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Memorandum

Date: May 16, 2008

Re: Bill 28's departure from the British Columbia Law Institute's Succession Law Reform Project Report recommendations

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This Memo reviews Bill 28 in conjunction with the British Columbia Law Institute's Succession Law Reform Project Report (the "Report"), and summarizes any departures that Bill 28 makes in relation to the British Columbia Law Institute's recommendations. For convenience, attached is a copy of Bill 28 to this memorandum.

Please note that at the time of writing, Bill 28 passed first reading in the Legislature.

RELEVANT BACKGROUND

Bill 28 was introduced in the Legislature on April 15, 2008 by Attorney General and Minister responsible for Multiculturalism, Wally Oppal. The Bill, entitled the "*Wills, Estates and Succession Act*," seeks to repeal and replace the following four Acts:

- *Estate Administration Act*, R.S.B.C. 1996, c. 122;
- *Probate Recognition Act*, R.S.B.C. 1996, c. 376;
- *Wills Act*, R.S.B.C. 1996, c. 489; and
- *Wills Variation Act*, R.S.B.C. 1996, c. 490.

The introduction of this proposed legislation represents the most recent comprehensive review of British Columbia's succession legislation since 1920. The purpose of Bill 28 is to modernize and simplify will-making and estate administration in the province, and make succession law more accessible to the public.

Bill 28's introduction to the Legislative Assembly comes in the wake of a three year law reform project by the British Columbia Law Institute (the "BCLI"), in collaboration with over thirty volunteers from the legal community, Societies of Notaries Public of British Columbia, and academics in the field of succession law. The BCLI's Report was published in 2006, and was initiated on the request of the Ministry to examine the need for law reform in this area. The Report includes a discussion of recommendations, in addition to including a proposed statutory framework.

EXECUTIVE SUMMARY

The Report recommends significant changes to the way in which will-making and estate administration is presently governed in the province. Bill 28 largely follows the Report's recommendations for law reform in this area. However, this proposed legislation does depart from the Report's recommendations in some respects. Whereas some of these departures reflect general drafting changes, other departures are much more significant.

Among the general departures that Bill 28 makes, one concerns the reorganization of the statutory framework and the adoption of "plain language" provisions. While Bill 28 largely follows the Report's proposed statutory framework, it does make some changes with respect to the order in which these provisions appear, as well as the level of content within these provisions themselves (e.g. through consolidating content into a single provision, or separating content over several sections). Bill 28's proposed legislative framework also adopts a more plain language approach in its drafting. Several terms have been changed in favour of more publicly accessible alternatives, such as referring to a testator as a "will-maker," or an intestate as a "person without a will."

Apart from these general departures, Bill 28 also makes specific changes to the Report's recommendations and proposed statutory framework. Although some of these changes relate to specific amendments within a provision itself, other changes reflect more significant departures from the Report's broad legislative recommendations. Among the most significant departures from the Report's recommendations are: the preservation of privileged wills; the addition of undue influence principles respecting testamentary dispositions; the continuation of provisions respecting deceased worker's wages; and the maintenance of eligibility restrictions for wills variation claims.

This memorandum discusses each of these departures in turn, and (where applicable) includes contrasting excerpts from the Report and Bill 28 to highlight these changes. The memorandum begins with a discussion of Bill 28's general departures from the Report's recommendations, followed by an examination of Bill 28's specific changes to the Report's legislative suggestions.

BILL 28'S DEPARTURES FROM THE REPORT: GENERAL AND SPECIFIC CHANGES

1) GENERAL CHANGES

In addition to making specific changes to the Report's recommendations and proposed statutory framework (discussed below), Bill 28 makes general changes that appear throughout the body of the proposed legislation.

First, and perhaps not surprisingly, Bill 28 makes organizational changes to the Report's recommended statutory framework. These changes include modifications to the order in which the provisions appear in the proposed statute (e.g. moving definitional provisions to the beginning of the statute as opposed to the start of each Division), as well as to the general content of the provisions themselves. For example, whereas some of the Report's recommended provisions remain mostly intact (apart from minor drafting modifications), other provisions have been combined under one broad provision, or divided into smaller sections. These minor organizational departures appear throughout Bill 28.

Second, Bill 28 makes significant changes with respect to the statutory language. In keeping with the Ministry's stated legislative objective of promoting clarity and public accessibility, Bill 28 adopts predominately plain-language provisions that do not appear in the Report's proposed framework. These drafting departures are reflected in the following table:

THE REPORT	BILL 28
"Testator"	"Will-maker"
"Intestate"	"Person who dies without a will"
"Died intestate"	"Died without a will"
"Issue"	"Descendants"
"Document"	"Record"
"Habitually resident"	"Ordinarily resident"
"Age of majority"	"19 years of age"
"Abate"	"Annul"
Months	Days

2) SPECIFIC CHANGES

In addition to the general changes that Bill 28 makes in relation to the Report's proposed statutory framework, Bill 28 also makes specific departures from the Report's recommendations. While some of these departures significantly change the Report's recommendations relating to preserving or eliminating entire provisions from the present succession legislation, other departures involve less significant changes respecting the particular content of these provisions.

SIGNIFICANT DEPARTURES

Privileged Wills

Privileged wills are a class of informal wills made by military personnel on active service and mariners at sea. This class also includes wills made by minors who are or have been married. There is no witness requirement for privileged wills.

The Report recommends that privileged wills should be abolished on the grounds that they are not used, the armed forces does not encourage reliance on them, and the recommended dispension power of the Court would provide a means to uphold an otherwise informal will if the will demonstrates the testator's final wishes.

However, while the Report recommends that privileged wills should be abolished, Bill 28 still makes provisions for this kind of testamentary document under section 38. Although section 38 does not retain this privilege to minors who are or have been married, the provision does retain the privilege for members of the armed forces. Section 38 reads as follows:

> **Will by members of military forces**
>
> **38** (1) A member of the Canadian Forces while placed on active service under the *National Defence Act* (Canada), or a member of the naval, land or air force of any member of the British Commonwealth of Nations or any ally of Canada while on active service may, regardless of his or her age, make a gift of property by will in writing, signed by the will-maker at its end or by some other person in the presence of and by the direction of the will-maker.
> (2) If the will is signed by the will-maker, there is no need for a witness to be present to witness or to sign the will as a witness.
> (3) If the will is signed by another person, the signature of that other person must be witnessed by the signature of at least one person, who must sign the will in the presence of the will-maker and of that other person.

Undue Influence

The Report does not recommend any changes respecting the doctrine of undue influence. While the members of the BCLI project committee considered whether the principles and presumptions governing *inter vivos* dispositions of property should be applied to cases of undue influence in respect of wills, the project committee did not propose any modifications to the legislation. Bill 28, however, proposes to amend the legislation and include provisions respecting undue influence.

Pursuant to section 52 of the proposed legislation, the principles and presumptions respecting *inter vivos* dispositions of property are extended to the making of wills or provisions thereof. Section 52 provides:

> **Undue influence**
>
> **52** In an action, if a person claims that a will or any provision of it resulted from another person
> (a) being in a position where the potential for dependence or domination of the will-maker was present, and
> (b) using that position to unduly influence the will-maker to make the will or the provision of it that is challenged,
> and establishes that the other person was in a position where the potential for dependence and domination of the will-maker was present, the party seeking to defend the will or the provision of it that is challenged or to uphold the gift has the onus of establishing that the person in the position where the potential for dependence and domination of the will-maker was present did not exercise undue influence over the will-maker with respect to the will or the provision of it that is challenged.

Deceased Worker's Wages

The Report recommends that Part 13 of the *Estate Administration Act* dealing with the payment of deceased workers' accrued wages outside of estate administration should not be carried forward into the new legislation. The Report instead recommends that these provisions of the *Estate Administration Act* should be relocated to the *Employment Standards Act*, R.S.B.C. 1996, c. 113. According to the Report, the subject-matter of these provisions is best addressed through employment-related legislation rather than through succession-related legislation.

