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THE CREATION OF WILLS

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INVITATION TO COMMENT

This Report for Discussion by the Alberta Law Reform Institute addresses a number of issues regarding the creation of wills and recommends tentative proposals for reforming the law in this area.

The purpose of issuing a Report for Discussion is to allow interested persons the opportunity to consider these proposals and to make their views known to ALRI. Any comments sent to us will be considered when the ALRI Board makes final recommendations.

The deadline for comments on the issues raised in this Report for Discussion is December 15, 2007.

You can reach us with your comments by mail, fax or e-mail to:

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Law reform is a public process. ALRI assumes that comments on this Report for Discussion are not confidential. ALRI may quote from or refer to your comments in whole or in part and may attribute them to you, although we usually discuss comments generally and without attribution. If you would like your comments to be treated confidentially, you may request confidentiality in your response or may submit comments anonymously.

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ABOUT THE ALBERTA LAW REFORM INSTITUTE

The Alberta Law Reform Institute was established on January 1, 1968, by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding of ALRI's operations is provided by the Government of Alberta, the University of Alberta, and the Alberta Law Foundation.

The members of ALRI's Board are The Honourable Justice N.C. Wittmann (Chairman); C.G. Amrhein; A. de Villars, Q.C.; The Honourable. Judge N.A. Flatters; W.H. Hurlburt, Q.C.; H.J.L. Irwin, Q.C.; P.J.M. Lown, Q.C. (Director); The Honourable Justice A.D. Macleod; J.S. Peacock, Q.C.; The Honourable Justice B.L. Rawlins; Wayne N. Renke; N.D. Steed, Q.C.; D.R. Stollery, Q.C. and K.D. Yamauchi.

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This and other ALRI reports are available to view or download at the ALRI website: *http://www.law.ualberta.ca/alri/*.

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This project has been greatly assisted by receiving feedback and advice from an accomplished Project Advisory Committee, the opinions of which have assisted both ALRI counsel and the ALRI Board in making recommendations for reform. We express our gratitude to the members of this committee:

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Due to the heavy demands placed on ALRI by the Alberta Rules of Court project, the Succession (Wills) project has proceeded over a multi-year time frame. Several counsel and quite a few student research assistants have contributed their efforts over that time period to the ongoing work which has culminated in this Report for Discussion. We are grateful to Debra Hathaway who has been lead counsel on the project and who has had carriage of this Report for Discussion. Counsel Janice Henderson-Lypkie was involved in the early identification of reform issues. More recently, counsel Witek Gierulski prepared materials on holograph wills. Ilze Hobin prepared the document for publication. Sandra Petersson, Research Manager, provided editorial support. Student research assistance was provided at various dates by Jon Stolee, Alicia Backman-Beharry, Kristen Lewicki, Erin Viala, Kajal Patel, Shannon Brochu, and Kelly Nychka.

EXECUTIVE SUMMARY

The Report for Discussion on *The Creation of Wills* proposes various preliminary recommendations for reform of the *Wills Act*. The Alberta Law Reform Institute invites public consideration of, and comment on, these recommendations. Such public input will be taken into account by the Institute when formulating its final recommendations.

The main recommendations of the Institute are summarized as follows.

Dispensing Power

The Alberta Law Reform Institute reiterates its recommendation (originally made in a previous report) that Alberta courts be given the power to validate a will or an alteration, revocation or revival of a will even if it does not comply with the formalities prescribed by the *Wills Act*. This power is called a "dispensing power." A court may exercise this power only if satisfied, by clear and convincing evidence, that the testator intended to adopt the document as a will. However, the dispensing power could not be used to validate an oral will.

Testamentary Capacity of Minors

The Alberta Law Reform Institute wishes to consult on two different reform models in this area. In the first model, the Institute recommends that the age of testamentary capacity be lowered from 18 years to 16 years. Doing so would make current statutory exceptions unnecessary for minors, although an exception should be maintained to allow a minor parent under 16 years to provide for their child by will.

However, as an alternative model if the age of testamentary capacity remains at 18 years, the Institute recommends repealing all statutory exceptions. Any minor who wants to make a will would be allowed to apply to the Court of Queen's Bench for a declaration of testamentary capacity. The Institute seeks public response about whether the court should also have to approve the terms of such a will or whether a minor who is granted testamentary capacity by the court should be able to make a will without such supervision.

Statutory Wills for Persons Without Testamentary Capacity

People may possess and then lose testamentary capacity, either temporarily or permanently, due to any number of conditions resulting in mental disability or mental incompetence. Some people may never have testamentary capacity in their lifetime due to developmental delay or impairment. In Alberta, a substitute decision-maker for a person who lacks testamentary capacity is not allowed to make, alter or revoke a will on behalf of that person.

However, in England, Australia and New Zealand, legislation grants to courts the authority to make "statutory wills" for persons without testamentary capacity. Canadian courts do not have such power, except in New Brunswick. The court's power is exercised following a hearing with extensive evidence. The Report for Discussion examines the various legislative models in depth and asks whether Alberta courts should have similar powers.

The Alberta Law Reform Institute has serious reservations about allowing statutory wills to be made in Alberta but wants to assess public views and opinions on this issue by consulting as widely as possible.

Oral Wills and Electronic Wills

The Alberta Law Reform Institute recommends no change to the current law which recognizes only written wills. Oral wills should not be valid either in their own right or under the dispensing power.

Similarly, the *Wills Act* should not be amended to recognize electronic wills as valid in their own right. Electronic wills exist only in digital form (or in some other intangible form) on computers or other technology. Despite technological advances, such documents still raise too many issues of authentication and durability. However, following recent proposals made by the Uniform Law Conference of Canada, the dispensing power should be revised so that it is wide enough to allow a court, in an appropriate case, to validate a will in electronic form despite its lack of compliance with the usual formalities. But the concept of "electronic form" should be narrowly defined in the statute in order to prevent any possible recognition of videotaped or tape-recorded wills.

Privileged Wills

Members of the Canadian Forces on active service and mariners and seamen at sea are allowed to make "privileged wills" which do not have to meet the formalities required by the *Wills Act*. Historically, social and legal conditions were so poor for soldiers and sailors that privileged wills were a good idea. However, modern conditions have improved significantly and the need for privileged wills is increasingly obsolete. The Alberta Law Reform Institute recommends that the ability to make a privileged will should be ended, although existing privileged wills should continue to be effective if they were validly made before the cut-off date.

Holograph Wills

Holograph wills are unwitnessed wills which are entirely in the testator's own handwriting. The Alberta Law Reform Institute reviewed the main issues in this area and largely affirms the current law. The *Wills Act* should continue to expressly allow holograph wills, which are an easy and inexpensive way for people to make wills, especially in an emergency situation. The statute should not enact a special provision addressing unwitnessed printed will forms with handwritten entries. Such problem wills should be validated by a court severing the handwritten entries and finding a holograph will (if possible) or by a court making an order under the general dispensing power (if necessary).

The Institute does recommend one small change to the *Wills Act*, however. It should authorize holograph wills made in the testator's "own writing," defined as "handwriting, footwriting, mouthwriting or writing of a similar kind." The current requirement of "handwriting" is too narrow and could be viewed as discriminatory.

Will Formalities

The statutory requirement that a will must be signed at its "end or foot" has resulted in much inconsistent case law, despite the elaborate statutory saving provision which is supposed to ameliorate the problem. A reform movement is underway in England, Australia and New Zealand to replace these provisions with a simpler model.

The Alberta Law Reform Institute recommends that the *Wills Act* continue to require that a will be signed by the testator, but the statute should not specify where the signature must be placed. The Act should state that any dispositions written above the testator's signature are part of the will but any dispositions written below the testator's signature are not, unless the dispensing power is used to validate and include those dispositions. The special savings provision should be discontinued and reliance placed on the dispensing power to deal with problem wills.

Concerning formalities which involve witnesses, the Alberta Law Reform Institute recommends that two or more witnesses should continue to be required for a valid will. But it is also true that other important documents (such as contracts and enduring powers of attorney) can be created with only one witness. Any public comment on this area is welcome. Similarly, the Institute requests public input on the issue of whether a testator should be able to sign or acknowledge their signature in the presence of two witnesses serially, rather than requiring the witnesses to both be present at the same time. If concurrent witnessing is retained, the Institute proposes that the statute should allow a witness who previously signed the will in the other witness's absence to acknowledge their signature to the other witness when both are together, rather than having to actually re-sign the will. This would overturn case law that renders such a will invalid.

The *Wills Act* provides that a will is valid "without other publication." The term "publication" as used in this provision has an archaic meaning that is not at all obvious to a modern reader. The provision means that a witness to a will does not need to know that the document is a will. The Alberta Law Reform Institute recommends the adoption of a plain language provision to simply say so.

Witnesses to a Will

Currently, the *Wills Act* has a saving provision which validates wills signed by an incompetent witness. This dates from Victorian times when there were many ways in which a witness could be incompetent, but today only two ways remain legally applicable – age and mental incompetence. It seems inappropriate to

automatically validate wills witnessed by someone who is underage or lacks mental capacity. The Alberta Law Reform Institute recommends repealing this provision and providing instead that a valid will must have competent witnesses at the date on which the will is signed. Problem wills can be dealt with under the dispensing power, if necessary and appropriate. The *Wills Act* should define a competent witness as any person who is capable of making a will.

The *Wills Act* should disqualify as a witness any person who signs a will on behalf of and at the direction of the testator. Such a witness poses an obvious danger. However, no other express disqualifications should be stated. Some Australian jurisdictions disqualify blind persons or those who are unable to see, but the Institute rejects such a provision as inappropriate.

The *Wills Act* provides that a witness (and the witness's spouse or adult interdependent partner) cannot also be a beneficiary under the will. If an inheritance is left to any of them, the gift is rendered void due to the witness-beneficiary rule. It is said that this rule protects testators from undue influence and fraud, but it is often criticized as unfair, rigid and harsh. The rule operates even if there has been no wrongdoing. The Alberta Law Reform Institute recommends retaining the witness-beneficiary rule but offsetting its harsher effects by giving Alberta courts the discretion to prevent the forfeiture of the testamentary gift. A court could allow the witness or spouse (as the case may be) to receive the gift, if it is satisfied that the witness or spouse did not exercise any improper or undue influence on the testator. There would be a six-month limitation period to bring such an application.

In addition to the witness-beneficiary rule, the Alberta Law Reform Institute further recommends that an interpreter (who interprets the will to the testator before signing) and a person who signs a will on behalf of a testator should also be disqualified from receiving any inheritance under the will. However, the interpreter's disqualification would not apply to any charge or direction in the will for the payment of appropriate remuneration for the interpretation services. An interpreter or proxy signer could also apply to a court to prevent forfeiture on proof that no undue influence or fraud occurred.

If an executor or trustee acts as a witness to the will, it does not affect any trust provisions in the will but does cause forfeiture of any remuneration for the executor or trustee that is directed by the terms of the will. The Alberta Law Reform Institute recommends that this situation be changed. The *Wills Act* should provide that forfeiture under the witness-beneficiary rule does not apply to a charge or direction in the will for the payment of appropriate remuneration, including professional fees, to an executor or trustee of that will.

TABLE OF ABBREVIATIONS

LEGISLATION

Canada

Alberta Act	*Wills Act*, R.S.A. 2000, c. W-12.
British Columbia Act	*Wills Act*, R.S.B.C. 1996, c. 489.
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.
Nova Scotia Amending Act	*An Act to Amend Chapter 505 of the Revised Statutes, 1989, the Wills Act*, S.N.S. 2006, c. 49 (unproclaimed as of August 10, 2007)
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.
Quebec Civil Code	Civil Code of Quebec.
Saskatchewan Act	*Wills Act, 1996*, S.S. 1996, c. W-14.1.
Uniform Wills Act	Uniform Law Conference of Canada, *Uniform Wills Act* (1986).
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	*Wills, Probate and Administration Act 1898* (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 1992* (Tas.).
Victoria Act	*Wills Act 1997* (Vic.).
Western Australia Act	*Wills Act 1970* (W.A.).
Western Australia Bill	*Wills Amendment Bill 2006* (W.A.).

New Zealand

New Zealand Act	*Wills Act 1837* (U.K.) 7 Will. IV & 1 Vict., c. 26, declared in force in New Zealand by the *Imperial Laws Application Act 1988* (N.Z.), 1988/112, Schedule 1.
New Zealand Bill	*Wills Bill* (N.Z.), No. 78-2, 2006.

England

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

United States

Uniform Probate Code	U.C.C. Uniform Probate Code (2006).

LAW REFORM PUBLICATIONS

Alberta Report	Alberta Law Reform Institute, *Wills: Non-Compliance with Formalities*, Final Report No. 84 (2000).
Australia Uniform Report	Queensland Law Reform Commission, *Consolidated Report to the Standing Committee of Attorneys General on the Law of Wills*, 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 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 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 Wills Report	New South Wales Law Reform Commission, *Wills - Execution and Revocation*, Report No. 47 (1986).
New South Wales Statutory Wills Report	New South Wales Law Reform Commission, *Wills for Persons Lacking Wills-Making Capacity*, Report No. 68 (1992).
New Zealand Report	Law Commission of New Zealand, *Succession Law: A Succession (Wills) Act*, Report No. 41 (1997).
Nova Scotia Report	Law Reform Commission of Nova Scotia, *Reform of the Nova Scotia Wills Act*, Final Report (2003).
Nova Scotia Discussion Paper	Law Reform Commission of Nova Scotia, *Reform of the Nova Scotia Wills Act*, Discussion Paper (2003).
Saskatchewan Report	Law Reform Commission of Saskatchewan, *Report on Electronic Wills* (2004).
Victoria Report	Law Reform Committee (Victoria), *Reforming the Law of Wills*, Final Report (1994).

SECONDARY SOURCES

Feeney	J. MacKenzie, ed., *Feeney's Canadian Law of Wills*, 4th ed., looseleaf (Markham, Ont.: Butterworths Canada Ltd., 2000).
Sweatman	Jasmine Sweatman, "Holographic Testamentary Instruments: Where are we?" (1995) 15 E.T.J. 176.

Parry & Clark	Roger Kerridge, *Parry & Clark*: *The Law of Succession*, 11th ed. (London: Sweet & Maxwell, 2002).

LIST OF RECOMMENDATIONS

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 nearly 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. It is time to review the 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.

B. The Succession Project

[4] The Alberta Law Reform Institute has conducted numerous projects over the years to review various aspects of the law of succession and has made many recommendations for reform.[12] The Succession Project is now focussing on a comprehensive review of the Alberta *Wills Act*. This review will produce a series of Reports for Discussion –

(1) *The Creation of Wills,*
(2) *Revocation, Alteration or Revival of a Will,*
(3) *Lapse and Other Issues of Property Disposition* and
(4) *Interpretation and Evidence*.

[5] After the consultation process is concluded, ALRI will produce a Final Report with our final recommendations in this area.

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

[12] 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).

[6] ALRI's review of the substantive law of succession is an ongoing commitment. In the future, we will undertake a number of further projects to recommend reform in the remaining areas of succession law requiring examination. These projects will be focussed on major individual issues or clusters of issues within such areas as administration of estates, dependants relief and the effect of beneficiary designations.

C. Document Plan

[7] This Report for Discussion is divided into eight chapters. While Chapter 1 is mainly introductory, it also reasserts ALRI's previous recommendation to enact a dispensing power, which is an important reform to enhance the creation of wills. Chapter 2 addresses the testamentary capacity of minors. Chapter 3 explores whether statutory wills ought to be available for persons who lack testamentary capacity.

[8] Issues related to special kinds of wills are covered in the next three chapters. Chapter 4 discusses oral and electronic wills, Chapter 5 asks whether privileged wills for the armed forces are still needed and Chapter 6 examines various issues concerning holograph wills.

[9] Chapters 7 and 8 examine issues affecting testators and witnesses which can arise from the formalities required for a valid will.

D. Dispensing Power

[10] The Alberta Act says that a will is not valid unless certain necessary formalities are strictly complied with. A formal will is not valid unless the testator signs or acknowledges the testator's signature in the presence of two witnesses who are present at the same time and who sign in the presence of the testator.[13] A holograph will is not valid unless it is wholly in the handwriting of the testator and signed by the testator.[14]

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[13] Alberta Act, s. 5.

[14] Alberta Act, s. 7.

[11] Testators sometimes fail to comply with these mandatory formalities because of ignorance or inadvertence. The number of such cases is small in comparison with the number of wills that do comply with the formalities, but it is substantial in absolute terms. Many things can go wrong. In the shuffling of papers, a witness (or even a testator) may fail to sign the will, or a husband and wife may inadvertently sign each other's wills. A testator who has already signed may fail to acknowledge that signature in the presence of both witnesses. A testator may be unable to see the witnesses sign so that, technically, the witnesses do not sign in the testator's "presence." The strict-compliance rule of the Alberta Act invalidates wills in such cases. While the substance of the matter is that a testator has adopted a document as the testator's will, that substance may be defeated because of a failure of form, that is, a failure to comply strictly with the statutory formalities.

[12] In our 2000 report entitled *Wills: Non-compliance with Formalities,* ALRI recommends that, like many jurisdictions in Canada, Australia and the United States, Alberta courts should be given the power to validate a will or an alteration, revocation or revival of a will even if it does not comply with the formalities prescribed by the Alberta Act.[15] This power is generally referred to as a "dispensing power." The power could be exercised only if the court is satisfied, by clear and convincing evidence, that the testator intended to adopt the document as a will, alteration, revocation or revival. In extreme cases, a court could even admit to probate a document which, for inadvertence or other good reason, a testator fails to sign. The only formal requirement that could not be dispensed with in a proper case would be the requirement that wills must be in writing. In other words, the dispensing power could not be used to validate an oral will. Nor could electronic records be admitted to probate under the dispensing power.

[13] The draft text of the recommended dispensing power is as follows:

> **Dispensing with formal requirements**
>
> **20**.1(1) In this section, "formal requirements" means the requirements contained in sections 5 to 8, 16(c), 19 and 20 for the making, revocation, alteration or revival of a will.

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[15] Alberta Law Reform Institute, *Wills: Non-Compliance with Formalities*, Final Report No. 84 (2000) [Alberta Report].

> (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.
>
> (3) This section applies only in respect of a person who dies after this section comes into force.[16]

[14] ALRI recommends the enactment of this dispensing power provision because the existence of such a power will enable courts to give effect to testators' wishes in cases where they must now refuse to do so. The requirement of clear and convincing evidence will prevent the admission to probate of dubious documents.

[15] A dispensing power will not cure all cases, however. A testator may have intended to adopt a document as a will, but there may be no clear and convincing evidence that the testator did so. Such a will cannot be saved under the dispensing power. The requirement of clear and convincing evidence for the exercise of the dispensing power is necessary to ensure that only authentic wills are admitted to probate.

[16] Despite the presence of a dispensing power, testators will still have good reason to comply strictly with the formalities. A failure to comply strictly will expose a testator's estate to substantial additional legal costs, because a court application will be needed to seek the use of the dispensing power. A failure to comply strictly will also increase the risk of rejection for such a will.

[17] ALRI's recommendations concerning a dispensing power have not yet been implemented. The statutory enactment of a dispensing power remains central to ALRI's reform proposals concerning the creation of wills. Our reform proposals in this Report for Discussion often depend on the recommended dispensing power and proceed on the assumption that such a dispensing power will be concurrently enacted in the Alberta Act. Therefore, we take this opportunity to reiterate our previous recommendations in this area.

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[16] Alberta Report at 51.

RECOMMENDATION No. 1

We again recommend that a dispensing power be enacted in the *Wills Act* in the form provided by our previous recommendations made in *Wills: Non-compliance with Formalities* (Report No. 84, 2000).

CHAPTER 2. TESTAMENTARY CAPACITY OF MINORS

A. Introduction

[18] Every person who makes a will must have the testamentary capacity to do so or the will is invalid. The classic view of testamentary capacity is that the testator must understand

> … the "nature and quality of the act." The testator must be able to comprehend and recollect what property he or she possessed, the persons that ordinarily might be expected to benefit, the extent of what is being given to each beneficiary and, finally, the nature of the claims of others who are being excluded.[17]

[19] By law, a minor is usually not considered to have testamentary capacity until the age of majority. In Alberta, a person must be 18 years or older and of sound mind to make a valid will.[18] The general rule is that a minor does not have testamentary capacity because "[t]he young are deemed to lack the requisite judgment to make a valid will …."[19] However, some statutory exceptions exist which allow a minor to acquire testamentary capacity. A minor can make a valid will if the minor

- has or has had a spouse or adult interdependent partner;[20]
- is a member of a regular force in the Canadian Forces or is on active service with the Canadian Forces;[21]
- is a mariner or seaman.[22]

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[17] J. MacKenzie, ed., *Feeney's Canadian Law of Wills*, 4th ed., looseleaf (Markham, Ont.: Butterworths Canada Ltd., 2000) at § 2.6 [Feeney].

[18] Alberta Act, s. 9(1).

[19] Feeney at § 2.1.

[20] Alberta Act, s. 9(1)(a).

[21] Alberta Act, s. 9(1)(b).

[22] Alberta Act, s. 9(1)(c).

[20] Similar exceptions are also generally found in the wills legislation of other Canadian provinces and territories.[23] However, Alberta has an additional statutory exception that is unique to this province – if a minor has children but no spouse or adult interdependent partner, the minor may also make a valid will but only for the limited purpose of providing for the benefit of any or all of those children.[24]

[21] The exceptions made for minors who are Canadian Forces members, mariners and seamen will be considered in Chapter 3 under the topic of privileged wills.

[22] ALRI proposes that significant reform be made concerning a minor's testamentary capacity, but we also make some alternative recommendations if a different path is chosen. Before turning to those recommendations, however, we will discuss a legal remedy (court declaration of testamentary capacity) which is relevant to the consideration of both paths.

B. Court Declaration of Testamentary Capacity

[23] Like Alberta, the wills statutes of the eight Australian jurisdictions provide that minors cannot make wills. Often there are exceptions for married or partnered minors or minors in the armed forces. But most Australian wills statutes also contain a unique procedure which allows any minor who lacks testamentary capacity by reason of age to apply for authorization to make a will. Currently, only one Australian jurisdiction does not have such a procedure (Western Australia).[25] Country-wide adoption of this procedure is recommended in the uniform model statute produced by the Australian National Committee for Uniform Succession Laws.[26]

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[23] Northwest Territories, Yukon and Nunavut have an additional exception which allows will-making by members of the Royal Canadian Mounted Police who are under the age of 19 years (the age of majority in those territories). Whatever its past practice concerning the recruitment of minors, the RCMP's current practice is that its members must now be 19 years of age at the time of engagement: http://www.rcmp-grc.gc.ca/recruiting/basic_e.htm.

[24] Alberta Act, s. 9(3).

[25] Western Australia is in the process of amending its wills legislation but no enactment of this procedure is contained in its *Wills Amendment Bill 2006* (W.A.) [Western Australia Bill].

[26] National Committee for Uniform Succession Laws, *Consolidated Report to the Standing*

(continued...)

[24] Most Australian jurisdictions and the uniform model statute require that the application be made to a court. However, Tasmania[27] allows such applications to be made either to a court or to the Public Trustee. All the jurisdictions provide that a specific will must be considered for authorization – in other words, there is no declaration of general capacity that allows a minor to go home from court and simply make some will in private. The authorizing body must vet the terms of the actual will being proposed by the minor and consider whether the minor should be allowed to make it. Once an authorized will is made, the minor must return for further authorization if alteration or revocation is desired.

[25] The ability to seek a court declaration of testamentary capacity "will be useful in situations (admittedly not numerous) where … [minors] have accumulated property of value, especially where, if a will is not executed, the property would pass inappropriately on an intestacy."[28] For example, a minor with significant property who is diagnosed with a fatal illness may want the minor's estate to benefit only one parent and not another estranged parent.[29]

[26] New Zealand also has this statutory model. Currently, New Zealand allows the application for a declaration of testamentary capacity to be made either to a court or to the Public Trustee.[30] In its proposed new wills statute, however, only the Family Court will be authorized to decide such applications.[31]

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[26] (...continued)
Committee of Attorneys General on the Law of Wills, Miscellaneous Paper 29 (1997) at 40-43 [Australia Uniform Report].

[27] *Wills Act 1992* (Tas.), ss. 6(4)-(5), 7, 8 [Tasmania Act].

[28] Law Commission of New Zealand, *Succession Law: A Succession (Wills) Act*, Report 41 (1997) at 15 [New Zealand Report].

[29] Australia Uniform Report at 41.

[30] *The Wills Amendment Act, 1969* (N.Z.), 1969/40, s. 2(2).

[31] *Wills Bill* (N.Z.), No. 78-2, 2006, s. 10(4)(d)-(e) [New Zealand Bill]. This change implements the recommendation of the Law Commission of New Zealand that the Public Trustee's right to grant such approvals should be discontinued and that only the Family Court should be empowered in this area. The reason for the recommendation seems not to concern issues of jurisdiction or appropriateness but is, rather, simply to create a level playing field among competitors – "there seems no justification for the Public Trustee to continue to have this advantage [of granting approvals to make wills] over other trustee corporations that are privately-owned ….": New Zealand Report at 13.

[27] A similar procedure (but with more comprehensive results) is found in some American states which have an "emancipation" procedure for minors. In California, for example, a minor who meets certain qualifications[32] can apply to court for a declaration of emancipation which will confer on the minor all the rights, capacities and obligations of adulthood, including the general testamentary capacity to make or revoke a will.[33]

[28] No Canadian jurisdiction allows a minor to obtain testamentary capacity by declaration.[34] Two Canadian law reform bodies have recommended its adoption, however. In 1981, the British Columbia Law Reform Commission proposed that a minor should be able to apply to court to obtain the general capacity to make a will.

> There are undoubtedly situations in which a minor would benefit from having the capacity to make a will, but the law provides no machinery by which the minor may acquire such capacity …. [A]rbitrarily fixing the age of majority as the age at which every person may make a will could work an injustice. While many minors are undoubtedly immature, others may be as capable of exercising mature judgment at 16 as they will be at 19. Where for some reason the execution of a will by a minor is desirable, we do not believe that an individual capable of comprehending his moral obligations, the extent of his estate, and the legal consequences of his acts should be precluded from executing a valid will solely because he is under age.[35]

[29] Unlike the Australian and New Zealand models, the British Columbia proposal does not require the court to approve a specific will. Two reasons were given for this different approach. First, if approval is required of a specific will, every subsequent amendment would require approval as well, which simply

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[32] In order to apply for emancipation, a minor must be at least 14 years of age, must willingly live separate and apart from the minor's parents with those parents' consent, must manage the minor's own financial affairs and must have an income not derived from crime: *Family Code*, 11 Calif. Stat., tit. 6, § 7120 (1992).

[33] *Family Code*, 11 Calif. Stat., tit. 6, §§ 7002(c), 7050(e)(6), 7122. Obtaining a declaration of emancipation is known colloquially as "divorcing your parents."

[34] Nor is this procedure available in England.

[35] Law Reform Commission of British Columbia, Report on the Making and Revocation of Wills, Report No. 52, (1981) at 18-19 [British Columbia 1981 Report].

"re-open[s] issues which may thereby have to be continually re-litigated."[36] And secondly,

> …[n]o such limitations are placed on adult testators. If the bar of minority is justified on the basis of immaturity, it seems unfair to continue to impose restrictions when a minor has been specifically found to be capable of exercising mature judgment.[37]

[30] The Commission noted that a minor who applies for a declaration would have to find a guardian *ad litem* who is not the minor's parent to bring the application on the minor's behalf.[38] The minor's parents would be in a conflict of interest since they are the heirs on intestacy and that interest may be displaced by a will.[39]

[31] In 2006, the British Columbia Law Institute again reviewed the law of wills but did not renew its support for this particular recommendation. Although ALRI considered the possibility of a court process to approve wills by minors, this option was ultimately "rejected as unduly cumbersome."[40]

[32] In 2003, the Law Reform Commission of Nova Scotia also recommended the adoption of a procedure to empower a minor to make a will.[41] The Commission noted that, while minors lack testamentary capacity, they are not under a legal disability to acquire and own both real and personal property.[42] In fact, minors who

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[36] Law Reform Commission of British Columbia, *The Making and Revocation of Wills*, Working Paper No. 28 (1980) at 14 [British Columbia Working Paper].

[37] British Columbia 1981 Report at 21.

[38] An adult must make the court application on behalf of a minor because the minor lacks the legal capacity to conduct litigation. Usually one of the minor's parents acts as the litigation representative. In Alberta, the litigation representative is called the minor's "next friend."

[39] British Columbia Working Paper at 15.

[40] British Columbia Law Institute, *Wills, Estates and Succession: A Modern Legal Framework*, Report No. 45 (2006) at 27 [British Columbia 2006 Report]. The British Columbia Law Institute is the successor agency to the Law Reform Commission of British Columbia.

[41] This recommendation has not been implemented in Nova Scotia's recent reform of its wills statute in *An Act to Amend Chapter 505 of the Revised Statutes, 1989, the Wills Act*, S.N.S. 2006, c. 49 (unproclaimed as of August 10, 2007) [Nova Scotia Amending Act].

[42] Law Reform Commission of Nova Scotia, *Reform of the Nova Scotia Wills Act*, Final Report (2003) at 20 [Nova Scotia Report].

work in the high-tech field or professional sports may acquire significant wealth while underage.[43]

[33] The Commission recommended that the age of testamentary capacity remain the same as the age of majority and that statutory exceptions be eliminated. If a minor is to obtain testamentary capacity, it should not be through an arbitrary exception but through "a standard confirmatory procedure, whereby the capacity of a minor to make a reasoned decision about the disposition of his or her property could be gauged."[44] A minor should be able to apply to an objective third party to certify whether the minor should be granted the general testamentary capacity to make a will. Like the 1981 British Columbia proposal, the Law Reform Commission of Nova Scotia recommendation would not require a specific will to be vetted. A general grant of testamentary capacity would be conferred.

[34] However, unlike the British Columbia proposal, Nova Scotia recommended that certification of a minor's testamentary capacity should be sought from the Public Trustee, not a court, "for reasons of cost and convenience."[45] This aspect of the Nova Scotia recommendation seems untenable. As discussed, the overwhelming trend in other jurisdictions is to vest declarative power in a court, not in a government official. A declaration of testamentary capacity seems more properly characterized as a quasi-judicial decision, not an administrative decision. Granting testamentary capacity to a person who is otherwise legally incapable carries profound consequences for the rights not only of that person, but also for the rights of those who stand to inherit under any will and those whose statutory inheritance is thereby displaced. It is a decision more appropriately made by a court.

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[43] Nova Scotia Report at 19.

[44] Nova Scotia Report at 21.

[45] Nova Scotia Report at 22.

C. Recommendations for Reform

1. Lower the age of testamentary capacity

a. Making a will at 16 years

[35] In almost all Canadian jurisdictions, the age of testamentary capacity is the same as the age of majority. In Alberta, for example, both are attained at the age of 18 years. Newfoundland and Labrador is the only province where testamentary capacity is attained before the age of majority. There a person becomes a legal adult at 19 years of age[46] but may make a valid will at 17 years.[47]

[36] In England and Australia as well, the age of testamentary capacity equals the age of majority. However in New Zealand, the age of majority is 20 years of age[48] but a person may make a valid will at 18 years.[49]

[37] Over the years in Canada, there have occasionally been proposals to lower the age of testamentary capacity. In 1977, the Quebec Civil Code Revision Office suggested that a person should be able to make a notarial will at 16 years old.[50] However, this was not implemented and the age of full testamentary capacity in Quebec remains at 18 years (the same as the age of majority). But the Quebec Civil Code also provides that a minor can dispose of "articles of little value" by testamentary means.[51]

[38] The Manitoba Law Reform Commission has recently recommended lowering the age of testamentary capacity in that province to 16 years.[52] The

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[46] *Age of Majority Act*, S.N.L. 1995, c. A-4.2, s. 2.

[47] *Wills Act*, R.S.N.L. 1990, c. W-10, s. 3 [Newfoundland Act].

[48] *Age of Majority Act 1970* (N.Z.), 1970/137, s. 4.

[49] *Wills Amendment Act 1969* (N.Z.), 1969/40, s. 2(1). This will continue to be the case under New Zealand's new wills legislation, New Zealand Bill, s. 10(1). This Bill is currently in the process of being enacted and has a projected coming into force date of November 1, 2007.

[50] Quebec Civil Code Revision Office, *Report on the Quebec Civil Code*, Book III, Title Three, Art. 248 (1977); British Columbia 1981 Report at 18.

[51] Quebec Civil Code, art. 708 states "A minor may not dispose of any part of his property by will, except articles of little value."

[52] Manitoba Law Reform Commission, *Wills and Succession Legislation*, Report No. 108 (2003) at 10-11 [Manitoba Report].

