



*40th Annual
Refresher Course*

Wills, Estates & Elder Law

Lake Louise, Alberta
May 5 – 9, 2007

Honorary Chair

Hon. Colleen Kenny
Court of Queen's Bench of Alberta
Calgary, Alberta

Sessional Chairs

Jane C. Carstairs
McKinnon Carstairs
Calgary, Alberta

Leanne S. Cherry
Underwood Cherry Gilholme
Calgary, Alberta

Wanda Fawcett
Bishop & McKenzie LLP
Edmonton, Alberta

Les Hills
Office of the Public Trustee
Edmonton, Alberta

Barbara Kimmitt
Bennett Jones LLP
Calgary, Alberta

Paul Trotter
Counsel West Law
Calgary, Alberta

Helen R. Ward
Duncan & Craig LLP
Edmonton, Alberta

Instructors

Roy D. Boettger, Q.C.
Field LLP
Calgary, Alberta

Nadja Ibrahim
PricewaterhouseCoopers
Calgary, Alberta

Siân M. Matthews
Bennett Jones LLP
Calgary, Alberta

Malcolm F. Pritchard
Pritchard & Company LLP
Medicine Hat, Alberta

Richard H. Bowes
Justice and Attorney General
Edmonton, Alberta

Craig Kinsman
Alberta Lawyers
ASSIST Program
Calgary, Alberta

Paul McLaughlin
Turning Point Law
Sherwood Park, Alberta

Philip J. Renaud, Q.C.
Duncan & Craig LLP
Edmonton, Alberta

Mark P. Chartrand
Borden Ladner Gervais LLP
Vancouver, British Columbia

Barbara A. Krahn
Fraser Milner Casgrain LLP
Calgary, Alberta

Ross G. McLeod, Q.C.
Law Society of Alberta
Edmonton, Alberta

Dragana Sanchez Glowicki
Miller Thomson LLP
Edmonton, Alberta

Nancy L. Golding
Borden Ladner Gervais LLP
Calgary, Alberta

Bernice Kutney
TD Waterhouse,
Private Trust
Calgary, Alberta

Hon. Vital O. Ouellette
Court of Queen's Bench
of Alberta
Edmonton, Alberta

Allan G.P. Shewchuk, Q.C.
Machida Mack Shewchuk
Meagher
Calgary, Alberta

Tracy L. Hanson
Beaumont Church LLP
Calgary, Alberta

Paul D. Lailey
Davis & Company LLP
Vancouver, British Columbia

Dennis J. Pelkie, Q.C.
Parlee McLaws LLP
Calgary, Alberta

Lexy R. Wong
Bennett Jones LLP
Calgary, Alberta

Kary B. Hargreaves
Brownlee LLP
Edmonton, Alberta

Lois J. MacLean
de Villars Jones
Edmonton, Alberta

Karen A. Platten
McLennan Ross LLP
Edmonton, Alberta

Kenneth Shulman, MD, SM
Sunnybrook Health Science
Centre
Toronto, Ontario

LEGAL EDUCATION SOCIETY OF ALBERTA

These materials have been prepared for use in conjunction with a seminar presented by the Legal Education Society of Alberta in Lake Louise, Alberta from May 5th to 9th, 2007. These materials are not to be used or reproduced without first obtaining written authorization from the Legal Education Society of Alberta, 2610 Bell Tower, 10104 – 103 Avenue, Edmonton, Alberta, T5J 0H8. Additional copies of these materials, individual papers, or the entire binder, are available from the Legal Education Society of Alberta. Contact LESA or visit <http://www.lesa.org>.

These materials are produced by the Legal Education Society of Alberta (LESA) as part of its mandate in the field of continuing education. The information in the materials is provided for educational or informational purposes only. The information is not intended to provide legal advice and should not be relied upon in that respect. The material presented may be incorporated into the working knowledge of the reader but its use is predicated upon the professional judgement of the user that the material is correct and is appropriate in the circumstances of a particular use.

