

# Wills CAN

## Introduction to Wills and Succession:

The disposition of assets upon death is either:

### 1. By operation of law (Default)

- Homestead rights (Dower)
- Intestacy

### 2. Intentional

- Testamentary forms of succession (wills, codicils)
  - Takes effect ONLY UPON DEATH
- Quasi-testamentary (RRSP, joint-tenancy, pension)
  - Non-testamentary because not dependent on death for effect
  - Created inter-vivos, with a legal existence during my life

## Intentional Disposition of Assets:

Will → Testamentary document

Codicil → Addendum/revision to a will

\*\* If a will becomes ineffective, a codicil may stand on its own

## **Terms → USE ON EXAM**

Bequest = personal property not money

Legacy = money

Devise = real property

## New Wills & Succession Act

- Effective Feb. 1, 2012
- Wills drafted before February 1, 2012 are subject to the old legislation, as are any codicils

## Personal Representative:

The person who administers your will when you die:

- Executor or executrix – the administrator named in the will
  - Can renounce their position or be disqualified for being insane, bankrupt, incarcerated, or criminally responsible for my death
  - If executor gone, someone needs to apply to court to be administrator
- Administrator or administratrix = the admin appointed by the court

## **Responsibilities of the Administrator:**

Payment of Debts:

First → collect all of the assets

1. Satisfy secured creditors first
2. Reasonable funeral expenses
3. Administrative expenses of the will
4. Unsecured creditors
  - If you have unsecured creditors and you each are entitled to more than is available, you all take a hit proportionally (50 cents on the dollar, etc.)
5. THEN: Gifts to beneficiaries
  - For gifts, beneficiaries are ranked if there is not enough left to go around
    - 1. Land
    - 2. Personal property that is not money
    - 3. Legacies of money
    - 4. Residual gifts

To do all this, you need all of the details of the debts owed by the dead person

- You have to notice and advertise that the person has died, WHERE YOU REASONABLY EXPECT PEOPLE TO BE
  - As long as you advertise, you are never liable as the executor or administrator
  - If a creditor comes forward AFTER you distributed the will, they can't sue you, but they can trace the assets → Go after the beneficiary to try and get the debt satisfied

**Intestacy:**

\*\* A default will imposed by statute looking at your NET ASSETS WORLDWIDE

There can be both complete and incomplete intestacy

Complete → All of your assets are disposed by intestacy

Incomplete → Only some of your assets are disposed of by will, or the disposition you made in your will is now impossible

**Goals of Intestacy Legislation:**

1. Take care of the spouse or “Adult inter-dependent partner”
2. Distribute the property to the people closest to you

Prescribed amount – Either \$150,000 or half the value of the estate, whatever is greater

### **Potential Recipients through Intestacy:**

1. Affinity = marriage
2. Consanguinity = blood (\*\* Not the nieces and nephews of your wife)
  - Includes half siblings

\*\* Look at descendants or issue first. If none available, we look to ascendants (parents, grandparents) and collateral (nieces, nephews, cousins)

**Child:** doesn't matter if they are born in or out of marriage

- Counts adopted children as blood children
  - Law disregards child's biological relationships
- All children in vitro and then born alive after you die (**WSA 28, 58(2)**)
  - BUT NOT CHILDREN THAT ARE CONCEIVED WITH YOUR SPERM AFTER YOU ARE DEAD
- Step-children are not considered children → Get around this by legally adopting them

**Spouse:** Anyone to whom you are married (DOES NOT INCLUDE COMMON LAW)

- Same-sex included
- **WSA 63:** Spouse deemed to predecease you if:
  - Living separate & apart for 2 years
  - Judicial order of irreconcilability
  - Agreement to finalize independence after break-up

### **Adult interdependent partner** (**WSA 1(1)(a)**)

Two sets of criteria:

1. "share lives", "emotionally committed", "economic & domestic unit"
2. One of three categories:
  - Relationship of at least 3 years; OR
  - Relationship of some permanence with a child; OR
  - Any length with adult interdependent partnership agreement

Non-discriminatory scope:

- Relationship need not be conjugal
- **Blood relations may be AIPs only through partnership agreement**
- Maximum one AIP at a time
- AIP impossible if reside with spouse
  - AIP *agreement* impossible if married
- AIP cannot also claim in some other capacity (eg sibling) (**WSA 64**)

## Distribution Rules of Intestacy:

**\*\* The prescribed amount comes from *WSA 61(1)(b)***

**Spouse OR AIP but no descendants** → They get entirety of estate (*WSA 60*)

### **Spouse OR AIP and descendants**

- If all children are of the union → Spouse/AIP gets entirety of estate (*WSA 61(1)(a)*)
- If some children are not of the union: (*WSA 61(1)(b)*)
  - Spouse/AIP gets the prescribed amount or 50% of the net value of the estate
  - Residue is split between the children equally

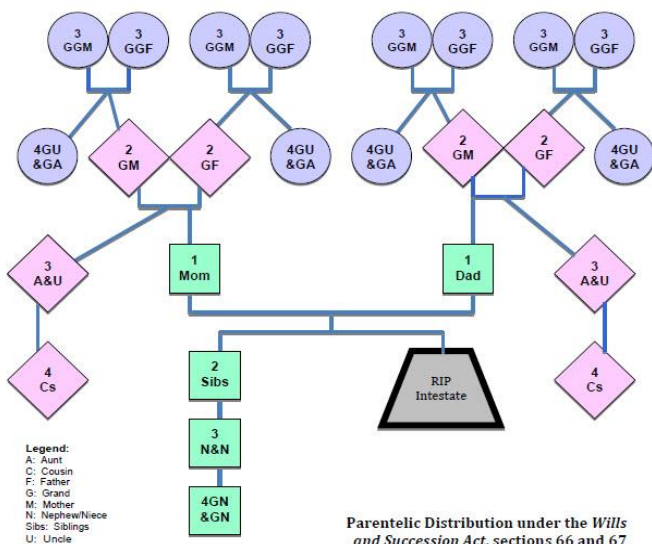
### **Spouse AND AIP**

- If there are no descendants → Estate is split between spouse and AIP (*WSA 62(b)*)
- If descendants → Spouse & AIP split the prescribed amount (or 50% of the estate) (*WSA 62(a)*)

### **No spouse OR AIP but CHILDREN**

- If only one child → They get everything (*WSA 66(1)*)
- If multiple children → Divide it equally (*WSA 66(1)*)
  - But if a child has died, you need to use representation (*WSA 66(2)*)
    - Divide it among their issue → Go as far down as need to find representation (the first generation with people alive to take)
    - No generational limits when looking at representation of your descendants

## Rules of Intestacy if No Preferred Claimants (No spouse, AIP, or children): (*WSA 67*)



**Section 67(1)(a): Surviving Parents and Section 67(1)(b): Surviving Siblings or Their Descendants**

Start with the GREEN SQUARES → Follow the green squares to the 4<sup>th</sup> degree of representation

1. Give to the parents if they are alive (WSA 67(1)(a))
2. Give to siblings if parents are dead (WSA 67(1)(b))
  - Can have representation all the way to the grand-nieces and grand-nephews

**Section 67(1)(c): Surviving Grandparents or Their Descendants (No parents or siblings/issue of siblings)**

Follow the PINK SQUARES

1.  $\frac{1}{2}$  the estate goes to the mother's side and  $\frac{1}{2}$  the estate goes to the father's side
  - If no descendants on one side, the whole estate is distributed to the other side
2. If grandparents are dead, then go to aunts and uncles and then to cousins

**Section 67(1)(d): Surviving Great-Grandparents or Their Descendants**

Follow the PURPLE CIRCLES to get representation

Reminder:  $\frac{1}{2}$  goes to maternal side and  $\frac{1}{2}$  to paternal side, **AND THEN  $\frac{1}{2}$  to each grand-parents side**

- So you give  $\frac{1}{2}$  to your maternal; great-grandparent side and  $\frac{1}{2}$  to your paternal great grandparent side

**Section 69: No Heir**

## Escheats to the Crown

### Contracting Out:

Can a separated wife contract out of the intestacy legislation?

- Yes, but the K is read very narrowly → It needs to clearly and unambiguously apply to intestacy
- So in *Re Winter*, the court decides that in the circumstances that it only means alimony, etc. and things done between spouses going through a separation or a divorce

*Re Winter* (Ont HC 1955)

Under the terms of a separation agreement, the wife promised to “release the husband ... from all claims present, past and future against the husband for maintenance, alimony or separation allowance and acknowledge[d] that she ha[d] no further claims against the husband nor against the estate of the husband.” When he later died intestate, the wife claimed the estate.

The claim was upheld. The court held, as a matter of interpretation, that the agreement pertained merely to maintenance, alimony or separation allowances, and did not bar a claim in intestacy.

### Advancement:

You give someone something to “advance” them in life

- An advance on the inheritance – they get it early

**RULE:** If they get it early, it is subtracted from the share of your estate that they may have gotten

- Applies to ANYONE who can make a claim (“Prospective beneficiaries”)
- Needs to be proof of an **INTENDED** advancement → Need to show that it was advanced against the intestacy (Burden on person making the claim of advancement)
- Available evidence
  - Intestate’s oral statement at time of transfer
  - Intestate’s written statement anytime
  - Prospective beneficiary’s oral or written statement anytime
- ON EXAM – the fact that a father gives \$100,000 to a child means nothing unless you prove it was meant as an advancement

(Estate + Advancement)/people then add what they need to be equal – and if it would be more then do nothing

### Survivorship Rules (**WSA 5**)

If unclear which person died first ...

- Presume each person predeceased other and look at each estate separately
- Joint tenancy treated as tenancy in common

## Other Non-Testamentary Transfers:

### The Dower Act

Rights apply only if you have a spouse and only if the property is owned ABSOLUTELY

- Rentals and shared ownership are not included

You get two types of rights with dower:

#### 1. Inter vivos rights:

- If your spouse sells the property without your permission you can sue them
- If they can't pay, the government will pay you
- You have the right to consent to any sale or transfer

#### 2. Survivor Rights:

- Life estate in real property and personal property (**s.18, 23(1)**)
- Dower always trumps any testamentary/intestacy bequest

\*\* If you have more than 1 property, you pick which one you want the life estate in

### Temporary Possession of the Family Home → if Dower does NOT apply (**WSA s.74-85**)

- Spouses or partners can stay in the rented/owned family home for 90 days
- Applies to the use of personal property closely connected to the home as well

While you live in it for 90 days, all expenses are borne by the estate

- Presumptively, these are not taken out of inheritance
- Court has the discretion to change the duration

You lose possession if you (1) don't live in it or (2) live in it and trash it

This right is strong – trumps the end of a lease, and any conveyance to another person

- **But this IS subject to the Dower Act** and the rights of any dependent child

### **Matrimonial Property Act** → \*\* DOESN'T APPLY TO MARRIED SPOUSES IN AB\*\*

Allows you to take 50% of the assets of your separated spouse – right continues if they die

- In AB, you can only bring the action if the relationship has dissolved

In everywhere but AB, you can bring an MPA if:

- Your spouse has died and you are happily married
- You are separated and they die

But s.117 of the WSA has been abolished, so this does not apply to AB

### Wills & Succession Act: Maintenance & Support

If you are a family member, you have the right for an adequate provision for proper support and maintenance



### **Berube v Berube Estate:**

At the time of marriage, the husband was 81 and the wife was 42. Because he had children from previous relationships, and because she had not contributed to the accumulation of his estate, the parties signed a pre-nuptial agreement under which he promised to leave her \$15,000 and she promised to refrain from making any other claims. When he died twelve years later, his will contained the promised provision, but she claimed additional relief. The trial judge upheld her claim and held that she was entitled to receive \$80,000 in total.

The appellate court partially allowed an appeal. It agreed that the wife was not barred by reason of her prior agreement. It also held, however, that the trial award was excessive in light of, *inter alia*, the parties' agreement that the estate, minus \$15,000, would be used to discharge the deceased's moral obligations to his children. The widow's total award was reduced to \$60,000.

This shows that the fact that a K is in place doesn't matter

- You can't attempt to contract out of maintenance obligations
- Your attempt to K out may effect the amount you get though

### **Anti-Vulture Provisions:**

- Unconscionability – I exploited an opportunity to my advantage
- A young man was an expected heir and knew he was getting a fortune. Many times he would sign away his right to his inheritance and get something small
  - These K's would be void on unconscionability

This is the same thinking as the anti-vulture provisions

- You can't contract out of your right NOR can you sell your right to maintenance and support (**s.101**)
- Any property that would have been included comes back into the estate, but the estate can't touch any property that was given away under a BONA FIDE contract (*inter vivos* good faith)

The protective provisions are subject to a BFPV

- Dower, maintenance, etc.

