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Across the Country in
90 Minutes – Part III

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June 3, 2014



**Wills, Estates and Trusts:
The Alberta Perspective**

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Outline

- ❖ Introduction
- ❖ *Wills and Succession Act (WSA)*, SA 2010, c W-12.2
- ❖ *New Estate Administration Act*, to be proclaimed Spring 2015
- ❖ Updated Surrogate Rules - coming
- ❖ Updated Trustee Act – proposed
- ❖ Updated Powers of Attorney Act – proposed
- ❖ New Beneficiary designation by Substitute Decision Maker - proposed
- ❖ Q & A


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Wills and Succession Act, SA 2010, c W-12.2

- ❖ The WSA was passed by the Alberta Legislature in 2010 and proclaimed in force February 1, 2012.
- ❖ The WSA has a significant impact on estate planning.
- ❖ The WSA repealed and affected numerous other Acts: Dependants Relief, Intestate Succession, Survivorship, Wills, Trustee, Administration of Estates, and Family Law.


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Intestacy

<p>Old:</p> <ul style="list-style-type: none"> ▪ If the estate is less than \$40,000.00, the entire Estate passes to the spouse. ▪ If the Estate is over \$40,000.00, first 40K to the spouse and the remainder split between the spouse and children. ▪ No spouse, AIP or dependants – consanguinity distribution. 	<p>New:</p> <ul style="list-style-type: none"> ▪ Entire estate will pass to surviving spouse if children are a product of that relationship. ▪ If children are from another relationship, spouse or AIP gets a preferential share of $\frac{1}{2}$ of the estate or \$150,000.00 (<i>preferential share prescribed by the regulations</i>), whichever is greater, with remainder going to the children equally. ▪ No spouse, AIP or dependant – parentelic distribution.
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Survivorship

Old:	New:
<ul style="list-style-type: none"> Youngest is deemed to have survived the older Female is deemed to have survived the male 	<ul style="list-style-type: none"> When order of death cannot be determined: <ul style="list-style-type: none"> Joint title now deemed to have been owned as tenants in common Both sides share the estate equally distributing the estate as if each person died before the other Beneficiary is deemed to have predeceased


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Dependant's Relief

Old:	New:
<ul style="list-style-type: none"> Dependants could claim for "proper maintenance and support". Dependant is defined as spouse, adult interdependent partner, minor child, and an adult child who is unable to earn a livelihood because of a mental or physical disability. 	<ul style="list-style-type: none"> Two new categories of claimants: <ul style="list-style-type: none"> Adult children under age 22 who attend school full time, if supported by deceased parent Minor grandchildren, with whom grandparents act as parents (<i>in loco parentis</i>) "family member"


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Advancements

Old:	New:
<ul style="list-style-type: none"> If a minor adult child holds property jointly with a parent, upon the death of that parent the child receives the property in whole – presumption of advancement - until the Supreme Court of Canada's decision in <i>Pecore v. Pecore</i>; <ul style="list-style-type: none"> The presumption of advancement was reversed. If an adult child is on title jointly with a parent, the presumption is that the property forms part of the Estate unless that child can prove the property was meant to be gifted to them. 	<ul style="list-style-type: none"> <i>Pecore v. Pecore</i> is codified Advancements to beneficiaries may be deducted from their gift <ul style="list-style-type: none"> PROBLEM: this may include farm property transferred to child for less than FMV/ shares in the business MUST clearly state the intention in the will whether advancement is intended to be a gift

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Wills


Old:

- If a beneficiary is a witness to the will, their gift under the will fails.
- Court was limited as to their power to rectify mistakes in drafting or execution of the Will.

New:

- Court can correct a gift if a beneficiary or their partner was a witness to the will.
- Court can rectify mistakes.
- Court has validating powers in the event wills are non-compliant or altered.

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Evidence


Old:

- Extrinsic evidence is only admissible in very rare circumstances.

New:

- Rules are less strict as to what is admissible evidence.
- Just because it is extrinsic evidence, does not mean it will not be considered by the Court.
- Evidence is allowed if it speaks to the testator's intention.

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Evidence (cont'd)

❖ *Ryrie v. Ryrie*, 2013 ABQB 370 (Can LII)

- S. 26 and the use of extrinsic evidence
- Validation and rectification addressed
- Court points out that its task in the initial phase is not to rewrite the testator's will. Rather, the Court's task is to determine if extrinsic evidence is required to disclose external circumstances or internal ambiguities that on a balance of probabilities disclose that the intent of the testator is a question that merits investigation
- If external circumstances require or if the intent of the testator is ambiguous, then the legislation is clear that an investigation is necessary and the questions then become:
 - what evidence of intent should be accepted,
 - the weight evidence should be given; and
 - whether the evidence is corroborated

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Marriage and Divorce


Old:

- A will is not revoked upon divorce;
- A will is revoked on marriage or upon signing an adult interdependent partnership agreement;

New:

- An appointment of spouse as executor and a gift in a will to a spouse or adult interdependent partner is now revoked if the marriage or partnership ends.
- The “ex” is treated as predeceased for the purposes of the gift and the appointment. This applies to divorces and adult interdependent relationships that terminate after the WSA comes into force, regardless of when the will was made.
- A will is no longer revoked upon marriage.


