the contingency set by the will (namely, the primary beneficiary having predeceased the testator) and replaces it with a new one (namely, the primary beneficiary being legally incapable of taking the gift), allowing here again the alternate to take,[454] and (3) the literal reading approach where the court refuses to interfere to deem the primary beneficiary deceased or create a new condition, allowing a partial intestacy to follow.[455]

[339] Alberta courts have recently preferred the literal reading approach, bringing in the scheme of the Alberta Intestate Act as a result.[456]

4. The beneficiary refuses the gift

[340] A beneficiary may also choose to disclaim or refuse a gift. For instance, a beneficiary may want to accelerate the gift to the beneficiary's children, lighten a tax burden or avoid creditors receiving any benefit from the inheritance.

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[453] *Dhaliwall v. Dhaliwall*, [1986] 6 W.W.R. 278 (B.C.S.C.).

[454] *Brissette Estate v. Brissette* (1991), 42 E.T.R. 173 (Ont. Ct. J.(Gen. Div.)).

[455] *Re Dreger* (1976), 12 O.R. (2d) 371 (H.C.).

[456] *Re Bowlen Estate* (2001), 207 D.L.R. (4th) 175 (Alta. Q.B.).

[341] When a beneficiary disclaims a gift under a will, the gift is completely void and is treated as if no gift had ever been made.[457] Under s. 23, a disclaimed gift falls into the residue, if there is a residuary clause and the gift is not a residual one, or otherwise passes on an intestacy, unless a contrary intention appears in the will.[458]

[342] Here again, problems occur when a beneficiary disclaims the gift and the entitlement of the alternate under the will is contingent on another cause of failure.

[343] It should, however, be noted that at common law the disclaimer of a life interest (for example, annuity or use of a property) results in an acceleration of the remainder gift, unless a contrary intention is expressed (or implied).[459] In this case, the disclaimer has the effect of vesting immediate and absolute interest in the remainder on the designated beneficiaries.[460]

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[457] *Sembaliuk Estate v. Sembaliuk* (1984), 15 D.L.R. (4th) 303 at para. 5 (Alta. C.A.).

[458] In such case as well, ss. 34 and 35 do not apply inasmuch the beneficiary has not predeceased the testator.

[459] As stated in *Re Fry Estate*, [1913] 18 B.C.R. 63, at 63-64 (S.C.):

> There is a broad distinction between cases of a life estate and remainder and those of substitutional gifts; in the first case, the interest of the remainderman is vested at the death of the testator, and only the possession is postponed, so that where the life estate ceases from whatever cause, the possession of the remainderman is accelerated; on the other hand, in the case of substitutional gifts, the interest of the primary legatee is vested, subject to be divested when and only when a certain contingency happens, and it is only on the happening of that contingency that the secondary legatee acquires any interest at all.

[460] As stated in *Re Flower's Settlement Trusts and al v. Inland Revenue Commissioner*, [1957] 1 All E.R. 462 at 465 (C.A.), (followed in *Brannan v. Brannan Estate* (1990), 37 E.T.R. 209 (B.C.S.C.)):

> The principle, I think, is well settled, at all events in relation to wills, that where there is a gift to some person for life, and a vested gift in remainder expressed to take effect on the death of the first take, the gift in remainder is construed as a gift taking effect on the death of the first taker or on any earlier failure or determination of his interest, with the result that if the gift to the first taker fails – as, for example, because he witnessed the will - or if the gift to the first taker does not take effect because it is disclaimed, then the person entitled in remainder will take immediately on the failure or determination of the prior interest, and will not be kept waiting until the death of the first taker.

5. The beneficiary does not satisfy a condition imposed by the testator

[344] A testator may place a condition (or a limitation) on a gift made in the will.[461] If the beneficiary does not meet the condition imposed by the testator, the gift fails.

[345] For example, a testator gives a stamp collection to a nephew if the nephew graduates from law school before turning 30 years old. If the nephew does not graduate before this age, the nephew cannot take the gift.

[346] In such a case, s. 23 applies provided the will contains a residue clause (the gift in our example is not a residuary but a specific one). However, ss. 34 and 35 do not apply as the beneficiary has not predeceased the testator.

C. Should There be a Statutory Distribution Scheme?

[347] Testators are occasionally advised to indicate in their will to whom they would like to give the gift if ever the primary beneficiary could not take it. Many times, however, the only causes of failure contemplated in the will are the beneficiary predeceasing the testator or not satisfying a condition placed on the gift. Statutory default provisions and the common law provide only partial answers to deal with gifts that fail due to circumstances related to the beneficiary.[462] This has resulted in a patchwork of laws that is not only incomplete but also inconsistent and often unsatisfactory.

[348] This is not only difficult for lawyers to apply correctly in drafting wills but it creates a barrier for Albertans to understand their own wills. Therefore, the legislature should intervene to deal with the potential void created and minimize its effect on the expressed testamentary wishes of the testator.

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[461] It should be noted that a condition or limitation placed on the gift by the testator may be void for various reasons, including public policy, impossibility of performance or uncertainty. In such a case, the gift either fails due to the void condition (the illegal condition renders the gift void) or takes effect free of the condition (the condition is struck down) depending on a number of factors (condition precedent or condition subsequent, real property or personal property, etc.). See Oosterhoff at 705-733.

[462] For instance, s. 23 of the Alberta Act applies to all causes of failure, but not to all classes of gifts (excludes gifts of residue). Meanwhile, s. 35 applies to all classes of gifts, but not to all causes of failure (excludes causes other than predeceased beneficiary).

[349] A single statutory distribution scheme could provide a simple and uniform solution to those issues which will help to avoid a partial intestacy whenever a testator has made a gift under a will that fails.

[350] The new *Wills, Estate and Succession Act* in British Columbia proposes one such distribution scheme.[463]

[351] Similarly, a single distribution scheme that applies when a gift fails because a beneficiary is not able or not willing to inherit should be added to the Alberta *Wills Act*.[464] It should be subject to a contrary intention.[465]

RECOMMENDATION No. 24
Subject to a contrary intention, a single statutory distribution scheme should apply to all causes of failure, including lapse, disqualification, forfeiture, disclaimer and non-compliance with a condition.

[352] It should be noted that if a court validates a disqualified gift to a witness-beneficiary, proxy signer or interpreter in accordance with ALRI's previous

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[463] British Columbia has opted for a statutory distribution scheme applicable to all causes of failure. Section 46, British Columbia 2009 Act provides:

> 46 (1) If a gift in a will cannot take effect for any reason, including because a beneficiary dies before the will-maker, the property that is the subject of the gift must, subject to a contrary intention appearing in the will, be distributed according to the following priorities:
>
> (a) to the alternative beneficiary of the gift, if any, named or described by the will-maker, whether the gift fails for a reason specifically contemplated by the will-maker or for any other reason;
>
> (b) if the beneficiary was the brother, sister or a descendant of the will-maker, to their descendants, determined at the date of the will-maker's death, in accordance with section 42 (4) *[meaning of particular words in a will]*;
>
> (c) to the surviving residuary beneficiaries, if any, named in the will, in proportion to their interests.
>
> (2) If a gift cannot take effect because a beneficiary dies before the will-maker, subsection (1) applies whether the beneficiary's death occurs before or after the will is made.

[464] As discussed below, while a statutory scheme can apply to all causes of failure as the objective is merely to find a new beneficiary, it is also appropriate to allow a testator to express a contrary intention if he wishes. See Recommendation No. 5.

[465] A contrary intention can be found in the will or in admissible extrinsic evidence. See Chapter 5.

recommendations, the gift will not be classified as a failed gift and the statutory distribution scheme will not apply.

D. What Should be the Premises of a Statutory Distribution Scheme?

[353] Under a statutory distribution scheme it is necessary to presume the intention of the testator to fill in any gaps in the will. A default provision could be based on various premises: (1) testators likely prefer to benefit the alternate beneficiaries they have named even if the reason why the gift has failed is not contemplated in the will, (2) testators likely prefer to benefit the issue of their own issue, (3) testators likely prefer to benefit the remaining residuary beneficiaries they have named in their will, and (4) testators who make a will likely prefer their properties to pass by the will rather than on intestacy.[466]

1. Alternate beneficiaries

[354] A testator may provide for an alternate gift.[467] An alternate gift is a provision made by the testator to benefit expressly another named or described beneficiary in the event the primary beneficiary cannot take the gift (generally, if the beneficiary does not survive the testator). For example, a gift to A, but if A predeceases me, to B.[468] A provision can also be made for successive alternate gifts. For example, a gift to A, but if A predeceases me, to B, and if B predeceases me, to C, and so on.

[355] If a gift fails for a reason contemplated by the testator in the will, the property goes to the other beneficiary named or described in the provision creating the alternate gift.

[356] Most of the time, when a will provides for an alternate gift, the only contingency contemplated by the testator is the death of the beneficiary. If that beneficiary is alive but debarred from taking the gift for another reason, the

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[466] *Kossak Estate v. Kosak* (1990), 72 O.R. (2d) 313 (H.C.J.).

[467] Alternate gifts are also referred to as "alternative gifts", "substitute gifts", "substitutionary gifts" or "gifts over."

[468] Alternate gifts are often used in class gifts. For example "a gift to my children but if any of them predecease me leaving issue who survive me, their issue will take their share per stripes."

question is whether the alternate beneficiary can still take the failed gift if the contingency set out in the will is not met.[469]

[357] It can likely be assumed that a testator does not want to prejudice the rights of the named or described alternate beneficiary if the primary beneficiary cannot take the gift (in other words, assume that a testator would not want to disentitle innocent third parties). For instance, a testator gives $10,000 to friend A and, alternatively, to friend B, if A predeceases the testator. Presumably, the testator would prefer the failed gift to go to friend B even if the failure of the gift to A is not due to lapse but rather to forfeiture. The testator would not want the failed gift to pass to residuary beneficiaries or heirs on intestacy, leaving the innocent friend B with nothing (B is not a named residuary beneficiary or an heir on intestacy in this example).[470]

[358] Therefore, whenever a testator specifically makes provision for an alternate gift, it is sensible to presume that the testator would want a failed gift to go first to

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[469] As indicated, courts have dealt with that question in cases where a beneficiary is excluded for killing the testator. Several competing approaches exist: (1) the deemed death approach where the court deems the criminal to have predeceased the testator (*Dhaliwall v. Dhaliwall*, [1986] 6 W.W.R. 278 (B.C.S.C.)), (2) the implied intention approach where the court ignores the contingency set by the will and adds a new condition, that is the primary beneficiary being legally capable of taking the gift (*Brissette Estate v. Brissette* (1991), 42 E.T.R. 173 (Ont. Ct. J. (Gen. Div.)), and (3) the literal reading approach where the court refuses to interfere to deem the primary beneficiary deceased or create a new condition (*Re Dreger* (1976), 12 O.R. (2d) 371 (H.C.)). In Alberta, the literal reading approach has recently been preferred, bringing in the scheme of the Alberta Intestate Act as a result (*Re Bowlen Estate* (2001), 207 D.L.R. (4th) 175 (Alta. Q.B.)). The literal reading of the will approach presents however certain difficulties. It could indeed be argued that "the purpose of the alternative disposition is to indicate the testator's intention as to what should occur if the primary gift cannot take effect. It defies common sense to ignore this obvious intention in favour of the literal words of the will": see Chris Triggs, "Against Policy: Homicide and Succession to Property" (2005) 68 Sask. L. Rev. 117 at 133.

[470] As Justice Southin suggested in *Dhaliwall v. Dhaliwall*, [1986] 6 W.W.R. 278 at 282 (B.C.S.C.), testators could avoid this result by putting in the will gift over "if he does not survive me or, surviving me, is deprived by operation of the law...." Courts in Alberta have also invited the legislature to solve the problem by amending the relevant provisions of the Alberta Act (see, for instance, *Re Bowlen Estate* (2001), 207 D.L.R. (4th) 175 (Alta. Q.B.) at paras. 76-77). Some jurisdictions, such as England, Scotland, New Zealand and Tasmania, already have legislation (or draft legislation) codifying the effects of forfeiture and disclaimer in order to remove uncertainty and inconsistency. As indicated, British Columbia has also addressed the issue by adopting a statutory distribution scheme that gives priority to the alternate beneficiaries named or described in the will, whether the gift fails for a reason specifically contemplated by the testator or for any other reason.

the alternate beneficiary the testator has designated even if the gift fails for a reason that is not contemplated in the will.

[359] This does not mean that the alternate beneficiary inevitably takes the failed gift. When the alternate gift is also contingent and the condition is not met, the alternate gift fails as well. If the testator has named a successive alternate beneficiary, the gift goes to that beneficiary. Otherwise, it passes to the next category of beneficiaries under the statutory distribution scheme.[471]

[360] For example, the testator gives a car to the testator's son A, and if A predeceases the testator, to grandson B if B marries before the age of 25. If A kills the testator, the gift would normally pass to B even though the particular cause of failure (forfeiture) is not contemplated in the will. However, if B is unable to take the gift because B is over 25 and not married, the alternate gift also fails.

[361] In any event, a statutory distribution scheme should expressly provide that an alternate beneficiary named or described in the will should take the failed gift under the distribution scheme, whether or not the testator has contemplated the cause of failure.[472]

2. Descendant beneficiaries' issue

[362] Other examples of a testator's presumed intention can be found in current anti-lapse provisions. Sections 34 and 35 of the *Wills Act* presume that a testator prefers to benefit specific relatives rather than residuary beneficiaries or heirs on intestacy, unless a contrary intention appears in the will (for example, class gift, joint gift or alternate gift).

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[471] Following the order of priorities established in the proposed distribution scheme, the gift passes to the issue of a beneficiary who is unable to take, if that beneficiary is also the issue of the testator. See Recommendation No. 3.

[472] However, if the reason why a gift fails is relevant for the testator, he should be able to limit the application of the distribution scheme by stating, for example, that an alternate gift can only take effect if the beneficiary predeceases him and for no other reason. As discussed below, the distribution scheme is a default provision and thus subject to any contrary intention. See Recommendation No. 28.

a. Extend exception to all causes of failure

[363] As indicated above, ss. 34 and 35 deal with only one contingency (or cause of failure), which is lapse, and cannot be used when the beneficiary does not predecease the testator but is excluded for another reason.

[364] In accordance with Recommendation No. 24 it seems appropriate, however, to extend this exception favouring family beneficiaries so that it applies not only to lapse but also to other causes of failure, such as disqualification, forfeiture, disclaimer and non-compliance with a condition.

b. Narrow list of triggering family members

[365] Sections 34 and 35 are triggered by the lapse of a gift to the testator's child, other issue or to the testator's brother or sister. Should the list of triggering family beneficiaries be narrowed to the testator's issue only, removing the testator's siblings?

[366] The original English provision applied only to the issue of the testator. This approach has been followed in Prince Edward Island, Nova Scotia and most jurisdictions in Australia. Alberta's anti-lapse provisions were also modeled on the English provision until 1960, when Alberta adopted the model Uniform Wills Act as its wills legislation.[473] This model Act included siblings (brother or sister) in the class of family beneficiaries that trigger the anti-lapse provision, although the policy reason for doing so was not made clear by the Conference of Commissioners on Uniformity of Legislation in Canada.[474] Looking at it today, this departure from the original English provision does not appear to be based on any sound reason which could justify retaining the testator's siblings as triggering family members under a new distribution scheme.

[367] In any event, it should be kept in mind that anti-lapse provisions create an exception in favour of specific relatives which derives from a testator's presumed

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[473] *The Wills Act, 1960*, S.A. 1960, c. 118.

[474] *Proceedings of the Thirty-fifth Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada* (1953) at 17-18 and Appendix D. The Conference of Commissioners is now known as the Uniform Law Conference of Canada.

intention.[475] Such an exception should be carefully circumscribed as it ultimately gives priority to unnamed family beneficiaries' issue over named residuary beneficiaries.[476]

[368] Therefore, while it may be consistent with the expectations of most testators to provide that failed gifts to their issue trigger the statutory distribution scheme, it does not appear to be appropriate to include their brothers and sisters as triggering family beneficiaries. Testators remain, however, free to indicate in their wills how they wish gifts to siblings to be distributed if these gifts fail.

[369] Only the issue of the testator should trigger the application of the distribution scheme, not siblings.

c. Narrow list of inheriting beneficiaries

[370] Under ss. 34 and 35 a failed gift to a child, other issue or sibling of the testator who leaves living issue passes directly to the persons who would take the beneficiary's estate under the Alberta Intestate Act.[477] As a result, spouses and in-laws can end up being beneficiaries of the failed gift.[478] Should the list of inheriting beneficiaries be narrowed to the beneficiary's issue only, removing the persons who would take if that beneficiary had died intestate?

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[475] In other words, this type of provision creates a legal fiction as to what the testator would have wanted in the absence of any express provision in the will.

[476] Even if the list of inheriting beneficiaries is narrowed to the beneficiaries' issue only, excluding other persons who would take on intestacy, it is one thing to presume that testators want failed gifts to their children to pass to their grandchildren (or other issue of their own issue); it is however another to presume that they also want failed gifts to their brothers or sisters to pass to their nephews or nieces (or other issue of their siblings). See discussion below.

[477] *Rosychuk Estate, Re* (2005), 387 A.R. 196 (Q.B.); *Fossen Estate, Re* (2002), 319 A.R. 190 (Q.B.); *Rothstein Estate* v. *Rothstein* (1996), 11 E.T.R. (2d) 125 (B.C.S.C).

[478] As indicated, the fact that the beneficiary has living issue does not mean that the failed gift goes to them since leaving issue is only a condition to trigger the distribution of the failed gift under the intestacy scheme.

[371] Although all Canadian jurisdictions have enacted anti-lapse provisions, there is no unanimity as to which members of a predeceased beneficiary's family should take the failed gift.[479]

[372] Here again, it seems consistent with the expectations of most testators to pass a failed gift to the beneficiary's issue if that beneficiary is the testator's issue. However, it does not appear to be appropriate to bring in the scheme of the Alberta Intestate Act at this stage to distribute the failed gift among the persons who would have inherited if the beneficiary had died without a will. If a testator wants a gift to go, for instance, to a spouse or an in-law this should be stated in the will and not occur through a statutory default provision.

