

# CONTENTS

<i>Preface</i> .....	v
<i>Summary of Chapters</i> .....	vii
<i>Table of Contents</i> .....	ix
<i>Table of Cases</i> .....	xxxv
<i>Table of Statutes</i> .....	cxxxv

## PART I INTRODUCTION

<b>CHAPTER 1 HISTORY AND TERMINOLOGY</b> .....	3
<b>1.1 OUTLINE OF THE HISTORY OF SUCCESSION</b> .....	3
<b>1.1.1 Introduction</b> .....	3
<b>1.1.2 The English Background</b> .....	3
(a) Personal Property .....	3
(b) Distribution of Personal Property .....	5
(c) Succession to Land.....	6
(d) Wills of Real Property.....	6
(e) Probate and Administration .....	7
<b>1.1.3 The Law of Succession in Canada</b> .....	8
<b>1.1.4 The Law of Succession in Ontario</b> .....	9
(a) Early History .....	9
(b) Succession Law Reform.....	13
(c) Court Reform.....	15
(d) Estate Administration Law Reform .....	15
<b>1.2 CONSTITUTIONAL ISSUES IN SUCCESSION</b> .....	16
Further Reading.....	19
<b>1.3 SUCCESSION UNDER THE <i>INDIAN ACT</i></b> .....	19
Further Reading.....	21
<b>1.4 TERMINOLOGY</b> .....	21

## PART II ESTATE ADMINISTRATION

<b>CHAPTER 2 PROBATE AND ADMINISTRATION</b> .....	27
<b>2.1 INTRODUCTORY NOTE</b> .....	27
<b>2.2 THE ROLE OF THE COURTS</b> .....	28
<b>2.3 PROBATE JURISDICTION OF THE COURT</b> .....	32
<b>2.4 OBTAINING GRANTS</b> .....	33
<b>2.4.1 Purpose of Grants</b> .....	33
<b>2.4.2 Time Lapse</b> .....	34
<b>2.4.3 Types of Executors and Administrators [Estate Trustees]</b> .....	36
(a) Executor [Estate Trustee with a Will] .....	36
(b) Administrator [Estate Trustee without a Will] .....	37
(c) Administrator with Will Annexed [Estate Trustee with a Will].....	39
(d) Administrator <i>de Bonis non Administratis</i> [Succeeding Estate Trustee without a Will].....	39

TABLE OF CONTENTS

(e) Administrator <i>de Bonis non Administratis</i> with Will Annexed [Succeeding Estate Trustee with a Will].....	39
(f) Administrator Appointed Pending an Action [Estate Trustee During Litigation] .....	40
(g) Litigation Administrator.....	40
(h) Executor <i>de Son Tort</i> .....	41
<b>2.4.4 Special Types of Grants</b> .....	41
(a) Introduction .....	41
(b) <i>Cessate</i> Grants .....	41
(c) Double Probate [Succeeding Estate Trustee with a Will] .....	41
(d) Grants Save and Except .....	41
(e) <i>Caetorum</i> Grants .....	42
(f) Grants <i>ad Colligenda Bona</i> .....	42
(g) Grants of Temporary Administration .....	42
(h) Grants Pursuant to Powers of Attorney.....	42
(i) Grants During Minority .....	42
(j) Grants while a Person is under a Disability .....	43
<b>2.4.5 Ancillary Grants and Resealing</b> .....	43
(a) Ancillary Grants [Certificate of an Ancillary Appointment of Estate Trustee with a Will] .....	43
(b) Resealing [Confirmation by Resealing of Appointment of Estate Trustee with or without a Will].....	44
<b>2.4.6 Procedure</b> .....	44
(a) Introduction .....	44
(b) Application for Letters of Administration [Application for Certificate of Appointment of Estate Trustee without a Will] .....	44
(c) Application for Letters Probate [Application for Certificate of Appointment of Estate Trustee with a Will].....	44
(i) <i>Introduction</i> .....	44
(ii) <i>Common Form Probate [Non-Contentious Proceeding:         Application for Certificate of Appointment of Estate Trustee         with a Will]</i> .....	45
(iii) <i>Solemn Form Probate [Formal Proof of Testamentary         Instrument (Contentious Proceeding)]</i> .....	45
(d) Contentious Proceedings.....	46
(e) Method of Proceeding .....	46
(i) <i>Generally</i> .....	46
(ii) <i>Caveat [Notice of Objection]</i> .....	47
(iii) <i>Intervention [Request for Notice]</i> .....	47
(iv) <i>Citation [Order for Assistance]</i> .....	47
(f) Summary Judgment.....	47
Further Reading.....	48
<b>2.5 COSTS</b> .....	48
Further Reading.....	51
<b>2.6 CONTESTATION OF CLAIMS</b> .....	52
Further Reading.....	53
<b>2.7 PASSING OF ACCOUNTS</b> .....	53
<b>2.7.1 Generally</b> .....	53
<b>2.7.2 Compensation of Personal Representatives</b> .....	54
Further Reading.....	57

TABLE OF CONTENTS

2.7.3 Solicitors' Fees .....57

**2.8 DUTIES OF PERSONAL REPRESENTATIVES**..... 58

2.8.1 Generally.....58

2.8.2 Actions by or against Estate.....58

2.8.3 Disposition of the Deceased's Body..... 58

    Further Reading.....59

2.8.4 Income Tax .....59

    Further Reading.....60

**2.9 PAYMENT OF DEBTS** .....60

**2.10 SALE OF REAL PROPERTY** .....61

2.10.1 Generally .....61

2.10.2 Powers of Sale.....62

    (a) Introduction .....62

    (b) Testamentary Powers of Sale.....62

    (c) Statutory Powers of Sale and Conveyance .....63

        (i) Introduction .....63

        (ii) Sales to Pay Debts.....63

        (iii) Sales to Distribute the Proceeds among the Beneficiaries .....64

        (iv) Division in Specie among the Beneficiaries .....65

2.10.3 Sale by Beneficiaries .....65

2.10.4 Sale of Minors' Lands.....66

**2.11 DISTRIBUTION OF ESTATE**.....66

    Further Reading.....68

**PART III**  
**INTESTATE SUCCESSION**

**CHAPTER 3 INTESTATE SUCCESSION**.....71

**3.1 INTRODUCTION**.....71

**3.2 DEVOLUTION OF PROPERTY**.....72

*Estates Administration Act*, R.S.O. 1990, c. E.22, s. 2 .....72

    Comparable Legislation.....72

    Notes and Questions .....73

**3.3 DISTRIBUTION ON INTESTACY** .....73

3.3.1 Introduction.....73

    Notes and Questions .....74

3.3.2 Spouses and Partners .....75

    (a) Spouse.....75

        (i) Definition of "Spouse" .....75

*Succession Law Reform Act*, R.S.O. 1990, c. S. 26, s. 1(1), (2).....75

        Comparable Legislation.....75

        (ii) Spouse but no Descendants .....75

*Succession Law Reform Act*, R.S.O. 1990, c. S. 26, s. 44 .....75

        Comparable Legislation.....76

        Notes and Questions .....76

        (iii) Spouse and Descendants.....76

        (A) Preferential Share .....76

*Succession Law Reform Act*, R.S.O. 1990, c. S. 26, s. 45 .....76

        Comparable Legislation.....77

TABLE OF CONTENTS

Notes and Questions .....	77
(B) Distributive Share .....	77
<i>Succession Law Reform Act</i> , R.S.O. 1990, c. S. 26, s. 46 .....	78
Comparable Legislation .....	78
Notes and Questions .....	78
(b) Spouse, Partner, or Both.....	78
(i) Definition of “Spouse” .....	78
<i>Wills, Estates and Succession Act</i> , S.B.C. 2009, c. 13, s. 2 .....	78
Comparable Legislation .....	79
Notes and Questions .....	79
(ii) Spouse or Partner, but no Descendants.....	80
<i>Wills and Succession Act</i> , S.A. 2010, c. W-12.2, s. 60 .....	80
Comparable Legislation .....	80
Notes and Questions .....	80
(iii) Spouse or Partner and Descendants.....	80
(A) Preferential Share .....	80
<i>Intestate Succession Act</i> , C.C.S.M., c. I85, s. 2(2), (3)(a) .....	81
Comparable Legislation .....	81
Notes and Questions .....	81
(B) Distributive Share .....	81
<i>Intestate Succession Act</i> , S.S. 1996, c. I-13.1, s. 6(3).....	82
Comparable Legislation .....	82
Notes and Questions .....	82
(iv) Both Spouse and Partner.....	82
<i>Wills, Estates and Succession Act</i> , S.B.C. 2009, c. 13, s. 22.....	82
Comparable Legislation .....	82
Notes and Questions .....	82
(c) Other Rights .....	83
(d) Spousal Disentitlement.....	84
Notes and Questions .....	85
<b>3.3.3 Descendants</b> .....	85
<i>Intestate Succession Act</i> , R.S.N.S. 1989, c. 8, s. 4(7) .....	86
Comparable Legislation .....	86
<i>Succession Law Reform Act</i> , R.S.O. 1990, c. S.26, s. 47(1), (2).....	86
Comparable Legislation .....	86
Notes and Questions .....	89
<b>3.3.4 Ascendants and Collaterals</b> .....	89
(a) Introduction .....	89
Table of Consanguinity .....	90
Notes and Questions .....	90
(b) Gradual Scheme .....	91
<i>Succession Law Reform Act</i> , R.S.O. 1990, c. S.26, s. 47(3)-(9).....	91
Comparable Legislation .....	92
Notes and Questions .....	92
(c) Parentelic Scheme.....	94
<i>Intestate Succession Act</i> , C.C.S.M. I85, ss. 4, 5 .....	95
Comparable Legislation .....	96
Notes and Questions .....	96
(d) Problems .....	96
<b>3.3.5 Illegitimacy and Adoption</b> .....	97

