#L-603 2/22/82

Second Supplement to Memorandum 82-9

Subject: Study L-603 - Probate Law (Testamentary Capacity of Minors)

The Uniform Probate Code and existing California law provide that any person 18 or more years of age who is of sound mind may make a will. The Commission may wish to consider whether under some circumstances a minor should be permitted to make a will.

Attached is an extract from the Report on The Making and Revocation of Wills by the Law Reform Commission of British Columbia. You should read the extract for a discussion of possible exceptions to the minimum age requirement.

The attached extract recommends:

(1) A will may be executed or revoked by a minor of any age if, upon application to court, the court determines that the minor has testamentary capacity notwithstanding that the minor has not reached the age of 18.

(2) Notwithstanding that the testator is a minor, the minor may make or revoke a will which is expressed to be in contemplation of his or her marriage if both of the following requirements are satisfied:

(a) The will names the intended spouse.

(b) The marriage subsequently takes place.

(3) The existing British Columbia rule that a person who is, or has been, married may make or revoke a will while under the age of majority is recommended to be retained.

(4) A minor who is a regular member of the Armed Forces may make or revoke a will.

Respectfully submitted,

John H. DeMoully
Executive Secretary

EXTRACT from Report on The Making and Revocation of Wills, Law Reform Commission of British Columbia (1981).

CHAPTER II TESTAMENTARY CAPACITY OF MINORS

A. Who May Make a Will?

Prior to 1837, wills disposing of leasehold and personal property could be made by boys of fourteen and girls of twelve years of age, but in general a person could not dispose of real property by will until the age of 21. In their 1833 Report, the Real Property Commissioners recommended that no person under the age of 21 years should be capable of making a will.

In British Columbia anyone who has reached the age of 19 and is of sound mind has testamentary capacity.[1] There are exceptions to this rule: individuals who are military personnel or mariners, or who are married,[2] may make a will although under 19. In Canada, the age at which a person acquires capacity is not uniform. The most common age of majority specified in provincial legislation is 18. In Newfoundland, however, a testator need only be 17.[3] In Quebec, the Civil Code Revision Office has proposed that a 16 year old be permitted to dispose of his property by will in the authentic (or notarial) form.[4]

Should the minimum age for general testamentary capacity remain at 19 in British Columbia? Although consistency with other British Columbia minimum age requirements is desirable, if the age were lowered to that at which a person could enlist in the Armed Forces it would eliminate the need for a major exception to the rule that testamentary capacity is required at the age of 19. At the present time, a person may enlist in the Canadian Forces at age 18.[5] However, a person under 18 may enlist if he has his parents' consent. If the general testamentary age limit were lowered to 18, an exception would still be required for those who enlist at an earlier age. Similarly, a reduction to 18 would not obviate the necessity for an exception in respect of married persons. A person as young as 16 may marry with his parents' consent, or at an earlier age where the court so authorizes.[6]

We are of the opinion that as a general rule the age of majority in the Province should be the minimum age at which wills may be made. It is at this age that an individual is generally considered to be sufficiently mature to understand his obligations to other people. Although the age of 19 specified by the current *Wills Act* in section 7(1) is the same as that specified in the *Age of Majority Act*,[7] we nevertheless are of the view that the reference to a specific age should be replaced by a reference to the "age of majority." In this manner, changes in the age of majority will automatically be reflected in the *Wills Act*.

The Commission recommends that:

1. Section 7 of the Wills Act *be amended by deleting "is under the age of 19 years" and substituting "is under the age of majority."*

B. Exceptions to the Minimum Age

1. Applications for Capacity

(a) Generally

There are undoubtedly situations in which a minor would benefit from having the capacity to make a will, but the law provides no machinery by which the minor may acquire such capacity. A similar issue arose in our

[1] Feeney, T., The Canadian Law of Wills: Probate, 24.
[2] *Wills Act*, R.S.B.C. 1979, c. 434, ss. 7 (1) (a) and 7 (3).
[3] R.S.N. 1970, c. 401, s. 3.
[4] Report on the Quebec Civil Code, Quebec Civil Code Revision Office, Book III, Title Three, Art. 248 (1977).
[5] *National Defence Act*, R.S.C. 1970, c. N-4, s. 20 (3).
[6] *Marriage Act*, R.S.B.C. 1979, c. 251, s. 24 (1), s. 25 (2).
[7] R.S.B.C. 1979, c. 5, s. 1.

