**PLEASE NOTE:**
**As an enhancement to the materials we have created, where possible, external web links to those cases and legislation that were available on the CanLII website. Please note, however, that not all links are reliable. The incorrect links appear to be especially problematic for the statutes, especially if the complete citation for the statute is not present at that exact spot in the materials. If you use the web links, please always double-check to ensure that you are being directed to the correct place.**
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NOVA SCOTIA
BARRISTERS' SOCIETY

# WILLS AND PROBATE

**March 2020**

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- *Guardianship Act*, SNS 2002, c 8 as amended
- *Human Organ and Tissue Donation Act*, SNS 2019, c 6 (not proclaimed as of April 4, 2020). If proclaimed, will repeal the *Human Tissue Gift Act*, RSNS 1989, c 215 as amended). Note – the *Human Organ and Tissue Donation Act*, SNS 2010, c.63 was never proclaimed.
- *Variation of Trusts Act*, RSNS 1989, c 486 as amended
- *Adult Capacity and Decision Making Act*, SNS 2017, c4, an act respecting representative decision making that came into force on December 28, 2017 and replaces the *Incompetent Persons Act*, RSNS 1989, c 218. This new piece of legislation amends certain sections of the *Trustee Act*, the *Probate Act* and the *Public Trustee Act* as well as other pieces of legislation.
- *Life Partners in Long-Term Care Act*, SNS 2020, c 3 (not proclaimed as of April 4, 2020).

There are other acts or portions thereof that have relevance to wills and probate issues not specifically listed here. You are urged to check for applicable/relevant legislation in each specific situation.

There are regulations under the *Probate Act* that should be reviewed. Also check for regulations made under other relevant statutes. Make sure to check the list of 'Regulations by Act' to see if any recent amendments are filed with the registry that have not yet been included in the consolidated version.

For estates **opened before October 1, 2001**, the "old" *Probate Act*, RSNS 1989, c 479, as amended still applies. In addition, devolution of property will be subject to the "old" *Probate Act* for wills executed before October 1, 2001, and property devolving on intestacy when the intestate dies prior to October 1, 2001 (see PROBATE AND ADMINISTRATION OF ESTATES below).

# II. WILLS

## *1. Definition*

A will is a testamentary disposition of property of the testator; it takes effect only on the death of the testator, and speaks from the date of death (*Wills Act*, RSNS 1989, c 505, s 23**)**. "Will" includes a codicil and an appointment by will or by writing in the nature of a will in exercise of a power, and also a disposition by will and testament or devise of the custody and tuition of any child, and any other testamentary disposition. (*Wills Act*, s.2(f)).

Section 23 was considered in *Thimot* v *Amero Estate*, 2019 NSSC 372, where the court was asked to consider whether an insurance policy that – at the time the will was made – was in place to secure a truck loan. The loan was paid out when the testator died and the testator's common-law spouse received ownership of the unencumbered truck (which she then sold). The estate claimed reimbursement of the full amount of the insurance payout, relying in part on section 23 (and the fact the loan was outstanding at the time of death). The court rejected the argument, finding that s.23 does not offer guidance on contingent bequests (which it found this one to be).

## *2. Requirements for a valid will*

**Age of the testator**
The testator must be of the age of majority unless married. (*Wills Act*, s. 4(1)).

**Testamentary intent**
The will

- must be intended to have a disposing effect;
- must not be intended to take effect until after death and must be totally dependent on death for its operation;
- must be intended to be revocable, and in fact be revocable; and
- must be executed in accordance with the *Wills Act*. (Where the power of revocation is retained, the document was held to be testamentary in nature, but not executed in accordance with the Act. See *Re MacCulloch Estate* (1981), 44 NSR (2d) 666 at 679 (SC (TD)).

**Testamentary capacity**
The testator must be of sound and disposing mind. The testator must be:

- able to comprehend what the testator is doing;
- able to comprehend and recollect the testator's property;
- able to remember the persons the testator might be expected to benefit;
- able to comprehend the nature of what the testator is giving to each -beneficiary; and
- able to comprehend the nature of claims of others the testator is excluding. (*Murphy* v. *Lamphier* (1914), 31 OLR 287 (Ont HC), affirmed in 20 DLR 906 (Ont CA)).

> The standard for testamentary capacity is the highest test of competency. (See ***Challenges to the Will – Testamentary Capacity*** below.)

**Formalities**
The formalities required for a valid will are set out in the ***Wills Act.***

**EITHER the will must be formally executed:**

- must be in writing (s.6).
- must be signed by the testator or by someone else at the direction of and in the presence of the testator at the end or foot of document (s.6(a)); see also s.7, which outlines other situations where the signature may appear elsewhere; however, nothing underneath or following the signature or inserted after the signature is a part of the will. (Signature in attestation clause within s.7 (***Cook*** v. ***Nova Scotia*** (1982), 53 NSR (2d) 87 (SC(TD)); where the testator signed before writing in provisions in printed will form, invalid (*Kennedy* v. *MacEachern* (1978), 27 NSR (2d) 329 (SCAD)).
- must have two witnesses (s.6(b)(2)).

The witnesses must see the testator sign (or acknowledge signature) and see each other sign, and the testator must see them sign at the same time (See *Hubley* v. *Cox Estate* (1999), 181 NSR (2d) 1 (SC)). A bequest to a witness or the spouse of a witness is void (s. 12 ***Wills Act***) unless there are two other competent witnesses to prove the will. A creditor (s.13) or an executor (s.14) may be a witness. Spouse of executor may be a witness: *Re Kyte Estate* (1998), 169 NSR (2d) 192 (Probate Ct). There is a presumption of due execution once the will is determined to have survived the testator (*Cole et al.* v. *Cole Estate* (1994), 131 NSR (2d) 296 (CA), *Re Kumar Estate*, 2002 NSSC 65, 202 NSR (2d) 307 (Probate Ct.)).

Where the beneficiary in a will subsequently is a witness to a codicil, or the beneficiary named in a codicil has witnessed the will, the court will either apply or not apply the doctrine of republication to save the gift to the attesting beneficiary, so long as there is one document that the beneficiary did not witness. (*Gurney* v. *Gurney* (1855), 61 ER 882; *Re Trotter*, (1899) 1 Ch 764).

**OR meet the holograph will requirements:**

- must be wholly in the testator's own handwriting; and
- must be signed by the testator

(s. 6(2) *Wills Act* – Holograph Wills)

The leading case on holograph wills is *Re Gray, Estate*, [1958] SCR 392. This was followed in Nova Scotia. See *Casavechia Estate (Re)*, 2014 NSSC 73, affirmed on appeal: *Casavechia* v. *Noseworthy*, 2015 NSCA 56 where the Court considered a handwritten letter and whether it was a valid codicil to a will.

**OR the will must meet a substantial compliance standard:**

Pursuant to s. 8A of the *Wills Act*, a court may determine that a will that otherwise fails to satisfy the formal requirements set out in the Act is effective if it is satisfied that the will "embodies the testamentary intentions of the deceased" or embodies "the intention of the deceased to revoke, alter or revive a will of the deceased or the testamentary intentions of the deceased embodied in a document other than a will". This is sometimes referred to as a "substantial compliance" provision. These provisions were considered and found not to apply retroactively to a will prepared before these provisions were proclaimed, August 19, 2008. See *MacDonald* v. *MacDonald Estate*, 2009 NSSC 323. Also see *Robitaille* v. *Robitaille Estate*, 2011 NSSC 203 where a revised will met s. 8A requirements even though it was not witnessed at the time of the testator's signature, and *Thompson* v. *McKenney Estate*, 2011 NSSC 488 where a note written by a daughter and signed by deceased in hospital after he suffered a stroke was held not to be a valid will. Also see *Hayward* v. *Hayward*, 2011 NSCA 118

where the Court interpreted a separation agreement to see if it was a writing that embodied the intentions of the testator. Also see *Sweeney Cunningham Estate* v. *Sweeney*, 2013 NSSC 299 considering a will witnessed by only one witness instead of two and *Komonen* v. *Fong*, 2011 NSSC 315, where handwritten notes of a deceased were found on an unsigned printed will form.

**Codicils**
The definition of "Will" includes a codicil, and therefore a codicil must meet the same requirements as a will. A codicil is an instrument executed by a testator for adding to, altering, explaining or confirming a will previously made by the testator. The codicil must show an intention to republish an existing will, or may revive a revoked will if the codicil shows an intention to do so. See ***Revocation*** and ***Republication and Revival*** below. Reference to the date of a previous will (erroneously referred to as Last Will) is not sufficient to revive an earlier will by codicil (*Re DeBaie's Will* (1977), 22 NSR (2d) 326 (Probate Ct)).

**Incorporation by reference**
An unexecuted written document separate from the will may be considered part of the will if it is found to have been in existence at the time of the execution of the will, if the testator has stated in the will that the testator wishes to incorporate the document. The reference in the will must be sufficient to identify the document. The document cannot be one made later by the testator, unless referred to in a later codicil once it is already in existence. See *Re Tucker Estate* (1993), 126 NSR (2d) 201 (Probate Ct).

For a recent discussion on whether handwritten memos can be considered testamentary in nature, see Jones Estate (Re), 2017 NSSC 300, where the court was asked to consider four handwritten memos (two made before the testator's last will and two made after) and determine whether they were testamentary instruments and admissible to probate pursuant to s. 8A of the *Wills Act*.

## *3. Other kinds of wills*

**Conditional**
The testator may make a will intended to have effect only on the happening of some contingency or effective only during the continuance of some situation that is temporary. If the condition has not occurred or the temporary situation has changed or passes, probate will not be granted. (In *Re Govier*, (1950) P. 237; In *the Goods of Spratt*, (1897) P. 28.)

**Made pursuant to a contract**
A contract to make a will may exist where the testator agreed to leave property to another in return for performance of certain actions, and the person performs those actions, in reliance on the contact. (See CLAIMS.)

**Mutual wills**
Wills that dispose of property belonging to two (or more) testators who agree to pool their mutual property and provide for its disposal according to an agreed scheme. Usually there is an agreement not to alter or revoke the wills without the consent of the other, which may result in a constructive trust. Mutual wills are revocable except where there is an express or implied agreement against revocation, which is not to be inferred from mere existence of mutual wills or conferring mutual benefits. (*Harvey* v. *Powell Estate* (1988), 86 NSR (2d) 191 (SC (TD)) and *Hand Estate (Re)*, 2010 NSSC 297.)

**Joint will**
One will is executed by two or more persons. See *Pratt et.al.* v. *Johnson et.al.*, [1959] SCR 102. Joint wills are not commonly used.

**Nuncupative/oral wills**
Only valid for soldiers, including air force, naval personnel if on "active military service", or mariner or seaman at sea. (s. 9 ***Wills Act***) Formalities are not required. The former requirement of "actual military service" is more restrictive than "active service" (*Re Wheatley Estate* (1984), 95 NSR (2d) 66 (Probate Ct)).

**Holograph wills**
Under s. 6(1) of the ***Wills Act*** (amended), a testamentary document entirely in the handwriting of the testator and signed by the testator is valid. This is known as a holograph will.

## *4. Revocation*

**By operation of law**
A will is revoked by the subsequent marriage of the testator **unless:**

- will states it is made in contemplation of the specific marriage and that it is to be effective after the marriage;
- spouse elects to take benefits under the will within one (1) year of death of the testator; or
- will is made in exercise of power of appointment, when property appointed would not in default of appointment pass to heir, personal representative, or persons entitled as next of kin. (s. 17 ***Wills Act***) (See also *Davies* v. *Collins*, 2010 NSSC 457)

**Effect of divorce or declaration of nullity on a will**
Pursuant to s. 19A of the ***Wills Act***, where the testator's marriage is terminated after the testator makes a will by a judgment absolute of divorce or is declared a nullity, each of (a) a devise or bequest of a beneficial interest in property to the testator's former spouse; (b) an appointment of the testator's former spouse as executor or trustee; and (c) the conferring of a general or special power of appointment on the testator's former spouse is revoked, **unless a contrary intention appears by the will or a separation agreement or marriage contract,** and the will is construed as if the former spouse predeceased the testator. This amendment to the Act was proclaimed in force August 18, 2008. The Supreme Court of Nova Scotia held in *Thibault Estate (Re)*, 2009 NSSC 4 that s. 19A is to be read prospectively. The reasoning in *Thibault Estate (Re)* was also adopted in *Hayward Estate (Re)*, 2010 NSSC 6, but Hayward was reversed on appeal – see *Hayward* v. *Hayward*, 2011 NSCA 118. The Court of Appeal in Hayward applied s. 8A and s. 19A retrospectively.