[373] Only the issue of the beneficiary who is unable to inherit should take the failed gift under the distribution scheme (excluding other persons who would take on intestacy).[480]

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[479] In British Columbia, Manitoba, Nova Scotia and Prince Edward Island, there is a general presumption that a testator would normally wish to benefit bloodlines and thus, in some provinces, only surviving issue are entitled to the gift. In Saskatchewan, Ontario and New Brunswick the failed gift passes directly to the person who would have received the gift if the predeceased beneficiary had died intestate leaving a spouse. However, Saskatchewan and Ontario do not allow the spouse of the predeceased beneficiary to receive a preferential share. Newfoundland allows a gift to the spouse without a preferential share when a child or issue predecease but only allows the gift to pass to the children of the brother or sister who predecease the testator (excludes in-laws). Similar anti-lapse provisions in Australia allow surviving issue only to be entitled to the gift (Australian Capital Territory, Northern Territory, Queensland, Tasmania, Victoria and Western Australia). In Western Australia the failed gift passes to the children, rather than issue, of the deceased child. In New South Wales and South Australia, the failed gift forms part of the deceased issue's estate and passes to the designated beneficiaries under their will.

[480] If the testator has named a primary beneficiary A and an alternate beneficiary B, and both A and B are unable to take the gift, the respective issue of the primary beneficiary A and the alternate beneficiary B should inherit following a pattern or sequence (i.e. an order of priorities) similar to what the testator has established in his will for the named primary and alternate beneficiaries. In other words, if the testator's stated intention was to give the gift to beneficiary A, and only alternatively to beneficiary B, a statutory exception based on the testator's presumed intention should reflect this preference when assigning priority among the issue of these beneficiaries who are unable to take the gift. Accordingly, in such case, the failed gift should first pass to the issue of the primary beneficiary A if the conditions are met, and if not, then pass to the issue of the alternate beneficiary B if the conditions are met. See Recommendation No. 26.

3. Residuary beneficiaries

[374] Subject to certain exceptions (such as contrary intention and anti-lapse provisions), the lapse provision in s. 23 of the Alberta Act presumes that if a devise or bequest fails or becomes void, it is included in the residue of the will, if any. The residue is then shared by all residuary beneficiaries who survive the testator in proportion to their interests.

[375] Even though s. 23 is brought into operation regardless of the reason a gift fails, its application is nonetheless limited as the lapse provision does not apply to a gift of residue. It is appropriate to presume that a testator likely prefers to benefit the residuary beneficiaries whom the testator has named in the will rather than the heirs on intestacy. Gifts of residue should not, however, be treated differently than other classes of gifts in this regard.

[376] Hence, if a will contains a residuary clause, any failed gift, including a gift of residue, should increase the residue shared by all residuary beneficiaries under the distribution scheme.

4. Heirs on intestacy

[377] As indicated, the legislature (through anti-lapse provisions) or the courts (through literal reading of the will) sometimes bring in the default distribution scheme of the Alberta Intestate Act at an earlier stage. However, while courts may be justifiably reticent to speculate as to the intention of a testator, the legislature can more easily presume that a person who makes a will does not wish a failed gift to pass as if they had died without a will, unless there is no other option or a contrary intention has been expressed.[481]

[378] For that reason, the scheme in the Alberta Intestate Act should only be brought in as a last resort, and a failed gift under a will should only devolve as a partial intestacy if all the beneficiaries who have priority under the distribution scheme in the Alberta Act are unable or refuse to take the gift.

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[481] See Chapter 5.

RECOMMENDATION No. 25

Subject to a contrary intention, a statutory distribution scheme in the *Wills Act* should include the following presumptions:

a. Testators do not want to disentitle the alternate beneficiaries they have named even if the reason a gift fails is not contemplated in the will.

b. Testators wish to benefit the issue of their own issue who are unable to take a gift.

c. Testators intend any failed gift to increase the residue shared by the residuary beneficiaries they have named rather than be distributed to the heirs on intestacy.

E. What Order of Priorities Should the Statutory Distribution Scheme Follow?

[379] Although all of the above beneficiaries are suitable substitutes to inherit failed gifts, the legislature still needs to assign priority among them.

[380] Generally, the proposed statutory distribution scheme does not change the order of priorities that is currently reflected in the succession rules.[482] However, it replaces and consolidates the existing patchwork of laws into one comprehensive distribution scheme and fills voids left by the legislation and the common law.[483]

[381] Under the scheme (subject to a contrary intention of the testator),[484] failed gifts to primary beneficiaries are distributed in this order of priorities: (1) alternate beneficiaries, (2) primary beneficiaries' issue (if primary beneficiaries are the

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[482] The proposed priorities remain essentially the same. Currently, a failed gift passes in the following order: (1) alternate beneficiaries if the cause of failure is contemplated in the will (contrary intention appearing in the will), (2) close relative beneficiaries if certain conditions are met (anti-lapse provisions), (3) residuary beneficiaries, except if there is no residue or the failed gift is a residuary one (lapse provision), and (4) heirs on intestacy (scheme in the Alberta Intestate Act).

[483] As discussed below, the proposed changes also leave the option to exclude or deviate from the statutory distribution scheme if the testator does not like it. See Recommendation No. 28.

[484] See Chapter 5.

testator's issue), (3) alternate beneficiaries' issue (if alternate beneficiaries are the testator's issue), and (4) residuary beneficiaries.[485]

[382] For example, a testator gives ½ of the residue of the estate to the testator's son A, and to the testator's friend B if A predeceases. Of course, if the primary beneficiary A is able to take, the gift simply goes to A (the gift does not fail). Otherwise, the proposed statutory distribution scheme provides that:

- If A predeceases the testator or is otherwise unable or unwilling to take, the failed gift passes to the testator's friend B.
- If the alternate beneficiary B is unable to take, the failed gift passes to the issue of the testator's son A.
- If the testator's son A leaves no living issue (the alternate beneficiary B's issue cannot take because B is not the testator's issue, but the testator's friend), the failed gift increases the residue shared by the remaining residuary beneficiaries.
- If there are no remaining residuary beneficiaries, the failed gift passes to heirs on intestacy under the Alberta Intestate Act.

[383] It should be noted that "alternate beneficiary" may refer in certain cases to a *successive* alternate beneficiary where a testator has made a provision for successive alternate gifts and a previous alternate beneficiary is unable or unwilling to take the failed gift (for example, gift to A, but if A predeceases the testator, to B, and if B also predeceases the testator, to C. If both the primary beneficiary A and the alternate beneficiary B cannot inherit, the gift then passes to the successive alternate beneficiary C).

RECOMMENDATION No. 26

Subject to a contrary intention, if a gift in a will cannot take effect for any reason, a statutory distribution scheme should follow this order of priorities until the gift is disposed of:

a. to the alternate beneficiary whether or not the particular cause of failure is contemplated in the will,

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[485] As indicated, if all other priorities fail, the gift is distributed to the heirs on intestacy in accordance with the Alberta Intestate Act's scheme of distribution as a last resort.

b. to the issue of the primary beneficiary who is unable to take the gift if that beneficiary is also an issue of the testator,
c. to the issue of the alternate beneficiary who is unable to take the gift if that beneficiary is also an issue of the testator,
d. to the residue, if any, shared by all residuary beneficiaries in proportion to their interests.

F. Should the Statutory Distribution Scheme Apply to All Classes of Gifts?

[384] As indicated, some statutory default provisions, such as ss. 34 and 35 of the Alberta Act, apply to all classes of gifts.[486] Other provisions, such as s. 23, are construed as excluding failed residuary gifts.[487] For consistency's sake, a statutory distribution scheme should apply to all classes of failed gifts, including gifts of the residue of the estate.

RECOMMENDATION No. 27
A statutory distribution scheme should apply to all classes of gifts, including general and pecuniary gifts, specific gifts, demonstrative gifts and residuary gifts.

G. Should the Testator be Able to Exclude or Deviate from the Statutory Distribution Scheme?

[385] It is also settled law that by making certain types of gift, such as a class gift or a joint gift, a testator is taken to have expressed a contrary intention that precludes the application of default provisions, such as the lapse provision in s. 23

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[486] Three types of testamentary gifts have been historically recognized, namely devises (gifts of real property), bequests (gifts of personal property) and legacies (gifts of money or money equivalent). Devises, bequests and legacies are themselves classified into four broad classes, which are general and pecuniary gifts (gifts payable out of the general asset of the estate), specific gifts (gifts of an identifiable property or object described with sufficient particularity), demonstrative gifts (gifts of a specified amount or quantity which is directed to be primarily payable out of a specific fund) and residuary gifts (gifts of residue of that part of the testator's estate which he has not specifically disposed of). See Oosterhoff at 511-525.

[487] See for instance *Rosychuk Estate*; *Re* (2005), 387 A.R. 196 (Q.B.); *Kvellestad Estate, Re* (1985), 65 A.R. 361 (C.A.); *Re Stuart Estate* (1964), 47 W.W.R. 500 (B.C.S.C.); *Sparks Estate v. Mackay*, [1994] 6 W.W.R. 731 (Man. C.A.); *Re Redmond Estate* (1993), 11 Alta. L.R. (3d) 144 (Surr. Ct.).

and the anti-lapse provisions in ss. 34 and 35, unless otherwise provided by the legislature.[488] When the testator makes a provision creating such a gift, the testator's testamentary wish has to be respected.[489]

[386] In some cases, a testator's intention may not be to exclude entirely a statutory distribution scheme but merely to deviate from the scheme by changing, for instance, the order of priorities. This also has to be given effect as the testator's intention should always prevail.[490]

1. The testator makes a class gift

[387] A testator may wish to make a class gift. A class gift is a gift to a generic group of persons (such as "my children" or "my nephews and nieces" or "the employees of ABC"). The class must be described as including all possible members. In other words, a gift is generally considered a class gift if the number of members of the group is not mentioned or the members are not named individually. Conversely, where the number of members of a group is given or the members of a group are individually named it is not considered a class gift and the exception does not apply.[491]

[388] If one member of the group predeceases the testator, that member's share goes to increase the shares of the other class members. The inference is that by giving a class gift the testator intends that the gift is only to pass to the surviving

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[488] *Wallocha v. Lethbridge Community Foundation* (2005), 28 Alta. LR (4th) 388 (Q.B.).

[489] It should also be noted that the doctrine of lapse generally applies to gifts to charities or for charitable purposes. If a charity no longer exists before the death of the testator, the gift will lapse. However, the common law favours gifts to charities. As a result, courts will give effect to a charitable gift if they can find that the testator had a general charitable intention. The common law *cy-pres* doctrine is applied by the courts to allow the gift to pass to a similar charity or one as near as possible to the charity no longer in existence. Whether a gift to a charity no longer in existence will lapse or come under the *cy-pres* doctrine will generally depend on whether the gift is construed as a gift to a particular institution (in which instance the gift will lapse) or a gift with a general charitable intent (in which case the gift will pass to a charity as near as possible to the charity no longer in existence). For instance, see *Re Shortt* (1977), 4 Alta. L.R. (2d) 152 (Surr. Ct); *Re Machin* (1979), 9 Alta. L.R. (2d) 296 (S.C. (T.D.)); *Bezpalko Estate (Public Trustee of) v. St. Anne's Orphanage* (1979), 11 Alta. L.R. (2d) 32 (Q.B.). Also see s. 32 of the Alberta Act.

[490] See Chapter 5.

[491] *Campbell Estate, Re* (1998), 172 Nfld. & P.E.I.R. (2d) 141 (P.E.I.S.C.(T. D.)); *Stewart Estate , Re* (1994) 119 Nfld. & P.E.I.R. 344 (P.E.I.S.C.(T.D.)); *Guthrie Re* (1924), 56 O.L.R. 189 (S.C.(A.D.)).

members of that class. However, the testator may expressly give directions that the share of the predeceased class members go to alternate beneficiaries in which case the class gift exception does not apply.

2. The testator makes a joint gift

[389] A testator may also intend to make a joint gift to two or more named beneficiaries. A gift to two or more persons as joint tenants includes a right of survivorship.

[390] A gift as tenants in common does not include a right of survivorship. In Alberta, s. 8 of the *Law of Property Act*[492] establishes that devises of land or interest in land to two or more persons take effect as tenancies in common unless a contrary intention is expressed to take as joint tenants.

[391] If a gift to one of the joint beneficiaries fails, that share goes to the survivor(s). The property devolves pursuant to the common law survivorship rules. The failed gift passes to the joint tenant(s) surviving the testator, regardless of whether the joint property is a share of a specific gift or the residue.

3. The testator wants to deviate from the statutory scheme

[392] The statutory distribution scheme is a default provision. Hence, a testator's intention to deviate from the scheme also has to be carried out.

[393] For example, a testator may intend an alternate beneficiary to take the gift only if the primary beneficiary predeceases and for no other reason. If the gift fails as a result of a different cause, the gift should go to the issue of the beneficiary who is unable to take it if that beneficiary is also an issue of the testator (even though the statutory scheme provides that the alternate beneficiaries take before the descendant beneficiaries' issue).

[394] In the same way, a testator may not want the grandchildren to take under any circumstance and express this wish to disinherit them in the will. If the testator does so, the failed gift should pass to the alternate beneficiary. If there is no

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[492] R.S.A. 2000, c. L-7.

alternate beneficiary, it should go to the residue of the estate (even though the statutory scheme provides that the descendant beneficiaries' issue take before the residuary beneficiaries).

[395] In any event, the paramountcy of the testator's intention should remain the general rule.

RECOMMENDATION No. 28

A statutory distribution scheme should be a default provision only. Therefore, any intention of the testator expressed in the will or established by admissible extrinsic evidence, including a class gift or a joint gift and an intention to otherwise deviate from the scheme, should be given full effect.

CHAPTER 8. ADEMPTION BY CONVERSION

A. Introduction

[396] This chapter concerns the common law rule of ademption by conversion. Ademption by conversion has been defined as follows:

> A will often describes the subject matter of a gift with such specificity as to clearly distinguish it from other property, or other things of the same kind. This type of gift is a specific legacy and the rule of law is that if, at the testator's death, the specific property is not found among the testator's assets, the gift fails: it is said to have adeemed. ... Ademption by conversion occurs as a matter of law quite irrespective of the testator's intention in the matter and it occurs because the specific property has been wholly or partly destroyed, or the testator has parted with it, or it has ceased to conform to the description of it in the will.[493]

[397] Ademption was developed as a simple and easy-to-apply rule which accommodated a testator's usual intent without the complexity of a case-by-case determination of the testator's actual intent. It was intended to minimize litigation and avoid confusion.[494] The difficulty is that in many cases application of the doctrine as a hard and fast rule has led to harsh results where a beneficiary receives nothing, which may frustrate the testator's actual intent.

[398] The case of *Church v. Hill* illustrates the problem.[495] A testator left his youngest daughter a particular property in his will and provided that the balance of property was to be divided equally among his three other children. Before his death, the testator entered into an agreement to sell the property he had bequeathed to his youngest daughter. The Supreme Court of Canada found the gift failed by ademption and the proceeds of sale of the property fell into the residue to be divided among the three other children. The youngest daughter received nothing. In the reasons for decision, the Court stated:

> That the testator ever contemplated that his youngest daughter, the respondent, would take nothing under his will, and that the price of the property he had left to her would go to his other children, or that he intended

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[493] Feeney at § 15.1 and § 15.2.

[494] *Humphreys v. Humphreys* (1789), 30 E.R. 85 at 86 [*Humphreys*].

[495] *Church v. Hill*, [1923] 3 D.L.R. 1045 (S.C.C.) [*Church*].

> any such result seems doubtful. But the Court cannot make a will for him or provide the respondent with an equivalent for the loss of the property which the testator had devised to her. Nothing would be more dangerous than to refuse to apply the settled rules as to the ademption of legacies because it may be conjectured that the result would be contrary to the intention of the testator.[496]

[399] Consequently, courts have employed various judicial devices to avoid a harsh application of the rule. In addition, legislative exceptions have been created for particular situations, notably in the area of equitable conversion.

[400] This chapter considers whether the original rationale for the ademption by conversion rule is still relevant. It recommends that the rule should be retained as a starting point unless there is evidence of a contrary intention.

[401] This chapter also looks at the existing legislative exceptions to the ademption rule. It considers whether the exceptions for equitable conversion under the Alberta Act are sufficient or whether they should be expanded or further clarified. It recommends a simplification and a clarification of the current statutory language. It also recommends that the ademption exception found in the *Adult Guardianship and Trusteeship Act*[497] be brought under the Alberta Act and that it be extended to include all situations where a substitute decision-maker is disposing of property for an incapacitated adult.

[402] Finally, it also considers whether a gift of proceeds should fail if the proceeds are commingled with other funds.

B. Should the Common Law Rule of Ademption by Conversion Be Retained?

[403] Ademption by conversion can occur in a variety of circumstances, including destruction, loss, theft, expropriation, foreclosure, seizure, gift or sale.[498]

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[496] *Church*, note 495, at 1051-52.

[497] *Adult Guardianship and Trusteeship Act*, S.A., 2008, c. A-4.2, s. 67(2).

[498] Feeney at § 15.1 distinguishes between ademption and abatement. The latter occurs when an estate is legally unable to satisfy a legacy or device because of the testator's debts. Feeney, at 176.

[404] Historically, in Roman Law, ademption by conversion was not automatic. Rather, the courts would attempt to ascertain the testator's intent with respect to the particular property. Did the testator intend the gift to adeem or did the testator wish the beneficiary to have the value of the property even if it no longer existed at the testator's death?[499]

[405] This "intention approach" was initially adopted by the English courts but was frequently criticized as being "[p]roductive of endless uncertainty and confusion."[500] Consequently, it was abandoned in favour of the "identity approach," a simple two-part test: (1) is there a gift of a specific or particular asset? and (2) does the asset which is the subject matter of the specific gift exist in the estate at the time of death?[501] If there is a gift of a specific asset and the asset is no longer part of the estate at the time of death then the gift fails or adeems.

[406] The identity approach is premised on two assumptions. First, a testator who makes a gift of a specific asset does not intend to confer a general economic benefit on that beneficiary. Second, where the specific asset is not in the testator's estate at the time of death, the testator intended to revoke the gift of it in the will.[502]

[407] These two assumptions, however, have been the subject of some criticism.[503] First, whether a gift is characterized as specific or general is not necessarily a reliable indicator of a testator's intention to confer a general economic benefit.[504] "Other factors, such as the nature of the gift, its value relative to the worth of the estate, or the relationship of the beneficiary to the testator, may

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[499] Oosterhoff at 533.

