



The Law Society of
Upper Canada | Barreau
du Haut-Canada



WILLS AND ESTATES Practice Basics 2017

CHAIR

Jordan Atin, C.S., TEP
Atin Professional Corporation

March 27, 2017

cpd Continuing
Professional
Development



* C L E 1 7 - 0 0 3 0 5 0 1 - A - P U B *



The Law Society of
Upper Canada | Barreau
du Haut-Canada

DISCLAIMER: *This work appears as part of The Law Society of Upper Canada's initiatives in Continuing Professional Development (CPD). It provides information and various opinions to help legal professionals maintain and enhance their competence. It does not, however, represent or embody any official position of, or statement by, the Society, except where specifically indicated; nor does it attempt to set forth definitive practice standards or to provide legal advice. Precedents and other material contained herein should be used prudently, as nothing in the work relieves readers of their responsibility to assess the material in light of their own professional experience. No warranty is made with regards to this work. The Society can accept no responsibility for any errors or omissions, and expressly disclaims any such responsibility.*

© 2017 All Rights Reserved

This compilation of collective works is copyrighted by The Law Society of Upper Canada. The individual documents remain the property of the original authors or their assignees.

The Law Society of Upper Canada

130 Queen Street West, Toronto, ON M5H 2N6
Phone: 416-947-3315 or 1-800-668-7380 Ext. 3315
Fax: 416-947-3991
E-mail: cpd@lsuc.on.ca
www.lsuc.on.ca

Library and Archives Canada
Cataloguing in Publication

Wills and Estates Practice Basics 2017

ISBN 978-1-77094-221-0 (Hardcopy)
ISBN 978-1-77094-222-7 (PDF)





WILLS AND ESTATES

Practice Basics 2017

Chair: Jordan Atin, C.S., TEP, *Atin Professional Corporation*

Monday, March 27, 2017

9:00 a.m. – 12:30 p.m.

Total CPD Hours = 2 h 30 m Substantive + 1 h Professionalism 

**Law Society of Upper Canada
130 Queen St. West
Toronto, ON**

SKU CLE17-0030501



Agenda

9:00 a.m. - 9:05 a.m.

Welcome and Opening Remarks

Jordan Atin, C.S., TEP, Atin Professional Corporation

9:05 a.m. – 10:05 a.m.

The Initial Meeting and Instructions (30 minutes) 

*Mary-Alice Thompson, C.S., TEP
Cunningham, Swan, Carty, Little & Bonham LLP*

10:05 a.m. - 10:15 a.m.

Question and Answer

10:15 a.m. - 10:30 a.m.

Coffee and Networking Break

10:30 a.m. - 11:25 a.m.

Drafting (5 minutes) 

Ed Esposito, Aird & Berlis LLP

11:25 a.m. - 12:15 p.m.

The Execution and Reporting Stage (25 minutes) 

Jordan Atin, C.S., TEP, Atin Professional Corporation

12:15 p.m. - 12:30 p.m.

Question and Answer

12:30 p.m.

End of Program



WILLS AND ESTATES Practice Basics 2017

Chair: **Jordan Atin, C.S., *Atin Professional Corporation***

March 27, 2017

SKU CLE17-0030501

Table of Contents

NOTE: Material is reprinted with permission. The Law Society of Upper Canada CPD gratefully acknowledges the efforts of the past and current authors and contributors.

TAB 1	The Initial Meeting And Instructions	1 – 1 to 1 – 28
	Intake Information Form —	
	Wills & Poas/Estate Planning	1 – 29 to 1 – 32
	Mary-Alice Thompson, C.S., TEP, <i>Cunningham, Swan, Carty, Little & Bonham LLP</i>	
TAB 2	Basic Information Checklist.....	2-1 to 2-11
	<i>Jordan Atin, C.S., Atin Professional Corporation</i>	
TAB 3	Memorandum to File – Smith Facts	3-1 to 3-3
	<i>Corina Weigl, Fasken Martineau DuMoulin LLP</i>	

TAB 4	Joint Retainer	4-1 to 4-5
	<i>Jordan Atin, C.S., Atin Professional Corporation</i>	
TAB 5	Obligations of the Solicitor and the Estate Planning Retainer with Husband and Wife	5-1 to 5-15
	<i>Ian Hull, Hull & Hull LLP</i>	
TAB 6	Drafting Protection of Trustees	6-1 to 6-12
	Sample Clauses	6-13 to 6-14
	<i>Jordan Atin, C.S., Atin Professional Corporation</i>	
TAB 7	Annotated Will 2017	7-1 to 7-123
	Roadmap for Drafting of a Trust in a Will	7 - 124
TAB 8	Don't Send Out a Will for Execution by a Client Alone	8-1 to 8-6
	<i>Rodney Hull, Q.C., Hull & Hull LLP</i>	
TAB 9	Will Review	9 – 1 to 9 – 2
	<i>Jordan Atin, C.S., Atin Professional Corporation</i>	
TAB 10	Sample Reporting Letter	10-1 to 10-10
	<i>Jordan Atin, C.S. Atin Professional Corporation</i>	
TAB 11	Will Plan Meetings – a Model	11 – 1 to 11 - 4
	<i>Jordan Atin, C.S. Atin Professional Corporation</i>	

TAB 1



WILLS AND ESTATES Practice Basics 2017

The Initial Meeting and Instructions

Mary-Alice Thompson, C.S., TEP
Cunningham, Swan, Carty, Little & Bonham LLP

March 27, 2017

Wills and Estates Practice Basics 2017

Monday, March 27, 2017

THE INITIAL MEETING AND INSTRUCTIONS

Mary-Alice Thompson, C.S., TEP

Cunningham, Swan, Carty, Little & Bonham LLP

There are a number of helpful resources for the actual preparation of wills and powers of attorney, and the estate planning that precedes it. The focus of this paper, however, is on all of the things that surround the actual drafting of wills and powers of attorney, starting with the first contact from a potential client. The emphasis is principally on practising defensively, but the best way to practise defensively in this area of law is to ensure that you pay careful attention to your clients and their needs. Of course, you also need to be able to make a living in your practice, so there is also an emphasis on practising efficiently at every step from that first call to the storage and retrieval of documents.

Perhaps the most useful tools are checklists. At the end of this paper, you will find some resources for checklists that have been prepared for practitioners in this area. Use one of them, or create you own, but wherever you source your forms, make sure you use them. You can use a single checklist, or a series of checklists dealing with the following issues:

- Information provided to a client in advance of the meeting in order to assist them in preparing
- Information about the client's personal circumstances and assets
- Instructions for the disposition of the estate and the preparation of wills and powers of attorney

Consider, in addition, having a "soup to nuts" procedure written down so that not only you but your staff and any newcomers to your office will be able to follow it.

Apart from taking information about the client and taking instructions, there are number of other issues to be dealt with either before or during the first interview:

- Verifying identification. You may have assumed that since, as a part of the information-gathering process in a standard wills interview, you have identified your client adequately; that is, you will have the client's name, address, telephone number, and occupation. You should, however, also verify identification. Although a typical will drafting and estate planning file will not in itself trigger the threshold for a requirement to verify identity,¹ you may later be asked whether you verified the identity of the client. For example, if a Continuing Power of Attorney for Property is used subsequently on a real estate matter involving title insurance, the title insurer will routinely ask whether the lawyer who prepared the Continuing Power of Attorney for Property verified the identity of the donor of the power. Clients are well inured to the idea of producing photo ID and are unlikely to object to being asked for it. Keep a photocopy or scanned copy of the identifying documents you review.
- Conflict searches. While conflicts may not often occur in wills matters, it is inadvisable to rely on your memory to pick up the possibility that, for example, your potential client is the subject of a debtor's examination by one of your other clients or a client of the firm.
- Compensation agreements. Where the client has decided to appoint a trust company as executor or as attorney under a Continuing Power of Attorney for Property, compensation agreements may have been signed before you begin the process of taking instructions and drafting. Make sure you obtain copies.
- Timetable for process. My practice is to set an appointment date at the end of the first meeting with the client. Not all practitioners do this, but it is, I believe, very important to keep the process of preparing wills and powers of attorney on schedule. There are, of course, cases where failure to prepare a will promptly has resulted in the solicitor being found negligent, but even where there is no reason to anticipate an emergency, this is work that should not sit on your desk for months.² Both you and the client will forget the

¹ According to the Law Society's on-line notes, you are required to obtain verification of identity "When you are retained to provide legal services to a client and you are involved in a funds transfer activity, that is, when you engage in or give instructions in respect of the receipt, payment or transfer of funds."

² There have been many cases, over the last 30 years or so in which lawyers have been found negligent for failure to hear a will in a timely fashion. See Martyn Frost, *With the Best Will in the World: Negligence in Will Preparation* (London: Legalease, 2000).

exact instructions or the rationale behind them, and delays inevitably mean lost time which cannot fairly be billed to the client.

- **Retainers.** You need to inform your client of certain parameters, and have their signed acknowledgement in a formal retainer. Some practitioners send the retainer by mail to clients following the first meeting. Unless you have a particularly complex retainer, it may be possible to have it signed by the clients at the end of the first meeting. See the comments below on what should be included in a retainer agreement. This is an area where it is still not, to the best of my knowledge, common to request cash retainers, perhaps because a solicitor who has just taken all of the asset information from the clients well placed to assess whether this is necessary. Nevertheless, a signed retainer is advisable.

a. Questions for your client questionnaires

New clients (and returning client, depending on how recently you have seen them) should be prepared for the first meeting, in order to get the best value from the time you will spend together. At the very least, a new client should be asked to bring:

- Full names, addresses, and dates and places of birth for potential beneficiaries (spouses, children, grandchildren, etc.). Names are required for identification purposes and middle names are especially helpful where families tend to reuse the same name through generations. Dates of birth are helpful in identifying when beneficiaries are minors or will achieve a specified age, and places of birth are helpful in identifying citizenship issues or exposure to US tax for those who may be US persons.
- Names and contact information for professional advisers (accountant, financial planner, family doctor). Identifying other advisers for the client is helpful, especially where they may be involved in some of the planning. While a family doctor is unlikely to be involved in planning, he or she may be called upon if capacity issues arise.
- Copies of any existing wills and powers of attorney. It is helpful to review earlier documents, especially to know whether there are radical changes from previous

dispositions, which will be a red flag. Where there are departures, you will want to explore with the client the reasons for the changes.

- Copies of any domestic contracts or court orders. Where the client has had prior relationships, there may be obligations to dependents. For example, if a separation agreement creates a continuing obligation to maintain life insurance for the previous spouse, you will need to be careful about changing beneficiary designations. Where there are dependants, the plan will have to make appropriate provision for them.
- Copies of shareholder agreements. The arrangements in a shareholder agreement for the disposition of shares of a private corporation, or how buyouts are to be funded will impact the plan. You will need to ensure that the shares are not left in contravention of the shareholder agreement.
- Copies of trust deeds. If the client is a trustee or a beneficiary under a trust, you will need to know what provisions are made for the death or incapacity of the client. The client may, for example, have a power of appointment which should be exercised by will.
- Recent investment statements. Clients are often unsure exactly how they hold their assets. Obtaining recent statements will help to clarify which accounts are, for example, held jointly with the spouse, and which accounts are registered or unregistered. It may also allow you to make a rough estimate of the potential for capital gains tax on an account where assets have appreciated.
- The names of the beneficiaries under RRSPs, RRIFs, TFSAs and life insurance. Clients are often unaware of the fact that a will does not change beneficiary designations unless this is done specifically. It is not uncommon for a client to have created a mosaic of fairly random gifts to family members as they have opened new accounts and named various family members as beneficiaries. Part of the planning process will be to rationalize the total estate, and to use beneficiary designations prudently to avoid claims against the estate, to convey discrete benefits, and to reduce Estate Administration Tax.

- Information on the title to any real estate (a deed if possible). It is important to determine that your client actually owns the real estate they are dealing with – as opposed to owning shares in a corporation that owns the real estate. Having a deed will also give you a good idea of any potential conveyancing issues and whether the property can be passed through a secondary (non-probate) will.

You may also wish to prepare the client for the fact that the first interview may be lengthy. Even with well-prepared clients, a first interview usually takes an hour or more. Clients also need to understand your role: you are not simply a scribe, as many – even quite sophisticated – clients believe. You are an adviser, and that means that you will need to advise on the operation of the law in their situation. It seems fairly obvious, but that means you must understand both the law and the client's situation.

Taking instructions and note-taking

Your main tool for understanding the client's situation is your checklist or questionnaire. For the most clients, who are clearly capable, it can be a significant saving of your time, and an opportunity for them to begin organizing their thoughts, if they are provided in advance of the first meeting, with the questionnaire.

The purpose of the questionnaire is to provide the information you will need as background to estate planning. It also serves as a reminder to ask questions that may escape in a more free-flowing interview. It should be comprehensive, but you should also be prepared to explain the relevance of any question that you ask.

Generally, the questions you ask will be about the client or clients, their family, and their assets. You will want to probe for complications – are there blended families, former spouses, children who have no contact, informally adopted children, predeceased children, incapable beneficiaries, insolvent beneficiaries, non-resident beneficiaries, clients or beneficiaries who may be considered U.S. persons, hostile family members, charitable beneficiaries? Each of these factors may require a particular set of planning provisions or clauses in the documents you are about to draft.

Similarly, with the assets. You will need to know not only what the client owns, but how it is held – solely, jointly with one or more others, through a corporation or a trust – its current

market value and (for capital assets) when and for what it was acquired. You will need to understand the corporate structure of family businesses, and look at the terms of existing trusts.

Your checklist should be revised regularly to respond to changes in the law.³ For example, if you do not know when real estate was acquired, you cannot advise on the possibility of sheltering its value from Estate Administration Tax. If you have not asked whether the client or the client's children have had fertility treatments, you may not be able to advise about the impact of the posthumous conception provisions in s. 1(1) of the *Succession Law Reform Act*.⁴ If you ignore ownership of bank accounts, you cannot advise about the impact of the presumptions under *Pecore*.⁵

Substantiating capacity and the absence of undue influence

The questions you ask your client in the course of preparing a will are the same questions that will establish capacity. Therefore, in situations where capacity may be an issue, you should complete the questionnaire at the meeting, and ask probing, open-ended questions in order to test capacity. You should always, of course, have file notes, but where there is any indication that capacity may be an issue, you must ask more probing questions and take especially meticulous and complete notes.

Your notes are not only the guidance you will need for the work you have to do in drafting for the client, but may also be critical evidence on any challenge to the documents. In particular, you will want to establish that your client had capacity to make the will and powers or attorney, if you are preparing these. You will also want to record the evidence to rebut any suggestion of undue influence.

³ See Appendix A for one example of a “Client Intake” questionnaire.

⁴Effective the 1st of January 2017, a child, for the purposes of the *SLRA*, now may include a “child conceived and born alive after the parent’s death”. *Succession Law Reform Act*, R.S.O. 1990, c. S.26, s. 1(1).

⁵ *Pecore v. Pecore*, [2007] 1 SCR 795, 2007 SCC 17 (CanLII).

The classic test for capacity is found in *Banks v Goodfellow*,⁶ and elaborated in a number of subsequent cases, *Hall v Bennett Estate* being a good example.⁷ To have capacity to make a will, one must:

- understand the nature and effect of a will;
- recollect the nature and extent of his or her property;
- understand the extent of what he or she is giving under the will;
- remember the persons that he or she might be expected to benefit under his or her will; and
- where applicable, understand the nature of the claims that may be made by persons he or she is excluding from the will.

It is possible for a will-maker to suffer from delusions, and still make a valid will, provided that the delusion does not impact the disposition.⁸

The cases where wills are challenged repeat that while a drafting solicitor is not a guarantor of the will-maker's capacity, he or she is a trained and impartial observer. Detailed notes of the demeanor and answers of a will-maker will carry substantial weight, but the questions must be pointed, especially where there is a possibility of undue influence. Consider, for example, *Walman v Walman Estate*, where the will was rejected by the court.⁹ The drafting solicitor appeared to have followed standard practice and, in the court's own words, he "did several things 'right' in connection with this interview. He interviewed [the client] in [his wife's] absence. He kept good notes. And he asked questions that, facially, comport with the requirement of

⁶ (1870), LR 5 QB 549, applied by the Supreme Court of Canada in *Leger v Poirier*, [1944] SCR 152, [1944] 3 DLR 1.

⁷ [2003] OJ No 1827 (CA).

⁸ See Ian Hull and Dr Kenneth Shulman, "Personality Disorders and Their Impact on Testamentary Capacity," 2014 LSUC E&T Summit, Toronto; C. Wagner and N. Herrmann, "Insane Delusions: Has the Test Been Expanded?" (Toronto) LSUC, Estate Litigation Practice Essentials, 2012).

⁹ [2015] OJ No 179, 2015 ONSC 185. See also *Stevens v Crawford* 2000 ABQB 5 (CanLII), additional reasons at *Stevens v Crawford*. 2000 ABQB 305 (CanLII), aff'd *Stevens v Morrisroe*, 2001 ABCA 195 (CanLII), 281 AR 201, 202 DLR (4th) 577; leave to appeal refused 2002 CarswellAlta 378 (SCC). See also *Scott v Cousins*, [2001] OJ No 19, 37 ETR (2d) 113 (Sup Ct) and *Smith Estate v Rotstein*, [2010] OJ No 1527, 2010 ONSC 2117, 56 ETR (3d) 216, para 117 (Sup Ct)..

determining whether the testator understood the extent of his assets.” The court went on to find, however, that in the circumstances “he needed to go further than he did,” and should have asked about the wife’s means, what had already been gifted to her, and the reason for his disappointment with his sons, even though they were not, in the end, cut out of the will.

Capacity is nuanced, variable, and not always readily apparent.¹⁰ Medical diagnosis may be helpful, but remember that family physicians are mostly neither able nor willing to opine on testamentary capacity; and capacity to make a will is a legal, not a medical matter. While it may make sense to obtain an assessment from a qualified physician in appropriate situations, you will need to consider:

- There is a presumption of capacity at common law. The executor of a properly executed formal will made by an adult is entitled to rely on this presumption.¹¹
- Capacity to make a will is not the same as capacity to make a power of attorney, or capacity to undertake any number of other legal acts such as marrying, contracting, managing finances, or making decisions about personal care.
- A diagnosis of a dementing disease such as Alzheimer’s disease is not the equivalent of incapacity. A newly diagnosed Alzheimer’s patient may well have capacity and a real need to make a will and powers of attorney.¹²
- When a client is very elderly or infirm, has been seriously ill, or under severe pressure from family, you must be alert to the likelihood of capacity problems or undue influence and take appropriate steps to establish the “righteousness” of the will. The gold standard here is a full assessment by a trained geriatrician or other specialist physician.¹³ Age, however, is not in

¹⁰ See Brian S Schnurr & Kenneth I Shulman, *Law Society of Upper Canada Special Lectures 2010: A Medical-Legal Approach to Estate Planning and Decision Making for Older Clients* (Toronto: Irwin Law, 2011).

¹¹ *Vout v Hay*, 1995 CanLII 105, [1995] 2 SCR 876, 125 DLR (4th) 431, 82 OAC 161.

¹² See *Stevens v Crawford*, [2000] AJ No 21, 2000 ABQB 5.

¹³ *Key & Anor v Key & Ors*, [2010] WTLR 623, [2010] EWHC 408, [2010] 1 WLR 2020 (Ch). In this case, the solicitor made a will for an 89-year-old man whose wife of 65 years had not been dead a week, and which changed dramatically the previous disposition. The judge was highly critical of the lawyer, citing (among other failings) his lack of file notes. *Key* also found that depression is a factor that can be taken to impair capacity. We are not aware of any case in Canada adopting the reasoning of *Key*.

and of itself an impairment, and it is ageist and insulting to start by assuming that an elderly client lacks capacity.¹⁴

- If you ask for an opinion from a physician who is not a specialist, a covering letter setting out the legal test for capacity and some background may result in a more helpful response.
- Try to arrange your meetings with a client whose capacity may be impaired at a time and place when they are likely to be at their best. Beware, however, of relying on “lucid intervals” which in those who are truly impaired likely last for far too short a time to complete will instructions.¹⁵
- If your client clearly does have capacity, the assessment may be useful if you anticipate a challenge to the will, but you should not make a habit of sending obviously competent clients for medical assessment.
- Do not subject a clearly incapable client to an unnecessary, expensive, and humiliating process of an assessment. It is always an option to decline a retainer.¹⁶
- A client who is reluctant to undergo an assessment may be persuaded of the value of the process by understanding that the purpose is not to undermine him or her, but to create solid evidence of capacity to bolster the will if it is challenged.
- A client who is reluctant to pay for your time in dealing with these issues should be encouraged to think of your duties as falling into two categories: 1) the preparation of documents, which you might consider billing at a flat fee, and 2) the advice and documentation necessary to protect the will, which you bill at an hourly rate.¹⁷

¹⁴ “I should add . . . that there is plainly no duty upon solicitors in general to obtain medical evidence on every occasion upon which they are instructed by an elderly client just in case they lack capacity. Such a requirement would be insulting and unnecessary.” *Thorpe v Fellowes Solicitors LLP*, [2011] EWHC 61, [2011] EWHC 61 (QB), [2011] PNLR 13, (2011) 118 BMLR 122.

¹⁵ See Kenneth Shulman, *et al*, “Cognitive Fluctuations and the Lucid Interval in Dementia: Implications for Testamentary Capacity” (2015) 43(3) *J Am Acad Psychiatry Law* 287-92.

¹⁶ *Hall v Bennett Estate*, 2003 CanLII 7157, (2003) 64 OR (3d) 191 (CA), found that the solicitor who was called at the last minute to the deathbed of the deceased and concluded that he was incapable was entitled to decline the retainer in the circumstances.

¹⁷ I thank John Poyser for this ingenious suggestion of a way to explain the billing on a complex estate planning file.

Undue influence is not the same thing as lack of capacity, but the two are related. As a person's capacity declines they may be less able to make good judgments about who to trust or the veracity of what they are told, and less able to resist suggestion. Where there are factors that may suggest the possibility of undue influence, the

Joint retainer letters and joint retainer documents

In any retainer, you will want to make clear what you are being asked to do, the payment terms, the arrangements regarding delegation, the terms on which information is gathered and retained, etc. In addition, with will clients, you will frequently have to deal with conflicts and joint retainers. If you act for a couple to prepare their wills — and this is perhaps the commonest situation for a wills practitioner — you will most likely have a joint retainer.¹⁸

The Rule of Professional Conduct include provisions dealing with joint retainers, one of the most vexing problems in the preparation of wills (and powers of attorney) for a couple. Where there is a joint retainer to prepare a will, the lawyer must inform the clients that information will be shared, and that he or she cannot prepare different wills later without the other partner's agreement, unless the couple has separated or one of them has died.¹⁹

Joint retainers need to be approached with care. For couples in a stable first marriage with children in common, the risk that things will go awry may be relatively low. But you must ask the questions to discover whether there are factors that would make a joint retainer inappropriate. Does either of the couple have children from a prior marriage, and if so do they understand the impact on their children of a new marriage by a surviving spouse? Do the children get along? Is there a significant difference in net worth between them? Do they have a – mistaken - belief that the wills they are making cannot be re-made without the consent of both of them? Can you safely advise them both? If you do accept joint retainers, it is especially important to use a retainer that

¹⁸ The following circumstances would indicate a joint retainer:

- the parties attend at the lawyer's office at the same time;
- the parties meet with the lawyer together;
- the parties appear to have a common goal and instruct the lawyer together on achieving that goal;
- the wills are executed at the same time;
- one account is rendered to both clients;
- a single reporting letter is usually prepared for both clients.

¹⁹ https://www.lsuc.on.ca/with.aspx?id=2147502071#ch3_sec4-5-joint-retainers.

clearly sets out the terms on which you are acting. While this may be included in your reporting letter, you must also explain the joint retainer at the outset, according to the Rules.²⁰

It is also important to distinguish acting on a joint retainer from preparing mutual wills. You do not want to find yourself faced with the claim that the wills you prepared for a couple were mutual wills — irrevocable without the consent of the other party during their joint lives, and unchangeable at all after the death of one. Because clients are often unsophisticated about this, you need to make clear that you are not preparing mutual wills, that the wills are not set in stone, that there is no contract between them not to change the wills, and that either of them can make changes before or after the death of the other partner. The best way to defend yourself from a claim of negligence in this regard is to be clear and to place this information in the retainer.

You will also want to use your retainer agreement to set out any other information that your client needs to know such as:

- Your fees and the basis on which they are calculated, what you charge for disbursements, the period of time for payment of the account, etc.
- Any information regarding electronic communication. If you plan to send drafts or any other information by email it is advisable to have the client's consent included in the retainer.
- If you plan on sharing information with anyone other than the clients, include consent to do this in the retainer agreement. This is particularly important where you are working with other advisers such as trust companies or accountants (see the comments below on working with third parties) or if you will need to have discussions with family members.

Managing the client's expectations

²⁰ **3.4-5** *Before a lawyer acts* in a matter or transaction for more than one client, the lawyer shall advise each of the clients that

- (a) the lawyer has been asked to act for both or all of them;
- (b) no information received in connection with the matter from one client can be treated as confidential so far as any of the others are concerned; and
- (c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

Your clients will have different levels of familiarity with what it is, exactly, that you do. It is not unusual for client to believe that all they need to do is tell you who they intend to make beneficiaries, and they may react negatively to the extensive questioning that you are required to do in order to act competently. Here are some common misunderstandings, and suggestions about how to deal with them:

- Myth #1: It is not necessary for the lawyer to meet with the client. In fact, the Rules of Professional Conduct require you to meet at least once with any client for whom you are drafting wills. In emergency situations, you may take instructions over the phone, or even take instructions from a third party, but you must verify capacity in person, and confirm the identity of the person you are dealing with, and your instructions.
- Myth #2: It is not necessary to know anything about parties who will not receive anything in the will. In fact, it is especially helpful to know a great deal about any family member who would expect to be in the will and is being omitted, in order to establish that the omission is not a matter of lack of capacity. While the explanation may or may not find its way into the will, the solicitor's background notes may be very helpful if the will is ever challenged.²¹ This is also an area where solicitor's advice may be helpful in strategizing how to reduce the likelihood of challenges.
- Myth #3: Solicitors should not give advice on disposition. In fact, one of the most helpful things a competent solicitor can do is discuss with the client the impact of a proposed disposition. This is especially true when the client wishes to make charitable dispositions or is concerned about the tax impact on the estate. It is often helpful to explain the pros and cons of a legacy as opposed to a share of residue, whether legacies can actually be paid on the first death of a couple, or the options for disposing of personal effects.
- Myth #4: It is not necessary to know about previous wills. For a capable client who is clearly intent on changing prior dispositions, this may be true, but for some clients, especially where there is a radical change in the disposition or may be questions about the capacity of the will-maker, reviewing an earlier will is important.

²¹ See *Spence v. BMO Trust Company*, 2016 ONCA 196 (CanLII).

- Myth #5. Lawyers work alone. In fact, in the context of estate planning, lawyers are frequently part of a team of planners and advisers. Clients may find you on their own or through a family member, but they are often referred by other advisers. The risk for a lawyer who depends on these referrals is forgetting that loyalty is owed to the client first. While advisers or family members may participate in part of an interview, actual instructions should be given directly by the client, and without interested parties present.²² This does not mean, however, that you cannot discuss issues with other advisers or family members. Consider what each of them might legitimately bring to the planning process.

Working With Third Parties

You and your client can benefit from the involvement of family members, financial planners, and trust companies, provided you abide by the basic rule of ensuring that your instructions come from the client, and are careful to share information with other parties only if the client authorizes you to do so, and only to the extent that is appropriate.

Family members are often deeply involved in the planning process, and may even have initiated it. You will need to be wary, of course, of any family member who appears to have a disproportionate influence on your client, especially if that family member is a beneficiary or gains by the changes being proposed. Nevertheless, if your client is clearly dependent on advice and direction from a family member and wants them to be involved, you can incorporate the involvement of family into your planning meetings provided to take some of the following precautions:

- Confirm with the client that you are authorized to speak with family members, and if a family member offers to accompany the client into a meeting, ensure that your client is given an opportunity to say no.
- Family members may be present through the portion of the meeting that involves taking information about assets, especially if capacity is not seriously in doubt. If there are capacity issues, however, they may not be apparent to you if the family member is

²² See *Re Worrell*, [1970] 1 OR 184, 8 DLR (3d) 36 (Surr Ct), for a judicial view of the solicitor's obligation when taking instructions.

jumping in to answer questions consistently. This interference may arise from protectiveness rather than avarice, but you may need to ask the family member to let the client speak for him or herself.

- Even if a family members are present for a portion of the meeting, and are given an opportunity to ask questions, they should be excluded from the portion of the meeting that involves the actual giving of instructions.
- Changes that benefit one family member, who is leading the process to effect the changes, are a red flag for undue influence. This does not mean you cannot make a will for your client, but you must go further to establish the “righteousness of the transaction”. This will mean:
 - Ensuring that you confirm instructions;
 - Probing as to the reasons for the disposition;
 - Reviewing carefully the impact of the decision ;
 - Ensuring the client has adequate capacity;
 - Making sure instructions are given in a context where the client can express himself or herself freely;
 - Offering alternatives, such as a “secret” will not to be shown to family, or a condition on a gift that certain service be provided; and
 - Asking the same question in several different contexts and forms, to ensure the client is not simply repeating someone else’s word by rote.
- Family members may have conveyed will instructions by telephone, especially the will-maker is unwell or in hospital. In this case you will need to have a meeting alone with the client, if necessary just before documents are signed, to confirm the instructions you have been given.

Trust companies provide executor services for a fee set by agreement in advance of the execution of the will. Trust companies no longer draft wills in-house, so they will need to refer the file to

an outside lawyer, and are thus a good source of referrals. As executors, they require particular clauses to be inserted in wills where they are appointed, and they will review draft documents for you. They will also act as attorneys under continuing powers of attorney for property, and require a compensation agreement for this purpose as well. Although an employee of the trust company may have met with the client and may even have taken instructions to forward to the drafting lawyer, it is important to confirm both your retainer and the instructions directly with the client, even if you do so only by telephone.

Accountants, financial advisers, gift planners, and bankers often initiate the will-making process. Financial advisers may have long-standing relationships with clients and may be familiar not only with their assets but with their family and the businesses. Since they have regular meetings with clients, they may be the ones who have insisted on the clients seeing you in order to have wills made.

Large and complex estates will almost certainly need an accountant to assist in the making the plan. Accountants may, in fact, prepare a planning letter detailing what steps the client should take, including the provisions that should be included in wills and powers of attorney. This can be extremely helpful, although you must, of course, assess for yourself the appropriateness of the plan and do your own drafting. Most accountants are happy to discuss with you the pros and cons of the options put to the client.

Planning For Second Relationships

Clients who have children from a previous relationship and a new spouse have a particular set of issues to be addressed. They have a legal obligation – and likely a desire – to support the new spouse. They will also, however, want to ensure that some portion of their estate passes to their own children rather than having the whole of a joint estate passed to the children of the spouse. You will have to explain that if the surviving spouse remarries, the wills are revoked and the intestacy rules will result in the whole of the joint estates passing to the new spouse and the surviving spouse's children, leaving the children of the deceased spouse disinherited.

In truly blended families, the couple may each regard the other's children as his or her own. If the couple has a cohabitation or marriage contract, planning in a second marriage may be easier, but even here there may be issues since the efficacy of such contracts made 20 or 30 years ago in

defending against claims for support may be questionable. If they do not have a cohabitation or marriage contract, they are probably not willing to undertake the exercise of preparing one late in their relationship, especially given the potential costs, and the possibility of creating acrimony between them.

There are generally three broad frameworks for planning in this area, one of which, possibly with some modifications, is usually acceptable for couples in second or later relationships.

- a. Mirror wills. In this arrangement, each of the parties agrees to leave everything to each other, and both parties will leave their joint estate to their children equally (or in some agreed proportion) on the death of the second to die. Clients who make this arrangement should understand the possibility that after the death of one of them the survivor may remarry, the will be revoked, and (if a new one is not made so that the survivor dies intestate) the estate will be divided between the new spouse and the survivor's children. Also possible is that the surviving spouse will become estranged from step-children, and make a will leaving everything to his or her own children.

The last scenario has resulted in a number of cases where it is alleged that the original wills were, in fact, mutual wills.²³ The doctrine of mutual wills, of course, holds that where a couple who have made essentially mirror wills intend to bind themselves to maintain the agreed disposition, after the death of one of them, the survivor cannot change his or her will. An attempt to do so will cause equity to impose a trust on the executor of the new will to ensure that the intention under the original mutual wills is honoured. Clients often like the idea of mutual wills, but they are, in fact, very difficult to draft effectively. If you undertake to do them, at the very least they should be paired with a full-fledged domestic agreement, which is likely to add significantly to the time and

²³ See, for example, *Ramage v Estate of Roussel*, 2016 ONSC 1857 (CanLII), where the court imposed a trust, even where there was “no direct written or oral confirmation that the 1998 wills were mutual.” For a sense of the complexities, see TG Youdan, “The Mutual Wills Doctrine” (1979) 29 UTLJ 390; Julie Cassidy, “Case Note: Osborne v Estate of Osborne; Equitable Agreement or a Contract in Law: Merely a Matter of Nomenclature?” [2003] MULR 27(1) 218; LA Sheridan, “The Floating Trust: Mutual Wills” (1977) 15 Alta L Rev 211; JDB Mitchell, “Some Aspects of Mutual Wills” [1951] 14 Mod L Rev 136; Albert H Oosterhoff, “Mutual Wills” (2008) 27 ETPJ 135; Mary-Alice Thompson, “Mutual Wills and More” in *Beyond Will and Estate Planning Essentials* (Ontario Bar Association, Continuing Legal Education Program, 10 May 2011).

cost of will preparation. Since the attraction of the “just trust me” will is frequently its simplicity, venturing into the preparation of mutual wills is unlikely to appeal to clients.

Clients who wish to do mirror wills in a second relationship should be advised of the risks, and your file should note that as part of your interview, and include it in a reporting letter. It may even be worthwhile putting a specific statement in the wills themselves to say that they are not intended to be mutual wills.

- b. Division between spouse and children. A client with a spouse who plans to leave his or her estate to children of a first marriage will need to be advised about the legal obligations owed to a surviving spouse, and the rights of a surviving spouse to either division of property or support. Where there is no domestic agreement, the estate risks claims being made by a surviving spouse. Equalization claims may be relatively easy to quantify. In a long-standing relationship where the assets have been openly shared, the client can probably make a reasonably reliable estimate of the value of an equalization claim. It is, then, possible to consider using gifts outside of the will – life insurance designations, pensions, and beneficiary designations on registered retirement savings plans are registered retirement income funds – to discourage equalization claims.

The provisions of the *Family Law Act* dealing with how such gifts are taken into account are relevant. Essentially, the *Act* holds that where a surviving spouse has elected to take an equalization, but has received or is receiving life insurance, pension benefits, or property by right of survivorship, not only is the value of those benefits set off against the claim, but the estate may actually recover any excess.²⁴

²⁴ *Amounts to be credited*

(6) The rules in subsection (7) apply if a surviving spouse elects or has elected to receive an entitlement under section 5 and is,

(a) the beneficiary of a policy of life insurance, as defined in the *Insurance Act*, that was taken out on the life of the deceased spouse and owned by the deceased spouse or was taken out on the lives of a group of which he or she was a member;

(b) the beneficiary of a lump sum payment provided under a pension or similar plan on the death of the deceased spouse; or

(c) the recipient of property or a portion of property to which the surviving spouse becomes entitled by right of survivorship or otherwise on the death of the deceased spouse.

(7) The following rules apply in the circumstances described in subsection (6):

In addition, since registered plans like RRSPs and RRIFs are subject to full taxation in the estate unless they are transferred to a surviving spouse (or disabled dependant), there is very good tax planning reasons to make a spouse the beneficiary of these plans.

Provided the amount of the plans is – and is likely to remain²⁵ – roughly equivalent to the value of an equalization payment, designating a surviving spouse as a beneficiary may allow a client in a second marriage to make a will leaving everything to his or her own children.

Where registered plans and life insurance are not available, or are inadequate, the spouse may have to receive a legacy or a share of residue, in order to ensure that he or she is not inclined to make an equalization claim.

A will-maker who is married must also make adequate provision for his or her spouse, or who will otherwise have a claim under Part V of the *Succession Law Reform Act* for support against the estate. In many cases, where provision has been made to ensure that there is no equalization claim, the result will be that “adequate provision” has been made for the spouse. There may be some couples, however, where this is not the case. The will-maker will need to consider what the needs of the surviving spouse will be, and what will be required to ensure that he or she has a standard of living more or less equivalent to what was available during their joint lives.

Will-makers may have to be reminded that, although they may wish to leave an inheritance for their children, they have a legal obligation to support a spouse.

- c. Spousal trusts. While recent changes in the *Income Tax Act* have made spousal trusts for less attractive as a tax-planning vehicle, they continue to be extremely useful as a device that allows a will-maker to make provision for a surviving spouse but preserve capital for eventual transmission to his or her children. The creation of a spousal trust does,

1. The amount of every payment and the value of every property or portion of property described in that subsection, less any contingent tax liability in respect of the payment, property or portion of property, shall be *credited against the surviving spouse's entitlement* under section 5.

2. If the total amount of the credit under paragraph 1 exceeds the entitlement under section 5, the deceased spouse's *personal representative may recover the excess* amount from the surviving spouse.

²⁵ Once RRSPs are converted to RRIFs, of course, they begin to decline in value, so if they are being used as a disincentive to a claim for equalization, the client may need to look at some other source of funding such as life insurance to prevent the claim.

however, require that the will-maker have sufficient assets in his or her own name to fund the trust. In a common arrangement – even in second or later marriages – a couple may hold all of their assets either in investments with a designated beneficiary, such as pensions and registered plans, or in jointly owned assets like real estate or investment accounts. The result is that on the death of the first of the couple, there is nothing in the estate proper. This is a good illustration of why it is important to understand the structure of assets for planning purposes, since if you draft a will with a spousal trust for a client who holds assets in this manner, the result will be that the trust is utterly useless for its intended purpose.

If clients do wish to use spousal trust they must either hold their assets separately or consider taking steps to divide them. Clients may be resistant to changing title on assets, especially if they are concerned about simplifying their arrangements. Nevertheless, a well-drafted spousal trust that allows for income to be paid to the surviving spouse, and possibly capital as well with some parameters, will both ensure that adequate provision is made for the surviving spouse, and provide for the preservation of capital for the children following the spouse's death.

It is important to take some time considering who is best to be trustee of the trust. Although the will-maker may be inclined to make the spouse the sole executor and trustee, this is not always wise. Since the trustee will have the power to make discretionary decisions about capital distributions, the children may feel that this is putting the wolf to mind the sheep. Moreover, if the spouse does not keep especially good records, it may be difficult for a successor trustee to determine what has been done in the course of a long standing trust. Putting the children on alone may set up hostility between the children and the spouse which is antipathetic to the will-maker's intention. Where the relationship with the children is good, the spouse may be put on as the co-trustee with one of the children. Where this is not the case, an impartial professional trustee is probably the best option.

When this arrangement is made, and depending on the funds available, the will-maker may wish to consider a small legacy immediately to the children, in order to prevent their sense that they have received nothing from their own parent and will have to wait for the step-parent to die before getting their inheritance.

Planning for minor children

Clients with minor children generally have two areas of the will that require particular planning:

- Guardians. Although it is of short duration, the power to name a guardian for minor children can be especially important to parents. Only a parent who has sole custody has this power, so it is important to remind clients that the clause may not be effective if they have joint or shared custody. Apart from naming guardians, clients will need to think about whether they should have a backup guardian – young parents often want to name their own parents as guardians, but this may not be a practical arrangement. They will also want to consider whether to give their executors the power to pay for the application to court to have the guardian confirmed, or for other purposes such as buying a new car or putting an extension on the house, which would technically be for the benefit of the guardians rather than of the children. Parents may also want to put in provisions about maintaining contact with both sides of the family, or education in a particular religion or school. As long as they understand that these provisions are precatory, and cannot be enforced by the executor, it is possible to include them in the will.
- Trusts. Most parents will want some form of trust for minor children in their will. While the standard age varies according to their assumptions about when children will be capable of managing funds, many will like 21 as a traditional age, 25 as a round number approximating when children can be expected to have completed their education and begun their independent lives, or 30. Unless it is for tax-planning reasons, it is unlikely that clients will want funds held for their children past 30.²⁶

Young parents may well have a good portion of their wealth in registered plans or life insurance. Depending on the amount of these funds, it may be prudent to explore having them held in trust. While the clients may have named children and a trustee on their life insurance policy, for example, they will not usually have understood that the trustee, as trustee of a bare trust, has no powers to hold the trust past the age of 18. Where the amounts in registered plans and life insurance are not proportionately large, it may actually make better sense to have them paid to the estate, notwithstanding that they are

²⁶ Testamentary trusts have, of course, become subject to top marginal tax rates, with the exception of the so-called "40 year trust", under section 104(18) of the *Income Tax Act*, which has arguably limited utility.

thereby exposed to Estate Administration Tax. Larger sums, of course, will justify your time in drafting either trusts within the context of the will, or freestanding trusts.

Planning for disabled children

Parents of disabled children frequently know that they want a Henson trust, having heard the term at one of the many presentations by associations that work with parents of disabled children. You may need to explain that the term “Henson trust” is simply a convenient way of referring to a fully discretionary trust set up for the benefit of a person in receipt of *Ontario Disability Support Plan Act* payments. Henson trusts vary from very simple to very elaborate, but they should all have certain elements:

- Full discretion for the trustee to pay the income to the beneficiary or not;
- A provision ousting the operation of the “even hand” rule so that the trustees will not be forced into making payments to the disabled beneficiary; and
- Provision for income to be paid to someone other than the disabled beneficiary after 21 years, so that if after 21 years, the *Accumulations Act* compels the payment of income, it will not necessarily vest in the disabled beneficiary and interfere with their entitlement to ODSP benefits.

In addition, the trust may deal with the number of other issues such as:

- termination of the trust once the beneficiary’s no longer receiving ODSP;
- guidance for payments that can be made from the trust;
- payment of funeral and expenses of the beneficiaries last illness;
- Provision for replacement trustees in the event that the first named trustee is no longer able or willing to continue;
- naming an adviser, especially for disabled beneficiaries who are unable to speak to their own needs;
- authorization for payment into other sheltered vehicles such as a Registered Disability Savings Plan; and
- Authorization for the trustees to elect to make the trust a qualified disability trust.

Working with parents of a disabled child may require you to explore other vehicles than the Henson trust in a will. Payments into a registered disability savings plan, or the purchase of a principal residence may, in the appropriate circumstances, represent good planning to provide for a disabled beneficiary.

Planning to reduce probate

Clients are frequently very certain that they want to avoid probate, but without really understanding what probate is or how it operates. In order to assist them you will need to be able to advise on:

- Primary and secondary wills
- Beneficiary designations
- Inter vivos trusts, such as alter ego and joint partner trusts, and bare trusts
- Joint ownership of assets, including some very new products such as the joint with right of survivorship bank account

You should also be prepared to make a quick estimate of the client's exposure to Estate Administration Tax, in order to ensure that the cost of the planning does not outweigh the potential benefit of the tax to be avoided.

Planning for business owners

Business owners will need good tax advice, especially with respect to the potential tax on shares in a private business. They will also, however, need you to advise on issues such as who should act as their executor and the impact this may have on the business. For example, while naming a business partner as executor may seem to make good sense, it can place the partner in an acute conflict of interest in the management of the estate. Working with small business owners you should be prepared to discuss:

- Shareholder agreements
- Life insurance – who owns it and who is named as beneficiary?
- How to compensate a child who is not interested in a share of the business
- How to finance a buyout of corporate shares and ensure that there is some liquidity for payment of beneficiaries

- Where shares are to be held in a trust such as a spousal trust, what instructions should be given to the executors to ensure an appropriate flow of income to the spouse
- What clauses will need to be included to facilitate postmortem tax planning if appropriate
- Multiple wills

Planning for real estate

You will want to do sub-searches of any real estate owned by your client that is not obviously under the land titles system, such as a condominium. Even property in the land titles system may be passed through a secondary will without probate if it benefits from the “first dealing” exemption. Perhaps the most troublesome piece of real estate to be dealt with is a family cottage. You will need to discuss with your clients some of the following issues:

- Various forms of title if the property is passing directly to children. For example, should they own as tenants-in-common or as joint tenants or perhaps each set of children should own as joint tenants with their own spouses and children but as tenants-in-common with their siblings
- Is there a benefit to an immediate transfer of real estate as opposed to a transfer under the will? Do not forget that a conveyance retaining a life interest may accomplish many of your client’s objectives, especially where there is not a large capital gain at the time.
- Should the estate hold the cottage in trust and if so for how long and on what terms?
- If there is a trust, how are the cottage expenses to be funded for the duration of the trust? A common arrangement is to have funds set aside from the residue of the estate, but clients will frequently want some provision for payment to be made by the children who use the cottage
- If the cottage is held in a trust who should be the trustee, bearing in mind that the trustee may be called upon to act as arbiter if there are disputes?
- Do the children really want the cottage, or would they prefer the cash generated by its sale to buy their own cottage?

Planning for income tax

You may not be a tax expert, but you need to know enough to know where there are likely to be tax liabilities and roughly how much, in order to make a reasonable assessment of the funds that

the client has available to dispose of. Obviously, if there are complex questions, you are well advised to involve the client's accountant in addressing the impact of tax on the estate.

Planning for Non-Residents

Your clients may have assets or beneficiaries outside Canada or be subject to laws and taxation in another jurisdiction. Property in another jurisdiction will be subject to the laws of that jurisdiction, such as a “forced heirship” regime common in many civil law countries.²⁷ The United States levies estate taxes on the basis of nationality or citizenship rather than residence.²⁸ You need be able to identify which of your clients need to be concerned about US estate tax issues and know how to direct them to help.

- US person need to consider US estate and gift taxes. A US person includes a US citizen (including “accidental Americans” born in the US but have no other association with the country) and US resident, Green Card holders or those with a “closer connection” to the US.
- Canadian residents may also need to be concerned if they own US situs assets²⁹ worth more than US\$60,000.00 and whose worldwide estate over \$5.49 million USD (for 2017), or if they have beneficiaries who have US connections.
- Unless you are qualified to advise on US law you should be prepared to connect clients to good cross-border accountants and lawyers.
- Recent European Union regulations permit individuals who die on or after August 17, 2015 to select the legal regime of their nationality to govern the succession of EU *situs*

²⁷ See Catherine Brown, “Death as a Taxable Event: The Problem of Multi-Jurisdictional Estates for Canadians and Their Heirs and a Road Map for Assessing Potential Liability,” (2011) 31 ETPJ 27.

²⁸ So do Chinese Taipei, Czech Republic, Greece, Hungary, Japan, the Netherlands, Norway, Poland, Croatia, and Germany.

²⁹ US *situs* assets include real estate in the United States, shares in US corporations (even in an account in Canada), tangible personal property situated in the United States (*i.e.*, cars, art, *etc.*), US pension plans (including IRAs and 401(k) plans), and US shares held in a Canadian registered account.

assets, so it may now be possible to change the default “forced heirship” by making a declaration that Ontario law will apply to assets located in a EU member state.³⁰

Planning for charitable gifts

Clients who are making significant charitable gifts may already have discussed the issue with their potential beneficiaries, but if they have not done so it may make sense for you to contact the charities. Particularly where the gift to the charities to be made after an intervening trust, the client will need to understand that the full benefit of the charitable donation may not be obtained.

Where the client wishes to apportion their estate between charities and individual beneficiaries, consider that some charities have become particularly aggressive in their approach to executors, and that the administration of the estate may be significantly easier if the charities receive a fixed sum instead.

Where all or a significant portion of the client’s estate is a gift to charity, or where there is a gift of over \$10,000, most charities are willing to create a named fund. Clients who do not have children are often very pleased with the suggestion that their name can be carried on through a fund established with the charity.

Choosing executors

You should be prepared to canvass with your client a range of potential executors in varying combinations. Consider the following:

- The categories of potential executors are: spouses, children, other family members, close friends, professional executors. Strategic combinations of members of these various classes can mitigate some of the potential problems. For example, a child may be still too young to assume the full responsibility of executorship, but could be co-appointed with a close friend. A spouse may have too many conflicts of interest, but could be co-appointed with a trust company.

³⁰ Regulation (EU) Nr. 650/2012 of the European Parliament of the Council of July 4, 2012 applies to individuals from non-member states. The application of the new regulation is a complex matter, which you should investigate carefully before advising on it.

- Number of executors – while there is no legal limit on the number of people who can be named as executors, there are some very practical problems. Since executors are required to act unanimously, five executors may have difficulty simply in discussing the issues on which decisions are required, even if disagreement is not likely to arise. Where the client has several children who do not get along, the likelihood that the administration will go well if they are all named as executors is slim!
- Try to persuade clients that executorship is a job and that they should be choosing someone who is most likely to do the job effectively, rather than someone whom they would like to honour. Apart from honesty and a willingness to get on with doing the job, there is no essential quality for an executor, although some business experience, an ability to communicate with beneficiaries, and some negotiating skills are likely to be of assistance.
- Where a professional executor is being appointed, it is highly advisable for the will-maker to have discussed compensation with the proposed executor, and for the executor (especially trust company) to have had an opportunity to review your drafts.
- Trust companies have compensation agreements, and some other professionals are occasionally using a similar approach to compensation. Even where a family member is appointed, however, client should be discouraged from “lowballing” the compensation to be paid to the executor. It is also generally not a good idea to try to use a legacy in lieu of compensation, since if it is in lieu of compensation it will be subject to tax at the same rate as ordinary compensation, with the additional complication that the recipient may simply take the legacy and pass on the work.
- Where there are several executors, it may be advisable to provide for some form of majority decision making. Another option may be to appoint an “umpire” who is not actually a trustee but could be appealed to in the event of disagreements among the trustees.
- Clients should also be discouraged from appointing nonresident trustees, since they may thus inadvertently trigger the creation of a non-resident trust, or compel the purchase of a surety bond. If there is, for example, non-resident child, the simplest solution may be to appoint a Canadian resident co-trustee but without a majority rules clause.
- As trustees, executors are required to act unanimously, and so executors should never be appointed jointly and severally.

