The Law Society of Manitoba

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# WILLS AND ESTATES

## Chapter 1

Will Drafting

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# A. WILLS AND ESTATES GLOSSARY*

**administrator**

- One who is appointed by the court to administer the estate of a person who died without leaving a will, without appointing an executor in a will, or where the nominated executor is unable or unwilling to act.
- A person appointed by the Minister of Indian Affairs and Northern Development to administer the property of deceased Indians and includes a person who, by reason of their office, is instructed to initiate or conclude the administration of an estate. *Indian Estates Regulations,* C.R.C., c. 954, s.2.

**bequest**

- A general term for a gift of personal property under a will; often used interchangeably with "legacy"; compare to "devise" which is a gift of real property under a will.

**codicil**

- An addition or change made to a will by a testator. It is a separate document executed with the same formalities as a will.

**committee**

- A person appointed by the court to look after a mentally incompetent person or the affairs of a mentally incompetent person.

**demonstrative gift**

- A general gift to be paid from a particular source or fund.

**devise**

- A disposition or gift of real property by will.

**executor**

- A person appointed in a testator's will to carry out directions and requests set out therein and to distribute property according to the will's provisions, whether male or female.

**executor de son tort**

- A stranger who acts as executor or administrator without just authority.

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* Adapted from Daphne A. Dukelow and Betsy Nuse, *The Dictionary of Canadian Law,* 2d ed. (Scarborough: Carswell, 1995).

**executrix**

- The female version of executor (antiquated).

**general legacy**

- A gift of assets payable out of the general assets of the estate, not a particular named object or asset.

**grant of probate**

- The order made when the court admits a will to probate.

**holograph will**

- A will written entirely in the testator's own hand, dated and signed by the testator.

**in specie [L. in its own form]**

- In its own form, without being converted into cash.

**inter vivos**

- Between living people, such as a gift.

**intestate**

- A person who dies without a will.

**issue**

- Includes all lawful lineal descendants of an ancestor.

**legacy**

- A general term for a gift of personal property under a will; often used interchangeably with "bequest"; compare to "devise" which is a gift of real property under a will.

**pecuniary legacy**

- A gift of money under a will payable out of the general assets of the estate.

***per capita* [L. by heads]**

- In equal shares.

**personal representative**

- An executor, an administrator, and an administrator with the will annexed.

***per stirpes* [L. according to stocks]**

- Refers to a scheme of distribution based on the branches of a family. See the detailed definition and examples in section E. 2.(b) of these materials.

**probate**

- A court process to prove the validity of a will.

**residuary gift**

- A gift of all of the testator's property not otherwise disposed of after payment of the general and specific gifts.

**residue**

- What remains of a testator's estate after every debt and specific bequest or devise is discharged.

**specific gift**

- The gift of a certain item of personal property in a will.

**testator**

- The person making a will, whether the person is male or female.

**testate**

- An adjective describing a person who has died leaving a will.

**testatrix**

- The female version of testator (antiquated).

**will**

- The written statement by which a person instructs how their estate should be distributed after death.
- Includes a testament, a codicil, an appointment by will or by writing in the nature of a will in exercise of a power and any other testamentary disposition.
- Includes testament, codicil, and every other testamentary instrument of which probate may be granted.
- Must be a written document.

# B. WHY DOES ANYONE NEED A WILL?*

Often the lay person is of the opinion that they do not need a will. Typically, this might arise where spouses own a house in joint tenancy, keep their money and non-registered investments in joint accounts, and have some insurance and registered investments naming each other as the designated beneficiary.

Some of the following points may influence the decision about whether or not to execute a will:

1. The estate may be larger than appreciated. For example, if a home mortgage is life-insured, then the mortgage will be paid off on death. This will mean that the full value of the property will be part of the estate when the second spouse dies. Also, other life insurance can substantially increase the size of an estate. An inheritance from a parent or other individual could have the same effect.

2. Intestacy rules are inflexible. Even though the statutory rules of *The Intestate Succession Act,* C.C.S.M. c. I85 concerning disposition of assets on intestacy may initially appear satisfactory, it is important to remember that these rules are inflexible, and benefit only certain blood relatives. Provision for others can only be made by a will. As an example, the unexpected death of a son leaving a needy childless daughter-in-law can only be addressed in a will. Similarly, a specific bequest of property to someone, or the forgiveness of debts, or the provision of a legacy for a friend, an employee or a charitable organization or for the care of a pet, etc., can only be accomplished in a will.

3. Intestacy rules change. On July 1, 1990 the Manitoba Legislature changed the pattern of intestate succession by passing *The Intestate Succession Act* which replaced *The Devolution of Estates Act*. Why leave the disposition of your estate to the vagaries of changing legislative provisions?

Intestacy rules may not do what a lay person expects. For example, a person may expect their spouse to inherit their entire estate when they pass away, or may expect their children to receive an equal share. However, if the person has a child from a previous relationship, the surviving spouse receives a preferential share of $50,000 or ½ of the intestate estate, whichever is greater, and a distributive share of ½ of the balance of the estate remaining after payment of the preferential share. This often means the surviving spouse will receive 75%, and all of the deceased's children (including the children from the current relationship and any previous relationships) will share the remaining 25%. If the estate is worth less than $100,000, the surviving spouse will receive more than 75%.

* This article has been adapted from an article originally written by Professor Cam Harvey.