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Temporary Possession

- A surviving spouse or AIP has 90 days to possess the home after the date of death regardless of who owns the property.

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Duty of the Lawyer

- Every lawyer who acts on behalf of a party in a contested application must discuss and inform their client on alternate methods of resolving the dispute and collaborative processes which may be available.

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Estate Administration Act – coming Spring 2015

❖ Changes:

- Court has wider powers to issue a grant if the Court is satisfied a grant is necessary – expands the Court's jurisdiction to deal with Albertan's estates or property left in Alberta
- Common law role of the Personal Representative as a fiduciary is now stated.
 - Act honestly and in good faith
 - In accordance with the testator's intentions
 - With the care, diligence and skill of a prudent person
- Must distribute estate "as soon as practically possible"
- A professional PR must exercise a greater degree of skill.
- Rules on how to determine who gets to dispose of the remains and arrange the funeral

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Estate Administration Act – coming Spring 2015 (cont'd)

❖ Changes (cont'd):

- Core tasks are defined:
 - Identify the estate assets and liabilities
 - Administer and manage the estate
 - Satisfy debts and obligations
 - Distribute and account
- Duties and core tasks apply to the PR who does NOT get a grant.
- Specific notice requirements apply to all PR's whether or not they get a grant.
- Ability to bring an application against a PR who hasn't done their duty, task or given notice
- Marshalling rules are now specifically set out.

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Conclusion

❖ New laws that may be coming:

- Trustee Act
- Powers of Attorney Act
- Beneficiary designations by substitute decision makers

❖ What will be coming:

- New Surrogate Court Rules – forms and substance


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Thank You!


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**Wills, Estates and Trusts:
The Quebec Perspective**

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Outline

- ❖ *Letendre v. Société de fiducie privée MD*, 2012 QCCS 4128 - discretionary powers of trustees; capital encroachment
- ❖ *Québec (Curateur public) v. A. N. (Succession de)*, 2014 QCCS 616 – discretionary trust; rights of beneficiary under social assistance


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Reminder

- ❖ Key inspiration on the topic of exercise of discretionary powers – even in Quebec!
 - Maurice CULLITY, “Judicial Control of Trustees’ Discretion”, (1975) 25 *U.T.L.J.* 99
 - Ian M. HULL, “Discretion to Encroach: Do the beneficiary’s personal resources matter?”, (2004-05) 24 *Est. Tr. & Pensions J* 30 (HeinOnline)

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Letendre v. Société de fiducie privée MD

- ❖ Decision interpreting the scope of trustees’ discretion in matter of capital encroachment

Facts:

- ❖ Sylvie Letendre (“Plaintiff”) was the common-law spouse of Deceased
- ❖ Plaintiff and Deceased had one child together; Deceased had four children from a previous marriage
- ❖ In 2009, two months prior to his death, Deceased made a Will under which a Trust was settled for the benefit of Sylvie Letendre
- ❖ Plaintiff and Defendant were both appointed trustees

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Letendre v. Société de fiducie privée MD (cont’d)

- ❖ Will includes various provisions stating that the interests of Plaintiff in the Trust are paramount
- ❖ Under the heading “Appropriation”, Deceased provides that Trust assets will be appropriated exclusively for the benefit of Plaintiff during her lifetime; Deceased states his intention to grant Plaintiff a [priority](#) regarding the use of the Trust patrimony
- ❖ Will provides that cottage which was transferred to the Trust will be for the personal use of Plaintiff and that all expenses regarding such cottage will be paid from the Trust income, and at the trustees’ discretion, from the Trust capital
- ❖ Will states that the Trust income shall be distributed exclusively to Plaintiff during her lifetime

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Letendre v. Société de fiducie privée MD (cont'd)

- ❖ Will includes a provision whereby the trustees have the discretionary power to encroach on the capital of the Trust in the following circumstances:
 - for the payment of any expenses with respect to the cottage where such expenses cannot be paid from the Trust income;
 - for any expenses that are necessary for the Plaintiff to live appropriately or expenses that are extraordinary, unpredictable and required in the event of Plaintiff's illness, accident, hospitalization, etc.
- ❖ Plaintiff claims that she is entitled to request and obtain an annual, non-taxable payment from the Trust capital of approximately \$86,000 (gross amount of \$125,000) that would allow her, and her daughter, to live "appropriately" – in French – "convenablement"

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Letendre v. Société de fiducie privée MD (cont'd)