[500] *Humphreys*, note 494, at 85.

[501] *Humphreys*, note 494, at 86.

[502] British Columbia 1989 Report at 3-4

[503] British Columbia 1989 Report, at 16.

[504] British Columbia 1989 Report, at 16.

often provide more reliable clues to the testator's intent in this regard."[505] Second, a disposition is not always consistent with the presumption that a testator intended to revoke the gift.[506] Dispositions may be involuntary, resulting from loss, accidental destruction or sale by a third party (such as a trustee appointed to manage the property of a represented adult). Moreover, even if the disposition is intentional, the testator may have intended to substitute another asset in the will, but for whatever reason did not get around to revising the will.

[408] Given that the application of the rule may, in some cases, lead to harsh results that frustrate the intent of the testator, the courts have employed a number of judicial devices to avoid application of the ademption doctrine in particular cases: (1) construing legacies as other than specific,[507] (2) finding the subject of a legacy is in the estate in a different form,[508] and (3) declaring the common law rule inapplicable in certain circumstances.[509] In addition, various legislative exceptions to the ademption doctrine have also been created.

[409] Most problems resulting from the doctrine of ademption by conversion could be avoided by good planning and careful legal drafting, however, this is not

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[505] British Columbia 1989 Report, at 16.

[506] British Columbia 1989 Report, at 16.

[507] Where a devise is characterized as general, ademption does not apply and the beneficiary receives the value of their gift from the total assets of the estate. In construing wills, the courts have demonstrated a strong preference for construing a devise in a will as general rather than specific. Speaking for the majority on the subject of specific legacies, Rand J. states in *Diocesan Synod of Fredericton v. Perrett*, [1955] S.C.R. 498 at 501: "That the courts lean strongly against specific legacies has long been settled." See also *Nakonieczny v. Kaminski*, [1989] 2 W.W.R. 738 (Sask. Q.B.) at 747.

[508] Where specific property is given by the will and subsequently there is a change in that property, there will usually be an ademption. Where the change is in form or name only (rather than the nature or substance of the property), however, ademption will not follow. Oosterhoff at 544.

[509] "Ademption and the Testator's Intent"(1961) 74:4 Harv. L. Rev. 741 at 743-45. In the United States, courts have made some exceptions to the ademption doctrine for involuntary changes in specific devises in certain circumstances. For example, they have generally agreed not to apply the ademption rule when specific property is sold by an incompetent testator's guardian. The rationale being that the testator could not intend the result and lacked the capacity to change his will. Canadian courts have not followed this approach; rather they have relied on the other devices already mentioned or on specific legislative exceptions, depending on the circumstances.

a complete solution to the issue.[510] Lawyers could explain to their clients the consequences of leaving a specific asset to a beneficiary if the asset is no longer in their estate at the time of death. Where a testator intends to confer a general economic benefit on a beneficiary, they could, for example, leave the beneficiary a percentage of their estate or provide in the will that the beneficiary is to receive the proceeds of sale, insurance proceeds or replacement property.[511] The drafter could also refer to the property in a general way, such as "my home," rather than identifying a particular home at a specific address.[512] There will, however, continue to be cases where the will is drafted by a layperson who may not be aware of these concerns or a lawyer could miss this issue.[513]

[410] No province in Canada has passed legislation to effectively abolish the rule of ademption by conversion. In the United States, Kentucky is the only state to have abolished the ademption rule.[514] Under Kentucky legislation, a beneficiary is entitled to the economic equivalent of a gift where the proceeds are not traceable. Commentators have noted that Kentucky has not experienced increased litigation as a result of the presumption against ademption, nor problems related to the introduction of extrinsic evidence to prove intent.[515] On the other hand, Kentucky's approach has been criticized as the payment of the economic equivalent may negatively affect gifts to other beneficiaries.[516]

[411] ALRI considers that the doctrine of ademption by conversion is a useful starting point as it generally reflects a testator's intention. In other words, at death, when the asset that was the subject of a specific bequest is no longer part of the

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[510] Mary Lundwall, "The Case Against the Ademption by Extinction Rule: A Proposal for Reform" (1993-1994) 29:1 Gonz. L. Rev. 105 at 128 [Lundwall].

[511] Lundwall, note 510, at 127.

[512] Lundwall, note 510, at 127.

[513] Lundwall, note 510, at 128.

[514] *Wills*, Ky. Rev. Stat. § 394.360, online: <http://www.lrc.ky.gov/KRS/394-00/360.pdf> provides a rebuttable presumption that the testator intended to provide a gift to a beneficiary who is left a specific asset and provides for a monetary value where that asset is no longer part of the estate at death.

[515] Lundwall, note 510, at 130.

[516] Lundwall, note 510, at 130.

estate, it is reasonable to conclude, in the absence of evidence to the contrary, that the testator intended the gift to fail. Retention of the common law rule of ademption is further supported when one considers the difficulty of substituting other estate assets for the specific property named in the will.

RECOMMENDATION No. 29
The common law rule of ademption by conversion should be retained.

C. Legislative Exceptions

1. Should the legislative exceptions to ademption be extended to include any disposition where the proceeds can be traced?

[412] Equitable conversion occurs where a disposition of property is not completed at the time of the testator's death.[517] In the absence of a statutory provision, the common law rule of ademption would apply to either an equitable or an actual conversion. For example, in *Church*, it made no difference that the testator had only entered into an agreement to sell the property which the youngest daughter was to receive under the will, but had not yet received the proceeds.

[413] The Uniform Law Conference of Canada recommended in its Uniform Wills Act that provinces enact a legislative exception for equitable conversion. Section 20(2) of the Uniform Wills Act provides:

> 20(2) Except when a contrary intention appears by the will, where a testator at the time of his death has a right or chose in action or equitable estate or interest that was created by a contract respecting, a conveyance of, or other act relating to real or personal property that was comprised in a devise or bequest, made or done after the making of a will, the devisee or donee of that real or personal property takes the right or chose in action or equitable estate or interest of the testator.

A number of provinces, including Alberta, have also enacted legislative exceptions for equitable conversion.[518]

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[517] British Columbia 1989 Report at 10.

[518] Alberta Act, s. 21(2); Ontario Act, s. 20(2); New Brunswick Act, s. 20(2); Northwest Territories Act, s. 14(2); Nunavut Act, s. 14(2); and Saskatchewan Act, s. 26(2).

[414] As the Law Reform Commission of British Columbia observed, it may be difficult to justify having an exception for equitable conversion, however, without extending an exception to cases of actual conversion as well where the proceeds are traceable.[519] The distinction turns on the timing of receipt of the proceeds of the property and appears to be based on a concern regarding the ease of identifying the proceeds.[520]

[415] Where the proceeds are owing on the testator's death they can be readily identified. Where, however, they have been received before the death of the testator they may have changed form several times or be commingled with other property and consequently be more difficult to identify.[521] This reasoning, however, excludes the possibility that in a situation of actual conversion the proceeds received by the testator before death could remain identifiable. For example, proceeds retained in a separate bank account would be readily identifiable. The identifiability of the proceeds would be a question of fact.[522]

[416] Concerning the timing of the receipt of the proceeds, the difference in the treatment of equitable conversion and actual conversion could be justified on the basis that in the latter case, the proceeds were received prior to the death of the testator, who had sufficient time to change the will if the testator did not intend to revoke the gift. Again, it has been suggested that this rationale is flawed.[523] A testator might die shortly after receiving the proceeds and therefore not have time to change the will. Alternatively, in the equitable conversion scenario, the proceeds of sale may be outstanding on a disposition of property made some considerable time ago, affording the testator ample time to change the will. The Law Reform Commission of British Columbia concluded that the "factor of timing is not a sure

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[519] British Columbia 1989 Report at 13.

[520] British Columbia 1989 Report at 13.

[521] British Columbia 1989 Report at 13.

[522] British Columbia 1989 Report at 14.

[523] British Columbia 1989 Report at 14.

objective test of the testator's intention to revoke a gift."[524] It recommended that in each case the testator's actual intention should be ascertained. This recommendation was not continued in the British Columbia 2006 Report and the province's new wills legislation does not address this issue.

[417] The legislative exceptions for equitable conversion provide some relief from the otherwise inflexible presumption of ademption. In the absence of evidence of a contrary intention, an exception for equitable conversion provides a reasonable approximation that a testator intended to benefit the specific beneficiary over either the residuary beneficiary or a third party. The property that is the subject of the testamentary gift is in the possession of the testator's estate and the actual disposition is not yet complete. While ALRI acknowledges that there are cases of actual conversion where the proceeds are still traceable and where the disposition may have occurred shortly before the death of the testator, it does not favour extending an exception to ademption to such cases. We do not agree that the traceability of the proceeds of a disposition is a sufficient indication that the testator intended to benefit the specific beneficiary over either the residuary beneficiary or a third party.

RECOMMENDATION No. 30
The legislative exception for equitable conversion should be retained. A legislative exception should not be extended to actual conversion regardless of whether the proceeds of disposition are traceable.

2. What form should the legislative exceptions take?

[418] Alberta's legislative exception for equitable conversion, s. 21(2) of the Alberta Act, reads as follows:

> **21(2)** Except when a contrary intention appears by the will, when a testator at the time of the testator's death has a right or chose in action or equitable estate or interest that was created by
>
> (a) a contract entered into after the making of the will and respecting real or personal property that was comprised in a devise or bequest,
>
> (b) a conveyance made after the making of the will and relating to real or personal property that was comprised in a devise or bequest, or

[524] British Columbia 1989 Report at 14.

> (c) any other act done after the making of the will and relating to real or personal property that was comprised in a devise or bequest,
>
> the devisee or donee of that real or personal property takes the right or chose in action or equitable estate or interest of the testator.

It is based on s. 20(2) of the Uniform Wills Act. Other jurisdictions, including New Brunswick, the Northwest Territories and Nunavut, have adopted substantially similar provisions.

[419] Ontario, on the other hand, enumerates a list of exceptions. Section 20(2) of the Ontario Act provides:

> 20(2) Except when a contrary intention appears by the will, where a testator at the time of his or her death,
>
> (a) has a right, chose in action or equitable estate or interest that was created by a contract respecting a conveyance of, or other act relating to, property that was the subject of a devise or bequest, made before or after the making of a will;
>
> (b) has a right to receive the proceeds of a policy of insurance covering loss of or damage to property that was the subject of a devise or bequest, whether the loss or damage occurred before or after the making of the will;
>
> (c) has a right to receive compensation for the expropriation of property that was the subject of a devise or bequest, whether the expropriation occurred before or after the making of the will; or
>
> (d) has a mortgage, charge or other security interest in property that was the subject of a devise or bequest, taken by the testator on the sale of such property, whether such mortgage, charge or other security interest was taken before or after the making of the will, the devisee or donee of that property takes the right, chose in action, equitable estate or interest, right to insurance proceeds or compensation, or mortgage, charge or other security interest of the testator.

[420] Ontario first introduced the enumerated list of exceptions to equitable conversion in 1977. Interestingly, an earlier report from the Ontario Law Reform Commission recommended that Ontario adopt a provision with the same wording as the Uniform Wills Act.[525] There is nothing in Hansard to indicate why the province chose to go with the more enumerated list for s. 20. Was it for greater clarity or was it intended to expand upon the Uniform Wills Act provision?

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[525] Ontario Law Reform Commission, *The Proposed Adoption in Ontario of the Uniform Wills Act*, Report (1968) at 35-36, s. 20(2).

[421] Ontario's enumerated list has remained unchanged since its introduction. It parallels the list found in the United States' *Uniform Probate Code* of 1969.[526] It is not, however, an exhaustive list as it does not include, for example, an exception for replacement property such as § 2-606(a)(5) of the current version of the *Uniform Probate Code.*[527] Ontario's legislative provision is also broader than those of the other provinces as it applies whether the disposition of property occurs before or after the will is made.

[422] Saskatchewan, like Ontario, adopted an enumerated list of legislative exceptions to equitable conversion, although its list is more limited in scope.[528] In a 1984 report, the Law Reform Commission of Saskatchewan expressly rejected extending a legislative exception to cases of insurance proceeds or compensation for expropriation as the conversion of the property was involuntary and should signal to the testator the need for a will change.[529] The Commission distinguished this involuntary disposal from a situation where a testator retains an interest in the property and assumes that the words in the will are sufficient to pass such an interest. On the other hand, other commentators cite situations of destruction, expropriation or other involuntary disposition of property as cases where ademption should not apply as the testator did not likely intend to revoke a gift of the property.[530]

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[526] *Uniform Probate Code: Official Text with Comments*, (St. Paul, Minn: West Publishing, 1969) at § 2-608.

[527] *Uniform Probate Code* § 2-606(a)(5) (2008), online: <http://www.law.upenn.edu/bll/archives/ulc/upc/2008final.htm> (accessed July 2010).

[528] Saskatchewan Act, s. 26(2):

> 26(2) Unless a contrary intention appears in the will, where a testator has devised real property and subsequently does any of the following, the beneficiary named in the devise takes the testator's interest under that agreement for sale, mortgage or option agreement:
>
> (a) sells the property by agreement for sale;
>
> (b) sells the property and takes back a mortgage on that property as security for all or part of the purchase price;
>
> (c) grants an option to purchase the property.

[529] Law Reform Commission of Saskatchewan, *Proposals Relating to Ademption by Equitable Conversion*, Report (1984) at 10-11.

[530] Manitoba Report at 34.

[423] In the United States, § 2-608(a) of the 1969 *Uniform Probate Code*, adopted by several states, eliminated ademption in a number of specific cases of equitable conversion:

- proceeds of sale,
- condemnation or casualty insurance awards which are unpaid at the testator's death, and
- property owned by the testator at death and acquired as a result of foreclosure, or obtained in lieu of foreclosure, of the security interest for a specifically devised obligation.[531]

The 1990 *Uniform Probate Code* retained all of the specific exceptions for equitable conversion from the 1969 version (plus a new exception for replacement property), but also added a mild presumption against ademption.[532]

[424] Neither the United Kingdom nor Australia has adopted any legislative exceptions for equitable conversion.

[425] At first glance, s. 21 of the Alberta Act does not appear to contain provisions equivalent to Ontario's s. 20(2)(b)-(d). However, unlike the Ontario Act, s. 21(c) of the Alberta Act contains a broad basket clause referring to "any other act done after the making of the will." On its face, this language would appear broad enough to include the situations referred to in the Ontario legislation, as well as other scenarios. There is no case law, however, from Alberta or any of the other provinces with comparable legislation confirming the scope of "other

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[531] *Uniform Probate Code: Official Text with Comments* (St. Paul, Minn: West Publishing, 1969) at § 2-608(a).

[532] *Uniform Probate Code: Official 1993 Text with Comments*, 11th ed. (St. Paul, Minn: West Publishing, 1994). The 1990 *Uniform Probate Code* codified a return to an intent theory of ademption in subsections § 2-606(a)(5) and (6):

> (5) real or tangible personal property owned by the testator at death which the testator acquired as a replacement for specifically devised real or tangible personal property; and
> (6) unless the facts and circumstances indicate that ademption of the devise was intended by the testator or ademption of the devise is consistent with the testator's manifested plan of distribution, the value of the specifically devised property to the extent the specifically devised property is not in the testator's estate at death and its value or its replacement is not covered by paragraphs (1) through (5).

Note that subsection (a) (6) was substantially revised by technical amendment effective July 31, 1997 and subsection 2-606 (a) remains unchanged in the 2008 *Uniform Probate Code*.

act." Ontario's enumerated list of exceptions has the benefit of clarity but lacks the flexibility of a more open-ended listing such as that found in Alberta's s. 21.

[426] ALRI prefers a broader provision that clearly states the concepts at issue to that of an enumerated list that may not be exhaustive. In order to ensure that the exception would clearly extend to a case where, for example, insurance proceeds are received or compensation is received for an expropriation, ALRI recommends that the wording be extended to an equitable interest in "any occurrence" after the making of the will relating to the property in question, as well as "anything done."

RECOMMENDATION No. 31
The *Wills Act* should provide that, subject to evidence of a contrary intention, a gift of property that is not part of the estate at the time of death does not fail if the testator has a right or chose in action or equitable estate that was created by anything done or any occurrence after the making of the will relating to the property in question.

3. Should a single chose in action be applied pro-ratably in satisfaction of the entitlement of multiple beneficiaries?

[427] Another issue to consider is whether s. 21(2) of the Alberta Act should be applied pro-ratably when there is a single chose in action and multiple beneficiaries. This question arose in the New Brunswick Court of Appeal case of *McLean Estate*.[533] A testator left specific bequests of shares to several beneficiaries. He subsequently made an agreement to sell all his shares to a purchaser. Upon the testator's death, he had delivered some but not all his shares to the purchaser and the purchaser had not paid the full purchase price. The issue was whether the gift of shares to the specific beneficiaries failed as a result of ademption or whether it could be saved by the exceptions for equitable conversion found in the province's wills legislation. The Court held that the statutory exceptions in s. 20(2) were not applicable as the case concerned only one chose in action which was not severable:

> The difficulty that arises in applying section 20(2) of the *Wills Act* to this case is that the testator had no separate rights or choses in action in respect to the shares comprised in each specific bequest, but only one right or chose in

[533] *Re. A. Neil McLean Estate* (1969), 1 N.B.R. (2d) 500 (N.B.S.C.(A.D.)) [*McLean Estate*].

> action which was in respect to all the shares which he agreed to sell. That chose in action was the right to receive the balance of the purchase price of the shares when all was delivered. To give those to whom the shares were specifically bequeathed the chose in action would mean they would receive approximately $1,000,000., when the value of their bequests was less than $600,000. Such an interpretation is unreasonable and must be rejected.[534]

[428] The Court expressly rejected a proportional allocation of the proceeds between the specific legatees and the residue of the estate finding that the wording of the statutory provision precluded such a solution. In reaching its decision, the Court clearly drew a distinction between the property (proceeds of sale) which were clearly fungible and the agreement to sell the shares which represented a single, indivisible right or chose in action.