4. The application of *The Survivorship Act,* C.C.S.M. c. S250 can lead to unexpected results. This may also occur even where there is a will, if it does not adequately address what is to happen in the event of a common disaster or other worst case scenario.

For example, consider the situation of a husband and wife who own all of their assets jointly. If husband, wife and their children are all killed at the same time in a common disaster, or it is uncertain which of them survived the others, and if neither spouse had a will, the result under *The Survivorship Act* would be as follows:

(i) The husband would be deemed to have survived his wife and children, and *vice versa*; and

(ii) The husband and wife would each be considered to own their joint property as tenants in common, each as to one-half. Then each estate would be distributed pursuant to *The Intestate Succession Act.*

Presuming both the husband and wife had no grandchildren or other issue, the result would be that the husband's one-half interest in the joint assets and assets in his name alone would pass to his parents, if alive, and otherwise to his parents' issue (i.e., his brothers and sisters), or if there were none, to grandparents and their issue.

The wife's undivided one-half share of the joint property and assets in her name alone would similarly pass to heirs on her side of the family.

This distribution may be completely different than what the couple would have intended.

The best way to avoid such undesired results is to make a will and ensure that it includes appropriate provisions for the distribution of the estate in the event that all expected beneficiaries die.

5. The distribution of certain assets may be more problematic without a will. Dealing with personal effects (such as jewellery, heirlooms, stamp collections, etc.) can cause bitterness and division in families, especially when complicated by promises that may have been made by the deceased during their lifetime. The disposition of assets such as a business may also be complex and fraught with difficulty. Such problems can be avoided by a detailed will that states how these assets are to be allocated or otherwise disposed of.

6. If there is an intestacy, the person administering the estate may not be the person the intestate would have chosen. If the spouse of an intestate has died or is unable to act, and all other close relatives reside outside the province, those relatives could not apply for administration of the estate as the law requires an administrator to be resident in the province (see *s. 7(1)* of *The Court of King's Bench Surrogate Practice Act*).

The administrator may therefore be a distant relative or non-related person who resides in the province, or a trust company, which may be completely inconsistent with what the deceased would have wanted.

7. An administrator, unlike an executor resident in Canada, must post an administration bond and, with estates exceeding $50,000.00, supply one or more personal sureties (see *s. 25* of *The Court of King's Bench Surrogate Practice Act*). If the administrator cannot provide the required sureties and has to purchase a commercial surety bond, this will likely cost far more than drawing a will. It is also often difficult to obtain a commercial surety bond and once it is in place, the commercial surety can only be cancelled by court order.

8. An administrator on intestacy does not have as much power as an executor. An administrator has only a limited power to value, divide and distribute the assets *in specie.* They also have the power to postpone the sale of estate assets. However, an administrator's power only comes into existence when they have been officially appointed by the court. By contrast, an executor's power under a will is immediate from the date of death; the grant of probate merely confirms the powers. A carefully drafted will should also give the executor appropriate discretionary powers to deal with the estate assets.

9. Where there is no will, the share of a minor is locked up until the minor reaches the age of majority (18 in Manitoba). Funds can only be accessed for the maintenance and education of the minor through a court order. Further, even if the amount is significant, the beneficiary will receive the full amount of the inheritance at 18, which is often a concern to parents or grandparents. A will provides the testator with the opportunity to specifically address how the share of a minor, or any other beneficiary, is to be handled. The directions in the will could include the establishment of a trust, provide for how the funds are to be used, and could delay the age at which the funds are distributed to the beneficiary. This would eliminate the need for court involvement.

10. Especially with larger estates, but even in smaller ones, tax savings may be available through will trusts, and other tax planning provisions that include the ability to make certain elections under the *Income Tax Act,* R.S.C., 1985, c. 1 (5th Supp.) at the time of death. While some of the significant tax advantages of testamentary trusts have been eliminated by changes to the taxation of income generated by testamentary trusts that came into effect in 2016, there are still some potential tax benefits that may apply to some testamentary trusts.

11. A will is a convenient, although not necessarily the best, vehicle for providing directions concerning burial or cremation or for disposing of the body for medical purposes.

12. Although guardianship of children is a matter ultimately and entirely for the court to decide, directions can be included in a will and are usually very persuasive.

13. If the beneficiary designated under any insurance policy or registered investment predeceases the deceased, or dies in a common accident, the proceeds will form part of the deceased's estate. Having a will enables a person to decide how these proceeds should be distributed.

14. Certain individuals could benefit greatly from the advice of a lawyer regarding estate succession and the drafting of an appropriate will, including individuals who:

- have minor children;
- are older and may be subject to pressure from younger family members or others;
- do not have the facility to express themselves clearly and concisely in writing;
- are contemplating marriage or commencing a common-law relationship;
- are in a common-law relationship;
- are currently married or cohabiting with a partner and who also have a child or children from previous relationship(s);
- are separated or contemplating separation and divorce;
- have a history of mental or emotional illness;
- wish to provide for a disabled or special needs family member;
- are without any known or close relatives;
- have an uncertain domicile;
- have real estate in a foreign jurisdiction;
- have complex financial affairs;
- do not want to make any provision for certain members of their immediate family; and
- are citizens of other countries or have connections to other countries that may attract foreign succession taxes or other duties.

