



Heritage Law\*

# Upcoming Changes to Family, Wills and Estates and Incapacity Law in BC

**Pinnacle Hotel**

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# Outline of Presentation:

1. Proposed Changes to Family Law: BC Attorney General White Paper
2. Upcoming Changes to Estate Law in 2011: WESA
3. Upcoming Changes to Incapacity Law Sept. 1, 2011: Bill 29



# Background to the Attorney General White Paper

- 2002: Justice Review Task Force
- 2003: Family Justice Reform Working Group
- 2005: release of “A New Justice System for Children and Families
- 2006: AG begins Family Relations Act review
- 2007: public consultations begin
- 2010: release of “White Paper on Family Relations Act Reform”



# Present Status of White Paper Proposes Reforms

- AG's office has affirmed the government's intention to have bill introduced and passed sometime in 2012
- No warranty on nature of final bill; White Paper published to solicit comment
- No information publicly available about when new legislation will come into force



# Concept of Family Law Reforms

- Court no longer the implied starting point
- Promote broader range of dispute resolution options
- Adopt less adversarial terminology and more child-centered approach
- More effectively address family violence



# Alternatives to Court

- Lawyers required to advise of alternatives to litigation before commencing action
- Lawyers must certify advice given when filing application
- Better support of non-court processes by requiring full disclosure and potential costs awards against party obstructing process



# Parenting Coordination

- Court may appoint parenting coordinators to manage specific issues, including implementation of parenting orders, for specific term
- Parenting coordinators to resolve disputes by consensus, failing which may make determinations that are binding on parties



# Arbitration

- Arbitration among enumerated non-court dispute resolution processes
- *Commercial Arbitration Act* to be overhauled to better provide for arbitration of family law matters
- Arbitrators bound by act
- Arbitral awards binding on parties

# Protection Orders

- Very broad definition of family violence
- Court required to consider effect and consequences of family violence
- If family violence is likely to occur, court may make protection order
- Protection orders enforced through Criminal Code s. 127 and police; offence provisions of FRA s. 128 not carried forward



# Assisted Reproduction

- Donor not presumed to be parent as result of donation
- Couple having child by surrogate presumed to be parents where there is agreement with surrogate prior to conception
- Donor/surrogate may be made a legal parent of the child by agreement prior to conception

# Redefining Spouse

- Married
- Lived in a marriage-like relationship for a continuous period of at least two years
- Lived in a marriage-like relationship “of some permanence” if the parties are parents



# Parental Support

- \* Provisions of FRA s. 90 not carried forward



# Family Property & Debt

- “Family property” is all property in which a spouse has an interest at the date of separation
- “Excluded property” includes: pre-relationship property (except for increase in value), gifts, inheritance, awards, trusts (unless spouse has absolute interest and ability to wind up trust)
- Family debt is all debt incurred by a spouse during the relationship
- Excludes debts incurred after separation

# White Paper Unanswered Questions

The White Paper does not address key implementation issues, including :

- transition from the *Family Relations Act*;
- the reconciliation of *Divorce Act and Child, Family and Community Service Act* language on custody and access, and
- the effect of foreign orders and interprovincial and international treaties and conventions.

# WESA Background

- *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13 (the “WESA”)
- proclamation date TBA (AG advises sometime in 2011)
- Reflects report of the BCLI: “Wills, Estates and Succession: A Modern Legal Framework” BCLI Report No. 45, June 2006



## WESA OVERVIEW – cont -

- Consolidates into a single statute, many existing statutes or statutory provisions, including:
  - *Wills Act*
  - *Wills Variation Act*
  - *Survivor and Presumption of Death Act*
  - *Estate Administration Act*
  - *Law and Equity Act*
  - *Probate Recognition Act*
  - *Escheat Act*



# TERMINOLOGY

## Old

- Testator
- Intestate heir
- Matrimonial home
- Grants of probate & letters of administration

## New

- Will Maker
- Intestate successor
- Spousal home (includes co-op housing and mh)
- Representation grant



# SURVIVORSHIP RULES

## **COMMON DISASTER - OLD**

- Presumption that older died before younger (subject to contrary intention in will)

## **COMMON DISASTER - NEW**

- Presumption that each survived each other (subject to contrary intention in instrument)
- Joint assets severed and held as tenants in common (subject to contrary intention in instrument)



# SURVIVORSHIP RULES - cont -

## **SURVIVAL CLAUSES - OLD**

- Wills might provide that beneficiary must survive 15/30/45 days to receive benefit

## **SURVIVAL CLAUSES - NEW**

- Beneficiary must survive at least 5 days or such longer period as provided in instrument
- If less than 5 days, then conclusively deemed to have died before deceased



# INTESTATE SUCCESSION

## OLD

- **Degrees of Kinship**
- the intestate estate passes to the closest kin
- Degrees of kin are counted upward from the deceased to the nearest common ancestor and then down to the relative

## NEW

- **Parentelic system**
- where the deceased has no spouse or children, the estate passes to the parents of the deceased and their descendants (the deceased's siblings, nieces, nephews, etc.), and, if there are none, to the grandparents and their descendants and so on until an heir is found.