TABLE OF CONTENTS

3.3.6 Common Deaths .....	97
3.4 PARTIAL INTESTACY.....	98
3.5 CONTRACTING OUT OF LEGISLATION.....	98
<i>Caron v. Rowe</i> , 2013 ONSC 836, 86 E.T.R. (3d) 243 .....	99
Notes and Questions .....	101
3.6 ADVANCEMENT.....	102
<i>Estates Administration Act</i> , R.S.O. 1990, c. E.22, s. 25.....	102
Comparable Legislation.....	102
Further Reading.....	102
Notes and Questions .....	103

**PART IV  
PROVING WILLS**

CHAPTER 4 NATURE OF TESTAMENTARY DISPOSITIONS .....	107
4.1 NATURE OF A WILL.....	107
4.1.1 Generally.....	107
Notes and Questions .....	111
4.1.2 <i>Spes Successionis</i> .....	113
Further Reading.....	116
4.2 CONTRACTS TO MAKE WILLS.....	116
4.2.1 Introduction.....	116
Further Reading.....	117
4.2.2 Remedies for Breach.....	117
<i>Synge v. Synge</i> , [1894] 1 Q.B. 466 (C.A.) .....	117
Notes and Questions .....	120
4.2.3 Part Performance .....	121
Notes and Questions .....	121
4.3 EQUITABLE RELIEF .....	122
4.3.1 <i>Quantum Meruit</i> .....	122
Further Reading.....	124
Notes and Questions .....	124
4.3.2 Proprietary Estoppel.....	125
Further Reading.....	126
Notes and Questions .....	126
4.4 MUTUAL WILLS.....	126
Further Reading.....	129
<i>University of Manitoba v. Sanderson Estate</i> (1998), 155 D.L.R. (4th)	
40 (B.C.C.A.) .....	129
Notes and Questions .....	133
4.5 INCORPORATION BY REFERENCE .....	136
<i>In the Goods of Smart</i> , [1902] P. 238 (Prob. Div.) .....	138
Notes and Questions .....	140
4.6 CONDITIONAL WILLS .....	142
<i>Re Huebner</i> (1974), 53 D.L.R. (3d) 730 (Man. C.A.).....	144
Notes and Questions .....	145
4.7 DELEGATION OF TESTAMENTARY POWER .....	146
<i>Re Nicholls</i> (1987), 57 O.R. (2d) 763 (C.A.).....	148
Notes and Questions .....	152

TABLE OF CONTENTS

Further Reading.....	152
<b>4.8 LIMITS ON THE POWER OF TESTATION</b> .....	153
<i>McCorkill v. McCorkill Estate</i> , 2014 NBQB 148.....	155
Notes and Questions .....	160
<b>4.9 DISPOSITION OF PARTS OF THE BODY</b> .....	162
Further Reading.....	162
 <b>CHAPTER 5 WILL SUBSTITUTES</b> .....	165
 <b>5.1 INTRODUCTION</b> .....	165
Further Reading.....	165
<b>5.2 GIFTS <i>INTER VIVOS</i></b> .....	165
<b>5.3 GIFTS <i>MORTIS CAUSA</i></b> .....	166
<b>5.4 DEEDS AND <i>INTER VIVOS</i> TRUSTS</b> .....	166
<b>5.5 JOINT INTERESTS</b> .....	168
Further Reading.....	171
Notes and Questions .....	171
<b>5.6 LIFE INSURANCE</b> .....	172
Further Reading.....	173
Notes and Questions .....	174
<b>5.7 PENSIONS AND BENEFICIARY DESIGNATIONS</b> .....	175
Further Reading.....	176
<i>Succession Law Reform Act</i> , R.S.O. 1990, c. S.26, Part III, ss. 50-54.....	176
Comparable Legislation.....	178
<i>Amherst Crane Rentals Ltd. v. Perring</i> (2003), 241 D.L.R. (4th) 176 (Ont. C.A.).....	178
Notes and Questions .....	183
<b>5.8 USE OF WILLS SUBSTITUTES TO AVOID PROBATE FEES</b> .....	185
Further Reading.....	188
 <b>CHAPTER 6 TESTAMENTARY CAPACITY, UNDUE INFLUENCE, AND FRAUD</b> .....	189
 <b>6.1 INTRODUCTION</b> .....	189
Further Reading.....	190
<b>6.2 AGE REQUIREMENT</b> .....	190
<i>Succession Law Reform Act</i> , R.S.O. 1990, c. S.26, s. 8.....	190
Comparable Legislation.....	191
Notes and Questions .....	191
<b>6.3 KNOWLEDGE AND APPROVAL</b> .....	192
<b>6.4 MENTAL CAPACITY</b> .....	193
<b>6.4.1 Introduction</b> .....	193
<b>6.4.2 General Lack of Capacity</b> .....	195
<i>Leger v. Poirier</i> , [1944] S.C.R. 152.....	196
Notes and Questions .....	199
<b>6.4.3 Insane Delusions</b> .....	204
<i>O'Neil v. Royal Trust Co.</i> , [1964] S.C.R. 622.....	205
Notes and Questions .....	208
Further Reading.....	212

TABLE OF CONTENTS

<b>6.4.4 Onus of Proof</b> .....	212
(a) Generally .....	212
Further Reading.....	214
Notes and Questions .....	214
(b) Suspicious Circumstances.....	215
Further Reading.....	217
<i>Vout v. Hay</i> , [1995] 2 S.C.R. 876 .....	217
Notes and Questions .....	221
<b>6.4.5 When Capacity is Required</b> .....	229
<i>Re Bradshaw Estate</i> (1988), 30 E.T.R. 276 (N.B. Prob. Ct.).....	229
Notes and Questions .....	231
<b>6.5 UNDUE INFLUENCE</b> .....	232
Further Reading.....	235
<i>Re Marsh Estate; Fryer v. Harris</i> (1991), 41 E.T.R. 225 (N.S.S.C., App. Div.).....	235
Notes and Questions .....	236
<b>6.6 FRAUD</b> .....	240
Notes and Questions .....	241
<b>CHAPTER 7 MISTAKE AND RECTIFICATION OF WILLS</b> .....	243
<b>7.1 INTRODUCTION</b> .....	243
Further Reading.....	243
<b>7.2 JURISDICTION OF THE COURT OF PROBATE</b> .....	243
Notes and Questions .....	248
<b>7.3 STATUTORY MODIFICATIONS</b> .....	248
<i>Wills, Estates and Succession Act</i> , S.B.C. 2009, c 13, s. 59 .....	249
Comparable Legislation.....	249
Further Reading.....	249
Notes and Questions .....	249
<b>7.4 PATENT MISTAKES</b> .....	249
<b>7.5 DRAFTING ERRORS</b> .....	250
<i>Re Morris</i> , [1971] P. 62 (Prob. Div.) .....	253
Notes and Questions .....	257
<b>7.6 EXECUTION OF WRONG INSTRUMENT</b> .....	259
Further Reading.....	259
<i>Re Brander</i> , [1952] 4 D.L.R. 688 (B.C.S.C.).....	259
Notes and Questions .....	260
<b>CHAPTER 8 RELATED MATTERS</b> .....	263
<b>8.1 INTRODUCTION</b> .....	263
<b>8.2 CONFLICT OF LAWS</b> .....	263
<b>8.2.1 The Issues</b> .....	264
<b>8.2.2 Administration of Estates</b> .....	264
<b>8.2.3 Succession</b> .....	266
(a) Concepts and Categories .....	266
(b) Intestate Succession.....	267
(c) Testate Succession: Common Law Rules .....	267
(d) Statutory Reform.....	268