In *Morrell Estate* v. *Robinson*, 2009 NSCA 127, the Court of Appeal confirmed the trial judge's decision (2008 NSSC 295) that a will made before the separation and divorce of the parties was not revoked as the words in the separation agreement did not clearly demonstrate a contrary intention.

A will is **not revoked** by change of domicile of the testator. (s. 16)

A will is **not revoked** by alteration in circumstances. (s.18)

A will is **not revoked** by a marital separation.

**Act of the testator**
The testator may revoke a will by:

- making and validly executing a later will;
- written instrument declaring intention to revoke executed in same manner as a will;

- destruction by burning, tearing or otherwise by the testator or person in the testator's presence and by the testator's direction, with the intention to revoke; or
- partial revocation (where only a part of the will is revoked; see *Re Keating* (1981), 46 NSR (2d) 550 (Probate Ct)), where the testator unsuccessfully attempted to revoke dispositive portion of will by excising same).
  (s. 19 ***Wills Act***)

See *Hubley* v. *Cox Estate*, *supra*.

The revocation of a will also revokes a codicil to the will.

**Dependent relative revocation**
Where the testator destroys the will with intention to substitute a new will, and the intention is to revoke the first will only on condition that second will is effective; if second will is not effective, the first will stands. Where the testator believes that destruction of the new will, or revocation by an instrument that does not clearly show the intention of reviving the former will, has the effect of reviving the former will, the new will stands. (*Re Ott*, [1972] 2 OR 5; *Re Colling*, [1972] 3 All ER 729, *Re Little Estate* (1998), 169 NSR (2d) 113 (Probate Ct)) Doctrine may also apply when new document never made (*Dixon* v. *Treasury Solicitor*, (1905) P. 42; *Re Bolton Estate* (1961), 35 WWR 621 (Man CA)).

## *5. Republication and revival*

***Republication*** occurs when the testator either re-executes the will for the express purpose of republishing it, or makes a codicil from which it can be inferred that the testator wishes to have it considered as part of the will. If later document is not called a codicil to the will, then the will is not republished unless the latter document refers to the existing will.

***Revival*** occurs when the testator executes a document intended to revive a revoked will. The will may only be revived by re-execution of the will or by execution of a codicil showing on the face of it the intention to revive the will (s. 21 ***Wills Act***). The testator must do more than state the codicil is a codicil to the revoked will; stating it confirms the revoked will may be sufficient. (See ***Re DeBaie's Will***, *supra*, and *Re MacKinlay Estate* (1993), 122 NSR (2d) 354 (CA), reversing 119 NSR (2d) 345 (Probate Ct) where a codicil is executed after the will has been revoked by marriage; the testator's belief that the will is still valid is not a clear intention to revive.)

## *6. Alteration of will*

No alteration (crossing out, cutting out, interlineation, etc.) is valid except to the extent the words before the alteration are not apparent, unless the alteration is executed with same formalities as will at the time of alteration, or with a Memorandum at the end that is also executed with the same formalities (s. 20 ***Wills Act***). Generally preferable to execute new will or codicil. (See ***Re Jackson's Estate*** (1991), 106 NSR (2d) 55 (Probate Ct), where alterations appeared on face and notes on backer initialled by the testator and witnesses were included in probated will; see *Re Murphy Estate* (1998), 170 NSR (2d) 1 (Probate Ct)).

## *7. Problem areas*

**Ademption**
Ademption is the failure of a gift of real or personal property to be distributed according to the provisions of a deceased's will because the property no longer belongs to the testator or cannot be found. It occurs when the specific property willed is not found among the testator's assets at death because it has been destroyed (*Re Phillips Estate* (1995), 140 NSR (2d) 213 (SC)), or the testator has parted with it (*Re Palmer* (1985), 69 NSR (2d) 384 (SC (TD)); *Re Fenton* (1977), 26 NSR (2d) 662 (SC (TD)), or the specific property ceases to conform to the description by which it is given, unless otherwise provided for in the will.

General legacies that do not specifically identify the thing bequeathed (often a pecuniary legacy) are not subject to the rule of ademption. A demonstrative legacy is similar to a general legacy except the will points to a fund from which the legacy is to be paid. A specific legacy is subject to ademption.
A specific devise of land is subject to ademption, and a general devise is not.

A legacy is a gift by will, usually of money or personal property. A devise is a disposition of real property (*i.e.*, land) by a will.

For an interesting discussion of ademption, see *Re Clements Estate*, 2007 NSSC 168.

**Abatement**
Abatement of debts occurs when the testator's debts cannot be satisfied by the residuary estate. Residuary personalty and realty are first liable for payment of debts, followed by general legacies that abate *pro rata*, specific and demonstrative legacies next, and finally devises. See *Re Legge Estate*, 2001 NSSC 156 (Probate Ct).

**Lapse**
Describes situation where the donee of gift has predeceased the testator.

A failed devise of real property falls into the residue of the estate (s. 24 ***Wills Act***). Also applies to personal property. If there is no residuary clause in the will, then the property passes as on intestacy. Anti-lapse provision for bequest or devise to child or issue of the testator allows the bequest to pass to issue (s. 31 ***Wills Act***). Will may express contrary intention that will govern.

Common law exceptions to lapse are when gift is to persons as joint tenants or is a gift to a class, as long as there is one surviving joint tenant or member of class, in the absence of a contrary intention in will. See *Mitchell Estate* v. *Mitchell Estate*, 2003 NSSC 223; affirmed on appeal at 2004 NSCA 149 re class gift. See also *Re Saunders Estate*, 2005 NSSC 216.

See SATISFACTION below re gifts to charitable institution.

Gift to fulfil some moral or legal obligation **may** not lapse but pass to the estate of deceased donee.

Gift may fail because it is
- void as illegal;
- contrary to public policy;

- contrary to the rule against perpetuities (abolished in Nova Scotia as of July 23, 2013 when the *Perpetuities Act*, SNS 2011, c 42 was proclaimed in force; the common law rule may continue to apply in limited circumstances arising before the Act came into force – see subsection 4(2)); or
- void for uncertainty.

For a discussion about what constitutes "contrary to public policy", see *Jollimore Estate* v. *Nova Scotia (Public Archives)*, 2011 NSSC 218. In this case the son killed his mother before killing himself, and the Court found it was contrary to public policy to allow the son's estate to benefit.

**Class gifts**

Property given as a class gift is to be shared by all members of the class (group) whenever born. The group includes all possible members. In general, members of the group must bear a certain relationship to the testator or some other person. The death of one member of the class does not result in lapse. If class gift is void for uncertainty, the class too wide for its members to be ascertained, or no members are alive at the testator's death, the gift fails and passes on intestacy (rather than fall into residue).

If the testator does not state when class is to close, rules of convenience apply. If any members of the class exist at the testator's death, after-born members are excluded (*Hill* v. *Chapman* (1791), 30 ER 408). If gift is vested but payment postponed, this rule applies. If gift to class follows life estate or trust to accumulate, all members born at death of the testator and those coming into being before death of life tenant or end of accumulation period share gift, and those born after death of life tenant or end of accumulation period are excluded. If there is a class gift after a life interest to one person, and the class is those who would inherit on the testator's intestacy, or the testator's next of kin or nearest relatives, class closes at the testator's death, not life tenant's death.

If postponement of class gift for reason personal to donees (*e.g.*, marriage or attainment of certain age), class closes when one member is entitled to his or her share, or if member is entitled at death of the testator, closes at death. If none have met condition, all those born at the testator's death, and those born up to first becoming entitled share gift. This rule does not apply if there is an inconsistent provision in will, or if there is a direction to allow maintenance or advancement out of vested shares, or to gifts of income, or where gift would otherwise be void, or if interest is contingent or subject to divestment.

Where gifts of a fixed sum go to each member of a class, the class closes at the testator's death.

For a Nova Scotia case considering a class gift, see *Mitchell Estate (Re)* at 2003 NSSC 223, upheld on appeal at 2004 NSCA 149.

**Postponed gifts and vesting**

A vested gift is one that is absolute, and not contingent or conditional.

The question is whether the interest given is a present vested interest, the enjoyment of which is postponed, or whether it is contingent (*i.e.*, subject to an event that may never occur). A postponed vested interest may also be subject to a condition subsequent, which may result in divestment.

There is a presumption in favour of vesting, particularly in relation to devises, unless there is a clear *condition precedent*. If a postponement is for the convenience of the testator's estate or there is a prior interest in the will, the gift is ***prima facie*** vested (*Browne* v. *Moody*, [1936] AC 635 (PC)). If the reason for the postponement is personal to the donee, gift is ***prima facie*** contingent. (*Re Francis*, [1905] 2 Ch 295).

See also *Price Estate* v. *Mann*, 2001 NSSC 16.

**Encumbrances**
Unless a contrary intention appears in the will, the beneficiary takes property free and clear of any existing encumbrances (where general direction to pay debts). (*Re Brumwell* (1984), 65 NSR (2d) 293 (CA) affirming 61 NSR (2d) 316 (Probate Ct)).

**Satisfaction**
There is a presumption that a legacy is in satisfaction of a debt. Where there is a direction to pay debts, the presumption is rebutted and becomes a matter of construction. (*Re Trider* (1978), 41 NSR (2d) 663 (Probate Ct)).

**Advancement**
Sometimes called a presumption against "double portions". If **after** making a provision for a child in the will, the testator makes a substantial and similar *inter vivos* gift to the same child, the presumption is that it is an advance on the child's share under the will. The presumption is easily rebutted. A principal justification for the presumption of advancement is parental obligation to support dependent children and the Supreme Court of Canada has held that, as such, the presumption does not apply in respect of *inter vivos* transfers to adult children (*Pecore* v. *Pecore*, 2007 SCC 17; *Madsen Estate* v. *Saylor*, 2007 SCC 18). For a detailed discussion of the circumstances in which the presumption of advancement may apply in the context of joint accounts see ***Pecore*** v. ***Pecore,*** *supra* and ***Madsen Estate*** v. ***Saylor***, *supra.* See also ADVANCEMENT re advancement on intestacy.

**Cy-près doctrine**
Where there is a gift to a charitable institution that is not in existence at the testator's death, the gift will either lapse, or come under the *cy-près* doctrine. This depends on whether the gift is construed as a gift to the particular institution or whether there is a general charitable intention shown in the Will. **See *Re Chisholm*** (1977), 29 NSR (2d) 173 (SC (TD)) and *Fort Sackville Foundation* v. *Darby Estate*, 2010 NSSC 27 and *Pictou County Genealogy & Heritage Society* v. *Darby Estate*, 2011 NSSC 271. The doctrine may also be applied in cases of uncertainty to identify the donee (*Re Loggie Estate*, [1954] SCR 645). Where the purpose of the gift is not impossible or impracticable to fulfil, cannot use the doctrine to change the purpose of the gift where a charitable organization is in existence (*Rector, Wardens and Vestry of the Parish of Christ Church* v. *Moseley Estate* (1984), 66 NSR (2d) 132 (SC (TD)).