- ❖ Plaintiff and Defendant agreed that Plaintiff's current financial situation, which included the following assets, allows her to live appropriately:
 - RRSP of approximately \$2 million;
 - immoveable property worth approximately \$728,000;
 - income from the Trust
- ❖ Plaintiff alleges that irrespective of her personal financial situation, the Trust must support her needs
- ❖ Defendant alleges that an annual payment to Plaintiff would deplete the Trust in a not so distant future (current capital of \$620,000)

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Letendre v. Société de fiducie privée MD (cont'd)

- Issue:**
- ❖ Notwithstanding the discretionary powers of the Trustees, the Court has to determine whether the Plaintiff's current lifestyle, which she maintains from her own assets, must be assumed in the future by the Trust by way of a permanent capital encroachment, based on the priority granted to her under the Will.
 - ❖ Article 1278 *Civil Code of Québec* (CCQ):

"A trustee has the control and the [exclusive administration](#) of the trust patrimony, and the titles relating to the property of which it is composed are drawn up in his name; he has the exercise of all the rights pertaining to the patrimony and may take any proper measure to secure its appropriation.

A trustee acts as the administrator of the property of others charged with full administration."

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Letendre v. Société de fiducie privée MD (cont'd)


❖ Article 1306 CCQ:

"A person charged with full administration shall preserve the property and make it productive, increase the patrimony or appropriate it to a purpose, where the interest of the beneficiary or the pursuit of the trust requires it."

❖ Article 1310 CCQ:

"No administrator may exercise his powers in his own interest or that of a third person or place himself in a position where his personal interest is in conflict with his obligations as administrator.
If the administrator himself is a beneficiary, he shall exercise his powers in the common interest, giving the same consideration to his own interest as to that of the other beneficiaries."

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Letendre v. Société de fiducie privée MD (cont'd)


Decision:

❖ Deceased privileged Plaintiff's interests under the Will and provided her with a priority, however not to the detriment of the other beneficiaries, namely the capital beneficiaries

❖ Evidence clearly showed the Deceased's intent – children of the first marriage would be entitled to the Trust capital outright unless Plaintiff's financial situation warranted otherwise

❖ If the Deceased's intent had been different, he would not have settled a trust but would have rather transferred the assets outright to the Plaintiff

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Letendre v. Société de fiducie privée MD (cont'd)

❖ Capital encroachment clause was included to compensate for any expenses relating to the cottage and for the payment of any extraordinary expenses which would allow the Plaintiff to live appropriately

❖ If Court were to allow a permanent encroachment of capital, Plaintiff would be acting in her own interest contrary to the provisions of article 1310 CCQ

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Québec (Curateur public) v. A. N. (Succession de)

- ❖ Decision interpreting the rights of a beneficiary in a discretionary trust where the beneficiary is also a beneficiary of social assistance

Facts:

- ❖ In 2005, the Public Curator of Quebec was appointed Curator to the person and property of E.J.N, a 55 year old man with diminished capacity ("Beneficiary").
- ❖ Beneficiary's mother signed a Will in 1986; she appointed Defendant as liquidator and trustee of a testamentary trust ("Trust") created for the benefit of Beneficiary.
- ❖ Beneficiary has been receiving social assistance payments since 1981.

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Québec (Curateur public) v. A. N. (Succession de) (cont'd)

- ❖ At some point, government ceased making social assistance payments to Beneficiary on the basis that payments to fulfil his needs should be made under the Trust.
- ❖ The Public Curator, as legal representative of the Beneficiary, claims that Defendant must pay Beneficiary \$12,000 annually from the Trust.
- ❖ Defendant claims that provisions of the Trust are clear and should not be interpreted; the Trust is discretionary and is not intended to provide for the daily needs of Beneficiary.

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Québec (Curateur public) v. A. N. (Succession de) (cont'd)

Issues:

- ❖ To determine the meaning and scope of the following provision in the Will:

"[...] I direct that my Estate be made over to my Executor and Trustee[...] to be held by them in trust and managed for the following purposes:

(b) To provide out of the revenue of my Estate and from the capital thereof should my said Executors and Trustees in their sole discretion deem it advisable, such sums as in their discretion they deem necessary, for any additional maintenance of my son, [E.J.N], during his lifetime, including additional provision for education, medical care, residence, companion and such other expenses as my Executor and Trustee shall deem reasonable;"

- ❖ Furthermore, should the Trust be varied under art. 1294 of the Civil Code?