TABLE OF CONTENTS

<i>Succession Law Reform Act</i> , R.S.O. 1990, c. S.26, ss. 34-41 .....	268
Comparable Legislation .....	269
(i) <i>Types of Property</i> .....	270
(ii) <i>Choice of Law</i> .....	270
(iii) <i>Renvoi Abolished</i> .....	270
(iv) <i>Change in Domicile</i> .....	271
(v) <i>Change in Law</i> .....	271
(vi) <i>Construction</i> .....	272
(e) International Wills.....	272
Comparable Legislation .....	272
Notes and Questions .....	272
Further Reading .....	274
<b>8.3 TESTAMENTARY GUARDIANS AND CUSTODIANS</b> .....	274
<i>Children's Law Reform Act</i> , R.S.O. 1990, c. C.12, s. 61.....	276
Comparable Legislation .....	276
Notes and Questions .....	277
Further Reading.....	277
 <b>CHAPTER 9 FORMAL VALIDITY OF WILLS</b> .....	279
 <b>9.1 INTRODUCTION</b> .....	279
Further Reading.....	279
<b>9.2 ATTESTED WILLS</b> .....	279
<b>9.2.1 Introduction</b> .....	279
<i>Succession Law Reform Act</i> , R.S.O. 1990, c. S.26, ss. 3, 4, 7 .....	280
Comparable Legislation .....	281
Notes and Questions .....	281
Sample Will.....	282
Sample Codicil .....	284
<b>9.2.2 In Writing</b> .....	285
<i>Murray v. Haylow</i> (1927), 60 O.L.R. 629 (C.A.) .....	285
Notes and Questions .....	286
<b>9.2.3 Signed by the Testator or an <i>Amanuensis</i></b> .....	286
<i>Re White</i> , [1948] 1 D.L.R. 572 (N.S.S.C., App. Div.).....	287
Notes and Questions .....	288
<b>9.2.4 At the End of the Will</b> .....	290
<i>Yen Estate v. Yen-Zimmerman</i> , 2013 BCCA 423 .....	291
Notes and Questions .....	293
<b>9.2.5 Attestation</b> .....	295
(a) Generally .....	295
<i>Chesline v. Hermiston</i> (1928), 62 O.L.R. 575 (H.C.) .....	295
Notes and Questions .....	297
(b) Acknowledgment .....	298
<i>Re Gunstan</i> (1872), 7 P.D. 102 (C.A.) .....	298
Notes and Questions .....	300
(c) By Beneficiaries and Others.....	301
<i>Wills and Succession Act</i> , S.A. 2010, c. W-12.2, ss. 20, 21 .....	302
Comparable Legislation.....	303
<b>9.3 HOLOGRAPH WILLS</b> .....	303
<b>9.3.1 Introduction</b> .....	303



TABLE OF CONTENTS

Further Reading.....	303
<i>Wills and Succession Act</i> , S.A. 2010, c. W-12.2, s. 16.....	304
Comparable Legislation.....	304
<b>9.3.2 A Deliberate or Fixed and Final Intention.....</b>	<b>304</b>
<i>Bennett v. Gray</i> , [1958] S.C.R. 392.....	304
Notes and Questions.....	306
<b>9.3.3. Use of Printed Wills.....</b>	<b>308</b>
<i>Re Forest</i> (1981), 121 D.L.R. (3d) 552 (Sask. C.A.).....	308
Notes and Questions.....	310
<b>9.3.4 Formalities.....</b>	<b>310</b>
<i>Re Clarke</i> (1982), 39 O.R. (2d) 392 (Surr. Ct.).....	311
Notes and Questions.....	312
<b>9.3.5 Holograph Codicils to Formal Wills.....</b>	<b>313</b>
<b>9.3.6 Incorporation by Reference of Non-Holograph Documents.....</b>	<b>313</b>
<i>Re Dixon-Marsden Estate</i> (1985), 21 E.T.R. 216 (Ont. Surr. Ct.).....	313
Notes and Questions.....	316
Further Reading.....	316
<b>9.4 A DISPENSING OR VALIDATING POWER.....</b>	<b>316</b>
Further Reading.....	317
<i>Wills Act</i> , C.C.S.M., c. W150, s. 23.....	317
Comparable Legislation.....	317
Notes and Questions.....	317
<b>9.5 ELECTRONIC WILLS.....</b>	<b>320</b>
Notes and Questions.....	322
<b>9.6 PRIVILEGED WILLS.....</b>	<b>323</b>
<i>Succession Law Reform Act</i> , R.S.O. 1990, c. S.26, s. 5.....	323
Comparable Legislation.....	323
<i>Re Booth</i> , [1926] P. 118 (Prob. Div.).....	324
Notes and Questions.....	325
<b>9.7 THE INTERNATIONAL WILL.....</b>	<b>326</b>
<i>Succession Law Reform Act</i> , R.S.O. 1990, c. S.26, s. 42.....	327
<i>Schedule</i> (Convention and Annex).....	327
Comparable Legislation.....	330
Notes and Questions.....	330
<b>CHAPTER 10 REVOCATION OF WILLS.....</b>	<b>331</b>
<b>10.1 SCOPE OF THIS CHAPTER.....</b>	<b>331</b>
Further Reading.....	331
<b>10.2 VITIATING FACTORS.....</b>	<b>331</b>
<b>10.3 REVOCATION BY OPERATION OF LAW.....</b>	<b>332</b>
<b>10.3.1 Introduction.....</b>	<b>332</b>
<b>10.3.2 By Marriage.....</b>	<b>333</b>
(a) Generally.....	333
Further Reading.....	333
<i>Succession Law Reform Act</i> , R.S.O. 1990, c. S.26, s. 15(a).....	333
Comparable Legislation.....	333
Notes and Questions.....	333
(b) Validity of the Marriage — Predatory Marriages.....	334
Further Reading.....	336

TABLE OF CONTENTS

Notes and Questions .....	336
(c) Will Made in Contemplation of Marriage.....	337
<i>Succession Law Reform Act</i> , R.S.O. 1990, c. S.26, s. 16(a) .....	337
Comparable Legislation .....	337
<i>Re Coleman</i> , [1976] Ch. 1 (Ch. Div.).....	337
Notes and Questions .....	340
(d) Election .....	342
<i>Succession Law Reform Act</i> , R.S.O. 1990, c. S.26, s. 16(b) .....	342
Comparable Legislation .....	343
<i>Re Browne and Dobrotinic</i> (1958), 13 D.L.R. (2d) 565 (Ont. H.C.)...	343
Notes and Questions .....	344
(e) Powers of Appointment.....	344
<i>Succession Law Reform Act</i> , R.S.O. 1990, c. S.26, s. 16(c) .....	345
Comparable Legislation .....	345
<i>Re Gilligan</i> , [1950] P. 32 (Prob. Div.).....	346
Notes and Questions .....	348
<b>10.3.3 By Dissolution of Marriage</b> .....	348
<i>Succession Law Reform Act</i> , R.S.O. 1990, c. S.26, s. 17 .....	348
Comparable Legislation .....	349
<i>Re Billard Estate</i> (1986), 22 E.T.R. 150 (Ont. H.C.).....	349
Notes and Questions .....	350
<b>10.4 REVOCATION BY ACT OF THE TESTATOR</b> .....	351
<b>10.4.1 Generally</b> .....	351
<i>Wills Act</i> , R.S.N.B. 1973, c. W-9, s. 15(b), (c) .....	351
Comparable Legislation .....	352
<b>10.4.2 By Subsequent Document</b> .....	352
<i>Re Davies</i> , [1928] Ch. 24 (Ch. Div.) .....	353
Notes and Question .....	354
<b>10.4.3 By Physical Act</b> .....	356
(a) Generally .....	356
<i>Wills Act</i> , R.S.N.B. 1973, c. W-9, s. 15(d) .....	356
Comparable Legislation .....	356
(b) By the Testator .....	356
<i>Leonard v. Leonard</i> , [1902] P. 243 (Prob. Div.).....	357
Notes and Questions .....	359
(c) By Another .....	360
<i>Delack, Hickey and Camp v. Newton</i> , [1944] O.W.N. 517	
(Surr. Ct.).....	361
Notes and Questions .....	362
<b>10.5 ALTERATIONS IN A WILL</b> .....	362
<i>Wills Act</i> , C.C.S.M., c. W150, s. 19 .....	363
Comparable Legislation .....	363
<i>Re Douglas Estate</i> (1986), 25 E.T.R. 154 (N.S.C., T.D.) .....	363
Notes and Questions .....	365
<b>10.6 CONDITIONAL REVOCATION</b> .....	367
<b>10.6.1 Generally</b> .....	367
<b>10.6.2 The Testator Believes the Will Is Void</b> .....	367
<b>10.6.3 The Testator is Mistaken About the Facts or the Law</b> .....	367
<i>Re Sorenson; Montreal Trust Co. v. Hawley</i> (1982), 10 E.T.R. 282	
(B.C.S.C.).....	367

