UNIFORM LAW CONFERENCE OF CANADA

CIVIL LAW SECTION

RENEWAL OF THE UNIFORM WILLS ACT

WORKBOOK

Background Materials

Readers are cautioned that the ideas or conclusions set forth in this paper, including any proposed statutory language and any comments or recommendations, may not have not been adopted by the Uniform Law Conference of Canada. They may not necessarily reflect the views of the Conference and its Delegates. Please consult the Resolutions on this topic as adopted by the Conference at the Annual meeting.

Winnipeg, Manitoba

August 7 - 11, 2011

PREFACE

This document represents a Work Book of materials to assist in the discussion of the various renewal topics in respect of the Uniform Wills Act. In most cases the materials are directed at possible reforms to the Uniform Act, however, in a few cases proposals already accepted by the Uniform Law Conference of Canada will be reviewed again to consider whether they might be appropriate additions to the Wills legislation of the various jurisdictions in Canada.

The format of the Workbook generally follows an outline of the issue(s), legislation in Canada, together with legislation in Commonwealth countries and the United States where appropriate. Law Reform proposals are also highlighted from those jurisdictions where it appears useful to do so.

At the Meeting in August 2011, discussion will center on each issue in turn with a view to obtaining from the delegates appropriate drafting instructions for the completion of draft amendments in time for the 20112 meeting of the Conference.

CONTENTS

TESTAMENTARY CAPACITY OF MINORS

A minor is usually not considered to have testamentary capacity until the age of majority.

LAW REFORM:

Proposals to lower the age of testamentary capacity:

Quebec Civil Code Revision Office suggested notarial will at 16 years old - not implemented.

Manitoba Law Reform Commission has recommended 16 years.

British Columbia Law Institute the unproclaimed British Columbia *Wills, Estates and Succession Act* – 16 years.

Alberta Law Reform Institute - should remain at 18 years.

Statutory Exceptions for Minors

LEGISLATION: CANADA

Exceptions are generally found in the wills legislation of Canadian provinces and territories.

Northwest Territories, Yukon and Nunavut have additional exceptions allowing will-making by members of the Royal Canadian Mounted Police who are under the age of 19 years (the age of majority).

LAW REFORM:

CANADA

The Alberta Law Reform Institute recommended that Sections 9(1)(a) and 9(3) of the Alberta *Wills Act* should remain unchanged.

Authorization for Will-making By a Minor

LEGISLATION: CANADA

No Canadian jurisdiction allows a minor to obtain testamentary capacity by Declaration nor is this procedure available in England.

LEGISLATION: AUSTRALIA - NEW ZEALAND

Most Australian wills statutes contain a unique procedure which allows any minor who lacks testamentary capacity by reason of age to apply to court for authorization to make a will.

Only Western Australia does not have such a procedure.

New Zealand also has this model.

LEGISLATION: UNITED STATES

American states which have an "emancipation" procedure for a minor who meets certain qualifications can apply to court for a declaration of emancipation which will confer on the minor all the rights, capacities and obligations of adulthood, including the general testamentary
capacity to make or revoke a will.

LAW REFORM:

CANADA

1981 - Law Reform Commission of British Columbia proposed that a minor should be able to apply to court to obtain the general capacity to make a will.

2006 - the British Columbia Law Institute again reviewed the law of wills but did not renew its support for this particular recommendation.

2003 - the Law Reform Commission of Nova Scotia also recommended the adoption of a procedure to empower a minor to make a will – not implemented in Nova Scotia.

2009 - the Alberta Law Reform Institute favoured having a court application available for minors who want to make a will in order to displace the operation of the *Intestate Succession Act*, but who fall outside the existing statutory exceptions allowing will-making by minors. On application, the Court of Queen's Bench could validate a will for a minor by approving the terms of a specific will.

STATUTORY WILLS FOR PERSONS WITHOUT TESTAMENTARY CAPACITY

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.

LEGISLATION: CANADA

In Canada it 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.

Five jurisdictions, Northwest Territories, Nunavut, Ontario, Saskatchewan and Quebec expressly provide that a substitute decision-maker cannot make, change or revoke a will.

The only Canadian jurisdiction which allows a court to make a statutory will (see below) for a person without testamentary capacity is New Brunswick, in 1994. No other Canadian jurisdiction has followed New Brunswick's lead.

LEGISLATION: AUSTRALIA - NEW ZEALAND

Australian jurisdictions, except for the Australian Capital Territory, authorize the making of statutory wills for mentally incompetent persons.

The Family Court of New Zealand is empowered to make a statutory will for a person who is subject to a property order.

LEGISLATION: ENGLAND

The English Court of Protection has been empowered since 1970 to make statutory wills for mentally incompetent persons.

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.

LAW REFORM:

CANADA

There does not appear to be any significant reform movement to advocate this development in Canada.

2009 - the Alberta Law Reform Institute reviewed the law in this area and concluded that it would not recommend that Alberta courts be given the power to make a statutory will for an adult who lacks testamentary capacity.

ORAL WILLS

To be valid, a will must generally conform to the formalities required by the wills statute.

The most basic formality is that a will must be in writing and be signed by the testator (or by some other person in the testator's presence and at the testator's direction).

LEGISLATION: CANADA

Generally speaking, most Canadian jurisdictions do not recognize oral wills under any circumstances.

Newfoundland and Labrador recognizes oral wills made by sailors or fishers at sea.

Nova Scotia recognizes oral wills made by military personnel on actual military service as well as mariners or seamen at sea.

However, neither of those provinces allows ordinary testators to make valid oral wills.

LEGISLATION: ENGLAND - AUSTRALIA - NEW ZEALAND

In England, Australia and New Zealand, oral wills are invalid except in the limited circumstances of exempt wills for military personnel or sailors.

LAW REFORM:

CANADA

There does not appear to be any significant public demand for oral wills. Most law reform agencies which review their jurisdiction's wills legislation do not even bother to raise the issue of oral wills.

Those few law reform agencies which did consider the issue, have all recommended against recognizing oral wills.

ELECTRONIC WILLS

Electronic Wills in Their Own Right

LAW REFORM

CANADA

The Uniform Law Conference of Canada has recently considered the issue of electronic wills in depth, based on research and analysis by Alberta Law Reform Institute. (*Proceedings of the Eighty-third Annual Meeting* (Toronto, 2001) 60-61 and Appendix E)

The Conference did not recommend that any electronic will should be recognized as legally valid in its own right. However, the ULCC did recommend that, in certain circumstances, it should be possible to give effect to an electronic will under the dispensing power.

2006 - the Law Reform Commission of Saskatchewan and the British Columbia Law Institute agreed with the ULCC approach.

2009 - the Alberta Law Reform Institute specifically did not recommend that electronic wills be currently recognized as legally valid in their own right.

Electronic Wills Under the Dispensing Power

LAW REFORM

CANADA

2001 - the Alberta Law Reform Institute report to the Uniform Law Conference recommended recognition of electronic wills (in appropriate cases) under the dispensing power of the Uniform Wills Act.

In adopting this recommendation, the ULCC amended its uniform dispensing power so that a court may recognize a document to be a will if it "was not made in accordance with any or all of the formalities referred to in subsection (3), or is in electronic form, or both …."

2006 - the Law Reform Commission of Saskatchewan also recommended in its report on electronic wills that this wording be used to amend that province's dispensing power so as to allow recognition of electronic wills, as has the British Columbia Law Institute. The unproclaimed British Columbia *Wills, Estates and Succession Act* in section 58 adopts this approach.

2009 - the Alberta Law Reform Institute also recommended that the statutory dispensing power should be amended to allow a court, in an appropriate case, to validate a will in electronic form despite its lack of compliance with the usual formalities, but that "electronic form" should be narrowly defined.

Other law reform agencies have rejected any recognition of electronic wills under a dispensing power.

LEGISLATION: AUSTRALIA - NEW ZEALAND

The Australian National Committee for Uniform Succession Laws recommended that a dispensing power should be wide enough to recognize electronic wills. To date, the uniform model statute (and its dispensing power's expansive definition of document") has been enacted in five of Australia's eight jurisdictions.

The New Zealand Law Commission recommended a very narrow definition of "document" as "any material on which there is writing".

EXEMPT WILLS

The Uniform Law Conference of Canada model is derived from the English model but differs from in two main ways – oral wills are not allowed and there is a greater attempt to more precisely define "active service."

LEGISLATION: CANADA

With the exception of Quebec and the Yukon, all Canadian jurisdictions allow some sort of exempt wills. Nine provinces or territories follow the main features of the ULCC mode, although some of their provisions have small variations from the norm.

UNIFORM LAW CONFERENCE OF CANADA

HOLOGRAPH WILLS

LEGISLATION: CANADA

In Canada, 11 provinces or territories allow holograph wills: Alberta Act, s. 7; Saskatchewan Act, s. 8; Manitoba Act, 249 s. 6; Ontario Act, c. S-26, s. 6; Quebec Civil Code, art. 726; New Brunswick Act, s. 6; Nova Scotia Act, s. 6(2); Newfoundland Act, s. 2(1); Northwest Territories Act, s. 5(2); Nunavut Act, s. 5.1(2); Yukon Act, s. 5(2).