Choosing Attorneys

Many of the same considerations when choosing an executor will apply when choosing an attorney under a Continuing Power of Attorney for Property. The skills required of an attorney for personal care may be different, and clients may need to be reminded that they do not have to appoint the same person to manage their finances as they appoint to assist with medical and personal care decision-making. Consider the following:

- Attorneys for property can act for many years without any effective oversight or even notice to beneficiaries and family, so honesty and transparency may be even more important in this role than they are in an executor.
- Attorneys for personal care need to convey the last capable wishes of the donor, including wishes expressed orally, so it is important that the attorney have had discussions regarding those wishes. It would thus be unwise to appoint someone with whom the donor was not comfortable discussing personal and medical matters.
- Some decisions – where the incapable person resides, for example – require cooperation between attorneys for property and attorneys for personal care. Clients should therefore be encouraged to make sure that they will be able to cooperate in making decisions. This is not the time to placate squabbling children by giving them each a role.
- Gifting by an attorney for property has become a particularly contentious area, and the guidelines in the statute are not particularly precise, so – especially where the client is in the habit of making significant gifts to children, or is actively supporting one child, ask about including some guidance for the attorney on how gifts are to be made.
- Medical aid in death is not yet a matter that can be dealt with by an attorney for personal care, but many clients want to include a statement of their desire that their attorney be able to make the decision for them if it does become legally possible.
- You should review your precedent powers of attorney to ensure that they contain a fairly generous package of powers, since the law on some issues – in particular the powers of an attorney for property to make will-like transactions – has yet to be fully clarified.

Some practice pointers

- Use good quality paper for your wills and store them flat, without plastic covers or envelopes. They should be kept in a fireproof, waterproof environment. You *must*

have a record system that will allow you to keep track of the wills you hold and to recover them promptly when they are needed.

- If at all possible, do not allow clients to sign wills and powers of attorney except under your direct supervision.
- Scan your wills so that they are easy to call up while you are on the telephone with your client or the executors.
- Consider using larger type and plenty of spaces for clients who have difficulty with their vision.
- Have a series of handouts or YouTube videos to which you can refer clients for the kind of standard information that you provided every meeting, such as the difference between a power of attorney for personal care and a living will or the difference between a will and a power of attorney for property.
- The pace of change in estates law, especially in recent years, means that you should not promise to tell your clients if they need to revise their wills because there is been a change in the law. Blogs are an excellent way to make available information about changes in the law, and can also act as an excellent marketing tool.
- You should charge a decent fee for the work that you do in preparing wills and powers of attorney. If you choose to use a flat fee, you should base it on a reasonable estimate of the actual time you put into meeting and interviewing clients and drafting documents. One option is to break your fee into two parts – a flat fee for each document provided and an hourly fee for your time, expertise, and advice in meeting the client and preparing and executing the plan.

INTAKE INFORMATION FORM — WILLS & POAS/ESTATE PLANNING

Date		Referred by	
Any reason for urgency? <input type="checkbox"/> No <input type="checkbox"/> Yes Details:			
Personal Information — <u>Client #1</u>			
Name (in full)			
Date of Birth		Place of Birth	
Citizenship		S.I.N.	
Father's place of birth?		Mother's place of birth?	
Address			Postal Code
Telephone Number		Email	
Occupation	Employer	Telephone	
Personal Information — <u>Client #2</u>			
Name (in full)			
Date of Birth		Place of Birth	
Citizenship		S.I.N.	
Father's place of birth?		Mother's place of birth?	
Address			Postal Code
Telephone Number		Email	
Occupation	Employer	Telephone	
Marital Status — Existing Wills — Health Issues			
<input type="checkbox"/> Single <input type="checkbox"/> Married <input type="checkbox"/> Common Law Date of Marriage/Cohabitation <input type="checkbox"/> Widowed <input type="checkbox"/> Engaged		<input type="checkbox"/> Separated <input type="checkbox"/> Divorced Date of Separation/Divorce Separation Agreement /Court Order? <input type="checkbox"/> No <input type="checkbox"/> Yes	
Do you have a will now?	Client #1 <input type="checkbox"/> No <input type="checkbox"/> Yes	Client #2 <input type="checkbox"/> No <input type="checkbox"/> Yes	
Are you on medication that affects your mood or thinking?	Client #1 <input type="checkbox"/> No <input type="checkbox"/> Yes	Client #2 <input type="checkbox"/> No <input type="checkbox"/> Yes	
Have you had a capacity — related diagnosis?	Client #1 <input type="checkbox"/> No <input type="checkbox"/> Yes	Client #2 <input type="checkbox"/> No <input type="checkbox"/> Yes	
Other Advisors			
Family Doctor		Accountant	
Financial Advisor			

Children and Grandchildren — Use back of page to provide details if you have more than 3 children

1.	Name	<u>Child of</u>	<u>Date of Birth</u>	<u>Marital Status –</u> <u>circle</u>
	Address	1/2/Both		S/M/CL/W/Sep.
		Place of Birth	Occupation:	
	Tel.	Notes		

His or her children (your grandchildren) — **please indicate step-children**

		1/2/Both		S/M/CL/W/Sep.
		1/2/Both		S/M/CL/W/Sep.
		1/2/Both		S/M/CL/W/Sep.

2.	Name	<u>Child of</u>	<u>Date of Birth</u>	<u>Marital Status –</u>
	Address	1/2/Both		S/M/CL/W/Sep.
		Place of Birth	Occupation	
	Tel.	Notes		

His or her children (your grandchildren) — **please indicate step-children**

		1/2/Both		S/M/CL/W/Sep.
		1/2/Both		S/M/CL/W/Sep.
		1/2/Both		S/M/CL/W/Sep.

3.	Name	<u>Child of</u>	<u>Date of Birth</u>	<u>Marital Status –</u>
	Address	1/2/Both		S/M/CL/W/Sep.
		Place of Birth	Occupation	
	Tel.	Notes		

His or her children (your grandchildren) — **please indicate step-children**

		1/2/Both		S/M/CL/W/Sep.
		1/2/Both		S/M/CL/W/Sep.
		1/2/Both		S/M/CL/W/Sep.

Other Dependents or Significant Family Members

ASSETS — Bank Accounts — Please give an estimate of the current balance

Institution and Account Number	Client #1	Client #2	Joint

GICs, Stocks, Bonds, Mutual Funds, Investment Accounts

Institution and Account Number	Client #1	Client #2	Joint

RRSPs and RRIFs

Institution and Account Number	Client #1	Client #2	Beneficiary

Personal Property — Household furnishings, vehicles, boats, jewellery, artworks, etc.

Description	Appraised?

Pets you wish to provide for?

Loans Receivable: Does anyone owe you money?

Details

Pension Plans

Institution	Client	Client #2	Beneficiary	Death Benefit?

Life Insurance

Institution, Policy Number, Type	Owner	Insured	Beneficiary	Death Benefit

Real Estate — please estimate the market value

Address/Legal Description	Client #1	Client #2	Joint/TIC?
1. Principal Residence			
Address			
Mortgage <input type="checkbox"/> No <input type="checkbox"/> Yes Estimated Mortgage Balance:			
2. Vacation Property			
Address			
Mortgage <input type="checkbox"/> No <input type="checkbox"/> Yes Estimated Mortgage Balance:			
Date Acquired:		Value:	
3. Other Property			
Address			
Mortgage <input type="checkbox"/> No <input type="checkbox"/> Yes Estimated Mortgage Balance			
Date Acquired:		Value:	
Business Interests			
Name and Address	Ownership Structure		Fair Market Value
	Sole Part. Corp.		
	Shareholder Agreement	No	Yes
Principal Shareholders/Partners			
Liabilities (other than mortgages listed above) — please estimate the current amount owing			
Institution/Creditor	Client #1	Client #2	Joint
Do you have any other assets? Please include assets you expect to acquire, such as an inheritance.			
Safe Deposit box? <input type="checkbox"/> No <input type="checkbox"/> Yes	Genetic Material? <input type="checkbox"/> No <input type="checkbox"/> Yes		
Inheritance? <input type="checkbox"/> No <input type="checkbox"/> Yes	Power of Appointment? <input type="checkbox"/> No <input type="checkbox"/> Yes		
Digital Assets? <input type="checkbox"/> No <input type="checkbox"/> Yes	Trust Interests <input type="checkbox"/> No <input type="checkbox"/> Yes		
U.S. Securities? <input type="checkbox"/> No <input type="checkbox"/> Yes			
Notes:			

TAB 2



WILLS AND ESTATES

Practice Basics 2016

Basic Information Checklist

Jordan Atin
C.S., J.D., TEP
Atin Professional Corporation

March 22, 2016

Basic Information Checklist

PERSONAL INFORMATION

Your Full Name: _____

The name you commonly use, if different: _____

Home Address: _____

Telephone: (H) _____ (B) _____ (cell) _____

Email: _____

Occupation: _____

Employer Information:

Date of Birth: _____

Place of Birth: _____

Citizenship: _____

Marital Status: _____

Full name of Spouse: _____

Date and Place of Marriage: _____

Do you have a domestic contract? _____

Any Previous Marriages? _____

Full name(s) of ex-spouse(s): _____

Full names of all children from **previous** marriages:

Name

Age

_____	_____
_____	_____
_____	_____
_____	_____

Full names of children from **current** marriage:

Name

Age

_____	_____
_____	_____
_____	_____
_____	_____

Are any of your children residents or citizens of other countries?

Are any of your children married?

If so, please provide details of spouse and grandchildren, if any.

Child's Name	Spouse's Name	Grandchildren's Names and Ages
1.		1. 2. 3.
2.		1. 2. 3.
3.		1. 2. 3.

(attach additional sheets as necessary)

Details of any relevant personal situations:

e.g. disabled or spendthrift spouse and/or children:

Your Parents and Siblings (attach additional sheets as necessary)

Parents' Names	Siblings' Names	Nieces and Nephews Names and Ages
1. Deceased?	1.	1. 2. 3.
2. Deceased?	2.	1. 2. 3.
	3.	1. 2. 3.
	4.	1. 2. 3.

Name and Phone Number of Accountant: _____

ASSET INFORMATION

REAL ESTATE

Your Home:

Names on title:

Joint Tenants Tenants in Common Percentage ownership _____

Current Approximate Value: _____

Value of Mortgages or other Encumbrances: _____

Acquisition Cost and Date: _____

Other Real Estate:

Property 1

Street address or location:

Names on title:

Joint Tenants Tenants in Common Percentage ownership _____

Current Approximate Value: _____

Value of Mortgages or Other Encumbrances: _____

Acquisition Cost and Date: _____

Property 2

Street address or location:

Names on title:

Joint Tenants Tenants in Common Percentage ownership _____

Current Approximate Value: _____

Value of Mortgages or Other Encumbrances: _____

Acquisition Cost and Date: _____

Property 3

Street address or location:

Names on title:

Joint Tenants Tenants in Common Percentage ownership _____

Current Approximate Value: _____

Value of Mortgages or Other Encumbrances: _____

Acquisition Cost and Date: _____

REGISTERED INVESTMENTS

RRSPs or RRIFs:

<u>Plan Holder</u>	<u>Issued by</u>	<u>Beneficiary</u>	<u>Approximate Value</u>

Tax Free Savings Accounts:

<u>Owner</u>	<u>Financial Institution</u>	<u>Beneficiary</u>	<u>Approximate Value</u>

DPSP's and pensions:

<u>Name</u>	<u>Issued by</u>	<u>Beneficiary</u>	<u>Estimated Value on Death</u>

Other Registered Investments:

<u>Name</u>	<u>Issued by</u>	<u>Beneficiary</u>	<u>Estimated Value on Death</u>

LIFE INSURANCE

Name and phone number of Insurance Advisor: _____

Policies:

Insurance Company	Policy No.	Owner	Life Insured	Beneficiary	Amount Payable on Death

Loyalty Reward Programs

Are you a member of a loyalty rewards program, such as aeroplan, air miles, etc? If yes, please indicate member number and approximate number of points.

NON REGISTERED INVESTMENTS

Bank Accounts:

<u>Name and Address</u> <u>of Bank or Depository</u>	<u>Type of Account</u> <u>and No.</u>	<u>Approximate</u> <u>Ownership</u>	<u>Amount</u>
---	--	--	--------------------

Investment Accounts:

Name of Investment Advisor: _____

(Approximate value of Portfolio) \$ _____

Attach copy of most recent portfolio statement(s).

Non-Registered Assets

Do you own any stocks, bonds, debentures, GICs etc. separately from your investment account?

If yes, please attach a list including current value, acquisition cost and date and location of instrument.

Do you own any US stocks or bonds (including those held in any Registered or Non-Registered Account)?

PRIVATE CORPORATIONS

1. Do you have any shares or other interest in a private corporation?

Full Legal Name of Corporation	Are you the sole shareholder?	Approximate value of Shares/ Shareholder Loans?

Is there a Shareholder's Agreement? _____. If yes, please provide a copy.

2. Do you have any interests in a partnership or an unincorporated business?

If yes, please describe and supply copies of all shareholder or partnership agreements.

3. Do you have an interest in an existing trust?

If yes, please describe and supply copies of all Trust agreements.

4. Are you currently acting as an executor or trustee of an estate or trust?

If yes, please describe and supply copies of all Trust agreements or Wills

Debts owing by you including promissory notes:

<u>Name of Creditor</u>	<u>Amount</u>	<u>Maturity</u>	<u>Other terms</u>

Debts owing to you including promissory notes:

<u>Name of Debtor</u>	<u>Amount</u>	<u>Maturity</u>	<u>Other terms</u>

Automobiles, Boats and Recreation Vehicles:

<u>Description</u>	<u>Ownership</u>	<u>Value</u>

ANY heirlooms, artwork, jewellery and any collections, etc. OF SPECIAL NOTE?:

Total approximate value of assets \$ _____

Total value of debts \$ _____

Approximate net value of estate \$ _____

TAB 3



WILLS AND ESTATES

Practice Basics 2017

Memorandum to File – Smith Facts

Corina Weigl
Fasken Martineau DuMoulin LLP

March 27, 2017

MEMORANDUM

To: File

Date: February, 200

From: Lawyer

File/Matter No.: new

Client: Smith

Re: Estate Planning

Facts

Mr. and Mrs. John and Joan Smith are in their early 60s. Mrs. Smith is a U.S. citizen, resident in Canada; she is also a Canadian citizen, resident in Canada. Mr. Smith is a Canadian citizen, resident in Canada. They have been resident in Canada since they married some 30 years ago. Mrs. Smith has never taken steps to formally renounce her U.S. citizenship.

They have three children: Robert, Susan and Jack.

Robert is in his mid thirties and is married to Kate. Robert and Kate have two young children. Mr. and Mrs. Smith believe their marriage is stable.

Susan is in her early thirties. She has never been able to manage her finances. She is currently living in a common law relationship with her boyfriend. Mr. and Mrs. Smith do not believe Susan's current relationship will have long term potential even if her and her boyfriend get married. Mr. and Mrs. Smith have provided financial assistance to Susan over the years for various endeavours.

Jack is 28 years old and lives with Mr. and Mrs. Smith. He suffers from Downs Syndrome. He receives benefits under the *Ontario Disability Support Program Act* (the "ODSPA"). The Smiths anticipate that he will need assistance for the rest of his life. Jack will either need to live with one of his siblings or in a group home.

Mrs. Smith is an only child. Mr. Smith has a brother and a sister both of whom are alive with adult children. Neither of their parents are alive.

Mr. Smith has taken early retirement from his position as a senior executive with a bank. He is currently receiving pension income. Mrs. Smith did not work outside of the home.

In terms of their assets, they are as follows:

Jointly Owned	Mr.	Mrs.
Peterborough cottage - \$250,000.	RRSP - \$400,000	RRSP - \$100,000
House in Moore Park, Toronto - \$750,000		
Vacation property in Florida - \$250,000 U.S.		
	Numbered Company with investments of \$1,000,000	
Life insurance on Mr. Smith's life in the amount of \$1.0 million		
Amount of assistance to Susan - \$200,000		

The family cottage is used and enjoyed by all of the children. The Smiths anticipate that the cottage will be maintained by their children even after they are gone. They would like to ensure the cottage is available for all of their kids to use and enjoy.

The life insurance, even though it is only on Mr. Smith's life, is intended to fund any tax liability that will arise in respect of the cottage. The Smiths do not know who owns the policy. Mrs. Smith has been designated the beneficiary. The Smiths believe they have each designated the other as beneficiary of their respective RRSPs.

Given the financial assistance they have provided to their daughter, Susan over the years, they want all of their children treated equally but they do not want Susan to have to pay their estate any funds.

Given Susan's history with finances, and their concern with her current relationship, they would like to ensure she is looked after but that she not have control of any funds directly.

The Smiths would like to do what they can to provide for their grandchildren's education.

To the extent possible, they would like to protect Jack's ODSPA benefits. This should not, however, be at the expense of ensuring Jack is well looked after.

They do not anticipate that the Florida property will be of interest to any of their children.

Robert has expressed an interest in acquiring the house in Moore Park but he cannot afford to do so given his present financial situation.

The Smiths are interested in discussing measures to save probate taxes and income taxes. Since they've lived in Canada for over 30 years they are unaware of any U.S. tax implications.

What kind of an estate plan do you recommend? Your estate plan should take into account:

1. U.S. asset and citizenship
2. ODSPA recipient
3. Spendthrift child
4. Grandchildren's education
5. Family cottage
6. Advancements to one child
7. Corporate owned investment portfolio
8. Beneficiary designations and ownership of life insurance
9. Option to acquire property.
10. Probate tax, Canadian income tax and U.S. estate and gift tax.

Other complicating factors when faced with an estate plan:

1. Second marriage
2. Family business



WILLS AND ESTATES

Practice Basics 2017

Joint Retainers

Jordan Atin

C.S., J.D., TEP

Atin Professional Corporation

Laura Kerr

Barrister and Solicitor

Corina Weigl

Fasken Martineau DuMoulin LLP

March 27, 2017

JOINT RETAINER

1. We hereby authorize and retain _____, to act on our behalf to prepare the following documents for each of us:
 - a. **Wills (including trusts for minor children an insurance trusts);**
 - b. **Powers of Attorney for Property;**
 - c. **Powers of Attorney for Personal Care.**
2. We confirm that we have not retained you to provide advice on how foreign succession or tax laws will impact your estate or your beneficiaries or advice with respect to income tax planning.
3. We acknowledge being advised that when _____ is retained by both of us, no information received in connection with the matter from one can be treated as confidential as far as any of the other is concerned. We further acknowledge being advised that, if a conflict develops between us that cannot be resolved, you cannot continue to act for both and may have to withdraw completely. By executing this Retainer, we indicate our consent to _____ acting for us on this basis.
4. We confirm that the fees for the services to be provided above will be \$_____, plus HST and any disbursements. In the event that our instructions for the documents materially change from those previously given, we acknowledge that additional fees may be charged. We agree that one half of the total fees is payable upon delivery to us of drafts of the documents referred to in paragraph 1. The balance of the fees and disbursements and HST is payable when the documents are signed.

or

5. We confirm that you will bill us based on the time spent on our file, including discussions with us, reviewing documents and drafting documents. We understand the current standard hourly rates are follows:

All time expended on our behalf will be accurately recorded in tenths of an hour and the minimum amount of time so recorded shall be .1 or 6 minutes.

6. We further agree to deposit with you the sum of \$_____ as a deposit on account of your fees, HST and disbursements. This amount is payable by cheque or by email money transfer to “ _____ ” and is due on execution of this Retainer Agreement.
7. We understand that to provide us with services, _____ will collect some personal information about me. We have been advised to review the privacy policy, located at _____, about the collection, use and disclosure of personal information, steps taken to protect the information and my right to review my personal information. We understand how the privacy policy applies to us. We have been given a chance to ask any questions that we have about the privacy policy and they have been answered to our satisfaction. We agree to _____ collecting, using and disclosing personal information about us as set out above and in the privacy policy.
8. We hereby acknowledge receipt of a copy of this Retainer.

DATED: _____, 2015

Print Name:

Print Name:

Retainer Letter (Joint)

<Retained Lawyer>
Direct +<Telephone>
<Email>

<Date>
File No.: <@>

<@>

Dear <@>:

Re: Will<s> and Powers of Attorney

Thank you for contacting me on <Date> and for retaining me to prepare Wills and Powers of Attorney for you and your <husband>/<wife>. As discussed, I enclose my Estate Planning Questionnaire which I would ask you to complete prior to our first meeting, which is scheduled for <time> on <Date>. For general information regarding Wills and Powers of Attorney that may assist you in making some decisions, please see [my website / the enclosed brochure / etc.].

You have asked that I prepare Wills and Powers of Attorney for both <husband> and <wife>. As this constitutes a joint retainer, I would like to make you aware of the following obligations imposed on me by the Law Society of Upper Canada:

1. Although I have a duty of confidentiality in respect of all information acquired during the course of our professional relationship, no information relating to the matter on which you have jointly retained me can be treated as confidential as between the two of you. This means that I am required to share all information received from one spouse and relating to your Wills and Powers of Attorney with the other spouse.
2. If ever a dispute develops between you that cannot be resolved, I cannot continue to act for both of you. Only if both spouses agree may I continue to act for one of you, in which case I would refer the other spouse to another lawyer.
3. <If ever a dispute develops between you that cannot be resolved, I cannot continue to act for both of you. As I have done other work for husband in the past and may continue to do so in the future, I would ask you both to agree now that in these circumstances, I would cease to act for wife but would continue to act for husband. I recommend that each of you, and particularly wife because of my pre-existing relationship with husband, obtain independent legal advice before giving me instructions to act for you in this joint retainer>.

4. If in the future one of you instructs me to change your estate plan, these future instructions would be considered a new retainer and thus confidential. However, I would still be obligated to decline the retainer unless one of you has died, you have divorced or otherwise permanently ended your relationship, or the other spouse consents to my acting on the new instructions.
5. In particular, it is common for two spouses to prepare Wills setting out a mutually acceptable distribution that is to occur regardless of which spouse dies last. However, in most cases, a person is entitled to change his or her Will at any time. If you are concerned that your spouse may change his or her Will, either before or after your death, to exclude people you wish to benefit, I recommend that you consider entering into a contract not to change your Wills, which would require each spouse to obtain advice from a separate lawyer.

My fees for preparing Wills and Powers of Attorney for a couple range between <\$X> plus HST for a simple situation, to <\$Y> plus HST for a more complex situation involving income tax or probate planning. *[NTD: alternatively, lawyers who charge on an hourly basis would set out their hourly rate along with the names, positions and hourly rates of any associates and staff who may be working on the file.]* I will be able to advise you at our first meeting of any circumstances that I think warrant more complex planning, and make recommendations accordingly. Please don't hesitate to ask me at the end of that meeting for a more precise estimate of my fees based on the options you have selected. Occasionally there may be disbursements (e.g. for title searches) that I would pass on to you but I do not charge for supplies, photocopies or postage. *[Insert request for retainer cheque if applicable.]* I will send a single account once all matters are complete, unless this process takes more than two months, in which case I may also send out one or more interim accounts.

To ensure that no-one is fraudulently attempting to dispose of your assets, and in order to be able to swear an affidavit of execution for your Wills after they are signed, I must confirm your identity. Therefore, at our first meeting, I will request a copy of each spouse's driver's licence (either a photocopy that you can make beforehand or a photograph that I can take at our meeting with my digital camera). At our first meeting, I will also ask you to sign a copy of this letter confirming that you understand and agree with the terms of my retainer.

[NTD: if the retainer is to have any limitations, these should be identified. For example, if you have already, identified the potential need for foreign advice and the client has declined, you may wish to state this. The most common example of this is advice related to US estate taxes as a result of US citizenship or ownership of US assets. Another common example would be if you are instructed not to confirm ownership of assets but are to rely on the client's information in this regard, you may

wish to confirm this as well. If these matters are not identified until after the initial retainer letter is signed, they may be confirmed in writing at the time of sending out the draft documents and/or in the final reporting letter.]

I look forward to meeting you on <Date>.

Yours truly,

LARRY LAW FIRM

<Retained Lawyer>

<Initials>

I confirm that I understand and agree with the terms contained in this letter.

Date: _____

Name:

Date: _____

Name:



WILLS AND ESTATES Practice Basics 2017

Obligations of the Solicitor and the Estate Planning Retainer with Husband and Wife

Ian Hull
Hull & Hull, LLP

March 27, 2017

Obligations of the Solicitor and the Estate Planning Retainer with Husband and Wife

Ian Hull, Hull & Hull, LLP

Introduction

The generally non-contentious approach to estate planning can lull a lawyer into forgetting that friendly familial situations can turn sour. When things do not work out as the clients intended, negligence, issues the disciplinary rules and ethical considerations which apply to all lawyers suddenly may impose themselves into an otherwise peaceful setting.

Many of these problems arise because, by the very nature of an estate planning practice, and in particular when a lawyer represents both a husband and a wife.

More often than not, estate planning clients are married couples. While occasionally spouses have different lawyers plan their estates, the majority retain one lawyer to prepare both spouses' documents.

The nature of the retainer itself is often overlooked and may as a result give rise to negligence issues.

Retainer Generally

The case law provides that there is no need for a formal retainer in order for the solicitor-client relationship to be constituted.¹ A retainer has been defined as a “contract whereby in return for the client’s offer to employ the solicitor, the solicitor expressly or by implication undertakes to do certain things.”² The difficulty that arises with estate planning solicitors and with solicitors in any event, is the question of when the retainer is at an end. It is recommended that the solicitor should formally in writing confirm that the work has been completed and that the retainer is an end.³ The central issue is of course that if this is not done

¹ Hoque v. Montreal Trust Co. of Canada (1994), 138 N.S.R. (2d) 97 (S.C.); Mierzwinski, [1982] 1 S.C.R. 860. See also Hines v. Williams, (2002) WTLR 299 at p. 305 and 308.

² Graham-Green, ed., Cordery’s Law Relating to Solicitors, 7th ed (London; Butterworths, 1981) at p.49. See also Jackson and Powell on Professional Negligence (3rd ed) (London; Sweet and Maxwell, 1992) at p. 309.

³ Campion and Dimmer Professional Liability in Canada, (Carswell) at p.7-10

or cannot be done, liability may ensue if a client is under the impression that the solicitor is still acting and looking out for the client's interest.⁴

Frequently, in a solicitor's practice it is appropriate to prepare "mirror wills" for a husband and wife for whom you act. The wills provide for all of each others assets to pass to and they are identical in all respects.

The debate that has carried on throughout the estates bar is what does the solicitor who wrote the will do if one of those spouses come back to that solicitor and requests that solicitor to make changes to the prior "mirror will", which affects the surviving spouse adversely.

Does the solicitor tell the other spouse?

⁴ Ibid at p.7-10, See also 120 Leaseholds Inc. v. Thomson, Rogers (1995), 43 R.P.R. (2d) 79 (Ont. Gen. Div.) additional reasons at May 12, 1995, document Toronto 92-CQ-19141 (Ont. Gen. Div.).

This is an ethical dilemma that may give rise to a negligence claim and there is no simple answer.

Where There Are No Prior Instructions

The solicitor is clearly in a position of conflict between the spouses and unless the solicitor has received prior instructions from both clients as to how to deal with this situation, that solicitor may have a difficult decision to make.

The following is an outline of the relevant rules of professional conduct

Rules of Professional Conduct

2.03(1)- a lawyer at all times shall hold in strict confidence all information concerning the business affairs of the client acquired in the course of the professional relationship and shall not divulge any such information unless expressly or impliedly authorized by the client or required by law to do so.

2.04- Avoidance of conflicts of interest:

Definition

2.04(1)- In this Rule

A “conflict of interest” or a “conflicting interest” means an interest

- (a) that would be likely to affect adversely a lawyer’s judgment on behalf of, or a loyalty to, a client or prospective client, or
- (b) that a lawyer might be prompted to a preferred to the interests of a client or prospective client.

Definition

Avoidance of conflicts of interest:

- (2) a lawyer shall not advise or represent more than one side of a dispute
- (3) a lawyer shall not act or continue to act in a matter where there is or is likely to be a conflicting interest unless, after disclosure adequate to make an inform decision, the client or prospective client consents.

The commentary with respect to Rule 2.04(3) provides that a lawyer should examine whether a conflict of interest exists not only from the outset but throughout the duration of a retainer because new circumstances or information may establish or reveal a conflicting interest. It is clearly an ongoing obligation.

Joint Retainer

- (6) before a lawyer accepts employment from more than one client in a matter or transaction, the lawyer shall advise the clients that
- (a) the lawyer has been asked to act for both or all of them,
 - (b) no information received in connection with the matter from one can be treated as confidential so far as any of the others are concerned, and
 - (c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and they have to withdraw completely.

Existing Client- Continuing Relationship

- (7) Where a lawyer has a continuing relationship with a client for whom the lawyer acts regularly, before the lawyer accepts joint employment from the client and another client in a matter or transaction, the lawyer shall advise the other client of the continuing relationship and recommend that the client obtain independent legal advice about the joint retainer.
- (8) Where a lawyer has advised the clients as provided under sub rules (6) and (7) and the parties are content that that lawyer act, the lawyer shall obtain their consent

The solicitor can of course refuse to draw the new will; however, this is not a very satisfactory solution as the client will just get another solicitor down the street to draw the will and the first lawyer of course may jeopardize the existing business relationship. However, this option does not solve the problem as to whether or

not the solicitor has an obligation to inform the other spouse of the wish or wishes of the other spouse.

If the solicitor informs the other spouse of the change, there is of course the problem that the solicitor will be sued for breach of trust and negligence or acting in conflict of interest.

Planning for the Severing of a Mirror Will

In some respects, you, as solicitor, can plan in advance for this possibility and can avoid some of the problems to which this conflict may give rise.

The following is a list of some of the considerations that counsel can look to when they are meeting with a husband and wife to draw up mirror wills and these suggestions should be recorded in the notes that are taken and should, as a counsel of perfection, be referred to in your reporting letter:

1. The option of asking the couple to see their own counsel when drawing wills is of course available; however, in my view this is neither a realistic nor a practical solution.

2. When the couple come to see you, you shall advise them that their wills can be changed by either of them at a later date and that they should consider entering into an agreement not to change their wills without the consent of the other.

3. The solicitor should advise both clients that he or she is acting jointly for both of them, that the information between them is not confidential and if a conflict arises in the future, the solicitor is obliged to advise the other spouse.

4. It is a good idea to remind the clients that in the event of one of the spouses dying, it may be that the surviving spouse will want to change his or her will and review some of the scenarios with respect to the possibility of a second marriage. While these issues are sometimes difficult to raise with your clients, many people do not consider the possibility that the surviving spouse may want to revise their affairs in the event of the other spouses death.

The problem with all of these solutions is of course that the vagueness of this problem causes difficulties.

There is a strong argument that the original solicitor will remain functus to each of these clients in that event and that unless she makes it perfectly clear that she is obliged to tell the other spouse in the event of a change to the will, the solicitor may be sued by the other spouse for conflict of interest. The practitioner will be

faced with difficult and potentially expensive problems if this condition of disclosure is not made.

Solving the Lawyer's Dilemma

When considering the fiduciary duties of a solicitor, it is not sufficient to simply consider your clients' interests. It is necessary to consider as well those parties who will be affected by your work and your duty of care to third parties.

In the field of estate planning, solicitors frequently consider themselves to be the "family" solicitor. This means that not only are the interest of mothers and fathers involved in estate planning matters but the interests of children, grandchildren and other relatives must also be considered.

In many cases, this resembles a forest of family representation involving diverse interest which are not easily recognizable and which interests change from time to time.

Matters become more complicated when prior marriages and children born from such marriages are involved.

Not infrequently, one of the spouses, after having the estate plan included in a will or trust, will consult the solicitor and request a change which the spouse insists that the solicitor not disclose to the other spouse.

It is also not unusual for a child to give the "family solicitor" instructions to prepare a will for his parent giving a greater benefit to that child than other siblings or children of a prior marriage.

How about this. "My father will qualify for increased social benefits if you will prepare a deed of his farm to me which he wants me to have."

In such circumstances, the solicitor must recognize the problem and conflicts that exist and consider how he will deal with the problems they create when they eventually arise.

Surely, a thorough discussion with the testator or grantor is the least one could expect.

While elaborate retainers or engagement letters are not usually warranted, where potential conflicts exist, it would seem that a satisfactory answer would be to include in a reporting letter paragraphs along the following lines:

“You have jointly requested me to prepare your wills in the form enclosed after a full consideration of your respective assets and wishes.

At the time of taking instructions for these wills, I advised each of you together that as between both of you, any confidences which you have reposed in me relating to either or both of your wishes are held by me on the understanding that if any conflict of interest is disclosed to me respecting either of your interests I am bound to disclose that conflict to the other of you.

In other words, there are no secrets between the three of us affecting either of you respecting these wills and the dispositions in connection with your estate and I am bound to discuss with each of you any subsequent changes either of you may wish to make.”

In considering whether you can act for both the husband and wife, you should ask yourself the following questions:

1. Did the husband and wife come to you jointly and ask you to prepare their estate plans?

2. Did one of the parties come to you and say, "I would like you to prepare wills and trusts for me and my spouse?"

3. Have you already represented either the husband or wife in another capacity? Is there any relationship between your firm and one of the spouses which might affect your ability to treat the spouses equally?

4. Is either the husband or wife a relative of another client of yours whose interest may be affected?

5. Did either of the spouses tell you that it is not necessary for you to talk to his or her spouse as to what he or she wants?

6. Have you considered any fiduciary duty of yours which may arise with respect to some third party to whom you owe a duty either of care or disclosure?

By recognizing conflicts and fiduciary duties, considering their implications and dealing with them in a reasoned way a solicitor can avoid becoming a target for a claim arising out of breach of fiduciary duty.



WILLS AND ESTATES

Practice Basics 2017

Drafting Protection of Trustees

Sample Clauses

Jordan Atin, C.S., TEP
Atin Professional Corporation

March 27, 2017

DRAFTING PROTECTION OF TRUSTEES

By

JORDAN M. ATIN
(416) 369-0335
Jatin@hullandhull.com

Protecting Trustees¹ is not, typically, a testator's first priority. However, it is not uncommon for a testator to concern herself with the burden being left to her selected Trustee. This trustee may be a relative or friend whom the testator selects because of his relationship to her and not for any special expertise in administering an estate. It may also be because of the testator's own experience as a trustee that she turns her mind to the protection of her trustee. Of course, it is even more likely that it is the trustee himself who requires such protection prior to accepting the appointment².

In any case, there are a number of areas where a trustee can be protected by the provisions of the Will. This paper will consider the three most common:

1. Compensation;
2. Exercise of Discretion; and
3. Liability.

¹The term "trustee" will be used throughout this paper. This term is meant to include executors as well.

²Typically, the solicitor's duty is to the testator, not to the trustee. However, professional responsibilities issues are beyond the scope of this paper.

1. COMPENSATION:

Pursuant to section 61(1) of the *Trustee Act*³, a trustee is entitled to “fair and reasonable” compensation. However, that compensation must be determined by the Court unless it is agreed to by all of the beneficiaries.

Although usually compensation is based on 2.5% of the receipts and disbursements, the calculation is subject to a court’s exercise of discretion. Thus, the amount of compensation to which a trustee is entitled is an uncertainty. Uncertainty, naturally, breeds litigation.

Fixing Compensation

To avoid leaving the decision regarding compensation to the Court, a testator may wish his trustees to be paid a specific amount as compensation. Where a trust, including a Will, fixes compensation, section 61(1) of the *Trustee Act* does not apply⁴ and therefore, the amount of compensation is not within the discretion of the Court under section 61(1)⁵.

Thus, a provision fixing the trustee’s compensation will enable the trustee and the beneficiaries to determine the exact amount of the compensation. A typical clause fixing compensation is attached as Schedule “A”.

However, the drafter must be careful to ensure that the Will properly “fixes” compensation and does not leave unnecessary ambiguity in the determination of the amount.

³ R.S.O. 1990, c.T.23 as amended.

⁴ 61(5) of the *Trustee Act* reads:

“Nothing in this section applies where the allowance is fixed by the instrument creating the trust.”

⁵ See *Re Robertson* [1949] O.R. 427 (H.C.J.)

In a decision of Greer J.⁶, the question of whether a clause authorizing the trustee to take a "reasonable per diem rate", fixed compensation within the meaning of section 61(5) of the *Trustee Act*.

Her Honour found that such wording did not "fix" compensation. In order to fix compensation in an instrument, she held, it must be by way of "fixed amount or a liquidated amount".

A compensation agreement which is properly incorporated by reference into the Will⁷ would also fix compensation so as to oust the application of s. 61(1). These compensation agreements are seen frequently where trust companies are being appointed.

It is important to note the requirements for a document to be validly incorporated by reference into a Will⁸:

- (a) the document must be in existence at the time the will is made;
- (b) the document to be incorporated must be described in the will as being in existence at the time of making the will;
- (c) the document to be incorporated must be sufficiently described in the will so that it is clear that the document submitted for admission to probate is the same document referred to in the will.

A sample clause incorporating a compensation agreement is attached in Schedule

⁶ *Re Andrachuk Estate* (Unreported) Toronto Court File No. 06-23/98

⁷ See *Re Taylor* [1967] 2 O.R. 557 (Surr. Ct.)

“B”.

Pre taking

As well, the trustee is not entitled to receive compensation prior to the Court order or beneficiaries' agreement. To do so, is referred to as “pre-taking” compensation, and is, by the most recent authority, not permitted.

The general prohibition against pre-taking compensation may be overridden by the provisions of the Will. Therefore, it is relatively common to have a pre-taking clause included by the testator where he wishes his trustee to receive compensation on a regular basis throughout the administration. Typically, such clause will permit the trustee to pre-take amounts of compensation which are reasonable, subject to the final determination by the Court or the consent of the beneficiaries. The clause will also generally allow the trustee to repay any amount which she has pre-taken without interest. A sample pre-taking clause is attached in Schedule “C”.

Division of Compensation

Trustee's compensation is a global amount, intending to cover the entirety of trustee's work, regardless of the number of trustees. Thus, once the quantum of compensation is established, either by agreement of the beneficiaries or by the Court, it is generally up to the trustees to determine the division of the amount as among themselves.

Therefore, in addition to establishing the quantum of compensation, the testator may also wish to set out the division of compensation where there are multiple trustees. For example, where a trustee is also a beneficiary, the testator

⁸ *Thomas Estate v. Gay* (1996), 14 E.T.R. (2d) 229 (O.C.G.D.)

may wish her to receive a smaller part of the compensation, than a non-beneficiary trustee.⁹ Where a trust company is appointed along with individual trustees, the testator may wish the trust company to handle the bulk of the administration duties, leaving the other trustees with less work. The trust company will likely seek the lion's share of the compensation, while the other trustees may feel equally entitled to the compensation. To avoid arguments between the trustees, a clause specifying how the compensation should be divided may be included in the Will.

Legacies in Lieu of Compensation

Executor's compensation is taxable income to a trustee. On the other hand, a legacy is not. There is therefore, a tax advantage to a trustee if he or she were to receive a gift in the Will, instead of taking executor's compensation. The testator may wish to leave a legacy directly to the trustee in lieu of any executor's compensation to which she would otherwise be entitled, in order to more greatly benefit the trustee.

There is a rebuttable presumption that a legacy to a trustee is made in lieu of compensation¹⁰. Thus, a legacy to a trustee *prima facie* disentitles the trustee from seeking executor's compensation in addition to it. However, as the case-law shows, the presumption is seemingly easily rebutted¹¹. Therefore, if the testator is intending to make the gift to the trustee on the understanding that no further compensation will be taken, this should be specifically set out in the legacy clause. On the other hand, if the testator intends the gift to be in addition to compensation, this should be set out for greater certainty, as well. Sample clauses for both scenarios are included at Schedule "D".

⁹ For example, see *Re Andrachuk Estate, supra*.

¹⁰ See *Re Stanley Estate* (1996), 13 E.T.R. (2d) 102 (O.C.G.D.)

¹¹ See, for example, *McClenaghan v. Perkins* (1902), 1 O.W.R. 752 (C.A.)

2. EXERCISE OF DISCRETION

Another area where a trustee can be embroiled in litigation is in respect of her exercise of discretion.

It is very common to see provisions granting a trustee “absolute discretion” in respect of, for example, powers to encroach. The testator has chosen her trustee to make decisions without restrictions. This is typically because the range of possible decisions which the trustee may be confronted with cannot, at the time that the Will is drawn, be accurately forecasted. However, such broad discretion is a mixed blessing for the trustee. While she is given the greatest latitude to consider all options when exercising discretion, she is left with little guidance as to how to do so. Did the testator intend the trustee to encroach liberally for the life tenant? Was it important to the testator that the remainderman’s interest be as fully protected as possible? Is the purpose of the encroachment one which the testator would have approved of?

Notwithstanding the broad, seemingly unlimited authority, the trustee is bound not to abuse her discretion and if she does, is subject to the Court’s scrutiny.¹²

“If the trustees ignore relevant factors or give significant weight to irrelevant considerations, they will have abused their discretion and the purported exercise of the power will be set aside by the Court: *Fox v. Fox Estate* (1996), 28 O.R. (3d) 496 (Ont. C.A.). These principles flow from their fiduciary status as trustees and apply even where the power is expressed to be absolute or uncontrolled.”¹³

¹² See Howard Black “*Encroachments on Capital- Is there any Discretion Left*” LSUC – *Six Minute Estate Lawyer*, 1996; Maurice Cullity, ‘*Judicial Control of Trustees’ Discretion*’ (1975), 25 U.T.L.J. 99

¹³ *Banton v. Banton* (1998), 164 D.L.R. (4th) 176 (O.C.G.D.)

Thus, the “absolute discretion” can give the trustee a false sense of security awash in a sea of conflicting interests without the assistance to find her way in the storm.

From the trustee’s point of view, some guidance as to how to exercise the discretion may be helpful. The testator may wish to limit discretion within the Will itself. For example, an encroachment power may be limited to use only for a beneficiary’s education or health-care needs.

Alternatively, the testator may choose to provide guidance to the trustee without specifically restricting the trustee’s powers, by using precatory language. The testator may express his non-binding wishes with respect to the trustee’s exercise of discretion by coupling them with a provision giving absolute discretion.

An example of where this may be important to the testator is with respect to trusts for minor children. Typically, the trustee will be given power to encroach for the minor’s benefit to be exercised in her absolute discretion. It may be that the testator is most concerned about the child’s wellbeing while he or she is growing up and that liberal payments should be made on his or her behalf by the trustee. Thus, the corollary desire is that the trustee should place less importance on the amount of capital which will be left upon the child reaching the age upon which the capital is to be transferred to him or her absolutely. A sample of this type of clause is attached as Schedule “E”.

Of course, precatory wishes can also be communicated to the trustee through the use of memoranda. Provided that the testator is aware and intends that the wishes are not binding on the trustee, the memorandum need not be incorporated by reference, but may be created or amended after the execution of the Will.

Exercise of discretion in accordance with the precatory wishes will likely also protect the trustee from a finding of *mala fides*.

Clearly, the use of precatory language either by memorandum or within the Will itself provides the trustee with some instruction and guidance on how to exercise that "absolute" discretion and even some protection in that regard as well.

3. EXCULPATORY PROVISIONS

A common form of protection which is sought by trustees, and often included by testators, is an exculpatory clause. Its intention is to relieve or limit the liability of trustees in the administration of the trust.

Although there is little Canadian case law on the subject, there is a great body of English and American jurisprudence.

It appears that exculpatory provisions are generally valid in Canada.¹⁴ However, it is equally clear that such provisions must be carefully drafted to be effective.

A trustee cannot be excluded from all liability, no matter how the clause is drafted.

"Although some effect must be given to exculpatory provisions that purport to absolve a trustee from the consequences of a breach of trust or abuse of discretion, there is always the risk that a court will construe them narrowly and, when this is not possible, will hold them repugnant to the fiduciary

¹⁴ See David Steele's excellent and thorough article "Exculpatory Clauses in Trust Instruments" (1995) 14

status of a trustee.”¹⁵

Until recently in England, an exculpatory clause could not protect a trustee from liability for his “gross negligence”¹⁶. However, in *Armitage v. Nurse et. al.*,¹⁷ the English Court of Appeal held that it was permissible to confine a trustee’s liability to cases of actual fraud involving dishonesty and exclude liability for any action short of actual fraud.

A further potential restriction on the enforceability of exculpatory provisions originates from the American case-law. In many states, where exculpatory provisions are included as a result of an abuse of a pre-existing fiduciary or confidential relationship between the testator and the trustee, the clause will not be given effect. The *Restatement of the Law, Second* sets out the following relevant factors in determining the validity of the clause:

1. whether the trustee prior to the creation of the trust had been in a fiduciary relationship to the settlor ...;
2. whether the trust instrument was drawn by the trustee or by a person acting wholly or partially on his behalf;
3. whether the settlor has taken independent advice as to the provisions of the trust instrument;
4. whether the settlor is a person of experience and judgment...;
5. whether the insertion of the provision was due to undue influence or other improper conduct...;

E.T.J. 216 For recent dicta on the issue see *Crawford v. Jardine* (1997), 20 E.T.R. (2d) 182 (O.C.G.D.).

¹⁵ Maurice Cullity “*Personal Liability of Trustees and Rights of Indemnification*” (1996) 16 E.T.J. 115

¹⁶ *Carruthers v. Carruthers*, [1896] A.C. 659 (H.L.); *Wyman v. Paterson* [1900] A.C. 271 (H.L.); *Rae v. Meek* (1889), 14 App.Cas. 558 (H.L.)

¹⁷ [1997] 2 All E.R. 705 (Eng. C.A.)

6. the extent and reasonableness of the provision.¹⁸

Executor's Insurance

There is apparently a new way of protecting trustees - Insurance. Executor's Insurance is a product that can be purchased to shield the trustee from personal liability for negligence.

As noted above, negligence by the executor can render the executor personally liable to the beneficiaries and creditors of the estate. Some common examples where executors could be found negligent are:

- improperly interpreting the Will;
- paying the wrong amounts to the wrong parties;
- not prudently investing the estate assets;
- not properly protecting estate assets, for example not changing locks or purchasing fire insurance;
- improvident settlements; and
- failure to keep accurate records of the administration.

By using executor's insurance, the executor would not be risking his or her own personal assets when assuming the fiduciary obligations of a trusteeship.

As the product is brand new, it will be important to determine whether the executor and the estate will benefit from this kind of protection.

From a drafting perspective, the testator could direct that the executor purchase insurance at the cost of the estate. In this manner, the executor may be more willing to accept the role. Sample language is found in Schedule "F".

Conclusion

As much of estate litigation centers on what trustees have or have not done and how

¹⁸ *Supra*, Note 14 at p. 233

much they may receive, it is recommended that issues relating to the protection of trustees be canvassed with clients. If the testator is concerned about avoiding litigation after she is gone, there are certainly provisions which can be inserted which may not only protect his selected trustee, but discourage others with a financial interest from litigating.

~ Blank Page ~

SAMPLE CLAUSES

SCHEDULE "A"

I HEREBY DECLARE that each of my Trustees shall receive \$_____ payable from the capital of the residue of my estate, as compensation for their acting as Trustees under this my Will.

SCHEDULE "B"

I declare that [NAME OF EXECUTOR], shall be entitled to receive and shall be paid out of my estate, as compensation for so acting, the fees, reimbursements and other compensation provided for in the Compensation Agreement between [NAME OF EXECUTOR] and me signed by me on the ____ day of _____, 2011, prior to the execution of this my Will.

SCHEDULE "C"

I authorize my Trustees to pay to themselves from time to time from the capital and/or income of my estate or the trusts thereof, such amounts as my Trustees may, in their discretion, consider reasonable as payments on account of any compensation to which they shall subsequently become entitled by reason of a Court order on any passing of accounts or by agreement with my beneficiaries. Provided, however, that if the amount subsequently awarded on court audit or agreed to by the beneficiaries is less than the amount so pretaken, the difference shall be repaid forthwith to my estate without interest.

SCHEDULE "D"

I direct that each of my Trustees shall receive \$_____ in lieu of any compensation which might otherwise be awarded to them by the court.

I declare that any benefits received by _____ under the provisions of my Will shall be in addition to any remuneration to which _____ may be entitled for services rendered as a Trustee or as solicitor for my estate.

SCHEDULE "E"

Without restricting the absolute discretion of my Trustees with respect to the payment of income and capital for the benefit of my children, I wish to emphasize to my Trustees that I consider it very important that liberal payments be made to the guardians of my children, in order that a very

happy home-life should be created for them while my children are growing up. I desire that my Trustees place emphasis on the financial needs of the guardians and my children during this period of time, rather than be unduly concerned about the fact that such payments will decrease the funds available to my children when reaching the age specified in my Will.

SCHEDULE "F"

I hereby direct that should my Trustee desire to purchase insurance to protect him from personal liability as trustee, the cost of such insurance shall be paid from the capital of my estate as a testamentary expense and shall not be deducted from my Trustee's compensation.



WILLS AND ESTATES Practice Basics 2017

The Annotated Will 2017

Susannah Roth, TEP, *O'Sullivan Estate Lawyers*

Mary-Alice Thompson, C.S., TEP,

Cunningham, Swan, Carty, Little & Bonham LLP

Darren Lund, *Fasken Martineau LLP*

Jane Martin, *Dickson Appell LLP*

March 27, 2017

TABLE OF CONTENTS

INTRODUCTORY CLAUSE	1
INTRODUCTORY CLAUSE FOR A WILL IN CONTEMPLATION OF MARRIAGE	2
REVOCAION	2
DISPOSITION OF BODY	3
REGISTERED PLANS	4
INSURANCE DECLARATION	7
INSURANCE TRUST	8
AIR MILES DESIGNATION	12
JOINT ACCOUNTS	13
APPOINTMENT OF EXECUTORS	15
DISPUTE RESOLUTION	20
DEFINITION OF ISSUE	21
DEFINITION OF SPOUSE	25
LOCATION OF BENEFICIARIES	26
VESTING CLAUSE	26
DISPOSITIVE CLAUSES	28
SPECIFIC GIFT OF PARTICULAR ITEM OF PERSONALTY	30
GIFT OF REMAINING PERSONAL EFFECTS	31
BINDING AND PRECATORY MEMORANDA	32
PETS	34
SOCIAL MEDIA	35
REGISTERED EDUCATION SAVINGS PLAN	37
DEBTS, FUNERAL AND TESTAMENTARY EXPENSES	40
POWERS OF SALE AND RETENTION	42
CASH LEGACIES	43
CHARITABLE GIFT	46
GIFT OF REAL ESTATE	49
Principal Residence Trust.....	50
Trust Of Cottage Property.....	55
Option To Purchase Cottage Property.....	58
Education Trust For Grandchildren.....	60
Residue.....	60
Gifts To Spouse.....	64
Outright Gift of Residue to Surviving Spouse.....	64
Trust Fund for Surviving Spouse.....	66
Dual Trusts For Surviving Spouse.....	68
Gifts To Issue.....	71
Outright Distribution to Issue.....	71
Simple Trust For All Issue.....	71
Staged Distributions to Children.....	73
Lifetime Trusts for Children.....	74
Hotchpot Clause.....	78
Gifts If There Are No Surviving Spouse Or Issue.....	79

“Henson Trust” For Disabled Beneficiary	81
Payments During Minority	87
Receipts	87
GENERAL ADMINISTRATIVE PROVISIONS	88
Investments	89
Relief From Liability	90
Investment Counsel	91
Employment Of Agents	91
Corporations	92
Real Estate	94
Executor Insurance	94
Borrowing	95
Loans To Beneficiaries	95
Use Of Assets By Beneficiaries	96
Distribution In Kind	96
Elections	96
Guarantees	97
Signing Of Documents	97
Purchase By Trustees	97
Settlement Of Debts	98
SETTLEMENT OF CLAIMS	98
Stock Dividends	98
Combine Trusts	99
Compensation	99
Maintain Spousal Trust Status Under The Income Tax Act	103
Maintain Testamentary Trust Status Under The Income Tax Act	104
Survivorship	105
Family Law Act	105
Custody And Guardianship Of Property	107
Testimonium	109
MULTIPLE WILLS FOR ONTARIO PROBATE PLANNING PURPOSES	111
Introductory Clause	113
Revocation	113
Definitions	114
No Obligation to Obtain Probate of Private Assets Will	118
Confirmation of No Revocation	118
Addition to Debts Clause	118
Legacies	119
MULTIPLE WILLS FOR ASSETS SITUATE IN DIFFERENT JURISDICTIONS	120
Introductory Clause	121
Revocation	122
Definitions	123
ROADMAP FOR DRAFTING OF A TRUST IN A WILL	124

ANNOTATED WILL OF JOHN DOE¹

INTRODUCTORY CLAUSE

Description of Clause: *This clause identifies the testator and includes a statement of his or her residence.*

I, JOHN DOE, of the City of Toronto, in the Province of Ontario, [insert occupation], declare that this is my Last Will and Testament [made this XXX day of January, 2017].