Bill 28 significantly departs from the Report's recommendation with respect to these provisions. Contrary to the Report's recommendation, Bill 28 continues to include a Division respecting the payment of deceased worker's wages. These provisions are found in sections 175-180 of Bill 28, and read as follows:

> **Definition**
>
> **175** In this Division, **"worker"** means a person who has entered into or works under a contract of service or apprenticeship, written or oral, express or implied, in an industry within the scope of Part 1 of the *Workers Compensation Act*, whether by way of manual labour or otherwise.
>
> **Wages payable to surviving spouse**
>
> **176** The wages
> (a) earned by a worker during the 3 month period before the worker's death, and
> (b) owing or accrued to the worker at the time of the worker's death
> are, subject to this Division, payable to the surviving spouse, if any, of the deceased worker, free from debts of the deceased worker.
>
> **Wages not subject to administration**
>
> **177** The wages of a deceased worker that are payable to the surviving spouse by this Division are not subject to the provisions of the laws relating to
> (a) the administration of the intestate estates, or
> (b) if the worker dies with a will, obtaining probate or the provisions of the deceased worker's will.
>
> **Evidence of entitlement**
>
> **178** The surviving spouse of a deceased worker is entitled to those wages referred to in section 176 on production of an affidavit, sworn before a person authorized under the *Evidence Act* to administer an oath, stating that the person claiming to be the surviving spouse of the deceased worker is in fact the only person entitled to claim as a surviving spouse.

Discharge of employer

179 An employer who, in good faith and relying on an affidavit made under section 178, pays the wages of a deceased worker to a person purporting to be the surviving spouse of the deceased worker is discharged from liability towards the deceased worker or the estate of the deceased worker to the extent of that payment.

Application to court to determine competing claims

180 If 2 or more persons claim to be the surviving spouse entitled to the wages of a deceased worker, the court may order that the wages be paid to one or more of them in the amounts the court considers just.

Maintenance from Estate

Both the Report and Bill 28 carry forward provisions respecting whom may apply for an order when the testator did not leave him or her adequate provision under the estate. While the Report and Bill 28 recommend similar provisions in this regard, Bill 28 makes significant departures from the Report's recommended statutory framework in other respects.

Perhaps one of the most significant departures that Bill 28 makes in relation to the Report's recommended statutory framework pertains to the kind of claimant that may apply for an order for maintenance under the estate. Pursuant to the Report's recommendations, the following "eligible claimants" should be entitled to apply to the Court under this provision: the deceased person's spouse; the deceased person's child who has not attained the age of majority; a special circumstances child (defined as a child who is not likely to be self-supporting due to illness, mental or physical disabilities, or any other special circumstances); a student claimant (defined as a child who has reached the age of majority, but is unable to be self-supporting due to their enrollment in an educational or vocational program); and finally, an eligible stepchild (defined as a person who is not a natural or adopted child, but who was the natural or adopted child of the deceased's spouse at the time of the deceased's death, to whom the deceased person contributed maintenance and support one year immediately prior to the deceased's death, and who had not reached the age of majority at the time of the deceased person's death). Conversely, Bill 28 only permits the testator's spouse or children to make an application to the Court for maintenance under the estate. Bill 28 makes no mention of the Report's additional categories of eligible claimants, nor provides a definition of what "children" means or includes.

Another significant departure concerns the weight with which certain evidence must be accorded in considering a variation claim. Pursuant to the Report's recommendations, the Court should look to whichever evidence it considers proper in order to determine whether adequate provision has been made for the eligible claimant. The Report specifically recommends that a written statement signed by the deceased must be accorded significant weight unless there is a good and sufficient reason for not doing so. Bill 28, however, departs from this recommendation. Section 62(2) of Bill 28 provides that the Court must have regard to all the circumstances from which an inference may be reasonably drawn

about the accuracy of a deceased's written statement. What's more, Bill 28 remains silent on what weight should be given to this kind of evidence.

Finally, whereas the Report recommends that the Court *must* refuse to make an order in favour of a claimant whose character or conduct disentitles the claimant to the benefit of a maintenance order, Bill 28 elects for a permissive provision. Pursuant to section 63 of Bill 28, the Court *may* refuse to make an order in favour of a person whose character or conduct disentitles that person to a maintenance order.

OTHER DEPARTURES

Definition of "estate"

Pursuant to section 1 of its proposed statutory framework, the Report defines "estate" as follows:

> **"estate"** means, with respect to
> (a) a person who died before June 1, 1921, personal property of the deceased,
> (b) a person who died on or after June 1, 1921, both personal property and land of the deceased,
> (c) a minor or mentally incapable person who is living, both personal property and land of the minor or mentally incapable person.

Prior to June 1, 1921, only personal property passed to a personal representative on death., whereas real property passed directly to the heir at law or devisees by will. According to the Report, subsections (a) and (b) have been added to clarify that the new legislation does not alter the legal effect of wills made prior to 1921.

Section 1 of Bill 28, however, does not preserve this distinction. Instead, the proposed legislation simply defines "estate" as the "property of a deceased person."

Definition of "gift"

Section 1 of the Report's proposed statutory framework defines "gift" as follows:

> **"gift"** means a disposition of property in a will and includes a beneficial devise or bequest or appointment of or affecting property, *but does not include charges, directions for payment of debt or the designation of a person as executor of the will* [emphasis added].

As noted in the above definition, this provision makes specific exclusions for charges, directions for debt payment, and designation of an executor under the will.

Whereas Bill 28 similarly excludes the appointment of a person as executor of the will, section 1 of this proposed legislation does not exclude charges or directions for payment of debt.

Definition of “instrument”

Section 7 of the Report’s proposed statutory framework includes the following definition of an “instrument”:

> **7** In this Part, **“instrument”** means a will, deed, trust, insurance policy, pension, profit-sharing, retirement or similar benefit plan, a document creating or exercising a power of appointment or power of attorney, or any other dispositive, appointive or nominative document of similar type.

According to the Report, this definition is intentionally broad to include a variety of documents that are used as a part of estate planning.

While the Report’s proposed definition of an instrument includes such documents as insurance policies, Bill 28’s proposed definition of an instrument specifically excludes any instrument to which the *Insurance Act*, R.S.B.C. 1996, c. 266, applies, except for a will. This provision reads:

> **"instrument"** includes a testamentary instrument and other legal documents but does not include an instrument to which the *Insurance Act* applies except for a will.

Section 1 further defines a “testamentary instrument” as “a will or designation or a document naming a person to receive a payment or series of payments on death under a plan or arrangement of a type similar to a benefit plan.”

Definition of “land”

Pursuant to section 163 of the Report’s proposed statutory framework, the definition of “land” does not include a manufactured home on land that is not owned by the manufactured home owner unless through an agreement filed in accordance with the *Manufactured Home Act,* S.B.C. 2003, c. 75 (“*Manufactured Home Act*”). Section 163 provides:

> **“land”** does not include a manufactured home situated on land not owned by the owner of the manufactured home unless an agreement that the manufactured home is part of the land has been filed in accordance with section 23 (2) *[manufactured home on rented pad]* of the *Manufactured Home Act*.

Unlike the Report’s proposed definition of “land,” Bill 28’s proposed definition does not make an exclusion for manufactured homes. Rather, under section 1, “land” is defined as including “buildings and fixtures, and every right, title, interest, estate or claim to or in land.” Bill 28 does, however, does narrowly incorporate the Report’s recommended definition within its provision respecting the termination of a declarant’s authority to administer a small estate (see: section 115).

Definitions of "property" and "personal property"

Neither the Report nor its recommended statutory framework includes definitions for "property" or "personal property." Conversely, Bill 28 defines both of these terms under section 1. Section 1 of Bill 28 reads as follows:

> **"property"** means land and personal property;
>
> **"personal property"** means every kind of property other than land.

Definition of "registrable charge"

Neither the Report nor its recommended statutory framework defines a "registrable charge." Unlike this proposed statutory framework, Bill 28 does include this definition under section 1. Section 1 provides:

> **"registrable charge"** means a charge created by an order of the court under section 33 (2) *[retention of spousal home]* and made effective by registration in a land title office under section 34 *[registrable charges]*;

Definition of "spousal home"

The Report recommends the following definition of a "spousal home" under section 26:

> **"spousal home"** means
>
> (a) a parcel of land that is
> (i) shown as a separate taxable parcel on a taxation roll for the current year prepared under the *Taxation (Rural Area) Act* or on an assessment roll used for the levying of taxes in a municipality, and
> (ii) has as improvements situated on it a building assessed and taxed in the current year as an improvement, in which the deceased and his or her spouse were ordinarily resident, owned or jointly owned by the deceased, and not leased to another person, or
> (b) a share owned or jointly owned by the deceased in a corporation, the charter of which provides that a building owned or operated by the corporation must be owned and operated exclusively for the benefit of shareholders in the corporation who are occupants of the building, if the value of the share is equivalent to the capital value of a suite owned by the corporation, in which suite the deceased and his or her spouse were ordinarily resident, and which was not leased to any other person.