[429] *McLean Estate* is still valid law in New Brunswick.[535] There are, however, no Alberta cases dealing with this particular issue.

[430] As s. 21(2) of the Alberta Act contains virtually identical wording to that of s. 20(2) of the New Brunswick Act, it is possible that an Alberta court could reach the same result as that of the court in *McLean Estate*. On the other hand, if one considers that the purpose of the legislative exception is to provide some relief in cases of equitable conversion from the inflexible application of the ademption rule, then a broader interpretation including the proportional allocation of proceeds would be appropriate. To ensure that any legislative exception for equitable conversion would permit the proportional allocation of proceeds, ALRI recommends that this be expressly provided for in the legislation.

RECOMMENDATION No. 32

The statutory exception for equitable conversion should expressly provide that the devisee or donee of that property takes in whole or in part the right, chose in action, equitable estate or interest of the testator.

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[534] *McLean Estate*, note 533, at 512.

[535] See *Kilpatrick v. Keller* (2004), 264 N.B.R. (2d) 21 (Q.B.(T.D.)); *Murphy v. Small et. al*, (2004) 270 N.B.R. (2d) 44 (C.A.).

4. Should the current legislative exception for the disposition of property by the trustee of a represented adult be extended to other substitute decision-makers?

[431] A substitute decision-maker, such as a committee or trustee appointed because the testator is incapable of managing property, can trigger ademption by selling property subject to a specific gift. A number of jurisdictions have passed legislative exceptions in such circumstances because an intention to revoke a testamentary disposition cannot be ascribed to the testator.

[432] In Canada, several provinces have passed legislation that contains an anti-ademption provision for substitute decisions. These legislative exceptions provide that the beneficiary's interest in the property is transferred to the proceeds of disposition.

[433] Alberta's *Adult Guardianship and Trusteeship Act* provides:

> 67(1) A trustee may apply to the Court for an order authorizing the trustee to sell property that is the subject of a specific gift in the will of the represented adult and directing the trustee to place the proceeds of the sale into an identifiable trust account, to be administered as the Court directs having regard to the present and future needs of the represented adult.
>
> (2) If a trustee complies with an order under subsection (1), the specific gift of the property in the will of the represented adult does not fail under the doctrine of ademption.
>
> (3) If a trustee has sold or otherwise disposed of property that was the subject of a specific gift in the will of the represented adult otherwise than in accordance with an order under subsection (1), the Court on the application of any affected person may make an order that it considers will best give effect to the represented adult's testamentary intentions, having regard to the circumstances in which the property was sold.
>
> (4) An application under subsection (3) may be made either before or after the death of the represented adult.[536]

[434] The Alberta provision is limited to trustees although it would appear that under the *Powers of Attorney Act*, an attorney could have the power to administer the estate of a donor (including disposing of property) if the donor becomes mentally disabled or suffers a loss of capacity.[537] Although there is no Alberta case on this point, it would appear that where a trustee appointed by a court disposes of

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[536] *Adult Guardianship and Trusteeship Act*, S.A., 2008, c. A-4.2, s. 67.

[537] *Powers of Attorney Act*, R.S.A. 2000, c. P-20, s. 7.

property, the anti-ademption provision in the *Adult Guardianship and Trusteeship Act* would apply, but where property that is the subject of a devise is disposed of by an individual acting under a power of attorney there would be no such relief.

[435] Similar anti-ademption provisions can be found in other Canadian provinces such as Ontario,[538] Manitoba[539] and British Columbia.[540] The trend in recent years has been to extend the anti-ademption exception to all substitute decision-makers and to move the legislative exception to the wills legislation.

[436] In the United States, § 2-606(b) of the *Uniform Probate Code* provides a broad exception to the ademption doctrine for property disposed of by a conservator or agent acting under a power of attorney:

> If specifically devised property is sold or mortgaged by a conservator or by an agent acting within the authority of a durable power of attorney for an incapacitated principal or a condemnation award, insurance proceeds, or recovery for injury to the property is paid to a conservator or to an agent acting within the authority of a durable power of attorney for an incapacitated principal the specific devisee has the right to a general pecuniary devise equal to the net sale price, the amount of the unpaid loan, the condemnation award, the insurance proceeds, or the recovery.[541]

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[538] *Substitute Decisions Act, 1992*, S.O. 1992, c. 30, s. 36.

[539] Manitoba Act, s. 24. Manitoba Law Reform Commission, *Ninth Annual Report* (1980) mentions at 9-10 *"The Wills Act" and Ademption*, Informal Report 9E (November 20, 1979), which recommended that the *Mental Health Act* be extended to cover a disposition by not only the Public Trustee, but also any committee and that the new provision be moved to the *Wills Act.*

[540] Most recently, the British Columbia 2009 Act provides that disposition by a nominee (defined broadly to include a committee acting under the *Patients Property Act*, R.S.B.C. 1996, c. 348, or person acting under a power of attorney or a representative acting under the *Representation Agreement Act*, R.S.B.C. 1996, c. 405) while the testator is mentally incapable does not result in ademption.

[541] *Uniform Probate Code* § 2-606(b) (2008), online: <http://www.law.upenn.edu/bll/archives/ulc/upc/2008final.htm> (accessed July 2010). This revision originally enacted in 1990 broadened the exception contained in the 1969 version for property sold be conservators to include agents acting under a durable power of attorney.

[437] This provision has been adopted by a number of states.[542] Other states, such as New York, have adopted their own exemption provisions in response to court decisions.[543]

[438] Similarly, the United Kingdom has introduced an anti-ademption provision in its *Mental Health Act*.[544]

[439] Some individual states in Australia have added legislative exceptions where a substitute decision-maker disposes of property that is also the subject of a bequest in a will.[545] In 1997, the Australian National Committee for Uniform Succession Laws considered a draft provision to overcome the effects of the ademption doctrine in the case of a sale of the testator's property under an enduring power of attorney. Ultimately, it concluded that while there was merit in reviewing the ademption doctrine as part of the wills project, "the [ademption] rule as a whole should be reviewed" as part of a discrete project "rather than amended on a piecemeal basis."[546]

[440] ALRI recommends that an anti-ademption provision parallel to that found in the *Adult Guardianship and Trusteeship Act* should be provided for individuals acting pursuant to a power of attorney, who lawfully dispose of property on behalf of an incompetent testator.

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[542] See Cornell University Law School, Legal Information Institute, "Law by source: Uniform laws: Uniform Probate Code", online: <http://www.law.cornell.edu/uniform/probate.html>.

[543] *Estates, Powers and Trusts*, N.Y. Stat. § 3-4.4, online: <http://public.leginfo.state.ny.us/MENUGETF.cgi?COMMONQUERY=LAWS+&TARGET=VIEW>.

[544] *Mental Health Act 1983* (U.K.), c. 20, s. 101 was not modified by the *Mental Health Act 2007* (U.K.), c. 12.

[545] In 1988, South Australia amended its *Powers of Attorney and Agency Act 1984* (S.A.), s. 6(1), online: <http://www.austlii.edu.au/au/legis/sa/consol_act/poaaaa1984305/> to deal with ademption of legacies. Other states, including New South Wales and Queensland also have exceptions in their legislation to address ademption and powers of attorney.

[546] Australia Uniform Report at 114.

RECOMMENDATION No. 33
There should be a legislative exception comparable to s. 67 of the *Adult Guardianship and Trusteeship Act* for the disposition of property on behalf of an incompetent testator by an individual acting pursuant to a power of attorney.

D. Where a Gift Includes the Proceeds of Sale, What Should Happen If the Proceeds Are No Longer Identifiable?

[441] The issue of the commingling of proceeds and the application of the rule of ademption by conversion arises in two different scenarios. The first is where a specific devise (such as a piece of land) is sold during the lifetime of the testator and the proceeds from the sale are commingled with other funds. In such a scenario, it is still the law in Canada that the result is an ademption, whether or not there is a commingling of the proceeds.[547]

[442] In the second scenario, where there is a devise of the proceeds of sale of property, or where the courts have read the devise as being capable of including the proceeds of sale, and the funds are commingled, the gift will not fail, provided the proceeds are traceable into those funds.[548]

[443] Section 20(3) of the Uniform Wills Act is consistent with this common law position with regards to a bequest of the proceeds of sale. It provides:

> 20(3) … [W]here the testator has bequeathed proceeds of the sale of property and the proceeds are received by him before his death, the bequest is not adeemed by commingling the proceeds with the funds of the testator if the proceeds are traced into those funds.

[444] New Brunswick, the Northwest Territories and Nunavut are the only jurisdictions to have adopted this provision in their wills legislation.[549] The Alberta Act does not contain a comparable provision. Manitoba introduced a similar

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[547] Feeney at § 15.1.

[548] In *Hicks v. McClure*, [1922] 64 S.C.R. 361, the Court held there was no ademption because the gift was actually one of the proceeds of sale and this was interpreted as including the mortgage. See also *Synod of Fredericton v. Perrett*, [1955] S.C.R. 498 at 500-501.

[549] New Brunswick Act, s. 20(3); Northwest Territories Act, s. 14(3); Nunavut Act, s. 14(3).

provision in its 1964 wills legislation but it was not proclaimed pending further research and review[550] and was repealed in 1967.[551]

[445] The Ontario Law Reform Commission recommended that the Uniform Wills Act provision not be adopted on two grounds:

1. The commingling might be looked upon as a change in intention on the part of the testator.
2. There might be difficulty in deciding what rules should be applied if the testator had withdrawn money from the combined fund.[552]

[446] In its 1989 Report, the Law Reform Commission of British Columbia criticized the Ontario Law Reform Commission's reasoning.[553] They dismissed the idea that commingling could be an indicia of a change of intention and recommended that existing legal principles concerning the traceability and identifiability of property be applied. This recommendation was not carried forward into the British Columbia 2006 Report and does not form part of the new British Columbia legislation.

[447] Neither the United Kingdom, the United States nor Australia have adopted specific legislative provisions concerning a bequest of the proceeds of sale of property and the commingling of funds.

[448] Whether the common law applies or a legislative provision such as that proposed in the Uniform Wills Act, one is left with the difficult determination as to when the proceeds of sale can be traced and identified when they are commingled with other funds. The rules of tracing are complex and an exhaustive discussion is

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[550] Manitoba, Legislative Assembly, Debates and Proceedings, vol. 13, no. 141 (4 May 1967) at 3362, as referred to in Manitoba Report, footnote 103 at 35.

[551] *The Wills Act*, S.M. 1964 (1st Sess.), c. 57, s. 22(2) as rep. by *The Statute Law Amendment and Statute Law Revision Act, 1967*, S.M. 1967, c. 19, s. 93.

[552] Ontario Law Reform Commission, *The Proposed Adoption in Ontario of the Uniform Wills Act*, Report to the Department of the Attorney General (1968) at 35-36, s. 20(2) at 36.

[553] British Columbia 1989 Report at 15.

beyond the scope of this report.[554] A review of the case law reveals no clear principle. T. G. Youdan suggests that:

> ... the change that occurs when proceeds of sale are mixed with other property of like description, for example when proceeds of sale are placed to the credit of a bank account into which other payments have been, or are subsequently, made, is a change of substance that, unless it could be characterized as being *de minimis*, will ordinarily cause ademption.[555]

[449] ALRI acknowledges that the commingling of funds does not necessarily make the proceeds of sale untraceable but that it can have some effect. Nevertheless, we consider that no specific legislative provision is necessary in this area. It is hard to see what value such a statement would add. It is, therefore, sufficient to allow the common law to evolve on this issue.

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[554] For a comprehensive discussion of traceability see the Law Reform Commission of British Columbia, *Report on Competing Rights to Mingled Property: Tracing and the Rule in Clayton's Case*, Report No. 66 (1983).

[555] T.G. Youdan, *Annotation to Re Rodd*, (1981) 10 E.T.R. 117 (P.E.I.S.C.) at 123.

CHAPTER 9. LEGAL DISCRIMINATION AGAINST CHILDREN BORN OUTSIDE MARRIAGE

A. Status of Children

1. Introduction

[450] In Alberta today, over 30% of children are born outside marriage.[556] The purpose of this chapter is to highlight the discrimination still faced by these children under the law in Alberta and to reaffirm past recommendations made by ALRI that the discrimination against these children be ended.

[451] The legal disabilities faced by children born outside marriage are rooted in the English common law of the 17th and 18th centuries. The primary disability faced by such children under the common law was the incapacity to inherit property.[557] The vast majority of common law jurisdictions throughout the world have abolished the legal status of being born outside marriage, largely through enactment of status of children legislation which gives all children equal status regardless of the circumstances of their births. Alberta has chosen instead to partially address the issue by amending individual enactments over the years. The result is that discrimination against children born outside marriage continues in certain areas of the law. Significantly, these children are still discriminated against under the law of succession pertaining to wills.

[452] This chapter arises from ALRI's review of the Alberta Act. A review of the law on the construction of wills by the courts in relation to children revealed that children born outside marriage still face discrimination under the common law and in the Alberta Act. ALRI believes that it is important to reaffirm our recommendation in three previous final reports that Alberta enact status of children legislation.

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[556] Alberta, Service Alberta, *Albert Vital Statistics: Annual Review 2007*, Birth Related Statistics, at 5-7.

[557] Institute of Law Research and Reform, *Illegitimacy,* Research Paper No. 10 (1974) at 5, online: <www.law.ualberta.ca/alri>.

[453] This chapter will review the current status of children born outside marriage in Alberta. The position of our children will be contrasted with the status of children in other Canadian provinces, common law jurisdictions, and the European Union. The fact that Alberta is in contravention of United Nations' conventions will be discussed. This chapter will explore in some detail how these children are discriminated against under the law of wills.

2. Status of children in Alberta

[454] Since the beginning of the 20th century, Alberta has been making changes to the law to recognize the relationship of children with their parents.[558] Many of these changes have addressed the discrimination in the law against children born outside marriage.[559] For example, discrimination in intestate succession, dependants relief and family law legislation has been largely addressed.

[455] With respect to intestacy, children have been able to take from their mothers as if they were legitimate with respect to real property since 1886 and with respect to personal property since 1901. Legislation in 1920 consolidated the position with

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[558] Some examples of important legislative changes are: 1901 (illegitimate child may succeed to personal property of deceased intestate mother); 1906 (succession to real property of mother); 1908 (illegitimate child recognized as a 'dependant' for workmen's compensation); 1913 (legitimation through adoption); 1922 (compensation provided under fatal accidents legislation); 1927 (mother of illegitimate child a guardian by statute); 1927 (common law rule of construction for wills reversed in respect of the mother); 1939 (illegitimate child allowed to share in the estate of his deceased intestate father, though only where there was no widow or legitimate child); 1960 (*Legitimacy Act*, 1960, S.A. c. 56 made legitimate some persons who would be illegitimate at common law); 1969 (illegitimate child allowed to claim maintenance from deceased father's estate under family relief legislation); 1991 (status of illegitimacy abolished with respect to intestate succession; definition of a 'child' in the *Family Relief Act* changed to include a child born inside or outside marriage; guardianship provision making mother sole guardian of illegitimate child changed; provisions for establishing parentage enacted; *Parentage and Maintenance Act* provided for support for children born in and out of wedlock). See: Institute of Law Research and Reform, *Status of Children: Revised Report, 1985,* Final Report No. 45 (1985) at 17, online: <www.law.ualberta.ca/alri>; *Family and Domestic Relations Statutes Amendment Act, 1991,* S.A. 1991, c. 11; *Parentage and Maintenance Act,* S.A. 1990, c. P-0.7.

[559] The Alberta Law Reform Institute recommended many of these legislative changes in the following three reports:

Status of Children, Final Report No. 20 (1976)
Status of Children: Revised Report, 1985, Final Report No. 45 (1985)
Status of Children: Revised Report, 1991, Final Report No. 60 (1991).

respect to intestacy.[560] A child was able to inherit from its father on intestacy if the father was not survived by a widow or legitimate children.[561] In 1991, the *Intestate Succession Act* was amended to provide that "issue" included "all lineal descendants, whether born within or outside marriage," thus abolishing any relevance of legitimacy with respect to intestate succession.[562]

[456] Despite this amendment, the legitimacy of beneficiaries continues to be relevant as the Alberta Intestate Act is not retroactive. This is illustrated by the recent Alberta case of *Re Hilstad Estate* in which the court had to determine the correct beneficiaries for distribution of an estate. The closest relative at the date of death in 1963 was a paternal first cousin who had been born outside marriage. The court held that the abolition of illegitimacy in 1991 was not retroactive and the determination of those entitled to take was to be determined as at the date of death. Therefore, the next-of-kin of the paternal first cousin were not entitled to take and the estate was distributed to maternal second cousins.[563]

[457] Under the *Dependants Relief Act*, a "child" includes a child born within or outside marriage.[564] An application may be made for maintenance and support by a

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[560] *An Act to Consolidate and Amend the Law Relating to Intestate Succession*, S.A. 1920, c. 11, "s. 9(4): Illegitimate children shall be entitled to take property from or through their mother as if they were legitimate."

[561] *Intestate Succession Act,* R.S.A. 1970, c. 190, s. 16.

[562] *Family and Domestic Statutes Amendment Act 1991*, S.A. 1991, c. 11, s. 3:

> 3(1) The *Intestate Succession Act* is amended by this section.
>
> (2) Section 1(b) is repealed and the following is substituted (b) "issue" includes all lineal descendants, whether born within or outside marriage, of the ancestor.

The current section in the Alberta Intestate Act reads in s. 1(b):

> 1(b) "issue" includes all lineal descendants, whether born within or outside marriage, of the ancestor.

The 1991 amendment not only abolished illegitimacy in respect of intestate succession, but eliminated a problem in the prior legislation with s. 9 and the definition of "issue." It had been suggested that because "issue" included all lawful lineal descendants, an illegitimate child of an illegitimate daughter would not be "issue" of the maternal grandmother and, hence, could not inherit from her. Institute of Law Research and Reform, *The Illegitimate Child in Alberta* by Anne H. Russell, unpublished paper (1973) at 4.

[563] *Re Hilstad Estate* (2008), 461 A.R. 211 (Q.B.).

[564] *Dependants Relief Act*, R.S.A. 2000, c. D-10.5, s. 1:

> 1(b): "child" includes ...

