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Law Reform Notes

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Law Reform Notes is produced in the Legislative Services Branch of the Office of the Attorney General. It is distributed to the legal profession in New Brunswick and the law reform community elsewhere, and is available on the Office of the Attorney General's website. The Notes provide brief information on some of the law reform projects currently under way within the Branch, and ask for responses to, or information about, items that are still in their formative stages.

We welcome comments from any source. If any of our readers are involved either professionally or otherwise with groups or individuals who may be interested in items discussed in these Notes, we encourage them to let them know what the Branch is considering and to suggest that they offer their comments.

Opinions expressed in the Law Reform Notes merely represent current thinking within the Legislative Services Branch on the various items mentioned. They should not be taken as representing positions that have been taken by either the Office of the Attorney General or the provincial government. Where the Office or the government has taken a position on a particular item, this will be apparent from the text.

*Responses to the items below should be sent to the address above or to lawreform-reformedudroit@gnb.ca. We would like to receive replies no later than **May 15, 2023**, if possible. We welcome suggestions for additional items which should be studied with a view to legislative reform.*

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1. *Intimate Images Unlawful Distribution Act*

The *Intimate Images Unlawful Distribution Act* (c. 1, 2022) came into force on April 1, 2022. As mentioned in previous issues, this Act creates statutory civil liability for the distribution, or threatened distribution, of intimate images without the consent of the person depicted in the image and provides judicial remedies for the victims of such activity.

2. *Fiduciaries Access to Digital Assets Act*

The *Fiduciaries Access to Digital Assets Act* (c. 59, 2022), which is designed to facilitate fiduciary access to a person's digital assets after they die or lose capacity, was passed by the legislature, and came into force on December 16, 2022.

3. Remote witnessing of wills and enduring powers of attorney

In December 2020, amendments were made to the *Enduring Powers of Attorney Act* and the *Wills Act* to allow for the use of electronic means of communication as an acceptable alternative to meeting with clients and witnesses in person when executing wills and enduring powers of attorney. The amendments were set to expire on December 31, 2022. Both Acts were amended in December 2022 to remove the expiry date and allow remote witnessing as a permanent option for enduring powers of attorney and wills.

The Law Society's website includes directives developed by the Law Society for lawyers to follow when using electronic means of communication for the execution of wills and enduring powers of attorney.

4. *Supported Decision-Making and Representation Act*

Last summer we submitted proposals for new legislation to replace the *Infirm Persons Act* and establish a scheme for supported decision-making. The proposals, which were largely consistent with those described in issue #46 of the *Law Reform Notes*, led to the enactment of the *Supported Decision-Making and Representation Act*. The Act received Royal Assent in December and will come into force on proclamation. We expect that it will come into force later this year.

The Act provides for three types of appointment: decision-making assistant, decision-making supporter, and representative. Decision-making assistants are appointed by the person requiring assistance, through a prescribed authorization form. (A lawyer will review the authorization with the person and confirm that they have capacity to make the authorization.) Decision-making supporters and representatives are appointed by the Court of King's Bench (Family Division).

We are currently working on two regulations: a regulation under the Act, and a regulation that will replace Rule 71 of the Rules of Court (Proceedings Concerning Infirm Persons) with a new rule relating to proceedings under the Act. Our plan is that the new rule will establish the following procedure for an application for the appointment of a decision-making supporter or representative:

1. The applicant files a Notice of Application, along with the supporting documents required by the Act. (The Act provides that an application must be accompanied by an affidavit of the applicant, an affidavit of any proposed decision-making supporter/representative other than the applicant, a capacity assessment report, and a financial summary. The regulation under the Act will include prescribed forms for the capacity assessment report and the financial summary. The Notice of Application will be a new form under the Rules of Court that is tailored to these applications.)

2. The applicant serves the Notice of Application, along with a blank Response (a new form under the Rules of Court) on (a) the person who is the subject of the application (the supported/represented person), (b) any existing decision-making assistant, decision-making supporter, or representative of the person, (c) any attorney appointed by the person under an enduring power of attorney, (d) the person's spouse, and (e) the person's family members (parents, adult children, adult siblings). The applicant may serve the family members by sending the Notice of Application by mail in accordance with Rule 18.06. The applicant serves the Notice of Application and the supporting documents on the supported/represented person but serves only the Notice of Application on the others. However, the applicant must provide the supporting documents to the others on request.