While Bill 28 contains a comparable provision under section 1, it includes an additional subsection pertaining to manufactured homes. Section 1(c) of the definition of "spousal home" provides that this term includes "a manufactured home, as defined in the *Manufactured Home Act*, situated on land not owned by the owner of the manufactured home and in which the deceased person and his or her spouse were ordinarily resident."

Posthumous births

The Report recommends that the rule currently preserved in section 91 of the *Estate Administration Act* be carried forward in the new legislation. Pursuant to section 18 of the Report's proposed statutory framework, descendants and relatives of the intestate, conceived prior to the person's death but born afterwards, will inherit as if they had been born in the lifetime of the intestate and had survived the intestate.

Bill 28 contains a comparable provision under section 8 of its proposed legislation. However, this provision slightly departs from the Report's recommendation in that Bill 28 specifically requires that the descendant live for at least five days after the intestate's death. Section 8 reads as follows:

> **Posthumous births**
>
> **8** Descendants and relatives of an intestate, conceived before the intestate's death but born and living for at least 5 days afterwards, inherit as if they had been born in the lifetime of the intestate and had survived the intestate.

Although the Report's recommended statutory framework also contains a general 5-day survivorship rule within its provisions respecting simultaneous deaths, only Bill 28 incorporates this rule in the provision respecting posthumous births, in addition to including a separate general provision respecting the 5-day survivorship rule (section 10).

Treaty First Nation Members

Both Bill 28 and the Report propose special provisions respecting Nisga'a cultural property and notice requirements to the Nisga'a Lisims Government.

Although the Report limits its recommendations to Nisga'a citizens and governments, Bill 28 also extends these special provisions to other "treaty first nation members." Bill 28 also includes other provisions respecting service on Nisga'a Lisms Government and treaty first nations members, as well as small estate administration. These added provisions are found in section 14, and sections 16-18 of Bill 28. These sections read as follows:

> **Will or cultural property of treaty first nation members**
>
> **14** (1) In this section, **"cultural property"**, in relation to a treaty first nation, has the same meaning as in the final agreement of the treaty first nation.
>
> (2) If the final agreement of a treaty first nation so provides, the treaty first nation may commence and may intervene in an action under this Act in respect of the will of a treaty first nation member of the treaty first nation that provides for the devolution of cultural property.
>
> (3) If the final agreement of a treaty first nation so provides, in any judicial proceeding under this Act in which
>
> (a) the validity or variation of the will of a treaty first nation member of that treaty first nation, or

(b) the devolution of cultural property of a treaty first nation member of the treaty first nation

is at issue, that treaty first nation has standing in the proceeding.

(4) In a proceeding described in subsection (2) or to which subsection (3) applies, the court must consider, among other matters, any evidence or representations in respect of the applicable treaty first nation's laws or customs dealing with the devolution of cultural property.

(5) The participation of a treaty first nation in a proceeding described in subsection (2) or to which subsection (3) applies must be in accordance with the applicable Rules of Court and does not affect the court's ability to control its process.

Service on Nisga'a Lisims Government or treaty first nation

16 An action in respect of the will of a Nisga'a citizen or a treaty first nation member must not be heard by the court at the instance of a party claiming the benefit of Division 6 of Part 4 *[Wills]* unless a copy of the writ of summons has been served on the Nisga'a Lisims Government or the treaty first nation, as applicable.

Nisga'a citizen leaving small estate

17 (1) If a deceased person was a Nisga'a citizen leaving a small estate and a will respecting all or part of the small estate, a person named in section 109 (2) *[small estate — leaving a will]* must give, in addition to the notice under section 109 (1) (a), notice to the Nisga'a government of the proposed filing of a small estate declaration.
(2) If a deceased person was a Nisga'a citizen leaving a small estate and no will, a person named in section 110 (2) *[small estate — no will]* must give, in addition to the notice under section 110 (1) (a), notice to the Nisga'a government of the proposed filing of a small estate declaration.

Treaty first nation member leaving small estate

18 (1) If a deceased person was a treaty first nation member leaving a small estate and a will respecting all or part of the small estate, a person named in section 109 (2) *[small estate — leaving a will]* must give, in addition to the notice under section 109 (1) (a), notice to the treaty first nation of the proposed filing of a small estate declaration.
(2) If a deceased person was a treaty first nation member leaving a small estate and no will, a person named in section 110 (2) *[small estate — no will]* must give, in addition to the notice under section 110 (1) (a), notice to the treaty first nation of the proposed filing of a small estate declaration.

Purchase of Spousal Home and Retention of Spousal Home

Both the Report and Bill 28 abolish provisions of the *Estate Administration Act* that grant a surviving spouse a life estate in the family home. Instead of these provisions, the Report and Bill 28 propose that the surviving spouse should instead be given a preferential and ordinary share of the intestate estate.

While both the Report and Bill 28 permit the surviving spouse to purchase the remainder of the deceased person's interest in the spousal home when the surviving spouse's interest in the estate is below the home's fair market value. Bill 28 also imposes specific requirements for making this application. These requirements are contained in section 31(3) of Bill 28. Section 31 reads as follows:

> **Purchase of spousal home by surviving spouse**
>
> **31** (1) If the fair market value of the deceased person's interest in the spousal home exceeds the value of the surviving spouse's interest in the estate under section 21 *[spouse and descendants]*, subject to subsection (3) of this section, the surviving spouse may purchase the remainder of the deceased person's interest from the personal representative, or from those in whom that interest beneficially vests, in accordance with the valuation of the deceased person's interest in the spousal home as determined under this Division.
> (2) The surviving spouse may purchase the deceased person's interest in the spousal home under this Division whether or not the surviving spouse is a personal representative of the deceased person and despite any rule of law concerning the purchase of trust property by a trustee.
> *(3) Before a surviving spouse may make an application under section 33, the surviving spouse must provide financial information in the prescribed form to*
> *(a) the personal representative of the deceased person, and*
> *(b) the descendants of the deceased person entitled to share in the intestate estate or that part of the estate that is to be treated as an intestate estate* (emphasis added).

Bill 28 also includes an additional provision regarding a surviving spouse's retention of the spousal home under special circumstances. These circumstances are listed in section 33 of Bill 28, which reads as follows:

> **Retention of spousal home**
>
> **33** (1) On application by a surviving spouse, the court may make an order under subsection (2) if
> (a) the surviving spouse is ordinarily resident in the spousal home at the time of the deceased person's death,
> (b) assets in the estate are not sufficient to satisfy the interests of all descendants entitled to share in the intestate estate or that part of the estate

that is to be treated as an intestate estate without disposing of the spousal home,
(c) the court is satisfied that purchasing the spousal home under section 31 would impose a significant financial hardship on the surviving spouse,
(d) the court is satisfied that, in all the circumstances, a greater prejudice would be imposed on the surviving spouse by being unable to continue to reside in the spousal home than would be imposed on the descendants entitled to share in the intestate estate or that part of the estate that is to be treated as an intestate estate by having to wait an indeterminate period of time to receive all or part of their share of the intestate estate, and
(e) either
(i) the surviving spouse has resided in the spousal home for a sufficient period of time to have established a connection to the spousal home, or
(ii) the surviving spouse has a sufficient connection with the community or members of the community in the vicinity of the spousal home to warrant an order under subsection (2).
(2) The court may, subject to any terms or conditions the court considers appropriate, make an order doing one or more of the following:
(a) vesting the same interest in the spousal home in the surviving spouse that the deceased person had;
(b) specifying the amount of money the surviving spouse must pay to the descendants towards satisfaction of their interest in the estate;
(c) converting the remaining unpaid interest of the descendants in the intestate estate into a registrable charge against the title to the surviving spouse's interest in the spousal home;
(d) determining an interest rate, as that term is defined in section 7 of the *Court Order Interest Act*, or at any other rate the court considers appropriate, for the amount the descendants are entitled to under paragraph (c) of this subsection;
(e) determining the value of the registrable charge to include the principal amount owing to the descendants entitled to share in the intestate estate or that part of the estate that is to be treated as an intestate estate and the expected value of the future interest that will be earned under paragraph (d) of this subsection.

