



e-news from Alexander Holburn Beaudin & Lang LLP

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BILL 4 — 2009 WILLS, ESTATES AND SUCCESSION ACT

What is Bill 4?

Bill 4, 2009 Wills, Estates and Succession Act consolidates and modernizes seven pieces of legislation into one. It is expected to come into force in 2011.

The new legislation does not invalidate wills made prior to its inception, but it will apply to the interpretation of existing wills.

A summary of some key amendments to the existing regime include the following:

1. The court will have the power to declare a document which does not meet the formality requirements of a will to be effective as a will.
2. Under the new legislation, land is applied equally with personal property to pay debts. Currently, bequests of personal property are firstly applied to debts, followed by gifts of land.
3. The presumption that a gift given during one's lifetime is given in place of a gift in a will is rebutted.
4. Where two people die at the same time or in circumstances that make it unclear who died first, there is no longer a presumption that the youngest survived the eldest. Instead, the distribution of property is determined as if each survived the other. In these cases, jointly held assets are treated as if owned as tenants in common, unless a contrary intention appears in an instrument.
5. There is no longer a presumption that multiple trustees must act unanimously.

A Comparison of Bill 4 to the Current Regime

The following chart provides a comparison of the new legislation to the current regime. This paper also provides some suggestions to practitioners.

	CURRENT REGIME	BILL 4
Definitions		
1.	Wills are only valid if executed in accordance with the formalities of the <i>Wills Act</i> .	The definition of "will" includes an appointment "by writing in the nature of a will in exercise of a power" and anything the court orders to be effective as a will.
2.	"Spouse" means married or common law.	A person ceases to be a "spouse" if married but living separate and apart for at least two years, with the intention to live separate and apart permanently.
Interpretation		
3.	Case law provides that once adopted, a child has no entitlement to the natural parents' estate and vice versa.	The case law is codified.

	CURRENT REGIME	BILL 4
4.	Case law is contradictory regarding when, if ever, extrinsic evidence is admissible to interpret a will.	The limited circumstances in which extrinsic evidence of testamentary intent may be considered are when: - a provision in a will is meaningless - a provision of a testamentary instrument is ambiguous - it is permitted by the Act
5.	When two people die simultaneously or in circumstances that make it unclear who died first, the youngest is deemed to have survived the eldest.	When two people die simultaneously or in circumstances that make it unclear who died first, if a gift is made in the event a person dies before or at the same time, that event is deemed to have occurred.
6.	Descendents of an intestate conceived before the person's death but born afterwards inherit as if they had been born in the lifetime of the intestate and survived the intestate.	The same rule applies, with the condition that the infant live for at least five days.
7.	A person must survive a deceased for any period of time, however short, to be deemed to survive.	A person must survive a deceased by five days or will be deemed to have predeceased, subject to a contrary intention provided in an instrument.
8.	Property on a reservation may be subject to the Indian Act. Nisga'a property is dealt with separately.	First Nations' wills and cultural property are dealt with separately. This includes small estates, which requires certain notice to be given.
Intestacy		
9.	BC has its own unique intestacy provisions.	The Act states the division applicable to intestacy is to be interpreted in a way that is uniform to the laws of other provinces enacting similar provisions.
10.	The order of distribution on intestacy is as follows: a) To spouse, if only a spouse. b) To issue, if only issue. c) Where there is a spouse and issue, \$65,000 to the spouse, and half of the residue to the spouse if there is one child, or 1/3 of the residue to the spouse if there is more than one child. The spouse is also entitled to the household assets. d) To parents, or the survivor. e) To brothers and sisters, or to a deceased's sibling's child(ren). f) To nieces and nephews. g) To next of kin of equal degree of consanguinity.	The order of distribution on intestacy is as follows: a) To spouse, if only a spouse. b) Where there is a spouse and descendents, household furnishings to spouse. Where descendents are those of both the deceased and the spouse, \$300,000 to spouse. If not, \$150,000 to spouse. The spouse is entitled to half of the residue and the descendents are entitled to the remaining half. c) To descendents. d) To parents, or the survivor. e) To parents' descendents. f) Half to grandparents on one side, or their surviving descendents, and half to grandparents on the other side, or their surviving descendents. g) Half to great-grandparents on one side, or their surviving descendents, and half to great-grandparents on the other side, or their surviving descendents. h) To the government, subject to the <i>Escheat Act</i> .