The views expressed herein are the personal views and opinion of the individual authors and do not represent the position of LESA or other seminar participants. The information in these materials is believed to be reliable; however, LESA does not guarantee the quality, accuracy, or completeness of the information provided. These materials are provided as a reference point only and should not be relied upon as being inclusive of the law. LESA is not responsible for any direct, indirect, special, incidental or consequential damage or any other damages whatsoever and howsoever caused, arising out of or in connection with the reliance upon the information provided in these materials.

These materials contain reproductions of the Statutes of Alberta and Alberta regulations, or both, which should not be relied upon. The official Statutes and Regulations published by or under the authority of the Queen's Printer for Alberta should be consulted for all purposes of interpreting and applying the law. The Statutes of Alberta and Alberta Regulations herein are reproduced under license from the Province of Alberta. Copyright, 2007, Her Majesty the Queen in Right of the Province of Alberta.

40th Annual Refresher Course

Wills, Estates & Elder Law

Table of Contents

Page No.

TAB 1	Should Probate Be Avoided?	Malcolm F. Pritchard
--------------	----------------------------	----------------------

Introduction	1
Estate Planning Goals	2
Probate	3
Joint Tenancy	4
Review Prior to Transfer.....	5
Loss of Control	5
Creditors	6
Matrimonial Property	6
Tax	7
After the Transfer	10
Life Lease	10
Trusts	11
Special Trusts	14
Avoiding Claims from Dependents	15
Corporations	16
Estate Freeze	18
Enduring Powers of Attorney (EPA).....	20
Conclusion	20
Appendix 1 – Reference Materials	
Acknowledgement of Trust	
Acknowledgement of Gift	

TAB 2	Empowering the Incapable: Enduring Power of Attorneys and Personal Directives in Estate Planning	Roy Boettger
--------------	--	--------------

Introduction	1
Enduring Power of Attorneys	1
Capacity to execute an enduring power of attorney.....	1
Estate planning authority of attorney.....	1
Testamentary dispositions	2
Gifting of property.....	3
Investment powers.....	7
Accounting to interested persons.....	7
Sale of property	9
Making a will.....	11
Transferring property to attorney	11

Severance of joint ownership	12
Settling an inter vivos trust for a donor.....	13
Ability to erode capital.....	14
Undertaking an estate freeze.....	15
<i>Family Law Act</i> election	16
Change of beneficiary designation.....	17
Dissipation of assets by a donor.....	17
Personal Directives	19
Capacity to execute a personal directive	19
Conflicts between attorneys and agents – who has the trump?.....	19
Alternatives to an Enduring Power of Attorney During Incapacity	20
Issues to Consider when advising an attorney or agent	21

TAB 3	Giving Life to an Estate Plan – After Death	Tracy L. Hanson
--------------	---	-----------------

Introduction	1
Dependants Relief Legislation.....	1
Overview – Dependants Relief Legislation	2
Disclaimers	5
Post Mortem Planning – Disclaimers	7
Income Tax Act	10
Replacement Property Rules.....	10
Corporate Reorganization	12
Interpretations From the Surrogate Court.....	14
Conclusion	18

TAB 4	Wills, Estates and Elder Law	Siân M. Matthews
--------------	------------------------------	------------------

Introduction	2
What Are Trusts Used For?	3
Why Use A Trust?	3
Estate Freezes.....	4
Income Splitting.....	4
Holding Property for Minors	6
Charitable Foundations.....	6
Insurance Trusts.....	8
Business Trusts	8
Royalty Trust	10
Income Trust	10
Probate Fee Avoidance/Confidentiality.....	11
Interprovincial Tax Planning.....	12
Investment Income	13
Sale of Capital Assets	14
RDTOH	14
Asset Protection	15
How Is A Personal Trust Taxed?	16

