UNIFORM WILLS ACT – DISCUSSION CHART

SUBJECT MATTER	UNIFORM WILLS ACT	COMMENTS	DISCUSSION/NOTES
Testamentary Capacity of Minors	**Infants** **8**(1) A will made by a person who is under the age of majority is not valid unless at the time of making the will the person (a) is or has been married; (b) is a member of a component of the Canadian Forces, (i) that is referred to in the *National Defence Act* as a regular force, or (ii) while placed on active service under the *National Defence Act;* or (c) is a mariner or seaman.	A minor is usually not considered to have testamentary capacity until the age of majority. **LAW REFORM:** Proposals to lower the age of testamentary capacity: Quebec Civil Code Revision Office suggested notarial will at 16 years old - not implemented. Manitoba Law Reform Commission has recommended 16 years. British Columbia Law Institute the unproclaimed British Columbia *Wills, Estates and Succession Act* – 16 years. Alberta Law Reform Institute - should remain at 18 years.	
	See the exceptions in section	**LEGISLATION: CANADA**	

Statutory Exceptions for Minors	8(1)(a) to (c) above	Exceptions are generally found in the wills legislation of Canadian provinces and territories Northwest Territories, Yukon and Nunavut have additional exceptions allowing will-making by members of the Royal Canadian Mounted Police who are under the age of 19 years (the age of majority). **LAW REFORM:** **CANADA** The Alberta Law Reform Institute recommended that Sections 9(1)(a) and 9(3) of the Alberta *Wills Act* should remain unchanged.	
Authorization for Will-making By a Minor	N/A	**LEGISLATION: CANADA** No Canadian jurisdiction allows a minor to obtain testamentary capacity by Declaration (see below) nor is this procedure available in England. **LEGISLATION: AUSTRALIA - NEW ZEALAND**	

		Most Australian wills statutes contain a unique procedure which allows any minor who lacks testamentary capacity by reason of age to apply to court for authorization to make a will. Only Western Australia does not have such a procedure New Zealand also has this model. **LEGISLATION: UNITED STATES** American states which have an "emancipation" procedure for a minor who meets certain qualifications can apply to court for a declaration of emancipation which will confer on the minor all the rights, capacities and obligations of adulthood, including the general testamentary capacity to make or revoke a will. **LAW REFORM:** **CANADA** 1981 - Law Reform Commission of British Columbia proposed that a minor should be able to apply to court to obtain the general capacity to make a will.	

		2006 - the British Columbia Law Institute again reviewed the law of wills but did not renew its support for this particular recommendation. 2003 - the Law Reform Commission of Nova Scotia also recommended the adoption of a procedure to empower a minor to make a will – not implemented in Nova Scotia. 2009 - the Alberta Law Reform Institute favoured having a court application available for minors who want to make a will in order to displace the operation of the *Intestate Succession Act*, but who fall outside the existing statutory exceptions allowing will-making by minors. On application, the Court of Queen's Bench could validate a will for a minor by approving the terms of a specific will.	
Statutory Wills for Persons Without Testamentary Capacity	N/A	The law is clear that a mentally challenged person whose affairs require management by a substitute decision-maker may still have the testamentary capacity to create a will.	

		LEGISLATION: CANADA In Canada it also seems clear that a substitute decision-maker cannot exercise the testamentary power of a person under their care by making, altering or revoking that person's will. A testator's power to make a will cannot be transferred or delegated at common law. Five jurisdictions, Northwest Territories, Nunavut, Ontario, Saskatchewan and Quebec expressly provide that a substitute decision-maker cannot make, change or revoke a will. The only Canadian jurisdiction which allows a court to make a statutory will (see below) for a person without testamentary capacity is New Brunswick, in 1994. No other Canadian jurisdiction has followed New Brunswick's lead. **LEGISLATION: AUSTRALIA - NEW ZEALAND** Australian jurisdictions, except for the Australian Capital Territory, authorize the making of statutory	

		wills for mentally incompetent persons. The Family Court of New Zealand is empowered to make a statutory will for a person who is subject to a property order. **LEGISLATION: ENGLAND** The English Court of Protection has been empowered since 1970 to make statutory wills for mentally incompetent persons. In England, most people apply to court to make a statutory will in a one-step process. The typical Australian model creates a two-step process whereby every applicant must first seek leave of the court to bring a subsequent application for a statutory will. **LAW REFORM:** **CANADA** There does not appear to be any significant reform movement to advocate this development in Canada. 2009 - the Alberta Law Reform Institute reviewed the law in this	

