

LEGISLATION & COMMON LAW

- ✦ WILLS AND ESTATES ARE GOVERNED BY LEGISLATION and COMMON LAW
- ✦ LEGISLATION IS THE WRITTEN LAWS, STATUTES ie: *THE INDIAN ACT*
- ✦ COMMON LAW: IS JUDGE MADE LAW; PART of English law that is derived from CUSTOM and JUDICIAL PRECEDENT rather than statutes.

ON RESERVE



- ✦ The INDIAN ACT and THE INDIAN ESTATE REGULATIONS govern Will and Estates on Reserve
- ✦ Applies only to “ordinarily resident” on reserve is a question of fact to be determined on a case by case basis. Factors to be considered include:
 - ✦ (a) the general mode of life the person was engaged in;
 - ✦ (b) whether the person was actually physically on the reserve;
 - ✦ (c) the intention of remaining on the reserve ; and
 - ✦ (d) the duration of the stay.

JURISDICTION AND AUTHORITY



- ✦ Subsection 42(1) establishes that the **Minister** has **exclusive jurisdiction** and authority in relation to “matters and causes testamentary” pertaining to the property of deceased Indians regardless of whether such died with a will or intestate.

MATTERS AND CAUSES TESTAMENTARY



- ✦ The power and authority of the Minister is clearly confined to matters and causes relating to the granting and revoking of probate of wills and of letters of administration and the administration of estates.

PARTICULAR POWERS OF THE MINISTER



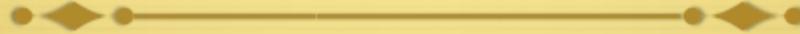
- ✦ Section 43 delegates particular powers to the Minister to appoint executors of wills and to authorize executors to carry out the terms of the wills.
- ✦ This means that the Minister has the authority (like the court) to appoint an executor of a will where the testator fails to do so in the body of the will.
- ✦ This section also gives the Minister the authority to approve or remove an executor or

COURTS MAY DEAL WITH TESTAMENTARY MATTERS



- ✦ The *Indian Act* makes provision for the **courts to become involved** in testamentary matters involving Indians.
- ✦ In deciding such testamentary matters the court is bound by the *Indian Act* and not what would otherwise be its relevant provincial legislation.
- ✦ The court may, however, refer to common law and precedents established in case law dealing with non-Indians.

FORM OF WILL



- ✦ Subsection 45(1) recognizes an Indian's **capacity to devise and bequeath** his property by will.
- ✦ Subsection 45(2) establishes that the Minister has the authority to **accept a will in any written form signed by an Indian** provided the testator indicates his wishes regarding the distribution of his property at his death.

VALIDITY OF A WILL



- ✦ In order for a will to be valid, it must be approved by the Minister or by a court that has granted probate pursuant to the *Indian Act*.
- ✦ Section 15 of the *Indian Estates Regulations* states that the form of the will does not have to conform with the requirements of the laws of general application in force in the province at the time of death of the Indian.

VALIDITY OF A WILL

cont

- ✦ Accordingly, a will that is handwritten in the testator's own handwriting (a holograph will) or written out for a testator in someone else's handwriting and signed by the testator or drafted by someone else for the testator to sign will be considered a valid will by the Minister.
- ✦ The *Indian Estates Regulations* also states that the term "instrument" does not have any special meaning attached to it and may mean something as informal as a signed note or letter.

VALIDITY OF A WILL

cont

- ✦ Additionally, neither the *Indian Act* nor its regulations make it a requirement for the Indian testator to name an executor in the body of the will.
- ✦ Further, a will is considered valid even if the testator's signature on the will is not witnessed since the legislation does not make this a requirement.

INVALIDITY OF A WILL



- ✦ Subsection 46(1) of the *Indian Act* sets out conditions that may invalidate a will in whole or in part. The Minister has the authority to declare a will **void** if in his opinion the following conditions are present:
- ✦ the will was executed under **duress or undue influence**;
- ✦ the testator at the time of execution of the will **lacked testamentary capacity**;
- ✦ the terms of the will would **impose hardship** on persons for whom the testator had a responsibility to provide;

INVALIDITY OF A WILL

cont

- ✦ The will purports to dispose of land in a reserve in a manner contrary to the interest of the band or contrary to the *Indian Act*,
- ✦ The terms of the will are so **vague, uncertain or capricious** that proper administration and equitable distribution of the estate of the deceased would be difficult or **impossible to carry out** in accordance with the *Indian Act*, and/or
- ✦ The terms of the will are against the public interest.

LANDS ON RESERVE



- ✦ When an estate matter deals with lands on reserve, the first and critical determination to make is whether the deceased has lawful possession to the lands in question. Subsection 20(1) states:
 - ✦ Prior occupation;
 - ✦ Conduct of the parties;
 - ✦ Certificate of possession; or
 - ✦ Other allocation by the Council of the Band.