General 16
 Transfer of Assets to a Trust..... 17
 Distributions from a Trust 18
 Inter Vivos Trusts..... 19
 Testamentary Trusts 20
 Tax Issues for Settlers 20
 Tax Issues for Trustees 22
 Tax Issues for Beneficiaries 22
 Reversionary Trust Rules..... 23
 21 Year Deemed Disposition Rules..... 25
 International Trusts and Their Uses 25
 Section 94 – Non-resident Trusts 25
 Foreign Investment Entity Rules – Section 94.1 26
 International Asset Protection Trusts..... 27
 Minors and Trusts 28
 In-Trust Accounts 28
 104(18) Trusts..... 29
 PowerPoint Presentation – Uses of Trusts

TAB 5	Top Issues In Canada – U.S. Cross Border Estate Planning	Nadja Ibrahim
--------------	--	---------------

Estate Tax Update
 - The Departing Canadian
 - Canadian Living in the U.S.
 - U.S. Estate Tax Exposure for Canadians
 - U.S. Estate Tax Exposure for U.S. Citizens Living in Canada
 - U.S. Family Members in the Canadian Family-Owned Business
 PowerPoint Presentation – Canada-U.S. Cross-Border Planning

TAB 6	Protectors in Domestic Trusts	Phil Renaud, Q.C.
--------------	-------------------------------	-------------------

Introduction 1
 Drafting Testamentary Trusts in Light of Changes to the *Public Trustee Act*..... 1
 Why Would a Testator or Settlor want the Public Trustee to Monitor
 A Minor’s Trust? 5
 Alternatives to Appointing the Public Trustee as Monitor of a Minor’s Trust 6
 Appointment of a Protector 6
 Analysis of the Office of Protector 10
 History 11
 Current Usage of Protectors..... 12
 International Trusts 12
 Domestic Trusts 12
 Liability of a Protector..... 13
 Fiduciary Relationships 13
 Application to Protectors 16

Canada.....	16
United States	17
A Sampling of International Jurisdictions.....	19
Summary of Fiduciary Law.....	23
Drafting Considerations.....	24
Appendix – Sections from the <i>Public Trustee Act</i>	28

TAB 7	Estate & Trust Administration Through the Eyes of a Personal Representative	Bernice Kutney
--------------	---	----------------

PowerPoint Presentation

TAB 8	Conflicts of Laws in Estates	Karen A. Platten
--------------	------------------------------	------------------

Jurisdiction	2
Domicile	5
Movables and Immovables.....	7
Ancillary Matters	9
Conclusion	10
Conflicts of Laws in Canada	

TAB 9	Cross Border Tax and Estate Issues for Alberta/British Columbia	Paul D. Lailey
--------------	---	----------------

Introduction	1
Income Tax Planning	1
Basic Concepts	2
Comparison of British Columbia/Alberta Tax Rates	2
Allocations of Income to the Different Provinces under the <i>Tax Act</i>	2
Salary and Investment Income	2
Business Income.....	2
Determining Tax Residence	3
Individuals.....	3
Trust	4
Planning Opportunities.....	7
Individual Becomes a Resident of Alberta.....	7
An Estate Becomes a Resident of Alberta	8
Use of Alberta Inter Vivos Trusts	8
Establish Trust as part of an Estate Freeze.....	8
Transfer Assets to an Alberta Spousal Trust	9
Transfer of Assets to an Alter Ego or Joint Partner Trust	9
Planning for Business Income of a Partnership.....	9
Planning for Partners Resident in Alberta.....	10
Planning for Partners not Resident in Alberta	10

Challenges to Tax Planning 10
 Residence of Individuals and Trusts..... 10
 British Columbia GAAR and Trust Rules 11
 Probate Fee Planning 12
 Basic Concepts 12
 Comparison of British Columbia/Alberta Probate Fees..... 12
 What is Subject to Probate?..... 12
 Planning Opportunities 13
 Inter Vivos Gifts and Transfers into Joint Tenancy 13
 Multiple Wills..... 13
 Change of Situs of Assets 14
 Inter Vivos Trusts 15
 Issues with Wills 15
 Differences in Wills Legislation 15
 Holograph Wills 16
 Effect of Divorce 16
 Age of Majority 16
 Saunders v. Vautier 16
 Challenges to Wills 16
 British Columbia..... 16
 Differences in Other Documents..... 17
 Powers of Attorney..... 17
 Representing Agreements Etc..... 18

