

Legal Research Guide to Wills and Succession

2006

Compiled by Eric B. Appleby

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Legal Research Guide to Wills and Succession: Introduction

Scope of this guide

Legal research is the process of finding a case, statute, regulation, text, etc., that is relevant to a legal issue.

How does a lawyer resolve a legal issue? First, the lawyer must identify the issue. The issue can, in many cases, be resolved by finding a binding case (a precedent) or a relevant statute or regulation. Case law and statutes and regulations are referred to as primary sources of the law.

This legal research guide is meant to provide instruction on how to find cases that are relevant to an issue in the law of wills and succession. This **is not** a guide to finding relevant statutes or regulations. The concepts of jurisdiction and stare decisis **are not** discussed in this guide.

Introduction

This guide contains some of the first principles of the law of **Wills and Succession**.

Each section refers to a principle and to cases that apply the principle. At the end of each section is one of Maritime Law Book's key numbers that can be used to search for additional cases that apply the principle - search in print law reports or at www.mlb.nb.ca. A key number can be used to do a computer search of a single province or to search simultaneously every common law jurisdiction in Canada. The MLB key numbers set out below are preceded by the words "**Search aid**".

The MLB key numbers are useful because a point of law is always assigned the same key number by MLB editors. For example, the key number **Wills Topic 1704** is assigned to all cases that address the question of what constitutes undue influence (see Chapter 5). A list of MLB key numbers is found in any recent MLB digest (a digest covers 10 volumes in any report series) and at www.mlb.nb.ca. To generate a key number list of cases, at www.mlb.nb.ca click on "Key Number Search", click on a title, such as **Wills**, and then click on the key number.

See Appendix A for a complete list of all the key numbers assigned by

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MLB editors to headings in the topic **Wills**.

Appendix A also includes under each key number a list of cases that have been assigned the key number. Appendix B is a list of key numbers and cases for the topic **Perpetuities**.

The principles or rules stated in this booklet should always be checked against the relevant provincial statutes (e.g. Wills Act, Devolution of Estates Act, Dependents Relief Act, Family Relief Act, Marital Property Act, etc).

The language of wills - common terms defined

Accumulations - adding income of a fund to the principal and preventing its expenditure. See Chapter 9.7.

Attestation - the act of witnessing an instrument in writing.

Beneficiary - one who will benefit from a transfer of property.

Codicil - a supplement to a will, containing an addition, modification, etc., of something in the will.

Cy-près - as near as possible.

Donor - one who makes a gift.

Donee - one to whom a gift is made.

Estate - the total property owned by a deceased person prior to the distribution of that property in accordance with the terms of a will.

Executor/executrix - a person appointed by a testator to carry out the directions in a will.

Holograph - a will written entirely by a testator in his own hand and not witnessed.

Intestate - to die without a will.

Lapse - the failure of a gift in a will to vest because of the death of the donee prior to the death of the testator.

Legacy - the disposition of personalty by will; a bequest.

Legatee - the person to whom a gift in a will is given.

Perpetuity - continuing forever. See Chapter 9.7.

Probate - a court procedure by which a will is proved to be valid or invalid.

Residue - the surplus of a testator's estate remaining after all debts and gifts are

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discharged.

Surrogate court - the name given to a court in some jurisdictions with similar jurisdiction to that of a Probate court.

Testament - the latin word for will.

Testator/testatrix - the person who makes or has made a will.

Vested - having the character of absolute ownership; not contingent.

Will - an instrument that disposes of property to take effect on death. See Chapter 2.1.

Chapter 1 - What is a will?

1.1 Why make a will?

A person who owns property may want to name persons to receive the property after the owner's death. A will is the document in which those persons are named, and those persons are called beneficiaries. A will may be made wholly in the testator's own handwriting (a holograph will) but most persons engage a lawyer to prepare a will. See Testamentary Instruments, chapter 2.

1.2 Capacity to make a will

Any adult may make a will. In many provinces you must be age 19 to make a valid will unless the testator is married or is a member of the armed forces. Also a testator must be mentally competent in order to make a valid will. See Testamentary Capacity, chapter 3.

1.3 Formalities required to make a will

A statute, usually the Wills Act, requires that a will must meet certain formalities such as being witnessed. See Preparation and Execution, chapter 5, below.

1.4 The Executor

In a will the testator can name the person to be responsible for carrying out the testator's wishes, and that person is called an executor. For small estates the executor is usually a trusted family member or friend. Institutional executors may be difficult to remove or change. A trusted family member as executor can be instructed to retain and change lawyers, accountants, and institutions as required.

In the absence of a trusted spouse or trusted family friend, a corporate executor may be a prudent appointment.

A will should also name an alternate executor to act in case the executor is unwilling or unable to act.

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1.5 Change or Revocation of a will

A will can be revoked or cancelled at any time prior to death, as long as the testator is mentally competent at the time of revocation. See Revocation, chapter 7.

A will should be reviewed periodically or whenever there is a change in the testator's financial or family status.

1.6 Intestate Succession

If a person dies without a will, the person is said to have died intestate. The property of an intestate is distributed according to rules set out in a statute, such as a Devolution of Estates Act. See Devolution of Estates, chapter 16.

1.7 Marital Property Legislation

Legislation respecting marital property may affect a donee's property rights under a will or on an intestacy. The **Marital Property Act, S.N.B. 1980, c. M-1.1, s. 4(4)** provides that a spouse's right to have marital property divided in equal parts, supercedes any bequest contained in a will or any claim on an intestacy.

1.8 Protection of Testator's Family

A testator's freedom to dispose of property is limited by legislation that requires a testator to provide for the maintenance and support of dependents. See chapter 16.

1.9 Living wills

A person should consider making a "living will" that names persons who can act on behalf of the person respecting medical care and treatment if for some reason the person is unable to act prior to death. Such authority can be included in a power of attorney. In some provinces such as Alberta a person can make a written personal directive that can include instructions respecting medical care. The phrase "living will" is not a legal term in Canada. But it is used to describe the legal directives each province sanctions that deal with your medical care wishes should you be unable to communicate them.

Chapter 2 - Testamentary Instruments

2.1 Wills

The well known phrase "Last Will and Testament" refers to a testamentary disposition. The word "will" is English and the word "testament" is Latin. Today if the word "will" is used, the word "testament" is superfluous. See **The Language of the Law** (1963) by David Mellinkoff at page 331.

What is a testamentary disposition? In short it is a will. And a will is an instrument by which a person makes a disposition of property to take effect at the time of death (see **Black's Law Dictionary**, 6th ed., page 1598).

In **Miskew Estate v. Hughes** (1986), 71 A.R. 316, the Alberta Court of Appeal stated at para. 11:

A document will be testamentary and admissible to Probate if it meets three tests:

- (a) does it satisfy the legal formalities?
- (b) does it contain a disposition intended to take effect upon death? and
- (c) did the testamentary intention continue to the time of death?

Search aid - MLB Key No. - **Wills Topic 4** is assigned to cases that include an issue of what constitutes a testamentary disposition. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

Note that testamentary intention is required for a valid will. See Preparation and Execution, chapter 5, below and see cases under MLB Key No. - **Wills Topic 14**. This key number is assigned to cases that include an issue of what constitutes testamentary intention. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

2.2 Codicils

A codicil is a supplement to a will and may add or revoke provisions in the will. A codicil must be executed with the formalities required of the original will - see Legal Formalities below. A codicil is part of the will and the will and the codicils make but one testament.

2.3 Conditional wills

A conditional will is one which depends on the occurrence of some uncertain event. If the testator intends to dispose of his property in case the event happens, the gift is conditional. In the case of **Schullman, Re** (1984), 32 Sask.R. 74 (Q.B.) the headnote stated in part:

In 1975 the testator executed a will that stated ". . . I am getting heart trouble . . . if I die by morning my will is . . .". The testator did not die until 1983 when he was killed in an accident. The court held that the will was not conditional and admitted it to Probate.