(continued...)

dependent child of a deceased person and the court has the power, notwithstanding the provisions of the will, to order such maintenance and support.[565] Thus, an application may be made by a dependent child for support under the will of the biological father, notwithstanding the provisions of the will.

[458] The *Family Law Act* defines a "father" as the biological father of a child and a "mother" as the person who gave birth to the child, with a "parent" being the father or mother of a child. The Act provides under s. 7 that a parent under the Act is a parent of a child for all purposes of the law of Alberta, unless another enactment provides otherwise.[566] Mechanisms for determining parentage and presumptions as to paternity are contained in the Act.[567]

[459] However, the status of being born outside marriage is retained in the *Legitimacy Act*, under which children are deemed legitimate from birth for all purposes of the law of Alberta if their parents have subsequently intermarried.

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[564] (...continued)

> (ii) a child born within or outside marriage;
>
> ...
>
> (d) "dependant" means ...
>
> (iii) a child of the deceased who is under the age of 18 years at the time of the deceased's death, and
>
> (iv) a child of the deceased who is 18 years of age or over at the time of the deceased's death and unable by reason of mental or physical disability to earn a livelihood.

[565] *Dependants Relief Act*, R.S.A. 2000, c. D-10.5, s. 3(1):

> 3(1) If a person
>
> (a) dies testate without making in the person's will adequate provision for the proper maintenance and support of the person's dependants or any of them, or
>
> (b) dies intestate and the share under the *Intestate Succession Act* of the intestate's dependants or of any of them in the estate is inadequate for their proper maintenance and support,
>
> a judge, on application by or on behalf of the dependants or any of them, may in the judge's discretion, notwithstanding the provisions of the will or the *Intestate Succession Act*, order that any provision that the judge considers adequate be made out of the estate of the deceased for the proper maintenance and support of the dependants or any of them.

[566] *Family Law Act*, S.A. 2003, c. F-4.5: "s. 1(f) "father" means ... the biological father of a child; (i) "mother" means ... the person who gives birth to a child; (j) "parent" means the father or mother of a child; s. 7: "Unless another enactment provides otherwise, a person who is a parent of a child under this Act is a parent of that child for all purposes of the law of Alberta."

[567] *Family Law Act*, S.A. 2003, c. F-4.5, ss. 8-15.

There are also sections legitimating an individual in circumstances of voidable and void marriages.[568] Registration of legitimatized children continues under the *Vital Statistics Act*.[569]

[460] Under the Alberta Act, the common law rule of construction that words of relationship in a will refer only to legitimate relationships remains with respect to inheritance through a father.[570] The common law rules remain in place affecting the inheritance rights of a child born outside marriage when conceived during the testator's life but born after the testator's death. In addition, the *Perpetuities Act* still contains distinctions between children born inside or outside marriage.[571] The *Fatal Accidents Act* was amended in March 2010 to remove any references to "illegitimate child."[572] While the intention was clearly to remove any differentiation between a child born outside marriage, it is not certain that the amendment will actually achieve that purpose.

3. Changing family relationships and attitudes

[461] The nature of families and attitudes toward children born outside marriage changed tremendously over the course of the 20th century. The first sentence of a

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[568] *Legitimacy Act*, R.S.A. 2000, c. L-10: s.1(1):

> 1(1) If, before or after the coming into force of this section and after the birth of a person, the person's parents have intermarried or intermarry, the person is legitimate from birth for all purposes of the law of Alberta.

[569] *Vital Statistics Act*, R.S.A. 2000, c. V-4.

[570] Alberta Act, s. 36.

> **Gift to illegitimate children**
> **36.** In the construction of a will, except when a contrary intention appears by the will, an illegitimate child shall be treated as if that child were the legitimate child of that child's mother.

[571] The 1991 Revised Report recommended that the *Perpetuities Act* be changed to eliminate any distinction between children born within or outside marriage when deciding questions under the Act that turn on the ability of a person to have a child at some particular time. The section remains the same. See *Perpetuities Act*, R.S.A. 2000, c. P-5, s. 9(4) and Alberta Law Reform Institute, *Status of Children: Revised Report, 1991,* Final Report No. 60 (1991) at 92.

[572] *Fatal Accidents Amendment Act, 2010*, S.A. 2010, c. 6 amending ss. 1(a) and 8 of the Act. Section 1(a) now reads: "'child', except in s. 8, includes a son, daughter, grandson, granddaughter, stepson and stepdaughter." Section 8(1)(a) now reads: "'child' means a son or daughter."

study on unwed mothers published in 1920 stated that "Motherhood without marriage is such a frank departure from the social code of civilized peoples, it is so inevitably linked up with the idea of disgrace...."[573] These attitudes prevailed until the 1960s with severe social stigmatization of such children and their mothers, along with legal sanctions.[574]

[462] By the 1970s, women's magazines were reflecting the view that single motherhood was no longer a disgrace. By the 1980s, the focus had shifted away from stigmatization of unwed mothers to the social problems usually faced by single mothers. In the mid-1980s, articles on planned single motherhood surfaced, as increasing numbers of single women decided to have children. As of the mid-1990s, any moral censure seemed to be gone, with an attitude that if a woman was economically independent, single motherhood was acceptable.[575]

[463] The results of a survey done in Ontario in 2000 predicted that positive attitudes toward non-marital childbearing would continue to increase. These positive attitudes were driven by larger numbers of people cohabiting and by women's increased economic independence.[576]

[464] With respect to attitudes in Alberta, a 1973 study found that a majority of Albertans believed that children born outside marriage should have equal rights with marital children in terms of their relationships with their parents, inheritance from their fathers, and family ties. The attitude of Albertans was that the mother and father were responsible for having the child and the child should not be punished for their actions. The survey concluded that attitudes were

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[573] Alberta S. B. Guibord & Ida R. Parker, "What Becomes of the Unmarried Mother?: A Study of 82 Cases" (Boston: Research Bureau on Social Case Work, 1922) at 5.

[574] Katherine Arnup, "Close Personal Relationships between Adults: 100 Years of Marriage in Canada" (Law Commission of Canada, 2001) at 22; Susan Crawford, "Public Attitudes in Canada Toward Unmarried Mothers, 1950-1996" (1997) 6 Past Imperfect 111 at 130 .

[575] Susan Crawford, "Public Attitudes in Canada Toward Unmarried Mothers, 1950-1996" (1997) 6 Past Imperfect 111 at 121-130.

[576] Amir Erfani & Roderic Beaujot, Population Studies Centre, University of Western Ontario, "Determinants Of Attitudes Toward Having Children Outside Marriage", Discussion paper No. 07-01 at 16-17, online: University of Western Ontario <http://www.ssc.uwo.ca/sociology/popstudies/dp/dp07-01.pdf>. Accessed January 7, 2010.

"fundamentally incongruent" with the law respecting children born outside marriage in Alberta at that time.[577]

[465] The number of children being born outside marriage and the number of couples in common law relationships have been steadily increasing in Alberta and in the rest of Canada. Between 2001 and 2006, Alberta had the greatest increase in the number of common law relationships in Canada. In 2006, 13% of couples were in common law relationships.[578] Throughout the prairies, common law relationships increased from 9.6% in 1987-88 to 16.2% of parents in 1993-94.[579] Common-law couples made up 15.5% of all couples in Canada in 2006,[580] an increase of 9.5% since 1981.[581]

[466] In 1997, 27.46% of children in Alberta were born outside marriage.[582] By 2007, this percentage had increased to 30%.[583] In Canada, 9% of births in 1971 were births outside marriage. By the end of the 1990s, approximately ⅓ of Canadian children were born outside marriage, although the majority of these children were born within common-law relationships.[584]

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[577] Department of Health and Social Development, "Public Attitudes Toward Illegitimacy in Alberta" by Michael C. Jansson as reprinted in Institute of Law Research and Reform, *Status of Children*, Final Report No. 20 (1976) at 131-132, online: <www.law.ualberta.ca/alri>.

[578] The number of common-law couples increased 23.4% between 2001 and 2006. Alberta Finance, Statistics, "2006 Census of Canada, Families, Marital Status and Households Release" (September 12, 2007).

[579] Statistics Canada, "Growing up with Mom and Dad? The intricate family life courses of Canadian children" by Nicole Marcil-Gratton (Ottawa: Ministry of Industry, 1998) at 8.

[580] Statistics Canada, "Family Portrait: Continuity and Change in Canadian Families and Households in 2006, 2006 Census" by Anne Milan, Mireille Vézina & Carrie Wells (Ottawa: Ministry of Industry, 2007) at 8.

[581] Anne Milan, "Would you live common-law?" 2003 Canadian Social Trends 2 at 2.

[582] Alberta Municipal Affairs, *Vital Statistics Annual Review 1997*, Births, at 2-4.

[583] Alberta, Service Alberta, *Alberta Vital Statistics Annual Review 2007,* Birth Related Statistics, at 6-7.

[584] This figure was roughly the same in 2003. Canada, Department of Justice, "When Parents Separate: Further Findings From the National Longitudinal Survey of Children and Youth," by Heather Juby, Nicole Marcil-Gratton and Céline Le Bourdais, Research Report (2004) at 6-7. Amir

(continued...)

[467] Thus, the number of children born outside marriage and the number of common-law couples continue to increase, with these children making up over 40% of births in Alberta today.[585]

4. Status of children in Canada

[468] The legal distinction between children born within or outside marriage has been abolished by statute in all provinces in Canada with the exception of Alberta and Nova Scotia. Ontario was the first province to abolish the distinction in 1977.[586] The Uniform Law Conference of Canada adopted a *Uniform Child Status Act* in 1982.[587] The legislation in Prince Edward Island is representative:

> 1.(1) Subject to subsection (2), for all purposes of the law of Prince Edward Island a person is the child of his natural parents and his status as their child is independent of whether he is born inside or outside marriage.
>
> ...
>
> (4) Any distinction between the status of a child born inside marriage and a child born outside marriage is abolished and the relationship of parent and child and kindred relationship flowing from that relationship shall be determined in accordance with this section.
>
> 2.(1) For the purpose of construing an instrument or enactment, a reference to a person or group or class of persons described in terms of relationship to another person by blood or marriage shall be construed to refer to and include a person who comes within the description by reason of the relationship of parent and child as determined under section 1.[588]

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[584] (...continued)
Erfani & Roderic Beaujot, Population Studies Centre, University of Western Ontario, "Determinants Of Attitudes Toward Having Children Outside Marriage," Discussion paper No. 07-01 at Introduction, online: <http://www.ssc.uwo.ca/sociology/popstudies/dp/dp07-01.pdf>. The Canadian figures are skewed somewhat by Quebec which has a higher percentage of common-law couples and children born outside marriage than the rest of the country. Katherine Arnup, "Close Personal Relationships between Adults: 100 Years of Marriage in Canada" (Law Commission of Canada, 2001) at 35.

[585] Alberta, Service Alberta, *Annual Review 2007*, Birth Related Statistics, at 6-7

[586] *Children Law Reform Act*, R.S.O. 1980, c. 68. Child status legislation was introduced in New Brunswick (1980), British Columbia (1985), Yukon (1986), Prince Edward Island (1987), Northwest Territories (1987), Manitoba (1987), Newfoundland (1988), Saskatchewan (1991). See Law Commission of Nova Scotia, *Final Report: The Legal Status of the Child Born Outside Marriage in Nova Scotia* (March 1995) at 13.

[587] Uniform Law Conference of Canada, *Uniform Child Status Act,1980*, Uniform Law Conference Proceedings 1981-82 at Appendix F.

[588] Prince Edward Island, *Child Status Act*, R.S.P.E.I. 1988, c. C-6, s. 1, 2. Similar provisions exist in: (continued...)

5. Status of children in other common law jurisdictions

a. England

[469] In England, the *Family Law Reform Act 1969* and the *Family Law Reform Act 1987*[589] removed discrimination against children born outside marriage.[590]

b. Scotland

[470] The *Law Reform (Parent and Child) (Scotland) Act 1986* contained a section setting out a basic principle of equality for children born inside and outside marriage. This Act has recently been amended by the *Family Law (Scotland) Act 2006* which specifically abolishes the status of illegitimacy.[591]

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[588] (...continued)
British Columbia, *Law and Equity Act,* R.S.B.C. 1996, c. 253, s. 61 (1), (3); New Brunswick, *Family Services Act*, S.N.B. 1980, c. F-2.2, ss. 96- 97 (Despite this provision, s. 33 of the New Brunswick Act still contains an identical provision to Alberta in respect of treatment of illegitimate children under a will); Newfoundland, *Children's Law Act*, R.S.N.L. 1990, c. C-13, ss. 3- 4; Northwest Territories, *Judicature Act*, R.S.N.W.T. 1988, c. J-1, s. 54, *Children's Law Act,* S.N.W.T. 1997, c. 14, s. 2(1), (3), (4), s. 3(1); Ontario, *Children's Law Reform Act,* R.S.O. 1990, c. C.12, ss. 1 - 2; Saskatchewan, *The Children's Law Act, 1997*, S.S. 1997, c. C-8.2, ss. 40- 41; Yukon, *Children's Act*, R.S.Y. 2002, c. 31, ss. 5- 6. In Manitoba, the sections on kindred relationships and construction have not been enacted: *The Family Maintenance Act,* C.C.S.M., c. F20, s. 17. In Nova Scotia, the *Vital Statistics Act*, R.S.N.S. 1989, c. 494, s. 6, contains provisions similar to the Alberta *Legitimacy Act*, R.S.A. 2000, c. L-10. See also Uniform Law Conference of Canada, *Uniform Child Status Act,1980*, Uniform Law Conference Proceedings 1981-82 at Appendix F.

[589] *Family Law Reform Act 1969* (U.K.), c.46, s. 15; *Family Law Reform Act 1987* (U.K.), c. 42:

> 1(1) In this Act and enactments passed and instruments made after the coming into force of this section, references (however expressed) to any relationship between two persons shall, unless the contrary intention appears, be construed without regard to whether or not the father and mother of either of them, or the father and mother of any person through whom the relationship is deduced, have or had been married to each other at any time.
>
> 19 (1) In the following dispositions, namely ...
> (b) dispositions by will or codicil where the will or codicil is made on or after that date, references (whether express or implied) to any relationship between two persons shall be construed in accordance with section 1 above.

[590] The Law Reform Commission of Hong Kong, *Report on Illegitimacy*, Topic 28 (1991) at 26.

[591] Scotland, *Law Reform (Parent and Child) (Scotland) Act 1986*, (c.9); *Family Law (Scotland) Act 2006 ASP 2,* s. 21:

> **21 Abolition of the status of illegitimacy**
> (1) *The Law Reform (Parent and Child) (Scotland) Act 1986* (c.9) shall be amended in accordance with subsections (2) to (4).
> (2) In section 1 (legal equality of children) –
> (a) for subsection (1) there shall be substituted – (1) No person whose status is governed by Scots law shall be illegitimate; and accordingly the fact that a

(continued...)

c. Ireland

[471] The *Status of Children Act* was enacted in 1987 and provides that the relationship between a person and their father or mother is determined without reference to whether the father and mother are or have been married to each other, unless there is a contrary intention.[592]

d. Australia and New Zealand

[472] Most states and territories in Australia have enacted legislation with respect to the status of children.[593] For example, the Victorian *Status of Children Act 1974* provides in s. 3 that "for all purposes of the law of Victoria the relationship between every person and his father and mother shall be determined irrespective of whether the father and mother are or have been married to each other."

[473] In New Zealand, the *Status of Children Act 1969* declared all children to be of equal status. The provisions of the Act in s. 3 are similar to the terms of the Australian legislation just discussed.[594] In 2004, the Act was amended and a new section states that the purpose of the equal status sections is to "remove the legal disabilities of children born out of wedlock."[595]

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[591] (...continued)

person's parents are not or have not been married to each other shall be left out of account in – (a) determining the person's legal status; or

(b) establishing the legal relationship between the person or any other person.

[592] Ireland, *Status of Children Act,1987,* No. 26/1987, ss. 3, 27.

[593] New South Wales, *Status of Children Act 1996*, No. 76; Northern Territory of Australia, *Status of Children Act* (1978); Queensland, *Status of Children Act 1978*; South Australia, *Family Relationships Act 1975*; Tasmania, *Status of Children Act 1974*, No. 36; Victoria, *Status of Children Act 1974*, No. 8602/1974. Under wills legislation in Western Australia and the Australian Capital Territory, children born outside marriage inherit as if they had been born inside marriage, Western Australia Act; Australian Capital Territory Act.

[594] New Zealand, *Status of Children Act 1969,* No. 18, s. 3.

[595] New Zealand, *Status of Children Act 1969,* No. 18, s. 2a.

6. Status of children in the European Union

[474] In 1915, Norway was the first European country to provide for substantial equality for all children whether born inside or outside marriage.[596] Other European countries which have taken steps to provide for equal treatment of all children include France, Poland, West Germany and Italy.[597]

[475] The *European Convention on Human Rights*[598] has various provisions relating to family life, discrimination, freedom of thought and religion and other matters. The European Court of Human Rights has interpreted its provisions to require states to put children born outside marriage on an equal footing with marital children. Two cases are of particular importance. The *Marckx* case held that a cohabiting family had the same protections as marital families. In the *Johnston* case, the Court held that a child born outside marriage "should be placed, legally and socially, in a position akin to that of a legitimate child."[599]

[476] Article 9 of the *European Convention on the Legal Status of Children Born Out of Wedlock* states that: "A child born out of wedlock shall have the same right of succession in the estate of its father and its mother and of a member of its father's or mother's family, as if it had been born in wedlock."[600]

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[596] D. H. Van Doren, "Current Legislation" (1916) 16 Columbia L. Rev. 698 at 699-700:

> It is submitted that the Norwegian statute accomplishes in a direct and manly way a much-needed reform at which American courts and legislatures have hinted and connived, but to which they have not given their open support.

[597] Law Commission of Nova Scotia, *Final Report: The Legal Status of the Child Born Outside Marriage in Nova Scotia* (1995) at 13-14.

[598] *Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol 11* (C.E.T.S. No. 005, Rome: April 11,1950).

[599] For a discussion of these cases, see Johan Meeusen, "Judicial Disapproval of Discrimination Against Illegitimate Children: A comparative study of developments in Europe and the United States" (1995) 43 Am. J. of Comp. Law 119 at 142-143. *Johnston and Others v. Ireland* (1986), All2 Eur. Comm'n H.R.D.R. 1 at para 74; *Marckx v. Belgium* (1979), A31 E.C.H.R. Series A.