### ***Tataryn v Tataryn Estate:***

Facts: Deceased has a spouse who he is on good terms with. He has sons E who he likes and J who is a douche. He drafts a will giving wife the home under a life estate, with EVERYTHING ELSE going to E. E is the executor and the ability to give support and maintenance on the wife at his discretion

- But even though you could do this in life, you cant do it in death
- As soon as you die, you have obligations to take care of spouse and dependent children (even adults)
  - You have a legal and **moral obligation** to give something to all of your children
- The legislation used to be a spouse, dependent children or children with a NEED – they don't have enough to get by
- But now, even if there is no dependency, you have to give something to your children – it's a moral obligation → and it has to be meaningful

\*\* IN AB, they have to be a DEPENDANT child. Independent children cannot apply for support and maintenance

**[The test] cannot be limited to the bare necessities of existence. [The] court [must] naturally proceed from the point of view of the judicious father of a family seeking to discharge both his marital and his parental duty; and would of course ... consider the situation of the child, wife or husband, and the standard of living to which, having regard to this and the other circumstances, reference ought to be had.**

### Applications for Support and Maintenance:

- Applications can be made if either a WILL or an INTESTACY doesn't leave you with enough
- There is a difference between STANDING to sue, and the amount you get
  - Just because you have standing doesn't mean you will get money

An application can be made by any "family member", but it is deemed to be done on behalf of all family members

- The moment you get the grant for administration or probate, you have to wait 6 months to distribute assets → This gives other people time to apply for support and maintenance
- And if you are the administrator and do something before the 6 months, if someone has a good claim, it comes out of your pocket personally
  - And if the court finds you did it willfully, \$5000 and 6 months in prison
- But money can be paid out before this if it is absolutely necessary for maintenance → Charged against the beneficiary's share
- If there is a valid claim by a creditor, you can distribute before the 6 months → they come before both dependents and beneficiaries

### *Re Detinger* (1981 Ont Surr Ct)

- executrices distributed estate *prior* to lapse of six month period
  - executrices personally liable to satisfy P's claim against estate

What if in the 6 month period the intention to file a claim and doesn't file until 9 months?

Answer: It is the claim itself, not reasonable notice. After 6 months you can only claim against the undistributed assets

Who is deemed to be a "family member"? → Who has standing?

1. Spouses – LEGALLY MARRIED (Not partners, ex-spouses)

- But it does include a party to a void marriage (Ex. A polygamist's 5 wives)
- Includes people who are legally married but separated
  - Issue: Standing to sue is different than if you actually get anything
  - So a separated partner has standing, but may not be able to prove they are owed anything
- See *Stayco v Stayco* and *Boychuk v Boychuk*

***Stayco v Stayco* (2002 Alta QB)**

**Before the husband's death, the parties had been separated for 50 years and had virtually no contact during the last 30 years. The widow nevertheless had standing to sue. Her claim, however, was dismissed on the grounds that she no longer was dependant on the estate, and was owed no legal or moral obligations.**

***Boychuk v Boychuk* (2008 Alta QB)**

**The couple had been married for 71 years before the husband's death. They separated two years earlier only because the wife had to move into a care facility. The husband's will left the estate, worth \$62,000, to two of the couple's five children. Notwithstanding the separation, the widow was dependant upon her husband and, in the circumstances, she was entitled to the entire estate.**

2. Family Members:

- AIPs
- Children but only:
  - Infant children
  - Adult child who is actually dependent → Physical or mental disability
  - 18-22 and dependent due to full time studies
  - BUT NOT ADULT INDEPENDENT CHILDREN (cf *Tataryn*)
  - Remember child by blood or adopted, not step-child, child born after death, but not conceived after death
- Grand children and to great grandchildren
  - Settled intention to treat as own child AND
  - Primary home and financial support for 2 years before death or since birth

Reminder: Always a representative action → Deemed to be on behalf of everyone if one person applies

- Cant bring an application until you have all info
- You have to serve all beneficiaries of the wills/intestacy and any claimants

### *Re Cooper* (1980 Ont SC)

Man was divorced from defendant 10 years earlier. They have 4 children one of whom will always be dependent because of a mental disability. At the time of divorce, deceased had no assets at all. In the divorce, he promised that when he died, he would leave them stuff in his will. Dead guy gets a girlfriend and gives all his stuff to his ex-wife and children and nothing to his girlfriend in the will. Girlfriend makes an application for maintenance

- Lower court denies the claim and says she doesn't have standing because she wasn't dependent and made more money than him
- CA: That's wrong. You don't have to actually be dependent, it's a term of art that means dependent or family like situation
  - The fact that P contributed more than the dead guy strengthens her claim, because the more you give to the relationship, the more you should get from the other person's death

Cohabitees are subject to reciprocal legal obligations

- Irrelevant that P contributed more than deceased to joint finances
  - contribution to estate *supports* right to relief
- Irrelevant that P not "actually dependent on deceased"
  - "dependant" as a term of art
    - parties to a relationship + *either* support or obligation to support
    - statutory aim extends beyond financial need (*Walker + Tataryn*)
  - *cf* WSA: "dependant" displaced by "family member"
    - P would now qualify as AIP
- Circumstances support order for \$15,000
  - order charged against estate—including insurance and pension

### **Adequacy of Support:**

Test for adequacy of support:

1. Has there been proper provisions made by will or intestacy?
2. If no, how much more would be appropriate in the circumstances?
  - Asses needs at time of death, not time of the trial

### *Allardice v Allardice* (1910 NZSC, affd 1911 PCNZ)

- "Support" ... does not mean merely having a supply of food and clothing. It means ... such kind of maintenance as the widow during the life of her husband has been accustomed to. The matter that should be considered, both as to widow and children, is how she or they have been maintained in the past.
- A child ... that has been living on a father's bounty could not be expected to begin the battle of life without means. A child, however, who had maintained her or himself, and had perhaps

accumulated means, might well be expected to be able to fight the battle of life without any extraneous aid. But even in such a case, if the fight was a great struggle, and some aid might help, and the means of the testator were great, the Court might ... properly give aid. ... Even in many cases where the Court comes to a decision that the will is most unjust from a moral point of view, that is not enough to make the Court alter the testator's disposition of his property. The first inquiry in every case must be what is the need of maintenance and support; and the second, what property has the testator left.

Not enough to just provide the basic necessities → should get what they expected during your life

- Key: Nature of the lifestyle they had before your death
- Also, if you have an adult child who would have looked to you to get ahead, you have an obligation to them (not in AB)

\*\*Quantifying the legal and moral obligations is something well beyond necessities

\*\* TATTARYN AND ALLARDICE are the interpretative guidelines as to who gets maintenance and how much

*Wills and Succession Act: Maintenance and Support—Adequacy of Support (cont'd)*

- Formal criteria:
  - *nature and duration* of relationship
  - *age and health* of claimant
  - claimant's *capacity to support self*—including other forms of support
  - deceased's *legal obligations* to claimant
  - deceased's *reasons for refusing* provision—including signed statements
  - *agreement or waiver* between deceased and claimant
  - *size, nature and distribution* of *estate*
  - *size, nature and distribution* of *posthumous benefits* to claimant or others
  - deceased's *inter vivos transfers* to claimant (gift, trust, contract)
  - “any other matter” (accommodates moral duties)

*Tataryn v Tataryn Estate* (1994 SCC)

- Striking a balance: fulfilment of obligations vs testamentary freedom
- Deceased free to choose *if* obligations are satisfied
  - Legal obligation: *Divorce Act, Dower Act, MPA, Pettkus v Becker*
  - Moral obligation: reasonable expectation + community standard
    - factors: eg nature of relationship + P's contribution to estate

Legal duties outweigh moral duties in event of conflict

*Dupere v Spinelli Estate* (1998 Alta Surr Ct)

Peter Spinelli and Carole Dupere—incorrigible cocaine addicts—produced a child named Vicky in 1983. Peter abandoned the girl and Vicky was raised in poverty by her mother and (when her mother was incarcerated) by family friends. When Peter died in 1996, he left his entire estate, worth \$325,000, to his parents. Vicky sought relief.

Peter did not make adequate provision for Vicky. He intentionally “shirk[ed] the legal and moral responsibilities which resulted from his fathering a child.” Moreover, his estate was not subject to any competing moral claims.

Alberta’s statute generally limits relief to *minor* children. Nevertheless, because Vicky was under 13 at the time Peter’s death, relief could be given with respect to needs that she would experience after becoming an adult. That was important because she wished to pursue post-secondary education.

Vicky received a total of \$75,000 on trust for living expenses and education. Any funds remaining at age 25 would be split between her and the estate.

#### *Re Kinsella Estate* (2004 Alta QB)

Loretta died intestate and was survived by an estate worth \$43,000 and *fourteen* children. Larry sought a bigger piece of the intestacy pie on the basis that he was physically disabled, deeply in debt, living on welfare, and without prospects.

Although Larry was a “dependant” (under the old legislation), his claim failed. Loretta “would not have wanted to prefer one child over the others” — certainly not Larry. Neither Larry nor Loretta had financially supported the other during their lives. Furthermore, he had not contacted her during the last five years of her life, perhaps because she took a dim view of his lifestyle (eg a spotty employment record, an assault conviction, a history of defaulting on debts). And finally, although Larry was in need, he “stands in no different position than many of [his siblings],” none of whom had prospered in life.

#### *Cummings v Cummings* (2004 Ont CA)

Held

- Assessed on basis of financial need *and* moral entitlement (*Walker + Tataryn*)

“[T]he Court must place itself in the position of the testator and consider what he ought to have done in all circumstances of the case, treating the testator for that purpose as a wise and just, rather than a fond and foolish, husband or father”

- *Bosch v Perpetual Trustee Co* (1938 PC NSW)

Moral obligations evolve with community standards

“In earlier times, the prevailing view was that ... the husband was obliged to maintain the wife, and nothing more. At present, however ... society’s expectations [require] that children will be properly supported and that spouses are entitled not only to proper support but also to a share in each other’s estate when a marriage is over.”

Proper assessment requires consideration of all parties

- application deemed to be representative action
  - Paul’s needs (while great) cannot leave Ruta destitute
- trial discretion entitled to substantial deference

- \$250,000 to Mary on trust
  - \$10,000 maximum for Elizabeth's education
  - remainder for Paul's lifetime needs
- \$53,000 support arrears to Mary

Posthumous support obligation terminated

- When he died, he had a legal obligation to his wife as she was a creditor
- But the court terminates the post-numerous obligations
- A lot of the money given to the children would be money the ex-wife would have had, so they get more and she gets less

Take-Aways:

1. In terms of "how much" take the perspective of the wise and just father. Give beyond the necessities
2. As per Allardice, more and more is expected over the bare necessities

### ***Wills and Succession Act: Maintenance and Support—Orders***

- Interim order: preservation of assets or administration of estate
- Suspensory order: reinforce distribution prohibition for six months
  - *cf* order for immediate advance for beneficiary's maintenance
- Orders for maintenance and support
  - periodic payment *or* lump sum *or* assignment of specific asset
  - direct *or* in trust
  - from capital *or* income *or* both
  - charged against all *or* part of estate (below)
  - subject to conditions or restrictions considered appropriate
- further orders: discharge, vary, or suspend earlier order

### ***Wills and Succession Act: Maintenance and Support—Property Subject to Order***

- Orders presumptively charged against entire estate
  - Including both *probate estate* and *notional estate*
    - probate estate = under representative's control
    - notional estate = property passing otherwise (eg insurance, JT)
- Except ... property subject to *inter vivos* good faith contract for value
  - Except ... extent to which property value exceeds consideration

\*\* Courts can do what they want to come to the right answer

## Quasi-testamentary Dispositions:

### The Nature of Testamentary Dispositions:

#### Dispositions Generally

- *inter vivos* = effective during transferor's lifetime
- testamentary = effective upon transferor's death

Quasi-testamentary dispositions → Effective *inter vivos* but crystallize upon death

#### Requirements for Testamentary Dispositions

- *cf* formalities
  - pertains to form rather than inherent substance
- Must be a written instrument
  - oral or "nuncupative" dispositions no longer valid
- Disposes of assets
  - Almost always involves disposition of deceased's property
  - Exceptionally deals only with other matters
    - Exercise of power of appointment
    - Appointment of personal representative
    - Appointment of guardian for minor children
  - other directions non-binding on representative (*eg* funeral)
- Takes effect only upon death
  - Disposition depends upon death for its essential vigour

#### Powers:

- Simple absolute dispositions vs. trusts vs. powers
- To give away property you can:
  - (1) Give an absolute gift
  - (2) Trust
  - (3) Power
- In both trusts and powers you give the property to a 3<sup>rd</sup> party
  - If I absolutely know you want to property to go to the person, then you create a trust. It creates an obligation for the property to go to you
- Power → Where a trust is an obligation, a power is an authority, not an obligation
  - An authority is something that can be done, but need not be done
  - If you want to you can distribute it but if you don't it goes to...?