Commission noted that, while many legal rights or privileges are predicated on attaining the age of majority (such as voting, drinking and marrying without parental permission), other statutes do allow minors to participate in "'adult' activities"[53] (such as driving an automobile, leaving school, entering into an insurance contract and seeking employment). As an alternative to lowering the age of testamentary capacity, the Commission considered retaining it at 18 years, but allowing a minor who wants to make a will to seek a court declaration conferring testamentary capacity on the minor. However, the Commission rejected this option in favour of simply lowering the age of testamentary capacity:

> Given the sophistication of many of today's youths, the Commission is of the view that a minor who has attained the age of 16 should not be required to apply to the court to make a valid will and would therefore recommend that the age requirement be set at 16. If the will meets all of the other formal requirements of a valid will, that is: mental capacity, knowledge and approval, due form, and execution, we do not believe that lowering the age to 16 will prove problematic.[54]

[39] The British Columbia Law Institute has also made essentially the same recommendation for that province.[55]

[40] In the area of medical consent (by way of comparison), Canadian common law recognizes the "mature minor" doctrine which allows minors who meet certain criteria to consent to medical procedures despite being underage. The test is whether the minor

> is able to appreciate the nature and purpose of the treatment and the consequences of giving or refusing consent. If the child has this capacity, the child's consent is both necessary and sufficient; the parents' consent is not required, nor can they override the child's decision.[56]

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[53] Manitoba Report at 11.

[54] Manitoba Report at 11.

[55] British Columbia 2006 Report at 52.

[56] Ellen I. Picard and Gerald B. Robertson, *Legal Liability of Doctors and Hospitals in Canada*, 3rd ed. (Scarborough, Ont.: Carswell, 1996) at 72-73. The leading Alberta case in this area is *C. (J.S.) v. Wren*, [1987] 2 W.W.R. 669 (Alta. C.A.).

While the "mature minor" doctrine is applied and assessed on a case-by-case basis, it supports the general view that many youth are capable of making some important decisions in their lives.

[41] If it would be an appropriate reform for the Alberta *Wills Act* to recognize the testamentary capacity of mature minors generally, the issue is whether that capacity should be individually assessed or not? If individually assessed, the model of applying for a declaration of testamentary capacity could be enacted. This is an involved and expensive procedure because a court application would be required in every case before a will is made. But it has the virtue of ensuring that only truly mature and capable minors would be allowed to make wills and that any resulting will is valid (insofar as testamentary capacity is concerned).

[42] If individual assessment is not needed in this area, then the age of testamentary capacity could simply be statutorily lowered to 16 years for everyone. This is simpler and cheaper for all concerned. The viability of this option depends on the perception that most minors of 16 years and older are mature enough to handle the responsibility of testamentary capacity.

[43] Support for the option of statutorily lowering the age of testamentary capacity to 16 years may be found by analogy in the *Insurance Act*. In that Act, a minor who is 16 years or older is granted adult capacity to make an enforceable contract of life insurance and has the capacity of an adult "in respect of" a contract of life insurance.[57] Accordingly, such a minor could obtain life insurance and, in a contract or by declaration, designate a beneficiary to receive the proceeds of the policy on the minor's death.[58] The proceeds would not form part of the minor's estate and so would not pass according to intestacy legislation.[59] If a 16 year old minor has been statutorily empowered to make this important testamentary decision about what would likely be a significant sum of money, why should a 16 year old not otherwise be able to make a will?

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[57] *Insurance Act*, R.S.A. 2000, c. I-3, s. 586 [Insurance Act].

[58] Insurance Act, note 57, s. 574.

[59] Insurance Act, note 57, s. 580.

[44] On the other hand, if a 16 year old minor could make a will, a somewhat anomalous situation would be created. Any significant money or property which the minor is entitled to receive from another must generally be held and administered by a trustee on the minor's behalf and yet the minor would (like an adult) be able to personally dispose of that money or property by will.[60] In other words, the minor would be considered able to handle the minor's own property and, simultaneously, not be considered able to handle it. But this situation is also present in the case of a minor who designates a beneficiary to receive the minor's life insurance proceeds on death – the *Insurance Act* confers adult capacity in respect of any contract of life insurance "[e]xcept in respect of a minor's right as beneficiary …."[61] So a minor who is named as a beneficiary under a life insurance policy cannot deal with those rights until age 18 (for example, by assigning them).[62] A minor beneficiary would also require a trustee to receive and administer insurance proceeds if they become payable during the minority.

[45] By the narrowest of margins, the ALRI Board favours amending the Alberta Act to lower the age of testamentary capacity to 16 years.[63] The majority Board members are of the view that today's youth are quite capable of exercising sufficiently mature judgment to be able to write their own wills. They oppose requiring an individual assessment of testamentary capacity by means of court declaration, since the expense of doing so would make it an unrealistic option for most youth.

[46] Board members who voted against lowering the age of testamentary capacity favour allowing a minor to apply to court for a declaration of testamentary capacity, as in Australia, if the minor wants to alter the distribution which would otherwise occur under the law of intestate succession.

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[60] *Minors' Property Act*, S.A. 2004, c. M-18.1. For example, a trustee would administer the minor's entitlement to money or property from such sources as an intestacy, a will, litigation-related settlement or damages, a trust deed and a court-ordered sale of property.

[61] Insurance Act, note 57, s. 586.

[62] *Canadian Encyclopedic Digest* (West.), 3d ed., Vol. 19, looseleaf (Toronto: Carswell, 2001) at § 1254.

[63] The vote was tied and the Chair cast the deciding vote in favour of the reform: Alberta Law Reform Institute, *Minutes of Board Meeting* (25 November 2005) at 2.

RECOMMENDATION No. 2
The age of testamentary capacity in Alberta should be lowered from 18 years to 16 years.

b. Married or partnered minor exception

[47] If the age of testamentary capacity is lowered to 16 years, there seems little reason to retain many of the existing statutory exceptions to the current age of capacity. These exceptions work to confer testamentary capacity on persons who would typically be between 16 and 18 years of age.

[48] The married or partnered minor exception would continue to serve a purpose only for minors who marry or enter an adult interdependent relationship under the age of 16. In Alberta, however, no one can legally marry under the age of 16 except for a female who is pregnant or the mother of a living child.[64] Similarly, no one under the age of 16 can enter into an adult interdependent partner agreement,[65] although a minor of any age can establish an adult interdependent relationship by ascription with anyone who is not related by blood or adoption.[66] Status will be ascribed if the couple has lived in a relationship of interdependence for a continuous period of not less than 3 years or has lived in a relationship of interdependence of some permanence, if there is a child of the relationship.[67]

[49] If the age of testamentary capacity is lowered to 16 years, it is submitted that the married or partnered minor exception would be largely obsolete.

[50] While some marriages of females under 16 years do occasionally occur, it is surely a reasonable assumption that such marriages are extremely rare.[68] Similar

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[64] *Marriage Act*, R.S.A. 2000, c. M-5, ss. 17, 19.

[65] Adult Interdependent Relationships Act, note 11, s. 7(2)(c).

[66] Adult Interdependent Relationships Act, note 11, ss. 4(1), 6.

[67] Adult Interdependent Relationships Act, note 11, s. 3(1)(a).

[68] Unfortunately, annual government statistics make it impossible to pinpoint that number with any accuracy: see the Vital Statistics Annual Review published by Alberta Government Services at http://www.servicealberta.gov.ab.ca/vs/statistical_info.cfm . Aggregate statistics are calculated for those 14 years and under (called "<15" in the more recent tables and "14 or less" in the older tables) and 15-19 years (called "15-19") in all the tables). Thus, it is not possible to isolate figures specifically

(continued...)

considerations apply to those minors under 16 years who enter an adult interdependent relationship by ascription. Given the threshold criteria of 3 years' cohabitation or production of offspring, it also seems to be a reasonable assumption that such legal relationships will be extremely rare.

[51] In recommending that the age of testamentary capacity be lowered to 16 years, the British Columbia Law Institute further proposed that there should be "no special status for married minors."[69] The Manitoba Law Reform Commission did not explicitly consider this particular issue when making its recommendation to confer testamentary capacity on 16 year old persons.

RECOMMENDATION No. 3
If the age of testamentary capacity is lowered to 16 years, the statutory exception which allows a minor to make a will if the minor has or has had a spouse or adult interdependent partner should be repealed.

c. Minor parent exception

[52] Even if testamentary capacity is conferred on everyone at age 16, it would seem prudent to retain Alberta's exception for minor parents.[70] People under the age of 16 can and certainly do bear and raise children and this provision is needed to benefit those children. If the married or partnered minor exception is deleted, however, the minor parent exception should also be amended to remove its reference to the lack of a spouse or adult interdependent partner so that the exception would also apply to any parent under 16 years. The testamentary

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[68] (...continued)
for those who marry at age 15 and under. For the 6-year period of 1997-2002, there was only one bride who was 14 or under. That marriage occurred in 1998. In that same year, there were 803 marriages where the bride was between 15 and 19 years and 182 where the bridegroom was between 15 and 19 years (the overlapping figure was 119 marriages where both parties were between 15 and 19 years). In 1998, there was a total (in all age categories) of 17,813 marriages in Alberta. Each year there seems to be approximately 600 to 800 marriages where one or both parties are between 15 and 19 years, out of a total number of marriages varying between 17,000 and 18,000. But again, it cannot be determined how many of those marriages involve 15 year olds: the statistics for 1997-2000 are found at *ibid*. The statistics for 2001-2002 were provided orally to ALRI by Alberta Vital Statistics on March 8 and 9, 2005.

[69] British Columbia 2006 Report at 24 .

[70] Alberta Act, s. 9(3).

capacity conferred by the exception should remain limited to providing by will for the child rather than conferring general will-making power.

RECOMMENDATION No. 4
If the age of testamentary capacity is lowered to 16 years, the statutory exception to allow any minor parent under that age to make a will providing for the minor's child or children should be retained. The exception should not be dependent on the marital or relationship status of the minor parent.

2. Alternative recommendations: Retain the age of testamentary capacity at 18 years

[53] Because the vote to recommend lowering the age of testamentary capacity was so close, the ALRI Board feels that, for the purpose of consultation, it should also present what its alternative recommendations would be if the age of testamentary capacity remains at 18 years. Even for this alternative scenario, ALRI would like to propose a major reform. Retaining the age limit at 18 years does not mean that the rest of the *status quo* should not be changed.

a. Minor spouses, partners and parents

[54] ALRI proposes that the current statutory exceptions to the achievement of testamentary capacity at 18 years old should be repealed. There should no longer be automatic conferring of full or limited testamentary capacity on married or partnered minors and minor parents. Instead, the provisions of the *Intestate Succession Act*[71] and the *Dependants Relief Act*[72] should govern the estates of all minors who die. These statutes function adequately in most situations to produce a fair distribution of a deceased person's estate.

RECOMMENDATION No. 5
As an alternative recommendation if the age of testamentary capacity remains at 18 years, the statutory exceptions for married or partnered minors and minor parents should be repealed.

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[71] *Intestate Succession Act*, R.S.A. 2000, c. I-10.

[72] *Dependants Relief Act*, 2000, c. D-10.5.

b. Court declaration of testamentary capacity

[55] In place of the current statutory exceptions, ALRI recommends that minors who want to make a will should be allowed to apply to a court for a declaration of testamentary capacity, as in Australia. This procedure allows an individual assessment to be made of the minor's maturity and capacity. Such an assessment is most properly made by a court. In Alberta, the Court of Queen's Bench has jurisdiction in the surrogate area and would be the appropriate court to assess such an applicant.

[56] Admittedly, obtaining a court declaration of testamentary capacity will require the expenditure of both time and money, making it a suitable procedure only if there is a significant estate in question. Minors for whom a court application is not viable would simply have to rely on the *Intestate Succession Act* and *Dependants Relief Act* to effect the distribution of their estates, which will usually produce a fair and reasonable result, as discussed. But the availability of a court declaration of testamentary capacity can address those occasional cases where a default statutory distribution of a minor's estate would not be appropriate.

RECOMMENDATION No. 6
As an alternative recommendation if the age of testamentary capacity remains at 18 years, a minor should be allowed to apply to the Court of Queen's Bench for a declaration of testamentary capacity so that the minor can make a will.

c. Limited or general grant of testamentary capacity?

[57] The ALRI Board was evenly divided on the issue of whether the court's declaration should confer general testamentary capacity (so that the minor could make a will without further court supervision or approval of its terms) or whether the grant of testamentary capacity should be limited to making a specified will approved by the court. As discussed earlier in this chapter, the Australian model requires that the court vet and approve a specific will for the minor. This is one more measure of control over a minor who is allowed to make a will. However, two Canadian law reform agencies have advocated a general grant of testamentary capacity so that a minor can make any will, without the necessity for court approval of its terms. If a person has testamentary capacity (whether by reaching a certain age or by court declaration), surely the fact of testamentary capacity means

they are legally capable of writing a valid will on their own without further supervision. Indeed, further supervision could be construed as insulting.

[58] Because both arguments found equal support among ALRI Board members, we seek your input concerning which option constitutes the best choice.

REQUEST FOR COMMENT: Limited or General Grant of Testamentary Capacity?

When a court grants testamentary capacity to a minor, should the minor be able to make a will without submitting its terms to the court for approval or should the court be required to approve a proposed will?

CHAPTER 3. STATUTORY WILLS FOR PERSONS WITHOUT TESTAMENTARY CAPACITY

A. Introduction

[59] After reaching the age of majority, adults may possess and then lose testamentary capacity, either temporarily or permanently, due to any number of conditions resulting in mental disability or mental incompetence, including mental illness, brain injury from physical trauma, senile dementia, etc. Some people may never have testamentary capacity in their lifetime due to developmental delay or impairment. However, the legal assessment of an adult's testamentary capacity is never just presumed from the presence of a mental condition; it is always assessed on an individual basis. The law is clear that a mentally challenged person whose affairs require management by a substitute decision-maker may still have the testamentary capacity to create a will.[73]

[60] The law in Canada also seems clear that a substitute decision-maker cannot exercise the testamentary power of a person under their care by making, altering or revoking that person's will. A testator's power to make a will cannot be transferred or delegated at common law. Like getting married or serving a prison sentence, will-making is classified as a personal act that can only be performed by the principal, not by an agent. In addition, the fiduciary nature of the relationship between a principal and their agent, attorney or trustee restricts a substitute decision-maker from disposing of the principal's property without clear and specific authority to do so; therefore, this principle also restricts substituted will-making.[74] Although many Canadian statutes confer on substitute decision-makers very broadly-stated general powers to deal with the property and affairs of the persons under their care, it is extremely doubtful that the power to make a will would thereby be included.[75] Five provinces leave no doubt about the matter by

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[73] Feeney at § 2.7.

[74] Dawn D. Oosterhoff, "Alice's Wonderland: Authority of an Attorney for Property to Amend a Beneficiary Designation" (2002), 22 E.T.P.J. 16 at 18-19.

[75] Gerald B. Robertson, *Mental Disability and the Law in Canada*, 2d ed. (Toronto: Carswell, 1994) at 97-98 [Robertson].

expressly providing that a substitute decision-maker cannot make, change or revoke a will.[76]

[61] Courts have no greater authority in this area than other substitute decision-makers. In the absence of express statutory authority, a court cannot make, change or revoke the will of a person without testamentary capacity.[77]

[62] In England, Australia and New Zealand, courts are granted such express statutory authority to make "statutory wills" for persons without testamentary capacity. In Canada, however, courts typically do not have such statutory authority. The one exception is New Brunswick, which extended such jurisdiction to its courts about a decade ago.

B. Circumstances Addressed by Statutory Wills

[63] Before considering the relevant legislation and reform issues in this area, it is useful to canvass the types of fact scenarios which are typically advanced as reasons to make a statutory will.[78] These scenarios are a cause for concern only if they result in an unjust or inappropriate distribution on the incompetent person's death that, for whatever reason, cannot be adequately addressed by the law of intestacy or dependants relief legislation. If the safety net of intestacy and dependants relief statutes produces an acceptable result for a particular incompetent person and their family, then the justification for a statutory will is reduced. The usual fact scenarios discussed in the context of this issue include the following:

- The person made no will before becoming incompetent and intestacy will produce an undesirable result or a result the person would not have wanted.

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[76] Northwest Territories, Nunavut, Ontario, Saskatchewan and Quebec: *Guardianship and Trusteeship Act*, S.N.W.T. 1994, c. 29, s. 36(3); *Substitute Decisions Act*, S.O. 1992, c. 30, s. 31(1); *Adult Guardianship and Co-decision-making Act*, S.S. 2000, c. A-5.3, s. 43; Quebec Civil Code, art. 711.

[77] Robertson, note 75, at 98.

[78] See, e.g., Martin Terrell, "Wills for persons without capacity" (2004), 154 New L.J. 968 at 970 [Terrell].

- A pre-existing will was revoked by marriage or divorce, the person is now incompetent to make a new one and intestacy will produce an undesirable result or a result the person would not have wanted.
- The person did make a will before becoming incompetent but it has become seriously outdated during the period of incompetence for reasons such as:
  - a major asset in the will has been disposed of by the property trustee;
  - the will does not provide for a child who arrived after the period of incompetence commenced;
  - the executor or chief beneficiary has predeceased the testator;
  - there has been a major change in the relationship between the testator and the beneficiaries or heirs at law.
- A statutory will is needed to prevent money inherited from one side of the family from going to the other side on intestacy.
- It is just and desirable to make testamentary provision for a dedicated non-family caretaker (a friend, employee or charitable organization) who of course will have no claim on intestacy or under dependants relief legislation. This scenario is most compelling where the blood relatives are non-existent, remote or neglectful.
- A statutory will can prevent litigation over the estate which would otherwise occur.
- In jurisdictions where inheritance or estate taxes exist (unlike Alberta), a statutory will can result in significant tax savings, for example, by substituting a beneficiary's child for the beneficiary in the will so the estate property passes between the three generations only once, not twice.

[64] A statutory will case in England that had very unique circumstances is *Re Davey*.[79] A young male nurse in a nursing home secretly married an elderly dying woman with mental deterioration. The marriage revoked her will (made while mentally competent) which had left her property to her family. On her death she

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[79] *Re Davey*, [1981] 1 W.L.R. 164 (Ct. of Protection).

would therefore die intestate and her estate would pass to her secret husband of a few days. In the course of an already ongoing application to appoint a trustee, the Court of Protection learned of the secret marriage and quickly appointed the Official Solicitor as trustee to deal with the matter. Without time to challenge the validity of the marriage in court, the Official Solicitor applied for and obtained a statutory will in the same terms as the revoked will, without notice to the husband or family. The woman died just a few days later. The court observed that the disinherited husband's remedy would be to apply for a share of the estate under the dependants relief legislation.

[65] It is also important to remember when considering fact scenarios for statutory wills that a court need not be asked to make a statutory will to deal with absolutely all of a person's estate. If an existing will or the intestacy laws will distribute a person's estate in an appropriate way except for one small aspect which needs intervention, the court can be asked to simply make that one adjustment. For example, the court could make a codicil to an existing will to add a bequest to a caregiver. As stated by the Law Reform Committee of Victoria:

> ... it should be made clear that the Court is not bound to make an entire will for an incapable person. The applicant may be satisfied with a specific bequest or devise, for example a life interest in a house in which the applicant may be living with the incapable person whom he or she is caring for on a gratuitous basis. The rest of the estate can be distributed according to an existing will or the intestacy rules, or be left to a family provision claim. The jurisdiction should be capable of being exercised only to meet the need at hand. If every time the court were to consider that it must authorise an entire will that could be an occasion for expensive enquiries and hearings.[80]

C. Statutory Wills in England

[66] The English Court of Protection has been empowered since 1970 to make statutory wills for mentally incompetent persons.[81] On application, a judge may

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[80] Law Reform Committee (Victoria), *Reforming the Law of Wills*, Final Report (1994) at para. S.5A.23 [Victoria Report].

[81] Roger Kerridge, *Parry & Clark: The Law of Succession*, 11th ed. (London: Sweet & Maxwell, 2002) at 66 [Parry & Clark]. This authority is currently found in the *Mental Health Act 1983* (U.K.), 1983, c. 20, ss. 96-97 [Mental Health Act] but it will be replaced with equivalent provisions in the *Mental Capacity Act 2005* (U.K.), 2005, c. 9, s. 18 and Schedule 2, ss. 1-4 when that portion of the Act is proclaimed. (Some sections of the Act came into force at various dates in 2006 and 2007, but the statutory wills provisions are not yet in force). The *Mental Capacity Act 2005* resulted from a review of substitute decision-making by The Law Commission (England), *Mental Incapacity*, Report

(continued...)

authorize the creation of a will or codicil for a "patient," defined as a person who "is incapable, by reason of mental disorder, of managing and administering his property and affairs …."[82] Mental disorder means "mental illness, arrested or incomplete development of mind, psychopathic disorder and any other disorder or disability of mind …."[83] A judge must not make a statutory will for a patient unless "the judge has reason to believe that the patient is incapable of making a valid will for himself."[84] A judge cannot make a statutory will for a minor patient.[85]

[67] Under the Court of Protection Rules, an application for a statutory will may be brought by a wide assortment of people, including the patient's receiver (property trustee), a beneficiary under an existing will, an heir at law on intestacy, an attorney under an enduring power of attorney, any person for whom the patient might be expected to provide if the patient were not mentally disordered, or any other person the court may allow.[86]

[68] In authorizing a statutory will, the court is to make the provision "which could be made by a will executed by the patient if he were not mentally disordered …."[87] Accordingly, "[t]he Court will, broadly speaking, attempt to make for the patient the will it supposes he would, had he been capable, have made for himself."[88] The court is to proceed in a subjective manner to determine what this particular person would want done with their estate, rather than just doing what the

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[81] (...continued)
No. 231 (1995). This report contains virtually no discussion of the law and practice of statutory wills, apparently treating it as self-evident that statutory wills are a useful and valid mechanism that should continue as before. And indeed, the *Mental Capacity Act 2005* makes no substantive changes to this area.

[82] Mental Health Act, note 81, s. 94(2).

[83] Mental Health Act, note 81, s. 1(2).

[84] Mental Health Act, note 81, s. 96(4)(b).

[85] Mental Health Act, note 81, s. 96(4)(a).

[86] Lord Mackay of Clashfern, ed., *Halsbury's Laws of England*, 4th ed. reissue, vol. 30(2) (London: LexisNexis Butterworths, 2005) at para. 695 [Halsbury's].

[87] Mental Health Act, note 81, s. 96(1)(e).

[88] Parry & Clark at 67.

court perceives as being objectively best. The leading case of *Re D.(J.)*[89]listed five principles or factors for a court to follow when devising a statutory will:

> (1) the patient should be assumed to have a brief lucid interval at the time the will was made;
>
> (2) during that lucid interval it should be assumed that the patient has full knowledge of the past and realises that as soon as the will is executed he will lapse back into his pre-existing mental state;
>
> (3) the actual patient must be considered, with all his antipathies and affections that he had while in full capacity, and not a hypothetical patient;
>
> (4) the patient must be assumed to be acting reasonably and to have been advised by a competent solicitor; and
>
> (5) in normal cases, he is to be envisaged as taking a broad brush to the claims on his bounty rather than an accountant's pen.[90]

[69] Subjectively considering the actual, not hypothetical, person can pose difficulties in some circumstances. In *Re C*, the patient was profoundly mentally handicapped from birth and lived in an institution for her entire life. She inherited a great deal of money from her parents.[91] Her relatives appeared to be largely unaware of her existence. Apart from the staff and other patients at the hospital, her only friend was a volunteer from a charitable organization concerned with mental patients. The court was unable to do a subjective assessment of Miss C because

> [i]n all relevant respects, the record of her individual preferences and personality is a blank on which nothing has been written. Accordingly, there is no material on which to construct a subjective assessment of what the patient would have wanted to do... . [I]n those circumstances the court must assume that she would have been a normal decent person, acting in accordance with contemporary standards of morality. In the absence of actual evidence to the contrary, no less should be assumed of any person ....[92]

So "the judge was obliged to partially resurrect the patient on the Clapham omnibus" and objectively assess what Miss C might have wanted to do with her

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[89] *Re D.(J.)*, [1982] 1 Ch. 237.

[90] Halsbury's, note 86, vol. 30(2) at para. 695, summarizing *Re D.(J)*, [1982] 1 Ch. 237 at 243-244.

[91] *Re C*, [1991] 3 All E.R. 866 (Ch.).

[92] *Re C*, [1991] 3 All E.R. 866 (Ch.) at 870.

estate.[93] The court felt that she would be influenced by two considerations – first, that she had lived her entire life in community care and second, that her wealth had come from her family. Accordingly, the court decided that she would have felt a moral obligation to recognize both the community and her relatives in her will. The statutory will therefore split the estate between local mental health charities and the relatives. The effect of the statutory will was to significantly benefit the charities, who would have received nothing if the estate had passed by intestacy.

[70] Once the court has approved the terms of a statutory will, it will authorize someone (usually the property trustee) to sign the will for the person who lacks capacity. The authorized person must sign the will with their own name and the name of the patient, in the presence of two or more witnesses present at the same time. The witnesses must then sign the will in the presence of the authorized person. Finally, the will must be sealed with the court seal. Apart from these special formalities, the will is governed by the standard wills legislation.[94]

[71] Statutory will applications are fairly rare in England – only around 250 applications per year.[95] Applications are detailed, time-consuming to prepare and therefore costly to bring. The effort and cost must be assessed against the size of the estate and the consequences of not having a statutory will.[96] As one writer notes:

> An application needs to show the patient's family and interests, character and history of generosity, the patient's testamentary history and the relationship to his proposed beneficiaries, the size of the estate and the likely size of the estate at the date of death. The application must then apply all these factors to the present situation and show why the present dispositions under an existing will or intestacy are inappropriate, and why the patient would wish to change those present dispositions. The burden of proof is on the applicant to justify the change to the current dispositions.[97]

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[93] I.M. Hardcastle, "Statutory wills and the blank canvas" (1991), 135 So. J. 780-781 at 781.

[94] Mental Health Act, note 81, s. 97; Perry & Clark at 66.

[95] Terrell, note 78, at 968.

[96] Terrell, note 78, at 970.

[97] Terrell, note 78, at 968, 970.

D. Statutory Wills in Australia

[72] Five Australian jurisdictions (Northern Territory, Queensland, South Australia, Tasmania, and Victoria) authorize the making of statutory wills for mentally incompetent persons.[98] A sixth jurisdiction (Western Australia) has such legislation awaiting passage and proclamation.[99] Only two jurisdictions (Capital Territory and New South Wales) do not allow the making of statutory wills for adults lacking testamentary capacity.[100] In addition to enacted legislation, the uniform model statute proposed by the Australian National Committee for Uniform Succession Laws recommends that all Australian jurisdictions adopt a standard procedure allowing statutory wills.[101]

[73] There are several differences between the English model of statutory wills and the typical Australian model. A major difference is that, in England, most people apply to court to make a statutory will in a one-step process. The typical Australian model creates a two-step process whereby every applicant must first seek leave of the court to bring a subsequent application for a statutory will.[102]

[74] The Australian two-step process is designed to screen applications so that only well-founded applications will be heard by the court. It reflects a fear that frivolous or vexatious applications may be brought. In Australia, anyone can apply to have a statutory will made for an incompetent person. This permissive model recognizes that a wide assortment of people who interact with an incapacitated person may have good reason to be concerned about that person's affairs (such as

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[98] *Wills Act* (N.T.), ss. 19-26 [Northern Territory Act]; *Succession Act 1981* (Qld.), ss. 21-28 [Queensland Act]; *Wills Act 1936* (S.A.), s. 7 [South Australia Act]; Tasmania Act, ss. 27A-27I; *Wills Act 1997* (Vic.), ss. 21-30 [Victoria Act].

[99] Western Australia Bill, s. 24 will amend the *Wills Act 1970* (W.A.) [Western Australia Act].

[100] Adoption of such legislation has been recommended by the New South Wales Law Reform Commission, but its report has not been to date implemented: New South Wales Law Reform Commission, *Wills for Persons Lacking Will-making Capacity*, Report No. 68 (1992) at 5 [New South Wales Statutory Wills Report].

[101] Australia Uniform Report at 44-58.

[102] The two-step process of requiring leave to be sought before the application hearing is found in Victoria, South Australia, Queensland and Northern Territory. It is also recommended by the uniform model statute. It is not present in Western Australia or Tasmania, which both use a single application procedure.

solicitors, social workers and health care workers).[103] But the downside of allowing anyone to apply is that "frivolous or vexatious applications may be lodged, or relatives may make applications for the purpose of ascertaining what provision, if any, the person who is the subject of an application has made for them in a will."[104]

[75] The disadvantage of a two-step process is that an applicant must appear twice – first to seek leave and then later to make the substantive case for a statutory will. In a small estate, the cost of two applications might be prohibitive. Also, in a clear case that is uncontested, two hearings seem excessive. Therefore, the court is usually given the power to allow the leave hearing to immediately proceed as the substantive hearing, using the same evidence and documents which have been filed. In other words, a leave application can (in appropriate cases) "be utilised as a 'fast track' procedure."[105]

[76] The application for leave must be supported by extensive evidence and documentation about the person's lack of testamentary capacity both now and in the future, the need to make a statutory will, the size and nature of the estate, the person's wishes or history concerning family and charitable giving, whether there is an existing will, the potential objects of testamentary provision, the heirs at law on intestacy and, of course, a draft of the proposed testamentary direction.[106] An application for leave must essentially present the substantive case for making a statutory will.

[77] By contrast, the English one-step model screens potentially frivolous or vexatious applications by putting some restrictions on who may apply for a statutory will in the first place. As already noted, English regulations specify many types of people who can apply for a statutory will, including the patient's receiver (property trustee), a beneficiary under an existing will, an heir at law on intestacy, an attorney under an enduring power of attorney and any person for whom the

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[103] New South Wales Statutory Wills Report at 12-13.

[104] New South Wales Statutory Wills Report at 14.

[105] Victoria Report at para. S.5A.21.

[106] See, e.g. Queensland Act, s. 23.

patient might be expected to provide if the patient were not mentally disordered. But any other person who does not fit one of those categories must have the court's permission to apply for a statutory will. In other words, England uses a one-step model for the most common applicants, but not for a narrow category of other applicants – the kind who have the most remote relationship to the patient and presumably might be the most likely to bring an unfounded application. These applicants must use a two-step procedure and obtain leave before bringing an application for a statutory will.

[78] The Australian model also provides explicitly that the court is not bound by the rules of evidence. This makes it much easier to receive and assess information about the incapacitated person's wishes, habits and character.

[79] Before making a statutory will, Australian courts must be satisfied that the person lacks testamentary capacity and is incapable of making a valid will. But unlike the English legislation, Australian statutes do not explicitly tie testamentary incapacity to concepts of mental disability or impairment. In practical terms, the effect of both models is probably the same, but the Australian model appears to be more objective and less stigmatizing as a result. As stated by the Law Reform Committee of Victoria:

> ... it would be better not to attempt to enumerate the possible causes of incapacity in the person on whose behalf a statutory will may be made, by references to disease, senility, injury, mental infirmity, etc. That would involve an applicant having to show which kind of incapacity the person on whose behalf a statutory will was being sought was suffering from. Some of these terms relating to mental incapacity are not clear of meaning and are demeaning to the sufferer.[107]

[80] Also in contrast to the English model, most Australian jurisdictions allow a statutory will to be made for a minor who lacks testamentary capacity.[108] This power is distinct from the power which most Australian courts also have to authorize a minor to make a will despite their minority. In that situation, the minor lacks testamentary capacity only by temporary reason of youth, with no other underlying cause of long-term incapacity, and the minor is personally requesting

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[107] Victoria Report at para. S.5A.26.

[108] The Western Australia Bill will restrict statutory wills to adults without testamentary capacity.

the ability to make a will. By contrast, the statutory will provisions are used where someone other than the minor is applying to have a statutory will made for a minor who is not going to acquire testamentary capacity on reaching majority or during their adult life due to some underlying cause of long-term incapacity.

[81] Like the English model, the typical Australian model requires the court to subjectively consider the actual person who lacks testamentary capacity, not a hypothetical person. In the language of the uniform model statute, the court must be satisfied that "the proposed will, alteration or revocation *is or might be one that would have been made* by the proposed testator if he or she had testamentary capacity."[109] This flexible formulation allows the court to examine the issue according to a wide range of factors, as in England. Two Australian jurisdictions (Victoria and South Australia) use a much narrower formulation (the court must be satisfied that "the proposed will or revocation *accurately reflects the likely intentions* of the person, if he or she had testamentary capacity"),[110] which has been interpreted as limiting the court to examining only the proposed will rather than examining the wide range of factors delineated in the English case law.[111] To avoid this limiting effect, the majority of Australian jurisdictions (Northern Territory, Queensland, Tasmania and West Australia) use variations of the more flexible wording also used in the uniform model statute.

[82] The typical Australian model provides that a court can make a statutory will only if the person who lacks testamentary capacity is alive at the date on which the order is made.[112] If the incapacitated person dies at any point in the application process before the order is given, the possibility of making a statutory will ends and the person's estate will pass subject to the usual law of wills, intestacy and dependants relief. The Law Reform Committee of Victoria had recommended a more radical proposal – that an application for a statutory will should be able to be brought within six months of the incapacitated person's death (or such further

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[109] Australia Uniform Report at 57, s. 21(b) of the uniform model statute [emphasis added].

[110] Victoria Act, s. 26(b) [emphasis added].

[111] *Boulton v. Sanders* (2004) 9 V.R. 495 (C.A.) discussed in John Hockley, "Statutory wills in Australia: Wills for persons lacking capacity" (2006), 80 Austl. L.J. 68 at 71-72.