   The court may dispense with service on the supported/represented person if the evidence filed by the applicant establishes that service would cause serious harm to the person.

   When the Public Trustee is the applicant, the Public Trustee is not required to serve the Notice of Application on a family member whose existence or address is not known to the Public Trustee. The Public Trustee is not required to take steps to ascertain the existence or addresses of family members.

3. A respondent who wishes to oppose the application must file a Response within 20 days after the date of service, and may file a supporting affidavit. If a respondent files a Response, the administrator serves a copy on the applicant.

4. When the 20-day notice period has expired for all respondents, the applicant files a record containing an index, the documents that have been filed, and proof of service.

5. The administrator forwards the record to a judge, who determines whether a hearing will be held. A hearing is required if the supported/represented person has filed a Response. If a Response has been filed by someone else or no Response has been filed, the judge has the discretion to decide whether a hearing will be held.

6. If the judge determines that a hearing will be held, the judge provides the administrator with a hearing date and the administrator informs (a) the applicant, (b) any proposed decision-making supporter/representative other than the applicant, (c) the supported/represented person, and (d) any respondent who filed a Response. Before the hearing, the applicant files a pre-hearing brief in accordance with Rule 38.06.1.

This proposed procedure has some similarities to the existing procedure under Rule 71 and the *Infirm Persons Act*. For example, it allows the court to make an order without holding a hearing. However, there are a number of differences, including the following:

- In the existing procedure, an applicant who would like the court to make an order without a hearing must obtain the consent of all the respondents. In the proposed procedure, an applicant will have no obligation to obtain consent. Instead, a respondent who wishes to oppose an application will be required to take the active step of filing a Response. This change is intended to reduce the number of unnecessary hearings. At present, a hearing is required when a respondent declines to cooperate (by providing written consent), even where the respondent is not actually opposed to the application. In the new procedure, a lack of cooperation will not trigger a hearing.

- In the existing procedure, the person who is the subject of the application (the "alleged infirm person") is usually not served with the Notice of Application, because the court can dispense with service on the basis that the person does not have the capacity to understand the nature of the proceeding (Rule 71.03(2)(b)). In the new procedure, the court will be able to dispense with service on the supported/represented person only where service would cause serious harm to the person, so the person will typically be served. This change is intended to give the supported/represented person an opportunity to oppose an application (by filing a Response). We expect that it will be unusual for the person to oppose the application, but we think they should have the opportunity to do so.

- The medical evidence in the existing procedure typically consists of two affidavits from medical practitioners containing, among other things, an opinion that the person is mentally incompetent. (One affidavit from a medical practitioner is the basic requirement, but two are required if service on the alleged infirm person is to be dispensed with and a hearing thereby avoided.) The new requirement is a capacity assessment report from one "assessor" – a medical practitioner, nurse practitioner or psychologist. The prescribed form for the report will be designed to ensure that the assessor provides the information and opinion necessary for the court to decide which type of appointment should be made (if any) and how the order should be tailored to reflect the person's abilities and needs. These changes are intended to remove barriers (by requiring only one person to assess capacity and expanding the class of persons who may do so) and to ensure that the court receives the evidence it needs to make an appropriate order.

The drafts of the two regulations will be posted on the Executive Council Office website before they (and the Act) come into force.

We welcome comments on this proposed procedure, either now or when the regulations are posted.

5. Wills and estates legislation

As mentioned in previous issues, we are planning to propose comprehensive new legislation to modernize estates law (both testate and intestate) and to consolidate the principles found in the *Wills Act*, Part II of *Devolution of Estates Act*, the *Survivorship Act,* and the *Provision for Dependents Act*. We are now in the process of finalizing our proposals for the new legislation. A non-exhaustive outline is set out below (additional details on some of these topics can be found in issues #45 and #46 of the *Law Reform Notes*). We welcome feedback on these proposals as well as items raised in the prior *Notes*. We would ask that comments be sent to us by **May 15, 2023**, at the latest.

