Manitoba Law Reform Commission

REFORM OF *THE WILLS ACT* REVISITED

Consultation Report

September 2019

Library and Archives Canada Cataloguing in Publication

The Commission's Reports are available electronically at www.manitobalawreform.ca.

ACKNOWLEDGEMENTS

President Cameron Harvey, Q.C. is the primary researcher and author of this consultation report.

The Commission gratefully acknowledges Professor Donn Short, Faculty of Law, University of Manitoba, for bringing to the attention of the Commission the issue respecting ss. 29 and 17.4 of *The Wills Act* and *The Law of Property Act*, respectively.

This consultation report was shared with certain individuals in advance of its publication. The Commission would like to thank those who have already generously provided their comments on the issues for discussion. All commenters will be properly acknowledged in the final report.

CONSULTATION PAPER

Comments on this Consultation Paper should reach the Manitoba Law Reform Commission ("the Commission") by **October 31, 2019**.

The Commission encourages you to provide your thoughts, comments and suggestions concerning this aspect of Manitoba's law. Please refer to the issues for discussion identified in this report, and any other matters you think should be addressed.

Please submit your comments in writing by email, fax or regular mail to:

The Manitoba Law Reform Commission
432-405 Broadway
Winnipeg, Manitoba
R3C 3L6

Phone: (204) 945-2896
Fax: (204) 948-2184
Email: mail@manitobalawreform.ca

The Commission assumes that written comments are not confidential. You may submit anonymous written comments, or you may identify yourself but request that your comments be treated confidentially. If you do not request confidentiality, the Commission may quote from or refer to your comments in its Final Report.

TABLE OF CONTENTS

CHAPTER 1: INTRODUCTION

In 2003, the Manitoba Law Reform Commission ("the Commission") published Report 108, *Wills and Succession Legislation* ("Report 108"),[1] which contains 77 recommendations to reform wills legislation in Manitoba,[2] none of which has been implemented. Since the report's release, several other law reform agencies have published reports on this topic and several legislative amendments have been enacted by other jurisdictions; they make timely an update of Report 108 and afford an opportunity to shine light on and affirm the recommendations and add several new recommendations.

The organization of this Consultation Paper is the same as Report 108, but, being a Consultation Paper, raises issues about which the Commission seeks your comment.

As in Report 108, this Consultation Paper uses the gender neutral terms "testator" and "executor" to include "testatrix" and "executrix".

[1] Manitoba Law Reform Commission, *Wills and Succession Legislation*, Report 108, March 2003 [Report 108]. Available at the Commission's website www.manitobalawreform.ca.
[2] See Appendix A for a list of Recommendations from Report 108.

CHAPTER 2: *THE WILLS ACT*

While succession legislation is addressed in several pieces of legislation in Manitoba, the primary statute is *The Wills Act*.[3] This chapter discusses 16 areas of potential reform of *The Wills Act* (sections A to P) and raises 21 issues upon which the Commission seeks your input.

A. MENTAL CAPACITY

Testamentary mental capacity is one of the requirements of a valid will, the others being requisite age and intention, knowledge and approval, due form, and due execution. *The Wills Act* includes the requirements respecting age, form, and execution, but not the intention, mental capacity, or knowledge and approval. Recommendation 1 of Report 108 recommends that the requirements of intention, mental capacity, and knowledge and approval be added to the Act. Report 108 does not deal further with mental capacity. The law defining testamentary mental capacity is common law,[4] the root case being *Banks v. Goodfellow*:

> It is essential … that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties—that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.[5]

An extensive body of case law and journal commentary has developed since this principle was first enunciated, easily accessible from several treatises.[6] In 2017, the United Kingdom's Law Commission published a Consultation Paper on *Making a Will* ("UK Paper")[7] in which the Law Commission raised several concerns:

> 2.32 Usually a will is admitted to probate without proof of capacity unless it is challenged. When capacity is brought into question the burden of proof lies on the person propounding the will (the person who is offering the will for probate and therefore alleging that the testator had capacity). However, if the person propounding the will can demonstrate that the will is formally valid and looks rational, the burden of proof is re-shifted. Only if sufficient evidence is raised to bring doubt upon capacity, does the propounder have to prove capacity. The burden of proof in

[3] RSM 1988, c W150.
[4] The law is created in two ways: legislation and common law. Legislation is created by legislatures and government cabinets in the form of statutes or Acts, such as *The Wills Act*, and regulations. Common law is created by judges of trial courts and courts of appeal and by tribunals, in the written reasons given for their decisions or judgments. Common law is sometimes called case law and judge-made law.
[5] *Banks v Goodfellow* (1870), 5 QB 549, at 565.
[6] For example see *Feeney's Canadian Law of Wills*, 4th ed; *Oosterhoff on Wills*, 8th ed; *Theobald on Wills*, 17th ed; *Williams on Wills*, 10th ed; and *Macdonell, Sheard and Hull on Probate Practice*, 5th ed.
[7] United Kingdom, Law Commission, *Making a Will*, Consultation Paper No 231 (2017) [UK Paper]. Note that the final report has not yet been published as the timelines for the project are being revised as the government considers other related issues.

cases of disputed testamentary capacity is therefore highly mobile, and stakeholders have argued that it is unclear where the burden of proof lies in many such cases. …

2.33 Many stakeholders have told us that the *Banks v Goodfellow* test works well, and is well understood by those who apply it. The test succinctly and effectively addresses the fundamental requirements for capacity in the context of making a will, covering what someone without expertise in the law would intuitively think necessary to make a will. It is a specific test to assess capacity for a specific issue, making a will.

2.34 Moreover, many commonwealth jurisdictions also continue to use the test developed from *Banks v Goodfellow*. In its recent review of the common law tests of capacity, the British Columbia Law Institute decided against recommending change to the *Banks v Goodfellow* test (beyond introducing a legislative presumption of capacity). It noted that the common law test, with hundreds of years of precedent, is well-established in the case law.

2.35 Other stakeholders have expressed concern with the test. The language of the case now appears archaic. It may be understood by lawyers who are well-versed in dealing with the test, but is unlikely to be readily appreciated by lay people or other professionals, such as social workers, called upon to make assessments of capacity. At the very least, recasting the test in a modern form would make it more readily understandable and therefore more easily applied…

2.41 More generally, it has been questioned whether the test in *Banks v Goodfellow* is appropriate given that it was created before many developments in modern medicine. Its focus on disorders of the mind and delusions does not reflect the wide range of factors that are now understood to have the potential to affect a person's capacity. In particular, the test does not reflect the significance of dementia in the context of assessments of capacity. The test dates back to a time when rarely did people outlive their minds. In the context of an ageing population where dementia has become increasingly prevalent, it might be argued that there is clearly scope here for a new test for testamentary capacity which would consign *Banks v Goodfellow* to history….

2.59 The longevity of the *Banks v Goodfellow* test may suggest that it performs its task well and is understood by courts, solicitors and testators alike. We have concluded, however, that the problems with the current law mean that reform is required…

2.61 We have considered, but rejected, two possible approaches to reform. The first would be to replace the *Banks v Goodfellow* test with one of the existing medical assessments doctors use to assess testamentary capacity... These tests would provide simplicity; most result in a numeric score, which can be categorised along a spectrum of capacity or cognitive ability. Consequently, they are rather blunt instruments, which do not provide a detailed or contextual assessment of capacity and do not take into account the complexity of the will the person intends to make. In short, these types of assessment are neither nuanced enough nor accurate enough to be used as a legal test for testamentary capacity…

2.64 A second approach would be to propose an entirely new test to assessing testamentary capacity, not based on *Banks v Goodfellow*, the *Mental Capacity Act*[8] (MCA), or even an existing medical test. We have rejected this approach as it does not seem necessary or desirable to create a legal test of capacity out of thin air. Ignoring hundreds of years of case law and the work on capacity that led to the MCA in order to strike out on an entirely new and untested path would appear foolhardy.

2.65 Having discounted these options, we provisionally propose that the MCA is adopted as the test for testamentary capacity, with the specific elements that a testator is required to understand outlined in the MCA Code of Practice…

Placing *Banks v Goodfellow* on a statutory footing

2.74 While our preferred option for reform is to adopt the MCA as the test for testamentary capacity, we recognise that some stakeholders might still favour the retention of the *Banks v Goodfellow* test. Therefore, we would like to hear consultees' views on the alternative approach of placing *Banks v Goodfellow* on a statutory footing. We envisage that such an approach would go beyond a "codification", which would simply seek to crystallize the current test in statutory form. A statutory form of the test would incorporate reform.

2.75 Although we regard such a statutory test as an alternative to our preferred proposal, we recognise that, like the adoption of the MCA, this approach would have a number of advantages over the current common law test.

2.76 First, placing the Banks test on a statutory footing enables the test for capacity to be recast in simple, modern terms, and in terms more in line with current psychiatric thinking.

2.77 Secondly, this approach would also provide an opportunity to provide that disorders of the mind and delusions are only some of the possible causes of incapacity. Such a statutory test would meet the criticism that the test does not reflect the range of facts that are now understood as being capable of affecting a person's testamentary capacity…

2.81 … a statutory test would provide an opportunity to clarify that the essential test is of the testator's ability to understand the will, not whether he or she actually understood the will. While the courts have interpreted *Banks v Goodfellow* to that effect, the language used in the judgment is arguably ambiguous on its face as regards that point. Placing the test on a statutory footing would bring the explicit drafting of the rule into line with its interpretation.

2.82 Finally, this approach to the test would make the law more accessible. Accessibility is particularly important in the context of wills, given that many people write their own wills without the benefit of advice from a solicitor.

2.83 We note that despite concerns about the accessibility and clarity of the common law test, the British Columbia Law Institute did not recommended a statutory version of the *Banks v Goodfellow* test in its recent review. Rather, in its view, the test was better left to the common law

[8] 2005, c 9. The Act provides in ss 2 and 3 (see Appendix B) a definition of mental incapacity to be used in several situations, apparently not including the making of a will, the UK Paper paras 2.7 – 2.9.

The UK Paper distinguishes (i) wills that are created electronically (which are now the majority of wills), (ii) wills that are created and executed electronically, (none currently), and (iii) wills that are created, executed, stored, and submitted for probate electronically.[39] For the purpose of this Consultation Report, an electronic will is a will created, executed, and stored on an electronic medium, from which a printout can be made.

Report 108, not only does not consider the creation of a discrete regime for the making of an electronic will or recommend the use of the dispensation power established by s. 23 of *The Wills Act*, but recommends that the Act should be amended to expressly prohibit the admission to probate of "wills that exist only in electronic form."[40] Since the publication of Report 108, there has been a deluge of law reform commission reports dealing with, and journal articles about, electronic wills.[41]

The only electronic wills legislation creating a discrete regime is the Nevada Revised Statute,[42] which has its critics and has never been used due to one of its requirements.[43] Electronic wills have been admitted to probate via dispensation legislation like s. 23 of *The Wills Act:*

> **Dispensation power**
>
> 23 Where, upon application, if the court is satisfied that a document or any writing on a document embodies
>
> (a) the testamentary intentions of a deceased; or
>
> (b) the intention of a 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;
>
> the court may, notwithstanding that the document or writing was not executed in compliance with any or all of the formal requirements imposed by this Act, order that the document or writing, as the case may be, be fully effective as though it had been executed in compliance with all the formal requirements imposed by this Act as the will of the deceased or as the

Electronic Wills in Texas, (2015) 8 Est. Plan & Cmty. Prop. L.J., 291, 310; and the electronic Will Bills tabled in various US states and the *Draft Electronic Wills Act* of the National Conference of Commissioners of Uniform State Laws, all of which can be found at <uniformlaws.org/committee.aspx?title=Electronic%2OWills>.

[39] UK Paper, *supra* note 7 at 105.

[40] Report 108, *supra* note 1, Recommendation 9.

[41] Law Reform Commission reports: SK Report, BCLI 2006 Report at 29-33; ALRI Report at 43-54; the UK Paper 231, 2017, Chp 6. Selected articles: W Hurlburt, "Electronic Wills and Powers of Attorney: Has Their Day Come?", the Uniform Law Conference of Canada, Proceedings of 83rd Annual Meeting, 2001, at 175, Appendix E; GW Beyer and CG Hargrove, "Digital Wills: Has the Time Come for Wills to Join the Digital Revolution?", (2007) 33 Ohio Northern U.R. 865; JK Grant, Shattering and Moving, "Beyond the Gutenberg Paradigm: The Dawn of the Electronic Will", (2008) 42 Univ of Mich. J of LR 105; SC Boddery, "Electronic Wills: Drawing a Line in the Sand against their Validity", (2012) 47 Real Prop. T &E LJ 197; K Melnychuk, "One Click Away: The Prospect of Electronic Wills in Saskatchewan", (2014) 77 Sask. LR 27; J Banks, "Turning a Won't into a Will: Revisiting Will Formalities and E-Filing as Permissible Solutions for Electronic Wills in Texas", (2015) 8 Est. Plan & Cmty Prop LJ 291; D DeNicuolo, "The Future of Electronic Wills", <americanbar.org/publications/bifocal/vol_38/issue-__June2017_/the_future_of_electronic_wills.html>; Willing, "The Current Role of Technology in the Law of Succession, 2017", <Willing.com/blog/Modernizing_the_law_to_enable_electronic_wills.html>; "What is an "Electronic Will"? (2018) 131 Harv. LR 1790.

[42] *Supra* note 38.

[43] See Banks, *supra* note 41 at 301; Melnychuk at 32; Beyer and Hargrove at 887; Grant at 124; and Oosterhoff on Wills, 8th ed (Thomson Reuters) at 321.

Recommendation 25(c) of Report 108 provides for the situation where the destroyed thing is insured, but not otherwise.

Issue for Discussion 16: Should *The Wills Act* be amended to provide that a beneficiary is entitled to the value of a specifically gifted uninsured thing that has been destroyed simultaneously with the death of the testator?

L. Undue Influence

The second of the five requirements for a valid will, listed at the beginning of Chapter 2, is knowledge and approval. A testator must know and approve of the contents of a will. Undue influence occurs where there is imposition or coercion that causes a testator to make a will or include in a will a provision that does not reflect the true wishes of the testator. Like the law of testamentary mental capacity, the law of knowledge and approval, including the law of undue influence, is entirely common law, and it is as well described in wills treatises as the law of mental capacity.[72] The law of undue influence relating to inter vivos gifts and contracts is different from the law of testamentary undue influence. The onus of proving undue influence is on the person alleging it. A facet of the law respecting inter vivos gifts and contracts is a presumption of undue influence in connection with relationship of influence where, for example, a gift is made by a child to a parent, a follower to a spiritual adviser, a patient to a medical adviser, and a client to a lawyer; there is no such presumption in the law of testamentary undue influence.

The BCLI 2006 Report considers "whether the principles and presumption respecting inter vivos dispositions of property should be applied in cases of alleged undue influence in relation to wills."[73] Ultimately, it concluded against recommending "to change the testamentary doctrine of undue influence".[74] Nonetheless, the *Wills, Estates and Succession Act*[75] contains s. 52:

> **Undue influence**
>
> **52** In a proceeding, if a person claims that a will or any provision of it resulted from another person
>
> (a) being in a position where the potential for dependence or domination of the will-maker was present, and
>
> (b) using that position to unduly influence the will-maker to make the will or the provision of it that is challenged,

[72] *Supra* note 6.
[73] BCLI 2006 Report, *supra* note 29 at 53.
[74] *Ibid* at 54.
[75] SBC 2009, c 13.

and establishes that the other person was in a position where the potential for dependence or domination of the will-maker was present, the party seeking to defend the will or the provision of it that is challenged or to uphold the gift has the onus of establishing that the person in the position where the potential for dependence or domination of the will-maker was present did not exercise undue influence over the will-maker with respect to the will or the provision of it that is challenged.

This prompted BCLI to publish a guide for practitioners that prepare wills to guard against the possibility of undue influence.[76]

The UK paper considers at considerable length the law of knowledge and approval, including undue influence, and seeks comment on a proposal of the creation of a statutory doctrine of testamentary undue influence.[77] The UK Paper is critical of s. 52 for its focus "on the finding of a relationship of undue influence to the exclusion of [ie: without] any requirement that the disposition calls for explanation."[78]

Issue for Discussion 17: Is the law of knowledge and approval, including undue influence, in need of statutory definition or change?

M. Presumptions of Satisfaction of a Debt and of a Legacy by a Gift Inter Vivos.

This section concerns two common law presumptions: (1) when a testator makes a will giving to a creditor a legacy equal to or greater than the debt, the gift is presumed to be in satisfaction of the debt; and (2) when a testator makes a will giving a legacy and subsequently makes an inter vivos gift to the legatee of the same amount as the legacy, the inter vivos gift is presumed to revoke the legacy. The BCLI 2006 Report recommends the abrogation of these presumptions, for the reason that they create "uncertainty in the administration of estates."[79] The BCLI 2006 Report also recommends that the abrogation of these presumptions should be subject to a contrary intention appearing in the will or otherwise proved by extrinsic evidence.[80] These recommendations have been implemented by s. 53 of the *Wills, Estates and Succession Act* of British Columbia:

Common law presumptions abrogated

53 (1) The presumption of law that a gift by a will-maker made during his or her lifetime to a child of the will-maker or to a person to whom the will-maker stands in place of a parent is an advancement of a portion that is intended to revoke a gift in the will-maker's will in favour of the child or person is abrogated and the gift in the will takes effect according to its terms.

[76] BCLI, Report 61, *Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide* (2012).
[77] UK Paper, *supra* note 7, Chapter 7.
[78] UK Paper, *supra* note 7 at 109, para 7.
[79] BCLI 2006 Report, *supra* note 29 at 44-45.
[80] *Ibid.*

(2) The presumption of law that a legacy is revoked by a gift in the same amount as the legacy made by the will-maker during the will-maker's lifetime is abrogated and the legacy takes effect according to its terms.

(3) The presumption of law that a debt owed by a will-maker is satisfied by a legacy to the creditor equal to or greater than the debt is abrogated and the debt continues to be a claim against the will-maker's estate.

