Wills & Estates
Winter Term 2024

Lecture Notes – No. 3

III. INTESTATE SUCCESSION

Key Words and Concepts

Estate

Testate Succession

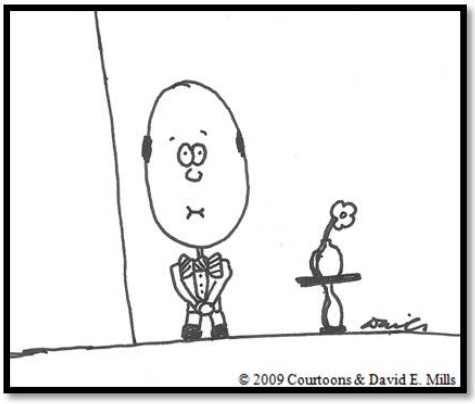
Intestate Succession

Partial Intestacy

Distribution

Preferential Share

Release



A wills and trusts attorney who just got kicked intestates.

A person who dies leaving a Will is said to have died ***testate***. Traditionally, we refer to the deceased in such circumstances as the ***testator*** or ***testatrix***. The Will is the principal type of ***testamentary instrument***.

A person who leaves no Will dies ***intestate***. A person who leaves a Will that that does not provide for complete distribution of his or her estate (e.g there is no clause disposing of the residue of the Estate or that clause is invalid) dies ***partially intestate***. In both cases, Part II of the *Succession Law Reform Act* provides a scheme ('the intestacy rules') for the distribution of the deceased's property.

The intestacy rules themselves owe their genesis to the complexity of medieval English property law. After the Norman conquest of England in 1066 and the evolution of the feudal system, land was passed by the principle of primogeniture. Real property then was *inherited* without reference to the intention of the deceased; it passed according to the type of common law right in the property. Personal property was not the subject of inheritance rules. It passed to a married man's widow and children according to local custom and later by statute. The *Statute of Distribution* was enacted in 1670 and started the evolution of modern succession law including more uniform intestacy rules. This dichotomy between land and personalty was present in English law (in theory at any rate) until the wholesale reforms of the *Law of Property Act 1925*. It has not featured in Canadian law in any real sense since the mid-19th century.

Distribution on Intestacy

Please refer to the Succession Law Reform Act, s. 1 ('spouse').

Please also note a change to the statute in 2021 through the Section 43.1:

Non-application of intestacy rules to separated spouses

43.1 (1) Any provision in this Part that provides for the entitlement of a person's spouse to any of the person's property **does not apply with respect to the spouse if the spouses are separated at the time of the person's death**, as determined under subsection (2). 2021, c. 4, Sched. 9, s. 6.

Same

(2) A spouse is considered to be separated from the deceased person at the time of the person's death for the purposes of subsection (1), if,

(a) before the person's death,

(i) they lived separate and apart as a result of the breakdown of their marriage for a period of three years, if the period immediately preceded the death,

(ii) they entered into an agreement that is a valid separation agreement under Part IV of the Family Law Act,

(iii) a court made an order with respect to their rights and obligations in the settlement of their affairs arising from the breakdown of their marriage, or

(iv) a family arbitration award was made under the Arbitration Act, 1991 with respect to their rights and obligations in the settlement of their affairs arising from the breakdown of their marriage; and

(b) at the time of the person's death, they were living separate and apart as a result of the breakdown of their marriage. 2021, c. 4, Sched. 9, s. 6.

Transition

(3) This section applies in respect of a separation only if an event referred to in clause (2) (a) occurs on or after the day section 6 of Schedule 9 to the Accelerating Access to Justice Act, 2021 came into force, except that in the case of subclause (2) (a) (i), the spouses must also have begun to live separate and apart on or after that day. 2021, c. 4, Sched. 9, s. 6.

Operation of the rules:

1. If the deceased is survived by only his or her married (and non-separated) spouse, the spouse takes the whole of the Estate.