Prince Edward Island does not allow holograph wills in ordinary situations, but has a general dispensing power under which such wills could be validated.

Section 58 of the British Columbia *Wills, Estates and Succession Act* has a dispensing power but there is not a special provision for holograph wills because such wills could be validated under the dispensing power.

LEGISLATION: ENGLAND

England currently does not allow holograph wills in ordinary situations and has no general dispensing power.

LEGISLATION: ENGLAND - AUSTRALIA - NEW ZEALAND

The Australian courts use the general dispensing power to validate holograph wills on a case-by-case basis.

New Zealand makes no special provision for holograph wills but does have a dispensing power.

LAW REFORM

CANADA

2009 – the Alberta Law Reform Institute recommended that the *Wills Act* should continue to expressly allow holograph wills.

In 1986, the Uniform Law Conference of Canada recommended a model holograph wills section which defined "own writing" to mean "handwriting, footwriting, mouthwriting or writing of a similar kind."

LEGISLATION: CANADA

Nunavut amended its wills legislation in 2005 to enact the ULCC definition and is currently the only Canadian jurisdiction to have this provision for holograph wills

LEGISLATION: UNITED STATES

Holograph wills are authorized by the wills legislation of more than half the states in the United States. The Uniform Probate Code allows holograph wills as well but there appears to be no attempt by any jurisdiction to legislatively define "handwriting."

LEGISLATION: ENGLAND - AUSTRALIA - NEW ZEALAND

England, Australia and New Zealand do not have legislation authorizing the making of holograph wills (other than as exempt wills for the armed forces in certain circumstances) and have no statutory provisions addressing the definition of "handwriting."

LAW REFORM

CANADA

The Manitoba Law Reform recommended an expanded definition of "handwriting" although the Commission acknowledged that the presence of a general dispensing power probably makes it unnecessary.

The Law Reform Commission of Nova Scotia made a recommendation in favour of allowing holograph wills in that province in particular, the ULCC model holograph wills provision. But the issue of "own writing," was neither raised nor discussed.

The government of Nova Scotia did enact a holograph will provision but chose not to implement the ULCC model provision. Instead, it adopted the standard Canadian model that a holograph will must be "wholly" in the testator's undefined "own handwriting.

2009 - the Alberta Law Reform Institute recommended that the Alberta *Wills Act* be amended to authorize holograph wills made in the testator's "own writing," defined as "handwriting, footwriting, mouthwriting or writing of a similar kind."

PRINTED WILLS FORMS

"Fill-in-the-blank" printed will forms are widely available.

Some testators make handwritten entries on them and then sign the forms without witnesses. Such testators intend to make a will. Yet, the resulting document is not a valid will. It is not a valid holograph will because the document is partly printed and therefore not "wholly" in the testator's own handwriting. It is not a valid formal will because the document is unwitnessed. This failure defeats the testator's intention.

To give some effect to the testator's intention, courts will try to validate the handwritten entries as a holograph will by severing them from the printed portions of the will form.

LEGISLATION: CANADA - ENGLAND

In Prince Edward Island the courts have a general dispensing power, which the courts can use it to validate printed will forms with handwritten entries but no witnesses.

In jurisdictions that do not allow holograph wills and that have no general dispensing power, a printed will form with handwritten entries, but no witnesses, can never be a valid will. That is the law in British Columbia and England.

Most jurisdictions which allow holograph wills require that they be "wholly" or "entirely" in the testator's handwriting. If these jurisdictions have a general dispensing power, then the courts can use it to validate printed will forms with handwritten entries but no witnesses. That is the law in Manitoba, Saskatchewan, Nova Scotia and New Brunswick. It is also the law in Quebec; although the court's discretionary power in that jurisdiction is narrower, because the will still has to meet the "essential requirements" of a holograph will.

If these jurisdictions do not have a general dispensing power, then printed will forms with handwritten entries but no witnesses fail, except to the extent that a court can read the handwritten entries standing alone to find a valid holograph will. That is the current law in Alberta and also in the Northwest Territories, the Yukon Territory and Ontario. Newfoundland and Labrador may also belong in this category, although the law in that province is not clear.

A few jurisdictions have specific statutory provisions to address unwitnessed wills which are only partly in the testator's handwriting. In one variation, the specific statutory provisions require the will to be "partly" in the testator's handwriting. That is the law in Nunavut, following the recommendations of the Uniform Law Conference of Canada in the Uniform Wills Act.

LEGISLATION: ENGLAND - AUSTRALIA - NEW ZEALAND

Australia and New Zealand have a general dispensing power, which the courts can use it to validate printed will forms with handwritten entries but no witnesses.

LEGISLATION: UNITED STATES

Specific statutory provisions require that "material provisions" or "material portions" be in the testator's handwriting. That is the law in much of the United States, following the recommendations of the American Law Institute and the Uniform Probate Code.

REFORM OPTIONS

a. Prohibit printed will forms

b. Delete the requirement of being "wholly" in the testator's handwriting

The province of Newfoundland and Labrador allows holograph wills, but has no express requirement that they must be "wholly" in the testator's handwriting.

c. Enact a specific provision to address the problem

Nunavut has an express provision which validates holograph wills "partly" in the testator's handwriting, but has also retained the parallel provision which validates holograph wills "wholly" in the testator's handwriting.

Nunavut also has a general dispensing power based on the work of the Uniform Law Conference of Canada. To date, Nunavut is the only Canadian jurisdiction to have adopted the ULCC's solution to the problem of unwitnessed printed will forms with handwritten entries.

The American Law Institute notes that more than half the states allow holograph wills. Some states allow them only if they are wholly in the testator's handwriting. Others allow them if the signature and "material provisions" or "material portions" of the document are in the testator's handwriting.

The American "material portions" approach is similar to Scottish common law, which allows holograph wills that are wholly or "in essential parts" in the testator's handwriting.

The American Law Institute also favours a general dispensing power for "harmless errors." A small minority of States have enacted such a power.

d. Rely on a general dispensing power

2009 - the ALRI recommended that Alberta *Wills Act* should not enact a special provision addressing unwitnessed printed will forms with handwritten entries but that such problem wills should be validated either by a court severing the handwritten entries and finding a holograph will or by a court making an order under the general dispensing power.

WILL FORMALITIES

Placement of Testator's Signature

ULCC MODEL

1986 – the ULCC amended the Uniform Wills Act to require a will to be signed but did not specify where the signature must appear. A very general saving provision states that, if the signature is not at the end of the document, the will is not invalid solely on that ground "if it appears that the testator intended by the signature to give effect to the will."

Nunavut has fully implemented the new ULCC model in its legislation.

Saskatchewan has a similar provision to the ULCC model in that its wills legislation does not mandate where a will must be signed with one significant difference from the ULCC approach: it must be apparent "on the face of the will" that the testator intended the signature to give effect to the will, whereas the ULCC model is silent concerning the source from which the testator's intention is to be assessed.

LEGISLATION: CANADA

Nine Canadian jurisdictions (British Columbia, Alberta, Manitoba, New Brunswick, Nova Scotia, Northwest Territories, Ontario, Prince Edward Island and Yukon) provide that a will is not valid unless "it is signed at the end or foot of it by the testator….." In a separate saving provision, the Act clarifies the meaning of "end or foot" of the will.

Section 39 of the British Columbia *Wills, Estates and Succession Act* has a deeming provision such that a will is signed at the end if certain circumstances, as enumerated in that section, arise.

Quebec requires a will to be signed at the end but has no specific saving provision cconcerning this requirement; it simply relies on its substantial compliance provision to deal with any problems.

The province of Newfoundland and Labrador has a signature requirement but does not specify where the signature must be placed. The legislation does not contain any specific or general saving provision or dispensing
power.

LEGISLATION: ENGLAND

England repealed its Victorian signature provisions in 1982 and now has a simpler provision: A will must be signed, but the statute does not specify where. It states that the will is not valid unless "it appears that the testator intended by his signature to give effect to the will."

LEGISLATION: AUSTRALIA - NEW ZEALAND

Virtually all Australian jurisdictions have also reformed their wills legislation on this point while only the Australian Capital Territory still uses the traditional model.

The National Committee for Uniform Succession Laws has recommended the simpler provision in its uniform model statute.

New Zealand has the simplest provision of all and requires only that the testator must sign the will, without further elaboration concerning location or intention.

LAW REFORM

CANADA

The Manitoba Law Reform Commission has endorsed the new approach, but the Law Reform Commission of British Columbia recommended against changing the Victorian provisions, preferring instead to rely on the enactment of a dispensing power to solve these problems.

The Law Reform Commission of Nova Scotia did not address this issue in its recent report.