The proposals are drawn from a number of sources, including the existing legislation, law reform literature, legislation from other provinces (particularly British Columbia's *Wills, Estates and Succession Act*, Alberta's *Wills and Succession Act*, Ontario's *Succession Law Reform Act* and Saskatchewan's *The Intestate Succession Act, 2019*), the Uniform Law Conference of Canada's *Uniform Wills Act (2015)*, caselaw, and the submissions we received.

General Issues

We plan to propose that the provisions found in the new wills and intestate succession regimes apply to common law partners generally, to the extent possible and with any necessary modifications, in the same way as they apply to married persons. We plan to propose that "common law partners" be defined as persons who are not married to each other but have cohabited continuously in a conjugal relationship for a period of two years. We do not plan to propose that the time period be shortened if the persons have a child together, nor do we plan to propose a list of factors to be considered when determining cohabitation or conjugality.

We also plan to propose that children conceived and born alive after a parent's death, using assisted human reproduction, be included in these regimes. This would be subject to certain conditions, including that notice of an intention to use reproductive material to conceive be given to the personal representative (and other persons whose interest in the estate might be affected) and that the child be born within two (or perhaps three) years after the parent's death.

Testate Issues (*Wills Act*)

Lowering minimum age

We plan to propose that the minimum age for making a will be lowered to 16 and that, as a result of the lowering of the minimum age, the exceptions currently found in section 8 of the *Wills Act* will not be carried forward.

Electronic wills

We do not plan to propose provisions dealing with electronic wills.

Formal requirements

We plan to propose that the basic requirements of formal validity found in the Act – writing, signed by testator or someone on their behalf, witnessed by two witnesses – be carried forward. This includes the recently added provisions dealing with execution using electronic means of communication.

The ability for members of the Canadian Forces to make a will without some of the required formalities, as found in section 5, will remain with some clarifications.

The ability to make a holograph will, as set out in section 6, will be continued.

Provisions relating to the position of the testator's signature, found in section 7, will generally be carried forward with some wording changes.

Witnesses to wills

We plan to propose that it be made clear that a witness must be the age of majority and that a person signing the will on behalf of the testator is not eligible to be a witness.

Gifts to witnesses

We plan to propose that the provisions prohibiting gifts to witnesses and their spouses and persons claiming under them, found in section 12, be extended to include persons who sign the will on behalf of the testator as well as interpreters who provide translation services in respect of the will. The prohibition will also extend to common law partners of such persons (witnesses, signors, interpreters).

That said, we also plan to propose that the Court be given the ability to validate any such gifts if it is satisfied that the testator intended to benefit the person despite their status as witness, signor or interpreter and that neither the beneficiary nor their spouse (or common law partner) exercised any improper or under influence over the testator.

We also plan to propose a provision that a charge or direction respecting personal representative remuneration is not void by the personal representative acting as witness.

Failed gifts

We plan to propose one hierarchical scheme to deal with gifts that fail for any reason (e.g., lapse, ademption, forfeiture, declension). Subject to a contrary intention in the will, if a gift cannot take effect for any reason, the property that is the subject of the gift is to be distributed according to the following priorities: (1) to the alternate beneficiary whether or not the particular cause of failure is contemplated in the will, (2) to the issue of the primary beneficiary who is unable to take the gift if that beneficiary is also an issue of the testator, (3) to the issue of the alternate beneficiary who is unable to take the gift if that beneficiary is also an issue of the testator, and (4) to the residue, if any, shared by all residuary beneficiaries in proportion to their interests. If none of these are applicable, then the subject matter of the gift would devolve as if the testator died intestate.

Revocation of wills

We plan to propose that the methods by which a will is revoked, and which are set out in section 15, carry forward to the new legislation – i.e. by another will, a writing declaring an intention to revoke and burning, tearing or otherwise destroying with an intention to revoke.

Likewise, we plan to propose that the principle found in section 17 that a will is not revoked by presumption resulting from a change in circumstances be carried forward. This would be subject to possible exemptions relating to revocation of certain gifts on divorce/termination of common law relationship and/or separation as discussed in more detail below.

Alteration and revival of wills

We plan to propose that the provisions found in sections 18, 19 and 21 be carried forward.

Effect of subsequent marriage on wills

We plan to propose that sections 15.1 and 16 of the Act not be brought forward to the new legislation, thereby eliminating the effect a subsequent marriage has on a will.