Registrable Charges

In addition to the above-mentioned provisions respecting the spousal home, Bill 28 also departs from the Report’s recommendations by adding provisions respecting when registrable charges on the spousal home become due and payable. These additional provisions are reflected in sections 34 and 35 of Bill 28, and read as follows:

Registrable charges

34 (1) A registrable charge becomes due and payable in the circumstances specified by the court, having regard to prevailing residential lending practices in Canada, but if none are specified, becomes due and payable on the earlier of

(a) twelve months after the date of death of the surviving spouse,
(b) twelve months after the date the surviving spouse ceases residing in the spousal home, or
(c) the completion date of the sale of the spousal home.
(2) If a registrable charge payable under subsection (1) is not paid, the owner of the registrable charge may take any action that a mortgagee of land under the prescribed standard mortgage terms under the *Land Title Act* may take.
(3) A registrable charge is not enforceable until a form approved by the Director of Land Titles accompanied by a certified copy of the court order under section 33 (2), in relation to the registrable charge, is registered under the *Land Title Act*.
(4) The owner of a registrable charge, on receipt of payment of the total amount secured by the registrable charge, must deliver to the registered owner of the spousal home or to that person's representative, a release of the registrable charge, in the form approved by the Director of Land Titles.
(5) A registrable charge may be released from the title to the spousal home by filing in a land title office
(a) a release of the registrable charge executed by the owner of the registrable charge in the form approved by the Director of Land Titles, or
(b) a certified copy of a court order releasing the registrable charge.

Circumstances when registrable charge becomes payable

35 (1) In this section, **"charge"** has the same meaning as in the *Land Title Act*.
(2) In addition to the circumstances described in section 34 (1), a registrable charge also becomes due and payable if the court, on application by or on behalf of the owner of the registrable charge, orders that it should become due and payable because of the following:
(a) the surviving spouse has not paid an amount required to be paid under or secured by a charge registered against the title of the spousal home in priority to the registrable charge;
(b) a tax or other charge is levied against the title of the spousal home and has not been paid, unless payment has been lawfully deferred;
(c) an action or failure to take action jeopardizes the value of the spousal home to such an extent that it no longer provides sufficient security for the total amount secured by the registrable charge;
(d) the provisions of the registrable charge have not been complied with or an event has occurred pursuant to those provisions by which the amount secured by the registrable charge becomes due and payable.
(3) If a registrable charge becomes payable by order of the court under subsection (2), the surviving spouse has a period of 180 days to sell his or her interest in the spousal home in order to pay, in full, the amount secured by the registrable charge.
(4) After 180 days the owner of the registrable charge may take any action in respect of the registrable charge that a mortgagee of land may take under the prescribed standard mortgage terms under the *Land Title Act* if the surviving spouse has not sold his or her interest in the spousal home or the owner of the registrable charge has not been paid.

(5) The owner of a registrable charge may, before or after it is registered in a land title office, postpone the priority of the registrable charge to other charges.
(6) The owner of a registrable charge may sell, assign or otherwise dispose of the registrable charge before or after it is registered in a land title office in a form approved by the Director of Land Titles.
(7) If the sale of a spousal home yields sale proceeds that are not sufficient to pay, in full, the amount secured by a registrable charge, the court may order the release of the registrable charge, but may not make any order to recover from the estate, the surviving spouse or the estate of the surviving spouse any shortfall resulting from the insufficiency of sale proceeds to pay the amount secured by the registrable charge.

Witnesses to Wills

The Report and Bill 28 outline various rules with respect to an individual's capacity to witness and sign a will. However, Bill 28 makes an additional requirement that is not proposed in the Report's recommendations or proposed statutory framework. This requirement is found in section 40(1) of Bill 28, which requires signing witnesses to be 19 years of age or older. Section 40 of Bill 28 reads as follows:

Witnesses to wills

40 (1) Signing witnesses to a will-maker's signature must be 19 years of age or older.
(2) A person may witness a will even though he or she may receive a gift under it, but the gift may be void under section 43 *[gifts to witnesses]*.
(3) A will is not invalid only because a witness was, at the time the will was signed by the will-maker, or afterwards became, legally incapable of proving the will.

Gifts in Trust

While appearing in a slightly modified form, sections 27-28 of the *Wills Act* are largely preserved in the Report's recommended statutory framework. These provisions govern a gift of land to a trustee or executor in a will, and provide that the gift passes the greatest interest in the land that the testator has the power to dispose of by the will, unless a contrary intention appears in the will indicating that a lesser interest should pass. Unlike the *Wills Act* and the Report's recommended statutory framework, Bill 28 entirely excludes these provisions from its recommended legislation.

Revocation of Gift on Termination of Spousal Relationship

Both the Report and Bill 28 carry forward provisions respecting the revocation of a gift following the termination of a spousal relationship. While Bill 28 largely follows the Report's recommended statutory framework for this provision, Bill 28 does not include certain provisions within its proposed legislation.

According to the Report's recommendation, this section should provide that a gift, appointment or power of appointment is revoked upon the occurrence of an event that would cause a statutory half-interest in family assets under Part 5 of the *Family Relations Act*, R.S.B.C. 1996, c. 128 ("*Family Relations Act*"). These provisions from the *Family Relations Act* specifically apply to a legal marriage or an agreement between non-marital spouses under section 120.1 of the Act. As noted in the Report, the current legal framework between the *Family Relations Act* and the *Wills Act* are not harmonized with respect to these events. The Report also recommends that the section should include a provision applying to persons in a marriage-like relationship, whereby the termination of this relationship would be sufficient to revoke the gift. According to the Report, this recommendation is based on the general policy that persons in a long-term marriage-like relationship should be treated in a similar manner to married persons. Finally, the Report recommends that the revocation provisions under this section should not apply to gifts made to a beneficiary other than the testator's spouse if the gift consists of a limited estate based on the life of the spouse.

Again, while Bill 28 carries forward many of the provisions respecting the revocation of a gift after the termination of a spousal relationship, Bill 28 does not include the above (or comparable) provisions in its proposed legislation.

Court Order Curing Deficiencies

Both the Report and Bill 28 allow the Court to dispense with a failure to comply with formal requirements relating to a will, alteration of a will, revocation of a will, and revival of the will if the Court determines that the document actually reflects the testator's wishes.

In addition to the same curative provisions that are recommended by the Report, Bill 28 additionally includes circumstances in which an alteration to a will renders a word or provision illegible. In these circumstances, if the Court is satisfied that the alteration was not made in accordance with the legislation, the Court may reinstate the original word or provision if there is evidence to determine what the original word or provision says. This additional dispensing power is found in section 58(4) of Bill 28. Section 58 reads as follows:

> **Court order curing deficiencies**
>
> **58** (1) In this section, "record" includes data that
> (a) is recorded or stored electronically,
> (b) can be read by a person, and
> (c) is capable of reproduction in a visible form.
> (2) On application, the court may make an order under subsection (3) if the court determines that a record, document or writing or marking on a will or document represents
> (a) the testamentary intentions of a deceased person,
> (b) the intention of a deceased person to revoke, alter or revive a will or testamentary disposition of the deceased person, or
> (c) the intention of a deceased person to revoke, alter or revive a testamentary disposition contained in a document other than a will.
> (3) Even though the making, alteration or revival of a will does not comply with this Act, the court may, as the circumstances require, order that a record,

document or writing or marking on a will or document be fully effective as though it had been made
(a) as the will or part of the will of the deceased person,
(b) as an alteration, revocation or revival of a will of the deceased person, or
(c) as the testamentary intention of the deceased person.
(4) If an alteration to a will makes a word or provision illegible and the court is satisfied that the alteration was not made in accordance with this Act, the court may reinstate the original word or provision if there is evidence to establish what the original word or provision was. (emphasis added)

Time Limit for Variation Claim

Both the Report and Bill 28 carry forward provisions respecting the time limits and procedural requirements that must be followed when bringing a wills variation claim. However, Bill 28 differs from the Report with respect to which provisions it includes under this section.