(4) The presumption of law that a binding promise by a person to make a gift to advance a child in life is satisfied to the extent of the benefit promised by a gift in the person's will to the child is abrogated and the promise remains binding on the person and the person's estate.

(5) The abrogation of a presumption set out in any of subsections (1) to (4) is subject to a contrary intention appearing in the will or otherwise and extrinsic evidence is admissible to prove the contrary intention.

<u>Issue for Discussion 18</u>: Should *The Wills Act* be amended to abrogate the presumptions of satisfaction of a debt and of a legacy by a gift inter vivos, subject to a contrary intent appearing in a will or otherwise provable by extrinsic evidence?

N. Mortgaged Land

Regarding s. 36 of *The Wills Act*:

Primary liability of mortgaged land

36(1) Where a person dies possessed of, or entitled to, or under a general power of appointment by will disposes of, an interest in freehold or leasehold property which, at the time of the death of the person, is subject to a mortgage, and the deceased has not, by will, deed, or other document, signified a contrary or other intention, the interest is, as between the different persons claiming through the deceased, primarily liable for the payment or satisfaction of the mortgage debt; and every part of the interest, according to its value, bears a proportionate part of the mortgage debt on the whole interest.

Signifying contrary intention

36(2) A testator does not signify a contrary or other intention within subsection (1) by

(a) a general direction for the payment of debts or of all debts of the testator out of his personal estate or his residuary real or personal estate; or

(b) a charge of debts upon that estate;

unless he further signifies that intention by words expressly or by necessary implication referring to all or some part of the mortgage debt.

Saving

36(3) Nothing in this section affects a right of a person entitled to the mortgage debt to obtain payment or satisfaction either out of the other assets of the deceased or otherwise.

"Mortgage" defined

36(4) In this section "mortgage" includes an equitable mortgage, and any charge whatsoever, whether legal, equitable, statutory or of other nature, including a lien or claim upon freehold or leasehold property for unpaid purchase money, and "mortgage debt" has a meaning similarly extended.[81]

Report 108 makes two Recommendations 34 and 35:

RECOMMENDATION 34

Section 36 of the Act … should apply to both real and personal property.

RECOMMENDATION 35

The definition of "mortgage" in the Act should include only mortgages and charges related to the acquisition, use, or improvement of the particular land or chattel.[82]

These recommendations are based upon recommendations of the British Columbia Law Reform Commission Report, *Wills and Changed Circumstances*, Report #102, 1989, relating to s. 30 of the then *Wills Act* of British Columbia. Section 30 of British Columbia's Act is identical to s. 36 of the Manitoba *Wills Act*. The BCLI 2006 Report reconsiders these matters:

> In keeping with the objective of eliminating archaic and unwarranted differences between the treatment of real and personal property, the former Law Reform Commission recommended that the principle of section 30 be extended to both categories of property, and to any mortgages or charges that were reasonably related to the acquisition, improvement, or preservation of the property. It would be fair to let debts secured by charges not specifically relating to the particular property, such as a general security over the testator's assets, to be borne as debts of the estate with all interests contributing to their payment, however.
>
> In this Project, the extension of section 30 to personal property was debated at length. It was noted that while the extension had a theoretical appeal from the standpoint of fairness among beneficiaries, it would require the personal representative to inquire into the origins of all debts and security on estate assets to determine how it affects various beneficial interests. This imposes a fairly onerous burden on personal representatives and those advising them. In addition, some forms of security on intangibles such as shares may be difficult to categorize.
>
> Ultimately, a majority consensus emerged that a new provision based on the principle underlying section 30 of the *Wills Act* should extend only to *registered* charges on real and *tangible* personal

[81] SM, c W150, s 36.
[82] Report 108, *supra* note 1 at 42-43.

property to the extent of the indebtedness relating to the acquisition, preservation or improvement of the asset.[83]

This has been implemented by s. 47 of British Columbia's *Wills, Estates and Succession Act*.

Property encumbered by security interest

47 (1) In this section, "purchase money security interest" means a security interest taken in land or in tangible personal property that

(a) secures credit, including interest charges, provided to the will-maker to acquire, improve or preserve the land or tangible personal property, and

(b) is registered under the Land Title Act or the Personal Property Security Act.

(2) The interest of a beneficiary in a gift of property encumbered by a purchase money security interest is, as between the different persons claiming through the will-maker, primarily liable to pay the debt secured by the purchase money security interest to the extent that the debt is attributable to the acquisition, improvement or preservation of the property.

(3) If a purchase money security interest applies to more than one gift of property in a will, each property is liable for payment of the purchase money security interest proportionally, to the extent that the debt is attributable to the acquisition, improvement or preservation of each property.

Issue for Discussion 19: Do you agree with the BCLI 2006 Report and, therefore, is s. 47 of the *Wills, Estates, and Succession Act* of British Columbia better than Recommendations 34 and 35 of Report 108?

O. Section 29

Section 29 of *The Wills Act* provides:

Gifts to heirs

29 Except when a contrary intention appears by the will, where property is devised or bequeathed to the "heir" of the testator or of another person,

(a) the word "heir" means the person to whom the beneficial interest in the property would go under the law of the province if the testator or the other person died intestate; and

(b) where used in that law, the words "child", "issue" or "descendant" include for the purposes of this section, a person related by or through adoption to the testator or other person.

Section 17.4 of *The Law of Property Act*[84] provides:

[83] BCLI 2006 Report, *supra* note 29 at 47.
[84] CCSM c L90. Added by SM 1989-90, c 43, s 14.

Meaning of "heirs and assigns"

17.4 In the case of a person dying on or after July 1, 1885, in the interpretation of any Act of the Legislature, or in the construction of any instrument to which the deceased was a party or was interested, the expression "heirs" or "heirs and assigns" or "heirs, executors, administrators or assigns", or any expression of similar import, shall be construed to mean the person's personal representative, unless a contrary intention clearly appears.

Bearing in mind that presumably "any instrument" in s. 17.4 of *The Law of Property Act* includes a will, is there a different construction to be made of a gift in a will of a parcel of land "to the heir of A" and the gift of another parcel of land "to heirs of B"?

The original version of current s. 29 was included in *The Wills Act*[85] of 1936 as s. 25:

Devise to "Heir."

25. Where real property is devised to the heir or heirs of the testator or of any other person and no contrary or other intention is signified by the will, the words "heir" and "heirs" shall be construed to mean the person or persons to whom the beneficial interests in the real property would go under the law of the Province in the case of intestacy.

The Wills Act of 1936 was an adoption of the 1929 *Uniform Wills Act* of the Conference of Commissioners of Legislation in Canada (the Conference). In 1951 the Conference began the process of updating its *Uniform Wills Act*. A Special Committee reported to the annual meeting of the Conference in 1954 with a draft revised *Uniform Wills Act*, which continued s. 25 of the 1929 *Uniform Wills Act*. At the 1956 annual meeting of the Conference the Special Committee reported with a revised draft of the *Uniform Wills Act*, with a changed wording of s. 25 as section 27:

27. Except when a contrary intention appears by the will, where property is devised or bequeathed to the "heir" of the testator or of another person,

(a) the word "heir" means the person to whom the beneficial interest in the property would go under the law of the Province if the testator or the other person died intestate; and
(b) where used in that law the word "child" includes for the purpose of this section a person related by or through adoption to the testator or the other person.

No explanation was recorded for the change in wording. The revised draft *Uniform Wills Act* was adopted at the 1957 annual meeting.

In the 1964 re-enactment of *The Wills Act*,[86] s. 28 adopted, so to speak, the wording of s. 27 of the *Uniform Wills Act*, which since has been re-numbered to be s. 29 currently. There is no explanation in the legislative record for the change in wording from s. 25 of *The Wills Act* of 1936 to s. 28 of *The Wills Act* of 1964.

[85] SM 1936, c 52.
[86] SM 1964, c 57.

The comparable legislation of the other Canadian provinces and territories varies.[87]

Issue for Discussion 20:

Should the preamble wording of s. 29 and the wording of s. 29(a) be changed to add "heirs"?

P. Consolidation

The Commission has considered whether Manitoba's multiple Acts dealing with wills and succession law ought to be consolidated into a single statute. This matter was considered in the BCLI 2006 Report:[88]

> VIII. STATUTORY CONSOLIDATION
>
> A. Why Consolidate?
>
> In jurisdictions where consolidation of succession-related statutes has been undertaken, the reasons given for doing so have been very simple. One is that succession to property rights on death is a distinct, though multi-faceted, branch of the law. Another is that accessibility to the law and ease of use is enhanced by gathering conceptually related enactments in a single statute. A third reason for consolidation, not advanced overtly like the above two but equally arguable, is that the process of consolidation facilitates comprehensive and harmonious reform as opposed to quick fixes through piecemeal amendment. A fourth, and typically unstated, policy ground is that of legislative economy: an assumption that it is simply a good thing to reduce the number of separate Acts wherever possible.
>
> These policy reasons for consolidation appear quite axiomatic. As with much else that appears axiomatic on the surface, the devil is in the details.
>
> The argument for some degree of consolidation is nevertheless compelling. There are few other branches of the statutory law of British Columbia in which legislation with closely related subject-matter is as badly fragmented. It may make sense to look for the law relating to wills in the Wills Act, and the law relating to the procedures for administration of estates in the Estate Administration Act. Surely very little justification can be offered, however, for maintaining two separate Acts for provisions dealing with domestic grants of probate (Estate Administration Act) and those concerning resealing of foreign ones (Probate Recognition Act).The substantive rules governing inheritance on intestacy are buried deep within the Estate Administration Act, surrounded by extensive procedural provisions.
>
> It is clear that the statutory portion of succession law is not as accessible or as logically organized as it could be. The issue is not whether any consolidation is needed. Rationalization

[87] BC and AB define heir, heirs, next of kin and kin; SK defines heirs; ON, NWT, and N define heir or heirs; NB, like MB, defines heir; the Acts of NS, PEI, and NL, and YK contain no such section.
[88] BCLI 2006 Report, *supra* note 29 at 93 [footnotes omitted].

of British Columbia's statutes in this area requires it. The issues are the appropriate extent of consolidation.

The current *Wills, Estates, and Succession Act* of British Columbia consolidates, in terms of Manitoba statutes, *The Wills Act*, *The Intestate Succession Act*,[89] *The Dependants Relief Act*,[90] *The Survivorship Act*,[91] *The Homesteads Act*,[92] *The Beneficiary Designation (Retirement, Savings, and Other Plans) Act*,[93] and *The Court of Queen's Bench Surrogate Practice Act*.[94]

The Alberta *Wills and Succession Act*[95] and the *Succession Law Reform Act*[96] of Ontario also consolidate many of the same Acts, but not so many as British Columbia.

Issue for Discussion 21:

(a) Would it be beneficial to consolidate at least *The Wills Act, The Intestate Succession Act,* and *The Dependants Relief Act*?

(b) If yes, should more legislation be consolidated, as with the Acts of British Columbia, Alberta, and Ontario? If so, which additional Acts ought to be consolidated?

[89] SM 1989-90, c 43.
[90] SM 1989-90, c 42.
[91] RSM 1987, c S250.
[92] SM 1992, c 46.
[93] SM 1992, c 31.
[94] RSM 1987, c C290.
[95] SA 2010, c W-12.2.
[96] RSO 1990, c S.26.

CHAPTER 3: MISCELLANEOUS

This chapter considers two issues related to succession legislation contained in other statutes.

A. Abatement

In Report 108, the Commission observes: "A testator can designate assets of his or her estate to be used to pay debts, funeral expenses, and the costs of administering the estate. When a will does not contain such a provision, or to the extent that the assets designated are insufficient, the common law of abatement applies. Manitoba is one of many jurisdictions that have superseded the common law of abatement by subsections 17.3(4) and (5) of *The Law of Property Act*."[97]

Report 108 provides several recommendations, 49-53,[98] respecting the replacement of these subsections.

Issue for Discussion 22: Should the superseding sections be continued in *The Law of Property Act* or would they be better placed in *The Court of Queen's Bench Surrogate Practice Act*?

B. *The Court of Queen's Bench Surrogate Practice Act*

A final issue relates to *The Court of Queen's Bench Surrogate Practices Act*. In light of other contemplated changes discussed in this Consultation Report, the Commission raises the issue of whether *The Court of Queen's Bench Surrogate Practice Act* should be renamed or consolidated.

Issue for Discussion 23:

(a) Does *The Court of Queen's Bench Surrogate Practice Act* continue to be an apt title for the legislation contained in it, or would it be salutary to change the title to *The Administration of Estates Act*?

(b) Are there any changes that should be made to, or included in, or consolidations of other legislation with *The Court of Queen's Bench Surrogate Practice Act*?

[97] Report 108, *supra* note 1 at 61.
[98] *Ibid.* See Appendix A.

APPENDIX A

LIST OF RECOMMENDATIONS (REPORT 108)

1. *The Wills Act* should provide a complete, consolidated listing of the fundamental requirements for a valid will. (p. 5)

2. The Act should provide that a will is valid if it appears that the testator intended by his signature to give effect to the will. (p. 6)

3. The Act should provide that a person signing a will on behalf of a testator may sign the testator's name, his or her own name, or both names. (p. 7)

4. The Act should provide that a will is validly executed even if any or all of the witnesses did not know that it was a will. (p. 8)

5. The Act should provide that, if the first witness signs the will in the presence of the testator only, he or she need only acknowledge his or her signature to the second witness in the presence of the testator. (p. 8)

6. Privileged wills should no longer be valid but provision should be made that those in existence at the time of the coming into force of the new legislation remain valid. (p. 10)

7. The age at which a person can make a valid will should be set at 16 years. (p. 11)

8. "Handwriting" should be defined in the Act to include mouthwriting, footwriting, and similar kinds of writing. (p. 11)

9. The Act should prohibit the admission to probate of wills that exist only in electronic form. (p. 15)

10. The Act should provide that a handwritten postscript on a holograph will apparently written at the same time as the will is not invalidated if it appears the testator intended the writing to be part of the will. (p. 15)

11. The Act should provide that, subject to the requirements of The Queen's Bench Rules and The Court of Queen's Bench Surrogate Practice Act, a will need not be dated and need not include either a testimonium clause or an attestation clause. (p. 16)

12. The Act should provide that a will is invalid if a person who attested it was incompetent as a witness at the time of attestation, but not if the person became incompetent only after attesting it. (p. 17)

13. The Act should provide that any person competent to make a will, other than a person unable to see sufficiently to attest the testator's signature and a person who signs a will on behalf of the testator, can act as a witness to a will. (p. 17)

14. The Act should provide that a will is not revoked by the marriage of the testator where it appears from the will, or from extrinsic evidence, that the will was made in contemplation of the marriage. (p. 22)

15. The Act should provide that a will is not revoked by the marriage of the testator where either the will or a part of the will was made in contemplation of the marriage. (p. 22)

16. The Act should provide that no obliteration, interlineation, cancellation by the writing of words of cancellation or by drawing lines across a will, or any part of a will, made after

execution of a will, is valid or has any effect except to the extent that the words or effect of the will before the alteration are not apparent unless the alteration is executed in accordance with this Act. (p. 26)

17. The Act should provide that the alteration is properly executed if the signature of the testator and the subscription of the witnesses are made:

(a) in the margin or in some part of the will opposite or near to the alteration; or

(b) at the foot or end of or opposite to a memorandum referring to the alteration and written at the end or in some other part of the will. (p.26)

18. The Act should provide that a will may be obliterated, interlineated, or cancelled by the writing of words of cancellation or by drawing lines across a will or any part of a will by a testator without any requirement as to the presence of or attestation or signature by a witness or any further formality if the alteration is wholly in the handwriting of, and signed by, the testator. (p. 26)

19. The Act should provide that, after the making of a will by a testator and before his or her death, the marriage of the testator is terminated by a divorce judgment or the marriage is found to be void or declared a nullity by a court in a proceeding to which he or she is a party, then, unless a contrary intention appears in the will, the will shall be construed as if the spouse had predeceased the testator. (p. 28)

20. The Act should stipulate that a life estate pur autre vie with a spouse as a cestui que vie will not survive the termination of a marriage, unless a contrary intention appears in the will. (p. 29)

21. The Act should treat beneficiary designations in favour of a spouse, whether designations of insurance proceeds or pension proceeds, in the same manner as other devises or bequests. (p. 29)

22. The provisions of the Act dealing with revocation of a will upon marriage should not apply in the event of a subsequent marriage to the former spouse. (p. 30)

23. References to "a decree absolute of divorce" should be replaced with a reference to "a divorce judgment". (p. 30)

24. The Act should explicitly permit the revival of wills that have been revoked by destruction if copies or adequate evidence is available to the court to reconstruct the will. (p. 31)

25. The Act should provide that, except when a contrary intention appears by the will, where a testator (or his or her estate) before, at the time of, or after his or her death

(a) made an agreement to dispose of specifically gifted property but the agreement was not fully implemented at the time of death;

(b) sold specifically gifted property and has taken back a mortgage, charge or other security;

(c) has a right to receive insurance proceeds covering loss of or damage to specifically gifted property;

(d) has a right to receive compensation for the expropriation of specifically gifted property;

the devisee or donee of that property is entitled to the proceeds of disposition, mortgage, charge or security interest, insurance proceeds or compensation. (p. 34)

26. The Act should provide that, except where a contrary intention appears by the will, where the testator has bequeathed proceeds of sale of property and the proceeds are received by the testator before his or her death, the bequest is not adeemed by commingling the proceeds where those proceeds can be traced. (p. 36)

27. The provision of the Act dealing with property disposed of by committee or substitute decision maker should include an attorney acting pursuant to an enduring power of attorney under The Powers of Attorney Act. (p. 36)

28. The Act should provide that, where a gift fails and the testator has designated an alternative beneficiary, the gift should be distributed to that alternative beneficiary, notwithstanding that it fails for a reason other than that contemplated by the testator. (p.37)