Effect of subsequent divorce or termination of common law relationship on wills

We plan to propose the inclusion of a specific provision in the new legislation to deal with the effect of a divorce or termination of a common law relationship on a prior will. Upon divorce or common law relationship termination, any gift (personally or as a class of beneficiaries), power of appointment or appointment as personal representative or trustee made to the former spouse or former common law partner will be deemed to be revoked, unless the contrary intention is expressed in the will.

We continue to consider the best way to approach or define termination of a common law relationship, including whether a list of factors to establish termination should be set out in the legislation or if this should be left to be developed by the common law. We are leaning towards the latter as it would provide the court with more flexibility to apply the legal standard to different circumstances, when disputes arise.

Effect of subsequent separation on wills

As discussed in issue #46, we continue to consider including provisions such as those recently implemented in Ontario (see section 17 of its *Succession Law Reform Act*), which indicate that separation also revokes a gift or appointment to a spouse (or common law partner). We would like your views on this issue, particularly on how separation might be defined, in terms of duration or actions of the persons, so as to capture only circumstances that are sufficiently "permanent" to justify revocation of a gift or appointment.

Devise of mortgaged land and tangible personal property

We plan to propose that the concepts found in subsections 34(1) to (3) which make mortgaged land primarily liable for the mortgaged debt be extended to include both land and tangible personal property. However, this would be limited to registered (under the *Registry Act/Land Titles Act* or *Personal Property Security Act*, as applicable) purchase money security interests (generally meaning security interests that secure credit provided to the testator to acquire, improve or preserve the land or tangible personal property).

Dispensing power

We plan to propose that the power of the court (under current section 35.1) to validate documents not executed in compliance with the formal requirements imposed by the Act, be carried forward to the new legislation.

Common law presumptions/doctrines

We plan to propose that, subject to a contrary intention in a will, the following common law presumptions be abrogated:

- advancement to child in lifetime revokes gift in will,
- revocation of gift in will by *inter vivos* gift in the same amount,
- gift in will to creditor satisfies debt, and
- binding agreement/promise to give in lifetime is satisfied by gift in will.

We also plan to propose that a gift of property that the testator does not own is void and that the rights of a beneficiary are not affected by the purported gift by the testator of property owned by the beneficiary. However, a testator may make a gift that is conditional on the disposition by the beneficiary of property owned by the beneficiary.

Admissibility of evidence to interpret will

We plan to propose that the rules governing admissibility of evidence will be relaxed to allow extrinsic evidence of testator's intent in certain circumstances. In keeping with the ULCC *Uniform Wills Act* as well as the Alberta and BC legislation, we plan to propose a provision that indicates that a will is to be interpreted in a manner that gives effect to the intent of the testator, and in determining the testator's intent the court may admit the following evidence:

- evidence as to the meaning, in either an ordinary or a specialized sense, of the words or phrases used in the will,
- evidence as to the meaning of the provisions of the will in the context of the testator's circumstances at the time of the making of the will, and
- evidence of the testator's intent with regard to the matters referred to in the will.

Intestate Issues (*Devolution of Estates Act* – Part II)

Inclusion of common law partners

We plan to propose that intestate succession law expressly include common law relationships, thereby allowing a common law partner to inherit, generally in the same manner as a married spouse, when their partner dies intestate and to be eligible to be appointed to administer an intestate estate.

Preferential/spousal share

We plan to propose adopting the regime set up in most Canadian intestacy statutes whereby the surviving spouse/common law partner is granted a fixed preferential share (a specified dollar amount) out of the deceased's net estate, as opposed to identifying any particular class of assets (i.e. "marital property") as is currently in place under the *Devolution of Estates Act*. We plan to propose that the fixed amount be prescribed in regulation to allow for easier adjustment, when necessary. We consider an amount in the $200,000 to $300,000 range to be appropriate; but we welcome input. The surviving spouse/common law partner would also be entitled to a distributive or residual share of the estate, as discussed below.

That said, if there are reasons for maintaining the existing "marital property" method of preferring a spouse, and extending it to include common law partners, we remain open to considering that approach. However, our current thinking is that this approach would become too complex and cumbersome when common law partners are added to the intestacy scheme, given that they are not covered by the marital property regime under the *Marital Property Act*.