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Québec (Curateur public) v. A. N. (Succession de) (cont'd)

Decision:

- ❖ Intent of testator at the time of the signing of the Will has to be ascertained
- ❖ Testator (Beneficiary's mother) in full knowledge settled the discretionary Trust to provide for payments for "[any additional maintenance of my son](#)" therefore, in excess to the social assistance payments he was receiving
- ❖ Beneficiary does not hold any *ad rem* right in the Trust assets but rather a personal right

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Québec (Curateur public) v. A. N. (Succession de) (cont'd)

- ❖ Trust provisions are clear to the effect the sums that may be paid out of the Trust are subject to the Trustee's discretion and are supplementary to the amounts that Beneficiary is already receiving under the social assistance program
- ❖ Court confirms that sums which Beneficiary may receive are at the Trustee's discretion
- ❖ The Trustee's interpretation of the applicable provision of the Will is reasonable and complies with the Testator's intent; Plaintiff cannot obtain an order requiring Defendant to pay an annual amount of \$12,000 as such order would violate Testator's intent


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Québec (Curateur public) v. A. N. (Succession de) (cont'd)

- ❖ Common law principles regarding discretionary trusts and social assistance payments are similar.
- ❖ The Quebec Superior Court cited *Thomas v. Director, Employment and Income Assistance Programs*, 2013 MBCA 91: "the contingent beneficial rights of the applicant in the discretionary trust are not a financial resource adversely affecting her eligibility to receive social allowance".

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Québec (Curateur public) v. A. N. (Succession de) (cont'd)

- ❖ In light of article 1294 CCQ, the Trust should not be varied.
- ❖ Article 1294 CCQ:

"Where a trust has ceased to meet the original intent of the settlor, particularly as a result of circumstances unknown to him or unforeseeable and which make the pursuit of the purpose of the trust impossible or too onerous, the court may, on the application of an interested person, terminate the trust; the court may also, in the case of a social trust, substitute another closely related purpose for the original purpose of the trust.

Where the trust continues to meet the intent of the settlor but new measures would allow a more faithful compliance with his intent or facilitate the fulfillment of the trust, the court may amend the provisions of the constituting act."
- ❖ Under this provision, the Court's intervention is limited to situations where the pursuit of the purpose of the trust has become impossible or too onerous, based on unknown or unforeseeable circumstances.

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Conclusion

- ❖ The priority granted to a beneficiary under a trust will not result in an automatic or perpetual encroachment on capital.
- ❖ Trustees still retain their discretion as long as same is properly exercised, within the ambit of the trust instrument.

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Thank You!

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Wills, Estates and Trusts: The New Brunswick Perspective


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New Brunswick Outline

- ❖ Introduction
- ❖ Legislation
 - Gender-Specific v. Gender-Neutral
 - The "Irresponsible" Unmarried Father
- ❖ Case Law
 - Statutory Survival Period
 - Strict Compliance v. Substantial Compliance
 - Joint Tenancy
 - Disposition of Assets During Lifetime
 - Undue Influence/Family Conflicts and Credit Unions
- ❖ Conclusion




Legislation: Gender-Specific v. Gender-Neutral

- ❖ In 2008, a series of amendments were made:
 - ✓ "Husband" and "wife" replaced by "spouse"
 - ✓ "He" replaced by "he or she"
 - ✓ "His" replaced by "his or hers"
- ❖ *Wills Act*, RSNB 1973, c W-9
- ❖ *Executors and Trustees Act*, RSNB 1973, c E-13
- ❖ *Infirm Persons Act*, RSNB 1973, c I-8


 POLLING QUESTION #1

Prior to 2012...
Did unmarried fathers have any guardianship duties or rights to appoint a guardian under the *Guardianship of Children Act*, RSNB 2011, c 167?

☐ Yes
☐ No



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 Legislation: The "Irresponsible" Unmarried Father

❖ In 2012, amendments were made to the *Guardianship of Children Act*, RSNB 2011, c 167 :

Definition of "*parent*" and "*child*" - modified to include the father of a child who is not married to the mother

❖ [Previous definition] – "*parent*" does not include the father of a child whose father and mother are not married to one another.

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 Case Law: Statutory Survival Period

❖ Presumption under the *Survivorship Act*, SNB 2012, c 116, s 6(2) :

"[...] when two or more persons die within ten days or each other, they shall be deemed, for the purposes of this Act, to have died at the same time." [s.6(2)]


❖ *Collett and Kelly v Borland* (2008), unreported decision (testatrix died 36 hours before daughter).

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 POLLING QUESTION #2

If a will is attested in New Brunswick and it is later found that one of the two witnesses **did not actually see** the testator sign his will; is that will valid and effective in New Brunswick?