[600] *European Convention on the Legal Status of Children Born Out of Wedlock* (C.E.T.S. No. 085, Strasbourg: October 15, 1975).

7. Status of children in the United States

[477] In 18 states and the District of Columbia, status of children acts have been adopted. The legislation makes a child the child of the natural parents whether or not they are married.[601]

8. Status of children under United Nations' Conventions

[478] The United Nations' *Convention on the Rights of the Child,*[602] which was adopted in 1989 and ratified by Canada in 1991, protects children from discrimination on the basis of birth or other status. As stated in ALRI's 1991 report on the status of children: "It is evident that the Convention supports and reinforces the Institute's recommendations for the equal treatment of all children in relation to their parents and other kindred, regardless of the birth of a child within or outside marriage."[603]

[479] This was not the first statement by the United Nations that children should be treated equally. Article 25 of the 1948 *Universal Declaration of Human Rights* addresses the right to an adequate standard of living and assistance from government. It states that children, whether born inside or outside marriage, should enjoy the same social benefits.[604]

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[601] This information is current to 2007. Browne Lewis, "Children of Men: Balancing the Inheritance Rights of Marital and Non-Marital Children" (2007-2008) 39 U. Tol. L. Rev.1 at 20-23. Other articles discussing the treatment of children born outside marriage in the United States include: Krishna Haney, "Gomez v. Perez: Mitigating the Stigma of Illegitimacy" (2004-2005) 14 J. Contemp. Legal Issues 363; Lili Mostofi, "Legitimizing the Bastard: The Supreme Court's Treatment of the Illegitimate Child" (2004-2005) 14 J. Contemp. Legal Issues 453; Martha F. Davis, "Male Coverture: Law and the Illegitimate Family" (2003-2004) 56 Rutgers L. Rev. 73; Mary Louise Fellows, "The Law of Legitimacy: An Instrument of Procreative Power" (1992-1993) 3 Colum. J. Gender & L. 495; Max Stier, "Corruption of Blood and Equal Protection: Why the Sins of the Parents Should Not Matter" (1991-1992) 44 Stan. L. Rev. 727.

[602] *Convention on the Rights of the Child* (GA Res. 44/25, UNGAOR, 1989, Supp. No. 49, UN Doc. A/44/49) [entered in to force September 2, 1990]. Canada ratified the *Convention* on December 13, 1991.

[603] Alberta Law Reform Institute, *Status of Children: Revised Report, 1991,* Report No. 60 (1991) at 2.

[604] *Universal Declaration of Human Rights*, (G.A. Res. 3171 (III), UNGAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) at Art. 25.

9. Previous ALRI recommendations

[480] ALRI has been advocating that children born outside marriage be treated equally since the mid-1970s. A 1974 background paper on illegitimacy stated that the trend in law reform with respect to the law of succession was to recognize the relationship of the child born outside marriage to its parents on intestacy and to reverse the presumption that words "denoting family relationships refer *prima facie* to lawful relationships."[605] Further, ALRI has recommended that Alberta comprehensively abolish the status of being born within or outside marriage in three previous final reports.

[481] In all three reports, ALRI recommended that Alberta adopt status of children legislation. In the first report published in 1976, Report No. 20 on *Status of Children*, ALRI recommended that children be treated equally under the law regardless of whether the child was born inside or outside marriage. Report No. 20 contained a draft *Status of Children Act*.[606] In 1985, a revised and updated report was published at the request of the Alberta government following approval of the principles contained in Report No. 20 by the Standing Committee on Law and Regulations. The revised report was published as *Status of Children: Revised Report, 1985*.[607] In 1991, ALRI published *Status of Children: Revised Report, 1991.* This report made only one recommendation which was that Alberta enact the proposed *Status of Children Act*.[608] The 1991 report pointed out that "piecemeal reform lends itself to ambiguous, if not inequitable, results."[609] As outlined above, despite these repeated recommendations, Alberta has not yet taken steps to comprehensively abolish distinctions based on birth.

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[605] Institute of Law Research and Reform, *Illegitimacy,* Research Paper No. 10 at 97-98, online: <www.law.ualberta.ca/alri>.

[606] Institute of Law Research and Reform, *Status of Children,* Final Report No. 20 (1976), online: <www.law.ualberta.ca/alri>.

[607] Institute of Law Research and Reform, *Status of Children: Revised Report, 1985,* Final Report No. 45 (1985), online: <www.law.ualberta.ca/alri>; Alberta Law Reform Institute, *Status of Children: Revised Report, 1991,* Final Report No. 60 (1991) at 1.

[608] Alberta Law Reform Institute, *Status of Children: Revised Report, 1991,* Final Report No. 60 (1991) at 4.

[609] Alberta Law Reform Institute, *Status of Children: Revised Report, 1991,* Final Report No. 60 (1991) at 5.

10. Recommendation for reform

[482] The Institute has been recommending that all children be of equal status since the mid-1970s. The fact that discrimination still exists in the law against children born outside marriage does not accord with present day social attitudes and realities. We believe that most Albertans would be dismayed to learn of the current situation and would be fully in support of an immediate change in the law. It is certain that the parents, grandparents and families of the 30% of children born outside marriage would be in favour of an end to discrimination.

RECOMMENDATION No. 34
We recommend again that Alberta end discrimination in law against children born outside marriage and enact status of children legislation in the form proposed in our three previous reports on the status of children.

B. Children Born Outside Marriage and Inheritance Under a Will

1. Introduction

[483] This part will examine the impact on a child born outside marriage of the common law rule of construction that words of relationship refer to legitimate relationships. Section 36 of the Alberta Act addresses this rule with respect to inheritance through the birth mother. The section is contrary to the *Canadian Charter of Rights and Freedoms* in failing to provide for inheritance from the father.[610]

2. Common law rule: *Hill v. Crook*

[484] The status of being born either inside marriage or outside marriage was taken very seriously by the English common law. A person born outside marriage was *filius nullius* – no one's son. The primary disability faced by such a child was the incapacity to inherit.[611] This had not always been the case and, for example, children born outside marriage in England, Wales and Scotland had inheritance

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[610] *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [Charter].

[611] Institute of Law Research and Reform, *Illegitimacy*, Research Paper No. 10 (1974) at 5, online: <www.law.ualberta.ca/alri>.

rights for varying periods of time until a preference for monogamous marriage evolved which led to the imposition of legal disabilities.[612]

[485] This disability developed into a rule of construction for statutes and written instruments. Words of relationship in statutes were interpreted to mean legitimate relationships and to exclude natural relations, unless natural relations were expressly or impliedly included.[613]

[486] This construction rule extended to the interpretation of wills, deeds and other legal documents.[614] Therefore, absent a contrary intention found in a will, the use of words such as "children," "issue," "child," "son" or "daughter," referred only to persons born within marriage. *Wilkinson v. Adam* held that this rule could not be stated too broadly and that the use of any word of relationship referred to legitimate kindred.[615] For example, references to nieces or nephews also had this limited meaning.[616] Although the rule was laid down long before the English House of Lords decision in *Hill v. Crook*, it is often referred to as the rule in *Hill v. Crook*.[617] In keeping with that tradition, it will be referenced to as such in this report.

[487] Along with *Hill v. Crook*, there is another 19th century decision of the English House of Lords that is often cited to describe how the rule is applied and the exceptions to it. *Dorin v. Dorin* was decided two years after *Hill v. Crook* and explains the general rule of construction. The word "children" in a will means

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[612] Karen A. Hauser, "Inheritance Rights for Extramarital Children: New Science Plus Old Intermediate Scrutiny Add Up to Need for Change" (1996-1997) 65 U. Cin. L. Rev. 891 at 893-894.

[613] Institute of Law Research and Reform, *Illegitimacy*, Research Paper No. 10 (1974) at 11, online: <www.law.ualberta.ca/alri>. This presumption has been eroded in Alberta. The Alberta Court of Appeal held in *White v. Barrett* that the word "parent" in a statute passed in 1967 included the father of an non-marital child. *White v. Barrett* [1973] 3 W.W.R. 293 (Alta. C.A.). But see below at note 630 with respect to the Court's comments in that case on the rule of construction as it applies to wills.

[614] Institute of Law Research and Reform, *Illegitimacy*, Research Paper No. 10 (1974) at 11, on line: <www.law.ualberta.ca/alri>.

[615] *Wilkinson v. Adam* (1812) 1 V & B 422, 35 E.R. 163 (Ch.).

[616] Feeney at §11.132.

[617] *Hill v. Crook,* (1873) L.R. 6 H.L. 265 [*Hill v. Crook*].

legitimate children in the same way as if the word "legitimate" had been inserted in front of it. The only situation in which the word "children" would have a different meaning was if the words of the will, when combined with the outward circumstances, failed to make sense.[618]

[488] In *Hill v. Crook*, Lord Cairns described two exceptional situations where children born outside marriage would be included within a generic description. Under the "dictionary principle," if the words used by the testator showed an intention to include the child, it was able take the gift. In this type of situation, the child could benefit together with legitimate children.[619] There did not need to be an express reference to the children, it was enough if the relationship was stated indirectly.[620] Earlier cases had held that the intention to benefit the children which had to appear in the will was "so strong a probability of intention, that an intention contrary to that which is imputed to the testator cannot be supposed."[621] The dictionary principle relaxed the strictness with which the rule had been applied in earlier cases.[622]

[489] The other circumstance where children born outside marriage could inherit under a generic gift to "children" was when it was impossible from the circumstances that any legitimate children could take under the gift.[623] It was essential in the early cases that there not be any legitimate children.[624] This no longer appears to be the case. In *Re Jebb,* the English Court of Appeal stated that

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[618] *Dorin v. Dorin*, (1875) L.R. 7 H.L. 568 at 574-575 (per Lord Hatherley).

[619] *Hill v. Crook,* note 619, at 282-286 (per Lord Cairns).

[620] Raymond Jennings & John C. Harper, eds., *Jarman on Wills,* 8th ed. (London: Sweet & Maxwell, 1951) at 1767.

[621] *Wilkinson v. Adam* (1812) 1 V & B 422, 35 E.R. 163 (Ch.).

[622] Examples of earlier cases include: *Meredith v. Farr* (1843) 2 Y & C.C.C. 525, 63 E.R. 235 (Ch.); *Bagley v. Mollard* (1830) 1 Russ. & M. 581, 39 E.R. 223 (Ch.).

[623] *Hill v. Crook*, note 619, at 282-286 (Lord Cairns in *obiter*).

[624] Raymond Jennings & John C. Harper, eds., *Jarman on Wills,* 8th ed. (London: Sweet & Maxwell, 1951) at 1758.

children born outside marriage could benefit where it was "strongly improbable" rather than "impossible" for there to be legitimate children.[625]

3. Canadian case law

[490] The common law rule in *Hill v. Crook* that words of relationship refer to legitimate relationships has been applied in a number of reported Canadian cases.[626] The Supreme Court of Canada held in *Re Millar* that a bequest to "children" did not include children born outside marriage.[627] In 1961, the rule was stated again in *Ketterer v. Griffith* in the context of adopted children.[628] In *Plummer v. Air Canada*, the question for the Supreme Court was interpretation of an insurance statute. Laskin, C.J.C., writing for the majority, stated that there was no "reason, on principles of construction or from the standpoint of context to narrow the ordinary meaning of 'children' to exclude illegitimate children."[629] In an earlier case concerning the interpretation of a statute, the Alberta Court of Appeal stated in an *obiter* comment that the common law rule probably applied to wills.[630]

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[625] *In Re Jebb*, [1966] Ch. 666 at 672 (C.A.).

[626] Aside from Supreme Court decisions, only cases concerning non-marital children are discussed.

[627] *Re Millar,* [1938] S.C.L.R. l.

[628] *Ketterer v. Griffith,* [1962] S.C.R. 241, affirming *Re Gage,* [1961] O.R. 540 (C.A.).

[629] *Plummer v. Air Canada,* [1979] 2 S.C.R. 343 at 360 Note that the Law Commission of Nova Scotia takes the position that this case, along with *Gingell v. R,* [1976] 2 S.C.R. 86 has changed the common law rule of construction in relation to wills. See Law Commission of Nova Scotia, *Final Report: The Legal Status of the Child Born Outside Marriage in Nova Scotia* (March 1995) at 53. *Gingell* held that word parent should be given its ordinary meaning unless the context of a statute indicated a more restrictive meaning. But see to the contrary, Feeney at §11.132, Issue 20-12/08 ("unless the rule has been changed by legislation, as it has in some provinces, such expressions are presumed to exclude the illegitimate." Please note that this quote no longer appears in the 2010 looseleaf edition). See also *Belanger v. Pester* (1979) 108 D.L.R. (3d) 84 (Man. Q.B.) and *Re Jensen Estate* (1990), 37 E.T.R. 137 (B.C.S.C.) both decided after *Plummer* and *Gingell*, discussed at note 631 below.

[630] *White v. Barrett,* [1973] 3 W.W.R. 293 (Alta. C.A.).

[491] The rule in *Hill v. Crook* has been applied to exclude children born outside marriage in six reported cases in Canada.[631] The most extreme example of its application may be the case of *Re Herlichka*, where the devise was "to my wife, Phyllis Herlichka" (the will-maker's common law wife) with bequests to the children of "my said wife." The court held that, given the compelling principal meaning of "children" as legitimate children, the one reference to the common law wife was not enough to displace the common law rule. The gifts under the will went to the will-maker's legal wife and legitimate children.[632] In five other reported cases, the gift in the will was found to come within the exceptions to the common law rule as outlined in *Hill v. Crook.*[633]

[492] There are three reported cases where the rule has not been followed on the grounds of a change in public policy as evidenced by legislation governing

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[631] *Re Seibel,* [1925] 3 W.W.R. 636 (Sask. C.A.) (The case did not fall within the exceptions. There was nothing on the face of the will to indicate that the testator intended the illegitimate grandchildren to take); *Re Brand Estate,* [1956] O.J. No. 402 (S.C. H. Ct. J.) (Nothing in the will to put the gift within exceptions in *Hill v. Crook*); *Dodson Estate v. Sinclair*, [1976] O.J. No. 1214 (S.C. H. Ct. J.) (Will referenced a legitimate child by name, there was no reference to the illegitimate child); *Belanger v. Pester* (1979), 108 D.L.R. (3d) 84 (Man. Q.B.) (Residue of estate given to the children of son and the son had three illegitimate children. The Manitoba Act, s. 33 did not extend to fathers. The case did not fall within exceptions to *Hill v. Crook*); *Re Jensen Estate* (1990), 37 E.T.R. 137 (B.C.S.C.) (Legitimate children were mentioned by name in the will. There was no mention of an illegitimate child living in Denmark who had not been in contact with the testator. The British Columbia Act section on inheritance from the mother had been repealed. There was nothing to put the illegitimate child within exceptions in *Hill v. Crook*). See also *Re Herlichka*, [1969] 1 O.R. 724 (H.Ct.J).

[632] *Re Herlichka,* [1969] 1 O.R. 724 (H.Ct.J.). This case was criticized by Professor P.W. Hogg in "Comment" [1972] 1 Can. Bar Rev. 531.

[633] *Lobb v. Lobb* (1910), 21 O.L.R. 262 (H.Ct.J.) (Testator had deserted his legitimate children in England. He had three illegitimate children in Canada who were mentioned by name in his will. The court found that the intention of testator was to exclude the legitimate children in England. "Children" in will was a reference to the illegitimate children); *Re Hervey* (1961), 30 D.L.R. (2d) 215 (B.C.S.C.) (The will left a gift to the "issue" of siblings of the testator. A sister had an illegitimate son. The Court held the testator knew of the child at time of the making of the will, was on good terms with him, and regarded him as a nephew. The intention was to include the illegitimate nephew); *Martin v. Cruise* (1978), 3 E.T.R. 91 (B.C.S.C.) (Testator had one legitimate grandchild and two illegitimate children. At the date of the making of the will, the only "issue" were the two illegitimate children. The court found that the testator intended to include them in the will.); *Re Nicholls,* [1973] 2 O.R. 33 (H.Ct.J.) (Testatrix knew the grandchildren were illegitimate when she made the will. She left the residue to the grandchildren living at her death. It was plain her intention was to benefit the illegitimate grandchildren.); *Re McLaughlin* (1977), 16 O.R. (2d) 375 (H. Ct.J.) (Testatrix left the residue to the "children" of her step-daughter who was 52 when will was made. Step-daughter had one illegitimate child who was accepted by the testatrix as her grandson. The court found the case was within either or both of exceptions in *Hill v. Crook*).

intestate succession.[634] In *Re Hogbin*, a decision of the British Columbia Supreme Court, there was a gift over in the will to the children of the will-maker's daughter. The daughter had one child born outside marriage, who was born after the death of the will-maker. The Court held that the public policy expressed in the legislation on intestate succession which deemed a child to be a legitimate child in relation to its mother prevailed and the judge-made rule in *Hill v. Crook* did not apply in British Columbia.[635]

4. Criticism of the rule in *Hill v. Crook*

[493] The rule in *Hill v. Crook* has proved difficult for the courts to apply. This was recognized by early textbook writers. For example, in the 1910 edition of *Jarman on Wills*, the author stated: "It will be seen that the authorities are not in a satisfactory state."[636] The courts have correctly perceived that the presumption may operate to defeat a will-maker's intention and the case of *Re Herlichka* discussed above illustrates this point. To avoid defeating the intention of the will-maker, the courts have appeared to bend over backwards on occasion to fit the facts or the language of the will into one of the exceptions.[637]

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[634] See *Re Hogbin,* [1950] 3 D.L.R. 843 (B.C.S.C.); *Re Stevenson,* [1966] 66 D.L.R. (2d) 717 (B.C.S.C.) (Question was whether the legitimacy of grandson (child of testator's daughter) was material to executors in the administration of the estate. Testator had died in 1958 and the public policy of the province at the time was that an illegitimate child was treated as if he or she were the legitimate child of the mother. The Court followed *Re Hogbin*. References in the will to 'children of Margaret Elizabeth Leighton' and 'my grandchildren' refer to the same persons and include the illegitimate grandson); *Re Dunsmuir,* [1968] 67 D.L.R. (2d) 227 (B.C.S.C.) (Follows *Re Hogbin* to the effect that the restrictive rule of construction in *Hill v. Crook* is not applied in B.C. to wills made after the legislation with respect to the illegitimate children of the mother passed in 1920s. An illegitimate child was to be treated as if it were the legitimate child of his mother); *Re Hervey* (1961), 30 D.L.R. (2d) 215 (B.C.S.C.) is often referred to as a case which rejects the rule in *Hill v. Crook* on the ground of changed public policy. But although the court discusses *Re Hogbin*, the judge states that he does not have to decide a new rule and the decision is based on a finding of an intention in the will to include the illegitimate nephew.