Search aid - MLB Key No. - **Wills Topic 31** is assigned to cases that include an issue of what constitutes a conditional will. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

2.4 Incorporation by reference

It is possible for a will to refer to another document, and that the document referred to, will become a part of the will. Such a reference is called incorporation by reference. The elements of incorporation by reference are:

In addition to the requirement that the document intended to be incorporated must be an existing document and not one that is to come into existence at a future date (which may be called the first condition for the operation of the doctrine), there are two other conditions required. The second of these three conditions is that the document must be referred to in the will; the third condition is that the reference in the will must be sufficient to identify the document. See **Tucker Estate, Re** (1993), 126 N.S.R.(2d) 201; 352 A.P.R. 201 (Probate Ct.), para. 14.

Search aid - MLB Key No. - **Wills Topic 8** is assigned to cases that include an issue of what constitutes incorporation by reference. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

2.5 Legal formalities, general

Generally, a will to be valid must be signed by the testator in the presence of two attesting witnesses. See Preparation and Execution, chapter 5, below.

2.6 Wills by military

Special provisions are made by statute to accommodate persons who make a will while in military service. Sometimes the validity of an armed forces member's will depends on whether the person was on "actual military service". See **Wheatley Estate, Re** (1984), 95 N.S.R.(2d) 66; 251 A.P.R. 66 (Probate Ct.) which includes a history of these special legislative provisions at para. 4.

Search aid - MLB Key No. - **Wills Topic 55** is assigned to cases that interpret the phrase "actual military service". See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

2.7 Holograph wills

A holograph will is written entirely by the testator in his own hand and not witnessed.

A holograph will is governed by provincial legislation, for example, s. 6 of the **Wills Act**, R.S.N.B. 1973, c. W-9 states:

A testator may make a valid will wholly by his own handwriting and signature, without formality, and without the presence, attestation or signature of a witness.

When a testator combines his handwriting with a printed will form that is not witnessed, the courts have had to rule on the validity of the alleged holograph will. See **Carr Estate, Re** (1990), 112 N.B.R.(2d) 151; 281 A.P.R. 151 (Probate Ct.).

Search aid - MLB Key No. - **Wills Topic 62** is assigned to cases that include an issue of what constitutes a holograph will. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

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2.8 Successive Wills

An otherwise valid will may be rendered invalid by the making of a second will that is inconsistent with the first will. See **Kavanagh's Will, Re** (1992), 98 Nfld. & P.E.I.R. 165; 311 A.P.R. 165 (Nfld. S.C.).

Search aid - MLB Key No. - **Wills Topic 83** is assigned to cases that include an issue of what is the effect of a second will. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

2.9 Mutual Wills

Mutual wills are the separate wills of two persons which are reciprocal in their provisions. The effect of such wills is stated in **O'Connell Estate, Re** (1980), 44 N.S.R.(2d) 181; 83 A.P.R. 181 (Probate Ct.), and at para. 19 the court stated:

I shall dispose first of all with the legal effect of the mutual wills. It is clear beyond question that the mere making of these mutual wills does not effect any permanent change in the rights and obligations of the makers for by the English common law a will, by its very nature, is always revocable and, during the joint lives of the testators, each is free to alter his or her will. It is only upon the death of one of the makers who dies without having altered his or her mutual will that the rights of the survivor to alter his or her mutual will may be compromised (cf. e.g., **Gray v. Perpetual Trustee Co. Ltd.**, [1928] A.C. 391; [1928] All E.R. Rep. 758).

Search aid - MLB Key No. - **Wills Topic 92** is assigned to cases that consider the effect of mutual wills. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

2.10 Power to designate a beneficiary outside a will

There may be circumstances where a testator may designate a beneficiary outside his/her will. This power is usually based on a statute. In **McGrath v. Nadeau** (1994), 153 N.B.R.(2d) 141; 392 A.P.R. 141 (T.D.) the headnote states:

This application raised the issue of whether a beneficiary card signed by a deceased under the provisions of the Credit

Unions Act took precedence over the provisions of her will.

The New Brunswick Court of Queen's Bench, Trial Division, held that the beneficiary card took precedence over the provisions of the will.

Search aid - MLB Key No. - **Wills Topic 98** is assigned to cases that consider the designation of a beneficiary outside of a will. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

Chapter 3 - Testamentary Capacity

3.1 General Principles

The caselaw states that the testator must possess a soundness of mind. **Halsbury's Laws of England**, 2nd Ed., vol. 34, p. 37, states "It is necessary for the validity of a will that the testator should be of sound mind, memory, and understanding, words which time out of mind have been held to mean sound disposing mind, and to import sufficient capacity to deal with and appreciate the various dispositions of property to which the testator is about to affix his signature . . .".

A testator may have testamentary capacity even though suffering from Alzheimer's disease - see **Stevens v. Crawford** (2001), 281 A.R. 201; 248 W.A.C. 201 (C.A.).

A testator was held to lack the necessary capacity where he suffered from delusions - see **Fuller Estate v. Fuller** (2004), 197 B.C.A.C. 245; 323 W.A.C. 245 (C.A.).

Search aid - MLB Key No. - **Wills Topic 302** is assigned to cases that include an issue of what constitutes testamentary capacity. **Wills Topic 405** is assigned to cases that include an issue of what constitutes a mental disability. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with these issues.

3.2 Presumption of capacity

The New Brunswick Court of Appeal stated that "there is a presumption of testamentary capacity ... It is only where the trial judge accepts that there are suspicious circumstances that proof of capacity will have to be made on a balance of probabilities." See **Clark Estate, Re** (1996), 180 N.B.R.(2d) 379; 458 A.P.R. 379 (C.A.).

Search aid - MLB. Key No. - **Wills Topic 534** is assigned to cases that consider the onus of proof of testamentary capacity. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

Chapter 4 - Donees

4.1 Generally

A donee is the person to whom a gift or bequest is made. The person who gives the property is called the donor.

4.2 Capacity to benefit

Public policy may operate to render invalid a bequest under a will. See **Benson Estate, Re** (1998), 231 A.R. 76 (Surr. Ct.) at para. 14:

"The forfeiture rule. A sane person who commits murder is debarred by public policy from taking any benefit under the will or intestacy of his victim. ... The forfeiture rule has sometimes been applied where the killer is convicted of manslaughter by reasons of diminished responsibility, but it does not apply if the killer was insane - an insane killer may take a benefit under the will or intestacy of his victim." Clark and Ross Martyn, **Theobald on Wills**, 15th Ed., 1993, Sweet and Maxwell, p. 146.

Search aid - MLB Key No. - **Wills Topic 1055** is assigned to cases that consider the capacity to benefit and the forfeiture rule. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

4.3 Disqualification of donees

A beneficiary under a will may be disqualified if the beneficiary is a witness to the signing of the will. See **Campbell Estate, Re** (1990), 90 Sask.R. 3 (Sur. Ct.), where the Saskatchewan Surrogate Court declared invalid bequests to beneficiaries who witnessed the will. See also **Pauliuk v. Pauliuk Estate** (1986), 73 A.R. 314 (Q.B.) where the court declared invalid a bequest to the son of the testator where the son was a witness to the execution of the will.

Search aid - MLB Key No. - **Wills Topic 1083** is assigned to cases where the donee was a witness to the execution of a will. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

4.4 Identification of donees

Careful drafting is required to identify donees so as to avoid the costs of litigation. See **Zive Estate, Re** (1976), 23 N.S.R.(2d) 477; 32 A.P.R. 477 (T.D.) where the court was asked to determine who was included in the phrase "members of my family". The court held that the testator intended to include nephews and nieces in the phrase "members of my family".

Where the description of the donee is vague the gift may be void for uncertainty and the gift would devolve as on an intestacy. See **Olson Estate, Re** (1988), 70 Sask.R. 240 (C.A.).

Search aid - MLB Key No. - **Wills Topic 1403** is assigned to cases where the description of the donee is vague. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

Chapter 5 - Preparation and Execution

5.1 Generally

There is a general requirement that a testator know and approve the contents of a will. So where the testator is blind, special modes of proof may be required where the will is probated. See **Brewster Estate, Re** (1989), 75 Sask.R. 279 (Q.B.).