First, whereas both the Report and Bill 28 authorize a plaintiff in an action to register a certificate of pending litigation in accordance with the *Land Title Act*, R.S.B.C. 1996, c. 250 ("*Land Title Act*"), Bill 28 does not include many of the provisions put forward in the Report's statutory framework. Under section 61(5) of Bill 28, a plaintiff in an action under the Division may register a certificate of pending litigation in any form approved under the *Land Title Act* within 10 days from the date of the issue of the writ of summons. By contrast, the Report does not specify a limitation period for filing a certificate of pending litigation.

Second, the Report's recommended statutory framework include specific provisions governing circumstances in which the limitation period for bringing a wills variation action will recommence. Pursuant to section 86(5) of the Report's recommended statutory framework, the 6-month limitation period for bringing an action should recommence in the following situations, whether or not the 6-month limitation period had earlier elapsed: when a representation grant other than a small estate declaration has been revoked and a new representation grant has been issued; when a declarant's authority to administer a small estate has been terminated by the court and a new small estate declaration has been filed or a representation grant has been issued; and when a representation grant has been issued or filed respecting a will that revokes a will to which a prior representation grant relates. Unlike the Report, Bill 28 does not incorporate any such provisions in its proposed legislation.

Wills Variation Order and Payments

Although both the Report's recommended statutory framework and Bill 28 carry forward provisions that allow the Court to make an order for various payments under a maintenance action (e.g. including lump sum payments, periodic payments and trusts), Bill 28 does not follow the Report's recommended provision respecting the contents of maintenance orders for persons other than a spouse. This new provision is found in section 88 of the Report's recommended statutory framework, and reads as follows:

Contents of order — claimant other than spouse

88 (1) In an order made under section 85 *[court may order provision — general principles]* in favour of a claimant who, at the date of death, was not a spouse of the deceased person the court may provide for the maintenance of the claimant in accordance with:
(a) subsections (2) and (3) in fixing the value or amount of the maintenance and its form, and
(b) subsection (4) in fixing the duration of the maintenance.
(2) In fixing the value or amount of maintenance in an order made under subsection
(1) the court may have regard to the following factors:
(a) the amount required to discharge the claimant's daily living expenses at a standard of living appropriate to the claimant,(b) the actual value of support provided to the claimant in the year immediately before the death of the deceased person,
(c) the likelihood that support referred to in paragraph (b) would have continued if the deceased person had not died, and at what level and for how long,
(d) provision made for the claimant by the deceased person, or any other person, apart from the estate,
(e) the value of the estate, and
(f) the nature and extent of competing claims to the estate, but the following factors are not relevant in fixing the value or amount of maintenance:
(g) any moral obligation owed by the deceased person to the claimant,
and
(h) what would constitute a fair share of the estate.
(3) An order made under subsection (1)
(a) must provide that the maintenance take the form of periodic payments,
and
(b) may provide that the payment of the maintenance be
(i) secured through the purchase of an annuity,
(ii) secured by a charge on property or otherwise
(iii) discharged through the creation of such trust arrangements as the court considers appropriate
(iv) discharged by the payment of a lump sum equal to the present value of the periodic payments calculated as if they were future damages to which section 56 *[discount rates]* of the *Law and*
Equity Act applies
(A) using the discount rate prescribed under section 56 (2)
(b) of that Act if:
(1) the claimant is a special circumstances child, or
(2) payments are to be made over seven or more years, or (B) another discount rate that the court orders if clause (A) does not apply.
(4) The duration of maintenance payments in an order under subsection (1) are governed by the following rules:
(a) maintenance payable to a claimant that is a child of the deceased person who has not attained the age of majority must cease when the claimant attains the age of majority except where there is a reasonable likelihood that

the claimant on attaining the age of majority will enroll or become enrolled in an educational or vocational training program in which case the claimant is deemed to be a student claimant and paragraph (b) applies;
(b) maintenance payable to a claimant that is a student claimant must not extend beyond the claimant's 25th birthday;
(c) maintenance payable to a claimant that is an eligible stepchild must cease when the claimant attains the age of majority;
(d) maintenance payable to a claimant that is a special circumstances child is not subject to any specific time limitation and its duration is as set out in the order.

This recommended provision has not been carried forward in Bill 28's proposed legislative framework.

International Wills

Both the Report and Bill 28 introduce implementing legislation respecting the *Convention Providing a Uniform Law on the Form of an International Will*. While this implementing legislation is virtually identical, Bill 28 makes a slight departure respecting the notice requirements for these effective provisions. Under section 83(7) of Bill 28, the minister must publish a notice in the Gazette outlining the effective date for this provision as soon as six months after the date on which the government of Canada submits the declaration respecting the convention. This additional provision does not appear in the Report's recommendations or proposed statutory framework.

Designating Beneficiaries: Conflicts between the Plan and the Part

Both the Report and Bill 28 recommend provisions respecting the designation of beneficiaries in an employee pension, retirement savings, or other form of financial plan. While Bill 28's proposed legislation is predominately consistent with the statutory framework recommended under the Report, there are some departures in the event of a conflict between the plan and the statutory provisions.

While the Report recommends that the new legislation should take priority over the benefit plan provision, section 84(2) of Bill 28 does not provide for this legislative paramountcy. Under this provision, the new legislation will take priority over the benefit plan unless the benefit plan's provision is made under the authority of another British Columbia enactment or federal Act. Section 84(4) of Bill 28 further provides that if the new legislative provision is inconsistent with another enactment, then that enactment takes precedence over the new legislation.

Designating Beneficiaries: Mechanics and Procedure

The Report and Bill 28 contain various provisions governing the mechanics and procedure of designating a beneficiary under a benefit plan. However, Bill 28 contains additional requirements that are not put forward in the Report.

Under section 85(2)(a) of Bill 28, the new legislation would require that the designation be in writing and signed by the person making it, or by another person in the presence of the

person making it and by his or her direction. This requirement is absent from the Report's recommendations and recommended statutory framework.

Designating Beneficiaries by Power of Attorney

Although both the Report and Bill 28 permit an Attorney to designate beneficiaries, the Report and Bill 28 differ with respect to the authority that an Attorney may be given under these provisions.

Section 73(1) of the Report's recommended statutory framework provides that an Attorney may, by declaration, designate, alter, or revoke a beneficiary provided that the power of attorney expressly confers these authorities. Pursuant to section 73(4) of the recommended statutory framework, a designation by an Attorney in accordance with this provision will not be valid unless the power of attorney expressly authorizes it or the principal ratifies it.

Conversely, while section 85(3) of Bill 28 permits an Attorney to designate a beneficiary, it does not provide that an Attorney can make, revoke or alter a designation under this provision. What's more, this provision requires the Attorney to first obtain authorization from the Court to exercise these powers.

Appeals to British Columbia Court of Appeal

The Report recommends the repeal of section 15 of the *Wills Variation Act*. Section 15 allows persons who are prejudicially affected by orders made under the Act to appeal to the Court of Appeal. According to the Report, this section confers an overly broad standard of review on the appellate Court, and permits the Court to substitute its own discretion for that of the Trial Court, rather than employing a narrower standard of review that is applicable on appeals from discretionary orders.

Bill 28, however, preserves this appeal provision. Under section 72 of the proposed legislation, a person who considers themselves to be prejudicially affected by an order under that Division may appeal to the British Columbia Court of Appeal.

Notices to Minors

Both the Report and Bill 28 recommend similar provisions respecting the representation of a minor and notices to a minor. However, the Report and Bill 28 differ with respect to conflicts with other enactments, and which notice requirements will prevail in the event of differing notice requirements.

According to the Report, another enactment should prevail if it requires notice to be given to the Public Guardian and Trustee or another person, in addition to the notice given to a guardian under the proposed legislation. This recommendation was incorporated in section 98 of the Report's proposed statutory framework, which reads:

> **Representation of minor**
>
> **98** (1) If a person entitled to receive a notice under this Part is a minor, the notice is valid if given to each guardian of the minor.

> (2) If the guardian of the person of a minor referred to in subsection (1) is not also the guardian of the minor's estate, the reference to "guardian" in subsection
> (1) means the guardian of the minor's estate.
> (3) If an enactment requires notice to the Public Guardian and Trustee or to another person in addition to notice given under this section to a guardian, that enactment prevails.