		area and concluded that it would not recommend that Alberta courts be given the power to make a statutory will for an adult who lacks testamentary capacity.	
Oral Wills	N/A	To be valid, a will must generally conform to the formalities required by the wills statute. The most basic formality is that a will must be in writing and be signed by the testator (or by some other person in the testator's presence and at the testator's direction). **LEGISLATION: CANADA** Generally speaking, most Canadian jurisdictions do not recognize oral wills under any circumstances. Newfoundland and Labrador recognizes oral wills made by sailors or fishers at sea. Nova Scotia recognizes oral wills made by military personnel on actual military service as well as mariners or seamen at sea. However, neither of those	

		provinces allows ordinary testators to make valid oral wills. **LEGISLATION: ENGLAND - AUSTRALIA - NEW ZEALAND** in England, Australia and New Zealand, oral wills are invalid except in the limited circumstances of exempt wills for military personnel or sailors. **LAW REFORM:** **CANADA** There does not appear to be any significant public demand for oral wills. Most law reform agencies which review their jurisdiction's wills legislation do not even bother to raise the issue of oral wills. Those few law reform agencies which did consider the issue, have all recommended against recognizing oral wills.	
Electronic Wills in Their Own Right	N/A	**LAW REFORM** **CANADA** The Uniform Law Conference of Canada has recently considered the	

		issue of electronic wills in depth, based on research and analysis by Alberta Law Reform Institute. (*Proceedings of the Eighty-third Annual Meeting* (Toronto, 2001) 60-61 and Appendix E) The Conference did not recommend that any electronic will should be recognized as legally valid in its own right. However, the ULCC did recommend that, in certain circumstances, it should be possible to give effect to an electronic will under the dispensing power. 2006 - the Law Reform Commission of Saskatchewan and the British Columbia Law Institute agreed with the ULCC approach. 2009 - the Alberta Law Reform Institute specifically did not recommend that electronic wills be currently recognized as legally valid in their own right.	
Electronic Wills Under The Dispensing Power	N/A	**LAW REFORM** **CANADA** 2001 - the Alberta Law Reform	

		Institute report to the Uniform Law Conference recommended recognition of electronic wills (in appropriate cases) under the dispensing power of the Uniform Wills Act. In adopting this recommendation, the ULCC amended its uniform dispensing power so that a court may recognize a document to be a will if it "was not made in accordance with any or all of the formalities referred to in subsection (3), or is in electronic form, or both …." 2006 - the Law Reform Commission of Saskatchewan also recommended in its report on electronic wills that this wording be used to amend that province's dispensing power so as to allow recognition of electronic wills, as has the British Columbia Law Institute. The unproclaimed British Columbia *Wills, Estates and Succession Act* in section 58 adopts this approach. 2009 - the Alberta Law Reform Institute also recommended that the statutory dispensing power should be amended to allow a court, in an appropriate case, to validate a will	

		in electronic form despite its lack of compliance with the usual formalities, but that "electronic form" should be narrowly defined. Other law reform agencies have rejected any recognition of electronic wills under a dispensing power. **LEGISLATION: AUSTRALIA - NEW ZEALAND** The Australian National Committee for Uniform Succession Laws recommended that a dispensing power should be wide enough to recognize electronic wills. To date, the uniform model statute (and its dispensing power's expansive definition of document") has been enacted in five of Australia's eight jurisdictions. The New Zealand Law Commission recommended a very narrow definition of "document" as "any material on which there is writing".	
Exempt Wills	**Infants** **8**(1) A will made by a person who is under the age of majority is not valid unless at	The Uniform Law Conference of Canada model is derived from the English model but differs from in two main ways – oral wills are not	

