ACTION TO BE CONSIDERED	NOTES

INTRODUCTION

Purpose and currency of checklist. This checklist is designed to be used with the CLIENT IDENTIFICATION AND VERIFICATION PROCEDURE (A-1), CLIENT FILE OPENING AND CLOSING (A-2), WILL PROCEDURE (G-1), and WILL-MAKER INTERVIEW (G-2) checklists. It should only be used as a guide. The provisions must be considered in relation to the particular facts at hand and augmented and revised as appropriate. This checklist is current to September 1, 2021.

New developments:

- **COVID-19 pandemic.** The COVID-19 pandemic continues to have significant impacts on society, including families in British Columbia and the practice of wills and estates: inability to attend, or aversion to, in-person meetings; possible delays at government agencies and public registries; border closures; unpredictable economic circumstances, etc. Counsel should keep apprised of developments related to COVID-19 (and response measures) that may affect wills and estates practice.
- **Virtual witnessing and electronic wills.** On August 14, 2020, the *Wills, Estates and Succession Amendment Act*, SBC 2020, c. 12 added provisions to the *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13 ("*WESA*") to allow witnessing of wills by videoconference (s. 35.2) (provisions in force retroactively to March 18, 2020) and to validate electronic wills (provisions not yet in force at the time of publication).

Of note:

- **Aboriginal law.** The *Indian Act*, R.S.C. 1985, c. I-5, applies to wills made by "Indians" (as defined in the *Indian Act*) who ordinarily reside on reserve land and to their estate. The Minister of Indigenous Services is given broad powers over testamentary matters and causes (*Indian Act*, ss. 42 to 50). Sections 45 and 46 of the *Indian Act* govern the formalities of execution of a will. Also see the Indian Estates Regulations, C.R.C., c. 954, s. 15; the Minister may accept a document as a will even if it does not comply with provincial laws of general application. It is good practice, however, to ensure that a will or testamentary document governed by the *Indian Act* is executed in the presence of two witnesses, with those witnesses signing after the will-maker in the will-maker's presence.

  A will governed by the *Indian Act* will is of no legal effect unless the Minister accepts it, and property of a deceased Indian cannot be disposed of without approval (*Indian Act*, s. 45(2) and (3)). The Minister also has the power to void a will, in whole or in part, under certain circumstances (*Indian Act*, s. 46(1)(a) to (f)). If part or all of a will is declared void, intestacy provisions in the *Indian Act* will apply (*Indian Act*, ss. 46(2) and 48). Should an executor named in a will be deceased, refuse to act, or be incapable of acting, a new executor can be appointed by the Minister (*Indian Act*, s. 43; Indian Estates Regulations, s. 11). A provincial probate court may be permitted to exercise jurisdiction if the Minister consents in writing (*Indian Act*, ss. 44 and 45(3)). The Minister is also vested with exclusive jurisdiction over the estates of Indigenous persons with mental and/or physical incapacity. (*Indian Act*, s. 51).

ACTION TO BE CONSIDERED	NOTES

On December 16, 2014, ss. 12 to 52 of the *Family Homes on Reserves and Matrimonial Interests or Rights Act*, S.C. 2013, c. 20, came into force; ss. 1 to 11 and 53 came into force on December 16, 2013. This federal legislation applies to married and common-law spouses living on reserve land where at least one spouse is a First Nations member or an Indian. Sections 13 to 52 apply to First Nations who have not enacted their own matrimonial real property laws. Sections 14 and 34 to 40 pertain to the consequences of the death of a spouse or common-law partner.

Other statutory restrictions may apply to estates governed by the *Indian Act*. For example, a person who is "not entitled to reside on a reserve" may not acquire rights to possess or occupy land on that reserve under a will or on intestacy (*Indian Act*, s. 50), and no person may acquire certain cultural artifacts situated on a reserve without written consent of the Minister (*Indian Act*, s. 91). As some Indian bands or First Nation entities have entered into treaties (e.g., the *Nisga'a Final Agreement Act*, S.B.C. 1999, c. 2, and the *Tsawwassen First Nation Final Agreement Act*, S.B.C. 2007, c. 39) that may have governance, property, and other related implications, consider the status of an Indian instructing on a will and that of the band or First Nation in which a deceased was a member.

WESA, Part 2, Division 3 allows for the intervention of the Nisga'a Lisims Government and treaty first nations where the will of a Nisga'a or treaty first nation citizen disposes of cultural property.