2. If the deceased is survived by married (and non-separated) spouse and issue ('issue includes a descendant conceived before and born alive after the person's death'):

    a. The spouse takes the first $350,000 of the Estate (his or her **'preferential share'** as currently valued by Regulation to the SLRA);

    b. The spouse and children split the remainder of the Estate – equally (if there is only one child) or in shares (1/3 to the spouse, and, 2/3 split equally amongst the deceased's children). If the child dies before a parent, and leaves issue, then his or her children inherit the share of their deceased parent equally;

    c. If the deceased is survived his or her children (and no spouse), then the children split the remainder of the Estate equally. If the child dies before a parent and leaves issue, then his or her children inherit the share of their deceased parent equally.

3. If the deceased is not survived by married spouse or issue, the Estate is distributed as follows (in order of priority):

    a. Surviving parent(s) in equal shares;

    b. Surviving brothers or sisters. If the sibling dies before the deceased, and leaves issue, then his or her children inherit the share of their deceased parent equally;

    c. Surviving nephews and nieces equally;

    d. 'Where a person dies intestate in respect of property and there is no surviving spouse, issue, parent, brother, sister, nephew or niece, the property shall be distributed among the next of kin of equal degree of consanguinity to the intestate equally without representation;' s.47(6) **[Refer to chart of consanguinity / kinship];**

    e. Escheat to the Crown (the ownership interest in the property is extinguished in principle and is considered as 'bona vacantia' and thus reverts to the Crown).

Preferential Share and 'Net Value'

Re Crane Estate
2016 ONSC 291 (Ont. S.C.J.); cb, p.78, fn. 5

D.A. Broad J.:

Issue

10 The facts are not in dispute. **The sole issue for determination is a legal one, namely, whether the payment and discharge of the mortgage on the house from the proceeds of the mortgage insurance policy is to be taken into account in determining the "net value" of the estate for the purpose of determining whether it exceeds the preferential share of the respondent as the deceased's surviving spouse.** If the payment under the mortgage insurance policy is to be taken into account, the net value of the estate would, subject to the payment of taxes, funeral expenses and estate administration expenses, exceed the preferential share of the respondent by some $94,500, which residue would be shared equally by the responding party and each of the two sons by virtue of sections 46 and 47 of the SLRA. If the mortgage insurance policy is not to be taken into account the net value of the estate would be less than the preferential share in the responding party as the surviving spouse who would be entitled to the estate property absolutely pursuant to s. 45(1) of the SLRA.

…

14 In my view the object of s. 45 of the SLRA is to confer limited protection on surviving spouses of persons dying intestate by providing them with entitlement to a preferential share in the assets of the intestate estate after satisfaction of the debts and obligations of the estate. The scheme of the section is to strike a balance between affording protection to surviving spouses on the one hand and recognizing the legitimate interests of the surviving issue of the deceased in the estate on the other. This is done by placing a maximum limit on the preferential share to be given to surviving spouses.

15 For the purpose of determining whether the property of the estate in respect of which there is an intestacy exceeds the preferential share of the surviving spouse, and if so, to what extent, the section introduces the concept of "net value" which backs out of the calculation of the value of the estate property "charges thereon", "debts", "funeral expenses" and "expenses of administration." Subsection 45(4) states that the "net value" is the value of the property "after payment" of these items. The subsection does not explicitly specify how and by whom these items are to be paid to arrive at the "net value".

16 In my view, the purpose of the introduction of the concept of "net value" is to ensure that the true value of the estate, after taking into account the legitimate claims of third parties against the estate assets, is what is considered in determining whether the preferential share of the surviving spouse has been exceeded, and if so, to what extent.