	the time of making the will the person (a) is or has been married; (b) is a member of a component of the Canadian Forces, (i) that is referred to in the *National Defence Act* as a regular force, or (ii) while placed on active service under the *National Defence Act;* or (c) is a mariner or seaman.	allowed and there is a greater attempt to more precisely define "active service." **LEGISLATION: CANADA** With the exception of Quebec and the Yukon, all Canadian jurisdictions allow some sort of exempt wills. Nine provinces or territories follow the main features of the ULCC mode, although some of their provisions have small variations from the norm.	
Holograph Wills	**Interpretation** **6**(1) In this section, 'own writing' means handwriting, footwriting, mouthwriting or writing of a similar kind. **Holograph will** (2) A will, wholly in the testator's own writing and signed by the testator, is validly made without meeting the requirements set out in clauses 4(1)(b) and (c). **Idem** (3) If a will is partly in the testator's own writing and partly in printed, typewritten or other written form, and	**LEGISLATION: CANADA** In Canada, 11 provinces or territories allow holograph wills: Alberta Act, s. 7; Saskatchewan Act, s. 8; Manitoba Act, 249 s. 6; Ontario Act, c. S-26, s. 6; Quebec Civil Code, art. 726; New Brunswick Act, s. 6; Nova Scotia Act, s. 6(2); Newfoundland Act, s. 2(1); Northwest Territories Act, s. 5(2); Nunavut Act, s. 5.1(2); Yukon Act, s. 5(2). Prince Edward Island does not allow holograph wills in ordinary situations, but has a general dispensing power under which	

	(a) it appears that the testator intended to incorporate the printed, typewritten or other words, and (b) the will is signed by the testator, the will is validly made without meeting the requirements set out in clauses 4(1)(b) and (c).	such wills could be validated. Section 58 of the British Columbia *Wills, Estates and Succession Act* has a dispensing power but there is not a special provision for holograph wills because such wills could be validated under the dispensing power. **LEGISLATION: ENGLAND** England currently does not allow holograph wills in ordinary situations and has no general dispensing power. **LEGISLATION: ENGLAND - AUSTRALIA - NEW ZEALAND** The Australian courts use the general dispensing power to validate holograph wills on a case-by-case basis. New Zealand makes no special provision for holograph wills but does have a dispensing power. **LAW REFORM** **CANADA** 2009 – the Alberta Law reform	

		Institute recommended that the *Wills Act* should continue to expressly allow holograph wills. In 1986, the Uniform Law Conference of Canada recommended a model holograph wills section which defined "own writing" to mean "handwriting, footwriting, mouthwriting or writing of a similar kind." **LEGISLATION: CANADA** Nunavut amended its wills legislation in 2005 to enact the ULCC definition and is currently the only Canadian jurisdiction to have this provision for holograph wills **LEGISLATION: UNITED STATES** Holograph wills are authorized by the wills legislation of more than half the states in the United States. The Uniform Probate Code allows holograph wills as well but there appears to be no attempt by any jurisdiction to legislatively define "handwriting."	

		LEGISLATION: ENGLAND - AUSTRALIA - NEW ZEALAND England, Australia and New Zealand do not have legislation authorizing the making of holograph wills (other than as exempt wills for the armed forces in certain circumstances) and have no statutory provisions addressing the definition of "handwriting." **LAW REFORM** **CANADA** The Manitoba Law Reform recommended an expanded definition of "handwriting" although the Commission acknowledged that the presence of a general dispensing power probably makes it unnecessary. The Law Reform Commission of Nova Scotia made a recommendation in favour of allowing holograph wills in that province in particular, the ULCC model holograph wills provision. But the issue of "own writing," was neither raised nor discussed. The government of Nova Scotia did enact a holograph will	

		provision but chose not to implement the ULCC model provision. Instead, it adopted the standard Canadian model that a holograph will must be "wholly" in the testator's undefined "own handwriting. 2009 - the Alberta Law Reform Institute recommended that the Alberta *Wills Act* be amended to authorize holograph wills made in the testator's "own writing," defined as "handwriting, footwriting, mouthwriting or writing of a similar kind."	
Printed Wills Forms	**Interpretation** 6(1) In this section, 'own writing' means handwriting, footwriting, mouthwriting or writing of a similar kind. **Holograph will** (2) A will, wholly in the testator's own writing and signed by the testator, is validly made without meeting the requirements set out in clauses 4(1)(b) and (c).	"Fill-in-the-blank" printed will forms are widely available. Some testators make handwritten entries on them and then sign the forms without witnesses. Such testators intend to make a will. Yet, the resulting document is not a valid will. It is not a valid holograph will because the document is partly printed and therefore not "wholly" in the testator's own handwriting. It is not a valid formal will because the document is unwitnessed. This	