Report on Minors' Contracts,[8] in which we examined the question of minors' capacity to enter into contracts. It was recommended that a minor should be able to apply for contractual capacity either generally, or in respect of a specific contract when the protection offered by the law to minors would be unnecessary in the circumstances.[9]

In New Zealand a similar scheme has been in operation in respect of wills since 1903. Under the *Life Assurance Policies Act Amendment Act* enacted in that year, a minor 15 years of age or older was declared competent, with the consent of the Public Trustee, to dispose by will of any interest he might have in a policy of insurance on his own life. This conditional grant of capacity does not appear to have caused undue problems in New Zealand, and it has been noted that the vast majority of proposals presented to the Public Trustee were sensible and reasonable dispositions of the proceeds of life insurance policies. As a result, the Public Trustee's consent has rarely been withheld.[10]

In 1969, this concept was extended to embrace wills disposing of different types of property. Section 2 of the *Act to Amend the Law Relating to Wills*[11] provides:

> **2. Wills of minors**—(1) Every minor after his or her marriage or on or after attaining the age of 18 years shall be competent to make a valid will or revoke a will in all respects as if he or she were of full age.
>
> (2) Every minor who is of or over the age of 16 years, but has never been married and has not attained the age of 18 years, may, with the approval of the Public Trustee or of a Magistrate's Court, make a will or revoke a will, and every will so made and every revocation so effected shall be valid and effective as if he or she were of full age.
>
> (3) The approval required by subsection (2) of this section shall be given if the Public Trustee or the Court is satisfied that the minor understands the effect of the will or the revocation, as the case may be.
>
> (4) Except as provided in section 6 of the Wills Amendment Act 1955 or in subsection (1) or subsection (2) of this section, no will made, and no revocation of a will effected, by a person under the age of 18 years shall be valid or effective.

In the Working Paper that preceded this Report, we made the following proposal:

> 2. The Supreme Court of British Columbia have the power, upon application, to grant a minor a general testamentary capacity as if he were of full age.

There are obvious differences in approach between the New Zealand Act and that proposal. In addition, comments we received from our correspondents respecting the proposal were mixed. We therefore think it appropriate to address separately each of the concerns identified by our correspondents.

(b) Would the Proposal be Useful?

Our correspondents were equally divided on this question. Nevertheless, we are not persuaded that the proposal is without merit. We therefore adhere to our original conclusion that in certain cases arbitrarily fixing the age of majority as the age at which every person may make a will could work an injustice. While many minors are undoubtedly immature, others may be as capable of exercising mature judgment at 16 as they will be at 19. Where for some reason the execution of a will by a minor is desirable, we do not believe that an individual capable of comprehending his moral obligations, the extent of his estate, and the legal consequences of his acts should be precluded from executing a valid will solely because he is under age. The age of majority

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[8] Law Reform Commission of British Columbia, Report on Minor's Contracts (LRC 26, 1976).

[9] *Ibid.* at 42.

[10] *See* G.P. Barton, *Wills Amendment Act 1969*, (1970) 4 N.Z.U.L. Rev. 78 at 80.

[11] 1969, No. 40 (N.Z.).

should be no more than a *prima facie* requirement, which may be displaced by appropriate evidence. This conclusion is buttressed by the apparent success of a similar scheme in New Zealand.

(c) Should the Minor be Required to Obtain Approval?

It might be argued that if an age requirement works an injustice, the solution is merely to repeal it, and to judge each case on its merits. However, we are not convinced that the general rule is completely without merit. The alternative is probably litigation whenever a minor draws a will. In general, we have no quarrel with the view that in many cases a minor will not in fact be competent. We think it appropriate therefore that the capacity of a minor be determined before he makes a will. We are in accord with the New Zealand legislation insofar as it specifies that a minor who desires to execute a will should obtain approval in advance.

(d) Who Should Approve the Execution of a Will?

In Working Paper No. 28, we proposed that the power to approve the execution of a will should be vested in the Supreme Court. As one of our correspondents pointed out, most residents of British Columbia enjoy relatively easy access to judges or local judges of the Supreme Court. While it is possible to grant a similar power to the Public Trustee, the centralization of that office's functions in Vancouver renders that option less attractive than it might otherwise be. Moreover, vesting the power to make such orders in a Supreme Court judge will be advantageous when the recommendations made in our Report on Minor's Contracts[12] are implemented. In that Report we recommended that the Supreme Court of British Columbia be given a power to confer a general contractual capacity on minors. Such an application might usefully be combined with an application for capacity to make a will.