# C. TAKING INSTRUCTIONS ON A WILL

## 1. Role of the Lawyer

The Practicing Law Institute of New York described the solicitor taking instructions and drafting the will as a detective. The Institute says:

> *It is the responsibility of the solicitor to draw out of the client an inventory of his assets. Many people do not realize the extent and nature of their assets… Once you are satisfied that you know all there is to know about your client's assets (and don't forget to ask about his liabilities), it is time to find out about the object of his bounty (and those to whom he may owe some legal or moral testamentary duty).*

Gathering complete information and taking proper will instructions requires considerable attention on the part of the lawyer. Thorough information gathering forms the basis for being able to properly advise the client and ensure that the client's true testamentary intentions will be fully carried out. It is the duty of a lawyer preparing a will to be satisfied that, prior to its execution, the instrument expresses the real testamentary intentions of the client.

The role of the lawyer is to understand the instructions of the testator and to put them in a form of a will that expresses the testator's intentions clearly and is binding on all concerned. This is a very personal task.

Rodney Hull in his article "Obtaining Instructions for the Preparation of the Will" (1982) 6 E.T.Q. stated at 11:

> *I cannot emphasize too strongly that a solicitor whose advice is sought for the preparation of a will is not merely the scribe of the client. It is simply not good enough to blindly take instructions on the basis that it is none of your business to inquire into the disposition that the testator seeks to make and that it is his will and not yours.*

*Slobodianik v. Podlasiewicz,* 2003 MBCA 74 (CanLII) is a leading Manitoba decision on the role of the lawyer in taking instructions when there are suspicious circumstances. The Court of Appeal noted that the lawyer came to see the elderly testator in a personal care home at the request of one side of the family. However, among other things, the lawyer had not kept notes, did not examine the testator in any meaningful way to determine his ability to understand, did not systematically assess the testator's capacity, did not ask the testator to give an inventory of assets and did not ask questions to test the testator's mental functioning. The court found that the lawyer did not meet the obligations expected of him in the circumstances.

# 2. Receiving Instructions

## a) General

The lawyer drafting the will should meet with the testator to obtain instructions, giving them a meaningful opportunity to observe the testator, to ask questions and probe to obtain all relevant information before drawing the will. The lawyer must be satisfied that they understand the intentions of the testator, that the testator appreciates the consequences of the instructions expressed and that the instructions truly reflect those intentions.

The goal in taking instructions for a will is to obtain sufficient information to permit the lawyer to understand the testator's intentions and to enable them to incorporate those intentions into a will that is binding and effective. There is no one correct technique for obtaining these instructions. Each lawyer approaches the matter differently.

It is crucial that the lawyer keep written notes as to the instructions given by the testator, as well as the circumstances surrounding how the instructions were obtained and the signing of the will. These may prove invaluable in later years if the will requires interpretation or is challenged. The notes should be sufficiently comprehensive not only to trigger the lawyer's memory, if necessary, but also to aid a court if the lawyer is not personally available.

Lawyers should follow the cases in the reports where this subject matter is discussed. Usually there are not many wills cases in the reports and a quick review of the index in the monthly or quarterly reports will reveal the cases where this subject has been discussed and reviewed.

It is not recommended that a lawyer take instruction for drafting a will over the phone in any situation, even where the lawyer believes they are familiar with the testator and their personal and financial situation. Unless a full and meaningful consultation is conducted it would be rare that the lawyer fully comprehends a testator's family tree, the nature and extent of their assets, all dynamics of their family and relationships, and their objectives in a way that allows them to draft a proper will.

Any informal practice can lead to omissions or errors that create an inadequate will for which the lawyer can be held liable.

## b) Some Cautions

A meeting should be arranged in person, in order to obtain proper instructions. In advance of the meeting, the lawyer is well advised to provide the client with an introductory letter that establishes the recommended process. The letter should also

describe the documentation a client should consider reviewing and bringing to the meeting, the particulars of information useful to the planning process, and how fees will be charged.

> At the interview, the lawyer should be satisfied that the instructions are the free intentions of the testator and that no other party is present who might influence the directions of the testator. Where circumstances warrant, more than one consultation meeting is prudent.

There is no reason that a lawyer should not charge a reasonable fee for collating the information required to draft the will, which should not be considered non-chargeable time. The will is not a commodity waiting in a lawyer's cabinet for dating and signing. The client should understand the importance of the information gathering process to the ultimate objective of drafting a will that reflects their intentions and avoids or minimizes challenges on death, including ones based on capacity, undue influence and suspicious circumstances. The details surrounding the preparation of the will may ultimately be closely examined if a disappointed beneficiary surfaces.

## c) Other than Simple Will Instructions

A more comprehensive will may be required where the assets of the testator are numerous and varied and the circumstances and intentions of the testator are detailed and complicated. A comprehensive interview should take place and include a careful review of the testator's circumstances and situation. In some cases, additional consultations before execution of the will are appropriate. The instructions should be taken by the lawyer drafting the will. Instructions should not be taken by a paralegal or assistant.

## d) Will Instructions from Third Parties

Occasionally, you may receive what are intended to represent will instructions for a testator from third parties, such as:

- trust companies;
- accountants;
- life insurance agents;
- financial planners;
- members of your firm not familiar with wills practice; or
- members of the family of the testator.

While the information collated and presented by third parties may be useful in an engagement to draft a will, it should not be relied upon without routine follow up. Its provision should not deter you from meeting with the testator in the same manner you would have in a normal engagement, to review the accuracy and completeness of the information provided and to assess the capacity of the testator and the presence or absence of undue influence or other suspicious circumstances. This is especially true where a member of the family of the testator is presenting the information to you and even more so when they are one of multiple potential beneficiaries.