TABLE OF CONTENTS

<b>10.6.4 Dependent Relative Revocation</b> .....	369
<i>Re Jones</i> , [1976] 1 Ch. 200 (C.A.) .....	370
Notes and Questions .....	372
<b>10.7 REVIVAL OF REVOKED WILLS</b> .....	373
<i>Wills Act</i> , S.S. 1996, c. W-4.1, s. 20 .....	374
Comparable Legislation .....	374
Further Reading .....	374
<i>Re Ott</i> , [1972] 2 O.R. 5 (Surr. Ct.) .....	374
Notes and Questions .....	375
 <b>CHAPTER 11 OTHER PROBATE MATTERS</b> .....	 379
<b>11.1 INTRODUCTION</b> .....	379
<b>11.2 PROOF OF DEATH AND RELATED MATTERS</b> .....	379
<b>11.2.1 Generally</b> .....	379
<b>11.2.2 The Common Law</b> .....	380
(a) Inference of Death .....	380
(b) Presumption of Death .....	380
(c) Jurisdictional Issue .....	381
(d) Return from “The Dead” .....	382
<i>Re Miller</i> (1978), 22 O.R. (2d) 111 (H.C.J.) .....	383
<b>11.2.3 Special Statutory Provisions</b> .....	386
Notes and Questions .....	387
<b>11.2.4 Absentees</b> .....	388
<i>Absentees Act</i> , R.S.O. 1990, c. A.3, ss. 1-8 .....	388
Comparable Legislation .....	389
Notes and Questions .....	389
<b>11.2.5 General Statutory Reform</b> .....	390
<i>Declarations of Death Act, 2002</i> , S.O. 2002, c. 14, Sched., ss. 1-8 .....	390
Comparable Legislation .....	393
Notes and Questions .....	393
Further Reading .....	395
<b>11.3 PROOF OF LOST WILLS</b> .....	395
<b>11.3.1 The Scope of the Presumption</b> .....	396
<b>11.3.2 Rebutting the Presumption</b> .....	397
<b>11.3.3 Probate in Part</b> .....	397
Further Reading .....	398
<i>Sorkos v. Cowderoy</i> (2006), 26 E.T.R. (3d) 108 (Ont. C.A.) .....	398
Notes and Questions .....	400

**PART V**

**THE INTERPRETATION OF WILLS**

<b>CHAPTER 12 CAPACITY OF BENEFICIARIES</b> .....	407
<b>12.1 INTRODUCTION</b> .....	407
<b>12.2 ILLEGITIMACY</b> .....	407
<i>Children’s Law Reform Act</i> , R.S.O. 1990, c. C.12, ss. 1, 2 .....	409
Comparable Legislation .....	409
<i>Succession Law Reform Act</i> , R.S.O. 1990, c. S.26, s. 1(3), (4) .....	410

TABLE OF CONTENTS

Comparable Legislation.....	410
Notes and Questions .....	410
Further Reading.....	412
<b>12.3 ADOPTION .....</b>	<b>412</b>
<i>Child and Family Services Act</i> , R.S.O. 1990, c. C.11, ss. 158, 159.....	413
Comparable Legislation.....	414
Notes and Questions .....	414
Further Reading.....	415
<b>12.4 HOMICIDE .....</b>	<b>415</b>
<b>12.4.1 Generally .....</b>	<b>415</b>
<b>12.4.2 Problems of Proof.....</b>	<b>417</b>
Notes and Questions .....	419
<b>12.4.3 Nature of the Crime.....</b>	<b>420</b>
Notes and Questions .....	421
<b>12.4.4 The Limits of Disentitlement .....</b>	<b>421</b>
<i>Re Gore</i> , [1972] 1 O.R. 550 (H.C.J.).....	422
Notes and Questions .....	424
Further Reading.....	428
<b>12.5 FOREIGN BENEFICIARIES .....</b>	<b>428</b>
Notes and Questions .....	429
<b>12.6 WITNESSES.....</b>	<b>429</b>
<b>12.6.1 Generally .....</b>	<b>429</b>
<i>Succession Law Reform Act</i> , R.S.O. 1990, c. S.26, s. 12 .....	430
Comparable Legislation.....	430
<i>Re Trotter</i> , [1899] 1 Ch. 764 (Ch. Div.).....	431
Notes and Questions .....	432
<b>12.6.2 Gift to Witness in Representative Capacity .....</b>	<b>433</b>
<i>Re Ray's Will Trusts</i> , [1936] Ch. 520 (Ch. Div.).....	433
Notes and Questions .....	435
<b>12.6.3 Supernumerary Witnesses .....</b>	<b>435</b>
Notes and Questions .....	435
<b>CHAPTER 13 GENERAL PRINCIPLES OF CONSTRUCTION .....</b>	<b>437</b>
<b>13.1 SCOPE OF THIS CHAPTER.....</b>	<b>437</b>
Further Reading.....	437
<b>13.2 JURISDICTION OF COURTS.....</b>	<b>437</b>
<b>13.2.1 Generally .....</b>	<b>437</b>
<b>13.2.2 Function of the Court of Construction.....</b>	<b>439</b>
<b>13.3 PRINCIPLES AND RULES OF CONSTRUCTION .....</b>	<b>440</b>
<b>13.3.1 General Principles.....</b>	<b>440</b>
(a) Generally.....	440
(b) The Whole Will to Be Read in Context .....	441
(c) Identical Words are Presumed to Have the Same Meaning.....	442
(d) Effect to Be Given to All Words .....	442
(e) <i>Ejusdem Generis</i> .....	442
(f) General versus Particular Intention.....	443
(g) Presumption against Intestacy .....	444
(h) Presumption of Rationality.....	446
(i) Presumption of Legality .....	446

TABLE OF CONTENTS

(j) Presumption against Disinheritance .....	446
(k) Irreconcilable Dispositions.....	447
<b>13.3.2 Specific Rules of Construction .....</b>	<b>447</b>
(a) Generally.....	447
(b) Spouses .....	448
(c) Children and Grandchildren .....	448
(d) Issue.....	449
(e) Next of Kin.....	450
(f) Other Relatives.....	450
(g) Legatees .....	451
(h) Gifts to Two or More Persons.....	451
(i) <i>Introduction</i> .....	451
(ii) <i>Per Capita Distribution</i> .....	452
(iii) <i>Gifts Directing Distribution “Per Stirpes”</i> .....	453
(i) Gifts to Survivors.....	455
(j) Multiple Gifts.....	456
(k) House and Contents .....	457
(l) Power of Selection.....	457
(m) Inability to Locate Beneficiaries.....	458
(n) Options and Rights of First Refusal .....	458
<b>13.3.3 Statutory Rules .....</b>	<b>459</b>
(a) Generally.....	459
(b) Disposition of Void Gift.....	459
(c) Devise of Real Property Includes Leaseholds.....	460
(d) Gift Includes Property over Which Testator Has Power of Appointment .....	460
(e) Devise without Words of Limitation.....	461
(f) Meaning of “Heir” .....	461
(g) Meaning of “Die without Issue” .....	461
(h) Devise to Trustee.....	462
(i) Undisposed of Residue .....	462
<b>13.4 THE MEANING OF PARTICULAR EXPRESSIONS .....</b>	<b>463</b>
<b>13.4.1 Generally .....</b>	<b>463</b>
<b>13.4.2 <i>Prima Facie</i> Meaning.....</b>	<b>463</b>
<i>Perrin v. Morgan</i> , [1943] A.C. 399 (H.L.).....	464
Notes and Questions .....	468
<b>13.4.3 Words Defined by the Testator .....</b>	<b>469</b>
<i>Re Helliwell</i> , [1916] 2 Ch. 580 (Ch. Div.) .....	469
Notes and Questions .....	470
<b>13.4.4 Terms of Art.....</b>	<b>471</b>
<i>Re Cook</i> , [1948] Ch. 212 (Ch. Div.) .....	471
Notes and Questions .....	472
<b>13.5 PARTIAL INTESTACIES.....</b>	<b>473</b>
<i>National Trust Co. v. Fleury</i> , [1965] S.C.R. 817.....	473
Notes and Questions .....	475
<b>13.6 ADMISSIBILITY OF EVIDENCE.....</b>	<b>477</b>
<b>13.6.1 Introduction .....</b>	<b>477</b>
<b>13.6.2 Common Law .....</b>	<b>477</b>
(a) Objective Approach.....	477
(b) Evidence of Surrounding Circumstances .....	479