The major argument advanced against conferring such a power on the court is the difficulty of securing an impartial guardian *ad litem*. In the Working Paper, we expressed the view that the present Rules of Court were sufficiently flexible to ensure that a guardian *ad litem* could be found.[13] The only general qualification is residence in the province. We adhere to this conclusion.

(e) Should a Specific Will be Authorized?

The New Zealand legislation enables the appropriate authority to authorize "a will" or the revocation of "a will." Only a will so approved is effective. The minor is not granted a general testamentary capacity, and hence regardless of any change in his wishes or in his circumstances, a revocation without the appropriate consent is ineffective.

In the Working Paper we canvassed a number of objections to such a limited scheme. The court might be inhibited in its task of considering whether to approve a specific form of will if such an approval could be construed as a determination that the actual words used in the will are effective to carry out the minor's intent. That task is more appropriately that of a court of construction and the minor's legal advisers. The inquiry would of necessity go beyond the relatively simple issue of whether the minor is sufficiently mature and capable of recognizing the extent of his property and his legal and moral obligations. Instead the court would be forced to undertake an investigation into the merits of the will itself, a task which could involve wide-ranging

[12] L.R.C. 26, Feb. 24, 1976.

[13] *See* Working Paper No. 28, at 15.

inquiries into family relations, the minor's motives, the legal and financial position of possible beneficiaries, and the tax implications of certain dispositions.

Moreover, and apart from practical considerations, we are not convinced that it is necessary to restrict the court to approving a specific will. No such limitations are placed on adult testators. If the bar of minority is justified on the basis of immaturity, it seems unfair to continue to impose restrictions when a minor has been specifically found to be capable of exercising mature judgment. This is particularly so in respect of the revocation of wills. We think that a mature and capable minor should be able to revoke a will he deems unsatisfactory. There is little to commend a scheme of involuntary testation. We are fortified in this conclusion by the fact that those of our correspondents who favoured proposal 2 in our Working Paper did not take issue with the tentative conclusion that a general, and not a limited testamentary capacity should be conferred upon minors in appropriate cases.

2. Marriage

In British Columbia a person who is, or has been, married may make and revoke a will while under the age of 19. The rationale for this exception is that the distribution of a minor's estate should not be governed solely by the intestate succession rules where he has undertaken the responsibilities inherent in marriage. After his marriage there may be a wider range of potential beneficiaries having moral claims on the minor. He may believe that his spouse should be entitled to a larger share than the rules respecting intestate succession allow. A married minor should be free to recognize these claims by making a will. We are in agreement with the policy of the Act and therefore do not propose any amendment to the exception for married persons.

Both convenience and policy dictate, however, that a minor should be able, like an adult, to make a will in contemplation of marriage. It is possible that a spouse could die after the wedding but before he has a chance to execute a will. A provision enabling a will to be made in contemplation of such a marriage recognizes that many young newlyweds may be understandably lax about attending to the making of a will after their marriage.

Some question arises concerning the manner in which a minor should be obliged to indicate that a will is in contemplation of marriage. We are of the view that a minor should not be able to avoid making an application for testamentary capacity by the simple expedient of making a will expressed to be in contemplation of an unspecified future marriage. Rather, we feel that the will should indicate on its face an intent to enter into a specific marriage, and the minor should actually marry the person indicated.

We are aware that it might be thought anomalous that a minor be empowered to make a will without first obtaining a grant of capacity under our second recommendation. As one of our correspondents noted in respect of a proposal in the Working Paper that would permit a minor to make a will in contemplation of marriage:

> One might, I suppose, question the conferring of testamentary capacity on a married minor. The maturity of married minors is not necessarily any greater than that of the unmarried; indeed, not too facetiously, it might be argued that the married minor is a living example of immaturity. The spouse of the minor is generally well protected by the law of intestacy, though I suppose that, in a case where there are children, by force of circumstances the children will be young, and it might be better in such a case if all of the property can be given to the other spouse.
>
> In any event, given the present law, [the Commission's proposal] makes eminent good sense.