#### *Corlet v Isle of Man Bank* (1937 Alta CA)

In an attempt to avoid succession duties, Wilfred Corlet transferred three life insurance policies to the defendant bank as trustee for named beneficiaries, but made the trust fully revocable within his lifetime.



Although the beneficiaries' interest was defeasible prior to Wilfred's death, it was *inter vivos* and not testamentary because it took effect immediately and not upon death. The beneficiaries immediately enjoyed a vested interest (albeit one subject to divestment).

**\*\* MOST IMPORTANT QUESTION → IS THE DISPOSITION EFFECTIVE IN LIFE OR IN DEATH?**

### **Requirements for Testamentary Dispositions:**

#### 1. Revocable before death

Wills = ambulatory

- It doesn't mean anything to write a will unless you die with a will in the same form
- Implications:
  - Beneficiaries have nothing during your life
  - If I write a new will, it automatically cancels the old will

#### 2. Intention to be a Testamentary Disposition

To see if something is a testamentary disposition, look at the *animus testandi* or "testamentary intention")

- testator must have intended to give upon death
  - not so if induced by undue influence or fraud (below)
  - not so if language is merely precatory
    - "I hope that X gets..."
  - not so if document is merely preparatory
    - If I plan to see a lawyer, then it is a set of instructions to give to a lawyer

**\*\*\* LOOK AT THE INTENTION OF THE DECEASED**

### **Re Moir:**

Shortly before her death, a woman drafted a list of assets and desired recipients, placed that document in a trunk, and told her niece to find it there when she died. Did that document constitute a valid holograph will?

Those opposed argued that it was not intended as such.

The court explained that the outcome depended on the woman's intention. If she had sent the same document to her solicitor, it presumably would have constituted instructions for a will, rather than a will itself. On the facts, however, the court concluded that the woman did have the requisite *animus testandi*.

Court says:

- Normally that is not a will, it is just preparatory
- But if we look at the intention of the person here, it was intended to be a will, so the Court views it as a testamentary disposition

### Popowich v Capasso

Sheri suffered terribly from a bipolar condition. Six months before her suicide, she drafted a will that split her estate between her mother, who cared for her in Canada, and her husband, who lived in Italy. Shortly before

her death, she sold her house and deposited the proceeds into a bank account that she opened jointly with her mother. She later left a long suicide note in which she said to her mother, “**Take my money and do things for yourself.**” The mother argued that the note constituted a holograph will, which automatically revoked the earlier will.

Although the letter *could* have constituted a holograph will, it was not intended as such. Sheri did not thereby give her mother everything—she merely intended that her mother should spend the account balance on herself (eg not charity).

- While you can have a will inside another document, the court did not find this intention
- Court found intention was to spend the money in the joint bank account for herself

### Will Substitutes:

- Created inter-vivos but take effect on death
- You make a will substitute to stop the government from taking some of the money by taxes
- But since they are inter vivos, you normally cant revoke them
  - → Immediate loss of control

DMC → *donatio mortis causa* (“gift on the occasion of death”)

Requirements:

1. Limited to gifts of personal property
2. Contemplation (not necessarily expectation) of death
  - Donor need not be *in extremis* at time
3. Transfer intended to be reversible if donor survives
  - Donor may revoke prior to death
  - Gift automatically revoked if donor survives peril
4. Sufficient delivery before death
  - Actual delivery of asset itself
  - Constructive delivery of token or means of acquisition
    - eg car keys, title deeds, share certificates, bank book

\*\* DMCs are CONDITIONAL, INTER VIVOS TRANSFERS. NOT TESTAMENTARY

*Chevrier v Zachariuc Estate* (1984 Ont DC)

Chevrier went to visit his friend, Zachariuc, who was 81, alone in life, and sick. Because Z was terribly ill, C asked him if he had a will. Z said, “No, I give what I have to you; you are my only friend.” Z then gave C a key to a house in another town, and told him he could have money that was hidden in jars and buried under a crawl space. It was clear that C was to do so only if Z died. When Z died the next day, C went to the house, and discovered \$16,000 hidden as promised. C successfully argued that the transfer of the key constituted constructive delivery of a *donatio mortis causa*.

Gift effective conditionally *inter vivos*—absolutely on death

Cause of Death → DMC:

- IF you give a DMC and die of something else, it doesn't count
- Ex. You give it from being sick but get hit by a car

A person on hospital bed expects to die of cancer, but doesn't. He catches pneumonia at the hospital and dies.

Since it is closely enough related the court said it was a valid DMC

What you die from & what you expect to die from must be closely related

How to make a gift that circumvents a will:

- IV gift, deed, trust
- In law: IV gift or deed
  - Deeds allow you to give a gift when:
    - Difficult or hard to actually deliver
    - You anticipate difficulty with fighting between members. So you give a "deed of gift" to the recipient so they have proof of the gift
    - The deed has to be signed, sealed, and delivered
    - It's *inter vivos* even if you structure it weird
  - Ex. I have a bunch of artwork that I want my kids to have but not have to pay taxes on
    - So you draft up a deed of gift
    - But you can mean they get them immediately or that you have a life estate and they get the remainder
      - This looks testamentary, but it is *inter vivos*
- In equity: Trust
  - Trusts look quasi-testamentary. You don't get it until I die, but you already are vested in interest (beneficial interest)
    - You can sell it, etc.

*Anderson v Patton* (1947 Alta CA)

Frank Costello, who knew himself to be an awful driver, was about to set out on a trip. He handed his friend, Patton, \$5000 and a receipt that said, "To hold in trust for [Costello] and ... pay to [two women] if anything should happen to [Costello]. The money will be returned if ... Costello should demand it." In a self-fulfilling prophecy, Costello died the next day while driving. His estranged wife then came forward and argued that the document constituted an invalid attempt at a will.

The court held that Costello intended to create an *inter vivos* trust—for life to himself and the remainder to the two women. The fact that they did not receive possession until his death did not create a testamentary disposition. The fact that the trust was revocable did not defeat the *inter vivos* intention

Why was this not a DMC?

You have physical delivery & it was conditional upon death, but the Court ultimately decided the peril was not sufficiently focused

- I will die of X illness, I will die on X flight

Now we assume it would be enough

### Joint Tenancy:

You can share ownership as either a tenancy in common or a joint tenancy

Differences – JT needs the 4 unities → Time, shares, source, full enjoyment of whole property for both people

- If we are co-tenants, my share passes to my estate
- BUT if we are joint tenancy, it passes to the survivor
- If we are JT of Blackacre or a bank account
  - We (1) enjoy *inter vivos* use
  - (2) If one of us dies, the other gets the whole thing

Difficulties → If we both pay equally towards the property, we should legally and equitably own the whole thing

- But if I pay for the whole thing and put your name on it, you have legal ownership, but equitably that may not be true
- ISSUE: Equity presumes a resulting trust to anyone except an infant child if your name comes on title
  - You get legal title on trust for the purchaser

Presumption of advancement – presumption that when I give you legal title, I intend for you to take legal and equitable title

Presumption of resulting trust – presumption that I gave you legal title, but not the full benefit. SO when you get the legal title, there is an automatic resulting trust

What if I don't want either → I don't want them to use it when they are alive or when I'm dead, but I just want my kid to do my banking for me.

*Pecore v Pecore* (2007 SCC)

**During his lifetime, an elderly father transferred bank assets into joint title with his daughter. A dispute arose on his death as to whether the assets passed to the estate or were subject to the daughter's right of survivorship.**

**The evidence appeared divided. On the one hand, the father was aware of the right of survivorship, he expressly told the bank that the assets were "not gifted" to the daughter, and he retained control of the assets during his lifetime. On the other hand, his will dealt with all of his property *except* the bank assets.**

**Rothstein J held that the presumption of resulting trust *prima facie* applied, but he also carefully considered evidence of the father's intention. He concluded (1) that the father did *not* intend his daughter to enjoy use of the assets while he was alive, but (2) he *did* intend for her to enjoy the right of survivorship. As a result, the assets passed directly to the daughter and did not form part of the estate.**

Father puts daughter on the account, as a joint account holder.

- D gets the right of survivorship and the right to use the account

- But F was the only one accessing the funds during life and said it was not to be a gift to the daughter
- When F died, will deals with all assets EXCEPT the bank account
- SCC breaks it down
  - Legally speaking, she got inter vivos use and survivorship, but may not be true in equity
  - (1) Inter vivos use
    - In effect he gave her this for nothing (Ability to drain the account for no consideration)
    - This creates the presumption of a resulting trust in equity
      - So she gets legal but not equitable title
      - The burden is on the daughter to rebut the presumption of resulting trust
      - On the evidence, this was not his intention
  - (2) Survivorship
    - When she is put on title, she gets legal survivorship, but
    - In equity, they will not assume something for nothing, so resulting trust
    - Onus on D to rebut, and in this case, she can show the intention that he intended her to have the money upon the death
      - It wasn't mentioned in the will

\*\*\* BREAK IT UP and look for the father's intention → Did he intend her to have inter vivos use? Did he intend her to have the right of survivorship?

Life insurance or pension with designated beneficiary

- Not part of estate—generally unavailable to creditors
  - Unless estate is designated beneficiary

## **Contracts to Make Wills**

- Quasi-testamentary
- If you don't have a will, you may have a K to create the will or make a K not to revoke the existing will

Consideration → goes to the creation of the K

Consideration at law:

- At law, needs to be valuable OR nominal
  - Can trade for a peppercorn
- Or can be done by seal
  - The person making the promise affixes their seal
- Love and affection are not enough, neither is the fact that you are getting married

Consideration in equity:

- Can be valuable but CANNOT BE NOMINAL
  - Consideration needs to be equal on both sides
- Love and affection not enough, but a marriage settlement is
  - Marriage settlement – both promise to enter into marriage and it acts as consideration and privity for the wife, husband, and all of their issue
  - SO if you make a promise to leave money to the GC when they arrive, the GC can sue later

Privity → If there is a K, who is a party to the agreement

Remedy → If there is a breach, what is the remedy?

Remedies in law:

- In law you never get the thing, just the value of the thing
  - Historically, courts of law wanted everything reduced to money

Remedies in Equity:

- You can get specific performance if agreement recognized in equity and damages are inadequate
- But if you have a contract to draft a will
  - Equity doesn't force the will to be drafted, but allows you to get exactly the thing you expected to get

## ***Synge v Synge***

Woman and man contemplate marriage. Woman agrees to marry him (detriment to herself) if he creates a will that leaves her a life estate in Blackacre. After they marry, the H gives Blackacre to his kids from an earlier marriage

- He argues that you can't sue yet because he hasn't died yet
  - But this is an anticipatory breach. By giving the property away, he can't leave it in the will
- She sues in law only, not equity (Can sue today because of the anticipatory breach)
  - Wants the monetary value of the life estate

For study purposes: The oddity of this K is that it's a promise to exchange things upon death, but you can give it a present value

### ***Degelman v Guaranty Trust Co* (1954 SCC)**

An oral contract was created between an aunt and her nephew. He promised to care for her during her remaining years—she promised to devise her house to him. He dutifully performed, but her will left the property to someone else.

The oral contract was unenforceable under the *Statute of Frauds* and the nephew consequently was denied contractual relief. He nevertheless had established an unjust enrichment and he was entitled to restitutionary relief. What is the difference between contractual and restitutionary relief?

Issue here → It was an oral agreement

- Since it was dealing with land, it is unenforceable under the statute of frauds. Therefore he can't sue on it

His lawyer pleads unjust enrichment.

- 1. Enrichment
- 2. Deprivation
- 3. Absence of juristic reason

But in K, you get the house or the value of the house

But in restitution, you just get the actual value of your services → So they give him only \$3500

**\*\* USE UNJUST ENRICHMENT ON EXAM IF NEEDED!!!**

### **4 types of Contracts for Wills**

Quasi-testamentary because we create it when we are alive and it comes up when dead

1. ***Syngé v Syngé*** – purely contractual. There is a valid K and a breach of K
2. ***Degelman*** – valid K, but you can't sue on it, so you can sue in unjust enrichment.
3. ***Sorkos*** – ineffective K leading to proprietary estoppel
4. Mutual wills – effective K leading to K relief or a constructive trust

When you see a K, make sure you slot it into the right place on the exam!!

### ***Sorkos Estate***

Old Gus Sorkos had no children or grandchildren of his own, but for many years he treated the plaintiff brothers as though they were his sons. In 1985, when the plaintiffs were 13 and 17 years old, Gus proposed an arrangement: If the boys worked for him in various capacities without pay, he would leave his farm to them. The plaintiffs agreed and, over the next two and a half decades, they diligently performed work for Gus whenever he asked. In doing so, they often sacrificed their own interests. Gus occasionally repeated his assurance that the “boys” would benefit under his will. Near the end of his life, however, Gus met and married a woman. Within a short time, he revised his will, with the result that the claimants respectively inherited only \$50,000 and \$25,000 on his death. They sued for proprietary estoppel.