Further information on Aboriginal law issues is available on the "Aboriginal Law" page in the "Practice Areas" section of the Continuing Legal Education Society of British Columbia website (www.cle.bc.ca) and in other CLEBC publications. If acting with respect to an Indian will or estate, consider seeking advice from a lawyer who has experience in Aboriginal law matters

- **Additional resources.** See also annual editions of *Annotated Estates Practice* (CLEBC), and *Wills and Personal Planning Precedents: An Annotated Guide* (CLEBC, 1998–); *British Columbia Estate Planning and Wealth Preservation* (CLEBC, 2002–); *British Columbia Probate and Estate Administration Practice Manual*, 2nd ed. (CLEBC, 2007–); *Incapacity Planning: The New Law* (CLEBC, 2011), all available at www.cle.bc.ca; and *Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide* (British Columbia Law Institute, 2012), available at www.bcli.org and on the Law Society website at www.lawsociety.bc.ca/Website/media/Shared/docs/practice/resources/guide-wills.pdf.

ACTION TO BE CONSIDERED	NOTES
• **Law Society of British Columbia.** For changes to the Law Society Rules and other Law Society updates and issues "of note", see LAW SOCIETY NOTABLE UPDATES LIST (A-3). The Law Society's resources related to procedures generally and issues arising from COVID-19 can be viewed at www.lawsociety.bc.ca/about-us/covid-recovery/.	

CONTENTS

CHECKLIST

1. PRELIMINARY MATTERS

1.1 Complete the CLIENT FILE OPENING AND CLOSING (A-2), WILL PROCEDURE (G-1), and WILL-MAKER INTERVIEW (G-2) checklists.

ACTION TO BE CONSIDERED	NOTES
1.2 Confirm compliance with Law Society Rules 3-98 to 3-110 for client identification and verification and source of money for financial transactions and complete the CLIENT IDENTIFICATION AND VERIFICATION PROCEDURE (A-1) checklist. Consider periodic monitoring requirements (Law Society Rule 3-110).	
1.3 Joint retainer. Review BC Code rules 3.4-5 to 3.4-9. Note the requirements in rule 3.4-5, commentary [2] and [3] regarding specific advice the lawyer must give to clients when receiving will instructions from spouses or partners, the consent that should be obtained, and what to do if, subsequently, one spouse communicates new instructions.	
1.4 Conflicts—clauses that should not appear in the will. Review *BC Code* rules 3.4-37 to 3.4-39. You must not include a clause directing the executor to retain the lawyer's services for estate administration (see rule 3.4-37). The will-maker may want to communicate in the will or by a separate document the will-maker's wish that the executor retain a particular lawyer or firm to act for the estate, although such a statement by the will-maker would be advisory only (Ethics Committee April 4, 2013). Do not include a clause giving the lawyer or an associate a gift or benefit, unless the client is a family member (see rule 3.4-38). Also consider rule 3.4-26.1 to 26.2. "Family member" is not defined in the *BC Code*, but the BC Lawyers' Compulsory Professional Liability Indemnification Policy policy defines "family member" as a spouse, children, parents, or siblings. The lawyer must not accept a gift, other than a nominal gift, from the client unless the client has received independent legal advice (see rule 3.4-39). The placing of a charging clause at the client's request does not constitute a gift or benefit within the meaning of rule 3.4-38. Such a clause is simply an authorization for the lawyer to charge a fee for performing executor services in the future and is subject to the same ethical constraints as any other fee.	
1.5 Declaration of testamentary intention.	
2. REVOCATION	
2.1 Declaration that all other wills be revoked. Consider restricting the scope of the general revocation clause so that it does not extend to beneficiary designations for RRSPs and insurance policies owned by the will-maker unless they are specifically dealt with in the will. In considering this issue, note that *Wills, Estates and Succession Act*, S.B.C 2009, c.13 ("*WESA*"), s. 97 provides that a revocation of a will revokes a designation in the will, and a revocation in a will of a designation revokes a designation not in a will only if the revocation in the will relates "generally or specifically" to the designation.	
2.2 If the will-maker has multiple wills in different jurisdictions, ensure that a revocation clause in any one will does not inadvertently revoke other existing wills.	
3. WILL-MAKER'S DECLARATIONS	
3.1 Declaration that the will is being made in contemplation of marriage. Under *WESA*, marriage does not revoke a will, but it may still be prudent to mention an anticipated change in circumstances.	