More than one person entitled to share

We continue to consider the best approach to deal with the scenario where there are two or more persons eligible to inherit the "spousal share" on intestacy (and to be appointed to administer the estate). As mentioned in issue #46, we are considering a scheme which essentially prioritizes the most recent relationship except that a married spouse entitled to a receive a division of matrimonial property (i.e., under the *Marital Property Act*) receives that entitlement ahead of the division of the intestate estate. A surviving spouse who receives their matrimonial property entitlement cannot also inherit under the intestate succession regime. Other options we are considering include allowing the eligible claimants to agree upon their shares or apply to court and providing for an equal sharing.

Effect of separation on the spousal/common law partner share

As discussed in issue #46, we continue to consider adopting provisions which provide that a spouse (and common law partner) loses the ability to inherit on intestacy if they were separated (as defined) at the time of the intestate's death.

We are considering provisions like those found in section 15 of Saskatchewan's *Intestate Succession Act, 2019* and subsection 3(2) of Manitoba's *Intestate Succession Act*. These provisions, adapted for New Brunswick, would essentially provide that the spouse or common law partner would take no part of the estate if the intestate and the spouse/partner:

- had been living separate and apart for a period of time (perhaps 1 or 2 years) at the time of the intestate's death,
- were opposing parties to a proceeding under the *Divorce Act* (Canada) or the *Marital Property Act* at the time of the intestate's death,
- are parties to an agreement or an order with respect to their property or other spousal or family issues, which agreement or order appears to separate and finalize their affairs in recognition of the termination of their spousal/common law relationship, or
- before the intestate's death, they had divided their property in a manner that was intended by them, or appears to have been intended by them, to separate and finalize their affairs in recognition of the breakdown of their spousal or common law relationship.

Estate distribution rules

We plan to propose that the basic distribution rules be modified to provide that the surviving spouse or common law partner should receive the entirety of the intestate's estate where all children of the intestate are shared with the surviving spouse or partner.

Otherwise, we plan to propose that the basic distribution rules (amongst spouses and children) currently found in the Act be carried forward. Therefore, if an intestate dies leaving a surviving spouse (or surviving common law partner) and one child who is not also the child of the surviving spouse or surviving common law partner, the child will receive one-half of the residue (after the preferential share goes to the surviving spouse or partner) and, if there is more than one such child, the children receive two thirds of the residue.

Per stirpes distribution

We plan to propose that section 23 be carried forward such that If an intestate died leaving issue (or descendants), the estate shall be distributed, subject to the rights of the spouse and common law partner, if any, *per stirpes* among the descendants.

Parentelic Distribution

We plan to propose the adoption of the parentelic method for determining inheritance at more remote levels where the intestate leaves no immediate family, rather than continuing the existing consanguinity (next-of-kin) method found in sections 28 and 29 of the Act. As mentioned in issue #46, a parentelic system (which has been adopted in the western provinces), rather than focusing on degrees of kinship, looks at each family line and does not consider a new family line until the first (prior) line is extinguished. The parents' lines are considered first and only if there is no one to inherit in those lines are the next lines (such as those of the grandparents) considered. An example of this system can be found in sections 8 to 11 of Saskatchewan's *Intestate Succession Act, 2019*. The goal in making this change is to, among other things, reduce the effort and cost associated with administering an estate where more distant relatives are entitled to inherit.

We do not plan to propose that a limit be placed on the degrees of relationship that can inherit.

Doctrine of advancement

We plan to propose that section 31 not be carried forward to the new Act. This section provides that a gift to a child while the intestate is alive (an "advancement by portion") is to be considered as part of that child's inheritance when the estate is subsequently distributed thereby reducing the child's share accordingly. Our view is that this doctrine produces uncertainties (it can be difficult to determine which gifts will be an "advancement by portion") and anomalies (it applies only to gifts to children, it does not apply to all gifts, only to advancements, and it does not apply to partial intestacies). If a parent wishes to ensure that advances made to a child during their lifetime be set off in the distribution of the parent's estate, they can do so in a will.