Search aid - MLB Key No. - **Wills Topic 1504** is assigned to cases that consider whether the testator had knowledge of the contents of a will. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

5.2 Signature

A will must be signed by the testator. An unsigned will does not meet the various statutory requirements and is invalid. See **Chersak Estate, Re** (1955), 99 Man.R.(2d) 169 (Q.B.).

Search aid - MLB Key No. - **Wills Topic 1531** is assigned to cases that consider the requirement of a signature by the testator. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

5.3 Signature, What constitutes

Due to a physical infirmity a testator was only able to place marks on his will. A court held that such marks constituted a signature for purposes of the New Brunswick Wills Act. See **Bradshaw Estate, Re** (1988), 90 N.B.R.(2d) 194; 228 A.P.R. 194 (Probate Ct.).

Search aid - MLB Key No. - **Wills Topic 1538** is assigned to cases that consider what constitutes a signature by the testator. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

5.4 Attestation

Attestation is the act of witnessing an instrument in writing at the request of the person signing the instrument. Provincial legislation may require that a will be signed by the testator in the presence of two witnesses. There is a presumption that a will was duly executed and witnessed by persons who knew the statutory requirements, absent evidence to the contrary. See **Beaudoin**

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Estate v. Taylor (1999), 8 B.C.T.C. 302 (S.C.).

Search aid - MLB Key No. - **Wills Topic 1556** is assigned to cases that consider the requirement of attestation. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

5.5 Curing of irregularity

A court in some circumstances has the power to declare valid a will that is not signed or witnessed as required by the Wills Act. See **Felsing Estate, Re** (2001), 205 Sask.R. 143 (Q.B.).

Search aid - MLB Key No. - **Wills Topic 1573** is assigned to cases that consider the curing of an irregularity. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

5.6 Undue Influence, What constitutes

A donee who has obtained a gift by fraud or undue influence is liable to have the gift set aside (**Halsbury's Laws of England**, 2nd Ed., vol. 34, page 45). In **Nickerson Estate, Re** (1996), 155 N.S.R.(2d) 289; 457 A.P.R. 289 (Probate Ct.) the court, at paragraph 16, referred to a definition of undue influence as follows:.

Thomas Feeney in his text, **The Canadian Law of Wills**, (3rd Ed.1987) states at p. 42:

"The burden of proof of undue influence is on the attackers of the will to prove that the mind of the testator was overborne by pressure exerted by another person. It is not enough to show mere persuasion; the influence exerted on the testator must amount to coercion to be undue influence. Coercion has been defined to mean that the testator has been put in such a condition of mind that if he could speak his wishes to the last he would say 'this is not my wish but I must do it!'"

Search aid - MLB Key No. - **Wills Topic 1704** is assigned to cases that consider the question of what constitutes undue influence. See

www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

5.7 Alterations and Deletions

It is well established law that unexecuted interlineations or interpolations made after the execution of the will are of no effect. See **Hodder Estate, Re** (2002), 210 Nfld. & P.E.I.R. 87; 630 A.P.R. 87 (Nfld. T.D.) at para. 15.

Thomas Feeney in his text, **The Canadian Law of Wills**, (3rd Ed., 1987) states at p. 130:

"If, after executing a formal will, the testator desires to alter it in some manner, the alteration . . . must itself be signed and attested in the manner prescribed for a formal will. Furthermore, there is a presumption that a will was altered after execution and not before."

Search aid - MLB Key No. - **Wills Topic 1744** is assigned to cases that consider the validity of alterations and deletions to a will. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

5.8 Presumption of Due Execution

"If a will purports to be properly executed and attested, and there is no doubt that it is the testator's will, the court will assume that it was properly executed and attested, though the evidence of the attesting witnesses as to the execution may not be satisfactory." See **Theobald on Wills**, 13th Ed., para. 274.

Search aid - MLB Key No. - **Wills Topic 1884** is assigned to cases that consider the presumption of due execution. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

Chapter 6 - Revocation

6.1 Generally

While provincial statutes vary, generally a will is revoked:

- by a later valid will;
- by a later writing declaring an intention to revoke and made in accordance with the relevant statute;
- by burning, tearing or otherwise destroying the will by the testator;
- by marriage of the testator.

6.2 Revocation by subsequent will

A subsequent will must completely dispose of the testator's property in order to revoke a previously executed will or the subsequent will must express an intention to revoke the prior will. See **Comerford Estate, Re** (1980), 8 Man.R.(2d) 1 (Sur. Ct.).

Search aid - MLB Key No. - **Wills Topic 2376** is assigned to cases that consider whether a will was revoked by a subsequent will. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

6.3 Revocation by act of testator

The deceased's original will was accidentally destroyed in a fire at his lawyer's office. The Nova Scotia Court of Appeal held that the original will was not revoked by its destruction in the fire. See **Therault Estate, Re** (1997), 157 N.S.R.(2d) 398; 462 A.P.R. 398 (C.A.).

In 1980 a testator instructed her accountant to help her prepare a new will and she burned a 1973 will in the presence of the accountant. A new will was prepared, but it could not be proved that the woman executed it. The Newfoundland Supreme Court, Trial Division, held that the 1973 will was revoked by burning, notwithstanding that the woman intended to make a new will, but did not. See **Hennissey's Will, Re** (1984), 46 Nfld. & P.E.I.R. 91; 135 A.P.R. 91 (Nfld. T.D.).

Search aid - MLB Key No. - **Wills Topic 2336** is assigned to cases

that consider the revocation of a will by act of the testator. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

A husband and wife separated in 1996 after 27 years' marriage. The husband's 1987 will named his wife the sole beneficiary. A domestic contract purportedly released all claims the wife might have against the husband's estate. The husband died in 1998 without revoking the 1987 will or making a new will. The executors of the husband's estate applied for directions as to whether the ex-wife continued to take under the 1987 will or whether the will was invalidated by the divorce and/or the domestic contract.

The New Brunswick Court of Queen's Bench, Trial Division, held that the 1987 bequest was not nullified by either the domestic contract or the divorce. See **Eccleston Estate, Re** (1999), 221 N.B.R.(2d) 295; 567 A.P.R. 295 (T.D.).

Search aid - MLB Key No. - **Wills Topic 2335** is assigned to cases that consider whether an agreement revoked a will. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

6.4 Presumption of revocation where will is lost

The deceased executed a will in 1983. The deceased died in February 1985. Following his death neither his will nor the strong box he purportedly kept it in could be found. The executrix applied to the court for proof in solemn form of a copy of a 1983 document as the last will of the deceased. The New Brunswick Probate Court granted the application. The court found that there was no intention by the testator to revoke his will or change any dispositions in the will and that the will was missing because of the disappearance of the metal box where it was kept and not because of any intention of the testator. See **Quinlan's Will, Re** (1985), 63 N.B.R.(2d) 429; 164 A.P.R. 429 (Probate Ct.).

Search aid - MLB Key No. - **Wills Topic 2342** is assigned to cases that consider whether a will was revoked where the will is lost. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

Chapter 7 - Revival

7.1 General

Generally, a revoked will can be revived by re-execution and showing an intention to revive it. Evidence must be presented that shows with reasonable certainty an intention to revive the will. See **MacKinlay Estate, Re** (1993), 122 N.S.R.(2d) 354; 338 A.P.R. 354 (C.A.).

Search aid - MLB Key No. - **Wills Topic 2406** is assigned to cases that consider whether a will was revived. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

Chapter 8 - Gifts

8.1 Generally

The fundamental principle whereby the courts are guided in the interpretation of testamentary documents, is that effect must be given to the testator's intention, ascertainable from the expressed language of the instrument. If it is not possible to determine the intention in this way, then recourse may be had to evidence regarding the situation of the testator at the time the will was made. See **DiMambro Estate, Re**, [2002] O.T.C. 900 (S.C.), para. 17.

A testator bequeathed his house and its contents. The Saskatchewan Surrogate Court held that an automobile found stored in the garage of the house was included in the bequest. But the court held that uncashed cheques and other choses in action found in the house were not included in the bequest and were part of the residue of the estate. See **Dixon Estate, Re** (1990), 82 Sask.R. 241 (Sur. Ct.).