29. Section 25 of the Act [new draft s. 23] should be renumbered subsection (1) and a new subsection (2) should be added, reading substantially as follows: Exception 25(2) [new draft s. 23(2)] Subsection (1) does not apply to a residuary devise or bequest that fails or becomes void. (p. 38)

30. The Act should provide that the relevant date for identifying beneficiaries is the date of the testator's death. (p. 40)

31. Section 25.2 of the Act [new draft s. 25] should apply in any case where a gift to a child, other issue, or sibling of the testator fails, regardless of the reason. (p. 40)

32. Section 25.2 of the Act [new draft s. 25] should be applicable only when the person dies after the testator makes the will. (p. 41)

33. The Act should provide that, unless a contrary intention appears in the will, if a beneficiary fails to survive the testator by 30 days, any gifts to that beneficiary should be distributed as if the beneficiary had predeceased the testator. (p. 42)

34. Section 36 of the Act [new draft s. 37] should apply to both real and personal property. (p.43)

35. The definition of "mortgage" in the Act should include only mortgages and charges related to the acquisition, use, or improvement of the particular land or chattel. (p. 43)

36. The Act should impose a single set of conflict of laws rules for both movables and immovables, modeled on Articles 3, 5-7 and 17 of the Hague Convention [as set out in Appendix B], and guided by the principle behind subsection 42(2) of the current Act. (pp. 44-45)

37. If the Hague Convention is not adopted, the conflict of laws provisions in The Wills Act and The Dependants Relief Act should refer to an "interest in immovables" rather than an "interest in land". (p. 45)

38. The conflict of laws provisions of the Act should refer to "formal and intrinsic validity" rather than "the manner and formalities of making a will". (p. 45)

39. The conflict of laws rules provisions should include the testator's capacity. (p. 46)

40. A provision similar to clause 42(2)(b) of the current Act should include any writing made in accordance with the Act declaring an intention to revoke an existing will. The clause should also expressly provide that the testator's capacity to make the later will must also conform to the relevant law. (p. 46)

41. The Act ought to include a single set of conflict of laws rules relating to the revocatory effect of the destruction of a will. (p. 46)

42. The Act should include a set of conflict of laws rules relating to the revocatory effect of a subsequent marriage, divorce and annulment, for both movables and immovables, with domicile and habitual residence (as defined in The Domicile and Habitual Residence Act) at the time of the marriage, divorce and annulment being the relevant connecting factor. (p. 47)

43. The Act should codify, in their entirety, the common law choice of law rules regarding construction of wills, substituting "domicile and habitual residence" (as defined in The Domicile and Habitual Residence Act) for "domicile" as the connecting factor. (p. 47)

44. The Act should provide that an inter vivos gift to a child by a parent is presumed not to be an advancement. (p. 48)

45. The Act should provide that, if a court is satisfied that a will is so expressed that it fails to carry out the testator's intentions, in consequence of

(a) an error arising from an accidental slip or omission;

(b) a misunderstanding of the testator's instructions;

(c) a failure to carry out the testator's instructions; or

(d) a failure by the testator to appreciate the effect of the words used;

it may order that the will be rectified. (p. 55)

46. The Act should provide that, where any part of a will is meaningless or ambiguous either on its face or in the light of evidence (other than evidence of the testator's intention), extrinsic evidence, including statements made by the testator or other evidence of his intent, may be admitted to assist in its interpretation, which interpretation shall be preferred to one resulting from the application of a rule of construction. The legislation should also include a provision stating that the new rule should not render inadmissible extrinsic evidence that is otherwise admissible by law. (p. 57)

47. Where it is deemed appropriate to do so, provisions which contain the words "subject to a contrary intention appearing by the will" should also include the words "or from other relevant evidence". (p. 57)

48. The Act should provide that where a testator devises or bequeaths property in terms which in themselves would give an absolute interest to one person but by the same instrument purports to give another person an interest in the same property, the gift to the first person is absolute notwithstanding the purported gift to the second person. (p. 60)

49. The Law of Property Act should provide that, for the payment of unsecured debts, funeral expenses, and the costs of administering the estate, the order in which assets are used shall be:

(a) assets specifically charged with the payment of debts or left on trust for the payment of debts;

(b) assets passing by way of intestacy and residue;

(c) assets comprising general gifts;

(d) assets comprising specific and demonstrative gifts;

(e) assets over which the deceased had a general power of appointment that has been expressly exercised by will. (p. 62)

50. The Law of Property Act should provide that each class should include both personal property and real property, and no distinction should be made between the two types of property within a given class. (p. 63)

51. The Law of Property Act should provide that each asset within a given class should contribute rateably to payment of debts. (p. 63)

52. The Law of Property Act should provide that, to charge property with payment of debts or to create a trust for payment of debts, a testator must do something more than:

(a) give a general direction that debts be paid;

(b) give a general direction that the executor pay the testator's debts; or

(c) impose a trust that the testator's debts be paid. (p. 63)

53. The Law of Property Act should provide that the statutory order of application of assets may be varied by the will of the testator. (p. 63)

54. The Wills Act should provide that residuary personalty and realty are equally available for the fulfilment of general bequests, including legacies and demonstrative legacies. (p. 64)

55. The Wills Act should provide that real property charged with the payment of debts or pecuniary gifts is primarily liable for that purpose, notwithstanding a failure by the testator to exempt his or her personal property. (p. 64)

56. Subsection 41(2) of The Family Property Act and subsection 12(1) of The Dependants Relief Act should be repealed and replaced with provisions imposing the same abatement regime that governs the payment of debts, funeral expenses, and costs of administering the estate, subject to a contrary testamentary direction. (p. 65)

57. The Intestate Succession Act should expressly stipulate that the only ascendant and collateral blood relatives who are entitled to succeed shall be those up to and including great grandparents and their issue. (p. 66)

58. Section 8 of The Intestate Succession Act ought to apply equally to cases of whole and partial intestacies. (p. 67)

59. Section 8 of The Intestate Succession Act should treat as an advancement a gift declared by the testator to be an advancement, regardless of when the declaration is made. (p. 67)

60. The Intestate Succession Act should provide for a single choice of law rule substantially identical to Article 3 of the Hague Convention [as set out in Appendix B]. (p. 70)

61. The Intestate Succession Act should provide that a successor must survive the deceased by 30 days. (p. 71)

62. Subsection 27(3) of The Marital Property Act should be amended by deleting the requirement that the spousal agreement refer specifically to Part IV of the Act before a waiver of rights takes effect. (p. 73)

63. Section 38 of The Marital Property Act should be amended to clarify the order of calculation of entitlement under that Act and The Intestate Succession Act. (p. 73)

64. The Dependants Relief Act should be amended to provide that the right to apply or to continue an application for an order of relief under the Act survives the death of a dependant. (p. 75)

65. The Dependants Relief Act should permit the court to suspend the administration or distribution of an estate, in whole or in part, on application by persons who, apart from not being substantially dependent on the deceased at the time of death, fit the definition of "dependant" in order to make provision for their possible future needs. (p. 76)

66. The Dependants Relief Act should authorize the court to permit a late application whenever it is satisfied that it is just to do so. (p. 77)

67. The Dependants Relief Act should explicitly state that distribution of an estate is stayed for six months to permit beneficiaries to make an application under the Act. (p. 77)

68. Section 8 of The Dependants Relief Act should require the court to consider the financial responsibility a dependant has for dependants in calculating the maintenance and support required by the dependant. (p. 78)

69. Subsection 13(2) of The Dependants Relief Act should be repealed and replaced with a provision adopting a single choice of law rule substantially identical to Article 3 of the Hague Convention [as set out in Appendix B]. (p. 79)

70. The Dependants Relief Act should provide that an applicant need not establish either residence or domicile within Manitoba. (p. 80)

71. The Dependants Relief Act should provide that an agreement or waiver to the contrary will not disqualify an application under the Act, but will be a factor considered by the court in determining the application. (p. 81)

72. Subject to Recommendation 73, where a person has entered into an enforceable contract to devise property by will, the court may order that the rights of the promisee to the contract, whether or not the person complied with the agreement, be subject to an order under the Act provided the court is satisfied that:

(a) the value of the property exceeds the value of the consideration received by the person in money or money's worth;

(b) the person entered into the contract with the intention of removing property from his/her estate in order to reduce or defeat a claim under the Act;

(c) the promisee to the contract had actual or constructive notice of this intent; and

(d) there would be insufficient assets in the estate to make reasonable provision for the maintenance and support for a dependant after the transfer of the property which the deceased agreed to leave by will. (p. 82)

73. In exercising its power in relation to a contract to leave property by will, the court ensure that any order will not deprive the promisee of the right to receive property or to recover damages for the breach of the contract in an amount which is at least equal to the value of the consideration received by the deceased in money or money's worth. (pp. 82-83)

74. In determining whether the value of the property exceeds the value of the consideration received by the deceased and in what manner to exercise its powers, the court should have regard to:

(a) the value of the property and the value of the consideration at the date of the contract;

(b) the reasonable expectations of the parties as to the life expectancy of the deceased at the date of the contract;

(c) if the property was not ascertained at the date of the contract, the reasonable expectations of the parties as to its likely nature and extent; and

(d) if the consideration was a promise, the reasonable expectations of the parties as to that which would be delivered under the promise. (p. 83)

75. That The Dependants' Relief Act include anti-avoidance provisions similar to those contained in section 72 of the Succession Law Reform Act of Ontario. (p. 84)

76. The Trustee Act should be amended to provide that where the last surviving named or appointed executor of an estate dies, his or her executor automatically steps into his or her shoes as executor, but only until

(a) an administrator with will annexed is appointed; or

(b) six months have elapsed, whichever occurs first.(p. 86)

77. Rule 74.02(10) of the Queen's Bench Rules should be amended by deleting the references to specific examples of suspicious circumstances. (p. 87)

APPENDIX B

***The Mental Capacity Act*, 2005, c. 9, section 2, 3, 4, 16 and 18.**

2. People who lack capacity

(1) For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.

(2) It does not matter whether the impairment or disturbance is permanent or temporary.

(3) A lack of capacity cannot be established merely by reference to—

(a) a person's age or appearance, or

(b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.

(4) In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.

(5) No power which a person ("D") may exercise under this Act—

(a) in relation to a person who lacks capacity, or

(b) where D reasonably thinks that a person lacks capacity, is exercisable in relation to a person under 16.

(6) Subsection (5) is subject to section 18(3).

3. Inability to make decisions

(1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable—

(a) to understand the information relevant to the decision,

(b) to retain that information,

(c) to use or weigh that information as part of the process of making the decision, or

(d) to communicate his decision (whether by talking, using sign language or any other means).

(2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).

(3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.

(4) The information relevant to a decision includes information about the reasonably foreseeable consequences of—

(a) deciding one way or another, or

(b) failing to make the decision.

APPENDIX C

***Infirm Persons Act*, RSNB 1973, c I-8**

Interpretation

1. In this Act …

"mentally incompetent person" means a person

(a) in whom there is such a condition of arrested or incomplete development of mind, whether arising from inherent causes or induced by disease or injury, or
(b) who is suffering from such a disorder of the mind

that he requires care, supervision and control for his protection or welfare or for the protection of others or for the protection of his property;

[…]

Jurisdiction and authority of Court

3(1) Subject to the provisions of the *Mental Health Act*, the court shall have full jurisdiction and authority over and in relation to the persons and estates of mentally incompetent persons, including the care and the commitment of the custody of mentally incompetent persons and of their persons and estates.

3(2) The court may make orders for the custody of mentally incompetent persons and the management of their estates, and every such order shall take effect as to the custody of the person immediately, and as to the custody of the estate upon the completion of the committee's security.

3(3) Where no special provision is contained in this Act or in the rules made thereunder, the jurisdiction and authority of the court shall be exercised as nearly as may be in the same manner as the same might have been exercised prior to the commencement of this Act.

3(4) The jurisdiction and authority of the court under this Act includes the power to make, amend or revoke a will in the name of and on behalf of a mentally incompetent person.

[…]

Power of the court respecting wills

11.1(1) The power of the court to make, amend or revoke a will in the name of and on behalf of a mentally incompetent person shall be exercisable in the discretion of the court where the court believes that, if it does not exercise that power, a result will occur on the death of the mentally incompetent person that the mentally incompetent person, if competent and making a will at the time the court exercises its power, would not have wanted.

11.1(2) Any will made or any amendment made to a will under this Act is for all purposes, including subsequent revocation and amendment, the will of the person in whose name and on whose behalf the will or the amendment is made.

APPENDIX D

The Alberta Law Reform Institute Final Report no. 96, 2009, The Creation of Wills.

CHAPTER 3. STATUTORY WILLS FOR PERSONS WITHOUT TESTAMENTARY CAPACITY

A. Introduction

[57] After reaching the age of majority, adults may possess and then lose testamentary capacity, either temporarily or permanently, due to any number of conditions resulting in mental disability or mental incompetence, including mental illness, brain injury from physical trauma, senile dementia, etc. Some people may never have testamentary capacity in their lifetime due to developmental delay or impairment. However, the legal assessment of an adult's testamentary capacity is never just presumed from the presence of a mental condition; it is always assessed on an individual basis. The law is clear that a mentally challenged person whose affairs require management by a substitute decision-maker may still have the testamentary capacity to create a will.[58]

[58] The law in Canada also seems clear that a substitute decision-maker cannot exercise the testamentary power of a person under their care by making, altering or revoking that person's will. A testator's power to make a will cannot be transferred or delegated at common law. Like getting married or serving a prison sentence, will-making is classified as a personal act that can only be performed by the principal, not by an agent. In addition, the fiduciary nature of the relationship between a principal and their agent, attorney or trustee restricts a substitute decision-maker from disposing of the principal's property without clear and specific authority to do so; therefore, this principle similarly restricts substituted will-making.[59] Although many Canadian statutes confer on substitute decision makers very broadly-stated general powers to deal with the property and affairs of the persons under their care, it is extremely doubtful that the power to make a will would thereby be included.[60] Five provinces leave no doubt about the matter by

---

[58] Feeney at § 2.7.

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

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

expressly providing that a substitute decision-maker cannot make, change or revoke a will.[61]

[59] Courts have no greater authority in this area than other substitute decision makers. In the absence of express statutory authority, a court cannot make, change or revoke the will of a person without testamentary capacity.[62]

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

B. Circumstances Addressed by Statutory Wills

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

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

---

[61] Northwest Territories, Nunavut, Ontario, Saskatchewan [61] and Quebec: *Guardianship and Trusteeship Act*, S.N.W.T. 1994, c. 29, s. 36(3); *Substitute Decisions Act*, S.O. 1992, c. 30, s. 31(1); *Adult Guardianship and Co-decision-making Act*, S.S. 2000, c. A-5.3, s. 43; Quebec Civil Code, art. 711.

[62] Robertson, note 60, at 98.

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

- A pre-existing will was revoked by marriage or divorce, the person is

now incompetent to make a new one and intestacy will produce an undesirable result or a result the person would not have wanted.

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

[62] A statutory will case in England that had very unusual circumstances is *Re Davey*.[64] A young male nurse in a nursing home secretly married an elderly dying woman with mental deterioration. The marriage revoked her will (made while

---

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

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

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

> ... it should be made clear that the Court is not bound to make an entire will for an incapable person. The applicant may be satisfied with a specific bequest or devise, for example a life interest in a house in which the applicant may be living with the incapable person whom he or she is caring for on a gratuitous basis. The rest of the estate can be distributed according to an existing will or the intestacy rules, or be left to a family provision claim. The jurisdiction should be capable of being exercised only to meet the need at hand. If every time the court were to consider that it must authorise an entire will that could be an occasion for expensive enquiries and hearings.[65]

C. Statutory Wills in England

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

---

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

[66] Roger Kerridge, *Parry & Clark: The Law of Succession*, 11th ed. (London: Sweet & Maxwell, 2002) at 66 [Parry & Clark]. This authority is currently found in the *Mental Capacity Act 2005* (U.K.), 2005, c 9, s 18(i) and Schedule 2, ss 1-4 [Mental Capacity Act].*The Mental Capacity Act* was enacted following a review of substitute decision-making by The Law Commission (England) in its

(continued...)

authorize the execution of a will[67] for a person ("P") who "lacks capacity in relation to a matter or matters concerning . . . P's property and affairs."[68] A person lacks capacity "in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain."[69] The court cannot make a statutory will for a minor.[70]

[65] Under the Court of Protection Rules, an application for a statutory will may be brought without prior permission of the court by a wide assortment of people, including the Official Solicitor, the Public Guardian, a person who has made application for the appointment of a deputy (trustee or guardian) for P, a beneficiary under an existing will or on intestacy, an attorney under an enduring power of attorney and any person for whom P might be expected to provide if P had capacity to do so. Anyone else must have the prior permission of the court to apply for the making of a statutory will.[71]

[66] A statutory will "may make any provision (whether by disposing of property or exercising a power or otherwise) which could be made by a will executed by P if he had capacity to make it."[72] Accordingly, "[t]he Court will, broadly speaking, attempt to make for the patient the will it supposes he would, had he been capable,

---

[66] (...continued)
report *Mental Incapacity*, Report No. 231 (1995). This report contains virtually no discussion of the law and practice of statutory wills, apparently treating it as self-evident that statutory wills are a useful and valid mechanism that should continue as before. And indeed, the *Mental Capacity Act* made no substantive changes to this area which was previously governed by the *Mental Health Act 1983* (U.K.), 1983, c 20, Part VII.

[67] *Mental Capacity Act*, ss 16(2)(a) and 18(1)(i). The power to make a statutory will can only be exercised by the court, not by P's deputy: Mental Capacity Act, s 20(3)(b).

[68] *Mental Capacity Act*, s 16(1)(b).

[69] *Mental Capacity Act*, s 2(1).

[70] *Mental Capacity Act*, s 18(2).

[71] *The Court of Protection Rules 2007*, S.I. 2007/1744, rr. 50, 51(1), 51(2)(a) and 52(4)(a)-(e).