☐ Yes
☐ No




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 Case Law: Strict Compliance v. Substantial Compliance

- ❖ Before 2001—“strict compliance” with formal requirements of the *Wills Act*, RSNB 1973, c W-9 was required
- ❖ Since the enactment of s.35.1 of the *Wills Act*, RSNB 1973, c W-9 in 2001 – only “substantial compliance” is required:

“Where a court [...] is satisfied that a document or any writing on a document embodies the testamentary intentions of the deceased [...] the court may, notwithstanding that the document or writing was not executed in compliance with the formal requirements imposed by this Act, order that the document or writing is valid and fully effective [...]” [s.35.1]
- ❖ *Brown Estate v Bon*, [2003] NBJ No 233
- ❖ *Vaillancourt Estate v Vaillancourt*, [2000] NBJ No 520
- ❖ *Furlotte et al v McAllister et al*, 2005 NBQB 310


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 POLLING QUESTION #3


Does the following provision in a New Brunswick will create a **joint tenancy** or a **tenancy in common**?

“If one of the children predeceases the testatrix, the residue is to become the property of the successor or successors of them”

☐ Joint tenancy
☐ Tenancy in common




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Case Law: Joint Tenancy


- ❖ Wording of wills and the creation of a joint tenancy or a tenancy in common
 - "survivor" = presumption of a joint tenancy
 - "successor" = presumption of a tenancy in common [**Winchester**]
- ❖ Joint bank accounts and the creation of a rebuttable presumption
 - "[...] absent an intention to make a gift, there will be a resulting trust in favor of the estate of the funds to which the survivor holds only the legal title". [**Breau**]
- ❖ **Winchester v McCullough**, [2000] NBJ No 26
- ❖ **Breau v The Estate of Ernest St Onge et al**, 2009 NBCA 36

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Case Law: Disposition of Assets During Lifetime

- ❖ s.20(2) of the **Wills Act**, RSNB 1973, c W-9 and substitution of specific bequest
 - "[...] where a testator at the time of his death has a right or chose in action or equitable estate or interest that was created by a contract respecting a conveyance of or other act relating to real or personal property that was comprised in a devise or bequest, made or done after the making of a will, the devisee or donee of that real or personal property takes the right or chose in action or equitable estate or interest of the testator". [s. 20(2)]
- ❖ s.22 of the **Wills Act**, RSNB 1973, c W-9 and failed or void bequests
 - "Except where a contrary intention appears by the will, real or personal property or an interest therein that is comprised or intended to be comprised in a devise or bequest that fails or becomes void by reason of the death of the devisee or donee in the lifetime of the testator, or by reason of the devise or bequest being contrary to law or otherwise incapable of taking effect, is included in the residuary devise or bequest, if any, contained in the will". [s.22]
- ❖ **Kilpatrick v Kellar**, [2002] NBJ No 465
- ❖ **Dexter v Murphy**, 2004 NBCA 36

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POLLING QUESTION #4

If a deceased member of a New Brunswick Credit Union left all of her money in a Credit Union bank account to both:


- ✓ "beneficiary A" pursuant to a provision in her will; and to
- ✓ "beneficiary B" pursuant to a beneficiary card provided by the CU

... Which of the two designated beneficiaries is entitled to the money?

- ☐ The one on the Will
- ☐ The one on the Card



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Case Law: Undue Influence / Family Conflicts and Credit Unions


- ❖ Time frame for determining “undue influence” and time of execution of will
- ❖ State of personal conflict among administrators and appointment of a trustee
- ❖ **s. 47 of the Credit Union Act**, SNB 1992, c C-32.2 and precedence over wills

“ A member of a credit union may, by document, signed by the member, witnessed, and filed with the credit union, nominate a person to whom the member’s interest in the credit union is to pass and vest upon the member’s death [...] as fully as though passed and vested during the lifetime of the member. [...] A member of a credit union may vary or revoke a nomination [...] ”

[s.47(2), (3) and (4)]

- ❖ **DeWitt v Williams**, 2005 NBCA 69
- ❖ **Tower v Tower et al**, 2008 NBCA 7
- ❖ **Goguen (Estate of) v Hachey**, 2012 NBCA 56


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Thank You!


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An Essential Charity Law Update

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2014 Federal Budget Highlights

- ❖ Budget 2014 was released on February 11, 2014
- ❖ Certain measures are proposed to be implemented by Bill C-31, *Economic Action Plan 2014 Act, No. 1*, which received second reading on April 8, 2014

1. Gifts by Will

- There is uncertainty on these provisions as there were no legislative provisions provided in Budget
- Currently, the *Income Tax Act* ("ITA") deems a gift made under an individual's will to have been made by the individual immediately before death
- The donation tax credit for such gifts can be claimed in the individual's terminal tax return or the year immediately prior to death
- Similar provisions apply where an individual designates a qualified donee as the recipient of proceeds from an RRSP, RRIF, TFSA or life insurance policy upon death
- On the other hand, a tax credit for a gift made by the estate of a deceased person can only be claimed by the estate


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2014 Federal Budget Highlights (cont'd)