Search Aid - MLB Key No. - **Wills Topic 3106** is assigned to cases that consider what constitutes a gift. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

8.2 Accretions

Accretions to property, such as company shares, generally follow a bequest of the shares. See **Palmer Estate, Re** (1985), 69 N.S.R.(2d) 384; 163 A.P.R. 384 (T.D.)

Search aid - MLB Key No. - **Wills Topic 3109** is assigned to cases that consider whether the testator made a gift of accretions. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

8.3 Income from property

A testator bequeathed his business to his nephew. The Manitoba Court of Queen's Bench held that the nephew was entitled to the income from the business from the date of the testator's death. See **Dearden's Will, Re** (1987), 46

Man.R.(2d) 222 (Q.B.), para. 71.

Search aid - MLB Key No. - **Wills Topic 3110** is assigned to cases that consider whether the testator made a gift of income from property. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

8.4 Interest on legacies

The general rule is that interest is payable on a pecuniary legacy beginning one year after the testator's death. An executor is allowed one year from the date of death to settle the affairs of the estate. See **Fraserview v. Gilmore Estate**, [2003] B.C.T.C. 1920 (S.C.).

In **Widdifield on Executors and Trustees**, 6th ed. (Toronto: Carswell, 2002) at 5-5:

"(a) One Year Rule

Subject to the exceptions hereinafter mentioned, where no special time is fixed for the payment of a legacy, it carries interest only from the expiration of a year from the testator's death, and this whether the legacy is vested or not. The executor is allowed one year from the testator's death to get in the assets and settle the affairs of the estate; at the end of that time the court, for the sake of general convenience, presumes the estate to have been reduced into possession, and interest then becomes payable, and is given for delay in payment . . ."

Search aid - MLB Key No. - **Wills Topic 3112** is assigned to cases that consider whether the testator made a gift of interest on legacies. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

Chapter 9 - Conditional Gifts

9.1 Generally

Where the testator has clearly attached conditions or obligations to his gifts, his expressed intention is paramount. But where the will is not clear, it is a settled rule of construction that the words are not construed as importing a condition, if they are fairly capable of another interpretation. See **Halsbury's Laws of England**, 2nd Ed., vol. 34, para. 412.

9.2 Public policy

A condition may be invalid if it is illegal or contrary to public policy or uncertain in its meaning or its operation. See **Woods Estate v. Woods**, [2005] O.T.C. 49 (S.C.), para. 32.

Search aid - MLB Key No. - **Wills Topic 8018** is assigned to cases that consider the effect of public policy on a conditional gift. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

9.3 Conditions precedent

A testatrix devised a property to his daughter absolutely, but provided that, if the property was sold during the daughter's lifetime, half the proceeds of sale were to go to his son. The property passed to the daughter and was unsold when the son died. The Newfoundland Supreme Court, Trial Division, held that the sale was a condition precedent to the gift to the son and that the gift lapsed when the son died before the sale. See **Gosse's Will, Re** (1976), 14 Nfld. & P.E.I.R. 188; 33 A.P.R. 188 (Nfld. T.D.).

Search aid - MLB Key No. - **Wills Topic 8006** is assigned to cases that consider what constitutes a condition precedent. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

9.4 Conditions precedent and subsequent

"It may, however, be noticed that when the condition requires something to be done which will take time, the argument is in favour of construing it as a condition subsequent because the

law leans in favour of early vesting. On the other hand, a condition which involves anything in the nature of consideration is in general a condition precedent. If the language of the will leaves it in doubt whether the condition is intended to be precedent or subsequent, the court prefers the latter." See **Theobald on Wills** (14th Ed., 1982), page 623.

A testatrix gave her husband her realty, but stated that he could not dispose of it during the testatrix's sister's lifetime, because if the husband predeceased the sister, the property would become the sister's. The Nova Scotia Supreme Court, Trial Division, held that the husband's interest was conditional on the sister predeceasing him. See **Cook v. Nova Scotia** (1982), 53 N.S.R.(2d) 87; 109 A.P.R. 87 (T.D.).

Search aid - MLB Key No. - **Wills Topic 8015** is assigned to cases that consider what constitutes a condition subsequent. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

Search aid - MLB Key No. - **Wills Topic 8006** is assigned to cases that consider what constitutes a condition precedent. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

9.5 Vested defined

Fixed; accrued; settled; absolute. Having the character or given the rights of absolute ownership; not contingent. . . . See **Black's Law Dictionary**, 6th Ed., page 1563.

9.6 Vesting, contingent gifts

A testator directed that the income from his estate be paid to his daughter until she reached the age of 45 at which time the capital was to be paid to her; provided that if the daughter died before age 45 the capital was to be paid to a granddaughter. The Saskatchewan Court of Appeal dismissed the daughter's application for an order for immediate vesting of the gift to the daughter. The court held that the gift to the daughter was contingent and was not absolute. See **Little v. Salterio Estate** (1981), 14 Sask.R. 18 (C.A.).

Search aid - MLB Key No. - **Wills Topic 8060** is assigned to cases

that consider whether a gift is contingent. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

9.7 Rules against remoteness of vesting

Rule against perpetuities

"Perpetuity, unlimited duration. ... It is odious in law, destructive to the commonwealth, and an impediment to commerce, by preventing the wholesome circulation of property" **The Dictionary of English Law** by Earl Jowitt (1959), page 1333.

The rule against perpetuities or the doctrine of remoteness is that the vesting of property cannot be postponed ... beyond any number of lives in being ... and 21 years from the death of the surviving life ... **Duke of Norfolk's Case** (1681), 3 Ch. Ca. 1.

Search aid - MLB Key No. - **Perpetuities Topic 700** is assigned to cases that consider the duration of a limitation or a period of vesting. See www.mlb.nb.ca and Appendix B for a list of cases that dealt with this issue.

Rule against accumulations

An accumulation arises when an income from a fund is added to the capital.

The headnote in the case of **Ball Estate v. Miller** (1986), 52 Sask.R. 300 (Sur. Ct.) states:

Limits on accumulation of rent, profits or income - Application of legislation - The Accumulations Act 1800 (Imp.), 39 & 40 Geo. 3, c. 98 - limited the period of accumulation of profits and rents to a period of 21 years following the death of the testator - The Saskatchewan Surrogate Court held that the Act was in force in Saskatchewan - See paragraphs 8 to 23.

Search aid - MLB Key No. - **Perpetuities Topic 7025** is assigned to cases that consider the limits on accumulation of rent, profits or income. See www.mlb.nb.ca and Appendix B for a list of cases that dealt with this issue.

Chapter 10 - Lapse

10.1 Generally

Generally, when a person to whom property has been devised or bequeathed dies before the testator, the devise or bequest fails or lapses, and the property goes as if the gift had not been made. See **The Dictionary of English Law** by Earl Jowitt (1959) at page 1059.

By his will, the testator left his entire estate to two friends. One friend predeceased the testator. The issues raised by the administrator of the estate were whether the gift to the deceased friend lapsed and who was entitled to the gift. The Alberta Surrogate Court held that the testator did not intend the gift to lapse and that the remaining beneficiary was entitled to the entire estate as a surviving joint tenant. See **Kolenic Estate, Re** (1989), 93 A.R. 257 (Sur. Ct.).

Search aid - MLB Key No. - **Wills Topic 4041** is assigned to cases that consider whether a gift failed or lapsed. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

10.2 Devolution of lapsed gift

A will equally divided the testator's estate amongst her eight children and one grandchild. One of the witnesses to the execution of the will was the spouse of a beneficiary (a daughter). Section 12(1) of the Wills Act rendered the bequest to the daughter void. The co-executors of the estate applied for directions as to the disposition of the daughter's interest in the estate. The New Brunswick Court of Queen's Bench, Trial Division, held that the daughter's one-ninth share of the estate was to be divided as on an intestacy. Accordingly, all eight children, including the daughter, equally shared the one-ninth share - See **Brown Estate v. Bon** (2003), 263 N.B.R.(2d) 287; 689 A.P.R. 287 (T.D.) para. 118.

A testatrix bequeathed \$10,000 to a niece. The niece predeceased the testatrix. The trustee applied for interpretation of the will to dispose of niece's interest. The Saskatchewan Court of Queen's Bench held that s. 32 of the Wills Act did not apply to save the gift because the beneficiary was only a niece by marriage. Therefore, the gift lapsed, and fell into the residue and would pass according to law of intestacy. See **Pearson Estate, Re** (1989), 81 Sask.R. 221 (Q.B.).