ACTION TO BE CONSIDERED	NOTES
3.2 Declaration that the will is being made in contemplation of divorce or separation. If the will-maker wants a gift to spouse or appointment of spouse as trustee to survive the separation, the will should clearly state this intention to overcome the presumption in *WESA*, s. 56.	
3.3 Declaration that the will disposes of only assets in a particular jurisdiction.	
3.4 Special clause declaring that the will-maker has a will disposing of property in another jurisdiction. Ensure that the revocation clause does not revoke those wills.	
3.5 Statement of the will-maker's domicile or residence, if in doubt.	
3.6 Other declarations as required (e.g., insurance designation).	
4. EXECUTORS AND TRUSTEES	
4.1 Primary appointment.	
.1 Appointment.	
.2 Name(s) and address(es).	
.3 Occupation(s) or relationship(s).	
4.2 Substitute executors and trustees.	
.1 Event requiring substitution (e.g., predecease or refusal/inability of the original trustee to act or to continue to act).	
.2 Name(s) and address(es).	
.3 Occupation(s) or relationship(s).	
.4 Consider granting the power for the substitute executor(s) to appoint a replacement executor in their own will.	
4.3 Consider the use of a "majority rules" provision in a will with multiple executors/trustees. Beware of circumstances in which it would not be appropriate. Consider whether an independent trustee must be a member of the majority.	
4.4 Define the term "trustee" to include executor and trustee, original or substituted, if both the executor and trustee roles will be filled by the same person or persons.	
4.5 Consider a charging clause if the executor is a lawyer, accountant, or other professional.	
4.6 Executors' compensation.	
.1 Consider whether a gift in the will is meant to be in lieu of executor's compensation.	
.2 If any institutional executor is appointed, refer specifically to a governing fee agreement.	
5. GUARDIANS	
5.1 Event triggering appointment of guardians (e.g., death of surviving spouse or former spouse sharing custody).	

ACTION TO BE CONSIDERED	NOTES
5.2 Appointment. Avoid appointing married couples as guardians; choose the party with the closest relationship to the will-maker to avoid problems if the marriage breaks down. Consider provisions affecting the appointment of a guardian in *Family Law Act*, S.B.C. 2011, c. 25, s. 39 and Part 4, Division 3.	
.1 Name(s) and address(es) of guardian(s).	
.2 Relationship(s) or occupation(s).	
.3 Full names of children.	
5.3 Gifts to guardians in addition to or in lieu of guardian's compensation. See *Trustee Act*, R.S.B.C. 1996, c. 464, s. 88, in this regard.	
6. FUNERAL WISHES	
6.1 Advise the client that the wishes are binding on the executor unless they are unreasonable, impracticable, or cause hardship (*Cremation, Interment and Funeral Services Act*, S.B.C. 2004, c. 35, s. 6). Recommend that the client advise the family of these wishes, as the funeral usually precedes reading of the will.	
6.2 Burial or cremation.	
6.3 Organ donation (see item 6.2.3 of the WILL-MAKER INTERVIEW (G-2) checklist).	
6.4 Wishes for a funeral or memorial service (or none), party, wake, memorial bench or similar, and powers to trustee to pay all such expenses from estate.	
6.5 Consider putting these wishes into a memorandum of the will-maker's wishes. However if the will-maker's wishes would involve exceptional expenses, such as an extravagant party or paying for travel for out-of-town family members, the powers to pay such expenses should be included in the will.	
7. BEQUEST OF GENERAL ESTATE	
7.1 To trustee(s).	
7.2 Upon stated trusts (see item 8 in this checklist).	
8. TRUSTS	
8.1 Administrative trusts. There are preliminary matters to which the executors are required to attend:	
.1 Call in the property of the estate and convert it into money. Consider including a power to postpone the conversion.	
.2 Payment of debts, taxes, and testamentary expenses. If there are additional wills for property in another jurisdiction, consider which estate should (or has the ability to) pay taxes arising on the deemed disposition of particular assets.	
8.2 Bequests of specific articles. Consider the use of a memorandum made before the will, incorporated by reference into the will, if there is a long list of specific bequests.	