The elements of proprietary estoppel were established on the facts:

- (1) The plaintiffs believed that they would inherit Gus' property;



- (2) Gus encouraged them in that belief;
- (3) The plaintiff detrimentally relied on Gus' assurances, and
- (4) It would be unconscionable for Gus or his estate to act contrary to his representations.

The remedy for proprietary estoppel is discretionary, but it should consist of the minimum necessary to ensure an equitable result. In this instance, Equity required that the estate transfer the property to the plaintiffs rather than comply with Gus' will.

- They could have argued unjust enrichment, but they would only have gotten paid as "hired help"
  - Backwards looking, wouldn't be forward looking

### **Test for Proprietary Estoppel:**

1. Mistakenly believed they had an interest in land or would have one in the future
2. Show D knew of the belief and encouraged it
3. Need detrimental reliance – in reliance upon what the defendant said, you acted to your detriment – this is what distinguishes it from UE
4. It has to be inequitable for D to go back on the promise

**The relief** → Anything that the court thinks is fair

- Market price of services
- Lease over the property

But in this case, given the strength of the claim, the right thing is to make a constructive trust with brothers having beneficial title

1. PE can lead to anything, doesn't need to be a constructive trust
2. Constructive trusts are created by equity

One party has legal and one party beneficial

- So Gus's spouse would get legal title for the benefit of the brothers, and the next step would be for the brothers to ask for a vesting order of performance

### **Mutual Wills:**

**Joint Will:** If 2 people come in you can create a joint will

- It equally speaks for both parties
- It is treated as 2 completely separate wills, it just so happens that they are the exact same
- If you want to go get a new will the next day, you can do so on your own

### **Mirror/Reciprocal Wills:**

- 2 separate wills that say the exact same thing
- It just so happens they are in the same form – one or both can always make a new will, with nothing to prevent them

### **Mutual Wills:**

- Look like reciprocal wills
- But there is a K between the two parties
  - Effect is that you can't change your will after this
- Usually the K really bites when 1 person dies → The other person cannot change their will after that

- If I want to change my will while we are both still alive, I can do so.
- It makes it so you can't place a will when I am alive then give all my stuff to your lover when I die

***But you can have a broader mutual will***

- If the parties intend to be binding immediately, you may not be able to alter
  - Doing so would be an anticipatory breach
  - So you can sue immediately

There is a K, and if there is a breach, you can ask for contractual relief

- But they almost always lead to a constructive trust
- It's a perfectionary constructive trust
- Equity imposes or creates the trust to perfect the party's intentions
  - If you seriously say you are going to do something and the other person detrimentally relies on it, equity will impose a constructive trust

**Rules on Timing of Trust:**

- If the constructive trust refers to a specific thing, the CT is imposed as soon as the first person dies
  - Wife keeps legal title but kids get equitable title
- But if they don't refer to specific items, the constructive trust only takes effect when the 2<sup>nd</sup> person dies → Until that point we don't know what we are dealing with
  - Survivor is entitled to the assets during their lifetime
- Enforcement is by the trust beneficiaries even though they were not in existence when the K was made

***Dufour v Pereira (1769 Ch)***

A married couple created mutual wills that gave a life estate to the survivor and the remainder interest to the plaintiffs. The husband died with a will as promised and the widow enjoyed use of his estate during her life. When she died, however, her will left everything to the defendant. The plaintiffs successfully sued.

Lord Camden LC explained the doctrine: "[H]e, that dies first, does by his death carry the agreement on his part to execution. If the other then refuses, he is guilty of fraud, can never unbind himself, and becomes a trustee of course. For no man shall deceive another to his prejudice. By engaging to do something that is in his power, he is made a trustee for the performance, and transmits the trust to those who claim under him."

**Reminder:** Without naming specific assets, you can give inter vivos on the life estate, you just can't have waste. So if you give it away legitimately that's one way around it → But you can't get out of the K

### **Incorporation by Reference:**

Looks like a quasi-testamentary, but its really testamentary

Will Formalities:

- Signature & witnesses
- Identify the assets and the recipients

Incorporation by reference:

- You may have a separate list of assets and recipients
- Even though it is a separate piece of paper, it is incorporate in the will by reference
- To get the doc into the will, it has to be true that the thing could have been incorporated into the will itself.

### **Four Requirements:**

1. Need a valid will (valid in the same way)
  - Formal will or holographic will
  - So if you have the holographic will, then you need a handwritten list as well – if it is typed out, then you need an entirely typed out will with the 2 signatures
2. Outside doc needs to exist when the will is created
  - Because when you sign the will, you adopt the will and the external document
3. The will as to refer to the outside document as something that already exists
4. There has to be sufficient certainty as to which list you are talking about

### ***In the Goods of Smart***

T drafts up a will with assets going to “such friends as I may designate”. Problem is that the other doc hasn’t been made. Several months later she creates the list – at that point it would have been ineffective.

- However new rule: After she creates the rule and the list she creates a codicil which needs to be signed and witness
- Codicils not only add to the will, but republish them
- That means that since the list and the condicil existed at once, it all became valid

### **CONDITIONAL WILLS\*\*\* Move this to right after DMC**

The will may have conditional gifts

- CP or CS → BUT THAT’S NOT WHAT WE ARE TALKING ABOUT
- We are talking about the entire will being conditional upon some event

Party arguing a conditional will must adduce clear proof!!

### ***Re Huebner:***

Peter drafts a will giving it to his friends if he dies in Moscow. His kids argue that was a conditional will

- Court says it has to be quite clear it was a conditional will
- In this case, the Moscow trip was an occasion to write a will, not a conditional will

Why was this not a DMC?

There is no delivery inter vivos

# **CHAPTER 6: TESTAMENTARY CAPACITY**

## **Knowledge, Assent, Capacity & Undue Influence**

In order to have the capacity to make a will, you need to have testamentary intention. This means that someone has to both **APPROVE** the will and have **CAPACITY** to approve.

1. **K&A** → Did the testator approve of the will?
2. **Capacity** → Could the testator approve?

### **Knowledge and Approval:**

To have knowledge and approval of the will's contents

- Assume K&A if the will is (1) read by the testator or (2) to the testator
- But if the testator does not have capacity, approval is impossible
- If no K&A, all or part of the will fails → Sever offending provisions

### **When do we look at capacity?**

1. When you create the will
2. Any subsequent revisions of the will → Can be capacitated when you draft, but not when you revise
  - **Cf** if the will/revision is made during a lucid period → Need to prove lucid period
    - Rational will in itself may act as proof

### ***Re Bradshaw:***

Capacity at drafting: Need full capacity

Capacity at execution: Need to be able to understand the outline, not the details

### **Capacity:**

To have capacity, you must be:

#### **1. Over 18 → s.13(1)**

- **s. 13(2)** → Unless you are/were married or had an AIP, were a member of the army, or it is authorized by the court

#### **2. With mental capacity → s. 13(1)**

- A fairly low threshold. Need to show that the person understands:
  - Nature of the disposition
  - Size and nature of the estate
  - Individuals who are natural objects of the bounty
- Though you may not have capacity in another form, you may have testamentary capacity
  - **Eccentricity is not mental incapacity** → You can give away your assets however you want, as long as it is the product of an operating mind
    - **Cf** Discrimination → May be against public policy
      - The more public the disposition, the more likely the Courts will strike it

- **Cf Dislike/Disinheritance**

- This is allowed, but it is contrary to the court's trend per **Tattaryn**
  - More likely to strike if it also comes with a discrimination angle

- **Exam: (1) Against public policy, (2) And against the Court's trend against disinheritance per Tattryn**

- **Age-related decline** → High burden to show lack of capacity – someone needs to help old pple
- **General incapacity** → Incapacity in one sense is not in all – different degrees of capacity
- **General insanity** → You can be so old and frail to lack “disposing mind and memory”
- **Insane Delusions** → Delusion invalidates will **if but only if** it actually affected provisions
  - Show BoP that the wills provisions were not due to the delusions

### **Proving Capacity, Knowledge, and Assent:**

1. All three elements need to be proven by the person seeking probate on BoP
2. If the will is read to or by testator and the formalities are met, we raise the **rebuttable presumption** that the will is proven valid on BoP
3. Probate will be granted in the absence of any evidence to the contrary
  - Burden shifts to the attacking party to rebut the presumption
4. The presumption is rebutted if there are **suspicious circumstances**
  - Burden is on party seeking probate to show (1) capacity (2) Knowledge (3) Assent BoP

### **Suspicious Circumstances**

The suspicion that the testator did not **know or approve** of the wills contents

**\*\* THIS IS DIFFERENT THAT UNDUE INFLUENCE**

→ Burden is on party seeking probate to prove (1) capacity (2) Knowledge (3) Assent BoP

- Suspicious circumstances merely rebuts the presumption that the will is good. It does not RAISE the standard that must be proven → ***Vout v Hay***

Examples of suspicious circumstances:

1. The beneficiary is the solicitor 2. You give a gift to someone odd and leave out someone important

### **Undue Influence:**

The attacking party can also raise the issue of undue influence.

- Burden is on the attacking party to prove → Not subsumed into suspicious circumstances
- Party seeking probate **never has to positively disprove undue influence**

### **Interaction of Suspicious Circumstances and Undue Influence: → *Vout v Hay***

1. If there are suspicious circumstances, need to prove (1) capacity (2) knowledge (3) assent BoP
2. If you can prove capacity, knowledge and assent, the attacking party may still raise the defense of undue influence
3. The burden is then on the attacking party to prove undue influence. If they cannot, they will is granted probate → Probate party NEED NOT disprove an allegation of undue influence

### Proving Undue Influence:

Show that there was legitimate pressure that turned into coercion such that the will was no longer a function of the testator's autonomy/reflection of true wishes

- Need to show actual coercion, not just the potential. Pressure needs to be the **REASON** for the transfer
- Person applying the pressure need not be the beneficiary → **Re Marsh**

### **Vitiated Intention**

In order to transfer something, I need to intend for the transfer to occur

I can vitiate intention by:

#### **1. Intention Impossible**

- Deemed (Infancy)
- Actual (Incapacity)

#### **2. Intention Induced**

##### **A. Undue Influence**

##### **B. Fraud**

##### **C. Mistake**

### Fraud:

**Orthodox Rule:** If you (1) fraudulently induce a testamentary disposition, the disposition is invalid (2) IF the beneficiary is culpable

1. The beneficiary fraudulently induces → Intention vitiated
2. The beneficiary makes a negligent or innocent misstatement that is untrue → Intention NOT vitiated
  - The misstatement needs to be deliberately fraudulent → **Re Posner**
3. The fraudulent inducement is made by someone other than the beneficiary
  - The intention is only vitiated to the extent that the beneficiary is culpable

### Mistake:

**Orthodox rule:** As long as the will/provision is due to the mistake, the provision is ineffective

→ Need to show that the mistake was causative

Since we want to uphold wills when possible (presumption against intestate, there are curative provisions)

#### **1. Rectification → Cures any (1) accidental slip, (2) omission, or (3) misdescription**

**39(1)** The Court may, on application, order that a will be rectified by **adding or deleting characters**, words or provisions specified by the Court if the Court is satisfied, on clear and convincing evidence, that the will does not reflect the testator's intentions because of

- (a) an **accidental slip, omission or misdescription**, or
- (b) a misunderstanding of, or a failure to give effect to, the testator's instructions by a person who prepared the will.

## 2. Rectification → Cures the lack of a testator signature

**39(2)** Subsection (1) applies to the omission of the testator's signature only if the Court is satisfied on clear and convincing evidence that the testator

- (a) intended to sign the document but omitted to do so by pure mistake or inadvertence, and
- (b) intended to give effect to the writing in the document as the testator's will.

**(3)** An application under this section may not be made more than 6 months after the date the grant of probate or administration is issued, unless the Court orders an extension of that period

**(4)** The Court may order an extension of the period on any terms the Court considers just.

### Section 39(1)

1. Court can intervene and rectify if it can be done on clear and convincing evidence (BoP)
2. General view curative provisions apply to all mistakes except legal errors
3. 39(1)(a) leaves an ambiguity, but omissions and misdescriptions can be read as non-accidental

### **Types of Mistake:**

**1. Patent Mistake** → Obvious on the face of the document and in the circumstances

- ex. The mistaken belief in someone's death causes you to redraft and leave them out of the will
- Orthodox rule is that the will is invalidated to the extent of the mistake, **UNLESS** you can cure it under s. 39(1)

### **2. Drafting Errors**

- Orthodox rule is that the will is invalidated to the extent of the mistake, **UNLESS** you can cure it under s. 39(1) → Now, 39(1) will go in and write exactly what the testator wanted
- **Side note** → Charitable purposes must be **PERFECTLY** charitable

**3. Execution of Wrong Document** → Two people have reciprocal wills, but sign the wrong ones

- Orthodox Rule: Wills are invalid due to a lack of intention
- Now you correct it under a combined approach:
  - s.39(1) → Delete the offending signature
  - s.39(2) → Add the correct signature

# **CHAPTER 7: FORMAL VALIDITY OF WILLS**

## **Requirements for Formal Wills - Signatures**

### **Types of Wills:**

**Attested/Formal Will:** Signed by testator and attested by witness

**Holographic wills:** Needs to be completely in your own handwriting and be signed

**Privileged Will:** No formalities if you wrote it in act of service → As long as it reflects your testamentary intention

**International Wills:** Effective in any jurisdiction that signed off on international wills. There are a lot more requirements

### **Requirements of a valid will**

**s. 14 →** To be valid, a will

- (a) must be made in writing,
- (b) must contain a signature of the testator that makes it apparent on the face of the document that the testator intended, by signing, to give effect to the writing in the document as the testator's will, and
  - Note: This is fixed by s. 39(2)
- (c) subject to any order made under section 37, must be made in accordance with section 15, 16 [holograph wills] or 17 [military wills].