Search aid - MLB Key No. - **Wills Topic 4046** is assigned to cases that consider the devolution of a failed or lapsed gift. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

10.3 Tracing (exception from lapse)

A testatrix provided in her will that shares held jointly by herself and her husband would go to her daughter and then to her daughter's children, in the event her husband predeceased her. The husband predeceased her. It was argued at trial that the gift lapsed because at the time of her death there were no shares held jointly by herself and her husband. Upon the death of the husband, his interest in the jointly held shares passed to the wife. The Nova Scotia Supreme Court, Appeal Division, found that the trial judge was correct in concluding that the gift was of specific shares that could be traced in specie through splits and transfers to the time of the testatrix's death and that the gift did not lapse. See **Palmer v. Royal Trust** (1986), 73 N.S.R.(2d) 435; 176 A.P.R. 435 (C.A.).

Search aid - MLB Key No. - **Wills Topic 4047** is assigned to cases where a gift did not lapse because the gift could be traced. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

Chapter 11 - Failure of Gifts

11.1 Generally

A gift may fail for reasons personal to the donee, such as death of the donee prior to the testator's death. A gift may fail because the testator did not own the gifted property. A gift may fail because the gift was deemed satisfied by benefits conferred by the testator on the donee subsequent to the date of the will (this is called an ademption). Also the donee may disclaim the gift.

11.2 Implied revocation, ademption

The British Columbia Court of Appeal stated that "The doctrine [of ademption] applies as a matter of law, irrespective of the testator's intentions in the matter, although his or her intentions are clearly relevant to the anterior question of whether the gift in question is a 'specific' legacy (and therefore subject to ademption), or a general one (not subject to ademption). The doctrine is also subject to the qualification that even if the gift in question is a specific legacy, it may be saved in some circumstances if the property has changed 'in name or form only', and still forms part of the testator's property at the date of death." See **Wood Estate, Re** (2004), 203 B.C.A.C. 205; 332 W.A.C. 205 (C.A.).

A testator left his car to his granddaughter. The car was destroyed in a car accident in which the testator died. The Nova Scotia Supreme Court held that there was an ademption and that the insurance proceeds from the destruction of the car should form part of the residue of the estate. See **Phillips Estate, Re** (1995), 140 N.S.R.(2d) 213; 399 A.P.R. 213 (S.C.).

Search aid - MLB Key No. - **Wills Topic 4146** is assigned to cases that consider what constitutes an ademption. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

11.3 Failure of Gift, Uncertainty

Gibson died testate in December 1994. Gibson in his will dated January 1960 made a specific legacy "to a bus driver of the Gray Coach Lines Limited who has the best service record with his Company and the largest family at the date of my death as certified by the Gray Coach Lines Limited". The executor of the estate applied to determine whether the gift failed for uncertainty. The Ontario Superior Court held that the gift did not fail for lack of certainty, notwithstanding the numerous corporate changes of Gray Coach

Lines Limited since 1960. See **Gibson Estate v. Ashbury College Inc.** (1999), 104 O.T.C. 305 (S.C.).

Search aid - MLB Key No. - **Wills Topic 4248** is assigned to cases that consider what constitutes uncertainty. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

11.4 Failure of Gift, Impossibility

A testatrix made a residuary bequest for the establishment, construction and maintenance of a home for the aged. At the time of distribution, the executor believed that there were insufficient funds to carry out the testatrix's intention. The New Brunswick Court of Queen's Bench, Trial Division, held that the bequest did not fail for impossibility, because there was evidence that the testatrix's intention could effectively be carried out, either by using mortgage funds for the balance needed to establish a home or building an addition to an established home. See **McSweeney Estate, Re** (1982), 41 N.B.R.(2d) 419; 107 A.P.R. 419 (T.D.).

Search aid - MLB Key No. - **Wills Topic 4286** is assigned to cases that consider what constitutes impossibility. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

11.5 Failure of Gift, Repugnancy

The issue of repugnancy was stated by the Saskatchewan Surrogate Court in **Taylor Estate, Re** (1982), 19 Sask.R. 361, at para. 42:

"[T]he cases in which a testator after apparently conferring a benefit purports to deal with the property upon the death of the person upon whom the first benefit is conferred fall into two classes: first, those in which the later provision shows that the first taker was not intended to take absolutely, but was intended to have a life-estate only; and the second in which it was clear that the first taker was intended to take absolutely, and, therefore, the attempted gift over of all that might remain on the death of the first taker was repugnant and void, and that in each case the problem was to determine within which of the classes the particular will under consideration fell"

A testator gave land to his children subject to a life interest in the land to his wife. The Saskatchewan Surrogate Court held that there was no repugnancy between the gifts to the children and the wife's life interest. See

Rezansoff, Re (1985), 38 Sask.R. 170 (Sur. Ct.).

Search aid - MLB Key No. - **Wills Topic 4325** is assigned to cases that consider what constitutes a repugnancy. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

11.6 Failure of gifts, Partial failure

In 1989, Ross Woodside made a will bequeathing his farm to his nephew Mark Woodside, provided that Mark pay 50% of the farm's appraised value to Kent, Blake and Ann Woodside. The will also contained a residuary clause. In 1993, Ross sold his farm to Mark for \$115,000 payable on Ross' 65th birthday in 1995. Ross died in 1994. Mark paid the \$115,000 into court pending directions. The Prince Edward Island Supreme Court, Trial Division, held:

(1) that Ross' intention was to bequeath the farm to Mark and also to bequeath 50% of the farm's appraised value to Kent, Blake and Ann;

(2) that the bequest to Mark had been adeemed but not the bequest to Kent, Blake and Ann;

(3) that the \$115,000 was not part of the residue and was payable to Kent, Blake and Ann.

See **Woodside Estate, Re** (1997), 157 Nfld. & P.E.I.R. 232; 486 A.P.R. 232 (P.E.I.T.D.).

Search aid - MLB Key No. - **Wills Topic 4203** is assigned to cases where there is a partial failure of a gift. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

Chapter 12 - Rules of Construction, General

12.1 General

"Leading principle of construction. The only principle of construction which is applicable without qualification to all wills and overrides every other rule of construction is that the testator's intention is collected from a consideration of the whole will taken in connection with any evidence properly admissible, and the meaning of the will and of every part of it is determined according to that intention." (Emphasis added by Hunt, J.A.) See **Christensen v. Martini** (1999), 232 A.R. 339; 195 W.A.C. 339 (C.A.), para. 12.

Search aid - MLB Key No. - **Wills Topic 5000** is assigned to cases that consider the rule of construction to determine the intention of the testator. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

12.2 Time to which a will refers

A testatrix became of unsound mind in 1979. She made her will in 1972 and died in 1984. The trial judge concluded that since the testatrix became incompetent in 1979, the will must speak as of that time. The Nova Scotia Supreme Court, Appeal Division, stated that s. 22 of the Wills Act stipulated that a will must speak as of the death of a testator unless a contrary intention appeared; the trial judge was wrong in concluding that will must speak as of the date the testatrix became incompetent. See **Palmer v. Royal Trust** (1986), 73 N.S.R.(2d) 435; 176 A.P.R. 435 (C.A.).

Search aid - MLB Key No. - **Wills Topic 5002** is assigned to cases that consider the time to which a will refers. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

12.3 Technical words

"If the will has been drawn by a lawyer, the court will assume that the technical terms are used in their correct, technical, legal sense, unless it clearly appears that they were intended to bear some other meaning. Conversely, if the will is drawn by one who is not trained as a lawyer, it is more likely that the court will assume that the will is written in layman's language and, accordingly, will give the words their popular, rather than their technical,

meaning." See **Lyons Estate, Re** (1999), 16 B.C.T.C. 390 (S.C.), para. 11.