**Disclaimer**
Where the beneficiary formally disclaims a gift in will, the disclaimed property likely falls into the residue, in the absence of a contrary direction. If the beneficiary is a member of a class, his share falls to the other members of the class. If the beneficiary has a life interest, the disclaimer results in an acceleration of the subsequent interest, unless contrary intention appears in will. (*Re Roberts Estate* (1993), 121 NSR (2d) 58 (SC (TD)) (*Skerrett* v. *Bigelow Estate*, 2001 NSSC 116).

**Slayer**
A person criminally responsible for the testator's death is not entitled to any benefit under the will. See *Re Peacock*, [1957] 1 Ch 310. Those claiming through the criminal are not entitled to any benefit. (*Re Charlton*, [1969] 1 OR 706).

However, see *McNeil/Maidment* v. *Forbes*, 2020 NSSC 16, wherein the court confirmed there is a distinction between criminal responsibility and a finding of not criminally responsible. A person who

has been found not criminally responsible for a testator's death is not disqualified from receiving the benefit of life insurance proceeds being paid out as a result of that death.

**Commorientes legislation (*Survivorship Act*)**
When two or more persons die in a common disaster, either at the same time or in circumstances rendering it uncertain which of them survived the other(s), by statute, death is presumed to have occurred in order of seniority (s.3(1) ***Survivorship Act***). For insurance purposes, and for the purposes of the anti-lapse provision of the ***Wills Act***, the beneficiary is deemed to have survived the testator in such circumstances. The will may modify statutory rules.

**Joint accounts or ownership**
In a situation where a testator before his or her death gratuitously transfers money or other assets into a joint account or other form of joint ownership with another (often an adult child of the testator), the question sometimes becomes whether the transferee is exclusively entitled to the remaining money or assets in the account upon the death of the testator as a result of operation of a right of survivorship or whether the remaining money or assets are held by the transferee for the benefit of the estate to be distributed according to the will. This issue was considered by the Supreme Court of Canada in ***Pecore*** v. ***Pecore***, *supra*, and ***Madsen Estate*** v. ***Saylor***, *supra*. In both decisions, the Court held that a presumption of resulting trust applies with respect to such a gratuitous transfer. The transferee is charged with the burden of rebutting the presumption of resulting trust by showing that the testator intended an *inter vivos* gift of the assets in the accounts. The types of evidence that should be considered in ascertaining a transferor's intent will depend on the facts of each case. The evidence considered by a court may include the wording used in the bank documents, the control and use of the funds in the account, the granting of a power of attorney, the tax treatment of the joint account, and evidence subsequent to the transfer if such evidence is relevant to the transferor's intention at the time of transfer. It is important to discuss such transfers with testators and to document what was intended. The weight to be placed on a particular piece of evidence in determining intent is left to the discretion of the trial judge.

See *Finlayson Estate (Re)*, 2008 NSSC 120, where the Nova Scotia Supreme Court considered this issue in relation to corporate shares. For a recent discussion on the presumption of a resulting trust (in the context of a joint bank account held by the testator and an adult child accused of having exerted undue influence over the testator) see *Patterson Estate (Re)*, 2017 NSSC 221.

**Contrary to public policy**
Conditions in a will may be void if contrary to public policy. See *Peach Estate (Re)*, 2009 NSSC 383 where a direction in a will that property be sold to an Anglican or a Presbyterian was not upheld. See *Jollimore Estate* v. *Nova Scotia (Public Archives)*, 2012 NSSC 8, where a son who killed his mother could not benefit from her estate.

## *8. Other dispositions*

**Power of appointment**
A power of appointment is a power of authority contrived by one person by deed or will upon another to appoint or select and nominate the person(s) who are to receive and enjoy something at a future date.

A power of appointment must be executed in same manner as the will (see FORMALITIES above). It is not revoked by marriage if the property appointed would not, in default of appointment, pass to the heir, the personal representative, or persons entitled as next of kin. (See *Ferguson Estate* v. *MacLean*, 2001 NSSC 154).

**Assets passing outside the will**
There are a number of assets that pass outside the will and generally do not form the subject of testamentary disposition. These include:

- Joint property with right of survivorship – property passes to survivor; subject to rules re advancement in certain cases. See *Comeau* v. *Gregoire*, 2005 NSCA 135, where the Court cautioned against automatically considering a joint bank account passing as a gift to a survivor and see 'Joint accounts' section above.
- Life insurance proceeds where named the beneficiary – if the beneficiary predeceases and no alternate beneficiary is named, the proceeds fall into the estate.
- *Inter vivos* trusts – the testator has already disposed of property through the terms of the trust created upon its settlement or a subsequent amendment. A valid express trust requires the existence of the three certainties, namely certainty of intention, certainty of subject and certainty of object.
- *Donatio mortis causa* – gift made by the testator while living in contemplation of death from an existing peril, and conditional on death; it is revocable; will lapse if the beneficiary predeceases the testator; delivery is essential; applies only to personal property; takes effect before death and immediately, though conditionally, on delivery. (See *Re Murphy Estate* (1998), 169 NSR (2d) 284 (SC)).
- Beneficiary designation – relating to death benefits, pension plans, tax-free savings accounts and RRSPs in accordance with *Beneficiaries Designation Act* – as provided for in plan, or may be designated in will. (See *Bruhm* v. *Feindel et al.* (1999), 175 NSR (2d) 173 (SC) and *Mulrooney Estate (Re)*, 2016 NSSC 352).

## *9. Construction and interpretation*

Terms have been used interchangeably in some cases. Interpretation is ascertaining the subjective meaning from the words of the will in light of the surrounding circumstances. Construction occurs when interpretation fails, and rules of presumed intent and meaning must be applied. (*Re Adams Will* (1990), 102 NSR (2d) 98 (Probate Ct)).

A more recent discussion can be found in *Maskell Estate (Re)*, 2017 NSSC 305, where the Court was asked to interpret the (intended) scope of a testator's gift.

**Intent of the testator**
First to be determined by the words used in the will. (*MacDonald* v. *Brown Estate* (1995), 139 NSR (2d) 252 (SC); *Re Carter Estate* (1991), 109 NSR (2d) 384 (SC (TD)); *Re Phillips Estate*, *supra*; *Re O'Brien: Dalhousie University* v. *City of Dartmouth and Dartmouth Hospital Commission* (1978), 25 NSR (2d) 262 (CA); *D'Aubin Estate* v. *D'Aubin et al.* (1981), 46 NSR (2d) 481 (SC). If ambiguity exists, the court can look at the surrounding circumstances to see what in particular the testator meant. (*Re Adams Will*, *supra*, *Re Harnish Estate* (1978), 36 NSR (2d) 607 (SC (TD))). (*Re White's Will*, (1976), 23 NSR (2d) 546 (SC (TD))).

**Extrinsic evidence**
If it is necessary to look at the surrounding circumstances, direct evidence of the testator's intention when making of the will is not admissible, except in the case of equivocation. (***Re Adams Will***, *supra*). Indirect or circumstantial evidence is admitted (*Re Bergmann-Porter Estate* (1991), 110 NSR (2d) 401 (SC (TD))). Indirect evidence must be of circumstances known to the testator at time of the making of

the will; the testator is presumed to be familiar with surrounding circumstances. See *Re Murray Estate*, 2001 NSCA 25.

For a recent discussion on the applicability of extrinsic evidence as well as the armchair rule (below) see ***Gates Estate (Re)***, 2018 NSSC 266.

**"Armchair rule"**
Ordinary meaning of words in subjective approach is not the objective meaning or dictionary meaning; it is the meaning the words had for the testator. (*Marks* v. *Marks*, [1908] 40 SCR 210; *Bergmann-Porter* v. *Central Guaranty Trust Co*. (1991), 110 NSR (2d) 401 (SC (TD))). In *Murray Estate (Re), supra*, the Nova Scotia Court of Appeal, citing *Feeney's Canadian Law of Wills*, 4th ed, described the armchair approach in these terms: "[t]he court puts itself in the position of the testator at the point when he or she made his or her will, and, from that vantage point, reads the will, and construes it, in light of the surrounding facts and circumstances." See also ***Re Legge***, *supra*, and see *Peach Estate*, 2011 NSSC 74, where the testator gifted the residue of the estate to Glace Bay General Hospital, or if the hospital ceased to exist, to the Salvation Army. When the testator died, a new hospital had been built and was owned by the District Health Authority. Both the Health Authority and the Salvation Army claimed entitlement. The Court looked at the ordinary meaning of the testator's words, and held the Health Authority was the rightful beneficiary.

**Presumptions**
There are numerous presumptions that may be applied by court in construing the will, which have been reviewed in various sections of this guide. A partial list:

- presumption of legacy in satisfaction of debt;
- presumption against disinheritance;
- presumption against intestacy;
- presumption of joint tenancy;
- presumption of gift to personal representative in lieu of compensation;
- presumption of early vesting – a comprehensive review of this presumption and the rule in ***Browne*** v. ***Moody*** can be found in *Re Campbell Estate*, 2005 BCSC 1561; and
- presumption of advancement.

**Legal effect of words**
Certain words are given legal meaning by statute, *e.g.*, child, issue, spouse.

**After-acquired property**
Unless a contrary intention appears, the will is to be construed to include property acquired after making the will. See issue of ademption (ADEMPTION).

## *10. Challenges to the will*

**Testamentary capacity**
Age of the testator (see AGE OF TESTATOR above)

Mental capacity (also see TESTAMENTARY INTENT above)

Testamentary capacity is of the highest standard. The testator must

- understand the nature of the act and its effects;
- understand the extent of the testator's property to be disposed;
- comprehend and appreciate the nature of just claims to estate; and
- not suffer a "disorder of the mind" (*Banks* v. *Goodfellow,* [1870] 5 QB 549).

Neither rational responses nor repeating a tutored formula is sufficient (*Leger* v. *Poirier*, [1944] SCR 152). If a will is changing an existing will, the testator must have the ability to revoke and sound reasons for revocation. Where the testator is terminally ill, weak and confused, an apparent verbal agreement is not conclusive proof of capacity. (*Re Ferguson* (1980), 40 NSR (2d) 223 (Probate Ct)).

Where there is evidence of insane delusions, they must be shown to influence the testator's dispositions (*O'Neil* v. *Royal Trust Co.*, [1946] SCR 622; *Re Massey Estate* 1997 CanLII 3969 (Probate Ct). See *Re Keddy Estate*, 2002 CanLII 61123 (Probate Ct.), affirmed at 2003 NSCA 55 re lucid interval.

The burden of proof is on the proponent of the will to prove testamentary capacity on a balance of probabilities. See *Kerfont et al* v. *Fraser et al.*, 2010 NSSC 293 and also *Wittenberg Estate (Re),* 2014 NSSC 301 (appeal dismissed 2015 NSCA 79).

The two most recent decisions that canvass the issues of capacity and undue influence (discussed below) are *Patterson Estate (Re),* 2017 NSSC 221 (where undue influence was found in relation to both the new will and a joint bank account that was opened before the testator's death), and *Boutilier Estate* v. *Boutilier*, 2005 NSSC 16 (where evidence of the family's longtime solicitor was given some weight in determining there was no undue influence).

**Undue influence**

Where the testator makes a will that does not express the testator's true will or free wishes. It is not enough to show that the person has the power to influence the testator, but must show the power exercised and by means of the exercise of that power, the will has been produced. (*Craig* v. *Lamoureux* (1920), 50 DLR 10 (JCPC); *Re Marsh Estate* (1990), 99 NSR (2d) 221 (Probate Ct), aff'd. at (1991), 104 NSR (2d) 266 (CA); *Re Rideout Estate* (15 May 1995), Halifax 46951 NS Probate Court, Haliburton, J.; *Re Nickerson Estate* (1997), 155 NSR (2d) 289 (Probate Ct); *MacKenzie* v. *MacKenzie Estate* (1998), 169 NSR (2d) 224 (CA); ***Hubley*** v. ***Cox Estate***, *supra*.).

The burden of proof is on party contesting will on basis of undue influence. There is no presumption of undue influence.

