

Basic Issues for Drafting Wills

Bruce Hallsor, J.D.



Crease Harman LLP

800 – 1070 Douglas Street

Victoria, British Columbia

V8W 2S8

250-388-5421

www.creaseharman.com

Bruce Hallsor is a partner at Crease Harman LLP and a former national Chair of the Canadian Bar Association section on Wills, Trusts, and Estates. Bruce Hallsor has published articles on will drafting through the Canadian Bar Association.

INTRODUCTION

This presentation is designed to survey the broad principles involved in estate planning in British Columbia. It does not deal with the issues of probating a will or administering an estate. It is designed to give participants an idea of the issues they should consider when deciding how they wish to deal with their own estates in the event of death.

CONTENTS

1. Introduction
2. What is a Will?
3. Testamentary Capacity
4. Fraud, Undue Influence, Suspicious Circumstances, Mistake
5. Formal Requirements to Make a Will
6. Formal Requirements to Revoke a Will
7. Interpretation Of Wills
8. Will Drafting Checklist
9. Intestate Succession

SECTIONS

1. INTRODUCTION

Life is about the acquisition, enjoyment, and disposal of wealth. Wills are just one method of disposition. Many people avoid wills for tax reasons, or to avoid the *Wills Variation Act*. The simplest way to avoid a will is to give things away in your life. However, most people prefer to hold on to their things, and instead rely on other methods of disposition.

- 1.1 **Joint Tenancies (but not tenancies in common, which are divisible shares)**
- 1.2 **Gifts Mortis Causa (gifts given in contemplation of death are recognized, anomalously, as valid inter-vivos transactions)**
- 1.3 **Life Insurance, GICs, RRSPs, TFSAs, (all can have a designated beneficiary)**
- 1.4 **Pension Plan Account (can have a designated survivor)**
- 1.5 **Trust with retention of life interest**
- 1.6 **Covenant or Contract to give property on death (these happen in some marriage contracts and separation agreements or divorce agreements).**

2. WHAT IS A WILL?

A will includes any written instrument “in the nature of a will in exercise of a power, and any other testamentary disposition”. Several documents may be read together as constituting one will, but a later drafted document will prevail over an earlier drafted document because it speaks of the last intention of the testator.

A will can be used to dispose of property, to give directions for the care of minors or other people over whom the deceased held some legal authority, and to give directions about a person’s wishes for their funeral and mortuary arrangements.

The following things can be disposed of by a will:

- 2.1 Estates pour autre vie**
- 2.2 Executory and other vested interests in property**
- 2.3 Rights of Entry**
- 2.4 All other property, including legal and beneficial interests (this includes rights under a contract).**

3. TESTAMENTARY CAPACITY

3.1 Age

s.7 of the *Wills Act* sets the minimum age at 19 except where the testator is or has been married, is on active service with the armed forces (including those of a British Commonwealth nation or an ally of Canada), and is a mariner at sea or in the course of voyage.

s.36 of the yet to be proclaimed *Wills, Estates and Succession Act* lowers the age to 16, and adds in a explicit requirement for mental capacity.

3.2 Mental Capacity. Testator must show:

- .1 An understanding of the nature of a will and its effects on claimants.**
- .2 An understanding of the extent of his estate.**
- .3 An appreciation of the claims to which he ought to give effect and an Ability to rationally balance the competing claims.**

.4 That he is free of delusions which may affect his decisions.

3.3 Evidentiary considerations where testator's capacity is suspect:

- .1 Be particularly sure to keep record of answers to questions relevant to the issue or testamentary capacity.**
- .2 Before presenting will for execution, ask once more what was wanted.**
- .3 Either at the time the will was made or on execution, there should be independent witnesses (i.e., non-beneficiaries) including, if necessary, several individuals who knew the testator, and a qualified medical person.**
- .4 Written opinions from the witnesses. (If lay persons, should be asked for observations, not opinions.)**
- .5 If necessary, obtain a medical opinion confirming mental capacity.**

3.4 Capacity under foreign law where will disposes of:

- .1 Movables under the law of a foreign domicile.**
- .2 Immovables under the law of the foreign jurisdiction in which they are situated.**

3.5 Earlier wills: testator may have the capacity to revoke an earlier will and yet not have the capacity to create a new will.