It is appropriate to charge a reasonable fee for reviewing the information prior to the meeting and for the meeting. While some third parties may suggest the provision of the information ought to contract the process and reduce the cost, that is not necessarily true. Remember that the third party is not likely to be liable for any negative consequences of an improperly drafted will, however you can be liable. When drawing a will for an individual, you are responsible to that individual, not the third party who conveyed the instructions.

Avoid or refuse to carry out will instructions received from a third party who is a proposed beneficiary, especially those who direct that the will be sent back to them for execution.

The Ontario decision of *Re Worrell,* [1969] 8 D.L.R. (3d) 36 (Ont. Surr. Ct.), 1969 CanLII 269 (ON SC) reviews numerous authorities on the subject of the proper conduct of a solicitor when taking instructions and drafting a will and, among the many comments, deals with the subject of personal instructions. At page 43, the judge stated:

> *It is certainly improper for a solicitor to draft a will without taking direct instructions from the testator and then not to attend personally when the will is executed.*

*Worrell* at page 42, also quotes judicial comments on taking instructions which appear in *Jarman on Wills*, 8th ed. (London: Sweet & Maxwell, 1951) as follows:

> *… where instructions for a will are given by a party not being the proposed testator, a fortiori, where by an interested party, it is their bounden duty to satisfy themselves thoroughly, either in person, or by the instrumentality of some confidential agent, as to the proposed testator's volition and capacity, or in other words, that the instrument expresses the real testamentary intentions of a capable testator, prior to its being executed de facto as a will at all.*

On occasion you may receive will instructions on behalf of an aging person from a child or some other close relative, and the person giving such instructions may be a beneficiary of part or all of the estate. While this can be a legitimate situation, it requires your special attention. Accept such instructions only on the basis that you will contact the testator directly to verify the instructions and that you will be attending at the execution of the will.

You should then interview the testator in the normal course and discuss the terms of the will with them, completely apart from the person who gave the instructions or any other potentially interested person. Explain to the third party that such a process protects their potential inheritance. Through appropriate questions, confirm in your mind that the instructions received represent the intentions of the testator and that they have testamentary capacity and that there are no suspicious circumstances.

In confirming the testator's instructions, be governed by the comments from *Worrell* related to the interview that you should conduct in such situations. The court in *Worrell* warns the will drafter that elderly individuals will likely answer affirmatively to leading questions. This is not limited to the elderly and should be a consideration when dealing with any testator who presents with diminished capacity.

Accordingly, rather than reciting your understanding of the instructions and asking the testator to confirm, the proper way to interview is to use open-ended questions. For example, you could say to the testator "I understand you want to make a new will. What does your estate consist of? How do you want your estate to be distributed on your death?" This form of questioning should result in a clear expression by the testator of their understanding of their property, of the people expected to benefit from their wealth on death, and of their testamentary intentions.

Alternatively, it may indicate to you that the testator has no knowledge of their property and has different intentions regarding the distribution of their estate from the instructions you were given. This type of questioning will also assist you in determining whether there is testamentary capacity. In some cases where capacity is at issue appropriate initial open-ended questions are simply "why are you here today?", "do you know who I am?" and "do you know why we are meeting today"?

## e) Wills Instructions from Couples

It is common practice to take joint instructions from spouses or common-law partners. Caution should be exercised when doing so. Issues could arise if, for example, after a joint meeting with the couple, one of the parties calls and requests some changes to their will, but does not want their spouse to know.

Spouses should be advised at or before the initial meeting that if you are acting for both of them that it will be treated as a joint retainer. This means that any information provided to you by either spouse cannot be kept confidential from the other spouse. See the *Code of Professional Conduct* of The Law Society of Manitoba, *Rule 3.4-5* and Commentaries [1] to [3].

For example, one or both spouses may wish to limit the entitlement of the other to the minimum they are entitled to receive as a surviving spouse under *Part IV* of *The Family Property Act,* C.C.S.M. c. F25 and to thereby increase the testamentary benefit distributed to their children from prior relationships.

As described in *Rule 3.4-8,* if a conflict develops between the spouses that cannot be resolved, you are not able to continue to act for either of them.

While these types of conflicts seem more likely to arise in second or third relationships, in particular where one or both parties have children from previous relationships, they also occur in first marriages. Your guard should not be let down any time there is a joint retainer.

In these instances, it may not be appropriate to act for both spouses and you should recommend that one of them engage independent legal counsel from the beginning. While this may result in increased cost, it will help ensure the validity of the ultimate wills drafted and signed.

## f) Who Should be Present at Time of Instructions

A situation similar to the one raised in section (d) above arises when a child, close friend or relative brings an elderly testator into your office to give instructions for a new will. Even if the elderly testator is nervous or in poor health you should conduct your interview with the testator alone, without the escort being present at the time the instructions are being given. This might require delicate handling.

Consider greeting the testator and escort in your waiting room and then asking the escort to remain there while you and the testator move to your office for a private discussion of the will. If the escort objects to being left out of the meeting, you might explain the sensitive nature of the discussions to be held. You could also point out that if they may be a potential beneficiary, their presence in the meeting might raise concerns of undue influence or suspicious circumstances, which could lead to the will, and consequently their gift, being invalidated.

