Succession and Estate Planning

Law 320: Final Outline 2015

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Step 1: Has Someone Died?

Oh no, Someone has died: "This is an Ex-Parrot!"

- For this to not be an issue, you MUST have the death certificate as proof of death to get probate

→ **If death certificate (clearly dead), go to Step 2**

Someone MIGHT have died: "I'm not dead yet"

- Presumption of Continuance of Life: if no death certificate, presume person is still alive
  - Common Law presumption
  - **Reversed after 7 years of unexplained absence** – must make inquiries into persons location and make investigation, then there is Presumption of Death

- Presumption of Death Act, trumps: BCSC given discretion to presume someone dead prior to the 7 years for all purposes or a specific purpose
  - **S.1** – definition of "interested person" – would be affected by order, next of kin, creditor
  - **S.3** – application by interested person and court can order person be presumed dead for all purposes or just one
    - Done by petition
    - Prove the person has been absent without explanation, prove there is no reason to believe they are living, prove it on BOP
  - **Court gives date of death for probate – order replaces death certificate**
  - **S.4** – if reason to believe the person is alive, executor must stop dealing with assets
  - **S.5** – if later found alive, distributions made under the order are valid and final
    - **S.5(2)** – court could decide to return property, no case law yet

- Must prove on BOP that person is dead, can presume dead for all purposes or specific (Re Cyr)

Ok they are dead, what do I do with the body?: "bring out your dead" - *boom

- What to do:
  - CC, s.182: Cannot interfere with body, indictable offence, 5 years
  - Cremation, Internment and Funeral Services Act
    - **S.4** – can only dispose of body by **(a)** internment on land where there is certificate of public interest; **(b)** cremation; **(c)** crown land
    - Cremated remains can be sprinkled

- Who decides:
- CFSA, s.5 designates who controls body based on hierarchy:
  a) Personal Representative listed in will
  b) Spouse
  c) Adult child
  d) Adult grandchild
  e) Is deceased was minor, guardian
  f) Parent
  g) Adult sibling
  h) Adult nephew or neice
  i) Adult next of kin
  j) PGT
  k) Adult with personal relationship other than previous

- If tie, go to **s.5(3):** goes by agreement, OR the eldest person starting at (a)
    - **S.5(4)** – court can override this hierarchy
    - **S.5(5)** – factors for consideration to override:
        - Feelings of relations, specifically spouse
        - Rules, practices and beliefs in this regard of the deceased, re religion
        - Any reasonable directions given by deceased
        - If the dispute involves a capricious change of mind or family hostility
    - **S.6** – written wishes of deceased may be binding
        - Preference must be stated in will or funeral services K
        - Compliance is consistent with Human Tissue Gift Act
        - Compliance would not be unreasonable, impracticable, or cause hardship

- Wishes are only binding if they are in will or funeral services contract in compliance with Human Tissue Act – RA will NOT override this (Kartsonas v Stamoulos)
    - Wishes would have prevailed if they were in correct document

Did they donate any organs?

- Human Tissue Gift Act:
    - **S.2** – allows for transplants from one living body to another
    - **S.3** – consent for transplant while alive, must be 19 and competent, fully informed about risks
        - Considered inter vivos gift
    - **S.4** – consent for transplant **after death by deceased**
        - Must have been 19+, consent given in writing or in person with 2 witnesses
    - **S.5** – consent for transplant **after death by others**
        - Allows next of kin to give consent on their behalf, must show no reason to believe that the deceased wouldn't have wanted that

Step 2: Is there a Will?

Indeed there is! BUT is it a Testamentary Document?!

- **Is it a testamentary Document?**
  - Is the document the fixed, final intention of the WM?
  - Must take effect on death (ambulatory) – if effective immediately, it is NOT a testamentary document, can be revoked up until death
  - Document that depends on death to be effective is "testamentary" (Bird)
  - Does document have life from execution? (Hutton) Here, WM couldn't have revoked without others signing off on it – it was K, not will

- **Elements of a Will:**
  1. Disposes of property
  2. Only takes effect on death – document must be clear about that
  3. Revocable until death if competent
  4. Made with intention of creating testamentary document – fixed and final intention
     - Possible to be conditional wills – CL presumption that a will is NOT conditional (Re Huebner)
       - If the will indicates that the reason for MAKING the will was an event, rather than the REQUIREMENT to be valid, it is NOT conditional
     - "In the event one of us dies" = conditional (Green)
  - Only 1 will! – will can exist in multiple documents (Codicil), all taken together (Douglas)
    - Total of all unrevoked testamentary documents makes up a single will

→If there is a testamentary document, go to Step 3: Validity

Word on the street is there is one but the idiot lost it or maybe destroyed it!

- Presumption only applies if the will is in the possession of WM at death!!

LOST AND CAPABLE (IDIOT)

- **Presumption: if will was in possession of WM but when they die and the will cannot be found, it is presumed that WM destroyed the will with the intention of revoking it** (Polischuk)
  - Strength of the presumption depends on the character of control WM had over the will (kept in bank or just left laying around)

- **Rebutting:** prove on BOP that will is in fact lost and not destroyed with intention of revoking it (Polischuk) – must prove intention

- Factors to consider to rebut:
  - If terms of will were reasonable (Re Pigeon)
  - If they had good relationship with people until death (Re Pigeon)
  - If personal affects had been destroyed prior to search of will (Re Pigeon)
  - Nature and character of WM in taking care of personal effects (Re Pigeon)
  - Dispositions of property that would support/contradict the copy that is being applied to be probated
  - Statements made by WM that confirm/contradict terms of will (Bobersky Estate)
  - If WM would store valuable papers and had a place to store them (Bobersky Estate)
  - If the WM understood the consequences of not having a will, effects of intestacy (Bobersky Estate)
  - If WM made statements that he had a will (Bobersky Estate)

- Can prove intention through direct and indirect evidence – if rebutting is successful, must prove **contents of the will** and that it was **properly executed** (Re Pigeon)
    - If contents can be mostly proven but not completely, the court has a duty to probate the part of the will that is known (Sundun)
    - If the only thing remembered is the residual beneficiary, it is not enough (Re Perry)

LOST AND INCOMPETENT (WHO ARE YOU? WHERE AM I?)

- **Counter Presumption: if will was in possession of WM at time of death but cannot be found after death and WM was incompetent, will is presumed destroyed without intention/capacity** – therefore, if incompetent, will is NOT validly revoked (Polischuk)
    - Consider if terms of the will were reasonable and if the WM still had good relationships with family upon death – could be a reason to destroy

Dumbass didn't make one! Intestacy!

- If deceased didn't make a will (or it is deemed lost, destroyed with intention to revoke), estate passes on intestacy
    - Portions of estate that are NOT dealt with in a will are passed on intestacy

- **S.1** – definitions
    - Intestate: person that dies without will
    - Intestate estate: estate of the intestate
    - Intestate successor: person entitled to receive all/part of estate on intestacy

- **Step 1: is there a spouse?**

    - **S.2(1)** – people are spouses if they were both alive immediately before death and:
        - (a) were married to each other; or
        - (b) had lived with each other in "marriage-like" relationship for at least 2 years

    - Possible to be more than one spouse – married AND marriage like relationship

    - **Marriage-like relationship:** objective considerations (Souraya), non-exhaustive
        - Subjective – did they consider themselves to be in committed, long term financial and moral relationship (Gostlin)
        - Living arrangements – intention to live together
        - Ownership of property together (joint tenancy)
        - Shared finances
        - Common vacations
        - Exclusive sexual relationship
        - How they referred to each other (how others viewed them)
        - Sleeping arrangements
        - Social activities together
        - Attitude towards children

- **Step 2: did they cease to be a spouse before death?**
    - **S.2(2)** – people stop being spouses if:
        - (a) in the case of marriage, an event occurs that causes an interest in family property (divorce, separation)
        - (b) in the case of MLR, one or both terminate the relationship
    - **s.2(1)** – no separated if within 1 year of the separation
        - (a) they begin to live together again, reconcile; and
        - (b) live together for at least 90 days (doesn't have to be continuous)

- Look at conduct or writing – did either party believe the relationship was over? Was it intended to be a final separation? (Gosbjorn)
  - Absence from matrimonial home is not determinative
  - Physical separation, without more, is not enough to end CL relationship (Roach)

- Consider facts of each case to see if relationship ended (Roach)

- **Step 3: were there descendants?**

  - **S.1** – lineal descendants through generations
    - Doesn't include spouse of the descendent, will pass to descendant's children (Re Forgie)
  - **S.8** – D conceived before death but born after are included
  - **S.8.1(1)** – will inherit is conceived before death and born after if:
    - Spouse gives notice that someone can use reproductive material to conceive
    - D is born within 2 years of death and lives for at least 5 days

  - **No definition of child** – use Family Law Act, following are descendants:
    - Biological children
    - Adopted children – adoption removes all legal family ties from last family (Clayton v Markolefas)
    - NOT step children – if they haven't been formally adopted, they will not inherit (Naples v Martin Estate), they are a stranger at law