**Suspicious circumstances**

Where the beneficiary of the will plays a part in the procuring of the will, in instances where testamentary capacity, undue influence, or both may be an issue. In such circumstances, the proponent of the will has a heavier burden to remove the suspicion (***Riach*** v. ***Ferris***, [1934] SCR 725; ***Hayward*** v. ***Thompson*** [1961] SCR viii , 25 DLR (2d) 545; ***MacGregor*** v. ***Ryan***, [1965] SCR 757; ***Re Collicutt Estate*** (1994), 134 NSR (2d) 137 (CA); ***MacKenzie*** v. ***MacKenzie Estate***, *supra*; ***Re Morash Estate***, 2002 NSSC 244 (Probate Ct.); ***Re Skinner Estate***, 2003 NSSC 138, 215 NSR (2d) 47 (S.C.); ***Re Ramsay Estate***, 2004 NSSC 140; ***Wamboldt*** v. ***Wamboldt Estate,*** 2010 NSSC 81); ***Nieuwland*** v. ***York Estate,*** 2011 NSSC 19.

A lawyer has a duty not to prepare a will (or any instrument) in which the lawyer or a family member of the lawyer is the beneficiary, except where the client is a family member or if the client received independent legal advice. Lawyers can be named as executor/executrix for family member clients or with the client's informed consent (Nova Scotia Barristers' Society, ***Legal Ethics Handbook***, Rule 7 (e) and (f)); ***Harmes*** v. ***Hinkson***, [1943] SCR 61, 1 DLR 625. See however ***Re Winter Estate***, 2001 NSSC 121, aff'd at 2002 NSCA 23). These Rules changed in May of 2010, so keep this in mind when reviewing the cases. Nova Scotia Barristers' Society, ***Code of Professional Conduct***, Rule 3.4-38.

**Fraud**
Where the testator signs a document knowingly represented to be other than a will or the contents of which are represented to be otherwise, the will is not valid.

***In terrorem* clause**
This is a provision in a will threatening that if any beneficiary challenges the will, that person will be cut off or given only a nominal amount instead of the full gift provided in the will. These clauses are intended to discourage beneficiaries from challenging a will. See ***Bellinger*** v. ***Fayers***, 2003 BCSC 563. If used, an *in terrorem* clause should include a gift over.

## *11. Claims*

***Quantum meruit* claims**
May be an alternative when there is no written contract but a person performs services for the deceased in reliance on a promise for provision upon death.

- Must be part performance if not in writing.
- Must prove reliance and generally benefit to deceased to the detriment of the claimant.
- Must be more than the normal assistance that family member might be expected to provide.

For a recent discussion on this issue, see *Connors* v *Mood Estate*, 2017 NSSC 89.

Evidentiary issue: s. 45 ***Evidence Act*** requires corroboration where there is a claim against a deceased. Does not need to be another witness, but other material or circumstantial evidence or fair inferences of fact. ***Samson Estate*** v. ***Tanner*** (1984), 66 NSR (2d) 119 (CA); ***Ward*** v. ***Ward's Estate*** (1985), 70 NSR (2d) 219 (Co Ct); ***Comeau*** v. ***Boudreau Estate*** (1999), 179 NSR (2d) 186 (Probate Ct); ***Re Winters*** (1999), 31 ETR (2d) 137 (Probate Ct); ***Taylor Estate*** v. ***Stiles***, 2004 NSSC 124.

***Testators' Family Maintenance Act***
Statute allows dependant to apply to court where the testator "dies without having made adequate provision ... for the proper maintenance and support of a dependant". **Does not apply to intestacies.**

- "Dependant" is widow, widower or child (s. 1(b) ***Testators' Family Maintenance Act***); child includes both natural and adopted children of the testator; also may include natural children of the testator who have been adopted by third party (***Hart*** v. ***Hart Estate*** (1993), 124 NSR (2d) 333 (SC)).

No rights for common-law or same-sex spouse unless Part II of the ***Law Reform (2000) Act*** applies (registered domestic partnership declaration).

Courts consider a wide range of factors including: (s. 4)

- the character and conduct of the dependant;
- the likelihood of any other provision of maintenance and support for the dependant;
- the relations of the dependant and the testator **at the time of death** (emphasis added);
- the financial circumstances of the dependent;
- the claims of any other dependant;
- provision made for the dependant and any other dependant by the testator when living;
- any services rendered by the dependant to the testator; and
- any money or property provided by the dependant to the testator to provide for a home, assist in a business or occupation or for maintenance or medical or hospital expenses.

The court may consider evidence of the testator's reasons, including written statements (s.4(3)).

Actual dependency does not need to be established (***Garrett*** v. ***Zwicker*** (1976), 15 NSR (2d) 118 (SC (AD)); ***Sandhu*** v. ***Sandhu Estate*** (1999), 176 NSR (2d) 67 (SC)). While the son's claim in ***Sandhu*** settled between the parties, it should be noted that the son was a 35-year-old adult with a successful career at the time of the settlement. It is proper to consider the needs of a surviving spouse (***Welsh*** v. ***McKee-Daly,*** 2014 NSSC 356).

There is a moral obligation to make a provision even where there is no close relationship with the testator (***Corkum*** v. ***Corkum*** (1976), 18 NSR (2d) 50 (SCAD); ***Jones et al.*** v. ***Jones Estate*** (1993), 125 NSR (2d) 263 (SC); ***Walker et al.*** v. ***Walker Estate*** (1998), 168 NSR (2d) 231 (SC); ***McIntyre*** v. ***McNeil Estate,*** 2010 NSSC 135). For a case where there was not a close relationship with a son who received a nominal gift only under a Will which the Court refused to interfere with, see ***Irving*** v. ***Irving Estate*** 2016 NSSC 188.

Application to be made within six months of grant of Probate, unless extension granted by the court (s. 14) (***Smith*** v. ***Hunter*** (1993), 126 NSR (2d) 254 (SC)).

In *Lawen Estate* v. *Nova Scotia (Attorney General)*, 2019 NSSC 162, the court considered the argument that s.2(b) and s.3(1) of the *Testators' Family Maintenance Act* (TFMA) should be read so as to refer only to children to whom a testator owes a legal obligation and not a moral one. The court found those sections infringe upon testamentary autonomy and violates the right to the right to liberty guaranteed by s.7 of the Charter in a way that is not justified under s.1 of the Charter. It ruled that those sections will be read down to exclude non-dependent adult children from the operation of those sections.

In *LeBlanc* v *Cushing Estate*, 2019 NSSC 360, the court found that the word "widow" in the definition of "dependant" under s. 3 of the TFMA does not include a surviving female who was in a common-law relationship with the testator at the time of his death, unless, at the time of death, they were validly registered as a domestic partnership.

***Matrimonial Property Act***

Does not apply to common-law or same-sex spouses unless Part II of the ***Law Reform (2000) Act*** applies (registered domestic partnership declaration). Applies whether or not the testator dies testate. The surviving spouse has the right to apply to court for a division of matrimonial assets into equal shares, in addition to any other rights of the surviving spouse on intestacy, under the will. (s. 12(4) ***Matrimonial Property Act***). (***Fraser*** v. ***Vincent*** (1981), 50 NSR (2d) 55 (SC (TD)); ***Re Levy*** (1981), 50 NSR (2d) 14 (SC (TD))).

The court considers: (s. 13)

- the unreasonable impoverishment by either spouse of the matrimonial assets;
- the debts and liabilities of each spouse and the circumstances in which they were incurred;
- a marriage contract or separation agreement between the parties;
- the length of cohabitation **during the marriage** (emphasis added);
- the date and manner of acquisition of the assets;
- the effect of the assumption by one spouse of "domestic responsibilities" on the ability of the other spouse to acquire, manage, maintain, operate or improve a business asset;
- the contribution by one spouse to the education or career potential of the other;
- the needs of minor children;
- the contribution by each spouse to the marriage and welfare of the family;
- whether the value of the assets appreciated substantially during the marriage;
- the proceeds of insurance or an award of damages in tort to compensate for physical injuries or the cost of future maintenance of the injured spouse;
- the value of the pension or other benefit which one party will lose the chance of acquiring; and
- taxation consequences of the division.

Application cannot be made by the estate of the surviving spouse. (***Sagar*** v. ***Bradley*** (1984), 63 NSR (2d) 386 (CA)). Application must be made within six months of Probate or Administration being granted, with provision for extension by court (s.12(3)).

Parties can contract out of the operation of the ***Matrimonial Property Act*** (ss. 23(d), 24), and the will may include an election clause (see ***Driscoll*** v. ***Driscoll's Estate*** (1988), 88 NSR (2d) 1 (SC (TD))).

**Unjust enrichment/constructive trusts/resulting trusts**
Parties may be successful in challenging the distribution of property of the deceased on the basis of constructive trust or unjust enrichment claims, which of course are not restricted to probate law. See for example ***Veinot*** v. ***Veinot Estate*** (1998), 172 NSR (2d) 111 (SC) aff'd on appeal in 172 N.S.R. (2d) 111 S431/21 (CA) re constructive trust and ***Comeau*** v. ***Boudreau Estate***, *supra*, re unjust enrichment. For a recent case where a resulting trust argument was accepted by the court in estate litigation, see ***MacRae Estate (Re)***, 2010 NSSC 157.

In *LaMorre* v. *Kershaw*, 2020 NSSC 108, the court was faced with a situation where a corollary relief judgment ordered that the former husband maintain his workplace insurance for the benefit of his children until they reached the age of majority. He changed his beneficiary designation to apportion those insurance benefits – 50 percent to go to his common-law-spouse (Ms. K) and 50 percent to be held in trust for his children (by Ms. K). After he died, Ms. K invested the children's money (for their later benefit) but did not release any to their mother to help with their ongoing living expenses. The mother and the children sued on the basis of unjust enrichment. The court found that Ms. K was unjustly enriched by the amount she received in her personal capacity, but not as a result of being designated trustee of the children's share.

## *12. Conflicts/foreign wills*

A will validly made in accordance with the law in force at the time the will is made in either of:

- the place where the will is made; or
- the testator's domicile or place of habitual residence; or
- the testator's domicile of origin.

is valid. (s. 15 ***Wills Act* as amended**).

Prior to the proclamation of the 2008 amendments to the Act, the will would only be valid with respect to personal property. The applicable law relating to moveable assets (personal property) is ***lex domicilii*** (law of the place of the person's domicile); for immoveable assets it is ***lex situs*** (law of the place where property is situated) if there is no will.

For a Nova Scotia case concerning conflict of laws and the validity and effect of marriage on a will, see ***Davis*** v. ***Collins***, 2010 NSSC 457, appeal dismissed at 2011 NSCA 79.

## *13. Negligence*

**In taking instructions**
It is incumbent on solicitors who take instructions for wills to keep notes of their instructions. It is also incumbent to review provisions of legislation which may affect the disposition of the estate such as ***Testators' Family Maintenance Act***, ***Matrimonial Property Act***. (***Kuhn*** v. ***Kuhn Estate*** (1992), 112 NSR (2d) 38 (SC(TD)). The solicitor may be liable when instructions are not followed, *e.g.*, incorrect spelling, omission of the beneficiary, omission of words that court will not read in, or use of inappropriate words. (See ***White*** v. ***Jones,*** [1993] 3 All ER 481 (Eng CA) and ***Earl*** v. ***Wilhelm***, [1998] 2 WWR 522 (Sask QB). When it appears that testamentary capacity is an issue, the solicitor should investigate (***McCardell's Estate*** v. ***Cushman (No. 2)*** (1989), 107 AR 161 (Alta QB)) or could be liable in damages. The solicitor must do more than ask perfunctory questions. (See CHALLENGES TO THE WILL above.)

**Execution**
Failure to ensure that a will is properly executed has given rise to successful actions for damages against solicitors. (***Ross*** v. ***Caunters***, [1979] 3 All ER 580; ***Whittingham*** v. ***Crease & Co.*** (1978), 3 ETR 97 (BCSC)). The solicitor must ensure that no beneficiary or spouse of the beneficiary is a witness; if the solicitor is not present at execution, the solicitor must ensure that full instructions are given on proper execution; if provided with executed will or a copy, the solicitor must check whether the witnesses may be a beneficiary or spouse of a beneficiary.