This practice should be more effective than taking all parties to your office and then asking the escort to leave so that you can discuss the testator's intentions and instructions privately.

# 3. Information to be Gathered from the Testator

It is important to obtain thorough information about the client's personal and financial situation, in order to properly advise them with respect to the will.

Some practitioners send an information checklist for the proposed testator to complete prior to the first meeting. Even where a checklist has been provided, thorough information should be obtained (or confirmed) in an interview with the client, so that all potential issues can be properly canvassed and proper advice can be given. A sample will instruction checklist is appended to this chapter.

In all cases, the following information should be obtained from the testator:

## a) Personal Information

### i. Names

Obtain full legal names of the testator, spouse (or common-law partner), children and others to be named in the will. Sometimes testators' baptismal papers or birth certificates show many given names, while they use and are known by only one or two. One suggestion is to describe such testators in the will by the name(s) they use, while also including a reference to the other given names (i.e., John Smith also known as Jack Smith). This will help to avoid possible problems of later having to prove, for probate or other purposes, that the person named in the will is the same person as the one named in the death certificate or on title documents.

### ii. Family Status

Ascertain whether the testator is single, married or living in a common-law relationship with an opposite sex or same-sex partner and whether the testator has previously been married or in a common-law relationship. Determine if the testator is contemplating marriage, a new common-law relationship, separation, divorce or termination of a common-law relationship.

Be mindful of *sections 17* and *18* of *The Wills Act,* C.C.S.M. c. W150, which relate to revocation of a will by marriage and the effect of divorce on gifts made to a spouse in a will. Note that these provisions have no effect where a married client is merely separated. See also *section 18(4)* with respect to the effect of the termination of a common-law relationship on gifts made to a common-law partner in a will.

You should obtain and review any documents pertaining to the testator's marriage or common-law relationship. If the testator was previously married or was in a common-law relationship that has ended, obtain copies of any documents relating to the divorce, separation or termination of the relationship. This will confirm the client's true status. For example, the client may indicate that they are divorced but they may only be separated. The client may believe that a registered common-law relationship had been dissolved when this may not be the case.

Such documents are also important to enable you to determine if there are any outstanding support or other financial obligations that may have an impact on the testator's will planning, or if there have been releases of rights under *The Family Property Act, The Homesteads Act,* C.C.S.M. c. H80 or any other relevant legislation.

If the testator is contemplating marriage or commencing a common-law relationship, find out if there is a pre-nuptial, cohabitation or other agreement between the parties. Be sure to ascertain the client's wishes if the contemplated marriage is never solemnized or if the intended common-law relationship does not commence before the testator dies. Determine if the same will provisions are intended to apply as if the marriage was solemnized or common-law relationship had begun.

Note that a will is revoked by a marriage with some exceptions (s. 17 of *The Wills Act*). One exception is where there is a declaration in the will that it is made in contemplation of the marriage.

### iii. Relationship to Others

Determine the testator's exact relationship to other members of their family. As many people have been married more than once or involved in more than one relationship, the client may have children from prior relationships as well as children from the current relationship. It is also important to inquire into whether the testator has legally adopted any children of a current or former spouse or common-law partner. The testator may have step-children or step-grandchildren and may not realize that step-children are not treated the same as biological or legally adopted children for inheritance purposes, unless specifically provided for in the will.

> Establishing the true relationship between the testator and all members of their extended family and the extent of financial dependence, if any, will help to ensure that you provide appropriate will planning advice and properly drafted wills.

### iv. Citizenship, Residence and Domicile

Clarify the testator's citizenship, residence and domicile, especially if the testator has assets in a foreign country. Is the testator domiciled in your jurisdiction, but holding assets in another country? Alternatively, is the testator simply residing in Manitoba, but domiciled in a foreign country? *The Domicile and Habitual Residence Act,* C.C.S.M. c. D96 should be considered as it changes the common law rules relating to domicile.

In either case, the testator may wish to make a will in Manitoba which deals with local assets as well as assets in the other country. Caution must be exercised in this situation, as this can give rise to problems in will drafting. It is therefore important to ascertain what laws of the other jurisdiction(s) may be applicable. For example, there may be laws that call for special terms to be included in a will relating to moveables and/or immoveables.

Further, there may be some restrictions on the transfer of certain assets or special rules regarding the number of witnesses required in a will attempting to deal with certain foreign assets. A separate complementary will for the foreign assets might be preferable. You may need to obtain expert advice from lawyers in the foreign jurisdiction.

## b) Financial Information

### i. Designated Beneficiaries

Find out who the testator has currently designated as beneficiaries of life insurance policies, annuities, registered retirement savings plans, registered retirement income funds, tax-free savings accounts and any other similar assets. Have the testator bring in the relevant documents for you to review, as it is not uncommon for clients to either misinterpret the information or to forget who has been named as beneficiary.

For example, clients may forget about changing the beneficiary designation on a life insurance policy taken out prior to marriage, and may still have a parent or former spouse named as the beneficiary. Similar problems might arise with respect to RRSPs and/or RRIFs. Beneficiary designations are lost at the time of conversion of an RSP to a RIF and new designations are then required.

Consider whether spouses are named as successor holders rather than beneficiaries of each other's tax-free savings accounts. Frequently spouses are better positioned to name each other as successor holders allowing them to more seamlessly add the tax-free savings account of their deceased spouse to their own tax-free savings account without regard to remaining contribution room on their own accounts.