The Alberta Law Reform Institute recommended that the Alberta Act should continue to provide that a will must be signed by the testator at its end or foot, subject to the saving provision. Any other problems involving a testator's signature should be dealt with under the dispensing power.

Number of Witnesses

LEGISLATION: CANADA – ENGLAND – AUSTRALIA - NEW ZEALAND - THE UNITED STATES

Requiring a minimum of two witnesses, originating in the 1837 wills legislation, is a standard formality in Canada, England, Australia, New Zealand and the United States.

LAW REFORM

CANADA - ENGLAND

Law reform agencies rarely question the requirement for two witnesses. When an agency does raise the issue, it invariably affirms the continuation of this requirement for similar reasons as did the English Law Reform Committee that a rule requiring two witnesses provides a greater safeguard against forgery and undue influence than would a rule requiring only one.

2009 – the Alberta Law Reform Institute recommended a minimum of two witnesses should continue to be necessary to create a valid formal will.

Concurrent Presence of Witnesses When the Testator Signs the Will

LEGISLATION: CANADA

Almost all wills legislation in Canada provides that the testator must sign or acknowledge their signature in the concurrent presence of witnesses.

Only Newfoundland and Quebec do not explicitly state this requirement and so their provisions are potentially ambiguous in this regard.

In Canada, only Saskatchewan has a provision to allow a witness to acknowledge their signature.

LEGISLATION: AUSTRALIA - NEW ZEALAND

New Zealand and all the Australian jurisdictions also have an explicit provision requiring concurrent presence of witnesses when the testator signs or acknowledges.

In Australia, only South Australia has a provision to allow a witness to acknowledge their signature.

LEGISLATION: UNITED STATES

In the American Uniform Probate Code the concurrent presence of witnesses is not required and, therefore, serial witnessing is possible. The witnesses must sign within a reasonable time of witnessing either the testator's signature, the testator's acknowledgment of the testator's signature or the testator's acknowledgment of the will. The witnesses do not have to sign either in the testator's presence or each other's presence.

LAW REFORM

ENGLAND

The Law Reform Committee recommended that in a situation where a sole witness signs the will in the testator's presence but is joined later by the second witness (before whom the testator acknowledges the testator's signature), the first witness should be allowed to simply acknowledge their own signature to the other witness rather than having to re-sign the will. This reform would prevent the will from later being found invalid.

CANADA - COMMONWEALTH

There is no Canadian or Commonwealth law reform movement advocating that a testator should be able to sign or acknowledge the testator's signature in the serial presence of witnesses. Any law reform agency which has raised this issue in Canada, Australia, England or New Zealand has always recommended retaining the law of concurrent presence.

ALBERTA

2000 – the Alberta Law Reform Institute considered whether to recommend relaxing formalities, as the Uniform Probate Code or as the English wills legislation has done in a fairly minor way .The ALRI concluded that relaxing formalities was not the best way to deal with technically invalid wills and that enacting a general dispensing power would be a more effective response.

2009 - the Alberta Law Reform Institute stated that it remains a good argument that the current formalities should continue unchanged and that any problems can be adequately handled by resorting to the dispensing power recommended by ALRI.

2009 - the Alberta Law Reform Institute recommended that there should continue to be a requirement that witnesses must be present at the same time to witness the making or acknowledgement of a testator's signature, but that a witness be allowed to acknowledge their signature to the other witness rather than having to re-sign the will.

PUBLICATION OF WILLS

Historically, a testator was required to "publish" their will by making a declaration in the presence of witnesses that the document produced to them was the testator's will. The English *Wills Act, 1837* explicitly abolished the requirement of publication. Publication was superseded by the modern formalities involving the concurrent presence and signatures of the testator and at least two witnesses.

LEGISLATION: CANADA

Following the English precedent, the wills legislation of every Canadian jurisdiction has a provision stating that no publication of wills is necessary.

LEGISLATION: AUSTRALIA - NEW ZEALAND

a provision stating that no publication of wills is necessary is also present in the wills legislation of New Zealand and every Australian jurisdiction.

However, over half the Australian jurisdictions (Australian Capital Territory, Northern Territory, Queensland, Tasmania and Victoria) have modernized the language used to express this concept.

Instead of saying that "publication" is not required, these statutes simply say that a witness to a will does not need to know that the document is a will. New Zealand also has updated language.

LAW REFORM

GENERALLY

There is no national or international reform movement to alter this situation, either by repealing the provision or by reviving a publication requirement.

2009 - the Alberta Law Reform Institute recommended that the Alberta Act should continue to have a provision abolishing publication, as it serves an instructive purpose and promotes uniformity of legislation but did support expressing it in plainer English so that its meaning may be obvious to all who read it.

WITNESSES TO A WILL

Incompetent Witnesses

Historically under English law, "there were numerous bases on which a witness could be found to be incompetent, some more serious than others." Apart from incompetence based on mental impairment or age, a witness was also rendered incompetent, for example, by any kind of financial or pecuniary interest, large or small, related to the matter about which the testimony was given. When probating a will in those days, it was a real disaster to discover that a witness was incompetent either at the date on which the will was signed or later at probate, because the entire will would fail as a result and intestacy would occur. Therefore, a saving provision was enacted in the *Wills Act, 1837* to prevent invalidity. (Section 11 of the Uniform Act)

LEGISLATION: CANADA

This saving provision is found in the wills legislation of all Canadian jurisdictions but Quebec. Except in Nova Scotia, the provision always states explicitly that it applies both at the time of execution and afterwards.

LEGISLATION: AUSTRALIA – NEW ZEALAND

There is a trend in Australia to discontinue this provision. There are only three jurisdictions which still retain the traditional saving provision (Australian Capital Territory, South Australia and Tasmania). Five jurisdictions do not have saving provisions (New South Wales, Northern Territory, Victoria, Queensland and Western Australia). Instead, these jurisdictions specify a disqualification for witnesses, namely, that a person who cannot see and attest to the making of a signature cannot witness a will.

New Zealand used to have the saving provision until 2007, when it was discontinued in the New Zealand Act. The Act is silent about any qualifications or disqualifications for witnesses.

LEGISLATION: UNITED STATES

The Uniform Probate Code specifies who may be a witness – "[a]n individual generally competent to be a witness may act as a witness to a will." There is no saving provision in the event of an incompetent witness, but the Code does state that signing a will by an interested witness does not invalidate the will.

LAW REFORM

CANADA

The Manitoba Law Reform Commission recommended that the saving provision be changed to state that a will is invalid if a person was incompetent as a witness at the time of attestation, but not if the person thereafter became incompetent.

The Law Reform Commission of British Columbia recommended retention of the saving provision without change.

The Law Reform Commission of Nova Scotia did not mention this issue in its recent report concerning wills legislation.

2009 - the Alberta Law Reform Institute decided not to introduce any witness competence test because doing so would then require witness competence to be proved for probate and it recommended that any person who is blind or unable to see should not be disqualified as a witness.

Other Incompetency Issues

2009 - the Alberta Law Reform Institute noted comments by the Manitoba Law Reform Commission, that it is an obvious danger to allow a person who signs on behalf of the testator to also sign as a witness. It felt this practice should be prohibited and recommended that any person who signs the will on behalf of and at the direction of the testator would be disqualified as a witness.

The Witness-Beneficiary Rule

The witness-beneficiary rule has a long history in English law.

LEGISLATION: CANADA

All Canadian jurisdictions have some version of the witness-beneficiary rule. A couple of minor variations are found in Prince Edward Island (which does not have the sufficiency of witnesses exception) and Quebec (which does not have that exception either and also does not nullify a gift to a witness's spouse).

More significant variations are found in Manitoba, Ontario and Saskatchewan. In addition to the sufficiency of witnesses exception, these three provinces also allow a court to validate the witness's or spouse's gift if satisfied that there was no "improper or undue influence" exercised on the testator.

Saskatchewan specifies a limitation date for such applications of six months from the grant of probate or grant of administration with the will annexed.

Manitoba and Ontario also extend the disqualification of receiving gifts under the will to a person who signs the will on behalf of and at the direction of the testator and to that person's spouse. A court may nevertheless validate the gift on the same grounds of lack of improper or undue influence.

LEGISLATION: AUSTRALIA – NEW ZEALAND

There is a reform movement in Australia to repeal the disqualification on gifts to witnesses and spouses. Half of Australia's jurisdictions now allow witnesses and their spouses to keep any gift left to them under the will (Australian Capital Territory, South Australia, Victoria, and Western Australia).

Of the remaining four jurisdictions, Tasmania and New South Wales both disallow gifts to an interested witness and any person claiming under the interested witness, while Northern Territory and Queensland disallow gifts to witnesses only. Queensland also extends the disqualification on receiving gifts under the will to interpreters as well. However, none of the jurisdictions extend the disqualification to persons signing on behalf of a testator.

All four jurisdictions with the disqualification have the sufficiency of witnesses exception. In addition, they also have two other provisions designed to ameliorate the effect of the disqualification – (1) the gift can be given to the witness or witness's spouse in accordance with the will when all persons who would directly benefit from the gift's avoidance consent in writing and (2) the court may validate the gift.