TABLE OF CONTENTS

Further Reading.....	479
<i>Haidl v. Sacher</i> (1979), 106 D.L.R. (3d) 360 (Sask. C.A.).....	480
Notes and Questions .....	484
(c) Recent Developments .....	487
<b>13.6.3 Evidence of the Testator’s Intention</b> .....	490
<i>Re Carrick</i> (1929), 64 O.L.R. 39 (H.C.) .....	491
Notes and Questions .....	493
<b>13.6.4 Legislative Changes</b> .....	495
<i>Wills and Succession Act</i> , S.A. 2010, c. W-12.2, s. 26 .....	495
<i>Wills, Estates and Succession Act</i> , S.B.C. 2009, c. 13, s. 4(2) .....	496
Notes and Questions .....	496
<b>13.7 DRAFTING ERRORS AND OMISSIONS</b> .....	496
<b>13.7.1 Generally</b> .....	496
<b>13.7.2 Drafting Omissions</b> .....	497
<i>Central and Nova Scotia Trust Co. v. Freeman</i> (1975), 58 D.L.R. (3d) 541 (N.S.S.C., T.D.).....	498
Notes and Questions .....	501
Further Reading.....	503
<b>13.7.3 Drafting Errors</b> .....	503
<i>Re MacDonnell</i> (1982), 35 O.R. 578 (C.A.).....	504
Notes and Questions .....	506
<b>13.7.4 Rejection of Inaccurate Description</b> .....	506
<i>Re Beauchamp</i> (1975), 8 O.R. (2d) 2 (H.C.) .....	507
Notes and Questions .....	510
<b>13.7.5 Legislative Changes</b> .....	511
<i>Wills and Succession Act</i> , S.A. 2010, c. W-12.2, s. 39 .....	511
Comparable Legislation.....	512
Notes and Questions .....	512
<b>CHAPTER 14 TESTAMENTARY GIFTS</b> .....	513
<b>14.1 SCOPE</b> .....	513
<b>14.2 SUBJECT MATTER</b> .....	513
<b>14.3 TYPES</b> .....	515
<b>14.3.1 Generally</b> .....	515
<b>14.3.2 General and Pecuniary Gifts</b> .....	516
<i>Re Millar</i> (1927), 60 O.L.R. 434 (S.C.) .....	516
Notes and Question.....	518
<b>14.3.3 Demonstrative Gifts</b> .....	519
<i>Celentano Estate v. Ross</i> , 2014 BCSC 27.....	520
Notes and Questions .....	522
<b>14.3.4 Specific Gifts</b> .....	523
Further Reading.....	523
<i>Culbertson v. Culbertson</i> (1967), 62 D.L.R. (2d) 134 (Sask. C.A.).....	523
Notes and Questions .....	525
<b>14.3.5 Residuary Gifts</b> .....	526
Notes and Questions .....	527
<b>14.4 ABATEMENT</b> .....	528
<b>14.4.1 Generally</b> .....	528
<i>Wills, Estates and Succession Act</i> , S.B.C. 2009, c. 13, s. 50.....	530

TABLE OF CONTENTS

<i>Lindsay v. Waldbrook</i> (1897), 24 O.A.R. 604 (C.A.).....	531
Notes and Questions .....	532
<b>14.4.2 The Law of Assent</b> .....	536
<b>14.5 ADEMPTION</b> .....	538
<i>Re Hunter</i> (1975), 8 O.R. (2d) 399 (H.C.).....	538
Notes and Questions .....	539
Further Reading.....	541
<b>14.6 DATE FROM WHICH WILL SPEAKS</b> .....	542
<b>14.6.1 General Rule</b> .....	542
<i>Wills Act</i> , S.S. 1996, c W-14.1, s. 24 .....	542
Comparable Legislation.....	542
<i>Re Rutherford</i> (1918), 42 O.L.R. 405 (H.C.).....	543
Notes and Questions .....	544
<b>14.6.2 Contrary Intention</b> .....	545
(a) Generally.....	545
<i>Re Bird</i> , [1942] O.R. 415 (C.A.).....	546
Notes and Questions .....	548
(b) Use of Temporal Words.....	548
<i>Re Forbes</i> (1956), 3 D.L.R. (2d) 653 (Ont. C.A.) .....	548
Notes and Questions .....	550
<b>14.6.3 Change in Name and Form</b> .....	550
(a) Generally.....	550
<i>Re Britt</i> , [1968] 2 O.R. 12 (C.A.).....	551
Notes and Questions .....	553
(b) Tracing.....	554
<i>Re Cudeck</i> (1977), 16 O.R. (2d) 337.....	554
Notes and Questions .....	556
<b>14.7 EQUITABLE DOCTRINE OF CONVERSION</b> .....	558
<b>14.7.1 Generally</b> .....	558
<i>Church v. Hill</i> , [1923] S.C.R. 642 .....	559
Notes and Questions .....	560
<b>14.7.2 Options</b> .....	561
Notes and Questions .....	561
<b>14.7.3 Effect of Republication</b> .....	562
<i>Re Reeves; Reeves v. Pawson</i> , [1928] 1 Ch. 351 (Ch. Div.).....	562
Notes and Questions .....	563
<b>14.7.4 Statutory Reforms</b> .....	564
<i>Succession Law Reform Act</i> , R.S.O. 1990, c. S.26, s. 20 .....	564
Comparable Legislation.....	564
<i>DiMambro Estate v. DiMambro</i> (2002), 48 E.T.R. (2d) 22 (Ont. S.C.J.) .....	565
Notes and Questions .....	566
<b>14.8 APPURTENANCES</b> .....	568
<b>14.9 ENCUMBERED PROPERTY</b> .....	568
<i>Succession Law Reform Act</i> , R.S.O. 1990, c. S.26, s. 32 .....	568
Comparable Legislation.....	569
<i>Wills, Estates and Succession Act</i> , S.B.C. 2009, c. 13, s. 47.....	569
<i>Re Hicknell; Perry v. Hicknell</i> (1981), 34 O.R. (2d) 246 (H.C.) .....	570
Notes and Questions .....	571
<b>14.10 PRESUMPTIONS</b> .....	572

TABLE OF CONTENTS

<b>14.10.1 Introduction</b> .....	572
<b>14.10.2 Election</b> .....	572
Further Reading .....	572
<i>Granot v. Hersen Estate</i> (1999), 173 D.L.R. (4th) 227 (Ont. C.A.)....	573
Notes and Questions .....	575
<b>14.10.3 Satisfaction</b> .....	576
<i>Re Trider</i> (1978), 84 D.L.R. (3d) 336 (N.S. Prob. Ct.) .....	577
Notes and Questions .....	578
<b>14.10.4 Rule against Double Portions</b> .....	578
<i>Re George's Will Trusts</i> , [1949] Ch. 154 (Ch. Div.) .....	578
Notes and Questions .....	581
<b>14.10.5 Abolition</b> .....	582
<i>Wills and Succession Act</i> , S.A. 2010, c. W-12.2, s. 110 .....	582
Comparable Legislation .....	583
Notes and Questions .....	583
<b>14.11 DISCLAIMER</b> .....	583
Further Reading .....	584
<i>Montreal Trust Co. v. Matthews</i> (1979), 99 D.L.R. (3d) 65 (B.C.S.C.).....	584
Notes and Questions .....	585
 <b>CHAPTER 15 LAPSE AND SURVIVORSHIP</b> .....	 589
 <b>15.1 INTRODUCTION</b> .....	 589
Further Reading .....	589
<b>15.2 DISPOSITION OF LAPSED GIFT</b> .....	589
Further Reading .....	590
<i>Wills Act</i> , R.S.N.B. 1973, c. W-9, s. 22.....	590
Comparable Legislation .....	590
<i>Re Stuart</i> (1964), 47 W.W.R. 500 (B.C.S.C.).....	590
Notes and Questions .....	591
<b>15.3 ANTI-LAPSE LEGISLATION</b> .....	594
<b>15.3.1 Generally</b> .....	594
Further Reading .....	595
<i>Wills Act</i> , R.S.N.S. 1989, c. 505, s. 31 .....	595
Comparable Legislation .....	595
<i>Succession Law Reform Act</i> , R.S.O. 1990, c. S.26, s. 31 .....	595
Comparable Legislation .....	595
<i>Re Wolson; Wolson v. Jackson</i> , [1939] Ch. 780 (Ch. Div.) .....	596
Notes and Questions .....	596
<b>15.3.2 Contrary Intention</b> .....	600
<i>Re Wudel; Moore v. Moore</i> (1982), 13 E.T.R. 25 (Alta. Q.B.) .....	600
Notes and Questions .....	602
<b>15.4 EXCEPTIONS TO LAPSE</b> .....	603
<b>15.4.1 Joint Tenancy</b> .....	603
<i>Law of Property Act</i> , C.C.S.M., c. L90, s. 15.....	604
Comparable Legislation .....	604
<i>Re Coughlin</i> (1982), 36 O.R. (2d) 446 (H.C.).....	605
Notes and Questions .....	606
<b>15.4.2 Fulfilment of Moral Obligation</b> .....	607