**Safekeeping**
A solicitor was liable for losses suffered by beneficiaries when he could not find the will until after the estate was distributed on terms of an earlier will. (***Hawkins*** v. ***Clayon*** (1988), 78 Aust LR 69). If a solicitor keeps wills, the solicitor must develop and maintain a system for retention, and use a safe deposit box or safe for storing the wills. If the client keeps the will, the solicitor should confirm that in writing and may want to ask the client where the client intends to store the original will.

## *14. Miscellaneous related matters*

**Personal Directives Act**

With the April 1, 2010 proclamation of the ***Personal Directives Act***, SNS 2008, c 8, Nova Scotia now has specific legislative authority to allow a person to give advance written instructions on future health care or personal care decisions

The ***Personal Directives Act*** allows an individual to appoint a substitute decision maker in the event the individual becomes incapacitated. Instructional directives (often referred to as "living wills") are also allowed, and permit an individual to set out specific instructions about what level of medical treatment the maker wants. Individuals may also address other personal care decisions such as health care, nutrition, shelter, residence, clothing, comforts, social activities and support services. Personal directives become effective when the maker becomes incapacitated. In ***B.M.*** v. ***K.S.***, 2015 NSSC 105, the Supreme Court of Nova Scotia upheld provisions in a Personal Directive whereby the maker expressed a clear wish to remain in her home as long as possible.

Personal directives must be in writing, dated, signed by the maker or on behalf of the maker at the maker's direction, and in the presence of a witness who also signs (s. 3(2)). The witness must not be the delegate, the spouse of the delegate, or the person who signs on behalf of the maker or the spouse of such person (s. 3(3)).

Where a person who lacks capacity has not made a personal directive and does not have a guardian to make such decisions, the ***Personal Directives Act*** set out statutory decision makers. See s. 14(1) – the nearest relative, as defined in the Act, is authorized to make health care, placement in a continuing care home and home care services decisions. There is a personal contact requirement in the Act applicable to nearest relatives (see s. 14(2)).

The ***Medical Consent Act*** was repealed upon the April 1, 2010 proclamation of the ***Personal Directives Act***. Any appointment of proxies and medical authorizations under the ***Medical Consent Act*** made prior to April 1, 2010 will remain valid.

***Medical Assistance in Dying Act***

When considering personal directives and a client's wishes about future health care and personal care decisions, it is important to check for legislative and case law updates. As a result of the Supreme Court of Canada decision in ***Carter*** v. ***Canada (Attorney General)***, 2015 SCC 5, changes were made to the laws in Canada relating to assisted suicide. The decision in *Carter* was suspended for 12 months and then for a further period of four months to give government time to amend its laws, and during the suspension the Court ruled that provincial courts can begin approving applications for euthanasia until the new law passes.

The new law enacted by the Parliament of Canada in response to the ***Carter*** decision is the *Medical Assistance in Dying Act* (often abbreviated as "MAID"), which was assented to on June 17, 2016. The full citation is *An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)*, *SC 2016, c 3*. A person may receive medical assistance in dying if they are over 18, have a grievous and irremediable medical condition, make a voluntary request and give informed consent. The Nova Scotia Health Authority website has information on MAID issues, including a Request for and Consent to Medical Assistance in Dying form. Check http://www.nshealth.ca/about-us/medical-assistance-dying for the most recent information.

**Enduring power of attorney**

A donor may appoint another to act in the donor's stead in the management of property and the affairs of the donor. Must be in writing, signed by the donor, and witnessed by someone other than the donee or

spouse of the donee. To be enduring, *i.e.*, surviving incapacity of the donor, must expressly state that it may be exercised during any legal incapacity of the donor. Allows the donor to exercise choice; may exclude the operation of s.59(2) of the ***Hospitals Act***, RSNS 1989, c 208; may be broad or restricted in scope; subject to court intervention. Must be recorded if used to convey or mortgage real property, so consider affidavits required for registrations. See ***Powers of Attorney Act***. A 2010 amendment to the *Power of Attorney Act* clarifies what happens if a jointly named attorney dies or is unable to act, addressing concerns the Court expressed in ***Wilson Estate (Re)***, 2008 NSSC 418. For a recent case on accounting by an attorney and views on gifts made by an attorney see ***H. (B.F.)*** v. ***H. (D.D.),*** 2010 NSSC 340. For a recent removal application, see ***Vernon*** v. ***Sutcliffe,*** 2014 NSSC 376.

An enduring power of attorney usually grants very broad powers to the attorney, so donors should be careful in the selection of an attorney and only appoint persons in whom they have the utmost trust and confidence. It is also prudent for a donor to impose record keeping and accounting obligations on an attorney.

If a person does not have an enduring power of attorney in place when he or she lacks the legal capacity to manage her or his own affairs, and adult guardianship application may be required. The applicable legislation on Nova Scotia for this is the *Adult Capacity and Decision Making Act*, SNS 2017, c4, which replaces the *Incompetent Persons Act*, RSNS 1989 c. 218 effective December 28, 2017.

***Social Assistance Act***

- ***Designation of residence (s. 7, 8 and 14 Social Assistance Act)***
  A person may designate a residence to protect as an asset of the estate, and no claim by a municipal unit providing care can be made against the asset. Proceeds of the sale of the designated residence are not protected from a claim by a municipality for care costs (***Lunenburg (Municipality)*** v. ***Bichard Estate*** (1994), 131 NSR (2d) 265 (SC)). Designation cannot be made by the personal representative. (***Lawson Estate*** v. ***Annapolis (County)*** (1994), 134 NSR (2d) 176 (SC), aff'd. (1995), 139 NSR (2d) 318 (CA)). Despite past announcements in policy changes suggesting that a residence will not be treated as an asset, a designation of residence could still be signed where possible.

- ***Eligibility for assistance***
  Must be a person in need in accordance with the appropriate regulations. Financial disclosure is required.

- ***Discretionary trusts***
  Use of *inter vivos* and testamentary trusts to enable the beneficiary who may otherwise be eligible for social assistance benefits to continue to receive same. Right to receive income must be in discretion of the personal representative/trustee, and there is no power of encroachment on capital. (See ***Roma*** v. ***Mullenger*** (1985), 67 NSR (2d) 109 (SC(TD)); ***Ontario (Ministry of Social Services)*** v. ***Henson*** (1987), 28 ETR 121, aff'd. (1989), 36 ETR 192 (Ont CA)).

# III. INTESTACY

## *1. When does an intestacy occur?*

An intestacy, governed by the ***Intestate Succession Act***, which applies to deaths after September 1, 1966, arises upon any of the following events:

- deceased dies without a will (or without a valid will);
- deceased has not fully disposed of his assets in the will (partial intestacy);
- lapse (see LAPSE above) occurs under the terms of the will (generally only with respect to residue); or
- disclaimer by beneficiaries (generally with respect to residue). (See ADVANCEMENT above.)

Section 14 of the Act applies to the second and third points above.

In *Jackson Estate* v. *Young*, 2020 NSSC 5, the court found that the *Intestate Succession Act* excludes common-law spouses - that they are not captured under the definition of "spouse" in that *Act*. While the exclusion infringes s. 15(1) of the *Charter of Rights and Freedoms* (the "Charter"), the infringement is justified under s. 1 of the *Charter*.

## *2. Devolution of estate on intestacy*

**Definitions: (s. 2 *Intestate Succession Act*)**

- "Widow, widower or spouse" **are not defined in Act**.
- "Child" **is not defined in Act**. Note, however, that a child "***en ventre sa mere***" is considered as if born and surviving the person at the person's death (s.12 ***Intestate Succession Act***). See ***Marshall Estate, Re,*** 2006 NSSC 38, where the Nova Scotia Supreme Court held that a child adopted by a third party is not entitled to inherit under the ***Intestate Succession Act***. An appeal of this decision was dismissed – ***Strong*** v. ***Marshall Estate,*** 2009 NSCA 25.
- "Issue" is **defined to include** "all lawful lineal descendants of the ancestor".

**Statutory scheme (ss. 4, 5, and 7-10 *Intestate Succession Act*)**
The scheme governs all real and personal property, and is in part based on the value of the estate. For the purposes of determining value of the estate, includes the estate both inside and outside the province (to avoid having the spouse taking full preferential share in more than one jurisdiction).

- Where net value of estate is <$50,000, all goes to the surviving spouse – s. 4(1).
- Where net value of estate is >$50,000,
  - first $50,000 to the surviving spouse – s.4(2); and
  - amount over $50,000 to the surviving spouse if no children – s.5.
- If the surviving spouse and one child, amount over $50,000 is split equally between the surviving spouse and child – s.4(5)(a).
- If the surviving spouse and more than one child, amount over $50,000 is divided one-third to spouse, remainder divided equally among children (and issue of deceased children *per stirpes*) – s.4(5)(b).
- If no surviving spouse, to issue of the person *per stirpes* – s.4(7).
- If no surviving spouse and no issue, to parents of the person, or survivor – s.7.
- If no surviving spouse, no issue and no parents, to siblings of the person and children of deceased siblings *per stirpes* – s. 8.
- If no surviving spouse, no issue, no parents, no siblings, no issue of deceased siblings, to nieces and nephews – s.9.

- If no surviving spouse, no issue, no parents, no siblings, no issue of deceased siblings, no nieces or nephews, to those in the next degree of kindred – s.10. (Note, only go to next degree/class that has at least one qualified person.)

**Escheats**
If no person takes under statutory scheme, the estate passes to the Crown; personal property under ***bona vacantia***, and real property pursuant to the ***Escheats Act,*** RSNS 1989, c 151, s 2(b). The Crown may grant re-vested property to persons with legal or moral claim (s. 21(1)(a)), which has been suggested might benefit common-law spouse or illegitimate children (see RIGHTS OF COMMON LAW SPOUSE and RIGHTS OF CHILDREN BORN OUTSIDE MARRIAGE below).

**Spouse's election**
Where the net value of the estate is >$50,000.00, and there are children or issue of deceased children of the person, the surviving spouse can elect to take the principal residence of the person and all household goods and furnishings, either as part of the preferential share, or in lieu of the preferential share. Appraisals are required, and notice of election must be filed in Registry of Deeds. The remainder of the estate is distributed in accordance with the scheme. (s. 4(2) ***Intestate Succession Act***).

**Rights of common-law spouse**
There is no provision in the ***Intestate Succession Act***, unless Part II of the ***Law Reform (2000) Act*** applies (registered domestic partnership declaration); if not, there may be rights under pension legislation, or on the basis of constructive trust.

Note the decisions in ***Re Mitchell***, 1980 unreported case found at C15/38, and ***Spears*** v. ***Levy*** (1971), 3 NSR (2d) 33 (SC(AD)) regarding the rights of separated (decree ***nisi***, but not absolute) spouses, and "spouse" in marriage found to be a nullity, respectively.

**Rights of children born outside marriage**
Prior to November 23, 1999, the ***Intestate Succession Act*** provided in Section 16 that "illegitimate children" could only inherit through their mother on intestacy. Two cases found this provision invalid (***Surette*** v. ***Harris*** (1989), 91 NSR (2d) 418 (SC(TD)) and ***Tighe*** v. ***McGillivray*** (1994), 127 NSR (2d) 313 (CA) where the Court read in the word "father"). The constitutional invalidity has been cured by the amendment of the ***Intestate Succession Act*** by Section 7 of the ***Justice Administration Amendment (1999) Act***, SNS 1999, c 8, which adds "or father" to Section 16.

**Representation**
The provision that there is no right of representation in Section 9 (for nieces and nephews) or other next of kin (s.10) means that deceased children of relatives, other than siblings, cannot inherit on intestacy where there are living members of that earlier class of relatives. (See ***Re Matthews*** (1992), 44 ETR 164 (Alta QB)).