Annotation: *While it might be obvious, it is important to use the proper name of the client. Correctly identifying the client will ensure that the right Will is probated and that the probate certificate has the same name as that which appears on the client's other legal and financial documents. If the client is referred to by another name you should include reference to this other name in the following manner "also known as Jonathan Doe". Including common names will ensure that the Will matches the name on other documents.*

Including an identifying locale of where the client resides will assist in differentiating the client from other individuals who have a similar name. It will also assist in knowing in which probate court to bring the probate application. Sections 7, 11 and 12 of the Estates Act, R.S.O. 1990, c. E. 21 and Rule 74 of the Rules of Civil Procedure (the "Rules") deal with where and how to file an application for probate. Including the client's occupation can also be a helpful differentiator but is not essential, although again it can assist with the probate application as this information is one necessary item in the application for the certificate of appointment of estate trustee.

For income tax purposes, it is also helpful to include a statement of legal residence. Clients who are resident in a jurisdiction such as the United Kingdom, but who are not domiciled there can obtain certain tax advantages. For such clients, the following clause may be used:

I, JOHN DOE, resident in the City of London, in the United Kingdom, but domiciled in the Province of Ontario, Canada, declare that this is my Last Will and Testament.

¹ This work appears as part of the Law Society of Upper Canada's initiatives in continuing professional development. It aims to provide information and opinion, which will assist lawyers in maintaining and enhancing their competence. It does not, however, represent or embody any official position of, or statement by, the Society, except where this may be specifically indicated; nor does it attempt to set forth definitive practice standards or to provide legal advice. Precedents and other material contained herein are intended to be used thoughtfully, as nothing in the work relieves readers of their responsibility to consider it in the light of their own professional skill and judgement and their client's own specific facts and requirements.

Some practitioners enter the date at the top of the first page of the Will, others at the end of the Will, while some put the date both at the beginning and at the end (with care taken to ensure both dates are consistent). Putting the date in the first page lets you immediately know the date of the Will without having to flip to the last page. Any such format is fine, although it is usually best if possible to avoid extra items to be updated as this can lead to errors if special care is not taken.

If your client is preparing separate Wills to deal with different categories of assets (e.g. assets located in multiple jurisdictions, or assets that do require probate to administer vs. those that do not require probate), the introductory clause should identify the fact that the scope of the Will is restricted (see discussion of Multiple Wills below). Generally, this is done by identifying which Will the testator is making in each specific case (e.g. "...this is my Last Will and Testament in regards to my Secondary Estate" or "my Ontario assets").

INTRODUCTORY CLAUSE FOR A WILL IN CONTEMPLATION OF MARRIAGE

Description of Clause: If the Will is being made by the testator in contemplation of his or her marriage, the introductory clause should include an additional statement.

I, JOHN DOE, of the City of Toronto, in the Province of Ontario, declare that this is my Last Will and Testament made in contemplation of my marriage to JANE SMITH and is intended to take effect whether or not the marriage takes place.

Annotation: Section 16 of the Succession Law Reform Act, R.S.O. 1990, c. S.26 (the "SLRA") provides that a Will is revoked by marriage except where there is a declaration in the Will that it is made in contemplation of marriage. The purpose of this is to protect spouses and children of the marriage by at least ensuring they will benefit under the rules of intestacy if the testator does not make a new Will.

A further clause can be included in the introductory provisions of the Will to confirm whether the testator intends the Will to operate if he or she does not marry as intended.

This clause cannot be used if the testator does not have a specific intention to marry a particular person at a particular time - a general intention to marry one's partner sometime in the future is not sufficient.

In Owers v. Hayes (1983), 16 E.T.R. 61, 43 O.R. (2d) 407, 1 D.L.R. (4th) 280 (Ont. H.C.) the court held that the handwritten note in which the testatrix contemplated marriage was held to be a valid holographic codicil. As a result, the Will she had executed before her marriage had been revived.

REVOCATION

Description of Clause: The clause expressly states that the Will revokes any prior Wills.

I revoke all Wills and Codicils previously made by me.

Annotation: Sections 15, 16 and 17 of the SLRA deal with the various means of revoking a Will. In particular, the making of a new Will which disposes of all the client's property revokes an older Will (see ss. 15(b)). As a result, it is not, strictly speaking, necessary to include this clause. However, to ensure the testator understands what the effect of executing a new Will is, it is common practice to include it. In addition, subsection 15(c) provides for revocation of a Will by a writing declaring an intention to revoke. Other means of revocation include burning, tearing or otherwise destroying a Will and marriage.

The clause intentionally omits reference to other testamentary dispositions. In Ashton Estate v. South Muskoka Memorial Hospital Foundation (2008), 40 E.T.R. (3d) 153 (Ont. S.C.J.), a clause revoking "all wills and testamentary dispositions of every nature or kind whatsoever made by [the testator]" was found to revoke a beneficiary designation on a registered retirement income fund. This finding appears inconsistent with other non-Ontario case law that a general revocation clause in a Will is insufficient to revoke a designation of a beneficiary of an RRSP, other registered plan or life insurance policy. Nevertheless, a careful Will-drafting lawyer should restrict the scope of the revocation clause so as not to affect existing beneficiary designations inadvertently, and should deal separately with changes to the beneficiary of any RRSP, other registered plan, life insurance policy or segregated funds as described below.

If your client is preparing separate Wills to deal with different categories of assets (e.g. assets located in multiple jurisdictions, or assets that do require probate to administer vs. those that do not require probate), it is important that the revocation language only revoke prior Wills dealing with the particular assets governed by the Will (see discussion of Multiple Wills below), and that the language used make it plain that it is not the testator's intention to revoke Wills dealing with assets not intended to be governed by the Will in question.

DISPOSITION OF BODY

Description of Clause: This clause sets out the testator's wishes with respect to organ donation, other use of his or her body after death, and cremation.

Pursuant to the *Trillium Gift of Life Network Act* (Ontario), I consent to the use of my body or any part or parts of it after my death for therapeutic purposes only [or, for therapeutic purposes, scientific research or medical education]. I request that my remains be cremated.

Annotation: This is one example of the many ways a client can express wishes regarding the disposal of remains. Many clients have specific religiously-motivated wishes, desires regarding funds to be made available for funeral or disposal, places for scattering of ashes, etc.

If referred to at all, the testator's wishes with respect to the disposition of his or her body should appear as early as possible in the Will to maximize the chance that they will be seen in time to be effective. However, the client should be encouraged to discuss these

wishes ahead of time with the family and executors; to register wishes with respect to organ donation with the Ministry of Health (<http://www.health.gov.on.ca/english/public/pub/ohip/organdonor.html>); to complete the organ donation card that comes with a new driver's licence; and perhaps to complete a funeral pre-planning questionnaire. The client should also be warned that funeral instructions are not legally binding. Finally, the client should be discouraged from inserting detailed funeral instructions into a Will, which can become a public document; instead, a separate letter or memorandum could be written to the executors and kept with the Will.

REGISTERED PLANS

Description of Clause: *This clause names a beneficiary of the testator's registered retirement savings plans (RRSPs). If the client owns a tax-free savings account (TFSA) or a registered retirement income fund (RRIF), the language may be supplemented or amended as discussed below.*

I hereby designate my wife, JANE DOE, if she survives me, as my beneficiary under each registered retirement savings plan and other plan (within the meaning of Part III of the *Succession Law Reform Act*, R.S.O. 1990, c. S.26 ("the Act")) which I may own or under which I may be entitled to benefits at the date of this Will, to receive all proceeds payable thereunder after my death (including payments made as a consequence of my death as well as contractual payments continuing after my death). This is a designation within the meaning of the Act. I hereby revoke any previous designation made in respect of any plan to the extent of any inconsistency with this designation.

Annotation: *For estate administration tax purposes (a.k.a. probate fees), if a beneficiary is designated on RRSPs, RRIFs, pension funds and other plans as defined in the SLRA, so that the benefits do not fall into the control of the executor, then their value is not included for purposes of determining the value of the estate when calculating this tax. (See Forms 74.4 and 74.14 of the Rules applicable to the bringing of an application for a Certificate of Appointment of Estate Trustee with or without a Will).*

Under the Income Tax Act, R.S.C. 1985 (5th Supp.) c. 1 (the "Income Tax Act"), the owner of an RRSP is deemed to have disposed of his or her RRSP on his or her death and the full amount of the RRSP is brought into income in his or her terminal return. As a result, income tax will be payable on its value in the year of death. This tax burden can be deferred in two circumstances. If the surviving spouse (either legal or common law) is the designated beneficiary of an RRSP, then the property in the RRSP is not taxed as income in the deceased owner's terminal return. There will be no income tax consequence to the deceased owner. The surviving spouse will be subject to tax on the RRSP proceeds received. However, if the surviving spouse contributes the proceeds of the RRSP to his or her own RRSP (as opposed to using it), then there will be a deferral of the income tax consequences until the surviving spouse draws upon the RRSP, at which time the spouse will have an income inclusion of the amount of RRSP drawn upon. However, if the spouse chooses to take a lump-sum payment instead, the estate of the testator will bear the burden of the tax in most cases. If the spouse is not the sole

residual beneficiary of the testator's estate, for example in second marriage situations, the testator may wish to make a gift of RRSP conditional upon the spouse paying any income tax owing on the RRSP proceeds as a result of the testator's death, as discussed further below.

The same deferral opportunity is available if the designated beneficiary is a dependent child or grandchild of the deceased owner of the RRSP. However, the deferral is only available until age 18. There is a longer deferral opportunity available in the event the dependent child is also disabled for purposes of the Income Tax Act, i.e., the child qualifies for the disability tax credit. Alternatively, RRSP proceeds may be rolled into a registered disability savings plan ("RDSP") established for a financially dependent child or grandchild of the deceased owner, provided that the RDSP beneficiary is under 59 years of age, the RDSP beneficiary and the plan holder consent to the transfer, and the total of all rollovers and contributions ever made to the RDSP in respect of the particular beneficiary remains at or below \$200,000. (See sections 146 and 146.3 of the Income Tax Act for the provisions applicable to RRSPs and RRIFs, respectively.)

In the event the deemed disposition of an RRSP under the Income Tax Act results in a tax burden to the deceased owner, the tax burden will be borne by the residuary beneficiaries of the estate and not the beneficiary of the RRSP. (This is subject to CRA's right to look to the beneficiary in the event the residue of the estate does not have sufficient assets to satisfy the tax burden. See s. 160 of the Income Tax Act.) When drafting a Will or creating an estate plan it is important to determine if this result is equitable given the testator's overall objectives. Where appropriate, the testator can make it a condition of the gift to the RRSP beneficiary that the beneficiary must pay the relevant tax.

The definition of "plan" in Part III of the SLRA includes a RRIF. A beneficiary of a RRIF may be designated in the same manner as for an RRSP, and a tax rollover is generally available where the designated beneficiary is the surviving spouse or minor dependent child or grandchild of the deceased, or a disabled adult child or grandchild of the deceased who was dependent on the deceased by reason of physical or mental infirmity. However, where the RRIF is to be left to the spouse, the rollover is more easily accessed by naming the spouse as the "successor annuitant" of the RRIF rather than just as a beneficiary, because if there is a successor annuitant, there is no need to report an income inclusion and claim a corresponding deduction as is the procedure where there is a designated beneficiary. Therefore, if a client owns a RRIF, the first part of the clause may be amended as follows:

I hereby designate my wife, JANE DOE, if she survives me, as my beneficiary under and the successor annuitant of each registered retirement income fund which I may own or under which I may be entitled to benefits at the date of this Will ...

In addition, by Ontario Regulation 54/95 to the SLRA, "Tax Free Savings Accounts" are prescribed as "plans" for purposes of Part III of the SLRA, and a beneficiary may be designated in the same manner as for an RRSP. However, where the TFSA is to be left to the testator's spouse, the transfer of ownership is more easily effected by naming

the spouse as the “successor holder” of the TFSA instead of just the beneficiary, because if there is a successor holder, the existing TFSA will continue and all income generated after death will remain tax free. Such a designation also allows the spouse to retain the investments held in the TFSA, which may be beneficial in some cases. Beneficiaries can only receive a lump-sum in cash according to some financial institution policies. Where the successor holder is designated by Will, the Will must state that the successor holder acquires all the rights of the original holder, including the right to revoke beneficiary designations. Therefore, if the client owns a TFSA, the following clause may be used:

I hereby designate my wife, JANE DOE, if she survives me, as the beneficiary under and successor holder of each tax-free savings account which I may own at the date of this Will, and I give to her all my rights under each such account including the unconditional right to revoke any existing beneficiary designation in respect of each such account. This is a designation within the meaning of Part III of the *Succession Law Reform Act*, R.S.O. 1990, c. S.26. I hereby revoke any previous designation made in respect of any such account to the extent of any inconsistency with this designation.

Where the RRSP or RRIF was issued by an insurance company, it is the Insurance Act, R.S.O. 1990, c. I.8 (the “Insurance Act”) that governs the beneficiary designation rather than the SLRA. In this case, the last sentence of the beneficiary designation may be replaced by the following or alternatively the second sentence should combine reference to both statutes:

This is a declaration within the meaning of s. 190 of the *Insurance Act*, R.S.O. 1990, c. I.8.

It is possible to provide for an alternate beneficiary to receive an RRSP, RRIF or TFSA in the event the first named beneficiary is not alive.

If the named beneficiary may be a minor at the time of inheriting, it is important to give consideration to the manner in which the RRSP should be administered, otherwise the minor beneficiary will receive the RRSP by the age of 18. Depending upon the value of the RRSP, this may not be appropriate. In such cases, trust provisions should be considered, including incorporating residual trust provisions by reference, although some practitioners prefer to repeat trust provisions in beneficiary designations so as to ensure no question arises regarding the designation being separate from the testator's assets passing through the Will for probate purposes.

It is important to note that a beneficiary designation will only apply to those RRSPs in existence at the time the Will is executed. See Part III of the SLRA for RRSPs issued by a bank or other financial institution, and s. 192 of the Insurance Act, for RRSPs issued by insurance companies. This is one exception to the general rule that a Will speaks from the date of death and not the date of execution. The client should be advised that the Will should be revised or re-executed if the client acquires new registered plans or converts an RRSP to a RRIF (or the client should be told to make the correct designation on the new RRSP or RRIF plan document). This may be one topic to include in a reporting letter.

Barry Corbin has written a number of excellent articles on beneficiary designations. See “Designating Beneficiaries” (1988-89), 9 E. & T.J. 199; and “The Case of the Wayward RRSPs” (1995), 14 E. & T.J. 367. See also “More About the Nature of RRSPs” (1990-91), 10 E. & T.J. 37 by Cy Fien.

One area of the law which has now been settled in Ontario is whether an RRSP that has a designated beneficiary is subject to the claims of creditors of the estate. RRSPs issued by a life insurance company have long received protection after death under the Insurance Act. In 2004, the same protection was extended in Ontario to non-insurance RRSPs payable to a designated beneficiary: Amherst Crane Rentals Ltd. v. Perring (2002), 46 E.T.R. (2d) 1 (Ont. S.C.J.), affirmed (2004), 241 D. L. R. (4th) 176 (Ont. C.A.); leave to appeal refused, [2004] S.C.C.A. (430). This ruling was subsequently followed by s. 67(1)(b.3) of the Bankruptcy and Insolvency Act, RSC 1985, c B-3, which specifically exempts “property in a registered retirement savings plan or a registered retirement income fund, ... other than property contributed to any such plan or fund in the 12 months before the date of bankruptcy” from the property divisible among creditors of a bankrupt. Note that whether an RRSP will be exempt from seizure by creditors during the lifetime of the plan holder varies depending on the type of RRSP, whether the plan holder is bankrupt, when the contributions were made, and what relationship the designated beneficiary bears to the plan holder. A discussion of these conditions is outside the scope of the Annotated Will.

INSURANCE DECLARATION

Description of Clause: *This clause names the spouse as the beneficiary of certain insurance proceeds.*

I hereby designate my wife, JANE DOE, if she survives me, as beneficiary of the proceeds of all policies of insurance on my life (collectively, the “Insurance Proceeds”), including without limitation, my policy with the Life Insurance Company, being Policy No. 01234, no matter to whom the same may presently be payable in connection with the terms thereof or of any declaration prior in date hereto. For greater certainty, I designate my wife, JANE DOE, for purposes of the *Insurance Act*, R.S.O. 1990, c. I.8 as the beneficiary of the Insurance Proceeds. This designation is a designation within the meaning of the Insurance Act and I revoke any previous designation in respect of the Insurance Proceeds.

Annotation: *Section 192 of the Insurance Act includes the provisions relevant to the designation of beneficiaries of insurance policies by Will. It is important to be aware that the Insurance Act allows for beneficiary designations in a number of forms, as long as there is a written declaration. If the insured makes a beneficiary designation in a document that is later in time than his or her Will, the later document will govern. This is contrary to the general rule that a Will speaks from the date of death. For this reason and others described below, some practitioners prefer to do their insurance designations in a separate document, not as part of the Will. In this way, if the Will is revoked or destroyed, the insurance designation remains in force. However, this may not be the testator's intention in every case. Further, jointly-owned life insurance policies require*

a separate joint beneficiary designation to be effective, since both owners must agree to change the beneficiary designation.

While the above clause includes a catch-all phrase, a life insurance beneficiary designation may not be effective if it does not refer to the specific company and policy number, or group policy number in the case of group life insurance benefits.

Note that segregated funds are an insurance product and may be subject to a beneficiary designation in the account opening document which will not be revoked by (and therefore could be inconsistent with) the general dispositive provisions of the Will. It is prudent to ask a client specifically if they own segregated funds, as they may not provide a correct response if asked only about life insurance.

As with RRSPs, for estate administration tax purposes (a.k.a. probate fees), if a beneficiary is designated of life insurance proceeds such that the benefits do not fall into the control of the executor, then the value of the proceeds is not included for purposes of determining the value of the estate when calculating this tax. (See Forms 74.4 and 74.14 of the Rules applicable to the bringing of an application for a Certificate of Appointment of Estate Trustee with or without a Will).

Unlike RRSPs, the provisions of the Insurance Act specifically provide that insurance proceeds do not form part of the assets of the estate of the deceased insured. As a result, they are not subject to the claims of creditors of the estate. Furthermore, insurance products with a cash surrender value benefit from protection during the lifetime of the person whose life is insured if the designated beneficiary is a spouse, child, grandchild or parent of that person.

INSURANCE TRUST

Description of Clause: *Alternatively, the following clause creates an insurance trust of the proceeds for the benefit of the surviving spouse and issue.*

2. I direct and declare that the proceeds of all policies of insurance on my life (including, without limitation, my policy with Life Insurance Company being Policy No. 12345), no matter to whom the same may currently be payable in connection with the terms thereof or of any declaration prior in date hereto shall be paid over in a lump sum to my wife, JANE DOE, to be held and administered by her as the trustee of a separate insurance trust fund (hereinafter referred to as “the Insurance Trust”) in accordance with the provisions of this Clause 2 of this my Will. If my wife, JANE DOE, should predecease me, the proceeds of all such policies of insurance on my life shall be paid over in a lump sum to my wife’s father, JOHN SMITH, my wife’s sister, SANDRA SMITH, and my brother, ROBERT DOE, jointly, or to the survivor or survivors of them, to be held and administered by them as the trustees of the Insurance Trust in accordance with the provisions of this Clause 2 of this my Will. This is a declaration within the meaning of the *Insurance Act*, R.S.O. 1990, c. I.8 (the “Insurance Act”) and for greater certainty, I designate the trustees of the Insurance Trust for purposes of the Insurance Act as the beneficiary of the said insurance proceeds. For greater certainty, the Insurance Trust shall

not form part of my estate and shall be administered as a separate trust notwithstanding that one or more of the trustees of the Insurance Trust may be trustees of my estate.

In the event that my wife, JANE DOE, should survive me but become at any time after the date of my death unable or unwilling for any reason to act or to continue to act as the trustee of the Insurance Trust, I appoint my wife's father, JOHN SMITH, my wife's sister, SANDRA SMITH, and my brother, ROBERT DOE, jointly, or to the survivor or survivors of them, to be the trustees of such Insurance Trust in accordance with the provisions of this Clause 2 of this my Will in her place and stead. The trustees of the Insurance Trust, whether original or substituted as herein provided, shall have the same powers and rights in connection with the administration of the Insurance Trust as have "my Trustees" (as hereinafter defined in this my Will) for the administration of my estate and for such purpose I hereby incorporate by reference the provisions of Clauses [paragraph numbers of administrative provisions only, not dispositive provisions] of this my Will into this Clause 2 of my Will, *mutatis mutandis*, as terms of the Insurance Trust. Whenever there are more than two persons acting as trustees of the Insurance Trust I will and direct that a majority decision of such trustees shall be final and binding upon all such trustees unless a unanimous decision is specifically required by the terms of this my Will.

[Annotation: The above sample trustee provisions should be revised depending on the testator's intention and wishes regarding alternate trustees, majority decision-making vs unanimous decision-making, etc. Consider using the same persons as executors and trustees as are designated as trustees of a life insurance trust for ease of administration.]

The trustees of the Insurance Trust shall deal with the income and capital thereof in accordance with the following terms, trusts and conditions:

- (1) I authorize and empower the trustees of the Insurance Trust, in their discretion, to advance such life insurance proceeds, or any part thereof, by way of loan to my general estate and, if they consider it desirable to do so, to invest such proceeds, or any part thereof, in investments and assets of my general estate, whether movable or immovable, real or personal, and regardless of whether or not such property is in the form of an investment in which trustees, by law, are bound to invest and even if such property is of a non-income-producing nature.

[Annotation: Note that one must now be careful to determine whether advancing funds from the insurance trust to the general estate is advisable. Where an estate requires the designation of "Graduated Rate Estate" under the Income Tax Act (such as, for example, where the estate is to make charitable gifts to offset income tax), one must ensure that the estate receives no funds other than as a consequence of the death of the taxpayer. Arguably, having the insurance trust advance funds to the estate would violate this restriction.]

- (2) Subject to the foregoing, the trustees of the Insurance Trust shall invest and reinvest the Insurance Trust and may at any time and from time to time pay to or apply for the benefit of such one or more of my wife, JANE DOE, and my issue as may be living from time to time, to the exclusion of the other or others, all or so much of the annual net income of the Insurance Trust and all or any part or parts of the capital thereof, in such shares and proportions as the trustees of the Insurance Trust shall in their absolute discretion consider advisable.

Subject to the foregoing, the trustees of the Insurance Trust shall accumulate the whole or any part or parts of the annual net income thereof for any year as the trustees may in their absolute discretion consider advisable and in such year shall add such accumulated income to the capital thereof to be dealt with as part thereof. Notwithstanding the foregoing, in any year that the trustees of the Insurance Trust are required by law to distribute income, the trustees shall pay to or apply for the benefit of such one or more of my wife, JANE DOE, and my issue as may be living from time to time, to the exclusion of the other or others, all of the annual net income of the Insurance Trust, in such shares and proportions as the trustees of the Insurance Trust shall in their absolute discretion consider advisable and in the event the trustees fail to exercise their discretion within thirty (30) days of the end of such year any annual net income not so paid or applied shall be paid or applied to my wife, JANE DOE, if she is then alive and if she is not then shall be divided among my issue in equal shares per stirpes.

- (3) Subject to provisions equivalent to the provisions of Clauses [paragraph numbers of administrative provisions] of this my Will (which hereinbefore have been incorporated by reference into the terms of this Insurance Trust), *mutatis mutandis*, upon the later of:

- (i) the date of my death;
- (ii) the date of death of my wife, JANE DOE; and
- (iii) the date upon which there is no longer a child of mine living and under the age of thirty-five (35) years,

the balance of the Insurance Trust then remaining shall be divided among my issue in equal shares *per stirpes*.

- (4) In the event that on the date of my death or at any time subsequent thereto none of my wife, JANE DOE, and my issue are living to take an absolutely vested interest in the Insurance Trust in accordance with the foregoing provisions of this Clause 2, I direct the trustees of the Insurance Trust to divide the Insurance Trust or such portion thereof remaining on the date of death of the last survivor of me, my wife, JANE DOE, and my issue (such date shall hereinafter be referred to as the "Trust Distribution Date") among

such persons, upon the same trusts, terms and conditions as to the payment of income and capital as provided in Clause [paragraph number of “disaster clause”] of this my Will, but with the beneficiaries determined as if the Date of Final Distribution specified in Clause [paragraph number of “disaster clause”] were the Trust Distribution Date.

Annotation: While the Insurance Act allows for beneficiary designations by written declaration or Will, if the insured intends to have the insurance proceeds dealt with in a particular manner, such as in trust for minor children, it is generally preferable to complete the designation in the Will. (See ss. 190 to 194.) This is primarily due to the fact that the written declaration forms provided by most insurance companies do not allow for designations that are any more complicated than simply naming a beneficiary. However, if the intention is to avoid having the insurance trust considered part of the estate that may be subject to probate fees, it is important that the insurance declaration should occur before the vesting language in the Will. It would also be important to draft the insurance trust in such a way that it is clear that the insurance proceeds do not form part of the estate. Hence the above precedent essentially creates a complete self-contained trust, rather than simply adopting the dispositive provisions of the Will. The above precedent incorporates the powers clauses of the Will as the powers clauses of the Insurance Trust Fund thereby buttressing the argument that the Insurance Trust Fund is truly separate from the residue of the estate such that probate fees should not be payable on its value.

It is possible to create such an insurance trust as a separate document, but you would want to include all the necessary trust powers clauses. While this adds to the quantum of paper generated and perhaps complexity, some practitioners have noted that creating an insurance trust in a separate document outside of the Will may provide some advantages over an insurance trust in a Will. First, there will be no question that the insurance trust is separate from the Will and the estate created therein. Hence the type of arguments raised in Re Carlisle (see the discussion below) are avoided. Secondly, some financial institutions are not readily opening bank accounts to hold non-probate assets (such as insurance proceeds). The financial institutions are hesitant to allow any bank account to be opened by the “estate” (i.e., the executors of the estate) without a Certificate of Appointment of Estate Trustee. While the insurance trust created in a Will should be construed as a separate trust, not forming part of the estate under the jurisdiction of the executors, having an insurance trust created in a separate document should strengthen this argument.

Note that there is some debate as to whether the proceeds payable on death out of a group life insurance policy (such as a policy typically offered by employers to all employees) should be designated to be part of an insurance trust that is intended to be a testamentary trust for income tax purposes. Some have pointed to Technical Interpretation dated March 23, 2001, Document number 2000-0059755, as authority for the proposition that because the individual is not the “owner” of a group life insurance plan, the proceeds of a group insurance policy cannot form part of a testamentary trust. Recent changes to the Income Tax Act regarding testamentary trusts may make this issue moot. Other than certain disability trusts and a “Graduated Rate Estate” (which is essentially the estate of

a deceased taxpayer during the 36 months after death, subject to certain conditions), testamentary trusts no longer enjoy progressive tax rates. All income of such trusts is now taxed at the highest marginal rate commencing January 1, 2016. As a result, failure to maintain an insurance trust as a testamentary trust for Income Tax Act purposes will not have the same adverse tax effects as in the past.

Note that the Saskatchewan Court of Queen's Bench recently questioned this analysis, finding in Re Carlisle Estate (November 29, 2007), 2007 SKQB 435, that a designation in favour of "the person who shall from time to time be acting as my Trustee" caused the insurance proceeds to pass through the estate and become subject to probate fees. The court came to this conclusion despite specific language in the Will confirming that the proceeds "shall be paid to my Trustee in his capacity as insurance trustee, and not in his capacity as Trustee of my estate assets", that the proceeds would be held "upon the same trusts, terms and conditions, as if such proceeds had formed part of the residue of my estate" and that the insurance trustee "shall have the same powers, rights, protections, obligations and duties in connection with the administration of the insurance fund or funds as he has as a Trustee of my estate assets for the administration of the residue of my estate." Until such time as an Ontario court has had the opportunity to comment on Re Carlisle Estate, most practitioners are taking the view that it does not represent the law of Ontario. However, a more cautious approach would be to create such an insurance trust as a separate document, in which case it would be necessary to set out in detail all the necessary trust powers clauses as shown above. Alternatively, naming the separate trustees rather than referencing the executors of the Will should further bolster the argument that the insurance trust is a separate trust and does not form part of the estate for probate purposes.

If the insurance trust will have a beneficiary who is disabled and it is or may be the intention of the owner of the policy that the insurance trust be treated as a Qualified Disability Trust (QDT), then it is important to explore whether the insurance trust or the trust under the Will proper will be treated as the qualified disability trust, since each disabled beneficiary may only designate one QDT in any tax year. See the discussion of QDTs below.

AIR MILES DESIGNATION

Description of Clause: *This clause designates the beneficiary of certain air rewards points.*

I designate my wife, JANE DOE, if she survives me, as beneficiary to receive all my Air Canada Air Miles points, being account number 1234567. In the event that my wife has predeceased me then my Trustees (as hereinafter defined) shall divide all my Air Canada Air Miles points in equal shares between my son, JACK DOE, and my daughter, JILL DOE, if they are both alive on the date of my death, or all to the survivor of them if only one of my son and my daughter is then alive.

Annotation: *Clients may have built up frequent flyer points or other reward points with significant value. As a result, you should canvas with your clients whether they have*

reward points, particularly frequent flyer points. Each rewards program has its own rules concerning whether they can be specifically given away on death and to whom or whether if they are not specifically given away, if they can be dealt with by the executors. Most plans allow for a disposition of points to immediate family members. Unfortunately, there can be a significant cost. Most plans do not, however, allow for an exchange of points for money. To avoid any disputes concerning who is to receive the points and to avoid the necessity of any valuation in the event the points are not specifically disposed of, it is advisable to include a specific gift, although you should ensure that the testator understands that the program may not honour the gift to certain individuals.

This clause may also be included as part of the gifts of personal effects clauses (see below).

JOINT ACCOUNTS

Description of Clause: *These clauses make explicit the testator's intention with respect to jointly owned property, subject to the commentary below:*

I confirm it is my intention that if my daughter, JILL DOE, survives me then by right of survivorship she shall solely own all legal and beneficial right, title or interest in any real or personal property which I own jointly with her at the time of my death.

OR

I confirm it is my intention that my interest in [description of property] which I own as joint tenants with my daughter, JILL DOE, shall not pass by right of survivorship to my daughter as a consequence of my death. Notwithstanding that legal title to such property is owned as joint tenants, my daughter and I own our respective beneficial interests in such property as tenants-in-common (OR: Notwithstanding that legal title to such property is owned as joint tenants, my daughter holds legal title to such property in trust for me.) My interest in such property shall form part of my estate to be dealt with in accordance with the provisions of this my Will.

Annotation: *As a result of the decisions of the Supreme Court of Canada in Pecore v. Pecore, 2007 SCC 17, 2007 and Madsen Estate v. Saylor, 2007 SCC 18, 2007, the law pertaining to the effect of a transfer of property from sole ownership into joint ownership was clarified in some respects and altered in others. Where a person places assets into joint name with his or her adult child, a presumption of resulting trust will apply. The presumption of advancement will apply where the transfer is made to a minor child. Where the asset that is placed into joint name with an adult child is a bank or investment account in which the balance fluctuates over time and the parent does not intend that that the child may unilaterally withdraw money during the life of the parent, the decision in Pecore stands for the proposition that the parent may in such a circumstance transfer only the "right of survivorship" to the child (i.e., the right to own the balance in the account on the death of the parent.) In such a case, the presumption of resulting trust*

will still apply to that right of survivorship but the presumption may be rebutted by evidence on a balance of probabilities. It is the intention of the transferor that governs.

As both the presumption of a resulting trust and presumption of advancement apply to dispose of the issue only if the testator's intention cannot be ascertained or rebutted by other evidence, it is useful to have the testator clearly state his or her intention with respect to jointly owned property. It is the intention at the time of the transfer into joint name (or solely into the name of the child) that is relevant for these purposes. The intention of the transferee is not relevant. Often a desire to avoid probate fees is the reason for the creation of joint accounts. If so, particularly where only one of several children is made the joint account holder, it is good practice to have the testator make a clear expression of intent at the time of creating the joint account. It is also important that solicitors review these matters with clients to ensure that the estate has not been inappropriately stripped of assets where most assets have been put in joint name.

The second clause above is designed to confirm that the transferor did not intend that the specific jointly owned property would pass by right of survivorship after his or her death. Notwithstanding that a Will speaks from the date of death, subject to the limitation described below, the clauses above deal only with the particular property listed that was in existence on the date of the Will, and no others (since it is the intention at the time of the transfer that governs). Hence property that is acquired or placed in joint name after the date of execution of the Will is not covered by such clause and would be dealt with in accordance with the normal presumptions or evidence to the contrary.

It is important to note that the efficacy of a clause in a Will stating that the child holds the joint property in trust for the parent (thereby purporting to ensure that the presumption of resulting trust is not rebutted) may be questioned. For example, where a parent transferred property into joint name with an adult child and intended the adult child to become a full joint owner of the property at the time of transfer (i.e., the adult child shares the four unities of title, possession, interest and time with the parent), a statement in a later Will that contradicts this original intention should not be valid. It is also worth noting that it is not possible at law to intend to create a resulting trust. If the parent intends that the child hold the jointly owned property in trust for the parent, then an express trust has been created.

The best practice is to prepare a separate document at the time at which property is transferred into joint tenancy that either confirms an intention to (i) have a true joint tenancy of the entire property where both parties share the four unities, (ii) make a gift of the right of survivorship of the balance of the joint account on death, or (iii) confirms that the joint ownership was not intended to convey the beneficial interest in the property on the death of a joint owner (i.e., the joint owners own their own shares as tenants in common or, where all the property that is in joint name was provided by one party, the other party owns the entire property in trust for the transferor.)

Note that the above presumptions regarding transfers are modified by statute in the case of transfers between husbands and wives. The following is from section 14 of the Family Law Act of Ontario:

14. The rule of law applying a presumption of a resulting trust shall be applied in questions of the ownership of property between husband and wife, as if they were not married, except that,

(a) the fact that property is held in the name of spouses as joint tenants is proof, in the absence of evidence to the contrary, that the spouses are intended to own the property as joint tenants; and

(b) money on deposit in the name of both spouses shall be deemed to be in the name of the spouses as joint tenants for the purposes of clause (a).

APPOINTMENT OF EXECUTORS

***Description of Clause:* The following precedent appoints the surviving spouse as the sole executor of the Will and Trustee of the estate. The clause goes on to appoint an alternate to act on the second death and a further alternate. It provides that no foreign executor is required to post a bond as security. Finally, the clause includes a definitional section.**

I appoint my wife, JANE DOE, of the City of Toronto, Ontario, to be the Executrix of my Will and Trustee of my estate. If my wife shall predecease me or otherwise be unable or unwilling to act as Executrix of my Will and Trustee of my estate before all the trusts set out in my Will have been fully performed, I appoint my friend, ROBERT JONES, of the City of Toronto, to be the Executor of my Will and Trustee of my estate in her place and stead. If my friend, Robert Jones, shall predecease me or otherwise be unable or unwilling to act as Executor of my Will and Trustee of my estate before all the trusts set out in my Will have been fully performed, I appoint my solicitor, LINDA LAWYER, of the City of Toronto, to be the Executrix of my Will and Trustee of my estate in his place and stead.

I declare that the expression "my Trustees" used throughout my Will shall include, where the context permits, the Executrix, Executor or Executors and Trustee or Trustees for the time being, whether original, additional or substitutional. I declare that if any of my wife, Jane Doe, my friend, John Smith or my solicitor, Linda Lawyer acts as an Executor and Trustee of my Will he or she shall not be required to post a bond as security. I further declare that no Trustee who is not resident in Ontario shall be required to post a bond as security for acting as my Trustee.

***Annotation:* A preliminary note about terminology - the use of the word "executrix" may now be viewed as somewhat old-fashioned. Some practitioners use "executor" for all genders instead. This has the added benefit of not requiring modification of the precedent used where gender changes occur.**

There are any number of options as to who can be named the executor(s) and whether there is a sole executor or more than one. They can be family members, friends, professional advisors or a trust company. The choice of executor(s) will differ depending upon your client's circumstances and the nature of the Will plan. Choosing the

executor(s) is likely one of the most important decisions your client will make. In our experience, it is best to leave the discussion of this person until you have obtained the requisite background information and discussed your client's goals about disposing of his or her estate. If you have taken the requisite time to acquire sufficient background information from your client, by the end of this exercise you will have an understanding of your client's financial and personal affairs, as well as his or her goals and attitudes. It is only after you have completed this exercise that you will have an understanding of who may or may not be a suitable candidate for this position.

If the Will plan is for an immediate distribution, for instance to the surviving spouse, then one or more of the beneficiaries are generally a good choice. When this may not be the case includes:

- if the beneficiary resides outside of a Commonwealth jurisdiction. (A foreign executor, including a resident of the US, is required to post a bond as security. This can add to the costs of administration. It is possible for the testator to include a direction that s/he does not intend for the foreign executor to have to post a bond as security. This direction is, however, not binding on the court. An application to the court will have to be made to have the necessity of a bond waived. While the application is an 'over-the-counter' procedure, affidavit evidence as to the value of the estate and whether all debts have been paid, will be required. Where there are beneficiaries who are not sui juris, the court may not grant the application for the entire estate value.)*
- if the beneficiary is a charity;*
- if one of the beneficiaries may inherit while under the age of 18;*
- if there are trusts for any of the beneficiaries;*
- if the assets might require professional assistance to administer such as shares of a private company in which none of the beneficiaries are involved;*
- if the executor may be in a perceived conflict of interest with himself or herself as a beneficiary they should be balanced with an impartial executor; or*
- where an executor with particular expertise is appointed (e.g. a literary executor to deal with an author's unpublished works).*

If the Will plan includes a trust for the benefit of the residuary beneficiaries and the term of the trust could be long, consideration should be given to ensuring the executorship will always be filled. This can be accomplished by appointing more than one executor from the outset. Alternatively, substitute executors can be named. Where the life tenant is different from the remainder beneficiary, it is generally advisable to have representation from both classes of beneficiaries or to include an impartial executor.

Where multiple executors are named, it is important to ensure that they will be able to cooperate - not all of the testator's children may be able to do this, and a frank discussion

in this regard is sometimes warranted to ensure the Will is not setting up a future battleground for them. Also, where a majority decision-making power is provided, an odd number of executors should be appointed to more easily allow them to get past any impasse.

It is generally not advisable to name a large number of executors, as the larger the number, the more unwieldy the administration will be. Even in large estates, it is uncommon to have more than five named executors, and five should only be considered where absolutely warranted.

If a single executor is appointed then it is advisable to include substitute appointments to ensure continuity in the executorship. The only exception to this is if a trust company is appointed, although it should be considered if provision to allow beneficiaries to replace one trust company with another should be given where warranted (without allowing the beneficiaries to effectively control the estate administration). Alternatively, if no express substitutes are stipulated, consideration should be given to providing for the manner in which trustees can retire and new trustees can be appointed. This is particularly important in the context of long term trusts.

*Sections 2, 3, 4, 5 and 6 of the Trustee Act, R.S.O. 1990, c. T.23 (the "Trustee Act") deal with the ability of trustees to retire and the manner in which new trustees can be appointed. Provided the provisions of the Trustee Act are met, a trustee can resign without a court order. It is unclear, however, whether a sole trustee can resign and appoint his or her successor. Section 2 only applies to trustees, not to executors, and it is likely that any replacement of an executor requires a court order. See in particular, *Re McLean* (1982), 37 O.R. 164 (H.C.) where the court held that an executor cannot resign by deed pursuant to section 2 of the Trustee Act but can only be removed from office by a court order under section 37. However, it is not always a good idea to rely on the Trustee Act provisions as they do not cover all contingencies.*

If multiple executors are appointed i.e. Larry, Curly and Mo, then the continuity of the executorship is built-in. In particular, if one of the named executors dies, or is unwilling or unable to act, then the others are entitled to continue to act. (See the Trustee Act, subsection 46(1).)

In other cases, the testator may wish to give the executors the power to appoint their own successors. The following clause may be useful not only if the original executors become unable to act but also if they wish to change the residence of the estate for income tax reasons, to reduce the likelihood that an administration bond will be required, etc. It should be modified as appropriate, e.g. if it is desired that a sole trustee resign if a replacement is appointed.

Additional Trustees may be appointed from time to time as deemed necessary or advisable by an appointment in writing executed by my existing Trustee or Trustees of the residue of my estate or of any trust fund established hereunder, as the case may be, or failing him, her or them, by a majority decision of the then beneficiaries of the residue of my estate or of any trust fund established hereunder, as the case may be, who

are sui juris. No appointment shall be valid or effective unless the proposed Trustee has in writing agreed to act and a copy of such appointment is sent by prepaid registered mail or delivered personally to each of my other Trustees.

In the event that there is only one (1) Trustee of my estate or of any trust fund established hereunder, as the case may be, at any time, such Trustee may resign only upon an Order of a Court of competent jurisdiction where my estate has its situs. If there is more than one (1) Trustee of my estate or of any trust fund established hereunder, as the case may be, then any Trustee may retire on ninety (90) days' written notice sent by either registered mail, postage prepaid or by telegraph, telex, fax or similar method of communication, charges prepaid, to the last known addresses of, or personally served upon, my remaining Trustee or Trustees. If a Trustee desires to retire on less than ninety (90) days' written notice then my remaining Trustee or Trustees, may unanimously agree to accept such shorter notice as they consider appropriate. A Trustee shall cease to be a Trustee and shall be deemed to have retired upon being declared incapable or bankrupt.

To avoid the principles relating to the devolution of executorship applying (see the preceding subsection) if a solicitor (or other professional) is named (or is in fact) the last surviving executor then she/he should name an alternate in their own Will thereby avoiding their own executor stepping-in on those estates that they are an executor of in the event she/he dies.

If there are specific assets to be dealt with that require expertise that the person otherwise suitable to act as executor does not have, a separate executor may be appointed to deal with those assets. Examples include a professional practice (such as a law practice), valuable collections, intellectual property rights, research papers, or digital data. It is becoming increasingly common for individuals to have a significant online presence in the form of social networking accounts, blogs, etc. Where an individual does have such an online presence, it would be useful to remind the client to ensure that his or her executor (or special executor charged with administering only the digital estate) has all the necessary passwords, account log in details, etc., to allow the executor to close out or transfer such accounts (although in many cases such access would violate the terms of use/service agreed to by the testator). This advice would also extend to encouraging clients to keep an up-to-date list of all information that an executor would require to effectively administer the client's estate: beneficiaries and other family members and friends, locations and account numbers of bank and investment accounts, description and most recent valuation of other assets, credit cards and other liabilities, service providers with whom services or subscriptions need to be cancelled after death.

In certain circumstances, a trust company may be an appropriate choice. Some of those situations are as follows:

- *the assets require the experience, expertise and skills of a trust company;*
- *the duties would impose too great a burden on individuals;*
- *there are trust funds to be in existence for a number of years, such that the administration will require the continuity provided by a trust company;*

- *a conflict among the beneficiaries requires an impartial executor;*
- *your client wants the comfort of having a professional involved or has no obvious person in their life who would complete the responsibilities adequately.*

It is important to understand that a trust company will expect compensation for acting. It is generally advisable to discuss the appointment with the trust company, particularly in circumstances where the trust company will act (as opposed to being named an alternate executor). In this way, a fee arrangement can be negotiated up front and incorporated by reference into the terms of the Will. (See below for such a clause.) Further, most trust companies appreciate reviewing the Will prior to execution and may insist on certain administrative clauses being included.

If a surviving spouse makes an election under section 5(2) of the Family Law Act, R.S.O. 1990, c. F.3 (the “Family Law Act”) for an equalization of net family properties, the surviving spouse is considered to have predeceased the testator and therefore cannot act as executor and trustee, unless the testator specifies otherwise. See Reid Martin v. Reid (1999), 35 E.T.R. (2d) 267 (Ont. Div. Ct.).

If the Will plan involves a spousal trust for the surviving spouse and it is unlikely that an election will be made, then generally the surviving spouse should be one of the executors. Designating a minimum number of trustees and allowing for majority decision-making can avoid the spouse having a veto over decisions, while providing the spouse must form part of any majority can ensure it, as the testator wishes. See below for a further discussion of majority decision-making clauses.

An executor must be of the age of majority to act. Despite this, a minor can still be named as an executor so long as an adult is also named. If the minor executor is still a minor at the date of death, the adult executor may apply for probate, with the minor’s right to apply reserved until s/he attains the age of majority. Other conditions can be established upon the occurrence of which an additional executor may be appointed or an acting executor’s appointment may be terminated.

One of the more common potential conflicts to avoid is the naming of a business associate where the business is one of the assets of the estate. The existence of a buy/sell agreement between the deceased and the business associate or if there is a chance that the business associate may want to purchase the deceased’s business interests, will put the business associate in a conflict if named as an executor. If they are named as an executor, it is imperative that a provision be included in the Will allowing trustees to purchase trust property and that expressly recognizes the conflict(s) that the business associate is in. This comment applies to any named executor who may be in a conflict of interest – express recognition will avoid or minimize future issues. (This will be discussed again in the context of the administrative provisions of the Will.)

Note that changes in trustees of trusts that hold shares of private corporations may have income tax implications, such as a change of control. It is beyond the scope of the

Annotated Will to provide further detail other than to remind readers to consider this issue further.

If your client is the sole executor of an estate under administration, then on his or her death this executorship will devolve to his or her executors. (See the Trustee Act, s. 46(2).) This may not be appropriate, particularly where the client is a lawyer and may be acting in a number of estates. In Re Laking, [1972] 1 O.R. 649, 24 D.L.R. (3d) 5 (Surr. Ct.) the court held that where a testatrix appointed her husband to be the executor of her Will and appointed another individual to be executor of another estate in her place, effect would be given to the appointment of that named executor as executor of the other estate in the place of the testatrix. Accordingly, if this situation is applicable, the following precedent may be included:

For those estates of which I am the sole Trustee or the sole surviving Trustee, except for the estate of my wife, Jane Doe, and any person related to me by blood or marriage or adoption, I appoint my colleague, LINDA LAWYER, to be the successor Executrix and Trustee in my place and stead, provided that if Linda Lawyer is not then living or is or becomes unwilling or unable to act as the Executrix and Trustee, I appoint my colleague, SAM SOLICITOR, to be such Executor and Trustee.

As an alternative to expressly naming colleagues to act, it may also be appropriate to give the partners of your firm or the managing partner of your firm, the right to appoint a substitute.

Note that when appointing executors and trustees, it is not sufficient to use only the phrase "Estate Trustee". The phrase "Estate Trustee" is a defined term under Rule 74.01 of The Rules of Civil Procedure that means "executor, administrator, or administrator with the will annexed". The definition in the Rules does not include a "trustee". Hence if you use only the phrase "Estate Trustee" when making the appointment, you have failed to appoint a trustee of the estate. Consequences may ensue from the lack of appointment of a trustee, or at the very least a dispute requiring court intervention may arise.

DISPUTE RESOLUTION

Description of Clause: The following clause allows decisions to be made by a majority of the executors:

I direct that should any difference of opinion at any time exist among my Trustees in relation to the commission or omission of any act in the execution of the trusts of my Will, the opinion of my Trustees having the majority of votes shall prevail, notwithstanding that any one or more of my Trustees may be personally interested or concerned in the matter in dispute or question.

Annotation: Unless a contrary intention is stipulated, executors must make decisions unanimously. Disagreement among two or more executors can cause delay, loss to the estate due to the delay, costs of court proceedings, and general hostility. Therefore it is wise to give consideration to the manner in which decisions will be made by multiple

executors. The majority provision above may prevent deadlock where there are three or more executors, as decisions can be made in the face of dissent.

In some circumstances, it may be appropriate to give one executor a veto right. In other words, that executor must always be part of the majority. In this case the foregoing paragraph can be modified as follows:

I direct ... the opinion of my Trustees having the majority of votes (of which [Name] shall be one) shall prevail,....

Another option is for the testator to direct that disagreements between or among the executors be resolved by a third party. An umpire can resolve disputes between two executors (whereas the majority and veto clauses can only be used where there are three or more executors), or if there is a larger even number of executors divided into two equal camps, or if there are three or more positions taken by various executors. The following clause provides a method of selection of an umpire and a timeline for submitting the dispute for consideration and for receiving a decision:

In the event that my Trustees cannot agree on any matter involving the administration of my estate, any Trustee may, by notice in writing to the other Trustees provided within thirty (30) days of the date on which the dispute arose, request the appointment of an umpire (hereinafter in this Paragraph referred to as the “Umpire”) to settle such dispute. The Umpire shall be my accountant, *, provided that if my said accountant has died or for any other reason is unable or unwilling to act or to continue to act as the Umpire, then the Umpire shall be my solicitor, *, and provided further that if my solicitor has also died or for any other reason is unable or unwilling to act or to continue to act as the Umpire, then the Umpire shall be such other person as my Trustees may agree. Once the Umpire has been determined, my Trustees (either individually or collectively) shall forward to the Umpire a statement in writing summarizing the matter in dispute and setting out the vote cast by each of the Trustees. The Umpire shall then have sixty (60) days to determine the matter in dispute and to provide written notice of such determination to my Trustees. In coming to his or her determination, the Umpire shall have no fiduciary obligations to any of my beneficiaries and shall not be governed by any statute or law governing arbitrators or the arbitration process. The determination of the Umpire shall be final and binding upon my Trustees and on the beneficiaries of my estate, and my Trustees shall give effect to such determination as soon as is reasonably possible.