Provision for Dependants Issues (*Provision for Dependants Act*)

We plan to propose that, for the most part, the substantive rules found in the *Provision for Dependants Act*, enabling dependants of a deceased person (testate or intestate) to apply for an order for maintenance and support and providing the court with broad discretion to fashion the relief it considers most appropriate, be carried forward to the new legislation. That said, we plan to propose the following adjustments:

- update definitions to specifically include common law partners and posthumously conceived children (subject to the conditions referred to in the General Issues section above) as dependants,
- change the time period for bringing an application from four months to six months,
- confirm the ability of the court to make any interim orders and give any directions that may be necessary,

- allow a personal representative who has been served with an application to proceed with the distribution of the estate with the consent of all persons entitled to apply for an order or if the court so orders,
- provide that the rules do not prevent a personal representative from making reasonable/necessary advances for the maintenance and support of dependants who are entitled under the deceased's will or on intestacy,
- confirm that the court may inquire into and consider all matters that should fairly be taken into account in deciding the application and that, in addition to the evidence presented by the parties, the court may direct any other evidence to be given that it considers necessary or proper,
- specify that in making any order it considers appropriate, the court may order, among other things, the possession or use of any specified property by the dependant for life or such period as the court considers appropriate and may provide that payment or provision be secured by a charge on property or otherwise,
- clarify that the court may direct that the costs of any application be paid out of the estate or otherwise as it thinks proper, and may fix the amount of costs payable by any party at a lump sum based on the value of the estate and/or the amount of any maintenance and support applied for, and
- empower the court, when it orders security for payment of maintenance and support or charges a property therewith, to direct, upon proper notice, the sale of the property for the purpose of realizing the security or charge.

Survivorship Issues (*Survivorship Act*)

We plan to propose that the rules and presumptions currently found in the *Survivorship Act* generally be carried forward to the new legislation.

We have received some feedback suggesting that the combined effect of the presumptions found in section 3 and subsection 6(2), which provide that persons who jointly own property and die within 10 days of each other are deemed to have died at the same time and thus hold the property as tenants in common, should be reconsidered. The concern is that this outcome can create the added burden and cost associated with applying for probate/administration for both deceased co-owners, as well as the need to subsequently manage two separate estates.

While we understand that this can occasionally be the result, we question whether there are any better alternatives. The rule is in place to ensure, to the extent possible, that the property of each deceased passes to their family line, rather than to the family line of the other deceased. It is generally accepted that this result is in keeping with what would likely be the wishes of the deceased in such circumstances. In situations where there are common heirs, this rule may create the additional administrative requirements without any substantive difference in inheritance; however, such a rule is necessary where different sets of heirs are entitled to inherit (such as for persons in second marriages or common law relationships with children from those separate relationships or for persons with no children or grandchildren). Therefore, we are not inclined to abandon the current rule in favour of the old rule which provided that the oldest person is deemed to have died first, nor are we aware of any other scheme which better accomplishes the policy objective. Our rules are consistent with most other Canadian jurisdictions, including those who have recently updated their legislation.

In addition, the presumption in section 3 is subject to a contrary intention in an agreement between the co-owners and subsection 6(3) of the Act validates any actions taken by the second deceased during the intervening survival period; these provisions will be carried forward to the new legislation.

That said, we are considering a possible solution to address the scenario involving common heirs. We could potentially include an exception providing that the presumption found in section 3 is not applicable to jointly held property where the property would pass, under a will or on intestacy, to the same person or persons and in the same manner regardless of which co-owner died first. In such a situation, it would

pass to one of the deceased (likely the eldest). We are wondering if such an exception would be beneficial and workable in practice, or if it would result in disputes over whether the exception applies (i.e. whether there are, in fact, common heirs). Another potential option would be to give the court the ability to declare that the presumption doesn't apply and declare which deceased's estate is entitled to administer the property. However, this option might not solve the administrative burden issue as it essentially replaces one court application with another. We welcome your comments.

We also continue to consider whether 10 days is an appropriate survival period or whether another duration (such as 5, 15 or 30 days) should be adopted. Our view is that whichever number of days is chosen is somewhat arbitrary and may not, in the end, change the operative effect of the provisions in many cases. We are inclined to maintain the *status quo* but welcome any input.

Other Issues – Estate Administration

As we indicated previously, once our work outlined above is complete, we intend to explore reforms dealing with estate administration, including procedures under the *Probate Court Act* and *Probate Rules* as well as the powers and abilities of executors and administrators to deal with property under their management, for example, those found in Part I of the *Devolution of Estates Act* and in the *Executors and Trustees Act*.