Conversely, section 182 of Bill 28 provides that if another enactment requires notice to the Public Guardian and trustee or another person in addition to notice given to a guardian under this section, *both* enactments must be complied with. Section 182 of Bill 28 reads as follows:

> **Notices to minor**
>
> **182** (1) If a person entitled to receive a notice under this Act or the Rules of Court is a minor, the notice is valid only if it is given to every guardian of the minor.
> (2) If the guardian of a minor referred to in subsection (1) is not also the guardian of the minor's estate within the meaning of the *Infants Act*, the reference to "guardian" in subsection (1) of this section includes the guardian of the minor's estate.
> (3) If any other enactment requires notice to the Public Guardian and Trustee or to another person in addition to a notice given under this section to a guardian, both enactments must be complied with.

While, the effect of the Report's recommendations and section 182 of Bill 28 are functionally the same (both recommendations will result in notice being provided to a guardian, in addition to the Public Guardian and Trustee or another person), the contrasting language seemingly conveys a differing meaning.

<u>Requirement to Accept Executorship or to Explain</u>

Unlike the Report, Bill 28 recommends additional provisions respecting named executors who do not apply for probate. Pursuant to section 108 of Bill 28, an executor named under a will who does not apply for probate may be required to accept or renounce probate of the will. Further, a person interested in the estate may explain why administration of the estate should not be granted to the executor, or to another person who is willing to act as executor. Section 108 reads as follows:

> **Requirement to accept executorship or to explain**
>
> **108** If an executor named in a will does not apply for probate of a will, any person interested in the estate may, in accordance with the Rules of Court, require the executor to
> (a) accept or renounce probate of the will, or

(b) explain why administration of the deceased person's estate should not be granted to the executor and why executorship should not be granted to another person who is willing to act as executor.

Termination of Small Estate Declaration

Whereas Bill 28 largely follows the Report's recommended statutory framework in relation to the administration of small estates, Bill 28 contains additional provisions that are not contemplated in the Report. These provisions specifically relate to circumstances where the small estate declaration is terminated by the Court.

Pursuant to sections 115(3) and 116(2) of Bill 28, in the event that a small estate declaration is terminated, the declarant must promptly return the small estate declaration to the Court Registry in which the small estate declaration was filed. This obligation was not put forward in the Report's recommendations, or included within the Report's proposed statutory framework.

Notice Requirements for Application for Probate and Estate Administration

The Report carries forward (although in a modified form) provisions from the *Estate Administration Act* in relation to notice and other procedural requirements respecting an application for probate or estate administration. The provisions from the *Estate Administration Act* are found together in section 109 of the Report's proposed statutory framework. Perhaps not surprisingly, this provision is significantly detailed.

Although Bill 28 also contains notice requirements with respect to applications for probate or estate administration, the equivalent provision in this proposed legislation is comparatively small. This provision is found in section 121 of Bill 28, and merely provides that an applicant for probate or estate administration must provide persons with notice in accordance with the Rules of Court.

Supplementary Declaration

Both the Report and Bill 28 put forward provisions under the small estate administration sections respecting filing a supplementary declaration in the event that the original declaration is inaccurate. The Report and Bill 28 differ, however, with respect to the value of an omitted asset not previously known by the declarant.

While the Report recommends that it is unnecessary to file a supplementary declaration for an asset that is less than $1,000 in value at the date of death, and of which the declarant was unaware of when filing the original declaration, section 114 of Bill 28 leaves the specific value open to a "prescribed amount" to be determined by regulation.

Declarant's Accounts

While both the Report and Bill 28 incorporate provisions respecting a declarant's obligation to keep an account relating to the administration of a small estate, the Report recommends incorporating additional provisions from the present *Trustee Act* into the proposed statutory framework.

Unlike Bill 28, the Report's recommended statutory framework incorporates sections 88-90 of the *Trustee Act* respecting a declarant's entitlement to remuneration, as well as section 176 of the *Trustee Act* releasing the liability of third persons who deal with the declarant. Although section 268 of Bill 28 recommends amending the *Trustee Act* to allow for the remuneration of small estate declarants, these provisions are not incorporated in the proposed legislation itself.

Offence by Declarant

Both the Report and Bill 28 recommend incorporating provisions respecting penalties for declarants who commit offences under the Act. Such offences include intentionally filing a false declaration, filing a declaration for an improper use, and concealing or misappropriating property belonging to the estate. The Report and Bill 28 differ in regard to their respective penalties for these offences.

While the Report recommends a maximum fine of $10,000 and/or a term of imprisonment for 12 months, Bill 28 recommends an even stricter penalty. Pursuant to section 119 of Bill 28, a declarant who commits an offence under this provision is liable to a fine of a prescribed amount not exceeding $20,000, and/or a term of imprisonment not exceeding 12 months. Section 119 of Bill 28 reads as follows:

> **Offence and penalty**
>
> **119** A declarant who
> (a) files a false small estate declaration that is intentionally inaccurate, misleading or incorrect,
> (b) files with a registrar of the court a small estate declaration the declarant knows or reasonably ought to know is contrary to section 112 *[prohibitions on filing small estate declaration]*,
> (c) conceals, converts or otherwise misappropriates property belonging to the estate of a deceased person in respect of whose estate a small estate declaration is filed, or
> (d) does not return a small estate declaration in accordance with section 112 (3), 115 (3) or 116 (2)
> commits an offence and is liable to a fine of a prescribed amount not exceeding $20 000 or to imprisonment for not more than 12 months, or to both.

Like the Report, Bill 28 also recommends preserving civil remedies that a declarant may have against another person, or that a person may have against the declarant.

Disclosure on Application for Probate or Administration

The recommended provisions respecting the disclosure requirements in an application for probate or administration are essentially the same between the Report and Bill 28. This disclosure requirement is found in section 122 of Bill 28. However, while section 122 contains comparable provisions to the Report, it does not include an additional disclosure requirement that the Report recommends. Specifically, the Report recommends that if an

applicant learns of the deceased's asset or liability that was not originally disclosed, then the applicant must disclose that asset or liability immediately. This disclosure requirement is not included in Bill 28.

Production of Documents and Property

The Report's recommended statutory framework and Bill 28 both include provisions respecting the production of testamentary documents and attendance of witnesses. Under section 112 of the Report's recommended statutory framework, the Court may order a person to attend for examination or answer interrogatories respecting any testamentary document or asset belonging to the estate that is shown to be in the person's control or possession. The Report also provides that the Court may make an order for production of documents or attendance of a witness by way of an originating application, interlocutory application, or citation. Section 112 reads as follows:

> **Order for production of testamentary document or attendance of witness**
>
> **112** (1) The court may order a person to produce and bring into a registry any
> (a) testamentary document or writing,
> (b) document relating to an estate, or
> (c) asset belonging to an estate
> that is shown to be in the person's control or possession.
> (2) If there are reasonable grounds for believing that a person has knowledge of anything described in paragraphs (a) to (c) of subsection (1), the court may order the person to attend for examination or answer interrogatories respecting it.
> (3) The court may make an order under subsection (1) or (2) on an originating or interlocutory application or by citation.

Conversely, while section 123(2) of Bill 28 permits the Court to order a person to attend for examination, it does not include provisions respecting an order to answer interrogatories or the method by which a Court may make these orders. Section 123 of Bill 28 reads as follows:

> **Production of documents and property**
>
> **123** (1) The court may order a person having control or possession of the following to produce and bring all or any of them to the court or place directed by the court:
> (a) a testamentary instrument or purported testamentary instrument, including a record as defined in section 58 (1) *[court order curing deficiencies]*;
> (b) a document relating to an estate;
> (c) property belonging to an estate;
> (d) a representation grant.
> (2) If there are reasonable grounds to believe that a person has knowledge of anything referred to in paragraphs (a) to (d) of subsection (1), the court may order the person to attend for examination.

Public Guardian and Trustee: Sealed Applications, Payments and Immunity

While both the Report and Bill 28 include specific provisions respecting the role of the Public Guardian and Trustee, Bill 28 includes additional provisions that are not recommended in the Report or included under its statutory framework. These provisions provide for the following matters: the authority of the Public Guardian and Trustee to direct that a Court seal its own application for probate or administration; the requirement for the Public Guardian and Trustee to distribute an estate directly to any beneficiaries and intestate successors; and the immunity of the Public Guardian and Trustee and its officers or employees with respect to good faith performance or intended performance of their enumerated statutory duties and powers. These additional provisions are found in sections 125-127 of Bill 28, and read as follows:

Direction by Public Guardian and Trustee — sealed applications

125 (1) The Public Guardian and Trustee may, whenever the Public Guardian and Trustee considers it appropriate to do so, direct that an application by the Public Guardian and Trustee for grant of probate or administration be sealed by a registrar of the court.