[112] See, e.g., Northern Territory Act, s. 19(3).

extended period as the court may allow), on the basis that the extent of the estate and the relative claims of potential heirs would be clearest at that point.[113] However, this recommendation was never implemented in Victoria or followed by any other Australian jurisdiction. The National Committee for Uniform Succession Laws stated that:

> [t]he advantage of excluding applications made after the death of a person is that all applications to adjust how the person's estate will otherwise be distributed (whether by will or by the relevant intestacy rules) will be subject to a single legislative regime, namely, family provision legislation. This avoids the possible conflict that might arise if two different types of applications could be made after the death of a person.[114]

[83] A final departure from the English model concerns the method of executing a statutory will. In the typical Australian model, the court does not authorize a person (such as the property trustee) to sign the will on behalf of the incompetent person with their name and the incompetent person's name. The statutory will is instead signed by the Registrar of the court, sealed with the court seal and deposited in the court's will registry.[115] It is a much more direct recognition that a statutory will is essentially a court order.

E. Statutory Wills in New Zealand

[84] The Family Court of New Zealand is empowered to make a statutory will for a person who is subject to a property order. Although the person has already been found incompetent to manage their own affairs and a manager has been appointed to administer their property, the statute provides that the person is not, by reason only of that order, incapable of making a will. The court will assess testamentary capacity before it acts.[116]

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[113] Victoria Report at paras. S.5A.7, S.5A.17(3).

[114] Australia Uniform Report at 50-51.

[115] This model is not used in Tasmania, where statutory wills are made by the Guardianship and Administration Board rather than by a court. The Board is a special tribunal established under the *Guardianship and Administration Act 1995*. It handles all guardianship appointments and other issues concerning mentally incompetent persons. A statutory will is signed by the President or Deputy President of the Board in the presence of two witnesses present at the same time and then attested by those witnesses in the Board official's presence. A copy of the statutory will is given to the incapacitated person and the Public Trustee: Tasmania Act,. ss. 27A(1) and (4) and 27I.

[116] *Protection of Personal and Property Rights Act 1988* (N.Z.), 1988 No. 4, ss. 2, 54, 55 [Rights Protection Act].

[85] The court has a few mechanisms at its disposal. It can direct that a person subject to a property order may make a will only with the leave of the court.[117] If there is an existing will, the court can ascertain the testator's "present desire and intention"[118] to see if the existing will still expresses it. If the will does not, the court can make a statutory will "in accordance with that present desire and intention."[119]

[86] If the court has directed that a will can be made only with the court's leave or if there is no existing will, the court can make a statutory will by first settling "the proposed terms of the testamentary disposition provisionally"[120] and then authorizing the manager to execute a will in those terms for and on behalf of the person. There is no real test stated in the legislation to indicate whether the terms of a statutory will should be determined objectively or subjectively. However, case law has determined that English precedent should be followed, despite its

> … somewhat different statutory framework … , but in the absence of any guidelines the test suggested by Sir Robert Megarry VC [in *Re D.(J.)*] seems eminently practical, particularly as the Vice Chancellor did not suggest that the factors or principles enumerated by him were intended to be exhaustive.[121]

Therefore, a subjective assessment of the incapacitated person will occur, to the greatest extent possible.

[87] The signing requirements also follow the English model. The manager signs before two witnesses present at the same time and the witnesses then subscribe in the presence of the manager. Finally, the will is sealed with the court seal.[122]

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[117] Rights Protection Act, note 116, s. 54(2).

[118] Rights Protection Act, note 116, s. 54(6).

[119] Rights Protection Act, note 116, s. 54(6).

[120] Rights Protection Act, note 116, s. 55(2).

[121] *Re Manzoni (A Protected Person): Kirwan v. Public Trustee*, [1995] 2 N.Z.L.R. 498 at 505 (H.C.).

[122] Rights Protection Act, note 116, s. 55(4).

F. Statutory Wills in Canada (New Brunswick)

[88] As already mentioned, the only Canadian jurisdiction which allows a court to make a statutory will for a person without testamentary capacity is New Brunswick. In 1994, New Brunswick amended its *Infirm Persons Act* so that the Court of Queen's Bench would have "the power to make, amend or revoke a will in the name of and on behalf of a mentally incompetent person."[123] A mentally incompetent person is one who requires care, supervision and control due to "a condition of arrested or incomplete development of mind, whether arising from inherent causes or induced by disease or injury" or "who is suffering from such a disorder of the mind."[124] In addition to persons declared to be mentally incompetent by a court, these provisions also apply to anyone found by a court to be incapable of handling their affairs "through mental or physical infirmity arising from disease, age or other cause, or by reason of habitual drunkenness or the use of drugs."[125]

[89] While the court must find the person to be mentally incompetent or incapable of managing their affairs, there is no explicit statutory requirement that the person must be found to lack testamentary capacity. Such a requirement is present in the English, Australian and New Zealand models. A New Brunswick court has commented that, if the person still has testamentary capacity, they should sign the will along with the committee (property trustee), but if the person does not have testamentary capacity, then there is no need for the person to sign it.[126] Even if this is a correct interpretation of the statute, it seems inappropriate for a court to be acting when a person has testamentary capacity and can legally make their own will.

[90] The Act states a subjective test for the exercise of the court's discretion. The Act provides that a court may make, amend or revoke a will:

> ... where the court believes that, if it does not exercise that power, a result will occur on the death of the mentally incompetent person that the mentally

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[123] *Infirm Persons Act*, R.S.N.B. 1973, c. I-8, s. 3(4) [Infirm Persons Act].

[124] Infirm Persons Act, note 123, s. 1.

[125] Infirm Persons Act, note 123, s. 39(1).

[126] *Re M. (Committee of)* (1998), 27 E.T.R. (2d) 68 at 79 (N.B. Q.B.).

> incompetent person, if competent and making a will at the time the court exercises its power, would not have wanted.[127]

Only New Brunswick states the test as a negative proposition – the avoidance of a result which the mentally incompetent person would *not* want. One critic has inquired, "Would comments like 'I want A to get something' contrasted with 'I would not want A to get anything' furnish different results?"[128] Stating the test as a negative also caused some to question whether the English case law could be used when interpreting the law.[129] Despite this concern, New Brunswick courts have since adopted the English case law concerning the factors and principles which should guide a court in subjectively making a statutory will.[130]

[91] If the court believes a statutory will is warranted, it may authorize or direct the committee of the estate to do any action in relation to the incompetent person's estate that the person could do if competent.[131] Only a committee can be authorized to so act by the court. An attorney under an enduring power of attorney cannot apply for authorization to make, amend or revoke a will.[132]

[92] The making of any will, amendment or revocation by the committee must be approved by the court in order to be valid.[133] This seems to create an odd procedure. The court approves the terms of the will after the committee has executed the will rather than authorizing them in advance.[134]

[93] No other Canadian jurisdiction has followed New Brunswick's lead to authorize the making of statutory wills. Nor does there appear to be any great reform movement to advocate this development in Canada. However, one

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[127] Infirm Persons Act, note 123, s. 11.1(1).

[128] Eric L. Teed, Q.C. and Nicole Cohoon, "New Wills for Incompetents" (1996), 16 E.T.J. 1 at 2 [Teed & Cohoon].

[129] Franklin O. Leger, Q.C., "Court-approved Wills" (1998), 14:3 So. J. 7 at 8 [Leger].

[130] *Re M. (Committee of)* (1998), 27 E.T.R. (2d) 68 at 77 (N.B. Q.B.).

[131] Infirm Persons Act, note 123, s. 15.

[132] *Re MacDavid* (2003), 4 E.T.R. (3d) 50 at 53 (N.B. Q.B.).

[133] Infirm Persons Act, note 123, s. 15.1.

[134] Infirm Persons Act, note 123, ss.11.1, 15.1; Leger, note 129, at 9.

academic – Professor Gerald B. Robertson of the University of Alberta – has called for this reform to be made:

> If the present position is indeed that Canadian courts cannot authorize a property guardian to make or revoke a will, this is an unfortunate omission in our law. Although such a power is one which should rarely be exercised, there are situations in which its absence can cause grave injustice, injustice which cannot necessarily be cured by the law of intestate succession or by dependants' relief legislation. Those responsible for reforming the law in this area should give serious consideration to following the lead taken by the English legislation.[135]

G. Is There a Need for Reform in Alberta?

[94] Should an Alberta court have the power to make a statutory will for an adult who lacks testamentary capacity?

[95] Arguments in favour of court jurisdiction to make statutory wills usually focus on the perceived practical need, in some individual cases, to avoid an unjust or inappropriate distribution of an incapacitated person's estate on death. Sometimes the problematic distribution is not resolvable by reliance on intestacy or dependants relief laws and sometimes the problematic distribution may be the result of those laws.

[96] However, there are some major philosophical hurdles militating against allowing a court to simply come in and rearrange a person's testamentary affairs when the subject is personally incapable of doing it. Canadian legislation largely respects the view that will-making is a sacrosanct personal act that should not ever be delegated to another. To allow even a court to engage in substitute will-making for the most vulnerable of testators can attract condemnation. As some legal commentators in New Brunswick stated:

> Is this not another example of the "Big Brother" syndrome where the state can interfere with the discretion of an individual without the individual's knowledge. To what extent should the state continue to interfere with the individual? What next? In the writers' opinion, this is a bureaucratic enactment of control without justification and, as such, subject to dangerous development by the courts.[136]

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[135] Robertson, note 75, at 98.

[136] Teed & Cohoon, note 128, at 3.

[97] There is also the view that the statutory laws of intestacy and dependants relief already represent society's considered legal response to situations where a person does not have a will (for whatever reason) or where succession does not do full justice to a dependent relative. This view argues that the integrity of these statutory safety nets should be preserved without special treatment for a certain class of persons (those without testamentary capacity) whose estates are then handled by alternative means. As stated by the Scottish Law Commission when it refused to recommend any system of statutory wills, "[w]hat such a power would really be would be a power to change the ordinary rules of succession, testate or intestate, which would otherwise apply on the death of the *incapax*."[137]

[98] However, if a person who has testamentary capacity does not want their estate to be distributed according to intestacy or dependants relief laws, the person can avoid that result by exercising their testamentary capacity in an appropriate manner. Persons who lack testamentary capacity simply do not have that choice. It is arguable that the availability of a statutory will restores that choice to them (albeit via a substitute decision-maker) and provides equal opportunity to avoid an unwanted or undesirable result. Even though the choice would have to be exercised by substitute decision-making, it would at least occur in the context of an objective process with the most safeguards possible.

[99] The ALRI Board has serious reservations about allowing statutory wills to be made in Alberta. A major concern is whether it is appropriate or advisable to allow such substitute decision-making for persons lacking testamentary capacity. From the perspective of potential beneficiaries, it may be arguable that a need for this reform exists, but the issue must be assessed from the point of view of the incompetent testator. Society has already provided a default safety net of intestacy and dependants relief legislation to cover situations where a will is absent or inadequate for whatever reason.

[100] The Board is also concerned that allowing statutory wills would encourage estate-sponsored litigation and act as a drain on estates. It is concerned about the existence and nature of evidence in contested cases.

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[137] Scottish Law Commission, *Report on Succession,* Report No. 124 (1990) at 61 [Scotland Report]. The Commission's public consultation on the issue of statutory wills found that "the results of consultation were overwhelmingly against the introduction of any such power": Scotland Report at 62.

[101] The lack of any significant local or national reform movement in Canada advocating this major legal change is also a consideration. Presumably this indicates that there is no pressing need for such a reform.

[102] For the same kind of reasons, the Project Advisory Committee advised the ALRI Board that it did not support this reform. The Committee was also concerned that the legal availability of a statutory will could place a positive duty on a dependent adult's trustee or guardian to inquire into the propriety or adequacy of the dependent adult's will (or lack of same) and to assess whether a statutory will should be sought.

[103] While ALRI questions whether there is a need to allow statutory wills to be made for persons without testamentary capacity, we want to assess public views and opinions on this issue by consulting as widely as possible.

REQUEST FOR COMMENT: Statutory Wills
Is there a need for reform to allow an Alberta court to make a statutory will for an adult who lacks testamentary capacity?

CHAPTER 4. ORAL WILLS AND ELECTRONIC WILLS

A. Introduction

[104] To be valid, a will must generally conform to the formalities required by the *Wills Act*. The formalities which govern how a will is prepared, signed and witnessed assist in authenticating valid testamentary dispositions:

> The formalities prescribed for making a will provide some sort of safeguard not only against forgery and undue influence but also against hasty or ill considered dispositions. The formalities emphasise the importance of the act of making a will and serve as a check against imprudent action. In general, formalities can be justified by the need to provide reliable evidence of a person's testamentary intentions, which may have been expressed many years before his death.[138]

[105] The most basic formality is that a will must be in writing[139] and be signed by the testator (or by some other person in the testator's presence and at the testator's direction).[140] In Alberta, "writing" is broadly defined as including "words represented or reproduced by any mode of representing or reproducing words in visible form."[141] This flexible concept does not restrict the materials upon which the writing is made, the instruments by which the writing is made, the language used, or the form of the words.[142] But it does prevent oral wills from being valid. Wills that exist solely on audiotape, videotape, film or computer are also invalid, either because they are oral or, if considered to be in writing, because they cannot have an original signature.

B. Oral Wills

[106] Generally speaking, most Canadian jurisdictions (including Alberta) do not recognize oral wills under any circumstances. The province of Newfoundland and

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[138] Parry & Clark at 39.

[139] Alberta Act, s. 4.

[140] Alberta Act, s. 5(a).

[141] *Interpretation Act*, R.S.A. 2000, c. I-8, s. 28(1)(jjj) [Interpretation Act].

[142] Parry & Clark at 41.

Labrador recognizes oral wills made by sailors or fishers at sea.[143] Nova Scotia recognizes oral wills made by military personnel on actual military service as well as mariners or seamen at sea.[144] However, neither of those provinces allows ordinary testators to make valid oral wills. Similarly, in England, Australia and New Zealand, oral wills are invalid except in the limited circumstances of privileged wills for military personnel or sailors.

[107] There does not appear to be any great public demand for oral wills. Nor does there appear to be any developing law reform movement to change the current law. Most law reform agencies which review their jurisdiction's wills legislation do not even bother to raise the issue of oral wills. Those few law reform agencies which do consider the issue have all recommended against recognizing oral wills. The English Law Commission decided that oral wills "would create uncertainty and give rise to litigation because of the difficulties of proving and interpreting oral statements."[145] The Law Reform Commission of British Columbia said that "[a]ny form of oral will which came close to providing the same safeguards [as formalities provide for written wills] would be so technical as to be practically useless."[146]

[108] As discussed in Chapter 1, ALRI has recommended the creation of a statutory dispensing power to save wills that do not meet the required formalities. ALRI considered whether it should be possible to dispense with the requirement of writing, thereby allowing an oral will to be recognized as valid under the dispensing power. Saying "there is no doubt about the answer,"[147] ALRI stated that it should not be possible to dispense with the fundamental requirement that wills be written:

> There may be cases in which a deceased person has made an oral statement with the intention of adopting it as a will. We do not think that many persons do so. That is, while a refusal to admit an oral will to probate

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[143] Newfoundland Act, s. 2(2).

[144] *Wills Act*, R.S.N.S. 1989, c. 505, s. 9 [Nova Scotia Act].

[145] Law Reform Committee (England.), *The Making and Revocation of Wills*, 22nd Report (1980) at 8-9 [England Report].

[146] British Columbia 1981 Report at 26.

[147] Alberta Report at 43.

> may occasionally defeat a testator's intentions, we think that the incidence of such cases is small. On the other hand, to allow evidence of what testators have said to create a will which should be admitted to probate would be to create uncertainty and confusion in which many testators' testamentary wishes would be defeated through the admission to probate of statements which were not intended as wills. The underlying purpose of probate – to admit to probate expressions of testators' testamentary intentions – would, in our opinion, be defeated rather than promoted by the admission of oral wills.[148]

[109] For the purposes of this Report for Discussion, ALRI again considered this issue but sees no compelling reason to change its position.

RECOMMENDATION No. 7
An oral will should not be valid either in its own right or under the dispensing provision. Alberta law should remain unchanged that wills must be written to be valid.

C. Electronic Wills

1. What is an electronic will?

[110] Borrowing the definition of "electronic" from the provincial *Electronic Transactions Act*, one could say that an electronic will is a will that is "created, recorded, transmitted or stored in digital form or in any other intangible form by electronic, magnetic or optical means …."[149] It would include such things as:

- testamentary provisions read or spoken by the testator while being filmed or videotaped. Such provisions would fail anyway as an invalid oral will, quite apart from issues arising out of their existence on film or videotape.
- a written will with completed formalities that is filmed, videotaped, photographed, microfiched or otherwise recorded as a visual image. If the actual will did not exist at the testator's death, this image of the will might possibly be probated "in the same manner as a photocopy of the will would be, i.e., as a document evidencing a written and executed will. This being the case, no amendment to the Act would

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[148] Alberta Report at 43.

[149] *Electronic Transactions Act*, R.S.A. 2001, c. E-5.5, s. 1(1)(a).

appear to be required on the question of admissibility."[150] The law governing missing wills would determine whether such a copy could be admitted to probate.

- a will that exists solely in electronic form in a computer or on a computer disk. Legally, it is arguable whether data that is stored electronically constitutes "writing." In any event, there is no original signature by the testator, although there might be an electronically encrypted signature.

[111] It is this last kind of electronic will – the computer will – which will be the main focus of consideration in this Report for Discussion.

2. Valid in its own right?

[112] Should an electronic will be recognized as legally valid in its own right, on par with a will written on paper? The wills statutes of Canadian jurisdictions do not currently grant such recognition in explicit terms. Nor does England, New Zealand or Australia. Nor does the Uniform Probate Code recognize electronic wills in the United States.[151]

[113] Although no Canadian jurisdiction explicitly recognizes electronic wills in their wills legislation, three provinces have recently passed electronic document laws which could possibly encompass such recognition.

[114] In 2001, Quebec passed a law recognizing the legal validity of any electronic "document" if it complies with the legal rules applicable to paper documents and if its "integrity is ensured."[152] A document's integrity is ensured if it is possible to verify that no alteration has ever occurred to the information in the document.[153] In theory, the legislation is wide enough to apply to wills, assuming

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[150] Manitoba Report at 12.

[151] U.C.C. Uniform Probate Code (2006) [Uniform Probate Code].

[152] *An Act to Establish a Legal Framework for Information Technology Act*, R.S.Q., c. C-1.1, s. 5 [Information Technology Act].

[153] Information Technology Act, note 152, s. 6. A document's integrity is presumed, unless proven otherwise by the person contesting the validity of the document: Information Technology Act, s. 7.

that an electronic document could meet the signature and witness requirements for a valid will and could maintain the necessary integrity until probate.

[115] New Brunswick also has a similar statute.[154] It applies generally to electronic "information," which includes any "document," but the Act's application can be excluded by regulation. However, the regulation does not currently exclude wills from the application of the Act.[155]

[116] Manitoba also has a similar statute, which to date has been only partially proclaimed.[156] The provisions that are in effect clearly concern electronic commerce alone and would not encompass wills. However, the Act has an unproclaimed Part 2 ("Using Electronic Means under Designated Laws")[157] which would be wide enough to encompass electronic wills, if the *Wills Act* is listed as a "designated law" in a regulation made under that Part. So the situation in Manitoba cannot be determined until Part 2 is proclaimed and the designated laws to which it applies are named.

[117] By contrast to the approach taken in Quebec, New Brunswick and (possibly) Manitoba, nine other Canadian provinces and territories (including Alberta) have statutes governing electronic documents which explicitly exclude any application to wills.[158]

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[154] *Electronic Transactions Act*, S.N.B. 2001, c. E-5.5.

[155] *Exclusion Regulation – Electronic Transactions Act*, N.B. Reg. 2002-24.

[156] *The Electronic Commerce and Information Act*, C.C.S.M., c. E-55.

[157] *The Electronic Commerce and Information Act*, C.C.S.M., c. E-55, ss. 8-18.

[158] The nine jurisdictions are British Columbia (*Electronic Transactions Act*, S.B.C. 2001, c. 10, s. 2(4)(a)); Alberta (*Electronic Transactions Act*, R.S.A. 2000, c. E-5.5, s. 7(1)(a)); Saskatchewan (*The Electronic Information and Documents Act*, 2000, S.S. 2000, c. E-7.22, s. 4(1)(a)); Ontario (*Electronic Commerce Act*, S.O. 2000, c. 17, s. 31(1)); Nova Scotia (*Electronic Commerce Act*, S.N.S. 2000, c. 26, s. 3(3)(a)); Prince Edward Island (*Electronic Commerce Act*, R.S.P.E.I. 1988, c. E-4.1, s. 2(3)(a)); Newfoundland and Labrador (*Electronic Commerce Act*, S.N.L. 2001, c. E-5.2, s. 4(1)(a)); Yukon (*Electronic Commerce Act*, R.S.Y. 2002, c. 66, s. 2(3)(a)); and Nunavut (*Electronic Commerce Act*, S.Nu. 2004, c. 7, s.3(3)(a)). The Northwest Territories does not have a statute concerning electronic documents.

[118] The Uniform Law Conference of Canada has recently considered the issue of electronic wills in depth, based on research and analysis by ALRI.[159] ALRI's research showed that any "practical advantage of recognizing electronic wills is very small, literally just the cost of printing the paper."[160] However, even the advantage of having a "paperless will" is ultimately illusory – an electronic will would still need to be printed out and verified in any event, so the estate could deal with third parties. As ALRI noted, "[c]ourt, registry and business practices presently require wills or authenticated copies in paper form. There is no foreseeable change in practice that would recognize a will in electronic form on a computer or removable disk."[161] This effectively eliminates whatever small advantage might exist in recognizing electronic wills.

[119] ALRI found that the problem of authentication is one of the main disadvantages of electronic wills. Authentication involves proving two things: (1) that the testator adopted the electronic record as a will and (2) that the electronic record was not altered after adoption.

[120] ALRI investigated whether there could be an effective "electronic signature" to act as an unique, tamper-proof electronic record included in an electronic will to prove (perhaps decades later) that a certain individual adopted its contents. As an alternative, the feasability of third-party certification was also considered.[162] ALRI concluded that, in order to ensure the desired level of authentication, the law would have to prescribe all the minimum conditions that must be met for proof of authenticity, which would simply involve

> prescribing a level of new formalities or conditions precedent to recognition that would be much more burdensome than the present formalities surrounding the making of paper wills....[163]

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[159] Uniform Law Conference of Canada, *Proceedings of the Eighty-third Annual Meeting* (Toronto, 2001) 60-61 and Appendix E, *Electronic Wills*, at 175-194 [ULCC Conference 2001].

[160] ULCC Conference 2001, note 159, at 60.

[161] ULCC Conference 2001, note 159, at 189.

[162] ULCC Conference 2001, note 159, at 185-186.

[163] ULCC Conference 2001, note 159, at 187.

[121] How to prove (especially over the course of many years) that an electronic will has not been tampered with and altered by another person also seems to be a difficult problem. As ALRI concluded:

> The lapse of a decade or two is likely to make it ever more difficult to show that a specific computer-generated will is the will adopted by the testator. Costs of proving computer-generated wills in electronic form are likely to be substantial, and evidentiary problems are likely to cause valid computer-generated wills to be excluded from probate. On the other hand, the lack of a verifiable safeguard such as a signature will make tampering much easier.[164]

[122] The other major disadvantage of electronic wills concerns their durability or accessibility. With rapid technological change and obsolescence of prior technologies, it cannot safely be assumed that an electronic document made years or decades previously will still be accessible or readable at the time of the testator's death. ALRI noted that:

> Experts consulted suggested it was "reckless foolishness" to expect to store a record electronically for any extended period of time and, further, to expect to be able to recover it, given the constant changes in this field.[165]

[123] Based on ALRI's research and analysis, the Uniform Law Conference of Canada did not recommend that any electronic will should be recognized as legally valid in its own right. However, the ULCC did recommend that, in certain circumstances, it should be possible to give effect to an electronic will under the dispensing power (discussed in more detail under the next heading).

[124] In a recent report, the Law Reform Commission of Saskatchewan was more optimistic about both the current and future ability of computer technology to address such issues as authentication by electronic signatures, detection of unauthorized alterations and durability and future accessibility of electronic records.[166] However, the Commission also noted that "there is little evidence that either the legal profession or the public have any more than a curious interest in

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[164] ULCC Conference 2001, note 159, at 187.

[165] ULCC Conference 2001, note 159, at 60.

[166] Law Reform Commission of Saskatchewan, *Report on Electronic Wills* (2004) at 19-22, 24, 17-19 [Saskatchewan Report].

electronic wills at present."[167] Given the lack of current demand for electronic wills, the Commission agreed with the ULCC approach that electronic wills should not be recognized as valid in their own right but should be given effect (where appropriate) under the dispensing power.[168] However, the Commission also stated that full recognition of electronic wills may be necessary sooner rather than later, given the rapid pace of computerization of all facets of life.[169] These same conclusions have been echoed recently by the British Columbia Law Institute.[170]

[125] ALRI recognizes that technological advances are starting to address issues of authentication and durability. However, such advances do not yet ensure the kind of easily verifiable proof of authenticity and assurance of long-term accessibility that are necessary before the legal validity of electronic wills in their own right can be equated with that of traditional written wills. Therefore, like the Uniform Law Conference of Canada and other Canadian law reform agencies, ALRI does not recommend that electronic wills be currently recognized as legally valid in their own right.

RECOMMENDATION No. 8
The *Wills Act* should not be amended to recognize electronic wills as valid in their own right.

3. Valid under the dispensing power?

[126] Should it be possible to recognize an electronic will as valid under a statutory dispensing power, despite the electronic will's lack of compliance with the usual formalities? Such a result occurred in an uncontested 1996 Quebec case called *Rioux v. Coulombe*.[171] A woman committed suicide, leaving a note beside her body directing the finder to an envelope containing a computer disk. Handwritten on the disk was the phrase "This is my will / Jacqueline Rioux /

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[167] Saskatchewan Report at 25.

[168] Saskatchewan Report at 34.

[169] Saskatchewan Report at 7.

[170] British Columbia 2006 Report at 31-33.

[171] *Rioux v. Coulombe* (1996), 19 E.T.R. (2d) 201 (Qc. Sup. Ct.). This case is extensively discussed in Nicholas Kasirer, "From Written Record to Memory in the Law of Wills" (1997-98), 29 Ottawa L. Rev. 39.

February 1, 1996." The disk contained only one electronic file composed of unsigned directions of a testamentary nature. The file had been saved to computer memory on the same date on which the testator wrote in her diary that she had made a will on her computer.

[127] A clerk (master) of the Quebec Superior Court found this electronic will to be valid under that province's dispensing power, which specifies the requirement that the imperfect will must "unquestionably and unequivocally [contain] the last wishes of the deceased."[172] The unique circumstances of this case made it possible to meet that requirement. The electronic document was directly and unambiguously connected in time and location to the deceased and her death. This clear connection also reduced any suspicion of tampering by third parties. Evidence showed that those family members who lived with the deceased did not know of the will's existence until after her death. They also had no computer skills and would not have known how to alter it in any event. Although the electronic will was unsigned, the deceased's signature on the disk's label allowed the court to draw an analogy to case law validating unsigned wills placed in envelopes bearing the testators' signature.[173]

[128] The *Rioux v. Coulombe* case appears to be the only Canadian case on the issue of electronic wills. It has not been judicially considered by any other case in the eleven years since it was decided. It may become one of those cases whose value as a precedent is confined to its very unique and specific facts. Nevertheless, ALRI's report to the Uniform Law Conference of Canada relied on this case to support its recommendation to recognize electronic wills (in appropriate cases) under the dispensing power of the ULCC's Uniform Wills Act:

> I do not think that one anecdote should drive policy to recognize all electronic wills. However, this case does show that at least one testator, for some reason, had adopted an electronic record as her will, and it also shows that there can be circumstances, however rare, in which an electronic record can be shown, as conclusively as anything can be shown, to embody the testator's testamentary intentions. Therefore, I think that the occurrence of

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[172] Quebec Civil Code, art. 714.

[173] *Rioux v. Coulombe*, note 171, at 207.

> this one case supports the extension of a dispensing power to electronic as well as to written records.[174]

[129] In adopting this recommendation, the ULCC amended its uniform dispensing power so that a court may recognize a document to be a will if it "was not made in accordance with any or all of the formalities referred to in subsection (3), or is in electronic form, or both …."[175] As before, this recognition can be extended only if the court is "satisfied on clear and convincing evidence that the deceased person intended the document to constitute a will …."[176] A narrow definition of "electronic form" is included in the dispensing power so as to preclude recognition of videotaped or tape recorded wills:

> (4) In this section, "electronic form" means, in respect of a document, data that
>
> (a) is recorded or stored in any medium in or by a computer system,
>
> (b) can be read by a person, and
>
> (c) is capable of reproduction in a visible form.[177]

The Law Reform Commission of Saskatchewan has also recommended in its recent report on electronic wills that this wording be used to amend that province's dispensing power so as to allow recognition of electronic wills,[178] as has the British Columbia Law Institute.[179]

[130] Another law reform body which has recommended that a dispensing power should be wide enough to recognize electronic wills is the Australian National Committee for Uniform Succession Laws. In its uniform model statute, the National Committee proposed a very wide definition of "document" that would

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[174] ULCC Conference 2001, note 159, at 193.

[175] Uniform Law Conference of Canada, *Proceedings of the Eighty-fifth Annual Meeting* (Fredericton, 2003), Appendix O, Uniform Wills Act (Amendment), at 336 [ULCC Conference 2003].

[176] ULCC Conference 2003, note 175, at 336. Similarly, the proposed Alberta dispensing power also requires that there be clear and convincing evidence of the deceased person's intention that the document constitute a will: Alberta Report at 51.

[177] ULCC Conference 2003, note 175, at 336.

[178] Saskatchewan Report at 32-33.

[179] British Columbia 2006 Report at 32. British Columbia does not currently have a statutory dispensing power, but the British Columbia Law Institute also recommends that one be enacted: British Columbia 2006 Report at 24-25.

apply only to its recommended dispensing power, rather than applying generally throughout the uniform model statute. The definition is not only wide enough to encompass computer wills but also those made on other media like videotape, audiotape and film. Therefore, it also opens the door to recorded oral wills being validated under the dispensing power in appropriate circumstances. The definition states:

> "document" means any record of information, and includes:
>
> (a) anything on which there is writing, or
>
> (b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them, or
>
> (c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else, or
>
> (d) a map, plan, drawing or photograph.[180]

[131] To date, the uniform model statute (and its dispensing power's expansive definition of "document") has been enacted in three of Australia's eight jurisdictions and is in the process of being enacted in a fourth (Western Australia).[181]

[132] Other law reform agencies have rejected any recognition of electronic wills under a dispensing power. The New Zealand Law Commission recommended a very narrow definition of "document" as "any material on which there is writing."[182] Accordingly, courts cannot (except in the case of privileged military wills) "accept as a will a statement of intention that is not visible but recorded, for example, on audio tape."[183] This narrow definition is implemented in the new wills legislation that the New Zealand parliament is currently in the process of enacting.[184]

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[180] Australia Uniform Report at 14.

[181] Northern Territory Act, s. 10; Victoria Act, s. 9 incorporates by reference a similarly expansive definition of "document" found in the *Interpretation of Legislation Act 1984* (Vic.), s. 38; Queensland Act, s. 5 incorporates by reference a similarly expansive definition of "document" found in the *Acts Interpretation Act 1954* (Qld.), s. 36; Western Australia Bill, s. 23.

[182] New Zealand Report at 10.

[183] New Zealand Report at 11.

[184] New Zealand Bill, ss. 6 (definition), 14 (dispensing power).

[133] The Manitoba Law Reform Commission also rejected such recognition under that province's dispensing power, stating "[t]he reliability of a will that exists solely in electronic form must be highly suspect, as manipulation of computer data is even easier to effect, and even more difficult to detect, than manipulation of video tape or film images."[185] The Commission recommended that Manitoba's wills legislation be amended to specifically prohibit "the admission to probate of wills that exist only in electronic form."[186]

[134] At the time of our 2000 report recommending the adoption of a dispensing power, ALRI also rejected any validation of electronic wills under the proposed dispensing power.

> We think that, if the question of admissibility of an electronic document to probate is to be considered, it should be considered in the context of the formalities as a whole and not in the context of a dispensing power. The dispensing power which we recommend in this report is not intended to extend to electronic records.[187]

However, in the 2001 research report done by ALRI for the Uniform Law Conference of Canada,[188] ALRI fully considered the issue of electronic wills in both contexts. As already discussed, ALRI (and ultimately the ULCC) recommended that electronic wills should not be recognized as valid in their own right according to the standard formalities but should be able to be recognized as valid, in appropriate cases, under the dispensing power. ALRI has acknowledged that its position has changed since its first report on this issue and that an addendum is needed to revise the conclusion of its initial report.[189]

[135] Accordingly, ALRI now recommends that (for the reasons discussed above) Alberta should adopt the ULCC model in this area and widen the dispensing power to allow recognition, in an appropriate case, of a will in electronic form.

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[185] Manitoba Report at 14.

[186] Manitoba Report at 15.

[187] Alberta Report at 44.

[188] ULCC Conference 200l, note 159.