**Half-blood**
Section 11 provides that in computing degrees of kindred, persons of half-blood relationships are treated equally with those of whole-blood relationships. (See ***Re Lainson*** (1986), 22 ETR 168 (Ont Surr Ct)). In addition, note that in determining relationships, it is relationship by blood and not by marriage that applies. (See ***Re Dunbar Estate*** (1992), 119 NSR (2d) 271 (Probate Ct))).

**Advancement**

If the presumption of advancement can be proved, a child or grandchild of the person may not take his entire share of the estate on intestacy. The onus of proof is on the person alleging there was an advancement, unless the child or grandchild has acknowledged the advancement in writing. (s. 13 ***Intestate Succession Act***). (See ***Re Evashuk*** (1983), 15 ETR 56 (Man Surr Ct)).

In ***MacInnis Estate*** v. ***MacDonald*** (1995), 142 NSR (2d) 319 (CA), in the case of a joint bank account with a child, the Court found that the presumption of advancement applied, and the child did not hold the accounts in trust for the estate.

See the discussion under **Advancement** and **Joint Accounts**, *supra*.

**Disentitlement**

Under s. 17, the surviving spouse who has left the deceased **and** is living in adultery at the time of the death of the person spouse, is disentitled from sharing in the estate. The adulterous state must be in existence at time of death, and must be more than an isolated act (see ***Re Mitchell***, *supra*). In ***Re Berringer's Estate*** (1988), 95 NSR (2d) 234 (Probate Ct), ***in obiter***, the Registrar stated that adultery must be proven, and the leaving must be proven, and proven to be without justification.

Where the heir at law has caused the death of the person, the heir is disentitled to a share. (See ***Merkley et al.*** v. ***Proctor*** (1989), 33 ETR 175 (Man QB) and ***Worobel Estate*** v. ***Worobel*** (1988), 31 ETR 290 (Ont HCJ)).

# IV. PROBATE AND ADMINISTRATION OF ESTATES

## *1. General purpose*

**Probate**
To prove that the document is the last will of the deceased.

**Administration**
The settling of the estate of the deceased (usually when there is no will).

**Vesting of property passing on death (not joint tenancy situations)**
Prior to the enactment of the "new" ***Probate Act***, in Nova Scotia, real property did not vest automatically in the personal representative. For estates opened prior to October 1, 2001, or after October 1, 2001 where the will was executed prior to that date, it passes directly to the beneficiary under the will, if not left to the personal representative on trust to transfer; on intestacy, where the deceased dies prior to October 1, 2001, it devolves to the heirs-at-law (subject to the right of the surviving spouse under s.4(2) of the ***Intestate Succession Act*** and possible claims for debts). See Sections 44(2) and (3).

Under the current ***Probate Act***, the real property vests in the personal representative (Section 45). Sections 50-55 of the Act address the manner in which the personal representative may sell, lease, mortgage or distribute the real property. The statutory provisions are subject to the terms of any will that applies.

## *2. What is subject to Probate/Administration?*

Refer to ASSETS PASSING OUTSIDE THE WILL above regarding assets that pass outside the will or do not pass on intestacy. These are not subject to Probate or Administration. See ***Bruhm*** v. ***Feindel et al.*** *supra*.

Any constitutional challenge to the validity of Probate fees (***Balders Estate*** v. ***Registrar of Probate for Halifax*** (1999), 176 NSR (2d) 262 (SC) has apparently been overcome by constituting them a tax under the ***Costs and Fees Act*** ***and*** ***Probate Act*** ***(amended)***, SNS 1999, c 1.

## *3. Jurisdiction*

There is a court of probate for each probate district in the province (s.4 ***Probate Act***) and each court has jurisdiction throughout the province (s.7).

If the deceased was resident in the province, the Probate Court for the district in which the deceased resided is the venue (s.29(a) of ***Probate Act***). Residence is to be determined in accordance with Reg. 10.

Situs of assets or the probate district where property owned by the deceased is located is the venue if the deceased did not reside in the province at the time of his death (s.29(b)).

## *4. Who applies for Probate/Administration?*

The personal representative(s) named in the will (or codicil, if applicable), or alternate personal representative if the original is deceased or renounces or is not competent or cannot be located.

Where the deceased is testate, if no personal representative is named, or is alive and willing and capable of acting, application for administration with will annexed is required.

Where there is no will, the statutory list of persons who may apply (in priority) (***Probate Act***, s.32):

- The surviving spouse or adult next of kin, or both (must be legal, not common-law spouse, unless Part II of the ***Law Reform (2000) Act*** applies (registered domestic partnership declaration)) (***Forgeron*** v. ***Rideout*** (1995), 140 NSR (2d) 241 (CA)).
- Adult next of kin or beneficiary resident in the province, after persons in the above point have been cited and not taken out administration.
- Public Trustee (see ***Public Trustee Act*** and AS THE PERSONAL REPRESENTATIVE below) where no adult next of kin or beneficiary resident in province.
- Non-resident adult heirs-at-law on intestacy or non-resident adult residuary beneficiaries under a will.
- Creditor of deceased or person with cause of action against deceased.
- Trust company (see also s. 69 ***Trustee Act***).

Note that the person(s) having priority must renounce/consent to the appointment of the person lower in priority, or the person who has the responsibility for administration.

Provision is now made for a nominee to be appointed as administrator (see s.32(40) of the Act and Regulation 35).

## *5. Extra-provincial grants*

An extra-provincial grant may be recognized and issued where a grant or order to similar effect is made by an authority outside the province where there is compliance with Section 37 of the Act and Regulation 32. The same requirements for grants for residents relating to notice, advertising, inventory, etc. apply to such grants.

Note ***Re Creighton Estate*** (1987), 80 NSR (2d) 233 (Probate Ct) where under then the ***Probate Act***, probate can be granted in the province where general probate has already been granted in another jurisdiction.

## *6. Procedures to obtain Probate/Administration*

**Documents required for Grant of Probate (in addition to will and codicils, if any)**

- Application for Grant (see Forms 8, 8A)
- Affidavit of Execution (see Form 2, and Regulation 11). Since the enactment of the "new ***Probate Act***" it is now possible to swear the affidavit at the time of execution.
- Proof of Death in a form acceptable to the Registrar
- Renunciations, if required, in Form 12
- Security if required under Section 40

- Payment of probate tax

**Documents required for Grant of Administration**

- Application for Grant (see Forms 9, 9A)
- Proof of Death in a form acceptable to the Registrar
- Renunciations/consents of persons having priority (Form 13)
- Nomination if applicable in Form 15
- Security as required under Section 40
- Payment of probate tax

**Documents required for Grant of Administration with Will Annexed**

- Application for Grant (see Forms 10, 10A)
- Proof of Death in a form acceptable to the Registrar
- 2 certified copies of the will
- Renunciations/consents of persons having priority (Form 13)
- Nomination if applicable (Form 15)
- Security as required under Section 40
- Payment of probate tax

**Documents required for Extra-Provincial Grant of Probate or Administration**

- Application for Grant (see Forms 11, 11A)
- Proof of Death in a form acceptable to the Registrar
- 2 certified copies of the original grant or order under the seal of the court granting it, and a certificate under seal stating the original grant is still in effect
- 2 certified copies of the will, if applicable
- Affidavit of Translation in Form 3, if applicable
- Payment of probate tax

**Lost wills**

There is a presumption that if the will cannot be found it has been destroyed with the intention of revocation by the testator. May be proved in solemn form (see PROOF IN SOLEMN FORM below) if the presumption can be rebutted to the satisfaction of the court. ***Re Theriault Estate*** (1997), 157 NSR (2d) 398 (SC(AD)), where original copy of will held by testator's solicitor was destroyed by fire, no intention to revoke was shown.

If the will has been lost since the death of the testator, secondary evidence may be given of its contents. Such evidence usually takes the form of the testator's or solicitor's copy or draft copy of the will (***Re Dreger*** (1982), 13 ETR 212 (NWTSC)); solicitor's notes of instructions; written evidence such as correspondence or notes by the testator; parole evidence (***Sugden*** v. ***Lord St. Leonards,*** [1876] 1 PD 154 (CA***)***; ***Re Behie's Estate*** (1977), 23 NSR (2d) 361, aff'd. (1977), 24 NSR (2d) 1 on appeal).

When it is shown that the will was last traced to the possession of the testator, but cannot be found at the testator's death, there is a presumption that it was destroyed with the intent to revoke (***animo revocandi***). The fullest enquiries for the lost will must be undertaken (***Re Ferguson - Smith Estate*** (1954), 15 WWR 237 (Alta SCAD)). Presumption can be rebutted in either of two ways or a combination of the two:

- Circumstances may be shown or tend to show a contrary conclusion; or
- Evidence of declarations made by the testator showing that the testator regarded the lost will as valid and subsisting (***Re Perry***, [1925] 56 OLR 278; ***Quinlan*** v. ***Whelan et al.*** (1985), 24 ETR

112 (NB Probate Ct); ***Re Behie***, *supra*; ***MacBurnie*** v. ***Patriquin*** (1975), 14 NSR (2d) 680). The burden of proof appears to be quite heavy ("very clear and convincing evidence" as stated in ***Sigurdson*** v. ***Sigurdson***, [1935] 4 DLR 529 (SCC)), ***Brimicombe et al*** v. ***Brimicombe***, 2000 NSCA 67.

It is still necessary to prove due execution of the will and the contents of the will.

Where only parts of the will are missing, it must be proven that they have been removed without the authority of the testator.

Note that there is also a presumption against fraudulent abstraction of a will, *i.e.*, that some who would benefit on intestacy fraudulently destroyed the will; the evidence must be very clear and very strong before the court will allow the presumption against fraudulent abstraction to be rebutted (***Re Behie***, *supra*, on appeal).

In *Devlin Estate (Re)*, 2020 NSSC 77, the applicant sought to prove in solemn form what was alleged to be a holographic will. The document was lost but there was a colour reproduction made by a printer and a photo taken of it by a smart phone. Two people identified as next-of-kin filed notices of objection. The applicant sought an order for security for costs against one of them. The court found that unsuccessful opponents of an alleged will are in a peculiar position with respect to costs. While the court has discretion to award security for costs, there has been a general practice not to do so – in part for public policy reasons – in situations involving the proof of a will in solemn form.

**Missing witnesses**
No will is invalid on account of the incompetency of the witnesses to prove its execution (s. 11 ***Wills Act***).

If no affidavit in proof of execution of a will can be obtained from either of the witnesses, the due execution may be proved by an affidavit of a person attesting to the authenticity of the signature of the deceased **and** one of the witnesses; **or** an affidavit from any person present at the execution who can attest to the circumstances of the execution. If neither of these methods is possible, the registrar may accept an affidavit of the applicant attesting to the efforts made to locate the subscribing witnesses or other persons present at the execution of the will. (See Regulation 11.)

For military/service wills, contact either the Department of National Defence or National Archives (Personnel Records Centre, Government Records Branch) for assistance. Regulation 11(6) and (7) regarding proof of will for members of the Canadian Forces.

In addition, there are special requirements set out in Regulation 11(8) regarding proof of the will in situations where a testator is either blind, illiterate, does not understand English, signs with a mark, or has another person sign on his or her behalf.

If a witness can be located but lives some distance away and is not able to attend locally to prove the execution of a will, the Probate Court can issue a Letter of Authorization to a lawyer or notary who is located convenient to the witness. This process avoids the risk of an original will being lost while being sent to a witness to obtain an affidavit of execution.

## Proof in Common Form

This is the usual means of obtaining Probate, and is the process whereby the Registrar of Probate will grant Letters Testamentary or Letters of Probate (the terms are used interchangeably) upon the filing of the documents listed in DOCUMENTS REQUIRED FOR PROBATE above, unless proof in solemn form is required (see PROOF IN SOLEMN FORM below). (***Probate Act***, s.30).

