

Intestacy, Validity and Revocation and Related Forms

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Wills & Succession Act for Legal Support Staff

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Introduction

The new *Wills and Succession Act* (the “WSA”) is fast upon us. It is time to transition from multiple pieces of (some might say outdated) legislation to a one-stop “solution”. The WSA will consolidate and sweep under the rug the *Wills Act*, *Intestate Succession Act*, *Survivorship Act*, *Dependents Relief Act* and section 47 of the *Trustee Act*. There will also be major changes to the *Matrimonial Property Act*, *Administration of Estates Act* and the *Family Law Act*. The family law issues are complex and important, and will *thankfully* be discussed by another panel member.

This paper will focus on a couple of major areas of change and how they are important to legal support staff:

- **Application of WSA to Wills**
- **Intestacy** - when a person dies without leaving a valid will. What happens to all of their property? How does the WSA determine who will take what property?
- **Validity** - how does one make a valid will; and what are the strict requirements?
- **Revocation** - people sometimes wish to revoke or alter their will, but this can only be done in specific ways.
- **Forms** - I will touch upon some of the new forms required for applications as they relate back to the above topics. Another panel member has taken up the task of presenting on forms in more detail, so I will try not to overlap.

Ultimately, this WSA brings with it changes to the way wills are made, and how estates are administered after death. These changes will definitely impact legal support staff so possessing the knowledge to transition into this new legislative scheme will be essential for both lawyers and legal support staff.

Application of WSA to Wills

After the WSA comes into force, a will properly executed in accordance with the pre-WSA formalities continues to be validly executed. With respect to interpretation, validation and non compliance with formalities, the WSA will apply to all wills regardless of when executed. Therefore, a will which is improperly signed prior to WSA *may* be saved if the testator dies after WSA comes into effect.

Intestacy

An intestate estate is defined in the WSA as “an estate, or any part of an estate, that is not disposed of by a will”.¹ This covers:

¹ *Wills and Succession Act*, S.A. 2010 c. W-12.2, s. 58(1)(a) (not yet in force)

1. the situation where someone dies having not left a will;
and
2. where a person’s will (or part of a will) is invalid,
unintelligible, or voided for some reason.

When a person dies intestate, the basic presumption is that their estate will flow to their family.² Families come in all shapes and sizes, so there is a “formula” for determining which family members shall take part of the estate and in what order. Family members in this formula include “descendants”, meaning “all lineal descendants of an individual through all generations”, in other words - children, grandchildren, etc. Other family members dealt with here are siblings, nieces and nephews, parents, aunts and uncles, grandparents, great-aunts and uncles, and great-grandparents. Also included in this are Adult Interdependent Partners (“AIP’s”) under the *Adult Interdependent Relationships Act*. After it has been determined there are no family members (following up the chain to great-grandparents and then great aunts and uncles) the person’s estate will vest in the Crown under the *Unclaimed Personal and Vested Property Act*.³ It will be very helpful for legal support staff to have an understanding of this to know which family members will need to be contacted when these situations arise.

Formula 1: Spouse or AIP and descendants living

Old - Intestate Succession Act (ISA)	New - Wills and Succession Act
<p>s.3: 2 scenarios:</p> <p>1) Net value of estate less than \$40,000 – spouse/ AIP takes entire estate;</p> <p>2) Net value of estate more than \$40,000 – spouse/AIP takes all if no children; with one child, spouse/AIP takes first \$40,000 and also ½ of residue, other ½ left to the <u>one</u> child. If more than one child, spouse/AIP takes first \$40,000 and 1/3 of residue, the remaining 2/3 divided equally by children.</p>	<p>s. 61: 2 scenarios:</p> <p>1) where either there are no children or all children are the deceased and spouse/AIP’s <u>together</u>, then spouse/AIP takes entire estate.</p> <p>2) descendants of deceased are not all from surviving spouse/AIP (not all theirs together), spouse/AIP takes the <u>greater</u> of 50% of estate or the prescribed amount in regulations (<i>anticipated to be \$150,000</i>), and then the residue divided amongst descendants</p>

Under the WSA, this new “spouse takes all” rule will greatly simplify the situation where previously an otherwise “normal” family (2 parents and kid/kids) would have the involvement of the Public Trustee, division of family assets and great upheaval during an already traumatic time. This provision will allow the surviving spouse/AIP to use the assets received for the benefit of their children.

² “The New *Wills and Succession Act* S.A. 2010 C. 12.2, A Summary of Changes”

³ S.A. 2007, C. U-1.5., s. 33.

Formula 2: Spouse & AIP and descendants living

Old - Intestate Succession Act	New - Wills and Succession Act
<p>s. 3.1</p> <p>(contemplating common law vs. married spouse, not family member AIPs who live with spouse and intestate):</p> <p>Whoever was living with the intestate at the time of death takes the entire spouse/AIP share of the estate, the other takes nothing.</p> <p>*If neither were living with the intestate at time of death, whoever lived with him/her last takes the whole share.</p>	<p>s. 62:</p> <p>Where <u>both</u> a spouse and AIP are living at time of death, they divide the spouse/AIP share equally between them and the residue goes to descendants. If no descendants, spouse and AIP share entire estate.</p> <p>Subject to s. 63 – if a <u>spouse</u> is separated from the intestate at time of death, they are deemed to have predeceased the intestate.</p> <p>*3 conditions proving separation:</p> <ol style="list-style-type: none"> 1) living separate and apart 2 years or more; 2) declaration of irreconcilability under the <i>Family Law Act</i>; OR, 3) separation or matrimonial property agreement or order has been entered into.

For AIP's, a one year separation terminates the partnership under s10 of the *Adult Interdependent Relationships Act*.

Some AIP's can also be dependent family members (if an AIP agreement has been entered into)⁴, so a person may have a current spouse and a family member AIP when they pass away. Section 64 of the WSA provides that an AIP who is entitled to a spouse/AIP share discussed above is not entitled to any further share as a relative or descendant.

Formula 3: No spouse or AIP but descendants living

Old - Intestate Succession Act	New - Wills and Succession Act
<p>s. 4:</p> <p>“issue” shall share in the distribution of the estate <i>per stirpes</i></p>	<p>s. 66:</p> <p>“descendants” shall share in the distribution of the estate <i>per stirpes</i>, meaning among the children of the intestate, and also including any deceased children's surviving descendants (grandchildren).</p> <p>*Not a real change here, just clarifying the meaning of <i>per stirpes</i></p>

⁴ *Adult Interdependent Relationships Act*, S.A. 2002, c. A-4.5, s. 3(2).