TAB 10	US Files in Canadian Ointment: A Canadian Estate Freeze Where Participants Include US Citizens or Residents	Mark Chartrand
---------------	---	----------------

Reasons for the Canadian Freeze 4
 Participation of Children in Anticipated Corporate Growth..... 4
 Income Splitting..... 4
 Minimizing Income Tax and Probate Fees on a Freezor’s Death..... 4
 Crystallizing the Capital Gains Exemption 5
 Potential Multiple Access to the Capital Gains Exemption 5
 Canadian Law Governing Estate Freezes..... 5
 US Law Governing Estate Freezes..... 6
 A US Freezor in an Otherwise-Canadian Estate Freeze..... 7
 US Gift Tax Applies..... 7
 US Income Tax Treatment of the Common-for-Freeze-Preferred-Share Exchange 8
 US Income Tax Treatment of Freeze Transactions in which a Canadian Holding Company is Established..... 8
 US Income Tax Treatment of the Husband as a Trustee of the Family Trust 9
 A US Beneficiary in an Otherwise-Canadian Estate Freeze 10
 No US Gift Tax..... 11
 Part XII.2 Tax Under the ITA..... 11
 A US Settlor in an Otherwise-Canadian Estate Freeze..... 11

The 21-Year Deemed Disposition Rule: US Income Tax Implication
for the Family Trust 13

US Income Tax Implications for the CCPC..... 15

 The “Controlled Foreign Corporation” Rules 16

 The “Personal Foreign Investment Company” Rules 16

 US Anti-Deferral Rules and Their Application to the CCPC 17

 Use of Unlimited Liability companies to Obviate the
 US Anti-Deferral Rules 18

PowerPoint Presentation – US Files in Canadian Ointment: A Canadian Estate
Freeze Where Participants include US Citizens or Residents

TAB 11	Balancing Life and the Law: The Great Myth of the New Millenium	Allan G.P. Shewchuk, Q.C.
---------------	--	---------------------------

Introduction 1

Work-Life Balance Defined 1

The North American Part 2

The Mythical Part 4

Some Numbers..... 4

Good Advice – Hard to Follow..... 5

Embrace the Imbalance! 6

“Switch and Link” 7

Take A Long Term View 7

Enjoy Your Unique Ride 8

Parting Words..... 9

TAB 12	Balancing Life & Law	Craig Kinsman
---------------	----------------------	---------------

Balancing Life & Law – What does it mean?..... 1

Stress/Depression/Anxiety/Addition: Did you know? 2

Stress: What is it? 3

Effects on Health 4

What to do? 6

Depression: What is it? 7

What to do about it? 8

Anxiety: What is it? 10

What to do about it? 11

Substance Additions:..... 12

A Few Final Notes 13

Endnotes 14

The Addicted Lawyer by Ann D. Foster

Assisting the Addicted Lawyer by Ann D. Foster

TAB 13	Selling the Solo Law Practice	Paul McLaughlin
---------------	-------------------------------	-----------------

What Do I Have to Sell?	2
Hard Assets	2
Financial Assets.....	2
Goodwill.....	4
How Can I Enhance the Value of my Practice?	8
Upgrading the Practice	9
The Transition	10
How Can I Find the Right Buyer?	11
How Do I Negotiate the Sale Price?.....	13
The Theory	13
The Reality	14

TAB 14	The Ethics of Transition – A Guide to Winding Down Practice	Ross McLeod, Q.C.
---------------	---	-------------------

Resources
PowerPoint Presentation – The Ethics of Transition
Setting Up and Running a Law Office – Closing down your law practice
Winding Up A Sole Practice: A Checklist
Winding Up a Firm: A Checklist
Key Considerations When Selling or Closing a Law Practice in Canada
Crating a Law Firm Transition Plan
Preparing to Say Goodbye to the Baby Boomers
Winding Down the Law Practice: Planning for Retirement
Should Auld Lawyers Be Forgot, and Never Brought to Mind?
Retirement as a Career/Life Development Stage: A Renewal Process