**Proof in Solemn Form**

This is the means used when there is a issue as to the validity of the will (*e.g.*, a question of due execution) or the testamentary capacity of the deceased, or a challenge on the basis of undue influence, suspicious circumstances, duress or fraud. (See CHALLENGES TO THE WILL above.) The will may have already been proved in common form. The procedure is set out in Section 31 of the ***Probate Act*** and Regulation 71. Briefly, it is:

- the personal representative or a person interested in the estate (defined by Regulation 52(1) may apply before or after a grant is made;
- limitation of six months from the issuing of the grant (unless extended by court on application, when limited to undistributed portion of estate);
- proceeds as a contentious matter under Part IV of Regulations.

See ***Re Fawson Estate,*** 2012 NSSC 55 for a decision on an application to have a will proved in solemn form and declared invalid on the basis the testatrix lacked testamentary capacity. A subsequent decision in a case related to the Fawson Estate involved the applicant seeking to use the prior decision to set aside certain beneficiary designations. That appeal, ***Fawson Estate*** v. ***Deveau***, 2016 NSCA 39, was dismissed as the Court determined there was a genuine and separate issue to be determined. Delay in making the application was detrimental in ***Hopgood Estate (Re)***, 2015 NSSC 351.

An application for Proof in Solemn Form may be heard by the Registrar of Probate or by a Judge of the Supreme Court sitting as a Judge of the Probate Court.

The burden of proof is on the proponent of the will.

The Nova Scotia Supreme Court held in ***Re Barrieu Estate***, 2008 NSSC 162 that there are cost implications for beneficiaries who mount frivolous or vexatious challenges to the validity of the will. The normal rule is that costs are paid from the estate, usually on a party and party basis. However, costs may not be awarded where the objection is frivolous or vexatious. Costs are always in the discretion of the trial judge. For recent discussions on costs in probate matters, see *Keddy* v. *Keddy Estate* 2016 NSSC 194 (which concerned a lost will and an unsuccessful challenge to a grant of probate), affirmed on appeal (2017 NSSC 194), *Maskell Estate (Re)*, 2017 NSSC 325 and *Burgoyne Estate (Re)*, 2017 NSSC 275.

For a discussion on security for costs in the context of an application for proof in solemn form, see also the commentary re: *Devlin Estate (Re)*, 2020 NSSC 77 above – in the section titled "Lost Wills".

## *7. Duties and powers of the personal representative*

The personal representative is deemed to be a "trustee". (***Trustee Act***, s.2(r)). The duties and powers of the personal representative are as set out in the ***Probate Act*** and the ***Trustee Act***, except where enlarged or prohibited by the provisions of the will or an Order of the Court. (s. 10 ***Trustee Act***).

**Duties:**

- Serving notices of grant on beneficiaries, heirs-at-law, persons with statutory rights in prescribed forms (Regulation 44).
- Gathering of assets.
- Payment of debts (s. 63(2) ***Probate Act***).

- Filing inventory (s. 57 - 58 ***Probate Act*** and Regulation 45; appraisers to value assets can be appointed under s. 59-60; see the recent decision of Vickery Morris Estate (Re), 2019 NSPB 2, wherein these provisions were examined and the court accepted that, in some circumstances, a downward variation of the stated market value is permissible under the Probate Act and Regs).
- See the comments of Goodfellow, J. in ***Re Meagher Estate***, 2003 NSSC 5 regarding the duty to have assets valued.
- Advertising for creditors (s. 63 ***Probate Act*** – for six months) in the Royal Gazette.
- Income tax returns (refer to ***Income Tax Act***; will require T1 General to date of death, plus all previous required T1 Returns; possible "rights and things return"; T3 or Trust Returns; the personal representative will need to obtain Clearance Certificate for distribution to avoid personal liability).
- Passing accounts (s. 69-70 ***Probate Act*** and Regulations 53-57 require filing of accounts to be approved by Registrar on closing; all expenses are to be verified (s. 57 ***Probate Act***). The personal representative has a duty not to profit from position (***Re Chappell Estate*** (1992), 116 NSR (2d) 227 (Probate Ct)) and a duty to account for any profit made from the sale of trust assets (***Price Waterhouse Ltd.*** v. ***MacCulloch*** (1986), 72 NSR (2d) 1 (CA) and see (1987), 78 NSR (2d) 300 (CA) re amount.) (See also the comments of the Court in ***Saunders*** v. ***Crouse Estate*** (1999), 177 NSR (2d) 128 (CA) and in ***Saunders*** v. ***Hendry et al.*** (1999), 180 NSR (2d) 7 (SC) on the duties of the personal representative).
- Distribution of assets in accordance with the will or by law (s. 72 ***Probate Act***). The personal representative also has a duty to search for heirs.

**Powers:**
In addition to specific powers granted in a will, the ***Trustee Act*** gives the personal representative certain powers, which include:

- may establish and adhere to investment policies, standards and procedures that a reasonable and prudent person would apply in respect of a portfolio of investments to avoid undue risk of loss and to obtain a reasonable return (s. 3 ***Trustee Act***). This suggests a duty to diversify;
- may vary investments (s.11(1) ***Trustee Act***);
- may undertake/participate in corporate reorganization (s.12 ***Trustee Act***);
- may sell property where held on trust for sale or a power of sale (s. 19 ***Trustee Act***);
- may mortgage property where held on trust for sale or power of sale (s. 21 ***Trustee Act***);
- may appoint a solicitor as agent (s.23 ***Trustee Act***);
- may insure property (s. 24 ***Trustee Act***);
- may give receipts (s. 25 ***Trustee Act***);
- may pay or allow claims and settle debts (s. 26 ***Trustee Act***);
- may apply income for benefit of minor (s. 30 ***Trustee Act***);
- may pay money into court (s. 46 ***Trustee Act***).

In ***Kidd Family Trust*** v. ***Kidd***, 2005 NSSC 209, in determining whether trustees had breached their fiduciary duty, the Court examined the process which trustees followed in the sale of a significant business asset.

In ***Synott*** v. ***Bartlett Estate***, 2010 NSSC 477 the Court examined the authority of a personal representative to distribute personal effects.

The powers of the personal representative may be limited by the will, and the personal representative may be expressly prohibited from acts that would otherwise be permissible. The will overrides the powers conferred by statute.

## *8. Claims of creditors*

- Creditor must file an affidavit (verified) setting out claim, and indicating whether secured or not. (ss. 63(3) to 68 ***Probate Act***; Regulation 48).
- Claims may be dealt with on final settlement or earlier separate hearing (s.43(6) ***Probate Act***).

## *9. Insolvent estates*

Where the assets of the estate are insufficient to pay all of the liabilities, ***Probate Act*** sets out procedures to be followed (s. 83-84; Regulation 51). Priorities for payment have been set out in s. 83(3) as follows:

- funeral expenses including a headstone;
- probate taxes and court fees;
- personal representative's commission and legal fees on an equal footing;
- reasonable medical expenses in the last 30 days of life of deceased on an equal footing;
- all other debts.

After the above all other creditors, who have proved their claims share proportionally.

See ***Boutilier Estate*** v. ***Capital One Bank,*** 2011 NSSC 439.

See also ***Evans v Evans***, 2018 NSSC 68, which involved an appeal by the Public Trustee regarding the priority of a CRA debt. The court noted the decision was being released as guidance for the Probate Registrars in the province.

## *10. Representation of minors*

- Provision for representation of the interest of a minor in estate by the appointment of a guardian (***ad litem***) (s.16(2) ***Probate Act***).
- Reservation of right of executor who is an infant to administration of estate s. 32(6) and (7) of Act.
- Provision for sale or conveyance of interest of minor in real property – s. 50(3), (4), s. 51.
- See also MINORS below re role of Public Trustee.

The court recently considered when it might not be appropriate to pay the guardian *at litem*'s costs from the estate in ***Lockyer Estate (Re)***, 2018 NSSC 128.

## *11. Final settlement*

Commonly referred to as "closing" of the estate. Personal representative may make an application for passing accounts and serve notice on all interested persons. See s. 69-75 of the ***Probate Act*** and Regulations 53-59. If within eighteen (18) months of grant, the personal representative has not applied, an interested person may make application for the passing of accounts.

The "closing" may be with or without a hearing; if interested persons do not file a notice of objections, no hearing may be required. Pursuant to Regulation 54, in certain circumstances no accounting may be required.

**Accounts of the personal representative**
These must be filed with the court not less than forty-five (45) days before closing the estate. (See DUTIES above.) May be challenged by interested persons. Final settlement is conclusive proof of the correctness of the accounts (s. 75, ***Probate Act***).

A personal representative can be ordered to repay amounts to the estate. For a recent decision where the court (for the most part) upheld a decision of the Registrar ordering a personal representative to repay a large sum of money to the estate because he failed to act reasonably when making various payments on its behalf, see ***Hopgood*** v ***Hopgood (Estate)***, 2018 NSSC 100.

**Compensation of the personal representative**
Compensation for services as the personal representative to be fixed by the court and commensurate with services performed, value of estate, and degree of responsibility, and division where more than one personal representative, (see ***Re Forbes Estate*** (1991), 110 NSR (2d) 361 (Probate Ct); ***Samson*** v. ***Sampson Estate***, 1999 CanLII 13141 (N.S.S.C.) to a maximum of 5% of the value of the estate administered (s. 76 ***Probate Act***)). Court will consider provision for compensation as provided in the will (s.77 ***Probate Act***), which could include a compensation agreement incorporated by reference into the will. Where there is a bequest to the personal representative in the will, there is a presumption that it is in ***lieu*** of compensation. It is up to the personal representative to rebut that presumption by showing something in the nature of the bequest or other circumstances. (See ***Widdifield On Executors and Trustees*****. 6th ed**, (6th ed.) p.11-2-11-4 for a more extensive discussion.)

The pre-taking of compensation, unless specifically authorized in the will or compensation agreement, is not acceptable, unless there is informed consent of all residuary beneficiaries, who must be capacitated, or an Order of the Court. (See ***Adams Estate*** v. ***Keough et al.*** (1992), 119 NSR (2d) 235 (SCTD), ***Re Meagher Estate***, 2003 NSSC 5 and see ***Re Rustig Estate***, 2002 NSSC 210).

***Atlantic Jewish Foundation*** v ***Leventhal Estate***, 2018 NSSC 297, is a recent case where the court discussed and considered the various factors that apply when determining whether a 5% commission is reasonable – especially when the estate is very large but not necessarily complex.

**Compensation of proctor**
The proctor is often the lawyer representing the estate. The court has the power under s. 91 of ***Probate Act*** and Regulation 61 to tax lawyer's bill. This is done at closing, and may also be done at earlier stages upon application of an interested party. See ***Bruhm*** v. ***Feindel et al.***, *supra*. If the proctor is also a co-executor, then legal services can also be billed in addition to compensation as co-executor under s. 63 of ***Trustee Act***, with the consent of the co-executors. In ***Re Faye Estate***, 2002 NSSC 242, affirmed at 2003 NSCA 97, the Court reviewed the factors to be applied to determining the compensation.

In ***Re Meagher Estate***, 2001 NSSC 39, the Court confirmed that proctor's fees should not be pre-taken without Court approval or informed consent of all interested parties. This was reversed in ***Re Rustig Estate***, *supra*.

In the recent case of ***Zwicker*** v. ***Richardson***, 2018 NSSC 327 the court weighed various factors to determine the appropriate commissions to be paid to the personal representatives (one of whom was now deceased such that the amount owing to her personal representative was also in issue) and the proctor that was asked to help resolve accounting anomalies in the accounts. The personal representatives were

found to owe certain amounts to the estate, which were subtracted from the commission(s) owing to them.

See also the decision in ***Re Meagher Estate***, 2003 NSSC 5 for a discussion and findings regarding the legal expenses of beneficiaries.

## *12. Unusual circumstances*

**Administration with will annexed**
See earlier section. Where the personal representative refuses to act, or there is no personal representative either named or able to act. See s. 22 and s. 26 of Act.