[189] Alberta Law Reform Institute, "Current Projects: Electronic Wills and Formalities" at http://www.law.ualberta.ca/alri/Work-in-Progress/Current-Projects/Electronic-Wills-and-Formalities.php.

"Electronic form" should be narrowly defined in order to preclude recognition of videotaped or tape recorded wills. This development is also supported by the Project Advisory Committee, which made its views known to the ALRI Board.

RECOMMENDATION No. 9

The statutory dispensing power should be amended to allow a court, in an appropriate case, to validate a will in electronic form despite its lack of compliance with the usual formalities. "Electronic form" should be narrowly defined to prevent recognition of videotaped or tape recorded wills.

CHAPTER 5. PRIVILEGED WILLS

A. Introduction

[136] Historically, only one exception arose to the general rule that, to be valid, a will must strictly conform to the formalities required by succession law. Certain military personnel and mariners were allowed to make "privileged wills" that were valid despite their failure to meet the formalities.

[137] Roman law allowed the wills of soldiers and sailors to be made easily, without adherence to the rigid formalities otherwise required. Such a written will did not need witnesses. An oral will could also be valid, if its provisions were proved by one (or sometimes two) witnesses.[190]

[138] This ancient privilege was continued in English law for "any soldier being in actual military service, or any mariner or seaman being at sea ...."[191] The concept of "actual military service" proved to be quite ambiguous and generated much controversy and judicial interpretation over the years.[192] Although originally a privileged will could only dispose of personal property, eventually it was able to dispose of real property as well.[193] Soldiers and sailors under the age of majority were also allowed to make privileged wills.[194] A privileged will could be oral or in writing, and if written, there was no requirement that it be signed or witnessed.[195]

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[190] New South Wales Law Reform Commission, *Wills – Execution and Revocation*, Report No. 47 (1986) at 142 [New South Wales Wills Report].

[191] *Statute of Frauds, 1677*, 29 Car. II, c. 3, s. 23; England Act s. 11. "Soldier" includes a member of the Air Force: *Wills (Soldiers and Sailors) Act, 1918*, 7 & 8 Geo. V., c. 58, s. 5(2) [Privileged Wills Act].

[192] For example, it was litigated whether "actual military service" includes such activities as training or transportation to the front. *Re Booth*, [1926] P. 118 (Probate, Divorce and Admiralty Div.); *Re Wingham*, [1949] P. 187 (C.A.).

[193] Privileged Wills Act, note 191, s. 3.

[194] Privileged Wills Act, note 191, s. 1.

[195] *Theobald on Wills*, 15th ed. (London: Sweet & Maxwell, 1993) at 55.

[139] Privileged wills are commonly allowed in Canada and other Commonwealth jurisdictions, although there can be significant variations in the legislative provisions which authorize them. For example, most Canadian jurisdictions do not allow privileged wills to be oral.

B. Privileged Wills in Alberta

[140] Alberta's current statutory provision is based on the Uniform Wills Act recommended by the Uniform Law Conference of Canada.[196] The ULCC model differs from the English model in two main ways – oral wills are not allowed and there is a greater attempt to more precisely define "active service."

[141] Section 6 of the Alberta *Wills Act* specifies that the following people may make a privileged will:

- a member of the Canadian Forces while placed on active service pursuant to the *National Defence Act* (Canada);[197]
- a member of any other naval, land or air force while on active service;
- a mariner or seaman when at sea or in the course of a voyage.

[142] Any of these testators can make a written will signed by the testator, or by another person in the testator's presence and at the testator's direction, without any

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[196] Uniform models with similar privileged wills sections were adopted and recommended in 1929 and 1953 by the Conference of Commissioners on Uniformity of Legislation in Canada (as the Uniform Law Conference of Canada was formerly called): *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.

[197] The federal cabinet can place the Canadian Forces or any part or individual member of the Canadian Forces on "active service" at any time when it appears advisable to do so "by reason of an emergency, for the defence of Canada" or in consequence of Canadian actions under the United Nations Charter, the North Atlantic Treaty, the North American Aerospace Defence Command Agreement or "any other similar instrument to which Canada is a party": *National Defence Act*, R.S.C. 1985, c. N-5, s. 31(1) [Defence Act]. The Alberta Act also contains the standard ULCC evidentiary provisions about how "active service" can be proven – by a signed certificate to that effect from an appropriate officer or, if a certificate is not available, by a deemed presumption of active service if the member "has taken steps under the orders of a superior officer preparatory to serving with or being attached to or seconded to a component of … [a naval, land or air] force that has been placed on active service": Alberta Act, s. 6(2) and (3). Taken together, these federal and provincial legislative provisions make it much easier to determine when someone is eligible to make a privileged will.

need for witnesses. So, for example, a will could be typewritten and simply signed by the testator, without witnesses' signatures. Or it could be signed by someone else on behalf of the testator, again without witnesses' signatures. Were it not for the privilege, such wills would be invalid because of the lack of witnesses' signatures on documents which are not entirely in the testator's own handwriting.

[143] If a person under the age of 18 years meets the privilege criteria, that minor can also make a privileged will.[198] In addition, a minor who is a member of a regular force of the Canadian Forces (i.e. serves full-time in the military)[199] but who is not on active service can also make a valid will.[200] However, the will would have to meet all the formalities required by the Alberta Act and could not be a privileged will.

[144] A privileged will remains valid even after the testator is no longer qualified to make a privileged will (for example, is no longer on active service or has left the military).[201] However, a privileged will can be altered or revoked without meeting the formalities only so long as the testator is qualified to make a privileged will. Once the testator is no longer qualified to make a privileged will, alterations or revocation would have to comply with all the required formalities. However, there is a rebuttable presumption that unwitnessed alterations were made while the privilege was in effect.[202]

C. Privileged Wills in Other Jurisdictions

1. Canada

[145] With the exception of Quebec and the Yukon, all Canadian jurisdictions allow some sort of privileged wills. Nine provinces or territories follow the main

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[198] Alberta Act, s. 9(1)(b)(ii) and (c).

[199] The regular force of the Canadian Forces consists of members "who are enrolled for continuing, full-time military service" while the reserve force consists of members "who are enrolled for other than continuing, full-time military service when not on active service": Defence Act, note 197, s. 15(1) and (3).

[200] Alberta Act, s. 9(1)(b)(I).

[201] Feeney at § 4.96.

[202] A.H. Oosterhoff, *Oosterhoff on Wills and Succession*, 4th ed. (Scarborough, Ont.: Carswell, 2001) at 247, n. 7.

features of the ULCC mode, although some of their provisions have small variations from the norm.[203]

[146] British Columbia's most significant variation is that it requires the concurrent signature of at least one witness if the will is signed by someone else on behalf of the testator. British Columbia also restricts privileged wills of foreign armed forces personnel to those on active service with the British Commonwealth of Nations or any ally of Canada. As well, British Columbia does not empower will-making by minors who are full-time members of the Canadian Forces but who are not on active service.

[147] Prince Edward Island's provision is worded differently than the ULCC model but is essentially similar in effect. One difference is that a privileged will in Prince Edward Island must take the form of a writing made by the testator which is signed only by the testator (a holographic will). The will cannot be signed by anyone else. Privileged wills can be made by any member of the Armed Forces of Canada who is placed on active service or who serves in the Forces, "having been … called out for training, service or duty …."[204] Prince Edward Island does not extend the ability to make a privileged will to the members of any foreign armed forces.

[148] Saskatchewan's provision refers to "a member of the armed forces in actual service" but it is unclear whether this means only the Canadian Forces or whether foreign military personnel are included.[205] Saskatchewan does not authorize will-making by minors in the armed forces who are not on active service.

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[203] *Wills Act*, R.S.B.C. 1996, c. 489, ss. 5, 7 [British Columbia Act]; Alberta Act, ss. 6 and 9; *The Wills Act, 1996*, S.S. 1996, c. W-14.1, s. 6 [Saskatchewan Act]; *The Wills Act*, C.C.S.M. c. W150, ss. 5, 8 [Manitoba Act]; *Wills Act*, R.S.N.B. 1973, c. W-9, ss. 5, 8 [New Brunswick Act]; *Wills Act*, R.S.N.W.T. 1988, c. W-5, ss. 4, 6 [Northwest Territories 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 [Nunavut Act]; *Succession Law Reform Act*, R.S.O. 1990, c. S.26, ss. 5, 8 [Ontario Act]; *Probate Act*, R.S.P.E.I. 1988, c. P-21, s. 62 [Prince Edward Island Act]

[204] Prince Edward Island Act, s. 62(4).

[205] Saskatchewan Act, s. 6(1).

[149] Two provinces do not follow the ULCC model but rely instead on the English model. As a consequence, these jurisdictions allow for the possibility of an oral privileged will.

[150] The province of Newfoundland and Labrador has no provision dealing with armed forces personnel[206] but its wills legislation states that the Act "does not affect the disposal of a sailor or fisher of his or her property while at sea."[207] Received English law about privileged wills for mariners would therefore govern in that situation and so a sailor or fisher at sea could make an effective oral or written will without witnesses.[208]

[151] Nova Scotia's wills legislation repeats the English statutory provisions governing privileged wills for "any mariner or seaman being at sea" and a soldier, member of the Air Force or member of Her Majesty's naval or marine forces who is in "actual military service …. "[209] Accordingly, an oral privileged will is possible in Nova Scotia as well.[210] (An unproclaimed amendment will change the pre-requisite to "active military service" instead of the legally problematic "actual military service," but otherwise leaves the provision intact).[211]

[152] As mentioned, neither Quebec nor the Yukon allow privileged wills. However, the Yukon does allow regular will-making by a minor who, at the time the will is made, is in the Yukon "in connection with their duties as a member of any of the components of the Canadian Forces or of the Royal Canadian Mounted Police … [or is] a mariner at sea or in the course of a voyage."[212]

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[206] Newfoundland used to have a statute called *The Wills (Volunteers) Act*, last consolidated in R.S.N. 1970, c. 402. Following the English model, this legislation allowed privileged wills to be made by members of the Newfoundland Regiment and other volunteers on active service. While such privileged wills could be oral or written, they were restricted to estates under $500. The Act was repealed in the legislative revision of 1990.

[207] Newfoundland Act, s. 2(2).

[208] Feeney at § 4.92.

[209] Nova Scotia Act, s. 9.

[210] Feeney at § 4.92.

[211] Nova Scotia Amending Act, s. 3 [unproc].

[212] *Wills Act*, R.S.Y. 2002, c. 230, s. 4(2) [Yukon Act].

2. Australia

[153] Four Australian jurisdictions (New South Wales, Northern Territory, Victoria, and Queensland) have abolished privileged wills.[213] Four others (Capital Territory, South Australia, Tasmania, and Western Australia) still allow privileged wills but Western Australia is in the process of abolishing them.[214] Among the jurisdictions which allow privileged wills, there is not a great degree of uniformity among the legislative provisions. As noted by the New South Wales Law Reform Commission:

> The existing provisions relating to privileged testators in the different Australian States and Territories have been correctly described as 'divergent to the point of bewilderment.' There is no common definition of privileged testator … and there are material differences in the extent of the privileges available.[215]

[154] The various statutes describe one or more kinds of testator entitled to make a privileged will, such as

- members of the Defence Force in actual armed service (Capital Territory),
- members of any Commonwealth forces on active service (South Australia, Tasmania),
- any person, whether a member or not, serving with any Commonwealth or allied armed forces during war or armed conflict (Western Australia),
- prisoners of war (Capital Territory) and
- any persons employed abroad by organizations to render philanthropic, welfare or medical service to the Defence Force (Capital Territory).

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[213] *Wills, Probate and Administration Act 1898* (N.S.W.)[New South Wales Act]; Northern Territory Act; Victoria Act; Queensland Act. The abolition in Queensland took effect on April 1, 2006 when the *Succession Amendment Act 2006* (Qld.) came into force.

[214] *Wills Act 1968* (A.C.T.), s. 16 [Australian Capital Territory Act]; South Australia Act, s. 11; Tasmania Act, ss. 3, 9; Western Australia Act, ss. 17-19, subject to amendment by Western Australia Bill, s. 16.

[215] New South Wales Wills Report at 143.

[155] Only Western Australia and the Capital Territory extend the privilege to minors who otherwise meet the criteria. Two jurisdictions (Tasmania and Western Australia) authorize mariners or sailors at sea to make privileged wills as well.

[156] Unlike the usual situation in Canada, all four Australian jurisdictions allow both oral privileged wills and those written without formalities.

3. New Zealand

[157] New Zealand has very detailed legislation authorizing privileged wills for its domestic armed forces, Commonwealth and allied forces, prisoners of war, mariners or sailors at sea and minors who meet those same criteria.[216] There are elaborate provisions enumerating the wartime and emergency circumstances under which the privilege operates. Both oral wills and informal written wills are allowed, but oral wills will generally be effective only for 12 months after being made.[217]

[158] New Zealand is in the process of adopting a new wills statute which retains the same basic approach to privileged wills but significantly simplifies the elaborate provisions concerning the circumstances under which the privilege operates.[218] Once the new Act is passed and proclaimed, the privilege will be available only for members of the Armed Forces "on operational service" or at sea, seafarers at sea and prisoners of war who meet either of those criteria immediately before capture. The statute creates a certificate system to certify proof of the necessary status.

4. United States

[159] The 1969 Uniform Probate Code, which was enacted in 18 states, eliminated any provision for making privileged wills by the armed forces. This

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[216] *Wills Amendment Act 1955* (N.Z.), 1955/94, ss. 1-11.

[217] *Wills Amendment Act 1955* (N.Z.), 1955/94, s. 9. An exception is made for a testator who is or becomes a prisoner of war within a year of making an oral will. In those circumstances, the oral will's period of effectiveness is extended until 12 months after the testator-prisoner's release.

[218] New Zealand Bill, ss. 33-38.

feature continues in the Uniform Probate Code.[219] Among the states whose wills legislation is not based on the Uniform Probate Code, there appears to be a patchwork of varying laws. "Some American states have provisions for oral wills modeled on the Statute of Frauds. Others have special rules for wills of soldiers and seamen. Neither provision is often used."[220]

D. Should Privileged Wills Be Abolished?

1. Introduction

[160] Over the past twenty-five years, there has emerged a small but growing movement advocating the abolition of privileged wills. It is argued that privileged wills are no longer needed because the historical conditions which once made them a good idea are now obsolete or changed. Law reform agencies in British Columbia, Manitoba, New South Wales, Victoria, and Queensland have all called for the abolition of privileged wills.[221] In addition, the uniform model statute proposed for Australia contains no provision for privileged wills.[222] So far this reform movement has resulted in the abolition of privileged wills in four Australian jurisdictions (New South Wales, Northern Territory, Victoria and Queensland), with a fifth in the process of enacting such abolition (Western Australia).

[161] On the other hand, privileged wills also continue to find support and advocates. Law reform agencies in England, New Zealand, and Nova Scotia have all recommended retention of such provisions.[223]

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[219] National Conference of Commissioners on Uniform State Laws, *Summary – Uniform Probate Code: A Brief Overview* at http://www.nccusl.org/Update/uniformact_summaries/uniformacts-s-upcabo.asp

[220] William M. McGovern, Jr. and Sheldon F. Kurtz, *Wills, Trusts and Estates, including Taxation and Future Interests*, 3d ed. (St. Paul, MN: West, 2004) at 200.

[221] British Columbia 1981 Report at 22, 26-29, 159-162. Continuing support for this recommendation was recently affirmed by the Commission's successor agency: British Columbia 2006 Report 25-26; Manitoba Report at 8-10; New South Wales Wills Report at 141-152, 159-160; Victoria Report at para. S.7.12; Queensland Law Reform Commission, *The Law of Wills* (Report No. 52, 1997) at 34-36.

[222] Australia Uniform Report.

[223] England Report at 9; New Zealand Report at 4-5; Nova Scotia Report at 14-17.

2. Members of Canadian Forces on active service

[162] The main reason which is traditionally cited in support of privileged wills is that military personnel are often deployed on short notice for combat or lengthy campaigns abroad, where they have less access to consultation and professional advice about making or changing a will. This was certainly true in past centuries but may be questionable today. It is the current policy of the Canadian Forces to strongly encourage all members to make and update their wills regularly. The Canadian Forces provides each member with support, advice and opportunity, especially at enrolment, to make a will and place it in safekeeping with the Forces or record its location if held elsewhere.[224] Such modern military practices mean that "members of the armed forces are more, rather than less, likely than average members of the public to be able to obtain legal advice and so be able to make valid formal wills."[225]

[163] On the other hand, this reasoning did not persuade the Law Reform Commission of Nova Scotia to recommend abolition of the privilege:

> Having a will is not, however, compulsory for Canadian Forces members. As a result, it is possible that a member of the military … could well find himself or herself in a situation where making a privileged will becomes necessary. Although this type of situation may not arise often, if the availability of a privileged will might prevent an intestacy and therefore put into effect a testator's wishes, retention of the privileged will provision would have proved worthwhile.[226]

One such potential situation is where a member of the armed forces is given short notice of dangerous active service while learning at the same time of a change in a relationship with an intended beneficiary (such as the receipt of a "Dear John" letter before battle). This may necessitate an urgent need to make, amend or revoke a will in circumstances where it could be difficult to observe the usual formalities. It was this example which led to the New Zealand Law Commission's recommendation to retain privileged wills.[227]

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[224] Canadian Forces Finance and Corporate Services, *Preparation and Administration of Wills*, DAOD Form 7012-1 (2004-09-03).

[225] Parry & Clark at 55.

[226] Nova Scotia Report at 16.

[227] New Zealand Report at 5.

[164] Another reason which originally supported the creation of this privilege is that, historically, soldiers tended to have relatively low levels of education and literacy.[228] Clearly this factor has changed in our modern society and is no longer a justification.

[165] It has been said that the ability to make a privileged will acts as a reward and incentive for military personnel to engage in a dangerous occupation that is beneficial to society.[229] It has also been said that military personnel need this special right because they face a high risk of death in the performance of their duties. But some critics have questioned why a similar privilege should not be accorded to accident victims[230] or workers in other high-risk, socially valuable occupations.[231]

[166] Historically, the privilege arose at a time (both in Rome and England) when will-making requirements were complex and strictly enforced. Wills could fail for small technicalities. Intestacy was not a desirable alternative: "[t]he original reason for implementation of the privilege in Roman times seems to have been to avoid Rome's intestacy laws at any cost."[232] But the law of succession has greatly evolved since those days and currently offers much more flexible options. It is now possible for any testator to make a holograph will, eliminating the need for witnesses and greatly reducing the formalities of will-making.[233] Many jurisdictions have also legislated a substantial compliance provision or a dispensing power to save wills that would otherwise fail for some technical imperfection.[234] In addition, modern intestacy laws and dependants relief

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[228] New South Wales Wills Report at 142, 145.

[229] New South Wales Wills Report at 146.

[230] Parry & Clark at 56.

[231] Manitoba Report at 9.

[232] British Columbia 1981 Report at 29.

[233] Alberta Act, s. 7.

[234] As already discussed, ALRI has recommended enactment of a dispensing power in Alberta: see Chapter 1, Part D of this Report, summarizing the original recommendation made in Alberta Report .

legislation now exist and operate reliably to ensure that "the proper moral and social obligations of deceased persons" are met.[235]

[167] Apart from these assertions that the historical reasons for the privilege are now largely obsolete, it also appears that the privilege is rarely used in Canada. Twenty-five years ago, the Law Reform Commission of British Columbia conducted an informal survey of Probate Registrars across Canada. From these officials' anecdotal impressions and recollections, the Commission learned that privileged wills were rarely probated. In provinces where holograph wills are allowed, the privilege was used even less.[236] The Commission concluded that "[t]here is little evidence of modern use of this provision."[237] A similar conclusion was recently drawn by the Manitoba Law Reform Commission, which found that "… according to the Registrar of Probate of the Court of Queen's Bench, privileged wills are rarely submitted for probate and those which have been submitted were typically executed during the Second World War."[238]

3. Mariners and seamen

[168] The privilege for "a mariner or a seaman at sea or in the course of a voyage"[239] has no requirement of military activity *per se* – although this aspect of the privilege is what would have applied to navy personnel in the original English model. (In today's unified Canadian Forces, the military privilege would apply to any member on active service on a ship or submarine). This privilege has been extended to a wide array of seafarers, including an inland canal pilot,[240] a female stenographer on an ocean liner[241] and a sailor on a vessel docked permanently in harbour.[242] In Canada, "[t]here should be little doubt that it includes sea-going

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[235] New South Wales Wills Report at 146.

[236] British Columbia 2006 Report at 27.

[237] British Columbia 2006 Report at 26.

[238] Manitoba Report at 9.

[239] Alberta Act, s. 6(1).

[240] *Re Barnes's Will Trusts*, [1972] 2 All E.R. 639 (Ch.).

[241] *Re Hale*, [1915] 2 I.R. 362 (K.B.).

[242] *Re McMurdo* (1868), L.R. 1 P. 540.

fishers in the Atlantic provinces and British Columbia, as well as the crews of ships and ferries plying the St. Lawrence and the Great Lakes."[243] This privilege is also available to mariners or seamen who are minors.[244]

[169] The right to make privileged wills was undoubtedly given to mariners and seamen for the same historical reasons that it was given to military personnel. Sailors could be isolated and far from legal advice for months or even years at a time. They were often poorly educated or illiterate. They were in an occupation which was socially beneficial but dangerous and high-risk. However, modern mariners and seamen benefit from the same improvements in social and legal conditions (including better, more flexible succession laws) which arguably make military privileged wills obsolete. As noted by the New South Wales Law Reform Commission:

> The retention of the privilege by sailors simply because they are "at sea" has little to commend itself …. The modern sailor seldom endures special risks and has the advantages of communication which leave him or her in no different position than many other classes of workers in remote occupations.[245]

[170] The Law Reform Commission of British Columbia found no great use of this privilege in Canada and, in particular, "our research has led us to believe that the use of the privilege by minor mariners is virtually unknown."[246] The Commission also noted that ocean-going travel or employment is not as common as it was in earlier societies. Commenting specifically on the availability of this privilege for minor mariners, the Commission stated that:

> British Columbians work at many dangerous jobs. It is anomalous to single out one type of trade and give its underage members such an exception. Workers' Compensation Board statistics indicate that it is probably more dangerous to be a bush pilot, a logger, a sawmill employee or work in building demolition, than to work on a fishing boat.[247]

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[243] Feeney at § 4.93.

[244] Alberta Act, s. 9(1)(c).

[245] New South Wales Wills Report at 147.

[246] British Columbia 1981 Report at 22.

[247] British Columbia 1981 Report at 140-141, 162.

[171] Even if the decision were made to retain privileged wills for military service, it is still arguable that the additional privilege for mariners and seamen (both adults and minors) should be repealed.

4. Recommendations for reform

[172] The ALRI Board debated at length whether there is an ongoing need for privileged wills. Both the Board and the Project Advisory Committee which advised it came to the conclusion that, for all the reasons discussed in this Part, legal and social conditions have improved to the point where a special exception for privileged wills is no longer the necessity it once was.

[173] Military personnel are encouraged and given every assistance to make a valid will prior to deployment. If a person in the armed forces or a mariner at sea is nevertheless forced by circumstances to make an informal will, the availability of modern legal devices such as holograph wills and a court dispensing power is more than adequate to deal with any resulting written will that does not conform to standard formalities.

[174] However, ALRI does stress that its recommendation to abolish privileged wills is contingent on the implementation of its recommendation to enact a dispensing power. In the absence of a dispensing power, ALRI would be inclined to retain privileged wills.

[175] Ending the ability to make a privileged will as of a certain date should not, of course, be allowed to invalidate any privileged wills already in existence. Any kind of retroactive effect would be unjust because privileged testators (however few there might be) are relying on the validity of those wills to dispose of their estates and this expectation must not be defeated. Therefore, existing privileged wills should continue to be valid, as has been recommended by all other law reform agencies which proposed abolition of privileged wills.[248]

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[248] British Columbia 1981 Report at 30; New South Wales Wills Report at 160; Manitoba Report at 10.

RECOMMENDATION No. 10
The legal ability of members of the Canadian Forces and mariners or seamen at sea to make privileged wills should be ended.

RECOMMENDATION No. 11
Existing privileged wills should continue to be effective, if they were validly made before the legal ability to make such wills was ended.

5. Testamentary capacity of minors in the Canadian Forces

[176] With the consent of one parent or guardian, a minor can enroll in the Canadian Forces.[249] Its recruitment policy is that a 16 year old minor can join the (part-time) reserve force or enter Military College, but only a 17 year old minor can join the (full-time) regular force.[250] No minor can be "deployed by the Canadian Forces to a theatre of hostilities."[251]

[177] As noted earlier in this chapter, if a minor is a member of a regular force of the Canadian Forces, such full-time military service confers testamentary capacity on the minor.[252] If the minor is on active service, the minor can make a privileged will.[253] If the minor is not on active service, the minor can still make a will but it must comply with all the required formalities.[254]

[178] In Chapter 2, ALRI recommends lowering the age of general testamentary capacity to 16 years. This will also apply to military minors, so it will no longer be necessary to have a separate statutory provision conferring testamentary capacity

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[249] Defence Act, note 197, s. 20(3).

[250] http://www.forces.ca/v3/engraph/resources/howtojoin_en.aspx?bhcp=1.

[251] Defence Act, note 197, s. 34.

[252] The regular force of the Canadian Forces consists of members "who are enrolled for continuing, full-time military service" while the reserve force consists of members "who are enrolled for other than continuing, full-time military service when not on active service": Defence Act, note 197, s. 15(1), (3).

[253] Alberta Act, s. 9(1)(b)(ii) and (c).

[254] Alberta Act, s. 9(1)(b)(I).

on that group. In addition, ALRI's recommendation to abolish the ability to make a privileged will by any member of the Canadian Forces on active service or by mariners and seamen applies equally to minors who are entitled to make such wills.

[179] In Chapter 2, ALRI also makes two alternative recommendations if the age of testamentary capacity remains at 18 years. Firstly, special statutory exceptions conferring testamentary capacity on married or partnered minors or minor parents should be discontinued. Secondly, any minor who needs to make a will should be able to apply to the Court of Queen's Bench for a declaration of testamentary capacity. So, in the alternative, if the age of testamentary capacity remains at 18 years, we need to consider whether to retain or abolish the special extension of testamentary capacity to military minors and minor mariners.

[180] Most Canadian jurisdictions, following the Uniform Wills Act, extend general testamentary capacity to minors serving full-time in the Canadian Forces, even if not on active service. But four provinces do not – British Columbia, Saskatchewan, Quebec and Newfoundland and Labrador.

[181] The main argument against continuation of this grant of capacity is that it singles out minors in one profession for special treatment. Minors can also leave school and work full-time in other potentially dangerous professions but they are not allowed to make wills as a consequence. And although service in the armed forces can be dangerous, the risk to minors has been lessened (although not entirely eliminated) by the current policy of not sending minors to war zones.

[182] Of the two Canadian law reform agencies which recommended abolition of privileged wills for the military, similar proposals were ultimately made concerning this issue. The Manitoba Law Reform Commission recommended lowering the age of testamentary capacity for everyone to 16 years, thereby also eliminating any need to specially empower minors in the armed forces.[255] The British Columbia *Wills Act* does not currently extend general testamentary capacity to all minors in the armed forces, but only to those who meet the criteria of active

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[255] Manitoba Report at 10-11.

service otherwise required to make a privileged will.[256] The British Columbia Law Reform Commission originally recommended that this be changed so that any minor serving in the armed forces could make a will, regardless of whether the minor is on active service or not.[257] However, the British Columbia Law Institute has more recently (like Manitoba) recommended simply lowering the age of testamentary capacity for everyone to 16 years.[258]

[183] This issue is not addressed by Australian and New Zealand legislation, probably because most of their wills statutes allow any minor who lacks testamentary capacity but nevertheless needs a will to apply (usually to a court) for authorization to make a will.[259]

[184] If the age of testamentary capacity in Alberta remains at 18 years, ALRI recommends that the ability of military minors and minor mariners to make a will should be handled in the same way as it will be for any other minor. ALRI sees no reason to single out military minors and minor mariners. For the sake of consistency, there should no longer be special provisions conferring testamentary capacity on military minors and minor mariners. If they need to make a will, they can apply to the Court of Queen's Bench for a declaration of testamentary capacity in the same way as any minor.

RECOMMENDATION No. 12
The special statutory provisions which confer testamentary capacity on a minor who is a member of a regular force of the Canadian Forces or who is a mariner or seaman at sea should be repealed. If the age of testamentary capacity is lowered to 16 years, such people will already have testamentary capacity. If the age of testamentary capacity remains at 18 years, such minors who need a will can apply to the Court of Queen's Bench for a declaration of testamentary capacity.

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[256] British Columbia Act, ss. 5, 7(1)(b).

[257] British Columbia 1981 Report at 22.

[258] British Columbia 2006 Report at 27.

[259] See the discussion in Chapter 2, Part B.

CHAPTER 6. HOLOGRAPH WILLS

A. Are Holograph Wills Still Needed?

1. Introduction

[185] The Alberta *Wills Act* allows people to make informal holograph wills, which are wills wholly in the testator's own handwriting and signed by the testator, but made without witnesses.[260] Alberta has recognized holograph wills since 1926, a time long before any wills statute had a general dispensing power to validate technically imperfect wills.[261] The laws of intestate succession and dependants relief were also less developed eighty years ago.[262] In the context of that time, it made sense to give testators a way to avoid the potentially harsh consequences of an intestacy by allowing them to make informal holograph wills.

[186] Today, many jurisdictions have a general dispensing power allowing the courts to validate a will despite a lack of compliance with formalities. Intestate succession and dependants relief statutes have been improved. In addition, printing and typing have replaced handwriting in much of daily life, challenging the assumption that handwriting is the "do it yourself" testator's manner of making a will.

[187] In this new context, one must ask whether it is time to abolish holograph wills as a special category. Perhaps it is still useful to have the statute allow such wills expressly. On the other hand, they may now cause more problems than they solve.

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[260] Alberta Act, s. 7.

[261] *Holograph Wills Act*, S.A. 1926, c. 73; incorporated into the *Wills Act* in S.A. 1927, c. 21, section 5(b). The holograph will came to Canada not from English law, but from the French and Scottish legal tradition: Jasmine Sweatman, “Holographic Testamentary Instruments: Where are we?” (1995) 15 E.T.J. 176 at 176 [Sweatman].

[262] See Alberta Institute of Law Research and Reform, *Family Relief*, Report No. 29 (1978) at 4-5; and Alberta Law Reform Institute, *Reform of the Intestate Succession Act*, Final Report No. 78 (1999) at 18.

2. The law in other jurisdictions

[188] Most North American jurisdictions allow holograph wills. In Canada, 10 provinces or territories allow holograph wills.[263] Nova Scotia will soon allow holograph wills as well.[264] The Uniform Law Conference of Canada also provides for holograph wills in its Uniform Wills Act.[265] In the United States, more than half of the States allow holograph wills.[266] The Uniform Probate Code provides for them too.[267]

[189] Prince Edward Island does not allow holograph wills in ordinary situations, but has a general dispensing power under which such wills could be validated.[268] The same applies to Australian jurisdictions.[269] The Australian courts use the general dispensing power to validate holograph wills on a case by case basis.[270] Recent Australian initiatives for reform and uniformity do not seek to change this.[271]

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[263] Alberta Act, s. 7; Saskatchewan Act, s. 8; Manitoba Act, s. 6; Ontario Act, c. S-26, s. 6; Quebec Civil Code, art. 726; New Brunswick Act, s. 6; Newfoundland Act, s. 2(1); Northwest Territories Act, s. 5(2); Nunavut Act, s. 5.1(2); Yukon Act, s. 5(2).

[264] Nova Scotia Amending Act, s. 1. This reform was recommended in the Nova Scotia Report at 14.

[265] Uniform Law Conference of Canada, *Uniform Wills Act*, s. 6 [Uniform Wills Act].

[266] *Restatement of the Law Third: Property (Wills and other donative transfers)*, vol. 1 (St. Paul, Minn.: American Law Institute, 1999), at 200, 207-209 [Restatement].

[267] The Uniform Probate Code reads:

> Section 2-502 (b) A will that does not comply with subsection (a) is valid as a holographic will, whether or not witnessed, if the signature and material portions of the document are in the testator's handwriting.

[268] Prince Edward Island Act, ss. 60, 70. Privileged wills in Prince Edward Island may take the form of holograph wills.

[269] Western Australia Act, ss.8, 34; Queensland Act, ss. 10, 18; New South Wales Act, ss. 7, 18A; Victoria Act, ss. 7, 9; Tasmania Act, ss. 10, 26; South Australia Act, ss. 8, 12(2); Northern Territory Act, ss. 8, 10; Australian Capital Territory Act, ss. 9, 11A.

[270] See summary in Law Reform Commission of Western Australia, *Report on Wills (Substantial Compliance)*, Project No. 76, Part 1 (1985) at 37-39. See also summary of Australian cases in Alberta Report, at 85- 90.

[271] Australia Uniform Report at 10-26.