DEFINITION OF ISSUE

***Description of Clause:** This clause identifies which biological descendants qualify as beneficiaries of the Will. In today’s world of myriad relationships and means of having children, the implications of this provision should be canvassed with your client.*

Any reference in my Will to a “child”, “children” or “issue” includes adopted persons but does not include a person born outside marriage nor a person who comes within the description traced through another person who was born outside marriage unless such person comes within the description by virtue of adoption; provided, however,

that where the mother or father of a person born outside marriage has, in the unanimous opinion of my Trustees, demonstrated a settled intention to treat such person as his or her child, such person shall be deemed to be a child of such mother or father for purposes of my Will.

Annotation: *Since March 1978, both persons born inside marriage and those born outside marriage are entitled to share equally in an estate. See section 1 of the SLRA and subsection 1(1) of the Children's Law Reform Act, R.S.O. 1990, c. C. 12 (the "Children's Law Reform Act"). In particular, unless a contrary intention is shown in the Will, any words identifying a class of persons such as "children", "issue", "cousins" will be deemed to include such persons who were born outside of marriage or those who claim through a person born outside marriage, as well as those born in marriage. (An exception to this arises if an illegitimate person is adopted. Adoption severs the natural relationship for all purposes.)*

The practical problem with the legislation is that the executors are obligated to search for members of class gifts who may be illegitimate. Such searches can be costly and time consuming. (See sections 24(1) and (2) of the Estates Administration Act, R.S.O. 1990, c. E22 (the "Estates Administration Act") which provides that a personal representative is not liable for failing to distribute property to a person born outside marriage or a person claiming through such person, if the personal representative makes reasonable inquiries about that person and searches the records of the Registrar General relating to parentage. The legislation does not define what are reasonable inquiries and there is no jurisprudence to assist.)

The proposed clause addresses this problem by stipulating that a person born outside of marriage, whether as a result of a long-term common-law relationship or a fleeting encounter, will be treated for inheritance purposes in the same manner as a legitimate child if the parent through whom the person claims an interest in the estate treated the person as his or her child. This matter will be determined by the trustees, taking into consideration such factors as whether the parent lived with the child, exercised access rights to the child, gave the child birthday presents, took an interest in the child's health and education, and identified him or herself to other people as the child's parent.

Additional provisions to deem children born outside of marriage but whose parents subsequently marry each other to be legitimate can also be added if desired. This would be in keeping with most testators' intentions in most cases.

Additional provisions may be desired to specifically exclude certain adopted or second-relationship children in situations where the testator does not consider the adopted or non-related child to be a family member and therefore entitled to inherit. Further, if there are unadopted step-children in the family, special provisions would be required to include such children in the class of beneficiaries, or explanatory notes kept as to the intention to exclude such children. These matters demonstrate the importance of thorough information-gathering and note-taking when discussing the testator's instructions and wishes.

In the authors' opinion, the above clause reflects today's reality of common law and same sex relationships (keeping in mind also that it may be applied to the testator's great-grandchildren some decades in the future). However, some clients may still prefer to exclude illegitimate persons from benefiting for personal or religious reasons. In this case, the following more traditional clause may be used.

Unless otherwise specifically provided, any reference in this my Will or in any Codicil hereto to my children (including a reference to a son or daughter of mine) or to my more remote issue, or to the children or more remote issue of any other person or persons shall not include a person born outside marriage, nor a person who comes within the description traced through another person who was born outside marriage, provided that any person who was born outside marriage but whose parents subsequently married one another shall not be regarded as being a person born outside marriage but shall be regarded as having been born in lawful wedlock; provided further that any person who has been legally adopted shall be regarded as having been born in lawful wedlock to the adopting parent.

Note that the relationship of parent and child is predicated on a genetic connection by virtue of the Children's Law Reform Act. The clauses set out above do not address assisted reproductive techniques such as sperm donation and surrogacy. Until the legislation is amended to deal with persons born with the assistance of reproductive technology, any such situation will require specific and careful attention in a client's Will. The following clause attempts to deal with four scenarios:

- (i) - ordinary situations where children are born outside marriage, but also surrogacy***
- (ii) - donated egg***
- (iii) - donated sperm, including gay and lesbian couples***
- (iv) - cryogenic preservation***

Note that this is a developing area of the law and to the best of our knowledge, no clause of this type has been considered by a court. In such situations, additional provisions to specifically name and include certain children in a class of beneficiaries should be considered for clarity where possible.

Any reference in my Will to a "child", "children" or "issue" includes adopted persons but does not include a person who was born, or an individual who comes within the description traced through another person who was born, while such person's biological parents were not married to each other, unless such person comes within the description by virtue of adoption; provided, however, that:

- (i) where the biological mother or father of a person born outside marriage has, in the unanimous opinion of my Trustees, demonstrated a settled intention to treat such person as his or her child, such person shall be deemed to be a child of such mother or father for purposes of my Will,***

- (ii) where such person was carried *in utero* by a woman who is not such person's biological parent but who, in the unanimous opinion of my Trustees, demonstrated a settled intention both before and after the birth of such person to treat such person as her child, such person shall be deemed to be a child of such woman for purposes of my Will,
- (iii) where such person was conceived with the consent of an individual, who at the time of conception was living in a conjugal relationship with either a biological parent of such person or a woman who carried such person *in utero*, and who in the unanimous opinion of my Trustees demonstrated either before or after the birth of such person a settled intention to treat such person as his or her child, such person shall be deemed to be a child of such individual for purposes of my Will, and
- (iv) where such person was born more than ten (10) months after the death of one of such person's biological parents, but was conceived with the written consent of such deceased parent and is either the biological child of an individual who was cohabiting in a conjugal relationship with such deceased parent at such deceased parent's death or is adopted within three (3) years after birth by such an individual, then such person shall be deemed to be a child of such deceased parent, provided that no such person shall acquire an interest in any portion of my estate which has been distributed or allocated by my Trustees to any other beneficiary of my estate without knowledge of the conception or birth of such person.

For more discussion on the implications of reproductive technology for estates practitioners, see the following articles: Barry Corbin, "Cryopreservation & Surrogacy: Implications for the Estates Practitioner" (2004), 7th Annual Estates & Trusts Summit, Law Society of Upper Canada; Clare E. Burns and Clare Houston, "Beneficiaries On Ice: Assisted Reproductive Technology and Succession Law in Ontario" (2008), 2008 Annual Institute, Ontario Bar Association.

Some practitioners also insert the following definition of the phrase "in equal shares per stirpes":

"In equal shares per stirpes" means a division according to the normal and general rule, whereby remoter issue shall only be entitled to a share of my estate if they stand in substitution for a deceased parent and shall not be entitled to a share in competition with or concurrently with a living parent.

*There have been cases (such as *Re Hamel*, (1995) 9 E.T.R. (2d) 315 (B.C.S.C)) where on the specific facts of the case the phrase "per stirpes" in a Will did not prevent the court from declaring that all living descendants of the deceased were entitled to a per capita distribution. The above clause should prevent any such dispute or misunderstanding.*

The clause may also be helpful in explaining to clients how a division "per stirpes" works, as this may be a confusing concept. In essence, the property in question will be

divided into as many shares as there are children of the person whose issue are to benefit, either living or, having died, who leave issue alive at the time in question (e.g. the death of the testator). The share set aside for a deceased child will be subdivided into as many shares as there are children of that deceased child (i.e., grandchildren of the person whose issue are to benefit), either living or, having died, who leave issue alive at the time in question, and so on. In essence, the share to which each person would have been entitled if living will pass to his or her descendants of the closest degree. This concept is also referred to as a “right of representation”.

DEFINITION OF SPOUSE

Description of Clause: *This clause identifies who may be considered a “spouse” for purposes of the Will.*

Any reference in my Will or any Codicil hereto to the “spouse” of one of my issue means a person of either gender who is cohabiting with such issue in a conjugal relationship, whether or not such person is married to such issue, or if such issue has died, who was cohabiting with such issue in a conjugal relationship at the time of such child’s death.

Annotation: *In Wills which allow or require distributions to the “spouse” of a beneficiary (see, for example, the lifetime trusts for children of the testator set out below), it is wise to indicate whether, and after what period of cohabitation, a common-law spouse qualifies. Where distributions are entirely within the discretion of a child or other blood relative of the testator, it may be appropriate to have a broad definition as set out above.*

Defining the testator's spouse should be considered as well, particularly in situations where the testator has had multiple marriages. Such a definition would simply state that my spouse means Jane Doe, for example.

Where the testator wishes to exercise greater control, the following definition may be used.

Whenever my Trustees are authorized or directed by my Will to make any payment or distribution to the spouse of a living individual, such payment or distribution may only be made to a person who, in the opinion of my Trustees:

- (a) is married to such individual and is not living separate and apart from such individual at the relevant time;
- (b) has in good faith gone through a form of marriage with such individual which is void or voidable and the two of them are cohabiting or have cohabited within the previous twelve-month period;
- (c) though not married to such individual, is cohabiting with him or her and has cohabited with him or her continuously for a period of not less than five [or some other quantum] years;

- (d) though not married to such individual, is cohabiting with him or her in a relationship of some permanence where there is a child born of whom they are the natural parents; or
- (e) is a person in favour of whom an order for support, alimony or maintenance has been made by a Court of competent jurisdiction against such individual under which such individual continues to have obligations;

and wherever payment or distribution is authorized or directed to be made to a spouse of a deceased individual such payment or distribution may only be made to a person to whom a payment or distribution might have been made as the spouse of such individual immediately before such individual's death. Before making any payment or distribution to a person as the spouse of an individual, my Trustees may require such person to provide to my Trustees evidence to establish to my Trustees' satisfaction that person's entitlement to such payment or distribution.

LOCATION OF BENEFICIARIES

Description of Clause: Another issue relating to the ascertainment of beneficiaries arises when a potential beneficiary cannot be located at the time of the testator's death or within a reasonable period thereafter. To avoid unduly delaying the administration of the estate, the testator can set a maximum time period after which a particular beneficiary (as in the following clause), or any beneficiary, who cannot be located will lose his or her interest in the estate. It should be considered, however, whether specific instructions as to reasonable efforts to be made should be incorporated into such a clause, particularly where the executors stand to personally benefit from not locating the beneficiary in question. Such clauses should be used with caution and only in circumstances where they are likely to be applicable.

My Trustees shall pay or transfer two (2) shares to my stepson *, if he is alive at my death and if my Trustees can locate him by the second (2nd) anniversary of my death, provided that if my stepson * is not alive at my death or cannot be located but he leaves issue alive at my death who can be located by the second (2nd) anniversary of my death, my Trustees shall divide such two (2) shares in equal shares per stirpes among such issue. For greater certainty, any person who has not been located by the second (2nd) anniversary of my death shall be deemed to have predeceased me and my estate shall be distributed as if no share thereof had ever been set aside for such person. I request that my Trustees use their best efforts in searching for my stepson * and his issue but I relieve my Trustees from any liability to any such person who is located after the second (2nd) anniversary of my death so long as my Trustees have acted reasonably and in good faith.

VESTING CLAUSE

Description of Clause: This clause provides that all property of the testator is to be given to the trustees.

I give all my property of every nature and kind wherever situate, both real and personal and including any property over which I may have a general power of appointment, to my Trustees upon the following trusts.

Annotation: *The clause broadly defines the property passing to the trustees to ensure there is no issue about what property is included. In particular, it includes any property that is the subject of a general power of appointment which is exercisable by the testator. A general power of appointment is one whereby the testator has the right to appoint the property that is the subject matter of the power in favour of anyone including him/herself. If the testator exercises the power by Will, or fails to exercise it at all, there is a strong argument that the property that is the subject matter of the power would fall within the residue of the testator's estate and become subject to probate fees and claims of creditors. A specific power of appointment, on the other hand, is exercisable only in favour of a class of beneficiary specified in the original document creating the power (as in the Lifetime Trusts for Children clause below), and does not normally cause the property that is the subject matter of the power to fall into the donee's estate.*

If the client is preparing separate Wills to deal with different categories of assets, the vesting clause in each Will should be limited to the appropriate set of assets (see discussion of Multiple Wills below).

The concept of a bifurcation of legal and beneficial title between the executor/trustee and beneficiary respectively is unique to the common law. This clause will vest legal title to the assets of the deceased in the hands of the executor/trustee. The trustee is obligated to deal with the assets of the estate for the benefit of the beneficiaries in the manner provided for in the Will. (See section 2 of the Estates Administration Act.)

It is important to be aware of section 9 of the Estates Administration Act. Section 9 provides that where real property is not disposed of or distributed to the persons beneficially entitled to it within three years of death, then the real property will automatically vest in those persons without any conveyance. It appears to be a common misconception among practitioners that such automatic vesting applies in all cases. This is not the case; where executors are provided with a power of sale for real property, this will prevent automatic vesting (see Widdifield on Executors and Trustees, 6th Ed. at section 2.5.12, page 2-69).

Where such a power is not provided, to avoid this automatic vesting, which can effectively hamstring the executors, the executors must file a caution in Form 1 to this legislation. The registration of a caution will delay the automatic vesting for an additional three years. The section allows for repeated filing of cautions for an indefinite period. Automatic vesting occurs whether the Will has been probated or not. However, even if there is automatic vesting, the property still remains liable for the debts of the deceased.

DISPOSITIVE CLAUSES

Overview of Clauses: *The dispositive clauses are the “meat” or substantive clauses of a Will. They are the clauses which provide for the distribution of the assets of the estate. Since there are an endless number of ways assets can be disposed of, these clauses contain the most original content. It is also here that the draftsman needs to be aware of the many principles of law applicable to the disposition of assets. For it is here that the largest number of drafting errors occur.*

The following are some general comments to keep in mind when drafting the dispositive clauses of a Will:

- (i) ***Correct Names:*** *Obtain the correct full name of all beneficiaries, particularly those being referred to by a relationship that is dependent upon birth or marriage. If you intend to describe persons by relationship ensure that they have the particular status in law. For instance, your husband’s nieces and nephews are not your nieces and nephews as these relationships are only determined by blood not marriage. On the other hand, the children of another marriage of either of the testator’s parents (half-brothers and half-sisters) are the testator’s brothers and sisters and their children would be included in a gift to nieces and nephews.*
- (i) ***Minor Beneficiaries:*** *If it is possible for a minor to inherit, you should discuss with your client at what age the minor is to inherit. If nothing is specified, the minor will be entitled to his or her inheritance upon attaining the age of 18. Depending upon the size of the inheritance, this may not be appropriate. If it is determined not to be appropriate, then consideration should be given to the inclusion of trust provisions.*

The inclusion of trust provisions will require a consideration of at what point in time the child is to receive the capital of his or her inheritance i.e. specific ages, reaching particular milestones in life, or certain anniversary dates of the testator’s death. It will also require a consideration of how income is to be treated pending distribution of the capital i.e. should it all be paid out or should it be paid out in the discretion of the trustees. If there is discretion as to the distribution of income, such that undistributed income is accumulated and added to the capital of the trust, it is important that the Accumulations Act, R.S.O. 1990, c. A.5 (the “Accumulations Act”) be considered. Under the Accumulations Act income can only be accumulated for a maximum period of 21 years from the date the trust is established. If there is a possibility that the trust will continue for longer than 21 years, then you must provide for how the income is to be distributed after the 21st anniversary of the trust. [Attached as Appendix “A” is a “Roadmap to the Drafting of a Trust”.]

- (iii) ***Abatement:*** *If the testator’s net assets are insufficient to fulfill all the gifts in the Will then the gifts will “abate”. The order of abatement*

depends upon the nature of the devise or legacy. As we have already noted, debts, taxes and costs and expenses of administration are satisfied out of the residue of the estate. If the residue is exhausted, then general legacies will abate ratably first, followed by demonstrative legacies and then specific legacies. (General legacies are gifts of specified dollar amounts, while demonstrative legacies are gifts of cash or trust funds derived from specific assets and specific legacies are gifts of particular personal property.) Devises abate last. (Devises are gifts of real property.) The general ordering of abatement is subject to a contrary intention expressed in the Will. Thus, the testator can specify an ordering of payment for certain legacies. As a result, once you understand your client's goals concerning their Will plan, if there is any possibility of the residue of the estate being insufficient to satisfy the liabilities, it is important that you discuss the effect of the doctrine of abatement. It is for this reason that it is necessary you ascertain the liabilities, such as income taxes, which will arise on your client's death.

- (iv) *Language: Use plain language where possible, with simplicity and brevity being the goal. Avoid redundancies like "have and hold", "all and every", "sole and exclusive", "rest, residue and remainder". Be consistent in the language used, as well as in the style of drafting. Avoid using different words to denote the same idea e.g. "if she survives me by a period of thirty days" versus "if she is living on the thirtieth day following the date of my death". Avoid ambiguities. Sometimes this requires the use of Latin or terms of art to ensure meaning is clearly delineated. Use punctuation accurately and appropriately. Many cases have been decided on punctuation. Use a systematic scheme within clauses and for the Will as a whole. Use the same terms to mean the same thing in all parts of the Will and different terms if the same meaning is not intended - many cases have been decided based on the Will usage as a whole. With computers today, one should not see a Will with corrections unless absolutely necessary.*
- (v) *Solicitor's Responsibility: When preparing and drafting a Will it is your responsibility to: (1) prepare a document that is a legal and enforceable document; (2) ensure the Will does not include any provisions that will likely lead to litigation due to ambiguities or a failure to provide for all reasonable contingencies; and (3) ensure that the Will has the appropriate administrative powers so that the trustee can efficiently deal with the assets of the estate and accomplish the intentions of the testator. (This latter responsibility often leads solicitors to take the "include the kitchen sink" approach when drafting the administrative clauses in a Will - more about the suitability of specific powers in certain circumstances below.)*

Other general comments will be made in the context of the clauses which follow below.

SPECIFIC GIFT OF PARTICULAR ITEM OF PERSONALTY

Description of Clause: *This clause makes a gift of a particular item of personalty.*

My Trustees shall give my Rolex watch to my son, JACK DOE, if he survives me.

Annotation: *There are several comments to make in connection with specific gifts of property.*

First, it is important that you accurately describe the property so that it can be identified after death. Avoid making gifts that may require an interpretation to know their meaning e.g. the “contents” of a room.

Second, section 22 of the SLRA provides for the general rule that the Will “speaks from death” and not from the date of the Will. When discussing your clients’ intentions about dispositions of specific property, it is important to be aware of the doctrine of ademption. If the testator makes a gift of a specific asset that cannot be found at the date of death, for instance it has been disposed of by the testator or destroyed, then the gift adeems i.e. the beneficiary will receive nothing. Subject to two statutory exceptions, the beneficiary will not be entitled to any substituted property from the estate. Accordingly, it is important that your client is made aware that a gift may fail completely in the event s/he disposes of the property prior to his or her death.

The first exception to this rule is imposed by subsection 20(2) of the SLRA. Subsection 20(2) gives a beneficiary rights, in certain circumstances, with respect to property substituted for the property gifted to the beneficiary in the Will. In particular, it creates the entitlement of the beneficiary to a chose in action, insurance proceeds or compensation, or a mortgage or other security interest, in relation to property that is the subject matter of the bequest and that is no longer owned by the testator at the date of death.

The second exception arises as a result of section 36 of the Substitute Decisions Act, 1992 S.O. 1992, c. 30, as amended (the “SDA”). Section 36 provides as follows:

- “(1) The doctrine of ademption does not apply to property that is subject to a specific testamentary gift and that a guardian of property [or attorney under a continuing power of attorney] disposes of under this Act, and any one who would have acquired a right to the property on the death of the incapable person is entitled to receive from the residue of the estate the equivalent of a corresponding right in the proceeds of the disposition of the property, without interest.*
- (2) If the residue of the incapable person’s estate is not sufficient to pay all entitlements under subsection (1) in full, the persons entitled under subsection (1) shall share the residue in amounts proportional to the amount to which they would otherwise have been entitled.*

- (3) *Subsections (1) and (2) are subject to a contrary intention in the incapable person's will."*

The rationale of section 36 is that ademption is premised on the assumption that if the testator disposed of the specific property given away in his or her Will, then it was his or her intention to no longer give that property to the beneficiary. In the situation of a guardian or attorney of property disposing of specifically bequeathed property on behalf of an incapable person, this rationale does not apply. As a result, the doctrine of ademption should not apply.

The application of section 36 may not be what a testator intends. Accordingly, it is important that the results of section 36 be discussed with your clients, particularly since section 35.1 of the SDA imposes a duty on guardians and attorneys to not dispose of property that is the subject of a specific testamentary gift, unless it is necessary to meet the needs of the incapable person or it is to the beneficiary of the specific gift. In the situation of having to dispose of property to meet the needs of an incapable person, one wonders if s/he would want the beneficiary to, in essence, have a first charge on the residue of his or her estate. Consider the situation of a testator giving a particular piece of art to a friend and the residue of his or her estate to his or her children. Would s/he really intend the friend to have a first charge on his or her estate?

One final comment to note in connection with section 35.1 and 36 is the uncertainty surrounding what is meant by the words "specific testamentary gift". While subsection 35.1(2) makes it clear that the anti-ademption provision does not apply to a specific gift of money, there remains uncertainty concerning what types of dispositions are covered by this language.

A further point to note in connection with gifts of specific property (indeed all gifts), is the condition that the beneficiary must be alive at the date of death to inherit. When discussing your clients' intentions about dispositions of specific property, it is important to be aware of the doctrine of lapse. This doctrine will be discussed in greater detail below under the legacy of cash provision.

GIFT OF REMAINING PERSONAL EFFECTS

Description of Clause: *The following clause gives away the remainder of the testator's personalty to a named beneficiary who must survive for a period of 30 days.*

My Trustees shall give those remaining articles of personal, domestic or household or garden use or ornament which I shall own at my death and all boats, automobiles and accessories thereto (collectively, "the Personal Articles"), to my wife, JANE DOE, if she survives me by thirty (30) days, and if she fails to survive me by thirty (30) days to divide the said articles among those of my children as are alive on the date of my death, in such manner as they may agree upon, or, if they do not agree, then in such manner as my Trustees in an absolute discretion shall consider equitable.

Add, where applicable:

If any of my children is under the age of majority at my death, my Trustees may retain any or all of the Personal Articles for any period that my Trustees consider advisable, and from time to time may deliver any or all of the Personal Articles to any one or more of my children and to accept the receipt of a child as sufficient discharge for such Articles so delivered even if he or she has not attained the age of majority.

An alternative is to allow a particular group of beneficiaries to decide, with a mechanism for resolving disputes included. The testator may, for example, insert an order for selection of articles (e.g. from youngest child to eldest child on the first round of selection, from eldest child to youngest child on the second round, and so on), or a drawing of lots or some other mechanism for resolving disputes.

It is important to ensure that "personal property" is not used to refer to personal effects or personalty in this context, as this would refer to all bank accounts, investments, etc. that are not real property, an important distinction.

BINDING AND PRECATORY MEMORANDA

Description of Clause: *Specific articles of personalty are directed to be disposed of by a memorandum that is incorporated by reference into the Will.*

I have made a memorandum dated the day of , 20 , which gives certain articles of personal and household use and ornament, and I have deposited it with my Will. I direct my Trustees to deliver the articles of personal and household use and ornament described in the memorandum in accordance with the memorandum.

Annotation: *Using a memorandum incorporated by reference into the Will to dispose of personalty ensures that the directions in the memorandum are legally binding on the trustees. However, for an unattested document to be incorporated by reference into a Will, three conditions must be met. First, the document must be in existence prior to the execution of the Will. Second, the Will must refer to it as an existing document. Finally, the document must be described sufficiently to be identified. Given the conditions which must be fulfilled for a memorandum to be legally binding on the trustees, you should ascertain whether this method of disposing of personalty has any advantages over including the dispositions in the Will itself. In particular, if a memorandum is incorporated into the Will, then changes to the memorandum cannot be made without formally amending the Will. This can be inconvenient.*

An alternative to consider is the use of a non-binding precatory memorandum that is not incorporated by reference. Precatory memoranda, while not legally binding, do express the wishes of the testator. If the memorandum is in the testator's handwriting, it can often have significant moral suasion over the beneficiaries. The advantage of this method of disposing of personalty, is that changes to the memorandum do not require formal changes to the Will. Accordingly, they are very useful for those clients who frequently make changes to dispositions of personalty. The following is such a clause:

I hereby advise my Trustees that I have prepared a written memorandum (the "Written Memorandum"), which I have left among my personal papers, regarding the

division and disposition of articles of personal and household use and ornament owned by me on the date of my death. I hereby further advise that it is my strong wish and desire that my Trustees, together with those of my children as are alive on the date of my death, give effect to the terms of the Written Memorandum, although I recognize that there is no legal obligation upon them to do so, regarding the division and disposition of all articles of a personal and household use and ornament owned by me on the date of my death (collectively, the "Personal and Household Articles") and listed on the Written Memorandum. In the event that I do not leave the Written Memorandum or in the event the Written Memorandum I have left does not deal with the division and disposition of all of the Personal and Household Articles, I direct that the Personal and Household Articles which have not been divided and disposed of pursuant to the Written Memorandum shall be divided among those of my children as are alive on the date of my death, in such manner as they may agree upon, or, if they do not agree, then in such manner as my Trustees in an absolute discretion shall consider equitable.

The above clause can be modified where the testator has not made a memorandum yet but may wish to do so in the future.

Where the testator does not have children or wishes to give even greater discretion to the executors, the following clause can be used.

My Trustees shall distribute those articles of personal, domestic or household or garden use or ornament which I shall own at my death and all boats, automobiles and accessories thereto, as my Trustees in their personal, and not fiduciary, capacities may appoint, including to themselves. Without imposing any legal obligation on them, it is my wish that my Trustees have regard to any note or memorandum expressing my wishes as to the disposition of such articles, and that they dispose of any articles not so distributed and add the proceeds of disposition, if any, to the residue of my estate.

Alternatively, one individual or a group of individuals (e.g. the children of the testator) may be given the responsibility of distributing personal effects. This clause may be particularly appropriate where the executor is a trust company or other professional who has no knowledge of the sentimental value of the personal effects. However, it should be carefully considered where some of the testator's personal effects are of significant fair market value and not solely of sentimental value.

My Trustees shall deliver to those of my children alive at my death, or any one or more of them, all articles of personal, domestic or household or garden use or ornament which I shall own at my death and all boats, automobiles and accessories thereto, in trust to distribute the same among themselves and among such other persons as they may unanimously agree. The receipt of the child or children to whom such articles are delivered shall be a sufficient discharge to my Trustees who shall be under no obligation to supervise the manner in which such subsequent distribution is carried out, provided that if at any time my children are unable to agree upon the manner of distribution of any such articles, they may seek the advice and direction of my Trustees, whose decision regarding the distribution, sale or disposal of such articles shall be final and binding on my children and on all other persons interested in my estate.

PETS

Description of Clause: The following clause contains a gift (or custodial appointment) of the testator's pets together with a sum to help defray the costs of care:

If * survives me, my Trustees shall transfer and deliver to * all dogs, cats and other domestic animals living with me at my death (collectively, "my pets"). If * predeceases me, my Trustees shall transfer and deliver each of my pets to such family member, friend or neighbour as my Trustees consider will provide such pet with a loving and healthy home for the rest of such pet's natural lifetime. It is my preference that all my pets should go to the same home so that they may continue to live together after my death, but I recognize and accept that this may not be possible. In addition, my Trustees shall pay the sum of FIVE THOUSAND DOLLARS (\$5,000) to each family member, friend or neighbour to whom my Trustees transfer one or more of my pets, to assist such person in caring for such pet or pets and to express my appreciation to him or her for taking on this responsibility. Following delivery of my pets and the legacy as aforesaid, my Trustees shall have no obligation to monitor either the care of my pets or the use of the money transferred and paid to any family member, friend or neighbour.

Annotation: The above clause is structured as a gift of the testator's pet together with a sum to help defray the costs of care rather than a trust for the care of the testator's pet. A trust for the care of a pet, like a trust for the care of a grave, is a "a non-charitable purpose trust". At common law, a trust for a purpose is generally not a valid trust because one of the "three certainties", namely certainty of objects, is not satisfied. There must be a class of persons, i.e. the beneficiaries, who can enforce the trust. Trusts that are charitable at law are an exception to this rule. There is also some jurisprudence in Canada recognizing trusts for the care of specific pets or specific graves. However, section 16 of the Perpetuities Act, R.S.O. 1990, c. P.9, as amended, provides limited statutory recognition for non-charitable purpose trusts if the requirements below are met:

Specific non-charitable trusts

16.(1) A trust for a specific non-charitable purpose that creates no enforceable equitable interest in a specific person shall be construed as a power to appoint the income or the capital, as the case may be, and, unless the trust is created for an illegal purpose or a purpose contrary to public policy, the trust is valid so long as and to the extent that it is exercised either by the original trustee or the trustee's successor, within a period of twenty-one years, despite the fact that the limitation creating the trust manifested an intention, either expressly or by implication, that the trust should or might continue for a period in excess of that period, but, in the case of such a trust that is expressed to be of perpetual duration, the court may declare the limitation to be void if the court is of opinion that by so doing the result would more closely approximate the intention of the creator of the trust than the period of validity provided by this section.

Idem

(2) To the extent that the income or capital of a trust for a specific non-charitable purpose is not fully expended within a period of twenty-one years, or within any annual or other recurring period within which the limitation creating the trust provided for the expenditure of all or a specified portion of the income or the capital, the person or persons, or the person or person's successors, who would have been entitled to the property comprised in the trust if the trust had been invalid from the time of its creation, are entitled to such unexpended income or capital.

Accordingly, it is possible to establish a trust for a non-charitable purpose for a period of up to twenty-one years. At the end of the twenty-one year period, any unexpended income or capital will then pass to the persons who would have been entitled to it if the trust had been invalid from inception.

SOCIAL MEDIA

Description of Clause: *Domain names, websites, blogs, profiles on social networking sites, and other online content may be of both economic and personal value to the testator and his or her beneficiaries. The following clause sets out a variety of dispositions for domain names and websites:*

My Trustees shall deal with all rights and interests I have in certain domain names and websites on the date of my death as follows:

- (i) in the event that I own the domain name "*.com" on the date of my death, my Trustees shall remove the website associated with such domain name following the date of my death, provided that my Trustees shall, from the income and/or capital of my estate, purchase the rights to the domain name for the longest period then allowed, which as of the date of this my Will is a period of ten years, and hold the rights to such domain name in trust, provided that following the elapse of the initial time period for which the rights to such domain name have been purchased by my Trustees, my Trustees shall allow their rights and interests in such domain name to expire;
- (ii) in the event that [NAME] is living on the date of my death, my Trustees shall transfer all rights and interests I have in the domain name "*.ca" to [NAME]. All remaining "*" domain names that I own on the date of my death shall be divided among my siblings as are living on the date of my death in such manner as they shall agree upon, provided that if agreement cannot be reached with respect to any such domain names or in the event that there are any such domain names that my siblings do not wish to retain, such domain names shall be sold by my Trustees, with my family members, which for greater certainty shall include any spouse, issue, parent, brother, sister, nephew or niece or next of kin of mine, having the first right to

purchase the same in such manner and upon such terms and conditions as determined by my Trustees in the exercise of an absolute discretion; and

- (iii) all rights and interests I have in any remaining domain names and websites on the date of my death shall form part of the residue of my estate and be dealt with as part thereof, provided that it is my wish and desire that in dealing with such domain names and websites, my Trustees give effect to any oral instructions I may have made known to them or any written memorandum I may leave among my personal papers.

Annotation: The above clause places minimal ongoing responsibility on the executor. However, depending on the purpose and content of a website, the client may wish his or her executors to retain control over it instead of passing it to a family member or other person. This could be critical where the website is used to advertise an operating business that will be continued, at least temporarily, by the executors. The following clause not only directs the maintenance of websites but also provides funding to do so:

My Trustees shall maintain any business or personal websites hosted at * Hosting in which I directly or indirectly have an interest as of the date of my death, and in particular any personal blog content that I have on such websites, for the maximum period that is permitted by law.

My Trustees shall as soon as practicable after the date of my death set aside a fund, to operate as a separate trust (hereinafter referred to as the "Website Fund") that will, in the opinion of my Trustees, be sufficient to provide for the costs of maintaining such websites for the maximum period that is permitted by law and my Trustees shall hold the Website Fund for such period. When the Website Fund has been set aside, all costs of maintaining such websites shall be paid out of the Website Fund and there shall be no further liability on the residue of my estate in connection with the same. Any income, if any, earned in the Website Fund in any year not used for the purpose of maintaining such websites shall be added to and be dealt with as part of the capital of the Website Fund, provided that subsequent to the Accumulation Period, any such income shall fall into and form part of the residue of my estate to be dealt with as part thereof and in accordance with the provisions of this my Will. After the websites have been maintained for the maximum period that is permitted by law, any amount remaining in the Website Fund shall fall into and form part of the residue of my estate to be dealt with as part thereof and in accordance with the provisions of this my Will, with the beneficiaries thereof determined as of the date such amount remaining in the Website Fund falls into the residue of my estate.

It would be wise for the solicitor to keep current with the major forms of electronic and social media so as to be able to properly question clients regarding their online presence as part of the initial fact-finding interview. In addition to domain names and websites owned or managed by the client, third party servers may contain and display the client's personal information. As mentioned elsewhere in the Annotated Will, the solicitor may encourage the client to keep a list of passwords in a secure location, to be accessed by the executor when the time is right, so that the executor can edit the client's Facebook profile, remove the client from online dating sites, close down PayPal and eBay accounts,

and so on. Such actions may also reduce risk of identity theft and financial fraud. The topic of social media may be something useful to include in a reporting letter.

REGISTERED EDUCATION SAVINGS PLAN

Description of Clause: *The following clause directs the trustees to do what is necessary to ensure an RESP account is maintained for the benefit of the testator's children. The trustees will become the successor subscribers to the RESP and may make contributions to the RESP from the estate.*

I hereby advise my Trustees that I am the sole subscriber of a Registered Education Savings Plan held with [NAME OF INSTITUTION] Account No. * (hereinafter referred to as the "RESP"), for the benefit of my children, JILL DOE and JACK DOE. If any one or more of my children alive on the date of my death then qualifies or may qualify for educational assistance payments (as such term is defined in the Income Tax Act) after the date of my death (hereinafter referred to as the "Qualifying Children"), it is my intention and I hereby direct that my Trustees take such steps and do all such things as are necessary, including the making of contributions to the RESP from the income and/or capital of the residue of my estate in accordance with the following provisions of this my Will, in order for them to become subscribers (as such term is defined in the Income Tax Act) of the RESP. Upon becoming subscribers of the RESP, my Trustees shall hold the RESP for the benefit of the Qualifying Children until the date (hereinafter referred to as the "RESP Termination Date") that is the earliest of:

- (i) such time as there are no longer any funds available in the RESP;
- (ii) such time as none of the Qualifying Children qualify or may qualify for educational assistance payments, such determination to be made by my Trustees in their absolute discretion; and
- (iii) such time as all of the Qualifying Children have completed a qualifying educational program at a post-secondary educational institution thereby no longer requiring the RESP, such determination to be made by my Trustees in their absolute discretion;

and during such period, my Trustees shall manage the RESP on behalf of and for the benefit of the Qualifying Children in such manner and upon such terms as they in the exercise of an absolute discretion determine, with all the powers and authorities hereinbefore granted to them pursuant to the provisions of this my Will. Notwithstanding anything in this my Will to the contrary, my Trustees may set aside such amount or amounts from the income and/or capital of the residue of my estate as my Trustees in exercise of an absolute discretion determine appropriate, and shall contribute such amount or amounts so set aside to the RESP to be dealt with as part thereof.

Upon the RESP Termination Date, the RESP or such portion thereof then remaining shall be dealt with by my Trustees in the following manner, provided that it is my intention that the following provisions not conflict with any applicable contractual provisions governing the RESP and to the extent of such a conflict, the contractual

provisions governing the RESP shall prevail: [applicable distributive provisions to be inserted here]

Notwithstanding anything in the foregoing to the contrary, if my Trustees determine that it would be administratively more efficient or cost effective to terminate and transfer the funds in the RESP to any trust funds established for the Qualifying Children hereunder to be dealt with as part thereof, then they shall have the authority to do so in their absolute discretion, provided they take into consideration any income tax consequences that may arise with respect to a termination and withdrawal of the funds in the RESP.

Annotation: Section 146.1 of the Income Tax Act is the relevant statutory provision. A review of this provision is important to understand the manner in which RESPs can be dealt with. In addition, the Canada Revenue Agency has published Information Sheet RC4092 and Income Tax Information Circular IC93-3R2, both of which are available on its website. It is also important to review the terms of the RESP itself. For example, is it jointly owned (common for parents) such that a mirror provision needs to be included in both owners' Wills.

There are two options to consider when planning for how an RESP is to be dealt with after the death of the subscriber. They are:

- *continue the plan for the benefit of the beneficiary(ies); or*
- *wind up the plan and have the contributions returned to the estate of the deceased subscriber or distributed to the intended or other beneficiary(ies).*

An RESP is a property interest of the deceased subscriber, in that the subscriber has the right to a return of contributions which right devolves to his or her executors. Accordingly, if the testator has not set out any directions to the contrary, it is arguable that the executor's obligation is to withdraw the RESP contributions for the benefit of all the beneficiaries of the estate. This is likely not what the deceased subscriber would intend.

If the testator intends that the RESP be continued, it is necessary to determine who will become the successor subscriber. This is particularly significant in light of the fact that the subscriber can withdraw contributions from the RESP and can also receive accumulated income payments, which can be rolled over into the subscriber's RRSP to the extent that the subscriber has unused contribution room.

An individual other than the original subscriber can generally only become a subscriber to an RESP (as defined in subsection 146.1(1) of the Income Tax Act) in one of the following situations:

- (i) *the spouse or common law partner, or former spouse or common law partner, of the subscriber obtains the subscriber's rights under the RESP as a result of court order or written separation agreement;*

- (ii) *a public primary caregiver of a child (for example, where the child is a ward of the state, the department agency or institution that maintains the beneficiary or the public trustee or curator in the province in which the child resides) attains rights as a subscriber under the RESP pursuant to a written agreement;*
- (iii) *the contractual terms of the RESP allow an individual to continue making contributions to the RESP after the death of the subscriber (the subscriber's estate can also make such contributions); or*
- (iv) *after the death of the subscriber of the RESP, an individual acquires the subscriber's rights to the RESP plan.*

In addition, if the testator chooses to continue the RESP, then consideration should be given to (i) providing funding to do so; (ii) investment guidance; (iii) who the intended beneficiary(ies) are to be and permitted changes to the beneficiary(ies); and (iv) the limits or terms under which contributions by past or future subscribers (including the estate) can be withdrawn.

In the clause above, the testator has provided for his or her trustees/estate to become the successor subscriber to the RESP, and has authorized them to continue to make contributions to the RESP. Another possibility is for the testator to direct the trustees to set aside an amount for the benefit of a particular individual to make a contribution – that individual will then become the successor or new subscriber. In the following clause, the testator has directed the trustees to make a payment to the guardian of the testator's child with an obligation on the guardian to ensure an RESP account is maintained for the benefit of the testator's children.

If at the date of my death I am the sole remaining subscriber to one or more Registered Education Savings Plans for the benefit of one or more of the children of myself and my wife, Jane Doe (collectively, the "RESPs"), and if any one or more of our children qualifies or may qualify for educational assistance payments at my death or at any time in the future, then it is my intention and I hereby direct that my Trustees pay such sum as they in their absolute discretion deem advisable to the guardian of such qualified child or children on the following conditions:

- (a) that such guardian shall contribute such sum to an RESP that has been established for the benefit of such qualified child such that they become the subscriber for such RESP;
- (b) that such guardian agrees to take such further steps as are necessary in order for the RESP to be maintained by her or him for the benefit of such child, until such time as such child qualifies or may qualify for educational assistance payments; and
- (c) that such guardian agrees that should any funds remain in such RESP immediately before the date on which the RESP must be terminated pursuant to its terms, and should such child not qualify for educational

assistance payments at that time, such guardian shall take all such steps as are necessary and permitted under the RESP to obtain a refund of payments and/or an accumulated income payment on behalf of such child, either by transferring the right to withdraw contributions to such child, or by withdrawing all contributions and transferring them to such child for his or her own use absolutely.

provided that if such conditions are not met, the RESPs shall be collapsed and the net proceeds shall fall into and form part of the residue of my estate to be dealt with as part thereof with the beneficiaries thereof determined as of the date the RESPs fall into the residue of my estate.

If the testator wishes the RESP to be wound up rather than continued, the Will may direct the executors to (i) withdraw the contributions and distribute them to one or more beneficiaries of the estate, or (ii) withdraw the contributions and transfer them to an education trust created for the intended beneficiary(ies) of the RESP, or (iii) transfer the right to withdraw contributions to one or more beneficiaries of the estate. The contributions will pass on a tax-free basis. The accumulated investment income in the RESP may follow the contributions, but subject to the tax consequences set out below. Any Canada Education Savings Grants and Canada Learning Grants remaining in the RESP must be repaid to Employment and Social Development Canada.

Generally speaking, accumulated investment income in an RESP which is terminated is treated as income to the subscriber for tax purposes. In addition, it is subject to a special tax at a flat rate of 20% (12% in Quebec). Both these taxes can be avoided if the subscriber directs that the accumulated income be paid to a Canadian designated educational institution. Alternatively, two possible rollovers are available. First, up to \$50,000 of income may be transferred to the subscriber's RRSP or to a spousal RRSP, if the subscriber had sufficient contribution room. Second, if the beneficiary of the RESP is eligible for the disability tax credit at the time of termination, the income may instead be rolled over to a registered disability savings plan (RDSP) in the name of the beneficiary. This second rollover is only available if the beneficiary has a severe and prolonged mental impairment that can reasonably be expected to prevent him or her from pursuing post-secondary education, or if the RESP has been in existence for at least 35 years (or at least 10 years if all the beneficiaries are over the age of 21 and are not pursuing post-secondary education). The rollover to the RDSP is also subject to the usual restrictions on an RDSP, in particular that the beneficiary must be under the age of 59 at the time of the contribution, the total lifetime contributions in respect of any one beneficiary may not exceed \$200,000, and the beneficiary and the holder of the RDSP must both consent to the contribution.

DEBTS, FUNERAL AND TESTAMENTARY EXPENSES

Description of Clause: This clause directs the trustees to pay all debts and taxes that are payable as a result of the testator's death.

My Trustees shall pay my just debts, funeral and testamentary expenses and income taxes, and all estate, legacy, succession or inheritance duties and taxes whether imposed pursuant to the laws of Ontario or any other jurisdiction that may be payable in connection with any property passing on my death (or deemed so to pass) or in connection with any proceeds of any insurance and/or annuities on my life or any gift or benefit given or conferred by me either in my lifetime or by survivorship or by my Will or any Codicil thereto and whether such duties and taxes be payable in respect of estates or interests which fall into possession at my death or at any subsequent time. All such debts, expenses, duties and taxes are to be paid out of and be a charge on the capital of my estate. I hereby authorize my Trustees in their unfettered discretion to commute or prepay or defer the payment of any such duties or taxes.

Annotation: *As a result of this clause all debts of the deceased, all funeral and testamentary expenses, all unpaid income taxes and other taxes and any estate or succession duties or taxes are to be paid out of the residue of the estate. In certain circumstances this may have unintended and inequitable results. For instance, consider the situation of one child being the named beneficiary of an RRSP or the specific beneficiary of a cottage property, with a second child being the beneficiary of the residue of the estate. To the extent there is an income tax liability in the year of death as a result of the deemed disposition of the RRSP or cottage, this income tax liability will be borne by the beneficiary of the residue of the estate. In this circumstance, it is possible to impose the tax burden of a particular property, such as an RRSP or cottage, upon the beneficiary who will receive the specific property. If this is the intended result, then the debts clause should be amended to exclude the specific property from its operation or the debts clause should be subject to the clauses which specifically impose the tax burden on the beneficiary of the specific property.*

In terms of how the assets of the residue of the estate bear the burden of debts and taxes, section 5 of the Estates Administration Act provides that unless a contrary intention is expressed in the person's Will, the real and personal property of the residuary estate are ratably liable for the debts, expenses and taxes, according to their respective values. This section is, however, subject to section 32.

Section 32 provides that in the absence of a contrary intention in the Will, a beneficiary of real property is liable for any mortgage on the property. It is important that if your client is going to specifically gift real property that is the subject of a mortgage, he or she appreciate that the beneficiary will be responsible for the mortgage unless the Will provides otherwise.

The creation of specific gifts, without consideration of the application of section 5, can result in inequities. In Re Grisor (1979), 26 O.R. (2d) 57 (H.C.) the bequest of the "business" i.e. an unincorporated sole proprietorship, was determined to be a specific bequest of personalty and not part of the residuary estate. As a result, it was not liable to satisfy any indebtedness of the testator at the date of his death. The beneficiary of the specific bequest received the "business" free of its encumbrances and the debts of the "business" were paid out of the residuary estate.

In addition, if the client has family that will need travel expenses covered to attend the funeral and she/he has the ability to pay for such expenses, then the direction to pay for funeral expenses should be amended to capture such additional expenses. The following might be appropriate:

For the purposes of this paragraph of my Will, the reference to funeral expenses shall include all expenses relating to:

- (a) my visitation, wake, burial and/or cremation;
- (b) any tombstone, marker and/or monument associated with my grave or columbarium; and
- (c) reasonable travel expenses inclusive of transportation and accommodation of any relatives and/or friends of mine whom my Trustees determine it would be desirable to be present at my funeral and for whom attendance may create a significant financial burden, all such decisions to be made by my Trustees in their absolute discretion, and to be final and binding on all of the beneficiaries of this my Will. I hereby direct that my Trustees shall have no obligation under any circumstances to advise my relatives and friends of the availability of this particular provision, nor shall they have any obligation to consider whether this provision is applicable or should be available to any of my relatives or friends. I appreciate that the matters encompassed by this provision may have already been attended to prior to my Trustees being aware of this provision. In such circumstances my Trustees shall have no obligation or liability to any relative or friend of mine who may have benefited from this provision had my Trustees been aware of its existence.

POWERS OF SALE AND RETENTION

Description of Clause: The trustee is given the power to realize the assets of the estate but also the discretion to retain assets in their original form and the trustee is not required to dispose of those assets which are not “authorized” for trustees.

I authorize my Trustees to use their unfettered discretion in the realization of my estate. My Trustees shall have the power to sell or otherwise convert into money any part of my estate not consisting of money, at such time and upon whatever terms my Trustees shall decide, with power and discretion to decide against such conversion in connection with all or any part of my estate or to postpone the conversion of my estate or any part thereof for any length of time. I authorize and empower my Trustees to retain any portion of my estate in the form in which it may be at my death (whether it is in the form of investments which would be prudent investments for trustees or in which trustees are by law authorized to invest trust funds and whether there may be any liability attached thereto) for any length of time that my Trustees consider to be in the best interests of my estate, and I also declare that no property not in fact producing income shall be required or deemed to produce income.

Annotation: *Subject to a contrary intention in the Will, an executor is required to convert all assets of the residuary estate into cash as soon as is reasonably possible. Further, executors generally have the obligation to convert the assets of the estate into authorized investments. Finally, to the extent assets of an estate are non-income producing and there is a life tenant of the estate, the common law deems the assets to be income producing, with the life tenant being entitled to a deemed amount of interest as a charge on the capital of the estate.*

This clause gives the executor the power to postpone conversion until such time as the executor determines it is appropriate to convert. It also allows an executor the power and discretion not to convert assets at all. This latter power, together with the power to distribute assets in kind (see below), allows an executor the ability to hold onto assets of the deceased and to distribute those assets in kind.

The final phrase of the clause deems non income producing assets to be appropriate investments, thereby removing any entitlement of the life tenant to imputed income or a charge on capital.

CASH LEGACIES

Description of Clause: *This clause makes a gift of cash to a certain named beneficiary.*

My Trustees shall pay to my sister, CARRIE CUSTODY, the amount of Ten Thousand Dollars (\$10,000), if she survives me, provided that if she does not survive me such legacy shall lapse.

Annotation: *A solicitor should always be concerned about the application of the doctrine of lapse. Lapse occurs when a gift is made to an individual who predeceases the testator. In particular, subject to section 31 of the SLRA, where the named beneficiary predeceases the testator the gift is said to lapse, i.e. not to take effect.*

Section 31 is known as the “anti lapse provision”. It provides as follows:

“Except when a contrary intention appears by the will, where a devise or bequest is made to a child, grandchild, brother or sister of the testator who dies before the testator, either before or after the testator makes his or her will, and leaves a spouse or issue surviving the testator, the devise or bequest does not lapse but takes effect as if it had been made directly to the persons among whom and in the shares in which the estate of that person would have been divisible,

- (a) if that person had died immediately after the death of the testator;**
- (b) if that person had died intestate;**
- (c) if that person had died without debts; and**
- (d) if section 45 had not been passed.”**

In other words, if the deceased beneficiary is a child, grandchild, brother or sister of the testator, the legislation provides for a presumptive gift over to the spouse and/or issue of the beneficiary, in the same proportions in which the beneficiary's own estate would have been distributed if the beneficiary had died intestate except without payment of any preferential share to the surviving spouse pursuant to section 45 of the SLRA. In our experience, most clients do not want to directly benefit spouses of family members. Accordingly, it is important to include a contrary intention to avoid the application of section 31. A contrary intention can be exhibited by including a gift over to specified persons, such as the issue of the intended donee, or by directing that the intended donee must be alive to inherit, or by going on to state that if the intended donee does not survive the testator that the gift shall lapse.

As the drafting solicitor, you have a duty to ask your client what is to happen if the named beneficiary predeceases. In particular, in the context of persons who do not fall within section 31, your duty is to determine if a gift over is to be included in the event the named beneficiary predeceases, for example, to the named beneficiary's spouse or issue. If no gift over is intended, then it is advisable to provide that the legacy is to be paid to the named beneficiary "if s/he survives the testator." In the context of those persons who do fall within section 31, your duty is to determine whether your client wants section 31 to apply. If your client does not want section 31 to apply, which is generally our experience, then it is imperative that you either provide for a gift over or you include the words "provided that if s/he does not survive me such legacy shall lapse" or other language to signify an intention that section 31 is not to apply.

If you are preparing "mirror" Wills for a husband and wife which provide for identical legacies to be paid on the second death, it is important that you include language which avoids the doubling up of legacies in the event the husband and wife die together or in circumstances rendering it uncertain who has predeceased the other. In such circumstances, the SLRA provides that the spouses are deemed to have predeceased the other and to have held jointly-owned property as tenants in common rather than as joint tenants. It should be noted that the SLRA provisions apply to any persons who die in such circumstances, and not only spouses. The relevant provisions are subsection 55(1) and 55(2) as follows:

Succession

55. (1) Where two or more persons die at the same time or in circumstances rendering it uncertain which of them survived the other or others, the property of each person, or any property of which he or she is competent to dispose, shall be disposed of as if he or she had survived the other or others.