An Australian provision allowing a court to validate the gift typically says that the court may allow the gift to pass to the witness or witness's spouse when the court is satisfied that the testator "knew and approved of the disposition" and that it was "given or made freely and voluntarily by the testator.

New Zealand disallows gifts to witnesses, their spouses or partners, and any person claiming under them. But the disqualification is subject to the sufficiency of witnesses exception, unanimous consent to the contrary by other beneficiaries and court validation of the gift. The disqualification also does not apply if the disposition is the repayment of a debt to the person in question.

LEGISLATION: UNITED STATES

Under the Uniform Probate Code, there are no disqualifications or penalties concerning witnesses who receive a benefit under the will. They can validly witness the will and receive their inheritance as well.

LAW REFORM

CANADA

In Canada, there has been little call for repeal of the witness-beneficiary rule.

The Law Reform Commission of British Columbia recommended retention of the rule, albeit with the reform of adding court discretion to validate the gift which was recently reiterated by the British Columbia Law Institute.

In recent reviews of provincial wills legislation, neither the Manitoba Law Reform Commission nor the Law Reform Commission of Nova Scotia even raised the issue of repeal.

The Alberta Law Reform Institute recommended that to exercise its discretion to validate a void gift, a court must be satisfied that the witness or spouse did not exercise any improper or undue influence on the testator and that the limitation period for bringing a court application for validation of a void gift should be six months from the grant of probate or administration with will annexed.

2009 - the Alberta Law Reform Institute did not favour repealing the witness-beneficiary rule but that the courts should be given the discretion to validate a testamentary gift made to a witness or a witness's spouse.

The Alberta Law Reform Institute supported extending the disqualification to interpreters and persons who sign a will on behalf of the testator (but not the spouses of interpreters or signers). Disqualifying these particular beneficiaries could protect the testator by removing an incentive or reward for wrongdoing.

LAW REFORM

ENGLAND - AUSTRALIA – NEW ZEALAND

The English Law Reform Committee recommended retention of the rule without change.

The New Zealand Law Commission also recommended retention of the basic rule and sufficiency of witnesses exception, but further recommended adding the exceptions of consent and court validation.

Like a witness-beneficiary, the disqualified interpreter or signer must have the right to apply to court for validation of the gift in appropriate cases. As in the Queensland provision, the statute should clarify that an interpreter is not prevented from receiving appropriate remuneration under the will for the interpretation services.

Witness-Beneficiary - Competent

A witness-beneficiary is competent as a witness to prove such matters as execution of the will or its validity or invalidity and essentially the same thing is said concerning specific types of witnesses – creditors whose debts are charged on property under the will and executors.

LEGISLATION: CANADA – AUSTRALIA –NEW ZEALAND – UNITED STATES

There are standard provisions in most Canadian wills legislation, as well as in England, New Zealand and half the Australian jurisdictions. The other four Australian jurisdictions (New South Wales, Northern Territory, Queensland and Victoria) do not have these provisions and neither does the uniform model statute proposed by the National Committee for Uniform Succession Laws.

LAW REFORM

CANADA

The Law Reform Commission of British Columbia recommended replacing the standard provisions with a single general rule that "no person is incompetent to act as a witness to a will by reason only of interest." The British Columbia *Wills, Estates and Succession Act* does not contain the standard provisions and also does not include a general provision.

2009 – the Alberta Law Reform Institute recommended that there should continue to be separate sections affirming that witness-beneficiaries, creditors and executors are competent witnesses.

CHANGES THAT ALTER OR REVOKE A WILL

There are several methods that a testator may use to change a will:

- through a separate document or made directly on the will itself (a testator may write on the will to add something in (interlineation) or to take something out (deletion or obliteration)) or a combination of both;
- by destruction of part or all of the will.

The writing may amount to a complete will or may be a codicil to an existing will. The effect is the same. Provided that the writing shows that the testator intended to change an existing will, and is made in accordance with the relevant formalities for creating a will, it will be a valid means of changing the existing will. The change made by a separate testamentary document may be express or implied.

LEGISLATION: CANADA

(s. 18 Uniform Act; s. 19 Alberta Act; s. 15 Ontario Act; s. 72 Prince Edward Island Act; ss. 54-55 British Columbia 2009 Act; s. 16 Manitoba Act; s. 15 New Brunswick 2009 Act; s. 11 Newfoundland Act; s. 19A Nova Scotia Act; s. 11 Northwest Territories Act; s. 16 Saskatchewan Act; s. 10 Yukon Act)

Changes on a formal will

Changes on formal wills are subject to two formalities: They must be signed by the testator and two witnesses. The requirement that the testator sign any changes on a formal will is rarely problematic

Courts have insisted on the requirement that changes on a formal will must be signed by two witnesses. One witness is not sufficient, the more frequent problem being that there are no witnesses at all. Courts have refused to accept signed but unwitnessed changes on a formal will even though such changes might be valid to change a holograph will.

Courts, though, often outline internal and external evidence showing intent to change. Where there is sufficient evidence of intent, courts will even try to find that unwitnessed, handwritten changes amount to a separate testamentary document in holograph form, i.e. a holograph codicil. However, to stand as a testamentary instrument, the attempted changes must be able to stand on their own. The net effect of the holograph codicil approach is merely to trade the formalities for altering a formal will for the more rigorous formalities for creating a separate holograph will.

LEGISLATION: CANADA

Some jurisdictions take a broad approach and allow formal wills to be altered without witnesses. The Saskatchewan Act provides (s.11(3)) that a will may be altered 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.

LAW REFORM

CANADA

The Manitoba Law Reform Commission has recently recommended a provision based on the Saskatchewan model. The Newfoundland Act is similar but does not require that the changes be in the testator's own writing.

In 2010, the Alberta Law Reform Institute recommended that changes on a formal will should continue to be made in accordance with the existing formalities for formal wills and that adopting the general dispensing power will allow courts to give effect to changes that do not meet the formalities.

Changes made by marking on a will

Sometimes there appears to be an implied distinction between changes made by writing and those made by marking on a will. In some jurisdictions, the distinction is express.

Generally speaking, "writing" requires words. Without more, merely drawing a line does not amount to "writing." Whether the dispensing power is limited to "writing" or extends to other markings is significant in discussing changes on a will.

LAW REFORM

CANADA

1981 - The British Columbia 1981 Report recommended a separate dispensing power for alterations which included the threshold requirement that the testator had signed the change.

2006 - The British Columbia Law Institute's 2006 Report proposed a general dispensing power that would apply to making, changing, revoking and reviving wills. This recommendation was implemented in the new Act, section 58.

2010 - The recommended that changes made by markings on a will should be made in accordance with the formalities that govern the will and as with other circumstances where formalities govern changes on a will, the dispensing power should apply to changes made by markings.

Changes that obliterate text on a will

Text that is no longer apparent on the will

A Wills Act may provide a special category of changes that amount to obliteration. An obliteration is a change that makes it impossible to read the original text of the will. This result may be achieved by over-writing, gluing

paper on top of the text, applying correction fluid, cutting a hole in the document or similar means. The change is effective for the very reason that the obliterated text is unreadable. No formalities are required, provided that the original text is "no longer apparent.

LEGISLATION: CANADA

Similar provisions are found in all Canadian jurisdictions, as well as England, New Zealand and Australia: Ontario Act, s. 18(1); Prince Edward Island Act, s. 73; s.17(1); Manitoba Act, s. 19(1); New Brunswick Act, 18(1); Newfoundland Act, s. 12(1); Nova Scotia Act, s. 20; Saskatchewan Act, 11(1); Alberta Act s. 19; Yukon Act, R.S.Y., s. 11(1); Northwest Territories Act, s. 12(1);

LEGISLATION: ENGLAND - AUSTRALIA - NEW ZEALAND

England Act, s. 21; s. 15(c) New Zealand Act; s. 12(1) Australian Capital Territory Act; s. 24 South Australia Act; s. 15(2) Victoria Act; s. 16(1) Tasmania Act; ss. 10(1), (3) Western Australia Act; s. 14(2) New South Wales Act; s. 16(3) Northern Territory Act; s. 16(2) Queensland Act.

COURTS

Courts have held that "no longer apparent" means that the words are not optically evident on the face of the will: if they can only be discovered through extrinsic evidence or by physically interfering with the will. Thus, courts have refused to accept oral testimony by a third party regarding the original text, to use chemicals to remove ink, correction fluid or paper glued on top of text, or to accept infra-red photographs Words are apparent if the original text can be read by limited means such as holding the page up to a light or by using a magnifying glass. If the words are apparent, the original text is still valid unless the change also complies with the relevant formalities.

But, words that are not apparent also remain valid if the testator did not intend to obliterate them. However, in contrast to the limited means that can be used to determine whether the original text is still apparent, the court may use any means to determine original text that was unintentionally obliterated.