TABLE OF CONTENTS

<i>Re Mackie</i> (1986), 54 O.R. (2d) 784 (H.C.).....	607
Notes and Questions .....	609
Further Reading.....	610
<b>15.4.3 Class Gifts</b> .....	610
<b>15.5 SPECIAL SITUATIONS</b> .....	610
<b>15.5.1 Powers of Appointment</b> .....	610
<b>15.5.2 Dissolved Corporations</b> .....	611
<b>15.5.3 Charities</b> .....	612
<b>15.5.4 Secret Trusts</b> .....	612
<b>15.6 SUBSTITUTIONARY GIFTS</b> .....	613
<b>15.6.1 Generally</b> .....	613
<i>Re Cousen's Will Trusts</i> , [1937] Ch. 381 (Ch. Div.) .....	613
Notes and Questions .....	615
<b>15.6.2 Words of Limitation or Substitution</b> .....	616
<i>Re Klein; Public Trustee of British Columbia v. Cochrane</i> (1980), 7 E.T.R. 176 (B.C.C.A.) .....	616
Notes and Questions .....	618
<b>15.6.3 Class Gifts</b> .....	619
<i>Re Grasett</i> , [1973] 1 O.R. 361 (C.A.).....	619
Notes and Questions .....	622
<b>15.7 SURVIVORSHIP</b> .....	622
<b>15.7.1 Introduction</b> .....	622
<b>15.7.2 Common Law Rules</b> .....	622
<b>15.7.3 Statutory Rules</b> .....	623
Further Reading.....	625
<i>Survivorship Act</i> , R.S.N.S. 1989, c. 454, s. 3.....	625
Comparable Legislation.....	626
<i>Succession Law Reform Act</i> , R.S.O. 1990, c. S.26, s. 58 .....	626
Comparable Legislation.....	626
<i>Insurance Act</i> , R.S.O. 1990, c. I.8, ss. 194, 215.....	627
Comparable Legislation.....	627
Notes and Questions .....	627
Problems .....	628
<b>15.7.4 Specific Rules</b> .....	629
<i>Wills, Estates and Succession Act</i> , S.B.C. 2009, c. 13, ss. 8-10 .....	629
Notes and Questions .....	630
<b>CHAPTER 16 CLASS GIFTS</b> .....	633
<b>16.1 INTRODUCTION</b> .....	633
Further Reading.....	633
<b>16.2 NATURE AND EFFECT OF A CLASS GIFT</b> .....	633
<b>16.3 IDENTIFYING CLASS GIFTS</b> .....	634
<b>16.3.1 Class Gift or Gift <i>Nominatim</i>?</b> .....	634
<i>Re Snyder</i> , [1060] O.R. 107 (H.C.).....	636
Notes and Questions .....	639
<b>16.3.2 Artificial Classes</b> .....	640
<i>Kingsbury v. Walter</i> , [1901] A.C. 187 (H.L.).....	640
Notes and Questions .....	643
<b>16.3.3. Description by Number</b> .....	643

TABLE OF CONTENTS

<i>Re Burgess</i> (1968), 67 D.L.R. (2d) 526 (B.C.S.C.) .....	644
Notes and Questions .....	646
<b>16.4 COMPOSITION OF THE CLASS</b> .....	647
<b>16.4.1 Generally</b> .....	647
<i>Re Hyslop</i> (1978), 3 E.T.R. 216 (Ont. H.C.) .....	648
Notes and Questions .....	650
<b>16.4.2 Class Closing Rules</b> .....	651
(a) Immediate Gift to a Class .....	651
<i>Re Charlesworth Estate</i> (1996), 12 E.T.R. (2d) 257 (Man. Q.B.) .....	651
Notes and Questions .....	653
(b) Postponed Gift to a Class .....	653
<i>Latta v. Lowry</i> (1886), 11 O.R. 517 (Ch. Div.) .....	654
Notes and Questions .....	655
(c) Class Gift Postponed by Condition .....	656
Further Reading .....	657
<i>Re Edmondson's Will Trusts; Baron Sandford of Banbury v. Edmondson</i> , [1972] 1 W.L.R. 183 (C.A.) .....	657
Notes and Questions .....	660
(d) Gifts to Each Member of a Class .....	661
<i>Re Bellville; Westminster Bank Ltd. v. Walton</i> , [1941] 1 Ch. 414 (Ch. Div.) .....	662
Notes and Questions .....	663
 <b>CHAPTER 17 VESTED AND CONTINGENT GIFTS</b> .....	 665
<b>17.1 SCOPE OF THIS CHAPTER</b> .....	665
Further Reading .....	665
<b>17.2 VESTED AND CONTINGENT GIFTS</b> .....	666
<b>17.2.1 Background</b> .....	666
<b>17.2.2 Meanings and Distinctions</b> .....	667
(a) Generally .....	667
(b) Two Senses of the Term Vested .....	668
(c) Relevance of Vesting .....	668
(d) Conditions of Acquisition versus Conditions of Retention .....	670
(e) Vested versus Divested .....	671
<b>17.3 GENERAL PRINCIPLES OF VESTING</b> .....	672
<b>17.3.1 Introduction</b> .....	672
<b>17.3.2 Presumption in Favour of Early Vesting</b> .....	672
<b>17.3.3 Presumption in Favour of Condition Subsequent</b> .....	674
<b>17.3.4 Presumption in Favour of Postponement of Enjoyment</b> .....	675
<b>17.3.5 Presumption in Favour of Indefeasible Interests</b> .....	675
<b>17.4 SPECIFIC PRINCIPLES OF VESTING</b> .....	676
<b>17.4.1 Introduction</b> .....	676
<b>17.4.2 Gifts Over on Death Generally</b> .....	676
(a) The Rules in <i>Edwards v. Edwards</i> .....	676
<i>Re Brailsford</i> , [1916] 2 Ch. 536 (Ch. Div.) .....	677
Notes and Questions .....	679
(b) The Rule in <i>Doe d. Blomfield v. Eyre</i> .....	680
<i>Re Archer</i> (1907), 14 O.L.R. 374 (H.C.J.) .....	680
Notes and Questions .....	682

TABLE OF CONTENTS

<b>17.4.3 Gifts Over on Death Under Specified Age</b> .....	682
<i>Re Barton</i> , [1941] S.C.R. 426, [1941] 3 D.L.R. 653.....	683
Notes and Questions .....	684
<b>17.4.4 Gifts Over on Death Before Receipt</b> .....	685
<i>Re Stephens; Royal Trust Co. v. East</i> (1978), 3 E.T.R. 55, [1978] 5 W.W.R. 444 (B.C.S.C.).....	685
Notes and Questions .....	687
<b>17.4.5 Convenience of the Estate Rule</b> .....	688
<i>Re Taylor</i> , [1972] 3 O.R. 349, 28 D.L.R. (3d) 257 (H.C.J.) .....	689
Notes and Questions .....	694
<b>17.4.6 Postponed Payment</b> .....	695
<i>Re Squire</i> , [1962] O.R. 863, 34 D.L.R. (2d) 481 (H.C.J.).....	696
Notes and Questions .....	698
<b>17.4.7 Survivorship</b> .....	701
(a) Survivorship Generally .....	701
<i>Re Krause</i> (1985), 18 D.L.R. (4th) 631, 19 E.T.R. 92 (Alta. C.A.).....	702
(b) Survivorship in the Context of Successive Interests.....	703
Notes and Questions .....	704
<b>17.4.8 The Rule in <i>Boraston's Case</i></b> .....	706
Notes and Questions .....	707
 <b>CHAPTER 18 VOID CONDITIONS</b> .....	 709
<b>18.1 INTRODUCTION</b> .....	709
<b>18.2 CONSEQUENCES OF VOID CONDITIONS</b> .....	710
Notes and Questions .....	712
<b>18.3 CONDITIONS CONTRARY TO PUBLIC POLICY</b> .....	713
<b>18.3.1 Generally</b> .....	713
<b>18.3.2 Conditions Requiring Divorce and Abandonment</b> .....	714
Notes and Questions .....	716
<b>18.3.3 Restraints on Marriage</b> .....	717
<i>Re Goodwin</i> (1969), 3 D.L.R. (3d) 281 (Alta. S.C, T.D.) .....	717
Notes and Questions .....	719
<b>18.3.4 Discriminatory Conditions</b> .....	719
Notes and Questions .....	725
Further Reading.....	727
<b>18.3.5 In Terrorem Conditions</b> .....	727
<i>Re Kent</i> (1982) 139 D.L.R. (3d) 318 (B.C.S.C.).....	728
Notes and Questions .....	731
Further Reading.....	732
<b>18.3.6 Conditions <i>Malum Prohibitum</i> and <i>Malum in Se</i></b> .....	732
<i>Re McBride</i> (1980), 27 O.R. (2d) 513 (H.C.J.) .....	733
Notes and Questions .....	734
<b>18.3.7 Repugnant Conditions</b> .....	735
<i>Re Collier</i> (1966), 60 D.L.R. (2d) 70 (N.S.C.) .....	735
Notes and Questions .....	737
<b>18.4 CONDITIONS IMPOSSIBLE OF PERFORMANCE</b> .....	739
<i>Re MacDonald</i> , [1971] 2 O.R. 577 (H.C.J.) .....	740
Notes and Questions .....	742