[190] British Columbia, England, and New Zealand do not currently allow holograph wills in ordinary situations and have no general dispensing power.[272] New Zealand will soon enact a dispensing power but still makes no special provision for holograph wills.[273] Similarly, a dispensing power has been recommended for British Columbia, but not a special provision for holograph wills because such wills could be validated under the dispensing power.[274]

3. Why might reform be needed?

[191] This chapter considers whether the Alberta Act should continue to have a special provision expressly validating holograph wills or whether it should be repealed. Repeal would result in holograph wills being valid only if a court approves them under the recommended general dispensing power.

[192] For over 80 years, a special provision allowing holograph wills has been an important component of the Alberta Act. The traditional arguments for and against allowing holograph wills have not changed in that time.[275] However, any re-examination of the current need for holograph wills does not depend on questioning or challenging those traditional arguments because it is a given that Alberta has chosen to allow holograph wills.

[193] The traditional arguments in favour of allowing holograph wills may be summarized as follows. Holograph wills are free and convenient. They do not require the presence of any person other than the testator. A testator can quickly make a holograph will at any time. This is useful for testators who suddenly find themselves in life-threatening situations or who would otherwise find making a will too expensive or inconvenient.[276]A statute allowing testators to draft their own

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[272] British Columbia Act; Halsbury's, note 86, vol. 50 at para. 351; New Zealand Report. In New Zealand, the Law Commission has recommended a general dispensing power. If implemented, this may make New Zealand law like that in much of Australia.

[273] New Zealand Bill, s. 14.

[274] British Columbia 2006 Report at 23-25.

[275] See, for example, E.W.S. Kane, Jr. & W.A. Stevenson, "Holograph Wills: A survey of existing legislation" (1955-1961) 1 Alta. L. Rev. 103 at 114.

[276] Law Reform Commission of Nova Scotia, *Reform of the Nova Scotia Wills Act*, Discussion Paper (2003), at 13 [Nova Scotia Discussion Paper].

testamentary documents should enable testators to do so as simply as possible.[277] Express allowance "recognizes the holograph will as a minimally formalistic juridical act."[278] The policy objective of testator convenience suggests that the statute should expressly allow the use of holograph wills.

[194] Traditional arguments against holograph wills focus on whether such an informal will can adequately meet the policy objectives usually satisfied by formalities.[279] The holograph requirements of being wholly in the testator's handwriting and containing the testator's signature do provide evidence of the testator's intention and help protect against fraud. However, unlike formal, witnessed wills which are usually prepared by lawyers, "homemade" holograph wills are often much more diverse in structure and content, which does not promote uniformity or reduce litigation. There can also be a fear that expressly allowing holograph wills may induce more people to make wills without appropriate reflection or legal advice.[280] This could result in too many questionable documents being probated as holograph wills or too much litigation being conducted.[281] However, despite this fear, it is not obvious that holograph wills impose a disproportionate or unreasonable burden on Alberta litigants and courts. A review of case law shows that, although wills litigation is frequent in Alberta and elsewhere, it pertains mostly to formal wills.

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[277] Sweatman, note 261, at 190.

[278] Nicholas Kasirer, "From Written Record to Memory in the Law of Wills" (1997-1998) 29 Ottawa L. Rev. 39 at 44.

[279] These recognized policy objectives are: (1) *Evidentiary:* to prove facts relevant to the testator's intention; (2) *Cautionary:* to remind the testator of the significance of the testator's conduct; (3) *Protective:* to help protect the testator against fraud or influence; (4) *Channelling:* to promote uniformity in the structure and content of wills, so as to minimize litigation and judicial effort, as to the effect of the testator's conduct. *See* New South Wales Wills Report at paras. 2.42-2.49; Restatement, note 266, at 217.

[280] Nova Scotia Discussion Paper at 13.

[281] *See, e.g., Lindblom Estate v. Worthington* (1999), 252 A.R. 17 (Surr. Ct.), where the alleged holograph will was comprised of the testator's handwritten note to his lawyer, stating only some names and percentages. This note was the testator's instructions to his lawyer to prepare a formal will, a document which the testator later received but never signed or had witnessed. However, on the evidence, the court was able to find the note to be a valid holograph will despite its having "no words of disposition."

[195] While we do not propose to reopen and reconsider these traditional arguments, there are new developments in society and in the law which require examination in order to determine whether a special provision validating holograph wills continues to be needed or warranted.

4. New developments affecting holograph wills

a. Printed will forms

[196] Expressly allowing holograph wills now arguably causes more problems than it solves. As discussed at length in Part C, much litigation arises from the conflict between the availability of "fill-in-the-blank" printed will forms and the legal requirement that holograph wills be “wholly” in the testator’s handwriting. Some testators make handwritten entries on the printed will form and then sign it without witnesses. But such a document is not a valid will in Alberta. It is not a valid holograph will because it is partly printed. It is not a valid formal will because it is unwitnessed.

[197] In order to give some effect to the testator’s intention, Alberta courts will try to treat the handwritten entries as a holograph will by severing them from the printed portions on the will form.[282] The position and content of the severed handwritten entries end up determining which of the testator’s dispositions the court finds effective. Other dispositions will fail if they cannot stand alone without the printed portions. This can lead to an overall outcome that the testator did not intend.[283] With printed will forms in mind, one Australian law reform agency has recommended that “holograph wills not be accorded validity as a special class of informal wills” partly because validating handwritten wills causes such uncertainty.[284]

b. Decline of handwriting

[198] Another problem with having holograph wills as a “special class of informal wills” is that nowadays, testators are more likely to find it convenient to type rather than handwrite their wills. As noted by the New South Wales Law Reform Commission:

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[282] See review and discussion in *Pears v. Pears* (2001), 301 A.R. 162 (Q.B.).

[283] Sweatman, note 261, at 189.

[284] New South Wales Wills Report at para. 4.23.

> Today, with the popularity of computers, and of typewriters before, people are more apt to type, not hand write their will. Further, when changes are to be made, it is easy to turn on the computer and make any revisions.[285]

[199] Continuing to give special status to handwritten holograph wills to promote testator convenience may now be misleading and obsolete.

c. General dispensing power

[200] A legislated general dispensing power is the main reason to ask whether a specific statutory provision to validate holograph wills is now obsolete. A general dispensing power would allow Alberta courts to validate any genuinely testamentary document, regardless of witnesses or the extent of the handwriting. Arguably, the presence of a general dispensing power eliminates the need for any express statutory category of wills other than formal, witnessed wills.

5. Is reform needed?

[201] All the ALRI Board members and the members of the Project Advisory Committee were unanimous in rejecting any change to this area of the law. The Alberta Act should continue to have a special provision allowing holograph wills, even if it also has a general dispensing provision. Holograph wills are an inexpensive and easy way for people to make a will, especially in emergency situations.

[202] A general dispensing power would require a person seeking to probate a holograph will to bring an additional court application in every case, which would be costly and time-consuming. Avoiding this additional procedural burden is probably why all five Canadian jurisdictions with an existing provision expressly allowing holograph wills retained it even after enacting a general dispensing power (Manitoba, Saskatchewan, Quebec, New Brunswick and Nunavut). The sixth jurisdiction with a general dispensing power (Prince Edward Island) did not previously have a provision expressly allowing holograph wills and continues not to have one.

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[285] Sweatman, note 261, at 189.

[203] The Office of the Public Trustee advised ALRI that it often probates handwritten suicide notes as holograph wills and would not want to have to make a special court application for this purpose.[286]

[204] Holograph wills are convenient because they require no witnesses. The increased convenience of typing, as opposed to handwriting, does nothing to change that.

[205] The Alberta Act has expressly allowed holograph wills since 1926, without major problems or obvious calls for abolition. Most Canadian and American jurisdictions expressly allow holograph wills, even if they have a general dispensing power. There is currently no abolition movement, either generally or among law reform entities. Research revealed no instance of a jurisdiction abolishing holograph wills after having a statute expressly allowing them.[287]

[206] As for problems created by printed will forms with handwritten entries but no witnesses, abolishing holograph wills is not the best solution to this problem. As will be discussed later in Part C, that situation is best handled by the general dispensing power.

RECOMMENDATION No. 13
The *Wills Act* should continue to expressly allow holograph wills.

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[286] Alberta Law Reform Institute, *Minutes of the Succession - Wills Project Advisory Committee Meeting* (Feb. 5, 2007) at p. 4, per Suzanne McAfee, Office of the Public Trustee.

[287] However, until the 1830s, England implicitly allowed holograph wills for personal property but then abolished them by statute, on the premise that witnesses provide better evidence than handwriting analysis. See discussion in John C. Fitzgibbons, "An Analysis of the History and Present Status of American Wills Statutes" (1967) 28 Ohio St. L.J. 293 at 305. See also R.H. Helmholz, "The Origin of Holographic Wills in English Law" (1994) 15 J. Legal Hist. 97.There does not appear to be any movement in England to reverse this abolition. See, for example: England Report at 10; Michael Sladen, "Wills Act 1837: Is it obsolescent?", (2001) The TACT Review, Issue 15 (http://www.trustees.org.uk/review-index/index.php).

B. Is the "Handwriting" Requirement Too Narrow?

1. Introduction

[207] As already noted, the Alberta Act provides that a valid holograph will must be wholly in the testator's "own handwriting."[288] The statute does not define "handwriting," but clearly it means a uniquely individual script produced by the hand of the writer using a stylus of some description (pen, pencil, brush, etc.) without the intervention of any mechanical means such as a typewriter, printing press or computer.[289] By contrast, the definition of "writing" in the *Interpretation Act* is much broader and is stated to include "words represented or reproduced by any mode of representing or reproducing words in visible form."[290]

[208] It is precisely the individual nature of handwriting which serves as a holograph will's basic protective device against fraud. Of course it is not an absolute protection and forgery may occur. However, handwriting experts can be engaged to help determine if the testamentary document is in the handwriting of the testator or not.

[209] There is a small issue, unresolved by any case law, of whether the concept of "handwriting" could be interpreted to include writing produced by a person with a part of their body other than a hand, such as writing by mouth or by foot (as certain disabled persons are trained to do). Assuming a court could not interpret "handwriting" this broadly, the issue arises whether statutory amendment is needed to accommodate these other forms of personal script.

2. The law in Canada and other jurisdictions

[210] Holograph wills are valid in most Canadian jurisdictions but their respective statutes usually refer only to "handwriting." In 1986, the Uniform Law Conference of Canada recommended a model holograph wills section which defined "own

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[288] Alberta Act, s. 7.

[289] In a famous unreported case, a knife was used by a dying farmer trapped under a tractor to scratch his will on the metal fender, which was accepted by the Saskatchewan Surrogate Court as a valid holograph will: W.M Elliott, "Case and Comment: Wills – Writing Scratched on Tractor Fender – Granting of Probate," (1948) 26 Can. Bar Rev. 1242.

[290] Interpretation Act, note 141, s. 28(1)(jjj). However, this would not encompass any electronic record of writing, according to Alberta Legislative Counsel: Alberta Report at 10. Digital storage of an electronic record means it is not "visible" until it is printed out.

writing" to mean "handwriting, footwriting, mouthwriting or writing of a similar kind."[291] To date, two Canadian jurisdictions have implemented the ULCC's provision, but one jurisdiction did so only temporarily.

[211] In 1989, Saskatchewan's *Wills Act* was amended to define "handwriting" as including footwriting, mouthwriting and writing of a similar kind.[292] However, the entire Act was repealed and replaced seven years later by the *Wills Act 1996* and the new Act did not continue this innovation. Saskatchewan's current wills legislation has returned to the standard Canadian model of using the single, undefined word "handwriting" in its holograph wills provision.[293]

[212] Nunavut amended its wills legislation in 2005 to enact the ULCC definition.[294] Therefore it is currently the only Canadian jurisdiction to have this provision for its holograph wills.[295]

[213] Holograph wills are authorized by the wills legislation of more than half the states in the United States.[296] The Uniform Probate Code allows holograph wills as well.[297] However, there appears to be no attempt by any jurisdiction to legislatively define "handwriting."

[214] England, Australia and New Zealand do not have legislation authorizing the making of holograph wills (other than as privileged wills for the armed forces in certain circumstances) and accordingly have no statutory provisions addressing the definition of "handwriting."

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[291] Uniform Law Conference of Canada, *Proceedings of the Sixty-eighth Annual Meeting* (1986), Appendix O at 527-528 [ULCC Conference 1986]. See Uniform Wills Act, s. 6(1).

[292] *An Act to amend The Wills Act*, S.S. 1989-90, c. 66, s. 3 amending *The Wills Act*, R.S.S. 1978, c. W-14, s. 2.

[293] Saskatchewan Act, s. 8.

[294] *An Act to Amend the Wills Act*, S. Nu. 2005, c. 6, s. 3.

[295] Nunavut Act, s. 5.1(1).

[296] Restatement, note 266, at 200-217.

[297] Uniform Probate Code § 2-502(b).

3. Recommendation for reform

[215] The Uniform Law Conference of Canada was concerned that too narrow a definition of handwriting could pose "a potential problem" for disabled persons "who are able to produce documentation, the source of which can be readily identified to them, but who do not use their hands to produce the document. Mouthwriting and footwriting are probably the most common examples."[298]

[216] It may be debatable whether this poses a large problem in practice. In the twenty years that have passed since the ULCC first made its recommendation, advances in technology have made communication much easier for persons who have lost the use of their arms. Such technology is now the dominant method by which disabled people achieve communication independence. In the disability rehabilitation field, it is not current practice to teach mouthwriting or footwriting as a preliminary or alternative method to the use of technology.[299] One might speculate that these advances in communication technology are why Saskatchewan saw no difficulty in abandoning its expanded definition of "handwriting" in its current wills legislation.

[217] However, an expanded definition of "handwriting" does have its proponents. The Manitoba Law Reform Commission has recommended its adoption, although the Commission acknowledges that the presence of a general dispensing power probably makes it unnecessary. However, the Commission feels that an expanded definition would benefit the wills statute "to the extent that the legislation is intended to serve an instructional purpose …."[300]

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[298] ULCC Conference 1986, note 291, at 527.

[299] Telephone conversation with Christine Beliveau, Coordinator, I-Can Centre for Assistive Technology, Glenrose Rehabilitation Hospital, Edmonton, Alberta (January 24, 2007). Similar information was also received by telephone conversation with Dr. Vivien Hollis, Chair, Department of Occupational Therapy, University of Alberta, Edmonton, Alberta (January 26, 2007). Christine Beliveau stated further that she is aware of very few disabled people who actually write using their mouths or feet. A quadriplegic person may learn to mouthwrite their name or an "x" for a signature, but mouthwriting anything longer than that would be arduous and unusual. She has never heard of anyone writing with their feet. Mouth painting is still done, probably because it is a creative outlet for people.

[300] Manitoba Report at 11.

[218] Recently, the Law Reform Commission of Nova Scotia made a major recommendation in favour of allowing holograph wills in that province. In doing so, the Commission recommended that the province should enact, in particular, the ULCC model holograph wills provision.[301] Although this model does, of course, include an expanded definition of "own writing," that issue was neither raised nor discussed in the Nova Scotia Report. However, the government of Nova Scotia, which has enacted (but not yet proclaimed) amendments in this area, has chosen not to implement the ULCC model provision. Instead, it has adopted the standard Canadian model that a holograph will must be "wholly" in the testator's undefined "own handwriting."[302]

[219] ALRI's main concern is that the use of the very literal word, "handwriting," seems on its face to clearly exclude writing done by any other body part. It is easy to construe this as a *Charter of Rights* violation against persons who have a physical disability. While it is possible to argue that a court would probably interpret "handwriting" to include the other methods or, if it did not, that the general dispensing clause would validate such a will anyway, the fact remains that this statutory provision overtly reads in a discriminatory and exclusionary manner. It is a simple matter to correct this unfortunate appearance and guarantee an inclusive interpretation by adopting the ULCC wording and definition.

RECOMMENDATION No. 14
The *Wills Act* should be amended to authorize holograph wills made in the testator's "own writing," defined as "handwriting, footwriting, mouthwriting or writing of a similar kind."

C. The Problem of Printed Wills Forms

1. Introduction

[220] "Fill-in-the-blank" printed will forms are widely available in Alberta. Some testators make handwritten entries on them and then sign the forms without witnesses. Such testators intend to make a will. Yet, the resulting document is not a valid will in Alberta. It is not a valid holograph will because the document is

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[301] Nova Scotia Report at 14.

[302] Nova Scotia Amending Act, s. 1 [unproc.] The Act also enacts a general dispensing power [s. 2].

partly printed and therefore not "wholly" in the testator's own handwriting. It is not a valid formal will because the document is unwitnessed. This failure defeats the testator's intention.

[221] In a valiant attempt to give some effect to the testator's intention, Alberta courts will try to validate the handwritten entries as a holograph will by severing them from the printed portions of the will form and treating them as if they were a separate document. The courts readily do this if the handwritten entries standing alone show "all of the essentials of a testamentary document … in an understandable manner reflecting a fixed decision as to disposal of … property."[303] However, if the handwritten entries fall short of this ideal, then the court may well conclude that there is no valid will at all.

[222] This interpretive approach is an "artificial exercise of dissecting the printed form into its handwritten and printed parts."[304] It creates a valid holograph will out of a document which the testator clearly intended to be a will but not a holograph will. The position and content of the handwritten entries end up determining which of the testator's dispositions the court finds effective. The testator's other dispositions fail if they cannot stand alone without the printed portions. This leads to an overall outcome that the testator did not intend.[305]

[223] A review of Alberta case law shows that such cases have been recurring quite regularly for decades. Although not numerous, this persistent recurrence justifies asking whether statutory reform should address this problem and, if so, how.

2. The law outside Alberta

[224] Many jurisdictions do not allow holograph wills. If these jurisdictions have a general dispensing power, then the courts can use it to validate printed will forms

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[303] See *Pears v. Pears* (2001), 301 A.R. 162 (Q.B.) at 167-168 657, following *Re Shortt*, 9 A.R. 51 (Alta. Surr. Ct. 1977) on this point.

[304] Sweatman, note 261, at 187.

[305] Sweatman, note 261, at 189.

with handwritten entries but no witnesses. That is the law in Australian jurisdictions.[306] It is also the law in Prince Edward Island.[307]

[225] In jurisdictions that do not allow holograph wills and that have no general dispensing power, a printed will form with handwritten entries, but no witnesses, can never be a valid will. That is the law in British Columbia, Nova Scotia, England, and New Zealand.[308]

[226] Most jurisdictions which allow holograph wills require that they be "wholly" or "entirely" in the testator's handwriting. If these jurisdictions have a general dispensing power, then the courts can use it to validate printed will forms with handwritten entries but no witnesses. That is the law in Manitoba, Saskatchewan, and New Brunswick.[309] It is also the law in Quebec, although the court's discretionary power in that jurisdiction is narrower, because the will still has to meet the "essential requirements" of a holograph will.[310]

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[306] Western Australia Act, ss. 8, 34; Queensland Act, ss. 10, 18; New South Wales Act, ss. 7, 18A; Victoria Act, ss. 7, 9; Tasmania Act, ss. 10, 26; South Australia Act, ss. 8, 12(2); Northern Territory Act, ss. 8, 10; Australian Capital Territory Act, ss. 9, 11A. See summary of cases in Law Reform Commission of Western Australia, *Report on Wills (Substantial Compliance)*, Project No. 76, Part 1 (1985), at 37-39. See also summary of cases in the Alberta Report at 85-90. The most recent Australian initiatives toward reform and uniformity do not seek to validate holograph wills expressly, nor do they address specifically the issue of printed forms with handwritten entries: Australia Uniform Report at 10-26.

[307] Prince Edward Island Act, ss. 60, 70.

[308] British Columbia Act; Nova Scotia Act; Halsbury's, note 86, vol. 50 at para. 351; New Zealand Report. However, New Zealand is in the process of enacting a dispensing power, while still making no special provision for holograph wills: New Zealand Bill. New Zealand's law will soon be like that of Australia and Prince Edward Island.

[309] Manitoba Act, ss. 6, 23; Saskatchewan Act, ss. 8, 37; .New Brunswick Act, ss. 6, 35.1. For Manitoba, see *Prefontaine v. Arbuthnott* (2001), 154 Man. R. (2d) 75, where the court validated the will without finding it necessary to decide whether the document was a valid holograph will.

[310] Quebec Civil Code, art. ss. 714, 726. Quebec courts have applied these provisions together to validate a holograph will out of a printed form, with the testator's own handwritten entries and signature. *Lessard c. Lessard*, [1998] J.Q. no 4876 (C.S. Que. 1998); *Poulin, succession c. Duchêne*, [1999] J.Q. no 4593 (C.A. Que 1999); *Dunsmuir (Succession de) c. Wayland*, [2005] J.Q. no 1599 (C.S. Que. 2005); *Beaton (Re)* [2005] J.Q. no 20711 (C.S. Que. 2005). A set list of "essential requirements" would vitiate the remedial purpose and discretionary nature of section 714, but an "essential requirement" of a holograph will is that the testator handwrite the will "at least in large part." See discussion in *Fontaine, Re*, [2000] J.Q. no 1626 (C.A. Que. 2000). Accordingly, a wholly typed or printed will, signed by the testator, fails to meet the "essential requirement" that a holograph be, at least in part, written by the testator. See *Demers, succession (Re)*, [1998] A.Q. no 2767 (C.S.

[227] If these jurisdictions do not have a general dispensing power, then printed will forms with handwritten entries but no witnesses fail, except to the extent that a court can read the handwritten entries standing alone to find a valid holograph will. That is the current law in Alberta and also in the Northwest Territories, the Yukon Territory, and Ontario.[311] Newfoundland and Labrador may also belong in this category, although the law in that province is not clear (discussed more fully under heading 3.b. below).

[228] A few jurisdictions have specific statutory provisions to address unwitnessed wills which are only partly in the testator's handwriting. In one variation, the specific statutory provisions require the will to be "partly" in the testator's handwriting. That is the law in Nunavut, following the recommendations of the Uniform Law Conference of Canada (ULCC) in the Uniform Wills Act.[312] In another variation, the specific statutory provisions require that "material provisions" or "material portions" be in the testator's handwriting. That is the law in much of the United States, following the recommendations of the American Law Institute and the Uniform Probate Code.[313]

3. Reform options

[229] There are a number of ways that statutory reform could address the problem of unwitnessed printed will forms with handwritten entries.

a. Prohibit printed will forms

[230] A "drastic solution" aimed specifically at printed will forms would be to "prohibit their printing and sale."[314] However, this would not solve the problem of printed will forms which testators have already used to make their wills. It would also fail to prevent testators from using printed will forms available on the Internet.

Que 1998); *Fortin (Succession de)*, [2006] J.Q. no 7509, 2006 QCCS 4136.

[311] Northwest Territories Act; Yukon Act; Ontario Act.

[312] Nunavut Act, s. 5.1(3); ULCC Conference 1986, note 291, at 37, 523-529.

[313] Restatement, note 266, at 200, 202, 203.

[314] Sweatman, note 261, at 190.

[231] Our research did not reveal that any jurisdiction has ever attempted such a prohibition. It is not a realistic or effective option for resolving this problem.

b. Delete the requirement of being "wholly" in the testator's handwriting

[232] The province of Newfoundland and Labrador allows holograph wills, but has no express requirement that they must be "wholly" in the testator's handwriting.[315] As in Alberta, however, the Newfoundland case law is consistent that an unwitnessed printed form with handwritten entries can only be a valid holograph will if the handwritten entries standing alone show testamentary intention. However, court decisions go both ways about whether the absence of the words "wholly" or "entirely" in the statutory provision means that a Newfoundland court can, after finding a holograph will, then go on to give effect to the printed portions as well.[316] The advantage of being able to do so is that the entire will would ultimately be validated, which is what the testator intended.

[233] Deleting "wholly" in the Alberta provision might cause similar confusion and conflicting case law. This approach is not the most effective way of addressing the problem of unwitnessed printed will forms with handwritten entries.

c. Enact a specific provision to address the problem

i. The "partly" approach

[234] Nunavut has an express provision which validates holograph wills "partly" in the testator's handwriting, but has also retained the parallel provision which validates holograph wills "wholly" in the testator's handwriting. These two parallel provisions are each framed as an exception to the general rule mandating formal, witnessed wills. The Nunavut *Wills Act* reads:

> 5.1(1) In this section, "own writing" means handwriting, footwriting, mouthwriting or writing of a similar kind.

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[315] Newfoundland Act, s. 2(1) reads:

> 2. (1) A will is invalid unless it is made in writing, and it is either in the handwriting of the testator, and signed by him or her, or, where not so written and signed, is signed by the testator in the presence of at least 2 witnesses, who shall, in the presence of the testator, sign the will as witnesses, and where the will is made by a person who cannot write, it must first be read over to or by the testator in the presence of the witnesses.

[316] For example, it is not clear whether the court can give effect to the appointment of an executor, where the appointing language is printed, but the name of the appointee is handwritten: *Re McGettigan Estate* (1996), 144 Nfld. & P.E.I.R. 281 (Nfld. S.C (T.D)); *Re Coombs Estate* (2000), 194 Nfld. & P.E.I.R. 232 (Nfld. S.C. (T.D)).

> 5.1(2) A will that is wholly in the testator's own writing and signed by the testator is validly made without meeting the requirements set out in paragraphs 5(1)(b) and (c).
>
> 5.1(3) A will that is partly in the testator's own writing and partly in printed, typewritten or other written form is validly made without meeting the requirements set out in paragraphs 5(1)(b) and (c) if
>
> (a) it appears that the testator intended to incorporate the printed, typewritten or other words; and
>
> (b) the will is signed by the testator.

[235] Nunavut also has a general dispensing power.[317] This statutory scheme comes from the work of the Uniform Law Conference of Canada.[318] To date, Nunavut is the only Canadian jurisdiction to have adopted the ULCC's solution to the problem of unwitnessed printed will forms with handwritten entries.

ii. The "material portions" approach

[236] The American Law Institute notes that more than half the States allow holograph wills. Some States allow them only if they are wholly in the testator's handwriting. Other States allow them if the signature and "material provisions" or "material portions" of the document are in the testator's handwriting. The "material portions" approach comes from the Uniform Probate Code:

> § 2-502 (b) A will that does not comply with subsection (a) [witnessed wills] is valid as a holographic will, whether or not witnessed, if the signature and material portions of the document are in the testator's handwriting.
>
> (c) Intent that the document constitutes the testator's will can be established by extrinsic evidence, including, for holographic wills, portions of the document that are not in the testator's handwriting.

[237] It appears that the American "material portions" approach is similar to Scottish common law, which allows holograph wills that are wholly or "in essential parts" in the testator's handwriting.[319]

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[317] Nunavut Act, s. 13.1.

[318] ULCC Conference 1986, note 291, at 514-516. The corresponding sections in the Uniform Wills Act are s. 6 (holograph wills) and s. 19.1 (dispensing power).

[319] For a Canadian discussion of the Scottish common law, see Cameron Harvey, "Stationers' Will Forms: *Re Philip* and other cases" (1980) 10 Man. L.J. 481 at 484. Harvey (at 486) identifies a statutory codification of the Scottish approach as a reform option for Canada. No Canadian jurisdiction has yet adopted this approach.

[238] Even a document that is not wholly handwritten meets the main policy objective of a handwriting requirement, which is to provide a handwriting sample more substantial than a mere signature.[320] In the "material provisions" or "material portions" approach, the non-handwritten portions or provisions are not merely evidence of testamentary intention, but actually part of the will.[321] The American Law Institute also favours a general dispensing power for "harmless errors." A small minority of States have enacted such a power.[322]

iii. Advantages and disadvantages of having a specific statutory provision

[239] Both the American "material portions" approach and the Canadian "partly" approach attempt to balance the policy objective of requiring a certain percentage of the document to be in the testator's handwriting to help prevent fraud and the objectives of testator convenience and giving effect to the testator's intention.

[240] The main advantage of having a specific statutory provision addressing this area is that it validates problem wills without a special court application. The testator's intention can be given effect without costly and time-consuming litigation.

[241] Unfortunately, the "partly" and "material portions" approaches also suffer from significant disadvantages.

[242] The main problem with the "partly" approach is that the concept of "partly" has no inherent measure of proportion. This approach can validate wills which have very little handwriting besides the signature. For example, a fully typed, unwitnessed will with a handwritten and signed note saying "the above is my will" meets the "partly" criteria and could be validated under this special section, while a fully typed, unwitnessed will without any handwritten note must be the subject of a special court application for validation under the dispensing power. This effect seems capricious and disproportionate. What policy reason exists for making such a distinction?

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[320] Restatement, note 266, at 200, 202, 203.

[321] Restatement, note 266, at 200, 204.

[322] Restatement, note 266, at 217-221.

[243] The "material portions" approach appears to have a greater requirement of proportionality but, in reality, determining how much handwriting constitutes a material portion of the document would probably generate as much litigation as occurs now from wills which are not "wholly" in the testator's handwriting.[323]

d. Rely on a general dispensing power

[244] Another option to deal with the problem of unwitnessed printed will forms with handwritten entries is to allow their validation only under a general dispensing power. This approach enjoys a certain consistency from a policy point of view.

[245] Printed will forms are designed to elicit formal wills, as long as the testator fills them out appropriately. They are designed to allow the testator to dispense with a lawyer, but not witnesses.[324] They are not designed to elicit a holograph will.

[246] Should the statute facilitate the use of printed will forms for a purpose for which they are not designed? If the answer is no, then there should not be a specific statutory provision to validate the use of printed will forms with handwritten entries but no witnesses. A general dispensing power seems preferable. But even if the answer to the policy issue is yes, the general dispensing power may still be the best option for dealing with these problem wills. A statute that allows testators to draft their own testamentary documents should enable testators to do so as simply as possible.[325] The policy objective of testator convenience suggests that the statute should facilitate the use of printed will forms and should help save those filled-out printed will forms whose formal defects prevent them from being valid formal wills. The potential diversity of such formal defects suggests that such saving is most appropriately done on a case by case basis. Therefore, this approach calls for use of a general dispensing power, rather than a specific statutory provision.

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[323] There is a suggestion that the "material portions" are "the words identifying the property and the devisee." See Restatement, note 266, at 203.

[324] Sweatman, note 261, at 187.

[325] Sweatman, note 261, at 190.

[247] If unwitnessed printed will forms with handwritten entries are validated only by the dispensing power, it promotes procedural and conceptual consistency. In other words, the same method of validation would be used for all kinds of analogous defective wills. Why should a special provision be created to validate only one kind of defective will? Should not all analogous defective wills be dealt with in the same way?

[248] The main disadvantage of relying on the general dispensing power is that a special court application is required in every case, which can be costly and time-consuming.

4. Recommendation for reform

[249] The ALRI Board concurs with the opinion of the Project Advisory Committee on this issue. Enacting a special provision to validate unwitnessed wills "partly" in handwriting or having "material portions" in handwriting would simply increase litigation due to the vagueness of those terms. Moreover, it is inconsistent to enact a special provision to validate only one kind of defective will while requiring that all other analogous defective wills be dealt with under the general dispensing power.

[250] ALRI recommends that the Alberta Act continue to be silent on the issue of unwitnessed printed will forms with handwritten entries and that no special provision should be enacted. A court should continue to find a valid holograph will in those documents where the handwritten parts can be successfully severed and treated as a separate document. But if this technique cannot salvage a problem will, the estate should apply to validate the will under the general dispensing power.

[251] There is one concern about this approach. Currently, in straightforward cases, a simple and inexpensive "desk application"[326] is brought to have a court find a holograph will by severing the handwritten parts of a problem will. But once a general dispensing power is enacted, might a court discontinue this current practice and insist instead that all such problem wills be validated under the

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[326] A desk application proceeds on written evidence and written submissions which are read by the judge, without the necessity of a court appearance by counsel or parties.

general dispensing power? Doing so would require a more expensive and time-consuming court application to be brought in every case. The answer to this concern depends on how the court chooses to act. ALRI urges a pragmatic approach which will preserve the benefits of the current practice, so that a court application under the general dispensing power will be necessary only to save those problem wills which cannot otherwise be salvaged by severing the handwritten portions.

RECOMMENDATION No. 15
The *Wills Act* should not enact a special provision addressing unwitnessed printed will forms with handwritten entries. Such problem wills should be validated by a court severing the handwritten entries and finding a holograph will (if possible) or by a court making an order under the general dispensing power (where necessary).

CHAPTER 7. WILL FORMALITIES

A. Introduction

[252] The Alberta *Wills Act* specifies the formalities which must be met in order to create a valid formal will. The will must be written, it must be signed by the testator in a certain spot and there is a strict procedure for witnessing the will. This chapter makes recommendations about issues arising out of the act of signing a will.

[253] Currently a testator must perform all the required formalities exactly as stated in the Alberta Act. There is no room for error. Any incorrectly performed detail renders the will invalid. As discussed in Chapter 1, ALRI has recommended that this situation be changed by enacting a general dispensing power, so that a court may (in appropriate circumstances) validate a will which incorrectly or incompletely meets the formalities.[327] The discussion of issues in this chapter includes a consideration of the role that would be played by a general dispensing power.

B. Placement of Testator's Signature

1. Introduction

[254] The Alberta Act provides that a will is not valid unless "it is signed at the end or foot of it by the testator …."[328] In a separate saving provision, the Act clarifies the meaning of "end or foot" of the will by providing that the signature may validly be placed:

> … at or after or following or under or beside or opposite to the end of the will so that it is apparent on the face of the will that the testator intended to give effect by the signature to the writing signed as the testator's will.[329]

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[327] For example, a court could use the dispensing power to validate an unsigned will – in other words, a court could dispense with the formality that the testator must sign the will. However, the wording of the proposed dispensing power makes it clear that there must be clear and convincing evidence that the testator intended to adopt the unsigned document as a will. This approach is consistent with the dispensing powers of most jurisdictions: Alberta Report at 39-43.