4. FRAUD, UNDUE INFLUENCE, SUSPICIOUS CIRCUMSTANCES, MISTAKE

- .1 Testator must be aware of the true facts surrounding his property and estate, as well as the true facts surrounding any reasons given for an unusual provision, or a sudden change to a will.**
- .2 Record these facts in a separate memorandum and explain the reasoning behind the change or unusual provision.**

- .3 **Ensure that attestation clause of will reflects fact that will has been translated or interpreted for testator.**
- .4 **Fraud can occur either by a third party tampering with the will, or by a third party convincing the testator to make a change to the will as a result of an untrue fact.**
- .5 **Undue influence can be shown where someone creates a situation in which a testator is robbed of his free will. This can involve violence, but can also involve wearing someone down psychologically.**
- .6 **Suspicious Circumstances (i.e., someone leaving everything to their financial planner) allow the court to overturn a will, even where it is not proven that there is undue influence.**
- .7 **The Courts will also alter or reject a will if there is a clear mistake. There are three kinds of mistakes recognized by courts:**
 - (i) Mistake as to Document (the wrong word or phrase used)
 - (ii) Mistake as to Motive (the testator made a mistaken assumption about a state of affairs, for example, if a testator thought his son was dead, but he was alive)
 - (iii) Mistake as to Contents (misdescribing an object, or a person)

5. THE FORMAL REQUIREMENTS TO MAKE A WILL

In British Columbia, there are very strict requirements about what constitutes a valid will. Some other provinces permit any written instrument to be considered a will. British Columbia uses the English form Will, and adheres to the following criteria. The one exception is for status Indians, who have more relaxed criteria under the *Indian Act*.

.1 The will must be in writing.

The term “writing” is becoming broader and now includes some forms of recording. The New Wills, Estates and Succession Act provides some broad language for courts to admit non-written instruments (s.37(2)). Video tapes have been found in the past not to constitute a valid will.

.2 The will must be signed by the testator

Section 4 of the *Wills Act* (37 of the WESA) requires the signature to be at

the end of the will, and to be affixed in the presence of two witness at the same time.

It is advisable that the signature be complete, and in the testator's ordinary handwriting.

Even where the will as all hand-written, there must be a signature, and it must be at the end.

- .3 There must be two witnesses, both of whom witness the signature at the same time, and both of whom witness each other's signature.**
- .4 The witnesses have to be adults and have mental capacity to understand what is occurring.**
- .5 Witnesses are not permitted to benefit from the will.**

Although it does not invalidate the will if a witness is a beneficiary, it does invalidate any gifts to the witness.

A beneficiary may witness a codicil if he does not benefit in any way from the codicil.

A creditor of the estate may be a witness without jeopardizing his right to collect debts from the estate which would be owed regardless of the will.

6. FORMAL REQUIREMENTS TO REVOKE A WILL

A will can be revoked by operation of law, or by an act of the testator.

.1 Revocation by subsequent marriage

Section 15, of the *Wills Act* states that a will is revoked by the marriage of the testator, unless the will is expressly made to be in contemplation of marriage, or unless the will is the exercise of a power of appointment which would not be affected by a change in legal heirs

This will no longer be the case with the adoption of the WESA.

.2 Revocation by subsequent instrument

A subsequent instrument, properly executed and witnessed, expressing a clear intention to revoke a previous will or codicil, acts to revoke.

A subsequent will or codicil which does not clearly revoke the entire previous will or codicil, will only prevail where there is an inconsistency between the two. Otherwise, they will be read together.

.3 Revocation by destruction

Section 14 of the *Wills Act* (s.55(1)9c) of WESA) states that a burning, tearing or other destruction of the will, if carried out by the testator with intention to revoke, makes a will a nullity.

If one of the elements is missing (complete physical destruction by testator, or intention to revoke), then the Courts will construe a will as best they can, even if it means relying on parole evidence.

.4 Conditional revocation

If a will is thought to be revoked by a subsequent will, or is destroyed because of an assumption the testator makes, the revoked will can be restored by the Courts if it turns out that the subsequent will was invalid or the facts which caused the testator to destroy his will were not true.

7. INTERPRETATION OF WILLS

A will should be read as if speaking at the time of death. For example, if someone had two children when they executed their will, but four when they died, the words “my children” mean all four, and not just the two who were alive at execution.