Simultaneous death of joint tenants

(2) Unless a contrary intention appears, where two or more persons hold legal or equitable title to property as joint tenants, or with respect to a joint account, with each other, and all of them die at the same time or in circumstances rendering it uncertain which of them survived the other or others, each person

shall be deemed, for the purposes of subsection (1), to have held as tenant in common with the other or with each of the others in that property.

Accordingly, if appropriate language is not included, then the legatees will receive the legacies twice – once from each estate. The following is language intended to avoid this result.

John's Will:

If my wife predeceases me or fails to survive me by thirty (30) days, then on the death of the survivor of me and my wife, my Trustees shall pay to my sister, CARRIE CUSTODY, if she is then alive, the amount of Ten Thousand Dollars (\$10,000).

Jane's Will:

If my husband predeceases me or fails to survive me by thirty (30) days, then on the death of the survivor of me and my husband, my Trustees shall pay to my sister-in-law, CARRIE CUSTODY, if she is then alive, the amount of Ten Thousand Dollars (\$10,000), provided that in the event that my husband and I have died within a period of thirty (30) days of each other, then this legacy shall be reduced by any amount paid to the said Carrie Custody pursuant to paragraph * of the Will dated * of my husband.

If either spouse survives the other by thirty days or more, the legacies will be paid only under that survivor's Will. However, if both spouses die within thirty days of each other, the legacies will be paid under John's Will first, and under Jane's Will only to the extent of any deficiency (for example, if John survives Jane but not by long enough to inherit her estate, or if Jane survives John and receives all of their jointly held property by right of survivorship so that there are no assets in John's estate to satisfy the legacy).

If a legacy is given to an individual who could be a minor and the amount is greater than the amount permitted under the Children's Law Reform Act, consider including trust obligations or making the gift conditional upon attaining age 18 or expressly refer to the ability to pay the amount to a parent as a trustee of the amount. Currently the amount permitted under the Children's Law Reform Act to be paid on behalf of a minor is \$10,000.

If desired, the testator can insert an indexing clause for a single legacy, for a stream of payments, or for all dollar amounts referred to in the Will. An example of the latter clause follows:

All dollar figures referred to in this Will shall be adjusted on the division date (and in the case of the payments described in section *, on each anniversary date thereof) in accordance with the All Items Consumer Price Index for the City of [Toronto, Ottawa etc.] (not seasonally adjusted) with base year [year that Will is signed] equal to 100, as provided by Statistics Canada.

CHARITABLE GIFT

Description of Clause: *This clause pays a cash legacy to a named charity. Once the Trustee obtains the receipt of the proper officer s/he is discharged and need not see to the manner in which the charity uses the legacy.*

My Trustees shall pay to THE KIDS CHARITY (BN123456789RR0001) the sum of Ten Thousand Dollars (\$10,000.00). The receipt of the treasurer or other proper officer of this organization shall be a sufficient discharge to my Trustees.

Annotation: *It is good practice to ask your clients if they wish to make any charitable gifts on their death, both because of the philanthropic benefits and the income tax advantages. When providing for gifts to charities, it is extremely important that the charity's proper name be used. Clients often provide inaccurate names. It is your responsibility to ensure that the correct name is used. There are many excellent directories of charitable organizations that are available for purchase e.g., Canadian Donors Guide. Checking the Canada Revenue Agency charities listing (which can also provide the business or registration number of the charity) or making a telephone call to the proposed entity to determine how they should be named for testamentary gifts will also avoid any issues. Where the chosen charity is outside Canada or is not registered for income tax purposes, it is a good idea to point out to the client before he or she signs the Will that the gift will not qualify for a tax credit, and to confirm the same in a reporting letter.*

It is also important to consider providing for what is to happen if the chosen charity no longer exists at the date of the testator's death, i.e., should there be a gift over to another charity or should the gift lapse. This will avoid any consideration by the trustees of whether they should bring an application to the court to have the gift applied cy-près (see the discussion below).

The jurisprudence is rife with cases where the chosen charity is improperly described or does not exist at the date of the testator's death. In the situation of the chosen charity no longer existing, the doctrine of cy-près may apply to save the charitable gift. Generally this doctrine applies where the testator's charitable intent is either impossible or too impractical to carry out. Provided the testator has expressed a general charitable intent, the court will approve a scheme whereby the gift is used to achieve an object as close as possible to that set out by the testator. This may result in the charitable gift being paid to a charity with a similar purpose. One way of clarifying the testator's intention in this regard would be to use the following clause.

Should any of the aforesaid organizations not be in existence at my death, I direct my Trustees to transfer the sum set aside for such organization to such other charitable or community organization as my Trustees in their absolute discretion consider to be the successor to such organization or to carry on similar works for the benefit of a similar group of people.

If the client cannot immediately identify the charities he or she may wish to benefit, another option is to stipulate a sum (or share of the estate) to be applied for charitable purposes, with discretion in the trustees to select the particular charities.

My Trustees shall distribute the sum of Fifty Thousand Dollars (\$50,000) among such registered charities (as such term is defined in the *Income Tax Act*) as my Trustees may in their absolute discretion select, and in such proportions and on such terms and conditions as my Trustees may in their absolute discretion determine. Without imposing any trust or legal obligation upon them, I request that my Trustees carry out any wishes with regard to the distribution of this sum that I may have expressed in a memorandum which I intend to make and to leave with my Will. The receipt of the treasurer or other proper officer of each charity shall be a sufficient discharge to my Trustees for the amount paid to such charity.

In the past, a charitable gift made by Will, or by beneficiary designation on a life insurance policy or registered plan, was deemed for tax purposes to have been made immediately before death, such that the charitable donation tax credit could be used to offset income (including taxable capital gains on the deemed disposition of capital assets) in the year of death. Changes to the Income Tax Act effective January 1, 2016 both increase the flexibility of timing of the donation credit and impose additional criteria for qualification. The Will drafting lawyer should be aware of the following points:

- ***The value of the gift will be determined at the time that it is made out of the estate, not at the date of death. As a result, two separate valuations may be required.***
- ***If the gift is made by an estate that is a graduated rate estate, the tax credit may be claimed in the taxation year in which the gift was made, any preceding taxation year of the estate, the year of death of the individual (up to 100% of the deceased's income for that year), or the year preceding the year of death (also up to 100% of the deceased's income for that year), or may be allocated among any two or more of these years.***
- ***Changes to the Income Tax Act introduced on January 15, 2016 extended the period during which a charitable gift made by an estate may generate a credit in the year of death or the year preceding the year of death from 36 months to 60 months after the testator's death, so long as the estate would (except for the expiration of the 36 month period) have qualified as a graduated rate estate at the time the gift was made. Under the January 15, 2016 amendments, the charitable credit could be claimed in the year the estate made the gift, the year of death, or the year preceding the year of death. Proposed legislation released on October 21, 2016 further amended these rules to provide that, where an estate makes the charitable gift in the two year period following the expiration of the graduated rate estate (i.e. months 37 to month 60 of the estate), and if the estate otherwise qualifies as outlined above, then the charitable credit can be claimed in the year the estate makes the gift, any preceding year of the estate in which it***

was a graduated rate estate, the year of death, or the year preceding the year of death.

- *The same flexibility of timing applies where a charity is directly designated as the beneficiary of a life insurance policy or registered plan. However, a donation made pursuant to the terms of a separate life insurance trust (whether inside or outside the Will) would only qualify for a credit in the year in which the donation is actually made, or any of the five following years, and only against 75% of the trust's income in those years. Furthermore, where the goal is to have the separate life insurance trust benefit from a charitable credit against its taxable income, it is important that the gift be seen to be made as a result of the trustees' exercise of a discretionary power to make the charitable gift, as opposed to the direction of the testator to distribute an amount to charity as a beneficiary.*
- *Similarly, if the gift is delayed beyond the 60-month period following the date of death, for example, because of litigation, waiting for a clearance certificate, or disposing of an illiquid asset, a credit can only be claimed for the year in which the donation is actually made, or any of the five following years, and only against 75% of the estate's income in those years.*
- *The amendments to the Income Tax Act released on January 15, 2016 also introduced a limited ability to claim a charitable tax credit and apply it to the deemed disposition that occurs on the death of a spouse who is the life interest beneficiary of a testamentary spousal trust. When such a spouse dies the trust is deemed to have disposed of its capital property and reacquired it at fair market value. There is also a deemed year-end for tax purposes. If the trust makes a charitable gift no later than 90 days following the end of the calendar year in which the spouse dies, then the charitable credit can be applied in the year the gift is made, the deemed year-end for tax purposes in which the deemed disposition occurs, or any of the 5 years following the year the gift is made. The gift must qualify as a gift at common law and must therefore be voluntary, so the Trustees must make the gift pursuant to a discretionary power to make charitable gifts, rather than a direction to make the gift.*
- *Whereas in the past it was necessary that the amount or formula for ascertaining the amount of the gift be stipulated in the Will, now the amount can be left up to the discretion of the executors without jeopardizing the availability of the tax credit. However, keep in mind that such discretion could create conflict between the executors and the residuary beneficiaries of the estate.*
- *The gifted property must have been received by the estate on and as a consequence of the individual's death, or have been substituted for such property. For this purpose, dividends paid on shares owned by the estate do not constitute substituted property for the shares. The estate may not borrow funds to satisfy a gift.*

- *After 2015, the charitable donation credit can no longer be claimed by the surviving spouse of the deceased donor.*

Due to the foregoing tax rules, as well as the fact that the client may want the estate to be a “graduated rate estate” for a period of 36 months following death, it may be desirable to allow the executors the discretion to make the gift at any time during the period the estate is a graduated rate estate or in the two following years. For this purpose, the following clause may be used:

My Trustees shall pay to THE KIDS CHARITY (BN123456789RR0001) the sum of Ten Thousand Dollars (\$10,000.00) at any time within 60 months following the date of my death as my Trustees in the exercise of an absolute discretion determine, without interest. The receipt of the treasurer or other proper officer of this organization shall be a sufficient discharge to my Trustees.

However, as noted above, in order for the charitable credit to be available, the Trustees must ensure that the estate is a graduated rate estate.

Tax benefits may also be achieved by making charitable gifts out of assets other than cash. For example, if publicly traded securities with accrued capital gains are donated in specie by the estate, no part of the capital gains will be included in the income of the donor. In effect, the charitable donation will shelter from tax both the capital gains on the donated securities, and other income using the usual credit mechanism. Executors who might otherwise be unaware of these provisions may be alerted to them by adding the following sentence at the end of any of the preceding clauses:

Without limiting the discretion of my Trustees, I request that they satisfy all or part of this legacy by transferring to THE KIDS CHARITY (BN123456789RR0001) publicly traded securities of my estate with accrued capital gains which may thereby be exempted from income tax.

The same exemption from tax on capital gains currently applies to gifts of ecologically sensitive land and gifts of cultural property. Draft legislation was released on July 31, 2015 which would have extend the exemption to certain gifts of cash proceeds from the disposition of private company shares and real estate, beginning in 2017. However, in Budget 2016 the new federal government announced that it did not intend to move forward with those provisions and they have not been enacted.

GIFT OF REAL ESTATE

Description of Clause: *This clause makes an outright gift of real estate to a named beneficiary.*

My Trustees shall transfer and convey to my wife, JANE DOE, if she is living on the thirtieth day following my death, subject to any encumbrance thereon, whatever interest I may have at my death in the residential property municipally known as XXX Road, North Bay [and legally described as Part 6 on Plan 1982.

Annotation: Although section 32 of the SLRA already provides that, in the absence of a contrary intention, a gift of real property passes subject to any mortgage, it is wise to state this intention in the Will to ensure that the testator has considered the consequence of the encumbrance.

If a person leaves a specific real property in a Will, a subsequent disposition of that real property by the owner after the date of execution of the Will extinguishes the putative beneficiary's interest (subject to the exception in the Substitute Decisions Act for property disposed of by an attorney for property (rather than the testator him or herself)). There is no automatic tracing of the gift into replacement property. If a gift of real estate is to extend to "any other residential property which I may have purchased as a replacement of XXX Road, Toronto and be living in at my death" (for example), this should be stipulated in the Will. Alternatively, the drafting solicitor should point out in the reporting letter that a future sale of the house would require the client to revisit his or her Will.

The property to be devised needs to be described with sufficient particularity to ensure that it can be accurately identified after the will-maker is gone.

PRINCIPAL RESIDENCE TRUST

Description of Clause: This clause provides that a beneficiary will have the use and occupation of the testator's principal residence during his or her lifetime provided the beneficiary pays for the maintenance and operating costs. As discussed below, the clause may require some modifications if the goal is also to rely on the provisions of the Spousal "roll over" in subsection 70(6) of the Income Tax Act.

If my wife, JANE DOE, survives me my Trustees shall hold in trust any right, title or interest that I may have in my urban residence at XXX Road, London ("the Residence"), at the date of my death, to be dealt with in accordance with the provisions of this Clause XXX of this my Will. In the event that on the date of my death my wife and I are not living at XXX but are living together in another home which I own, the provisions of this Clause XXX shall apply equally to such property which I own and am using as our urban residence on my death. My Trustees shall hold such real property in trust upon the following terms and conditions (such real property or any property substituted for it in accordance with the following provisions of this Clause XXX being hereinafter referred to in this my Will as "the Residence"):

- (1) Subject to the following provisions of this Clause XXX, if my wife survives me and so long as she is living, my Trustees shall allow my wife to have the exclusive benefit, use, occupation and enjoyment of the Residence, free of rent;
- (2) As a condition of allowing my wife to live in the Residence rent free, she shall be solely responsible for paying any and all costs of operating and maintaining the Residence including, without limitation, all costs of maintenance and upkeep of the Residence, capital repairs to the Residence,

maintenance and administrative fees, realty, municipal or other taxes associated with the Residence, costs of insuring the Residence, all costs of utilities necessary for the enjoyment of the Residence and all other costs of every nature and kind associated with the use of the Residence;

- (3) It is my express intention that my estate shall bear no responsibility to make any payments in any manner and for any purpose in respect of the Residence while it is held in trust for my wife pursuant to this Clause XXX. If at any time my wife shall fail to make any payments which my Trustees in their absolute discretion consider necessary for the upkeep, maintenance or preservation of the Residence, the right of my wife to the use and enjoyment of the Residence pursuant to this Clause XXX shall immediately cease and my Trustees shall deal with the Residence or the proceeds of sale thereof in accordance with the provisions of Clauses XXX(4) to XXX(11) of this my Will;
- (4) Subject to the provisions of paragraph XXX(11), below, my Trustees shall have the power to sell, partition, exchange or otherwise dispose of the whole or any part or parts of the Residence in such manner and at such time or times and on such terms as to price, credit or otherwise as my Trustees determine with power to my Trustees to accept purchase money mortgages for any part of the purchase or exchange price. My Trustees may use the net proceeds of sale to purchase and provide for or contribute toward the purchase, lease or other use of another Residence, anywhere in the world, for the exclusive benefit, use, occupation and enjoyment of my wife during her lifetime upon the same terms and conditions as herein provided in this Clause XXX and so on from time to time. My Trustees shall hold any proceeds of any such sale not so used for the provision of another Residence in a trust fund for the benefit of my wife in accordance with the provisions of paragraph XXX(6) of this my Will;
- (5) Subject to the provisions of paragraph XXX(11), below, my Trustees shall have the power to lease all or any portion of the Residence for such length of time and upon such terms, covenants and conditions as my Trustees shall determine and in such event my Trustees shall hold the net lease income in a trust fund for the benefit of my wife in accordance with the provisions of paragraph XXX(6) of this my Will;
- (6) My Trustees shall hold the net proceeds of any sale of the Residence not used for the provision of another Residence or Real Properties in accordance with paragraph XXX(4), and the net income from leasing all or any part of the Residence in accordance with paragraph XXX(5) in a trust fund and during the lifetime of my wife invest and reinvest the balance of any trust fund set aside pursuant to the provisions of this Clause XXX of this my Will and shall pay to or for the benefit of my wife all of the annual net income derived from such trust fund in such manner as my Trustees in their absolute discretion from time to time consider advisable. I expressly relieve my

Trustees from any obligation they may have in maintaining an even hand between my wife and the ultimate beneficiaries of the remainder of such trust fund;

- (7) Subject to the foregoing, my Trustees shall not be responsible for the care, maintenance or supervision of the Residence except as they in the exercise of an absolute discretion consider appropriate, and they shall not be liable for waste;
- (8) On the date of death of my wife, the Residence and the balance of any trust fund set aside pursuant to the provisions of this Clause XXX shall fall into the residue of my estate to be dealt with in accordance with the provisions of Clause YYY of this my Will, but with the beneficiaries thereof determined as of the date of death of my wife;
- (9) [***Annotation: The follow paragraph is desirable if the testator wishes to ensure the trust is able to declare the urban home the principal residence of the surviving spouse. See the discussion of principal residence exemption below.***] Notwithstanding the foregoing provisions of this Clause XXX of this my Will, the Residence trust in favour of my wife shall be subject to the condition that my estate and my wife shall jointly elect that the Residence shall be designated as her principal residence for income tax purposes during the entire period of her use of the Residence pursuant to this Clause XXX. It is a condition of the use of the Residence pursuant to this Clause XXX that should my wife fail to designate the Residence as her principal residence for all years during which she was enjoying the use of the property, she (or her estate) shall be responsible for all capital gains taxes otherwise payable by my estate upon the sale of the Residence;
- (10) So long as my wife is living and not suffering from any mental incapacity, she shall have sole authority to direct my Trustees in respect of the retention, sale, substitution, lease and other use of the Residence. For greater certainty, my wife, while she is living and able, shall have full and sole authority to direct my Trustees to:
 - (i) sell any Residence held pursuant to the provisions of this Clause XXX;
 - (ii) purchase any Residence selected by my wife using for such purpose the net proceeds of sale of any previously sold Residence, plus any amount held in trust pursuant to this Clause XXX, provided that in determining the amount of proceeds of sale available my Trustees shall not deduct the amount of debts secured thereon; or
 - (iii) sell the Residence and use the net proceeds thereof and any trust fund resulting therefrom to pay rental or lease costs of accommodation of any type selected by my wife.

- (11) For greater certainty, the provisions of this Clause XXX shall apply equally and independently to each Residence or other real property held by my Trustees in trust pursuant to this Clause XXX of this my Will.

Annotation: *This clause will allow the spouse or another beneficiary to use and occupy the testator's house for as long as the spouse or beneficiary wishes. The beneficiary also has the ability to direct that the house be sold and a replacement property be purchased. Alternatively, if the house is sold and no replacement is purchased, the proceeds are held in trust for the beneficiary with all of the income payable to the beneficiary. Upon the death of the beneficiary, the house or trust fund is added to the residue of the testator's estate.*

In this particular trust, the beneficiary is charged with the responsibility of paying all costs of maintaining the property, including capital repairs. Normally capital repairs are considered an expense of the estate; but if the estate is to be responsible for capital repairs, it is necessary for the Will to set up a fund to be administered by the trustees which will be held for the purpose of funding capital repairs for the lifetime of the life tenant. To avoid creating and maintaining a fund, the clause above places the burden of capital repairs on the beneficiary and provides that the trustees may sell the property if it is not being properly maintained.

Paragraph (9) of the clause above deals specifically with the principal residence exemption. In this case, the beneficiary and the estate are jointly obliged to designate the urban home as the principal residence of the life tenant-beneficiary. While the estate may or may not designate this home as the deceased's principal residence for the period up to the death of the deceased spouse (and a tax-deferred spousal rollover is available where the home is to be held in a qualifying spousal trust), paragraph (9) was designed to avoid a situation where the life tenant enjoys the use of the urban residence during her lifetime, but designates her cottage as her principal residence during the period after the death of the testator and until the sale of the home or death of the life tenant. If the life tenant were to so do, she would enjoy tax free principal residence status for the cottage, and the estate would be responsible for the capital gains taxes payable upon the ultimate sale of the urban home. It is unlikely the estate would want to hold monies in reserve for this purpose, although the urban home itself could be used to fund the taxes.

Changes were introduced, in the 2016 federal budget, that will affect how a trust is able to use a principal residence exemption. These changes affect trusts that hold real property where, after 2016, the trust disposes of the real property and would like to claim the principal residence exemption. The trust may be able to claim the exemption if it was a spousal or joint partner trust, an alter ego trust, a qualifying disability trust or a trust for minor children whose parents are deceased. If the trust was set up under a will, it must have as a beneficiary a person who resides in the residence for whom the exemption is claimed and who is the spouse of the will-maker (and an income beneficiary), an "electing beneficiary" (in the case of a qualified disability trust) or a minor child whose parents are deceased (in the case of a trust for children). Obviously, the resident beneficiary must also be a Canadian resident, and if the property was acquired on or

after October 3, 2016, the will must expressly provide the specified beneficiary with the right to use and enjoy the property as a residence throughout the year.

There are some common places where this change may make a significant difference to your clients. For example:

- *Any residence held in a spousal trust that does not explicitly provide the spouse with the right to use and enjoy the residence will not be able to designate the matrimonial home as a principal residence when, for example, the house is to be sold in order to be replaced by a smaller residence such as a condominium. The trustees might consider transferring the property to the spouse, who may claim the principal residence exemption personally before it is sold, but that may not comply with the will-maker's wishes. If the trust capital is to pass to the will-maker's children, it may be that the residence will be sold and the tax on the capital gain paid by the trust, even though there will be higher tax as a result.*
- *A Henson Trust for a beneficiary who does not qualify for the federal disability tax credit will not be able to be a qualified disability trust. If the trust owns the residence where the beneficiary resides, it cannot make a principal residence designation in respect of the residence. At the same time, it may not be advisable to distribute the property in kind to the disabled beneficiary prior to its sale.*
- *Finally, where a trust for children is set up in the expectation that it will hold the family home until all of the children have left home, the trust may not be able to claim the principal residence exemption after the last child turns 18, since the exemption for the trust is only available for minor children.*

If the principal residence trust is drafted as a "qualified spousal trust" under subsection 70(6) the Income Tax Act, then the deemed disposition on the real property transferred to the trust is deferred until the death of the spouse. In order to be a qualified spousal trust, all income must be paid to the spouse during his or her lifetime and no one other than the spouse is entitled to the benefit of the capital during the life of the spouse. If such a trust is used, then any type of property can be "rolled over" into the trust without triggering tax. The trust can continue to claim the urban home as a principal residence for the surviving spouse, as long as the trust is a "qualified spousal trust", and if the property was acquired after October 2016, the trust specifically allows the spouse the right to use and enjoy the property throughout the year.

*Whenever real estate is owned by the testator, it is good practice to ensure that you have confirmed how title to the property is owned. This is particularly so where the real estate is being left to only one of many potential beneficiaries. It is not uncommon for a client to be mistaken as to exactly how title to property is held (i.e., sole, joint tenant, tenants in common, corporate-owned). The case of *Earl v. Wilhelm* (1997), 18 E.T.R. (2d) 191 (Sask. Q.B.), reversed in part (2000), 31 E.T.R. (2d) 193, 183 D.L.R. (4th) 45 (Sask. C.A.), affirmed (2000) 34 E.T.R. (2d) 238, 199 Sask. R. 21, [2009] 9 W.W.R. 196, 232 W.A.C. 21 (Sask. C.A.) stands for the proposition that a drafting solicitor can be found negligent*

where a gift of land fails because the property was not legally owned in the manner the testator presumes.

When leaving a piece of real estate to a beneficiary or holding it in trust for a beneficiary, it is essential that the contents and personal property related to the real estate be dealt with unambiguously. If the contents of a parcel of real estate are intended to follow the real estate, this should be specified, otherwise the general clause dealing with disposition of personal property will govern all personal property.

TRUST OF COTTAGE PROPERTY

Description of Clause: *This clause holds the family cottage in trust for a period of years to allow the beneficiaries to live through the process of shared use of a cottage for a defined period. Upon the termination of the period, the cottage is either allocated amongst the beneficiaries or sold to a beneficiary if all beneficiaries agree or the cottage is sold on the open market.*

If at the date of my death I own or have an ownership interest in a cottage property located in [insert a full and proper legal description of the cottage property] (hereinafter referred to as the “Cottage Property”), I direct my Trustees as follows:

- (a) My Trustees shall hold the Cottage Property and all articles of domestic, household and garden use or ornament belonging to me on the date of my death which are located in or about or used in connection with the Cottage Property, including consumable stores and all vehicles, boats, motors and accessories thereto (hereinafter collectively referred to as the “Cottage Contents”) until the earlier of five (5) years from the date of my death and such earlier date as my children agree upon unanimously and so advise my Trustees in writing (the earlier of which is hereinafter referred to as the “Cottage Property Termination Date”) and until the Cottage Property Termination Date to allow my children and their respective families the use and enjoyment of the Cottage Property and the Cottage Contents, free of rent. My children shall agree among themselves on the use and care of the Cottage Property and the Cottage Contents. All decisions in this respect shall be left to my children; including all decisions relating to whether they use the Cottage Property and the Cottage Contents on a partially or totally shared basis or set aside specific time periods for the exclusive use by their respective families, provided that if my children are unable to agree, then all such decisions shall be made by my Trustees in their absolute discretion.
- (b) My Trustees shall set aside and keep invested in a separate fund (hereinafter referred to as the “Cottage Fund”) such assets of my estate as my Trustees in their absolute discretion consider sufficient to satisfy the following payments (collectively, the Cottage Property Payments) until the Cottage Property Termination Date, having regard both to the capital of the Cottage Fund and the annual net income which will be derived from the Cottage Fund:

- (i) insurance of the Cottage Property and the Cottage Contents against damage or destruction as well as public liability indemnity insurance;
 - (ii) local and municipal taxes in respect of the Cottage Property;
 - (iii) maintenance costs and repairs including expenses related to opening and closing the Cottage Property, storage costs associated with any of the Cottage Contents, and repairs and maintenance of any road or other allowances required to ensure full enjoyment of the Cottage Property; and
 - (iii) all utilities.
- (c) My Trustees shall pay all Cottage Property Payments each year, first out of the annual net income of the Cottage Fund and then, to the extent of any deficiency, out of the capital of the Cottage Fund. If the annual net income exceeds the amount of the charges in any year, such excess shall be accumulated and added to the capital of the Cottage Fund at the end of each year. Except for the payments noted above, my Trustees shall not be responsible for the care, maintenance or supervision of the Cottage Property and the Cottage Contents and shall not be liable for waste.
- (d) Upon the Cottage Property Termination Date, my Trustees shall divide and distribute the Cottage Property and the Cottage Contents among my children who are then alive, in such manner as they shall unanimously agree upon. Such agreement may involve a division of the Cottage Property and the Cottage Contents among all or any number of my children, provided that if fewer than all of my children acquire an interest in the Cottage Property and the Cottage Contents (or if any child of mine is not then alive but shall have left issue then alive), then, subject to the provisions hereinafter provided, any such acquisition shall be by purchase from my estate at the then fair market value (such fair market value to be determined by my Trustees after obtaining and considering one or more appraisals obtained from qualified real estate appraisers, provided that the ultimate decision shall be made by my Trustees in their absolute discretion and shall be binding on all of the beneficiaries of my estate) with complete payment to my estate, in cash or by certified cheque, upon the closing of any such transaction. To the extent possible, each such child who acquires an interest in the Cottage Property and the Cottage Contents, shall be entitled to have his or her interest in the residue of my estate, as set out in [RESIDUE CLAUSE] of this my Will, satisfied in whole or in part through the allocation of the Cottage Property and the Cottage Contents, assuming that my Trustees and all of my children are so agreeable. In the event that my children are not able to agree on the manner in which the Cottage Property and the Cottage Contents shall be divided among them by the Cottage Property Termination Date, then my Trustees shall sell the Cottage Property

and the Cottage Contents and the net proceeds of such sale shall fall into and form part of the residue of my estate to be dealt with as part thereof in accordance with the provisions of [RESIDUE CLAUSE] of this my Will with all references therein to the date of my death being read as references to the Cottage Property Termination Date.

- (e) Upon the Cottage Property Termination Date, to add any part of the Cottage Fund then remaining to the residue of my estate to be dealt with as part thereof in accordance with the provisions of [RESIDUE CLAUSE] of this my Will with all references therein to the date of my death being read as references to the Cottage Property Termination Date.

Annotation: *The cottage property is often an asset of significant emotional value. For this reason, it is generally advisable to avoid provisions that provide for long term trusts for all of the children or that provide for elaborate schemes of shared use of the property by children. If a trust is appropriate then it is important to consider how expenses will be shared, how use will be shared, how upkeep and maintenance will be shared, the length of the trust (keeping in mind the 21-year deemed disposition rule under the Income Tax Act) and how disputes will be resolved.*

In some circumstances it may be appropriate to transfer a cottage directly to a beneficiary, or more than one beneficiary (in which case the transfer would normally be to the beneficiaries as tenants-in-common). If the property has accumulated capital gains, it is important to be aware that the tax burden of those capital gains (which are deemed realized on death) is borne by the residuary beneficiaries under the Will and not the beneficiary of the cottage. It is also possible that the cottage may qualify for the principal residence exemption under the Income Tax Act, in which case the capital gain may be totally or partially exempted from tax. Accordingly, it may be appropriate to charge the beneficiary of the cottage property with the burden of the tax liability attributable to the cottage. If this is the case, then the gift of the cottage should be conditional upon the beneficiary satisfying the tax liability. The gift should go on to provide what is to happen if the beneficiary does not satisfy the tax liability. The following clause makes the gift conditional on paying both the income tax liability and all other costs and expenses associated with the ownership and transfer of the Cottage Property.

If at the date of my death I own or have an ownership interest in a cottage property located in [insert a full and proper legal description of the cottage property] (hereinafter referred to as the “Cottage Property”), my Trustees shall transfer and convey the Cottage Property to my sister, Carrie Custody, if she survives me, as her absolute property but subject to any encumbrance thereon, on condition that Carrie Custody personally reimburse my estate for all of the following expenses:

- (i) The amount by which the actual income tax payable by me for the year of my death exceeds the amount of income tax that would have been payable by me for the year of my death if the fair market value of the Cottage Property at the date of my death had been equal to its adjusted cost base;

- (ii) The amount by which the estate administration tax actually payable by my Trustees exceeds the amount of estate administration tax that would have been payable if I had transferred the Cottage Property prior to my death;
- (iii) All legal fees paid by my Trustees in connection with the transfer of the Cottage Property to Carrie Custody; and
- (iv) All other costs necessary or advisable to give effect to this gift of the Cottage Property, as determined by my Trustees acting reasonably. For greater certainty, it is my intention that no beneficiary of the residue of my estate shall receive less because I have made the gift set out in this section * than such beneficiary would have received if I had not owned the Cottage Property at all.

My Trustees may require that Carrie Custody reimburse the foregoing costs prior to receiving title to the Cottage Property, or may in their discretion enter into any arrangement that my Trustees think fit (including terms as to the period within which payment is required, interest owing on the payment, and security for the payment) for Carrie Custody to reimburse the foregoing costs after having received title to the Cottage Property. If my Trustees are unable to enter into a satisfactory arrangement for Carrie Custody to reimburse the foregoing costs, then the gift to Carrie Custody set out in this section * shall fail and the Cottage Property shall fall into and form part of the residue of my estate and be distributed as part thereof.

As noted above, whenever real estate is owned by the will-maker, it is good practice to ensure that you have confirmed how title to the property is owned. This is particularly so where the real estate is being left to only one of many possible beneficiaries. Since cottage properties are not always identified by a municipal address, it is also important to have a proper legal description, especially if the will-maker owns more than one lot.

OPTION TO PURCHASE COTTAGE PROPERTY

Description of Clause: *This clause provides for the sale of the family cottage at its fair market value to a particular beneficiary. If that beneficiary does not want the cottage, then the cottage is to be offered to other beneficiaries by order of age. Other methods may be used, including giving the option to children in the order they are – in the will-maker’s assessment – most likely to be interested in the cottage.*

One option is to use a definition of the Cottage property that includes the contents, assuming that they will be disposed of together, which saves cumbersome repetitions of “and the contents” and the risk that if you omit to mention the content at any point there is an implication that in that respect the contents are to be treated separately from the cottage itself.

[Definition of Cottage Property]

In this my will, “Cottage Property” means whatever interest I own at my death in my cottage property located on Herring Lake and municipally known as 111

Herringway Drive, L'Ardoise, Ontario, and legally described as Part of Lot 3, Concession 25, Leicester Township, County of Dedlock, together with all boats, motors and accessories, household goods, chattels, furniture, and articles of domestic and household use or ornament located in the cottage or on the property and used in connection with it.

Annotation: *The clause below gives a family member of the will-maker an option to purchase real estate or certain other assets, and provides for the purchase price to be reduced by 5% to allow for the costs (e.g., real estate commission, carrying costs during a typical listing and closing period) which will be saved by the estate as a result of selling to the family member instead of finding an unrelated purchaser. A different percentage may be appropriate, depending on the location of the cottage.*

If at the date of my death I own or have any interest in the Cottage Property, I direct my Trustees as follows:

- (a) My Trustees shall give to my sister, Carrie Custody, if she survives me, a first option to purchase from my estate the Cottage Property at 95% of the fair market value at my death. Fair market value is to be determined after obtaining and considering one or more appraisals by qualified real estate appraisers, and appraisers of personal effects (if my Trustees consider it advisable to have the personal effect appraised), but the ultimate decision shall be made by my Trustees in their absolute discretion and shall be binding on all of the beneficiaries of my estate. Complete payment to my estate, in cash or by certified cheque, must be received by my estate before the registration of any transfer affecting the Cottage Property. Carrie Custody shall have thirty (30) days from the date that express written notice from my Trustees of this option is given to her to exercise the option by entering into an enforceable agreement of purchase and sale in standard form with my Trustees to purchase the Cottage Property on the terms set out above, failing which Carrie Custody's shall terminate.
- (b) If Carrie Custody does not exercise her option, then my Trustees shall give to my eldest child alive at my death the option to purchase the Cottage Property on the same terms and conditions on which they were offered to Carrie Custody. That child shall have thirty (30) days from the date that express written notice of this option is given by my Trustees to that child to enter into an enforceable agreement of purchase and sale in standard form with my Trustees to purchase the Cottage Property on the terms set out above, failing which that child's option given shall terminate, and my Trustees shall give to the next eldest child of mine alive at my death a third option to the purchase the Cottage Property and the Cottage Contents, and so on.
- (d) If neither Carrie Custody nor any child of mine purchases the Cottage Property as provided for above, then my Trustees shall sell the Cottage Property for such amounts and to such person or persons and on such terms and conditions as my Trustees may in their absolute discretion determine.

- (e) The net proceeds of any sale pursuant to this section * shall fall into and form part of the residue of my estate.

EDUCATION TRUST FOR GRANDCHILDREN

Description of Clause: The following clause sets aside a sum to pay the education expenses of all the testator's grandchildren.

If any grandchild of mine is alive at my death and has not then attained the age of twenty-five (25) years, my Trustees shall set aside in a separate fund (the "Education Fund") assets of my estate having a value for probate purposes of THREE HUNDRED THOUSAND DOLLARS (\$300,000) for each such grandchild and shall hold the Education Fund in trust until the date (the "Education Fund Termination Date") that there are no grandchildren of mine (including grandchildren born after my death but before the Education Fund Termination Date) alive and under the age of twenty-five (25) years. Until the Education Fund Termination Date, my Trustees shall pay, firstly out of the annual net income of the Education Fund and then, to the extent of any deficiency, out of the capital of the Education Fund, all or such part as my Trustees think fit of the expenses related to the post-secondary education of those of my grandchildren who are from time to time under the age of twenty-five (25) years, or any one or more of them to the exclusion of the other or others and in any proportions that my Trustees think fit, which expenses may include tuition, ancillary fees, the cost of books and materials, rent, reasonable living expenses, and the costs of travelling between such grandchild's ordinary place of residence and the institution attended by such grandchild, provided that when making distributions, whether of annual net income or capital of the Education Fund, my Trustees shall have regard to the income tax consequences applicable to such distributions. Any part of the net income not applied to such expenses shall be accumulated and added to the capital of the Education Fund at the end of the year, but after the expiration of the maximum period for accumulation of income permitted by law, my Trustees shall divide the income in equal shares per capita among those of my grandchildren who have not attained the age of twenty-five (25) years. On the Education Fund Termination Date, the Education Fund or the part thereof then remaining shall fall into and form part of the residue of my estate to be dealt with as part thereof in accordance with the provisions of [RESIDUE CLAUSE] of this my Will with all references therein to the date of my death being read as references to the Education Fund Termination Date.

RESIDUE

There are a myriad of options for dealing with the residue of the estate. The first set of options below establishes benefits for the surviving spouse – by outright distribution, by spousal trust, or by dual (family and spousal) trusts. The second set of options establishes outright gifts to or trust funds for the testator's children with gifts over to the issue of predeceased children. Finally, there is a provision applicable if all of the testator's blood lineage is deceased prior to the estate being fully distributed.

Some common drafting errors to avoid are the following:

- (i) *“To divide the residue of my estate among my children in equal shares per stirpes.” It is technically impossible to have a stirpital distribution among children [or grandchildren]. The term “per stirpes” means “by roots”. The normal meaning of children is limited to the first generation following the deceased person, whereas “issue” means all generations. A per stirpes distribution requires a common root such as “among the issue of my children in equal shares per stirpes,” where the root is the child. In a distribution to “issue per stirpes” the distribution is only to the first generation, unless one of them has predeceased the relevant date, in which case, he or she will be represented by his or her children, and so on. In Dice v. Dice Estate [2012] OJ No. 3158, 2012 ONCA 468 the Ontario Court of Appeal reviewed recent cases dealing with similar constructions, and commented: “terms such as ‘per stirpes’, if used at all, are best used in their traditional sense — otherwise, the testator runs the risk of having his or her words ignored.”*
- (ii) *“To pay the amount of \$10,000 to my grandchild, A, per capita.” The term per capita is a term that describes a mode of division. Literally it means “by the head”. Therefore, to use the phrase in reference to a gift to one named person is illogical.*
- (iii) *“To pay the residue of my estate to my wife and after her death to divide the residue among our children then alive in equal shares”. This is an attempt to both give the residue outright to the wife and to create a life interest for her benefit. It is not possible to impose a life interest onto an outright distribution. And, should the matter require an interpretation, the law generally favors outright distributions.*
- (iv) *“To pay the residue to A and B.” You should go on to include language that deals with the situation of only one of A and B surviving.*
- (v) *Avoid partial intestacies. Where payments of capital are to be made at certain ages or times, do not forget to dispose of income during those intervening periods i.e. either direct income to be distributed or accumulated and added to capital. If income is directed to be accumulated for a period of time, ensure that a provision is included which directs how income is to be dealt with after the accumulation period is over. (The Accumulations Act only permits the accumulation of income for a maximum period of 21 years from when the trust is established.) Further, if a gift of residue is made, ensure there are gifts over in the event the gift fails.*
- (vi) *“Pour Over” Trusts. There is a common planning technique used in US Wills whereby the residue of an estate is directed to be added to (or “poured over into”) a pre-existing inter vivos trust. For example, the testator may say “I direct my Trustees to pour the residue of my estate into the Smith Family Trust, being an inter vivos trust created by me on the X*

day of X, 1989 to be used by the trustees thereof as part thereof.” Due to an increasing number of clients with U.S. connections, this “pour over” language is beginning to be seen in Canada. Ontario practitioners should be aware, however, that such “pour over” trusts may not be valid in Canada and should not be employed without further consideration of the legal issues involved. See the decision of the British Columbia Court of Appeal in Kellogg Estate (Re), 2013 BCSC 2292 (CanLII). The difficulty with such “pour over” trusts is that they may violate our testamentary compliance rules in the Succession Law Reform Act. Pour over trusts may in fact be an invalid testamentary disposition as they may allow the testator to direct the residue to be paid to an inter vivos trust which itself may not be executed or administered in compliance with testamentary compliance rules. As a result, one should consider the issue carefully. The US rules in this regard may be materially different from those in Ontario.

In addition to the considerations above, individuals may also want to consider whether it is desirable to delay the distribution of the estate (or the transfer of the estate assets to a testamentary trust) for up to three years. The reason for this is the new “graduated rate estate” (GRE) provisions that apply pursuant to changes to the Income Tax Act that came into effect on January 1, 2016. Prior to this date, an estate and testamentary trusts were taxed at progressive rates on all income retained or taxed in the trust. As a result of the new rules, only a “graduated rate estate” will enjoy taxation at progressive marginal rates. All other trusts arising upon the death of the individual are taxed at the highest marginal tax rate applicable to individuals.

Under the new rules, a GRE of an individual is defined in subsection 248(1) as the estate that arose on and as a consequence of the individual’s death if the following conditions are met:

- The estate is a “testamentary trust”. This means that all of its contributions must be as a consequence of the individual’s death.*
- The individual’s social insurance number is provided in the estate’s Part I tax return for the year and each previous year that ended after 2015.*
- The estate designates itself as the GRE of the individual in its Part I tax return for its first taxation year that ends after 2015.*
- No other estate designates itself as the GRE of the individual.*
- A GRE only retains its status as such for the first 36-months after the individual’s death. After that 36-month period, it will no longer qualify as a GRE.*

Due to the fact that an estate can enjoy graduated progressive tax rates for 36 months, some clients may want to take advantage of this tax opportunity by explicitly providing

that the executors can delay the distribution of the estate (or the creation of testamentary trusts) for 36 months. The following clause can be used for such purpose:

Notwithstanding any other provision in this Will or any common law rule regarding the ordinary time for administration and distribution of an estate, my Trustees shall have the power and authority to maintain my estate as a graduated rate estate, within the meaning of the Income Tax Act (Canada), until such date (the “distribution date”), prior to the third (3rd) anniversary of my death, as my Trustees may determine, and to defer the transfer or payment of any gifts set out in my Will, or the establishment of any trust created by my Will, until the distribution date. During the period between the date of my death and the distribution date, my Trustees may accumulate the net income derived from my estate and add it to the capital thereof, or may from time to time distribute all or any part of the net income to the person or persons who would be entitled to it if the distribution date occurred on the date of such distribution. My Trustees shall not be liable to any beneficiary of my estate or of any trusts created herein for any interest, cost or loss whatsoever for deferral of the distribution of my estate or payment pursuant to the terms of this my Will for a period of up to 36 months after the date of my death.

Despite the income tax advantages, practitioners should be careful to discuss with their clients whether it is appropriate that the estate distribution be delayed and whether any beneficiaries may be prejudiced by such a delay. In particular, it would be important to determine if the income needs of beneficiaries are properly being met.

In addition to graduated rate taxation, GRE status is linked to a number of other benefits. Some of the advantages of GRE status are:

- ***the ability to choose any year-end up to the first anniversary of the date of death, such that there could be up to 4 taxation years during the 36-month GRE period;***
- ***an exemption from the requirement to pay tax installments, which will now otherwise be required for testamentary trusts;***
- ***an exemption from the \$40,000 alternate minimum tax, which will no longer be available to other testamentary trusts;***
- ***the ability to carry back losses realized in the first year of the estate to the terminal return under s. 164(6) of the Income Tax Act, which is one of the strategies available to mitigate the potential for double taxation where the assets of the estate include shares of a private company; and***
- ***access to the flexible charitable donation tax credit rules in section 118.1 of the Income Tax Act.***

With the introduction of the GRE, it has become more important to distinguish between the administration period of an estate, and the administration of testamentary trusts established under the will. Assets that are used to fund a testamentary trust no longer form part of the GRE; testamentary trusts established under a Will cannot be designated as the GRE because they are not the estate of the individual that arose on and as a consequence of the individual’s death.

Since the estate must qualify as a testamentary trust in order to designate itself as the GRE, care must be taken to avoid “tainting” the estate in a manner that will disqualify it from being a testamentary trust. An estate can lose its status as a testamentary trust if a loan is made to the estate or contributions are made to the estate by someone other than the deceased. A limited exception for certain loans is provided in paragraph (d) of the definition of “testamentary trust” in subsection 108(1) of the Income Tax Act. That provision should be reviewed before the executors of an estate accept any loans. For example, a beneficiary can pay expenses of the estate and it will not cause the estate to lose its status as a testamentary trust provided the estate reimburses the beneficiary within 12 months of the loan. If the expenses are not reimbursed, however, or if the loan is anything other than estate expenses (such as for investment), the estate will cease to be a testamentary trust. Contributions to the estate by persons other than the deceased can occur in a number of ways. For example, if an inter vivos trust is directed to pay the tax liability of the settlor, that is a contribution to the settlor’s estate. In addition, if an inter vivos trust is drafted so that the capital remaining on the trust’s division date is to be paid over to the estate of a particular person, that is a contribution to that person’s estate.

As noted above, one of the reasons that GRE status is important (other than the income tax advantage described above) is because preferential charitable tax credit rules apply to graduated rate estates. Please refer to the annotation under the heading “Charitable Gift” for the particulars of the new flexible donation tax credit rules. Where planning to gain access to the flexible donation tax credit rules is an essential part of the estate plan, it may be desirable to ensure that the executors of the estate are aware of the need to properly maintain a GRE for 36 months. Proper tax advice is essential. For this purpose, the following paragraph may be used:

I direct my Trustees to take such steps as are necessary, and to manage the assets of my estate in a manner designed, to achieve the result that my estate will be a “graduated rate estate” as that term is defined in the *Income Tax Act* (Canada). My Trustees are authorized to use the assets of my estate to retain tax advisors to provide advice and direction for this purpose. My Trustees are authorized, in their discretion, to make any designation, election, allocation, or distribution they determine is necessary to maintain my estate as a graduated rate estate for a period of up to 36 months after my death.

GIFTS TO SPOUSE

Outright Gift of Residue to Surviving Spouse

Description of Clause: *The following clause is an outright distribution to the surviving spouse.*

My Trustees shall pay and transfer the said residue of my estate to my wife, JANE DOE, if she is living on the thirtieth day following my death.

Annotation: *An outright distribution to a surviving spouse is perhaps the most common distribution of estates of average complexity and value. Generally the Wills of spouses*

are identical to each other, for example, an outright distribution to the survivor, with the survivor being the sole executor(ix). These Wills are often referred to as “mirror Wills”, which are not to be confused with “mutual” Wills.

Under the Income Tax Act, a taxpayer is deemed to dispose of his or her capital property on his or her death with the result that any accumulated capital gains are deemed realized. This tax liability can be deferred if the capital property is left to the surviving spouse or to a trust which qualifies as a spousal trust under the Income Tax Act. (This deferral opportunity is often described as a “rollover”.) If capital property is left outright to a surviving spouse, then the surviving spouse inherits the tax attributes of the capital property. In particular, when the spouse disposes of the capital property or dies, there will be a realization of the capital gains that accumulated both during the taxpayer’s lifetime as well as during the time the surviving spouse held the property.

The 30 day survivorship period is intended to deal with the situation of both spouses dying within a short period of time. In particular, if the order of deaths is known (for example, where one dies a few days after the other), then the estate of the first to die will pass to the survivor, only to be again distributable according to the survivor’s Will. Without a survivorship clause, this will result in double estate administration, double probate taxes and double costs of administration. We note that there is no rule about the length of time the survivorship period should be. We have seen periods as little as 15 days and as long 60 days or more.

The use of survivorship clauses can, however, lead to one of the more common drafting problems. There are many cases where the courts have dealt with a Will that provides for a distribution if the spouse predeceases or dies within the survivorship period but then does not provide for what is to happen if the spouse survives the survivorship period. The jurisprudence goes both ways in terms of whether the missing words can be read into the Will.

In the event the spouses die in circumstances rendering it uncertain who survived the other (e.g. an airline disaster) and the Wills do not contain a survivorship clause, you should refer to Part IV of the SLRA. Section 55 provides as follows:

“Where two or more persons die at the same time or in circumstances rendering it uncertain which of them survived the other or others, the property of each person, or any property of which he or she is competent to dispose, shall be disposed of as if he or she had survived the other or others.”

In other words, each beneficiary who died at the same time as the testator is deemed to have predeceased the testator such that the gift to such beneficiary will not take effect. In the context of spouses, this will result in the alternate beneficiary provisions in the Wills of both taking effect. Section 55 goes on to direct that in the context of joint tenants dying in such circumstances, then each joint tenant is deemed to have held as tenants in common.

If the spouse does not survive the necessary period to take the outright gift, the appropriate wording for the first alternate gift to the issue of the testator is as follows.

If my wife predeceases me or is not living on the thirtieth day following my death, then on the death of the survivor of me and my wife (“the Division Date”), my Trustees shall divide the residue of my estate... [See options below for Gifts to Issue]

A more general form of survivorship clause appears later in the Annotated Will. Be careful if you use a survivorship clause that the phrasing in the gift to the first beneficiary (usually the spouse) and to alternate gift mirror each other. Phrases such as “provided she survives me for a period of 30 days” are potentially ambiguous. See Re Barbeau Estate, [2012] OJ No 3881, 2012 ONSC 3249 (Ont SCJ) where the court was called on to interpret this very phrase, and found that “30 clear days” as that phrase would be used under the rules of court, was consistent with the will-maker’s intention.

Trust Fund for Surviving Spouse

Description of Clause: This clause holds the residue in trust for the lifetime of the surviving spouse, with the spouse receiving all of the income during his or her life. In addition, the spouse is entitled to capital encroachments in the trustees’ discretion.

My Trustees shall hold the residue of my estate in trust during the lifetime of my wife, JANE DOE. My Trustees shall pay to or apply for the benefit of my wife the annual net income in such monthly, quarterly or other periodic payments as my Trustees in their absolute discretion consider advisable. My Trustees may at any time or times pay to or apply for the benefit of my wife any amount of the capital of the residue of my estate as my Trustees in their absolute discretion consider appropriate. My Trustees are expressly relieved of any duty to maintain an even hand among beneficiaries in respect of the investment management of the residue of my estate and shall be entitled to adopt an investment policy that favours my wife, Jane Doe, at the expense of the residuary beneficiaries.

Annotation: A spouse trust is often used in the case of second marriages, with children from a first marriage being the beneficiaries of the estate on the spouse’s death. It is a useful means to balance the needs of the spouse with the moral (and sometimes legal) obligations to the children. However, in this set of circumstances, the choice of trustees is paramount. Leaving the spouse as the sole trustee will inevitably lead to a conflict of interest.

Like an outright distribution to a surviving spouse, the use of a spouse trust which meets the requirements of the Income Tax Act will allow for a deferral of the income tax consequences of the deemed disposition of capital property, until the death of the spouse or until the trustees dispose of the capital property. See subsection 70(6) of the Income Tax Act for the requirements of a spouse trust. In addition Interpretation Bulletins IT-305R4, IT-449R and IT-381R3 will help to determine whether a spouse trust has been created. The only two points we will make in respect of the requirements is that often clients will want a spouse trust to terminate if the spouse remarries. If a condition, such

as remarriage, is imposed as a terminating event, the spouse trust will not qualify for purposes of the rollover provisions (however, remarriage could terminate the right to capital distributions from the trust). In addition, the spouse trust must be drafted such that no person other than the spouse can receive income or capital from the trust during the lifetime of the spouse. This latter requirement may seem easy to fulfill in terms of drafting the trust itself. However, CRA has successfully taken the position that where the administrative powers are used in a manner that permits someone other than the spouse to obtain the use of the capital of the estate, this will taint the spouse trust. The particular power at issue was the ability to lend money to other beneficiaries on a non-interest bearing basis. As a result, it is prudent to include a provision in the Will which directs the trustees not to use any of the administrative powers in a manner that will offend subsection 70(6) of the Income Tax Act. (See the clause entitled “Maintain Spousal Trust Status Under the Income Tax Act” below.)