Search aid - MLB Key No. - **Wills Topic 5006** is assigned to cases that consider the construction of technical words. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

12.4 Time when law applicable

The deceased's will left the remainder of his estate "to be divided equally between my brothers and sisters ... ". Two claimants asserted that they were children of a brother of the deceased who had predeceased him. Sections 40 and 41 of the Children's Law Act abolished the distinction between children born inside and outside marriage, but the sections did not affect an instrument made before those sections came into force on December 1, 1990. The Saskatchewan Court of Queen's Bench held that while the deceased's will was executed before December 1, 1990, pursuant to s. 24 of the Wills Act, the will was to be construed as if it had been executed immediately before the testator's death on August 23, 1997. Therefore, the claimants were included in the term "children" in the will and were entitled to the brother's share of the estate. See **Kurtz Estate, Re** (2000), 198 Sask.R. 116 (Q.B.).

Search aid - MLB Key No. - **Wills Topic 5010** is assigned to cases that consider the time when law is applicable. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

12.5 Interpretation of legislation and intent of testator

"No legislation will be construed as thwarting the intention of a testator as expressed in his will, unless the language clearly and unmistakably indicates that the Legislature so intended and has effectively brought about that result." See **Gee Estate, Re** (1988), 52 Man.R.(2d) 157 (Q.B.), para. 5.

Search aid - MLB Key No. - **Wills Topic 5015** is assigned to cases that consider legislation that conflicts with the intention of a testator. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

12.6 Presumption against intestacy

"Where the construction of the will is doubtful, the Court acts on the presumption that the testator did not intend to die either wholly or even partially intestate, provided that on a fair and reasonable construction there is no ground for a contrary conclusion". See **Halsbury's Laws of England**, 2nd

Ed., vol. 34, para. 258.

Search aid - MLB Key No. - **Wills Topic 5027** is assigned to cases that consider the presumption against intestacy. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

12.7 Interpretation of words

"There are certain rules of construction to which a judge ought to adhere, viz.:

(1) to read the will without paying any attention to legal rules;

(2) to have regard not only to the whole of the clause which is in question, but to the will as a whole, which forms the context to the clause ...;

(3) to give effect, if possible, to all parts of the will and so to construe the will that every word shall have effect, if some meaning can be given to it and if such meaning is not contrary to some intention plainly expressed in other parts of the will ...;

(4) When the judge thus determines the intention of the testator he should inquire whether there is any rule of law which prevents effect being given to it ...".

See **Hordynsky Estate, Re** (1983), 23 Sask.R. 196 (Q.B.), para. 6.

In **Antoniuk Estate, Re** (1982), 20 Sask.R. 293 (Sur. Ct.), para. 11, the court stated: "... in construing a will the duty of the court is to ascertain the intention of the testator, which intention is to be collected from the whole will taken together, and where there is ambiguity, the court is entitled to consider also the circumstances surrounding and known to the testator at the time he made his will".

Search aid - MLB Key No. - **Wills Topic 5060** is assigned to cases that consider the interpretation of words in a will. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

12.8 Omissions

The residual clause of Farren's will, which was drafted by a lawyer in 1997, read: "I direct that my brother, James P. Farren shall have the use of my home and contents during his life time. Should my said brother predecease me or die within thirty (30) days of my death, then my estate is to be equally divided between my nephew, James P. Farren Jr. and my grand nephew, William Royden Chase, share and share alike". The residual clause did not dispose of the residue of Farren's estate if her brother survived her by more than 30 days, which he did. The New Brunswick Court of Queen's Bench, Trial Division, examined the residual clause in the context of Farren's pattern of will making between 1993 and 1999 and found that she had intended to make a gift over of her residue to her nephew and grandnephew named in the residual clause in equal shares. The court concluded that in order to properly express Farren's intentions, the words "and upon my brother's death in any event" should be added to the second sentence of the residual clause. See **Farren Estate, Re** (2004), 279 N.B.R.(2d) 373 ;732 A.P.R. 373 (T.D.)

Search aid - MLB Key No. - **Wills Topic 5105** is assigned to cases that consider omissions in a will. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

12.9 Error in describing property or persons

Donald Bergey sought an order to rectify his deceased uncle's will. The issue was whether the residuary clause which left a share of the residue to "Mrs. Donald Bergey", should be rectified either to delete the word "Mrs." or to change "Mrs." to "Mr.", thereby making Donald Bergey the residuary beneficiary. The will was made in 1982. The deceased's earlier 1979 will had named "Mr. Donald Bergey" as the residuary beneficiary. The Manitoba Court of Queen's Bench concluded on all of the evidence that the deceased did not intend to change his beneficiary from Donald Bergey to Donald's wife and that the change resulted from a typographical error. The court ordered the will rectified to show Mr. Donald Bergey as the residuary beneficiary. See **Bergey Estate, Re** (1995), 103 Man.R.(2d) 202 (Q.B.).

A testator made a specific bequest of the proceeds from the sale of his real property to named beneficiaries. He identified the monies as those which

are now invested in an "income investment certificate" with his bank. In fact, the sale proceeds were invested in a "guaranteed investment certificate". The Saskatchewan Surrogate Court held that the misnomer should not deprive the beneficiaries of the bequest, because the intention of the testator was clear and the monies were identifiable. See **Babyn Estate, Re** (1991), 95 Sask.R. 279 (Sur. Ct.).

Search aid - MLB Key No. - **Wills Topic 5124** is assigned to cases where the will contains a misdescription of persons or property. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

12.10 Precatory words (request or wish)

A testator left a trust for the maintenance and education of his infant children. He expressed a "wish that my children be educated in private schools and learn the French language". The Saskatchewan Surrogate Court held that the words were precatory and did not place a binding obligation on the trustee. See **Crepeau Estate, Re** (1982), 23 Sask.R. 170 (Sur. Ct.).

The Newfoundland Supreme Court, Trial Division, held that a bequest by a testator which was expressed only as a wish was not binding on his estate. See **Collins Estate v. Collins Estate** (1981), 34 Nfld. & P.E.I.R. 313; 95 A.P.R. 313 (Nfld. T.D.), para. 24.

Search aid - MLB Key No. - **Wills Topic 5166** is assigned to cases that consider the effect of precatory words. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

12.11 Evidence, armchair rule

In a case that involved a boundary dispute, the Newfoundland and Labrador Supreme Court, Trial Division, stated that the court had to determine the testator's intention from what was written in a will. The court noted that in doing so, judges apply the "armchair rule" and attempt to place themselves in the armchair of the testator to determine the circumstances surrounding him at the time he made his will as an aid to construing the language of the will. See **Maher v. Bussey** (2004), 234 Nfld. & P.E.I.R. 56; 696 A.P.R. 56 (Nfld. T.D.), para. 19.

The Saskatchewan Court of Queen's Bench stated that the armchair rule "requires the court to place itself in the position of the testator at the time he wrote his will, then read the will and interpret it by utilizing admissible aids

of construction, such as the surrounding circumstances and context". Under the armchair rule, only indirect extrinsic evidence known by the testator at the time he made the will could be considered. Whatever occurred subsequent to the making of the will was inadmissible. See **Lenz Estate v. Lenz** (2005), 259 Sask.R. 301 (Q.B.), para. 17.

Search aid - MLB Key No. - **Wills Topic 5184** is assigned to cases that consider the evidentiary rule called the "armchair rule". See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

12.12 Invalid directions

A man directed in his will that his horses be shot, presumably because of his concern that they not end up in the hands of someone who would abuse them. The New Brunswick Court of Queen's Bench, Trial Division, struck down the direction and held that ensuring that the horses were properly placed and cared for would satisfy the testator's intention that they not be abused. In the alternative, the court held that the direction was void as contrary to public policy, because the destruction of the horses would serve no useful purpose and would waste estate assets even if carried out humanely. See **Wishart Estate, Re** (1992), 129 N.B.R.(2d) 397; 325 A.P.R. 397 (T.D.).

A testator's will required a beneficiary to remain in one of the named "main stream Christian churches" in order to receive his inheritance. The Newfoundland Supreme Court, Trial Division, concluded that a provision restricting the religious affiliation of any person in Canada was contrary to public policy. Further, if the provision was not contrary to public policy, it would have to be declared void because the gift could never be perfected. The bequest could not take effect until the death of the beneficiary, because only then would one know whether or not the beneficiary had become associated with any of the churches which were not "main stream". See **Murley Estate, Re** (1995), 130 Nfld. & P.E.I.R. 271; 405 A.P.R. 271 (Nfld. T.D.).