(2) On receipt of a direction under subsection (1), the registrar of the court must

(a) seal the court file respecting the application and related material specified by the Public Guardian and Trustee, and

(b) prohibit access to the file except as permitted

(i) by the Public Guardian and Trustee, or

(ii) by the court.

(3) The sealing of a court file under subsection (2) does not prohibit the disclosure that there is an application for grant of probate or administration or the date of death of the deceased person.

(4) An application and file to which this section relates must be sealed and remain confidential for 180 days from the date the application was filed with the registrar of the court, unless the Public Guardian and Trustee or the court authorizes all or part of the court file to be disclosed.

(5) A person may apply to unseal a file that has been sealed under subsection (2) and must give notice of the application to the Public Guardian and Trustee in order to provide the Public Guardian and Trustee with the opportunity to make submissions on the application.

(6) The court may, on application by the Public Guardian and Trustee, direct that a file to which this section applies remain sealed for one or more additional periods not exceeding in total 18 months.

(7) A person who, without the consent of the Public Guardian and Trustee or the court, knowingly discloses any information that the person knows or reasonably ought to know is information in a sealed file, commits an offence and is liable to a fine of not more

than $10 000 or to imprisonment for not more than 12 months, or to both.
(8) This section applies despite any enactment to the contrary.

Public Guardian and Trustee to pay beneficiaries and intestate successors directly

126 (1) The Public Guardian and Trustee must distribute an estate directly to any beneficiary or intestate successor to whom all or part of the estate is to be distributed, as the case may be, unless the Public Guardian and Trustee otherwise decides.
(2) Subsection (1) does not apply to a distribution of an estate to a guardian of a minor or guardian or committee of a person incapable of managing their affairs.
(3) Subsection (1) applies despite any direction, authorization, power of attorney, agreement, assignment of rights or otherwise to the contrary.

Immunity for Public Guardian and Trustee

127 (1) Subject to subsection (2), no legal proceeding for damages lies or may be commenced or maintained against the Public Guardian and Trustee or an officer or employee of the Public Guardian and Trustee because of anything done or omitted
(a) in the performance or intended performance of any duty under section 125 or 126, or
(b) in the exercise or intended exercise of any power under section 125 or 126.
(2) Subsection (1) does not apply to a person referred to in that subsection in relation to anything done or omitted by that person in bad faith.
(3) Subsection (1) does not absolve the Public Guardian and Trustee from vicarious liability arising out of anything done or omitted by a person referred to in that subsection for which the Public Guardian and Trustee would be vicariously liable if this section were not in force.

Security for Administration of Estates

The Report recommends significant changes to the law governing security provided by persons who are applying to be estate administrators, as presently provided under the *Estate Administration Act*. While Bill 28 similarly recommends the repeal of the *Estate Administration Act*'s stringent bonding requirements, there are some departures from the Report's recommendations and proposed statutory framework.

Under the Report's statutory framework, the Court may order that an applicant for a grant of administration (other than the Public Guardian and Trustree) provide security for collecting and administering the deceased's estate, and for making an inventory and account of the estate. The Report also recommends that in lieu of requiring an applicant to provide security, the Court may restrict the applicant's powers. In addition, the Report's recommended statutory framework includes a provision authorizing the Court to grant administration without the applicant having to provide security, so long as the Public

Guardian and Trustee issues written comments to the Court respecting the matter. These provisions are found in section 114(2)(4)(5) and (6) of the Report's proposed statutory framework, and read as follows:

> **Security**
>
> **114** (1) If
> (a) a minor, or
> (b) a mentally incapable person without
> (i) a statutory property guardian or property guardian under the *Adult Guardianship Act*,
> (ii) an attorney under Part 2 of the *Power of Attorney Act*,
> (iii) a representative having power over the adult's financial affairs under (A) section 7 (1) (b) of the *Representation Agreement Act*, or
> (B) section 9 (1) (g) of the *Representation Agreement Act*, granted before the repeal of that provision, is interested in the estate, or if a statutory property guardian, property guardian, attorney described in subparagraph (b) (ii) or representative described in subparagraph (b) (iii) of a mentally incapable person interested in the estate does not consent to an applicant acting as administrator without security, an applicant for a grant of administration other than the official administrator must provide security having a value not exceeding the value of the interest of the minor or mentally incapable person, for
> (c) the due and proper collection and administration of the deceased's estate, and
> (d) the making of a true inventory and account of the estate that comes into the hands of the administrator and its disposition.
> (2) In a case to which subsection (1) does not apply, the court may order, on the application of a person interested in the estate, that an applicant for a grant of administration other than the official administrator must provide security for the purposes described in paragraphs (1) (c) and (d).
> (3) The security referred to in subsections (1) and (2) may be in any form acceptable to the court.
> (4) In lieu of requiring an applicant to provide security, the court may restrict the powers of the applicant that may be exercised without prior approval of the court or the Public Guardian and Trustee.
> (5) Despite subsection (1), the court may grant administration without requiring the applicant to provide security if
> (a) the applicant first obtains written comments from the Public Guardian and Trustee in the matter and provides them to the court, and
> (b) after considering the written comments of the Public Guardian and Trustee, the court finds security to be unnecessary.
> (6) If subsection (1) applies, the Public Guardian and Trustee may consent to a grant of administration without security if the Public Guardian and Trustee is satisfied that the applicant has assets of sufficient net value situated in British Columbia.

Bill 28, conversely, contains no such comparable provisions.

Cancellation or Substitution of Security for Estate Administration

In addition to the above-mentioned provisions respecting the provision of security for estate administration, the Report also proposes a provision respecting the cancellation or substitution of security. This provision is carried forward from the *Estate Administration Act* (although in modified form), and permits the Court to cancel security that has been provided in accordance with the Act, when the administrator would be entitled to be discharged. The Report similarly recommends provisions authorizing the Court to approve a substitution of the required security for other security. These recommendations are codified in section 116 of the Report's proposed statutory framework, which provides:

> **Cancellation or substitution of security**
>
> **116** (1) The court may cancel security provided under sections 114 (1) or (2) *[security]* if, at the time the application for cancellation is made, the administrator would be entitled to be discharged under section 141 (3) *[right to apply for discharge]*.
> (2) The court may approve the substitution of other security for security provided under sections 114 (1) or (2) *[security]*
> (a) with the consent of all persons interested in the estate, if section 114 (1) *[security]* does not apply,
> (b) with the consent of all persons with capacity interested in the estate and the Public Guardian and Trustee, if section 114 (1) *[security]* applies.

Again, Bill 28 does not contain a comparable provision.

Administration if Sole Executor is a Minor

Both the Report and Bill 28 adopt a provision from the *Estate Administration Act* relating to the administration of an estate if the sole executor under a will is a minor. While the recommendations in the Report largely coincide with the provision in Bill 28, there are some differences of note.

First, while both the Report and Bill 28 require the Court to grant administration with will annexed to a guardian of the minor, or another adult as the Court deems fit until the minor reaches the age of majority, Bill 28 also authorizes the Court to make the grant generally to another person if the Court considers it appropriate in special circumstances.

Second, while the Report carries section 12(2) from the *Estate Administration Act* which provides that the Court's grant of administration may be general or limited, and may be on terms as the Court may direct, Bill 28 contains a slightly modified provision. Pursuant to section 134(2) of Bill 28, the administration grant may be conditional or unconditional, and made for general, special, or limited purposes. Section 134 of Bill 28 reads as follows:

Administration if sole executor a minor

134 (1) If a minor is named the sole executor under a will,
(a) the court must grant administration with will annexed
(i) to the guardian of the minor, on application by the guardian,
(ii) if the guardian does not apply, to another person the court considers appropriate until the minor reaches 19 years of age, or
(iii) in special circumstances, to another person if the court considers it appropriate, and
(b) when the minor reaches 19 years of age, the court may revoke the grant to the guardian or other person and grant probate of the will to the former minor.
(2) Administration granted under subsection (1) may be
(a) conditional or unconditional, and
(b) made for general, special or limited purposes.