A common drafting error made when using spouse trusts is to fail to provide for the distribution of the estate on the spouse’s death or if the spouse predeceases. This error can be avoided if the devise of residue clause which follows the spouse trust includes language making the clause applicable in both circumstances. After the death of the surviving spouse, or if, in fact, the testator is the surviving spouse, the appropriate wording for the alternate gift is as follows.

Upon the date of death of the survivor of me and my spouse (the “Division Date”), my Trustees shall divide the residue of my estate or the part thereof then remaining... [See options below for Gifts to Issue]

Upon the death of the surviving spouse, there will be a deemed disposition of all capital assets of the trust. Effective January 1, 2017, changes to the Income Tax Act which caused any resulting taxable capital gain to be taxed in the estate of the surviving spouse, rather than in the trust, which originally applied to all spousal trusts, and then – for 2016 tax year only – could be access by election will no longer be applicable.

Lawyers may still need to plan around the deemed disposition in other ways. For example, where a spousal trust owns shares of a private company that have a low cost base and a high fair market value, the Income Tax Act deems that those shares are disposed of by the spousal trust at fair market value on the date of death of the spouse. This would trigger a capital gain inclusion in the spousal trust, which, since 2016, will be subject to top marginal tax rates. To decrease the possible tax payable, a common planning technique is to ensure that the spousal trust does not come to an end immediately upon the date of death of the spouse. Instead, the spousal trust can continue to exist for up to three years after the death of the spouse. This allows the spousal trust to carry back any capital losses that may occur in the spousal trust against the capital gain caused by the deemed disposition. As with any other taxpayer, spousal trusts can carry back losses up to three years. Hence, keeping the spousal trust open for three years allows for losses after the spouse’s death to reduce the gains payable upon the deemed disposition. The following clause is an example of such drafting. It is important to specify to whom the trustees must pay income or capital during the extra three-year period. The following clause also includes optional language that specifies that the

trustees may favour the interests of the spouse to the detriment of the residual beneficiaries in the administration of the spousal trust and the encroachments upon capital.

For purposes of this Paragraph X of my Will, the term “Division Date” means the third (3rd) anniversary of the date of death of the last to die of me and my wife, *, or such earlier date not preceding the date of death of the last to die of me and my wife, *, as my Trustees in their absolute discretion determine.

Until the Division Date, my Trustees shall keep invested and reinvested the residue of my estate and shall deal with the residue of my estate as provided below in this Paragraph.

During the lifetime of my wife, *, my Trustees shall pay the annual net income derived from the residue of my estate to or for the benefit of my wife, *, in such monthly, quarterly or other convenient instalments as my Trustees in their absolute discretion consider advisable, provided that my Trustees may at any time and from time to time pay to or for the benefit of my wife, *, any amount or amounts out of the capital of the residue of my estate as my Trustees in the exercise of an absolute discretion consider advisable. I hereby advise my Trustees that when exercising their discretion with respect to whether to pay amounts of the capital of the residue of my estate to my wife, *, it is my intention that my wife, * be maintained at the same standard of living at which she was accustomed to living during my lifetime. Further, when investing and reinvesting the residue of my estate and when exercising their discretion with respect to whether to pay amounts of the capital of the residue of my estate to my wife, *, my Trustees shall be entitled to prefer the interests of my wife, * over the interests of those beneficiaries who may be entitled to the capital of the residue of my estate on the Division Date.

After the date of death of the last to die of me and my wife, * and until the Division Date, my Trustees shall pay or apply the annual net income derived from the residue of my estate to or for the benefit of any one or more of and to the exclusion of any one or more of my issue living from time to time in such proportions, in such manner and on such terms, trusts and conditions as my Trustees in their absolute discretion determine. In addition, until the Division Date, my Trustees shall have the power at any time or times to pay to or apply for the benefit of any one or more of and to the exclusion of any one or more of my issue living from time to time such amount or amounts out of the capital then remaining of the residue of my estate as my Trustees in their absolute discretion may determine.

On the Division Date, my Trustees shall deal with the residue of my estate or the part thereof then remaining in the following manner [*add appropriate dispositive provisions*]:

Dual Trusts For Surviving Spouse

Description of Clause: An alternative to consider is providing for two trusts to be established on the testator’s death – one for the benefit of the surviving spouse and one

for the benefit of the children of the testator (and possibly the surviving spouse). These dual trusts are commonly referred to as a spousal trust and a tainted or family trust. The rationale behind the creation of dual trusts is to take advantage of certain provisions of the Income Tax Act. In particular, the provision is drafted in such a way that the executors are given discretion over which assets form which trust. Those assets which have accumulated capital gains at death will typically form the capital of the spousal trust, thereby taking advantage of the deferral opportunity provided by the Income Tax Act for assets left in a spousal trust. Assets which do not have accumulated capital gains at death will typically form the capital of the family trust. This form of Will is usually used in second marriages where the testator wants to provide for both a second spouse and children of a first marriage. It is also common to use this form of Will in the context of shares of a private company.

If my wife, JANE DOE, survives me, my Trustee shall divide the residue of my estate into two separate funds. The first such fund (the "Family Trust") shall consist of the sum of ONE DOLLAR (\$1.00) together with any other assets of my estate that my Trustees in their absolute discretion shall allocate to the Family Trust within a period of thirty-six (36) months after my death, and shall be dealt with in accordance with subparagraph (i). The second such fund (the "Spouse Trust") shall consist of all assets of my estate that my Trustees have not specifically allocated to the Family Trust, and shall be dealt with in accordance with subparagraph (ii).

- (i) My Trustees shall hold the Family Trust during the lifetime of my wife and may at any time and from time to time pay to or apply for the benefit of my wife and issue, or any one or more of them to the exclusion of the other or others of them and in such proportions as my Trustees in their absolute discretion deem advisable, all or such part of the net income derived from the Family Trust, and such part or parts of the capital thereof, as my Trustees in their absolute discretion consider to be in the best interests of my wife and issue. In exercising the said discretion, my Trustees shall give primary consideration to the welfare of my wife and shall ensure that she continues to enjoy the same standard of living following my death as she enjoyed at the time of my death. Any net income derived from the Family Trust that is not so used in any year shall be accumulated and added at the end of the year to the capital of the Family Trust, provided that after the expiration of the maximum period for accumulation of income permitted by law, my Trustees shall pay to or apply for the benefit of my wife and issue, or any one or more of them to the exclusion of the other or others and in such proportions as my Trustees may determine, the whole of the net income derived from the Family Trust.
- (ii) My Trustees shall hold the Spouse Trust during the lifetime of my wife and shall pay the annual net income derived therefrom to or for the benefit of my wife, in such annual or more frequent periodic payments as my Trustees in their absolute discretion consider advisable. In addition, my Trustees may at any time or times pay to or for the benefit of my wife any amount or amounts out of the capital of the Spouse Trust as my Trustees in their

absolute discretion consider advisable. My Trustees are expressly relieved of any duty to maintain an even hand among beneficiaries in respect of the investment management of the Spouse Trust and shall be entitled to adopt an investment policy that favours my wife at the expense of the residuary beneficiaries.

Without placing any legal obligation on my Trustees, I desire that they engage legal and accounting experts to advise them as to the income tax consequences under the *Income Tax Act*, R.S.C. 1985 (5th Supp.) c. 1, as amended (the "Income Tax Act"), and any other tax consequences of any kind pursuant to any legislation of any jurisdiction, of allocating or not allocating any of the assets of my estate to the Family Trust or the Spouse Trust. In particular, as well as considering the provisions of both the Family Trust and the Spouse Trust, I should like my Trustees to consider the relative advantages of deferring income tax liabilities arising at my death in respect of my assets, by allowing a portion or all of the residue of my estate to be administered as part of the Spouse Trust and thereby taking advantage of the provisions of Subsection 70(6) of the Income Tax Act, as compared to permitting income tax liabilities to arise at my death pursuant to Subsection 70(5) of the Income Tax Act by allocating a portion or all of the residue of my estate to the Family Trust. I specifically exonerate my Trustees from any liability to my estate or to any beneficiary thereof as a result of their allocation of assets between the Family Trust and the Spouse Trust if my Trustees act in good faith in making such allocation.

Annotation: The clause above creates two trusts to be maintained during the surviving spouse's lifetime. One is a family trust with the surviving spouse and the children as the potential income and capital beneficiaries; the other is an exclusive spousal trust, with the surviving spouse as the sole beneficiary. In the family trust, the trustees may pay income to the surviving spouse or the testator's children, in their discretion, however the trustees are to give primary consideration to the welfare of the surviving spouse. In the spousal trust, all income must be paid to the surviving spouse on an obligatory basis. The trustees may also make discretionary distributions of capital to the surviving spouse or the children out of the capital assets of the family trust and to the surviving spouse out of the spousal trust.

The preference given to the surviving spouse with respect to the income of the family trust is provided to oust the even-hand rule. Unless the trust document provides otherwise, the trustees must consider the interests of all of the beneficiaries when making investment and distribution decisions and they must not be seen to making decisions which prefer the interests of one beneficiary over another.

After the death of the surviving spouse, or if, in fact, the testator is the surviving spouse, the appropriate wording for the alternate gift is as follows.

Upon the date of death of the survivor of my wife and me (the "Division Date"), my Trustees shall divide the residue of my estate or the part thereof then remaining (which shall include both the Family Trust and the Spouse Trust)... [See options below for Gifts to Issue]

It is also common to allow the spousal and family trust structure to continue to exist for a period of up to three years following the death of the surviving spouse. This will allow for the carry back of capital losses for income tax purposes. If this is appropriate, then the clause above should be amended to define the Division Date as the third anniversary of the date of death of the survivor of the testator and his or her spouse. The clause should go on to provide what is to happen to the income earned in the spousal trust after the death of the surviving spouse and before the Division Date.

GIFTS TO ISSUE

The following clauses are intended to follow the gifts to a spouse set out above, and can be used whether the gift to the spouse was an outright gift or was held in one or more trusts. If the testator is unmarried when the Will is prepared, or is not leaving the residue of his or her estate to his or her spouse, then all references to “the Division Date” should be replaced with references to “my death”.

Outright Distribution to Issue

Description of Clause: The following clause provides for a stirpital distribution among the issue of the testator who are alive at the death of the survivor of the testator and his or her spouse.

[My Trustees shall divide the residue of my estate - see options above for Gifts to Spouse] among my issue in equal shares *per stirpes*.

*Annotation: With class gifts e.g. “my children” it is important to provide at what point in time membership in the class is to be determined. Since a stirpital distribution means a distribution only to the next generation (unless one of that generation had predeceased, in which case he or she will be represented by his or her children), it is not necessary to use any qualifying terms to identify the point in time for determining membership in the class with “issue *per stirpes*.” Indeed, using qualifying terms in this context can lead to confusion, and phrases such as “among my issue living at the date of division in equal shares *per stirpes*” have lead courts to interpret the gift as a gift to all of the issue of the will-maker - effectively, to read the clause as a gift to issue in equal shares *per capita*. It is easy to avoid the risk of having the Will interpreted this way, by refraining from the (unnecessary) qualification of issue *per stirpes*.*

Simple Trust For All Issue

Description of Clause: The following clause provides for a stirpital distribution among the issue of the testator. Any share set aside for a child, grandchild or more remote issue is held in trust until the beneficiary reaches the age of 25.

[My Trustees shall divide the residue of my estate - see options above for Gifts to Spouse] among my issue in equal shares *per stirpes*, and each share (the “Share”) shall be held in a separate trust in accordance with the following provisions:

- (i) Until the issue for whom the Share is set aside (“the Beneficiary”) attains the age of 25 years, my Trustees may from time to time pay to or apply for the benefit of the Beneficiary the whole or such part or parts of the income of the Share and such part or parts of the capital thereof as my Trustees shall from time to time in their unfettered discretion consider necessary or advisable for any reason whatsoever. My Trustees shall accumulate and add to the capital of the Share for all purposes of my Will any income not so paid or applied in any year until the expiration of the maximum period permitted by law for the accumulation of income, and shall pay all such income arising after the expiration of that period to or for the benefit of the Beneficiary for his or her own use absolutely. On the later of the Division Date and the date that the Beneficiary attains the age of 25 years, my Trustees shall pay and transfer to the Beneficiary all of the capital of the Share, for his or her own use absolutely.
- (ii) If the Beneficiary dies before attaining the age of 25 years, then on the date of death of the Beneficiary, my Trustees shall divide the Share or the part thereof then remaining:
- (A) among his or her issue, or failing such issue,
 - (B) among the issue of his or her parent, who is me or one of my issue, or failing such issue,
 - (C) among the issue of his or her grandparent, who is me or one of my issue, or failing such issue,
 - (D) among my issue,

in each case in equal portions *per stirpes* and to deal with each such portion in accordance with the provisions of this subparagraph * of my Will as if references therein to the “Beneficiary” referred to the individual to whom such portion shall have been so allocated and as if references in the said subparagraph * to a “Share” referred to such portion.

- (iii) Notwithstanding any of the foregoing provisions of this paragraph * of my Will, on the twentieth (20th) anniversary (the “perpetuity date”) of the death of the last survivor of me, my spouse, and all of my issue alive at my death, any Share or portion held by my Trustees in trust shall vest absolutely in possession in the individual for whose benefit the share is held, for his or her own use absolutely.

Annotation: *Where a gift is made to a person with a condition that s/he is not to receive it until reaching a specified age that is more than the age of majority, it is important to draft the clause so to avoid the application of the rule in Saunders v. Vautier. The rule provides that unless it is certain that a beneficiary will not inherit property if s/he fails to reach the specified age, the beneficiary can direct the trustees to give him or her the property upon his or her attaining the age of majority. This result can be avoided by*

providing for a gift over in the event the beneficiary fails to attain the specified age. Accordingly, the gift will not vest in the beneficiary until he or she reaches the specified age. Thus, it is uncertain whether the beneficiary will inherit.

Clause (iii) of the trust deals with the possible application of the rule against perpetuities to the trust. The rule essentially provides that the trust must be fully vested before the expiration of 21 years from the death of the last “life in being” – in this case the last survivor of the testator, his spouse and his issue living at his death. The Perpetuities Act, R.S.O. 1990, c. P.9, modifies the traditional common law rule by the addition of the “wait and see” rule. This provides that where a trust may vest either within or outside the perpetuity period, the trust will be presumed to be valid until actual events show otherwise. The terms of the trust set out above provide that if a child dies before attaining age 25, the trust property will be divided among that child’s issue and held for the issue until age 25. It is possible that the child’s issue were not born during the testator’s lifetime and are therefore not lives in being. If, on the child’s death, he or she was the last life in being, and the issue are then less than 4 years old, the trust property would be destined to vest outside the perpetuity period. Clause (iii) provides that, if the end of the perpetuity period is ever reached, any property being held in trust at that time will immediately vest in the beneficiary. This ensures that the trust will always become fully vested within the perpetuity period.

Staged Distributions to Children

Description of Clause: The following clause creates trusts only for the children (not the more remote issue) of the testator. The capital of the trusts will be distributed in several stages, as each child attains certain ages.

[My Trustees shall divide the residue of my estate - *see options above for Gifts to Spouse*] among my issue in equal shares per stirpes, provided that my Trustees shall hold any share (a “Share”) allocated to a child of mine (“my child”) who has not attained the age of thirty (30) years in a separate trust in accordance with the following provisions:

- (i) While the Share or any part thereof is held in trust, my Trustees may from time to time pay to or apply for the benefit of my child the whole or such part of the net income derived from the Share, and such part or parts of the capital thereof, as my Trustees in their uncontrolled discretion from time to time consider necessary or advisable for the benefit of my child. Any net income derived from the Share that is not paid to or applied for the benefit of my child in any year shall be accumulated and added at the end of the year to the capital of the Share, provided that if my Trustees are still holding the Share on the expiration of the maximum period for accumulation of income permitted by law, they shall thereafter pay to or apply for the benefit of my child all of the net income derived from the Share or the part thereof from time to time remaining.

- (ii) One-quarter (1/4) of the Share or of the part of the Share then remaining shall be paid or transferred to my child on the later of the Division Date and the date that my child attains the age of twenty-one (21) years, one-third (1/3) of the part of the Share then remaining shall be paid or transferred to my child on the later of the Division Date and the date that my child attains the age of twenty-five (25) years; and the remainder of the Share shall be paid or transferred to my child when he or she attains the age of thirty (30) years. For greater certainty, if my child has attained the age of twenty-five (25) years at the Division Date, a total of one-half (1/2) of the Share shall be distributed to him or her.
- (iii) If my child dies before attaining the age of thirty (30) years, my Trustees shall divide the Share or the part thereof then remaining among the issue of such child alive at his or her death in equal shares per stirpes; provided that if my child should die without leaving issue him or her surviving, the Share or the part thereof then remaining shall be divided in equal shares per stirpes among my issue alive at the death of my child; provided further that the portion accruing to any other child of mine then alive and under the age of thirty (30) years shall be added to and dealt with as an accretion to the share held by my Trustees for such other child pursuant to the terms of this subparagraph.

Annotation: A typical discretionary trust allows the trustees to distribute income and capital at any time and for any purpose upon the request of the beneficiary. However, the beneficiary will ordinarily have to explain why he or she wants or needs the money, and convince the trustees that the distribution is for a good purpose. A staged distribution allows a beneficiary to receive part of the capital of the trust fund without having to justify its use. Although this creates a risk that the beneficiary may squander the money, at least he or she will have a second chance at a later date with the money remaining in trust. Providing for a gradual transfer of financial responsibility to the beneficiary can be reassuring both to the testator and the beneficiary.

When giving instructions, clients will typically state what proportion of the original amount of the inheritance should be distributed at each age. However, as the value of the trust fund may either increase (due to prudent investment) or decrease (due to payment of expenses) over time, distributions made after death should be described as a fraction of the trust fund then remaining. For example, in the clause set out above, the client wished 1/4 to be distributed at age 21, 1/4 at age 25 (or 1/3 of the part remaining after the first distribution) and the remainder at age 30.

Lifetime Trusts for Children

Description of Clause: The following clause continues each child's trust for his or her lifetime. Each child will be the sole trustee of his or her trust, with discretion to distribute income and capital to the child him or herself or the spouse and/or issue of the child. The child also has the right to determine how the assets remaining in trust are divided among the spouse and/or issue of the child on the child's death.

[My Trustees shall divide the residue of my estate - *see options above for Gifts to Spouse*] among my issue in equal shares per stirpes, provided that my Trustees shall hold any share (a "Share") allocated to a child of mine ("my child") in a separate trust in accordance with the following provisions:

- (i) If my child has not attained the age of thirty (30) years at my death, my Trustees shall hold the Share and may from time to time pay to or apply for the benefit of my child all or such part of the net income derived from the Share or the part thereof from time to time remaining, and such part or parts of the capital thereof, as my Trustees in their uncontrolled discretion from time to time consider necessary or advisable for the benefit of my child. Any net income derived from the Share that is not paid to or applied for the benefit of my child shall be accumulated and added at the end of the year to the capital of the Share.
- (ii) On the later of my death and the date that my child attains the age of twenty-five (25) years, my Trustees shall pay or transfer to my child, for his or her own use absolutely, any portion of the Share, to a maximum of one-third (1/3) of its value at that time, that my child may request in writing.
- (iii) On the later of my death and the date that my child attains the age of thirty (30) years, my Trustees shall pay or transfer the Share or the part thereof then remaining to my Child's Trustees in respect of the Share (as defined in clause (vi) of this paragraph *).
- (iv) My Child's Trustees shall thenceforth hold the Share and may from time to time pay to or apply for the benefit of my child and his or her spouse and issue, or any one or more of them to the exclusion of the other or others of them and in any proportions that my Child's Trustees may in their absolute discretion determine, all or such part of the net income derived from the Share or the part thereof from time to time remaining, and such part or parts of the capital thereof (even to the exhaustion of the Share), as my Child's Trustees in their uncontrolled discretion from time to time consider necessary or advisable for the respective benefit of my child and his or her spouse and issue. In making any such determination, I specifically authorize my Child's Trustees to place the interests of my child above those of any other beneficiary. My Child's Trustees are also expressly relieved of any duty to maintain an even hand among beneficiaries in respect of the investment management of the Share and shall be entitled to adopt an investment policy that favours my child at the expense of the residuary beneficiaries. Any net income derived from the Share that is not paid to or applied for the benefit of my child and his or her spouse and issue in any year shall be accumulated and added at the end of the year to the capital of the Share, provided that if my Child's Trustees are still holding the Share on the expiration of the maximum period for accumulation of income permitted by law, they shall thereafter pay to or apply for the benefit of my child and his or her spouse and issue, or any one or more of them to the

exclusion of the other or others of them and in such proportions as my Child's Trustees may in their absolute discretion determine, all of the net income derived from the Share or the part thereof from time to time remaining.

- (v) On the death of my child, my Child's Trustees shall distribute the Share or the part thereof then remaining among the issue of my child alive at his or her death in such proportions and on such terms and conditions as my child may have directed by Will. If my child has made no such direction or if and to the extent that the direction is void, my Child's Trustees shall divide the Share or the part thereof then remaining among the issue of my child in equal shares per stirpes. If my child should die without leaving issue, the Share or the part thereof then remaining shall be held for or distributed among my other issue in accordance with this paragraph * as if I had died immediately after my child, or if there are no other issue of mine alive at the death of my child, the Share or the part thereof then remaining shall be added to the residue of my estate and shall be distributed in accordance with paragraph * of my Will [being the clause setting out the alternate distribution if there are no spouse or issue surviving].
- (vi) The Child's Trustees in respect of the Share shall be my child for whom the Share was set aside pursuant to this paragraph * and such other person or persons as my child may select by instrument in writing to be a Child's Trustee in respect of the Share. My child (or after his or her incapacity to manage property or his or her death, my child's attorneys for property or guardians of property or the estate trustees of my child's estate) may at any time and from time to time by instrument in writing resign from the office of Child's Trustee, remove any other person acting as Child's Trustee from such office, or appoint additional or successor Child's Trustees.
- (vii) I hereby declare that in administering the Share set aside for a child of mine as provided in this paragraph *, my Child's Trustees in respect of the Share shall have all of the same powers and authorities as the Executors and Trustees of my general estate.

Annotation: The purpose of this lifetime trust is to provide income splitting opportunities to adult children. Prior to January 1, 2016, income could be retained in the trust and taxed at the graduated rates available to individuals, thus splitting the income between the adult child and the trust. Since January 1, 2016, income splitting is only available if the child has a spouse and/or issue in a lower tax bracket that the child would otherwise be supporting out of after-tax income and to whom the child may instead distribute pre-tax income from the trust. How large an inheritance needs to be before it is worth setting up a trust will depend on the number and financial situation of the child and his or her dependents and the comfort level of the child and the testator with sophisticated structures. However, the tax savings generated by paying even \$10,000 to \$20,000 of pre-tax income to a dependent family member of the child with no other income, may outweigh the administrative costs (e.g. filing annual T3 tax returns), inconvenience (e.g.

keeping separate statements of the trust funds) and risk (e.g. of a claim by the contingent beneficiaries) associated with the trust.

Another option is to give the trustees of the child's trust the power to declare the date on which the trust terminates. In this way, the child can collapse the trust if it turns out to be administratively burdensome or disproportionately expensive. The simplest way to accomplish this is to have the trust held until the "Division Day" and define that term as follows:

My child's Division Day shall be the first to happen of:

- (a) the date of death of my child; and
- (b) such earlier date as the Child's Trustees in the exercise of an absolute discretion select.

If the trust uses a Division Day, it should also specify what happens to the corpus of the trust on that day – typically, it will be paid to the child for his or her own use absolutely if the date chosen is before the child's date of death, and will have a power of appointment, like the one in the precedent above, if the trust is to be distributed on the death of the child.

Until the child who is the primary beneficiary of the trust reaches an age that the testator considers sufficiently responsible to control the trust fund, the terms of the trust are similar to those of the staged distribution above. A third party Trustee will invest the money, and has the discretion to pay out income and capital to the child alone. The child may, but need not, withdraw a proportion of the trust fund at the intermediate age of 25.

After the child reaches the age of 30, he or she will acquire additional access to and control over the trust assets. The child will become a Child's Trustee together with one or more other persons chosen by the child. The child has the right to resign as Child's Trustee, remove any other Child's Trustee or appoint one or more additional or successor Child's Trustees. As a Child's Trustee, the child can participate in investment and distribution decisions. Income and capital may be distributed not only to the child, but also to his or her spouse and issue (which should be defined in the Will, as in the clauses set out above); however, the Child's Trustees have the right to put the child's interests before those of any other beneficiary, and even to terminate the trust fund by distributing all its assets to the child.

On the child's death, the child has a specific power of appointment over the remaining assets in the trust fund, exercisable in favour of the child's spouse and/or issue. The rationale for limiting the class of beneficiaries in favour of whom the power of appointment can be exercised is to make it a special power of appointment rather than a general power of appointment. As mentioned above, a special power of appointment does not cause the assets which are the subject matter of the power to fall into the primary beneficiary's estate where they will be subject to claims of creditors and probate fees.

It is common for these trusts to name the child (or other primary beneficiary of a lifetime trust) as the sole trustee. There would appear to be no grounds for Canada Revenue Agency to look through the trust and treat the child as the sole beneficial owner of the assets. Further, while a creditor may have an argument that being the sole trustee with broad capital distribution provisions, means the sole Trustee can collapse the trust, it is not a certainty that this is so. Nevertheless, the more conservative approach would be to have more than one trustee, or to remove the unilateral right to distribute the entire trust fund to the child, or otherwise to reduce the child's control over the assets. This is especially important if the trustees have a power to determine when the trust will terminate.

It should be noted that notwithstanding the new tax rules applicable to testamentary trusts, it is possible to create a testamentary trust that allows income to be allocated to minor beneficiaries (and taxed at their progressive rates) without distributing that income out of the trust. These trusts must meet the specific requirements set out in subsection 104(18) of the Income Tax Act. A review of such a tax-planned trust is beyond the scope of this Annotated Will program.

For the maximum tax efficiency, these income splitting trusts will include a spouse in the pool of discretionary beneficiaries to whom income of the trust can be paid at the discretion of the trustees. The clause drafted above also allows for capital distributions to a spouse. Clients should be made aware, however, that including the child's spouse as a beneficiary of the trust may be very problematic if the child's marriage subsequently break down. At the very least, the possibility that the spouse could receive income or capital of the trust will give him or her a right to information about the trust, and where there is a pattern of distribution from the trust, it may be very difficult to argue that the trust should not be included as part of the child's net family property. The complexities of family law property claims as they affect interests in trusts are also beyond the scope of this Annotated Will program.

Hotchpot Clause

Description of Clause: In the event a beneficiary, for instance one child of the testator, has received an advance from the testator or owes a debt to the testator that the testator would like to have taken into account when dividing the residue of the estate, then a "hotchpot" clause should be used in the Will. The use of a hotchpot clause will equalize the benefits which beneficiaries may receive by advances to them by the testator during his or her life or by the release in the Will of debts owing by the beneficiary to the testator. The purpose of a hotchpot clause is to prevent a person to whom a testator has left a share of his or her estate, and who has been advanced in the testator's lifetime, from obtaining, by the combined effect of the bequest and the advance, more of the testator's property than s/he intended the beneficiary should have. To use a hotchpot clause, you need to ensure that the clause that provides for the division of the residue of the estate is subject to the hotchpot clause. The following is a precedent of a hotchpot clause.

I declare that I have advanced by way of loan to my son, JACK DOE, the amount of \$x and this amount, together with any other sum or sums that I may after the

date of this my Will advance to him or for his benefit, or so much thereof as may be owing to me at my death, shall not be charged or claimed as a debt owing to me from him or his representatives, but every such sum, whether legally constituting a debt or not, with interest thereon from my death at the rate of 2% per cent per annum, but not any interest thereon prior to my death, shall be brought into account by way of hotchpot, in the division of the residue of my estate, as against my son, JACK DOE, and his wife and issue or any other person or persons interested in his share of the residue of my estate.

Annotation: *In the event the hotchpot clause is used to equalize debts that are owed by beneficiaries (as opposed to inter vivos gifts made to beneficiaries), it is important that you ensure there is a release of the debt either in the hotchpot clause itself (as above) or in a separate forgiveness of debts provision in the Will. Otherwise the debt will still be owing to the estate and the beneficiary will be doubly impacted. Note with the decision in Hare v. Hare (2006), 218 O.A.C. 164 (C.A.), a hotchpot clause may provide the only means to address debts that are or may become statute barred.*

If the will-maker is using more than one will, we suggest putting the hotchpot clause in both wills, and referring to the complementary will.

GIFTS IF THERE ARE NO SURVIVING SPOUSE OR ISSUE

Description of Clause: *The following clause, sometime referred to as a “common disaster” clause, provides for a distribution of the testator’s estate if the testator’s spouse and issue have all predeceased.*

If none of my issue are alive at the Division Date or at any time subsequent thereto to take an absolutely vested interest in the residue of my estate, then upon the date of death of the last to die of me, my wife and my issue (the “Date of Final Distribution”), my Trustees shall divide the balance of the residue of my estate then remaining as follows:

- (a) If any one or more of my brother, Gary Doe, my sister, Carrie Custody, my mother, Jessica Doe and my father, Justin Doe, are alive on the Date of Final Distribution, my Trustees shall set aside one (1) equal share of the said residue and shall divide such one (1) equal share into the requisite number of equal parts to give effect to the following provisions:
 - (i) if my brother, Gary Doe is then alive, my Trustees shall pay one (1) equal part to my brother, Gary Doe;
 - (ii) if my sister, Carrie Custody is then alive, my Trustees shall pay one (1) equal part to my sister, Carrie Custody; and
 - (iii) if either or both of my mother, Jessica Doe and my father, Justin Doe, are then alive, my Trustees shall pay one (1) equal part to my mother, Jessica Doe, and my father, Justin Doe, in equal shares if they are both then alive, or all to the survivor of them if only one of them is then alive; and

- (b) If any one or more of my brother-in-law, Sam Smith, my sister-in-law, Sophie Smith, my mother-in-law, Stephanie Smith and my father-in-law, William Smith are alive on the Date of Final Distribution, my Trustees shall set aside one (1) equal share of the said residue and shall divide such one (1) equal share into the requisite number of equal parts to give effect to the following provisions:
- (i) if my brother-in-law, Sam Smith is then alive, my Trustees shall pay one (1) equal part to my brother-in-law, Sam Smith;
 - (ii) if my sister-in-law, Sophie Smith is then alive, my Trustees shall pay one (1) equal part to my sister-in-law, Sophie Smith; and
 - (iii) if either or both of my mother-in-law, Stephanie Smith and my father-in-law, William Smith are then alive, my Trustees shall pay one (1) equal part to my mother-in-law, Stephanie Smith and my father-in-law, William Smith, in equal shares if they are both then alive, or all to the survivor of them if only one of them is then alive.

Annotation: *The above clause would apply where (i) there is no spouse or issue of the testator alive at his or her death, (ii) the residue of the estate was being held in a spouse and/or family trust and there are no issue of the testator alive at the death of the spouse, or (iii) there are issue alive at either of the foregoing dates but they die before their trust funds are fully distributed (this last option is often not contemplated by the testator). The clause provides for a very typical distribution where half the estate is divided equally among the surviving siblings and parents of one spouse and the other half of the estate is divided equally among the surviving siblings and parents of the other spouse. The division of each half of the estate depends upon which members of that spouse's family are alive. For instance, in the case of the testator's side, if Carrie Custody, Jessica Doe and Justin Doe have all died, then Gary Doe will take the full share which will equal 50% or one half of the estate (i.e. the full share set aside for the testator's side will not be divided into parts other than the part for Gary Doe). Note that this clause does not provide for gifts to the issue of any predeceased siblings. If the testator wishes to provide for a gift over to the issue of a predeceased sibling, then the following language can be added to the gifts to the siblings:*

... provided that if Gary Doe is not alive at the Date of Final Distribution but has left issue then alive, my Trustees shall divide such one (1) equal part among such issue in equal shares per stirpes.

When drafting "mirror Wills" for spouses, it is important to recommend to clients that the Alternate Gift of Residue clause be the same in each spouse's Will. Otherwise, if the spouses die within a relatively short time, but one survives the other by more than thirty days and inherits all the other spouse's property, it will be the provisions of that surviving spouse's Will that determine the ultimate distribution of the entire estate. As there is no way to know the order in which the spouses will die or the time that may elapse between deaths, the order of deaths should not determine the identity of the ultimate beneficiaries.

However, the solicitor must also warn both spouses that in the absence of a contract not to change their Wills, either spouse may change the Alternate Gift of Residue clause (or, for that matter, any other part of his or her Will) without the consent of the other, either before or after the other's death. The reporting letter often contains a reminder regarding this matter, and also the fact that the drafting solicitor will not act for a spouse wishing to change his or her Will without the knowledge of the other spouse because of the solicitor's obligation to both clients in a joint retainer situation.

"HENSON TRUST" FOR DISABLED BENEFICIARY

Description of Clause: *This clause would be used for the share of a beneficiary who is disabled and is reliant upon Ontario Disability Support Program ("ODSP") payments and the other benefits (such as a dental care and drug card) that come with qualifying for ODSP.*

If my daughter, ANN DOE ("Ann"), is alive at the Division Date, then my Trustees shall pay the sum of * (the "Ann Doe Trust Fund") to my son, JACK DOE, as trustee thereof (my said son and any other person or persons acting as a trustee of the trust created hereunder being hereinafter referred to as "Ann's Trustees"), and I declare that Ann's Trustees shall have all the same powers, authorities and discretions granted to my Trustees by this my Will. Ann's Trustees shall stand possessed of and keep invested the Ann Doe Trust Fund on the following trusts:

- (a) Until the date of the death of Ann, Ann's Trustees may pay or apply so much of the income of the Ann Doe Trust Fund together with so much of the capital thereof to or for the benefit of Ann, in such amounts (including, for greater certainty, the whole of such income and the whole of such capital), and subject to such trusts, terms and conditions (including the giving of discretion to trustees or others) as Ann's Trustees shall in the exercise of their absolute and unfettered discretion consider advisable from time to time and, and shall deal with any income not so paid or applied as aforesaid in any year in the manner hereinafter provided:
 - (i) until the day that is 21 years from the date of my death, Ann's Trustees shall accumulate all such income, such income so accumulated to be added to the capital and treated as a part thereof;
 - (ii) after the day that is 21 years from the date of my death, Ann's Trustees shall pay all such income arising after that day to those of the issue of Ann [or specify other beneficiaries], who shall be alive after such day in such shares as Ann's Trustees may determine;

and for greater certainty I hereby declare that neither the Ann Doe Trust Fund nor any interest in it nor any income therefrom shall vest in Ann and the only interest she shall have shall be in payments actually made to her, or on her behalf, and received by her or in property purchased for her;

- (b) Without in any way binding the discretion of Ann's Trustees, I hereby declare that it is my wish that in exercising their discretion in accordance with the provisions of subparagraph *(a) of my Will, Ann's Trustees should provide extra comforts and amenities of life for Ann without, to the extent reasonable in the circumstances, impairing the benefits which she might receive from other sources, including but not limited to governmental sources;
- (c) Ann's Trustees, in exercising any of the powers conferred on them, are hereby expressly relieved of any duty to maintain an even hand among beneficiaries, with the intent that Ann's Trustees should have access to the entire income and capital of the Ann Doe Trust Fund to make such payments to or on behalf of Ann as they may in their absolute and unfettered discretion consider advisable. Ann's Trustees are also expressly relieved of any duty to maintain an even hand among beneficiaries in respect of the investment management of the Ann Doe Trust Fund and shall be entitled to adopt an investment policy that favours Ann at the expense of the residuary beneficiaries; and
- (d) On the death of Ann, Ann's Trustees shall divide the Ann Doe Trust Fund, or so much thereof as shall then remain, along with any accumulated income, in equal shares per stirpes among the issue of Ann alive at the date of her death, and if there are none, Ann's Trustees shall pay the Ann Doe Trust Fund to *.

Annotation: The Ontario Disability Support Program Act, 1997, S.O. 1997, c. 25, Sch, B (the "ODSPA") came into effect on June 1, 1998. The purpose of the ODSPA is to provide income support to people who are qualified and over the age of eighteen.

There are three ways to qualify for income support under the ODSPA. First, a person may be "grandparented" as a former family benefits recipient. Second, a person may be a member of a prescribed class such as a recipient of a Canada Pension Plan disability pension, or a resident of certain facilities or homes such as psychiatric hospitals and homes for special care. Third, a person may qualify under the ODSPA definition of "person with a disability".

Generally, to qualify as a person with a disability, one must have a substantial physical or mental impairment which is expected to last at least 12 months and substantially limits one's activities of daily living in at least one of the following three areas, namely: personal care; activities in the community; or activities in the workplace. The impairment, its likely duration, and its impact on the person's activities of daily living must be certified by an Ontario physician or certain other specified health professionals.

Eligibility for ODSPA is also determined by financial testing.

Once a person has qualified as a person with a disability, certain financial eligibility tests must be met. A single person is entitled to have up to \$5,000 worth of assets and still

qualify for income support. If the disabled person has a spouse, the disabled person is allowed \$7,500 worth of assets and an additional \$500 for each dependant.

Certain personal use property is excluded in calculating the \$5,000 limit, such as an interest in a principal residence, an interest in a second property if required for health and well-being of the disabled person, a motor vehicle of any value, a second motor vehicle up to \$15,000 in value if it is needed by a dependant for work, an RESP, an RDSP, certain trust funds started with an inheritance or life insurance up to a certain monetary limit, the cash surrender value of life insurance, and a prepaid funeral.

Certain additional assets and funds are exempt from the asset limits. In addition, the accumulating income in such funds is exempt from inclusion in the disabled person's income as described further below. One of the most important of these funds is a trust fund of any amount if it is an absolute discretionary trust (commonly known as a Henson trust).

The trusts derive their name and effectiveness from the case of Ministry of Community and Social Services v. Henson.²

In the Henson case, Audrey Henson was a beneficiary of a trust fund created under the Will of her father. The provisions of the trust were as follows:

“To pay so much of the income therefrom, or the whole of the income therefrom, together with so much of the capital thereof to or for the benefit of my daughter AUDREY JOAN HENSON as my Trustees shall in the exercise of their absolute and unfettered discretion consider advisable from time to time. Any income not so paid in any year shall be accumulated by my Trustees and added to the capital of the residue of my estate, provided, however, that if it becomes unlawful for my Trustees to continue such accumulation of income, then the income not so paid in any year to or for the benefit of my said daughter shall be paid to The Guelph and District Association for the Mentally Retarded Incorporated.

The residue of my estate and the income therefrom shall not vest in my said daughter and the only interest she shall have therein shall be the payments actually made to her, or on her behalf, and received by her or for her benefit therefrom. Without in any way binding the discretion of my Trustees, it is my wish that in exercising their discretion in accordance with the provisions of this paragraph, my Trustees take account of and insofar as they may consider it advisable take such steps as will maximize the benefits which my said daughter would receive from other sources if payment from the income and capital of the residue of my estate were not paid to her for her own benefit, or if such payments were limited to an amount or time. In order to maximize such benefits, I specifically

² (1987), 28 E.T.R. 121 (Ont. Div. Ct.), affirmed at (1989), 36 E.T.R. 192 (O.C.A.).

authorize my Trustees to make payments varying in amounts and at such time, or times, as my Trustees in the exercise of their absolute discretion may consider in the best interests of my said daughter.”

The Will further provided that upon the death of Audrey Henson, the trustees were to transfer the remainder of the estate to the Guelph District Association for the Mentally Retarded Incorporated.

The question considered by the Divisional Court was whether Audrey Henson had a beneficial interest in assets held in trust and available to be used for maintenance. The Divisional Court ruled that Audrey Henson did not have such an interest since the trustees had absolute and unfettered discretion and could not be compelled to make payments to her.

In the Ministry of Community and Social Services v. Powell³, the Divisional Court found that a testamentary trust fund was includable in determining the eligibility of a disabled person for family benefits. Thomas Powell was a beneficiary under the Will of his father. The Will provided as follows:

“To keep invested the residue of my Estate and to pay the net income derived therefrom to or for my son, Thomas James Powell, for his support, maintenance, medical attention and assistance as my Trustee in his uncontrolled discretion may decide, with power and authority to my said Trustee to pay to or for the benefit of my son, such part or parts or the whole of the said capital of the said residue of my Estate as he in his uncontrolled discretion considers advisable until my son dies.”

In this case the Divisional Court found that the direction in the Will to pay the net income derived from the residue of the estate to Thomas Powell constituted a mandatory requirement to pay to him all of the net income. Thomas Powell had an enforceable right to the net income. The difference between the clause in the Powell Will and that contained in the Henson Will was that there was no discretion in the Powell Will as to the amount of the income that could be paid to Thomas Powell, nor was there a power to accumulate unpaid parts of the income. The Divisional Court found, however, that the discretion as to the payment of capital to Thomas Powell put the capital beyond the beneficiary’s reach and thus he had no interest in the trust capital for purposes of determining his entitlement to income support.

The Powell case illustrates the importance of careful drafting in the creation of discretionary trusts if it is necessary that the beneficiary maintain his or her entitlement to income support.

Henson trusts can be very useful in allowing money to be set aside to be used to provide extra comforts and pleasures for the disabled person without jeopardizing the person’s entitlement to income support. Often, the amount available to be left by the testator in a

³ (1989), 38 E.T.R. 205 (Ont. Div. Ct.).

Henson trust would not be sufficient to provide full support to the beneficiary if income support under the ODSPA were not available. However, because of the nature of a Henson trust there is potential for abuse. Since the trust is fully discretionary and the beneficiary has no enforceable entitlement, there is the potential for an inappropriate trustee to refuse to make payments from the trust to the disabled person and merely to accumulate the income in favour of the residuary beneficiaries. If a testator chooses to provide benefits for a beneficiary by way of a Henson trust, the choice of trustees is of crucial importance in order to be assured that the funds will be managed and used in a responsible manner. It is perfectly appropriate to name a mentally competent disabled beneficiary as a co-trustee of his or her own Henson trust, although not advisable for the beneficiary to act as the sole trustee as the ODSPA requires a beneficiary to take positive steps to obtain payment of all assets and income to which he or she may be entitled, and a claim could be made that this obligation also requires a beneficiary acting as a trustee to make payments to him or herself.

With the recent introduction of registered disability savings plans, a testator should consider providing in his or her Will for a gift to an established RDSP instead of or in addition to establishing a Henson trust. Benefits that an RDSP have over a Henson trust include the tax-deferred status of income and capital gains earned in the RDSP; the availability of government contributions (although this is a minor consideration where the funding for the RDSP is received in a lump sum such as a legacy rather than in annual contributions); and the exempt status of both the capital and income in the RDSP and income distributed from the RDSP in determining the beneficiary's entitlement to ODSP benefits. Limitations to the RDSP include the facts that no contributions may be made after the beneficiary turns 59, that both the plan holder and the beneficiary consent to a contribution from any other source, and that the lifetime maximum contribution to an RDSP from all sources is \$200,000 in respect of any one beneficiary.

From 2016 on, it will also be possible for the trustees of a testamentary trust for a disabled beneficiary to elect for the trust to be a Qualified Disability Trust under subsection 122(3) of the Income Tax Act (Canada) ("ITA"). These provisions will apply to a trust for a beneficiary who suffers from a severe and prolonged impairment in physical or mental function. A QDT is created when the executor of a testamentary trust jointly elects, with one or more beneficiaries under the trust, in its T3 return of income for the year to be a qualified disability trust for the year. In order to make the election there are some requirements for information -- such as the electing beneficiary's social insurance number - to be provided in the return, and:

- *each electing beneficiary must be named as a beneficiary in the Will, which appears to require the actual name of the beneficiary, rather than, for example, a reference to "my issue" or "my children", such as might be used if the Will included a general discretionary trust applicable to any beneficiary who is or may be under a disability. Such references would not suffice to meet the QDT definition.*

- *each electing beneficiary must be certified as eligible for the disability tax credit (i.e., an individual with a severe and prolonged impairment in physical or mental function and in respect of whom the certification required for the disability tax credit has been filed with the CRA). Essentially, this means that each electing beneficiary must qualify for the disability tax credit under paragraphs 118.3(1)(a) and (b) of the ITA.*
- *no electing beneficiary can elect with any other trust for the other trust to be a qualified disability trust in the beneficiary's taxation year;*

Since a QDT must be a testamentary trust that arose on and as a consequence of a particular individual's death, a QDT can only be created by Will. Moreover, since the mind and management of the trust must be in Canada in order to maintain its Canadian residence, the selection of a resident trustee will be especially important where there is a possibility that the trust for a disabled beneficiary may be electing as a QDT.

The advantage of an election for the trust to be a QDT is that the income that is not paid to the beneficiary, but retained in the trust, will be taxed as graduated rates, rather than at the top marginal tax rates that would otherwise apply to a testamentary trust after the introduction of the new rules on taxation of testamentary trusts in the 2014 budget.

There may be some disadvantages to electing as a QDT. There are several pitfalls that practitioners should be aware of when considering the use of a QDT. The filing requirements are stringent and the deadlines tight, with no relief for a late-filed election.

This tax credit, under paragraphs 118.3(1)(a) and (b) of the Tax Act, may not be available to all disabled individuals. For example, not all individuals who qualify for provincial disability benefits also qualify for the disability tax credit. Such individuals will not be able to benefit from the QDT designation.

A QDT may be subject to a recovery tax under subsection 122(2) in respect of a previous year. The intent of the recovery tax is to claw-back tax savings for income taxed at graduated rates that is subsequently distributed as capital to a non-electing beneficiary. The formula for the calculation of the recovery tax is somewhat complicated, however, it effectively equals the amount of tax that would have been paid in a previous year if the trust had been subject to the highest marginal rate and taxable income for that year excluded amounts that were subsequently distributed as capital to the electing beneficiary.

A QDT will be subject to the recovery tax under the following circumstances: (i) none of the beneficiaries at the end of the trust year were an electing beneficiary for a preceding year, (ii) the trust ceased to be resident in Canada, or (iii) a capital distribution is made to a non-electing beneficiary. There are several issues to note regarding the recovery tax. The first condition applies to the year in which a qualifying beneficiary passes away and in such year, the recovery tax will apply. In addition, special attention must be paid to the administration of the trust to ensure that its mind and management are in Canada so that it does not become a non-resident trust, triggering the recovery tax under the

second condition. Finally, if there will be multiple beneficiaries of the trust and not all such beneficiaries are disabled, then consideration should be given to the terms of the trust in allowing capital contributions to non-electing beneficiaries. One might consider setting aside a separate trust or trusts for such individuals so that capital can still be distributed to those beneficiaries without the concern of the recovery tax applying.

PAYMENTS DURING MINORITY

Description of Clause: *This clause would apply to a beneficiary under the age of majority whose inheritance was otherwise not directed to be held in trust. Where specific trust provisions are provided for the shares of the testator's issue, this clause will not apply to those shares. If, however, there was a gift over to the issue of a predeceased sibling, then the shares of any minor nieces and nephews would be held by the trustees pursuant to this clause.*

Subject to any specific provisions above, if any beneficiary acquires a vested interest in any share of my estate before attaining the age of majority, my Trustees shall hold and keep the interest of such beneficiary invested and, subject to the applicable law against accumulations and the provisions of my Will providing for distribution of any share of my estate later than upon a beneficiary attaining the age of majority, my Trustees shall pay, apply or use the income and capital, or so much thereof as my Trustees shall in their unfettered discretion determine necessary or advisable, for the benefit of such beneficiary until he or she attains the age of majority.

Annotation: *Persons under the age of majority cannot enter into contracts or otherwise deal with their own property. Accordingly, if a beneficiary inherits while under the age of majority and there is no direction to the Trustees to hold the beneficiary's inheritance, then it must be paid into court. Accordingly, it is prudent to include a clause like this to avoid the cumbersome process of making a payment into court (and later out of the court). Since the beneficiary's inheritance is fully vested, the trustees are acting as bare trustees when holding the beneficiary's inheritance under this clause.*

A common drafting error in Wills is to amend a standard clause such as the one above by changing "age of majority" to a later age such as 21 or 25. This will not change the fact that the beneficiary's gift is fully vested since the clause does not contain an alternate gift in the event the beneficiary fails to attain the specified age. Accordingly the rule in Saunders v. Vautier would apply, with the result that the beneficiary can demand payment of his or her gift upon attaining the age of majority.

RECEIPTS

Description of Clause: *At law minors cannot contract. Thus, they cannot execute a receipt and release for amounts paid to them or on their behalf by the trustees. This clause allows the trustees to pay out money they are holding on behalf of minors to other persons and thereby obtain a receipt and release from those other persons.*

Subject to any specific provisions above, in making any payments for a beneficiary under the age of majority or who is incapable of managing property, my

Trustees may make any payment or transfer for the benefit of that beneficiary to any one or more of the following persons:

- (i) the beneficiary;
- (ii) a parent of the beneficiary;
- (iii) the legal guardian of the beneficiary;
- (iv) any other person or persons who, in the sole and unfettered opinion of my Trustees, has the care and custody of the beneficiary; and
- (v) the personal representatives of the beneficiary who is not a minor but is otherwise under legal disability;

and my Trustees shall not be under any obligation to see to the application of any funds so paid, and any reasonable evidence that my Trustees have made the payment or transfer shall be a good and sufficient discharge to my Trustees.

Annotation: *In Ontario, parents are not guardians of their minor children's property, unless they have been appointed under the Children's Law Reform Act. Accordingly, a parent also cannot give a receipt and release to the trustees for distributions made to the parent in respect of inheritances of their minor children, except to the extent of a total of \$10,000 under the Children's Law Reform Act. To ensure the trustees have the authority to make payments out of trust funds held for minors, and to discharge their liability with respect to such payments, it is necessary to include this clause.*

Note that this clause does not authorize the Trustee to transfer the amount and responsibility over to a parent of a minor, as the succeeding trustee: Hedley v. Grant, [1998] O.J. No. 5270 (Gen. Div.). If the testator wishes to provide this power to the Trustee, the following paragraph may be added.

Without limiting the generality of the foregoing, I authorize my Trustees to pay or any funds held for an individual under the age of majority or who is mentally incapable of managing property to a parent, guardian, committee, attorney for property, or person standing in place of a parent of that beneficiary, or to any other person my Trustees in their absolute discretion consider to be a proper recipient who shall hold the funds in trust. My Trustees may accept the receipt of the recipient as a full release and shall not be required to see to the administration of the funds. I declare that the recipient as Trustee under this paragraph of this will shall have, with the necessary modifications, all the same powers, authority, discretion and privileges as are granted to the Trustees of my general estate under the provisions of this will.