Search aid - MLB Key No. - **Wills Topic 5164** is assigned to cases that consider invalid directions by a testator. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

12.13 General v. particular intention; Cy-près doctrine

Where a Court finds upon the face of a will a clear, general or paramount intention to which effect can be given, and a particular or

subordinate intention to which the Court cannot give effect, then the particular intention must be rejected or modified. Such a modification is called the doctrine of cy-près, and the intention of the testator is carried out as nearly as may be consistent with certain rules of law. The doctrine is well established as regards charitable gifts. See **Halsbury's Laws of England**, 2nd Ed., vol. 34, para. 270.

The testatrix's will left a bequest to Twin Rivers Home Care Inc. When the testatrix died, the Twin Rivers Health District, which had responsibility for Twin Rivers Home Care Inc., no longer operated as such and responsibility for that entity had passed to the Prairie North Health Region. The Saskatchewan Court of Queen's Bench held that the testatrix was concerned with benefitting the facility rather than the actual operator. The court applied the cy-près doctrine, holding that the true meaning and intent of the clause in the will could be resolved by substituting the name Prairie North Health Region for Twin Rivers Home Care Inc. See **Leer Estate, Re** (2005), 264 Sask.R. 131 (Q.B.).

Search aid - MLB Key No. - **Wills Topic 3543** is assigned to cases that consider the cy-près doctrine. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

12.14 Extrinsic evidence

The testator left his estate in trust to establish a summer camp for diabetic children in his area and, if no camp was established, to the operators of an existing camp. In fact the existing camp was operated by the Rotary Club for crippled children, which offered camp facilities for two weeks a year to the Canadian Diabetic Association for diabetic children. The New Brunswick Court of Queen's Bench found that the will was ambiguous in its identification of the donee. The Court of Queen's Bench admitted extrinsic evidence to resolve the ambiguity. See **Binns, Re** (1976), 16 N.B.R.(2d) 601; 21 A.P.R. 601 (Q.B.).

An unmarried testator made bequests to his niece and to her young son, his favourite relative. When the niece experienced financial difficulties, the testator lent the niece money and he also changed the bequests in several codicils. The Nova Scotia Supreme Court, finding ambiguity in what the testator intended, held that it was entitled to determine the meaning in the light of the circumstances surrounding the making of the will. The court interpreted the bequests in accordance with the testator's intention to be protective and supportive of his niece and fair and equitable to his other relatives, with the

exception of his favourite relative, his niece's son. See **Brown Estate, Re** (1995), 139 N.S.R.(2d) 252; 397 A.P.R. 252 (S.C.), paras. 25 to 35.

A testator left the residue of his estate to three unnamed children. The testator had five children. The Saskatchewan Court of Queen's Bench held that the will clearly contained an equivocation and it was therefore necessary to look at extrinsic evidence of the testator's actual intention to resolve the equivocation. The court looked to the typed instructions provided by the testator to the solicitor who prepared the will. The instructions provided that the property was to be divided equally between three of his children and contained the children's names. The court held that the residue should be divided equally among these three children.

See **Holland Estate, Re** (1994), 122 Sask.R. 274 (Q.B.), paras. 1 to 11.

Search aid - MLB Key No. - **Wills Topic 8544** is assigned to cases that consider the admission of extrinsic evidence to determine the intention of the testator. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

Chapter 13 - Construction, Persons entitled to take

13.1 General

A testator invites litigation by the use of words like "children" or "issue" or "family" rather than using the names of donees.

Search aid - MLB Key No. - **Wills Topic 7002** is assigned to cases that interpret the words "child" or "children". See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

13.2 Class gifts

"In my opinion the principle is clear enough. When there is a gift to a number of persons who are united or connected by some common tie, and you can see that the testator was looking to the body as a whole rather than to the members constituting the body as individuals, and so you can see that he intended that if one or more of that body died in his life-time the survivors should take the gift between them, there is nothing to prevent your giving effect to the wishes of the testator." See **Allan Estate, Re** (1994), 161 A.R. 292 (Sur. Ct.), para. 17.

"Where there is a gift to a group of persons and one or more of them predeceases the testator, it is necessary to determine whether the gift is a gift 'personae designatae' or whether it is a class gift. ... generally speaking, a gift to a group of persons whose number is not mentioned or whose members are not named is to be regarded as a class gift, while a gift to a group whose number is given or whose members are named is to be regarded as a gift 'personae designatae'". See **Campbell Estate, Re** (1998), 172 Nfld. & P.E.I.R. 141; 528 A.P.R. 141 (P.E.I.T.D.), para. 7.

A testator had nine children. Two died before the testator executed his will. Two others predeceased the testator. The residue clause of the testator's will provided that his estate be divided "equally amongst my children, share and share alike, to be theirs absolutely". At issue was whether the clause created a class gift or either a tenancy in common or a gift persona designatae. The Prince Edward Island Supreme Court, Trial Division, held that the testator made a class gift. Therefore, the residue was to be divided equally among the five surviving children. See **Campbell Estate, Re** (1998), 172 Nfld. & P.E.I.R. 141; 528 A.P.R. 141 (P.E.I.T.D.).

Search aid - MLB Key No. - **Wills Topic 6803** is assigned to cases

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that consider what is a class gift. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

Chapter 14 - Construction, Quantity of Interest Taken

14.1 General

"A testator gives arbitrarily such estate as he thinks fit, consistently with law, and, there is no presumption that he means one quantity of interest rather than another". See **Halsbury's Laws of England**, 2nd Ed., vol. 34, para. 377.

14.2 Absolute interests

"A person has an absolute interest in property when such is so completely vested in the individual so that no contingency can deprive him of it without his consent". **Black's Law Dictionary**, 6th Ed., p. 812.

The residuary clause in a will instructed the executor to convert the residue into money and establish a trust fund for the testatrix's son and pay him \$300/month "until ... this fund has been exhausted". The son died before the fund was completely distributed. The Manitoba Court of Queen's Bench, Probate Division, interpreted the clause and held that it created an absolute gift in the son. The residue vested in the son at the time of the testatrix's death and, accordingly, the fund formed part of the son's estate. The Manitoba Court of Appeal affirmed the decision. See **Ferguson Estate, Re** (1992), 76 Man.R.(2d) 286; 10 W.A.C. 286 (C.A.).

Search aid - MLB Key No. - **Wills Topic 7296** is assigned to cases that consider whether a gift is an absolute gift. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

14.3 Concurrent gifts, *per capita* or *per stirpes*

When property is given to the descendants of two or more persons, the question frequently arises whether the donees are to take *per stirpes*, that is, as representatives of their respective ancestors, or *per capita*, that is whether they together form one class each member of which is to take an equal share.

A clause in the testator's will directed the executor to distribute the residue of the testator's estate to "my nieces Yolande, Jeannine, and Pauline and Alphonse Levasseur's 4 children - to share and share alike". An issue in this application was whether the clause divided the residue into sevenths (*per capita*) or into fourths (*per stirpes*). The Alberta

Surrogate Court held that, given the presence of the phrase "share and share alike" coupled with the rule that, *prima facie*, "to A and the children of B" was an indication of a per capita distribution, the testator's intention was one of a per capita distribution. The court directed that the residue be divided into seven equal shares. See **Boudreault Estate, Re** (2001), 290 A.R. 116 (Sur. Ct.).

Search aid - MLB Key No. - **Wills Topic 7388** is assigned to cases where the donees take per capita. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

14.4 Life interests

The interest taken by a donee may be defined by rights of enjoyment attached to the gift. For example, a gift of the "possession" or "use and enjoyment" of chattels *prima facie* gives the donee a life interest. See **Halbury's Laws of England**, 2nd Ed., vol. 34, para. 386.