Formalities and testator's intent are not governing factors in the area of obliteration.

LAW REFORM

ALBERTA

2010 - the Alberta Law Reform Institute recommended that:

a. Changes that obliterate text in a will should be made in accordance with the formalities that govern the will.

b. As with other circumstances where formalities govern changes on a will, the dispensing power should apply to changes made by obliteration.

c. Where the formalities are not met and the change is not valid under the dispensing power, the original text should be determined by any means acceptable to the court.

If it is not possible to determine the obliterated text, the obliteration will not be a valid change but may still be an effective change.

Changes made by destruction

A will may also be revoked, in whole or in part, by destruction. As with the current law of obliteration, revocation by destruction does not require the testator's signature or witnesses. If the will is only partially destroyed, it is not revoked unless the surviving parts of the will cannot stand on its own.

LEGISLATION

(s. 15 Uniform Wills Act; s. 55(1)(c) and (d) British Columbia 2009 Act; s. 16 Alberta Act s. 14; Manitoba Act, s. 16; New Brunswick Act, s. 15; Newfoundland Act, s. 11; Northwest Territories Act, s. 11; Nova Scotia Act, s. 19; Nunavut Act, s. 11; Ontario Act, s. 15; Prince Edward Island Act, s. 72; Civil Code of Quebec, S.Q., art 767; Saskatchewan Act, s. 16; Yukon Act, s. 10; England Act, s. 22; Australian Capital Territory Act, s. 21; South Australia Act, s. 22; Tasmania Act, s. 15; Western Australia Act, s. 15)

In the context of revocation by destruction, the problematic "formality" is the insistence on total destruction. Some jurisdictions have relaxed the total destruction requirement by allowing courts to consider the testator's intention even if the will has not been totally destroyed.

The new British Columbia 2009 Act extends the revocation provision to address incomplete destruction requires the court to consider the testator's intent which suggests that the court may hear oral evidence regarding what the testator may have said while attempting to destroy the will.

In 2010, the ALRI recommended that the revocation provision of the Alberta *Wills Act* should allow the court to give effect to the testator's intent where destruction is incomplete.

Changes on a holograph will

Changes on holograph wills must be signed by the testator. Case law accepts that the testator's initials are sufficient and that a full signature is not required on every change. Changes on holograph wills must also be in the testator's own writing and this rarely causes problems.

In contrast to changes on a formal will, changes on holograph wills need not be witnessed in Alberta, for example, and changes on a holograph will are not invalidated if they happen to be witnessed. However, some other jurisdictions require that any changes on a will must be witnessed, regardless of whether the will is holograph or formal.

LEGISLATION: CANADA

(Nova Scotia Act, s. 20; Northwest Territories Act, s. 12(2); Yukon Act, s. 11(2); *Wills Ac*t, s. 12(2) Nunavut Act).

LAW REFORM

ALBERTA

There is an underlying requirement that a will and any changes must reflect the testator's intent. Where the formalities are met, the change will generally be accepted as valid and the court will not inquire further into the testator's intent. Consequently, evidence that the testator intended to change a will is most often raised where the formalities were not met. However, under the current law, it is the very fact that the formalities were not met that prevents the court from giving effect to the testator's intended change.

2010, - the Alberta Law Reform Institute recommended that changes on a holograph will should continue to be made in accordance with the existing formalities for holograph wills and adopting the general dispensing power would allow courts to give effect to changes that do not meet the formalities.

A general dispensing power could allow the courts to consider the testator's intent. If the court is satisfied on clear and convincing evidence that the testator intended to adopt the change as part of the will, the court can give effect to it even though the formalities may not have been met.

REVOCATION BY LAW

LEGISLATION: ENGLAND

Under the England Act marriage by the testator revoked a will except when the will was made in contemplation of marriage or in exercise of a power of appointment. The England Act provided that marriage revoked the wills of both men and women and that married women's wills were not valid.

The social policy reasons behind revocation were very different for women as opposed to men. Revocation of a woman's will was a result of her loss of capacity to deal with property on marriage. For a man, the law reflected a policy that a wife and children should be provided for. This policy was achieved by ensuring that until a new will was made after marriage a man's estate passed by intestacy.

LEGISLATION: CANADA

All the common law provinces and territories in Canada, except British Columbia, have a provision that revokes a will when a testator marries. Alberta s. 16 ; Manitoba Act, s. 17; New Brunswick Act, s. 15.1; Ontario Act, s. 16; Saskatchewan Act, s. 17; Northwest Territories Act, s. 11; Newfoundland Act, s. 9; Nova Scotia Act, s. 17; Yukon Act, s. 10; Prince Edward Island Act, s. 68; Nunavut Act, s. 11. See also, Uniform Wills Act, s. 16 but note section 19.1 where the court can relieve against the automatic revocation under section 16 under the dispensing power adopted in 2000.

A will is not revoked by the presumption of an intention to revoke it.

LAW REFORM

CANADA

The British Columbia Law Institute recommended that marriage should not revoke a will. A will's revocation by marriage is not generally known by the public. This results in unplanned intestacies. In addition, today a will is often not the primary means by which testators provide for spouses and children. Life insurance or RRSPs are commonly used instead. Family relief legislation and matrimonial property legislation also provide protection that was not available when the England Act was enacted. Also, the Institute pointed out that today many relationships are not based on marriage.

The protection only applies to a portion of society, namely, wives and children within legal marriage. The Institute concluded that "the archaic nature and untoward effects" justified abolition of the rule. This recommendation has been followed in the recently enacted succession legislation which does not include revocation of a will by marriage. The Alberta Law Reform Institute was in broad agreement with the conclusions of the B. C. Institute.

2010 - The Alberta Law Reform Institute recommended that Alberta *Wills Act* should no longer provide that all existing wills are revoked by law when a testator marries Further it said, subject to contrary intention of the

testator, where the testator's marriage ends in divorce or is found to be void or a nullity, any provision in the testator's will that

a. gives a beneficial interest in property to the former spouse, appoints the former spouse as executor or trustee, or gives the former spouse a general or special power of appointment should be construed as if the former spouse has predeceased the testator.

FAILED GIFTS – BENEFICIARY ISSUES

Gifts made in wills may fail for a number of reasons. In some cases, the gift cannot take effect because the particular asset is no longer part of the estate at the time of the testator's death. In other cases, the gift is available, but still fails due to circumstances related to the beneficiary.

Those circumstances may also vary. A gift generally fails when the intended beneficiary has died before the testator (lapse), witnessed the will (disqualification), killed the testator (forfeiture), declined the gift (disclaimer) or not met a condition placed on the gift by the testator (non-compliance with a condition). In any of these situations, a new beneficiary must be found.

Subject to a contrary intention, a gift that fails due to forfeiture falls into the residue, except when there is no residuary clause in the will or the gift is a residuary one.

Problems occur when a testator provides for an alternate beneficiary but does not contemplate forfeiture as a cause of failure.

The beneficiary predeceases the testator

If a beneficiary under a will does not survive the testator, the gift fails. It does not pass to the beneficiary's estate. This is called the doctrine of lapse. The doctrine of lapse is based on the principle that a testator intends those who are named or described beneficiaries to take their gifts personally. This shows a preference for a living beneficiary over a deceased beneficiary.

The beneficiary is disqualified

If a beneficiary under a will is disqualified by operation of the law, the gift also fails. The disqualification (or incapacity) of a beneficiary may occur in various situations. A gift in a will is void if it is made to a witness or witness's spouse;

The beneficiary commits a criminal wrongdoing

It is a rule of public policy that an individual should not be allowed to profit from their own criminal wrongdoing. The crime must, however, have some connection to the receipt of the inheritance to debar the criminal wrongdoer from taking the gift

The beneficiary refuses the gift

A beneficiary may choose to disclaim or refuse a gift. For instance, a beneficiary may want to accelerate the gift to the beneficiary's children, lighten a tax burden or avoid creditors receiving any benefit from the inheritance. When a beneficiary disclaims a gift under a will, the gift is completely void and is treated as if no gift had ever been made.

The beneficiary does not satisfy a condition imposed by the testator

A testator may place a condition (or a limitation) on a gift made in the will. If the beneficiary does not meet the condition imposed by the testator, the gift fails.

A Statutory Distribution Scheme

LEGISLATION: CANADA

The new British Columbia Act (Section 46) has a statutory distribution scheme as does the unproclaimed Alberta Wills and Succession Act. In its 2010 Report the ALRI recommended that, subject to a contrary intention, a single statutory distribution scheme should apply to all causes of failure, including lapse, disqualification, forfeiture, disclaimer and non-compliance with a condition

LAW REFORM

CANADA

2010 - The Alberta Law Reform Institute recommended that, subject to a contrary intention, a statutory distribution scheme in the Alberta *Wills Act* should include the following presumptions:

1. Testators do not want to disentitle the alternate beneficiaries they have named even if the reason a gift fails is not contemplated in the will;

2. Testators wish to benefit the issue of their own issue who are unable to take a gift; and

3. Testators intend any failed gift to increase the residue shared by the residuary beneficiaries they have named rather than be distributed to the heirs on intestacy.