- **Step 4: if no spouse or descendants, were there lineal ascendants?**
  - Go up the family tree – ascendants and collaterals (come from ascendants)
    - If siblings, they share equally (half-blood siblings share equally as well – Re Kishen Singh)
  - If parents alive: both share equally
  - If one parent alive: get the whole
  - If no parent alive: go to collaterals and siblings split the share
  - Grandparents and their descendants (collaterals) – take share depending on who alive
  - Great-Grandparents and their descendants (collaterals)

→See chart for how to divide estate

- **If no heirs, property goes to Crown**
  - Unclaimed Property Act – **personal property** is treated as abandoned
    - Can claim for unclaimed money within 5 years, goes in special account for 6-30 years and if still unclaimed, to Crown – must have legal entitlement to claim
  - Escheat Act – **real property** goes directly to Crown, usually sold
    - Can apply to have it returned if prove you are legal heir – moral or legal claim

INTESTACY CHART

- Go down the list until something fits – the first one that does will apply over all the others
- S.153 – PGT holds funds for minors unless court orders otherwise

WESA	Dies Leaving	Distribution	
20	spouse and no descendants	**entire estate to spouse**	
22	two or more spouses	spouses share in the spousal share as agreed or as determined by the court—applies whether there are descendants or not (would just share preferential share)	
21(3)	spouse and ALL common descendants (only kids together)	***to spouse*:** I. **preferential share** of $300,000 II. **household furnishings** s.21(2)(a); and III. **1/2 of the residue** "distributive share" s. 21(6)(b)(i) IV. Spouse has first right to purchase spousal home (division 2) V. If spouses' interest in estate is = or > value of spousal home, **spouse may elect to take home** to satisfy, in whole or in part, S's share of the estate s. 26(2) ***to descendants*:** I. **1/2 of the residue** "distributive share" s. 21(6)(b)(ii) II. **Find first living generation of descendants, and that is where you divide the estate equally**. Any descendants below that generation split their deceased parent's share equally: s. 24 II. relatives of the half kinship inherit equally with those of the whole kinship in the same degree 23(5)(b)	** Vak Estate: **use jurisdiction that deceased died in to determine amount of preferential share**, although court will choose different jurisdiction that benefits spouse if there is the opportunity to do so. ** If estate has lower net value than the preferential share, then the spouse gets it all s. 21(5) **if estate has same net value as the preferential share, then spouse gets it all (has charge on estate for full amount of preferential share) s. 21(6)(a) **net value = means FMV after deducting, inside and outside BC, value of household furnishings distributed to spouse & charges, debts, funeral and administration expenses, and probate fees payable from the estate. s.21(1) **Household furnishings means personal property usually associated with enjoyment by the spouse of the spousal home s. 21(1)
21(4)	Spouse and if one or more descendant (of deceased) NOT common (children from previous relationships)	***To spouse:*** I. **preferential share** of $150,000 II. **household furnishings**; and III. **1/2 of the residue** "distributive share" s. 21(6)(b)(i) IV. Spouse has first right to purchase spousal home (division 2) V. If spouses' interest in estate is = or > value of spousal	

		home, spouse may elect to take home to satisfy, in whole or in part, S's share of the estate s. 26(2) ***<u>to descendants</u>*:** VI. **1/2 of the residue** "distributive share" s. 21(6)(b)(ii) VII. **Find first living generation of descendants, and that is where you divide the estate equally**. Any descendants below that generation split their deceased parent's share equally: s. 24 VIII. relatives of the half kinship inherit equally with those of the whole kinship in the same degree 23(5)(b)	
<u>23(2)(a)</u>	descendants and **no spouse**	to descendants Find first living generation of descendants, and that is where you divide the estate equally. Any descendants below that generation split their deceased parent's share equally: s. 24	Note no more Hotchpot Doctrine—pre WESA assumed gifts to children would be subtracted from that child's share, as that was seen as advancement of inheritance. No longer. Equal shares regardless of inter vivos gifts.
<u>23(2)(b)</u>	**None of the above but**: parents or surviving parent of intestate	equally to parents or all to surviving parent	
<u>23(2)(c)</u>	**Siblings** descendants of intestate's parents or either parent	<u>NO PARENTS LIVING</u>: to descendants of intestate's parents or either parent – **SIBLINGS** Find first living generation of descendants, and that is where you divide the estate equally. Any descendants below that generation split their deceased parent's share equally: s. 24 relatives of the half kinship inherit equally with those of the whole kinship in the same degree 23(5)(b) – half siblings share equally	
<u>23(2)(d)</u>	**Intestate survived by one or more grandparents** or descendants of grandparents ONLY	1/2 to the grandparents on one side in equal shares or to the surviving grandparent on that side, but if there is no surviving grandparent, to the descendants of the grandparents. Same for the grandparents on the other side. If there are only survivors on one side, then the whole estate goes to the surviving side	Find first living generation of descendants, and that is where you divide the estate equally. Any descendants below that generation split their deceased parent's share equally: s. 24 relatives of the half kinship inherit equally with those of the whole kinship in the same degree 23(5)(b)
<u>23(2)(e)</u>	**Survived by great-grandparents** or descendants of great-grandparents	1/2 to the great-grandparents on one side or their descendants in equal shares.	

	ONLY	Same for the great-grandparents on the other side. If there are only survivors on one side, then the whole estate goes to that side	
23(2)(f)	**no person entitled** under paragraphs (a) to (e)	to the government subject to the *Escheat Act*, R.S.B.C. 1996, c. 120—real property usually sold, personal property treated as abandoned property.	
s.23(4)	However, can apply	persons outside the 4th degree can apply to be entitled to intestate estate instead of going to the Crown—usually very hard to find one of these people.	
Lecture	Unclaimed property	○ Unclaimed personal property goes to Crown and is sold ○ Records kept for 6 years if value less than $1000, longer period if worth more	

Step 3: Is the Will Valid?

- Is it a holographic will? – must be completely handwritten by WM and signed
  - **S.38** – not accepted unless WM is military member on active service, if signed then no witnesses required
  - **S.58** – this will is invalid unless court finds it captures intention of WM (possible to cure deficiency, no case law yet)
  - **Consider s.79**: is will is valid in another jurisdiction, it can be accepted in BC
    - If is it valid in WM domicile, in jurisdiction or ordinary residence, country in which they are citizen, valid in BC but made outside BC, valid in place where property situated – can be valid in BC
    - **S.80** – revocation in these places is valid in BC

Do they have all the things required?

- Executor of will has legal burden of proof for all requirements (Vout)

AGE

- S.36(1) – Must be 16 years or older and mentally capable
- S.38(1) – if in armed forces on active service, can make it at any age

FORMALITIES UNDER S.37 – DUE EXECUTION

- **S.37(1)** – to be valid, a will must be
  - in writing;
  - signed at its end by the WM, OR the signature at the end must be acknowledged by WM as theirs, AND in the presence of 2+ witnesses, present at the time of signing; and
  - signed by 2+ witnesses in presence of WM

- **S.37(2)** – if will doesn't comply with (1), it is invalid, UNLESS:
  - court cures deficiency under s.58 – orders it be effective will
  - recognized as valid under s.80 (made in accordance with other laws)
  - is valid under another provision of this act

- **Purpose of formalities** (George v Daily)
  - Impresses importance on participants, reliable evidence for court re intent
  - Uniformity in wills
  - Protects WM from imposition or fraud

- **Presumption:** court will presume due execution of will, unless there is evidence to contrary (Yen Estate v Chan)
  - A witness not remembering if formalities complied with does NOT rebut presumption (Ball v Taylor)
  - To rebut, must raise suspicious circumstances (Yen Estate v Chan)

In Writing and Signed at the End

- Was it in writing? – only in electronic form will not count and will fail, go to curing deficiencies (Electronic Transaction Act, s.2)
  - Electronic signature wouldn't count (Taylor v Holt – found in US, likely not here)

- Was it signed by WM? (must be signed in front of witnesses)
    - **Is it a Signature?** – court must be satisfied the markings were made by WM and intended to be signature
        - Must be the best they could do in their physical circumstances (Re Bradshaw)
        - If WM got assistance in signing, that will be ok as long as they asked for the help (Re White)
            - Is NOT their signature if they did ask for help to sign – lack of intention and therefore not a signature (Peden v Abraham)
        - Stamp is NOT signature (Bolton)
    - **If not WM's signature, did WM acknowledge signature as theirs?**
        - Can acknowledge by gestures, enough to say that it is their will (recognize it) and direct witnesses to sign, or by asking someone else to sign for them (Re Shafner)
        - Both witnesses must be present for acknowledgement (Re Brown)
- Was it signed at the END of the will? – **s.39**
    - **Will mean at or after the end of the will, following under or beside the end of the will**
        - Does not have to immediately follow the end (blank space allowed)
    - Must be signed after any dispositions or directions – anything after the signature is invalid, no effect
    - Must look at intent of WM when signing – if signed at top and then put in envelope and signed that, intention that it was his signature at end of will (Re Wagner)

Witnessed by 2 People in the Presence of WM

- Do the witnesses have capacity?
    - **S.40** – Must be 19+, absolute requirement (if signed when younger, when attaining 19, that doesn't make the will valid – it is invalid as soon as younger witness signs)
    - Mental competence isn't necessary
- Did WM sign/acknowledge in front of BOTH witnesses (there are the same time)?
    - **Both must be there** when WM signs or acknowledges (Re Brown)
    - Can't sign in front of one and then acknowledge the signature in front of the other
- Did the witness sign in the presence of WM?
    - Means that holographic wills aren't valid – curing deficiencies
    - **Must sign in WM's presence** – WM doesn't actually have to see it done, must just have the ability to see the witness sign if they want to (Wozeceichowiecz)
- Is the witness a beneficiary under the will? – **s.43**
    - Gift to that witness will be invalid, or if spouse of B is witness, gift invalid, unless court orders otherwise
    - **(4)** – saving provision, court can declare the gift isn't void (if WM intended gift to them even if they were the witness)
    - Look at whether there was benefit from the gift (Ray Hill Trust) – what happens after the gift should not impact the B receiving the gift (Re Royce)
        - If codicil and B witnesses but the change doesn't affect their gift, then this will be valid (Gurney, Anderson)

If there are problems with Formalities, can the deficiency be cured?