The main issue is whether the rules of intestacy should prevail in every case where a minor wishes, but is unable, to execute a will prior to his marriage. We do not think the risk of an immature bride or bridegroom making an inappropriate will is so high that the rules of intestacy should inevitably apply. What risk there is in recognizing the practical advantages inherent in permitting intended spouses to execute wills is, in any event, tempered by the power of the court under the *Wills Variation Act* to vary the will in appropriate cases.

C. Military Personnel and Mariners

There are two categories of individuals who, by virtue of their employment, are permitted to make wills while under the age of 19: members of certain armed forces while on active service and mariners or seamen at sea. Our *Wills Act* does not specifically grant capacity to minors answering those descriptions. Instead it provides an exception to the minimum age requirement by cross-referencing section 7,[14] which deals with age requirements, to section 5 which describes the execution formalities required for a privileged will.[15] In order to ascertain who has the capacity to make a will while a minor, it is thus necessary to determine who may make a privileged will.

Because this particular area of succession law is unusually recondite, we have relegated such a review to an Appendix[16] and here record only our principal conclusions. The privilege for military personnel turns on concepts of "active service" and of membership in the Canadian Forces or certain foreign forces. The law surrounding both these concepts is needlessly complex and idiosyncratic. The exception for minor mariners is archaic.

We have concluded that the privilege extended to minor servicemen should not turn on concepts such as active service. We do not quarrel with the proposition that a minor serviceman should be permitted to draw a will. We are, however, concerned that it should be clear at the time the will is drawn that it may not be challenged because of the testator's minority. Therefore we think that membership in the armed forces should be the sole criterion governing the modified privilege. The *National Defence Act*[17] contains no definition of a "member" of the Armed Forces. Instead that Act refers to officers and men of the Armed Forces.[18] We think that provincial legislation should be framed in similar terms.

We do not think that the privilege granted to minor mariners is necessary. We see no ground for singling this profession out from among other dangerous activities. Moreover, our research has led us to believe that the use of the privilege by minor mariners is virtually unknown. Under the present *Wills Act*, the right to make a privileged will is also extended to certain minors who are members of the armed forces of Allied or Commonwealth countries. We think the position of foreign minors should be governed by the foreign law to which our courts would be directed under the appropriate choice of law rule. Later in this report we examine the rules governing the conflict of laws.

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[14] The *Wills Act*, R.S.B.C. 1979, c. 434, s. 7 (1).

[15] *Ibid.* s. 7 (1).

[16] Appendix H.

[17] R.S.C. 1970, C. N-4.

[18] The *National Defence Act* defines "officer" and "man" as follows:

"officer" means

(a) a person who holds Her Majesty's commission in the Canadian Forces,

(b) a subordinate officer in the Canadian Forces, and

(c) any person who pursuant to law is attached or seconded as an officer to the Canadian Forces.

"man" means any person, other than an officer, who is enrolled in, or who pursuant to law is attached or seconded otherwise than as an officer to, the Canadian Forces.

D. Recommendation

The following recommendation incorporates our conclusions respecting grants of capacity to minors, the execution of a will by a minor in contemplation of marriage, and the privilege to execute wills enjoyed by minor servicemen. That part of the recommendation concerning "contemplation of marriage" adopts a broad view of when a will may be said to be in contemplation of marriage. The minor need not specifically state that the will is made in contemplation of a specific future marriage, if that intent can be gathered from the whole of the will. It would, of course, be prudent to include such a formal statement in the will. We do not think, however, that the failure to do so should necessarily invalidate the will.

The Commission recommends that:

2. *Section 7 of the* Wills Act *be amended by:*
   - *(a) adding the words "subject to subsection (5)" to subsection (1), and*
   - *(b) adding subsections comparable to the following:*
     - *(4) A minor may apply to the Supreme Court for a declaration that he has testamentary capacity notwithstanding that he has not reached the age of majority.*
     - *(5) Subsection 1 does not apply to:*
       - *(a) a will made by a minor pursuant to a declaration made under subsection 4;*
       - *(b) a will made by a minor which is expressed to be made in contemplation of his marriage if*
         - *(i) the will names the intended spouse, and*
         - *(ii) the marriage subsequently takes place; or*
       - *(c) a will made by an officer or man of the regular force of the Canadian Forces.*
     - *(6) Nothing in subsection 5 shall derogate from the power of the court to refuse probate of a will on a ground other than the minority of the testator.*