Some of the considerations in developing such a scheme might be:

1. Alternate beneficiaries

2. Descendant beneficiaries' issue

    a. Extend exception to all causes of failure

    b. Narrow list of triggering family members

    c. Narrow list of inheriting beneficiaries

3. Residuary beneficiaries

4. Heirs on intestacy

In addition some of the other considerations might be:

1. Order of Priorities

Subject to a contrary intention, if a gift in a will cannot take effect for any reason, a statutory distribution scheme should follow this order of priorities until the gift is disposed of:

a. to the alternate beneficiary whether or not the particular cause of failure is contemplated in the will,

b. to the issue of the primary beneficiary who is unable to take the gift if that beneficiary is also an issue of the testator;

c. to the issue of the alternate beneficiary who is unable to take the gift if that beneficiary is also an issue of the testator; and

d. to the residue, if any, shared by all residuary beneficiaries in proportion to their interests.

2. Should the Scheme Apply to All Classes of Gifts?

A statutory distribution scheme should apply to all classes of gifts, including general and pecuniary gifts, specific gifts, demonstrative gifts and residuary gifts.

3. Should the Testator be Able to Exclude or Deviate from the Statutory Distribution Scheme?

a. The testator makes a class gift

b. The testator makes a joint gift

c. The testator wants to deviate from the statutory scheme

The statutory distribution scheme should be a default provision only. Therefore, any intention of the testator expressed in the will or established by admissible extrinsic evidence, including a class gift or a joint gift and an intention to otherwise deviate from the scheme, should be given full effect.

ADEMPTION BY CONVERSION

Should the Common Law Rule of Ademption by Conversion Be Retained?

A will often describes the subject matter of a gift with such specificity as to clearly distinguish it from other property, or other things of the same kind. This type of gift is a specific legacy and the rule of law is that if, at the testator's death, the specific property is not found among the testator's assets, the gift fails: it is said to have adeemed. ... Ademption by conversion occurs as a matter of law quite irrespective of the testator's intention in the matter and it occurs because the specific property has been wholly or partly destroyed, or the testator has parted with it, or it has ceased to conform to the description of it in the will.

Ademption was developed as a simple and easy-to-apply rule which accommodated a testator's usual intent without the complexity of a case-by-case determination of the testator's actual intent. It was intended to minimize litigation and avoid confusion. The difficulty is that in many cases application of the doctrine as a hard and fast rule has led to harsh results where a beneficiary receives nothing, which may frustrate the testator's actual intent.

English courts eventually adopted an approach with a two part test: (1) is there a gift of a specific or particular asset?; and (2) does the asset which is the subject matter of the specific gift exist in the estate at the time of death? If there is a gift of a specific asset and the asset is no longer part of the estate at the time of death then the gift fails or adeems.

Given that the application of the rule may, in some cases, lead to harsh results that frustrate the intent of the testator, the courts have employed a number of judicial devices to avoid application of the ademption doctrine in particular cases: (1) construing legacies as other than specific, (2) finding the subject of a legacy is in the estate in a different form, and (3) declaring the common law rule inapplicable in certain circumstances. In addition, various legislative exceptions to the ademption doctrine have also been created.

LEGISLATION: CANADA - UNITED STATES

No province in Canada has passed legislation to effectively abolish the rule of ademption by conversion. In the United States, Kentucky is the only state to have abolished the ademption rule.

UNIFORM LAW CONFERENCE

The Uniform Law Conference of Canada recommended in its Uniform Wills Act that provinces enact a legislative exception for equitable conversion. Section 20(2) of the Uniform Wills Act provides:

Rights in place of property devised
(2) Except when a contrary intention appears by the will, where a testator at the time of his death has a right or chose in action or equitable estate or interest that was created by a contract respecting, a conveyance of, or other act relating to real or personal property that was comprised in a devise or bequest, made or done after the making of a will, the devisee or donee of that real or personal property takes the right or chose in action or equitable estate or interest of the testator.

LEGISLATION: CANADA

A number of provinces, including Alberta, have also enacted legislative exceptions for equitable conversion. (Alberta Act, s. 21(2); Ontario Act, s. 20(2); New Brunswick Act, s. 20(2); Northwest Territories Act, s. 14(2); Nunavut Act, s. 14(2); and Saskatchewan Act, s. 26(2))

What form should the legislative exceptions take?

LEGISLATION: UNITED STATES

In the United States, § 2-608(a) of the 1969 *Uniform Probate Code*, adopted by several states, eliminated ademption in a number of specific cases of equitable conversion:

- proceeds of sale,
- condemnation or casualty insurance awards which are unpaid at the testator's death, and
- property owned by the testator at death and acquired as a result of foreclosure, or obtained in lieu of foreclosure, of the security interest for a specifically devised obligation.

The 1990 *Uniform Probate Code* retained all of the specific exceptions for equitable conversion from the 1969 version (plus a new exception for replacement property), but also added a mild presumption against ademption.

LEGISLATION: CANADA

Ontario enumerates a list of exceptions:

20(2) Except when a contrary intention appears by the will, where a testator at the time of his or her death,

(a) has a right, chose in action or equitable estate or interest that was created by a contract respecting a conveyance of, or other act relating to, property that was the subject of a devise or bequest, made before or after the making of a will;

(b) has a right to receive the proceeds of a policy of insurance covering loss of or damage to property that was the subject of a devise or bequest, whether the loss or damage occurred before or after the making of the will;

(c) has a right to receive compensation for the expropriation of property that was the subject of a devise or bequest, whether the expropriation occurred before or after the making of the will; or

(d) has a mortgage, charge or other security interest in property that was the subject of a devise or bequest, taken by the testator on the sale of such property, whether such mortgage, charge or other security interest was taken before or after the making of the will, the devisee or donee of that property takes the right, chose in action, equitable estate or interest, right to insurance proceeds or compensation, or mortgage, charge or other security interest of the testator.

Ontario first introduced the enumerated list of exceptions to equitable conversion in 1977. Ontario's enumerated list has remained unchanged since its introduction. It parallels the list found in the United States' *Uniform Probate Code* of 1969.

Saskatchewan, like Ontario, adopted an enumerated list of legislative exceptions to equitable conversion, although its list is more limited in scope.

LEGISLATION: ENGLAND - AUSTRALIA

Neither the United Kingdom nor Australia has adopted any legislative exceptions for equitable conversion.

LAW REFORM

CANADA

1984 - the Law Reform Commission of Saskatchewan expressly rejected extending a legislative exception to cases of insurance proceeds or compensation for expropriation as the conversion of the property was involuntary and should signal to the testator the need for a will change. The Commission distinguished this involuntary disposal from a situation where a testator retains an interest in the property and assumes that the words in the will are sufficient to pass such an interest. On the other hand, other commentators cite situations of destruction, expropriation or other involuntary disposition of property as cases where ademption should not apply as the testator did not likely intend to revoke a gift of the property.

1. Should a single chose in action be applied pro-ratably in satisfaction of the entitlement of multiple beneficiaries?

If the purpose of the legislative exception is to provide some relief in cases of equitable conversion from the inflexible application of the ademption rule, then a broader interpretation including the proportional allocation of proceeds might be appropriate.

2. Should the current legislative exception for the disposition of property by the trustee of a represented adult be extended to other substitute decision-makers?

A substitute decision-maker, such as a committee or trustee appointed because the testator is incapable of managing property, can trigger ademption by selling property subject to a specific gift. A number of jurisdictions have passed legislative exceptions in such circumstances because an intention to revoke a testamentary disposition cannot be ascribed to the testator.

LEGISLATION: CANADA - UNITED STATES - ENGLAND

In Canada, several provinces have passed legislation that contains an antiademption provision for substitute decisions including Alberta, Ontario, Manitoba and British Columbia. These legislative exceptions provide that the beneficiary's interest in the property is transferred to the proceeds of disposition.

In the United States, § 2-606(b) of the *Uniform Probate Code* provides a broad exception to the ademption doctrine for property disposed of by a conservator or agent acting under a power of attorney. This provision has been adopted by a number of states.

Similarly, the United Kingdom has introduced an anti-ademption provision in its *Mental Health Act*. Some individual states in Australia have added legislative exceptions where a substitute decision-maker disposes of property that is also the subject of a bequest in a will.

3. D. Where a Gift Includes the Proceeds of Sale, What Should Happen If the Proceeds Are No Longer Identifiable?.

Section 20(3) of the Uniform Wills Act is consistent with the common law position with regards to a bequest of the proceeds of sale. It provides:

> 20(3) … [W]here the testator has bequeathed proceeds of the sale of property and the proceeds are received by him before his death, the bequest is not adeemed by commingling the proceeds with the funds of the testator if the proceeds are traced into those funds.

LEGISLATION: CANADA

New Brunswick, the Northwest Territories and Nunavut are the only jurisdictions to have adopted this provision in their wills legislation.