Is there Incorporation by Reference?

- If document doesn't comply with formalities, can be saved if incorporated by reference in a document which does comply

- **To be incorporated, MUST** (Re Jackson)
  - Be in existence at time of execution of the will – can't reference memo you will write
  - Be described as existing in the will
  - Be in terms such that the document is capable of being ascertained – identifiable
    - Best to reference by date – if there are 2 codicils or 2 memos, only the most recent will be incorporated without explicit mention

- **Secret Trust** – will gives everything to one B and before death, WM tells B that they must hold this on trust for certain people on certain conditions, B must agree to be trustee
  - Cannot see that there is a trust on the face of the will

- **Partially Secret Trust** – will gives property to trustee but terms of trust are communicated outside of the will, must be communicated BEFORE execution of will (Jankowski)

- **EXCEPTION: Pour over clause is NOT Valid** (Re Kellog)
  - If clause gives property to existing trustee (valid so far, in existence) but reserves right to make future dispositions of trust property are NOT valid

To cure a Deficiency

- **S.58(1)** – record is data that is (a) recorded/stored electronically, (b) can be read, (c) is capable of reproduction in visible form
  - **(2)** court may make an order that a record, document or writing represents the testamentary intentions of a deceased person
  - **(3)** if the will doesn't comply with requirements of the act, court can order that it is fully effective as though it was a will or part of a will

- Only goes to compliance with formalities – nothing to do with construction of will

- **Court must be satisfied that it reflects testamentary intentions of deceased** (Young Estate), factors NOT to consider:
  - Presence of WM signature, in handwriting, witnessed, revokes previous wills, sets out funeral arrangements, title of document, bequests
  - Not just about giving property away – must be fixed and final intention to dispose of property on death (Re Beck)

Republication?

- **S.57(3)** – if a will has been revived by codicil or been resigned in presence of 2 witnesses (as codicil), will is deemed to have been made at the time it was revived/resigned
- Where will is amended by codicil that confirms the remainder of the will, will is effectively republished at date codicil was executed, unless there is contrary intention

- Can cure deficiencies in will, formalities and where B witnesses original will (Anderson)
- Invalid codicil doesn't invalidate will (Re Estate Ruth Smith)
- Republication cannot invalidate a gift that was valid under the will when executed (Re Heath's Will's Trusts)

KNOWLEDGE AND APPROVAL

- Must prove K and A **at time of execution** (Parker) – have to know and understand what will said

- **Presumption:** WM knew and approved of contents of the will if it was executed properly after being read to or by WM who appeared to understand it (Vout)

    - Separate from capacity – can have capacity and NOT have K and A
    - Do not have to know exact composition of estate and value – must have general idea of the nature of assets and approximate value, dollars or "lots" (Lazlo)

- **Presumptions of due execution and K and A can be rebutted by challenging capacity** (Elder Estate) – 3 requirements to bring into question
    - If challenger shows this, executor must prove due execution and K and A, AND capacity

- **Rebutting Presumption**: burden of raising evidence of well-grounded suspicion (suspicious circumstance) – must show "some evidence", that it accepted, would tend to negate the K and A or testamentary capacity (Vout, Maddess Estate), can be raised by:
    - Circumstances surrounding preparation of will
    - Circumstances tending to call into question the capacity of WM
    - Circumstances tending to show the free will of WM was overborne by will of another or by fraud
- Court has ability to strike only a single clause for lack of K and A, rather than the entire will (Russell)

- **Proof in Common Form** – no one contesting the will, just go and get probate
    - Rely on presumptions at this point (due execution, presume K and A)
- **Proof in Solemn Form** – will is contested, get this to protect executor (can then only be overturned by the court)
    - Challenger proves BOP for each presumption, then onus goes to executor

- **Main Suspicious Circumstance** = person who drafted will receives a gift in will (lawyer gets gift)
    - Creates a suspicion that WM didn't have K and A – must be rebutted by propounder of the will (Wintle, Russell)
- **Other Circumstances:**
    - Gift is larger than expected for person it is going to
    - Bad English or poor business dealings is insufficient evidence (Maddess)

CAPACITY

- **Relevant Time**: capacity is relevant at 2 times (Lazlo)
    1. When WM gives instructions to lawyer
    2. When will is executed – easier to prove capacity at this time (Parker)

- If competent at time of instruction but incompetent at execution, may still be valid IF they meet one of these requirements: (Parker)
    - Capable of understanding what they were doing – remember the transaction
    - If not, could WM confirm accuracy of clause in will?
    - If not, could they say that they have given instruction to lawyer and rely on them to have drafted it properly, so this paper must be it

- **Test:** WM must be clear in understanding and memory to know on their own, in a general way: (Banks v Goodfellow, restated in Schwartz)
    - Nature and extent of property
    - Persons who are natural objects (heirs)
    - Testamentary provisions being made
    - Appreciation of the factors in relation to each other
    - Having a desire to dispose of property

- Factors that do NOT necessarily indicate incapacity:
  - Lack human affection or don't like people (Bohrmann)
  - Don't understand affects/collateral consequences of bequests (Simon)
  - Grief MAY affect capacity if it overrides capacity (Anor)

Where there is NO mental illness:

- **Presumption:** if no mental illness, presumed that WM had testamentary capacity (Vout) – presumed properly executed with formalities after being read to or by WM who appeared to understand it

- **Rebutting Presumption:** raise evidence of suspicious circumstances – "some evidence" (Vout)
- If suspicious circumstance raised, onus shifts to executor to prove capacity on BOP (Vout)
  - No higher standard of proof, just BOP (Re Henry)

Where there IS mental illness:

- **Categories of mental illness:** unsound mind (mental functioning decreasing or gone) OR delusional

- **Presumption:** if there is mental illness, presumed that WM did NOT have capacity and onus shifts to executor to prove capacity on BOP (Banks)

- **Rebutting**: can show lack of capacity in one area but still has testamentary capacity
  - Can be medically incompetent but legally competent to write will (Royal Trust v Rampone) – *mental incapacity (committeeship made) but doctor said he was competent enough to make simple judgments like making codicil*
  - Making contracts (POA, RA) require highest level of capacity – making wills requires less

- **Delusion:** belief in state of facts that no rational person would believe is true, only exists in the mind of the believer (Lazlo)
  - Where delusion plays no part in influencing WM testamentary decisions, WM can still have capacity (Banks) – *haunted by spirits, could manage his own financial funds, medically insane, still had testamentary capacity*
  - If delusion is an "actual and impelling influence", it will vitiate capacity
  - If delusion only affects 1 disposition, court can strike it and probate the rest of will that is fine (Bohrmann)

→ **If everything is met and will is probated, challenger must prove undue influence OR fraud on BOP**

If all these things are met, is there any funny business?

UNDUE INFLUENCE BY SKETCHY RELATIVE

- Volition is overborne by the will of another person – there must be actual exercise of influence over the person (Windgrove)
  - Consider frequency and intensity of influence and the characteristics of WM
  - Courts allow for certain extent of influence between spouses and parent-child

- **S.52** – if person claims that will or any provision of **will resulted from potential for dependence or domination and used that position to unduly influence the person**, the party seeking to defend the will (executor) has onus to show there was no undue influence – proves a negative
  - Reversed CL presumption from Vout

- Ask: is there coercion? Did WM make will they didn't want to make?

- For care workers, cannot induce person to change will to get gift to give gift to WM's relative
    - Must get written approval from PGT

FRAUD! HOW DARE!

- Fraud must have induced gift in order to invalidate gift (Coffey)
    - Fraudulent people are still allowed to get gifts as long as they didn't use fraud to get the gift (Coffey)
- Challenger must prove the fraud on BOP (Vout)
- Differentiate:
    - **Innocent legatee** – fraud on WM by another and you receive something = valid gift
    - **Fraudulent legatee** – fraud on WM so you can receive something = invalid gift

WAS IT REVOKED?