[72] *Mental Capacity Act*, Schedule 2, s 2. This continues the subjective approach long taken by British courts under predecessor legislation such as the *Mental Health Act 1983* (U.K.), 1983, c 20, s 96(1)(e), for example.

have made for himself."[73] The court is to proceed in a subjective manner to

determine what this particular person would want done with their estate, rather than just doing what the court perceives as being objectively best. The leading case of *Re D.(J.)*[74] listed five principles or factors for a court to follow when devising a statutory will:

> (1) the patient should be assumed to have a brief lucid interval at the time the will was made;
>
> (2) during that lucid interval it should be assumed that the patient has full knowledge of the past and realises that as soon as the will is executed he will lapse back into his pre-existing mental state;
>
> (3) the actual patient must be considered, with all his antipathies and affections that he had while in full capacity, and not a hypothetical patient;
>
> (4) the patient must be assumed to be acting reasonably and to have been advised by a competent solicitor; and
>
> (5) in normal cases, he is to be envisaged as taking a broad brush to the claims on his bounty rather than an accountant's pen.[75]

[67] Subjectively considering the actual, not hypothetical, person can pose difficulties in some circumstances. In *Re C*, the patient was profoundly mentally handicapped from birth and lived in an institution for her entire life. She inherited a great deal of money from her parents.[76] Her relatives appeared to be largely unaware of her existence. Apart from the staff and other patients at the hospital, her only friend was a volunteer from a charitable organization concerned with mental patients. The court was unable to do a subjective assessment of Miss C because

> [i]n all relevant respects, the record of her individual preferences and personality is a blank on which nothing has been written. Accordingly, there is no material on which to construct a subjective assessment of what the patient would have wanted to do.... [I]n those circumstances the court must assume that she would have been a normal decent person, acting in

---

[73] Parry & Clark at 67.

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

[75] Lord Mackay of Clashfern, ed., *Halsbury's Laws of England*, 4th ed. reissue, vol. 30(2) (London: LexisNexis Butterworths, 2005) at para. 695, summarizing *Re D.(J)*, [1982] 1 Ch. 237 at 243-244 [Halsbury's].

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

> accordance with contemporary standards of morality. In the absence of actual evidence to the contrary, no less should be assumed of any person....[77]

So "the judge was obliged to partially resurrect the patient on the Clapham omnibus" and objectively assess what Miss C might have wanted to do with her estate.[78] The court felt that she would be influenced by two considerations – first, that she had lived her entire life in community care and second, that her wealth had come from her family. Accordingly, the court decided that she would have felt a moral obligation to recognize both the community and her relatives in her will. The statutory will therefore split the estate between local mental health charities and the relatives. The effect of the statutory will was to significantly benefit the charities, who would have received nothing if the estate had passed by intestacy.

[68] Once the court has approved the terms of a statutory will, it will authorize someone (usually the property trustee) to sign the will for the person who lacks capacity. The authorized person must sign the will with their own name and the name of the patient, in the presence of two or more witnesses present at the same time. The witnesses must then sign the will in the presence of the authorized person. Finally, the will must be sealed with the court seal. Apart from these special formalities, the will is governed by the standard wills legislation.[79]

[69] Statutory will applications are fairly rare in England – only around 250 applications per year.[80] Applications are detailed, time-consuming to prepare and therefore costly to bring. The effort and cost must be assessed against the size of the estate and the consequences of not having a statutory will.[81] As one writer notes:

> An application needs to show the patient's family and interests, character and history of generosity, the patient's testamentary history and the relationship to his proposed beneficiaries, the size of the estate and the likely size of the estate at the date of death. The application must then apply all these factors to the present situation and show why the present dispositions

---

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

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

[79] Mental Capacity Act, Schedule 2, s. 3; Parry & Clark at 66.

[80] Terrell, note 63, at 968.

[81] Terrell, note 63, at 970.

> under an existing will or intestacy are inappropriate, and why the patient would wish to change those present dispositions. The burden of proof is on the applicant to justify the change to the current dispositions.[82]

D. Statutory Wills in Australia

[70] Most Australian jurisdictions (New South Wales, Northern Territory, Queensland, South Australia, Tasmania, Victoria and Western Australia) authorize the making of statutory wills for mentally incompetent persons.[83] Only the Australian Capital Territory does not allow the making of statutory wills for adults lacking testamentary capacity. The uniform model statute proposed by the Australian National Committee for Uniform Succession Laws recommends that all Australian jurisdictions adopt a standard procedure allowing statutory wills.[84]

[71] There are several differences between the English model of statutory wills and the typical Australian model. A major difference is that, in England, most people apply to court to make a statutory will in a one-step process. The typical Australian model creates a two-step process whereby every applicant must first seek leave of the court to bring a subsequent application for a statutory will.[85]

[72] The Australian two-step process is designed to screen applications so that only well-founded applications will be heard by the court. It reflects a fear that frivolous or vexatious applications may be brought. In Australia, anyone can apply to have a statutory will made for an incompetent person. This permissive model

---

[82] Terrell, note 63, at 968, 970.

[83] *Succession Act 2006* (N.S.W.), ss. 18-26 [New South Wales Act]; *Wills Act* (N.T.), ss. 19-26 [Northern Territory Act]; *Succession Act 1981* (Qld.), ss. 21-28 [Queensland Act]; *Wills Act 1936* (S.A.), s. 7 [South Australia Act]; Tasmania Act, ss. 21-41; *Wills Act 1997* (Vic.), ss. 21-30 [Victoria Act]; *Wills Act 1970* (W.A.), ss. 39-48 [Western Australia Act].

[84] Australia Uniform Report at 44-58.

[85] The two-step process of requiring leave to be sought before the application hearing is found in Victoria, South Australia, Queensland, New South Wales, Northern Territory and Tasmania. It is also recommended by the uniform model statute. Western Australia uses a single application procedure. Tasmania allows statutory wills to be made by the Guardianship and Administration Board as well as by a court. The Board is a special tribunal established under the *Guardianship and Administration Act 1995*. It handles all guardianship appointments and other issues concerning mentally incompetent persons. Whether a statutory will is sought from a court or the Board, the procedure is essentially the same.

recognizes that a wide assortment of people who interact with an incapacitated

person may have good reason to be concerned about that person's affairs (such as solicitors, social workers and health care workers).[86] But the downside of allowing anyone to apply is that "frivolous or vexatious applications may be lodged, or relatives may make applications for the purpose of ascertaining what provision, if any, the person who is the subject of an application has made for them in a will."[87]

[73] The disadvantage of a two-step process is that an applicant must appear twice – first to seek leave and then later to make the substantive case for a statutory will. In a small estate, the cost of two applications might be prohibitive. Also, in a clear case that is uncontested, two hearings seem excessive. Therefore, the court is usually given the power to allow the leave hearing to immediately proceed as the substantive hearing, using the same evidence and documents which have been filed. In other words, a leave application can (in appropriate cases) "be utilised as a 'fast track' procedure."[88]

[74] The application for leave must be supported by extensive evidence and documentation about the person's lack of testamentary capacity both now and in the future, the need to make a statutory will, the size and nature of the estate, the person's wishes or history concerning family and charitable giving, whether there is an existing will, the potential objects of testamentary provision, the beneficiaries on intestacy and, of course, a draft of the proposed testamentary direction.[89] An application for leave must essentially present the substantive case for making a statutory will.

[75] By contrast, the English one-step model screens potentially frivolous or vexatious applications by putting some restrictions on who may apply for a statutory will in the first place. As already noted, English regulations allow many types of people to apply for a statutory will without the prior permission of the

---

[86] New South Wales Law Reform Commission, *Wills for Persons Lacking Will-making Capacity*, Report No. 68 (1992) at 12-13 [New South Wales Statutory Wills Report].

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

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

[89] See, for example, Queensland Act, s. 23.

court, including the Official Solicitor, the Public Guardian, a person who has made application for the appointment of a deputy (trustee or guardian) for P, a beneficiary under an existing will or on intestacy, an attorney under an enduring power of attorney and any person for whom P might be expected to provide if P had capacity to do so. But any other person who does not fit one of those categories must have the court's permission to apply for a statutory will. In other words, England uses a one-step model for the most common applicants, but not for a narrow category of other applicants – the kind who have the most remote relationship to the patient and presumably might be the most likely to bring an unfounded application. These applicants must use a two-step procedure and obtain leave before bringing an application for a statutory will.

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

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

> ... it would be better not to attempt to enumerate the possible causes of incapacity in the person on whose behalf a statutory will may be made, by references to disease, senility, injury, mental infirmity, etc. That would involve an applicant having to show which kind of incapacity the person on whose behalf a statutory will was being sought was suffering from. Some of these terms relating to mental incapacity are not clear of meaning and are demeaning to the sufferer.[90]

[78] Also in contrast to the English model, most Australian jurisdictions allow a statutory will to be made for a minor who lacks testamentary capacity.[91] This

---

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

[91] In Western Australia, statutory wills may be made only for adults without testamentary capacity: Western Australia Act, s. 40(2).

power is distinct from the power which most Australian courts also have to authorize a minor to make a will despite their minority. In that situation, the minor lacks testamentary capacity only by temporary reason of youth, with no other underlying cause of long-term incapacity, and the minor is personally requesting the ability to make a will. By contrast, the statutory will provisions are used where someone other than the minor is applying to have a statutory will made for a minor who is not going to acquire testamentary capacity on reaching majority or during their adult life due to some underlying cause of long-term incapacity.

[79] Like the English model, the typical Australian model requires the court to subjectively consider the actual person who lacks testamentary capacity, not a hypothetical person. In the language of the uniform model statute, the court must be satisfied that "the proposed will, alteration or revocation *is or might be one that would have been made* by the proposed testator if he or she had testamentary capacity."[92] This flexible formulation allows the court to examine the issue according to a wide range of factors, as in England. South Australia uses a much narrower formulation (the court must be satisfied that "the proposed will, alteration or revocation *would accurately reflect the likely intentions* of the person if he or she had testamentary capacity")[93] which, when previously used in the Victoria Act (now changed) was interpreted as limiting the court to examining only the proposed will rather than examining the wide range of factors delineated in the English case law.[94] To avoid this limiting effect, most Australian jurisdictions (New South Wales, Northern Territory, Queensland, Tasmania, Victoria and Western Australia) use variations of the more flexible wording also used in the uniform model statute.

[80] The typical Australian model provides that a court can make a statutory will only if the person who lacks testamentary capacity is alive at the date on which the

---

[92] Australia Uniform Report [92] at 57, s. 21(b) of the uniform model statute [emphasis added].

[93] South Australia Act, s. 7(3)(b) [emphasis added].

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

order is made.[95] If the incapacitated person dies at any point in the application process before the order is given, the possibility of making a statutory will ends and the person's estate will pass subject to the usual law of wills, intestacy and dependants relief. The Law Reform Committee of Victoria had recommended a more radical proposal – that an application for a statutory will should be able to be brought within six months of the incapacitated person's death (or such further extended period as the court may allow), on the basis that the extent of the estate and the relative claims of potential beneficiaries would be clearest at that point.[96] However, this recommendation was never implemented in Victoria or followed by any other Australian jurisdiction. The National Committee for Uniform Succession Laws stated that:

> [t]he advantage of excluding applications made after the death of a person is that all applications to adjust how the person's estate will otherwise be distributed (whether by will or by the relevant intestacy rules) will be subject to a single legislative regime, namely, family provision legislation. This avoids the possible conflict that might arise if two different types of applications could be made after the death of a person.[97]

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

E. Statutory Wills in New Zealand

[82] The Family Court of New Zealand is empowered to make a statutory will for a person who is subject to a property order. Although the person has already been found incompetent to manage their own affairs and a manager has been appointed to administer their property, the statute provides that the person is not,

---

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

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

[97] Australia Uniform Report at 50-51.

by reason only of that order, incapable of making a will. The court will assess testamentary capacity before it acts.[98]

[83] The court has a few mechanisms at its disposal. It can direct that a person subject to a property order may make a will only with the leave of the court.[99] If there is an existing will, the court can ascertain the testator's "present desire and intention"[100] to see if the existing will still expresses it. If the will does not, the court can make a statutory will "in accordance with that present desire and intention."[101]

[84] If the court has directed that a will can be made only with the court's leave or if there is no existing will, the court can make a statutory will by first settling "the proposed terms of the testamentary disposition provisionally"[102] and then authorizing the manager to execute a will in those terms for and on behalf of the person. There is no real test stated in the legislation to indicate whether the terms of a statutory will should be determined objectively or subjectively. However, case law has determined that English precedent should be followed, despite its

> … somewhat different statutory framework … , but in the absence of any guidelines the test suggested by Sir Robert Megarry VC [in *Re D.(J.)*] seems eminently practical, particularly as the Vice Chancellor did not suggest that the factors or principles enumerated by him were intended to be exhaustive.[103]

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

---

[98] *Protection of Personal and Property Rights Act 1988* (N [98] .Z.), 1988 No. 4, ss. 2, 54, 55 [Rights Protection Act].

[99] Rights Protection Act, note 98, s. 54(2).

[100] Rights Protection Act, note 98, s. 54(6).

[101] Rights Protection Act, note 98, s. 54(6)
.

[102] Rights Protection Act, note 98, s. 55(2).

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

[85] The signing requirements also follow the English model. The manager signs before two witnesses present at the same time and the witnesses then subscribe in the presence of the manager. Finally, the will is sealed with the court seal.[104]

F. Statutory Wills in Canada (New Brunswick)

[86] As already mentioned, the only Canadian jurisdiction which allows a court to make a statutory will for a person without testamentary capacity is New Brunswick. In 1994, New Brunswick amended the *Infirm Persons Act* so that the Court of Queen's Bench would have "the power to make, amend or revoke a will in the name of and on behalf of a mentally incompetent person."[105] A mentally incompetent person is one who requires care, supervision and control due to "a condition of arrested or incomplete development of mind, whether arising from inherent causes or induced by disease or injury" or "who is suffering from such a disorder of the mind."[106] In addition to persons declared to be mentally incompetent by a court, these provisions also apply to anyone found by a court to be incapable of handling their affairs "through mental or physical infirmity arising from disease, age or other cause, or by reason of habitual drunkenness or the use of drugs."[107]

[87] While the court must find the person to be mentally incompetent or incapable of managing their affairs, there is no explicit statutory requirement that the person must be found to lack testamentary capacity. Such a requirement is present in the English, Australian and New Zealand models. A New Brunswick court has commented that, if the person still has testamentary capacity, they should sign the will along with the committee (property trustee), but if the person does not have testamentary capacity, then there is no need for the person to sign it.[108] Even if this is a correct interpretation of the statute, it seems inappropriate for a court to

---

[104] Rights Protection Act, note 98, s. 55(4).

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

[106] Infirm Persons Act, note 105, s. 1.

[107] Infirm Persons Act, note 105, s. 39(1).

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

be acting when a person has testamentary capacity and can legally make their own will.

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

> ... where the court believes that, if it does not exercise that power, a result will occur on the death of the mentally incompetent person that the mentally incompetent person, if competent and making a will at the time the court exercises its power, would not have wanted.[109]

Only New Brunswick states the test as a negative proposition – the avoidance of a result which the mentally incompetent person would *not* want. One critic has inquired, "Would comments like 'I want A to get something' contrasted with 'I would not want A to get anything' furnish different results?"[110] Stating the test as a negative also caused some to question whether the English case law could be used when interpreting the law.[111] Despite this concern, New Brunswick courts have since adopted the English case law concerning the factors and principles which should guide a court in subjectively making a statutory will.[112]

[89] If the court believes a statutory will is warranted, it may authorize or direct the committee of the estate to do any action in relation to the incompetent person's estate that the person could do if competent.[113] Only a committee can be authorized to so act by the court. An attorney under an enduring power of attorney cannot apply for authorization to make, amend or revoke a will.[114]

---

[109] Infirm Persons Act, note 105, s. 11.1(1).

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

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

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

[113] Infirm Persons Act, note 105, s. 15.

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

[90] The making of any will, amendment or revocation by the committee must be approved by the court in order to be valid.[115] This seems to create an odd procedure. The court approves the terms of the will after the committee has executed the will rather than authorizing them in advance.[116]

[91] No other Canadian jurisdiction has followed New Brunswick's lead to authorize the making of statutory wills. Nor does there appear to be any great reform movement to advocate this development in Canada. However, one academic – Professor Gerald B. Robertson of the University of Alberta – has called for this reform to be made:

> If the present position is indeed that Canadian courts cannot authorize a property guardian to make or revoke a will, this is an unfortunate omission in our law. Although such a power is one which should rarely be exercised, there are situations in which its absence can cause grave injustice, injustice which cannot necessarily be cured by the law of intestate succession or by dependants' relief legislation. Those responsible for reforming the law in this area should give serious consideration to following the lead taken by the English legislation.[117]

G. Is There a Need for Reform in Alberta?

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

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

[94] However, there are some major philosophical hurdles militating against allowing a court to simply come in and rearrange a person's testamentary affairs when the subject is personally incapable of doing it. Canadian legislation largely

---

[115] Infirm Persons Act, note 105, s. 15.1.

[116] Infirm Persons Act, note 105, ss.11.1, 15.1; Leger, note 111, at 9.

[117] Robertson, note 60, at 98.

respects the view that will-making is a sacrosanct personal act that should not ever

be delegated to another. To allow even a court to engage in substitute will-making for the most vulnerable of testators can attract condemnation. As two legal commentators in New Brunswick stated:

> Is this not another example of the "Big Brother" syndrome where the state can interfere with the discretion of an individual without the individual's knowledge. To what extent should the state continue to interfere with the individual? What next? In the writers' opinion, this is a bureaucratic enactment of control without justification and, as such, subject to dangerous development by the courts.[118]

[95] There is also the view that the statutory laws of intestacy and dependants relief already represent society's considered legal response to situations where a person does not have a will (for whatever reason) or where the will or intestacy laws do not adequately provide for a dependent relative. This view argues that the integrity of these statutory safety nets should be preserved without special treatment for a certain class of persons (those without testamentary capacity) whose estates are then handled by alternative means. As stated by the Scottish Law Commission when it refused to recommend any system of statutory wills, "[w]hat such a power would really be would be a power to change the ordinary rules of succession, testate or intestate, which would otherwise apply on the death of the *incapax*."[119]

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

---

[118] Teed & Cohoon, note 110, at 3.