Issues of interpretation are to be resolved by looking at the plain meaning of the words, in the context of the document. Courts are not keen on entering extrinsic evidence to aid in interpretation, but will do so where the words are clearly ambiguous. For example, where a gift “to Arthur” does not disclose which “Arthur” the testator meant, the Court will look at external evidence to determine which “Arthur” was most likely the person the testator had in mind.

The principles of Ademption and Abatement apply when the assets of the will are not as described.

Ademption occurs when there is a gift made of specific property which is not in the testator’s power to give. A gift of “my house on Maple Street” adeems when the testator has sold his house and bought a Condo. A gift of “my grandfather’s clock” adeems when the clock cannot be found.

Abatement occurs when there is a gift made of a general property. Ten gifts of \$1,000 each abate to \$500 when there is only \$5,000 left in the estate after debts are paid. Abatement eats away at gifts in the following order:

1. Residue
2. General Legacies (cash, stocks)
3. Specific Legacies (names heirlooms, vehicles, properties, etc.)

The Principle of Lapse occurs when the intended donees are not as described.

Section 21 of the *Wills Act* states that property given to a deceased person is presumed to lapse unless a contrary intention appears in the will. The lapsed gift falls into the residuary. The exceptions to this rule are in section 29, and state that where a gift is to children or siblings, their share can go to their children or their spouse according to the rules of intestacy. Typically, testators express their clear intention in the will.

5 Day Survivorship Rule

Under the WESA (ss. 5-11), heirs and appointees are presumed to have pre-deceased you if they die within 5 days of you. Unborn children are presumed to have been alive when you died, provided they live for more than 5 days.

8. WILL DRAFTING CHECKLIST

8.1 Executors and trustees

- .1 Number**
- .2 Names**
- .3 Status**
 - (a) Spouse
 - (b) Child
 - (i) One child of several
 - (ii) Provision for substitution of other children in order of seniority (Scott-Harston: 5-15)
 - (c) Other relative
 - (d) Friend
 - (e) Business associate

- (f) Professional or Trust company
- (g) Spouse and Professional or Trust company
 - (i) With power in spouse to substitute another professional or trust company at any time
 - (ii) With spouse acting only in an advisory capacity
 - (iii) Company to have custody of estate assets

.4 Suitability of persons chosen as executors

- (a) Age and health
- (b) Expressed willingness to act and practical ability (i.e., location of executor)
- (c) Business and administrative ability and expertise
- (d) Possible conflict of interest (i.e., co-owner of testator's business)
- (e) Relationship with the beneficiaries
- (f) Time to act

.5 Provision for the predecease of an executor or trustee: alternative

.6 Provision for the replacement of an executor or trustee in the event that such person refuses to act or is unable to act or to continue to act

.7 Fees

- (a) Refer to prior contractual arrangement (i.e., trust company as Executor)
- (b) Provision that any gift under will to executor is (or is not) in addition to any remuneration otherwise claimable

8.2 Disposal of remains (advise client of executor's discretion in these matters)

.1 Burial

.2 Cremation

**.3 Human tissue bequest under s.4 of the *Human Tissue Gift Act* (overrides executor's discretion to dispose of remains, disregarding will)
See ss. 53 and 54 of the *Cemetary and Funeral Services Act* for qualifiers on this.**

.4 Have any pre-paid arrangements been made?

8.3 Provision of debts and taxes

- .1 All duties and taxes as a debt of the estate
- .2 Tax to be paid by purchaser or transferee of assets

8.4 Provision for spouse

- .1 Ten day (or thirty day) common disaster clause
- .2 Bequest of entire estate
- .3 Bequest of a portion of the estate or a designated fund to provide an annuity for life
- .4 Income trust:
 - (a) With power to encroach on capital. Consider effect of *Income Tax Act*, s. 70(6) if power is given to encroach for a beneficiary other than a spouse
 - (b) Consider whether trust will be a Canadian resident trust and effect of *Income Tax Act*, s. 70(6) if it is not
 - (c) With lifetime occupancy of family residence and expenses
- .5 Life estate with remainder over. Consider whether a legal life interest (i.e., not by way of a trust) complies with *Income Tax Act*, s. 70(6)
- .6 Exclusion of unfair treatment of spouse:
 - (a) Possibility of application under *Wills Variation Act*
 - (b) Explanation in text of treatment (previous gift, etc.) or in separate memorandum executed in compliance with the *Wills Act*.