[635] *Re Hogbin*, [1950] 3 D.L.R. 843 (B.C.S.C.).

[636] Thomas Jarman, *A Treatise on Wills*, 6th ed. by Charles Sweet and Charles Percy Sanger (London: Sweet and Maxwell, 1910) at 1778.

[637] *Re Hervey* (1961), 30 D.L.R. (2d) 215 (B.C.S.C.) is perhaps a modern Canadian example of this. In 1910, Jarman stated:

> At the present day, slight peculiarities of language contained in a will, taken in conjunction with the circumstances of the case, are allowed to shew that by "children" the testator meant to include illegitimate children.

(continued...)

[494] The common law rule that words of relationship refer to legitimate relationships originated in an era in which punishing children for the actions of their parents was seen as acceptable. The inapplicability of these attitudes to modern Canadian society can be seen in the British Columbia decisions rejecting the rule on the grounds of a change in public policy.[638] It can also be seen in the rejection of the rule as it applies to the construction of statutes by the Supreme Court of Canada and the Alberta Court of Appeal.[639]

5. *Wills Act*, s. 36

a. Application of the rule in Hill v. Crook in Alberta

[495] The laws of England as they existed on July 15, 1870 were introduced into Alberta by the *Northwest Territories Act.*[640] Unless the rule in *Hill v. Crook* has been changed by legislation, it applies in Alberta.[641] In Alberta, the rule has been partially eliminated by legislation.

[496] Section 36 of the Alberta Act provides:

> **Gift to illegitimate children**
>
> **36.** In the construction of a will, except when a contrary intention appears by the will, an illegitimate child shall be treated as if that child were the legitimate child of that child's mother.

b. Legislative history of s. 36

[497] The right of children to inherit from their mothers as if they were legitimate was first recognized in 1886 in *The Territories Real Property Act*.[642] In 1901, the right of a child to inherit personal property from its mother on intestacy was

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[637] (...continued)
Thomas Jarman, *A Treatise on Wills*, 6th ed. by Charles Sweet and Charles Percy Sanger (London: Sweet and Maxwell, 1910) at 1779.

[638] See in particular, *Re Hogbin*, [1950] 3 D.L.R. 843 (B.C.S.C.) and the cases cited in note 634.

[639] See *Plummer v. Air Canada,* [1979] 2 S.C.R. 343; *White v. Barrett,* [1973] 3 W.W.R. 293 (Alta. C.A.).

[640] *Northwest Territories Act*, R.S.C.1875 c. 50, s. 6.

[641] See the discussion at note 629 and Feeney at §11.132.

[642] *The Territories Real Property Act*, R.S.C. 1886, c. 51, s. 16. See *In Re Stone Estate*, [1924] S.C.R. 682.

granted[643] and this was extended to real property in 1906.[644] Under a consolidation statute, children were granted the right to take property from their mother on intestacy as if they were legitimate in 1920 and under wills in 1927.[645]

[498] Wording very similar to the current s. 36 first appeared in the 1960 *Wills Act*, presumably as a result of the language adopted by the Uniform Law Conference in 1957.[646]

c. Scope of the rule in Hill v. Crook under the Wills Act

[499] Under the Alberta Act, a child born outside marriage is treated as if the child were the legitimate child of the mother for purposes of construing a will, except where there is a contrary intention in the will.[647] However, the common law rule that words of relationship refer to legitimate relationships applies to bequests from the biological father, even where paternity has been established.[648]

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[643] Northwest Territories Ordinances, *An Ordinance respecting the Devolution of Estates*, 1901, 4th Leg., 3rd Sess., c. 3, s. 3.

[644] *An Act Respecting the Transfer and Descent of Land,* S.A. 1906, c. 19, s. 13:

> 13 Illegitimate children shall inherit from the mother as if they were legitimate, and through the mother, if dead, any land which she would, if living, have taken by purchase, gift, devise, or descent from any other person.

[645] *An Act to Consolidate and Amend the Law Relating to Intestate Succession*, S.A. 1920, c. 11, s. 9(4) ("Illegitimate children shall be entitled to take property from or through their mother as if they were legitimate."); *The Wills Act*, S.A. 1927, c. 21, s. 31 ("Every illegitimate child of a woman shall be entitled to take under a testamentary gift by or to her or to her children or issue the same benefit as he or she would have been entitled to if legitimate").

[646] *The Wills Act, 1960*, S.A. 1960, c. 118 s. 34:

> 34 In the construction of a will, except when a contrary intention appears by the will, an illegitimate child shall be treated as if he were the legitimate child of his mother;

Conference of Commissioners on Uniformity of Legislation in Canada, *Wills Act* in *Model Acts Recommended from 1918 to 1961 Inclusive* (1962) at s. 34.

[647] Alberta Act, s. 36.

[648] *Re Jensen Estate* (1990), 37 E.T.R. 137 at 142 (B.C.S.C.):

> It is significant that it only recognized the right of an illegitimate child to inherit from the mother, rather than the father ... I can only conclude that the common law rule was deliberately left intact concerning inheritance through a putative father, even if paternity was established.

[500] The common law rule has been modified with respect to gifts to "heirs."[649] Under s. 27 of the Alberta Act, the word "heir" means the person to whom the property would go under the law of intestate succession, unless a contrary intention appears in the will. Thus, the status of a child will not be relevant, unless the death of the person occurred prior to the amendment of the Alberta intestate succession legislation in 1991.[650] In addition, a minor person without a spouse or adult interdependent partner may make a valid will to benefit any children of the minor.[651]

d. Application of the Canadian Charter of Rights and Freedoms

[501] The Charter has been interpreted as requiring equal treatment of children whether they have been born within or outside marriage. There is a duty on the part of the provinces to ensure that their laws are in accordance with the Charter.

[502] The wording of s. 36 is contrary to the Charter. The Nova Scotia Court of Appeal held that a similar section in the Nova Scotia *Intestate Succession Act* violated the Charter in *Tighe (Guardian ad litem of) v. McGillivray Estate.*[652] The impugned section read: "For the purposes of this Act, an illegitimate child shall be treated as if the child were the legitimate child of the child's mother."[653] The constitutionality of the section had been considered in a previous trial level decision, *Surette v. Harris Estate,*[654] which also had found the section to be

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[649] Feeney at §11.132.

[650] Alberta Act, s. 27; *Re Hilstad Estate* (2008) 461 A.R. 211 (Q.B.).

[651] Alberta Act, s. 9(3):

> **9(3)** Notwithstanding subsection (1), a person who
>
> (a) is under the age of 18 years,
>
> (b) has no spouse or adult interdependent partner, and
>
> (c) has children,
>
> may make a valid will to the extent that the person makes a bequest, devise or other disposition to or for the benefit of any or all of those children.

[652] *Tighe (Guardian ad litem of) v. McGillivray Estate* (1994), 127 N.S.R. (2d) 313 (C.A.).

[653] *Intestate Succession Act*, R.S.N.S. 1989, c. 236, s. 16. (Section 16 was changed in 1999 to read "child's mother or father."(*1999 (2nd Sess.),* c. 8, s. 7.)).

[654] *Surette v. Harris Estate* (1989), 91 N.S.R. (2d) 418 (S.C. (T.D.)) (In this case, the court declared the section invalid. In the five years before the *Tighe* case, the Nova Scotia legislature had not acted to amend the section.).

unconstitutional. The Court stated in *Tighe* that it had no reluctance in finding that the section discriminated against non-marital children and was contrary to s.15 of the Charter.

> The illegitimate child is precluded from the benefits of the legislation by reason of a distinction - birth out of wedlock. Such a distinction is based on personal characteristics associated with the group to which the child belongs. It is an unfair distinction.[655]

[503] The Court followed *Schacter et al. v. The Queen et al.*[656] to find that the section was a suitable one for "reading in" as opposed to striking out the section. Reading in can only take place in the clearest of cases where the material read in was "obviously intended by the legislature in any event."[657]

[504] The Court found that *Tighe* was a clear case for reading in. The section of the legislation was contrary to the Charter because it was "under-inclusive." Its purpose was to make sure that the family of an intestate inherited. The section failed because its benefits did not extend to inheritance from the father's estate. It discriminated against children born outside marriage. However, to strike it down would result in these children being unable to inherit from their mother's estate as well. Therefore, the Court held that the words "or father" should be read in at the end of the section.[658]

[505] In *Hegedus Estate v. Paul*, the Alberta Surrogate Court considered the question of the relevance of the status of a grandchild under a will and the effect of s. 36. The Court stated that "children born out of wedlock are treated in law as if they had been born to married parents. Section 36 of the Alberta Act which states that in the construction of a will an illegitimate child shall be treated as if he were

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[655] *Tighe (Guardian ad litem of) v. McGillivray Estate,* (1994), 127 N.S.R. (2d) 313 (C.A.) at para.12.

[656] *Schacter et al. v. The Queen et al.*, [1992] 2 S.C.R. 679.

[657] *Tighe (Guardian ad litem of) v. McGillivray Estate* (1994), 127 N.S.R. (2d) 313 (C.A.) at para. 26.

[658] *Tighe (Guardian ad litem of) v. McGillivray Estate* (1994), 127 N.S.R. (2d) 313 (C.A.) at paras. 28-29.

the legitimate child of his mother should be interpreted to include the child's father."[659]

[506] In Alberta, other legislative provisions which discriminated against children born outside marriage have been held to be contrary to the Charter. For example, in *Milne (Doherty) v. Alberta (Attorney General)*, a provision in the *Maintenance and Recovery Act* which stopped child maintenance for a child when the mother married was held to violate s. 15 of the Charter.[660]

6. Children born outside marriage and succession in other jurisdictions

[507] As outlined above, all provinces in Canada, except for Nova Scotia and Alberta, have enacted status of children legislation.[661] In some provinces, the common law rule of construction in *Hill v. Crook* has been specifically abolished. For example, in Manitoba:

> 35(1) In the construction of testamentary dispositions, except where a contrary intention appears by the will, a child, whether born inside or outside

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[659] *Hegedus Estate v. Paul* (1998), 225 A.R. 154 at para. 18. (It may be questioned as to whether non-marital children in Alberta are treated in law as if they had been born to married parents for all purposes. For example, see the *Legitimacy Act*, R.S.A. 2000, c. L-10. However, the Court's statement that s. 36 should be read as including the father is certainly correct. The Court did not cite any authorities.)

[660] *Milne (Doherty) v. Alberta (Attorney General)* (1990), 107 A.R. 152 (Q.B.). Other cases include: *Massingham-Pearce v. Konkolus* (1995), 170 A.R. 10 (Q.B.) (*Maintenance Order Act*, R.S.A. 2000 c. H-2 (now repealed Oct 1, 2005) express exclusion of illegitimate children from the definition of "child" violates s. 15(1) of Charter.); *M. (R.H.) v. H. (S.S.)* (1994), 150 A.R. 67 (Q.B.) (Sections of *Maintenance and Recovery Act*, R.S.A. 1980, c M-2 (now repealed) requiring filiation proceedings to be commenced within 24 months after birth of child violating s. 15(1) of Charter).

[661] *Law and Equity Act*, R.S.B.C. 1996, c. 253, s. 61 (1), (3); *Family Services Act*, S.N.B. 1980, c. F-2.2, ss. 96- 97 (Despite this provision, s. 33 of the New Brunswick Act still contains an identical provision to Alberta in respect of treatment of illegitimate children under a will.); *Children's Law Act*, R.S.N.L. 1990, c. C-13, ss. 3- 4; *Judicature Act*, R.S.N.W.T. 1988, c. J-1, s. 54, *Children's Law Act,* S.N.W.T. 1997, c. 14, s. 2(1), (3), (4); s. 3(1); *Children's Law Reform Act,* R.S.O. 1990, c. C.12, ss. 1 - 2; *Child Status Act,* R.S.P.E.I. 1988, c.C-6, s. 1; *The Children's Law Act, 1997*, S.S. 1997, c. C-8.2, ss. 40- 41; *Children's Act*, R.S.Y. 2002, c. 31, ss. 5- 6. In Manitoba, the sections on kindred relationships and construction have not been enacted: *The Family Maintenance Act,* C.C.S.M., c. F20, s. 17. In Nova Scotia, the *Vital Statistics Act* contains provisions similar to the Alberta *Legitimacy Act*, R.S.A. 2000, c. L-10: *Vital Statistics Act*, R.S.N.S. 1989, c. 494, ss. 47-51. See also Uniform Law Conference of Canada, *Uniform Child Status Act,1980*, Uniform Law Conference Proceedings 1981-82 at Appendix F.

> marriage, shall be treated as the legitimate child of the child's natural parents unless, before the will takes effect, the relationship is severed by adoption.[662]

The Ontario section reads:

> 1(3) In this Act, and in any will unless a contrary intention is shown in the will, a reference to a person in terms of a relationship to another person determined by blood or marriage shall be deemed to include a person who comes within the description despite the fact that he or she or any other person through whom the relationship is traced was born outside marriage.[663]

[508] In England, the rule in *Hill v. Crook* that words of relationship signify only legitimate relationships was abolished[664] by the *Family Law Reform Act 1969* and the *Family Law Reform Act 1987*.[665] In most of the common law world, the rule no longer applies and has been specifically abolished in some jurisdictions. For example, the Victorian *Status of Children Act 1974* provides in s. 3(2):

> 3(2) The rule of construction whereby in any instrument, in the absence of expression of any intention to the contrary, words of relationship signify only legitimate relationship is abolished.
>
> (3) For the purpose of construing any instrument the use, with reference to relationship of a person, of the words "legitimate" or "lawful" shall not of itself prevent the relationship from being determined in accordance with the provisions of subsection (1).[666]

[509] In the United States, at least eighteen states have adopted status of children acts and both the *Uniform Probate Code* and the *Uniform Parentage Act* give children the right to inherit from both their parents, regardless of whether their parents are or have been married.[667]

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[662] Manitoba Act, s. 35.

[663] Ontario Act, s.1(3).

[664] Parry & Clark at 260-261; Hawkins at 172-174.

[665] *Family Law Reform Act 1969*(U.K.), c.46, s. 15; *Family Law Reform Act 1987*(U.K.), c. 42, ss. 1(1), 19(1).

[666] Victoria, *Status of Children Act 1974*, s. 3. The Queensland, Tasmania and South Australia provisions are similar: South Australia, *Family Relationships Act 1975*, s.6; Tasmania, *Status of Children Act 1974*, s.3; Queensland, *Status of Children Act 1978*, s. 6.

[667] National Conference of Commissioners on Uniform State Laws, *Uniform Parentage Act* (2002), s. 202, online: <http://www.law.upenn.edu/bll/archives/ulc/upa/final2002.htm> (accessed July 2010, 2009); *Uniform Probate Code* (2008), § 2-117, online: <http://www.law.upenn.edu/bll/archives/ulc/upc/2008final.htm> (accessed July, 2010).

7. Previous ALRI recommendations

[510] ALRI has been recommending that discrimination against children born outside marriage be removed from the law of succession since the mid-1970s. In 1976, ALRI published its first report on the status of children. This report recommended:

> (1) That the rule of construction whereby in a will, deed or other instrument words of relationship signify only legitimate relationship in the absence of a contrary intention be abolished.[668]

[511] This recommendation was repeated in two further reports on the status of children issued in 1985 and 1991.[669]

8. Recommendations for reform

[512] The piecemeal approach taken by Alberta in removing discrimination from the law against children born outside marriage has resulted in an outdated rule of construction remaining to potentially bar a child from inheriting from or through its father. Further, s. 36 of the Alberta Act violates the Charter in only providing for inheritance from the mother by a child born outside marriage. While a court would almost certainly read the father into s. 36, a child should not be in the position of potentially needing such a court determination.

[513] The review of the law in other Canadian provinces and common law countries reveals that Alberta stands almost alone in not having taken steps to abolish the *Hill v. Crook* rule of construction that words of relationship refer only to legitimate relationships.

[514] The best approach is legislative action to abolish the *Hill v. Crook* rule and provide that a child inherits from its natural parents whether born inside or outside marriage. This will bring Alberta's law into line with other provinces and common law countries. It will also provide for consistency with the law in relation to

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[668] Institute of Law Research and Reform, *Status of Children,* Final Report No. 20 (1976) at 52 (Recommendation #23), online: <www.law.ualberta.ca/alri>.

[669] Institute of Law Research and Reform, *Status of Children: Revised Report, 1985,* Final Report No. 45 (1985) at 62 (Recommendation # 23), online: <www.law.ualberta.ca/alri>; Alberta Law Reform Institute, *Status of Children: Revised Report, 1991,* Final Report No. 60 (1991) at 39, 98.

intestate succession and dependants relief. It will enable our legislation to reflect current social realities and attitudes.

[515] It is recommended that the wording of s. 36 of the Alberta Act be changed to remove the reference to "illegitimacy." It is fair to say that describing a child as "illegitimate" is regarded as offensive by many people.[670]

[516] Given that Alberta has not yet adopted status of children legislation, ALRI recommends that the Alberta Act be amended to abolish the rule of construction that words of relationship signify only legitimate relationships. Section 36 of the Alberta Act should be amended to provide that a child, whether born inside or outside marriage, is treated as the legitimate child of its natural parents. In the absence of status of children legislation, s. 36 should not be repealed as there is a possibility that inheritance from both parents might be affected. For example, there is a common law rule based on public policy that gifts to future children born outside marriage are void.[671]

RECOMMENDATION No. 35
In the absence of implementation of Recommendation 34, the *Wills Act* should be amended to abolish the common law rule of construction that words of relationship refer only to relationships traced from birth inside marriage.