- ❖ Budget 2014 proposes that donations made by will and designation donations will be deemed to have been made by the estate at the time the property is transferred to a qualified donee
- ❖ Gifts by will will no longer be deemed to have been made immediately before death
- ❖ Instead, estate trustees will be given more flexibility to allocate the donation made by will among any of the following:
 - the taxation year of the estate in which the donation is made;
 - an earlier taxation year of the estate;
 - the last two taxation years of the deceased person
- ❖ Qualifying donation must be effected by a transfer to a qualified donee within the first 36 months after death (which is currently not the case)
- ❖ Estate may continue to claim a donation tax credit in respect of other donations in the year in which the donation is made or in any of the five following years
- ❖ The proposed amendments will apply to the 2016 and subsequent taxation years

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2014 Federal Budget Highlights (cont'd)

2. Donations of Ecologically Sensitive Land

- The ITA provides enhanced tax incentives for donations of ecologically sensitive land
- Donations must be made to eligible conservation charities, including land trusts, through Environment Canada's Ecological Gifts Program
- The tax credit or deduction is currently limited to a 5-year carry-forward, which often results in some unused tax benefit, e.g.:
 - Lands under pressure with appreciation have often been held by the same owner for decades (often farmers)
 - These owners often do not have the income to offset the tax receipt over the 5 year period
- Budget 2014 proposes to amend the definition of "total ecological gifts" in the ITA to extend this charitable deduction or credit to a 10-year carry-forward
- This amendment will apply to donations made on or after February 11, 2014

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2014 Federal Budget Highlights (cont'd)


3. Donations Of Certified Cultural Property

- Currently a tax exemption applies to capital gains realized on the disposition of certified cultural property to institutions and public authorities designated by the Minister of Canadian Heritage
- When disposition is by way of a gift to those institutions of certified cultural property, the donor may claim a tax credit up to 100% of their net income
- Budget 2014 proposes to remove, for certified cultural property acquired through a tax shelter arrangement, the exemption from the rule that deems that value of a gift to be no greater than its costs to the donor
- This provision will apply to donations made on or after February 11, 2014

4. New De-registration Power – State Support Of Terrorism

- Budget 2014 proposes that the Minister of National Revenue may refuse to register a charity or revoke its registration if a charity or registered Canadian amateur athletic association has accepted a “gift” from a “foreign state” listed in the *State Immunity Act* (presently only Syria and Iran)


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2014 Federal Budget Highlights (cont'd)

- ❖ “Foreign state” includes:
 - a sovereign or head of the state or any political subdivision
 - any government or subdivision of the foreign state, including any of its departments;
 - any “agency” of the foreign state, meaning any legal entity that is an “organ of the foreign state but that is separate from the foreign state”;
 - any “political subdivision”
- ❖ Budget 2014 also contemplates that CRA will “provide information about best practices” for exercising due diligence when “accepting gifts and for preventing terrorist abuse of the registration system for charities”
 - This could prove to be an important policy document considering the increasing due diligence burdens on registered charities

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2014 Federal Budget Highlights (cont'd)

5. Consultation On Non-profit Organizations (NPOs)

- Budget 2014 outlines concerns that some NPOs earn profits that are not consistent with NPO purposes and that the limited reporting requirements for NPOs do not allow the CRA or the public to properly assess the activities of NPOs
- Budget 2014 reveals the government’s intention to review whether the tax exemption for NPOs is appropriately targeted and whether there are “sufficient transparency and accountability provisions in place”
- The government is expected to release a consultation paper on the matter

6. Reducing The Administrative Burden on Charities and Other Investments in the Charitable Sector

- Budget 2014 proposes:
 - to enable charities to apply for registration and for their annual information returns electronically
 - to amend the *Criminal Code* to allow charities to purchase, process and issue lottery tickets and receipts to donors electronically
 - to “continue to work with leaders in the not-for-profit and private sectors to explore the potential for social finance initiatives”

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Other Recent Federal Initiatives

1. Bill S-14, Fighting Foreign Corruption

- Bill S-14, *Fighting Foreign Corruption Act*, amending the *Corruption of Foreign Public Officials Act*, received Royal Assent on June 19, 2013
- It removed the words “for profit” from the definition of business in s.2 so that it is now defined as “any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere”
 - The prohibition on bribery and books and records offences now apply to organizations involved in any business or undertaking in Canada or in a foreign country, regardless of profit motivation or lack thereof
- Another important amendment will repeal the “facilitation payment” exemption provision of the *Corruption of Foreign Public Officials Act* on a date to be fixed by order of the Governor in Council
 - Currently, such facilitation payments are excluded from the prohibition on bribery
 - As a result, in the future, charities could be exposed to possible criminal liability for activities which, up to now, have been permitted

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Other Recent Federal Initiatives (cont'd)