LEGISLATION: ENGLAND – UNITED STATES - AUSTRALIA

Neither the United Kingdom, the United States nor Australia has adopted specific legislative provisions concerning a bequest of the proceeds of sale of property and the commingling of funds.

LAW REFORM

CANADA

The Ontario Law Reform Commission recommended that the Uniform Wills Act provision not be adopted on two grounds:

1. The commingling might be looked upon as a change in intention on the part of the testator; and

2. There might be difficulty in deciding what rules should be applied if the testator had withdrawn money from the combined fund.

1989 - the Law Reform Commission of British Columbia did not agree with the idea that commingling could be an indicia of a change of intention and recommended that existing legal principles concerning the traceability and identifiability of property be applied. This recommendation was not carried forward into the British Columbia 2006 Report and does not form part of the new British Columbia legislation.

2010 - the Alberta Law Reform Institute recommended that the common law rule of ademption by conversion should be retained and that the legislative exception for equitable conversion should be retained. A legislative exception should not be extended to actual conversion regardless of whether the proceeds of disposition are traceable.

ADMISSION OF EXTRINSIC EVIDENCE

The admission of extrinsic evidence by the court can be very important to the interpretation of a will. For over 200 years, two different approaches to the interpretation of wills and the admission of extrinsic evidence have co-existed in the case law. These approaches differ in the extent to which it is felt appropriate to look at evidence of surrounding circumstances at the time of the making of the will. Under both approaches, the admission of evidence of the testator's intentions is severely restricted. Some courts have used one approach or the other consistently, while other courts have wavered between the two approaches.

One approach focuses on attempting to give similar results in similar cases. This is the literal, objective or strict constructionist approach. Under this approach, the court concentrates its attention on the ordinary meaning of the words used by the will-maker and tends to exclude extrinsic evidence. The other approach, termed the subjective or intentional approach, concentrates on giving effect to the intentions of the testator and favours admission of extrinsic evidence.

The trend seems to be that the case law from the Supreme Court takes a traditional objective approach. But recent case law, particularly in western Canada, favours an intentional approach. However, a leaning toward the objective approach still prevails, most notably, in recent decisions of the Newfoundland and Labrador Court of Appeal.

LEGISLATION: ENGLAND

1982 - England passed legislation which appeared to mandate an intentional approach to construction. This legislation has provided the model for law reform in other common law jurisdictions

The focus of the objective approach is on the language used in the will. It is presumed that the intention of the testator can be found by looking at the language of the will. Surrounding circumstances were only looked at to establish a reference point. Once a person or object satisfying the description in the will was found, no further evidence of surrounding circumstances was accepted. However, this principle has been extended in the case law to include evidence of surrounding circumstances to determine the sense of a word as well as its reference.

The basic premise of the intentional approach is that the object of the construction exercise should be to determine the testator's subjective intent. The court considers the words of the will in conjunction with the surrounding circumstances. The extrinsic evidence is used to explain the testator's words. It is only possible to give effect to an intention which is express or implied.

Under the common law, whether the court uses the objective approach or the intentional approach, evidence of surrounding circumstances is admitted where appropriate. This is often called the "armchair rule." The court sits in the armchair of the testator in order to assess the surrounding circumstances.

The evidence must concern surrounding circumstances at the time the will was made. Thus, circumstances not known to the testator at the time the will was made are inadmissible.

In contrast to the position in probate court, evidence of the testator's intention is inadmissible in a court of construction under the common law, subject to a few exceptions.

LAW REFORM

ENGLAND

Since the enactment of the 1982 English Act, all law reform agencies examining the use of extrinsic evidence have recommended that similar legislation be adopted.

1973 - English Law Reform Committee adopted a "broadly intentional approach" to interpretation. The majority felt that admission of extrinsic evidence should be widened, noting the trend in the case law toward an intentional approach. In the majority's view, extrinsic evidence of any kind should be admissible to interpret a will, apart from admission of evidence of the testator's intention.

AUSTRALIA - NEW ZEALAND

Australian law reform agencies have also recommended that wills legislation be changed to widen the circumstances in which extrinsic evidence can be admitted.

1980 - the Chief Justice's Law Reform Committee in Victoria recommended that the intentional approach should be adopted with respect to the admission of evidence of surrounding circumstances. However, the Committee felt that evidence of a testator's intention should not be admissible except in cases of latent ambiguity.

1994 - a further report recommended that the approach taken by the 1982 English Act be adopted. Other states recommending adoption of the English legislative approach during the 1990s included Queensland, the Northern Territory and New South Wales.

1997 - the New Zealand Law Commission recommended that wills legislation in New Zealand be amended to provide for admission of extrinsic evidence based on the English model. More specifically, it recommended adoption of the wider Australian Capital Territory *Wills Act* provision which allowed admission of extrinsic evidence in cases of ambiguity and uncertainty.

CANADA

1982, the Law Reform Commission of British Columbia recommended that extrinsic evidence should be admissible in all cases to assist the court in interpreting a will. The Commission found that the distinction between patent ambiguities and latent ambiguities was unwieldy and therefore, both evidence of surrounding circumstances and evidence of the testator's intent should be admissible. It recommended that legislation specifically provide that the purpose of such evidence is to find the meaning of the words used by the testator.

2006 - the British Columbia Law Institute revisited the issue. The Institute was in general agreement with the previous report that the law needed to be clarified. The Institute noted that the Court of Appeal had endorsed the intentional approach and evidence of surrounding circumstances was able to be admitted initially to assist the

court. However, the Institute was not in favour of admission of evidence of the testator's intent in all cases for policy reasons. They felt that litigation might increase with greater numbers of spurious claims. Therefore, the recommendation was that legislation be enacted along the lines of the 1982 English Act The recommendations have resulted in the enactment of legislation in British Columbia.

2003 - the Manitoba Law Reform Commission issued a report which discussed the admission of extrinsic evidence. The Commission agreed that reform of the law was necessary and suggested adoption of legislation on the English model, with the addition of a provision that the new rules were not a complete code.

2010 - the Alberta Law Reform Institute recommended that the Alberta *Wills Act* should provide that extrinsic evidence is admissible to establish a contrary intention to rebut a statutory rule of construction.

LEGISLATION: AUSTRALIA - NEW ZEALAND

Some Australian states and New Zealand have adopted the model of the 1982 English Act. In Australia, legislative action came first in 1991 when the Australian Capital Territory enacted a wider version of the English model. The legislation provided for the introduction of extrinsic evidence not only in cases of meaningless or ambiguous provisions, but uncertain provisions as well. This was followed by legislation in Victoria in 1997 and the Northern Territory in 2000. In 2006-2007, New South Wales, Queensland and Western Australia enacted legislation. Only Victoria followed the wider model adopted in the Australian Capital Territory. In Tasmania, the *Wills Act 2008* also contains a provision modeled on the English legislation.

In 2007, New Zealand's *Wills Act* was enacted, following the English model on this issue, as recommended by the Law Commission in 1997, a rejection of the literal approach in favour of an intentional approach.

Two important changes to the English model have been made in some of the Australian and New Zealand legislation. They appear to have changed the English model so that admission of extrinsic evidence is not tied to the part of the will in which the ambiguity is found. They have provisions allowing admission of extrinsic evidence where the words used make the will or any part of it ambiguous. In addition, Victoria, the Australian Capital Territory and New Zealand allow admission of extrinsic evidence with respect to an uncertainty in the wording. This is not insignificant because ambiguous words must be capable of more than one meaning. If words are uncertain, the meaning is unknown. Thus, under this legislation, extrinsic evidence may be admitted where words have no meaning, more than one meaning or an unknown meaning.

LEGISLATION: CANADA

In Canada, the English approach has been adopted in the recently enacted wills legislation in British Columbia. Section 4 reads:

> 4(2) Extrinsic evidence of testamentary intent, including a statement made by the will-maker, is not admissible to assist in the construction of a testamentary instrument unless
>
> (a) a provision of the will is meaningless,
>
> (b) a provision of the testamentary instrument is ambiguous
>
> (i) on its face, or

(ii) in light of evidence, other than evidence of the will-maker's intention, demonstrating that the language used in the testamentary instrument is ambiguous having regard to surrounding circumstances, or

(c) extrinsic evidence is expressly permitted by this Act.

In the unproclaimed Alberta Act in section 26 it is provided that:

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

(a) evidence as to the meaning, in either an ordinary or a specialized sense, of the words or phrases used in the will,

(b) evidence as to the meaning of the provisions of the will in the context of the testator's circumstances at the time of the making of the will, and

(c) evidence of the testator's intent with regard to the matters referred to in the will.

Statutory Construction Rules

The law on the admissibility of extrinsic evidence to find a contrary intention on the part of the testator originated in the early common law. It is not an issue which has been extensively considered by law reform agencies or legal commentators.