- If revoked, will is NOT valid
- **S.55** – will revoked only in one or more of the following:
    a) Another will is written
    b) Declaration of revocation
    c) Destruction of will with intention of revoking it in presence of WM or a person in presence of WM
    d) Any other act of WM that the court determines was with intent to revoke all or part of the will

Operation of Law: "Mawwage. Mawwage is what brings us here todaaaay"

- **S.55** – revocation of wills
- **S.56** – revocation of gifts

- **Marriage:**
    - Before March 31, 2014 – marriage revoked will on date of marriage and remains revoked after passing of WESA (will not revive validly revoked will)
    - After March 31, 2014 – marriage does NOT revoke will, **s.55(2)**

- **Separation, s.56(2):** if WM
    a) Makes gift to person who was or becomes spouse;
    b) Appoints person who was/becomes spouse as executor or trustee; or
    c) Confers general or special power on them…
    - **AND** after the will is made and before WM's death**, they cease to be spouses, the gift, appointment or power of appointment is REVOKED** (gift lapses)
- **S.56(1)** – can override this and explicitly state that spouse should take even in case of separation or divorce
- **S.56(3)** – If spouses reconcile, GIFT IS STILL REVOKED
- **S.56(4)** – on date will is executed is when you determine if the person is a spouse

- Cease to be spouses if:
    - Formally married – on date of separation
    - Marriage like relationship – one or both terminates relationship
- **NOTE: check definition of spouse! Do they meet it?**

By a Subsequent Document?

- **S.55(1)** – revoking will must comply with formalities
- Most common way of revoking will – newer will has clause that explicitly revokes all past wills
    - If the will does NOT revoke all past wills, the other ones are revoked to the extent that they are inconsistent with the new will (read all documents together as one)

- Revocation clause in will can be found invalid if it is not the intention of WM, court can strike it out in certain circumstances (Re Lawer) – she kept both wills in same envelope, most recent was wills kit and revocation clause was just in there
    - Burden on person trying to use past wills to prove that WM didn't intend to revoke past wills or codicils

- **To Prove:** in Court of Probate, can only use **indirect evidence and what is written in the will** to prove WM's intention (Robinson Estate) – Spanish will, then Canadian will that said it revoked all other wills, Spanish will was revoked, only indirect and will language allowed
    - No evidence about what WM said to others allowed – no direct

By Declaration of Revocation?

- **S.55(1)(b)** – declaration to revoke all or part of will
    - Must comply with formalities in s.37
- Rare – only if person wants to die intestate so no one could challenge provisions

By a Physical Act of WM? "I will cut you"

- **S.55(1)(c)** – burning, tearing or destroying all of part of the will with the intent to revoke the entire will or a part, or done by another in the presence of WM
    - Must have INTENTION to revoke by destruction – accidental will NOT count
        - Must intend to revoke will by destroying it (Re Norris)
    - Must be a COMPLETE destruction of the will
        - Doesn't have to be destruction of entire will, if part is destroyed such that it cannot be read, it will count (Re Adams)
        - **Test: whether the original words are "apparent"** (Re Adams) – such that someone can decipher them (with tools, glasses, etc.), but cannot have any physical interference to see what it says

- **Presumption:** If WM had capacity, presume intention to revoke by destruction, if it was found in a place WM would naturally put it (Re Adams)
    - **Rebut:** evidence on BOP that they didn't intend to revoke, based on surrounding circumstances
    - Capacity is same as making a will in the first place

- **To Prove:** in Court of Probate, can use **both indirect and direct evidence** to prove

- Examples:
    - Scribbling out signature = destroying (Re Adams)
    - Signature is cut out = destroying
    - Striking through sections of will and signature with pen = NOT destruction
    - Scratching ink off = NOT destruction (Godfrey)
    - Writing "this is revoked" = NOT destruction (Lovejoy) – no destruction of document, no witness of revocation
    - Destroy copy of will with intention to revoke = NOT destruction (Morton)
    - Ripped up and put back in envelope and locked up = NOT destruction (Re Norris)

- **S.55(1)(d)** – court is able to rectify the revocation under s.58 if destruction is not done in accordance with s.55(1)(c) – no case law yet

By Conditional Revocation?

- 3 situations where revocation is conditional:

1. **WM believes will is void** – where WM destroys a valid will because they believe that it is actually void and then do not make a new will
    a. Prove that is what happened: revocation based on that will being void and if it was not void, then revocation was not effective

2. **WM is mistaken about facts or law** – renders revocation ineffective (Re Sorenson, Estate of Southerden)
    a. Where WM makes a will based on the belief in a certain set of facts that are not actually true – condition for revocation is that state of affairs, if that is not the state of affairs, revocation will not be effective (Re Sorenson)
    b. Belief in state of the law and write/revoke will on that basis, can be ineffective to destroy (Estate of Southerden)

3. **Dependent Relative Revocation** – WM destroys the old will in anticipation of making a new will to replace it
    a. Revocation only effective where you can prove the action was conditional on the new will being made (Re Jones)
    b. **Must revoke existing will: (1) in anticipation of making new one; and (2) new one is made but fails**
    c. Prove intention of WM – intention to revoke? Or intention to revoke only if new will was executed?

By Alteration?

- **Change made by WM on the face of the original will**
- **S.54(1)** – same requirements for formalities
    - **S.54(2) –** alteration must be signed beside change or in memo acknowledging the alteration by WM
    - **S.54(4)** – can be saved if **(a)** it doesn't have the formalities as long as alteration doesn't substantially effect the will OR **(b)** if there is evidence the change was made before execution of will

- **Presumption:** any alteration is made **after** execution and therefore not valid (Estate of Oates)
    - Rebut: person alleging alteration existed when will executed has onus, use any evidence
        - Executor to prove alterations were made before execution (Estate of Oates)

- **Steps:**
    1. **If made BEFORE execution**, alteration is valid and part of will (Estate of Oates)
    2. **If made AFTER execution**, must comply with formalities, s.54(2)
        a. **If it does NOT comply**, alteration is invalid unless court orders otherwise (court can cure deficiency in alteration in s.58(4))
    3. **If made AFTER execution and NOT in compliance with formalities**:
        a. Alteration that **makes provision illegible** makes that provision invalid – cannot use any special tools or physical interference to read (In the Goods of Itter)
        b. Alteration **where provision is still legible**, can probate it (In the Goods of Itter)
        c. UNLESS the alteration was conditional, then can use physical interference to discover the original words and probate (In the Goods of Itter)

- **Apparent vs. Not Apparent:** WESA uses "illegible"
    - If alteration made but is NOT valid, but the **original wording can be seen with the "naked eye"**, it may be admitted to probate (In the Goods of Itter) – *strips of paper glued on, alteration invalid but could be taken off to see original wording, saved on dependent relevant revocation – words weren't apparent but only revoked original if the alteration was effective, saved*
    - If alteration made but is NOT valid, but **original wording CANNOT be seen**, those words are struck and rest of the will is admitted to probate

- **Codicil vs. Alteration**
    - Codicil: separate testamentary document that makes changes/alterations
        - Republishes will if no changes or incorporates it by reference if changes
        - NOT an alteration
    - Alteration: changes made by WM to original will, not separate document

IF IT WAS REVOKED, WAS IT SAVED BY REVIVAL OR REPUBLICATION?

- Essentially a codicil

- **S.57** – a will or part of will that is revoked is revided ONLY by a will that shows intention to give effect to revoked will or part that is revoked
    - **S.58(3)(b)** – court can order revival even if it doesn't comply
    - **S.57(2)** – where will or part of will had already been revoked, only the most recent revocation will be revived by codicil unless contrary intention – won't revive to original state, just to last state
    - **S.57(3**) – will revived by codicil is deemed to have been made on date and time of execution of codicil

- **Rule:** words of codicil must clearly express, beyond a doubt, an intention to revive the will
    - Intention of WM is required (Re McKay)

- Republication vs Revival
    - **Republication:** new document, get a new will with a later date – sign will or codicil that confirms contents, get w new will
        - If changes, republication affirms them
        - Requires witnesses
        - RARE
    - **Revival**: old will is valid again with new date, re-execution

Is this a valid Joint or Mutual Will?

- **Reciprocal Wills** – identical wills, give everything to each other (common for spouses)
    - Similar wills not enough to show trust relationship or to make it irrevocable, can change will after death of 1st (Gillespie)
- **Joint Wills** – one document is the will for 2 people (Gillespie)

- **Mutual Wills** – mirror images with language changes, do the same thing in the result, it is essentially a K, should explicitly state that it is irrevocable to show it is mutual will

    - If one party dies leaving will like this, other party should be bound by it – on date of death, all assets dealt with in the will are held on resulting trust on the basis of the terms of that will
        - Other party cannot do anything with the property – any new property is not bound by it (Dufour)
    - Can revoke by consent up until death of one
    - **On death, K solidifies and severs JT, creating trust relationship (this is inconsistent with right of survivorship) – enforce in equity**
        - Courts impose a trust on survivor and gives them **a life estate in the property**, which must be disposed of in accordance with will

    - Common where there are common kids and own kids – leave to each other and last to die disposes equally between all kids, not just their own

- **Requirements:** will operate to create trust on death of 1st WM if: (Gillespie)
    1. Joint/mutual will were made pursuant to a definite K to make this type of will AND that the survivor will not revoke it
    2. The agreement is precise and clear
    3. The survivor has taken advantage of the provisions of the joint/mutual will
        - Unnecessary to have benefit, or probate of first will (Sanderson estate)
- To disprove mutual will:
    - Argue the gift was absolute rather than life estate, then anything to remainder would be repugnant to absolute gift – no trust could be imposed
    - BUT, could still enforce if they got benefit of the gift which they would not otherwise have received BUT FOR the mutual will

Step 4: Were there any Gifts given OUTSIDE the Will?