Reviewing and verifying the designations can help to prevent possible problems in the future.

Consider *section 171(1)* of *The Insurance Act*, C.C.S.M. c. I40 which provides that where a beneficiary predeceases the life insured, unless there are other provisions, the insurance monies are payable to the estate of the life insured. Keep in mind also that for tax or other reasons, you may be advising the client to change some of the beneficiary designations. This is discussed further below.

### ii. Ownership

It is important to get clear information about who owns which assets and the form of ownership (i.e., sole ownership, joint tenants or tenants in common). Check the title to all properties contemplated in the will instructions, as clients are not always clear or correct about how they own their properties.

It is not uncommon for clients to believe they solely own a property, when in fact it is jointly owned, or vice versa. Also, clients may not understand the distinction between joint ownership and tenancy in common, and as a result, may give you incorrect information. Inquire particularly into details of ownership of summer cottages. Having regard to Winnipeg's proximity to Lake of the Woods consider whether cottages are located in Manitoba or in Ontario. Consider also whether the cottage is leased or owned.

Check if any property is owned by a corporation. Clients with interests in private corporations may not have a clear understanding of the share structure. The client may believe that they are the sole shareholder when shares have been issued to other family members or an *inter vivos* family trust initially or during a corporate reorganization.

### iii. Inheritances

Find out if there are any expected inheritances and interests in other estates and trusts. If possible, verify the terms.

### iv. Powers of Appointment

Find out if the testator has a power of appointment through an interest in another estate or trust which enables them to direct, in the testator's own will,

how certain assets are to be distributed. Be sure that the testator's will instructions are consistent with the power given.

### v. Restrictions on Transfer

If the testator has a partnership interest, or shares in a small business or family corporation, find out if there are any restrictions on dealing with these on death. These restrictions might be set out in a partnership agreement, shareholders' agreement, or a buy-sell agreement, or even in the letters patent or articles of incorporation. Obtain and review these documents.

### vi. Values

Ascertain the value and adjusted cost base of all capital property owned by the testator. If the testator proposes gifts of capital property to someone other than a spouse and there is a possibility of capital gain, inquire into, establish and record values and adjusted cost base. For other assets, obtain the client's estimate of their value, as this information may be important in assisting the client with proper will planning. Discuss capital gains on capital properties and provide guidance on the use of exemptions where applicable.

### vii. Liabilities and Legal Obligations

Obtain particulars of the testator's liabilities including mortgages, lines of credit and contingent liabilities and guarantees. Determine whether any of these liabilities are insured.

Also ascertain whether there are any obligations with respect to estranged or former spouses or common-law partners, or with respect to children from prior relationships. Obtain copies of applicable spousal or cohabitation agreements, separation agreements and/or court orders.

# 4. Guidance by the Lawyer in Will Planning

As drafter of the will, it is your job as the lawyer to provide guidance to the client in planning their will. This includes giving the client at least an elementary outline of the laws relating to the succession, administration and taxation of an estate. You must also ensure that the client is aware of any limits that may apply on their testamentary freedom, such as possible limits relating to dependants or certain assets.

There are also certain powers that may be required on the part of an executor or trustee, which are not included in the powers given by *The Trustee Act,* C.C.S.M. c. T160. These powers must be specifically conferred on the executor or trustee in the will.

## a) Be Familiar with Relevant Statutes and Law

In light of your obligations as a solicitor, you should be very familiar with the provisions of all statutes that are relevant to will planning. This will allow you to advise the testator regarding modifications that may be needed if the testator wishes to dispose of their estate in a manner that may conflict with certain statutory obligations. At the very least you should warn the testator of the possible consequences if your advice is not followed and the will is drawn as requested. You should also confirm this in a letter.

Manitoba statutes relevant in will planning include:

- *The Wills Act;*
- *The Trustee Act;*
- *The Family Property Act*;
- *The Dependants Relief Act;*
- *The Intestate Succession Act;*
- *The Homesteads Act;*
- *The Infant's Estates Act;*
- *The Survivorship Act;*
- *The Beneficiary Designation Act (Retirement, Savings, and Other Plans);*
- *The Powers of Attorney Act;*
- *The Health Care Directives Act;*
- *The Domicile and Habitual Residence Act.*

Some of these are discussed more fully below.

In addition, you must be familiar with many provisions of the *Income Tax Act* so that you will be able to provide guidance to the client regarding the tax implications of their proposed distribution plans. Knowledge of these provisions will also ensure that the will is drafted appropriately.

Important areas to examine with respect to tax implications include provisions dealing with:

- tax consequences on death;
- capital gains and capital gain exemptions;
- principal residence exemptions;
- farmland taxation and exemptions;

- registered plans (i.e., designations, rollovers, etc.);
- private corporation shares (i.e., rollovers and strategies for dealing with shares on death);
- charitable donations; and
- testamentary trusts including spousal trusts.

#### i. *The Family Property Act*

Part IV of *The Family Property Act* (the *FPA*) entitles a surviving spouse or common-law partner to an accounting and equalization of family assets on the death of their spouse or common-law partner, similar to the accounting on marriage or relationship breakdown. This entitlement is negated only by an appropriate spousal or other written agreement between the parties.

> Only a surviving spouse or common-law partner may apply for such an accounting. A personal representative of the deceased party may not bring an application for an accounting, but may continue *FPA* proceedings commenced by the deceased prior to their death.