	Idem (3) If a will is partly in the testator's own writing and partly in printed, typewritten or other written form, and (a) it appears that the testator intended to incorporate the printed, typewritten or other words, and (b) the will is signed by the testator, the will is validly made without meeting the requirements set out in clauses 4(1)(b) and (c).	failure defeats the testator's intention. To give some effect to the testator's intention, courts will try to validate the handwritten entries as a holograph will by severing them from the printed portions of the will form. **LEGISLATION: CANADA - ENGLAND** In Prince Edward Island the courts have a general dispensing power, which the courts can use it to validate printed will forms with handwritten entries but no witnesses. In jurisdictions that do not allow holograph wills and that have no general dispensing power, a printed will form with handwritten entries, but no witnesses, can never be a valid will. That is the law in British Columbia and England. Most jurisdictions which allow holograph wills require that they be "wholly" or "entirely" in the testator's handwriting. If these jurisdictions have a general dispensing power, then the courts can use it to validate printed will	

		forms with handwritten entries but no witnesses. That is the law in Manitoba, Saskatchewan, Nova Scotia and New Brunswick. It is also the law in Quebec; although the court's discretionary power in that jurisdiction is narrower, because the will still has to meet the "essential requirements" of a holograph will. If these jurisdictions do not have a general dispensing power, then printed will forms with handwritten entries but no witnesses fail, except to the extent that a court can read the handwritten entries standing alone to find a valid holograph will. That is the current law in Alberta and also in the Northwest Territories, the Yukon Territory and Ontario. Newfoundland and Labrador may also belong in this category, although the law in that province is not clear. A few jurisdictions have specific statutory provisions to address unwitnessed wills which are only partly in the testator's handwriting. In one variation, the specific statutory provisions require the will to be "partly" in the testator's handwriting. That is the law in Nunavut, following the	

		recommendations of the Uniform Law Conference of Canada in the Uniform Wills Act. **LEGISLATION: ENGLAND - AUSTRALIA - NEW ZEALAND** Australia and New Zealand have a general dispensing power, which the courts can use it to validate printed will forms with handwritten entries but no witnesses. **LEGISLATION: UNITED STATES** Specific statutory provisions require that "material provisions" or "material portions" be in the testator's handwriting. That is the law in much of the United States, following the recommendations of the American Law Institute and the Uniform Probate Code. **REFORM OPTIONS** *a. Prohibit printed will forms* *b. Delete the requirement of being "wholly" in the testator's handwriting*	
	Court may dispense with formal requirements **19.1**(1) Despite the other provisions of this Act, but subject to this section, if a document was not made in		

	accordance with any or all of the formalities referred to in subsection (3), or is in an electronic form, or both, a court may nevertheless order that the document is valid as (a) a will of a deceased person, or (b) the revocation, alteration or revival of a will of a deceased person. (2) In order to exercise the authority under subsection (1), the court must be satisfied on clear and convincing evidence that the deceased person intended the document to constitute a will of the deceased person or the revocation, alteration or revival of a will of the deceased person. (3) For the purposes of subsection (1), the formalities are those established by sections 4, 5, 6, 15(c), 18 and 19. (4) In this section, "electronic form" means, in respect of a document, data that (a) is recorded or stored on any medium in or by a computer system,	The province of Newfoundland and Labrador allows holograph wills, but has no express requirement that they must be "wholly" in the testator's handwriting. *c. Enact a specific provision to address the problem* Nunavut has an express provision which validates holograph wills "partly" in the testator's handwriting, but has also retained the parallel provision which validates holograph wills "wholly" in the testator's handwriting. Nunavut also has a general dispensing power based on the work of the Uniform Law Conference of Canada. To date, Nunavut is the only Canadian jurisdiction to have adopted the ULCC's solution to the problem of unwitnessed printed will forms with handwritten entries. The American Law Institute notes that more than half the states allow holograph wills. Some states allow them only if they are wholly in the testator's handwriting. Others allow them if the signature and "material provisions" or "material	

	(b) can be read by a person, and (c) is capable of reproduction in a visible form. (5) This section applies [when: statement of intended application]	portions" of the document are in the testator's handwriting. The American "material portions" approach is similar to Scottish common law, which allows holograph wills that are wholly or "in essential parts" in the testator's handwriting. The American Law Institute also favours a general dispensing power for "harmless errors." A small minority of States have enacted such a power. *d. Rely on a general dispensing power* 2009 - the ALRI recommended that Alberta *Wills Act* should not enact a special provision addressing unwitnessed printed will forms with handwritten entries but that such problem wills should be validated either by a court severing the handwritten entries and finding a holograph will or by a court making an order under the general dispensing power.	
WILL FORMALITIES			