RECOMMENDATION No. 36
In the absence of implementation of Recommendation 34, s. 36 of the *Wills Act* should be amended to provide that in the construction of a will, a child born outside marriage shall be treated in the same way as a child born inside marriage.

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[670] Browne Lewis describes the term as "offensive" and says that most American states have removed the term from their laws. Browne Lewis, "Children of Men: Balancing the Inheritance Rights of Marital and Non-Marital Children" (2007-2008) 39 U. Tol .L. Rev. 1 at 1.

[671] See paras. 529-531 of this chapter.

C. The Child in the Womb and Inheritance under a Will

1. Introduction

[517] An old legal concept in the law of wills concerns the child "*en ventre sa mère*" – the child "in its mother's womb."[672] In other words, a child who is conceived during the testator's lifetime, who is gestating in the womb when the testator dies and who is born alive after the testator's death. The ability of such a child to inherit under a will has a long history under the common law. The common law applies a legal fiction to allow the child to inherit under a will. The rule is that a child in the womb will be treated as if it had been born in the lifetime of the will-maker.

[518] In reviewing the position of the unborn child under Scottish succession law, a recent writer concluded that the common law rule on children in the womb has worked well and has provided "a good example of how a fundamentally sound idea has spread throughout the various types of legal systems."[673] This view is corroborated by the fact that the position of the child in the womb has not been considered worthy of discussion in the vast majority of the work of law reform agencies in this area.[674]

[519] However, there are some constraints on the ability of the child in the womb to inherit under the common law. Of particular relevance in Alberta is that under the common law it is against public policy to make a gift in a will to future children born outside marriage. This is due to the fact that Alberta has not abolished the distinction between children born inside or outside marriage in relation to inheritance under a will.

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[672] *Black's Law Dictionary*, 4th ed., *s.v.* "*En ventre sa mère*".

[673] Roderick R. M. Paisley, "The Succession Rights of the Unborn Child" (2006) 10 Edinburgh L. Rev. 28 at 59.

[674] The author reviewed law reform publications from British Columbia, Manitoba, Saskatchewan, Nova Scotia, Ontario, New South Wales, Victoria, Queensland, New Zealand, England, Scotland and South Africa and did not find any discussion of the child in the womb.

2. Legal history

[520] The roots of the construction rule with respect to a child in the womb under wills and intestacy can be traced back to Roman legal writers.[675] At the end of the 17th century, the rule found expression in the House of Lords decision in *Reeve v. Long* where it was stated that a child in the womb at the time of the death of his father was able to take under a will.[676]

[521] "An act to enable Posthumous Children to take Estates as if borne in their Father's Life time" came into effect in 1699.[677] The legal commentary to the case of *Reeve v. Long* explains there was no definitive precedent that the statute applied to wills as well as to intestate succession, but that other cases and legal writers seemed to assume that it did. "[T]he words of the Act may be construed, without much violence, to comprize settlements of estates made by will ...."[678]

[522] A century later in *Doe v. Clarke*, the Court stated that:

> it seems indeed now settled, that an infant *en ventre sa mère* shall be considered, generally speaking, as born for all purposes for his own benefit ... And in a sensible treatise lately published ... the whole is well summed up by saying, "It is now laid down as a fixed principle, that wherever such consideration would be for his benefit, a child *en ventre sa mère* shall be considered as absolutely born."[679]

[523] In 1933, the Supreme Court of Canada stated in *Montreal Tramways Co. v. Léveillé* that an unborn child was "deemed to be born at a particular time if it was for the child's benefit that it be so held ...."[680]

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[675] Roderick R. M. Paisley, "The Succession Rights of the Unborn Child" (2006) 10 Edinburgh L. Rev. 28 at 29-30, 33.

[676] *Reeve v. Long* (1694), 91 E.R. 202. It is stated in the case that the judges of the King's Bench were unhappy with the decision.

[677] *1698 Public Act 10*, Will. III, c. 22 noted in Alison Reppy & Leslie J. Tompkins, *Historical and Statutory Background of The Law of Wills: Descent and Distribution, Probate and Administration* (Chicago: Callaghan and Co, 1928) at 77, 231.

[678] *Reeve v. Long* (1694), 6 W. & M.B.R., 91 E.R. 202 at 2 (K.B.).

[679] *Doe, on the demise of Clarke v. Clarke and Others* (1795), 2 H. Bl. 399 at 401 (C.P.).

[680] *Montreal Tramways Co. v. Léveillé*, [1933] S.C.R. 456 at para. 460.

3. The child in the womb rule

[524] The child in the womb is treated as a "person in being" to allow the child to acquire property.[681] The legal fiction applies to other areas such as insurance, torts and workers compensation.[682] With respect to succession under a will, the rule is used to give effect to the presumed intention of the testator[683] and is subject to a contrary intention being found in the will.[684]

[525] The leading case is *Elliot v. Joicey*, a 1935 decision of the House of Lords, which lays down the general principles to be followed in applying the rule.[685] The ordinary meaning of words referring to children or issue as "born", "living", or "surviving" at an event or point in time does not include a child in the womb. It is only when the child receives a direct benefit under the testamentary document that the words used will be construed to include the child in the womb. The justification for this is that when a will-maker gives a gift in such terms, the child in the womb "must necessarily be within the reason and motive of the gift."[686] It is presumed that if the donor had given the matter any thought, the donor would have wanted to include posthumous children as beneficiaries.[687]

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[681] P.H. Winfield, "The Unborn Child" (1941-42) 4 U. Toronto L.J. 278 at 279.

[682] *Fitzsimonds v. Royal Insurance Co. of Canada* [1984] 29 Alta. L.R. (2d) 394 at 397 (C.A.); *Burton v. Islington Health Authority* [1993] Q.B. 204 at 213-214 (Eng. C.A.)

[683] C. H. Sherrin, R.F.D. Barlow & R.A. Wallington, eds., *Williams on Wills*, 7th ed. (London: Butterworths, 1995) at 695; Karen M. Weiler, "The Unborn Child: Common-Law Canada" *Proceedings of the Thirteenth International Symposium on Comparative Law* (Ottawa: University of Ottawa Press, 1978) at 14.

[684] C. H. Sherrin, R.F.D. Barlow & R.A. Wallington, eds., *Williams on Wills*, 7th ed. (London: Butterworths, 1995) at 695.

[685] *Elliot v. Joicey*, [1935] H.L. 57.

[686] *Elliot v. Joicey*, [1935] H.L.57 at 67. The decision in *Elliot* was criticized at the time for narrowing the circumstances in which a child in the womb was able to take a gift. Cecil A. Wright, "Case and Comment" (1935) 8 Can. Bar Rev. 594 at 596:

> There is certainly no decision prior to *Elliot v. Joicey* which excluded the rule of construction simply because no *direct* benefit would accrue to the posthumous child by applying the rule. There is, indeed, authority to the contrary [emphasis in original].

[687] P.H. Winfield, "The Unborn Child" (1941-42) 4 U. Toronto L.J. 278 at 279.

[526] A benefit must be taken under the will by the child and thus, a gift to a parent or third party is not within the rule even if the child would benefit indirectly.[688] Another proviso is that the child must be subsequently born alive.[689] The rule applies not only to children or issue, but to other descriptions of relatives and to descriptions with respect to conditions.[690]

[527] Where the wording is simply a gift to "children" without any qualification, the child in the womb will be treated as being born already for the purpose of ascertaining the class. Thus, under a gift to "the children of A" where A has two children and is pregnant at the will-maker's death, the child who was in the womb will share equally in the gift with the other children.[691] The criterion that a direct benefit must be taken by the child does not apply if there is a question of application of the rule against perpetuities and gestation exists; then a gestation period is added whether or not it is for the benefit of the child.[692]

4. Common law exceptions to the rule

a. The rule in Wild's Case

[528] Children in the womb are not within one branch of the rule in *Wild's Case*.[693] This rule is a rule of construction and is subject to a contrary intention appearing in the will. Under the rule as it applies today in Canada, a bequest of land in the form "to A and A's children" creates a class gift of a tenancy in common in the land where "A" had children at the date of the making of the will.

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[688] Thomas Jarman, *A Treatise on Wills*, 8th ed. by Raymond Jennings and John Harper eds., (London: Sweet & Maxwell, 1951) at 1698.

[689] *Fitzsimonds v. Royal Insurance Co. of Canada* [1984] 29 Alta. L.R. (2d) 394 at 397 (C.A.).

[690] C. H. Sherrin, R.F.D. Barlow & R.A. Wallington, eds., *Williams on Wills*, 7th ed. (London: Butterworths, 1995) at 696.

[691] Hawkins at 222; *Bull v. Sloan* (1938), 53 B.C.R. 81 (C.A.) (Wife and living children named specifically, posthumous child did not take as beneficiaries were described as "personae designatae" and not as a class); *In Re Charlton Estate*, [1919] 1 W.W.R. 134 (Gift in will to "all living children" applies to those living at testator's death and children in the womb. Child was in the womb at the time of the testator's death and is therefore included in the term "all living children").

[692] C. H. Sherrin, R.F.D. Barlow & R.A. Wallington, eds., *Williams on Wills*, 7th ed. (London: Butterworths, 1995) at 697.

[693] *Wild's Case* (1599), 6 Co. Rep. 16b, 77 E.R. 277.

Children in the womb are not included within the class.[694] This rule is of decreasing importance today.[695]

b. Children born outside marriage

[529] This is an uncertain area of the common law based on outdated public policy concerns. The general rule is that a future gift to a child who will be born outside marriage is void. Such a gift is regarded as being against public policy because it encourages immorality.[696] However, the common law allowed these unborn children to inherit a future gift in limited circumstances. This was based on thinking that regarded providing for these children as a preferred alternative to state support.[697]

[530] Under the common law, for the child in the womb who will be born outside marriage, any reference in the gift to the paternity of the child will invalidate it. While some authority states that a child in the womb may have the reputation of being the child of a particular man, the better view seems to be that the child in the womb cannot acquire a reputation of paternity.[698]

[531] Where the child born outside marriage is in the womb at the date of the will, a gift to the child will be valid if the reference in the gift is to the child's mother only.[699] With respect to a child in the womb at the date of the will-maker's death, views differ on whether the child is able to take any gift, no matter how described. On one view, children born outside marriage after the will-maker's death probably

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[694] The other branch of the rule is that the words create a fee simple in A where A has no children at the date of the making of the will. Feeney at § 12.30 - 12.33; Hawkins at 291, 299-300.

[695] Feeney at §12.32.

[696] Thomas Jarman, *A Treatise on Wills*, 8th ed. by Raymond Jennings and John Harper eds., (London: Sweet & Maxwell, 1951) at 1767-1780.

[697] C. H. Sherrin, R.F.D. Barlow & R.A. Wallington, eds., *Williams on Wills*, 7th ed. (London: Butterworths, 1995) at 95.

[698] J. B. Clark, ed., *Theobald on Wills*, 14th ed. (London: Stevens & Sons, 1982) at 360.

[699] H. S. Theobald, *A Concise Treatise on the Law of Wills*, 7th ed. by E.D. Armour ed., (Toronto: Canada Law Book Company, 1908) at 292.

cannot take under the will.[700] The other view is that such children may take a gift if there is no reference to paternity in the description of the gift.[701]

[532] In Alberta, s. 36 of the Alberta Act treats a child born outside marriage as the legitimate child of the mother for the purposes of construing a will, except where there is a contrary intention in the will.

[533] Section 36 should assist the child in the womb in terms of inheritance through its mother even if the gift would be void under the common law. In addition, as previously outlined, the wording of s. 36 is contrary to the Charter. As already discussed, a court challenge would likely result in the court reading in so as to allow the child to inherit from the father or other paternal relatives. However, a child should not be dependant on court action for a right of inheritance and the section should be amended.

5. The position of the child in the womb in other jurisdictions

[534] Most other common law jurisdictions have retained the common law rule for the child in the womb as a rule of construction subject to a contrary intention appearing in the will.[702] A similar position on the succession rights of the unborn child can be found in various civil law countries such as France, Greece, and Germany. In the mixed jurisdictions of Scotland and South Africa, the rule also exists.[703] An analogous rule has been used by the European Court of Human Rights to find that a child born outside marriage was able to inherit on intestacy from the natural father where the child had been born after the father's death.[704]

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[700] J. B. Clark, ed., *Theobald on Wills*, 14th ed. (London: Stevens & Sons, 1982) at 361.

[701] C. H. Sherrin, R.F.D. Barlow & R.A. Wallington, eds., *Williams on Wills*, 7th ed. (London: Butterworths, 1995) at 95.

[702] Roderick R. M. Paisley, "The Succession Rights of the Unborn Child" (2006) 10 Edinburgh L. Rev. 28 at 59.

[703] Countries with similar rules include France, Greece, Germany, South Africa, Scotland and other commonwealth countries. Roderick R. M. Paisley, "The Succession Rights of the Unborn Child" (2006) 10 Edinburgh L. Rev. 28 at 32.

[704] Roderick R. M. Paisley, "The Succession Rights of the Unborn Child" (2006) 10 Edinburgh L. Rev. 28 at 34.

[535] The major difference between the treatment of a child in the womb in other common law jurisdictions as opposed to Alberta is that in these jurisdictions children born outside marriage are treated equally under the law. The result is that the common law restrictions on gifts to children in the womb outlined above do not apply.

6. Legislative provision for the child in the womb

a. Under wills legislation

[536] In most common law jurisdictions, the rule remains a rule of construction which is subject to a contrary intention appearing in the will. However, in Ireland, the common law rule has been codified in the *Succession Act, 1965* which provides: "Descendants and relatives of a deceased person begotten before his death but born alive thereafter shall, for the purposes of this Act, be regarded as having been born in the lifetime of the deceased and as having survived him."[705]

[537] In Canada, the common law rule has been codified in Ontario where the Ontario Act defines "child" as "'child' includes a child conceived before and born alive after the parent's death."[706] In Manitoba, the common law rule is codified in the Manitoba Act for the purposes of devises of estates tail and issue predeceasing the testator.[707]

b. Under intestacy legislation

[538] Provisions for children in the womb appear in intestacy legislation throughout Canada. These provisions are undoubtedly rooted in the English statute of 1699.[708]

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[705] Ireland, *Succession Act, 1965*, s. 3 (2).

[706] Ontario Act, s. 1(1).

[707] Manitoba Act, s. 25.3.

[708] *1968 Public Act*, 10 Will III c.22 was enacted as "An act to enable Posthumous Children to take Estates as if borne in their Father's Life time"; Reeve v. Long (1694), 91 E.R. 202.

[539] Section 10 of the Alberta Intestate Act covers posthumous births.

> **Posthumous births**
>
> 10 Descendants and relatives of the intestate, conceived before the intestate's death but born afterwards, shall inherit as if they had been born in the lifetime of the intestate and had survived the intestate.[709]

[540] Posthumously born children are treated in a similar fashion in the legislation of other Canadian provinces.[710]

c. Under dependants relief legislation

[541] In all Canadian jurisdictions except British Columbia, there is provision for the child in the womb.[711] In Alberta, the *Dependants Relief Act* defines a child as including "a child born after the death of a deceased."[712]

7. Recommendation for reform

[542] The child in the womb does not automatically inherit under a will in Alberta. Such a child remains subject to the limitations placed by the common law. The rule in *Wild's Case* and the restrictions on inheritance by children born outside marriage have the potential to prevent a child in the womb from receiving a gift under a will.

[543] Intestacy legislation and dependants relief legislation in Canada provides specifically for the child in the womb. It can be argued for that reason alone that a parallel provision should be in wills legislation. The likely reason that most common law jurisdictions have not taken steps to enact such a provision is due to the fact that the common law rule works well where children born outside marriage are not discriminated against in law.

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[709] Alberta Intestate Act, s. 10.

[710] *Estate Administration Act*, R.S.B.C. 1996, c. 122, s. 91; *The Intestate Succession Act*, C.C.S.M. c. 185, s. 1(3); *Devolution of Estates Act,* R.S.N.B. 1973, c. D-9, s. 30; *Intestate Succession Act*, R.S.N.L. 1990, c. I-21, s. 12; *Intestate Succession Act*, R.S.N.S. 1989, c. 236, s. 12; Ontario Act, s. 47(9); *Probate Act*, R.S.P.E.I. 1988, c. P-21, s. 95; *The Intestate Succession Act*, 1996, S.S. 1996, c. I-13.1, s. 14.

[711] Cameron Harvey & Linda Vincent, *The Law of Dependants' Relief in Canada*, 2d. ed. (Toronto: Thomson Carswell, 2006) at 64.

[712] *Dependants Relief Act*, R.S.A. 2000, c. D-10.5, s. 1(b)(i).

[544] It is our recommendation that the Alberta Act be amended to provide for succession by the child in the womb. Given that provisions already exist in other succession legislation, it is logical and consistent to have a parallel provision in wills legislation. In addition, such a provision will remove any possibility of the application of outdated and discriminatory common law rules. A provision which parallels the wording of the Alberta Intestate Act seems appropriate.

RECOMMENDATION No. 37
The *Wills Act* should be amended to provide for inheritance by a child in the womb in the form: A child who is in the womb at the time of the testator's death and who is born alive after the testator's death shall inherit in the same way as a child born in the lifetime of the testator who has survived the testator.

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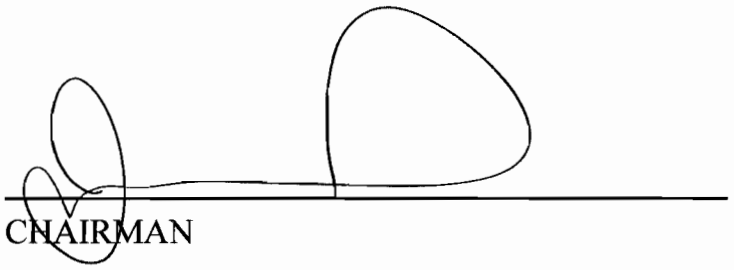

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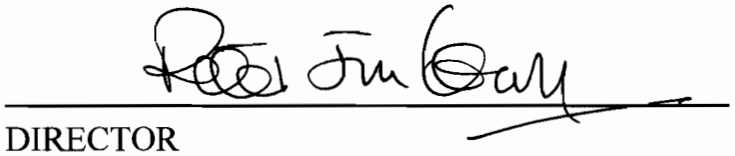

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