GENERAL ADMINISTRATIVE PROVISIONS

Description of Clause: *The Trustee Act, R.S.O. 1990, c. T.23, confers administrative powers to trustees as well as the entitlement to claim compensation. The powers conferred by the Trustee Act, however, are not broad enough to give modern trustees the*

range of powers required to administer many estates. The drafter must therefore ensure that the will has the administrative provisions required to give an estate trustee sufficient authority and flexibility to manage a modern estate.

If, in error, no administrative powers are included in a will, the powers conferred in sections 17 – 31 of the Trustee Act will apply. Section 67 of the Trustee Act states that the powers, rights and immunities conferred by the Trustee Act are in addition to those conferred by the instrument creating the trust.

The initial clause introduces the powers which follow. This precedent includes powers which may exceed the powers required for the administration of an estate of average complexity.

Clients who are executors or trustees often reach the conclusion that because they have the power to do something, they can or should do it in any circumstance. It is important to ensure your clients understand that simply because a power is available to them, does not mean it should be exercised at any time. Trustees are still under a fiduciary obligation to determine whether the power should be exercised.

In addition to all other powers vested in trustees by law or otherwise and without restricting the general powers, discretions and authorities in my Will given to my Trustees, my Trustees shall have the power, discretion and authority to deal with the assets of my estate (which for purposes of my Will shall include assets held in any trust created in my Will), without the interference of any person entitled hereunder, as follows:

INVESTMENTS

Description of Clause: *This clause provides for the investment powers of the trustees. It is intended to adopt the provisions of the Trustee Act.*

In making investments for my estate, my Trustees shall make such investments in accordance with the provisions of the Trustee Act R.S.O. 1990, c.T.23, as amended from time to time, and for greater certainty my Trustees may invest the assets of my estate in any form of property in which a prudent investor might invest, including mutual funds and common trust funds. My Trustees shall be fully exonerated from any liability for any loss that may happen to my estate by reason of any investment made by them in good faith.

Annotation: *Prior to 1999 a trustee's authority to make investments was limited by provisions of the Trustee Act and common law. For example, the "anti-netting rule" prevented trustees from netting out investment losses against gains, making trustees strictly liable for investment decisions. Trustees were not permitted to invest in mutual funds or to create discretionary investment accounts. Both of these activities were seen to violate the anti-delegation rule, which provides that those who are themselves delegates, may not further delegate.*

When planning the investment of trust property, trustees are required to consider the following seven criteria, "in addition to any others that are relevant to the

circumstances”: (i) general economic conditions, (ii) the possible effect of inflation or deflation, (iii) the expected tax consequences of investment decisions or strategies, (iv) the role that each investment or course of action plays within the overall trust portfolio, (v) the expected total return from income and the appreciation of capital, (vi) needs for liquidity, regularity of income and preservation or appreciation of capital, and (vii) an asset’s special relationship or special value, if any, to the purposes of the trust or to any one or more of the beneficiaries. In addition, there is an express obligation on a trustee to diversify the trust property to the extent that is appropriate to the needs of the trust and general economic and investment market conditions.

The failure to comply with the statutory requirements, including those pertaining to the use of an investment agent (see below), will leave a trustee without recourse to the sections of the Trustee Act allowing for relief for technical breaches of trust.

RELIEF FROM LIABILITY

Description of Clause: This clause is intended to provide the trustees with protection from certain claims of the beneficiaries.

No Trustee shall be liable for any loss or damage which may happen to my estate or any part thereof (including without limitation any company or other entity whose shares or ownership interests are comprised in my estate) or the income thereof at any time from any cause whatsoever unless such loss or damage shall be caused by her or his own actual fraud or gross negligence. A Trustee shall not be liable, answerable or accountable for any loss or damage resulting from the exercise of a discretion or a refusal to exercise a discretion. A Trustee shall be liable, answerable and accountable for her or his own dishonesty or gross negligence. A Trustee is liable, answerable and accountable only for money and securities actually received by her or him even though she or he has signed a receipt or other instrument for the sake of conformity. A Trustee is not liable, answerable or accountable for the acts, receipts, neglects or defaults of any other Trustee or any other person, firm or corporation having custody of any part of my estate and is not liable, answerable or accountable for any loss of money or security for money unless the same happens through her or his own dishonesty or gross negligence. Honesty and good faith shall be presumed in favour of each Trustee unless such presumption is rebutted.

Every Trustee shall be entitled in the purported exercise of her or his duties and discretions hereunder (including without limitation the management or administration of any company or other entity whose shares or ownership interests are comprised in my estate) to be indemnified out of my estate and the income thereof against all expenses and liabilities notwithstanding that such exercise constituted a breach of such Trustee’s duties unless brought about by her or his own actual fraud or gross negligence. The indemnity hereby granted to each Trustee shall extend to the expenses and liabilities incurred by a Trustee in any legal proceedings brought by the beneficiaries or any one or more of them notwithstanding that such proceedings shall be brought in respect of an alleged breach of duty by such Trustee unless it shall be established that such breach of duty was brought about by such Trustee’s own actual fraud or gross negligence.

Annotation: *This clause provides the trustees with an indemnity against the estate, in the event an action is brought against them and they are found negligent.*

INVESTMENT COUNSEL

Description of Clause: *This clause allows the trustees to employ investment counsel.*

My Trustees may from time to time retain the services of one or more investment counsel or investment advisors, to advise and assist my Trustees with respect to the investment of my estate and the trusts created in my Will on such terms and with such delegated powers as they may consider advisable including, for greater certainty, delegated powers to choose, acquire and dispose of investments. Such investment counsel company or companies or investment advisors are further expressly authorized to sub-delegate their discretionary investment management authority to one or more investment advisors or counsel, notwithstanding the provisions of subsection 27.2(2) of the *Trustee Act* (Ontario). My Trustees shall fix the remuneration to be paid to such counsel and shall pay such remuneration out of the capital and income of my estate in such proportions as the Trustees determine. It is hereby expressly declared that it shall be a prudent and reasonable exercise of discretion for my Trustees to employ the services of one or more professional discretionary investment managers and I declare that my Trustees shall not be liable for any losses incurred as a consequence of the exercise, or failure to exercise, any such delegated powers by any such investment counsel or investment advisor.

Annotation: *With the amendments to the Trustee Act in 2001, a trustee can now enter into a contract with an “agent” for the provision of investment services on a discretionary basis. The requirements of the agency relationship are carefully defined, including a written agreement, the development of an investment plan and periodic reporting. The premise is that the prudent choice and ongoing supervision of an investment agent is a duty which prudent trustees can be trusted to carry out. Adhering to the provisions of the Trustee Act regarding proper delegation of investment management to an agent should relieve the trustee from liability pursuant to section 28 of that Act.*

There is, however, some uncertainty as to whether an investment advisor can choose mutual funds as an investment. This uncertainty is based upon the decision in Haslam v. Haslam, (1994) 114 D.L.R. (4th) 562. In this case Judge Rosenberg held that an investment in a mutual fund was an unauthorized delegation of investment decision making. While mutual funds are now expressly deemed to not violate the rule against delegation, there is a concern that if an investment agent, to whom decision-making has been delegated, invests in a mutual fund, that this will be seen as a sub-delegation. Accordingly, this clause removes this concern.

EMPLOYMENT OF AGENTS

Description of Clause: *This clause allows the trustees to use third parties to perform some of their functions.*

I authorize my Trustees to engage agents as they in their discretion shall select to assist them in the administration of my estate or to do any act they consider reasonable or necessary in respect of such administration. They shall have the power to delegate to any such agent such authority as they consider appropriate in all the circumstances of my estate, provided they shall not delegate to such agent the discretionary right to distribute the income or the capital from my estate. My Trustees shall pay the charges for any such services either out of the income or the capital of my estate as they shall see fit, notwithstanding that one or more of my Trustees may be a member of or associated with any agent so employed.

Annotation: *At law trustees are not permitted to delegate their duties except in certain circumstances where courts have found that in the usual mode of conducting business of a like nature, persons acting with reasonable care and prudence on their own account would ordinarily conduct through mercantile agents. There is a further exception in section 20 of the Trustee Act where there is a limited power to appoint a banker or solicitor as an agent to receive funds or property on behalf of the trust. The clause clarifies and extends these exceptions by allowing the trustees to hire agents such as lawyers, real estate agents, brokers and accountants, to perform some of their functions. It is important to note that all decision-making must be completed by the trustees but the carrying out of decisions can be delegated to agents pursuant to this clause. The clause goes on to provide that the agents can be remunerated out of the estate. In the event an agent performs a function which is a function the trustee is expected to perform, such as the preparation of the trustee's accounts, and the estate pays the agent's remuneration, the agent's remuneration should be deducted from the compensation allowed to the trustees. If the testator wishes the trustee to obtain assistance with preparing accounts or tax returns, without impacting on the trustee's claim for compensation, the following sentence may be added.*

Without limiting the generality of the foregoing, I authorize my Trustees to engage a lawyer or accountant to assist them in preparing accounts for presentation to the beneficiaries for approval or submission to the court on a passing of accounts, and in preparing tax returns for myself, my estate and any trust created by my Will, and the reasonable costs of obtaining such assistance shall not be deducted from any compensation to which my Trustees may otherwise be entitled.

CORPORATIONS

Description of Clause: *This clause permits the trustees to deal with corporate interests as the testator could.*

If at any time my Trustees hold in my estate any investment in or in connection with any company or corporation, my Trustees may join in or take any action in connection with such investment or exercise any rights, powers and privileges which at any time may exist or arise in connection with any such investment to the same extent as I could if I were alive and the sole owner of such investment.

Annotation: There is some uncertainty in the law with respect to whether trustees can engage in transactions, such as amalgamations and winding-up proposals, in connection with corporate interests. This clause permits the trustees to do so. In the event the estate will include shares of an active private company, it will also be necessary to give the trustees the power to carry on the business:

Without in any way restricting the general power and discretion in this my Will given to my Trustees, I hereby specially authorize and empower them to continue and carry on any business I may own or I may be interested in at the time of my death, either alone or in partnership with any person or persons who may be a partner or partners therein for the time being, for such length of time as in their uncontrolled discretion my Trustees may consider to be in the best interests of my estate. I give to my Trustees power to do all things necessary or advisable for the carrying on of any such business and in particular, but without limiting the generality of the foregoing, my Trustees shall have the following powers, namely:

- (i) they may from time to time upon the expiration of the term of any partnership renew the same for any period determined or otherwise and at any time or times vary any or all of the terms contained in any partnership articles;
- (ii) they may employ therein or withdraw therefrom any capital which may be employed therein on my death, or advance, with or without taking security, any additional capital which they may deem desirable for effectually carrying on such business;
- (iii) they may arrange and agree: to the introduction at any time or times of any person or persons as a partner or partners therein; to the division of the profits thereof, or the payment of any sum or sums in lieu of profits to any partner; to the hiring or employment of any person or persons therein (including any one or more of my Trustees) at such salary or remuneration as they shall think proper; and to the extension or curtailment of the business thereof or the adoption of any new line of business; and
- (iv) they may form or join in forming a limited company for the purpose of taking over or purchasing the whole or any part of any such business or may sell the same to a limited company at such price, subject to such terms and conditions as my Trustees may determine and in consideration for any such taking over or sale, may accept cash, bonds, notes, preference or common shares of any company, whether or not such company is the company taking over or purchasing as aforesaid, or all or any of the aforesaid as my Trustees may think fit. Any bonds, notes, preference or common shares so received shall be an authorized investment under this my Will

With respect to my interests in any such business, I specifically authorize my Trustees to engage professional management as they in their discretion shall select to assist them in the management and carrying on of the business and they shall have the power to delegate to any such professional management such authority as they consider

appropriate. My Trustees shall pay the charges for any such services either out of the income or the capital of my estate as they shall see fit, notwithstanding that one or more of my Trustees may be a member of or associated with any agent so employed.

Annotation: *In addition to the foregoing, it may be advisable where there are significant private company interests to allow the estate to do post-mortem reorganizations:*

Without in any way limiting the other powers given to my Trustees:

(1) my Trustees may incorporate and organize one or more corporations for the purpose of acquiring assets of my estate; and

(2) my Trustees may sell any assets of my estate to one or more corporations incorporated by my Trustees as aforesaid, in return for common or preferred shares (whether entitled to discretionary or fixed dividends) or debt obligations, with or without a fixed rate of return, whether secured or unsecured, of such corporation or any combination of such securities and may invest funds of my estate in such shares or obligations. Any such shares or obligations shall be authorized investments of my estate and may be retained for such length of time as my Trustees in their discretion may determine.

REAL ESTATE

Description of Clause: *This clause allows the trustees to deal with real estate as the testator could.*

My Trustees shall have unfettered discretion to sell, mortgage or lease any real or leasehold property that forms part of my estate upon such terms and conditions as my Trustees think fit. My Trustees may accept surrenders of such leases and tenancies. My Trustees may expend money in repairs and improvements and generally manage such property. My Trustees may give any options with respect to such property as they consider advisable. My Trustees may renew and keep renewed any mortgage upon any such property and may pay off or renegotiate any mortgage which may be in existence at any time.

Annotation: *Historically in England real property was considered a special asset which trustees would presumptively be required to hold. This clause allows the trustees to deal with real estate in any manner in which the testator could. It also allows the trustees the power to not sell real estate if it is not appropriate to do so and to manage the real estate in a business-like manner pending sale.*

EXECUTOR INSURANCE

Description of Clause: *The following clause is designed to allow the executors to purchase liability insurance using the assets of the estate to pay the premiums. There are some insurance products available for this purpose. They all have their own features, costs and limitations. If a person who is not a beneficiary of the estate is acting as an executor, the testator may desire to offer that executor the ability to obtain liability*

insurance, at the expense of the estate. Without a specific clause permitting the use of estate assets for this purpose, it is likely that the executor would not be authorized to use estate assets in this way and would instead have to purchase such insurance personally.

I hereby direct that my Trustees are authorized to purchase executor liability insurance if they in their absolute discretion consider it appropriate to do so having regard to the assets, liabilities and beneficiaries of my estate and notwithstanding that doing so will directly benefit my Trustees. In the event my trustees determine it is appropriate for them to acquire executor liability insurance, the cost of such insurance may be charged to the capital and/or income of my estate as my Trustees in the exercise of an absolute discretion consider appropriate and shall be considered to be a proper expense of my estate.

BORROWING

Description of Clause: This clause permits the trustees to borrow.

My Trustees may borrow money, from themselves individually or from others, for such purposes (including for the payment of taxes, debts, duties, legacies or expenses) and upon such terms and conditions as they shall deem advisable, and to secure the repayment of the money so borrowed, may mortgage, pledge, hypothecate or otherwise encumber any of the property, real or personal, entrusted to them or from time to time held by them under my Will.

Annotation: At law trustees are not permitted to borrow. While generally trustees will not want to borrow, there may be circumstances where a borrowing is necessary. For instance, to avoid the unnecessary liquidation of assets at an inappropriate time, a trustee may want to borrow to satisfy liabilities (such as a tax liability arising upon death). This power allows the trustees to do so.

LOANS TO BENEFICIARIES

Description of Clause: This clause allows the trustees to engage in certain lending transactions.

I authorize and empower my Trustees to lend the whole or any part of my estate upon any security they may deem sufficient or upon no security whatsoever; to enter into guarantees or indemnifications for the benefit of the beneficiaries of my Will and persons, firms or corporations other than the beneficiaries of my Will and to give security therefor as my Trustees may in their discretion decide; and to renew and keep renewed such guarantees and indemnifications as my Trustees see fit.

Annotation: This can be a useful power to give trustees. It is often seen to be a necessary power to include where capital encroachments are permitted in the trustees' discretion. For instance, in the event a beneficiary wants a capital encroachment to acquire a house, the trustees can determine not to make the encroachment but instead take back a mortgage for part of the purchase price. This will ensure that the trust fund is not inappropriately exhausted. This can be particularly useful where the encroachment requested would represent a sizable portion of the trust fund.

USE OF ASSETS BY BENEFICIARIES

Description of Clause: *This clause allows the trustees to purchase assets for the use of a beneficiary.*

My Trustees may use any assets held in trust for a beneficiary of my Will to purchase or lease a residential property or any chattels, and may permit such beneficiary or any member of such beneficiary's family to use the residential property or chattels either free of any costs or upon such conditions as to payment of related expenses, and for such period and generally upon such terms as my Trustees may determine.

Annotation: *In some situations, the trustees may wish to provide comforts for a beneficiary such as a home, furniture, or a vehicle, without making large capital distributions to the beneficiary. This power can protect a beneficiary whose own assets may be subject to seizure by the beneficiary's creditors, or who is not responsible enough to own and maintain real estate.*

DISTRIBUTION IN KIND

Description of Clause: *This clause allows the trustees to distribute assets in kind.*

Notwithstanding the references in my Will to equal shares or a portion of my estate, my Trustees may make any division or distribution of the assets of my estate *in specie* and at such valuations as my Trustees in their unfettered discretion consider appropriate. In determining such valuations, my Trustees may take account of potential liabilities or benefits relating to any assets. The decision of my Trustees shall be final and binding on all persons concerned notwithstanding any fluctuation in market value and notwithstanding that one or more of my Trustees may be beneficially interested in any of the assets so valued.

Annotation: *As already noted, a trustee has an obligation to convert assets to cash. This clause allows the trustees to not sell assets in order to make a distribution to the beneficiaries. Instead, the trustees can distribute assets in kind (also referred to as "in specie"). The issue then becomes one of valuation of the assets distributed in kind.*

ELECTIONS

Description of Clause: *This clause allows the trustees to engage in elections under the Income Tax Act.*

My Trustees may exercise all discretions and make all designations, elections, determinations and applications under the *Income Tax Act*, R.S.C. 1985 (5th Supp.) c. 1, as amended, as my Trustees shall in their absolute discretion think fit.

My Trustees shall have the discretion, if they deem it appropriate, to allocate, designate, pay to or apply as part of the dispositive provisions of my Will related to income and capital, the entirety or any portion of the income and capital gains (including deemed and "phantom" income and gains).

Annotation: Under the Income Tax Act there are certain elections available to be made. For instance, the preferred beneficiary election is available in the context of beneficiaries who are entitled to the disability tax credit. Further, if a spouse is not named a beneficiary of an RRSP but is otherwise the beneficiary of the estate, the Income Tax Act allows for an election to have the spouse treated as the beneficiary of the RRSP. This clause gives the trustees the power to determine whether to take advantage of the elections available in the Income Tax Act.

GUARANTEES

Description of Clause: This clause permits the trustees to deal with guarantee obligations of the testator.

If at the time of my death I am liable as endorser, guarantor, or otherwise for any liability of any person, my Trustees may, in their unfettered discretion, renew from time to time the bills, notes, guarantees or other securities or contracts evidencing such liability and for that purpose may enter into, execute or issue new bills, notes, guarantees or other securities or contracts for or on behalf of my estate. My intention in conferring upon my Trustees these powers and discretions is to give them such powers and authorities as are necessary to assist in the gradual liquidation of the liabilities which I may be under in order that the person for whom I may be liable may not be unduly embarrassed.

Annotation: If the testator is a guarantor of a debt, this potential liability will devolve to the trustees. This power gives the trustees the authority to continue to deal with the guarantee and to settle the liabilities to which the guarantee pertains.

SIGNING OF DOCUMENTS

Description of Clause: This clause allows the trustees to delegate the signing of documents to a trustee.

My Trustees may appoint any one or more of my Trustees to sign all or any banking documents, stock transfers, receipts, promissory notes, negotiable instruments and any other documents of any kind required to be signed by my Trustees at any time.

Annotation: Where there is more than one trustee appointed it is necessary for all trustees to be involved in the decision-making including the signing of documentation. This may be impractical. At law it is possible for trustees to delegate to one trustee the power to sign documents, once the trustees collectively have made the decision. This power gives the trustees this authority.

PURCHASE BY TRUSTEES

Description of Clause: This clause permits a trustee to purchase trust assets without court approval.

Any of my Trustees may purchase in their personal capacity any assets from my estate if the purchase price and other terms are unanimously approved by my Trustees

and the adult beneficiaries of my estate. My Trustees shall not be required to obtain the approval of any court to such a purchase.

Annotation: *At common law, a trustee is not entitled to self-deal. Thus, a trustee is prohibited from purchasing trust assets. It may be, however, that there is an asset that a trustee would want to purchase, for example a family cottage, that is directed to be sold. In order for this to occur, the court would need to authorize the sale. This clause is intended to allow for such purchases without court approval.*

SETTLEMENT OF DEBTS

Description of Clause: *This clause allows the trustees to settle debts owing by or to the testator.*

I will and direct that as regards any debts owing to or by me on the date of my death, my Trustees shall have absolute power to deal with the same as they see fit including without limitation the power and authority to enforce immediate collection, to postpone or defer enforcement, or to compromise or settle the same for less than full value, all as they in the exercise of an absolute discretion consider to be in the best interests of my estate and the beneficiaries of my Will.

Annotation: *The general rule is that trustees should not settle debts or claims against the estate without obtaining a court order and full litigation. This may not be practical or cost-effective. This power allows the trustees to settle debts and claims.*

SETTLEMENT OF CLAIMS

Description of clause: *This clause empowers trustees to settle litigation without court order.*

Without the consent of any person interested under this will, my Trustee may compromise, settle, contest, or waive any claim at any time due to or by my estate and may make any agreement with any person, government, or corporation, and the agreement shall be binding on all persons interested in my estate.

Annotation: *the Trustee Act confers a partial set of powers to deal with debts and to settle claims. Although a trustee may be well advised not to settle any claims without the benefit of a court order, in small estates with family executors, a testator may wish to allow the trustee to settle claims without court approval in certain circumstances.*

STOCK DIVIDENDS

Description of Clause: *This clause declares that stock dividends are to accrue to the benefit of the capital beneficiary.*

I direct that all dividends paid in the form of stock received by my Trustees in connection with any shares of stock from time to time held by them shall be deemed to be and shall be dealt with as capital of my estate.

Annotation: *There is jurisprudence pertaining to whether a dividend in kind, such as a stock dividend, is to be treated as income or capital for trust law purposes. Generally, the jurisprudence has held that dividends in kind are to be treated as capital. To remove any issues concerning the treatment of stock dividends, it is useful to include this clause. However it is worth considering in a particular case whether stock dividends should, in fact, be treated as capital. For example, where you have a spousal trust and the spouse is relying on the income of the trust for his or her support, treating all stock dividends as capital may unduly restrict the income to which the spouse is entitled.*

COMBINE TRUSTS

Description of Clause: *This clause allows trustees to combine trusts for the same beneficiary or beneficiaries to ease administration and reduce costs.*

Notwithstanding any other provision in my Will, I authorize my Trustees in their absolute discretion to transfer any share or interest in my estate held by them to the trustees of any other trust to be held as part of such trust, provided that my Trustees are of the opinion that the persons beneficially interested in such other trust are the same persons and have similar interests in such other trust as the beneficiaries of such share or interest, and the terms of such other trust are substantially identical to the terms upon which my Trustees are to hold such share or interest. The receipt of the trustees of such other trust shall be a sufficient discharge to my Trustees for the assets transferred. The transfer of a share or interest as aforesaid shall be in satisfaction of all of the capital interests of all beneficiaries in such share or interest.

Annotation: *There may be circumstances where the same trustees are administering two or more trusts with similar or identical terms and beneficiaries, such as where two spouses die simultaneously and each Will divides the residue of the testator's estate equally among the testator's minor children; or where one spouse dies with two Wills, one dealing with shares of a private company and the other with real estate and other probateable assets, but both leaving the assets in a spouse trust (see discussion of multiple Wills below).*

COMPENSATION

Description of Clause: *This clause allows trustees to pre-take compensation. In the absence of such a clause, the trustees do not have the right to take compensation prior to it being awarded by the court or authorized by all of the beneficiaries.*

I authorize my Trustees to take and transfer at reasonable intervals from the income and/or capital of my estate amounts on account of their compensation which my Trustees reasonably anticipate will be requested at the end of the accounting period in progress, either upon the audit of the estate accounts or on approval of the then adult beneficiaries of my estate. If the amount subsequently awarded on Court audit or agreed to by the then adult beneficiaries is less than the amount so taken, the excess shall be repaid to my estate without interest.

Annotation: *The statutory basis for fees charged by executors and trustees is section 61 of the Trustee Act. Section 61 provides as follows:*

- (1) A trustee, guardian or personal representative is entitled to such fair and reasonable allowance for the care, pains and trouble, and the time expended in and about the estate, as may be allowed by a judge of the Superior Court of Justice.***
- (2) The amount of such compensation may be settled although the estate is not before the court in an action.***
- (3) The judge, in passing the accounts of a trustee or of a personal representative or guardian, may from time to time allow a fair and reasonable allowance for care, pains and trouble, and time expended in or about the estate.***

Over time a court-recognized “tariff” has developed as to what is fair and reasonable compensation. This is not a legislated tariff but is a guideline. It is subject to increase or decrease depending upon the facts. It has also been ignored in certain cases and other approaches adopted, such as fees on the basis of docketed time.

The tariff applies percentages to the various components of the trustees’ accounts. It provides as follows:

- 2 ½ % of the value of the capital receipts being original assets realized;***
- 2 ½ % of the value of the capital disbursements;***
- 2 ½ % of the value of revenue receipts;***
- 2 ½ % of the value of revenue disbursements;***
- an annual care and management fee of 2/5th of 1 % of the average market value of the capital of the trust.***

With respect to the fee on capital disbursements, it is important to bear in mind that the fee cannot be taken until the asset is either liquidated and disbursed i.e. to pay a debt or distributed to a beneficiary either in specie or in its liquidated form. If original assets are thus maintained and distributed in specie, it is only when the distribution is actually made that the capital disbursement fee can be taken.

The care and management fee is applicable where there is a trust to be held for a period of time and is not normally awarded where the Will provides that the estate is immediately distributable.

In terms of claiming compensation, it is becoming increasingly apparent that the courts are expecting more than a trustee simply putting forward a claim based on the tariff. The trustees should collect and maintain evidence to substantiate their claim. The evidence which should be collected and maintained should focus on such factors as the time spent (here docketed time is useful), the results achieved, the skill and ability

displayed, the complexity of the estate, the length of the administration, and the care and responsibility needed.

It is important to note that the compensation allowed trustees is intended to be for all services provided by trustees. To the extent the trustees engage agents to perform functions that they should be performing and the estate pays for this third party service, the amount paid will reduce trustee's compensation dollar for dollar.

In terms of charging compensation to the income and capital beneficiaries, the fees on account of capital receipts and disbursements are charged to the capital beneficiaries and those applicable to revenue are charged to the income beneficiaries. The care and management fee is generally charged 2/3 to capital and 1/3 to revenue but this general rule can be modified.

Sometimes issues arise about where disbursements should be charged. The general rule focuses on who benefits from the disbursement. It also takes into consideration that charging a disbursement to capital will ultimately impact the income beneficiary, as the capital to be invested is reduced thereby lowering the income that will be generated. This area is complicated and any more detail is beyond the scope of our paper.

In terms of when a trustee can take compensation, unless the trustees have obtained the approval of 100 % of the beneficiaries representing all of the interests in the trust, or the Will otherwise permits, trustees are not entitled to take compensation until their accounts, to which the compensation claim relates, have been approved by the court. It is generally the case that obtaining 100% approval is not possible. This is due to the fact that most trusts involve minor beneficiaries or have unascertained beneficiaries.

Given the uncertainties both as to the quantum of compensation and when it can be claimed, compensation can be stipulated in the Will or in a separate fee agreement incorporated by reference into the Will. Sections 23 (2) and 61(5) of the Trustee Act provide for the fixing of compensation by agreement and remove the court's jurisdiction to determine compensation in the face of a compensation agreement. In particular, trust companies that are named executors and trustees will ordinarily require a fee agreement to be entered into at the time the Will is prepared.

I declare that THE ABC TRUST CORPORATION shall be entitled to receive and shall be paid out of my estate, as compensation for its acting as an Executor and Trustee of and under my Will, the fees, reimbursement and other compensation provided for in the Compensation Agreement between THE ABC TRUST CORPORATION and myself signed on the _____ day of _____, 2003, prior to the execution of my Will and I declare that the terms of the said Compensation Agreement shall be valid and binding in all respects to fix the compensation payable to THE ABC TRUST CORPORATION as though the Compensation Agreement was expressly embodied in my Will.

A professional person other than a trust company is more likely to seek compensation on an hourly basis so that the task of administering the estate is equivalent to any other

client work. The following clause ensures that compensation is payable both for professional services and for ordinary executor's work:

Each of my Trustees that is a chartered accountant or solicitor shall be entitled to charge as compensation for acting as an Executor and/or Trustee his or her hourly rate as at the date of my death, such compensation to include, for greater certainty, time spent by such Trustee on matters which might or should have been attended to in person by a Trustee not being a chartered accountant or a solicitor and/or for matters which might or should have been attended to by a chartered accountant or a solicitor.

In addition, I direct that the professional firm of any of my Trustees who is a chartered accountant or solicitor may make and be paid all usual professional and other charges for work done by such firm or any member thereof in relation to the administration of this my Will or of any trust funds created hereunder in the same manner in all respects as if such Trustee were not one of my Trustees, and I direct that such firm shall be paid its reasonable charges in addition to disbursements for all work and business done and all time spent by such firm or any member thereof (inclusive of my Trustees) in connection with matters arising in the administration of this my Will or of any trust fund created hereunder, including matters which might or should have been attended to in person by a Trustee not being a member of such firm but which my Trustees might reasonably require to be done by such firm.

Where a solicitor, accountant or other professional acts as an executor and trustee, questions often arise as to whether the individual is entitled both to compensation for acting as the executor and trustee and to compensation for professional services rendered. Section 61(4) of the Trustee Act seems to give support to the proposition that a solicitor is not disentitled from charging both fees in this situation. The above clause avoids any uncertainty over this issue, and extends the right to receive both kinds of compensation to other types of professionals.

Note that the fees need to be justifiable. For example, if a solicitor is performing trustee functions and charging legal fees for those services, the quantum of legal fees must be deducted dollar for dollar from the solicitor's claim for trustee compensation. You cannot be compensated twice for performing the same service. The authors recommend that a solicitor who is named as an executor set up two matters. When providing legal advice and services, such as bringing a probate application or a passing of accounts application, the solicitor should docket to one matter and when performing trustee functions, like the preparation of estate accounts or the gathering of information pertaining to assets, he or she should docket to another matter. This way it becomes a relatively easy exercise to determine the amount of the fees which must reduce the solicitor's trustee compensation claim.

Furthermore, in October 2014 new Rule 3.4-38 was added to the Rules of Professional Conduct providing that "Unless the client is a family member of the lawyer or the lawyer's partner or associate, a lawyer must not prepare or cause to be prepared an instrument giving the lawyer or an associate a gift or benefit from the client, including a testamentary gift." If a compensation clause in the Will may result in greater

compensation to a solicitor executor than the usual tariff, this might be considered a benefit disqualifying the solicitor from drafting the Will at all. At the very least, it would be wise for the drafting solicitor to send the client for independent legal advice in respect of the compensation clause.

Where the executor is an individual other than a professional, it is more common for the testator to set compensation unilaterally:

My Trustees may claim and receive from the capital of my estate, as compensation for their time, trouble, care and skill in administering my estate, compensation in the amount of XXX Thousand Dollars (\$XXX,000). This amount may be taken at intervals, without the pre-approval of any beneficiary or the court, but is subject to pro-rata should any single Trustee not complete the task of administering my estate.

Alternatively, the testator may prohibit any claim for compensation and simply leave a legacy to the person appointed to act as executor and trustee. This has several advantages. First, it avoids a claim for compensation that the testator would have considered excessive. Second, it relieves the trustee of embarrassment in making a claim for compensation that has the effect of reducing the interest of the residual beneficiaries. Finally, whereas executor's compensation is subject to income tax in the year it is received, a legacy is normally non-taxable to the recipient. The following clause prohibiting compensation may be used with or without a legacy to the executor:

My Trustees shall not be entitled to claim or receive compensation from my estate, but shall be entitled to receive reimbursement for all expenses incurred in acting as my Trustees. Without limiting the generality of the foregoing, such expenses may incur fees paid to an accountant or bookkeeper to prepare tax returns and executor's accounts, fees paid to obtain valuations of my assets, travel expenses including mileage, and long distance telephone and postage costs.

Note that an executor may refuse to act if the amount of compensation available appears insufficient.

MAINTAIN SPOUSAL TRUST STATUS UNDER THE INCOME TAX ACT

Description of Clause: *This clause is necessary to ensure that a spouse trust will qualify for rollover treatment under the Income Tax Act.*

Notwithstanding anything in my Will to the contrary, during the lifetime of my wife, Jane Doe, none of the administrative provisions of my Will, and, in particular, paragraphs * through * inclusive, shall authorize or empower my Trustees to act in a manner which may jeopardize the trust fund established pursuant to the provisions of paragraph * of my Will from qualifying as an exclusive spousal trust in accordance with subsection 70(6)(b) of the *Income Tax Act*, R.S.C. 1985 (5th Supp.) c. 1, as amended, and more particularly in this regard my Trustees are prohibited from carrying out any act (through commission or omission) which may permit someone other than my wife from, directly or indirectly, receiving or otherwise obtaining the use of any of the income or capital of such trust fund during the lifetime of my wife.

Annotation: As noted above, the deferral of income tax available in relation to the use of a spousal trust requires that all of the income of the spousal trust be paid to the surviving spouse and that no person other than the surviving be entitled to receive or otherwise obtain the use of any of the income and the capital from the spousal trust. This provision makes clear that none of the administrative provisions of the Will are intended to allow distributions from the spousal trust that will “taint” the spousal trust. For example, a loan to a person other than the spouse on non-commercial terms, which would give that other person the use of the loaned property, is prohibited by the above clause.

MAINTAIN TESTAMENTARY TRUST STATUS UNDER THE INCOME TAX ACT

Description of Clause: This clause is advisable to ensure that no transaction occurs that might “taint” the testamentary trust status of a graduated rate estate or a qualified disability trust during a period that it otherwise qualifies for graduated tax rates, an off-calendar year and other benefits..

Notwithstanding anything in this my Will to the contrary, during any period that my estate might otherwise qualify as a graduated rate estate within the meaning of section 248(1) of the *Income Tax Act*, R.S.C. 1985 (5th Supp.) c. 1 (the “Income Tax Act”), as amended, or that any trust fund established pursuant to the provisions of this my Will might otherwise qualify as a qualified disability trust within the meaning of section 122(3) of the *Income Tax Act*, none of the administrative provisions of this my Will being, for greater certainty, Paragraphs 5 through 21 inclusive, including in particular the credit facilities provided for in this my Will, shall authorize or empower my Trustees to act in a manner which may jeopardize my estate or such trust fund from qualifying as a testamentary trust in accordance with the definition provided for in subsection 108(1) of the *Income Tax Act*, R.S.C. 1985 (5th Supp.) c. 1 (the “Income Tax Act”), as amended, and more particularly in this regard my Trustees are prohibited from carrying out any act (through commission or omission) which may result in my estate or such trust fund incurring a debt or any other obligation owed to, or guaranteed by, a beneficiary of my estate or such trust fund or any other person or partnership with whom any beneficiary of my estate or such trust fund does not deal at arm’s length, other than as permitted in subsection 108(1) of the *Income Tax Act* or any successor section thereto.

Annotation: As noted above, various tax benefits are available to a graduated rate estate, and one of the criteria for qualification as a GRE is that the estate be a “testamentary trust” as defined in s. 108(1) of the *Income Tax Act*. Similarly, only a testamentary trust may qualify as a qualified disability trust, the income of which will be taxed at the graduated rates available to individuals rather than the top marginal tax rate (as with income retained in an inter vivos trust) or the beneficiary’s marginal tax rate (as with income paid or payable to the beneficiary). An estate or trust will not qualify as testamentary if any of its property has been contributed “otherwise than by an individual on or after the individual’s death and as a consequence thereof.” For example, if the trustees were to borrow money from a living person without paying market value interest, the trust would have received value otherwise than from a deceased individual. The

above clause alerts the trustees to the fact that they must consider such consequences when exercising their administrative powers.

SURVIVORSHIP

Description of Clause: *This clause imposes a 30-day survivorship condition on all beneficiaries.*

Any person who does not survive me by at least thirty (30) clear days shall be deemed to have predeceased me for all purposes of my Will, and the income from my estate during the period of thirty (30) clear days from my death shall be accumulated and added to the capital thereof. Notwithstanding the foregoing, any person appointed an Executor by my Will may act as such from the date of my death.

Annotation: *As mentioned above in the residuary gift to a spouse, it is common to insert in an outright gift to a spouse a requirement that he or she survive for 30 (or some other number) of days. The survivorship period is intended to prevent the imposition of double estate administration tax and double costs of administration where both spouses die within a short period of time. Although the likelihood of a beneficiary other than a spouse or minor children dying within thirty days of the testator is much less, an alternative solution is to describe all gifts (including to the spouse) as being contingent on surviving the testator (without specifying any number of days), and then to insert a general survivorship clause in the form above. Note that the Estates Court will not allow the executors to submit a Will for “probate” within the survivorship period, since until the survivorship period has passed the beneficiaries under the Will are uncertain.*

FAMILY LAW ACT

Description of Clause: *This clause indicates the testator’s intention that inheritances received by a beneficiary, income earned on inheritances, and property into which inheritances can be traced, are to be excluded from the net family property calculation of a beneficiary.*

I declare that all property:

- (i) acquired by a person as a result of my death; or
- (ii) acquired by a person as a result of a gift made by me during my lifetime;

together with any property into which such property can be traced, and all income from such property and from any property into which such property can be traced, including income on such income, shall be excluded from such person's net family property for the purposes of Part I of the *Family Law Act*, R.S.O. 1990, c. F.3, as amended (the “Family Law Act”) and for the purposes of any provisions in any successor legislation or other legislation in any jurisdiction. For the purposes of this paragraph, the term “net family property” includes any property available for division or for satisfying any financial claim, between spouses upon separation, divorce, annulment or death of one of them and, for greater certainty, such term includes any net family property within the meaning of the

Family Law Act. This declaration shall be an express statement within the meaning of paragraph 4(2)2 of the Family Law Act and shall have effect to the extent permitted by that statute, any successor legislation thereto or any other legislation in any jurisdiction.

Annotation: *Part I of the Family Law Act provides the mechanism for the division of property between spouses who are separating or divorcing. In particular, it provides for an equalization of the “net family properties” of the spouses. Net family property is defined in subsection 4(1) of the Family Law Act. In general, it means the growth in a spouse’s net worth since the date of marriage. Certain property is expressly excluded from falling within net family property. In particular, subsection 4(2) provides for the exclusion of six different types of property. The two of relevance in the context of estates are defined as follows:*

- *Property, other than a matrimonial home, that was acquired by gift or inheritance from a third person after the date of marriage.*
- *Income from property referred to in paragraph 1, if the donor or testator has expressly stated that it is to be excluded from the spouse’s net family property.*

As a result of these two paragraphs, it is common practice in drafting Wills to include a provision which confirms that inheritances received by a beneficiary do not fall into the beneficiary’s net family property and to go on to direct that income earned on the inheritance is also excluded from the beneficiary’s net family property. It is important to bear in mind that excluded property treatment for gifts or inheritances only applies to those beneficiaries who are married at the date of inheriting i.e. it is only property that is inherited during the marriage that is excluded. Property that was inherited prior to marriage and thus brought into the marriage is treated like other property i.e. there is a deduction for the value of the property at the date of marriage. (The complexities of how net family property is calculated is beyond the scope of this paper.) Note that the above clause may not be effective to retroactively exclude income from property that was gifted during the lifetime of the testator; instead, a deed of gift should be prepared for all inter vivos gifts that includes a clause excluding the income from the gift, or property substituted for the gift, from the net family property of the gift recipient.

It is important to note that including this clause is not intended to defeat spouses. Rather, its purpose is to give beneficiaries who are married the choice as to how to deal with inherited property. They can either maintain the excluded property treatment by keeping the inherited property separate from property created by the spouse’s partnership or they can commingle the inherited property with marital property or use inherited property for marital purposes. Given inherited property is not property created as a result of the spousal partnership, this choice would appear to be a reasonable one to provide married beneficiaries.

At present there are no similar statutory provisions that apply to common law couples. Under certain circumstances, a common law spouse may have a claim to a partial division of property upon death or separation under the decision in Kerr v. Baranow (and Vanasse v. Seguin, released together with the same reasons), [2011] 1 SCR 269,

328 D.L.R. (4th) 577. Because the rights under Kerr v. Baranow are created by judicial decision, there is no corresponding statutory language provided in subsection 4(2) of the Family Law Act that allows common law spouses to keep inherited assets and the gain on such assets free from division with spouses. Presumably the principles set out in Kerr v. Baranow could be used to keep such assets free from division.

CUSTODY AND GUARDIANSHIP OF PROPERTY

Description of Clause: This clause appoints named persons to have custody of the testator's minor children and guardianship of their property. It goes on to give directions to the trustees of the estate with respect to making payments to the custodian/guardian.

In the event of the death of me and my wife, Jane Doe, before all my children have attained the age of eighteen years, I appoint my sister, CARRIE CUSTODY, to have custody of each minor child of mine and, if and to the extent that I have the authority to make such an appointment, to act as the guardian of the property of such child. If my sister, Carrie Custody does not survive me or otherwise is or becomes unable or unwilling to act as the guardian and custodian of my minor children, I appoint my brother, GARY DOE, to be the guardian of and to have custody of each minor child of mine and, if and to the extent that I have the authority to make such an appointment, to act as the guardian of the property of such child. In the event that my sister, Carrie Custody or my brother, Gary Doe, as the case may be, consents to have custody of any such minor child, I request him or her to apply to a court of competent jurisdiction within ninety (90) days of my death to have custody of such child and, if he or she considers it advisable, to act as the guardian of the property of such child.

My Trustees shall, to the extent reasonable, assist any person who may be appointed as the custodian of an minor child of mine by making available mortgage financing or by paying a portion of the mortgage or rental payments and other expenses to provide comfortable accommodation for my minor children, including the payment of a nanny or housekeeper or other such assistance. I wish to emphasize to my Trustees that I consider it very important that my children not be separated from each other and I request that liberal payments be made to the custodian of my children from any trust fund held for the benefit of such children in order that a very happy home life should be created for my children while they are growing up. I desire my Trustees to place emphasis on the financial needs of my minor children and the custodian during this period of time, rather than to be unduly concerned about the fact that any such payment would reduce the funds available to my children when reaching any age specified in my Will.

Annotation: Section 61 of the Children's Law Reform Act allows a testator to appoint by Will individuals to be the custodians of his or her minor children. If the testator has previously been appointed by the court as the guardian of his or her children's property (which is very uncommon), the testator may also appoint a successor guardian by Will. While the statute distinguishes between custodians and guardians they are often the same person, although there may be situations where this is not appropriate.

The appointment of a custodian is only effective if there is no other person entitled to custody of the child at the testator's death. This is particularly relevant in the context of spouses who are separated or divorced. In this situation, it is important that your client understands that the custodial arrangements for the children of divorced or separated parents will ultimately be determined by the surviving spouse's Will. Accordingly, this may be an issue your client wants to have resolved with his or her spouse prior to his or her death. It may in fact be something negotiated in any custodial orders or agreements. (This point is equally important for parents who are together. Often spouses have differing views on who should have custody of their minor children. If these differences persist to the point of the spouses naming different individuals, it will be the Will of the surviving spouse that governs.)

The appointment of a custodian/guardian is a temporary appointment for 90 days only. Pursuant to the statute, on or before the expiry of 90 days, a court application must be brought for an order formally appointing a guardian. The commencement of the court application within 90 days extends the effectiveness of the testamentary appointment until the application is disposed of. It is important that your client appreciates the temporary nature of the custodian/guardian appointment. The policy reason for only providing for a temporary appointment stems from the overriding concern of ensuring that the best interests of the child are met. For instance, your client may appoint someone who at the time the Will is prepared is an appropriate choice as custodian, but by the date of the client's death, is no longer appropriate. In this event, the court has the ability to rectify the situation at the time the application is brought. Despite the temporary nature of the appointment, it is still useful to include an appointment in the Will as it is strong evidence of the testator's opinion of the proposed guardian and custodian.

BOOKKEEPING AND ACCOUNTING

My Trustees shall keep appropriate books and records of the administration of the estate and of its investments and shall provide such books and records of the trust to the adult beneficiaries and to the parent(s) or guardians(s) of any beneficiary who is not *sui juris* on an annual basis until the completion of the administration. My trustees shall not be required to maintain or produce a set of accounts in any particular form; furthermore, if my Trustees retain an auditor to report on the financial statements for my estate, or for part of my estate, for a particular period and:

- (i) the auditor is a firm of chartered accountants or a public accountant licensed in [relevant jurisdiction]; and
- (ii) the auditor makes an unqualified report on the financial statements;

then the audited statement shall be a complete accounting of my Trustees' administration for the period and assets to which it relates and my Trustees shall not be required to give any further or better accounting to any beneficiary.

Annotation: Trustees are obliged to keep records of their administration of an estate, and may be required to present their records in court format if it becomes necessary to obtain court approval for the administration of an estate. The Rule 74.17 of the Rules of Civil Procedure sets out the content of ‘court format’ accounts. Trustees should maintain records showing:

- (a) a statement of the assets at the date of death, cross-referenced to entries in the accounts that show the disposition or partial disposition of the assets;
- (b) an account of all money received, excluding investment transactions;
- (c) an account of all money disbursed, including payments for trustee’s compensation and payments made under a court order, excluding investment transactions
- (d) where the estate trustee has made investments, an account setting out,
 - (i) all money paid out to purchase investments,
 - (ii) all money received by way of repayments or realization on the investments in whole or in part, and
 - (iii) the balance of all the investments in the estate at the closing date of the accounts;
- (e) a statement of all the unrealized assets in the estate;
- (f) a statement of all money and investments in the estate at the closing date of the accounts;
- (g) a statement of all the liabilities of the estate, contingent or otherwise, at the closing date of the accounts;
- (h) a statement of the compensation claimed by the estate trustee and, where the statement of compensation includes a management fee based on the value of the assets of the estate, a statement setting out the method of determining the value of the assets; and

TESTIMONIUM

Description of Clause: The testator signs the Will in the presence of two witnesses.

IN TESTIMONY WHEREOF I have to this my Last Will and Testament, written upon this page and the [Number of Pages] preceding pages of paper, subscribed my name this day of , 200 .

SIGNED, PUBLISHED AND DECLARED)
by the said Testator, John Doe,)
as and for his Last Will)
and Testament, in the presence of us, both)
present at the same time, who at his request,)
in his presence and in the presence of each)
other have hereunto subscribed our)
names as witnesses:)

JOHN DOE

Signature _____

Printed Name _____

Address _____

Occupation _____

Signature _____

Printed Name _____

Address _____

Occupation _____

Annotation: *In order for a formal Will to be valid, it must be executed in accordance with the requirements prescribed by section 4 of the SLRA. It is generally advisable that your client attend at your office or you attend at your client's home for execution purposes. Clients will often ask to have the Will sent home with instructions on how to execute. There are recent English cases which have held a solicitor negligent in circumstances where a Will was sent to a client with instructions for execution which the client followed incorrectly.*

The requirements are as follows:

- (i) ***the Will must be signed by the testator at its end in the presence of two witnesses who must also sign the Will in the presence of the testator and in the presence of each other;***
- (ii) ***to avoid any issues as to whether pages were added to the Will after it was signed, it is good practice to have the testator and the witnesses initial each page;***
- (iii) ***similarly, any handwritten changes made to the Will before execution should be initialed by the testator and the witnesses to prove that the changes had been made before the Will was executed;***
- (iv) ***the testator should sign the Will using his or her normal signature; and***

- (v) *a witness should not be a beneficiary or the spouse of a beneficiary. This includes contingent beneficiaries. While the execution will be valid, the gift to that beneficiary is presumed void unless the beneficiary can establish that no undue influence was exerted over the testator. An executor or spouse of an executor can act as a witness provided s/he is not a beneficiary.*

The Will may alternatively be signed by a person other than the testator, but in the presence of and at the direction of the testator. This alternative should only be used in special circumstances where the testator is physically unable to sign for him or herself (keeping in mind that even a mark, such as an X, made by the testator's hand, foot or mouth, can count as a signature). On an application for a Certificate of Appointment of Estate Trustee With a Will, the court will expect to see an explanation in the affidavit of execution as to any special circumstances that resulted in the Will being signed by another person or by a mark.

Given that much time may pass between the date the testator executes the Will and his or her death, it is advisable to complete the affidavit of execution at the time the Will is executed. This way costly and time consuming searches for witnesses can be avoided. If an affidavit of execution cannot be prepared because the witnesses cannot be located, then in order for a probate certificate to be issued it is likely that the Will will need to be proven in solemn form.

Only one original Will should be executed with photocopies or "trued" up copies made of the original. If more than one original is made, the doctrine of revocation will apply to the one that was executed first. (See section 15 of the SLRA which provides that a Will is revoked by the execution of another Will.) Since both Wills are the same, it may not be possible to know which was executed last with the result that it is unclear which is the valid Will.

The signed original Will should be kept in safe-keeping such as your fire-proof vault or your client's safety deposit box, so long as the client is not the only person with access to the box.

Finally, your client should let his or her executors know where the original is being kept.

SPECIAL CLAUSES

MULTIPLE WILLS FOR ONTARIO PROBATE PLANNING PURPOSES

The Estate Administration Tax Act, 1998, S.O. 1998, c. 34, Sched., ("Estate Administration Tax Act, 1998") provides for the payment of an estate administration tax (commonly referred to as probate fees or probate tax) on the value of the estate. The tax must be paid before a certificate of appointment will be issued by the court in respect of the estate. The value of the estate includes all property that belonged to the deceased person at the time of his or her death less the actual value of any encumbrances on real property. The forms of Application for Certificate of Appointment authorized under the Rules of Civil Procedure (see Form 74.4 or 74.14 as examples) provide that real property

situated outside of Ontario is not included in the value of the estate, nor is jointly owned property that passes by right of survivorship to another person, or life insurance payable to a named beneficiary. It also seems to be accepted that RRSPs and RRIFs payable to a named beneficiary are not included in calculating the value of the estate.

From a practical point of view, certain estate assets can be administered by the executors of the estate without a probated Will, such as personal effects and shares or debt in private corporations, the transfer of which can be consented to by the directors of the corporation upon evidence they deem sufficient. However, if probate of the Will is required in order to administer any asset of the estate, the value of all assets dealt with under that Will must be included in the value of the estate. The practice has now developed of executing a separate Will for the assets that will require probate and another for the assets that will not require probate. A Certificate of Appointment will be obtained only with respect to the Will dealing with the assets for which probate is required. The Application for Certificate of Appointment in this case is made on Form 74.4.1 or 74.5.1.