17 Payment of a "charge", a "debt", "funeral expenses" or "expenses of administration" on a voluntary basis by another person should not be taken into account because it would have nothing to do with determining the true value of the property in the intestacy. However **where a third party such as the mortgage insurer in this case is contractually bound to the estate to pay off a charge or debt of the estate on the death of the deceased such payment should, in my view, be taken into account in determining the true value of the estate in intestacy. On the date of the deceased's death the estate became entitled to enforce the obligation of the mortgage insurer to pay off the mortgage and accordingly there is no functional difference between the estate paying the mortgage debt from other resources and the estate submitting a claim to the insurer to pay the mortgage debt, as was done in this case.**

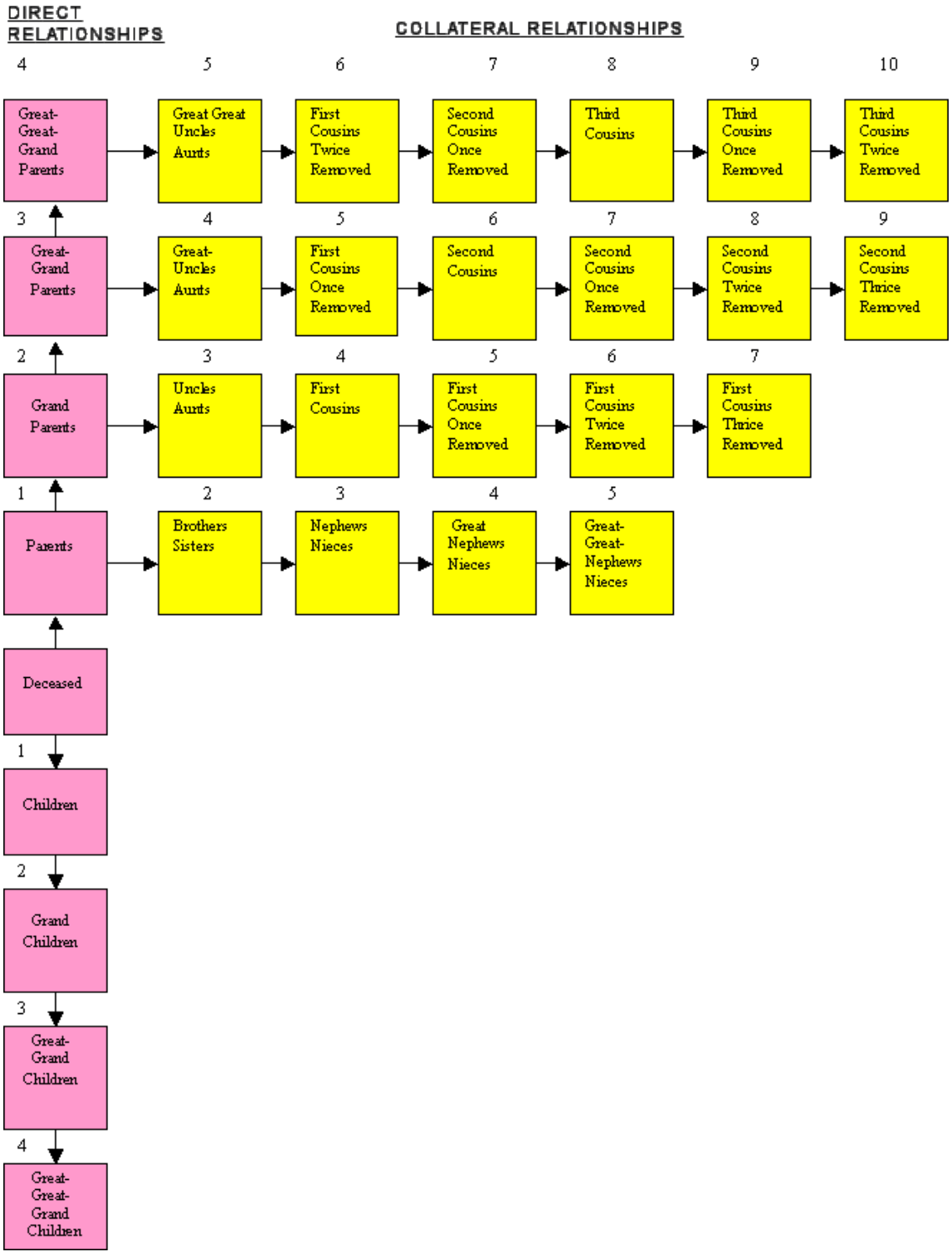
…

Disposition

23 For the reasons set forth above I make the following declarations:

(a) the net value of the estate for the purposes of s. 45 of the SLRA shall be determined without reduction by the amount owing under the Charge/Mortgage of Land registered against the title to the house in favour of the Toronto-Dominion Bank on June 22, 2010 as instrument number WR547614, by virtue of the payment of the outstanding balance of that mortgage by TD Life Insurance Company pursuant to the mortgage insurance policy issued by it to the deceased;