Placement of Testator's Signature	**Signature required** **4**(1) A will is validly made if (a) it is in writing and signed by the testator, or by another person in the testator's presence and by the testator's direction, (b) the signature is made or acknowledged by the testator in the presence of two or more witnesses, and (c) at least two of the witnesses (i) are both present at the same time as the signature is made or acknowledged by the testator, and (ii) sign the will, or acknowledge their signatures, in the presence of the testator but not necessarily in the presence of each other.	**ULCC MODEL** 1986 – the ULCC amended the Uniform Wills Act to require a will to be signed but did not specify where the signature must appear. A very general saving provision states that, if the signature is not at the end of the document, the will is not invalid solely on that ground "if it appears that the testator intended by the signature to give effect to the will." Nunavut has fully implemented the new ULCC model in its legislation. Saskatchewan has a similar provision to the ULCC model in that its wills legislation does not mandate where a will must be signed with one significant difference from the ULCC approach: it must be apparent "on the face of the will" that the testator intended the signature to give effect to the will, whereas the ULCC model is silent concerning the source from which the testator's intention is to be assessed.	

	Presence of testator (2) A will is not invalid solely on the ground that the testator does not see the witness sign, if the testator is otherwise present. **Placement of signature** (3) A will is not invalid solely on the ground that the signature required by clause (1)(a) is not at the end of the will if it appears that the testator intended by the signature to give effect to the will.	**LEGISLATION: CANADA** Nine Canadian jurisdictions (British Columbia, Alberta, Manitoba, New Brunswick, Nova Scotia, Northwest Territories, Ontario, Prince Edward Island and Yukon) provide that a will is not valid unless "it is signed at the end or foot of it by the testator….." In a separate saving provision, the Act clarifies the meaning of "end or foot" of the will. Section 39 of the British Columbia *Wills, Estates and Succession Act* has a deeming provision such that a will is signed at the end if certain circumstances, as enumerated in that section, arise. Quebec requires a will to be signed at the end but has no specific saving provision cconcerning this requirement; it simply relies on its substantial compliance provision to deal with any problems. The province of Newfoundland and Labrador has a signature requirement but does not specify where the signature must be placed. The legislation does not contain any specific or general saving provision or dispensing	

		power. **LEGISLATION: ENGLAND** England repealed its Victorian signature provisions in 1982 and now has a simpler provision: A will must be signed, but the statute does not specify where. It states that the will is not valid unless "it appears that the testator intended by his signature to give effect to the will." **LEGISLATION: AUSTRALIA - NEW ZEALAND** Virtually all Australian jurisdictions have also reformed their wills legislation on this point while only the Australian Capital Territory still uses the traditional model. The National Committee for Uniform Succession Laws has recommended the simpler provision in its uniform model statute. New Zealand has the simplest provision of all and requires only that the testator must sign the will, without further elaboration concerning location or intention.	

		LAW REFORM **CANADA** The Manitoba Law Reform Commission has endorsed the new approach, but the Law Reform Commission of British Columbia recommended against changing the Victorian provisions, preferring instead to rely on the enactment of a dispensing power to solve these problems. The Law Reform Commission of Nova Scotia did not address this issue in its recent report. The Alberta Law Reform Institute recommended that the Alberta Act should continue to provide that a will must be signed by the testator at its end or foot, subject to the saving provision. Any other problems involving a testator's signature should be dealt with under the dispensing power.	
Number of Witnesses	(see section 4 above)	**LEGISLATION: CANADA – ENGLAND – AUSTRALIA - NEW ZEALAND - THE UNITED STATES**	