Many of the statutory construction rules originated in the English *Wills Act 1837*. During the early development of the common law, there was great concern on the part of the courts that the terminology in legal documents be given a fixed meaning. It was thought that the meaning of the words within a document had an unchangeable meaning which applied to all documents. Over time, the case law articulated rules of construction which imposed a fixed meaning on certain words and phrases. In the construction of wills, the outcome of this process has been summarized as follows: "Decisions as to the true construction of the ambiguous words of one testator were cited as authorities for putting a similar construction

A statutory construction rule is akin to a general rule of construction. Under the common law, whether or not extrinsic evidence is available to assist in finding the intention of the testator under a rule of construction varies. There are rules of construction which appear to not allow any inquiry at all as to the intent of the testator. Some rules may be rebutted by extrinsic evidence which suggests another reasonable meaning. Other rules can only be rebutted by a contrary intention found in the wording of the testamentary instrument.

At present the statutory construction rules function as very strong rules of construction in that any contrary intention to refute a rule must be found within the wording of the document itself.

CASE LAW: CANADA – ENGLAND – IRELAND – AUSTRALIA NEW ZEALAND

A survey of case law in Canada indicates some courts admit extrinsic evidence and other courts stating that the contrary intention must be found in the language of the will itself.

In England and Ireland, it appears that the courts confine themselves to the wording of the will in searching for a contrary intention. In Australia and New Zealand, it seems that the courts apply the normal rules on admission of extrinsic evidence when searching for a contrary intention and look at evidence of surrounding circumstances when appropriate.

LAW REFORM

CANADA

The Law Reform Commission of British Columbia examined the issue of admission of extrinsic evidence with respect to statutory rules of construction in the early 1980s. The Commission made a detailed examination of both the rules of construction and the statutory construction rules. The Commission recommended that statutory rules should be treated no differently from other rules of construction and that a contrary intention should be able to be established by extrinsic evidence. In 2006, the British Columbia Law Institute recommended that the contrary intention should appear in the will unless the provision states that other extrinsic evidence may be admitted.

The recently enacted British Columbia legislation has retained the traditional scheme. The wording used is that "a contrary intention appears in a will."

The Act states:

> 40(1) If this Act provides that a provision of this Act is subject to a contrary intention appearing in an instrument, that contrary intention must appear in the instrument or arise from a necessary implication of the instrument.

The Manitoba Law Reform Commission reviewed the issue in 2003. The draft proposed by the Commission recommended that admission of extrinsic evidence should be considered on a rule-by-rule basis. Where it is felt appropriate, specific statutory rules should be revised to allow extrinsic evidence to be admitted. In the draft act, only the provision on the effect of divorce provided for the admission of extrinsic evidence.

The unproclaimed Alberta Act provides:

> 26 A will must be interpreted in a manner that gives effect to the intent of the testator, and in determining the testator's intent the Court may admit the following evidence:
>
> (a) evidence as to the meaning, in either an ordinary or a specialized sense, of the words or phrases used in the will,
>
> (b) evidence as to the meaning of the provisions of the will in the context of the testator's circumstances at the time of the making of the will, and
>
> (c) evidence of the testator's intent with regard to the matters referred to in the will.

In Australia, the question was examined by the Standing Committee of Attorneys General in 1997. The Committee recommended that extrinsic evidence be admissible with respect to provisions designed to prevent partial intestacies.

The Committee felt that other sections which were more concerned with establishing a statutory succession scheme should retain the traditional restriction.

Recent legislation passed in Australia also follows the traditional rule.

The New Zealand *Wills Act 2007* appears to restrict evidence of a contrary intention to the wording of the will.

Should the traditional restriction on admission of extrinsic evidence be retained?

As can be seen, recent legislation in British Columbia, Australia and New Zealand has reaffirmed the traditional rule that the contrary intention to rebut a statutory rule should appear in the will itself.

Retention of this restriction for statutory rules of construction is out of step with legislative reform expanding the admissible extrinsic evidence to construe a will in general. It contradicts Canadian case law which views the admission of extrinsic evidence of surrounding circumstances as necessary to determine a contrary intention on the part of a testator.

It has been argued that any expansion of admissible evidence should only apply to provisions which are characterized as being designed to prevent partial intestacies. Provisions characterized as imposing a statutory scheme of succession should retain the traditional restriction. However, the history of these provisions shows that the purpose was not to impose a statutory scheme of succession, but to avoid defeating the intentions of testators. Further, the creation of statutory schemes of succession within wills legislation may not be appropriate given the common law focus on testamentary freedom. It is arguable that schemes of statutory succession should only be present under intestate succession legislation.

2010 – the Alberta Law Reform Institute recommended that, in order to best find the intention of the testator, Alberta should adopt legislation which allows the admission of all extrinsic evidence to find an intention to rebut a statutory rule of construction.

APPENDIX

Legislation

Canada
Alberta Act *Wills Act*, R.S.A. 2000, c. W-12.

Alberta *Wills and Succession Act*, Chapter R.S.A. C. W-12.2 (Unproclaimed)

Alberta Intestate Act *Intestate Succession Act*, R.S.A. 2000, c. I-10.

British Columbia 1996 Act *Wills Act*, R.S.B.C. 1996, c. 489.

British Columbia 2009 Act *Wills, Estates & Succession Act*, S.B.C. 2009, c. 13

Manitoba Act *The Wills Act*, C.C.S.M. c. W150.

New Brunswick Act *Wills Act*, R.S.N.B. 1973, c. W-9.

Newfoundland Act *Wills Act*, R.S.N.L. 1990, c. W-10.

Northwest Territories Act *Wills Act*, R.S.N.W.T. 1988, c. W-5.

Nova Scotia Act *Wills Act*, R.S.N.S. 1989, c. 505.

Nunavut Act *Wills Act*, R.S.N.W.T. 1988, c. W-5 as duplicated and deemed to be the law of Nunavut by the *Nunavut Act*, S.C. 1993, c. 28, s. 29.

Ontario Act *Succession Law Reform Act*, R.S.O. 1990, c. S.26.

Prince Edward Island Act *Probate Act*, R.S.P.E.I. 1988, c. P-21.

Saskatchewan Act *Wills Act, 1996*, S.S. 1996, c. W-14.1.

Uniform Wills Act Uniform Law Conference of Canada, *Uniform Wills Act* (as amended to July 1, 2010).
Yukon Act *Wills Act*, R.S.Y. 2002, c. 230.

Australia
Australian Capital Territory Act *Wills Act 1968* (A.C.T.).

New South Wales Act *Succession Act 2006* (N.S.W.).

Northern Territory Act *Wills Act* (N.T.).

Queensland Act *Succession Act 1981* (Qld.).

South Australia Act *Wills Act 1936* (S.A.).

Tasmania Act *Wills Act 2008* (Tas.).

Victoria Act *Wills Act 1997* (Vic.).

Western Australia Act *Wills Act 1970* (W.A.).

New Zealand
New Zealand Act *Wills Act 2007* (N.Z.).

England
England Act *Wills Act, 1837* (U.K.), 7 Will IV & 1 Vict., c. 26.

LAW REFORM PUBLICATIONS

Alberta 1994 Report Alberta Law Reform Institute, *Effect of Divorce on Wills*, Final Report No. 72 (1994).

Alberta 2000 Report Alberta Law Reform Institute, *Wills: Non-Compliance with Formalities*, Final Report No. 84(2000).
Alberta 2009 Report Alberta Law Reform Institute, *The Creation of Wills*, Final Report No. 96 (2009).

Australia Uniform Report National Committee for Uniform Succession Laws, *Consolidated Report to the Standing Committee of Attorneys General on the Law of Wills*, Queensland Law Reform Commission Miscellaneous Paper (1997).
British Columbia 1981 Report Law Reform Commission of British Columbia, *Report on the Making and Revocation of Wills*, Report No. 52 (1981).
British Columbia 1982 Report Law Reform Commission of British Columbia, *Report on Interpretation of Wills*, Report No. 58 (1982).

British Columbia 1989 Report Law Reform Commission of British Columbia, *Report on Wills and Changed Circumstances*, Report No. 102 (1989).

British Columbia 2006 Report British Columbia Law Institute, *Wills, Estates and Succession: A Modern Legal Framework*, Report No. 45 (2006).

British Columbia Working Paper Law Reform Commission of British Columbia, *The Making and Revocation of Wills*, Working Paper No. 28 (1980).

England 1973 Report Law Reform Committee (England), *The Interpretation of Wills*, 19th Report (1973).
England 1980 Report Law Reform Committee (England), *The Making and Revocation of Wills*, 22nd Report (1980).

Manitoba Report Manitoba Law Reform Commission, *Wills and Succession Legislation*, Report No. 108 (2003).

New South Wales Report New South Wales Law Reform Commission, *Wills - Execution and Revocation*, Report No. 47 (1986).

Saskatchewan Report Law Reform Commission of Saskatchewan, *Report on Revocation of Wills* (2006).
Scotland Report Scottish Law Commission, *Report on Succession*, No. 215 (2009).