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

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

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

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

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

[101] While ALRI questioned whether there is a need to allow statutory wills to be made for persons without testamentary capacity, we wanted to assess public views and opinions on this issue by consulting as widely as possible. For that purpose, therefore, we made a formal Request for Comment in our Report for Discussion and waited to see what kind of response would emerge on this issue.

[102] Two responses were received in support of statutory wills from organizations advocating on behalf of seniors. These organizations argued that an aging parent's loss of testamentary capacity in the final stages of life can pose real issues for their families if intestacy or dependants relief laws do not adequately address the situation. Such issues will likely increase once today's large population

of "baby boomers" reach their senior years, when dementia and Alzheimer's disease are more common.

[103] The rest of the consultation feedback on the issue of statutory wills was largely negative. All the responses received from lawyers or organizations representing the mentally disabled were opposed to the making of statutory wills.

[104] The lawyers were mainly concerned about the subjective nature of creating a will for another person. They were also more likely to say that the existing legal safety net was sufficient to handle problems arising from loss of testamentary capacity.

[105] The opposition of organizations representing the mentally disabled was based on a profound distrust of lawyers, the courts and the legal system. While a statutory will might occasionally be beneficial to avoid unintended or unfair results on probate, they said that any possible benefit would be far outweighed by the perceived detriments of dealing with the legal system. The advocates for the mentally disabled said that both they and their clients distrust the motives of lawyers. They do not believe that the courts are capable of objectively assessing either a person's capacity or that person's testamentary wishes. They believe the judge will simply impose the judge's own views. Participating in the court system is time consuming, expensive and it always alienates the disabled individual.

[106] In ALRI's opinion, implementation of any proposal concerning statutory wills must be able to allay this kind of fear and distrust in a major population group affected by that law. Reform in a sensitive area like statutory wills cannot be accomplished without public support. Addressing this kind of fear and distrust would require a long-term government commitment to communication and reassurance. Extensive public education would also be required to show people how statutory wills work to people's benefit in other jurisdictions. The acceptance and use of statutory wills in other countries are facts which are completely unknown to people here.

[107] In addition to the other arguments against statutory wills which were canvassed in this chapter, the negative consultation input received on the issue of

statutory wills confirmed ALRI's own initial reluctance to recommend legislation. Accordingly, ALRI does not recommend law reform in this area.

RECOMMENDATION No. 6
The Alberta Law Reform Institute does not recommend that Alberta courts be given the power to make a statutory will for an adult who lacks testamentary capacity.

APPENDIX E

The Scottish Law Commission, Discussion Memo 70

Part IV – MAKING A WILL FOR AN INCAPAX

Introduction

4.1. A will is by definition an expression of the will of the testator. So the notion that someone else might make a valid will on behalf of a person who lacks testamentary capacity seems absurd. What such an exercise would really involve would be not the making of a will for the incapax, which is logically impossible, but the alteration of the ordinary rules of succession applying on his death. The discussion of this problem so far, however, has been in terms of making a will for an incapax and it is convenient to continue to use that terminology.

4.2. In Scotland there is no power to make a will for a person who lacks testamentary capacity. In English law the Administration of Justice Act 1969 gave the Court of Protection power, for the first time, to direct the making of a will for a mentally incapable person.[99] Before that the court had had power to direct a settlement of the property of a mental patient whose affairs it was managing and one of the main arguments conferring a will-making power was that this would enable the results which could have been achieved by a settlement to be achieved in a way which would be simpler and which would avoid the capital gains tax and stamp duty which would have been immediately payable on a settlement.[100] In Scotland there is no power to make an inter vivos settlement of a mentally incapable person's property.

4.3 In the 1970's there was active debate in Scotland on the desirability of enabling the courts to authorise the making of a will or an inter vivos settlement for an incapacitated person. The Council of the Law Society of Scotland was sharply divided on the issue, but a change in the law was strongly supported at a symposium on the subject organised by the Society.[101] In 1977 the Scottish Courts Administration consulted on a proposal for enabling a judicial factor or curator bonis to a mentally ill person to apply to a Lord Ordinary for authority to make a will, codicil, settlement or gift for his ward. By this time, however, the main attraction of a power to make a settlement or gift – namely the avoidance of estate duty by disposing of property more than seven years before death – had disappeared: estate duty had been replaced by capital transfer tax in 1975.[102] The Council of the Law Society of Scotland reconsidered the whole question and decided by a majority that it was opposed to the proposed power. This was ratified by a vote at the Society's Annual General Meeting in 1978. Changes in the law by the Finance Bill 1986 will again affect the position in relation to inter vivos gifts and

[99] S 17. The provisions are now contained in the Mental Health Act 1983, ss 93-97.
[100] See Parl. Debs. (H.C.) Vol. 777 col. 417.
[101] McNeil, "Making a Will for an Incapax" 1979 Journal of the Law Society of Scotland p. 415. In this most useful article McNeil concludes that "legislation to enable a curator bonis to make a will for his ward would be an undesirable innovation in the law of Scotland".
[102] Finance Act 1975, s 19. See now Capital Transfer Tax Act 1984. For this use of settlements on behalf of the mentally ill see Re C.W.M. [1951] 2 K.B. 714 and Re W.J.G.L. [1965] 3 All E.R. 865 at 870-871.

settlements.[103] That however, is beyond the scope of this memorandum although it could be dealt with in the context of our project on judicial factors.

Arguments for and against will-making power

4.4. The argument for the power is that it could avoid unfortunate results. The arguments against the power are that it is contrary to principle, that it is unnecessary, that it could lead to unseemly disputes during a person's life as to the disposal of his estate after his death, that no satisfactory criteria can be laid down for exercising the power and that it could place curators bonis in an embarrassing position, particularly if the ward recovered and objected to what the curator had done. In assessing these arguments it is of interest to consider examples of cases where the power might be thought to be useful.

Example 1. The incapax has made a will, before the onset of his incapacity, leaving everything to his wife. His wife divorces him but the terms of the will are such that she would probably still be able to claim the whole estate under it.[104] In these circumstances his curator bonis might wish to apply for authority to make a new will.[105]

Comment. There would be no problem in this situation if the ex-wife was automatically excluded by divorce, a suggestion which we consider later.[106] There would still, however, be a problem if the wife did not divorce the husband but, say, just went to live with another man as husband and wife. The difficulty here is that there is no way of knowing what the incapax would have wished. He may have hoped for a reconciliation. He may have still wished to benefit his wife in recognition of many years together. Even if he did not there may well be no way of knowing whom he would wish to benefit. It is, arguably, not the curator's, or the court's, function to exercise a moral judgment on the behaviour of beneficiaries under a will and to penalise or reward them accordingly.

Example 2. If the incapax died his property would go to his elderly brother. For tax reasons the brother and his children would prefer that it should go directly to the children.[107]

Comment. Avoidance of a double charge to Inheritance Tax (on the death of the incapax and again on the death of the brother) could be achieved by a deed of family arrangement under section 142 of the Capital Transfer Tax Act 1984 (soon to be renamed the Inheritance Tax Act 1984). This, in any event, seems a better way of achieving the desired result as there is no guarantee that the incapax would have wished to benefit his brother's children directly.

Example 3. Relatives of the incapax, or the curator bonis think that he would wish to leave something to someone who has given him devoted service over many years.[108]

---

[103] The Finance Bill 1986 Part V renames capital transfer tax, inheritance tax and removes liability for tax on certain transfers of value where the transfer occurs at least seven years before the transferor's death.
[104] Cf. Henderson's J.F. v. Henderson 1930 S.L.T. 743; Couper's J.F. v. Valentine 1976 S.L.T. 83.
[105] An example of this type, involving a divorce abroad not recognized by the English courts was used by the Attorney General to support the introduction of the will-making power in England. See Parl. Debs. (H.C.) Vol. 777 col. 417.
[106] Paras. 5.5 to 5.8.
[107] See McNeil, loc. cit.
[108] See McNeil, loc. cit. Re D.(J) [1982] 2 All E.R. 37.

Comment. A bequest on behalf of the incapax would be based largely on speculation. There is no reason why the heirs of the incapax, if they wish to benefit his devoted housekeeper or employee, should not do so directly.

Example 4. There is some ambiguity or formal defect in the existing will of the incapax which, it is thought, might give rise to litigation on his death.[109]

Comment. Other proposals in this memorandum and in our memorandum on The Constitution and Proof of Voluntary Obligations and the Authentication of Writings would deal with formal defects. If ambiguities were likely to provoke litigation after death they would be equally likely to provoke resistance to the application to make a new will.

Example 5. A very wealthy woman of 92, mentally incapable by reason of severe senile dementia and physically very weak, marries a 48 year old attendant in the nursing home where she lives. Let us suppose that (unlike the position in Scots law at present) marriage revokes previous wills.[110] She has made a will leaving most of her estate to relatives. They would like a new will made in their favour, as a matter of urgency, as the old woman is likely to die within days.[111]

Comment. The obvious remedy in this case is to have the marriage declared void on the ground of mental incapacity.[112] Making a new will would not be an adequate remedy if the law gives the surviving spouse legal rights.

Example 6. An old woman has made a will leaving everything to two charities. After the appointment of a curator bonis, and while obviously incapable of making a will, she is heard to express a wish to benefit two nephews. The nephews would like a will made, on behalf of the incapax, in their favour.

Comment. Of course they would. But how can it be known that the wishes of someone who, ex hypothesi, lacked the capacity to make a will represented a settled testamentary intention? If there is testamentary capacity a will can be made in the normal way. If there is not, it seems unwise and unprincipled to allow a will to be made in an abnormal way. Is it, in any event, desirable to encourage a dispute between the nephews and the charities as to what testamentary provisions an old woman should be making?

On the other hand these are rather abstract arguments of principle. There are no doubt cases where a will-making power would be regarded as useful by those responsible for the affairs of the incapax.[113] He may, for example have inherited a substantial fortune from one side of his family and it may seem reasonable that a will should be made to keep it in that side of the family. Given that the law already permits radical changes to a person's will or settlement to be made by deed of family arrangement or

[109] See McNeil, loc. cit.
[110] The question whether marriage should revoke a will is discussed below at paras. 5.1-5.4
[111] Cf. Re Davey [1981] 1 W.L.R. 164.
[112] In England this cannot be done after the death of one of the spouses as mental incapacity make a marriage voidable only, and not void. Matrimonial Causes Act 1973 ss 11 and 12. This may explain the choice of remedy in Re Davey. In Scotland mental incapacity makes a marriage void and it can be declared void after the death of one or both of the parties.
[113] The Victoria Chief Justice's Law Reform Committee has recently recommended the introduction of such a power. Report on Wills for Mentally Disordered Person (1985)

variation of trusts it may seem that allowing a will to be made for an incapax would not be such a very fundamental step. It may also be thought by some that it is undesirable that a facility for managing the estate of an incapax should be available in England but not Scotland.

Invitation for views

4.5. We have not reached a concluded view on this question but invite comments

3. Should a curator bonis, or a court, be empowered to make a will on behalf of a person who, because of mental illness or deficiency, lacks testamentary capacity?

The Scottish Law Commission Report on Succession, Report No. 124

Making a will for an incapax

4.78 In Scotland no one has power to make a will for a person who lacks testamentary capacity. Indeed, as we pointed out in memorandum 70,[114] the idea that someone else can make a will for anyone seems absurd, given that a will is, by definition, an expression of the will of the testator. What such a power would really be would be a power to change the ordinary rules of succession, testate or intestate, which would otherwise apply on the death of the *incapax*. In England and Wales the Court of Protection has power to direct the making of a will for a mentally incapable person.[115]

4.79 In memorandum 70 we set out arguments for and against enabling a court to authorise a judicial factor or *curator bonis* to make a will for an *incapax*. We gave examples of cases where such a power might be thought to be useful but pointed out that, in some of these cases, the same results could be achieved in other ways, such as by a deed of family arrangement, while in other cases the desirability of altering the succession on the basis of speculation seemed very doubtful. We expressed no concluded view but invited comments.[116]

4.80 We expected opinion to be fairly evenly divided on this question as it seemed to us that there were arguments both ways. Although the arguments of principle seemed to us to be rather against a power to make a will for an *incapax*, we were aware that the power had apparently been found useful in England and Wales. In the event the results of consultation were overwhelmingly against the introduction of any such power. Those opposed included the Sheriff's Association, the Faculty of Advocates, the Law Society of Scotland, the Scottish Law Agents' Society, the Scottish Society for the Mentally Handicapped, the Committee of Scottish Clearing Bankers and a number of individual legal practitioners and members of the public. A consultant psychiatrist expressed the fear that a power to make a will for an *incapax* would lead to more pressure on the medical profession to pronounce patients incapable so that their succession might be altered. Some consultees thought there might be a case for a power to alter the will of an *incapax* who had been divorced, on the ground that the testator would presumably not have wished to continue to benefit his or her former spouse. That situation would, however, be dealt with directly by our recommendation that

[114] Para 4.1.
[115] Mental Health Act 1983, ss93-97.
[116] Para 4.5.

divorce should revoke provisions in favour of the former spouse. In these circumstances, we do not recommend the introduction of a power to make a will for an *incapax*.

APPENDIX F

Project Proposal Application Received from a Member of the Public

LAW REFORM

1) Briefly describe your project.

   Currently, in the province of Manitoba, a person who lacks testamentary capacity cannot prepare a Will or have a Will prepared for them. I would like to make a new law, whereby the courts are granted an express statutory authority to make 'statutory wills' for persons without testamentary capacity.

   This affects all adults who have reached the age of majority who may possess and then lose testamentary capacity either temporarily or permanently. A loss may be due to any number of conditions resulting in mental disability or mental incompetence, including mental illness, brain injury from physical trauma, senile dementia, autism, birth mental disability, etc.

   I am hoping the Commission would see the need for this in our province. Wealth accumulation is passing down to generations and in trying to protect those who are vulnerable, they too have a right to protect their assets from moving into unwanted hands OR government agencies (i.e. Public Trustee Office). Though it would increase workload to the courts, it would be offset by a reduction in Public Trustee Office cases or having to appoint an administrator. This also will allow monies to pass to those who have positively interacted with an individual, including step-family members or others, who currently do not fall under succession law. Sadly many children with mental disabilities, such as Autism, end up in merged family situations or single-parent situations due to the burden it takes on traditional relationships.

2) Explain why you think this project is needed.
   My background to this idea is due to the fact I support a son who was born with significant developmental delays and does not have the ability to communicate. My family and I have ensured his financial well-being now and in the future, especially in case of a reduction in government supports. A trust was provided for my son, which expired upon his 21st birthday. He also has a Henson Trust which has a beneficiary in case of my son's death. Then of course, he has a Registered Disability Savings Plan, which we opened for him. My son is the beneficiary of this plan; however no beneficiary can be provided in case of his death.

   In my situation, his blood brother may or may not demonstrate the necessary requirements for financial care for his brother, he may pass on or he may no longer reside in the country. He has two step-brothers who have been a major part of his life and may be in a better position to assist him as he ages and myself and my husband become mentally ill, disabled or pass on. Lastly, he has a living blood father to which the money should never go to, as he has not financially supported his son's future and having a Will would protect that.

I have also worked in Trusts & Estates within a financial institution and in my personal are connected with families who have a child/young adult who has disabilities and those parents have the same worries I do. In looking towards the future for the people we care for, we want to ensure their monies are taken care of, to which we have diligently put aside for their future needs.

The information I can provide you is New Brunswick has introduced Statutory Wills, so we have a precedence in this country. Unfortunately, when needed the most, I will have passed on to argue this for my son. England, Australia and New Zealand courts have or have expressed authority to make Statutory Wills.

I have witnessed personal greed upon individuals' deaths whether it be in my personal life or through my professional life in the Finance. I have seen the chaos, stress and burden it causes on a life to manage an estate on 4 separate occasions for me personally, along with many individuals who I have assisted in the process through my career as a former banker, Trust Assistant and as an Investment Advisor. I have witnessed the time, energy and expense in the court system over individuals 'fighting' over estates.

Waiting until a person who does not have testamentary capacity dies would exclude many significant family members who have raised and cared for this person. I believe family members, while living, can provide the necessary information to create a Will for the person I have referenced. I believe though costs are involved to the Courts, in the long run it would be cost savings to the Province via, the Public Trustee's Office, The Vulnerable Person's Office, Residential agencies (Dasch), Day agencies (St. Amant) and Government Agencies (Community Living – cDs and Employment Income Assistance) who have these individuals under their care. Most importantly, I believe all citizens of Canada should have the same Rights as other Canadians.

APPENDIX G

Hassan Chaudhary

Statutory Wills: A Case for Granting Ontario Courts the Authority to Pass Statutory Wills on Behalf of Persons Lacking Testamentary Capacity

Osgoode Hall Review of Law and Policy

Volume 4 Spring 2013 Issue 1

STATUTORY WILLS: A CASE FOR GRANTING ONTARIO COURTS THE AUTHORITY TO PASS STATUTORY WILLS ON BEHALF OF PERSONS LACKING TESTAMENTARY CAPACITY

Hassan Chaudhary*

In Ontario, individuals have the freedom to create their own will. However, a person lacking testamentary capacity cannot draft an enforceable will. For those individuals who lack testamentary capacity and thereby draft an unenforceable will or simply pass away intestate, their estate is distributed according to the laws of intestacy, which can result in an undesirable outcome. An unjust distribution of an individual's estate can, nevertheless, be avoided by providing Ontario courts with the ability to make, change, or revoke a will.