TAB 15	Some Proposed Changes to the <i>Dependent Adults Act</i>	Richard H. Bowes
---------------	--	------------------

Introduction	1
Guiding Principles	1
Alternatives to Traditional Substitute Decision-Making Orders	2
Access to funds in an account.....	3
Court-appointed co-decision-maker	4
Investigations and Emergency Interventions.....	5
Investigation by statutory authority	5
Intervention by financial institution	5
Applications to Appoint a Private Trustee.....	6
Simplifying documentation and clarifying the process.....	6
Applications relating to a soon-to-be adult.....	8
Adult’s participation in the process	8
The Trustee	10

Suitability	10
Out-of-province trustees	10
Conflict of interest	11
Trusteeship plan	11
Input from Public Guardian and Public Trustee	12
Powers and Duties of Trustee	13
General powers	13
Investment	14
Gifts	14
Oversight	16
Review of guardianship and trusteeship orders	16
Accounting requirements	16
Trustee Compensation	17

TAB 16	Dependent Adult Litigation – Conflicts of Interest, Current Issues and Related Topics	Lois J. MacLean
---------------	---	-----------------

Introduction	1
Conflicts of Interest	2
The Legislation	2
Principles for Evaluating an Alleged Conflict of Interest	3
While the principles which apply to conflict of interest are very broad, evaluation of each particular concern must be fact specific.....	3
Merely being a family member or potential beneficiary will not Disqualify a person from being appointed as a guardian or trustee.....	11
Are family law principles increasingly being imported into dependent adult cases?.....	16
Should the Court impose conditions where there is an element of conflict of interest?.....	24
“Best Interests” has been broadly interpreted in the Dependent Adult Context.....	25
Consequences for breaching the duty of loyalty.....	26
Notice and Standing	27
Inter-Jurisdictional Issues	29
Conclusion	33

TAB 17	Dependent Adult Matters – A View from the Bench	Mr. Justice Vital O. Ouellette
---------------	---	--------------------------------

Common Errors on Dependent Adult Applications	3
Attachment 1 - Dependent Adults Desk Applications.....	7
Loans to the Trustee or Others.....	9
Compensation for Trustee.....	14
Attachment 2 - Suggested Fee Guidelines – Personal Representative	17
Costs of Application.....	18
Attachment 3	22

Seeking Section 40 Powers..... 23
 Late Filing of Review Applications and Passing of Accounts 25
 Informal Trusteeships and Limited Income Estates 27
 Attachment 4 – Sample – Certificate of Incapability 29
 Attachment 5 – Sample – Undertaking to Administer Benefits Under
 the Old Age Security Act and/or the Canada Pension Plan Act 30
 Attachment 6 – Sample – Financial Administrator Appointment 31`

TAB 18		Dr. K. Shulman
---------------	--	----------------

TAB 19	Challenges to Beneficiary Designation in Recent Case Law	Nancy L. Golding
---------------	--	------------------

Introduction 2
 Types of Assets for Which a Beneficiary Can Be Designated 3
 Creditor Protection 3
 Challenges to Beneficiary Designations..... 5
 Argument that asset falls within the estate 5
 The execution of a subsequent agreement dealing with the asset..... 10
 Changing a beneficiary designation later or including change in a later will 14
 Moving a plan or policy from one institution to another or
 making changes to it..... 16
 Conclusion 18

TAB 20	Privilege and Disclosure in Estate and Dependent Adult Litigation	Dragana Sanchez Glowicki
---------------	---	--------------------------

Introduction 1
 Historical Background 1
 General Rules of Privilege..... 1
 Solicitor Client Privilege 2
 Privilege in Estate and Dependent Adult Litigation..... 5
 Case Study: *Dool Estate* 9
 Case Study: *Harasym Estate* 12
 Case Law 13

TAB 21	Hearsay Evidence in Estate Litigation	Dragana Sanchez Glowicki
---------------	---------------------------------------	--------------------------