		Requiring a minimum of two witnesses, originating in the 1837 wills legislation, is a standard formality in Canada, England, Australia, New Zealand and the United States. **LAW REFORM** **CANADA - ENGLAND** Law reform agencies rarely question the requirement for two witnesses. When an agency does raise the issue, it invariably affirms the continuation of this requirement for similar reasons as did the English Law Reform Committee that a rule requiring two witnesses provides a greater safeguard against forgery and undue influence than would a rule requiring only one. 2009 – the Alberta Law Reform Institute recommended a minimum of two witnesses should continue to be necessary to create a valid formal will.	
Concurrent Presence of Witnesses When the Testator Signs the Will	(see section 4 above)	**LEGISLATION: CANADA** Almost all wills legislation in Canada provides that the testator	

		must sign or acknowledge their signature in the concurrent presence of witnesses. Only Newfoundland and Quebec do not explicitly state this requirement and so their provisions are potentially ambiguous in this regard. In Canada, only Saskatchewan has a provision to allow a witness to acknowledge their signature. **LEGISLATION: AUSTRALIA - NEW ZEALAND** New Zealand and all the Australian jurisdictions also have an explicit provision requiring concurrent presence of witnesses when the testator signs or acknowledges. In Australia, only South Australia has a provision to allow a witness to acknowledge their signature. **LEGISLATION: UNITED STATES** In the American Uniform Probate Code the concurrent presence of witnesses is not required and, therefore, serial witnessing is possible. The witnesses must sign	

		within a reasonable time of witnessing either the testator's signature, the testator's acknowledgment of the testator's signature or the testator's acknowledgment of the will. The witnesses do not have to sign either in the testator's presence or each other's presence. **LAW REFORM** **ENGLAND** The Law Reform Committee recommended that in a situation where a sole witness signs the will in the testator's presence but is joined later by the second witness (before whom the testator acknowledges the testator's signature), the first witness should be allowed to simply acknowledge their own signature to the other witness rather than having to re-sign the will. This reform would prevent the will from later being found invalid. **CANADA - COMMONWEALTH**	

		There is no Canadian or Commonwealth law reform movement advocating that a testator should be able to sign or acknowledge the testator's signature in the serial presence of witnesses. Any law reform agency which has raised this issue in Canada, Australia, England or New Zealand has always recommended retaining the law of concurrent presence. **ALBERTA** 2000 – the Alberta Law Reform Institute considered whether to recommend relaxing formalities, as the Uniform Probate Code or as the English wills legislation has done in a fairly minor way .The ALRI concluded that relaxing formalities was not the best way to deal with technically invalid wills and that enacting a general dispensing power would be a more effective response. 2009 - the ALRI stated that it remains a good argument that the current formalities should continue unchanged and that any problems can be adequately handled by resorting to the dispensing power recommended by ALRI.	

		2009 - the ALRI recommended that there should continue to be a requirement that witnesses must be present at the same time to witness the making or acknowledgement of a testator's signature, but that a witness be allowed to acknowledge their signature to the other witness rather than having to re-sign the will.	
Publication of Wills	**Publication** **10** A will made in accordance with this Act is valid without other publication.	Historically, a testator was required to "publish" their will by making a declaration in the presence of witnesses that the document produced to them was the testator's will. The English *Wills Act, 1837* explicitly abolished the requirement of publication. Publication was superseded by the modern formalities involving the concurrent presence and signatures of the testator and at least two witnesses. **LEGISLATION: CANADA** Following the English precedent, the wills legislation of every Canadian jurisdiction has a provision stating that no publication of wills is necessary.	

		LEGISLATION: AUSTRALIA - NEW ZEALAND a provision stating that no publication of wills is necessary is also present in the wills legislation of New Zealand and every Australian jurisdiction. However, over half the Australian jurisdictions (Australian Capital Territory, Northern Territory, Queensland, Tasmania and Victoria) have modernized the language used to express this concept. Instead of saying that "publication" is not required, these statutes simply say that a witness to a will does not need to know that the document is a will. New Zealand also has updated language. **LAW REFORM** **GENERALLY** There is no national or international reform movement to alter this situation, either by repealing the provision or by reviving a publication requirement. 2009 - the Alberta Law Reform	

		Institute recommended that the Alberta Act should continue to have a provision abolishing publication, as it serves an instructive purpose and promotes uniformity of legislation but did support expressing it in plainer English so that its meaning may be obvious to all who read it.	
WITNESSES TO A WILL.			
Incompetent Witnesses	**Incompetency of witness** **11** Where a person who attested a will at the time of its execution or afterward has become incompetent as a witness to prove its execution, the will is not on that account invalid.	Historically under English law, "there were numerous bases on which a witness could be found to be incompetent, some more serious than others." Apart from incompetence based on mental impairment or age, a witness was also rendered incompetent, for example, by any kind of financial or pecuniary interest, large or small, related to the matter about which the testimony was given. When probating a will in those days, it was a real disaster to discover that a witness was incompetent either at the date on which the will was signed or later at probate, because the entire will would fail as a result and intestacy would occur. Therefore, a saving provision was enacted in the *Wills*	