The incentive to execute a separate Will for assets that will not require probate to transfer has increased with the implementation on January 1, 2015 of new regulations under the Estate Administration Tax Act, 1998. Whereas in the past, the applicant for a Certificate of Appointment would merely swear to the total value of the deceased's estate (divided into real property and personal property) on the application for the Certificate of Appointment, that person now has an obligation to file an estate information return within 90 days after issuance of a Certificate of Appointment of Estate Trustee providing a full inventory of all property forming part of the estate, with very detailed prescribed information and values. In addition, if the estate trustee subsequently becomes aware that certain information on the return (see subsection 4(1) of Ontario Regulation 310/14 for the specified information) was incomplete or incorrect, or if any additional property is subsequently discovered, the estate trustee must file an amended information return or file a statement disclosing the subsequently discovered property. The information return is subject to audit and the estate trustee is subject to penalties (including fines and imprisonment) for failing to file a return or for providing false or misleading information. To avoid the filing requirement, the need for professional valuations and appraisals to substantiate the values listed, and the risk of penalties, a second Will – or other probate planning strategies such as an alter ego or joint partner trust, or ownership as joint tenants with right of survivorship - may be considered even for assets with a relatively low value, where the amount of the estate administration tax that could be saved might not on its own justify the additional complexity and professional fees of having multiple Wills.

When drafting multiple Wills for a client it is vital that the execution of the second Will does not result in the revocation of the first Will. In addition, it is important that the assets dealt with under each Will are carefully defined so that there is no overlap, nor any assets that are not dealt with under either Will.

Introductory Clause

Description of Clause: For each Will, the normal introductory clause will make reference to the fact that the Will is limited to certain property of the testator.

For the “non probate” or Private Assets Will:

I, JOHN DOE, of the City of Toronto and Province of Ontario hereby declare that this is my Last Will and Testament with respect to my Private Assets (as hereinafter defined), made this XXX day of January, 2014.

For the “probate” or General Will:

I, JOHN DOE, of the City of Toronto and Province of Ontario hereby declare that this is my Last Will and Testament with respect to my Public Assets (as hereinafter defined), made this XXX day of January, 2014.

Annotation: It does not matter what terminology is adopted, so long as it is used consistently. Some solicitors use the terms “General Estate” and “Special Estate” Others will use “Probate Estate” and “Non-Probate Estate”; “Primary Estate” and “Secondary Estate”; “Public Assets” and “Private Assets”. Due to the new definition of a graduated rate estate (GRE), which includes the condition that “no other estate designates itself as the graduated rate estate of the individual”, there has been some concern that the execution of two Wills might create two estates, only one of which would qualify as a GRE. The Canada Revenue Agency has recently confirmed that it views all property belonging to a deceased individual, wherever situated, to be a single estate; nevertheless, some lawyers now avoid any terms that might appear to create two separate estates. Furthermore, it is recommended that the same persons be appointed as executors of each Will to avoid any dispute among them, upon the filing of income tax returns, as to whether one set of property or the other should be designated as a GRE.

Revocation

Description of Clause: These clauses revoke all Wills made before the date that the dual Wills are executed. This ensures that the second Will signed does not revoke the first Will signed. See also the additional clauses provided under the heading “Confirmation of No Revocation”.

For the “non probate” or Private Assets Will:

I revoke all Wills and Codicils made by me at any time before the XXX day of January, 2014 with respect to my Private Assets (as hereinafter defined), and declare this to be my Last Will and Testament with respect to such Private Assets. I hereby declare that I have an existing general Will dealing with my Public Assets (as hereinafter defined) which was executed on this XXX day of January, 2014, and which I do not intend to revoke by the provisions of this my Will with respect to my Private Assets.

For the “probate” or General Will:

I revoke all Wills and Codicils made by me at any time before the XXX day of January, 2014 with respect to my Public Assets (as hereinafter defined) and declare this to be my Last Will and Testament with respect to such Public Assets.

Annotation: *The use of revocation clauses that refer to the specific date of execution of the dual Wills should also avoid any problem caused by a later republication of one or both of the Wills by the execution of a Codicil or Codicils. If a Codicil were made to one of the Wills and the Will contained a typical revocation clause revoking all Wills previously made, upon republication of the Will, the revocation clause would be read as of the date of republication, and may have the inadvertent result of revoking the other Will. This is another reason why a general revocation clause revoking all prior Wills and Codicils, that is not limited to the assets governed by that Will, should not be used in the context of multiple wills. In addition, it is prudent to re-execute the multiple wills if they are amended rather than using codicils, to avoid the risk of revocation due to the doctrine of republication.*

Definitions

Description of Clause: *It is necessary to define what is meant by “Private Assets” and also to define what it meant in the particular Will when the phrases “my estate” and “my property” are used.*

For the “non probate” or Private Assets Will:

I hereby further declare that:

- (1) In this my Will the term “Private Assets” shall be interpreted to include:
 - (a) all shares, if any, owned by me at my death in the capital stock of ABC LIMITED, XYZ INC. 1234 LIMITED, and any other corporation none of the shares of which are listed on a public stock exchange (in this my Will collectively referred to as the “Corporations”), those of my assets, if any, which are held in trust for me by any one or more of the Corporations and all amounts owing to me, including declared but unpaid dividends, from any of the Corporations;
 - (b) any interest I have in any limited partnership, partnership or joint venture (in this my Will collectively referred to as the “Partnerships”), those of my assets, if any, which are held in trust for me by any one or more of the Partnerships, and all amounts owing to my from any of the Partnerships;
 - (c) any beneficial interest I have in any trust including, without limitation, my beneficial interest in property held upon bare trust or resulting trust for me by any persons or corporations;

- (d) any interest I have in any real property in Ontario in respect of which transmission can be accomplished without a grant of authority by a court of competent jurisdiction;
- (e) all personal and household articles owned by me at my death, including artwork, antiques, consumable stores and all automobiles and boats and accessories thereto;
- (f) all amounts owing to me by any person, trust or trustees; and
- (g) all property over which I may have a general power of appointment to the extent such property is compromised in (a) to (f) above.

It is my intention to include the foregoing assets and none other in the definition of my Private Assets.

- (2) In this my Will the term “Public Assets” shall be interpreted to include all my property of every nature and kind other than my Private Assets.
- (3) All references in this my Will to “my property”, “my estate”, “my Will” and any related terminology shall, unless the context otherwise requires, include all my Private Assets and shall not include any of my Public Assets.

For the “probate” or General Will:

I hereby further declare that:

- (1) In this my Will the term “Private Assets” shall be interpreted to include:
 - (a) all shares, if any, owned by me at my death in the capital stock of ABC LIMITED, XYZ INC. 1234 LIMITED, and any other corporation none of the shares of which are listed on a public stock exchange (in this my Will collectively referred to as the “Corporations”), those of my assets, if any, which are held in trust for me by any one or more of the Corporations and all amounts owing to me, including declared but unpaid dividends, from any of the Corporations;
 - (b) any interest I have in any limited partnership, partnership or joint venture (in this my Will collectively referred to as the “Partnerships”), those of my assets, if any, which are held in trust for me by any one or more of the Partnerships, and all amounts owing to my from any of the Partnerships;
 - (c) any beneficial interest I have in any trust including, without limitation, my beneficial interest in property held upon bare trust or resulting trust for me by any persons or corporations;

- (d) any interest I have in any real property in Ontario in respect of which transmission can be accomplished without a grant of authority by a court of competent jurisdiction;
- (e) all personal and household articles owned by me at my death, including artwork, antiques, consumable stores and all automobiles and boats and accessories thereto;
- (f) all amount owing to me by any person, trust or trustees; and
- (g) all property over which I may have a general power of appointment to the extent such property is comprised in (a) to (f) above.

It is my intention to include the foregoing assets and none other in the definition of my Private Assets.

- (2) In this my Will the term “Public Assets” shall be interpreted to include all my property of every nature and kind other than my Private Assets.
- (3) All references in this my Will to “my property”, “my estate”, “my Will” and any related terminology shall, unless the context otherwise requires, include all my Public Assets and shall not include any of my Private Assets.

Annotation: *It is important that the assets to be covered by the “non-probate” Will be carefully examined to determine if there is any risk that a third party with custody of the asset, or with whom the executors may need to transact (e.g. if the asset is to be sold), may insist on a Certificate of Appointment. If the executors are required to apply for a Certificate of Appointment for the “non-probate” Will, estate administration tax is payable on the value of the entire “non-probate” estate, and not only the assets for which the Certificate of Appointment is required (but see the clause below that permits the executors to renounce their interest in specific assets). Accordingly, it is important to draft the definition of the assets covered by the “non-probate” Will carefully to reduce the risk of tainting.*

For example, although the directors of a private corporation may agree to transfer title to a deceased shareholder’s share to his or her executors without a Certificate of Appointment, the decision to do so is at the discretion of the directors; they are not required to do so. For this reason, the general provision for “any other private company shares” is often limited to only those private companies all of the shareholders of which are family members. Care must be taken where a private company has arm’s length directors or shareholders. Similar precautions should be taken in the case of partnership interests. With respect to debts owing to the deceased, secured debts should be investigated to determine if a Certificate of Appointment will be needed to discharge the security. In the case of unsecured debts, the identity of the debtor should be considered to determine the risk that he or she may insist on a Certificate of Appointment before dealing with the executors. For this reason, personal debts governed by the “non-probate” Will are often limited to unsecured debts owing by family members.

Another strategy to avoid the risk of tainting the “non-probate” Will is to prepare a third (or fourth, etc.) Will to govern the assets for which there is some risk that probate may be required. Additional Wills are often used for such assets as an art collection or a private company where there is some risk the directors may require a Certificate of Appointment.

Some practitioners define the assets to be covered by the “non-probate” Will as any assets that the trustees in their absolute discretion consider can be administered without probate. As the assets vest in the trustees at the moment of death (before they have made such a determination), it is doubtful that this division of assets between the “non-probate” Will and the “probate” Will is effective. To avoid dispute, it is preferable to specifically identify the Private Assets.

However, there is always a risk that unanticipated circumstances will make it impossible to administer without probate an asset that the testator and his or her solicitor expected could be dealt with under the Private Assets Will (for example, a private corporation may have taken on some unrelated directors who refuse to transfer the shares without a Certificate of Appointment of Estate Trustee With a Will, or the Land Titles Registrar may decline to exercise his or her discretion to allow property to be transferred without probate even though it is the first transfer since conversion to the land titles system). As noted above, should it be necessary to probate the Private Assets Will to deal with a single asset, the value of all the Private Assets will become subject to probate fees. Therefore, it is wise to allow the trustees of the Private Assets Will to renounce their interest in an asset that they decide does require probate to administer; see the clause below. The renounced asset would then fall into the General Will.

Note that where a parent has put title to assets owned by the parent into the joint names of the parent and one or more adult children, the Supreme Court of Canada decision in Pecore v. Pecore, 2007 SCC 17, 2007 deems such asset to be presumptively held upon resulting trust for the estate of the deceased parent. Absent independent evidence rebutting such a presumption, this means that the child owning such property must return the property to the deceased parent’s estate, thereby bringing such asset into probate. Often, this will undermine the very reason for putting the asset into joint names. Executing multiple Wills, where assets held in trust for the deceased parent are dealt with under the non-probate Will, will solve this problem.

In the event that different persons are named executors of the two (or more) estates, it may be prudent to provide instructions in all wills to ensure that the estate, as a whole, is a graduated rate estate. The following clause may be used for this purpose:

I direct my Trustees to consult with the executors under my Private Assets Will [or Public Assets Will, as applicable] to take such steps as are necessary, and to manage the assets of my estate in a manner designed, to achieve the result that my entire estate, defined as both my Private Assets and my Public Assets, will be a “graduated rate estate” as that term is defined in the *Income Tax Act* (Canada). My Trustees are authorized to use the assets of my estate to retain tax advisors to provide advice and direction for this purpose. My Trustees are authorized, in their discretion, and to make any designation,

election, allocation, or distribution as they determine is necessary to maintain my estate as a graduated rate estate for a period of up to 36 months after my death.

No Obligation to Obtain Probate of Private Assets Will

Description of Clause: *This clause will appear in the non-probate or Private Assets Will to clarify that the executors are not required to obtain probate of the Will.*

For greater certainty, I declare that my Trustees shall have no obligation to obtain a Certificate of Appointment of Estate Trustee with respect to this my Private Assets Will if, in their unfettered discretion, they determine that they will otherwise be able to perform their responsibilities hereunder, and they shall not be liable for any loss suffered by my estate, or by any of the beneficiaries hereunder, as a consequence of their not obtaining such certificate.

If for any reason the executors and trustees of this Will determine that they cannot deal with any of the assets listed in paragraph * without obtaining a Certificate of Appointment of Estate Trustee With a Will, I direct them immediately to renounce their interest in such asset by instrument in writing delivered to the executors and trustees of my Last Will and Testament dated * with respect to my property other than my Private Assets, in which case the definition of my Private Assets shall be deemed to exclude, and always to have excluded, such renounced interest.

Confirmation of No Revocation

Description of Clause: *For greater certainty, it is advisable that each Will contain a clause confirming that the Wills are not meant to revoke or override each other.*

For the “non probate” or Private Assets Will:

(4) For greater certainty, nothing in this my Will shall revoke or override any Will made by me on the XXX day of January, 2014, that purports to dispose of my Public Assets. Neither the execution of this my Private Assets Will nor the execution of my Will dealing with my Public Assets is intended to revoke the other; they are to operate concurrently.

For the “probate” or General Will:

(4) For greater certainty, nothing in this my Will shall revoke or override any Will made by me on the XXX day of January, 2014, that purports to dispose of my Private Assets. Neither the execution of this my Public Assets Will nor the execution of my Will dealing with my Private Assets is intended to revoke the other; they are to operate concurrently.

Addition to Debts Clause

Description of Clause: *The addition of this language to the end of the clause providing for the payment of debts, taxes etc. gives the trustees the discretion to determine how to*

allocate the debts, taxes etc. between the General and Private Assets parts of the estate. It also confirms that, although the direction to pay debts, taxes, etc. appears in both Wills, they are not to be paid more than once.

For the “probate” or General Will

It is not my intention that my just debts, funeral and testamentary expenses, duties and taxes be paid more than once. My Trustees shall determine in their discretion how my said just debts, funeral and testamentary expenses, duties and taxes referred to above shall be allocated between that part of my estate dealt with pursuant to this my Will in respect of my Public Assets and that part of my estate dealt with pursuant to my Private Assets Will in respect of my Private Assets.

For the “non probate” or Private Assets Will

It is not my intention that my just debts, funeral and testamentary expenses, duties and taxes be paid more than once. My Trustees shall determine in their discretion how my said just debts, funeral and testamentary expenses, duties and taxes referred to above shall be allocated between that part of my estate dealt with pursuant to this my Will in respect of my Private Assets and that part of my estate dealt with pursuant to my general Will in respect of my Public Assets.

Annotation: There is a potential for a double payment when multiple Wills are used in any scenario where the executors and trustees may require access to the assets of both estates to satisfy a payment and as a result the direction to make the payment appears in both Wills. Whenever such a direction appears in both Wills, then to prevent a double payment it is important that each Will include a provision to clarify that it is not the testator’s intention that the payment be made twice, and that the executors and trustees have discretion to determine how the payment will be allocated between the two estates. In addition to the direction to pay debts, taxes, etc., a double payment might arise where a cash legacy is directed or where a specific amount is to be set aside and held in trust for a beneficiary or class of beneficiaries. It can also occur with respect to executor’s compensation, in particular where an hourly rate or a specified annual amount is set out in lieu of the percentage guidelines. Compensation Agreements should be carefully reviewed and modified as required to avoid this outcome.

Legacies

Description of Clause: The addition of this language to the end of a clause providing for the payment of a cash legacy gives the trustees the discretion to determine whether the legacy will be satisfied from the assets governed by the General Will, the Assets governed by the Private Assets Will, or partly from one and partly from the other. It also confirms that, although the direction to pay the legacy appears in both Wills, the legacy is not intended to be paid more than once.

For the “probate” or General Will

I wish to advise my Trustees that my Private Assets Will makes provision for a similar legacy to the legacy set out in this paragraph. It is my intention that the legacy be paid once only, either out of that part of my estate dealt with pursuant to this my Will in respect of my Public Assets, out of that part of my estate dealt with pursuant to my Private Assets Will in respect of my Private Assets, or partly from one and partly from the other. I direct my Trustees to consult with the Trustees of my Private Assets Will to determine how the legacy shall be allocated between such parts of my estate.

For the “non probate” or Private Assets Will

I wish to advise my Trustees that my general Will makes provision for a similar legacy to the legacy set out in this paragraph. It is my intention that the legacy be paid once only, either out of that part of my estate dealt with pursuant to this my Will in respect of my Private Assets, out of that part of my estate dealt with pursuant to my general Will in respect of my Public Assets, or partly from one and partly from the other. I direct my Trustees to consult with the Trustees of my general Will to determine how the legacy shall be allocated between such parts of my estate.

Annotation: The above additions to a legacy clause should be used where the direction to pay the legacy appears in both the general Will and the Private Assets Will, but it is only intended to be paid once. For some testators it may be clear that the assets governed by one of the wills will be sufficient to pay the legacy and accordingly the direction to pay the legacy may appear in only one of the wills. Including the direction in both wills, however, eliminates any risk of a deficiency (i.e. assuming the aggregate value of the assets governed by the wills is sufficient) by giving the Trustees access to the assets governed by both wills to satisfy the legacy.

MULTIPLE WILLS FOR ASSETS SITUATE IN DIFFERENT JURISDICTIONS

In today’s world of freely moving people and capital, it is very common to have clients with assets in several jurisdictions. Consider, for example, the typical Canadian snowbird. S/he will have a residence in Canada and a residence in any one of Florida, Arizona or California. While one Will can dispose of all those assets, it is a common planning technique to prepare separate Wills to deal with the disposition of assets situate in different jurisdictions.

The advantage of separate situs Wills is that the probate process can be completed independently in each jurisdiction. (Where a single Will is used to dispose of all assets, it is necessary to reseal or obtain an ancillary appointment of the original or primary appointment.) Sections 34 to 42 of the SLRA are the conflict of laws rules pertaining to the formal validity of Wills and the rules for dispositions of real and personal property.

To ensure that no assets are inadvertently missed (for example, if the client unexpectedly inherits or otherwise acquires property in a country other than Canada and the US), it is a good idea for one Will to refer to the “worldwide estate” or the “general estate” of the testator. Typically, this would be the Will created according to the laws where the

testator is ordinarily resident although it can also be the one created according to the laws of the jurisdiction with the lowest probate fees. The Will or Wills dealing with properties in particular “foreign” jurisdictions (e.g. Florida) would refer to the “Florida Estate” of the testator.

In addition to the clauses set out below, the Wills dealing with assets in multiple jurisdictions should incorporate an addition to the normal debts clause and a Confirmation of No Revocation clause similar to those described in the Private Assets situation above.

Note that when preparing a Will dealing with assets in another jurisdiction, it is important to ensure that the Will complies with the laws of the relevant jurisdiction. A solicitor qualified in the relevant jurisdiction should review the Will before execution. In some civil law jurisdictions, rules of forced heirship may override the provisions of a standard Canadian Will. However, European Union Regulation 650/2012, which applies to deaths that occurred on or after August 17, 2015, permits a client to expressly elect in his or her Will that the law of his or her nationality (or if the client has more than one nationality, whichever one the client stipulates) will apply to his or her property in any European Union country except Denmark, the UK and Ireland, instead of that country’s local laws. A Canadian testator may now wish to include such an election in his or her Will in order to retain testamentary freedom over assets located in Europe.

In addition, it is important to recognize that there may be significant tax implications not dealt with in the Annotated Will where either the testator or a beneficiary is a citizen or of resident in another jurisdiction. For example, special planning may be required where the client or his or her spouse is a US citizen to avoid US estate tax and generation skipping tax. For this reason as well, it is important that a solicitor qualified in the relevant jurisdiction review or participate in the preparation of the Will.

Introductory Clause

Description of Clause: As when the assets of the testator are divided between a “non-probate” or Private Assets Will and a “probate” or General Will (as discussed above), the introductory clause in each Will should make reference to the fact that the Will is limited to certain property of the testator.

For the Will dealing with property in a particular jurisdiction:

I, JOHN DOE, of the City of Toronto, in the Province of Ontario, declare that this is my Last Will and Testament with respect to my Florida Estate (as hereinafter defined).

For the “worldwide” or General Will:

I, JOHN DOE, of the City of Toronto, in the Province of Ontario, declare that this is my Last Will and Testament with respect to my property other than my Florida Estate (as hereinafter defined).

Revocation

Description of Clause: *The following revocation clauses will be used if the Wills dealing with property in different jurisdictions are prepared by the same lawyer (or by collaboration between lawyers from the different jurisdictions) and signed at the same time.*

For the Will dealing with property in a particular jurisdiction:

I revoke all Wills and Codicils made by me at any time before _____, 20____ and declare this to be my Last Will and Testament with respect to my Florida Estate (as hereinafter defined), and I declare that this document is the only executed copy of my Last Will and Testament with respect to my Florida Estate.

For the “worldwide” or General Will:

I revoke all Wills and Codicils made by me at any time before _____, 20____ and declare this to be my Last Will and Testament with respect to my property other than my Florida Estate (as hereinafter defined), and I declare that this document is the only executed copy of my Last Will and Testament with respect to my property other than my Florida Estate.

If the Wills are signed at different times but each Will contemplated the existence of the other, then the revocation clause in the Will to be signed second must be adapted.

I revoke all Wills and Codicils made by me prior to the date hereof, other than my Last Will and Testament dated * which deals with [my Florida Estate (as hereinafter defined) *or* all my property other than my Florida Estate (as hereinafter defined)]
...

If the Will dealing with property in a particular jurisdiction is signed second, and the previous Will purported to deal with all the testator’s property, wherever situate, use the following clause:

I revoke all Wills and Codicils made by me prior to the date hereof to the extent that they deal with those of my assets forming part of my Florida Estate (as hereinafter defined). For greater certainty, it is my intention that my Will dated * shall continue to be effective in respect of all my assets, wherever situated, save and except for those of my assets forming part of my Florida Estate, which shall hereafter be governed by this Will.

This clause might also be used when the client is resident in a jurisdiction other than Ontario, and the lawyer has been retained to prepare a Will dealing only with a piece of real estate or other property in Ontario (replacing references to “my Florida Estate” with references to “my Ontario Estate”).

Definitions

For the Will dealing with property in a particular jurisdiction:

I declare that in my Will the following terms shall be interpreted as follows:

- (a) “my Florida Estate” shall mean
 - (i) [describe particular property existing at the date of the Will]
 - (ii) any [other] real property physically located in the State of Florida in which I may have an interest at the date of my death, and
 - (iii) any bank accounts and investments administered pursuant to the laws of the State of Florida in which I may have an interest at the date of my death.
- (b) “my property” and “my estate” shall, unless the context otherwise requires, include only my Florida Estate.

For the “worldwide” or General Will:

I declare that in my Will the following terms shall be interpreted as follows:

- (a) “my Florida Estate” shall mean
 - (i) [describe particular property existing at the date of the Will]
 - (ii) any [other] real property physically located in the State of Florida in which I may have an interest at the date of my death, and
 - (iii) any bank accounts and investments administered pursuant to the laws of the State of Florida in which I may have an interest at the date of my death.
- (b) “my property” and “my estate” shall, unless the context otherwise requires, include all my property other than my Florida Estate.

ROADMAP FOR DRAFTING OF A TRUST IN A WILL

1. Who are the beneficiary/ies to be?
2. When are the beneficiaries to be determined?
3. For how long is the trust to exist?
4. How is the annual net income to be dealt with?
5. If on a discretionary basis, then
 - (i) for what purposes can income be distributed;
 - (ii) can income be distributed directly to a beneficiary and/or to a third party on their behalf;
 - (iii) what happens if the trustees fail to exercise their discretion in a year, how is the income to be dealt with; and
 - (iv) how is income that is not distributed in a year to be dealt with?
6. If undistributed income is to be accumulated, what is to happen after the accumulation period ends?
7. Are capital distributions permitted prior to the termination of the trust? If yes,
 - (i) for what purposes can capital be distributed;
 - (ii) can capital be distributed directly to a beneficiary and/or to a third party on their behalf; and
 - (iii) how often?
8. Is preference to be given to any particular beneficiary with respect to income and/or capital distributions?
9. Is a certain minimum amount of income to be paid out each year? Should this be subject to a cost-of-living adjustment (“COLA”)? If yes, when should the COLA calculation start? Should there be a cap on the COLA calculation in a year?
10. On the termination date, how is the capital to be distributed?
11. If the termination date is dependent upon a beneficiary living until an age beyond the age of 18 years, is a gift-over provided for in the event the beneficiary doesn’t live to the specified age? If not, why not?

TAB 8



WILLS AND ESTATES

Practice Basics 2017

Don't Send Out a Will for Execution by a Client Alone

Rodney Hull, Q.C.
Hull & Hull LLP

March 27, 2017

DON'T SEND A WILL OUT FOR EXECUTION BY A CLIENT ALONE

Rodney Hull, Q.C.

Two recent English cases of its High Court of Justice, *Re Gray*, an unreported judgment of June 24, 1997, of Lloyd J., Chancery Division and *Esterhuizen v. Allied Dunbar*, [1998] 2 FLR 668, a judgment of Longmore J., The Queen's Bench Division, have brought into sharp focus the problems and exposure faced by a solicitor who sends out a Will for execution by a client without the supervision of a solicitor or other legally-trained person.

In view of these cases, it would appear that no matter how explicit and clear are the instructions for the unsupervised execution of the Will by a client without legal assistance, the formalities attendant upon the legal and proper execution of a Will as provided by the statute are sufficiently complex that a client not legally trained should not be trusted to undertake this ceremony alone.

I use the word "ceremony" advisedly as the process of execution of a Will involves at least three participants, with a prescribed ritual of which all solicitors are familiar.

If it is impossible for the solicitor who prepared the Will to be physically present on the occasion of its execution, the ceremony can be supervised by another solicitor or legally-trained person or a telephone call between the client and the solicitor who prepared the Will or any other solicitor or legally-trained person at the time of execution of the will.

This should ensure proper execution in accordance with the terms of section 4 of the *Succession Law Reform Act*, thus assuring the validity of the Will, at least from the standpoint of its execution.

These recent English cases should cause any solicitor to be skeptical about an unsupervised execution ceremony, not only from the standpoint of the wording of the instructions, which may or may not be understood by the client, depending upon the sophistication of the client's ability to deal with words, but also from the standpoint of the nature of the client, himself or herself.

We are all familiar with the swashbuckling client who would consider the ceremony described in the instructions to be so much gobbledygook, and may wish to cut some corners, or the client who simply will not turn his mind to the dictated detailed instructions provided and other clients with frailties too numerous to mention.

Thus, I say that based on these cases, never, or hardly ever, can an unsupervised execution of a Will by a client be justified and the solicitor will be at risk if such an execution is attempted.

And this is so, no matter the clarity of the instructions or the reason for executing the document without the supervision of the lawyer or other legally-trained person except in the most extended of circumstances.

While at first blush, this statement may appear to be overly ominous, it reflects what is the clear thrust of Longmore J.'s stern wording set out respectively on pages 674 and 677 of the report, which constitute clear words of warning to solicitors who send wills out for unsupervised execution by a client.

These words are:

"... a prudent solicitor regards it as his duty to take reasonable steps to assist his client in and about the execution of his will, rather than merely to inform the client how it is to be signed and attested. This means that once the client has approved the draft of a will a prudent solicitor will either invite the client to his office so that the will can be executed there or visit him with a member of his staff to execute the will at the client's house."

and

"Any testator is entitled to expect reasonable assistance without having to ask expressly for it. It is in my judgment not enough just to leave written instructions with the testator. In ordinary circumstances, just to leave written instructions and to do no more will not only be contrary to good practice but also in my opinion negligent."

In Re Gray, which was decided before Esterhuizen, Lloyd J. stated as follows:

What steps are appropriate in discharge of these various duties in any given situation may depend on who the client is and the view that the solicitor has formed, or ought to have formed if acting with reasonable competence, as to the ability of the client to understand and follow advice as to the relevant procedures.

In Esterhuizen, Longmore J., while not faced with it, did not agree with this statement and comments on this concept by stating as follows:

"There was some suggestion in argument that this might depend on how competent or intelligent the testator was perceived to be but I cannot believe that is correct, save insofar as the actual performance of the duty may vary according to a defendant's perception of his client."

It would seem that Longmore J. in Esterhuizen was not commenting on Lloyd J.'s statement set out above as no reference to Re Gray is contained in the reasons of Longmore J. in Esterhuizen, and one must assume that Longmore J.'s judgment was given without the judgment of Re Gray having been brought to his attention.

Thus, we have two conflicting opinions by these judges respecting that point.

In Esterhuizen, the solicitor was held liable and in Re Gray, the case against the solicitor was dismissed.

With respect to the words of warning in Esterhuizen, in my view the proper counsel of caution would seem to be to harken to the words and principles of Longmore J. in Esterhuizen, that if a solicitor wishes to avoid exposure to a claim arising out of sending a will out for execution by a client, legally unsupervised notwithstanding the inclusion of detailed instructions.

It is interesting to note that Longmore J. held in Esterhuizen, apart from the problems arising in connection with the execution of the will, that financial institutions who hold themselves out as capable of drawing wills for consideration will be held to the same standard of

care as that required of a solicitor. It is also worthy of note that in Esterhuizen, the defect in the execution of the Will was that only one witness signed the will.

In Re Gray, the defect was that both witnesses were not present together at the time of execution and in neither case was there any suggestion by either of these judges that these defects were not fatal to the validity of the will and no suggestion was made in either case that strict compliance with the execution provisions of the statute should have any effect on the perceived invalidity of the wills.

This should give some serious doubt to the authority of the cases of Sisson v. Park Road Baptist Church 24 E.T.R. (2d) 18 in the Ontario High Court of Justice and Kraus v. Toni 1999 B.C.J. 2075 in the British Columbia Supreme Court each of which holds that one signature is sufficient for execution of a will and these cases should not be relied upon to permit the relaxation of complying with the strict terms of the statute respecting execution.

If it is completely impractical to have a will executed under the supervision of a legally-trained person, then, while obviously full and complete instructions should be given to the client, it is essential as well that upon receipt of the will by the solicitor from the client after its purported execution, that the solicitor has a strict duty imposed upon him to review the will in the circumstances surrounding its execution and ensure that the will was properly executed.

As a counsel of perfection, the solicitor should inquire of the client as to the conduct of the execution ceremony and it would be most beneficial to obtain an affidavit of execution by the solicitor from each witness.



WILLS AND ESTATES Practice Basics 2017

Will Review

Jordan Atin, C.S., TEP
Atin Professional Corporation

March 27, 2017

CLIENT:		
Time Spent	Phone	In Person

Client Will Review

Date

Participants:

Special Discussion?

Changes

<u>Revocation</u>		
<u>Definitions</u>		
<u>RRSP</u>		
<u>Executors</u>		
<u>Funeral</u>		
<u>Personal Effects</u>		
<u>RESP</u>		
<u>Legacies</u>		
<u>Residences</u>		
<u>Residue</u>		
<u>Ultimate Distribution:</u>		
<u>Bene Under Age</u>		
<u>Trustee Powers</u>		
<u>NFP</u>		
<u>CBOW</u>		
<u>Guardians</u>		
<u>Insurance Decl.</u>		

POWERS OF ATTORNEY

Property Effective Date j/s mandatory statements mat. home comp

Personal Care j/s NHM

Outstanding Issues

CLIENT:	
Time Spent	Phone In Person

TAB 10



WILLS AND ESTATES

Practice Basics 2017

Sample Reporting Letter

Jordan Atin
C.S., J.D., TEP
Atin Professional Corporation

March 27, 2017

Private and Confidential

date

File No. file no

address

DELIVERED

Dear salutation:

Re: Wills and Powers of Attorney?more?

Thank you for retaining me to prepare your Will?s and Powers of Attorney.

Safekeeping

You have instructed our firm to keep possession of the following original documents:

1. Wills (for both of you)
2. Powers of Attorney for Property
3. Powers of Attorney for Personal Care

You signed the attached Escrow Instructions that confirm when these can be released.

You have instructed us to return the following original documents to you for safe keeping:

1. Wills (for both of you)
2. Powers of Attorney for Property
3. Powers of Attorney for Personal Care

As I mentioned, it is important that these are kept in a safe place. A safety deposit box or other similar location is preferable. If the original Will cannot be located at the time of death, it may be presumed that you did not have a Will or that you had intentionally destroyed it. In that case, your estate would be distributed as if no Will ever existed. I would suggest that you inform the executor of the location of the original Will.

The original Powers of Attorney are equally important. At least one original of the Powers of Attorney should be kept outside of a safety deposit box, otherwise, your attorney may not be able to gain access to it.

Review

As I mentioned, it is very important that you review your Will regularly, perhaps every few years. Should there be a major life change, such as the death, disability or incapacity of a beneficiary, guardian or executor, your marriage, separation or divorce, birth or adoption of children, significant acquisition or disposition of property, change of residency or citizenship or other such changes, you should immediately review the Will and, perhaps, consult an estates lawyer to determine its effect on your Will. Specifically, if any of your beneficiaries start to receive government assistance, you should reconsider your bequest to them as those gifts may disentitle them from the government benefits.

All of our discussions with you and the preparation of your estate planning documents were premised upon current applicable laws. Likewise, the comments in this letter reflect current applicable laws. Should any of those laws change in the future, a review of your estate plan may be warranted to ensure that the objectives reflected in your estate planning documents are not adversely affected by such changes. We do not assume any responsibility for advising clients of changes in the law or for monitoring the impact such changes may have on a particular individual's estate plan. For that reason, we suggest that you contact us in two to three years' time to see whether there have been any changes to the law which may require (i) modifications to your estate planning documents, or (ii) preparation of entirely new estate planning documents, having regard to your estate planning objectives at that time.

*??this??*In accordance with your instructions the Will has been drafted in contemplation of your marriage to each other. Without this clause the Will would automatically be revoked upon your marriage. If, for whatever reason you do not marry each other, I would recommend that you consult an estates lawyer concerning the affect of the failure to marry on your Will.

Should you wish to change your Will, I would caution you not to make handwritten notes on the face of the Will, as these may either not be binding or will lead to confusion and possible litigation. I would strongly suggest that you see an estates lawyer to assist you.

Your Will contains a suggestion to your Trustees to follow a non-binding list regarding your personal effects. If you wish to include one, make sure you keep it with the Will.

As we discussed since both of you have retained me together to draft your Wills, I cannot keep any information which I receive from one of you confidential from the other. I confirm your consent for me to act for you jointly in this regard. Thus, should you wish to change your Will, and do not wish your spouse to know about it, I would strongly advise you to retain other counsel at that time.

Your respective Wills are revocable and can be changed unilaterally without the consent of, or notifying, the other. *??lifetrust in Will??You were each content to leave your entire estate to the other. We had discussed the possibility of putting gifts in trust for each other's lifetime, which means that the capital would be protected to some degree for your other beneficiaries. As well, an agreement not to change your Wills without the consent of the other could be entered into, but at this time, you have not decided to enter into such an agreement.*

As explained, an absolute gift means that the beneficiary can do whatever he or she wishes with the inheritance received.

INCLUDE IF LEGACIES:

As you have a provision for a legacy to be paid on the 1st death, you should ensure that there are sufficient assets in your own name (i.e. not jointly held) to cover the payment of the legacies and any costs of probating the Will, taxes and debts.

I confirm that I have relied on your information regarding your assets and have not, in accordance with your instructions, independently verified their value, account or policy numbers, legal description or manner of ownership. Consequently, I cannot provide an opinion on whether any of them pass automatically on death or to whom they will pass.

As your Will directs your Trustees to take into account future advances to your children, it is recommended that you clearly document any future advance made.

Foreign Advice

As discussed, I am not permitted or qualified to provide you with any advice regarding how foreign succession or tax laws will impact your estate or your beneficiaries. If applicable, you should contact a lawyer in the jurisdictions where you own property or where your beneficiaries reside in order to determine if any special advice is required.

You advised me that you are a citizen of the United States. Unlike Canada, the US imposes taxes based on citizenship. Therefore, even if you do not own any property in the United States, your estate may be liable for income taxes. You should consult a US lawyer to determine if there is anything that can be done regarding this issue.

Tax Advice

I confirm that I am not providing you with any income tax advice regarding your estate plan. I have recommended that you consider retaining a tax specialist to provide you with advice in this regard.

Registered Plan Designations

??this??I would point out again, that the designation of beneficiaries in the Registered Plan Designation with respect to Registered Plans and any other similar plans apply only to those plans which are in existence at the date of the signing of your Will. Should you sell, transfer, purchase or add any plans, or have your RRSP converted into a RRIF, the beneficiary designation in that document will not apply to them. Thus, if you wish to have a beneficiary named for those plans, you must either revise your Designation or designate the beneficiary by attending at the company holding your Registered Plans or other plan and sign a beneficiary designation.

As we discussed, Registered Plans are taxable unless they pass directly to a surviving spouse and the spouse elects to roll over the Registered Plan into his or her own Registered Plan. If this election does not occur, the income tax related to the Registered Plans can be up to 50% of its value.

Under Ontario Law, the Estate will be responsible for paying all of the income taxes relating to the Registered Plans while the named beneficiary will receive the full proceeds of the Registered Plans.

IN CASE ESTATE DESIGNATED AS BENEFICIARY:

I would point out again, that the designation of beneficiary in the Designation with respect to RRSPs, RRIFs any other similar plans apply only to those plans which are in existence at the date of the signing of your Will. Should you sell, transfer, purchase or add any plans, or have your RRSP converted into a RRIF, the beneficiary designation in your Will will not apply to them. Thus, if you wish to have a beneficiary named for those plans, you must either revise your Will or

designate the beneficiary by attending at the company holding your Registered Plan and sign a beneficiary designation.

As we discussed, Registered Plans are taxable with the income tax related to the Registered Plans being up to 50% of its value.

Under Ontario Law, the Estate will be responsible for paying all of the income taxes relating to the Registered Plans while the named beneficiary will receive the full proceeds of the Registered Plans. Currently, the Estate is the beneficiary of your Registered Plans.

*??or this??*In accordance with your instructions, I have not included a designation of beneficiary for your RRSPs, RRIFs any other similar plans. You have advised me that you have valid beneficiary designation made on all of your plans. As you are aware, beneficiaries can be designated directly on the plan by attending at the company holding your RRSP or other plan and signing a beneficiary designation. Designating a beneficiary can, in some circumstances, reduce probate fees and provide creditor protection for the proceeds. I suggest you review these designations as frequently as your Will.

Because your entire Estate plan depends on the beneficiary designations on your life insurance and RRSPs, you have verbally confirmed with me that you recently designated _____ as the beneficiary of those policies. Obviously, if, for any reason, the beneficiary designations are not maintained or should fail, your intentions with respect to your Estate plan would be defeated. I have not provided for designations of _____ as beneficiary of the RRSPs and life insurance in the Will, in accordance with your instructions, but you have advised me that those have already been done. In accordance with your instructions, I am not independently verifying the designation.

Insurance Designations

*??this??*I would point out again, that the designation of beneficiaries in your Declaration with respect to life insurance policies apply only to those policies which are in existence at the date of the signing of your Will. Should you sell, transfer, purchase or add any policies, the beneficiary designation in your Will will not apply to them. Thus, if you wish to have a beneficiary named for those policies, you must either revise your Declaration or designate the beneficiary by attending at the insurance company holding your policy(s) and sign a beneficiary Declaration.

While I have included your group policy in the declaration, I must advise that such declaration may not be effective in respect of group policies. You should check with your Human Resources department regarding this issue.

It is important to notify the insurance company of your designation, since if they are unaware of your beneficiary designation in your Will, they could pay out the proceeds to the beneficiary named in their records.

*??or this??*In accordance with your instructions, I have not included a designation of beneficiary for your life insurance policies. You have advised me that you have valid beneficiary designation made on all of your policies. As you are aware, beneficiaries can be designated directly on the policy by attending at the insurance company holding your policy(s) and signing a beneficiary designation. Designating a beneficiary can, in some circumstances, reduce probate fees and provide creditor protection for the proceeds. I suggest you review these designations as frequently as your Will.

As we discussed, with respect to corporately owned life insurance, the manner in which the payment out of the proceeds occurs can affect the relative entitlements of the beneficiaries. Typically, the payment of proceeds is considered "income" and will be paid to the beneficiary entitled to the income.

Multiple Wills

I confirm we discussed the use of multiple Wills to reduce "probate tax".

Your instructions were to proceed with only a single Will at this time. You should closely monitor the value of shares you own in corporation that you control. If there is a significant increase in value, you may wish to revisit this issue. If you have questions about whether to implement a multiple Wills strategy to reduce Estate Administration Tax in the future, please feel free to contact me.

OR

In accordance with your instructions, I prepared multiple Wills for you.

The "Quaternary Will" deals with your personal effects, including your valuable artwork collection.

The "Tertiary Will" deals with your current home.

The "Secondary Will" disposes of your "Corporate Properties" and Personal Effects.

These 3 Wills ("other Wills") are intended to apply to those assets which you own which should not require that the Will be probated. If your executor is not required to probate these Wills, your estate will not be required to pay probate tax on those assets governed by these Wills.

The "Primary Will" is designed to deal with all other assets and should be the only Will which requires probate. Therefore, probate tax will only be paid on those assets which are governed by the Primary Will.

However, there are certain factors that may interfere with the objective of lessening probate tax which I will outline below as follows:

1. Future changes to applicable laws or to current administrative practices of third parties (such as banks or financial institutions) who hold your assets may require probate of the Other Wills;
2. If the validity of the Other Wills were ever challenged by a party having standing to do so, it would necessitate submitting that Will to the Court. In that event, the probate tax sought to be avoided would have to be paid.
3. The executors appointed under your Other Wills have the ultimate authority to decide whether that Will should be submitted to probate. There are some circumstances where it is in the best interests of the executors and the beneficiaries to probate a Will.

I also recommend updating your wills should you acquire an interest in any other private corporation.

I confirm your instructions not to draft multiple Wills with respect to your private corporation, despite the potential probate tax savings.

??this??House

I confirm that you have advised me that title to the house in ?is currently registered in your name and ?'s name as joint tenants, that you do not wish me to sever this registration at this time and that you will be seeking the advice of your family law lawyer with respect to this and related issues. As a result of these

instructions, if you were to die, entire title to the house would flow to ? absolutely.

In accordance with your instructions, your home at _____ has been transferred into your joint names with right of survivorship. This means that each of you is a one-half owner of the property and can do with it as you see fit. If the registration is unchanged, it will pass automatically to the survivor. Enclosed is the Transfer for your records.

Guardianship of Minors

As I told you, guardians named in Wills only have legal authority to act for 90 days after death. Within that time period, it is usual for the person or persons named to apply to court to be approved as guardian.

I also recommend that you leave a letter to your guardians and trustees about any specific wishes regarding education, religion, upbringing, or other matters. As I cautioned you, these writings are not binding, but are helpful to guardians and trustees.

??this??As you were not sure at this time who you would wish to have as a permanent guardian, I have included a clause that the court should consider your thoughts on the issue contained in any letter or memorandum which you may leave.

Children born out of Wedlock

I confirm that you do not wish to benefit any person born outside of marriage unless he or she is treated as a child in the opinion of your Trustee. The Will, therefore, includes a clause effecting that intention.

Severance of Joint Tenancy

In accordance with your instructions, I have prepared a transfer to sever the joint tenancy on your home situated at _____. As we discussed, this means, rather than your half of the property going to your spouse, _____, if you predecease him/her, it will be disposed of under your Will. You have also lost the right of survivorship to _____ half if she predeceases you.

Powers of Attorney

You instructed us not to prepare Powers of Attorney for you.

As I mentioned to you, by executing a general Power of Attorney, you are giving the person named in it the authority to deal with your finances and other legal matters on your behalf. You should understand that a Power of Attorney is a powerful document and can be misused by that person to your great detriment.

This authority is effective immediately after execution of the document, however, to utilize the authority the person you named in the document must present the document to the financial institution. Therefore, if you wish that that person acts only if you become mentally incapacitated, we advise you to keep physical possession of the Power of Attorney while letting that person know the whereabouts of it if that circumstance arises.

*?? or this??*You have instructed us to draft the Power of Attorney so that it may only be used if you become mentally incapacitated. As we advised you, this may cause problems if these circumstances arise. Third parties, such as banks and trust companies, are sometimes reluctant to accept Powers of Attorney which are contingent on the mental state of the donor. Banks have been known to insist on court authorization or a formal assessment, the very process Powers of Attorney are utilized to avoid, before acting upon a Power of Attorney which required evidence of mental incapacitation.

*??multiple POAs??*You have instructed us that you have executed previous Powers of Attorney which you do not intend to revoke at this time. In that regard, the Power of Attorney document which you have executed contemplates that you may have multiple Powers of Attorney.

Your Power of Attorney may be revoked at any time. If you wish to revoke your Power of Attorney, you must give notice in writing to the person named in it and any third parties with whom he or she is dealing.

Your Power of Attorney for Personal Care is only valid should you be unable to manage your own personal care. In that case, the person appointed is permitted to make personal care decisions for you. That person is also permitted to provide or withhold consent to medical treatment on your behalf if you are unable to do so yourself.

That person is required to follow your last known wishes in making these decisions.

Your current wishes are reflected in the document. You are free to alter or amend your instructions at any time. If you do so, it is a good idea to put them in writing and to keep them with the Power of Attorney document.

OR

You have instructed me not to include any specific wishes in your Power of Attorney for Personal Care. My suggestion is that you leave a written record of your wishes with your Power of Attorney.

If you travel to other jurisdictions or have assets in other jurisdictions, I would recommend that you prepare Powers of Attorney in those jurisdictions since your Ontario Powers of Attorney may not be recognized there.

My account is enclosed.

Once again thank you for choosing me. Should you have any questions or concerns in the future, please always feel free to give me a call.

Yours very truly,

XXXXX
Enclosures



WILLS AND ESTATES Practice Basics 2017

Will Plan Meetings – a Model

Jordan Atin, C.S., TEP
Atin Professional Corporation

March 27, 2017

Will Plan Meetings - a Model

Picture your last will planning meeting.

Your clients sat across the table from you. You talked. They talked. Everyone hoped that the other understood what they were saying.

Will planning can be a very complex exercise. There are a lot of moving parts, lots of "What ifs?". For clients, making a will is often an anxious experience. The multitude of decisions and options can be overwhelming, the legal concepts and terminology, intimidating.

Will challenges are more common now than ever. They almost always focus on "Did she really understand the Will?" And the lawyer is the primary witness in most of those cases.

Is there a better way of ensuring that your client understood what was really in the Will and why it was there?

Perhaps a more systematic, structured process is better for both the client and the lawyer. Better for the client because it is clear and easy to understand. Better for the lawyer because it is easier to defend against claims that "Mom didn't *really* understand what she was doing".

Here is a model that has two components: simplification and visualization.

Simplification

Despite all the complexities that lawyers have to consider, the options for the client's consideration can be easily simplified.

From the client's point of view, there are only two ways of giving a gift in a Will - what the Model refers to as "Absolute" and "Trust". Explaining those two concepts can also be very straightforward with the proper warnings attached such as:

“Absolute gifts are the simplest kind. The recipient can do anything with the inherited asset including spending it all or giving it away when the recipient dies to whomever he or she wants.”

A nifty way to explain if the client wants to use a trust is:

“If you (the client) use the word "BUT" in describing the gift, you know you don't want an absolute gift. You have indicated that you need a trust for that gift.”

Breaking it down into just two options makes it less overwhelming for the client and easier to focus on decisions.

The second component of the simplification process is creating a logical flow for the decisions. Almost all will plans can be divided into no more than 3 fixed scenarios-

1. Your spouse survives you.
2. Your spouse predeceases you, but you have descendants.
3. You have no descendants.

Some plans may not even have all three scenarios. Going through each scenario, one at a time, keeps the client focussed and avoids drifting off to innumerable other issues.

If your spouse is alive, do you want to give everything to your spouse? Absolute or in a trust? Perhaps some assets are held in trust while others are absolute. Maybe the client wants to leave initial gifts for the children. Absolute or trust?

Like the simplicity of “Absolute vs. Trust”, developing a trust can also be broken down into a few simple concepts. When discussing a monetary trust in simple terms, it can be broken down into 6 questions:

1. Beneficiaries?
2. “Duration”? When does the trust end?
3. “Mandatory Payments”? (e.g. staged distributions at certain ages or an required minimum annual payment)

4. "Discretionary Payments"? Are they permitted or are there any limits on those payments?
5. Trustee(s)? Who are the primary and alternates?
6. "Gift-Over"? What happens to any balance when the trust ends?

For trusts for specific property, the lawyer can add other decisions, such as payment of expenses, right to purchase, ability to buy a replacement property and other specific issues.

Visualization

Despite the complexities, most of us simply keep our own notes to track the conversation, advice, discussion and instructions.

Isn't *seeing* better than hearing?

Visualization of important concepts and decisions encourages the client to reflect and consider their ramifications. It also increases the likelihood that all important issues are canvassed and accurately recorded.

The benefit of visualization is it keeps the client and the lawyer focussed on the same issues and decisions. It avoids miscommunication. It serves as a reminder of where we are in the overall plan and where we are going.

It can be as simple as using a whiteboard or using specialized software that visualizes the instructions, tracks values of assets, income tax effects of certain distributions, probate tax, and automatic cues the lawyer on issues to be considered.

Here is an example of the Model:

House		
Cottage		
RRSP		
TFSA		
Non-Reg Investments		
Life Insurance - \$1M		
Life Insurance - \$500K		
Personal Effects		
Bank Accounts		
Florida Property		
Corp Shares		

ABSOLUTE
VS.
TRUST

SPOUSE IS ALIVE

Everything absolute to spouse except:
Life insurance \$500K equally among kids – Trusts as below

SPOUSE IS NOT ALIVE

\$10,000 to the World Fund
Balance = to kids – TRUST
Duration age 30
Mandatory Payments ¼ at age 25
Discretion Unlimited
Gift-over to other children
Trustee(s) John and Frank, jointly

IF NO ONE IS ALIVE

50% - to Jim's siblings
50% to Susan's siblings

(c) Jordan Atin 2016

When broken down visually, the client can start to process the decisions that have to be made and their impact. They can also highlight those questions that still need answers.

Once each scenario is drawn out, the display itself contains the will plan. This ensures that client and the lawyer understand one another and that they are all on the same page.

Jordan M. Atin is a Certified Specialist in estates law and an adjunct professor at Osgoode Hall Law School.

This article originally appeared in the March 3, 2017 issue of the Lawyers Weekly published by LexisNexis Canada Inc.

Reprinted with Permission.