TABLE OF CONTENTS

<b>18.5 UNCERTAIN CONDITIONS</b> .....	743
<i>Re Tuck's Settlement Trusts; Public Trustee v. Tuck</i> , [1978] Ch. 49 (C.A.) .....	744
Notes and Questions .....	748
 <b>CHAPTER 19 PERPETUITIES</b> .....	 751
<b>19.1 SCOPE OF THIS CHAPTER</b> .....	751
Further Reading .....	751
<b>19.2 HISTORY OF PERPETUITIES</b> .....	751
<b>19.3 RULE IN <i>WHITBY v. MITCHELL</i></b> .....	753
<b>19.4 RULE AGAINST INDEFINITE DURATION</b> .....	754
<b>19.5 RULE AGAINST PERPETUITIES AT COMMON LAW</b> .....	755
<b>19.5.1 Introduction</b> .....	755
<b>19.5.2 Perpetuity Period</b> .....	755
(a) Generally .....	755
(b) Lives in Being .....	756
(c) Period in Gross .....	757
(d) Operation of the Rule .....	758
(e) Some Examples .....	758
(i) <i>The "Fertile Octogenarian"</i> .....	758
(ii) <i>The "Precocious Toddler"</i> .....	759
(iii) <i>The "Unborn Widow"</i> .....	760
(iv) <i>The "Magic Gravel Pit"</i> .....	760
<b>19.5.3 Application of the Rule to Various Interests</b> .....	760
Further Reading .....	760
(a) Class Gifts .....	761
(b) Powers of Appointment .....	762
(i) <i>Generally</i> .....	762
(ii) <i>Validity of Power</i> .....	763
(iii) <i>Validity of Appointment</i> .....	763
(iv) <i>Validity of Gifts in Default of Appointment</i> .....	764
(c) Contingent Remainders .....	764
(d) Legal Executory Interests .....	765
(e) Equitable Executory Interests .....	765
(f) Rights of Entry for Condition Broken .....	766
(g) Possibilities of Reverter .....	766
(h) Gifts to Charity .....	767
(i) Administrative Powers and Trusts .....	767
(j) Ulterior Limitations .....	768
<b>19.6 RULE AGAINST PERPETUITIES UNDER STATUTE</b> .....	768
<b>19.6.1 Introduction</b> .....	768
<b>19.6.2 Wait and See Principle</b> .....	769
<b>19.6.3 Perpetuity Period</b> .....	769
<b>19.6.4 Measuring Lives</b> .....	770
(a) Generally .....	770
(b) Statutory List Model .....	771
(c) Statutory Formula Model .....	772
<b>19.6.5 Specific Reforms</b> .....	773
(a) Generally .....	773

TABLE OF CONTENTS

(b) Capacity to Have Children .....	773
(c) Age Reduction .....	774
(d) Class Splitting .....	775
(e) The Unborn Spouse .....	776
(f) <i>Cy-Près</i> .....	777
(g) Order of Remedies .....	777
<b>19.6.6 Application of Statutory Rule to Various Interests .....</b>	<b>778</b>
(a) Powers of Appointment.....	778
(b) Possibilities of Reverter and Rights of Entry for Condition Broken .....	779
(c) Interim Income.....	780
(d) Ulterior Limitations .....	781
(e) Administrative Powers.....	781
<b>19.6.7 Modification of Rule against Indefinite Duration.....</b>	<b>781</b>
Further Reading.....	781
<b>CHAPTER 20 ACCUMULATIONS .....</b>	<b>783</b>
<b>20.1 INTRODUCTION.....</b>	<b>783</b>
Further Reading.....	785
<b>20.2 THE STATUTE .....</b>	<b>785</b>
<i>Accumulations Act</i> , R.S.O. 1990, c. A.5, ss. 1-5.....	785
Comparable Legislation.....	786
Notes and Questions .....	786
<b>20.3 THE ACCUMULATION PERIODS .....</b>	<b>787</b>
<b>20.3.1 Generally .....</b>	<b>787</b>
<b>20.3.2 Twenty-one Years from Testator's Death .....</b>	<b>787</b>
<i>Re Arnold</i> , [1955] 4 D.L.R. 535 (B.C.S.C.).....	787
<b>20.3.3 Duration of Minorities of Persons Living at Testator's Death .....</b>	<b>789</b>
<i>Re Watt's Will Trusts; Watt v. Watt</i> , [1936] 2 All E.R. 1555 (Ch. Div.).....	789
Notes and Questions .....	790
<b>20.3.4 Duration of Minorities of Persons Entitled to Income if     of Full Age .....</b>	<b>791</b>
<i>Re Cattell; Cattell v. Cattell</i> , [1914] 1 Ch. 177 (C.A.).....	791
<b>20.3.5 Conclusion .....</b>	<b>793</b>
Problems .....	793
<b>20.4 TERMINATING THE ACCUMULATION.....</b>	<b>793</b>
<i>Re Burns</i> (1960), 25 D.L.R. (2d) 427 (Alta. S.C., App. Div.).....	794
Notes and Questions .....	796
<b>20.5 DESTINATION OF EXCESS INCOME.....</b>	<b>796</b>
<i>Re Ellis; Canada Permanent Trust Co. v. Ellis</i> (1982), 12 E.T.R. 205 (Sask. Q.B.) .....	797
Notes and Questions .....	800
<b>20.6 EXCEEDING THE ACCUMULATION PERIOD .....</b>	<b>800</b>
<i>Re Struthers</i> (1980), 29 O.R. (2d) 616 (C.A.) .....	801
Notes and Questions .....	805

TABLE OF CONTENTS

**PART VI  
FAMILY PROTECTION**

<b>CHAPTER 21 SPOUSAL RIGHTS</b> .....	809
<b>21.1 INTRODUCTION</b> .....	809
<b>21.2 MATRIMONIAL PROPERTY</b> .....	809
<b>21.3 FAMILY LAW ACT (ONTARIO)</b> .....	810
<b>21.3.1 Introduction</b> .....	810
Further Reading.....	810
<b>21.3.2 The Statute</b> .....	811
<i>Family Law Act</i> , R.S.O. 1990, c. F.3, ss. 1(1), 4, 5(2), (6), (7), 6, 7, 10.1, 14 .....	811
Comparable Legislation.....	817
<b>21.3.3 Overview of Statutory Scheme</b> .....	817
<b>21.3.4 Meaning of the Statute</b> .....	819
(a) Entitlement.....	819
Notes and Questions .....	819
(b) Unequal Division .....	820
Notes and Questions .....	821
(c) Spouse.....	822
(d) Property .....	822
Notes and Questions .....	823
(e) Net Family Property — Financial Statements.....	825
(f) Deductions from NFP.....	825
Notes and Questions .....	826
(g) Excluded Property.....	827
Notes and Question.....	827
(h) Valuation Date.....	829
Notes and Questions .....	831
(i) Additional Rights.....	832
Notes and Questions .....	833
(j) Election.....	834
Notes and Questions .....	835
(k) Priorities.....	837
(l) Burden of the Equalization Payment .....	837
Notes and Questions .....	838
(m) Payment of Entitlement.....	838
Notes and Questions .....	838
(n) Duties of Personal Representative.....	838
Notes and Questions .....	839
(o) Property Excluded Under Domestic Contracts.....	839
Notes and Questions .....	839
(p) Equalization and the Matrimonial Home.....	839
Notes and Questions .....	841
Problems .....	841
<b>21.4 LEGISLATION IN OTHER PROVINCES</b> .....	843
Further Reading.....	845
<b>21.5 ADDITIONAL SPOUSAL RIGHTS</b> .....	845
<b>21.5.1 Generally</b> .....	845