**Limited grants**
See Regulation 27.

**Administration during the minority, absence or mental incompetence of the personal representative**

- ***Absence* –** s. 23 of Act.

- ***Grant limited to part of the deceased's property***
  - Extra-provincial grant (see earlier section).
  - Unadministered property – s. 25 of Act and Regulation 31.

- ***Grants for a particular purpose***
  - Where validity of a will is in question – s. 24 of Act.
  - For the purpose of litigation.
  - For the preservation of property – where assets are perishable or of a precarious nature – see s. 21 of *Act.*
  - Limited to a specific matter.

  See also s. 32 (4) – (7) regarding grant to a nominee and reservation of right to a grant. Regulation 29 deals with the reservation and required forms.

- ***Missing persons***
  Where a person has not been heard of for a time accepted by the court, an application can be made re: that person's share of the estate. See s. 148 of ***Probate Act*** for procedure to make an application to distribute as if the missing person has died immediately before the deceased, together with ss. 8 -14 of ***Public Trustee Act***, which could allow payment to be made to the Public Trustee.

- ***Uncertainty re: Sequence of Death***
  There are few reported cases dealing with the issue of sequence of death. At times, it may be important to establish the order in which people died in order to determine how their property passes. For a recent decision on this issue, see Desmond Estate v Desmond Estate, 2019 NSSC 200.

## *13. Ongoing trusts*

Trusts established by a will for a spouse, minor children, or for other purposes are governed by the provisions of the will and the ***Trustee Act***. Remuneration of the trustee will, in the absence of an express provision/agreement, be governed by the Act, and the provisions of Practice Memorandum 11 of the Supreme Court.

In ***Killam Estate*** v. ***Dalhousie University et al.*** (1999), 185 NSR (2d) 201 (SC) the inherent jurisdiction of the court to alter the administration of charitable trusts established under a will was confirmed. A discretionary testamentary trust of a deceased individual was varied as part of a negotiated settlement involving a *Testators' Family Maintenance Act* claim in ***Drescher*** v. ***Drescher Estate,*** 2007 NSSC 352. Relying on the provisions of the ***Variation of Trusts Act***, charitable trusts were varied in ***Bethel Estate (Re)***, 2015 NSSC 216, so that the charities named in the will were able to receive the capital of the trust instead of being limited to receiving a certain amount of income each year in perpetuity.

## *14. Disputes*

**Powers of the Probate Court (s. 11 *Probate Act*)**
The Court may:

- issue grants;
- revoke or cancel grants;
- carry out the judicial administration of estate and determine all questions, matters and things necessary for such administration;
- order any person named as executor to appear and probate will or renounce executorship;
- order any person who witnessed a will to prove a will;
- order any person to comply with the Act;
- appoint guardians and take their accounts under the ***Guardianship Act.***

The Court does not have the jurisdiction to deal with claims involving questions of title and possession. (***Wolfe*** v. ***Olsen*** (1977), 22 NSR (2d) 640 (CA)).

**Jurisdiction of Registrar, Judge of Probate (s. 97 *Probate Act*)**
A Judge of Probate hears all

- applications for the approval of a sale under s. 50;
- applications for the approval of a lease or mortgage under s. 52;
- applications for an order for conveying or vesting real property under s. 53; and
- applications for an order under s. 55.

A Judge or the Registrar, at the option of the applicant, deals with

- the adjudication of claims of creditors;
- allowance of accounts;
- distribution; and
- partition and sale.

The Registrar deals with all other citations and applications. By written consent of the parties, a matter can be transferred to the Judge from the Registrar or vice versa.

**Removal of personal representative (s. 61 *Probate Act*)**
Application may be made by an interested party for removal of the executor:

- if the personal representative has not complied with an order of the court;

- if neglecting to administer or settle the estate;
- if wasting the estate;
- if failed to comply with an order to pay money into a chartered bank;
- if insolvent;
- if mentally incompetent;
- if within 5 years of application has been convicted of theft, criminal breach of trust, or other specified crimes;
- if cannot be found or has left the province without apparent intention of returning.

A personal representative may also seek to be discharged – s. 61(2). A removed or discharged personal representative is required to account – s. 61(6).

Where the personal representative has conflict of interest, he may be removed (or appointment suspended in ***Re MacCulloch*** (1992), 113 NSR (2d) 367 (Probate Ct); reinstated in (1991), 111 NSR (2d) 271). See also ***Re Winter Estate***, 2001 NSSC 121, affirmed at 2002 NSCA 23 and ***Willisko*** v. ***Pottie Estate***, 2014 NSSC 389 and ***Gillis Estate (Re)***, 2017 NSSC 6.

An application may be made by an interested party for removal of the administrator if he

- has left the jurisdiction without an intention to return;
- is wasting the estate;
- is of unsound mind or otherwise incapacitated from discharging duties; or
- fails to comply with an order for payment of money into a bank.

*Burgoyne Estate (Re)*, 2017 NSSC 275 is a reported decision on costs related to an (unsuccessful) application by a personal representative to have a named co-representative removed after the co-rep suffered a head injury. The application was dismissed in a decision that does not appear to have been reported, but the decision on costs canvasses some of the findings related to the level of capacity required to act as a personal representative.

See ***Wilkinson*** v ***Wilkinson***, 2019 NSSC 52 wherein the court granted an application to remove of one of three sisters as co- administrator and co-executor of her parents' estates. It also involved the transfer of interest in part of the real estate (land) that was not specifically devised.

See ***Baker Estate*** v ***Baker***, 2018 NSCA 80, wherein the Court of Appeal dismissed an appeal from the proposed executors whose sought interim expenses from the estate to cover their legal costs in defending an application to have them removed as co-executors.

See also *Bowman Estate (Re)*, 2020 NSSC 48, in which the court denied the executrix costs for administering the estate as a result of her misconduct before the testator's death as well as her obstruction of the efficient administration of the estate after.

## *15. Role of Public Trustee*

**As the personal representative**
The Public Trustee is authorized to act as the personal representative by s. 4(1)(c) (as a trustee of an estate if appointed by court) and (d) (as executor or administrator) of the ***Public Trustee Act***. With the consent of the Public Trustee, the Public Trustee may be appointed the personal representative by

instrument (*i.e.*, in a will as executor). The Public Trustee in such circumstances has all the powers of any other personal representative, and in addition, is able to undertake summary administration in certain cases. Specific reference should be made to the statute.

**Minors**
The Public Trustee **shall** act as the guardian of the estate of a minor where no guardian has been appointed **by the court** and the minor has property or is entitled to property. (s. 4(2) ***Public Trustee Act***). Where an estate or proceeds are to be distributed to a person for whose estate a guardian is required, the Public Trustee shall act as guardian if no other guardian is appointed (s. 4(5) ***Public Trustee Act***). Payments for a minor or property to be transferred to a minor are to be made to Public Trustee (s. 6 ***Public Trustee Act***), unless otherwise authorized by the will. See also the provisions of the ***Guardianship Act.***

**Receipt of money**
The Public Trustee is authorized (pursuant to subsection 28(1) of the ***Public Trustee Act***), to receive assets of an estate or trust, but must, pursuant to subsection 28(2), convert any such assets into cash and pay it immediately to the Minister of Finance whereupon the provisions of sections 35 and 35A apply. See ***Laing Estate*** v. ***Nova Scotia (Minister of Finance),*** 2010 NSSC 306, varied in ***Laing Estate*** v. ***Nova Scotia (Attorney General),*** 2011 NSCA 63 for a discussion on entitlement to money held by the Minister of Finance.

## V. ESTATES OF PERSONS REGISTERED UNDER THE *INDIAN ACT*

### *1. Jurisdiction*

The estates of persons registered under the federal *Indian Act,* RSC 1985, c I-5 ("Act") (commonly referred to as "status Indians") will be governed by sections 42 to 50 of the *Indian Act* and the *Indian Estate Regulations* ("*Regulations*") instead of provincial laws.

Section 42 of the Act vests the Minister of the Department of Aboriginal Affairs and Northern Development with "all jurisdiction and authority in relation to matters and causes testamentary, with respect to deceased Indians." However, pursuant to s. 4(3), the application of the Act's estate provisions and regulations is limited to Indians who ordinarily reside on reserve. “Ordinarily reside” is a matter of fact that must be determined in each case (see ***Canada (Attorney General)*** v. ***Canard,*** [1976] 1 SCR 170 and ***Earl*** v. ***Canada (Minister of Indian Affairs),*** 2004 FC 987).

### *2. Wills*

With regard to wills made by status Indians, s. 45(2) Act requires that a will be in writing, signed by the testator, and indicate his or her wishes or intentions with respect to the disposition of his or her property. The *Regulations* further specify that a will need not conform to the requirements of provincial laws in force at the time of the death of the Indian. However, pursuant to s. 45(3) of the Act, unless the Minister approves the will, it has no legal force or effect. Pursuant to s. 46, in addition to the grounds of duress, undue influence and lack of testamentary capacity, the Minister may also declare the will of a status Indian void, in whole or in part, where:

- the terms of the will would impose hardship on dependents;
- the will purports to dispose of reserve lands in a manner contrary to the interest of the band;

- the terms of the will are vague or uncertain; or
- the terms of the will are against the public interest.

## *3. Intestacy*

When an Indian dies leaving property undistributed by a will or when the will is declared invalid, the rules governing an intestacy will apply. The intestate rules are set out in s. 48 of the Act. While they are similar to those found in provincial legislation, there are some differences (for example, where the value of the estate is below $75,000, the entirety will go to the surviving spouse and "surviving spouse" in the Act is defined to include common-law spouses) as well as restrictions on the descent of reserve land.

## *4. Restrictions on descent of reserve land*

While reserve land is held for the collective use and enjoyment of a band, and is generally inalienable to third parties, except to the Crown in right of Canada, there are forms of private property on reserve. The Act allows a band council to allot a parcel of land to an individual band member. This allotment must be approved by the Minister, who can then issue a document called the certificate of possession. Such allotment grants a right to possession that is similar in many respects to *fee simple* ownership in that it permits the allotee to sell, lease or devise his or her lands, but only to another band member. Where such an interest is bequeathed or devised to a non-band member, s. 50 of the Act provides that the land will be auctioned (to eligible members) and the proceeds of the sale shall be paid to the devisee or descendent. If the land is not purchased within six months, it will revert to the band free from any claim. The restrictions on descent of reserve land will also apply to any possessory interest in reserve land of a status Indian who is not ordinarily resident on reserve.

Band members can also come to be in possession of individual lots within a reserve, not through s. 20 of the Act, but through band custom. However, in such circumstances, the member's right of possession, including their right to bequeath the property to another person, is at the pleasure of the band council.

## *5. Administration and Probate*

Pursuant to s. 43 of the Act, the Minister has the power to:

- appoint executors of wills and administrators of estates of deceased Indians;
- authorize executors to carry out the terms of the wills of deceased Indians;
- authorize administrators to administer the property of Indians who die intestate;
- act as executor of a will of a deceased Indian;
- administer the property of an Indian who dies intestate; or
- make or give any order, direction or finding that in his opinion it is necessary with respect to testamentary matters.

Section 44 of the Act also permits the Minister to transfer all of the Minister's jurisdiction and authority to the Superior Court of Justice in the province where the deceased resided, at the request of the descendants or devisees of a deceased or upon his own accord.

The Minister's powers in connection with the administration of estates are subject to review by the Federal Court under s. 47 of the Act.

6. Alternate regime under new Family Homes on Reserves and Matrimonial Interests or Rights Act

Under the new ***Family Homes on Reserves and Matrimonial Interests or Rights Act***, SC 2013, c 20, a surviving spouse or common law partner has the choice of opting for a division of the value of the family home and other structures on reserve in which the deceased spouse had a right or interest in. If a spouse chooses a division under the Act, then the spouse may not also benefit under the deceased's will or the intestate succession provisions under the *Indian Act*.