Joint Tenancy?

- When 2+ people hold legal and beneficial title, if JT owner dies, survivor gets full interest in property through right of survivorship – will not go through deceased's estate
    - Mutual Will severs JT (Gillespie)
    - Presumption: land held as tenants in common unless explicitly JT (PLA, s.11)
- Can be severed unilaterally VERY easily

PRESUMPTION OF ADVANCEMENT

- GIFT

- **Presumption:** Transfer, without consideration, to another to be held jointly with minor child or spouse will be presumed to be a gift (Pecore)
- Presumes a gift and on death, survivor will take full title, unless presumption rebutted by showing it wasn't intended to be a gift (Pecore, Madsen Estate)
    - Often kids names on bank accounts to eliminate need for probate

- Look for intent (Pecore) – can be gift to adult child if rebut presumption (Madsen Estate)

PRESUMPTION OF RESULTING TRUST

- NO GIFT

- **Presumption:** Transfer, without consideration, to another to be jointly held with another person (including adult child, NOT minor child or spouse), rebuttable presumption of resulting trust
    - Survivor holds legal title but estate holds beneficial interest (Pecore)

- **Rebut:** prove the deceased intended a gift (Pecore)
    - Onus on transferee to show intent on BOP
    - For adult children, degree of dependence on parent is relevant to rebut (Pecore)

- Factors to determine intention (non-exhaustive)
    - Acts or statements before or after transfer
    - Continued control of property after transfer – no gift
    - Granted POA to transferee – gift
    - Whether transferee paid CG or taxes – gift
    - Joint bank accounts – standard form bank documents are not evidence of intent to give gift (Madsen estate)

Inter Vivos Trust?

- During lifetime, settlor transfers legal title to B for life – beneficial title only passes to B on death of settlor
    - **Immediate, contingent interest**
    - Can be revocable or irrevocable (if revocable, will be taxed in your hands)
- Whether it is testamentary or inter vivos depends on control by settlor – **more control indicates it would be testamentary**

- Benefits:
    - No probate fees – transferred during lifetime
    - Avoid creditors – as long as purpose of transfer is not to avoid creditors and they don't exist at time of trust OR **Fraudulent Conveyance Act** applies to void it
        - Child or spouse is NOT a creditor per the act, must be someone that is entitled to something from the person while WM was alive (Mordo)
        - **FCA, S.1** – disposition is void if done to delay/hinder/defraud creditors
        - **S.2** – except where transfer is for good consideration, in good faith and transferee had no notice/knowledge of fraud at the time
    - Can avoid wills variation claims – transfer during lifetime and then there is nothing in the estate if anyone challenges the will (Mordo)

Insurance Designation?

- **S.84(3)** – life insurance, and accident and sickness insurance

- **Benefits:**
    - Falls outside of will
    - No probate fees (unless estate is B)
    - Can't be attacked by creditors
    - No wills variation claims against it
    - Proceeds will pass directly to B without going through estate

LIFE INSURANCE, ACCIDENT AND SICKNESS

- **Life:** insurer pays money on the insured's death
- Can designate B – designate alternatives in case main B dies
    - Can change at any time UNLESS irrevocable – can revoke by declaration
    - **S.53(1)(c)** – if no one designated, proceeds go to the estate
- If designation in a will:
    - Can always revoke it
    - **If will is invalid, insurance will continue** – executed separately
    - If will is revoked, insurance is also revoked

- **Accident:** Same idea, different sections

Other Beneficiary Designation?

- **S.1** – B designation: Pension plans, RRSPs, RIFs, TFSAs, RESPs
- **S.95** – can chose B so it won't go through estate
  - B designation must occur before death by a written declaration to company
- **S.85** – can designate someone as B and unless it is irrevocable under s.87, can alter or revoke the designation
  - **(2)** – must be in writing, not irrevocable, signed by the person making it, can be made in a will

s. 87 WESA (3)(a)	CANNOT make an irrevocable designation by will.
s. 87 WESA	Can make irrevocable designations through other means (governing statute)
s. 88 WESA	If an irrevocable designation exists (outside of will), THEN (1) *While a designated beneficiary of an irrevocable designation is living*, the participant may not alter or revoke the designation without the consent of the designated beneficiary. (2) A benefit that is the subject of an irrevocable designation (a) i*s not subject to the control of the participant or the participant's creditors,* and (b) *does not form part of the participant's estate.*

HOW TO REVOKE DESIGNATION

s. 96 WESA	**A designation in a will may be altered or revoked by a later designation that is not in a will**
s. 97 WESA	• A revocation in a will of a designation revokes a designation that is not in a will only if the *revocation in the will relates to the designation*, either generally or specifically, and the designation is not irrevocable • The revocation of a will revokes a designation in a will • Revocation of the designation does not revive and earlier designation
s. 98 WESA	A designation or revocation of a designation in a purported will is not invalid merely because the instrument is invalid as a will…
s. 99 WESA	If a will is revived (a previously revoked will) it doesn't automatically revive the beneficiary designation… unless the codicil that revives the will specifically revives the beneficiary designation
s. 100 WESA	Unless a designation is irrevocable, a designation or revocation of a designation in a will is effective from the time the will is made
Re Botcher	a general revocation clause is a will does not revoke a specific beneficiary obligation, unless the specific beneficiary designation was made in a previous will

IF FAILURE TO REVOKE DESIGNATION

- Where WM does not revoke designation after divorce/separation **AND didn't know they had to do something more**, money will be held by B on resulting trust (Roberts v Martindale)

- Where WM does not revoke designation after divorce/**separation AND KNEW that they had to do more**, B will receive money outright – WM's choice not to change it if they had the information, intention is not enough (Wilson v Wysoski)
  - Juristic reason to receive benefit, no resulting trust

Gifts?

- **Inter Vivos:** 5 requirements to be a valid gift
    1. Donor must be mentally competent
    2. Donee must be age of majority, 19
    3. Must be intention to give gift (indefeasible interest) – must show donor intended to give gift forever
    4. Delivery
    5. Donee must accept gift

- **Mortis Causa:** inter vivos gift of personal property that is made in contemplation of death
    - Only a gift upon death – requires death to take effect
    - Requirements: donor is expecting to die, doesn't require full delivery (just something like keys), clear intention of gift on death
    - If person does NOT die, gift is returned

Step 5: Were there any Gifts given in the Will?

Can the Gift be Given? Is this even yours??

- **S.41(1)** – can give property that WM has legal or beneficial title to
  - **(2)** Interpret the property as being owned immediately before death, unless contrary intention exists
  - **(3)** gift takes effect according to terms and gives maximum interest possible unless stated otherwise in the will

- Consider:
  - **What type of property is being given?**
    - Personal or real?
    - Beneficial interest or legal interest?
  - **Does the WM own the property?**
  - Did the WM used to own the property but no longer does?
  - Is there a mutual/joint will that will dictate disposition of certain property?
    - If joint/mutual will, on death of 1st, this property is held on resulting trust by survivor and they cannot dispose of it in a way that is inconsistent with that will – held in trust for B under mutual will (Sanderson)
    - No longer your assets to give

- **S.11, PLA** – Where WM does not own property: 2 arguments
  - **Can't gift what you don't own** (Re Estate of Meier) – transferred property to company he had shares in, left property to brother in will, brother got nothing because WM had nothing to transfer
  - **Can gift if WM has de facto ownership** (Ireland) – had controlling interest in company that owned the property, executors could compel company to transfer to B

- **S.45** – presume tenants in common unless specified that it is JT

DID THE GIFT ADEEM?

- **Ademption**: when property that is the subject matter of a specific gift, that was in existence at the date of the will, NOT in existence at the date of WM's death (lost, stolen, destroyed)
  - **Result:** B is SOL – gets nothing!

  - Will be strictly applied (Church v Hill) – if specific gift is gone, B will get nothing

  - **Only applies to **specific gifts** that were **in existence at time will was written**
    - Insurance money for that gift goes into residue, NOT TO B (unless stated otherwise in the will)

- **WM must own the property at the time of death to give it** – will speaks from moment of death

- **Conversion:** where WM gifted property in will but the sells/disposes of property before death (property is converted into something else), gift adeems, unless statutory provision saves it or intention of WM indicates B should get converted property

  - **Can be notional Conversion** – K to buy land but wasn't completed at death, proceeds of sale if completed after will be part of residue, was converted (Re Sweeting)
  - If K to buy land but it has **been repudiated/incomplete**, won't have converted (Re Dearden Estate)
  - For insurance money, **consider whether death or destruction occurred first** – if death, then property passes to B and they get insurance money for destruction of property that occurs after death (Re Clement Estate)

- **Policy:** WM should be free to deal with property during lifetime and change testamentary plans
  - If gift isn't there, assumed that WM revoked gift

- **Exception: Tracing** – Ademption will not occur if specific property has been changed only in name or form so that it still exists as essentially the same thing but in different shape (Trebett v Arlotti-Wood)
  - Eg. RRSP becomes RRIF – B will still receive it because it is the same property

What Type of Gift is it?