[328] Alberta Act, s. 5(a).

[329] Alberta Act, s. 8(1).

Some exceptional circumstances are also listed and specifically validated, such as where the signature is placed in the attestation clause, where there is a blank space between the concluding words of the will and the signature or where the signature is on a page separate from the provisions of the will.[330] But the Act expressly provides that a testator's signature can never give effect to any disposition underneath it or inserted after the signature was written.[331]

[255] These statutory provisions originated in Victorian England, where the 1837 legislation first required the testator's signature be at the end or foot of the will. British courts interpreted this requirement so strictly and narrowly that many wills were invalidated as a result. To prevent this situation from continuing, a more elaborate saving provision clarifying the meaning of "end or foot" was added in 1852.[332] However, this "needlessly verbose" provision still resulted in much contradictory and irreconcilable case law in Britain.[333]

2. The law in Canada and other jurisdictions

a. Canada

[256] Nine other Canadian jurisdictions (British Columbia, Manitoba, New Brunswick, Nova Scotia, Northwest Territories, Nunavut, Ontario, Prince Edward Island, and Yukon) have the same provisions as Alberta.[334] This elaborate Victorian model is probably so widespread in Canada because it was part of the uniform legislation adopted in 1929[335] and 1953[336] by the Conference of

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[330] Alberta Act, s. 8(2).

[331] Alberta Act, s. 8(3).

[332] Feeney at § 4.9.

[333] Feeney at § 4.10.

[334] British Columbia Act, ss. 4(a), 6; Manitoba Act, ss. 4(a), 7; New Brunswick Act, ss. 4(a), 7; Nova Scotia Act, ss. 6(a), 7; Northwest Territories Act, ss. 5(1)(b), 7; Nunavut Act, s. 29; Ontario Act, ss. 4(1)(a), 7; Prince Edward Island Act, ss. 60(2), (3), (4); Yukon Act, ss. 5(1)(b) and 6.

[335] Conference of Commissioners on Uniformity of Legislation in Canada, *Proceedings of the Twelfth Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada* (1929), Appendix B at 324-325 [ss. 6(1)(a) and 7 of the Uniform Wills Act].

[336] Conference of Commissioners on Uniformity of Legislation in Canada, *Proceedings of the Thirty-fifth Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada* (1953), Appendix D at 42-43 [ss. 6(1)(b) and 7 of the Uniform Wills Act].

Commissioners on Uniformity of Legislation in Canada (as the Uniform Law Conference of Canada was then called), on which many provincial statutes are based.

[257] However, the Uniform Law Conference of Canada has since modified its approach to this issue. In 1986, it amended the Uniform Wills Act to advocate a much simpler provision. The Uniform Wills Act still requires a will to be signed but does not specify where the signature must appear. A very general saving provision states that, if the signature is not at the end of the document, the will is not invalid solely on that ground "if it appears that the testator intended by the signature to give effect to the will."[337]

[258] Saskatchewan has a similar provision to the new ULCC model in that its wills legislation does not mandate where a will must be signed.[338] However, there is one significant difference from the ULCC approach. Saskatchewan's provision states that it must be apparent "on the face of the will"[339] that the testator intended the signature to give effect to the will, whereas the ULCC model is silent concerning the source from which the testator's intention is to be assessed.

[259] Of the remaining two Canadian jurisdictions, Quebec requires a will to be signed at the end but has no specific saving provision concerning this requirement; it simply relies on its substantial compliance provision to deal with any problems.[340] The province of Newfoundland and Labrador has a signature requirement but does not specify where the signature must be placed.[341] The legislation does not contain any specific or general saving provision or dispensing power.

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[337] ULCC Conference 1986, note 291, at 37 and Appendix O at 528 [s. 4(1)(a) and (3) of the *Uniform Wills Amendment Act*].

[338] Saskatchewan Act, s. 7(1)(a)-(b).

[339] Saskatchewan Act, s. 7(1)(b).

[340] Quebec Civil Code, arts. 714, 727.

[341] Newfoundland Act, s. 2(1).

b. England, Australia and New Zealand

[260] England repealed its Victorian provisions in this area in 1982[342] in accordance with recommendations from its Law Reform Committee[343] and now has a simpler provision. A will must be signed, but the statute does not specify where.[344] It states that the will is not valid unless "it appears that the testator intended by his signature to give effect to the will."[345]

[261] Some Australian jurisdictions are also in the process of revising their wills legislation on this point. Six have enacted simpler provisions (New South Wales, Northern Territory, South Australia, Victoria, Queensland, and Western Australia)[346] while only two others still use the traditional model (Australian Capital Territory and Tasmania).[347] The National Committee for Uniform Succession Laws has recommended the simpler provision in its uniform model statute.[348]

[262] At the moment, New Zealand uses the traditional model,[349] but its new wills statute (currently in the process of being enacted) simply states that the testator must sign the will, without further elaboration concerning location or intention.[350]

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[342] *Administration of Justice Act 1982* (U.K.), 1982, c. 53, s. 17.

[343] England Report at 4-5.

[344] England Act, s. 9(a).

[345] England Act, s. 9(b).

[346] New South Wales Act, s. 7(1)(b)-(c); Northern Territory Act, s. 8(1)(a), 8(3); South Australia Act, s. 8(a)-(b); Victoria Act, s. 7(1)(a)-(b); Queensland Act, s. 10(2), (6), (7); Western Australia Act, s. 8(b).

[347] Western Australia Act, ss. 9(1)(b), 10; Tasmania Act, ss. 10(a) and 11.

[348] Australia Uniform Report at 10-11.

[349] *Wills Act 1837* (U.K.) 7 Will. IV & 1 Victoria, c. 26, s. 9 and *Wills Amendment Act, 1852* (Imp.), 15 and 16 Vict., c. 24, s. 1, both declared in force in New Zealand by the *Imperial Laws Application Act 1988* (N.Z.), 1988/112, Schedule 1 [New Zealand Act].

[350] New Zealand Bill, s. 11(3)(a). A simpler provision was recommended in the New Zealand Report at 3, 16.

3. Reform issues

a. Must a will be signed at its end or foot?

[263] The requirement that a will must be signed at its end or foot has been described as "a perennial trap for do-it-yourself will-makers" and a review of the case law bears out this conclusion.[351] Although the Victorian model was designed to prevent courts from needlessly invalidating wills, it nevertheless continued to result in much contradictory and irreconcilable case law in Britain, as already mentioned. Canadian case law "is also uneven."[352] Different courts can reach opposite conclusions on similar facts. Sometimes mental gymnastics are used to save a will and to avoid applying the plain meaning of the provisions. Common fact situations which have challenged courts in this area include:

- "envelope cases" where the testator's signature and witnesses' attestation are found on the envelope containing the will, but are not written on the will itself (or are improperly placed in the will or are otherwise wrong).[353]
- cases where the first page of a will is properly signed and attested, but additional, attached pages are not. (This scenario can often arise where a printed will form is used and the testator attaches more pages to it). Although the statute clearly says that dispositions following the testator's signature are invalid, courts can use a number of techniques to save such a will:
    - The court will sometimes read the will in reverse order so that the signature can be artificially characterized as being on the "final" page. However, there must be evidence that the entire document existed before the testator signed it.[354]

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[351] New Zealand Report at 3.

[352] Feeney at § 4.11.

[353] Such a will was admitted to probate in *In the Estate of Mann*, [1942] 2 All E.R. 193 (Prob., Divorce and Admiralty), while probate was refused in *Re Beadle*, [1974] 1 All E.R. 493 (Ch.). In Canada, probate was granted in *Re Wagner Estate* (1959), 29 W.W.R. 34 (Sask. Surr. Ct.).

[354] See, for example, *In the Goods of Wotton* (1874), 3 P. & D. 159 (Court of Probate) and *In the Goods of Smith*, [1931] P. 225 (Prob. Div.). Alberta courts have reached opposite conclusions on such facts – an example of this type of will was declared valid in *In re Moir Estate*, [1942] 1 W.W.R. 241 (Alta. S.C. Appellate Div.), but was rejected in *In re Brown Estate* (1953), 10 W.W.R. (N.S.) 163 (Alta. S.C.). The court in the latter case insisted on a strict application of the wills legislation, despite

(continued...)

- If the rules for incorporation by reference can be met, the court may be able to characterize the additional pages as a document incorporated by reference into the text preceding the signature.[355]

- Depending on the facts, the court can sometimes find that the testator intended the "end" of the will to be somewhere other than at the literal end of the document.[356]

While the current judicial trend is to liberally construe the Victorian provisions and, if possible, to save wills, sometimes that is just not possible. "In many cases, however, despite its best endeavours, there is nothing a court can do to accept a signature not physically at the end of a will."[357]

[264] Because of this unpredictable case law, there is a reform movement underway in parts of the Commonwealth to remove the strict requirement that a will must be signed at the end and to replace it with a more flexible requirement that depends on judging the testator's intention rather than mandating a certain physical location for the signature. Such reform is not yet widespread in Canadian legislation but has received some attention from law reform agencies. The Uniform

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[354] (...continued)
being satisfied that the entire will was written before the signature was affixed and that the whole document was intended by the testator to be his will.

[355] This doctrine saved the will in *Re Poole*, [1929] 1 D.L.R. 418 (P.E.I. S.C.) but was unsuccessful in *In the Estate of Bercovitz*, [1962] 1 All E.R. 552 (C.A.).

[356] In *Re Henry Hornby*, [1946] 2 All E.R. 150 (Probate, Divorce and Admiralty), the court found the intended end of the will was the box drawn in the centre of the page in which the testator had written his signature, with the rest of the will written around the box. In *Re Roberts, W.E.*, [1934] P. 102 (Prob. Div.), the court accepted a testator's signature and witnesses' attestation written in the margin at right angles to the body of the will.

[357] Feeney at § 4.12. For example, it is extremely difficult to save wills which are signed by the testator at the beginning of the document rather than at the end – see *Re Wright Estate*, [1962] O.W.N. 122 (H.C.) and *Ellis v. Turner* (1997), 20 E.T.R. (2d) 306 (B.C. C.A.). Such wills can usually only be validated if the statute has a general dispensing provision, as in *Martineau v. Manitoba (Public Trustee)* (1993), 50 E.T.R. 87 (Man. Q.B.) or if another signature by the testator can be relied on, as in *Re Wagner Estate* (1959), 29 W.W.R. 34 (Sask. Surr. Ct.), where the testator's signature on the envelope served that purpose.

Law Conference of Canada[358] and the Manitoba Law Reform Commission[359] have endorsed the new approach, but the Law Reform Commission of British Columbia has recommended against changing the Victorian provisions, preferring instead to rely on the enactment of a dispensing power to solve these problems.[360] The Law Reform Commission of Nova Scotia did not address this issue in its recent report.[361]

b. Specific saving provision, general dispensing power, or both?

[265] If the signature placement requirement is retained, must the current saving provision also be kept if the statute also has a general dispensing power?

[266] As previously noted, the specific saving provision concerning testators' signatures originated in 1852, long before wills legislation had general dispensing powers to validate problematic wills. It would seem logical that enacting a general dispensing power would supersede the need to have a special saving provision dealing with one type of error. However, this does not seem to have been the case in three Canadian jurisdictions which have enacted dispensing powers – Manitoba, New Brunswick and Prince Edward Island.[362] All three retained their specific saving provisions for testators' signatures in addition to their general dispensing powers. Only Quebec relies solely on its substantial compliance provision to deal with problems stemming from the requirement to sign a will at the end.[363]

[267] The dispensing power which ALRI recommends for the Alberta Act applies (among other things) to the requirements governing a testator's signature and the

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[358] ULCC Conference 1986, note 291, at 37 and Appendix O at 509-510, 528.

[359] Manitoba Report at 5-6.

[360] British Columbia 1981 Report at 33, 52-53. This approach is reiterated in British Columbia 2006 Report at 24-25.

[361] Nova Scotia Report.

[362] Manitoba Act, ss. 4(a), 7, 23; New Brunswick Act, ss. 4(a), 7, 35.1; Prince Edward Island Act, ss. 60(2)-(4), 70.

[363] Quebec Civil Code, arts. 714, 727.

accompanying saving provision.[364] Technically, therefore, if the requirement is kept that a will must be signed at its end, the related saving provision could be eliminated since the general dispensing power would also cover all the circumstances mentioned in that provision. However, litigation would be needed to validate those circumstances under the dispensing power, whereas the saving provision already lists and authorizes them, thereby providing a shortcut to validation. This consideration may be why Manitoba, New Brunswick and Prince Edward Island retained their saving provisions following enactment of a dispensing power.

c. Testator's intention apparent on the face of the will?

[268] If the signature position requirement is discontinued, should the Alberta Act require that the testator's intention to give effect to the will by the testator's signature must be apparent on the face of the will?

[269] In the Commonwealth jurisdictions discussed above which have enacted (or recommended enacting) a simpler provision, this requirement is now typically expressed as having two parts:

(1) the testator must sign the will (although where is not specified), and

(2) the testator must intend by the signature to give effect to the will.

There is, however, some variation concerning whether the testator's intention must be apparent on the face of the will itself.

[270] There are a couple of jurisdictions (Saskatchewan and Western Australia) which explicitly require the testator's intention to be apparent on the face of the will, but they are in a distinct minority. Most jurisdictions are similar to the English model, which simply "states that it must *appear* that the testator intended by his signature to give effect to the will; but it does not *require* the intention to appear *from the will*."[365] This formulation allows wider extrinsic evidence based on the testator's words and actions to be used to determine the significance of the signature.

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[364] See Chapter 1, Part D for the text of our proposed dispensing power.

[365] Parry & Clark at 43 [emphasis in original]. England's Law Reform Committee had recommended that the testator's intention must be apparent on the face of the will but this was not implemented in the resulting reform: England Report at 5.

[271] Two jurisdictions (New South Wales and South Australia) provide that the testator's intention must appear "on the face of the will or otherwise" but this just results in the same legal effect as being silent about the source.

4. Recommendation for reform

[272] ALRI supports simplifying the formalities concerning a testator's signature. We recommend that the Alberta Act continue to require that a will be signed by the testator, but the statute should not specify where that signature should appear on the document. Like the other jurisdictions which have reformed this area, we recommend that the elaborate Victorian saving provision (with one exception) be discontinued and that the general dispensing power be relied upon instead to validate problematic wills where appropriate.

[273] One aspect of the Victorian saving provision should be retained as a safeguard. We recommend that the Alberta Act provide that any dispositions written above the testator's signature are part of the will but any dispositions written below the testator's signature are not part of the will, unless the dispensing power is used to validate and include those dispositions. This will encourage testators to sign at the end of the will, while ensuring that a court will always scrutinize those wills where dispositions follow the signature. The statute should make it clear that the dispensing power may relieve against this requirement. The court should also be able to use extrinsic evidence when assessing these cases.

RECOMMENDATION No. 16
The *Wills Act* should continue to require that a will be signed by the testator, but the statute should not specify where the signature must be placed.

RECOMMENDATION No. 17
The *Wills Act* should provide that any dispositions written above the testator's signature are part of the will but any dispositions written below the testator's signature are not part of the will, unless the dispensing power is used to validate and include those dispositions.

RECOMMENDATION No. 18
The statute should discontinue its special savings provision concerning testators' signatures. Problematic wills should be validated (in appropriate cases) under the general dispensing power. Extrinsic evidence may be used by the court when assessing these cases.

C. Number of Witnesses

[274] The Alberta Act provides that a formal will must be witnessed by two or more witnesses.[366] Requiring a minimum of two witnesses is a standard formality in Canada, England, Australia, New Zealand and the United States. It originated in the 1837 wills legislation which dramatically reformed the law of succession in Victorian England. In making this reform, the rationale for requiring two witnesses (instead of one witness) was stated to be as follows:

> The presence of witnesses is required in order to prevent fraud or coercion, and to prove the capacity of the testator; the number two was fixed on instead of one, in order to increase the chance that a witness would be living at the death of the testator, and in order to bring into play the difficulty of engaging an accomplice, the necessity of rewarding him, and the danger to be apprehended from his giving information; the two witnesses are required to be present together, in order to remove the possibility of getting two accomplices at different times, and in order to force them to tell exactly the same story in Court, and thus to render perjury more easily discoverable by cross-examination.[367]

[275] Perhaps it is time to question the requirement of two witnesses for a formal will. Other important legal documents can be created with only one witness. Contracts are routinely signed by parties in the presence of only one witness. Of course, unlike a testator, the contracting party will usually still be alive and in control of the situation when the terms of the contract are carried out. In Alberta, an enduring power of attorney is also validly made with only one witness to the donor's signature.[368] This situation is closer to that of a will because an enduring power of attorney operates when the donor is mentally incapable. Like a testator, the donor will not be in control of the situation or property at the operative time.

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[366] Alberta Act, s. 5(b).

[367] Fourth Report of the Real Property Commissioners, 1833 at 17 (which led to the enactment of the *Wills Act, 1837*), cited in the British Columbia 1981 Report at 32.

[368] *Powers of Attorney Act*, R.S.A. 2000, c. P-20, s. 2(1)(b).

Tremendous power over all the donor's property and affairs is given to an attorney. If this can be done on the strength of only one witness to the document, why should a will require two witnesses?

[276] On the other hand, requiring two witnesses for a will is not a particularly onerous requirement. If two witnesses are unavailable for whatever reason, a testator can always make a handwritten holograph will. If by mistake only one witness signs a will, a court can still validate the will in those jurisdictions which have a general dispensing power.

[277] Law reform agencies rarely question the wisdom of requiring two witnesses. Most reports concerning formalities do not even raise the issue. When an agency does raise the issue, it invariably affirms the continuation of this requirement for similar reasons as did the English Law Reform Committee:

> We think that a rule requiring two witnesses provides a greater safeguard against forgery and undue influence than would a rule requiring only one. The present law is generally well known and we see no reason to recommend that it be altered.[369]

[278] ALRI generally agrees with this assessment and recommends that two witnesses should continue to be required for a valid formal will. As with all our recommendations in this Report for Discussion, however, we welcome any comments or arguments that respondents may have for reducing the number of required witnesses.

RECOMMENDATION No. 19
A minimum of two witnesses should continue to be necessary to create a valid formal will.

D. Concurrent Presence of Witnesses When the Testator Signs the Will

1. Introduction

[279] Section 5(b) of the Alberta Act provides that "a will is not valid unless … the testator makes or acknowledges the [testator's] signature in the presence of 2

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[369] England Report at 5. See also: New South Wales Wills Report at 51-52; ULCC Conference 1986, note 291, at 510-511.

or more attesting witnesses *present at the same time* ….”[370] In other words, both witnesses must be present together when the testator signs, or acknowledges having already signed, the will. It is not sufficient if the testator signs in the presence of one witness alone and then later acknowledges that signature in the presence of the other witness alone. Both witnesses must be present at the same time for the testator’s signature or acknowledgment. Accordingly, the first reform issue arising out of this requirement is – should a testator be able to sign or acknowledge the testator’s signature in the presence of two witnesses serially rather than concurrently?

[280] Moreover, it is settled law that section 5(b) implicitly requires that the testator must sign the will before either of the witnesses do. If the testator signs in the presence of one witness alone who also signs and then subsequently the testator acknowledges the testator’s signature in the presence of both witnesses and the second witness signs at that time, the will is invalid despite the presence of both witnesses unless the first witness actually re-signs the will following the acknowledgment of the testator’s signature. It is not sufficient if the first witness simply acknowledges their signature to the other witness. This scenario resulted in invalid wills in the English case of *Re Colling*[371] and the Canadian case of *Re Brown*.[372] Accordingly, the second reform issue arising out of this requirement is – should one witness be able to acknowledge their signature to the other witness rather than having to re-sign the will?

[281] While both witnesses must be present when the testator signs or acknowledges the will, it is not a requirement that both witnesses must be present when they sign.[373] Section 5(c) of the Alberta Act provides that “2 or more of the attesting witnesses [must] subscribe the will *in the presence of the testator*.”[374] Each witness can sign separately so long as the testator is present for both.

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[370] Alberta Act, s. 5(b) [emphasis added].

[371] *Re Colling*, [1972] 3 All E.R. 729 (Ch.).

[372] *Re Brown*, [1954] O.W.N. 301 (Surr. Ct.).

[373] Feeney at § 4.23. As this source notes, only Prince Edward Island requires both witnesses to sign in each other’s presence as well as that of the testator.

[374] Alberta Act, s. 5(c) [emphasis added].

[282] These formalities were first introduced in the English *Wills Act, 1837*. Before this reform, a testator could acknowledge a will to witnesses separately.[375] Requiring the concurrent presence of witnesses was designed to discourage fraud.[376]

2. The law in Canada and other jurisdictions

[283] Almost all wills legislation in Canada provides that the testator must sign or acknowledge their signature in the concurrent presence of witnesses. Only Newfoundland and Quebec do not explicitly state this requirement and so their provisions are potentially ambiguous in this regard.[377] New Zealand and all the Australian jurisdictions also have an explicit provision requiring concurrent presence of witnesses when the testator signs or acknowledges.

[284] England considered whether to change this requirement, but its Law Reform Committee rejected such a reform as unnecessary, saying:

> … we do not consider that this requirement causes any great injustice and on the whole we think it is right that the three necessary participants in the "ritual" of execution of a will should be present together during the essential part of it, namely the signature or acknowledgement of his signature by the testator.[378]

[285] However, the Committee did recommend reversing the legal effect of *Re Colling*. In a situation where a sole witness signs the will in the testator's presence but is joined later by the second witness (before whom the testator acknowledges the testator's signature), the first witness should be allowed to simply acknowledge their own signature to the other witness rather than having to re-sign the will.[379] This reform would prevent the will from later being found invalid.

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[375] R. Jennings & J.C. Harper, eds., *Jarman on Wills*, 8th ed. (London: Sweet & Maxwell Limited, 1951) vol. 1 at 132.

[376] British Columbia 1981 Report at 32, citing the 1833 *Report of the Real Property Commissioners* which led to the adoption of the *Wills Act, 1837*.

[377] Newfoundland Act, s. 2(1); Quebec Civil Code, art. 727.

[378] England Report at 5.

[379] Feeney at § 4.9.

[286] Accordingly, the English legislation was amended so that it now provides:

> **9.** No will shall be valid unless –
>
> …
>
> (c) the [testator's] signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and
>
> (d) each witness either –
>
> (I) attests and signs the will; or
>
> (ii) acknowledges his signature,
>
> in the presence of the testator (but not necessarily in the presence of any other witness) …[380]

Although a witness may now simply acknowledge their signature in circumstances where re-attestation is required, English lawyers are still being encouraged to have the witness actually re-sign the will instead. As explained by one commentator:

> This is because a re-signing will be apparent on the face of the will and will, hopefully, dispel any doubts as to the correctness of the execution. An acknowledgement will obviously not be so apparent and will depend upon proof by affidavit evidence that it was done, which may not be forthcoming on death. It is as a matter of practicality just as easy and quick to re-sign as it is to acknowledge.[381]

[287] In Canada, only Saskatchewan has a similar provision to allow a witness to acknowledge their signature.[382] In Australia, only South Australia does.[383]

3. Recommendations by other law reform agencies

[288] There is no Canadian or Commonwealth law reform movement advocating that a testator should be able to sign or acknowledge the testator's signature in the serial presence of witnesses. Any law reform agency which has raised this issue in

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[380] England Act, s. 9, as am. by *Administration of Justice Act 1982* (U.K.), 1982, c. 53, s. 17. Note that the provision now also explicitly states what was formerly implicit, namely, that the witnesses need not be in each other's presence when they sign.

[381] C.H. Sherrin et al., eds., *Williams on Wills*, 8th ed. (London: Butterworths, 2002) vol. 1 at 136, n. 3.

[382] Saskatchewan Act, s. 7(1)(d).

[383] South Australia Act, s. 8(e).

Canada,[384] Australia,[385] England,[386] or New Zealand[387] has always recommended retaining the law of concurrent presence.

[289] As noted, the English Law Reform Committee did recommend an amendment to reverse the effect of *Re Colling* so that in appropriate circumstances a witness can acknowledge the witness's own signature instead of re-signing. The Manitoba Law Reform Commission has also made this recommendation.[388] So has the Uniform Law Conference of Canada, whose Uniform Wills Act provides that the witnesses are to "sign the will, or acknowledge their signatures, in the presence of the testator but not necessarily in the presence of each other."[389]

[290] In contrast to the Canadian and Commonwealth situation, one legislative model which does propose relaxed formalities in these areas is the American Uniform Probate Code.[390] The concurrent presence of witnesses is not required and, therefore, serial witnessing is possible. The witnesses must sign within a reasonable time of witnessing either the testator's signature, the testator's acknowledgment of the testator's signature or the testator's acknowledgment of the

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[384] British Columbia 1981 Report at 32-33. ULCC Conference 1986, note 291, at 37 and Appendix O at 511. No mention was made of this issue in the Nova Scotia Report. The Manitoba Law Reform Commission did not explore this aspect of the issue either: Manitoba Report at 8.

[385] Australia Uniform Report at 10-11; New South Wales Law Reform Commission, *Uniform Succession Laws: The Law of Wills*, Report No. 85 (1998) at 34-35; Queensland Law Reform Commission, *The Law of Wills*, Report No. 52 (1997) at 12. These reports all endorse a model of concurrent presence of witnesses without any real examination of the serial presence option. The Queensland Law Reform Commission did explicitly raise the issue of serial presence of witnesses in its issue paper but apparently nothing further came of it: Queensland Law Reform Commission, *The Law of Wills*, Issue Paper No. 1 (1994) at 5.

[386] England Report at 5.

[387] New Zealand Law Report at 3, 16.

[388] Manitoba Report at 8. The Commission did not really raise or explore the larger issue of concurrent versus serial presence of witnesses. Accordingly the Commission made no recommendation to change the requirement of concurrent presence of witnesses.

[389] Uniform Wills Act, s. 4(1)(c)(ii) implementing the recommendation made in ULCC Conference 1986, note 291, at 37 and Appendix O at 512-513.

[390] Uniform Probate Code § 2-502.

will. The witnesses do not have to sign either in the testator's presence or each other's presence.[391]

4. Role of dispensing power

[291] In 2000, ALRI considered whether to recommend relaxing formalities, as the Uniform Probate Code has done in a fairly major way or as the English wills legislation has done in a fairly minor way in order to reverse *Re Colling*.[392] ALRI concluded that relaxing formalities was not the best way to deal with technically invalid wills and that enacting a general dispensing power would be a more effective response.

> Relaxation of the formalities would allow into probate some documents that would comply with the relaxed formalities but do not strictly comply with the present formalities. However, after the relaxation the law would still focus on whether or not the testator has complied with the formalities rather than on whether the testator intended to adopt a document as his or her will. It would still, in our opinion, allow the intentions of too many testators to be defeated because of failures of form and formality, at least unless the formalities were relaxed to the point of being meaningless. We therefore do not recommend that the formalities be relaxed.[393]

[292] It remains a good argument that the current formalities should continue unchanged and that any problems can be adequately handled by resorting to the dispensing power recommended by ALRI.

[293] Relaxing formalities makes the most sense in jurisdictions like England where strict compliance with the formalities is a necessity because there is no dispensing power. However, Saskatchewan and South Australia, which follow England and also allow witnesses to acknowledge their own signatures, do have dispensing powers, as does Manitoba where a similar amendment has been

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[391] Lawrence H. Averill, Jr., *Uniform Probate Code in a Nutshell*, 5th ed. (St. Paul, Minn.: West Group, 2001) at 154-156 [Averill]. Averill notes at 156-157 that despite the breadth of the requirement to sign within a reasonable time, however, "several decisions have refused to probate wills where the witnesses signed outside the normal execution process …. In another case, it has held that necessary witnesses must sign prior to the testator's death."

[392] Alberta Report at 13-16, 19-20.

[393] Alberta Report at 20.

recommended.[394] The Uniform Wills Act has a dispensing power.[395] So does the Uniform Probate Code, which has the most relaxed formalities of all these jurisdictions and models.[396]

[294] In problematic situations such as a witness acknowledging their signature rather than re-signing the will, the resulting invalid will could of course be saved under a dispensing provision. However, it would require a court to hold a hearing for that purpose and so order. If the wills statute directly provides that a witness can acknowledge their own signature, then such a will would be properly executed and valid without the need for a special court order, thereby saving time and money. This is probably why the amendment to reverse *Re Colling* is found even in jurisdictions and models which have a dispensing power.

5. Recommendation for reform

[295] On the issue of whether a testator should be able to sign or acknowledge the testator's signature in the presence of two witnesses serially rather than concurrently, ALRI would like to canvass the opinion of the public, legal profession and judiciary before making a recommendation. The Project Advisory Committee which advised the ALRI Board on this issue is in favour of retaining concurrent witnessing.

> **REQUEST FOR COMMENT: Concurrent or Serial Witnessing**
> **Should a testator be able to sign or acknowledge the testator's signature in the presence of two witnesses serially rather than concurrently?**

[296] On the issue of whether one witness should be able to acknowledge their signature to the other witness rather than having to re-sign the will in a *Re Colling* situation, ALRI recommends making this reform to our Alberta Act, if concurrent witnessing is retained. While the dispensing power could validate wills which would otherwise fail for breaching this protocol, it would necessitate the time and

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[394] Saskatchewan Act, s. 37; South Australia Act, s. 12; Manitoba Act, s. 23.

[395] Uniform Wills Act, s. 19.1.

[396] Uniform Probate Code § 2-503.

expense of a special court application. It is simpler to amend the statute to allow a witness to acknowledge their signature where needed.

RECOMMENDATION No. 20
If the *Wills Act* retains concurrent witnessing, the statute should allow a witness to acknowledge their signature to the other witness rather than having to re-sign the will.

E. Publication of Wills

1. Introduction

[297] Historically, a testator was required to "publish" their will by making a declaration in the presence of witnesses that the document produced to them was the testator's will.[397] In other words, the witnesses had to know what kind of document they were witnessing. Subsequent proof of this publication was necessary for the will to be valid.

[298] The English *Wills Act, 1837* explicitly abolished the requirement of publication.[398] Publication was superseded by the modern formalities involving the concurrent presence and signatures of the testator and at least two witnesses.[399] The authors of the 1837 reforms asserted that these formalities were more reliable in defending against fraud, coercion and perjury.[400] The validity of a will became dependent on the proper formalities being followed. It was irrelevant whether the witnesses knew that the document being signed was a will.

[299] The abolition of the publication requirement also promotes a testator's right to privacy concerning the planned distribution of the estate:

> ... a testator should have the right to make a will without having to disclose its contents to a witness, and without even having to disclose to a witness that the testator is making a will. The purpose of the witnessing requirement

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[397] Halsbury's, note 86, vol. 50 at para. 362, n. 2.

[398] England Act, s. 13.

[399] Halsbury's, note 86, vol. 50 at para 362.

[400] *Fourth Report of the Real Property Commissioners* (England, 1833) at 17, cited in British Columbia 1981 Report at 32.

> is simply to verify the authenticity of the testator's signature, and to ensure that the testator is signing voluntarily.[401]

[300] The Alberta Act follows the standard English model and provides that "[a] will made in accordance with this Act is valid without other publication."[402]

2. The law in Canada and other jurisdictions

[301] Following the English precedent, the wills legislation of every Canadian jurisdiction has a provision stating that no publication of wills is necessary. In addition to the English legislation, such provisions are also present in the wills legislation of New Zealand and every Australian jurisdiction. However, half the Australian jurisdictions (Capital Territory,[403] Northern Territory,[404] Queensland[405] and Victoria[406]) have modernized the language used to express this concept. Instead of saying that "publication" is not required, these statutes simply say that a witness to a will does not need to know that the document is a will. New Zealand will also have updated language when its new wills legislation is enacted.[407]

3. Reform issues

a. Repeal?

[302] Does the standard provision abolishing publication of wills continue to serve an ongoing legal purpose or has it fulfilled its original function of creating procedural change so that it is now essentially obsolete and can be repealed? If this section were repealed, there is no danger that the former publication requirement which it abolished would automatically revive and become operative again.[408] However, it is arguable that its ongoing presence does serve a couple of purposes,

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[401] Australian Uniform Report at 12.

[402] Alberta Act, s. 11.

[403] Australian Capital Territory Act, s. 13.

[404] Northern Territory Act, s. 9.

[405] Queensland Act, s. 10(5).

[406] Victoria Act, s. 8.

[407] New Zealand Bill, s. 12(2). This implements a recommendation made in the New Zealand Report at 3.

[408] Interpretation Act, note 141, s. 35(1)(a).

namely (1) an instructive or informative purpose of letting testators know that witnesses need not be told the details of the will or even that the document is a will (thus preserving the testator's privacy) and (2) a deterrent purpose of blocking any court which (however unlikely) might consider re-creating a publication obligation at common law.

[303] As noted, this provision is found in the legislation of every jurisdiction in Canada, England, Australia and New Zealand. There is no national or international reform movement to alter this situation, either by repealing the provision or by reviving a publication requirement.[409] Concerning the latter option, the Australian National Committee for Uniform Succession Laws stated curtly that it "sees no valid reason" for reintroducing a publication requirement.[410]

b. Update the language?