### **Requirements for a Formal Will**

**s. 15 →** A will may be made by a writing signed by the testator if

- (a) the testator makes or acknowledges his or her signature in the presence of 2 witnesses who
- (b) are both present at the same time, and
- (c) each of the witnesses signs the will in the presence of the testator.

**Key here:** Both witnesses see the same act of signature or attestation → Witnesses need not see each other

### **s. 37 → Curative Provision for s. 15 (Lack of Witnesses)**

**37** The Court may, on application, **order that a writing is valid as a will or a revocation of a will**, despite that the writing was not made in accordance with **section 15, 16 or 17, if** the Court is satisfied on clear and convincing evidence that the writing sets out the testamentary intentions of the testator and was intended by the testator to be his or her will or a revocation of his or her will.



**If there is a problem with compliance of s.15, the Court can act if there is clear and convincing proof (BoP) that the will sets out the true testamentary intention**

- Standard is always a BoP, but the farther it is from valid, the less easily the Court finds intention
- Deem it true that the witnesses have signed and grant probate

**\*\* Important where there is an improper holographic will → Can turn it into a formal will**

### **Limitations to s. 37:**

1. Can only cure a lack of witnesses signatures → Does not deal with capacity or lack of testamentary intention

### **Writing Requirement:**

- Can be in any language
- Doesn't have to be in words → Can be little diagrams
  - If you can discern the T's intention, it is valid
- Doesn't need to be on PAPER → Can be written on a cow
- Can also be in electronic form → IE on a computer (Cure signature with 39(2))

### **Signature Requirement:**

**14 (b)** To be valid, a will must contain a signature of the testator that makes it apparent on the face of the document that the testator intended, by signing, to give effect to the document as the testator's will ...

- You can sign in any way that you normally sign or that shows you intend to adopt
- full or part name *or* initials *or* nickname (eg "Mother") *or* mark → even incorrect name
- a seal alone held *not* to be sufficient

**19(1)** A testator may sign a will, other than a will made under section 16, by having another individual sign on the testator's behalf, at the testator's direction and in the testator's presence.

- **AMANUENSIS:** "From a slaves' hand" → Another person can sign in your name or in their own name if it is in your presence & by your direction → The slave person cannot be a witness
- Attestation clause should be an explanation of what went on

### **Rules for amanuensis**

- Sign own name *or* testator's name
- Must sign at testator's *direction* and in testator's *presence*
  - "Direction" need not entail express instruction
- Amanuensis may not act as witness
- Attestation clause should (but need not) explain circumstances

**Not every instance of assistance that the person is a amanuensis** → You can help the testator write

**"If a testator, in making his mark, is assisted by some other person and acquiesces and adopts it; it is just the same as if he had made the mark without any assistance."**

## **Placement of Signature:**

### **Orthodox rule: Testator to sign at the END of the will**

- We assume if you sign at the end that you are assenting to everything before

Need not sign at the end if you can show the signature was meant to give affect to the will

### **NEED TO SHOW TESTAMENTARY INTENTION**

**19 ... (2)** A will is not invalid because the testator's signature is not placed at the end of the will if it appears that the testator intended by the signature to give effect to the will.

**(3)** A testator is presumed not to have intended to give effect to any writing that appears below the testator's signature

**(4) A testator's signature does not give effect to any disposition or direction added to the will after the will is made.**

## **Section 19 of the WSA:**

### **\*\* No curing provision → Need to find intention to validate whole will**

You should sign at the foot of the document, but the will can be valid if you sign anywhere

- (1) Validity is good if you sign anywhere → BUT NEED TO SHOW INTENTION
- **(2) Anything that comes after the signature is assumed not be adopted by the signature (but you can rebut this)**
- (3) Anything added to the will temporarily after you sign is not part of the will

## **Witnesses/Attestation**

### **Section 15 → You need an attestation clause (WITNESSES)**

**15** A will may be made by a writing signed by the testator if

- a. the testator makes or acknowledges his or her signature in the presence of 2 witnesses who
- b. are both present at the same time, and
- (c) each of the witnesses signs the will in the presence of the testator.

### **20(1) → Witnesses to signature**

An individual may be a witness to a signature of the testator if the individual has the mental capacity to do so.

**(2)** An individual who signs a will on behalf of a testator is not eligible to witness the signature of the testator.

**(3)** An individual who witnesses a signature of a testator is not disqualified as a witness to prove the making of the will or its validity or invalidity only because the individual is

- (a) an executor of the will,
- (b) a beneficiary under the will, or
- (c) the spouse or adult interdependent partner of an executor or a beneficiary.

**(4)** A will is not invalid only because

- (a) a witness to the signature of the testator did not know at the time of witnessing the signature that the document being signed was a will,

- (b) a witness to the signature of the testator was at the time of witnessing the signature, or afterwards became, incapable of proving the making of the will, or
- (c) more than 2 individuals witnessed the signature of the testator.

### Under Section 15:

All witnesses provide evidence of is that the signature they see before them is that of the testator

Witnesses don't attest to the fact that it is a will (not a mortgage, etc.) or the contents of the will → They attest that it is the actual signature of the person **\*\* Common on exams**

**1. Testator must sign OR acknowledge in the presence of 2 witnesses, present at same time**

2. Each witness must sign in presence of testator but not the other witness → SO the witnesses can walk out

### Witness Requirements:

**Each witness must sign in presence of testator—but not other witness**

Witnesses need to have:

- (1) Capacity → Intellectual ability
- (2) They cannot be the slave person (anauenis)
- (3) Witnesses can be beneficiary or executor → But gift ay not take effect
- (4) Need not know the doc is a will
- (5) Perfectly fine if there is more than 2 witnesses
- (6) Presence: Testator needs to sign in the presence of the witnesses
  - Witnesses have to sign in presence of the testator
    - Presence = Need the physical and mental capability of seeing the signature being made
  - One implication → You don't need to look at the person making the signature As long as you COULD, you don't have to. A blind person cannot be a witnesses

**Reminder: Under s.37, the curative provision says that if you have a defect, as long as the court is satisfied the the T intends to give it effect, we can validate the will, even if there are no witnesses**

**A defect in s.15 is remedied by s.37 → If satisfied this was testimony intention**

### Attestation—Acknowledgement

Testator must *sign* or *acknowledge* pre-existing signature in **BOTH** witnesses' presence **AT ONCE**

Acknowledgement = affirmation of signature as one's own → Option exists for testator but not witnesses

### Beneficiary as Witness:

**20 ... (3)** An individual who witnesses a signature of a testator is not disqualified as a witness to prove the making of the will or its validity or invalidity only because the individual is ...

- (b) a beneficiary under the will, or
- (c) the spouse or adult interdependent partner of ... a beneficiary.

### **Certain dispositions are void**

**21(1)** Subject to subsection (2) and any order made under section 40, a beneficial disposition that is made by will to

(a) an individual who acts as a witness to the signature of the testator, ...

(d) the spouse or adult interdependent partner of an individual described in clause (a)

is void as against the individual, the spouse or adult interdependent partner of the individual and any individual claiming under any of them.

**(2)** A disposition referred to in subsection (1) is not void ...

(b) in the case of a disposition to a witness, if the will is made under section 16 or 17 or if the testator's signature is witnessed by at least 2 other individuals under this Part, or

(c) if the Court validates the disposition by order under section 40.

### **Validation of gift to witness**

**40(1)** The Court may, on application, order that a disposition ... referred to in section 21(1) is not void if the Court is satisfied that

(a) the testator intended to make the disposition to the individual ... despite knowing that the individual was an individual described in section 21(1), and

(b) **neither the individual nor the individual's spouse or adult interdependent partner exercised any improper or undue influence over the testator.**

### **Attestation → Beneficiary as Witness**

- Witness can be both a witness and beneficiary but the gift is prima facie invalid
- Need to show **(1) You have 2 other good witnesses OR (2) the T knew you would be both and still intended the gift and there was no undue influence**

## **Holographic Wills**

### **Holographic Wills**

Holographic wills allowed without usual formalities - nature of the document itself prevents the fraud because no one else could have done it

- Be (1) completely in your own handwriting and (2) signed - no witnesses or attestation clauses required

### **A Deliberate or Fixed and Final Intention**

To see if an informal document is a holographic will, discern if there is testamentary intention

Problems when the will is in a suicide note :

- May not have (1) testamentary intention or (2) testamentary capacity

### **Holographic Wills - Use of Printed Form**

Pre-printed will form but don't finish it properly can only be saved as holographic wills if you can make out

complete will based on handwritten portions and ignoring the typed portions

**EXAM** - Possible to have a holographic handwritten will which was intended to be a longer formal will

**\*\* Might be able to use s. 37** to save as a formal will notwithstanding the informality - lots of judicial discretion here though which hasn't been applied in this situation yet

### Signature

**19(1)** A testator may sign a will, other than a will made under section 16 [ie a holograph will], by having another individual sign on the testator's behalf, at the testator's direction and in the testator's presence.

- s. 19(1) says you have to sign it yourself - **can't have amenuensis like in a formal will**

**No signature - use s. 39(2)**

### **Placement of Signature:**

Does 19(2) apply to holographic wills?

Arguments for:

- Saskatchewan upheld in *Re Clarke* because holographic wills are sui generis → so you can sign anywhere
- 19(2) just says "wills"

Arguments against: 19(1) doesn't apply and there is the orthodox rule

**On exam → See if you can find testamentary intention**

### Holographic Codicils to Formal Wills

If you have a formal will with holographic codicil, need to have a testamentary intention for a codicil

### Incorporation by Reference of Non-Holographic Documents

Requirements

1. Separate document has to be in existence at the time the will is done
2. Will has to refer to it as being in existence
3. Document has to be identified with sufficient certainty

Will and codicil are separate BUT incorporation by reference created one single document SO the **same formalities have to cover the entire document** → Logically cannot have holographic will which purports to incorporate by reference a typed out list

But, if you sign at the bottom and then dispositions come after, may be able to argue incorporation by reference → ***Re Dixon-Marsden Estate***

1. To incorporate, you need two documents in hand even though could be on same sheet of paper
2. Satisfy requirements (x3) + also have in the will dispositive language in itself (NEW RULE)
3. If you have incorporation, you still have to satisfy formalities - no witnesses so could only be holographic, couldn't be holographic because it was a mix of typed and hand written

## Privileged and International Wills

### **Privileged Wills**

**17** A member of the Canadian Forces while placed on active service pursuant to the *National Defence Act* (Canada), or a member of any other naval, land or air force while on active service, may make a will by signing it, without the presence or signature of a witness or any other formality.

Rare - only applies when someone in armed forces and on active service

**\*\* SEE BIG CAN FOR MORE RULES**

### **International Will**

Go through same steps as formal will + get someone from law society to provide certificate saying you went through formalities AND you have to number and sign each page AND have to give copy of the will to government registry

# **UNIT 8 – REVOCATION**

## **Statutory Provisions**

### **Alteration of a will**

**22(1)** Any writing, marking or obliteration made on a will

- (a) is presumed to be made after the will is made, and
- (b) is valid as an alteration of the will only if
  - (i) in the case of a will made under section 15, the alteration is made in accordance with that section,
  - (ii) in the case of a will made under section 16, the alteration is made in accordance with that section, or
  - (iii) the Court makes an order under section 38 validating the alteration.

**(2)** If a writing, marking or obliteration renders part of the will illegible, and is not made in accordance with subsection (1)(b)(i) or (ii) or validated by an order referred to in subsection (1)(b)(iii), the Court may allow the original words of the will to be restored or determined by any means the Court considers appropriate.

**(3)** A will may be altered by another will made by the testator.

### **Revocation of a will**

**23(1)** A will or part of a will may be revoked only by

- (a) the testator making another will,
- (b) the testator making, in accordance with the provisions of this Part governing the making of a will, a writing that declares an intention to revoke the earlier will,
- (c) the testator burning, tearing or otherwise destroying the will with the intention of revoking it, or
- (d) the testator having another individual burn, tear or otherwise destroy the will in the testator's presence, at the direction of the testator given with the intention of revoking the will.