I INTRODUCTION

Testamentary freedom is an idea that is highly valued and strongly embraced in Ontario. It provides testators, also known as will-makers, with the freedom to create their own will. As a result, a testator can determine how his or her estate will be divided, subject to practical legal limitations.[1] For a will-maker to exercise this ability, however, he or she must possess testamentary capacity. An important criterion for determining testamentary capacity was developed by the English courts in *Banks v Goodfellow*.[2] It requires a will-maker to have an understanding of the nature of his or her will, recognition of

[1] *Succession Law Reform Act*, RSO 1990, c S 26, ss 57-60 [*SLRA*]; *Family Law Act* RSO 1990 ss 29-39 [*FLA*].
[2] *Banks v Goodfellow* (1870), LR 5 QB 549 (Eng QB).

his or her own assets, and an awareness of who may reasonably become a beneficiary of the estate. While medical professionals may be called upon to help make these determinations, the fundamental question is of a legal nature. If a court holds that a testator did not possess testamentary capacity at the time the will was drafted, it shall be invalidated. Thus, a person lacking testamentary capacity cannot draft an enforceable will.

Some adults may lose testamentary capacity due to severe illness or injury while others may never possess testamentary capacity during their lifetime as a result of developmental delays. The relevant legal question that arises in these scenarios is whether Ontario courts should be given the power to create statutory wills for these individuals. By conferring such authority, Ontario's judiciary would be able to make, change or revoke the will of an individual who does not meet the requisite mental threshold. This paper will argue that Ontario courts should be given such authority. In developing this argument, the relevant Ontario law will be examined, followed by the history of the concept and a comparative analysis of how Commonwealth jurisdictions have addressed statutory wills. After exploring arguments in favour of and against such a scheme, this paper will put forward a proposal outlining specific recommendations for legislative reform authorizing Ontario courts to pass statutory wills.

II

CURRENT LAW IN ONTARIO

In Ontario, the *Substitute Decisions Act* provides guidance and relief for individuals that are not mentally capable of making decisions regarding their property or personal care. The Act allows for the appointment of a substitute decision-maker to act on behalf of the person lacking testamentary capacity.

If an individual is unable to make property-related decisions, a substitute decision-maker may be appointed in one of three ways. First, the original decision-maker may appoint a continuing power of attorney via a written document[3] provided that this is done before the original decision-maker loses capacity.[4] Second, a statutory guardian may be appointed.[5] This typically occurs when the original decision maker has not chosen a continuing power of attorney, is placed in a psychiatric facility, and is determined to be incapable of managing his or her property.[6] In these situations, the statutory guardian of any property will be the Public Guardian and Trustee (PGT).[7] A family member or another person may apply to the PGT to assume the role.[8] Finally, a court-ordered guardian can be appointed.[9] In order to be

[3] *Substitutes Decisions Act*, 1992, SO 1992, c 30, s 7 [*SDA*].
[4] *SDA, ibid*, s 8.
[5] *SDA, ibid*, s 15.
[6] *SDA, ibid*, s 15-16.
[7] *SDA, ibid*.
[8] *SDA, ibid*.
[9] *SDA, ibid*, s 22-25.

selected as a guardian, an individual would have to apply to a court. Prior to approving an application, the court would have to be certain that the original decision-maker is incapable of making property related decisions.[10]

The appointed attorney or guardian is provided with a broad set of powers. Typically, he or she is authorized to do anything the original decision-maker could have with respect to the estate's finances.[11] However, attorneys and guardians are expressly forbidden from making, changing or revoking the incapacitated person's will for two reasons.[12] First, individuals are restricted from performing acts that another is legally required to perform.[13] The crafting of wills – similar to marriage or serving a prison term –is placed in this category due to its intimate nature and the need for a subjective assessment that could not be duplicated by another. Second, the appointed attorney or guardian is legally obligated to act in the best interest of the incapacitated person, and thus allowing he or she to alter the will could cause a conflict of interest.[14]

Like substitute decision-makers, Ontario courts under the current legislative scheme have limited authority to alter wills. Indeed, assuming dependents – if any – have been adequately provided for and there are no apparent public policy concerns, the courts cannot make, change or revoke a will on behalf of a person lacking testamentary capacity.[15] However, the reasons as to why a substitute decision-maker may not alter a will do not apply to the judiciary and are thereby immaterial. In establishing this claim, context is useful and instructive. Thus, a historical perspective will be provided followed by an examination of jurisdictions that allow for statutory wills.

III

CONCEPTUAL ORIGINS OF STATUTORY WILLS

Making legal decisions on behalf of an incapacitated individual regarding the division of their estate has its origins in the laws of lunacy.[16] Statutory wills emerged when English courts began

---

[10] *SDA, ibid.*

[11] *SDA, ibid*, s 7(2), s 31(1).

[12] SDA, *ibid.*

[13] Dawn D Oosterhoff, "Alice's Wonderland: Authority of an Attorney for Property to Amend a Beneficiary Designation" (2002) 22 ETPJ 16 at 18-19.

[14] *Ibid*.

[15] *SLRA & FLA, supra* note 1. Certain public policy concerns where the court would set a will aside include findings that (i) the testator was unduly influenced (i.e. coerced), (ii) the will failed to comply with the requirements of due execution, (iii) the testator lacked knowledge of the contents of the will and did not approve its content, and (iv) evidence of fraud or forgery.

[16] Rosalind F Croucher, "An Interventionist, Paternalistic Jurisdiction: The Place of Statutory Wills in Australian Succession Law" (2009) 32 UNSWLJ 674 at 675-76.

focusing on how a lunatic's surplus income could best be distributed.[17] In the landmark decision of Re Hinde (1816), Lord Eldon of the Court of Chancery claimed that the court's "principal duty was to the lunatic" and established a framework to govern the division of a lunatic's estate.[18] After all of a lunatic's debts and expenses were paid, others – presumably the lunatic's kin – would be considered in the distribution of the estate,[19] because the distribution was to be done in the manner "the lunatic himself would do, if he were in a capacity to act."[20] This approach, whereby the court would attempt to divide the estate in the presumed wishes of the lunatic, became known as the "substituted-judgment approach" and has been most influential in modern English law.[21]

IV

STATUTORY WILLS IN OTHER COMMON LAW JURISDICTIONS

A. ENGLAND

The United Kingdom's *Mental Health Act* (1959) established the Court of Protection.[22] Since 1970 it has been assigned the responsibility of making statutory wills for incapacitated persons[23] using the substituted-judgment approach. In the case of *Re D (J)* (1982) the court established five principles that were to be followed when drafting a statutory will:[24]

1. Patients should be assumed to have a brief lucid interval at the time the will was made;

2. During this lucid interval it should be assumed that the patient has full knowledge of the past and realizes that once the will is executed he or she will lapse back into a pre-existing mental state;

3. The patient must be considered, with all his or her and affections that he or she had while in full capacity, and not a hypothetical patient.

4. The patient must be assumed to be acting reasonably

[17] *Ibid*.
[18] *Ex parte Whitbread in re Hinde, a Lunatic*, (1816) 35 Eng Rep 878 (Ch) [Re Hinde].
[19] *Ibid*.
[20] *Ibid*.
[21] *Ibid*.
[22] Royal College of Psychiatrists, *Seminars in Old Age Psychiatry*, (London: Gaskell, 1998) at 301.
[23] Roger Kerridge, *Parry & Clark: The Law of Succession*, 11thed (London: Sweet & Maxwell 2002) at 66.
[24] *Re D (J),* [1982] 1 Ch 237.

and to have been advised by a competent solicitor; and

5. In normal cases, he or she is to be envisaged as taking a broad brush to the claims on his or her bounty as opposed to an accountant's pen.[25]

It is often the case that an incapacitated person's preferences are unknown, thereby rendering the substituted-judgment approach inapplicable. In *Re C* (1991), the patient was mentally handicapped, institutionalized from birth, and upon the death of her parents inherited a significant amount of wealth.[26] When drafting the statutory will, the court recognized that a subjective assessment would be untenable because the "record of the patient's preferences and personality are a blank on which nothing has been written."[27] The court held that in these circumstances, an objective assessment reflecting a "normal decent person, acting in accordance with contemporary standards of morality" would be more practical.[28] The court believed that there was a moral obligation to recognize both the community and the patient's relatives. As a result, the estate was equally divided between local mental health charities and the testator's relatives.

Implemented in 2005, the *Mental Capacity Act* has since dramatically impacted the way statutory wills are drafted in the United Kingdom. Courts are now required to administer an estate based upon the "best interests" of the incapacitated person.[29] A host of considerations are taken into account to make this determination, including the individual's preferences, the views of certain parties (such as a caretaker) and relevant circumstances defined in the legislation.[30] In *Re P*, Lewison J noted that while the courts could explore each of these considerations, they were not obligated to give effect to each of them.[31] On this matter, Lewison J stated:

> Counsel stressed the principle of adult autonomy; and said P's best interests would be served by giving effect to his wishes. That is, I think, part of the overall picture[,] … But what will live on after P's death is his memory; and for many people it is in their best interests that they be remembered with affection by their family and as having done "the right thing" by their will. In my judgment, the decision-maker is entitled to take into account, in assessing what is in P's best interests, how he will be remembered after his death.[32]

Accordingly, an incapacitated person's estate may be divided in a manner that might not reflect his or her preferences but rather in

---

[25] *Ibid.*

[26] *Re C*, [1991] 3 ALL ER 866 (Ch).

[27] *Ibid* at 870.

[28] *Ibid.*

[29] *Mental Capacity Act 2005* (UK), 2005, c 9, s 4 [*MCA*].

[30] *MCA, ibid*, ss 4(6-7), (11).

[31] *Re P*, [2009] EWHC 163 at para 41 (Ch).

[32] *Ibid* at 44.

a manner that is reflective of judicial considerations regarding their best interests. While the development of this "best interests" standard has rendered the substituted-judgment approach less applicable today, it continues to be applied in several common law jurisdictions.

B. AUSTRALIA

Most jurisdictions in Australia allow the courts to execute statutory wills on behalf of those lacking testamentary capacity.[33] Each of these jurisdictions employs a regime whereby the courts attempt to draft a will that resembles what the incapacitated person "might," "is likely to," "could," or "would" have made – in effect the substituted-judgment approach.[34] While there are subtle differences between each jurisdiction, they all seek to provide courts with flexibility in the provision of statutory wills.

South Australia employs a more stringent method known as the "likely intentions" standard.[35] While the wording seems similar to that used in other Australian jurisdictions, it has been interpreted far more narrowly and entails a higher threshold of certainty, as seen in *Boulton v Sanders* (2004).[36] In this case, the claimant, Ms. Boulton, was appointed as the executor of Amy Sanders' estate, who was 90 years old and suffered from dementia. While Ms. Sanders' had an existing will, the principal beneficiary had passed away. Accordingly, the estate was to be divided in accordance with the laws of intestacy and Ms. Boulton, a longstanding family friend and executor of the estate, would receive nothing. As a result, she applied for a court imposed statutory will. The court held that an "accurate reflection of likely intentions required a substantial degree of precision" and "if the proposed will no more probably reflects likely intentions than a number of other possible dispositions," it would not be authorized.[37] Despite the apparent legitimacy of Ms. Boulton's claim, the court denied it and held that the evidence did not meet the threshold for "likely intentions."

In cases where an incapacitated person's preferences are unknown, Australian courts have employed an objective approach. In *Hoffman v Waters* (2007), an application for a statutory will was sought on behalf of a young person who had lacked capacity since the age of three.[38] Relying on the aforementioned Re C, the Supreme Court of South Australia decided to draft the will so that it would be akin to that "of a kind that one would reasonably expect would be made by a young man" in his situation.[39]

---

[33] This includes New South Wales, Northern Territory, Queensland, South Australia, Tasmania, Victoria and Western Australia. Martin Terrell, "Wills for persons without capacity" (2004) 154 New LJ 968 at 970.

[34] *Supra* note 16 at 680.

[35] *Wills Act* 1936, s 7(3)(b) [*South Australia Act*].

[36] *Boulton v Sanders* (2004) 9 VR 495 (CA).

[37] *Ibid* at 515-16.

[38] *Hoffman v Waters* (2007), 98 SASR 500.

[39] *Ibid* at 508.

C. NEW ZEALAND

The Family Court of New Zealand has the authority to make a property order,[40] which entails the appointment of an individual ("manager") to take care of another person's property.[41] The court will make such an order if it believes that the individual in question lacks the capacity to appreciate the consequences of his or her property related decisions or if the individual has the capacity to understand the effect of his or her decisions, but is unable to communicate them.[42] If an individual is subject to a property order, he or she will not automatically be considered incapable of making a will.[43] The court will examine the issue of capacity separately. If it is found upon examination that the individual does not possess testamentary capacity, the court will be empowered to pass a statutory will. New Zealand legislation does not specify whether the court should use a subjective or objective assessment when devising a statutory will. New Zealand's common law suggests that the subjective substituted-judgment approach is considered the most appropriate.[44] The courts thus seek to consider and apply the individual's intentions and desires in accordance with the five principles established in *Re D (J)*.[45]

D. NEW BRUNSWICK

In 1994, the provincial legislature of New Brunswick amended the existing *Infirm Persons Act*,[46] providing the Court of Queen's Bench the authority to make, amend or revoke a will on behalf of a mentally incompetent individual.[47] In doing so, New Brunswick became the first and only Canadian province to allow its judiciary to execute statutory wills.

The Act states that the courts of New Brunswick may draft a statutory will "where [it] believes that, if it does not exercise [its] power, a result will occur on the death of the mentally incompetent person that the mentally incompetent person, if competent…would not have wanted."[48] The court is thus required to employ the substituted-judgment approach when possible, similar to its counterparts in New Zealand and parts of Australia. In making subjective assessments, the Court of Queen's Bench has relied on

---

[40] *Protection of Personal and Property Rights Act 1988*, NZ 1988, no 4 s 1-15 [*Rights Protection Act*].

[41] *Rights Protection Act, ibid*, s 31.

[42] *Rights Protection Act, ibid*, s 6(1).

[43] *Rights Protection Act, ibid*, ss 2, 54, 55.

[44] *Re Manzoni (A Protected Person): Kirwan v Public Trustee*, [1995] 2 NZLR 498 at 505 (HC).

[45] *Ibid*.

[46] *Infirm Persons Act*, RSNB 1973, c I-8 [*IPA*].

[47] *IPA, ibid*, s 3(4).

[48] *IPA, ibid*, s 11.1(1).

principles established in English case law, including *Re D (J)*,[49] and determines personal interests through the individual's social interactions.[50] A subjective assessment is also applied when an individual has been incapacitated throughout their entire life.

Before granting leave for a statutory will, the court must be satisfied that the person in question is mentally incompetent. However, in addition to an individual being declared mentally incompetent, the court may also create, change or revoke a will on behalf of anyone found to be incapable of handling his or her affairs "through mental or physical infirmity arising from disease, age or other cause, or by reason of habitual drunkenness or the use of drugs."[51] In this regard, New Brunswick differs from the United Kingdom, Australia and New Zealand, as each requires a finding of testamentary incapacity before proceeding with a statutory will application.

V

ARGUMENTS IN FAVOUR

A. INTESTACY MAY CAUSE UNDESIRABLE OR UNJUST CONSEQUENCES

An incapacitated person may have once possessed testamentary capacity, but during that period may not have made a will; others may have lacked capacity since birth or childhood. Individuals in both groups will die intestate. In Ontario, the laws of intestacy would govern the division of their estate.[52] In certain circumstances this may produce an objectionable outcome, as demonstrated by the two examples below.

First, assume that a newly married couple has a child named Bob. Bob is particularly adored and loved by his elderly grandfather, who lives in a retirement home. Unfortunately, Bob's parents do not share these feelings of affection and he becomes a victim of physical abuse which leaves Bob severely disabled. Upon learning of this abuse, social services place Bob in foster care, where he receives significant attention and assistance from the staff. Shortly thereafter, Bob's grandfather passes away and in his will bequests his entire estate to Bob. At age 19, Bob's mental condition worsens and he dies before his parents, leaving no dependents. In Ontario, due to the absence of a statutory will-making scheme, Bob would die intestate. Due to the fact that he did not have a spouse nor any issue, Bob's parents would equally benefit from his estate. Such a result would be repugnant, unconscionable and almost certainly contradict what Bob would have done had he possessed capacity. This demonstrates the limitations of the existing law and, more importantly, demonstrates how the

---

[49] *Re M (Committee of)* (1998), 27 ETR (2d) 68 at 77 (NB QB).

[50] Eric L Teed, Q.C. and Nicole Cohoon, "New Wills for Incompetents" (1996), 16 ETJ 1 at 2.

[51] *Ibid* at 79.

[52] *SLRA, supra* note 1, ss 44-49.

administration of justice could be brought into disrepute.

In the hypothetical situation provided above, an undesirable outcome could have been avoided through a scheme allowing for statutory wills. Since Bob lost capacity at a young age, his intentions and inclinations would not be known. Therefore, when drafting a statutory will, a court could employ an objective approach and determine how a reasonable person in Bob's situation would dispose of his or her estate by examining the facts and circumstances of the case. By utilizing this approach, it is more likely that Bob's estate would be devised in a manner consistent with his presumed intentions.

Second, by allowing an incapacitated person's estate to be divided in accordance with the existing laws of intestacy, individuals and organizations can often be wrongfully overlooked. An individual lacking capacity, for instance, may have blood relatives with whom he or she has no meaningful or even a neglectful and abusive relationship. As a result, this individual's only form of support may come from a non-family caretaker, such as a volunteer or employee at a mental health care facility. This can be problematic because the caretaker would not have a claim on intestacy.[53] Furthermore, it is uncertain whether the caretaker would have a claim under dependents relief legislation. In *Perilli v Foley Estate*, the Ontario Superior Court held that non-dependents could inherit a share of the estate based on their moral and legal claims.[54] While this decision seemed progressive, it has not had much influence or impact in remedying the problem at hand. In contrast, a statutory will-making scheme would definitively allow courts to recognize the care and service provided by a non-dependent, thereby removing any uncertainty and potential injustice from ensuing.