[304] As previously noted, the only real reform which is occurring to provisions abolishing publication is updating or modernizing the language used in such sections. "Publication" conveys a very different meaning to a modern person than its archaic meaning in this section.

> [The] section can be understood only if it is appreciated that the term "publication" was intended to mean a declaration by the testator to witnesses that the document shown to them was the testator's will.[411]

[305] As already discussed, four Australian jurisdictions (Capital Territory, Northern Territory, Queensland and Victoria) have modernized the language used in this section and New Zealand is in the process of doing so. Instead of saying that "publication" is not required, these statutes simply say that a witness to a will does not need to know that the document is a will. Such a reform has also been

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[409] In recognition of this section's informative value, however, the Manitoba Law Reform Commission recommended that it be expanded to list other elements that are not legally required for formal validity yet must be proved during probate – the date of the will and an attestation or testimonium clause supporting due attestation: Manitoba Report at 16. No other law reform agency has made such a recommendation.

[410] Australian Uniform Report.

[411] New Zealand Report at 3.

recommended by the Australian National Committee for Uniform Succession Laws.[412]

4. Recommendation for reform

[306] ALRI recommends that the Alberta Act should continue to have a provision abolishing publication, as it serves an instructive purpose and promotes uniformity of legislation. However, it makes sense to express this provision in plainer English so that its meaning may be obvious to all who read it. ALRI recommends modernizing the language in the same manner as the Australian provisions.

RECOMMENDATION No. 21
The *Wills Act* should continue to provide that publication of a will is not necessary by stating in plain language that a witness to a will does not need to know that the document is a will.

[412] Australia Uniform Report at 12 .

CHAPTER 8. WITNESSES TO A WILL

A. Incompetent Witnesses

1. Introduction

[307] The Alberta *Wills Act* does not specify who should be a witness to a will. From a practical point of view, witnesses should be mentally competent adults so that their evidence about the will cannot be challenged for incompetence due to impairment or age. Case law suggests another qualification for witnesses – the ability to see. It has been held that a totally blind person should not be used as a witness. Physical inability to see the testator actually sign the will means that the will was not signed in the witness's "presence" as required by the Act.[413] "Presence" of a witness involves mental, physical and visual aspects.

[308] The Alberta Act has a saving provision to prevent a will from being invalidated by an incompetent witness. Section 5 provides that "a will is not valid" unless it has two or more attesting witnesses. But section 12 provides that:

> [i]f a person who attested a will was at the time of its execution or afterwards has become incompetent as a witness to prove its execution, the will is not on that account invalid.

Note that this saving provision applies both where the witness was incompetent at the time of signing the will and where an originally competent witness later became incompetent by the time the will needed to be proved.

[309] Section 12 "saves" the will from the invalidity that would otherwise result from a strict application of section 5. On an application for probate of a will in this situation, a court will be satisfied with the evidence of the other, competent witness.[414]

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[413] *Re Gibson*, [1949] P. 434 at 437 [*Gibson*].

[414] *Re Butler Estate* (1989), 249 A.P.R. 220 at 222 (Nfld. S.C. T.D.).

2. History and purpose of Section 12

[310] Historically under English law, "there were numerous bases on which a witness could be found to be incompetent, some more serious than others."[415] Apart from incompetence based on mental impairment or age, a witness was also rendered incompetent, for example, by any kind of financial or pecuniary interest, large or small, related to the matter about which the testimony was given.[416] When probating a will in those days, it was a real disaster to discover that a witness was incompetent either at the date on which the will was signed or later at probate, because the entire will would fail as a result and intestacy would occur. Therefore, this saving provision was first enacted in the *Wills Act, 1837*[417] to prevent invalidity.

[311] Victorian-era law reform ended most of the archaic forms of incompetence,[418] "so that today witness incompetency is essentially based solely upon mental impairment and age."[419] However, the saving provision lives on.

3. The law in Canada and other jurisdictions

a. Canada

[312] This saving provision is found in the wills legislation of all Canadian jurisdictions but Quebec. Except in Nova Scotia, the provision always states explicitly that it applies both at the time of execution and afterwards. Arguably, however, this effect may also be implicit in the Nova Scotia provision, which states that "[n]o will is invalid on account of the incompetency of the witnesses thereto to prove its execution."[420]

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[415] Manitoba Report at 17.

[416] Australia Uniform Report at 18.

[417] England Act, s. 14.

[418] Australia Uniform Report. The modern law that an interested person is nevertheless a competent witness is similarly affirmed in Canadian evidence law – see, for example, the *Alberta Evidence Act,* R.S.A. 2000, c. A-18, s. 3 [Evidence Act].

[419] Manitoba Report at 17.

[420] Nova Scotia Act, s. 11.

b. England, Australia and New Zealand

[313] As mentioned, this provision was first enacted in England in the *Wills Act, 1837*. It remains unchanged today.

[314] There is a trend in Australia to discontinue this provision. There are only three jurisdictions which still retain the traditional saving provision (Capital Territory, South Australia and Tasmania).[421] One jurisdiction (New South Wales) which does not have a saving provision specifies instead who may be a witness.[422] Its statute says that anyone, except a blind person, who is competent to be a witness in court civil proceedings can witness a will. Three other jurisdictions without saving provisions (Northern Territory, Victoria and Queensland) simply say that a person who cannot see and attest to the making of a signature cannot witness a will, without specifying any further qualifications.[423] A fourth jurisdiction without a saving provision, Western Australia, is in the process of adding a similar provision concerning the visually impaired.[424]

[315] New Zealand currently has the saving provision, but is in the process of discontinuing it in its new wills legislation.[425]

c. United States

[316] The Uniform Probate Code specifies who may be a witness – "[a]n individual generally competent to be a witness may act as a witness to a will."[426] There is no saving provision in the event of an incompetent witness, but the Code does state that signing a will by an interested witness does not invalidate the will.[427]

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[421] Australian Capital Territory, s. 14; South Australia Act, s. 16; Tasmania Act, s. 13.

[422] New South Wales Act, s. 12.

[423] Northern Territory Act, s. 11; Victoria Act, s. 10; Queensland Act, s. 10(10).

[424] Western Australia Bill, s. 10, amending Western Australia Act.

[425] New Zealand Bill, which will replace the New Zealand Act.

[426] Uniform Probate Code § 2-505(a).

[427] Uniform Probate Code § 2-505(b).

4. Reform issues and recommendations

a. Retain or repeal?

[317] Should the saving provision concerning incompetent witnesses be retained or repealed?

[318] The legal commentary in Feeney suggests that the traditional saving provision about incompetent witnesses really concerns credibility, not capacity, and that it should not be interpreted

> ... as not requiring a witness to be of sufficient mental capacity to understand the act of attestation, or as allowing a person too young to understand what he or she is doing to attest a will. In the light of the [sic] *Re Gibson*, [1949] P. 434, the section should be interpreted as going to credibility rather than capacity and allowing the evidence, for instance, of a witness who has a conviction for perjury recorded against him or her.[428]

[319] However, the Manitoba Law Reform Commission had no qualms about understanding this provision to concern incompetence due to the remaining grounds (in modern times) of mental impairment or minority. The Commission stated that this provision:

> ... is surely an anachronism insofar as it maintains the validity of a will attested by a witness who lacks the required mental capacity, or who is too young, to be a witness. The Commission is of the view that … [this provision] ought to be revised to reflect the present day understanding of witness incompetency. The competence of a witness is relevant only at the time of the execution of the will; subsequent incompetence is irrelevant as long as it can be proved that, at the time of execution, the witness was competent to be a witness.[429]

Accordingly, the Manitoba Law Reform Commission recommended that the saving provision be changed to state that a will is invalid if a witness was incompetent as a witness at the time of attestation, but not if the person thereafter became incompetent.[430]

[320] Among other Canadian law reform bodies, the Law Reform Commission of British Columbia has recommended retention of the saving provision without

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[428] Feeney at § 4.29, n. 3. As discussed above in this Part's introduction, *Gibson*, note 413, held that a blind person cannot be a witness to a will.

[429] Manitoba Report at 17.

[430] Manitoba Report at 17.

change.[431] The Uniform Law Conference of Canada includes a traditional saving provision in its Uniform Wills Act and has not considered whether change is needed.[432] The Law Reform Commission of Nova Scotia did not mention this issue in its recent report concerning wills legislation.[433]

[321] If a jurisdiction has a dispensing power to save wills that do not meet the formalities, one would think that the traditional saving provision about incompetent witnesses would be superfluous. Any reduction in the number of witnesses due to incompetence could still result in a valid will if the dispensing power were used. For example, the dispensing power which ALRI has recommended for adoption in Alberta relieves against errors made in the required formalities found in section 5 (among others).[434] Section 5 is the section for which section 12 currently acts as the saving provision.

[322] However, there is one difference between how a traditional saving provision and a dispensing power would handle the situation of an incompetent witness. Use of the dispensing power would require a court application to obtain the dispensation, whereas the traditional saving provision operates by virtue of law with an immediate and unequivocal effect.

[323] Despite the potential significance of whether a dispensing power is available or not, a jurisdictional review does not appear to show any correlation between presence or absence of a dispensing power and presence or absence of the saving provision for incompetent witnesses. Some jurisdictions which have repealed the traditional saving provision have dispensing powers[435] and some do

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[431] British Columbia 1981 Report at 75.

[432] Uniform Wills Act, s. 11.

[433] Nova Scotia Report.

[434] Alberta Report at 51. As well, our recommendation for a dispensing power is reiterated in Chapter 1, Part D of this Report for Discussion.

[435] Northern Territory, Victoria and Queensland.

not.[436] Similarly, some jurisdictions which have a traditional saving provision also have dispensing powers,[437] while others do not.[438]

[324] ALRI agrees with the Manitoba Law Reform Commission that the savings provision should be repealed. In its place, the Alberta Act should provide that, to be valid, a will must have competent witnesses at the date on which the will is signed. It is irrelevant to the issue of validity if a witness later becomes incompetent.

RECOMMENDATION No. 22
Section 12 of the *Wills Act*, which saves wills signed by an incompetent witness, should be repealed. The *Wills Act* should provide that a valid will must have competent witnesses at the date on which the will was signed.

b. Specify witness qualifications?

[325] Should the Alberta Act specify any qualifications for a witness and, if so, what should those qualifications be?

[326] As already discussed, New South Wales and the Uniform Probate Code have no saving provision for incompetent witnesses, but do specify who may act as a witness. New South Wales says that anyone, except a blind person, who is competent to be a witness in court civil proceedings can witness a will. The Uniform Probate Code says that any individual who is generally competent to be a witness may act as a witness to a will.[439]

[327] Canadian wills statutes do not address this issue. In Alberta, as elsewhere, qualifications for witness competence are left to the common law of evidence. For the purpose of court actions (including applications for probate), the *Alberta*

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[436] New South Wales and Western Australia.

[437] South Australia, Manitoba, Saskatchewan and Prince Edward Island.

[438] Australian Capital Territory and Tasmania.

[439] Uniform Probate Code § 2-505.

Evidence Act removes any prohibitions on witnesses by reason of interest or crime, but does not otherwise have any bearing on who can act as a witness to a will.[440]

[328] The Manitoba Law Reform Commission has recommended that its provincial wills statute should state the qualifications needed to act as a witness, in order to be "more instructive."[441] It proposes that "a person who is competent to make a will should also be able to attest a will."[442] This test differs from the Australian and Uniform Probate Code models but achieves more or less the same effect.

[329] ALRI agrees that the Alberta Act should set the basic qualification for witnesses by defining a competent witness as any person who is capable of making a will. According to our other recommendations, this would include anyone with testamentary capacity who is 16 years or older.

RECOMMENDATION No. 23
The *Wills Act* should define a competent witness as any person who is capable of making a will.

c. Specify witness disqualifications?

[330] Should the Alberta Act prohibit blind people from being witnesses? Are there any other appropriate disqualifications?

i. Blind people

[331] As previously discussed, four Australian jurisdictions expressly prohibit blind people (or those who cannot see) from witnessing wills (New South Wales, Queensland, Northern Territory and Victoria), with a fifth jurisdiction (Western Australia) about to do so. This codifies the common law established by the English case of *Gibson* which held that a totally blind person should not serve as a witness to a will. Physical inability to see the testator actually signing the will means that

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[440] Evidence Act, note 418, 440, s. 3.

[441] Manitoba Report at 17.

[442] Manitoba Report at 17.

the will was not signed in the witness's "presence" as required by the Act.[443] "Presence" of a witness involves mental, physical and visual aspects.

[332] No Canadian jurisdiction codifies this disqualification, leaving it instead to the common law. However, the Manitoba Law Reform Commission has recommended that it might be useful to codify this common law rule.[444]

[333] Such a provision is not without problems, however. In Canada, it would probably attract a Charter challenge under section 15 equality rights, although it might arguably be possible to justify the discriminatory treatment under section 1.

[334] In Australia, use of the word "blind" has been criticized because it "invites questions as to the definition of 'blind', and does not deal with the possibility of temporary inability to see …."[445] For that reason, Australia's proposed uniform model statute provides that a person "who is unable to see and attest that a testator has signed a document may not act as a witness to a will."[446] This revised wording has been chosen by the statutes of Northern Territory, Victoria, Queensland and Western Australia.

[335] But whether a statute says "blind" or "unable to see and attest" does not solve a more fundamental problem with such provisions. While the court in *Re Gibson* ruled against the use of blind witnesses generally, the court did leave it open that a blind person could perhaps be a valid witness to a will "in peculiar circumstances."[447] It has been suggested that a blind person could be a valid witness to a will written and signed in braille if the testator acknowledged the testator's signature.[448] But an unqualified statutory prohibition on blind witnesses would invalidate any will created in this reasonable scenario.

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[443] *Gibson*, note 413, at 17.

[444] Manitoba Report at 17.

[445] Victoria Report at para. S.10.5.

[446] Australia Uniform Report at 17.

[447] *Gibson*, note 413, at 437.

[448] Parry & Clark at 46, n. 57.

[336] ALRI does not recommend any statutory disqualification of witnesses who are blind or unable to see. Such a provision is too broad in its application and would disqualify some competent witnesses in certain circumstances. The Alberta Act requires that the testator must sign or acknowledge their signature in the "presence" of witnesses. This requirement is sufficient to deal with any issues that may arise.

RECOMMENDATION No. 24
The *Wills Act* should not disqualify as a witness any person who is blind or unable to see.

ii. Other disqualifications

[337] In the jurisdictions under consideration, there are no other enacted or recommended statutory disqualifications for witnesses to a will, except for one recommendation from the Manitoba Law Reform Commission. It recommended that

> ... because of the potential for abuse, the Commission believes that section 11 ought to include a provision overruling the 19th century case law which allows a person signing a will on behalf of a testator to attest the will as well.[449]

[338] It is true that a person may both sign the will at the testator's direction and also be a witness to the will.[450] The reasoning behind the old line of English case law on this point is that the person is not witnessing their own act of signing (which would not be permissible), but is instead witnessing the testator's direction that another person should sign the will on the testator's behalf. Such a direction is the same as if the testator acknowledged the testator's own signature previously written.[451] According to this logic, it seems essentially irrelevant who actually signs the will, so long as it is attested that the signature was made at the direction of the testator. Of course, the other witness would attest this direction as well.

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[449] Manitoba Report at 17.

[450] J.B. Clark and J.G. Ross Martin, *Theobald on Wills*, 15th ed. (London: Sweet & Maxwell, 1993) at 44-45; Feeney at § 4.7.

[451] *Smith v. Harris* (1845), 1 Rob. Eccl. 262, 163 E.R. 1033.

[339] ALRI does not agree with the extremely subtle reasoning of the English case law. As noted by the Manitoba Law Reform Commission, it is an obvious danger to allow a person who signs on behalf of the testator to also sign as a witness. It should be prohibited.

RECOMMENDATION No. 25
The *Wills Act* should disqualify as a witness any person who signs the will on behalf of and at the direction of the testator.

B. The Witness-Beneficiary Rule

1. Introduction

[340] Section 13(1) of the Alberta Act provides that any beneficial disposition in a will made to a witness (or to the attesting witness's "then spouse or adult interdependent partner") is void.[452] The section goes on to say that such a witness is nevertheless competent as a witness to prove such matters as execution of the will or its validity or invalidity.

[341] Section 13(2) allows two exceptions – the gift is not void if (1) the will is witnessed by at least two other people who are not subject to the disqualification (this is commonly called the "sufficiency of witnesses" exception) or (2) the will

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[452] Section 13(1) would not disqualify any disposition of legal interest in trust, for example, to a trustee or executor who witnessed the will. Section 15 also states that an executor can be a competent witness to a will.

Section 13(1) expressly excludes charges and directions for payment of debt from the disqualification. Thus, a creditor of the testator could act as a witness without losing their claim on the estate for payment of debt. Section 14 also states that a creditor and their spouse or interdependent partner can be a competent witness to a will despite the creditor's debt being charged on property by the terms of the will.

The Alberta wording identifies the relevant time to determine this relationship status as being the date on which the will is signed, not the date of the testator's death when the will takes effect. Most Canadian succession statutes are similarly worded, as is the Uniform Wills Act. Therefore, if a witness marries a beneficiary after having witnessed the will, section 13 should not operate to strip the spouse of the inheritance because they were not married at the date of signing. This accords with English case law to the same effect: *Thorpe v. Bestwick* (1881), 6 Q.B.D. 311; *Re Royce's Will Trusts*, [1959] 3 All E.R. 278 (C.A.). But our Canadian wording also suggests that, if a gift is left to a witness's spouse but the couple later divorces before the testator's death, the ex-spouse would still lose the inheritance because they were married at the date of signing. Feeney suggests that in this situation "[p]resumably the testator's intention at the date of death is still to provide for the beneficiary and that intention can be carried out by regarding the relevant time as the date of death, rather than the date of the will … ": Feeney at § 4.40. However, it is difficult to see how this result could occur, given the clear wording of most Canadian statutes.

Any gift invalidated by the witness beneficiary rule is also void for any person claiming under the witness, spouse or interdependent partner (i.e. their children or heirs).

did not need attestation anyway (i.e. it is a holograph or privileged will). Both exceptions work because the impugned witness is essentially superfluous to meeting the formal requirements and can therefore be disregarded.

2. History and purpose of the section

[342] The witness-beneficiary rule has a long history in English law. Wills dealing with real property were required by the *Statute of Frauds, 1677* to be witnessed by three "credible witnesses."[453] At that time there was a rule of evidence that no person could give evidence in any cause in which that person had a financial interest. Receiving a gift under the will made the witness financially interested in the estate and therefore disqualified the witness as a credible witness – the witness could not give evidence to prove the will in probate. As a result, the entire will would fail.[454] Instead of changing this rule of evidence, the English solution was to legislatively deprive the witness of the gift so that the witness could then be a competent witness to the will's validity and the will could be saved.[455] This solution was carried forward to the *Wills Act, 1837*.[456] In addition, that Act addressed a remaining problem by also depriving the witness's spouse of any gift under the will. Because the law at that time considered a husband and wife to be one person, a gift to the witness's spouse also served to disqualify the witness.

[343] So the original purpose of the witness-beneficiary rule was simply to circumvent a particular evidentiary rule. That rule of evidence was ultimately repealed in England during its major reform of the law of evidence in the mid-1800s[457] but, ironically, the provision designed to circumvent that rule continues unabated to the current day in wills legislation in England, Canada and much of the

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[453] *Statute of Frauds, 1677* (U.K.), 29 Car. II, c. 3., s. 5.

[454] A.H. Oosterhoff, *Oosterhoff on Wills and Succession*, 5th ed. (Scarborough, Ont.: Carswell, 2001) at 412.

[455] *Wills Act, 1752* (U.K.), 25 Geo. II, c. 6, s. 1.

[456] England Act, s. 15.

[457] Australia Uniform Report at 18. The modern law that an interested person is nevertheless a competent witness is similarly affirmed in Canadian evidence law – see, for example, the Evidence Act, note 418, 440, s. 3.

Commonwealth. The reason it continues is because a new purpose was devised to justify its existence.

[344] The modern rationale for the witness-beneficiary rule is that it protects testators from undue influence, duress or fraudulent conduct by witnesses. Requiring the witnesses and their spouses to have no personal interest in the distribution of an estate ensures that the witnesses "have no incentive to misrepresent the circumstances of execution."[458] The classic statement of this modern rationale comes from Lord Evershed, Master of the Rolls in the English Court of Appeal, who wrote that

> ... the object of these enactments was to protect a testator who was in extremis, or otherwise weak and not capable of exercising judgment, from being imposed on by someone who came and presented him with a will for execution under which the person in question was himself substantially interested ….[459]

As will be seen, much doubt has been expressed by legal commentators about the validity of this rationale and the effectiveness of the purported solution.

3. The law in Canada and other jurisdictions

a. Canada

[345] All Canadian jurisdictions have some version of the witness-beneficiary rule and most are the same as Alberta. A couple of minor variations are found in Prince Edward Island (which does not have the sufficiency of witnesses exception)[460] and Quebec (which does not have that exception either and also does not nullify a gift to a witness's spouse).[461]

[346] However, more significant variations are found in Manitoba, Ontario and Saskatchewan. In addition to the sufficiency of witnesses exception, these three provinces also allow a court to grant relief against the forfeiture of the witness's or spouse's gift if satisfied that there was no "improper or undue influence" exercised

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[458] Law Reform Advisory Committee for Northern Ireland, *Attestation of Wills*, Discussion Paper No. 12 (2005) at 7 [Northern Ireland Discussion Paper].

[459] *Re Royce's Will Trusts*, [1959] 3 All E.R. 278 at 280-281 (C.A.).

[460] Prince Edward Island Act, s. 65.

[461] Quebec Civil Code, art. 760.

on the testator.[462] Saskatchewan specifies a limitation date for such applications of six months from the grant of probate or grant of administration with the will annexed.[463]

[347] Moreover, Manitoba and Ontario also extend the disqualification of receiving gifts under the will to a person who signs the will on behalf of and at the direction of the testator and to that person's spouse.[464] A court may relieve against that forfeiture on the same grounds of lack of improper or undue influence.[465]

b. England

[348] The *Wills Act, 1837* still contains the witness-beneficiary rule although it was amended in 1968 to add the sufficiency of witnesses exception.[466]

c. Australia

[349] There is a distinct reform movement in Australia to repeal the disqualification on gifts to witnesses and spouses. Half of Australia's jurisdictions now allow witnesses and their spouses to keep any gift left to them under the will (Australian Capital Territory, South Australia, Victoria, and Western Australia).[467] Of the remaining four jurisdictions, two disallow gifts to both witnesses and spouses (New South Wales and Tasmania),[468] while the other two disallow gifts to witnesses only (Northern Territory and Queensland).[469] Queensland also extends the disqualification on receiving gifts under the will to interpreters as well.[470]

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[462] Manitoba Act, s. 12(3); Ontario Act, s. 12(3); Saskatchewan Act, s. 13(5).

[463] Saskatchewan Act, s. 13(6).

[464] Manitoba Act, s. 13(1); Ontario Act, s. 12(2).

[465] Manitoba Act, s. 13(2); Ontario Act, s. 12(3).

[466] England Act, s. 12(3) as am. by *Wills Act 1968* (U.K.), 1968, c. 28, s. 1.

[467] Australian Capital Territory Act, s. 15; South Australia Act, s. 17; Victoria Act, s. 11; Western Australia Act, s. 12.

[468] New South Wales Act, s. 13; Tasmania Act, s. 44.

[469] Northern Territory Act, s. 12; Queensland. Act, s. 11.

[470] Queensland Act, s. 12.

However, none of the jurisdictions extend the disqualification to persons signing on behalf of a testator.

[350] All four jurisdictions with the disqualification have the sufficiency of witnesses exception.[471] In addition, they also have two other provisions designed to ameliorate the effect of the disqualification – (1) the gift can be given to the witness or witness's spouse in accordance with the will when all persons who would directly benefit from the gift's avoidance consent in writing[472] and (2) the court can relieve against forfeiture.[473]

[351] An Australian provision allowing a court to relieve against forfeiture typically says that the court may allow the gift to pass to the witness or witness's spouse when the court is satisfied that the testator "knew and approved of the gift" and that the gift was "given or made freely and voluntarily by the testator."[474]

d. New Zealand

[352] At the moment, New Zealand still uses the old Imperial Act, as amended by more recent New Zealand legislation.[475] So, like England, New Zealand has the basic witness-beneficiary rule and the sufficiency of witnesses exception. However, this situation will change once New Zealand enacts and proclaims its new wills legislation. The new Act will continue to disallow gifts to witnesses and their spouses or partners, but the disqualification will be subject to the sufficiency of witnesses exception, unanimous consent to the contrary by other beneficiaries and court relief against forfeiture.[476]

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[471] New South Wales Act, s. 13(2)(a); Queensland Act, s. 11(3)(a); Tasmania Act, s. 44(2)(a); Northern Territory Act, s. 12(2)(a).

[472] New South Wales Act, s. 13(2)(b); Queensland Act, s. 11(3)(b); Northern Territory Act, s. 12(2)(b); Tasmania Act, s. 44(2)(b).

[473] New South Wales Act, s. 13(2)(c); Queensland Act, s. 11(3)(c); Northern Territory Act, s. 12(2)(c); Tasmania Act, s. 46(1).

[474] See, for example, New South Wales Act, s. 13(2)(c).

[475] New Zealand Act, s. 15 and *The Wills Amendment Act 1977* (N.Z.). 1977/55, s. 3.

[476] New Zealand Bill, s. 13.

e. United States

[353] Under the Uniform Probate Code, there are no disqualifications or penalties concerning witnesses who receive a benefit under the will. They can validly witness the will and receive their inheritance as well.[477]

> The Code leaves all underlying questions of undue influence to a direct attack in a will contest. It is important to emphasize, however, that by this rule the Code is not intended to encourage the use of … devisees as witnesses but is designed to prevent injustices that have occurred under the contrary current law.[478]

[354] While California has adopted the Uniform Probate Code provision, it goes further in an effort to actively discourage the use of witness-beneficiaries. The California provision creates a presumption of undue influence against a witness who receives a gift under the will (unless there is a sufficiency of disinterested witnesses).[479] One commentator states that "[e]vidence the witness did not know of the devise in the will should be relevant and admissible to rebut the presumption."[480] If the witness-beneficiary cannot rebut the presumption and the gift fails, the witness will still receive whatever that witness's intestate share would have been if the will were not proved. However, this protection for the witness will not be extended where undue influence, duress or fraud is proven against the witness.[481]

4. Reform Issues and recommendations

a. Retain or repeal?

[355] Should witnesses who are also beneficiaries continue to lose their gifts under the will or should this provision be repealed?

[356] As already mentioned, legal commentators have often expressed doubts about the witness-beneficiary rule's actual ability to prevent fraud and undue influence, which is now the ostensible policy reason for its continued existence.

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[477] Uniform Probate Code § 2-505.

[478] Averill, note 391, at 157.

[479] California Probate Code § 6112(c).

[480] Averill, note 391, at 158.

[481] California Probate Code § 6112(d).

Would someone who seeks to profit by fraud or undue influence really want to draw suspicion on himself or herself by acting as a witness to the will? "A more likely vehicle of fraud would be to produce a forgery with perjured testimony, or alternatively to practice undue influence which would be undetected by innocent and disinterested witnesses."[482] The commentary to the Uniform Probate Code similarly notes that "… in most cases of undue influence, the influencer is careful not to sign as a witness, but to procure disinterested witnesses."[483] One writer has said that it "is an article of faith rather than knowledge"[484] to believe that this provision provides meaningful protection against fraud and undue influence.

[357] The witness-beneficiary rule is often characterized as unfair, rigid[485] and even draconian[486] because it "is likely to operate more frequently against innocent parties who have accidentally fallen foul of its provisions, than deliberate wrongdoers."[487] It may have been entirely reasonable, fair and above-board for the testator to have left property in the will to the witness or the witness's spouse but it makes no difference – the gift must be forfeited because this provision "does not carry within it any requirement of impropriety: it assumes that every witness-beneficiary is fraudulent."[488] It is easy for a witness to infringe the rule without even "being aware that they are doing so, since a witness need not be shown or be aware of the operative terms of the will. Persons who are invited to act as witnesses may be embarrassed to ask the testator if they, or their spouses, are to benefit under its terms."[489]

[358] In contrast to these doubting critics, the English Law Reform Committee affirmed the ongoing need for this rule and recommended that it continue

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[482] Martin Davey, "The Making and Revocation of Wills – I" (1980), 44 C. P.L.J. 64 at 76 [Davey].

[483] Uniform Probate Code, comment to § 2-505.

[484] P.V. Baker, Q.C., "Witnessing Wills and Losing Legacies" (1984), 100 Law Q. Rev. 453 at 465.

[485] British Columbia 1981 Report at 77.

[486] Victoria Report at para. S.11.22.2.

[487] Davey, note 482, at 76.

[488] Victoria Report at para. S.11.22.2.

[489] Northern Ireland Discussion Paper, note 458, at 8.

unchanged in the English wills statute. Acknowledging that the witness-beneficiary rule does not distinguish between the innocent and the guilty, the Committee stated that it is

> unfortunate that a beneficiary should be deprived of the testator's bounty through nothing but good intentions on all sides. Nonetheless we think it right in principle that a witness should be independent, objective and have no "axe to grind". Further the rule is an obvious safeguard against abuse and on balance we think that it should be retained.[490]

[359] Proponents of repeal argue that allowing witnesses and their spouses to keep inheritances does not result in an upsurge of fraudulent wills. In Australia, the rule

> was abolished in South Australia and the Australian Capital Territory in 1972 and 1991 respectively and it is not apparent that the abolition of the rule has been the cause of concern in either jurisdiction since then.[491]

It has also been noted that in jurisdictions which allow holograph wills, often the only evidence available to prove the will is that of beneficiaries and this has not caused difficulties.[492]

[360] If the witness-beneficiary rule is repealed, it does not mean that there is no remedy against a witness who has wrongfully arranged to receive an undue benefit under the will. A substantial or unwarranted devise by will to a witness would trigger (at the very least) the doctrine of suspicious circumstances. This would serve to rebut the presumption of the testator's capacity and knowledge and approval of the will's contents and place the onus on the propounders of the will (the estate) to prove whether the gift is validly supportable or not.[493] One could even argue that allowing the doctrine of suspicious circumstances to take over the handling of this issue would be a good legal development for that doctrine –

> Another argument for the repeal of the interested witness rule is that, because of its monolithic character, it constitutes an impediment to the development of a mature doctrine of suspicious circumstances surrounding

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[490] England Report at 7.

[491] Australia Uniform Report at 19.

[492] Feeney at § 4.41.

[493] Feeney at §§ 2.18-2.30. *Vout v. Hay*, [1995] 2 S.C.R. 876 is the leading case in the Commonwealth on the doctrine of suspicious circumstances and cleared up much confusion in this area.

> the execution of a will... . It is clearly a suspicious circumstance when a witness to a will takes a benefit under it, but, because of the statute, an innocent witness is not allowed to show that the circumstances of the particular case are not suspicious at all.[494]

[361] If the evidence of wrongdoing is strong enough, the will might even be challenged on the basis of undue influence. In such a case, the onus of proving undue influence is on the challengers to the will.[495]

[362] The availability of these remedies to address wrongful circumstances persuaded the Uniform Probate Code to repeal the witness-beneficiary rule.[496] However, others are not convinced. Commenting on the doctrine of suspicious circumstances, the Law Reform Commission of British Columbia stated that:

> [a]lthough this may be an attractive option at first glance, it does contain two major drawbacks. If the suspicion of undue influence which arises from the fact of a large bequest to an interested witness cannot be dispelled, there is a danger that the whole will would be invalidated and bequests to innocent beneficiaries might fail. In addition, it is not clear that the estate should in every case bear the expense of dispelling the suspicion from the attestation of the will by an interested person.[497]

[363] In Canada, there has been little call for repeal of the witness-beneficiary rule. The Law Reform Commission of British Columbia recommended retention of the rule, albeit with the reform of adding court discretion to relieve from forfeiture.[498] A similar recommendation was made by the Uniform Law Conference of Canada.[499] In recent reviews of their provincial wills legislation,

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[494] Australia Uniform Report at 20.

[495] Feeney at § 2.21.

[496] Uniform Probate Code, comment to § 2-505.

[497] British Columbia 1981 Report at 78.

[498] British Columbia 1981 Report at 79.

[499] Uniform Law Conference of Canada, *Proceedings of the Sixty-fourth Annual Meeting* (1982) at 35 and Appendix FF at 525; see also Uniform Wills Act, s. 12(3).

neither the Manitoba Law Reform Commission[500] nor the Law Reform Commission of Nova Scotia[501] even raised the issue of repeal.