The testator drafted a will wherein he bequeathed a duplex to his wife, Martini, and indicated that she give it to the Christensens when she no longer need the property. The Christensens asked the court to interpret the bequest. The Alberta Court of Appeal held that a court should endeavour to give effect to the testator's intention in interpreting a will. The most likely interpretation was that the testator intended Martini to have a life estate without a power of encroachment, with a gift over to the Christensens. The absence of the words "during her lifetime" did not necessarily mean that the testator did not intend to grant his wife a life estate. It was inappropriate to decide the case upon a standard that would normally be applied to a will drafted by someone with legal training. See **Christensen v. Martini** (1999), 232 A.R. 339; 195 W.A.C. 339 (C.A.).

The testator gave to his wife all his property "for her sole use during her lifetime with full power and authority to hold", manage, sell and otherwise deal in the property. The Nova Scotia Supreme Court, Trial Division, held that the testator intended to confer a life estate on his wife. See **Dinn Estate, Re** (1977), 27 N.S.R.(2d) 298; 41 A.P.R. 298 (T.D.).

Search aid - MLB Key No. - **Wills Topic 7400** is assigned to cases that consider whether the donee took a life interest. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

14.5 Concurrent gifts, joint tenancy or tenants in common

"When property is given to two or more persons concurrently the question arises whether these persons are to take as joint tenants, with the attendant right of survivorship, or as tenants in common. The common law rule for both real and personal property was that the donees took as joint tenants. This rule, subject to any legislation to the contrary, is Canadian law. However, the rule was always applied with reluctance, and the slightest indication from the context to negative the idea of joint tenancy was sufficient to result in a finding of tenancy in common. So, in the Manitoba case **Re Peter's Will** (1967), 63 W.W.R. 180 the words 'in equal shares' were held to indicate a tenancy in common. Furthermore, it has been said many times that in case of ambiguity the court will always lean towards the construction which creates a tenancy in common." (emphasis added). See **Thomas G. Feeney, Canadian Law of Wills**, vol. 2, page 99.

The New Brunswick Court of Queen's Bench stated that a joint gift without words of limitation creates a joint tenancy with the right of survivorship. See **Mitchell Estate, Re** (1972), 7 N.B.R.(2d) 504 (Q.B.), paragraph 5.

Search aid - MLB Key No. - **Wills Topic 6858** is assigned to cases that consider whether a gift created a joint tenancy. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

14.6 Residue, what constitutes

A husband's will provided that all his life insurance policies, including those naming his wife as beneficiary, be paid to his trustee for the benefit of his three daughters as if the insurance proceeds formed part of the residue of his estate. The Saskatchewan Court of Queen's Bench held that the insurance proceeds did not form part of the residue of the estate; the will was simply being used to change beneficiaries as authorized by s. 152 of the Insurance Act. See **Harry v. Harry Estate** (1988), 67 Sask.R. 279 (Q.B.).

After disposing of the capital of a certain trust in her will the testatrix left her "remaining capital" to a sister and to two nephews or the survivor of them if one or both survived the sister - The Nova Scotia Supreme Court, Trial Division, held that the clause constituted a gift of the residue of the testatrix'

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estate. See **Bowman Estates, Re** (1975), 17 N.S.R.(2d) 76; 19 A.P.R. 76 (T.D.), para. 22.

A testator's will provided that "I nominate and appoint ... Timothy Clarence Nelson Michael Murley, as heir to my Estate...". The Newfoundland Supreme Court, Trial Division, concluded that the words had the legal effect of making Timothy Murley the residuary legatee. The word "estate" encompassed the residue and would apply to all assets not otherwise disposed of. See **Murley Estate, Re** (1995), 130 Nfld. & P.E.I.R. 271; 405 A.P.R. 271 (Nfld. T.D.), para. 7.

Search aid - MLB Key No. - **Wills Topic 7683** is assigned to cases that consider what constitutes the residue. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

Chapter 15 - Devolution of Estates, General

15.1 Intestate Succession

When a person dies without leaving a valid will that person is said to have died intestate. When a person dies intestate a provincial statute, sometimes titled Devolution of Estates Act, provides a "statutory will". That is, the statute directs who is entitled to the estate of the intestate person.

Intestate succession legislation can apply in circumstances where a will is invalid for a number of reasons, such as, improper execution, undue influence, contrary to public policy, lack of capacity, etc. Such legislation can also apply to a residuary gift that fails. A gift, other than a residuary gift, that fails becomes part of the residue of an estate.

15.2 Intestacy v. inclusion in residue

The testator had three sons from two marriages and little contact with the eldest. Another son, lacking legal training, prepared his father's will. The testator intended that, provided his second wife survived him, she would inherit all his estate, except that the testator's personal articles were to be divided between the two youngest sons, in equal shares. The wife predeceased the testator. The British Columbia Court of Appeal held that the testator's will failed to provide for his assets (other than personal effects) in the event that his wife predeceased him. The court declined to supply a missing bequest and affirmed that the residue should be divided equally under the Estate Administration Act among the three sons. See **Howell v. Howell Estate** (1999), 127 B.C.A.C. 272; 207 W.A.C. 272 (C.A.).

Search aid - MLB Key No. - **Devolution of Estates Topic 405** is assigned to cases that consider whether a gift is part of the residue or devolves intestate. See www.mlb.nb.ca for a list of cases that dealt with this issue.

15.3 Partial Intestacy

In his holograph will a testator in his only bequest left his house and land to one of his sons. His wife and other offspring were specifically excluded from receiving anything, but the testator failed to dispose of his other assets. The Newfoundland Supreme Court, Trial Division, held that the specifically excluded people were not entitled to share on intestacy in the undisposed property. The court held that the specific exclusion of his wife and other offspring created an implied gift of the balance to the son who received the

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bequest. See **Sharpe Estate v. Sharpe** (1985), 53 Nfld. & P.E.I.R. 247: 156 A.P.R. 247 (Nfld. T.D.).

Search aid - MLB Key No. - **Devolution of Estates Topic 521** is assigned to cases that consider the entitlement to intestate property on a partial intestacy. See www.mlb.nb.ca for a list of cases that dealt with this issue.

15.4 Bars to inheritance, public policy

The deceased died intestate survived by her husband and one infant daughter. The husband was convicted of the murder of the deceased. The Manitoba Court of Queen's Bench held that by public policy, the husband and his heirs, except for the deceased's child, were disentitled from taking a benefit in the estate of the deceased whom he had feloniously killed. The infant daughter was the sole heir of the deceased under the Devolution of Estates Act, s. 6(3). See **Proctor Estate v. Proctor** (1989), 59 Man.R.(2d) 199 (Q.B.), paras. 12 to 18.

Search aid - MLB Key No. - **Devolution of Estates Topic 510** is assigned to cases that consider whether a donee is barred by public policy from inheriting intestate property. See www.mlb.nb.ca and Appendix A for a list of cases that dealt with this issue.

Chapter 16 - Protection of Testator's Family

16.1 General, statutory provisions

The degree of freedom of testamentary disposition provided by English law sometimes resulted in a testator disregarding the needs of dependents. Many jurisdictions have enacted legislation that prevents a testator from disregarding such family obligations. In Canada such legislation is usually called the Dependents Relief Act or the Testator's Family Maintenance Act or the Family Relief Act or the Marital Property Act. Usually such legislation provides that a dependent of a testator may apply to a court for relief if adequate provision for maintenance and support has not been made in the testator's will. The interpretation of this legislation has resulted in a significant body of case law. For example,

- the moral obligation of a testator to dependents was the issue in 32 cases in six print reporters since 1978 - See www.mlb.nb.ca and MLB Key No. - **Family Law Topic 6610;**

- what constitutes "proper maintenance and support" of dependents was the issue in 33 cases in eight print reporters since 1974 - See www.mlb.nb.ca and MLB Key No. - **Family Law Topic 6604;**

- whether the claimant was a "dependent" was the issue in 29 cases in nine print reporters since 1980 - See www.mlb.nb.ca and MLB Key No. - **Family Law Topic 6664;**

- the economic status of the claimant was the issue in 15 cases in seven print reporters since 1981 - See www.mlb.nb.ca and MLB Key No. - **Family Law Topic 6689;**

- the entitlement of a common law spouse was the issue in 19 cases in eight print reporters since 1984 - See www.mlb.nb.ca and MLB Key No. - **Family Law Topic 662.**

NOTES