B. STATUTORY WILLS CAN CORRECT OUTDATED WILLS

Competent persons may lose testamentary capacity and circumstances may change in such a way that results in a will no longer reflecting the wishes of the testator. Consider the following: John and Jane are married and have two children. In her will, Jane leaves her entire estate to John and the remainder to their children. A decade into the marriage Jane learns that John has been having an affair and is devastated. She proceeds to file for divorce and orders a restraining order against John. Unable to cope with the circumstances, Jane shortly thereafter commits suicide without updating her will. In Ontario, the law would likely apply in an inflexible and mechanical manner. Despite all the evidence indicating that Jane would not have wanted her estate to pass on to John for life, this would be the probable result. Such an outcome illustrates a gap within the law that allows for counter-intuitive and perverse outcomes. Accordingly, empowering courts to pass statutory wills would effectively address these problems by allowing the law to operate in a more predictable

---

[53] *SLRA, supra* note 1, ss 44-49.

[54] *Perilli v Foley Estate*, [2006] 23 ETR (3d) 245.

and logical manner, both of which are important characteristics to a fair and just legal system.

C. STATUTORY WILLS PROVIDE EQUAL FOO FOOTING & TESTAMENTARY FREEDOM

A statutory will-making scheme would advance the rights of those who do not possess testamentary capacity. Currently, an Ontarian who lacks capacity is deprived of the opportunity to determine how his or her estate will be divided. Statutory wills would allow these people to be placed "on a more equal footing in terms of will-making."[55] As seen in jurisdictions that allow for statutory wills, courts will tailor its analysis and decision to the individual in question. All relevant information known about the incapacitated testator is considered and the estate is divided in a manner that is aimed to be more reflective of the testator's intent. Through this process, those who were close to and who provided assistance to the incapacitated person would typically be rewarded as beneficiaries of the estate while potential beneficiaries who were neglectful or abusive may receive far less than expected.

VI

ARGUMENTS AGAINST

A. STATUTORY WILLS ARE PATERNALISTIC

Neville Crago, Eric Teed and Nichole Cohoon affirm that statutory wills are paternalistic.[56] The latter two note that statutory wills provide the judiciary with too much discretion, freedom, and power.[57] Accordingly, the courts are able to interfere with a person's estate and determine how it should be divided.[58] Since the individual is incapacitated, the distribution takes place without their knowledge.[59] According to Teed and Cohoon, this represents "another example of the Big Brother syndrome" that should be prohibited rather than promoted.[60]

It is important, however, to distinguish between statutory wills that employ a substituted-judgment approach versus a best interests standard. The argument put forward by these scholars holds little force in the context of statutory wills that apply the subjective substituted-judgment approach, where the wills are designed to reflect the intentions of the incapacitated person. When drafting these wills, the court does not attempt to impose any beliefs or values

---

[55] Robert D Nicholson, "Waving the Magic Wand: Solving Key Legal Issues Relating to Intellectual Disability", (1995) 2 Journal of Law and Medicine 270 at 285.

[56] Neville Crago, "Reform of the Law of Wills", (1995) 25 Western Australian Law Review 255 at 258.

[57] *Supra* note 50 at 3.

[58] *Ibid.*

[59] *Ibid.*

[60] *Ibid.*

regarding how the estate should be divided, but rather attempts to provide autonomy to the individual. Therefore, it is reasonable to conclude that statutory wills that apply a substituted-judgment approach are not paternalistic but rather are respectful of the individual's autonomy.

Some jurisdictions that employ the substituted-judgment approach allow for objective assessments (i.e. that of the reasonable person) when the interests and inclinations of an individual lacking capacity are indeterminable. Such objective assessments are used infrequently and are typically applied when an obvious injustice would result in the absence of a statutory will. Since the objective approach is seldomly used and only in urgent situations, it tempers any paternalism-related concerns. On the other hand, the same does not hold true for the best-interests standard, as used in the United Kingdom. The court's authority seemingly prevails over the individual's autonomy. Thus, the concerns regarding paternalism may be justified.

B. The Law in Ontario is Sufficient

It may be argued that developments in the common law have provided Canadian courts with sufficient authority to prevent and resolve any injustices that may arise in the administration of an incapacitated person's estate. Thus, the argument holds a statutory will-making scheme is simply unnecessary.

To determine the strength of this argument, it is necessary to examine relevant common law developments. In *Cleaver et al v Mutual Reserve Fund Life Association* (1892)[61] the English court held that the law prohibits a criminal from benefiting from his or her wrongdoing.[62] This rule was adopted in Canada and bears relevance to the issue at hand because it can be used to extinguish the rights of a beneficiary without relying on a statutory will.[63] This can be illustrated through the South Australian case, *De Gois v Korp*.[64] In this case, Mr. Korp was charged with the attempted murder of his wife. While he was not successful, his wife was severely injured and eventually lost testamentary capacity. In her will, she had left everything to Mr. Korp. The South Australian court exercised its statutory will-making authority and removed Mr. Korp as a beneficiary. In Canada, however, a statutory will would not be necessary. Since Mr. Korp would profit from his criminal act, the rule of public policy would be invoked and as a result, he would be removed as a beneficiary of the estate.

The second development took place in *Cummings v*

---

[61] *Cleaver et al v Mutual Reserve Fund Life Association,* [1892] 1 QB 147 (CA).

[62] *Ibid* at 156-57.

[63] Norman M Tarnow, "Unworthy heirs: The Application of the Public Policy Rule in the Administration of Estates" in Robert C Dick, ed, *Estates and Trusts Quarterly* 377 at 377-83.

[64] *De Gois v Korp*, [2004] 1 VSC 450.

Cummings.[65] In this decision, the Ontario Court of Appeal examined how a dependent's relief claim should be assessed and quantified. The Court held that the legal and moral obligations between the deceased and the dependent must be considered before determining whether adequate support was provided.[66] Prior to the *Cummings* decision, moral obligations were not considered in a dependent's relief claim. However, with the inclusion of moral considerations a person's estate can be devised in a more equitable manner. This process can help protect dependents of an incapacitated individual from suffering grave injustices.

The common law developments prevent the occurrence of certain injustices. However, they are far too limited in their scope to effectively substitute for a statutory will-making scheme. The general rule of public policy only allows the removal of a beneficiary if he or she has profited from a criminal act (i.e. murdering a testator). However, if a non-dependent beneficiary indirectly caused a person to lose capacity (i.e. by putting them through unbearable emotional pain) or if they acted cruelly towards the incapacitated person but remained within the bounds of the law, the rule would not apply. The beneficiary would therefore inherit at least a portion of the estate, even if it were clear that the incapacitated person would have opposed such an outcome. While the decision in *Cummings* provided the courts with greater authority, it was confined to dependent relief claims and would not be able to resolve these predicaments.

C. A Scheme Facilitating Statutory Wills is Philosophically Irreconcilable

Crago claims that the concept of a statutory will is foreign "to the philosophy that has always informed wills legislation in Anglo-Australian law. The courts have always emphatically disclaimed any jurisdiction to make a will or any part of a will for a testator."[67] While one could contend that Cargo's argument applies to Ontario, existing Ontario legislation does not seem to support such a claim. For instance, following the *Cummings* decision, the judiciary has been provided with greater freedom and authority to restructure the distribution of an estate for the purposes of adequately providing for a dependent beneficiary.[68] Nevertheless, even if Cargo's argument is accepted, it should not be afforded much weight. An individual who is born without capacity does not choose to die intestate. Likewise, a person who possessed capacity but loses it later on in life would not choose to leave his other will outdated. These individuals are robbed of this choice because they lack testamentary capacity. The availability of a statutory will restores their choice and helps prevent unjust results. Therefore, the clear need and obvious benefits that result from instituting a statutory will-making scheme outweigh the claim that the scheme is a foreign concept.

---

[65] *Cummings v Cummings*, (2004) 69 OR (3d) 397 (Ont CA) [*Cummings*].

[66] *Ibid* at para 50.

[67] *Supra* note 56 at 260.

[68] *Cummings, supra* note 65.

VII

PROPOSAL

Ontario courts should be given the power to impose a statutory will on behalf of an individual who lacks testamentary capacity. While many of the specific and technical details of such a scheme are difficult to conclude concretely, there are several key elements that should be recognized as acceptable. Firstly, it seems appropriate to employ a substituted-judgment approach. In applying the approach the court attempts to make a decision akin to that of the incapacitated person, assuming he or she possessed capacity. This approach is preferred over the best interests standard use in England, since it does not give the court the authority to prioritize its own views above that of the incapacitated person and thus avoids charges of being overtly paternalistic.

Secondly, in certain circumstances, an incapacitated person's preferences will be unknown. In such situations an objective approach should be applied (i.e. what a "reasonable" person would do in the given situation). An objective approach is more preferable than attempting to determine an incapacitated person's intentions or inclinations, as they may not be consistent.

Lastly, the language that is to be used in the substituted judgment approach should be carefully selected. The courts should not attempt to make a decision akin to the "likely intentions" of the incapacitated person. Based upon the case law in Australia, the term "likely intentions" is interpreted in a strict manner and imposes an overly high threshold. As a result, it can prevent a statutory will from being applied in a number of urgent situations, thereby defeating its purpose. A more flexible formulation would be appropriate, and should strive to determine what a normal person "would" choose to do if he or she were not incapacitated.

APPENDIX H

New South Wales *Succession Act,* 2006

Sections 18-26

Division 2 Court authorised wills for persons who do not have testamentary capacity

18 Court may authorise a will to be made, altered or revoked for a person without testamentary capacity

(1) The Court may, on application by any person, make an order authorising:

(a) a will to be made or altered, in specific terms approved by the Court, on behalf of a person who lacks testamentary capacity, or

(b) a will or part of a will to be revoked on behalf of a person who lacks testamentary capacity.

(2) An order under this section may authorise:

(a) the making or alteration of a will that deals with the whole or part of the property of the person who lacks testamentary capacity, or

(b) the alteration of part only of the will of the person.

(3) The Court is not to make an order under this section unless the person in respect of whom the application is made is alive when the order is made.

(4) The Court may make an order under this section on behalf of a person who is a minor and who lacks testamentary capacity.

(5) In making an order, the Court may give any necessary related orders or directions.

(6) A will that is authorised to be made or altered by an order under this section must be deposited with the Registrar under Part 2.5.

(7) A failure to comply with subsection (6) does not affect the validity of the will.

19 Information required in support of application for leave

(1) A person must obtain the leave of the Court to make an application to the Court for an order under section 18.

(2) In applying for leave, the person must (unless the Court otherwise directs) give the Court the following information:

(a) a written statement of the general nature of the application and the reasons for making it,

(b) satisfactory evidence of the lack of testamentary capacity of the person in relation to whom an order under section 18 is sought,

(c) a reasonable estimate, formed from the evidence available to the applicant, of the size and character of the estate of the person in relation to whom an order under section 18 is sought,

(d) a draft of the proposed will, alteration or revocation for which the applicant is seeking the Court's approval,

(e) any evidence available to the applicant of the person's wishes,

(f) any evidence available to the applicant of the likelihood of the person acquiring or regaining testamentary capacity,

(g) any evidence available to the applicant of the terms of any will previously made by the person,
(h) any evidence available to the applicant, or that can be discovered with reasonable diligence, of any persons who might be entitled to claim on the intestacy of the person,
(i) any evidence available to the applicant of the likelihood of an application being made under the *Family Provision Act 1982* in respect of the property of the person,
(j) any evidence available to the applicant, or that can be discovered with reasonable diligence, of the circumstances of any person for whom provision might reasonably be expected to be made by will by the person,
(k) any evidence available to the applicant of a gift for a charitable or other purpose that the person might reasonably be expected to make by will,
(l) any other facts of which the applicant is aware that are relevant to the application.

20 Hearing of application for leave

(1) On hearing an application for leave the Court may:
(a) give leave and allow the application for leave to proceed as an application for an order under section 18, and
(b) if satisfied of the matters set out in section 22, make the order.
(2) Without limiting the action the Court may take in hearing an application for leave, the Court may revise the terms of any draft of the proposed will, alteration or revocation for which the Court's approval is sought.

21 Hearing an application for an order

In considering an application for an order under section 18, the Court:
(a) may have regard to any information given to the Court in support of the application, and
(b) may inform itself of any other matter in any manner it sees fit, and
(c) is not bound by the rules of evidence.

22 Court must be satisfied about certain matters

The Court must refuse leave to make an application for an order under section 18 unless the Court is satisfied that:
(a) there is reason to believe that the person in relation to whom the order is sought is, or is reasonably likely to be, incapable of making a will, and
(b) the proposed will, alteration or revocation is, or is reasonably likely to be, one that would have been made by the person if he or she had testamentary capacity, and
(c) it is or may be appropriate for the order to be made, and
(d) the applicant for leave is an appropriate person to make the application, and
(e) adequate steps have been taken to allow representation of all persons with a legitimate interest in the application, including persons who have reason to expect a gift or benefit from the estate of the person in relation to whom the order is sought.

23 Execution of will made under order

(1) A will that is made or altered by an order under section 18 is properly executed if:

(a) it is in writing, and

(b) it is signed by the Registrar and sealed with the seal of the Court.

(2) A will may only be signed by the Registrar if the person in relation to whom the order was made is alive.

24 Retention of will

(1) Despite section 52 (Delivery of wills by Registrar), a will deposited with the Registrar in accordance with this Part may not be withdrawn from deposit with the Registrar by or on behalf of the person on whose behalf it was made unless:

(a) the Court has made an order under section 18 authorising the revocation of the whole of the will, or

(b) the person has acquired or regained testamentary capacity.

(2) On being presented with a copy of an order under section 18 authorising the revocation of the whole of a will, the Registrar must withdraw the will from deposit.

25 Separate representation of person lacking testamentary capacity

If it appears to the Court that the person who lacks testamentary capacity should be separately represented in proceedings under this Division, the Court may order that the person be separately represented, and may also make such orders as it considers necessary to secure that representation.

26 Recognition of statutory wills

(1) A statutory will made according to the law of the place where the deceased was resident at the time of the execution of the will is to be regarded as a valid will of the deceased.

(2) In this section:

statutory will means a will executed by virtue of a provision of an Act of New South Wales or other place on behalf of a person who, at the time of execution, lacked testamentary capacity.

***Wills Act*, South Australia**[1]

Section 7

Part 2 – The making, alteration, revocation, revival etc of wills

Division 2 – Testamentary Capacity

7 - Will of person lacking testamentary capacity pursuant to permission of court

(1) The Court may, on application by any person made with the permission of the Court, make an order authorising the making or alteration of a will in specific terms approved by the Court, or the revocation of a will, on behalf of a person who lacks testamentary capacity.

(2) An authorisation under this section may be granted on such conditions as the Court thinks fit.

(3) Before making an order under this section, the Court must be satisfied that—

(a) the person lacks testamentary capacity; and

(b) the proposed will, alteration or revocation would accurately reflect the likely intentions of the person if he or she had testamentary capacity; and

(c) it is reasonable in all the circumstances that the order should be made.

(4) In considering an application for an order under this section, the Court must take into account the following matters:

(a) any evidence relating to the wishes of the person;

(b) the likelihood of the person acquiring or regaining testamentary capacity;

(c) the terms of any will previously made by the person;

(d) the interests of—

(i) the beneficiaries under any will previously made by the person;

(ii) any person who would be entitled to receive any part of the estate of the person if the person were to die intestate;

(iii) any person who would be entitled to claim the benefit of the *Inheritance (Family Provision) Act 1972* in relation to the estate of the person if the person were to die;

(iv) any other person who has cared for or provided emotional support to the person;

Wills Act 1936—1.8.2017 Part 2—The making, alteration, revocation, revival etc of wills Division 2—Testamentary capacity 6 Published under the *Legislation Revision and Publication Act 2002*

(e) any gift for a charitable or other purpose the person might reasonably be expected to give by a will;

(f) the likely size of the estate;

(g) any other matter that the Court considers to be relevant.

(5) An order may be made under this section in relation to a minor.

(6) The Court is not bound by rules of evidence in proceedings under this section.

(7) The following persons are entitled to appear and be heard at proceedings under this section:

[1] *Wills Act 1936* (SA), s 7.

(a) the person in relation to whom the order is proposed to be made;
(b) a legal practitioner representing the person or, with the permission of the Court, some other person representing the person;
(c) the person holding or acting in the office of Public Advocate under the *Guardianship and Administration Act 1993*;
(d) the person's administrator, if one has been appointed under the *Guardianship and Administration Act 1993*;
(e) the person's guardian, if one has been appointed under the *Guardianship and Administration Act 1993*;
(f) the person's manager, if one has been appointed under the *Aged and Infirm Persons' Property Act 1940*;
(g) the person's attorney, if one has been appointed under an enduring power of attorney;
(h) any other person who has, in the opinion of the Court, a proper interest in the matter.

(8) In determining an application under this section, the Court may make such incidental orders relating to costs or other matters as it thinks fit.

(9) A will or instrument altering or revoking a will made pursuant to an order under this section must be executed as follows:
(a) it must be signed by the Registrar; and
(b) it must be sealed with the seal of the Court.

(10) The will or instrument altering or revoking a will must be retained by the Registrar and will be taken to have been deposited with the Registrar under section 13 of the *Administration and Probate Act 1919*.

(11) The will may not be withdrawn from deposit with the Registrar by or on behalf of the person on whose behalf it was made unless the Court has made an order under this section authorising the revocation of the will (in which case the Registrar must withdraw it on presentation of a copy of the order) or the person has acquired or regained testamentary capacity.

(12) In this section—
testamentary capacity means the capacity to make a will.

APPENDIX I

Wills and Succession Legislation, Report 108, 2003, pp. 8-10, Manitoba Law Reform Commission.