8.5 Provision for children

- .1 Division of estate
- .2 Division of residue on death of spouse
- .3 Income or fully discretionary trust which is to terminate:
 - (a) On death of spouse
 - (b) On children reaching age 19, or other specified age; in portions at specified pages. Consider the rule in *Saunders v. Vautier*
- .4 In discretion of spouse (i.e., power of appointment granted to spouse)

- .5 **Life insurance policy. Consider use of separate life insurance trust declaration**
- .6 **Specific bequests to take effect on testator's death**
- .7 **Special fund for child's benefit or education (Scott-Harston: 5-78)**

8.6 Care of minor children if spouse dies

.1 Appointment of guardian (*Infants Act, s. 50*)

- (a) Names
- (b) Relationship to children
- (c) Suitability
 - (i) Age
 - (ii) Financial capacity
 - (iii) Willingness to serve

.2 Education

- (a) Special trust fund
- (b) Type of school
 - (i) Public
 - (ii) Private
 - (iii) Religious

.3 Accommodation

- (a) Occupation of family residence by minor children and guardian
- (b) Minor children to live in residence of guardian. If so, consider a legacy or other provision for compensation

8.7 Does the testator want to make provisions for:

- .1 **Step-children**
- .2 **Wards or others to whom the testator stands in loco parentis**

8.8 Disposition of family residence

- .1 **Joint tenancy or outright bequest to spouse**
- .2 **Outright bequest to children**

.3 Life estate to spouse with remainder over to:

- (a) Children
- (b) Other relatives
- (c) The estate

.4 Residence to remain in estate with spouse to retain occupancy rights only

- (a) Expenses
- (b) Right to income in lieu of occupation
- (c) Right to purchase substitute residence

.5 Family residence to pass with general estate**.6 Applicability of provisions to summer home****.7 Source of funds for payment of expenses****8.9 Disposition of personal effects****.1 Bequest to spouse****.2 Bequest to children**

(a) As they may agree among themselves (or failing such agreement, as the executor shall determine)

(b) By drawing of lots (Scott-Harston: 5-71)

(c) As set out in:

(i) An existing memorandum incorporated by reference in the will. If so, advise that the memorandum cannot be varied after creation of the will except in accordance with the *Wills Act (WESA)*

(ii) A list-type codicil meeting the requirement of the *Wills Act*, ss. 3, 4, 6 (Scott-Harston: 5-74.1) (*WESA*, s.37)

(iii) An informal, non-binding list

.3 Bequest to other beneficiaries

.4 Personal property to pass with estate

.5 Specific disposition of:

- (a) Home furnishings
- (b) Clothes
- (c) Jewellery
- (d) Valuable collections
- (e) Automobiles and accessories thereto
- (f) Boats and accessories thereto

.6 Who bears the expense of delivery of the gifts

8.10 Cash legacies

.1 Individuals

.2 Organizations

.3 Cash legacy to spouse equal to life insurance proceeds received by trustees

.4 Provisions to deal with the inability of a named beneficiary to take a gift

.5 Provision to be paid with or without interest from anniversary of testator's death

8.11 Distribution of estate on predecease of spouse or on termination of spouse's life estate

.1 Equal division among children

- (a) Interest to vest at age of majority or other specified age
- (b) Interest to vest immediately or in portions at specified ages
- (c) Interest to vest immediately subject to divestment if child dies before age of majority or other specified age
 - (i) Per stirpes
 - (ii) Per capita
- (d) Representation of issue where child predeceases or fails to reach specified age
- (e) Timing of distribution

- (i) When youngest child reaches age of majority or other specified age
- (ii) Immediately with shares of minor children to be held in trust pending age of majority or other specified age

.2 Children entitled to life estate with remainder over to grandchildren

- (a) Per stirpes
- (b) Per capita

.3 Children entitled to one-half of estate absolutely and one-half as tenants in common of a life estate with remainder over to grandchildren

- (a) Per stirpes
- (b) Per capita

4. Children beneficiaries under a discretionary trust. Consider:

- (a) Accumulation of annual income if not fully distributed
- (b) Scope of purposes for income distributions or capital encroachments (i.e., education, medical, maintenance)
- (c) Timing of winding-up, and identity and respective entitlements of beneficiaries

.5 Unequal division between children or exclusion of one or more children

- (a) Possibility of application under *Wills Variation Act* (*WESA s. 60*)
- (b) Explanation in text of will of unequal division or exclusion (previous gifts, etc.), or in separate memorandum executed in compliance with the *Wills Act*
- (c) Gifts made after the will
- (d) Use of purely discretionary trust to protect mentally or physically disabled child

.6 Division among other relatives

.7 Consider application of the rule against perpetuities as modified by the *Perpetuity Act*.