## INTESTATE SUCCESSION – cont.

- under the new parentelic system, the descendants of the nearest common ancestor take from the deceased's estate before descendants of a more remote ancestor
- This system will allow a more even division between the two sides of an intestate's family

# INTESTATE SUCCESSION – cont.

## OLD

- Spousal share
  - Household furnishings
  - First \$65,000
  - 1/2 or 1/3 residue
  - Life interest in home

## NEW

- Spousal share
  - Household furnishings
  - \$300,000 & ½ residue
  - OR
  - \$150,000 & ½ residue if descendants not common
  - Spouse has right to acquire home within 180 days of death

# FORMALITIES OF WILLS

## OLD

- Age 19 or married or in military
- Subsequent marriage invalidates a will
- Gift to witness void
- Gift of land includes mortgage unless otherwise stated

## NEW

- 16
- Automatic revocation of Wills by a subsequent marriage of willmaker is abolished
- Gift to witness not automatically void
- “purchase money security interest” passes with property



# NEW PROVISIONS FOR WILLS

- Undue influence (if will-maker was in a position of potential dependence on or domination of another person, then in proceedings alleging undue influence over the will-maker, the onus of establishing that a gift was not obtained by undue influence is on the person who wishes the gift to be upheld)
- Expanded rectification powers given to court
- Abatement rules (both land and personal property are to be reduced together. Property charged with a specific debt abates first, followed by residue, then general legacies, then specific legacies)
- Extrinsic evidence, including evidence of intent, is admissible



# Common Law Presumptions Abolished:

- Gift to child is an advance of that child's inheritance
- Legacy in Will is revoked if will-maker made a gift during his/her life of the same amount to that beneficiary
- Debt owed by will-maker is satisfied by a legacy equal to or greater than the debt (under WESA, debt continues to be enforceable against the estate)

# ESTATE ADMINISTRATION

- Creates order of priority for appointing administrator (subject to court discretion)
  - Spouse or person nominated by spouse
  - Child having consent of majority of children
  - Person nominated by a child and having consent of majority of children
  - Child without majority consent
  - Intestate successor with consent
  - Intestate successor without consent
  - Any other person including PGT



## ESTATE ADMINISTRATION – cont

- Creates order of priority for appointing administrator with will annexed (subject to court discretion):
  - Beneficiary having consent of beneficiaries with majority interest in estate
  - Beneficiary
  - Any other person including the PGT
- New procedure for administering small estates (likely <50k and no interest in land)



# WILLS VARIATION ACT

- No substantive changes
- Claimant must serve executor within 30 days of issuing Notice of Claim (formerly a Writ)
- Prohibition against distribution extended from 6 months to 210 days



# Background to Adult Guardianship Legislation in BC

- 4 A. G. Acts passed in 1993
  - The Representation Agreement Act
  - The Health Care (Consent) and Care Facility (Admission) Act
  - The Adult Guardianship Act
  - The Public Guardian and Trustee Act
- Proclaimed in part in 2000
- Amendments and Regs since
- Prof McClean Report
- CBA input

# Background to Adult Guardianship Legislation in BC - cont

- Adult Guardianship and Planning Statutes Amendment Act, 2007 S.B.C. 2007, c. 34 (Bill 29)
- Third Reading Oct. 22, 2007
- Amended by Misc. Statutes Amendment Acts: Bill 33, 2008 and Bill 13, 2009
- On Feb 3, 2011: the *Act*, as amended, proclaimed in part - effective Sept. 1, 2011



## New Incapacity Legislation – cont.

- Bill 29 makes many amendments to BC's existing tools for planning ahead:
  - representation agreements;
  - enduring powers of attorney; and
  - add a new third option: advance directives

# Advance Directives

## *Health Care (Consent) and Care Facility (Admission) Act*

- New Part 2.1: new provision for Advance Directives
- Gives legal effect to Living Wills
- Rep Agreements override ADs
- Must be signed before two witnesses unless one witness is a lawyer or notary



# Powers of Attorney

- Old enduring clause repealed and extensive new provisions for enduring POAs
- Existing enduring POAs grandfathered under new Act (sec. 42)
- Capacity presumed (sec. 11)



## Powers of Attorney – cont.

- Springing POA allowed, need to specify if active now (sec. 26)
- Expressly allows alternate attorneys (sec. 18(5)(c))
- Attorney must now sign before witnesses (sec.17)



## Powers of Attorney – cont.

- Two witnesses for adult and attorney required unless one is a lawyer or notary (sec. 16)
- Specifies who may be witness – be careful: an employee or agent of attorney may not act as a witness (sec. 16(6)(b))



## Powers of Attorney – cont.

- Duties set out in *Act* (sec. 19)
- Codifies common law
- Unless specify, must invest as per *Trustee Act* (sec. 19(3)(b))
- Not dispose of property gifted by Will unless necessary (sec. 19(3)(d))



## Powers of Attorney – cont.

- May not make a Will (sec. 21)
- May designate beneficiary if Court authorizes it or if replacing plan & no change in beneficiary or if designate estate

(sec. 20(5))



## Powers of Attorney – cont.

- No delegation unless expressly allowed (sec. 23)
- POA disposing of property in Will – beneficiary receives equivalent amount from estate (sec. 19 (3)(d)) and *E.A.Act* sec. 67.2)



## Powers of Attorney – cont.

- **Payment of Attorney**  
no compensation unless expressly allowed and sets amount or rate (sec. 24(1))
- May be reimbursed for expenses (sec. 24(2))



## Powers of Attorney – cont.

- Specifies when POA ends: attorney dies or incapable or bankrupt or convicted of proscribed offence or if adult victim or at end of marriage or marriage-like relationship (sec. 29)



# Representation Agreements

## *Representation Agreement Act*

- Section 9 repealed and new provisions - no longer need consult lawyer
- Cannot make Sec. 9 RA for finances (sec. 9)
- Existing Sec. 9 RAs grandfathered (sec. 44.3)



# Representation Agreements – cont.

- Notaries can be sole witness to Sec. 9 RAs (sec. 13(3.02))
- Rep has access to adult's information (sec. 32)
- Remuneration must be in RA and approved by Court (sec. 26(1)(c))





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Thank you !

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