ACTION TO BE CONSIDERED	NOTES
.1 Describe articles in enough detail to identify them. Consider the impact of ademption (i.e., identify a substitute gift in case a specific article contemplated is disposed of prior to the will-maker's death).	
.2 Identify beneficiary; name(s), address(es) and relationship.	
.3 Consider a provision for packing, insurance, and freight charges. Does the will-maker wish the estate or the beneficiary to pay?	
.4 Consider the effect of *WESA*, s. 47, if any personal property is encumbered by a purchase money security interest (e.g., automobile loans). Specify in the will whether the liabilities are to be paid by the estate or assumed by the beneficiary.	
8.3 Disposition of personal effects.	
.1 Bequest to spouse.	
.2 Bequest to children or other relatives.	
(a) As they may agree amongst themselves (or failing such agreement, as the executor shall determine).	
(b) Consider use of a non-binding statement of wishes to guide the children and the executor.	
.3 Bequest to executor or another person together with a general power of appointment, with or without a non-binding list of wishes.	
8.4 Cash legacies.	
.1 Individuals. Carefully identify the beneficiaries, including names and relationships. Consider the potential adverse impact of an outright gift to any disabled beneficiary (see item 13.10 in this checklist).	
.2 Charities. Ensure that the charity is specifically identified, including its branch, if the will-maker desires. Consider naming an alternate beneficiary in the case of the non-existence of the designated charity at the date of the will-maker's death, or including a cy-près clause.	
8.5 Provision for spouse.	
.1 Survivorship clause.	
.2 Gift of all or a portion of the estate.	
.3 Qualifying spousal trust	
(a) Define the property included.	
(b) Income to spouse.	
(c) Designate remainder beneficiaries.	
(d) Power of encroachment, as applicable.	

ACTION TO BE CONSIDERED	NOTES
(e) If tax deferral is desired, ensure that the requirements of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) for a testamentary spouse trust are met, including the requirement that the spouse or common-law partner be entitled to *all* trust income during their life and that *only* the spouse or common-law partner is entitled to receive or otherwise obtain the use of income or capital during their life (see *Income Tax Act*, s. 70(6)(b)). Further, vesting of property in the spouse trust must occur immediately "as a consequence of death" and should not be stated to be contingent on the spouse surviving for a five-day or longer period.	
8.6 Disposition of the family residence.	
.1 Gift outright to spouse or adult children.	
.2 Occupancy trust for spouse or children.	
(a) Payment of taxes, insurance and other expenses. Is the estate or are the beneficiaries responsible? If the estate is responsible, specify the source of the funds.	
(b) Maintenance. Is it the responsibility of the estate or the beneficiaries? Who pays for capital repairs?	
(c) Income in lieu of occupation.	
(d) Right of trustee to sell the home and buy another.	
(e) Events which might end the trust, such as death, beneficiaries reaching a certain age, or ceasing to reside in the property for a specified period. Specify what happens to property or proceeds of sale when the trust ends.	
(f) Restricting use to the personal use of the beneficiaries.	
8.7 Provision for children.	
.1 Income or fully discretionary trust to provide for children until majority or other specified age:	
(a) Power to encroach and to pay to guardian of a minor.	
(b) Circumstances in which power should be exercised. Consider using a letter of wishes to address will-maker's non-binding preferences regarding trustee's exercise of discretion.	
.2 Provision for disabled children. Consider a qualified disability trust or other fully discretionary trust for the child's lifetime. See item 13.10 in this checklist.	
.3 Bequest of property (share):	
(a) On majority.	
(b) At specified age.	
.4 Gift over on lapse or on failure of the beneficiary to survive to a specified age.	
8.8 Residue.	
.1 To spouse.	
.2 To children.	
.3 Effect of predecease.	

ACTION TO BE CONSIDERED	NOTES
.4 Gift over on lapse.	
9. TRUSTEE'S POWERS	
The will-maker grants the trustee powers to enable the trustee to deal with the assets in the estate and to carry out the trusts in the will.	
9.1 Investment powers (see the *Trustee Act*, ss. 15.1 to 15.6 and 17.1, which require a "prudent investor" standard).	
9.2 General powers. *WESA*, s. 142, gives the executor a broad general authority to deal with estate assets, subject to a contrary intention in the will, but this provision does not extend to a trustee. Include a similar general power in the will, extending to the "Trustee" in their capacity both as executor and trustee.	
9.3 Specific enabling powers to:	
.1 Make payment to parent, or to guardian in the case of an infant.	
.2 Delegate trustee duties (including investment powers).	
.3 Repair and improve property.	
.4 Insure the estate property.	
.5 Grant and deal with leases and options.	
.6 Compromise or settle claims against the estate.	
.7 Borrow on behalf of the estate, and give security.	
.8 Employ professionals or tradespeople.	
.9 Subdivide land.	
.10 Exercise all the rights and powers of an individual with respect to investments.	
.11 Allocate tax benefits amongst beneficiaries, and make all elections and designations.	
.12 Postpone distribution.	
.13 Carry on business.	
.14 Same powers as the will-maker with respect to corporation, including power to reorganize.	
.15 Loan trust property, with or without security.	
.16 Distribute *in specie* (including appreciated securities in satisfaction of a charitable legacy).	
.17 Sell real estate.	
.18 Purchase.	
.19 Invest in real estate, even if it is not income-producing, or other non-income–producing property for a disabled beneficiary.	
9.4 Special powers.	
.1 Purchase property personally from the estate.	