		Act, 1837 to prevent invalidity. (Section 11 of the Uniform Act) **LEGISLATION: CANADA** This saving provision is found in the wills legislation of all Canadian jurisdictions but Quebec. Except in Nova Scotia, the provision always states explicitly that it applies both at the time of execution and afterwards. **LEGISLATION: AUSTRALIA – NEW ZEALAND** There is a trend in Australia to discontinue this provision. There are only three jurisdictions which still retain the traditional saving provision (Australian Capital Territory, South Australia and Tasmania). Five jurisdictions do not have saving provisions (New South Wales, Northern Territory, Victoria, Queensland and Western Australia). Instead, these jurisdictions specify a disqualification for witnesses, namely, that a person who cannot see and attest to the making of a signature cannot witness a will. New Zealand used to have the	

		saving provision until 2007, when it was discontinued in the New Zealand Act. The Act is silent about any qualifications or disqualifications for witnesses. **LEGISLATION: UNITED STATES** The Uniform Probate Code specifies who may be a witness – "[a]n individual generally competent to be a witness may act as a witness to a will." There is no saving provision in the event of an incompetent witness, but the Code does state that signing a will by an interested witness does not invalidate the will. **LAW REFORM** **CANADA** The Manitoba Law Reform Commission recommended that the saving provision be changed to state that a will is invalid if a person was incompetent as a witness at the time of attestation, but not if the person thereafter became incompetent.	

		The Law Reform Commission of British Columbia recommended retention of the saving provision without change. The Law Reform Commission of Nova Scotia did not mention this issue in its recent report concerning wills legislation. 2009 - the ALRI decided not to introduce any witness competence test because doing so would then require witness competence to be proved for probate and it recommended that any person who is blind or unable to see should not be disqualified as a witness. **Other Incompetency Issues** 2009 - the ALRI noted comments by the Manitoba Law Reform Commission, that it is an obvious danger to allow a person who signs on behalf of the testator to also sign as a witness. It felt this practice should be prohibited and recommended that any person who signs the will on behalf of and at the direction of the testator would be disqualified as a witness.	

The Witness-Beneficiary Rule	**Gifts to attesting witness void** **12**(1) Where a will is attested by a person to whom or to whose then wife or husband a beneficial devise, bequest or other disposition or appointment of or affecting real or personal property, except charges and directions for payment of debt, is thereby given or made, the devise, bequest or other disposition or appointment is void so far only as it concerns (a) the person so attesting; or (b) the wife or the husband or a person claiming under any of them, but the person so attesting is a competent witness to prove the execution of the will or its validity or invalidity. **Idem** (2) Where a will is attested by at least two persons who are	The witness-beneficiary rule has a long history in English law. **LEGISLATION: CANADA** All Canadian jurisdictions have some version of the witness-beneficiary rule. A couple of minor variations are found in Prince Edward Island (which does not have the sufficiency of witnesses exception) and Quebec (which does not have that exception either and also does not nullify a gift to a witness's spouse). More significant variations are found in Manitoba, Ontario and Saskatchewan. In addition to the sufficiency of witnesses exception, these three provinces also allow a court to validate the witness's or spouse's gift if satisfied that there was no "improper or undue influence" exercised on the testator. Saskatchewan specifies a limitation date for such applications of six months from the grant of probate or grant of administration with the will annexed.	

	not within subsection (1) or where no attestation is necessary, the devise, bequest or other disposition or appointment is not void under that subsection. (3) Notwithstanding subsection (1), where a (surrogate court) is satisfied that neither the person so attesting nor the spouse of the person exercised any improper or undue influence upon the testator, the devise, bequest or other disposition or appointment is not void.	Manitoba and Ontario also extend the disqualification of receiving gifts under the will to a person who signs the will on behalf of and at the direction of the testator and to that person's spouse. A court may nevertheless validate the gift on the same grounds of lack of improper or undue influence. **LEGISLATION: AUSTRALIA – NEW ZEALAND** There is a reform movement in Australia to repeal the disqualification on gifts to witnesses and spouses. Half of Australia's jurisdictions now allow witnesses and their spouses to keep any gift left to them under the will (Australian Capital Territory, South Australia, Victoria, and Western Australia). Of the remaining four jurisdictions, Tasmania and New South Wales both disallow gifts to an interested witness and any person claiming under the interested witness, while Northern Territory and Queensland disallow gifts to witnesses only. Queensland also extends the disqualification on receiving gifts under the will to interpreters as	