[364] Abroad, the situation is similar, except for Australia. As already mentioned, the English Law Reform Committee recommended retention of the rule, without change.[502] The New Zealand Law Commission also recommended (without much discussion) retention of the basic rule and sufficiency of witnesses exception, but further recommended adding the exceptions of consent and court relief from forfeiture.[503]

[365] As already discussed, four Australian jurisdictions have actually repealed the provision. Australia's National Committee for Uniform Succession Laws thoroughly examined this issue and came to the following conclusion:

> It is unlikely, in the absence of adverse experience of the effect of the abolition of the rule, that jurisdictions that have abolished the rule could be persuaded to re-instate it. Consequently, the probable direction of a search for uniformity would be to abolish the rule throughout Australia. The divergence of the present law, however, requires that comparisons be made and that, if it is desired to retain the rule, a procedure should be allowed to ensure that the innocent witness is not disqualified.[504]

In other words, the decision about whether to retain the witness-beneficiary rule or not when implementing uniform legislation should be left up to individual jurisdictions. The National Committee clearly hinted that uniform repeal might be best but, if a jurisdiction wants to retain the rule, the Committee endorsed a uniform rule that would retain the disqualification for gifts to witnesses (but not spouses) and that would ameliorate the harsh effect of the rule on innocent

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[500] Manitoba Report. The Report did not discuss the rule at all.

[501] Nova Scotia Report. The Commission addressed two issues concerning this rule which are not issues in Alberta due to the reformed wording of our section: (1) effect of the rule on executors who act as witnesses and (2) explicit extension of the rule's disqualification to the registered domestic partners of witnesses.

[502] England Report at 3, 20-21.

[503] New Zealand Report at 3, 20-21.

[504] Australia Uniform Report at 19-20.

witnesses by being subject to three exceptions – sufficiency of witnesses, consent and court relief from forfeiture.[505]

[366] ALRI does not favour repealing the witness-beneficiary rule. Relying on the doctrine of suspicious circumstances and the remedies for undue influence are not an adequate substitute for the rule. It can be extremely difficult to prove undue influence, so an automatic disqualification of a witness-beneficiary provides an important initial protection.

RECOMMENDATION No. 26
The *Wills Act* should continue to provide that any beneficial disposition made in a will to a witness is void.

[367] However, while ALRI recommends retaining the witness-beneficiary rule, we recognize that it can operate harshly and so its worst effects should be ameliorated by reform. The following issues will explore the various options for improving the operation of the witness-beneficiary rule.

b. Remove spousal disqualification?

[368] One possible reform to ameliorate the sometimes harsh operation of the witness-beneficiary rule is to repeal the similar disqualification of a witness's spouse or adult interdependent partner. The most compelling argument for such a reform is that this disqualification dates from a by-gone era when married spouses were considered to be only one person in law. That legal situation has, of course, long since ceased to exist. However, it remains true that spouses "are likely to have an identity of financial interest, if not also a legitimate expectation of succession."[506]

[369] Does this disqualification serve a purpose in preventing or deterring fraud or undue influence? In the opinion of the Law Reform Committee of Victoria:

> [i]f the disqualification of the spouse were removed it would make the rule less draconian. It is less likely that a husband and wife would collude to

[505] Australia Uniform Report at 21-22.

[506] New South Wales Wills Report at 101.

> pressure a testator to confer a benefit on a spouse than that a beneficiary-witness would do so on his or her own.[507]

But is collusion always necessary? Could not a wrongdoing witness influence the testator to leave a gift to the witness's unsuspecting spouse, knowing that the money would still indirectly benefit the witness?

[370] And why should spouses be singled out? A wrongdoing witness could easily collude or plan to "co-benefit" with other family members too, but there does not seem to be any legislative concern about that scenario.

[371] On those occasions when repeal of the spousal disqualification is recommended by a law reform body, a major reason always seems to be concern that the section discriminates against non-married partners. But instead of recommending extension of the section to cover such non-married partners, the body will invariably recommend repeal of the spousal disqualification instead.[508] However, this concern has already been addressed in Alberta, where section 13 has been extended equally to any adult interdependent partner of the witness.

[372] The English Law Reform Committee considered whether to abolish the spousal disqualification "on the basis that it is anomalous to single out the spouse when abuse can come from others such as partners or close friends" but decided against doing so because it "would open greatly the possibilities for abuse ...."[509] Other law reform agencies have recommended keeping the spousal disqualification but without any real discussion – the need for its retention seems to be treated as self-evident.[510]

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[507] Victoria Report at para. S.11.26.3.

[508] Australia Uniform Report at 23-24; Victoria Report at paras. S.11.26.2, S.11.26.3; Northern Ireland Discussion Paper, note 458, at 25-26.

[509] England Report at 7.

[510] British Columbia 1981 Report at 79-80; New Zealand Report.

[373] In jurisdictions under consideration which have not repealed the witness-beneficiary rule, only three have no spousal disqualification – Quebec, Queensland and Northern Territory.[511]

[374] ALRI recommends retaining the disqualification for a spouse or partner of a witness-beneficiary. While the spousal disqualification may initially operate harshly, there are better options for amelioration of unfair results than repealing the disqualification across the board.

RECOMMENDATION No. 27
The *Wills Act* should continue to provide that any beneficial disposition made in a will to a witness's spouse or adult interdependent partner is void.

c. Miscellaneous options for amelioration

[375] Over the years, different options have been proposed or attempted by various jurisdictions to ameliorate the harsher effects of the witness-beneficiary rule. ALRI considered the following reform options, but ultimately rejected them as insufficient, unworkable or unnecessary.

i. An exception for small gifts

[376] When the English Law Reform Committee was considering ways to ameliorate the harsh effects of the witness-beneficiary rule, it considered

> … whether a partial exception could be made for small gifts. However, our general view about … [this suggestion] is that … [it] would be of limited value. There would be formidable practical difficulties in defining a small gift and any figure would quickly become out of date. In any event we believe that small legacies are likely to be honoured by the other beneficiaries where possible.[512]

No other law reform agency has considered this proposal. It is clearly not an effective reform.

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[511] Quebec Civil Code, art. 760; Queensland Act, s. 11(2); Northern Territory Act, s. 12.

[512] England Report at 7.

ii. Rebuttable presumption of undue influence

[377] At one time, a suggestion was made in England that the harshness of the rule should be ameliorated by replacing the automatic loss of gift with a rebuttable presumption of undue influence. If the witness could rebut the presumption, then the witness should be allowed to keep the gift.

> Those who advocate a solution of this kind do not, of course, envisage that an attesting beneficiary could obtain his gift only by means of a full court hearing. Very often the genuineness of the gift would be so obvious that the mere existence of the power would be enough to secure the agreement of the other beneficiaries.[513]

This suggestion has gone nowhere in England. It was not even mentioned by the English Law Reform Committee in its 1980 review of this legislative area.[514]

[378] Elsewhere, this approach is used by California which, in accordance with the Uniform Probate Code model, has no witness-beneficiary rule. California enacted this rebuttable presumption of undue influence in order to discourage the otherwise technically permissible use of interested witnesses. As noted earlier in this memorandum, the California presumption operates against a witness who receives a gift under the will (unless there is a sufficiency of disinterested witnesses).[515] If the witness-beneficiary cannot rebut the presumption and the gift fails, the witness will still receive whatever that witness's intestate share would have been if the will were not proved. However, this protection for the witness will not be extended where undue influence, duress or fraud is proven against the witness.[516]

[379] There are definitely similarities between this approach and the creation of court discretion to relieve against forfeiture, which is the favoured approach to amelioration in Canadian and Australian statutes. (A fuller discussion appears below about the important issues arising out of the differently shifting onuses which occur in these two approaches). Ultimately, however, ALRI assessed this option as less desirable than giving a court power to relieve against forfeiture.

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[513] S.M. "The Making and Revocation of Wills – II" (1981), 125 S.J. 283. The suggestion was first "proposed by 'Justice' in a report published in 1971 ('Home-Made Wills')."

[514] England Report.

[515] California Probate Code § 6112(c).

[516] California Probate Code § 6112(d).

iii. Substitution of intestate share

[380] Occasionally, as in the California provision just discussed, a jurisdiction will attempt to ameliorate the harshness of inheritance loss by providing that the witness can nevertheless receive whatever that witness's intestate share would have been if the will were unproved. Such a provision used to be in the Victoria *Wills Act 1958*. Victoria allowed a witness-beneficiary to take the lesser of the witness's intestate share or the gift left by the will.[517] Victoria has since repealed the witness-beneficiary rule in its entirety and so this provision no longer exists in that jurisdiction.

[381] This approach has never really caught on anywhere. It suffers from a number of obvious drawbacks:

> First, it is of no benefit to those persons who have no entitlement on intestacy. In addition it is completely arbitrary as it takes no account of the circumstances of the individual case. More particularly, it is of no assistance in preventing fraud or undue influence, which is the only ground on which the retention of the rule can be supported. For these reasons this solution of substituting the intestate benefit has proved unpopular and other law reform agencies have invariably declined to follow Victoria's lead.[518]

[382] And as the Law Reform Commission of British Columbia noted:

> A fraudulent relative may take advantage of such a provision to take a portion of the estate without dispelling the suspicion arising out of his attestation of the will. He may "lie in the weeds" and assert rights under the will if it appears that his fraud will remain undiscovered. There is little merit in awarding a "consolation prize" to a person whose fraud is unsuccessful or whose actions are such that he cannot prove lack of undue influence.[519]

iv. An exception for consent

[383] As noted earlier in this chapter, one of the provisions whose purpose is to ameliorate the harshness of the witness-beneficiary rule in New South Wales, Northern Territory, Queensland, Tasmania and (soon) New Zealand is that the gift can nevertheless be given to the witness (or, where also disqualified) to the

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[517] Australia Uniform Report at 19.

[518] Northern Ireland Discussion Paper, note 458, at 14.

[519] British Columbia 1981 Report at 79.

witness's spouse in accordance with the will when all persons who would directly benefit from the gift's avoidance consent in writing.[520]

[384] However, this provision is merely declaratory of the common law and legislation is not really needed to enable such an agreement to be made.[521] Is there any advantage to enacting an explicit provision to this effect in the statute? In the Australian jurisdictions, it always accompanies the provision giving court discretion to relieve against forfeiture. It serves to remind parties that an alternative to court action exists in cases where everyone agrees that no inappropriate behaviour occurred. As stated by the New South Wales Law Reform Commission:

> [w]e do not consider that estates should automatically be involved in the expense and trouble of litigation where a beneficiary is an interested witness, because in many cases the genuineness of the gift will be sufficiently obvious. Honest and deserving parties should not be forced unnecessarily to litigation in order to disprove improper conduct.[522]

The Commission also pointed out that minors and persons with a mental disability would not be able to consent and so an witness-beneficiary would have "no alternative but to initiate proceedings where they are involved."[523]

[385] ALRI sees no need to have an explicit statutory exception concerning consent. In estate practice, beneficiaries agree all the time to alter bequests and other details, without the *Wills Act* having to authorize such consent. If this kind of provision is enacted only with regard to a forfeited gift to a witness-beneficiary, it may lead to court challenges about its absence in other areas of the Act. It is better to simply rely on the common law concerning the role of consent, rather than spelling it out in the statute. This is the Canadian practice.

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[520] New South Wales Act, s. 13(2)(b); Northern Territory Act, s. 12(2)(b); Queensland Act, s. 11(3)(b); Tasmania Act, s. 44(2)(b); New Zealand Bill, s. 13.

[521] Australia Uniform Report at 24.

[522] New South Wales Report at 100.

[523] New South Wales Report at 100.

d. Court relief against forfeiture

i. Court discretion

[386] The most common way to ameliorate the witness-beneficiary rule's worst effects is to give a court discretion to relieve against the forfeiture of the testamentary gift. This is the favoured reform option in Canada.

[387] Manitoba, Ontario and Saskatchewan allow a court to grant relief against forfeiture of a witness's or spouse's gift if satisfied that there was no "improper or undue influence" exercised on the testator.[524] This reform is also advocated by the Uniform Law Conference of Canada[525] and the Law Reform Commission of British Columbia.[526] However, without much discussion, British Columbia recommends a different test than the Canadian norm – to obtain relief against forfeiture, the interested witness or witness's spouse must satisfy the court that the testator simply "knew and approved" of the gift.[527] There is no mention of disproving improper or undue influence.

[388] In Australia, the jurisdictions of New South Wales, Northern Territory, Queensland and Tasmania also provide that a court can relieve against forfeiture.[528] This reform is also advocated by the National Committee for Uniform Succession Laws.[529] A typical Australian provision says that the court may relieve against forfeiture of the witness's inheritance when it is satisfied that the testator "knew and approved of the gift" and that the gift was "given or made freely and voluntarily by the testator."[530] A similarly-worded provision will also soon be

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[524] Manitoba Act, s. 12(3); Ontario Act, s. 12(3); Saskatchewan Act, s. 13(5).

[525] Uniform Wills Act, s. 12(3).

[526] British Columbia (1981) Report at 79.

[527] British Columbia (1981) Report at 79.

[528] New South Wales Act, s. 13(2)(c); Northern Territory Act, s. 12(2)(c); Queensland Act, s. 11(3)(c); Tasmania Act, s. 46(1).

[529] Australia Uniform Report at 21-22.

[530] See, for example, New South Wales Act, s. 13(2)(c).

enacted in New Zealand,[531] based on a recommendation by the New Zealand Law Commission.[532]

[389] The obvious advantage of having such a provision is that the general rule against witness-beneficiaries is maintained, yet the harsh effects of that rule can be ameliorated in appropriate circumstances.

> By retaining the rule rather than abolishing it completely, one recognizes that it does serve some valid purpose. By allowing it to be modified, one recognizes also that there is a need for flexibility. Essentially there is a compromise between voiding the gift and doing away with the prohibition altogether. Moreover, modifying the rule would not act as an encouragement to a person who knows that he or she is a beneficiary under the will to become an attesting witness to that will. The uncertainty of his or her ultimate entitlement and the costs involved in securing it would probably deter anyone who had knowledge of the legislation from acting as a witness.[533]

[390] A drawback to having such a provision is that it necessitates the bringing of a court application (unless the gift is so small or so self-evidently innocent that all other beneficiaries agree to let the witness take it without having to apply to the court). It could be a burden for small estates to participate in such litigation as that expense might exhaust a significant portion of the estate.

[391] One reason why jurisdictions like to enact sections authorizing court relief against forfeiture is that such a provision places the legal onus on the witness-beneficiary to satisfy the court that the impugned gift was made under innocent circumstances. As stated by the Law Reform Commission of British Columbia, "[t]his solution clearly puts the onus of establishing the propriety of their conduct on the witness claiming a benefit under the will."[534] By contrast, if the witness-beneficiary rule is repealed and the doctrine of suspicious circumstances is invoked because of a gift to a witness, the onus would be on the estate (the propounder of the will) to answer any concerns of the court before it grants

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[531] New Zealand Bill, s. 13.

[532] New Zealand Report.

[533] Northern Ireland Discussion Paper, note 458, at 14.

[534] British Columbia 1981 Report at 79.

probate.[535] Likewise, if the witness-beneficiary rule is repealed and undue influence is alleged against a witness-beneficiary, then the onus would be on the challenger to prove the undue influence.[536]

[392] ALRI agrees that giving discretion to the courts to relieve against forfeiture is the most viable reform option for our province. We note that our proposed general dispensing power does not apply to the witness-beneficiary rule. (No jurisdiction's dispensing power does.) The dispensing power applies only to the formalities of creating a valid will. A separate saving provision, with an appropriately framed test, is needed to address the witness-beneficiary rule. It is the best way to balance the benefits and drawbacks of retaining the witness-beneficiary rule.

RECOMMENDATION No. 28
Alberta courts should be given the discretion to relieve against forfeiture of a testamentary gift made to a witness or a witness's spouse.

ii. What should the test be?

[393] What should the test be to allow relief against forfeiture? The standard Canadian provision requires the court to be satisfied that the witness or spouse did not exercise any "improper or undue influence" on the testator. The legal commentator Feeney has questioned whether placing the onus on the witness-beneficiary to essentially disprove "improper or undue influence" creates an impossibly difficult burden to discharge. This wording suggests much more evidence would be needed to satisfy the court than would be needed to simply dispel suspicious circumstances under that particular doctrine. In Feeney's opinion, if the mere fact of receiving a testamentary gift casts on the witness

> ... the burden of proving the absence of "improper or undue influence," then the legislation will be virtually useless to effect the significant amelioration of the general rule …. If a witness is required to prove "the righteousness of the transaction" the likely result is that judges will be unable to find themselves "satisfied" in the matter. Viewed in that light, the legislation will hardly

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[535] Feeney at § 2.21.

[536] Feeney at § 2.21.

> amount to any change in the former rule whereby such gifts were automatically struck down.[537]

[394] There is no Canadian case law to date addressing what a witness must show to discharge the onus.[538] And despite Feeney's fear that this onus could be extremely difficult to discharge, he goes on to recommend that the Manitoba, Ontario and Saskatchewan provision "should perhaps be adopted throughout Canada" (although his preferred reform would be to repeal the witness-beneficiary rule entirely).[539]

[395] In Australia, these provisions are usually worded differently than in Canada. As already noted, a typical Australian provision says that the court may relieve against forfeiture of the witness's inheritance when it is satisfied that the testator "knew and approved of the gift" and that the gift was "given or made freely and voluntarily by the testator."[540]

[396] This two-pronged test was first formulated and recommended by the New South Wales Law Reform Commission, which cautioned that any test in this area should not be based solely on disproving undue influence. The Commission stated that, in probate matters,

> [i]t is almost impossible to prove a case of undue influence because (unlike the situation with *inter vivos* transactions) there are no presumptions of influence in relation to will-making and it is only influence amounting to fraud or coercion that is regarded as "undue" in probate.[541]

Because "undue influence is virtually a dead letter in the probate field," the Commission stated that "a propriety test which confined itself to undue influence

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[537] Feeney at §§ 4.34, 4.35.

[538] The only case in this area so far simply confirms that the witness must personally apply to the court to obtain relief against forfeiture. The executor cannot obtain that relief for the witness merely by stating in the petition for probate that in the executor's opinion the bequest made by the deceased to the witness was in no way influenced by the witness: *Re Campbell Estate* (1990), 40 E.T.R. 82 (Sask. Surr. Ct.).

[539] Feeney at § 4.41.

[540] See, for example, New South Wales Act, s. 13(2)(c).

[541] New South Wales Wills Report at 98.

as that concept is understood in probate matters would give virtually no protection at all."[542]

[397] The Commission spoke somewhat favourably of the Canadian model, since its test encompasses "improper or undue influence" which is a wider formulation than simply undue influence.[543] But the Commission did not choose to use the Canadian wording in its own formulation. Its provision (as recommended and subsequently enacted) "deliberately does not refer to undue influence"[544] but instead speaks of the gift being given or made freely and voluntarily by the testator.

[398] The New South Wales provision has resulted in a few reported cases from the New South Wales Supreme Court. In each instance the court had no difficulty relieving against forfeiture. In these cases, the problem usually arose because the spouse of a beneficiary acted as witness. Only half the cases involved homemade wills on printed will forms – the other wills were drawn by solicitors.

[399] Concerning proof of the first branch of the test – knowledge and approval of the testator – the Court has stated that the usual presumptions may be relied upon if needed (the presumption that strict compliance with all the formalities means the testator knew and approved the contents of the will and the presumption that this conclusion is strengthened if the will was read by or to the testator before signing). However, the court should start with suspicion in assessing this part of the test because of the suspicious circumstance that a beneficiary or spouse acted as witness.[545]

[400] Concerning proof of the second branch of the test – the testator's gift was made freely and voluntarily – the New South Wales Supreme Court stated that this test

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[542] New South Wales Wills Report at 101.

[543] New South Wales Wills Report at 101.

[544] *Miller v. Miller; Estate Paul Lindo Miller* [2000] NSWSC 767 at para. 23 [*Miller*].

[545] *Miller*, note 544 at 6-7; *Tonkis & Anor v. Graham & Ors* [2002] NSWSC 891 at para 102 [*Tonkis*]; *McKinney v. Campbell; Estate Campbell* [2003] NSWSC 244 at paras. 17-20 [*McKinney*].

> ... is concerned with exercise of free will in relation to the content of which the testator is aware and has approved. The approval that accompanies awareness must be shown to have been the product of the testator's own volition and independently exercised judgment. The court's task is to see that the factors of self-interest on the part of the witness that may be presumed to arise from the gift to the witness or the witness's spouse have not intruded so as to colour the testator's decision making.[546]

[401] In another case, the Court stated further that

> … as a matter of practice, the evidence that is likely to convince a court that the testatrix knew and approved of a gift, will in many cases also suffice to convince the court that the gift was made freely and voluntarily, or alternatively, the extra evidence that will be needed to prove that the gift was made freely and voluntarily is not likely to be great.[547]

[402] As mentioned above, the test recommended by the Law Reform Commission of British Columbia involves only the first branch of the Australian test. While there is admittedly overlap between the two parts of the Australian test, the second branch does involve different considerations that are important to gauge. As the New South Wales Law Reform Commission put it:

> [w]e recognize that the second limb of the test almost certainly encompasses the first, but feel it is appropriate that the two stages of the road to propriety should be clearly signposted.[548]

For this reason, when the New South Wales Law Reform Commission devised what has become the standard Australian model, it rejected the British Columbia wording as "deficient."[549]

[403] Although the Australian test has merit, ALRI recommends that our statute should be consistent with the Canadian model established in this area. Using the same test as the other three provinces will promote uniformity of legislation and will allow Alberta lawyers and courts to rely on any future case law from those jurisdictions concerning the relief against forfeiture provision. ALRI believes that, in practice, Canadian and Australian courts would look at the same kinds of factors

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[546] *McKinney*, note 545, at para 22.

[547] *Tonkis*, note 545, at para 29.

[548] New South Wales Wills Report at 108, n. 42.

[549] New South Wales Wills Report at 101.

and reach similar decisions, despite any differences in the wording of their respective tests.

RECOMMENDATION No. 29
To exercise its discretion to relieve against forfeiture, a court must be satisfied that the witness or spouse (as the case may be) did not exercise any improper or undue influence on the testator.

iii. Limitation period

[404] In Canada, the Saskatchewan wills legislation sets a limitation date for bringing an application for relief against forfeiture of six months from the grant of probate or grant of administration with the will annexed.[550] This obliges the remedy to be sought quickly, before distribution of the estate begins. However, neither Manitoba nor Ontario specify a limitation period for these applications. Nor do the recommendations made in this area by the Law Reform Commission of British Columbia and the Uniform Law Conference of Canada.

[405] In Australia, Tasmania provides that a witness's application for relief may be made before the grant of probate but not later than six months after the grant. A court can extend this time, but not once the estate is distributed.[551] Wills statutes in Northern Territory and Queensland are silent about limitation periods.

[406] New South Wales uses a different method to ensure that an application for relief is brought before distribution of the estate. Rather than specifying a limitation period, New South Wales provides that the executor must give one month's notice to a witness-beneficiary before distributing the estate, unless the status of the witness's inheritance has already been settled by consent or by the court.[552]

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[550] Saskatchewan Act, s. 13(6).

[551] Tasmania Act, s. 45(2), (3).

[552] New South Wales Act, s. 13(3). This section implemented a recommendation in the New South Wales Wills Report at 100.

[407] ALRI is of the opinion that a limitation period is indeed necessary, so that an executor can finish the work of the estate and know that it is final. However, we do not agree with the New South Wales approach because it is better to deal with these issues earlier in the process, rather than later. ALRI endorses the Saskatchewan approach instead and recommends a six month limitation period from the grant of probate or administration with will annexed.

RECOMMENDATION No. 30

The limitation period for bringing a court application for relief against forfeiture should be six months from the grant of probate or administration with will annexed.

[408] Our Project Advisory Committee raised another important point. Currently, an executor does not give any notice to a witness or a witness's spouse that they are a beneficiary under the will, because the gift is automatically void. Such notice will have to be given in the future (along with notice of the forfeiture and the ability to make a court application for relief), so that the witness or witness's spouse will know to take action within the prescribed time limit. The executor should be obliged to give this notice when the application for probate is filed.

RECOMMENDATION No. 31

Where a witness or witness's spouse is named as a beneficiary in the will, the executor must give them notice of (1) the gift, (2) the forfeiture of the gift under section 13, (3) their right to bring a court application for relief against that forfeiture and (4) the limitation period for doing so. The executor must give this notice when the application for probate is filed.

iv. Retain sufficiency of witnesses exception?

[409] Virtually all jurisdictions under consideration in this Report for Discussion have the sufficiency of witnesses exception in their legislation. Those jurisdictions which have enacted court relief against forfeiture have all retained it as a way to soften the effect of the general rule. The only suggestion that perhaps this exception should be repealed was made by the Law Reform Commission of British Columbia, which thought that enabling a court to grant relief from forfeiture renders the application of the sufficiency of witnesses section

> ... no longer mandatory. We therefore see no reason why a "superfluous" witness should not be required to dispel the suspicion which arises from his attesting the will before he may take any interest under it.[553]

[410] ALRI sees no reason why the sufficiency of witnesses exception should not still be relied upon in appropriate cases. It will save the estate the time and expense of being involved in an additional court application.

RECOMMENDATION No. 32
The *Wills Act* should retain the sufficiency of witnesses exception in section 13(2).

e. Extend the disqualification?

[411] Should the disqualification on receiving gifts under the will be extended to any of the following:

(a) a witness's family?

(b) interpreters?

(c) a person who signs the will on behalf of the testator and by the testator's direction?

i. A witness's family

[412] As noted earlier in this chapter, there is little legislative concern about collusion between wrongdoing witnesses and their family members (as opposed to spouses). No jurisdiction under consideration attempts to disqualify family members beyond the witness's spouse. To do so would require a precise and probably lengthy definition of "family." And extending the disqualification in this way would simply extend the unjust results of this rule when innocent family members of a witness are left a bequest. No law reform agency has recommended this reform or even seriously considered it.

ii. Interpreters

[413] As previously noted, Queensland also disqualifies interpreters from receiving gifts under a will for which the interpreter has provided translation

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[553] British Columbia 1981 Report at 80.

services to the testator.[554] No other jurisdiction under consideration has this provision. No other law reform agency has recommended this reform or even really considered it.

[414] But Queensland felt strongly enough about the need for this provision that it is one of the few areas where that jurisdiction departed from adopting the uniform model statute recommended by the National Committee for Uniform Succession Laws. The Queensland Law Reform Commission stated that it is "important that there be confidence that an interpreter of a will is, in the performance of his or her duties, uninfluenced by any potential to benefit under the will."[555]

[415] Queensland's disqualification affects interpreters only, not their spouses. Plus the disqualification does not apply if (1) all the persons who would directly benefit from the gift's avoidance consent in writing or (2) a court is satisfied that the testator knew and approved the gift and that it was made freely and voluntarily by the testator. The Queensland provision also clarifies that the disqualification does not apply to a charge or direction in the will "for the payment of appropriate remuneration for being an interpreter for the testator in relation to the will."[556]

iii. A person who signs the will for the testator

[416] Again as previously noted, Manitoba and Ontario extend the disqualification of receiving gifts under the will to a person who signs the will on behalf of and at the direction of the testator and to that person's spouse.[557] A court may relieve against that forfeiture on the same grounds of lack of improper or undue influence.[558] The Law Reform Commission of British Columbia has also recommended adoption of this disqualification because "a person who signs a will on behalf of an incapable testator … is in a fiduciary relationship with the testator,

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[554] Queensland Act, s.12.

[555] Queensland Report at 33.

[556] Queensland Act, s. 12(4).

[557] Manitoba Act, s. 13(1); Ontario Act, s. 12(2).

[558] Manitoba Act, s. 13(2); Ontario Act, s. 12(3).

and it is not unjust that he be required to dispel any suspicion surrounding a gift to him."[559]

[417] No other jurisdiction under consideration has this provision and no other law reform agency has considered or recommended this reform.

iv. Recommendation for reform

[418] ALRI agrees that extending this disqualification beyond a witness's spouse to other family members would create an unworkable situation. It would be difficult to know where to stop in the definition. It is better to rely on the doctrine of suspicious circumstances and undue influence in this area.

[419] However, ALRI supports extending the disqualification to interpreters and persons who sign a will on behalf of the testator (but not the spouses of interpreters or signers). Disqualifying these particular beneficiaries could protect the testator by removing an incentive or reward for wrongdoing. Like a witness-beneficiary, the disqualified interpreter or signer must have the right to apply to court for relief against forfeiture in appropriate cases. As in the Queensland provision, the statute should clarify that an interpreter is not prevented from receiving appropriate remuneration under the will for the interpretation services.

RECOMMENDATION No. 33

The witness-beneficiary rule should not be extended to void gifts made under the will to a witness's family.

RECOMMENDATION No. 34

The *Wills Act* should be amended to provide that an interpreter is disqualified from receiving any gift under a will for which the interpreter provided interpretation services. The interpreter may apply to court for relief from forfeiture. The statute should also provide that the disqualification does not apply to any charge or direction in the will for the payment of appropriate remuneration for the interpretation services.

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[559] British Columbia 1981 Report at 80.

RECOMMENDATION No. 35
The *Wills Act* should be amended to provide that a person who signs the will on behalf of and at the direction of the testator is disqualified from receiving any gift under the will. The signer may apply to court for relief from forfeiture.

f. Executor's remuneration

[420] Historically, the common law prohibited an executor from receiving any remuneration from the estate for serving as the executor, but this has long since been overturned by statute in Canada. In Alberta, the *Administration of Estates Act* provides that a court may order remuneration and compensation to be paid from the estate to a personal representative, if such payment is not fixed by the will.[560]

[421] However, where a will does have a provision setting out the executor's remuneration, the witness-beneficiary rule will void that remuneration if the executor acted as a witness when the will was signed. As stated in Feeney, it is settled law that

> Executors or trustees may witness a will without affecting any trust provision of the will, but if the will also provides for the remuneration of the executor or trustee, the provision is to be regarded as a personal gift and the executor or trustee cannot collect the commission, fee, or other remuneration provided by the will. Remuneration of the executor may be implied from the terms of the will itself and, in fact, a specific gift given in the will to an executor raises a presumption that it is given in lieu of any other compensation. In either case, if the executor has witnessed the will, the law concerning a gift-receiving witness will operate.[561]

[422] ALRI believes this situation should be remedied. As we have recommended in the case of interpreters, the Alberta Act should provide that forfeiture under the witness-beneficiary rule does not apply to a charge or direction in the will for the payment of appropriate remuneration, including professional fees, to an executor or trustee of that will.

[423] The phrase "appropriate remuneration" is deliberately used, so that this exception cannot be used to circumvent the witness-beneficiary rule in

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[560] *Administration of Estates Act*, R.S.A. 2000, c. A-2, s. 61.

[561] Feeney at § 4.37.

questionable circumstances. If a will states that the executor-witness is entitled to some huge sum of compensation which is out of all proportion to what it should reasonably be, it can be challenged by other beneficiaries. A court will decide if the amount is appropriate. Otherwise, simply calling any sum "remuneration" would be enough to shield it from the protective purpose served by the witness-beneficiary rule.

[424] At the moment, no other jurisdiction makes a special exception to the witness-beneficiary rule for executors and their remuneration. In jurisdictions which allow court relief from forfeiture, however, executors could rely on the relief from forfeiture remedy like everyone else. But ALRI believes this to be a less attractive solution than the one we propose because it necessitates additional estate litigation in every case.

RECOMMENDATION No. 36
The *Wills Act* should be amended to provide that forfeiture under the witness-beneficiary rule does not apply to a charge or direction in the will for the payment of appropriate remuneration, including professional fees, to an executor or trustee of that will.

5. Other interested witnesses

[425] Section 13 of the Alberta Act states that a witness-beneficiary is nevertheless competent as a witness to prove such matters as execution of the will or its validity or invalidity. The legislation also contains two other sections which state essentially the same thing concerning specific types of witnesses – creditors whose debts are charged on property under the will (section 14) and executors (section 15).

[426] These are standard provisions in most Canadian wills legislation,[562] as well as in England, New Zealand and half the Australian jurisdictions. The other four Australian jurisdictions (New South Wales, Northern Territory, Queensland and Victoria) do not have these provisions and neither does the uniform model statute proposed by the National Committee for Uniform Succession Laws.

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[562] Quebec does not appear to have equivalent provisions. Newfoundland and Labrador does not have an equivalent provision about creditors but it does have one about executors: Newfoundland Act, s. 8.

[427] The Law Reform Commission of British Columbia has recommended replacing these standard provisions about with a single general rule that "no person is incompetent to act as a witness to a will by reason only of interest."[563]

[428] Technically, there is probably no need to even have such a general provision in light of most provincial evidence statutes. For example, Alberta's statute provides

> **Admission of witness with interest**
>
> 3(1) No person offered as a witness in an action shall be excluded from giving evidence by reason of any alleged incapacity from crime or interest.
>
> (2) A person offered as a witness shall be admitted to give evidence notwithstanding that the person has an interest in the matter in question or in the event of the action or that the person has been previously convicted of a crime or offence.[564]

[429] ALRI believes that, given the centrality of the acts of witnessing and subsequent probate of the will, there is value in maintaining separate provisions affirming the competency of witness-beneficiaries, creditors and executors. There is also no pressing need to depart from Canadian legislative uniformity on this point.

RECOMMENDATION No. 37

The *Wills Act* should continue to have separate sections affirming that witness-beneficiaries, creditors and executors are competent witnesses.

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[563] British Columbia 1981 Report at 75.

[564] Evidence Act, note 418, 440, s. 1(a)(iii). The Act's definition of "action" is wide enough to include probate proceedings.