Introduction	1
General Principles Relating to Admissibility of Hearsay Evidence	1
Admissibility of Hearsay Evidence in Estate Litigation	3
As to State of Mind (Capacity/Undue Influence)	3
On the Interpretation of the Will.....	3
On the Existence of a Will.....	5
From Interested Parties	5
Lawyer’s Testimony.....	6
Summaries of Recent Cases.....	7

TAB 22	Examples of Evidence Considered in Estate Litigation Cases	Nancy L. Golding
---------------	--	------------------

Introduction	2
General Rule	3
Part Wills or Testamentary Documents.....	3
Handwritten Notes	3
Holographic Will with Another Person’s Notes Written on the Same Paper ...	5
Stationer’s Will – Half Written, Half Typed	6
Extrinsic Evidence	7
Affidavit or Other Evidence Given and Person Dies Before Trial	11
Hearsay – People Hearing the Deceased Say Things Before He Or She Dies, Instructions to a Solicitor	13
Conclusion	15

TAB 23	The Adult Interdependent Relationships Act: Statutory Requirements and Judicial Consideration	Dennis J. Pelkie, Q.C.
---------------	---	------------------------

Introduction	1
The AIRA	1
Adult Interdependent Partners	4
By Operation of Law.....	4
By Agreement	9
Termination of Relationship	10
Retroactive Application of the AIRA.....	11
Claims of a Partner Pursuant to the DRA.....	12
The DRA	12
Notice Pursuant to the <i>Administration of Estates Act</i>	13
Proper Maintenance and Support.....	14
Waiver of Claims.....	18
Conclusion	19

TAB 24	The Ironclad Agreements...Fact or Fiction???	Barbara A. Krahn
---------------	--	------------------

Introduction	1
Agreement Provisions	2
Historical Perspective and Discussion	4
Conclusion	23
Cases Cited	24
Draft Precedent - Pre-Marriage Agreement	25
 <i>Estate Pot Pourri</i>	
Guardianship	1
Minor Children	1
Adults	3
Estate Support Obligations.....	4
Testamentary Agreements, Contractual Wills and Mutual Wills	6

TAB 25	Beneficiary Designations	Kary Hargreaves
---------------	--------------------------	-----------------

Introduction	1
Part I – Commonly Asked Questions and Interesting Cases	1
Is a Beneficiary Designation “Testamentary”?	1
Can a Will be used to change a beneficiary designation?.....	4
Is a General Revocation Clause in a Will Enough to remove an earlier Beneficiary Designation?	4
Is a reference to “All of my Policies” in a Will enough to revoke the beneficiary designations made earlier?	5
What if the Will that contains the designation turns out to be invalid?	6
Does revoking a Will revoke a designation made in the Will?	6
Does saying “I revoke all earlier Wills and Testamentary Dispositions” revoke a beneficiary designation made earlier in a plan?	6
Does making a later will change a designation made in an earlier Will?	7
Does revoking a designation revive an earlier designation?	7
Can a separation agreement be used to change a beneficiary designation?	8
Is a general release of “All Claims” in a separation agreement enough to void an earlier beneficiary designation?.....	8
Is the intention of the parties relevant?	9
Does a Consent Judgment covering matrimonial property revoke a beneficiary designation?.....	11
Is the fact of a Divorce or Separation enough to change a beneficiary designation to a spouse?.....	12
Can a suicide note change a beneficiary designation?	13
Part II – Life Insurance	14
Creditor Concerns.....	14
Creating a Trust	15
Name beneficiary of a life insurance policy in a Will	18
Part III – Registered Retirement Savings Plans and Registered Retirement Income Funds	20

The *Trustee Act* 20
 Who should be the beneficiary of the RRSP or RRIF? 20
 Taxation Issues 21
 The *Income Tax Act* 21
 Second marriage situation 24
 Planning around the timing of the death 25
 Transfer to an infirm child or grandchild 26
 Maintaining beneficiary designations 27
 Beneficiary designations by an attorney or by a trustee 29
 What happens when an investment account is moved? 31
 Donations to charity 34
 Conclusion 35
 Authorities 36

TAB 26	Bibliography
---------------	--------------