LAND INTEREST CAN BE TRANSFERRED

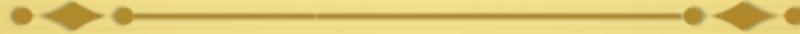
- ✦ If the deceased is in lawful possession of land on reserve **at the time death, his land holding can be transferred** provided that such transfer is in accordance with section 24.
- ✦ **Section 24** allows an Indian in lawful possession of land to transfer possession to the band or to **another member of the band.**
- ✦ As long as this requirement is met, such transfer is approved by the Minister.

APPEAL PROCESS



- ✦ Any decision of the Minister made in accordance to Sections 42, 43 and 46 are APPREALABLE within TWO MONTHS from the date of the affected decision by the affected person pursuant to section 47.
- ✦ Such appeals are to be made to the **Federal Court** if the amount in controversy **exceeds \$500** or if **consented to by the Minister**

DISTRIBUTION ON INTESTACY



- ✦ Section 48. Distribution will be as follows:
- ✦ (a) where the value of the estate does not exceed \$75,000, **the spouse is entitled** to this amount.
- ✦ (b) where the value of the estate exceeds \$75,000, the first \$75,000 goes to the surviving spouse, and
 - ✦ - if **no issue**, the remainder goes to the surviving **spouse**;
 - if **one child**, one **half** of the remainder goes to the surviving spouse;
 - if more than one child, **one-third** of the remainder goes to the surviving spouse, and

DISTRIBUTION ON INTESTACY



- ✦ Where a child has died leaving issue and that issue is alive at the date of the intestate's death, **the surviving spouse shall be entitled** to the same share of the estate as if the child had been living at that date.
- ✦ Where children of the deceased will not be adequately provided for, the **Minister** has the authority to direct that all or any part of the estate that would otherwise go to the surviving spouse shall **go to the children**.