		well. However, none of the jurisdictions extend the disqualification to persons signing on behalf of a testator. All four jurisdictions with the disqualification have the sufficiency of witnesses exception. In addition, they also have two other provisions designed to ameliorate the effect of the disqualification – (1) the gift can be given to the witness or witness's spouse in accordance with the will when all persons who would directly benefit from the gift's avoidance consent in writing and (2) the court may validate the gift. An Australian provision allowing a court to validate the gift typically says that the court may allow the gift to pass to the witness or witness's spouse when the court is satisfied that the testator "knew and approved of the disposition" and that it was "given or made freely and voluntarily by the testator. New Zealand disallows gifts to witnesses, their spouses or partners, and any person claiming under them. But the disqualification is subject to the sufficiency of witnesses exception,	

		unanimous consent to the contrary by other beneficiaries and court validation of the gift. The disqualification also does not apply if the disposition is the repayment of a debt to the person in question. **LEGISLATION: UNITED STATES** Under the Uniform Probate Code, there are no disqualifications or penalties concerning witnesses who receive a benefit under the will. They can validly witness the will and receive their inheritance as well. **LAW REFORM** **CANADA** In Canada, there has been little call for repeal of the witness-beneficiary rule. The Law Reform Commission of British Columbia recommended retention of the rule, albeit with the reform of adding court discretion to validate the gift which was recently reiterated by the British Columbia Law Institute. In recent reviews of provincial	

		wills legislation, neither the Manitoba Law Reform Commission nor the Law Reform Commission of Nova Scotia even raised the issue of repeal. The Alberta Law Reform Institute recommended that to exercise its discretion to validate a void gift, a court must be satisfied that the witness or spouse did not exercise any improper or undue influence on the testator and that the limitation period for bringing a court application for validation of a void gift should be six months from the grant of probate or administration with will annexed. 2009 - the ALRI did not favour repealing the witness-beneficiary rule but that the courts should be given the discretion to validate a testamentary gift made to a witness or a witness's spouse. The Alberta Law Reform Institute supported extending the disqualification to interpreters and persons who sign a will on behalf of the testator (but not the spouses of interpreters or signers). Disqualifying these particular beneficiaries could protect the	

		testator by removing an incentive or reward for wrongdoing. **LAW REFORM** **ENGLAND - AUSTRALIA – NEW ZEALAND** The English Law Reform Committee recommended retention of the rule without change. The New Zealand Law Commission also recommended retention of the basic rule and sufficiency of witnesses exception, but further recommended adding the exceptions of consent and court validation. Like a witness-beneficiary, the disqualified interpreter or signer must have the right to apply to court for validation of the gift in appropriate cases. As in the Queensland provision, the statute should clarify that an interpreter is not prevented from receiving appropriate remuneration under the will for the interpretation services. **WITNESS-BENEFICIARY - COMPETENT** A witness-beneficiary is competent	

		as a witness to prove such matters as execution of the will or its validity or invalidity and essentially the same thing is said concerning specific types of witnesses – creditors whose debts are charged on property under the will and executors. **LEGISLATION: CANADA – AUSTRALIA –NEW ZEALAND – UNITED STATES** There are standard provisions in most Canadian wills legislation, as well as in England, New Zealand and half the Australian jurisdictions. The other four Australian jurisdictions (New South Wales, Northern Territory, Queensland and Victoria) do not have these provisions and neither does the uniform model statute proposed by the National Committee for Uniform Succession Laws. **LAW REFORM** **CANADA** The Law Reform Commission of British Columbia recommended replacing the standard provisions with a single general rule that “no	

		person is incompetent to act as a witness to a will by reason only of interest." The British Columbia *Wills, Estates and Succession Act* does not contain the standard provisions and also does not include a general provision. 2009 – the Alberta Law Reform Institute recommended that there should continue to be separate sections affirming that witness-beneficiaries, creditors and executors are competent witnesses.	