In order to properly advise a client as to the effect of the *FPA*, you will have to be familiar with its provisions generally, and Part IV in particular. You will need to know to whom the act applies, to what assets it applies and which assets are exempted. In deciding what rights arise under the *FPA,* you will have to consider the assets of both parties.

Be aware of the special rules applicable to an accounting on death. For example, *section 35* of the *FPA* may bring in to the accounting the value of assets transferred to third parties on the deceased's death and other items. *Section 37* of the *FPA* excludes the value of certain assets which pass directly to the surviving spouse or common-law partner.

The *FPA* will be of particular concern to clients wishing to establish a spousal trust for the surviving spouse or common-law partner, and to those clients who do not intend to leave most of their estates outright to their surviving spouse or common-law partner. Familiarity with the relevant sections of this statute will enable you to properly advise your client.

If it appears to you that the client intends to leave their spouse or common-law partner less than they would be entitled to receive under Part IV of the *FPA,* you must warn the client of the potential consequences. In such a case, you might consider recommending strategies to reduce possible equalization payments.

These might include having RRSPs, RRIFs, and/or life insurance policies designated to the estate, with the will then leaving such assets to the spouse, in order to have these assets included in the accounting. You might also consider recommending that the client and their spouse or common-law partner hold certain properties as tenants in common rather than as joint tenants with rights of survivorship.

You should explain to the client that an application for an accounting that results in an equalization payment to the surviving spouse or common-law partner may undermine the client's true testamentary intentions. You should also discuss the possibility of the client and their spouse or common-law partner executing a spousal agreement or common-law relationship agreement to waive the applicability of Part IV of the *FPA*. In this case, the client should also be informed that each of the parties must obtain independent legal advice regarding the agreement and provide each other with full financial disclosure.

More information in this regard is available in the *Family Law materials* posted in the LSM Education Center.

If, in spite of your advice and recommendations, the testator insists on proceeding with a plan that does not accord with the *FPA* and is unable to put a spousal or common-law relationship agreement in place, you should make full notes to your file setting out the advice given and the instructions received, which should also be documented in a letter to the client. Your notes and a copy of the letter should be kept in a permanent record so that you are adequately protected.

### ii. *The Homesteads Act*

This legislation, among other things, entitles a surviving spouse or common-law partner to a life interest in the homestead, as defined in *The Homesteads Act,* where the deceased was an owner of the homestead which the parties occupied as their home. Be familiar with the definition of a homestead and with the meaning of a life interest, and the few circumstances in which that right does not exist.

Only one spouse or common-law partner at a time may have homestead rights. Accordingly, a subsequent spouse or common-law partner cannot acquire homestead rights until those of the prior spouse or common-law partner have been satisfied (see *s. 2.2*).

### iii. *The Dependants Relief Act*

Generally speaking, the testator will have some idea as to the persons they wish to benefit under their will. However, there may be others who are entitled to make an application for relief under *The Dependants Relief Act*, C.C.S.M. c. D37 (*DRA*). You must be aware of the meaning of "dependant", which includes a number of different parties, including opposite-sex or same-sex spouses and common-law partners, children, grandchildren, and siblings.

Financial dependence is not a prerequisite for all categories of potential claimants. For example, for a spouse the requirement for a successful claim is "financial need" rather than "financial dependence". In addition, an adult child of the deceased can be considered a dependant if at the time of the parent's death, the adult child was unable to provide themselves with the necessaries of life by reason of illness, disability or other cause. A relationship of financial dependence between parent and child is not a prerequisite.

In large estates where the testator is not leaving the spouse or common-law partner the entire estate, the testator should be warned that a potential claim under *DRA* could be made against the estate by the spouse or common-law partner, as the legislation allows various factors to be taken into consideration, such as health, age and other financial resources of the spouse or common-law partner.

A spouse's claim under the *FPA* will often grant a larger claim, but a *DRA* claim is also possible, especially if the surviving spouse had signed a waiver of rights under the *FPA.* Even if rights under the *FPA* are waived, the spouse can still make a claim as a dependant pursuant to *DRA*.

## b) Important Issues to Discuss with the Testator

### i. Choosing an Executor

> The executor is responsible for gathering the assets of the estate, paying debts, taxes and expenses and administering and distributing the estate according to the terms of the will.

The selection of executors is an area where the lawyer can give valuable guidance to the testator, especially where they have had experience with estate problems due to the choice of executor. Without guidance, testators may make poor choices by selecting an executor who may be too old or may not have the necessary abilities, given the testator's assets and distribution plans.

Discussions as to the choice of executor should take place after the testator has disclosed the type of assets owned and the proposed distribution. You should be able to explain advantages and disadvantages of naming a spouse, child, friend, relative, business partner, trust company, lawyer or accountant to act as an executor.

Determining which of these alternatives will be best for the testator will typically depend on factors such as the size, nature and complexity of the assets, the family circumstances and the planned distribution of the estate, as well as the availability of appropriate persons. See the discussion below for some examples.

You should also discuss how many executors should be named. If more than one is to be named, explain that co-executors and co-trustees must act unanimously, but that it is possible to specify otherwise in the will. Options could include requiring decisions to be made by a majority or by stating that the decision of one particular executor is to prevail. Alternate executors should also be named, in case the first-named executor(s) is unwilling or unable to act. Obtain the full name, residence and occupation of each executor and confirm with the testator that each is prepared to act.