DISTRIBUTION ON INTESTACY

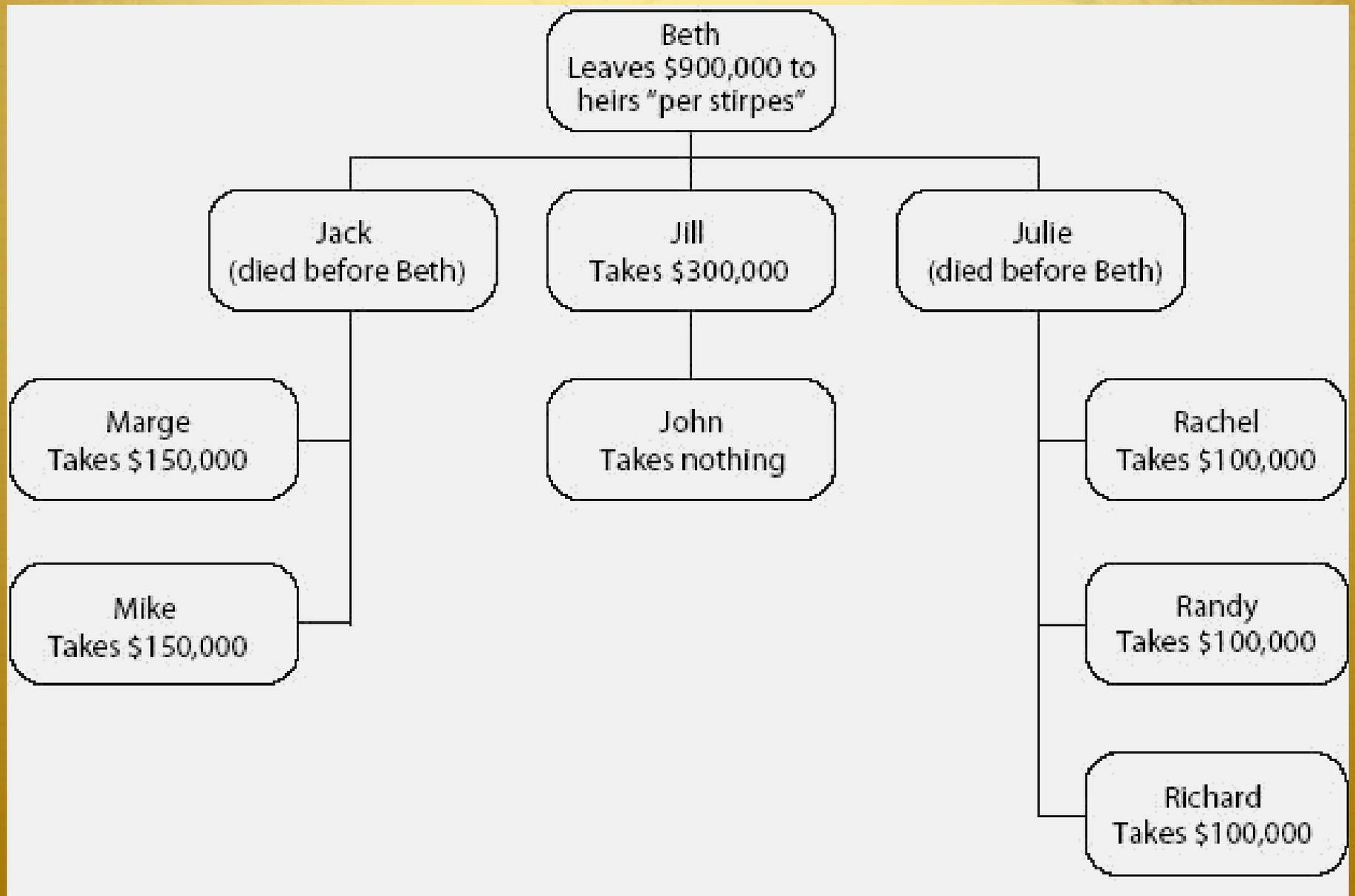


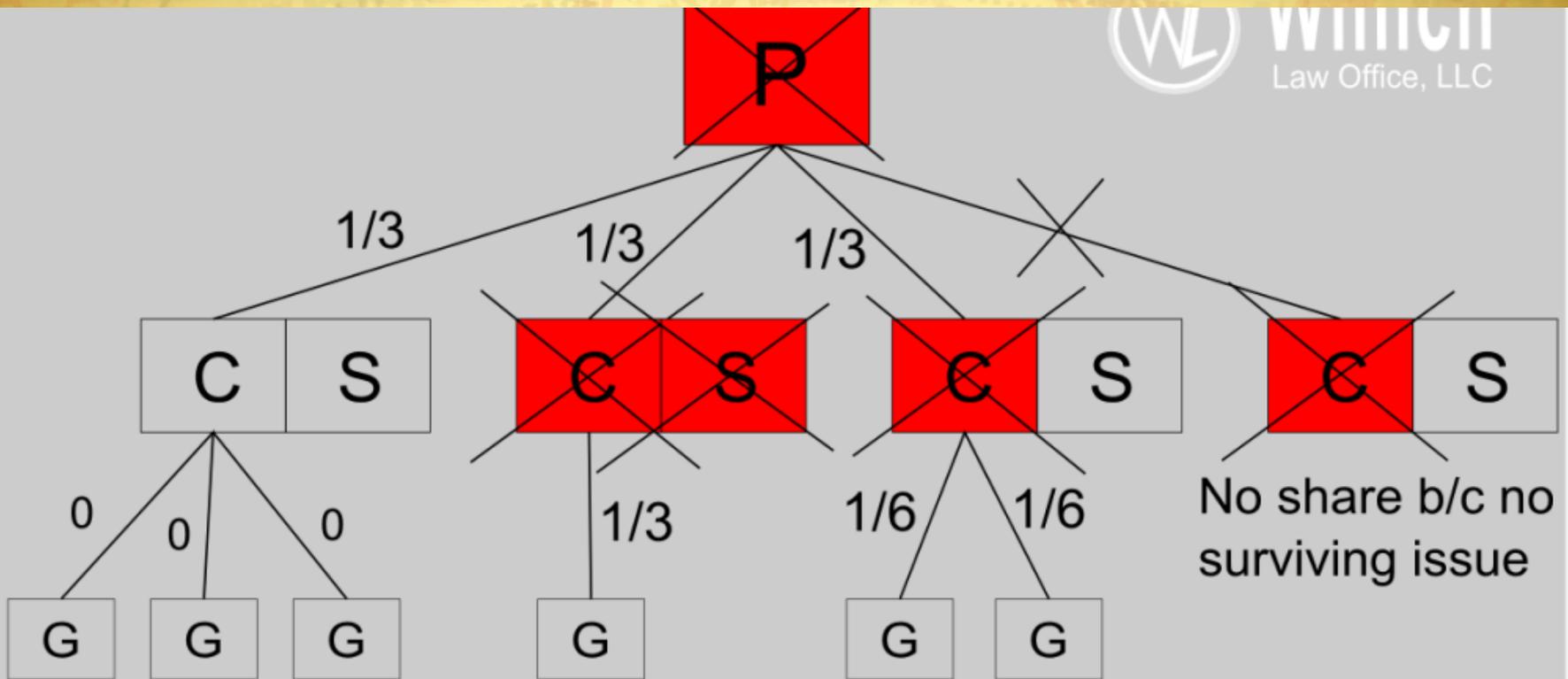
- ✦ (d) where the deceased occupied **lands** in a reserve at the time of his death, **the Minister has the authority** to direct that the surviving spouse has the right during her widowhood to **occupy such lands**.
- ✦ subject to the rights of the surviving spouse, where the deceased leaves issue, his estate shall be **distributed *per stirpes*** among such issue.
- ✦ (f) where the deceased leaves no surviving spouse or issue, his estate shall go to **his father and mother** in equal share if both are living at the time of death, but if either is dead, the estate goes to the surviving parent.