8.12 Charitable gifts. Consider problems arising if the testator wishes to benefit a charity not registered under the *Income Tax Act* or make a gift for a charitable purpose.

Advise client of problem if charity does not continue to exist as at the date of his or her death

8.13 Trust for sale

- .1 Consider which assets should be subject to an express trust for sale and which to an express trust to hold**
- .2 Consider what powers should be granted ancillary to the trusts**
- .3 Consider the application of the even hand rule**
- .4 Income from corporations – consider clauses stipulating that:**
 - (a) Bonus shares representing accumulated income are to be treated as if they were income
 - (b) Dividends representing the proceeds of the sale of corporate assets other than inventory are to be treated as if they were capital

8.14 Trustees' investment powers

- .1 Type of investments**
 - (a) No express provision: prudent investor rule applies
 - (b) Restricted investment clause -- authorized Canadian life insurance company investments, T Bills, Government Bonds, etc.
 - (c) Wide open investment clause, including express power to retain non-income-producing property such as testator's residence for use by minor children and their respective guardians.
See *Linsley v. Kirstiuk* (1986), 28 D.L.R. (4d) 495 (B.C.S.C.)
 - (d) Other
- .2 Power to delegate investment decisions to professional investment advisors**
- .3 Relief from liability for misinvestment**
 - (a) No express provision: s. 96 of the *Trustee Act* will, in appropriate circumstances, relieve trustees from liability if they acted honestly and reasonably

(b) Express provision of reduced standard of care

- .4 Power in trustees to act on majority vote with respect to investment decisions**
- .5 Regardless of other provisions, power to retain any investment existing at the date of death**
- .6 Consider granting a third party (perhaps a beneficiary) veto control over certain investment decisions (i.e., holdings in a private corporation)**

8.15 Trustees' administrative powers

- .1 Short-form boiler plate**
- .2 Long-form boiler plate**
- .3 Special provisions**
 - (a) Trustees may act on majority vote
 - (b) Trustees may delegate decision-making powers (to supplement *Trustee Act* which allows only the delegation of the mechanical execution by qualified persons of decisions already taken by trustees (s. 95) and the appointment of a solicitor as a fiscal agent to receive trust monies (s. 7))
 - (c) Power to make distribution of beneficiaries' shares in specie on the basis of a binding valuation by the trustee
 - (d) Power in trustee purchase from estate (Sheard: 94-95)
 - (e) Power in trustee to act on majority vote on trust matters generally (Scott-Harston: 5-16; Sheard: 95)
 - (f) Power in trustee to act as director and retain remuneration (Sheard: 94)
 - (g) Power to carry on business
 - (h) Power to borrow money (including by way of mortgage)
 - (i) Power to improve assets
 - (j) Power to sell assets, including real estate on terms determinable by trustee
 - (k) Power to lend assets on terms determined by the trustee

8.16 Other administrative provisions

- .1 Appointment of successors to trustees**
 - (a) No express provision: *Trustee Act*, ss. 27, 31

- (b) Power in spouse to appoint replacement trustee
- (c) Appointment in will of substitute executor to replace executor] who is unwilling or unable to act (Sheard: 92)
- (d) Power in executor to appoint substitute (Sheard: 92)
- (e) Other provision

.2 Mechanism for resignations by trustees

- (a) No express provision: *Trustee Act*, ss. 27, 28
- (b) Express provision

.3 Removal of trustees

- (a) No express provisions: *Trustee Act*, ss. 27, 30, 31, 35 and 36
- (b) Express provisions