**(2)** For greater certainty,

- (a) on and after the coming into force of this section, no will or part of a will is revoked by the marriage of the testator,
- (b) on and after the coming into force of this section, no will or part of a will is revoked by the testator entering into an adult interdependent relationship, and
- (c) no will or part of a will is revoked by a change in circumstances of the testator, except to the extent that section 25(1) applies.

**(3)** The revocation of a will does not revive any earlier will.

### **Revival of a will**

**24(1)** A will or part of a will that has been revoked in any manner may only be revived by making a new will, whether by re-execution or otherwise, in accordance with the provisions of this Part governing the making of a will and in a manner that shows an intention to give effect to the will or part that was earlier revoked.

**(2)** A will or part of a will that is revived by re-execution is deemed to be made at the time of its re-execution.

### **Gifts to ex-spouse or former adult interdependent partner**

**25(1)** If, after a testator makes a will and before the testator's death, the testator's marriage is terminated by a divorce judgment or found by a court to be void or the testator ceases to be the adult interdependent partner of an individual, then unless the Court, in interpreting the will, finds that the testator had a contrary intention, any provision in the will that

- (a) gives a beneficial interest in property to the testator's former spouse or to the individual, whether personally or as a member of a class of beneficiaries,
- (b) gives a general or special power of appointment to the testator's former spouse or to the individual, or
- (c) appoints the testator's former spouse or the individual as an executor, a trustee or a guardian of a child under the *Family Law Act*

is deemed to have been revoked and, for the purposes of clauses (a) to (c), the will is to be interpreted as if the former spouse or individual had predeceased the testator.

**(2)** Subsection (1) does not apply in respect of an individual

- (a) who is a former adult interdependent partner of the testator, and
- (b) who is also
  - (i) the spouse of the testator at the time of the testator's death, or
  - (ii) related to the testator by blood or adoption.

**(3)** This section applies only in respect of the will of a testator

- (a) whose marriage is terminated by a divorce judgment or found to be void, or
- (b) who becomes a former adult interdependent partner

after this section comes into force.

### **Court may validate non-compliant alteration**

**38** The Court may, on application, order that a writing, marking or obliteration is valid as an alteration of a will, despite that the writing, marking or obliteration was not made in accordance with section 22(1)(b)(i) or (ii), if the Court is satisfied on clear and convincing evidence that it reflects the testamentary intentions of the testator and was intended by the testator to be an alteration of his or her will.

## **Revocation of Wills**

### **Vitiating of Intent to Revoke Will**

To revoke a will, you need: (1) Capacity (2) Intention (3) Formalities

All of the same rules re: **fraud, mistake, undue influence apply**

- If you use undue influence to revoke a will and get a new one, the new will will be invalid

### **Revocation by Operation of Law - Marriage**

**23(2)** No will or part of a will is revoked by the marriage of the testator,

**23(2) (b)** No will or part of a will is revoked by the testator entering into an adult interdependent relationship



## Gifts to ex-spouse or former adult interdependent partner

### **SUMMARY: Will is NOT revoked upon marriage, but is partially revoked upon divorce**

**25(1)** If a testator gets divorced or terminates an adult independent partnership, unless contrary intention, they are deemed to have revoked a gift of:

- (a) beneficial interest in property to the testator's former spouse or to the individual, whether personally or as a member of a class of beneficiaries
- (b) a general or special power of appointment to the testator's former spouse or to the individual, or
- (c) appointment of the testator's former spouse or the individual as an executor, a trustee or a guardian

**(2)** Will be not be revoked if the person is a former AIP but is now either (i) spouse or (ii) related by blood or adoption → **They take as a spouse/relative, not AIP**

### Revocation of the will:

1. Marriage → No longer true
2. Divorce
3. Creation of new will or codicil OR **some other writing that satisfies the formalities**
4. Formal document written to revoke will
5. Destruction of will by T
6. Destruction by another party intended by testator to revoke will

### Revocation by Subsequent Document:

Revocation possible through written document → Another will or a codicil or a non-testamentary document  
Document must satisfy formalities for "the making of a will"

- Revoking document need *not* take same *form* as original will

Revocation may be express or implied — according to testator's intention

If you try to revoke and mess it up, you can use **s.37** as curing provisions

### **Non-testamentary document may entail revocation**

- eg revoke may be expressed in separation agreement
- eg letter discussing other matters may include holograph revocation, or it may be in a journal entry
  - courts require clear evidence of *animus revocandi*

### Inconsistencies between two wills:

- Subsequent will may implicitly revoke old will
- Revocation is implied if there is an inconsistency between two wills
- But if the inconsistency is in the same will, assume shared ownership
- **If there is an express revocation → 2<sup>nd</sup> gift failing means intestacy/residue; if no express revocation and just an inconsistency 2<sup>nd</sup> gift failing means 1<sup>st</sup> gift is effective**

### Revocation by Physical Act:

**23(1)** A will or part of a will may be revoked only by

- (c) the testator burning, tearing or otherwise destroying the will with the intention of revoking it, or
- (d) the testator having another individual burn, tear or otherwise destroy the will in the testator's presence, at the direction of the testator given with the intention of revoking the will.

### Revocation by Act of the Testator—By Physical Act

#### **Destruction by testator or another on testator's behalf**

Revocation only if act of **destruction and intention coincide**

- Testator cannot subsequently ratify earlier destruction
- The destruction needs to be MOTIVATED by want of destruction
  - o *Accidental* destruction insufficient for revocation—no intent

**Nature of destruction** → “burn, tear or otherwise destroy” read *ejusdem generis*

*Partial* destruction revokes whole *only if* remaining cannot stand alone

- Partial destruction otherwise creates partial revocation only

### Destruction or Loss of Copies:

1. Destruction of *one copy* entails revocation of *all* copies
2. Destruction of will does not necessarily revoke surviving *codicil* (intention)
3. Revocation *presumed* if will last in testator's possession is lost or destroyed
  - No presumption if testator became *incapacitated* while in possession
  - No presumption if *original* will located but testator's *copy* lost
4. Will survives ineffective loss or destruction → contents provable by duplicate, written records or oral testimony

**\*\* There are no curative provisions here – if you don't destroy it correctly, you haven't revoked at all**

### Revocation by Act of Another:

You can get someone to tear/destroy for you:

1. With your direction
2. With your intention
3. In your presence

## Alternation of Wills

### Alternations of a Will:

**22(1)** Any writing, marking or obliteration made on a will

- (a) is presumed to be made after the will is made, and
- (b) is valid as an alteration of the will only if
  - (i) in the case of a will made under [section 15](#), the alteration is made in accordance with that section,
  - (ii) in the case of a will made under [section 16](#), the alteration is made in accordance with that section, or
  - (iii) the Court makes an order under [section 38](#) validating the alteration.

**(2)** If a writing, marking or obliteration renders part of the will illegible, and is not made in accordance with subsection (1)(b)(i) or (ii) or validated by an order referred to in subsection (1)(b)(iii), the Court may allow the original words of the will to be restored or determined by any means the Court considers appropriate.

**(3)** A will may be altered by another will made by the testator.

### **Court may validate non-compliant alteration**

38 The Court may, on application, order that a writing, marking or obliteration is valid as an alteration of a will, despite that the writing, marking or obliteration was not made in accordance with [section 22\(1\)\(b\)\(i\)](#) or (ii), if the Court is satisfied on clear and convincing evidence that it reflects the testamentary intentions of the testator and was intended by the testator to be an alteration of his or her will.

### **Alterations in a Will**

- Alterations presumed made *after* execution of will
  - *prior* alterations are captured by original formalities
- Alterations must satisfy **same formalities as original form of will**
  - eg formal will cannot be altered by holographic changes
    - *but* ... formal will *can* be revised by holographic *codicil*
    - *and* ... codicil may appear on same page as original will
      - codicil requires independent *dispositive words*
- Formalities nevertheless somewhat relaxed for holographic will
  - Margin initials sufficient signature for alterations
  - Some cases allow change will without new signature
- General dispensing power if formalities not satisfied

## UNIT 9 – RELATED MATTERS OF PROOF

### Proof of Death

#### Proof of death

**94(1)** The court may permit a person to swear to the death of another person if there is no direct evidence of the death but there is evidence from which the death can be presumed.

**(2)** An application for permission to swear to the death of a person may be made

- (a) in Forms C1 and C2, and
- (b) without notice or on the notice the court orders.

**(3)** The court may declare that the death of a person is proven or presumed if the court is satisfied with the evidence and the form of the evidence presented to the court.

**4)** A declaration of presumption of death made by the court must contain particulars of the following information to the extent that those particulars have been established to the satisfaction of the court:

- (a) the full name of the person presumed dead, including the person's maiden or married name, where applicable;
- (b) the sex of the person presumed dead;
- (c) the place where the death is presumed to have occurred;
- (d) the date on which the death is presumed to have occurred.

#### How to Prove a Death:

##### **1) You know the facts surrounding but not the death**

- The only plausible inference is that testator is dead and you can provide the surrounding facts to which the Court can infer death

- **Inference will be drawn REGARDLESS of the passage of time → Don't need to wait 7 years to try and find a body**

- **But the courts won't draw the inference of death if there is another reasonable inference**

##### **2) There is no information whatsoever**

You can apply for a declaration of death if:

- A. 7 years have passed
- B. You have contacted ALL the people the person is expected to be in touch with
- C. You have to put notices in the newspaper of where the person may have been (generally a hollow gesture)
- **Death is rebuttable → Presumption is rebutted by alternative explanation**
  - If person comes out later, they are given their life but not necessarily their property

### Proof of Lost Wills

**RULE: If the will was last in the possession of the testator but cannot be found on death, you assume it was revoked by destruction of death**

**The orthodox rule only applies if:**

- 1) Original in testator's possession
- 2) At time of possession they had capacity

Revocation by destruction presumed if last in testator's possession

- Presumption displaced if testator lacked capacity during relevant period
- Presumption displaced if original held by lawyer
- Presumption rebuttable by evidence to contrary
  - eg testator's references to will shortly before death
  - eg testator killed by home fire and will kept at home
  - eg access to will by person who benefits from intestacy

**If the will is lost, you can still get probate on it if you can prove capacity, execution, contents:**

**24** If an original will is lost or destroyed but a copy or other evidence of it exists, the court may admit the copy or other evidence to probate if

- (a) the will is proved formally under Division 3 of Part 2, or
- (b) in the opinion of the court, the will can be adequately identified under this Part.

# UNIT 10 – CAPACITY OF BENEFICIARIES

## Capacity of Beneficiaries

### Bastards & Adopted Children

**28** Unless the Court, in interpreting a will, finds that the testator had a contrary intention, references in the will to the children, descendants or issue of any individual, including the testator, must be interpreted as including

(a) any child for whom that individual is a parent within the meaning of Part 1 of the *Family Law Act*

- Includes bastard children and adopted children

### Witness as Beneficiaries

If you are a witness and beneficiary, presumptively the gift fails BUT we may be able to save it

**Prove either:**

1) You are outside of the provision (“outside the mischief”)

- Holographic or privileged or military will which don’t require witnesses
- Or it’s a formal will with 3 witnesses – so you don’t trigger the rule because the other 2 together can prove the will is valid

2) Ask the court to exercise discretion

**T knew (1) You were both beneficiary and witness (2) Still wanted you to take (3) No undue influence or fraud**

**What if you are witness and the beneficiary of A TRUST? → THEN THE RULE IS INVOKED**

# UNIT 11 – PRINCIPLES OF INTERPRETATION

## Direct and Indirect Evidence

### ***Wills and Succession Act - Interpretation and evidence***

**26** A will must be interpreted in a manner that gives effect to the intent of the testator, and in determining the testator's intent the Court may admit the following evidence:

- (a) evidence as to the meaning, in either an ordinary or a specialized sense, of the words or phrases used in the will,
- (b) evidence as to the meaning of the provisions of the will in the context of the testator's circumstances at the time of the making of the will, and
- (c) evidence of the testator's intent with regard to the matters referred to in the will.

### ***Alberta Evidence Act - Evidence in action by heir etcetera***

**11** In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposed or interested party shall not obtain a verdict, judgment or decision on that party's own evidence in respect of any matter occurring before the death of the deceased person, unless the evidence is corroborated by other material evidence.

## General Principles of Interpretation

**\*\*\* ONLY APPLY THIS IF YOU DO NOT KNOW INTENTION**

**On matters of both probate & construction, we can now use both DIRECT AND INDIRECT EVIDENCE**

### **1. Timing of Interpretation**

**Will speaks from time of death**

**27** A will is to be interpreted as if it had been made immediately before the death of the testator unless the Court, in interpreting the will, finds that the testator had a contrary intention.