Degrees of Kinship



Contractual Surrender of Rights in an Intestacy

Caron v Rowe
2013 ONSC 863 (Ont. S.C.J.); cb, p.104

A common issue that arises is whether a domestic agreement containing a provision waiving inheritance rights is enforceable. In this case, husband and wife-executed a pre-marital agreement which provided that the husband's house would remain part of his estate. He died two years later. The issue was whether there was a waiver in the separation agreement.

Miller J.:

> [16] There is no dispute that the parties were entitled, as recognized by the Supreme Court of Canada in *Stern v. Stern Estate* [1968] S.C.J. No. 64, to contract themselves out of the benefits of otherwise governing legislation as long as they are clearly aware of their respective rights. In particular, Ms Caron was entitled to contract herself out of the benefits that would otherwise fall to her pursuant to s.44 of the Succession Law Reform Act as long as she was clearly aware of the rights she was relinquishing.
>
> [17] It is the Respondents' position that she did just that by entering into the Pre-Marital Agreement September 2, 2009.
>
> [18] The Pre-Marital Agreement provides at paragraph 4:
>
> > (a) The Home shall forever remain in Paul's personal estate, including, but not limited to, all interest, rents, profits and proceeds of disposition which may accrue from the Home; and,
> >
> > (b) Paul shall have, at all times, the full right and authority, in all respects the same as he would have if not married, to use, enjoy, manage, gift, sell, assign and otherwise convey the Home without interference, approval or other consent from Andrea and the Home shall remain forever free of claim by Andrea with the exception that she shall have the right to live in the Home for a reasonable length of time following the legal separation of Paul and Andrea, if ever, such occupation not to exceed a term of six(6) months.
>
> **[19] 'The Home' is specifically excepted from the description of and rights in respect of "Separate Property" under the Pre-Marital Agreement at paragraphs 2 and 3.**
>
> **[20] Paragraph 9, under the subtitle "Separation or Divorce – Separate Property", provides that "notwithstanding the provisions of the Family Law Act (Ontario), Andrea shall not be entitled to make a claim against Paul in respect of the division of the value of the Home".**
>
> **[21] The only provision in the Pre-Marital Agreement that specifically provides for "the death of Paul" is paragraph 11 dealing with child support for Ms Caron's children.**

[22] It is the Respondents' position that by agreeing, in paragraph 4 of the Pre-Marital Agreement, that "the Home shall forever remain in Paul's personal estate" and that "the Home shall remain forever free of claim by Andrea", Ms Caron contracted out of her right to the Home as part of Paul Rowe's estate under the Succession Law Reform Act.

[23] Ms Caron's position is that she did not specifically waive her rights under the Succession Law Reform Act and therefore is entitled to the whole of the estate including the Home.

[24] Ms Caron's position is supported by the decision of Krever, J. (as he then was) in *Re Saylor* [1983] O.J. No. 3252 (Ont. H.C.J.). In that case the deceased and his wife were separated at the time of death and had entered into a separation agreement "in satisfaction of all claims". Krever, J. found in respect of the wife's claim of entitlement to the estate pursuant to the Succession Law Reform Act, at paragraph 10: "Before it is concluded that a right as substantial as that has been surrendered one must find "direct and cogent" words to that effect." He did not.

…

[27] **In this case I do not find that there are direct and cogent words in the Pre-Marital Agreement to the effect that Ms Caron was relinquishing her rights** as a spouse under the Succession Law Reform Act. I find that the Pre-Marital Agreement provided for events of separation and dissolution of the marriage but, except as specifically provided in paragraph 11, dealing with child support, did not specifically address Ms Caron's rights as a surviving spouse.