TABLE OF CONTENTS

21.5.2 The Matrimonial Home.....	845
21.5.3 Dower, Curtesy and Homestead Rights .....	846
<b>CHAPTER 22 SUPPORT OF DEPENDANTS .....</b>	<b>849</b>
<b>22.1 INTRODUCTION.....</b>	<b>849</b>
<b>22.1.1 “Testamentary Freedom” .....</b>	<b>849</b>
<b>22.1.2 Family Provision .....</b>	<b>851</b>
<b>22.1.3 Genesis of the Current Model of Law .....</b>	<b>852</b>
<b>22.1.4 Principles Rationalizing the Support Obligation .....</b>	<b>853</b>
<i>Tataryn v. Tataryn Estate</i> , [1994] 2 S.C.R. 807 .....	854
<i>Cummings v. Cummings</i> (2004), 69 O.R. (3d) 397 (C.A.) .....	857
Notes and Questions .....	865
Further Reading.....	865
<b>22.2 PRACTICE AND PROCEDURE .....</b>	<b>866</b>
<b>22.2.1 Forum .....</b>	<b>866</b>
<b>22.2.2 Parties.....</b>	<b>866</b>
<b>22.2.3 Pleadings and Notice.....</b>	<b>867</b>
<i>Succession Law Reform Act</i> , R.S.O. 1990, c. S.26, s. 63(5) .....	867
<b>22.2.4 Limitation Periods .....</b>	<b>868</b>
<i>Succession Law Reform Act</i> , R.S.O. 1990, c. S.26, s. 61 .....	868
<b>22.2.5 Preservation of the Estate during Litigation .....</b>	<b>869</b>
<i>Succession Law Reform Act</i> , R.S.O. 1990, c. S.26, s. 67 .....	869
Notes and Questions .....	870
<b>22.3 SATISFACTION OF SUPPORT OBLIGATIONS .....</b>	<b>871</b>
<b>22.3.1 Generally .....</b>	<b>871</b>
<i>Succession Law Reform Act</i> , R.S.O. 1990, c. S.26, s. 57 .....	871
<i>Re Cooper</i> (1980), 30 O.R. (2d) 113 (S.C. (Div. Ct.)) .....	872
<b>22.3.3 “Inadequate Provision for Proper Support” .....</b>	<b>876</b>
<i>Succession Law Reform Act</i> , R.S.O. 1990, c. S.26, s. 62 .....	876
Notes and Questions .....	879
<b>22.3.4 Waiver.....</b>	<b>882</b>
<i>Succession Law Reform Act</i> , R.S.O. 1990, c. S.26, s. 63(4) .....	882
Comparable Legislation.....	882
Notes and Questions .....	883
<b>22.3.5 Spouses.....</b>	<b>883</b>
Notes and Questions .....	887
<b>22.3.6 Children.....</b>	<b>889</b>
Notes and Questions .....	889
<b>22.3.7 Parents.....</b>	<b>891</b>
<b>22.4 PROPERTY SUBJECT TO AN ORDER .....</b>	<b>892</b>
<b>22.4.1 Contracts to Leave Property by Will .....</b>	<b>892</b>
<i>Succession Law Reform Act</i> , R.S.O. 1990, c. S.26, s. 71 .....	892
Comparable Legislation.....	893
<i>Cowderoy v. Sorkos Estate</i> , 2014 ONCA 618 .....	893
Further Reading.....	897
Notes and Questions .....	897
<b>22.4.2 Property Falling into the Estate for the Support of     Dependants .....</b>	<b>897</b>
<i>Succession Law Reform Act</i> , R.S.O. 1990, c. S.26, s. 72 .....	897

TABLE OF CONTENTS

Comparable Legislation ..... 898  
Further Reading ..... 899  
*Moore v. Hughes* (1981), 37 O.R. (2d) 785 (H.C.J.) ..... 899  
Notes and Questions ..... 903  
**22.5 ORDERS** ..... 905  
**22.5.1 Introduction** ..... 905  
**22.5.2 Suspensory Orders** ..... 906  
*Succession Law Reform Act*, R.S.O. 1990, c. S.26, s. 59 ..... 906  
Comparable Legislation ..... 906  
Notes and Questions ..... 906  
**22.5.3 Interim Orders** ..... 906  
*Succession Law Reform Act*, R.S.O. 1990, c. S.26, s. 64 ..... 906  
Comparable Legislation ..... 907  
Notes and Questions ..... 907  
**22.5.4 The Contents of Orders** ..... 908  
*Succession Law Reform Act*, R.S.O. 1990, c. S.26, ss. 63, 66, 68 ..... 908  
Comparable Legislation ..... 909  
**22.5.5 Change in Circumstances** ..... 910  
*Succession Law Reform Act*, R.S.O. 1990, c. S.26, s. 65 ..... 910  
Comparable Legislation ..... 911  
Notes and Questions ..... 911

**PART VII  
SOLICITOR'S DUTIES**

**CHAPTER 23 SOLICITOR'S DUTIES** ..... 915  
**23.1 INTRODUCTION** ..... 915  
**23.2 TAKING INSTRUCTIONS FOR A WILL** ..... 915  
**23.2.1 Introduction** ..... 915  
**23.2.2 The Case Law** ..... 915  
*Re Worrell* [1970] 1 O.R. 184 (Surr. Ct.) ..... 916  
Notes and Questions ..... 919  
Further Reading ..... 921  
**23.3 DUTY OF CARE TOWARDS BENEFICIARIES** ..... 922  
**23.3.1 Introduction** ..... 922  
**23.3.2 The Case Law** ..... 922  
*White v. Jones*, [1995] 2 A.C. 207 (H.L.) ..... 924  
Notes and Questions ..... 935  
Further Reading ..... 940

**PART VIII  
PARA-TESTAMENTARY ACTIONS**

**CHAPTER 24 SUBSTITUTE DECISIONS** ..... 945  
**24.1 INTRODUCTION** ..... 945  
**24.1.1 Historical Development** ..... 946  
(a) "Power of Attorney" ..... 946  
(b) "Substitute Decision-Making" ..... 949  
**24.1.2 Sources of Law** ..... 950



TABLE OF CONTENTS

<b>24.1.3 Terminology and Scheme of the Ontario Statute</b> .....	952
<b>24.2 CAPACITY AND INCAPACITY</b> .....	953
<b>24.2.1 Generally</b> .....	953
<i>Substitute Decisions Act, 1992</i> , S.O. 1992, c. 30, ss. 1(1), 2, 6, 45 .....	953
<i>Calvert (Litigation Guardian of) v. Calvert</i> (1997), 32 O.R. (3d) 281 (S.C.J.) .....	954
Notes and Questions .....	958
Further Reading .....	959
<b>24.2.2 Capacity to Grant a Continuing Power of Attorney</b> .....	959
<i>Substitute Decisions Act, 1992</i> , S.O. 1992, c. 30, ss. 8(1), 47(1) .....	959
<b>24.2.3 Assessment of Capacity</b> .....	960
<i>Substitute Decisions Act, 1992</i> , S.O. 1992, c. 30, ss. 3(1), 79 .....	960
<i>Abrams v. Abrams</i> , 2008 CarswellOnt 7788 (S.C.J.) .....	962
Notes and Questions .....	968
<b>24.2.4 Challenging a Finding of Incapacity</b> .....	970
<b>24.3 APPOINTMENT OF ATTORNEYS AND GUARDIANS</b> .....	970
<b>24.3.1 Continuing Powers of Attorney</b> .....	970
(a) Formalities .....	970
<i>Substitute Decisions Act, 1992</i> , S.O. 1992, c. 30, ss. 7(1), (7)-(8), 10(1)-(2), (4) .....	970
Notes and Questions .....	971
(b) Conditions and Restrictions .....	971
<i>Substitute Decisions Act, 1992</i> , S.O. 1992, c. 30, s. 7(2), (6)-(7) .....	971
(c) Termination or Revocation of the Power of Attorney .....	972
<i>Substitute Decisions Act, 1992</i> , S.O. 1992, c. 30, ss. 8(2), 12 .....	972
Notes and Questions .....	972
<b>24.3.2 Guardians</b> .....	973
(a) Statutory Guardian .....	973
(b) Court-Appointed Guardian .....	973
<i>Substitute Decisions Act, 1992</i> , S.O. 1992, c. 30, s. 22(1)-(3), (5) .....	973
<i>Chu v. Chang</i> , 2010 ONSC 294 .....	974
Notes and Questions .....	980
<b>24.4 POWERS AND OBLIGATIONS OF ATTORNEYS AND GUARDIANS</b> .....	981
<b>24.4.1 Duty of Care and Fiduciary Duties Generally</b> .....	981
<i>Substitute Decisions Act, 1992</i> , S.O. 1992, c. 30, ss. 32(1), (7)-(8), 66(1) .....	981
<b>24.4.2 Personal Care</b> .....	982
<i>Substitute Decisions Act, 1992</i> , S.O. 1992, c. 30, ss. 59, 66 .....	982
<i>Cuthbertson v. Rasouli</i> , 2013 SCC 53 .....	985
Further Reading .....	999
Notes and Questions .....	999
<b>24.4.3 Property Management</b> .....	1000
(a) Generally .....	1000
<i>Substitute Decisions Act, 1992</i> , S.O. 1992, c. 30, ss. 31(1), 32 .....	1000
<i>McDougald Estate v. Gooderham</i> (2005), 255 D.L.R. (4th) 435 (Ont. C.A.) .....	1001
Notes and Questions .....	1002
(b) Maintain Records .....	1003

TABLE OF CONTENTS

Ontario Regulation 100/96 (under the *Substitute Decisions Act, 1992*)..... 1003  
(c) Duty to Account ..... 1004  
(d) Compensation ..... 1004  
*Substitute Decisions Act, 1992*, S.O. 1992, c. 30, s. 40..... 1004  
Notes and Questions ..... 1005

**INDEX**..... 1007