.4 Minimum number of trustees

.5 Trustee remuneration

- (a) No express provision: *Trustee Act*, s. 88
- (b) Provision that benefits to trustees under will are not in lieu of remuneration
- (c) Clause allowing lawyers or accountants who are trustees to charge for work done in a professional capacity
- (d) Other express provision

8.17 Some special clauses that are commonly included in wills

- .1 Testamentary life insurance declaration pursuant to the *Insurance Act* (Scott-Harston: 5-282)**
- .2 Designation of beneficiary under an RRSP or other kind of pension benefit plan, if permitted by the plan (Scott-Harston: 5-282)
See *Law and Equity Act*, s. 46**
- .3 Domicile clause where domicile in doubt (Scott-Harston: 5-36)**
- .4 Provision for mandatory future administration outside of Canada and resignation of Canadian trustees on demand by spouse who wishes to live in another country**
- .5 Power to appoint executor in another jurisdiction if required to obtain ancillary grant**

- .6 Financial “first aid” for injured or penurious spouse during long qualifying survival period
- .7 Provision for pets (Scott-Harston: 5-36)
- .8 Forgiveness of indebtedness (Scott-Harston: 5-40, Sheard: 103)
- .9 Loans brought into hotchpotch (Scott-Harston: 5-281)
- .10 Joint bank accounts to pass by survivorship (Scott-Harston: 5-40, Sheard: 103)
- .11 Will made in contemplation of marriage (Scott-Harston: 5-45)
- .12 Provision for upkeep of family burial plot
- .13 Maintenance to divorced spouse
- .14 Provision regarding preferred beneficiary election and other elections and designations pursuant to the *Income Tax Act* (i.e., that trustee has power to make or join in making the election (Sheard: 130)

9. INTESTATE SUCCESSION

Estate Administration Act

- s. 94 *Issue* – includes all lineal descendants
- s. 96 *Spouse and issue left*
 - (1-2) \$65,000 goes to spouse off the top (WESA s.
 - (3) If one child – 50% to spouse, 50% to child
If 2 or more children – 1/3 to spouse – 2/3 to children equally
 - (4) If child is dead, with issue alive, then the issue come in by representation to take the share the child would have taken
- s. 98 (a) *Issue and no spouse* – issue shall share per stirpes
- (b) *Spouse alone with no issue* – 100% to spouse

- s.99 **No spouse or issue** – to parents first, then
- s.100 **No spouse, issue, or parents** – to brothers and sisters
 -- nieces and nephews can take their parents' share as representatives
 -- **NO FURTHER REPRESENTATION BEYOND THIS POINT**
- s. 101 **No spouse, issue, parent, sibling** – to nieces and nephews in equal shares
 -- no representation allowed
- s. 102 **No spouse, issue, parent, sibling, or nieces and nephews** – among the next of kin of equal degree of consanguinity
 -- **See table of consanguinity**
- s. 105 **Advances** (inter vivos gifts) **are to be taken into account for the purposes of intestacy distribution**
- s.108 **Surviving spouse has a statutory life estate in the matrimonial home**
 -- it is subject to the mortgage on the property, however

Wills, Estates and Succession Act

- s. 1 **Issue** – includes all lineal descendants
- s.20 **Spouse alone with no children** – 100% to spouse
- s. 21 **Spouse and children left**
 \$300,000 goes to spouse off the top if the children are shared with the spouse. \$150,000 goes to spouse off the top if the children are not shares with the spouse. In either event, spouse also gets all household furnishings

 The rest is divided 50% to the spouse and 50% among the children. If a child is dead, with issue alive, then the issue come in by representation to take the share the child would have taken
- s. 22 **Two or More Spouses**
 Multiple spouses share in the household furniture and \$300,000 or \$150,000 equally, and the subsequent 50% share.
- s. 23 **Children and no spouse** – issue shall share per stirpes
- ss.23-24
No spouse or issue – to parents first, then
No spouse, issue, or parents – to brothers and sisters

-- nieces and nephews can take their parents' share as representatives

No spouse, issue, parent, sibling – to nieces and nephews in equal shares

-- no representation allowed

No spouse, issue, parent, sibling, or nieces and nephews – among the next of kin of equal degree of consanguinity

-- See table of consanguinity

s.27 Surviving spouse has an automatic option to acquire the matrimonial home

--first, spouse has a right of occupancy for at least 180 days

TABLE OF CONSANGUITY