ACTION TO BE CONSIDERED	NOTES

10. DESIGNATION OF BENEFICIARIES

10.1 Insurance (consider the effect of *Re Carlisle*, 2007 SKQB 435, which concerns designating an insurance trustee as beneficiary where the insurance trustee is also named as executor of the will).

10.2 RRSPs, RRIFs, TFSAs, or employee benefit plans. (Consider the tax implications of death of the annuitant. See *WESA*, Part 5.) Note that plans administered by insurance companies continue to be governed by the *Insurance Act*, S.B.C. 2012, c. 1.

10.3 Pension. (Consider the impact of the *Pension Benefits Standards Act*, S.B.C. 2012, c. 30, which applies to survivor rights and transferability of pension assets.)

10.4 Confirm that proceeds pass to designated beneficiaries with no resulting trusts.

11. ATTESTATION CLAUSE

11.1 Boilerplate clause indicating that all steps required by *WESA*, s. 37 have been met.

11.2 Consider special clauses in attestation in unusual circumstances, e.g., where the will-maker does not speak English, is too weak to sign, or is blind.

12. MISCELLANEOUS DRAFTING POINTS

12.1 Wills are drafted in the first person.

12.2 Consistency in terminology is important for interpretation. Consider use of definitions (e.g., define "discretion").

12.3 Care in use of tense is important. The will-maker in appointing executors and trustees, and in making gifts, is speaking from the date of the will (i.e., the present tense). Instructions to executors and trustees should be in the future tense.

13. SOME COMMON TRAPS TO AVOID

13.1 Rule in *Saunders v. Vautier* (1841), 49 E.R. 282 (Ch. Div.). Where there is an absolute vested gift made payable at a future event (usually the beneficiary reaching a stipulated age), with directions to the trustees to retain possession and accumulate the income or pay it to the beneficiary, the beneficiary is entitled to have the property transferred to him or her when they reach the age of majority, unless a gift over is provided.

13.2 Rule against perpetuities, as modified by the *Perpetuity Act*, R.S.B.C. 1996, c. 358. For long-term trusts, consider adopting the 80-year vesting period referred to in s. 7.

13.3 Do not use "issue" as a synonym for "children" because its *prima facie* meaning is "descendants of any degree". This may mean that a provision that the draftsman believed to be valid contravenes the rule against perpetuities; it can also cause administrative and interpretation difficulties.

13.4 Avoid or use carefully the terms "survive" and "survivors", since they may give rise to problems of construction.

13.5 If a class gift is created, clearly identify the time at which membership in the class is to be determined (e.g., the will-maker's death).

ACTION TO BE CONSIDERED	NOTES
13.6 Protect a gift from "lapsing" by identifying alternate beneficiaries to prevent a lapsed gift from unintentionally passing to the intended beneficiary's descendants. (Note *WESA*, s. 46, and also consider the effect of survivorship provisions in *WESA*, ss. 5, 6, 9, and 10.)	
13.7 Clearly identify the assets of any specific bequests and consider the consequences of ademption if the will-maker sells or otherwise disposes of the asset during their lifetime.	
13.8 Avoid any potential for double payments of cash legacies under mirror image wills that provide for identical cash legacies (typically, complementary spouse wills, each with a survivorship clause). Include a "no doubling" clause.	
13.9 Ensure that the terms "per stirpes" and "per capita" are used correctly if at all. Consider using other words, or defining the terms. Avoid the phrase "in equal shares per stirpes" which is self-contradictory.	

ACTION TO BE CONSIDERED	NOTES
13.10 If the will-maker intends to make an outright gift to a disabled beneficiary, consider whether the beneficiary would be capable of receiving and managing the gift, and whether the gift would diminish any government benefits or require significant expense to rearrange the gift in order to preserve benefits. Consider the benefits of a discretionary trust or a "qualified disability trust" (*Income Tax Act*, s. 122(3)).	