2. Bill C-28 “Canada’s Anti-Spam Legislation” (CASL)

- CASL will come into force on July 1, 2014 and will impact how charities and NPOs communicate with their donors, volunteers and members
- Section 6 of the CASL prohibits sending or causing or permitting to be sent a “commercial electronic message” (CEM) unless:
 - The person to whom the CEM is sent has consented to receiving it, whether the consent is express or implied; and
 - The CEM contains the prescribed information
- A CEM is:
 - Reasonable to conclude has as its purpose, or one of its purposes, to encourage participation in a “commercial activity” based on:
 - content of the message
 - the hyperlinks in the message to content on a website or other database
 - the contact information contained in the message
- The regulations include a specific exemption from CASL for select messages sent by registered charities (but not non-profit organizations) for fundraising purposes
- Many charities are planning to obtain express consent in order to be prudent

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Highlights Of Recent CRA Publications

1. Guidance on How to Draft Purposes for Charitable Registration (July 25, 2013)

- The Guidance contains CRA’s recommended approach to drafting charitable purposes, identifying three key elements of charitable purposes, including:


a) The Charitable Purpose Categories

- Relief of poverty
- Advancement of education
- Advancement of religion
- Other purposes beneficial to the community in a way that the law regards as charitable and that benefit the public or a sufficient segment of the public

b) The Means of Providing the Charitable Benefit

- Define the scope of activities conducted to directly further the purpose and ensure a charitable benefit

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Highlights Of Recent CRA Publications (cont'd)


c) The Eligible Beneficiary Group

- The charitable benefit should be provided to the public or a sufficient section of the public

2. Guidance on Purposes and Activities Benefiting Youth (June 24, 2013)

- The Guidance describes how CRA determines whether an organization that benefits youth is eligible to become a registered charity under the ITA or can continue as a charity if subject to an audit by CRA
- Purposes that benefit youth may fall under any of the four categories of charity described in the Guidance on How to Draft Purposes for Charitable Registration
- An organization must use "substantive evidence of a causal connection" to show that an activity can provide a public benefit by structuring and focusing activities to address the identified youth problem

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Highlights Of Recent CRA Publications (cont'd)

3. Guidance on the Promotion of Health and Charitable Registration (August 27, 2013)

- The Guidance defines the promotion of health as "directly preventing or relieving physical or mental health conditions by providing health care services or products to eligible beneficiaries"
- Promotion of health is a charitable purpose under the following two conditions:
 - It provides services or products to the public, thereby directly preventing and/or relieving a physical or mental condition; and
 - It must meet relevant requirements for quality and safety
- Some health-related activities may further other charitable purposes as well, such as relieving poverty, advancing education, and advancing religion in the charitable sense
- Additionally, to be eligible for charitable registration, promotion of health must:
 - Be provided only to eligible beneficiaries (the public or a sufficient section of the public)
 - Not provide unacceptable, non-incidental private benefits

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Highlights Of Recent CRA Publications (cont'd)

4. Guidance on Housing and Charitable Registration (February 8, 2014)

- The Guidance addresses situations in which housing is provided by charities, where the housing:
 - relieves poverty, or
 - provides specially adapted facilities or services to help eligible beneficiaries overcome or manage their conditions associated with age or disabilities
- If an organization rents housing to non-eligible persons, the housing must either qualify as investment property income generating a fair market value return, or meet the related business provisions of the *Income Tax Act*
- Organizations that provide housing may be required to issue T5007 slips to beneficiaries to identify recipients of workers' compensation benefits and social assistance payments, and to report the amount of benefits and assistance paid to them

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Corporate Update

1. Canada Not-for-profit Corporations Act (CNCA)

- The *Canada Not-for-Profit Corporations Act* (CNCA) was enacted on June 23, 2009 and proclaimed in force October 17, 2011
- Replaced Part II of the *Canada Corporations Act* (CCA)
- Existing CCA corporations required to continue under the CNCA within 3 years - i.e., by October 17, 2014
- Failure will lead to dissolution of the corporation
- According to Industry Canada, there are an estimated 17,000 Part II CCA non-profit corporations.
- As of the end of May 1, 2014, only 3795 or 22% of not-for-profit corporations incorporated under the CCA had continued under the CNCA
- There is no longer sufficient time to obtain pre-approval from CRA for change of objects for charities
- Elimination of non-voting members may require a separate meeting of members prior to the member's meeting to approve the continuance

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Corporate Update (cont'd)

2. New Ontario Not-for-Profit Corporations Act

- The *Ontario Corporations Act* ("OCA") has not been substantially amended since 1953
- The new *Ontario Not-for-Profit Corporations Act* ("ONCA") received Royal Assent on October 25, 2010 and will apply to OCA Part III corporations
- Bill 85 was introduced on June 5, 2013 and contains key amendments to the ONCA that must be passed before the ONCA can be proclaimed
- However, Bill 85 has now died on the Order Paper as a result of the upcoming provincial elections on June 12, 2014
- The ONCA is not expected to be proclaimed into force until sometime later in 2015 at the earliest

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Corporate Update (cont'd)