[28] I note that Paul Rowe had more than two years following the marriage to specifically provide for the disposition of the Home on his death and did not do so.

[29] I have considered that Ms Caron agreed in the Pre-Marital Agreement, that "the Home shall forever remain in Paul's personal estate" and that "the Home shall remain forever free of claim by Andrea", but it is not clear that it was agreed between the parties that Ms Caron should have no claim to the Home in the event of Paul Rowe's death.

[30] It is not clear that Ms Caron, notwithstanding that she had independent legal advice before signing the Pre-Marital Agreement, even contemplated that the Agreement had any bearing on any claim to Paul Rowe's estate except in respect of child support for her children.

[31] While I accept that Ms Caron had a right to contract out of her entitlement under the Succession Law Reform Act, I am not satisfied that she did so.

[32] Given these findings, it was not necessary that I consider the evidence in respect of Paul Rowe's intentions at the time he signed the will in May 2009 or at the time he entered into the Pre-Marital Agreement. Paul Rowe's intentions at those times are irrelevant unless they were

> communicated to Andrea Caron and agreed to by her with full knowledge that she would be relinquishing her rights pursuant to the Succession Law Reform Act. There is no evidence of that.

See also **Brant v. Brant (1997), 16 E.T.R. (2d) 134 (Ont. Gen. Div.),** per Lofchik J at para. 10:

> The decision in *Saylor* has been subsequently applied by the courts in such cases as *Re: Cairns Estate: Cairns vs. Cairns* (1990), 25 R.F.L. (3d) 373, H.C. and *Frye vs. Frye* (1992), 41 R.F.L. (3d) 145 (Gen. Div). In the case of *Re; Dyer vs. Dyer* (1984), 18 E.T.R., 44, (Ont. Surr. Ct.), a case dealing with the right of a wife to claim against a deceased husband's estate for support in spite of having entered into a separation agreement, reference is made to the *Saylor* case by Scott, J., holding that section 44 (now section 45) of The *Succession Law Reform Act* is a mandatory section, thereby reinforcing the argument that **there must be clear and cogent language by which a wife releases her statutory entitlement to the preferential share in her husband's estate before she will be held to have done so**.

Advancement

Whether through a Will or the intestacy rules, the law seeks to implement the relevant distribution scheme (i.e. the one created by the testator or testatrix, or the statutory scheme set out in default). There are rules to prevent a child of the testator or testatrix receiving more than the share of the Estate that was intended; thus, substantial gifts received inter vivos can be taken into account in determining that child's entitlement.

> 'Hotchpot' [clause]: a legal term of art referring to a rule or clause that operates to bring inter vivos gifts into the Estate to determine the proper quantum of a legatee's entitlement. In other words, a claw-back of gifts made by the deceased during his or her lifetime that were intended to be counted towards the donee's inheritance.
>
> 'Advancement': an equitable presumption to the same effect

The *Estates Administration Act*, s.25 brings the principle into the intestacy rules but qualifies it:

> 25. (1) **If a child of an intestate** has been advanced by the intestate by settlement or portion of real or personal property or both, **and the same has been so expressed by the intestate in writing or so acknowledged in writing by the child**, the value thereof shall be reckoned, for the purposes of this section only, as part of the real and personal property of the intestate to be distributed under this Act, and if the advancement is equal to or greater than the amount of the share that the child would be entitled to receive of the real and personal property of the intestate, as so reckoned, then the child and his or her descendants shall be excluded from any share in the real and personal property of the intestate.

If advancement is not equal

(2) If the advancement is less than the share, the child and his or her descendants are entitled to so much only of the real and personal property as is sufficient to make all the shares of the children in the real and personal property and advancement to be equal, as nearly as can be estimated.

Value of property advanced, how estimated
(3) The value of any real or personal property so advanced shall be deemed to be that, if any, which has been acknowledged by the child by an instrument in writing, otherwise the value shall be estimated according to the value of the property when given.

Education, etc., not advancement
(4) **The maintaining or educating of, or the giving of money to, a child without a view to a portion or settlement in life shall not be deemed an advancement within the meaning of this Act.**