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TAB 1

THE ANNOTATED WILL 2017

The Annotated Will 2017

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cpd Continuing Professional Development

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ANNOTATED WILL OF JOHN DOE[1]

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.

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[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 (2^{nd}) 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 (2^{nd}) 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 (2^{nd}) 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 (2^{nd}) 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 draftsperson 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.

<u>Annotation</u>: 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 <u>do not</u> 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 <u>do</u> 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.

<u>Annotation</u>: 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.

<u>Annotation</u>: 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 is 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 ¼ to be distributed at age 21, ¼ 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.

<u>Annotation</u>: 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.

<u>Annotation</u>: 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***

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[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. Powell[3], 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

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[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 <u>named</u> 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.

<u>Annotation</u>: 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 with 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.

<u>Annotation</u>: 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-ration 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) JOHN DOE
names as witnesses:)

_____

Signature _____

Printed Name _____

Address _____

_____

Occupation _____

Signature _____

Printed Name _____

Address _____

_____

Occupation _____

<u>Annotation</u>: 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 or 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.

<u>Annotation</u>: 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 <u>Pecore v. Pecore</u>, 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 form 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.