DISTRIBUTION ON INTESTACY



- ✦ Where the deceased leaves no surviving spouse, issue or mother or father, his estate shall be distributed in equal share among his **brothers and sisters**, and where the brother or sister is dead, the children of the deceased brother or sister shall take the share their parent would have taken if living, but where the only persons entitled are **children of deceased brothers and sisters**, they take a per capita share of the estate.
- ✦ (h) where the deceased leaves no surviving spouse, issue, father, mother, brother or sister, and no children of any deceased brother or sister, **his estate goes to his next-of-kin.**





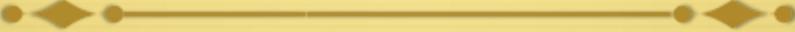
Since C is still alive at P's death, C's children receive nothing from P.

$1/1 \times 1/3 = 1/3$ $1/2 \times 1/3 = 1/6$

P = Designated Person;
 C = Child of P;
 G = Grandchild of P;

 = Living
 = deceased

Estate Administration



- ✦ The Minister appoints the Administrator of the Estate with recommendations from the family
- ✦ The appointed Administrator must take all the appropriate steps
 - ✦ Properly safe guarding assets
 - ✦ Calling in all monies due or owing to the deceased
 - ✦ Carrying out the wishes of the deceased according to the will if there is one
 - ✦ Paying legitimate debts owed by the Estate and obtaining releases or receipts
 - ✦ Transfer of ownership of assets or security
 - ✦ Sell any real or personal assets

Upon a Death



Notice of Death: The Minister receives notice

Statement of Inventory : The Minister receives an itemized statement of inventory showing:

Real and personal property, Estimated value, Debts or claims against the Estate, Whether there is a will or not, Names of beneficiaries

Application for approval of will and executor: Executor applies for approval of the will (application for probate)

Includes value of estate and list of beneficiaries

Contains Affidavit of executor confirming willingness to act

Original will and application sent to regional estates office for ministerial approval

Upon a Death



Letters of Administration: If no will or will but no executor appointed, or willing and able to act – application for administration or administration with will annexed to Regional's Estate office for ministerial approval

Duties of Executor/Administrator: Minister approves the will granting letters probate or appointing an administrator and granting letters of administration
Executor's actions are subject to oversight

Notice to Creditors: Claims against the Estate must be filed with the Executor within eight weeks from notice of the death. Notice can be posted at the post office, agency office or other meeting places

Issues of BAND CUSTOM

✦ So on Reserve:

- ✦ Provincial Laws do not apply
- ✦ Native custom does not apply
- ✦ Indian Act rules our Lives

TAX IMPLICATIONS



Tax Clearance Certificate

Necessary even if the testator was not required to pay taxes or file tax returns

APPLICATION OF MATRIMONIAL PROPERTY ACT



- ✦ Provisional Rules came into force **June 19, 2013.**
- ✦ Provide a SURVIVING SPOUSE or Common Law Partner have an **automatic rights** to occupy the family home for a minimum of **180 days** following the death of their spouse.
- ✦ On application, the rules will enable **courts** to provide to the surviving spouse or common law partner, for a specified time, exclusive occupation as well as reasonable access to the family home.

APPLICATION OF MATRIMONIAL PROPERTY ACT



- ✦ To claim survivor rights and interests to the family home under the Provisional Rules, rather than under a will or the Indian Act, a survivor must make **application to the court within 10 months** after the death of a spouse.
- ✦ May be entitled to an amount **equal to half the value** of the deceased's interest in or right to the family home and other matrimonial rights.
- ✦ MANY First Nations are constructing their own MRP Law and Wills and Estates are recommended to be apart.

Off Reserve Legislation

Wills & Estates

- ✦ The provincial legislation will apply
- ✦ Relevant legislation:
 - ✦ *The Wills Act*
 - ✦ *The Intestate Succession Act*
 - ✦ *The Dependent's Relief Act*
 - ✦ *The Family Property Act*
 - ✦ *The Income Tax Act*
 - ✦ *The Perpetuities and Accumulations Act*
 - ✦ *The Adoption Act*
 - ✦ *The Age of Majority Act*
 - ✦ *The Administration of Estates Act*
 - ✦ *Etc.*