- **General:** direction to give something from general assets of the estate
  - Pecuniary legacy – gift of money from general assets of the estate
  - Ex. I give $1,000… I give shares in the company X…
  - *If fails, falls into residue*

- **Specific:** specific gift of personal property that can only be satisfied by delivery of that particular thing – **usually "my" in front of item**
  - Ex. I give my 4runner… I give my shares in company X…
  - *If fails, falls into residue*

- **Demonstrative:** gift of specified amount/quantity to primarily come out of a particular asset/fund
  - **If not enough money in that particular asset/fund, remainder will come from general assets of estate**
  - Only fails where the specific fund cannot be found
  - Ex. I give $10,000 from RBC account
    - If only 7,000 in account, B gets 7,000 demonstrative gift and a 3,000 general gift from assets of the estate
  - *If fails, falls into residue*

- **Residuary:** remainder of estate not otherwise disposed of, the rest of the estate
  - *If this fails, will go on intestacy*

Does the Will require interpretation?

- Interpretation is the ascertainment of the meaning which the document would **convey to a reasonable person** having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract (Investors Compensation Scheme)

- **Courts roles in interpretation:**
  - **Court of Probate** – Validity: deciding if the document is the last will
  - **Court of Construction** – Interpretation: there is a valid will, must determine the true intention of WM
    - Cannot give effect to intention that is not expressed or implied in words of will
    - Interpret what they think WM meant
- **Uncertainty:** if the court uses all the interpretive techniques above and cannot determine intention, the disposition fails for uncertainty

Steps for Interpretation:

1. **What is written in the will?** – use extrinsic evidence, 4 corners of will
    a. Unable to determine meaning from language of will? – interpret it

2. **Use armchair approach** – indirect extrinsic evidence
    a. Look at what WM knew

3. **If ambiguity (patent or latent)** is found during armchair approach, s.4 allows use of direct or indirect evidence to interpret it

IS THE MEANING CLEAR?

- **Step 1:** If words are clear on the face of the will, no interpretation is necessary (Laws)
- **Step 2: Armchair Rule: what was known to the WM sitting in their armchair, at the time of writing the will?** (Perrin v Morgan)
    - Admit surrounding circumstances (indirect extrinsic) immediately to ensure there **are no latent ambiguities** and use ordinary meaning to interpret (Haidl)
        - Character of WM
        - Relationships with family
        - Size of estate
        - Gifts given
    - Use to interpret ambiguous term OR identify ambiguity
    - **Expansion:** ID meaning of words in light of natural and ordinary meaning, purpose of document, facts known at the time of execution and common sense (Tottrup)

→**If clear and have meaning, STOP – nothing is ambiguous**

IS THERE AN AMBIGUITY?

- **Evidence allowed:**
    - Extrinsic: 4 corners of the will
    - Direct Extrinsic: outside will but what WM said or wrote (lawyers notes), evidence of intent of WM
    - Indirect Extrinsic: surrounding circumstances, what is known by WM at time of writing will (**armchair rule**)

- **Ambiguity:** if one is found, **s.4** says that you can use direct OR indirect evidence to interpret
    - Patent Ambiguity: is the ambiguity apparent on the face of the will to anyone reading it?
    - Latent Ambiguity: is the wording on the face unambiguous but on interpretation it is clear there is an ambiguity?

- **General rules**

1. **Read whole will in context** – do not read in isolation

2. **Identical words are presumed to have the same meaning**
    a. If different meanings for same word implied, use armchair rule to determine what WM knew and meant at the time (Re Thiemer Estate)

3. **Effect should be given to all words** (Re Stark)

4. **Restrict General words** (Ejusdem Generis) – if there are general and specific words, **specific wins** (Di Bella)

5. **General vs. Particular Intention** – will ignore particular intention **in favour of general**

6. **Presumption against Intestacy** – presume WM wanted to dispose of entire estate and not die intestate (Wagg v Bradley)
    a. Golden rule of construction (Re Harrison)
    b. **BUT court won't force meaning** – more likely to allow intestacy rather than force meaning into will

7. **Presumption of Rationality** – presume WM didn't mean to be arbitrary or irrational with family
    a. If no family, presumption is weaker

8. **Presumption of Legality** – if ambiguous meaning and one interpretation offends ROL, court will interpret in a way that doesn't offend
    a. If overtly illegal direction, void

9. **Presumption against Disinheritance** – if ambiguous, will choose interpretation to benefit direct descendants, rather than extended kin
    a. If kin of equally close degree, equally between them

10. **Irreconcilable Disposition** – if will have dispositions that cannot be reconciled, interpret in a way to avoid the inconsistency
    a. **BUT** if they cannot be reconciled, the most recent clause prevails…
    b. **BUT** if inconsistency gives same property to 2 separate people, they take together as JT or tenants in common or in succession (depending on nature of property)
    c. **BUT** if the application of this will **result in intestacy**, first gift will be preferred

- **Specific rules**
    - **S.1 and FLA** – Meaning of spouse, child, descendent, grandchild
    - **S.42** – Meaning of next of kin, heir, issue
        - Those that would take on intestacy
    - **Eldest** – first born child even if they have predeceased (Amyot)
        - Would have to say eldest of my children still living to go to the remainder
    - **S.45** – Gift of land to 2+ people will be taken as tenants in common in proportion to their interests unless contrary intention in will

Who is the Gift to? I fart in your general direction..!

- Specific words defined in will overrides statute – can specifically define "children" to include step-children or foster children

- **Per Capita** – by head, all living descendants share equally (regardless of 1st descendant or not)
- **Per Stirpes** – by branch, divided into number of shares that the WM has children: each child gets a share and if they have predeceased, their share is divided amongst their children

- What type of interest – if future vested interest:

    - **Absolute/indefeasible interest**: B will definitely get it at some point, gift outright

    - **Subject to Divestment**: will get it unless something happens that will cause the gift to go to someone else
        - To A for life, then to X but if Canucks win Stanley Cup, then to C – X has interest subject to divestment

    - **Subject to Open/Partial Divestment**: where there is a class of B that can expand, class stays open
        - To my children – class could expand with birth of more kids

- **Class Gift:** gift to class of people under general description with certain relationship to WM (or another person)

    - **Allows people to join (births) or leave (deaths)** – joint gift with right of survivorship
        - If someone dies, remaining class members take a larger share
        - If someone is born, class members take a smaller share

    - Where members of class are specifically named, may not be considered a class gift but gifts to specified individuals (Milthrop)
        - Look to circumstances as to what they knew and how WM would want the gift divided (Re Hutton) – even if named, could be class gift

Are there any mistakes? Can they be fixed by Rectification? – excuse me, miss!

- **S.59** – court has broad power to rectify errors – **act as either court of construction OR probate** (can add, delete or substitute words)
    - **(1)** Can rectify errors if it fails to carry out WM's intention because of:
        - (a) An error arising from accidental slip or omission;
        - (b) Misunderstanding of WM's instructions; or
            - Got instructions but didn't understand will be clerical error (Segleman)
        - (c) Failure to carry out WM's instructions. (Clarke)
    - **(2)** Can use extrinsic evidence to prove evidence that error fails to carry out intention
    - **(3)** Limitation period of 180 days from probate to apply for rectification
        - **s.155** – executor cannot distribute until 210 days from probate unless all agree to earlier distribution

- Test: (Segleman) – onus on person seeking rectification (McPeake)
    1. What did WM actually intend? What were their instructions?
    2. Is the will expressed in a way that fails to carry out that intention?
    3. Is the will expressing that way because of an error that could be rectified under s.59(1)?

- **Must be certain of 2 things before making correction:**
  - It was unintentional omission – easy to show if there is a blank or no definition
  - Know WM's intention – more difficult
    - Cannot solve mistakes by speculation (Re McEwen) – presumption against intestacy didn't operate here, only if there are 2 potential situations one of which is intestacy – where there is just 1 situation that does not work, only solution is intestacy

- **Statute allows both indirect and direct evidence to be used**
  - CL only allows indirect evidence

- **Patent Mistake:** clear on the face of the will
  - If draftsperson had applied mind to words of the clause and was wrong, WM will be bound by the mistake (Clarke)
  - BUT if they applied mind based on instructions but failed to understand the law in application, could be rectified (Clarke)

- **Court will try to avoid intestacy and rectify mistakes**
  - Marley – signed wrong wills, gave "clerical error" broad meaning and found it was error

- **Common Law Principle:**
  - **Principle of Falsa Demonstration** – operations to strike out non-essential words in gift that may cause an ambiguity (Re Davidson)
    - If there is sufficient description of property to know what is meant to pass, a subsequent mistake will not affect it

Can mistakes be saved by Republication?