3. Social Enterprise Legislation

- British Columbia and Nova Scotia have enacted provincial social enterprise legislation
- In British Columbia, Part 2.2 of the British Columbia *Business Corporations Act* includes provisions for Community Contribution Companies
 - Provisions have been in force since July 29, 2013
- Nova Scotia has enacted the *Community Interest Companies Act*
 - Despite receiving Royal Assent on December 6, 2013, the *Community Interest Companies Act* is not yet in force and will come into force on such day as the Governor in Council orders and declares by proclamation
- In Ontario, the Ontario Ministry of Economic Development, Trade and Employment announced "Impact - A Social Enterprise Strategy for Ontario" on September 26, 2013 to support social enterprises in Ontario
 - The provincial government is currently conducting a consultation with the sector in this regard
 - It is not known when enabling legislation will be introduced

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Provincial Legislation Update

1. Manitoba Bill 46, Charities Endorsement Act 2013

- Bill 46 repealed Manitoba's *Charities Endorsement Act*, effective December 31, 2013
- As a result, charities that were once required to apply for authorization to solicit funds under the Act are no longer required to do so

2. Saskatchewan Bill 105, Informal Public Appeals Act

- Bill 105 received Royal Assent on March 12, 2014 and comes into force at a future unknown date
- The Act assists those who informally raise funds for charitable or non-charitable purposes through "public appeals" to dispose of any surplus or unused donations
- Otherwise, where a public appeals campaign raises more money than required, returning the money to donors or applying the funds to a different cause may amount to a breach of trust in certain situations

3. Alberta Bill 12, Statutes Amendment Act, 2014

- Bill 12 received Royal Assent on May 14, 2014 but is not yet in force
- Bill 12 amends the *Societies Act* to allow for "not-for-profit organizations" incorporated in other jurisdictions to be continued in Alberta

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Selected Case Law

1. Prescient Foundation v MNR, 2013 FCA 120, May 1, 2013

- On November 28, 2013, the Supreme Court of Canada dismissed Prescient's application for leave to appeal
- CRA had issued a notice of intention to revoke Prescient Foundation's charitable registration because:
 - Prescient donated \$500,000 to a foreign non-qualified donee
 - Prescient was involved in the sale of a farm, where sale proceeds were routed on a tax-free basis "for the private benefit of certain taxpayers"
 - Prescient had "failed to maintain adequate books and records"
- The Federal Court of Appeal ("FCA") held that the revocation of Prescient's registration for the gifts to the non-qualified donee was unfounded since there was no legislative basis at that time to enforce such position
- FCA stated that CRA must "(a) clearly identify the information which the registered charity has failed to keep, and (b) explain why this breach justifies the revocation of the charity's registration thereby questioning CRA's determination of books and records"

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Selected Case Law (cont'd)

2. Guindon v The Queen, 2013 FCA 153, June 12, 2013

- On March 2, 2014, the Supreme Court of Canada granted Guindon leave to appeal
- CRA assessed a penalty of \$564,747 against Guindon for knowingly assisting another taxpayer with making a false statement or omission in a tax return under s. 163.2 of the ITA
 - Guindon had provided a legal opinion on the "The Global Trust Charitable Donation Program" charitable donation scheme without having analysed any of the documents
 - She also issued 134 charitable donation receipts as an officer of the charity
- Tax Court of Canada ("TCC") held that the penalties were of a criminal nature, as per s. 11 of the Charter, and therefore unconstitutional
- FCA overturned TCC's decision on the basis that Guindon failed to serve a notice of constitutional question when she sought a finding that a section of the Act was invalid, inoperative or inapplicable
 - The TCC therefore had no jurisdiction to consider whether s. 163.2 created a criminal offence under s. 11 of the Charter
- The FCA also held that proceedings under section 163.2 are in place to maintain discipline, compliance or order "within a discrete regulatory and administrative field of endeavour" and are, therefore, not criminal in nature

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Selected Case Law (cont'd)

3. **Re: Fenton Estate, (2014 BCSC), January 13, 2014**

- The deceased directed his executor to establish a private charitable trust, which was to hold the gifted capital in trust in perpetuity
- The will directed the trustee to reinvest a portion of the Trust's income to protect the capital from inflation.
- However, the will restricted the trustee to distributing only net annual income and not any capital
- Because of this, the trust could not meet the 3.5% disbursement quota (DQ) required under the ITA in order to maintain charitable status
- The BC Supreme Court authorized a "total return investment strategy" to allow the trustee to encroach on capital gains in any year necessary, despite being prohibited under the will, by adding capital gains to income in order to meet the 3.5% DQ to avoid jeopardizing the Trust's charitable status
- The decision was based on the exercise of the court's *cy pres* jurisdiction as opposed to the court's administrative scheme-making jurisdiction


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Thank You!

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Questions?



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