Effect of a Representation Grant and Related Proceedings

Both the Report and Bill 28 carry forward provisions from the *Estate Administration Act* relating to the power and associated procedures of obtaining representation grants. However, Bill 28 departs from the Report's recommendations respecting section 56 of the *Estate Administration Act*. While the Report adopts this provision in a modified form, Bill 28 omits this provision entirely. This section of the *Estate Administration Act* appears in its modified form under section 100(3) of the Report's proposed statutory framework. The Report significantly expands this provision from its legislative predecessor, with the purpose of better encapsulating the intent of the original drafters. Section 100 reads as follows:

Effect of representation grant and related proceedings

100 (1) After the court has issued a representation grant, whether or not power is reserved to another person to apply for a subsequent representation grant, no one other than a person to whom the representation grant was made may act as executor of the will or administrator of the estate or portion of the estate to which the representation grant relates.
(2) If an executor does not join in an application for a representation grant, the executor is not liable in respect of assets of the estate coming into the hands of a co-executor, alternate executor, administrator with will annexed or declarant named in the representation grant, whether or not power is reserved to the executor to apply for a subsequent representation grant.
(3) In a proceeding
(a) for probate of a will in solemn form,
(b) for revocation of a grant of probate or administration with will annexed, or
(c) in which the validity of a will is in dispute, the probate, judgment, order or declaration is conclusive evidence, with respect to both land and personal property, of the validity or invalidity of the will or grant, as the case may be, other than in proceedings on appeal or to revoke the probate.

Proceedings by and against an Estate

Both the Report and Bill 28 carry forward provisions respecting proceedings commenced by and against an estate, however there are some variations within these provisions.

Pursuant to section 134 of the Report's statutory framework, this section does not apply to loss or damage to the person of the deceased prior to March 29, 1934. Section 134 further states that a personal representative who commences or continues a proceeding that the deceased could have commenced or continued, cannot recover damages for death or loss of expectation of life unless the death occurred before February 12, 1942. The purpose of these provisions is to make it clear that the new section does not change the law that applies to claims arising before these dates, or affect causes of action that may still be brought pursuant to former legislation that was in effect at that time. Section 59 of the *Estate Administration Act* similarly carries forward these dates. These dates, however, are not recognized in Bill 28, and the provision is not carried forward.

Distribution of Net Estate

While Bill 28 follows the Report's recommendation to include a provision governing when a personal representative may distribute the net estate, Bill 28 adds other requirements under this provision.

Pursuant to the Report's original recommendation, a personal representative may distribute the net estate without regard to a claim that may have been raised (if no proceeding has been commenced within 210 days following the issuance of the representation grant). While Bill 28 includes a comparable provision under section 155, this provision also requires the personal representative to obtain consent from the Court before making any distribution. Section 155 further requires a personal representative to obtain consents from all beneficiaries and intestate successors entitled to the estate, or order of the Court, before distributing the deceased's estate in the 210 days following the issuance of the representation grant. Section 155 of Bill 28 reads as follows:

> **Distribution of estate**
>
> **155** (1) The personal representative of a deceased person must not distribute the estate of the deceased person in the 210 days following the date of the issue of a representation grant except
> (a) with the consent of all beneficiaries and intestate successors entitled to the estate, or
> (b) by order of the court.
> (2) The personal representative of a deceased person must not distribute the estate of the deceased person after the 210 day period referred to in subsection (1) without consent of the court if
> (a) a proceeding has been commenced to determine whether a person is or is not a beneficiary or intestate successor in respect of the deceased person's estate,
> (b) relief is sought under Division 6 of Part 4 *[Wills]*, or
> (c) other proceedings have been commenced which may affect the distribution of the estate.

(3) Nothing in this section
(a) affects any right or remedy against a person to whom an estate has been distributed in whole or in part, or
(b) extends any applicable limitation period.

Right of Personal Representative to Apply for Discharge

Both the Report and Bill 28 carry forward provisions from the *Estate Administration Act* respecting the right of a personal representative to apply for a discharge. However, Bill 28 contains a small departure from the Report's recommended statutory framework.

Under section 141(2)(a) of the Report's recommended statutory framework, a personal representative may apply to the Court to be discharged from their office as personal representative whether or not the person has been appointed as executor under the will or administrator by the Court. Section 141(2)(b) further provides that this application can be made either alone or jointly with another person.

Although section 157 of Bill 28 is equivalent to the Report's recommended statutory framework, it excludes both of these subsections from its recommended provision.

Notice of Application for Discharge or Removal of Personal Representative

Pursuant to section 28 of the *Estate Administration Act*, an application to discharge or remove a personal representative from their office must be made in accordance with specific notice requirements. While the Report recommends including this provision (albeit in a somewhat modified form) in the proposed statutory framework, Bill 28 does not carry forward these notice or service requirements in its proposed legislation.

Devolution and Administration of Land

Both the Report and Bill 28 carry forward the subject matter of sections 77 and 78 of the *Estate Administration Act*. These provisions pertain to the devolution and administration of land upon death. Like the provisions in the *Estate Administration Act*, the Report's recommended statutory framework preserves the provision's temporal application with respect to persons who die on or after June 1, 1921. Following this date, the *Land Registry Act* modified the law governing the devolution of real property on death.

Although Bill 28 retains much of the original provisions from the *Estate Administration Act*, it does not contain any provisions respecting any temporal restrictions to this section.

Official Administrator

The Report's recommended statutory framework carries over several provisions from the *Estate Administration Act* relating to the powers and appointment of the official administrator for the province (the Public Guardian and Trustee). These provisions are modelled on sections 34-38, 43 and 54 of the *Estate Administration Act*, and provide for the following matters: the Lieutenant Governor in Council's power to appoint the Public Guardian and Trustee or another person as the official administrator; the official administrator's power to appoint one or more deputy official administrators; the official administrator's power to

delegate powers; a person's obligation to provide security before becoming the official administrator; the transfer of interest from a former official administrator to the successor official administrator; the official administrator's payment of probate fees and other charges; and the official administrator's entitlement to compensation.

Although Bill 28 contains several provisions relating to the Public Guardian and Trustee's role in relation to estate administration, the proposed legislation does not carry forward any of these procedural provisions from the *Estate Administration Act*.

Provable Debts

Both the Report and Bill 28 carry over a blend of provisions from the *Estate Administration Act* and the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, respecting provable debts. Although the provisions are virtually the same, Bill 28 makes a slight departure with respect to the rate with which a rebate of interest should be calculated. Whereas the Report recommends that the rebate of interest should be calculated at 5% per annum, section 171 of Bill 28 leaves this amount open to regulation, simply recommending a "prescribed amount."

Lieutenant Governor in Council's Power to Make Regulations

Both the Report and Bill 28 put forward provisions respecting the power of the Lieutenant Governor in Council to make regulations under the new legislation. Although these provisions are predominately alike, there are some key differences with respect to the powers given to the Lieutenant Governor in Council.

Pursuant section 186(3)(d) of the Report's recommended statutory framework, the Lieutenant Governor in Council may make regulations respecting various matters, including correcting deficiencies with respect to the Division dealing with registering notice of a will. Section 186(3)(f) further authorizes the Lieutenant Governor in Council to make a regulation prescribing anything that may be prescribed under the proposed legislation. Finally, section 186(4) of the Report's recommended statutory framework provides that a regulation under this provision may be made as a Rule of Court.

Conversely, section 184 of Bill 28 does not include these provisions within its list of the Lieutenant Governor in Council's regulatory powers. What's more, this section includes other provisions that were not enumerated within the Report's recommended statutory framework. Specifically, section 184(2)(d) of Bill 28 empowers the Lieutenant Governor in Council to make regulations respecting the authority of a personal representative. Lastly, section 184(4) authorizes the Lieutenant Governor in Council to make regulations for transitional matters respecting an matter that is not adequately provided for as a result of the repeal of an Act by the enactment of this new Act.

Direction by the Court respecting Transitional Provisions

While both the Report's recommended statutory framework and Bill 28 contain various transitional provisions, only Bill 28 includes an additional provision that is intended to provide the Court with power to provide any transitional directions. Pursuant to section 190 of Bill 28, the Court may give any transitional directions or orders that it deems necessary in

a proceeding with respect to an enactment repealed by this new Act. Section 190 of Bill 28 reads as follows:

> **Transitional — direction by court**
>
> **190** In a proceeding with respect to an Act repealed by this Act, the court may give any transitional directions or make any order that it considers necessary in the circumstances.

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