	CURRENT REGIME	BILL 4
Interpretation		
11.	The spouse is entitled to a life estate in the matrimonial home.	The spouse has the right to acquire the spousal home within 180 days of the grant.
Will Formalities		
12.	A person must be 19 to make a will.	A person must be 16 to make a will.
13.	A will must meet the formalities of the <i>Wills Act</i> to be valid.	A will that is invalid may be recognized as valid by the court.
14.	N/A	Witnesses to a will must be 19 or older.
15.	A gift to an attesting witness or his/her husband/wife is void.	A gift to a witness or spouse of a witness is void, unless on application to court the court is satisfied that the will-maker intended to make the gift.
16.	Secured interests such as mortgages are borne by the estate.	Where security is registered against land, that beneficiary's interest is primarily liable to pay the debt secured, to the extent the debt is attributable to the acquisition, improvement or preservation of the property, subject to a contrary intention.
17.	Case law provides limited remedies for tracing improperly disposed of gifts to their holders.	If property that is subject to a gift in a will is disposed of, the beneficiary is entitled to receive from the estate an amount equal to the proceeds of the gift.
Insolvent Estates		
18	Debts charged to land are payable by the estate. Gifts of personal property are reduced before gifts of land.	If assets of the estate are not sufficient to satisfy all debts and gifts, any land charged with a debt is primarily liable for such debt, and land and personal property must be reduced together.
19.	An order of priority is established for the payment of debts of an insolvent estate.	The order of priority has been modified slightly.
Common Law Presumptions Abrogated (subject to a contrary intention in a Will or otherwise)		
20.	Once suspicious circumstances are proven, the onus shifts to the proponent of the Will to demonstrate that undue influence was not exerted.	Where undue influence is alleged, the onus is on the person seeking to uphold the will to demonstrate that undue influence was not exerted.
21.	Presumption that a gift to a child during one's lifetime is an advancement and revokes part of the child's gift in the will.	This presumption is abrogated and the will takes effect according to its terms.
22.	Presumption that a legacy in a Will is revoked by a gift in the same amount as the legacy made during the will-maker's lifetime.	The presumption is abrogated and the legacy takes effect according to its terms.
23.	Presumption that a debt owed by the will-maker is satisfied by a legacy to the creditor of an equal or greater amount.	The presumption is abrogated and the debt continues to be a claim against the estate.
24.	Presumption that a binding promise to make a gift to a child in life is satisfied to the extent of the benefit promised by a gift in the will.	The presumption is abrogated and the promise remains binding on the person and the estate.

	CURRENT REGIME	BILL 4
Revocation of a Will		
25.	A will is revoked by marriage.	A will is not revoked by marriage. A court may make an order that a Will is revoked.
Court Order Curing Deficiencies		
26.	A court has very limited rights to cure deficiencies in a will. A will must be executed in accordance with the formalities of the <i>Wills Act</i> to be valid.	<p>A court may order that a “record” (defined, and including data stored electronically), document or writing or marking on a will or document represents: testamentary intentions, or an intention to revoke, alter or revive a will.</p> <p>Even if a document is not in compliance with the Act, a court may order it to be a will.</p> <p>If a revision to a will is illegible, the court may reinstate the original wording.</p>
27.	N/A	<p>A court may order rectification of a will if a later will fails to carry out the intention of a will-maker due to an error, misunderstanding or failure to carry out the will-maker’s instructions.</p> <p>The time limitation for rectification is 180 days from the grant.</p>
Wills Variation Act Claims		
28.	A testator must provide adequately for a spouse and child. A spouse or child may commence a <i>Wills Variation Act</i> claim without any requirement that the writ of summons be served.	<p>The provision is the same. Spouses and children have 180 days from the representation grant to make a claim. They then have 30 days to serve the writ of summons on the executor.</p> <p>The court may accept any evidence it considers proper regarding a will-maker’s reasons, including a written statement by the will-maker.</p>
Conflict of Laws		
29.	A will must be valid pursuant to the laws of BC.	<p>A will is valid as to the formal requirements for making a will and is admissible to probate if made in accordance with:</p> <ul style="list-style-type: none"> a) the law of the place where the will is made; b) the law of the will-maker’s domicile at the date the will is made or the date of death; c) the law of the will-maker’s ordinary residence at the date the will is made or the date of death; d) the law of a country where the will-maker was a citizen at the date the Will is made or the date of death; e) the law of BC; f) the law of the place where the will-maker’s property is situated at the date the Will is made or the date of death; g) where a will is made on a vessel or aircraft, the place where that vessel or aircraft is most closely connected; and h) to the extent that the will exercises a power of appointment, with the law governing the essential validity of that power.

	CURRENT REGIME	BILL 4
Convention Providing a Uniform Law on the Form of an International Will		
30.	The Convention was not recognized.	The Convention is adopted. This requires a will be in writing, witnessed by two witnesses and a lawyer or notary, who signs and attaches a certificate in the prescribed form. Each page of the will is numbered and signed by the testator. The will is dated at the end by the lawyer or notary.
Small Estates (the value of a small estate is to be prescribed; small estates include no real property)		
31.	N/A	On notice and filing with the Registrar, the executor named in the will may act as executor. Alternatively, the executor role may be filled by a beneficiary, other person at the beneficiary's consent, or Public Guardian and Trustee.
32.	N/A	On notice and filing with the Registrar where there is no will, the executor role may be filled by the spouse, intestate successor, other person at the intestate successor's consent, or Public Guardian and Trustee.
33.	Security may be required for an estate of any size.	Security is not required for small estates.
34.	As soon as the notice is sent, an application for a grant can be filed with the Registrar.	The filing with the Registrar must be made 21 days after death and 10 days after notice is given.
35.	N/A	A misrepresented filing can result in a fine of up to \$20,000, 12 months in prison or both.
Probate or Letters of Administration		
36.	In certain circumstances, the court may dispense with the requirement for a bond.	Security is required if a minor or mentally incapable beneficiary is interested.
37.	N/A	On intestacy or where the executor renounces, the administrator is selected in an order of priority set out in the Act.
38.	N/A	The personal representative is liable, to the extent estate assets come into the representative's possession or control, for the wrongful acts and omissions or breaches of legal duty of the deceased.
39.	The executor must commence an action on behalf of an estate.	If the executor does not commence or defend an action, a beneficiary may do so with leave of the court.
40.	Personal representatives have flexibility in determining when to distribute estate assets.	A personal representative must not distribute assets within 210 days of a grant, except where all beneficiaries and intestate successors agree, or by court order.
41.	When a minor is involved with an estate, notice must be given to a guardian of the minor.	Notice must be given to every guardian of the minor.

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