- **S.57(3)** – **if a will that has been revived by codicil OR has been re-signed by codicil with formalities, will is deemed to have been made at the time of codicil execution**

- **Republication:** will is valid but has been brought forward with a new date and changes
- **Revival:** something invalidated the will and codicil brings it back to life, with new date

- Confirms the remainder of the will – **not automatic, WM must show intention to confirm** (Re Hardyman), generally if codicil is signed, intention found unless republication would defeat intention of WM
  - Look at circumstances at time of republication to determine intention (Re Hardyman)

- Effect of Republication:
  - **Give new meaning to a general ter**m
    - "Wife of X" can be different person at republication than at execution of original will (Re Hardyman)
    - "Present interest" can be the interest at time of republication rather than at time of will (Re Reeves)
  - **Can cure deficiency in will** – if witnesses for original will are incapable or receive something in will, republication with new witnesses can fix formalities (Re Anderson)
  - **Can incorporate by reference** a document that wasn't in existence at time of execution of original will

- Exceptions:
- **CANNOT invalidate a gift that was valid when original will executed** (Re Heath's Will's Trust)
- **Invalid codicil does NOT invalidate will** (Re Estate of Ruth Smith)

Is there any property not disposed of?

- **S.44(a)** – Anything not disposed of will be distributed on intestacy

Step 6: Are the Gifts Valid?

Has a Gift Lapsed? Welease Wodger!!!

- **Definition:** a gift to B who predeceases WM fails (lapses) (Re Greenwood) – dies after execution but before death
  - Will either go into residue or on intestacy
  - Applies to corporations – if changed names, can still go to new corporation but if no longer exist, gift will lapse
  - Applies to charities – cy pres can save gift if it can be shown another charity is substantially the same (must have provision for it in the will)

- **Ask: did they die before the WM?**
  - Consider: survivorship, simultaneous death, destruction of property or death first

BENEFICIARY OR THEIR SPOUSE WITNESSES WILL

- **S.43(1)** – a gift is void/lapsed if B or their spouse witnesses will (Jones v Public Trustee)
  - Were they the B or spouse at time the will was made?
  - **(4)** – can make application that gift wasn't void if court satisfied that WM intended gift even though B or their spouse was witness

- **Has it been saved by republication of codicil to rectify the mistake in witnesses**?

BENEFICIARY PREDECEASES

- **Ask: did they die before the WM?**

- **Survivorship:** gifts to spouses will be treated as lapsed – each considered to have no spouse at time of death
  - **S.5** – spouses die simultaneously
  - **S.10** – spouses die within 5 days of each other

If it Lapsed, do any Anti-Lapse Rules apply?

STATUTORY ANTI-LAPSE

- **S.46** – if gift can't take effect for ANY REASON:
  - **(a)** – Alternate B in the will gets it (codifies CL)
  - **(b)** – If B is the sibling or descendant of WM, the gift will go to B's descendants
    - Nothing to the spouse of deceased B
  - **(c)** – if no descendants under (b), will go to residual B instead and will be distributed in proportion to their interests (changes CL)
- **Note**: Jones Estate case would be saved by s.46(1)(b) and children would get it

- Not actually preventing lapse, just providing statutorily alternate B – BC doesn't truly have anti-lapse laws (true anti-lapse would say gift goes to WM's estate)

- Contrary Intention will oust statutory anti-lapse (Re Wudel) – consider circumstances at time will was executed to see if contrary intention arises
  - Would WM know that B had died at time the will was written? – **was there intention to exclude that deceased B from the gift?** (Re Wudel)

- Per Capita creates presumption of joint tenancy (Re Estate of Stella West) – kids share equally
  - **Consider words in plain ordinary meaning to give effect to WM's intention** – each word has meaning (Re Estate of Stella West)

ANTI-LAPSE PROVISION IN WILL

- **Cannot prevent gift from lapsing but can draft to avoid consequences of lapse**
- Cannot take away courts ability to find that something lapse but able to make substitution gift to another to avoid effect (Re Greenwood)
- If alternate B from anti-lapse provision also dies, gift will lapse (Re Cousen's)
- If drafted broadly, using liberal approach, provision can apply to B who died before will is made (Re Davidson)

If Anti-Lapse Rules DO NOT apply, where does Gift go? – I have a gweat fwend in Wome named Biggus Dickus!

- **Specific or general gift lapses** = passes to residue (Re Stuart), **UNLESS**
  - A statutory anti-lapse provision applies; or
  - Contrary intention in the will that it will not lapse and go to another (Re Davidson); or
  - It is a class gift which will go to remainder of the class (Re Stuart); or
  - The gift is a moral obligation and will go to B's estate (Re Mackie)
- **Residue gift lapses** = passes on intestacy (Re Stuart), **UNLESS**
  - A statutory anti-lapse provision applies; or
  - Contrary intention in the will that it will not lapse and go to another (Re Davidson); or
  - It is a class gift which will go to remainder of the class (Re Stuart); or
  - The gift is a moral obligation and will go to B's estate (Re Mackie)
- **Exception at CL: Moral Obligation** – if WM makes gift to discharge moral obligation but B predeceases, gift does NOT lapse but goes to B's estate
- **Joint Tenancy:** if anyone predeceases, the rest receive the whole gift (share becomes bigger)
  - **S.35** – gifts to 2+ people are presumptively held as tenants in common – to be JT, must be expressly stated to be "joint" in the will
  - **Per capita presumptively means JT** (Estate of Stella West)
- **Class Gift:** share is divided among remaining members of the class (Estate of Stella West)
  - **Allows people to join (births) or leave (deaths)** – joint gift with right of survivorship
    - If someone dies, remaining class members take a larger share
    - If someone is born, class members take a smaller share
  - Where members of class are specifically named, may not be considered a class gift but gifts to specified individuals (Milthrop)
    - Look to circumstances as to what they knew and how WM would want the gift divided (Re Hutton) – even if named, could be class gift
- Lapse in Common Law:
  - **Real Property gift** – passed to heir, the eldest male child and if not them, their male children, and if not then, the eldest daughter
  - **Personal Property gift** – fell into residue OR if it was residuary gift or there was no gift of residue, went on intestacy (Re Stuart)

Step 7: Does Anyone want to CHALLENGE the Will?

- Wills variation must balance interests of:
  - **WM** – right to dispose of their own assets however they want
    - **Testamentary autonomy should yield to equitable interests** (Tataryn)
  - **Beneficiary** – dependant's right to receive adequate support from WM

- Main consideration is if there was "**adequate provision**" made in the will
  - Court has discretion to order provision for what is **"just, adequate and equitable"** in the circumstances of the case if adequate provision was not made in will (Tataryn)

- Overview:
  - **S.61** – Limitation Period and service: 180 days to challenge
    - **S.61(1)(b)** – must serve notice of civil claim within 30 days of commencing
    - **S.61(1)(c)** – PGT must be served if minor/mentally incompetent is affected
    - **S.61(4)** – representative: **if one person brings action, it is an action on behalf of ALL people entitled to apply** (others can piggy back on that one person)
    - ***if you never probate a will, limitation never starts to run**

  - Note: estoppel may operate to allow someone to make a claim after the LP if there was reliance on representations about the distribution of the estate

  - **S.62** – can accept evidence of WM's reasons for dispositions to see if there was adequate provision
    - **S.62(1)** – includes written statements (allows direct extrinsic evidence) that give reasons for dispositions

  - **S.63** – can make order subject to conditions

  - **S.64** – order for lump sum or periodic payments from estate

  - **S.71** – can cancel or vary an order

  - **S.72** – allows for appeal to BCCA (reviewed on correctness standard) (Bridger)

Step 1: Are they a Spouse or good-for-nothing Child?

- **S.60** – **Only spouse or child of WM can apply for maintenance from estate** if they did not receive adequate provision from will

SPOUSE

- **S.2(1)** – people are spouses if they were both alive immediately before death and:
  - **were married to each other**; or
  - **had lived with each other in "marriage-like" relationship for at least 2 years**

- **What was terminated and was it communicated? – who was it communicated to?**
  - Look at conduct or writing – did either party believe the relationship was over? Was it intended to be a final separation? (Gosbjorn)
  - **Person claiming to be spouse has burden to prove relationship** (Souraya)

- **Marriage-like relationship:** objective considerations (Souraya), non-exhaustive
  - Subjective – did they consider themselves to be in committed, long term financial and moral relationship (Gostlin)
  - *Living arrangements*
  - *Owning property together*
  - *Share finances*
  - *Common vacations*
  - *Share their lives*
  - *Exclusive sexual relationship*
  - *How they referred to one another*
  - *Sleeping arrangements*
  - *Feelings toward each other*
  - *Conduct and habit of parties in relation to prep of meals, washing, shopping, household chores*
  - *Social activities together*
  - *Attitude towards children*

- **Did they cease to be a spouse before death?**
  - **S.2(2)** – people stop being spouses if:
    - (a) in the case of **marriage**, an event occurs that causes an interest in family property (divorce, separation)
    - (b) in the case **of MLR,** one or both terminate the relationship
  - **s.2(1)** – no separated if within 1 year of the separation
    - (a) they begin to live together again, reconcile; and
    - (b) live together for at least 90 days (doesn't have to be continuous)

- Consider facts of each case to see if relationship ended (Roach)

CHILD

- **Only birth children and adopted children can apply**
  - Step children CANNOT apply (McCrea v Barrett)

Step 2: Was there Inadequate Provision for them in the Will?