**Traditionally:**

If you deal with people → Interpret the person at the time the will was made (wife, child, etc)

If you deal with assets: → Interpret at the time of death

### **2. Identical Words Have Same Meaning**

Presumption: if word is *clearly defined* in *one instance* ... *same meaning* if word is *ambiguous elsewhere* → Rebuttable: each word must be read in context

### **3. Effect Given To All Words**

Presume testator intended all words to be meaningful unless ... will as whole indicates otherwise

### **4. Eiusdem Generis**

*eiusdem generis* = "of the same kind"

*General* words tied to *specific* words presumed to fall in same *genus*

The specific limits the general → less likely if rule creates intestacy or context supports broad interpretation

## **5. General Versus Particular Intention**

If same gift *irreconcilably* expressed both *generally* and *particularly* ...

**Testator's predominant general intention prevails** → particular intention disregarded/modified

Ex. If you have a specific intention for property to pass to X, but a more general intention to avoid intestacy → Ask: What was the overall intention of the disposition?

## **6. Presumption Against Intestacy**

If ambiguity, presume no intestacy → Rebutted if testator intend only to dispose of some assets

## **7. Presumption of Rationality**

Testator entitled to be irrational, capricious, or unjust → presumption against such an intention

## **8. Presumption Against Disinheritance:**

Testator entitled to disinherit (subject to dependents' relief legislation) *but* ... presumption against disinheritance if ambiguity → *cf* testator cannot eliminate heir from share on *intestacy*

## **9. Irreconcilable Dispositions**

Rule of last resort—only if all other interpretive approaches fail

- If ostensibly absolute gift coupled with another inconsistent gift, reduce absolute to life interest or strike down latter as repugnant
- If inconsistency in *same* will or codicil latter usually prevails as testator's last intention
- *Same property to different beneficiaries* ... treat as joint tenants, common tenants or life estate + remainder → **So pick one to try and get as close to intention as possible**

## **Specific Principles of Interpretation**

**\*\*\* ONLY APPLY THIS IF YOU DO NOT KNOW INTENTION**

**On matters of both probate & construction, we can now use both DIRECT AND INDIRECT EVIDENCE**

### **1. Definition of Spouse**

- Person *lawfully married* to testator at *time* will was created or "common law spouse"
  - meaning does *not* change merely because circumstances change



## **2. Definition of Children and Grandchildren**

### **References to children, descendants or issue**

**28** Unless the Court, in interpreting a will, finds that the testator had a contrary intention, references in the will to the children, descendants or issue of any individual, including the testator, must be interpreted as including (a) any child for whom that individual is a parent within the meaning of Part 1 of the [Family Law Act](#).

### **Family Law Act → Rules of parentage**

**7(1)** For all purposes of the law of Alberta, a person is the child of his or her parents. ...

**(2)** The following persons are the parents of a child:

- (a) unless clause (b) or (c) applies, his or her birth mother and biological father ...
- (c) a person specified as a parent of the child in an adoption

## **2. Definition “Issue or Descendants”**

If I say the issue or descendants of someone else, it is simply changed to “children”

- But if I say my own issue or descendants, there is traditionally no limit on remoteness

**Per stirpes:** You get representation → Prima Facie governed by INTESTACY **just without SPOUSE/AIP**

### **Disposition to “issue” or “descendants”**

**31(1)** Unless the Court, in interpreting a will, finds that the testator had a contrary intention, a disposition of property by will to a class of individuals that

- (a) is described in the will as the “issue” or “descendants” of the testator or of another individual, or by any similar term, and
- (b) includes more than one generation of individuals,

must be distributed in accordance with Part 3 to the descendants of the testator or other individual in the same manner as if the testator or other individual had died intestate leaving only descendants and no spouse or adult interdependent partner.

**(2)** For greater certainty, an individual who is both a descendant of the deceased beneficiary and the adult interdependent partner of the deceased beneficiary may receive a share under subsection (1) as a descendant.

## **3. Definition of Next of Kin**

**New Alberta rule: people entitled on intestacy**

### **Disposition to “heir” or “next of kin”**

**30** Unless the Court, in interpreting a will, finds that the testator had a contrary intention, a disposition of property by will to one or more individuals described in the will as the “heir”, “heirs”, “next of kin” or “kin” of the testator or of another individual must be distributed as if the testator or other individual had died intestate.

#### **4. Definition of Other Relatives**

**Family *prima facie*** = children (not other kin—eg parents)

**Nieces and nephews *prima facie*** = children of testator's siblings **by blood**

#### **5. Gifts to Two or More People**

**LPA s. 8 → Presume tenants in common**

When, by ... will ... land or an interest in land is ... or bequeathed to 2 or more persons, other than as executors or trustees ... those persons take as tenants in common and not as joint tenants unless an intention sufficiently appears on the face of the ... will ... that they should take as joint tenants.

#### **6. Gifts to Two or More People**

Presume *per capita* rather than *per stirpes* where appropriate → ex. To kids of Ann & Bob

- *per capita* = “by head count” → each member of class receives equal share

**BUT, depends on the wording → If I say “to Ann & Bob’s children”, I mean ½ to A’s kids and ½ to B’s kids, no matter the # on each side**

#### **7. Multiple Gifts**

(1) If to same person in same instrument

- Assume gifts are supposed to accumulate → REBUTTABLE

(2) BUT, if they are in different instruments (will & codicil) then we still assume accumulation, but its much easier to rebut & say second gift is a substitute based on intention

#### **8. House and Contents**

“Contents” presumably = *choses in possession* associated with house

- Contents presumably ≠ *choses in action* found in house
  - eg share certificates, bank account documents

#### **9. Property Includes Testator’s Power of Appointment**

**Power:** An authority, not an obligation → MANY PEOPLE FORGET THEY HAVE A POWER TO USE

- WSA: Takes account that people forget they have powers and think they own the property absolute → So it includes property they have absolutely and under power

**11** Unless the Court, in interpreting a will, finds that the testator had a contrary intention, a disposition by will of

- property of the testator,
- property described in a general manner, or
- real property of the testator that is situated in a place mentioned in the will or that is occupied by a person mentioned in the will,

includes any property, or any property to which the description applies, that the testator has power to appoint in any manner that the testator thinks proper, and the disposition operates as an execution of that power.

## **10. Beneficiary's Power of Selection**

If testator gives several items of same description to different people Court will attempt to prioritize order of selection

- **If you name the people**, they have power of selection in the order you name them
- But if you don't name them (my nieces) the courts have a random draw or they decide among themselves → Courts will no longer strike for uncertainty
- Likewise if someone has the power to make the selection, and the person dies before selecting, the courts used to strike down the gift. Now they don't

Choice is personal to donee—must be exercised within lifetime → donee's portion may fail for non-selection

## **11. Statutory Rules—Disposition of Void Gift or a Failed Gift**

Disposition of void, unlawful or disclaimed gift ...

Intended beneficiary deemed to have predeceased testator

- 1. If the gift fails, it can be given to the alternative beneficiary, if they exist
- 2. If the beneficiary is a descendant and is dead, you can pass through to their beneficiary
- 3. Send through the residue
- 4. Send through intestacy

### **Where gift is void or contrary to law**

**33(1)** If a beneficial disposition in a will cannot take effect by reason of the disposition to the intended beneficiary being void, contrary to law or disclaimed, or for any other reason, then unless the Court, in interpreting the will, finds that the testator had a contrary intention, the property that is the subject of the disposition must be distributed

- (a) to the alternate beneficiary, if any, of the disposition, regardless of whether the will provides for the alternate beneficiary to take in the specific circumstances,
- (b) if clause (a) does not apply and the intended beneficiary was a descendant of the testator, to the intended beneficiary's descendants who survive the testator, in the same manner as if the intended beneficiary had died intestate without leaving a surviving spouse or adult interdependent partner,
- (c) if neither clause (a) nor clause (b) applies, to the surviving residuary beneficiaries of the testator, if any, named in the will, in proportion to their interests, or
- (d) if none of clauses (a), (b) or (c) applies, in accordance with Part 3 as if the testator had died intestate.

**(2)** For the purposes of subsection (1)(a) to (d), the intended beneficiary is deemed to have predeceased the testator.

**(3)** Despite subsection (1), no share of the property that is the subject of the disposition shall be distributed to an individual described in [section 21\(1\)](#) unless [section 21\(2\)](#) applies.

## **12. Undisposed Residue:**

### **Executor *prima facie* holds on resulting trust for intestacy**

- Presumption rebuttable by evidence of testator's intention
- Inapplicable if residue beneficially given to executor

### **Portion of estate not disposed of by will**

**34** Unless the Court, in interpreting the will, finds that the testator had a contrary intention, an executor appointed by the will

- (a) is a trustee of any property not disposed of by the will, and
- (b) holds that property in trust for the person or persons, if any, who would be entitled to receive it under Part 3 if the testator had died intestate.

## **13. Meaning of Particular Expressions—*Prima Facie* Meaning**

Words traditionally restricted to *prima facie* or dictionary meaning

**Modern approach starts with dictionary but ends with testator's intent → Overridden by intended meaning**

## UNIT 12: TESTAMENTARY GIFTS

### Type & Subject Matter of Gifts

#### Subject Matter of Testamentary Gifts:

In some instances, you think you have property and you don't:

- (1) Came to an end upon death (ie. JT) or it was a life estate
- (2) The interest was contingent upon an event that never occurred
  - Careful here → Can it still occur?
- (3) You don't really own a property
  - Ex. Co-tenancy, Property is subject to a mortgage, mere expectancy

#### Types of Testamentary gifts

**General:** To be paid from general estate assets → NEED NOT OWN IT

- (1) Pecuniary legacy → Money from general assets
- (2) General legacy → Gift from the general assets

**Specific:** A specific piece of property → **I have to own it when I die**

**Demonstrative:** Tells you to look in a specific place for the assets, but you can use the rest of the estate to find the rest

**Residue** → Everything left over after disbursements

### Ademption and Abatement

**Ademption:** Gift defeated if no longer in T's estate → Only specific gifts can adeem (Not general gifts)

Demonstrative gifts are attractive hybrid

- ademption *vis a vis* designated fund only *but* no ademption *vis a vis* satisfaction from general estate

#### Abatements:

**Specific gifts get the money, then the demonstrative, then general**

1. Residue Personal
2. Residue Real
3. General
4. Demonstrative → Becomes general to the extent it cannot be paid from fund
5. Specific personal
6. Specific real

**\*\* Everyone in the SAME CLASS takes the same hit → General gifts abate pro rata**

**Almost always, a will has a residuary clause**

- If there is no residual clause or the residuary beneficiary dies, it goes out through intestacy

### Presumptive Classification Rules:

1. Assume general before specific if not clear what testator's intention was
2. Assume demonstrative before specific
3. General gifts can always be traded for money

### Specific Gifts: Gift of identified asset or object

- Gift must be described with *sufficient certainty* and *accuracy*
- Gift must be *distinguished* from items of similar nature
  - key test: “my widget” vs “a widget”

**You can have a specific gift even if you don't own it at the time you make the will → BUT YOU NEED TO HAVE IT WHEN YOU DIE**

### Implications of specificity

- *Ademption* if asset not within testator's estate on death → To the extent the gift is not available
- *Abatement* as a last resort—after general, demonstrative and residue

### Residuary Gifts:

Simply everything left over – includes specific gifts that have failed

- But the residue itself can fail and to the extent it fails, it goes to intestacy

**Try to save the residuary by intention → Presumption against intestacy**

### Abatement:

**You simply don't have enough assets to go around → Debts MUST be paid before any gifts are given**

- Debts = testator's debts + liabilities, funeral + testamentary expenses
- Presumptive order may be altered by testator's intention

**General rule – same class takes hit proportionally, subject to contrary intention by testator**

- Contrary intention will normally not be found out of “pay immediately”, or “first give to” → Assume testator believed that there was enough money for all gifts, need VERY CLEAR LANGUAGE

**General Rule of Ademption: Specific gift adeems if it is not in the T's property upon death**

- **Adeems even if I can trace what happened to it and the proceeds are close at hand**

### **Insurance Proceeds:**

1. If the person dies before the property, then even though the property isn't there in the expected way, the gift doesn't adeem and the beneficiary to the property gets the insurance proceeds
2. If the property is destroyed before the person dies, the property never existed and the gift adeems. The insurance proceeds go to the general estate
3. If the evidence cant prove which was gone first, you presume ademption → Property before person

### **Date from which the Will Speaks:**

**26** A will must be interpreted in a manner that gives effect to the intent of the testator, and in determining the testator's intent the Court may admit the following evidence:

- (a) evidence as to the meaning, in either an ordinary or a specialized sense, of the words or phrases used in the will,
- (b) evidence as to the meaning of the provisions of the will in the context of the testator's circumstances at the time of the making of the will, and
- (c) evidence of the testator's intent with regard to the matters referred to in the will.

### **Will speaks from time of death**

**27** A will is to be interpreted as if it had been made immediately before the death of the testator unless the Court, in interpreting the will, finds that the testator had a contrary intention.