Privileged wills were first developed by the Romans and were carried over into the common law of England. They were codified in the first English *Wills Act* in 1540, continued in the *Statute of Frauds, 1677* and then in the *Wills Act, 1837*. The rationale behind privileged wills was well summarized by the New South Wales Law Reform Commission in its 1986 Report:[16]

- the relatively low level of education of privileged testators;
- the unavailability of consultation and professional advice to military personnel, especially when they are on campaign or in combat (they were said to be *inops consilii*, ie without advice);
- the high risk of death faced by testators when in combat or at sea in comparison with the community generally;
- the privilege is conferred as a reward and incentive to engage in a socially beneficial occupation;
- soldiers and others facing battle need the comfort of knowing that, should they not return, arrangements have been made for their affairs;
- the need to ensure that minors who were called upon to serve in a military capacity and thereby risk early death had the "adult" privilege of making and revoking wills.

It is our understanding that the current practice of the Canadian Forces is to encourage its personnel to complete a will upon joining and then to update their will at regular and logical intervals (new posting, deployment overseas, change in marital status and upon the birth of children). As the Law Reform Commission of British Columbia commented in its 1981 report:

> Forces personnel are probably more conscious of the necessity to maintain an accurate will than other members of the general public.[17]

Given modern communications technology and military practice, soldiers and sailors are no longer completely isolated when in combat or at sea. As well, many civilian occupations (firefighters, police officers, forestry workers) carry considerable risk; however, the privilege has not been extended to these individuals.

Although England retains the privilege, it should be noted that the English law does not permit holograph wills signed *solely* by the testator. On the other hand, New South Wales has abolished privileged wills as have 16 states of the United States which have adopted the *Uniform Probate Code*.

---

[16] New South Wales Law Reform Commission, *Wills – Execution and Revocation* (Report #47, 1986) 145-146 [NSWLRC].
[17] BCLRC, *supra* n. 9, at 26, citing a telephone call from Lieutenant-Colonel Macdonald, Judge-Advocate General's Office, Ottawa, on July 16, 1980.

We believe that the section has become obsolete and that the need for privileged wills no longer exists. In addition, current Manitoba legislation permits holograph wills made wholly in the person's own handwriting and signed at its end by the person (section 6) and gives the court the power to dispense with formal requirements of execution (section 23). The intestate succession and dependants relief legislation also provides for the orderly distribution of estates and the support of dependants when someone dies without a will. Accordingly, in our view, repeal of this provision would have very little adverse effect as, according to the Registrar of Probate of the Court of Queen's Bench, privileged wills are rarely submitted for probate and those which have been submitted were typically executed during the Second World War. We therefore recommend that the provision be repealed but that, in order to preserve the validity of any privileged wills which may be in existence at the time of repeal, repeal should not be made retroactive.

APPENDIX J

Reform of the Nova Scotia Wills Act, Final Report, 2003, pp. 14-17, Nova Scotia Law Reform Commission

2. Privileged wills

The law has long recognized that it could be difficult for people in dangerous or inconvenient circumstances to satisfy the ordinary criteria for creation of a valid will. For instance, a soldier at the front may not have access to pen and paper. Even if writing materials are available, a will may be destroyed during battle, or a witness to a will may be killed or captured. As a result, soldiers in special circumstances have long been able to transfer their personal property by way of "privileged" wills, which do not have to satisfy ordinary requirements. Similarly, for many years mariners while at sea have been able to make wills without having to satisfy the regular criteria. In Nova Scotia, as long as a witness is able to testify as to the intentions of certain soldier or mariner testators, expressed at some time before death, these wishes may be upheld even though not strictly in conformity with the ordinary requirements of wills legislation.[51] A privileged will under Nova Scotia law can even be an oral one. Privileged wills can transfer both personal and real property.[52]

If a person entitled to create a privileged will does so under the required special circumstances, but survives and is no longer subject to those conditions, the will remains valid indefinitely, like any other validly created will.[53] As a result, for example, a mariner who created a holograph will at sea would not have to re-write the will upon returning safely to land….

The Discussion Paper did not take a position on privileged wills. Rather, it asked readers whether privileged wills were still necessary, and if so, whether any changes should be made to their availability, nature, or duration.

Comments on the retention of privileged wills tended to be mixed. Having taken all comments into account, the Commission is of the view there is still a need for privileged wills in Nova Scotia. Many military personnel reside here. From time to time, some are posted overseas. The Commission understands that the Canadian military encourages its members to have up-to-date wills, either through the services of a private lawyer or the completion of a standard Canadian Forces will form. Having a will is not, however, compulsory for Canadian Forces members. As a result, it is possible that a member of the military, and more particularly a Nova Scotian resident, could well find himself or herself in a situation where making a privileged will becomes necessary. Although this type of situation may not arise often, if the availability of a privileged will might prevent an intestacy and therefore put into effect a testator's wishes, retention of the privileged will provision would have proved worthwhile. As a result, the Commission agrees that the privileged wills section in the *Wills Act* should be retained….

---

[51] For example, though the *Wills Act* does not expressly allow holograph wills, they may be permitted if prepared by soldiers or mariners in the appropriate circumstances. Also, a soldier or mariner does not have to be at least 19 years of age in order to create a valid privileged will.

[52] *Wills Act*, note 2, above, s. 9.

APPENDIX K

The Creation of Wills, Final Report No. 96, pp. 61-71, Alberta Law Reform Institute

D. Should Exempt Wills Be Abolished?

1. Introduction

[162] Over the past twenty-five years, there has emerged a small but growing movement advocating the abolition of exempt wills. It is argued that exempt wills are no longer needed because the historical conditions which once made them a good idea are now obsolete or changed. Law reform agencies in British Columbia, Manitoba, New South Wales, Victoria and Queensland have all called for the abolition of exempt wills.[224] In addition, the uniform model statute proposed for Australia contains no provision for exempt wills.[225] So far this reform movement has resulted in the abolition of exempt wills in five Australian jurisdictions (New South Wales, Northern Territory, Victoria, Queensland and Western Australia).

[163] On the other hand, exempt wills also continue to find support and advocates. Law reform agencies in England, New Zealand and Nova Scotia have all recommended retention of such provisions.[226]

2. Members of Canadian Forces on active service

[164] The main reason which is traditionally cited in support of exempt wills is that military personnel are often deployed on short notice for combat or lengthy campaigns abroad, where they have less access to consultation and professional advice about making or changing a will. This was certainly true in past centuries but may be questionable today. It is the current policy of the Canadian Forces to strongly encourage all members to make and update their wills regularly. The Canadian Forces provides each member with support, advice and opportunity, especially at enrolment, to make a will and place it in safekeeping with the Canadian Forces or record its location if held elsewhere.[227] Such modern military practices mean that "members of the armed forces are more, rather than

---

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

[225] Australia Uniform Report.

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

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

less, likely than average members of the public to be able to obtain legal advice and so be able to make valid formal wills."[228]

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

> Having a will is not, however, compulsory for Canadian Forces members. As a result, it is possible that a member of the military ... could well find himself or herself in a situation where making a privileged will becomes necessary. Although this type of situation may not arise often, if the availability of a privileged will might prevent an intestacy and therefore put into effect a testator's wishes, retention of the privileged will provision would have proved worthwhile.[229]

One such potential situation is where a member of the armed forces is given short notice of dangerous active service while learning at the same time of a change in a relationship with an intended beneficiary (such as the receipt of a "Dear John" letter before battle). This may necessitate an urgent need to make, amend or revoke a will in circumstances where it could be difficult to observe the usual formalities. It was this example which led to the New Zealand Law Commission's recommendation to retain exempt wills.[230]

[166] Another reason which originally supported the creation of this exemption is that, historically, soldiers tended to have relatively low levels of education and literacy.[231] Clearly this factor has changed in our modern society and is no longer a justification.

[167] It has been said that the ability to make an exempt will acts as a reward and incentive for military personnel to engage in a dangerous occupation that is beneficial to society.[232] 209 It has also been said that military personnel need this exemption because they face a high risk of death in the performance of their duties. But some critics have questioned why a similar exemption should not be accorded to accident victims[233] 210 or workers in other high-risk, socially valuable occupations.[234] 211

[168] Historically, the exemption arose in Rome and England when will-making requirements were complex and strictly enforced. Wills could fail for small technicalities. Intestacy was not a desirable alternative: "[t]he original reason for implementation of the privilege in Roman times seems to have been to avoid Rome's intestacy laws at any cost."[235] But the law of succession has greatly evolved since those days and currently

---

[228] Parry & Clark at 55.
[229] Nova Scotia Report at 16.
[230] New Zealand Report at 5.
[231] New South Wales Wills Report at 142, 145.
[232] New South Wales Wills Report at 146.
[233] Parry & Clark at 56.
[234] Manitoba Report at 9.
[235] British Columbia 1981 Report at 29.

offers much more flexible options. It is now possible for any testator to make a holograph will, eliminating the need for witnesses and greatly reducing the formalities of will-making.[236] Many jurisdictions have also legislated a substantial compliance provision or a dispensing power to save wills that would otherwise fail for some technical imperfection.[237] In addition, modern intestacy laws and dependants relief legislation operate reliably to ensure that "the proper moral and social obligations of deceased persons" are met.[238]

[169] Apart from these assertions that the historical reasons for the exemption are now largely obsolete, it also appears that the exemption is rarely used in Canada. Twenty-five years ago, the Law Reform Commission of British Columbia conducted an informal survey of Probate Registrars across Canada. From these officials' anecdotal impressions and recollections, the Commission learned that exempt wills were rarely probated. In provinces where holograph wills are allowed, the exemption was used even less.[239] The Commission concluded that "[t]here is little evidence of modern use of this provision."[240] A similar conclusion was recently drawn by the Manitoba Law Reform Commission, which found that "… according to the Registrar of Probate of the Court of Queen's Bench, privileged wills are rarely submitted for probate and those which have been submitted were typically executed during the Second World War."[241]

…

5. Recommendations for reform

[179] When preparing our Report for Discussion, the ALRI Board debated at length whether there is an ongoing need for exempt wills. Both the Board and the Project Advisory Committee ultimately came to the conclusion that, for all the reasons discussed in this Part, legal and social conditions have changed and improved to the point where a special exemption for such wills is no longer the necessity it once was. The Project Advisory Committee qualified its support for abolition, however, by stating that any decision in this area should be subject to consultation with the Canadian Forces and deference given to its opinion.

[180]ALRI's preliminary recommendation was to abolish exempt wills. Military personnel are encouraged and given every assistance to make a valid will prior to deployment. If a person in the armed forces or a mariner at sea is nevertheless forced by

---

[236] Alberta Act, s. 7.
[237] As already discussed, ALRI has recommended enactment of a dispensing power in Alberta. See Chapter 1, Part E of this Report, summarizing the original recommendation made in Alberta Report.
[238] New South Wales Wills Report at 146.
[239] British Columbia 2006 Report at 27.
[240] British Columbia 2006 Report at 26.
[241] Manitoba Report at 9.

circumstances to make an informal will, the availability of modern legal devices such as holograph wills and a court dispensing power is more than adequate to deal with any resulting written will that does not conform to standard formalities.

[181] During consultation, we received input from several lawyers in private practice who all agreed with ALRI and our reasons for suggesting abolition. They agreed that there no longer seems to be a pressing legal need to retain exempt wills. However, a note of caution was sounded that recommending abolition could attract political resistance.

[182] An extensive brief in support of retaining exempt wills was received from the Office of the Judge Advocate General, Canadian National Defence Headquarters.[262] The position of the Canadian Forces (CF) on key issues which it identified may be summarized as follows:

- **Canadian Forces will forms**: Although the CF provides standardized forms for creating a will, these are only helpful to CF personnel who have small, simple estates. Furthermore, the CF does not provide legal counsel to its personnel on estate matters. "Although military personnel are encouraged to make a will and are given some, limited, assistance in such an endeavour, these circumstances do not, alone, provide the desired measure of certainty for CF members when they are performing their duties."[263]
- **Mobility**: CF personnel are still required to deploy to distant locations with little notice, and often for extended periods of time. "While operational lines of communication and related amenities have substantially improved over time, service personnel have no practical means or facility in such circumstances to consult legal counsel or access resources that would permit the execution of a will under legal supervision."[264] An exempt will may be the only option.
- **Nature of military operations**: "One of our principal concerns involves members of the CF who are deployed on dangerous operations."[265] They may be faced with situations where they cannot execute a "civilian will" even in a holograph form (for example, where the CF personnel is injured in combat).
- **Reliance on exempt wills**: "[A]lthough there may be little evidence to support the reliance upon privileged wills in previous years, the CF is presently involved in operations of a nature and tempo not seen since the end of its involvement in the Korean War."[266] Furthermore, the use of exempt wills is difficult to quantify since many are not probated, but "within the CF we consistently rely upon the identification of personal representatives in testamentary instruments that might otherwise be invalid in provincial jurisdiction."[267] The CF relies on personal representatives to administer the "service estate" of the member

[262] Letter to Peter J.M. Lown, Q.C., Alberta Law Reform Institute from Col. P.K. Gleeson, Deputy Judge Advocate General/Military Justice & Administrative Law, Office of the Judge Advocate General, National Defence (December 10, 2007) [OJAG brief].
[263] OJAG brief, note 239, at 2.
[264] OJAG brief, note 239, at 2.
[265] OJAG brief, note 239, at 2.
[266] OJAG brief, note 239, at 4.
[267] OJAG brief, note 239, at 4.

which includes outstanding pay, personal equipment, personal property found on the body of the deceased, etc.

- **Certainty of law**: To maximize uniformity of the law in Canada, the CF recommends that Alberta legislation regarding exempt wills should be consistent with the law in other Canadian jurisdictions. An exempt wills provision also promotes another kind of certainty. Although "many jurisdictions have legislated compliance provisions or dispensing powers, I would suggest that these provisions do not necessarily provide the same degree of certainty."[268] In other words, an exempt will can be accepted as valid without the need for a court application, unlike the validation of an imperfect will under a dispensing provision.

[183] In light of these concerns, ALRI has reconsidered our recommendations concerning exempt wills. We still believe that a legitimate legal case can be made either way concerning this area. While the Office of the Judge Advocate General raises some valid points, the modern availability of holograph wills and a dispensing power really do dramatically undercut the continuing need for exempt wills. But it is also true that, as the Office of the Judge Advocate General points out, a dispensing power does not provide the same guaranteed result as an exempt will provision. Given that the Canadian Forces are at the moment actively involved in a war zone, it may not be an appropriate time to remove the historical availability of exempt wills.

[184] This may also be a reform area better suited to the Uniform Law Conference of Canada, which can examine the matter on a Canada-wide basis. If the time arrives to abolish exempt wills, it would be better to propose such a measure for all jurisdictions at the same time.

[185] The Alberta Law Reform Institute therefore recommends retaining this exemption for the meanwhile as provided in section 6 of the Alberta Act…

[268] OJAG brief, note 239, at 3.

APPENDIX L

Wills, Estates and Succession: A Modern Legal Framework, Report No. 45, 2006, pp. 26-27, British Columbia Law Reform Institute

C. Abolition of Privileged Wills

1. ARMED FORCES PERSONNEL AND MARINER

Armed forces personnel on active service of Canada, a Commonwealth country, or an ally of Canada enjoy the privilege to execute a valid will by signature alone, without attestation by witnesses[104] …

The Canadian Forces inform their members about the standard procedure for executing valid wills and the vast majority of wills of Forces personnel are executed in standard form. Reliance on the privilege to make an informal will is discouraged.[107] Inquiries directed to probate registry staff in Vancouver and Victoria indicate that not more than one or two unattested military wills are probated each year, and the latest one that current staff can remember dealing with was from the Korean War. No privileged wills by mariners have come to the attention of probate registry staff with long experience.

The former Law Reform Commission urged in 1981 that the privilege of informal will making by military personnel and mariners be abolished on the ground that it is in disuse and would also be unnecessary if a dispensing power were enacted to validate wills that do not meet formal requirements, but are demonstrated to be authentic.[108] An additional ground for abolishing the privilege is that there are many other dangerous occupations besides serving in the armed forces and seafaring. As a dispensing power is among the recommendations of this Project, the recommendation by the former Commission for abolition of privileged military and marine wills was endorsed by the Testate Succession Subcommittee and Project Committee.

The proposed *Wills, Estates and Succession Act* therefore contains no provision for informal wills by military personnel and mariners. Privileged wills made validly before the effective date of the proposed Act would remain fully valid, however.[109]

---

[104] *Wills Act*, *supra*, note 1, ss 5(1), (2). Attestation by a witness is required if the will is signed by someone other than the testator in the presence and at the direction of the testator: s. 5(3).

[107] Inquiries directed to the Judge Advocate-General's Office confirmed that the elaborate educational and facilitative programs concerning will-making by Forces personnel that are described in the Law Reform Commission of British Columbia *Report on the Making and Revocation of Wills*, *supra*, note 12 at 26-27 continue in effect with only minor variations.

[108] *Report on the Making and Revocation of Wills*, *supra*, note 12 at 28.

[109] See s. 187(3) of the proposed *Wills, Estates and Succession Act* in Part Two of this Report.

APPENDIX M

INDIANA

IN Code § 29-1-5-3.2 (2017)

IC 29-1-5-3.2 Videotape

Sec. 3.2. Subject to the applicable Indiana Rules of Trial Procedure, a videotape may be admissible as evidence of the following:

(1) The proper execution of a will.

(2) The intentions of a testator.

(3) The mental state or capacity of a testator.

(4) The authenticity of a will.

(5) Matters that are determined by a court to be relevant to the probate of a will.

LOUISIANA

LA Code Civ Pro 2904

Art. 2904. Admissibility of videotape of execution of testament

A. In a contradictory trial to probate a testament under Article 2901 or an action to annul a probated testament under Article 2931, and provided the testator is sworn by a person authorized to take oaths and the oath is recorded on the videotape, the videotape of the execution and reading of the testament by the testator may be admissible as evidence of any of the following:

(1) The proper execution of the testament.

(2) The intentions of the testator.

(3) The mental state or capacity of the testator.

(4) The authenticity of the testament.

(5) Matters that are determined by a court to be relevant to the probate of the testament.

B. For purposes of this Article, "videotape" means the visual recording on a magnetic tape, film, videotape, compact disc, digital versatile disc, digital video disc, or by other electronic means together with the associated oral record.