- **S.60 – must lack "adequate provision" to enable court to vary the will**

  - When provision is below the range of what is adequate, just and equitable according the contemporary standards of WM's legal and moral obligations (Tataryn)
    - **TEST:** "judicious father of a family seeking to discharge both his marital and parental duty" (Walker v McDermott)

  - Assess adequacy of provision at date of death (McBride)
  - Size of estate impacts what is "adequate" in the circumstances – small provision may be fine for a small estate but inadequate for a large estate (Waldman)

- **S.62** – court can consider any oral or written statements by WM for reasons of dispositions

- **TEST:** (Tataryn)

    - **1. Are the legal obligations satisfied?**
        - These MUST be satisfied first – if there is anything left over, then can look to meet moral obligations
        - If satisfied and nothing left in estate = adequate provision
        - If NOT satisfied = provision not adequate
        - If satisfied and some left in estate = go to moral obligations

    - **2. Are the moral obligations met?**
        - If no, vary to meet these

- All claims should be satisfied if estate permits (Tataryn)
- **Person making claim has onus to show adequate provision was not made**

Step 3: If there is inadequate provision, is there a LEGAL Obligation to provide for them?

SPOUSE

- **Test:** what obligations would the law have imposed if they have divorced/separated the day before death? (Tataryn)
    - **Married:** would have been owed spousal support and portion of property
    - Minimum is what they would have received on intestacy (discussed in case law)

CHILD

- **Legal duty to minor children and disabled children of any age**
    - Difficult to assess – generally would be monthly payments, not a lump sum
- Adult children: **may have legal duty if there is evidence of unjust enrichment or resulting trust**
    - Show that they have made a contribution to the estate (farming communities)
    - **Quantum meriot** – where adult child took care of parents for whole life, legal duty (Tataryn)

Step 4: Is there a MORAL Obligation to provide for them?

SPOUSE

- **Based on Community Standard**: what society expects, considering: (Bridger)
  - Length of marriage
  - If surviving spouse took care of WM
  - Surviving spouse's contributing to the estate (if any)
  - Where a long period of time passed from execution to death, efforts during this time could support moral obligation that was not contemplated at time of execution
  - Self-sufficiency of the spouse – financially self-sufficient?

- If significantly enriched outside the will and knew they were getting nothing, can lessen moral obligation (Saugestad)
- **Second Marriages**: where estate was enriched during first marriage and kids have reasonable expectation of receiving, moral obligation to 2nd spouse can lessen (Saugestad)

- Other considerations:
  - Adultery – irrelevant!
  - **Prenups** – have weight but do not bind court, weight will depend on detail, fairness and if there was independent legal advice
    - If agreements negotiated with independent legal advice, this should be given a lot of weight, but not determinative (Hartshorne)

- If spouses are separated, separation agreement is irrelevant – not spouse so NO CLAIM

CHILD

- **S.63** – if shown inadequate provision, executor must prove why disinheritance should stand:

  - **Contribution**: more contribution, the stronger the claim
    - Where adult children, usually the child that lives the closest contributes the most (they are there to help out)

  - **Misconduct/Neglect:** has to be severe to qualify – look at what society would accept and believe is misconduct, not what that individual thinks is misconduct
    - Beating up parents = misconduct
    - Daughter living with woman and parents disapproved = NOT misconduct

  - **Estrangement:**
    - If the fault of WM, may enhance moral duty – variation would rectify neglect
    - If fault of kids, may lessen moral duty
  - **Unequal treatment:** if no relevant reasons for unequal treatment, kids should share equally – but it is not itself a basis for a claim (McBride)
    - Situation 1: 1 kid gets more than the other, other makes claim
    - Situation 2: both kids get equal amount but one makes claim for more

  - **WM's reasons:** can give reasons for disinheritance
    - If financial need is NOT a factor, explanations can negate moral duty
    - Reasons must be valid and rational, must based on true facts that are logically connected to disinheritance

CONSIDERATIONS FOR ALL CLAIMS

- Date to determine Adequacy: date of death (McBride)
- Date of Valuation of Estate: date of death
- Size of Estate: bigger the estate, the weaker the moral claim can be and still get some
  - If estate is small and there are no legal obligations, more emphasis is put on the financial needs of claimants
- Standard of Living of WM and Claimants: what they were accustomed to
- Disabled Claimants: duty to that child
  - Unsettled if they deserve a larger share than other children
- Financial Circumstances of Claimants: **if self-sufficient, less moral obligation**
  - If financial need, stronger moral obligation
- Circumstances of Claimant:
  - Age and state of health
  - Claimants legal obligations to their own dependents
  - Surviving spouse's children from previous relationships
  - Expectations to inherit based on assurances from WM, enhances claim
- Gifts Outside of Will: pension, life insurance
- Contribution to Estate: kids that live closest contribute the most usually, or kids that live with and care for parents can have stronger moral claim (McBride)
- Competing Claimants: where charities are claiming as well
- Testamentary Intentions: why they are disposing this way, reasons for cutting out
  - **Doesn't have to be morally justifiable, just logically connected to disinheritance**
- Taxes: could be tax implications for giving/not giving (spouse gets tax free but kids would have to pay taxes)
- In Terrorem Conditions: clause that says if any one brings a variation claim will be disinherited is void for public policy – **if allowed by statute, cannot take the right away in the will**

→If provision is adequate, NOT VARIATION
→if provision is not adequate, continue to determine variation

Step 5: what should the variation be?

- **S.60** – court has discretion to determine what is "just, adequate and equitable" in circumstances
- **Only assets in BC** are included for variation
  - Inter vivos gifts are not included
- All valid claims should be satisfied if size of estate permits (Tataryn)
- Shareholder agreements in companies can restrict bequests in wills (Harvey, Frye)
  - Can give shares in the will but the company can refuse to transfer them
- Property rights from prenups or other agreements may have to be enforced
  - Court may decide to disturb these depending on the case (Tataryn)

Step 8: Are there any Problems Distributing?

Did anyone Disclaim a Gift?

- **B can refuse to accept a gift orally, in writing or by conduct**
  - If more than one gift, can refuse one but accept another as long as they aren't linked

- **Result of Disclaiming:** gift lapses
  - If specific, falls to residue
  - If residue, falls on intestacy
  - If gift given through intestacy is disclaimed, amount added to shares of next of kin

DOES ACCELERATION APPLY?

- **If a gift is disclaimed, it will immediately pass to the next B (often children of B)**

- **Presumption: gift will accelerate on disclaimer** unless contrary intention in will states that it will not accelerate (Estate of Creighton, Estate of Brannan)

- Factors to consider when applying acceleration (Estate of Creighton):
  - Remarriage or other distribution clauses
  - Encroachment on capital allowed in trust?
  - Any reference to succeeding generations?
  - Value of estate?

Is there not enough Property to pay debts or gifts?

Process: order of distribution of estate
1. Debts and liabilities of estate
2. Gifts (specific order below)

- Situations:
  - **Estate is insolvent** – not enough property to satisfy debts
  - **Abatement** – enough to satisfy debts but not enough to satisfy all gifts

INSOLVENT ESTATES

- **Estate is Insolvent – not enough money to pay all debts and** B's get nothing

- **S.170** – creditors are paid in specific order of priority

1. **Secured Creditors:**
   a. Funeral Expenses
   b. Personal Reps fee – Trustee Act states they gets up to 5% for acting
   c. Legal fees incurred in administration of estate (change from old act – lawyers used to be paid first)
   d. Wages of EE of deceased for 180 days before death
   e. Spousal or child support from past year
   f. Municipal taxes
   g. 90 days of unpaid rent – cap on rent
   h. Debts under Workers Comp
   i. Income Tax to government of Canada
   j. All other claims – put notice in paper and then all claims are paid within 31 days
      i. If after 31 days, could still be paid

- General debts like credit cards are paid last – only get what is owed on date of death
  - Not entitled to interest up to granting of probate

ABATEMENT

- **Estate can pay debts but not all the gifts**
- **S.50** – order for abatement – some gifts will abate
    - Pro rate reduction of amounts of or quantities of testamentary gifts (Celantano)
    - No case law on statute yet

Common law order for abatement

- **Step 1:** Determine what type of gift each is (Celantano)
    - **General:** direction to give something from general assets of the estate
    - **Specific:** specific gift of personal property that can only be satisfied by delivery of that particular thing – **usually "my" in front of item**
    - **Demonstrative:** gift of specified amount/quantity to primarily come out of a particular asset/fund
    - **Residuary:** remainder of estate not otherwise disposed of, the rest of the estate

- **Step 2:** Set out the order the gifts will abate – **s.50(5)**

    - Pay debts in the following order: (Celantano)
        1. **Residuary personalty and real property:** Pay debts that are attached to property out of the property
            a. Mortgage on property left to someone, pay mortgage out of value of property
        2. Pay out of residue or property on intestacy
        3. Pay out of general legacies and demonstrative legacies
        4. Pay out of specific legacies – sell all specifics equally to cover remaining debt so all specifics lose equally

        Pay gifts in the following order:
        1. **Specific gifts paid first** – if there is still property left, then continue
        2. Pay General and demonstrative legacies
        3. Pay out gifts of residue and property on intestacy if anything remaining
        4. Gift property that is specifically charged with a debt is paid last

- **Note:** best to devise in percentages instead of fractions so that everyone gets something of whatever is left