**\*\* READ INTO THIS THAT ONLY PROPERTY IS AT TIME OF DEATH**

### **Gifts to ex-spouse or former adult interdependent partner**

**25(1)** If, after a testator makes a will and before the testator's death, the testator's marriage is terminated by a divorce judgment or found by a court to be void or the testator ceases to be the adult interdependent partner of an individual, then unless the Court, in interpreting the will, finds that the testator had a contrary intention, any provision in the will that

- (a) gives a beneficial interest in property to the testator's former spouse or to the individual, whether personally or as a member of a class of beneficiaries,
- (b) gives a general or special power of appointment to the testator's former spouse or to the individual, or
- (c) appoints the testator's former spouse or the individual as an executor, a trustee or a guardian of a child under the [Family Law Act](#)

is deemed to have been revoked and, for the purposes of clauses (a) to (c), the will is to be interpreted as if the former spouse or individual had predeceased the testator.

**(3)** This section applies only in respect of the will of a testator

- (a) whose marriage is terminated by a divorce judgment or found to be void, or
- (b) who becomes a former adult interdependent partner

after this section comes into force.

### **Use of Temporal Words:**

Whether “now” qualifies the asset depends on whether it is meant as an essential descriptor of the asset

→ Assume time of death, but if evidence to contrary do it at another time

### **The General Rule Of Ademption:**

If you give a specific gift in a will and its not in the estate at the time of death, it adeems. Exceptions:

1. Will gave a general gift of “my car” and the car at execution and death are different
2. Specific gift but property is essentially the same AND not brought about by testator’s volition
3. You are giving not the asset, but the asset or traceable proceeds

### **Property Changing Forms:**

**We reckon property from time of death, even if it is new, better, bigger unless you can find contrary intention (Ex. To Johnny, my car → Whatever car I own at death)**

Presumption rebuttable by contrary intention

1. Intentional reference to property owned *at execution* → Car purchased in 2000
2. Intentional reference to *specific* property → Share certificate #1273

### **Change in Form → Ademption of Specific Gifts**

1. If there is an asset described in the will and something different in its place at time of death, it adeems
2. If the assets are different but essentially the same, there is **ademption only if the difference is a function of the testator’s volition**

### **Tracing:**

**To trace an asset (1) need to construe gift broadly as gift or proceeds (2) need to be able to trace**

- ademption if traceable substitute not part of gift
- ademption if—regardless of intention—property un-traceable

### **Disclaimer**

### **Disclaimer:**

You don’t have to take the gift, but if you disclaim:

1. Do it after I die
2. Clearly → Expressly or impliedly
3. Before you put your hands on the property
4. You need to disclaim all or nothing, but can sever separate gifts



## **Disclaimed Gifts under the WSA:**

### **Where gift is void or contrary to law**

**33(1)** If a beneficial disposition in a will cannot take effect by reason of the disposition to the intended beneficiary being ... disclaimed ... then unless the Court, in interpreting the will, finds that the testator had a contrary intention, the property that is the subject of the disposition must be distributed

(a) to the alternate beneficiary, if any, of the disposition, regardless of whether the will provides for the alternate beneficiary to take in the specific circumstances,

(b) if clause (a) does not apply and the intended beneficiary was a descendant of the testator, to the intended beneficiary's descendants who survive the testator, in the same manner as if the intended beneficiary had died intestate without leaving a surviving spouse or adult interdependent partner,

(c) if neither clause (a) nor clause (b) applies, to the surviving residuary beneficiaries of the testator, if any, named in the will, in proportion to their interests, or

(d) if none of clauses (a), (b) or (c) applies, in accordance with Part 3 as if the testator had died intestate.

**(2)** For the purposes of subsection (1)(a) to (d), the intended beneficiary is deemed to have predeceased the testator. ...

### **If a gift is disclaimed**

1. Give it to the alternative beneficiary if one is named

2. If a descendant disclaims, then property passes to your children or grandchildren as if you died intestate

- **Use intestacy regime with no preferred shares for spouses or partner**

3. If no intestacy, it goes to residue

4. If can't go to residue, goes to intestacy

One other possibility – arises in the charity context

### **If a charity disclaims your gift:**

#### ***Cy-pres – “as near as possible”***

- If there is a general charitable intention, you can give it cy-pres
- If no general charitable intention, go to WSA

# **UNIT 13: LAPSED GIFTS**

## **General Features of Lapsed Gifts**

**Lapsed Gifts:** Gift *lapses* if beneficiary *predeceases* testator

### **Where beneficiary dies before testator**

**32(1)** If a beneficial disposition in a will cannot take effect because the intended beneficiary has predeceased the testator, whether before or after the will is made, then unless the Court, in interpreting the will, finds that the testator had a contrary intention, the property that is the subject of the disposition must be distributed

(a) to the alternate beneficiary, if any, of the disposition, regardless of whether the will provides for the alternate beneficiary to take in the specific circumstances,

(b) if clause (a) does not apply and the deceased beneficiary was a descendant of the testator, to the deceased beneficiary's descendants who survive the testator, in the same manner as if the deceased beneficiary had died intestate **without leaving a surviving spouse or adult interdependent partner,**

(c) if neither clause (a) nor (b) applies, to the surviving residuary beneficiaries of the testator, if any, named in the will, in proportion to their interests, or

(d) if none of clauses (a), (b) or (c) applies, in accordance with Part 3 as if the testator had died intestate.

**(2)** For greater certainty, an individual who is both a descendant of the deceased beneficiary and the adult interdependent partner of the deceased beneficiary may receive a share under subsection (1)(b) as a descendant.

**(3)** Despite subsections (1) and (2), no share of the property that is the subject of the disposition shall be distributed to an individual described in section 21(1) unless section 21(2) applies.

**[WSA 21 presumptively voids gifts to witness, amanuensis, interpreter, or spouse/partner of same]**

### **Anti-lapse provision**

1. Give it to an alternative beneficiary
2. If no alternative, AND beneficiary is DESCENDANT and BENEFICIARY has living descendants → Living descendants
3. It goes into the residue
4. Goes to intestacy

**s.32(3)** → If you use Rule 1 or 2 or try to give it to the issue of a beneficiary then in no event can you get the property into the hands of a prohibited person under s.21 **(Witness, interpreter, slave hand, spouse or partner of any of those 3 people)**

**s.32(3)** → If you use Rule 1 or 2 or try to give it to the issue of a beneficiary then in no event can you get the property into the hands of a prohibited person under s.21 (**Witness, interpreter, slave hand, spouse or partner of any of those 3 people**)

**\*\* CANNOT USE ANTI-LAPSE TO GIVE TO A RESTRICTED PERSON UNLESS YOU CAN SHOW TESTATOR WAS AWARE AND HAD INTENTION**

### Anti-Lapse Legislation—Contrary Intention

Anti-lapse inapplicable if testator expresses contrary intention → Look at the general intention of the will  
→ Would the testator have wanted the person receiving under anti-lapse to benefit?

### Joint Tenancy:

#### **Law of Property Act → Presume Tenants in Common**

8 When, by ... will ... land or an interest in land is ... bequeathed to 2 or more persons, other than as executors or trustees ... those persons take as tenants in common and not as joint tenants unless an intention sufficiently appears on the face of the ... will or other assurance that they should take as joint tenants.

**Ratio: The presumption of TIC can be overcome by the presumption against intestacy, when you DON'T KNOW INTENTION**

### Exceptions to Lapse → Moral Obligations: \*\* NOT YET LAW IN CANADA

The rule, if it applies says: If you try to give property to a beneficiary and the B predeceases, you can avoid the lapse if you can show the property was meant to pay back a debt/ moral obligation

Therefore, if the person dies you don't have lapse, you give the property to the beneficiary's estate

### Substitutionary Gifts:

WSA s.32(1)(a) → Allows you to give a gift to an alternate beneficiary

#### **1. You can avoid the effects of lapse, but you can't pretend lapse didn't occur**

- (1) If the testator intended to oust the doctrine of lapse, then he attempted something that cannot be done, the gift will lapse
- (2) If the testator intended to create a substitutionary gift, rather than oust the doctrine of lapse, then the primary gift fails, but the substitutionary gift succeeds.

**\*\* So you have to interpret it correctly**

#### **2. You can only have a sub gift, if it is a genuine sub**

- The primary gift must have the potential to take effect → Primary cannot already be dead

### Words of Limitation:

"To X and heirs" **Orthodox rule: Words of limitation do not create sub gifts**

**UNLESS: The words of limitation make no sense other than a sub gift → look to intention**

### **Anti-Lapse - Class Gifts:**

**If one person in the class dies, each share simply gets bigger (instead of the person's share going to intestacy)**

### **Substitute Gifts for Class Members:**

Doctrine of lapse normally inapplicable to class gifts

- Gift not lapsed merely because one member predeceases testator
- Deceased's share distributed to other class members

1. If the gift truly lapses, then the sub gift is good

2. If the primary gift is impossible, sub gift is only good if you can show the sub was part of the class

ex. To my siblings and if they are dead, their children

→ If one brother already dead, need to show that the class can be defined as "Siblings and deceased sibling issue"

### **Survivorship: Assume each predeceases the other**

**5(1)** If 2 or more individuals die at the same time or in circumstances rendering it uncertain which of them survived the other or others, all rights and interests of each of the individuals with respect to property must be determined as if that individual had predeceased the other or others unless

(a) the Court, in interpreting a will or other instrument, finds a contrary intention,

(b) [section 599](#) or [690](#) of the [Insurance Act](#) applies, or

(c) a provision of an Act provides for a different result.

**(2)** If, during life, 2 or more individuals held property jointly with each other with a right of survivorship and all the joint owners die at the same time or in circumstances rendering it uncertain which of them survived the other or others, then unless the Court in interpreting a will or other instrument finds a contrary intention, the individuals are deemed to have held the property as tenants in common with each other.

**6** This Part applies only in respect of deaths occurring after this section comes into force.

# UNIT 14: CLASS GIFTS

## General Features of Class Gifts

### Categories of gifts distinguished

1. **Gifts to individuals** → “divided equally amongst Kate, Ben & Sam”
  - Not described as a class → SO they take individually → May result in lapse
2. **Gifts to individual members of a group** → “\$1000 to each of my children, Kate, Ben & Sam”
  - “Each” and naming *prima facie* reveals intention for individual gifts
3. **Gifts to a class—a true class gift** → “divided equally amongst my children”
  - Recipients defined by *membership*—not as individuals

### Rules:

1. If you have a mix of language, you assume individual gifts, not a class gift
2. You can only have a class gift if the class is to split the entire asset
3. If one of them predeceases, the class still gets the entire estate → Each individual gets a bit more property

### Rules for Finding a Class:

**FIRST, LOOK TO INTENTION → Would the testator have wanted lapse or for everyone to get more?**

1. The class has to be reasonably certain → Cant be all of the morally sound students
2. Defined by a common criteria → But you can have a class broken into different criteria/branches
3. Not a class if there is an outlier → Naming an individual makes it an individual gift

### **Identifying Class Gifts → Description by Number THE FINAL RULE IS ALWAYS INTENTION**

1. Stated *number* of beneficiaries *prima facie* precludes class gift → class gift nevertheless valid if *intended*
2. Potential problem with stated number - *actual* number of class members may *differ* from *stated* number
  - Then, need to decide if it was a class or individual gift

### Class-Closing RULES

**First rule: LOOK TO WHEN THE TESTATOR INTENDED THE CLASS TO CLOSE**

### **Second Rule: Immediate Vesting**

Apply this if the disposition takes effect immediately

1. **IF there is any class member at time of death, the class closes**
2. **If there is no member, then the class closes naturally** → Only when its no longer possible to get more members into the class

## **Second Rule: Remainder to a Class**

1. Class opens when T dies

2. Class closes at the end of the life estate IF there is a member at that time

3. If no members at that time, class doesn't close unless it closes naturally

Class closes either at end of life estate if there are members OR naturally if no members

If *determinable* prior (eg "to A for life or until remarries, then to class")

class closes at *earlier* of life interest death or determinable event

## **Third Rule: Gifts Postponed by Condition:**

The most complicated rule:

Where (1) Class member but (2) also have to satisfy condition

1. Class closes at T's death if anyone is both a class member and has satisfied a condition

2. OR class closes when 1<sup>st</sup> member satisfies condition

3. But as long as you are a class member, once the class closes you have an opportunity to satisfy the condition

## **Gifts to Each Member of Class**

Not a true class gift—instead fixed amount to each member of class

- eg "My estate shall pay \$5000 to each of my sister Sara's children"

*Prima facie* rules (even if payment postponed by condition—eg "reach 21")

- Class closes at testator's death ... **NO MATTER WHAT**
  - ... whether *at least one* member then exists
  - ... whether *no* member then exists
- Unless contrary intention or mischief managed (eg paid from set fund)