In assisting the testator in the selection of an executor, you should ensure that the proposed choice(s) make sense and will be workable. For example:

- If the assets are fairly straightforward and the estate is to be distributed outright (i.e., without the imposition of a trust), naming one of the beneficiaries as the executor might be appropriate.
- If the proposed executor resides outside Canada, they are considered a foreign executor and in order to obtain a Grant of Probate may have to post a bond, which would be an expense to the estate. The court has discretion to waive the bond and may do so if all of the beneficiaries are adults and consent (*s. 25(4) The Court of King's Bench Surrogate Practice Act*).

  More importantly, having a foreign executor might result in the residence of the estate and any trusts created under the will falling under the jurisdiction of domicile of the executors or trustees who control decision making. This could cause considerable complexities for the estate and beneficiaries, and could have detrimental tax consequences. Accordingly,

a non-resident executor should generally be avoided, or, if named, should not be given control or decision-making authority.

- A proposed executor who lives outside Manitoba but in Canada can be named as an executor without the need for posting security at the time of administration, but such an appointment may create delay and inconvenience. With modern technology this concern is greatly reduced. However, as simple a chore as signing documents creates an additional level of inconvenience in some circumstances where there is need for original signatures and individuals live in remote areas. Generally, residence outside Manitoba, but in Canada, is not a strong reason to reject an individual's eligibility for appointment as executor.

- Naming an executor who is close to the testator's age (such as a sibling or friend) or older (such as a parent) may be appropriate if the testator is young, but should be reviewed regularly. The testator should also be strongly encouraged to name one or more alternate executors in case the named executor predeceases or is otherwise unwilling or unable to carry out the duties of an executor or to continue to act due to age or other cause. This helps ensure that there will be an executor of the testator's choice available.

- If the testator has two or three adult children who are also the beneficiaries of the estate, it may or may not be advisable to appoint all of them as co-executors. The family dynamics may dictate successive or joint appointments. In some cases, there is a need to treat them all equally. Discord in estates can often be caused by something as seemingly innocuous as one child being appointed executor in priority to other siblings, however family circumstances may merit the exclusion of one or more.

- If the testator has several children (four or more) and proposes to appoint all of them as co-executors to avoid upsetting any of them or showing favouritism, point out that this proposal may cause logistical problems. Delays in the administration of the estate could result if one or more of the children reside outside the province. Children who may not get along with each other while the testator is alive are unlikely to get along any better if required to act together as co-executors.

  The testator might be encouraged to appoint just one child to act as the sole executor, with other children named as alternates. If the testator still wishes to have more than one child act as executor, then naming two or three co-executors might be considered.

Recommend including terms in the will other than unanimity, such as majority rules, to deal with possible differences of opinion that could arise where a multiple of executors are acting. While some testators will prefer multiple executors being forced to get along and reach consensus on all decisions, it is recommended that the issue be canvassed and then properly set out in the will.

If there is a potential for conflict among the children, it may be best to appoint a neutral party as executor or at a minimum as a tie-breaker in the event the executors are unable to reach a consensus or a majority. That person should be warned of the potential conflict amongst the beneficiaries and should be thick-skinned enough to deal with the conflict.

- If the will provides for the entire estate to go to the testator's spouse or common-law partner and alternatively, to their adult children, naming the spouse or common-law partner as sole executor, with the children as alternates, is a traditionally acceptable appointment. If any of the testator's children are from a prior relationship and they are intended to benefit on the testator's death or on the death of the spouse or common-law partner, it may be that the spouse or common-law partner would not be the best choice for executor. Other options should be considered.

- Sometimes a trust company might be a good choice of executor. In such situations, the trust company is often referred to as a corporate executor or corporate trustee. You should be able to explain the role, as well as advantages and disadvantages, of a corporate executor or trustee. Generally, the advantages include experience, objectivity, skill, continuity and longevity. On the other hand, the expense may be too great for smaller estates.

  When considering naming a trust company, first discuss the appointment with representatives of the trust company. Trust companies typically require a testator to enter a fee agreement at the time the will is signed, setting out the fee the trust company expects to charge at the time of administration, based on a percentage of the aggregate value of the estate. The fee schedule is signed before the will and is referenced in the will.

  *Section 90(5)* of *The Trustee Act* provides that an agreement executed by a testator fixing the amount of the executor's compensation for the administration of the testator's estate is not valid unless it is approved by a judge. As a result, compensation agreements commonly used by trust companies, can still be made in Manitoba, but must ultimately receive court approval. However, where all beneficiaries are adults and capable of

giving their consent, the beneficiaries will often consent to the fee based on the signed fee agreement.

The compensation guidelines for corporate executors are the same as those for any other executor. Individuals acting as executor are usually willing to act for less compensation than a trust company. Additionally, a trust company will likely be unwilling to act if the estate is not large enough to justify the compensation they seek.

Some factors which might indicate that a corporate trustee would be appropriate include:

- There are conflicting interests among the beneficiaries, created either by the will or trust instrument itself or by the personalities or the relationship between the beneficiaries, which may be best handled by appointing an impartial corporate trustee;
- Assets are to be held in one or more trusts for an extended period of time;
- The administration of the assets involved requires experience, expertise and specialized skills because of their size or nature;
- The testator wishes to have complete security and protection of assets. This can likely only be offered by a trust company which has suitable arrangements for the safeguarding of valuables;
- Trust companies have sufficient financial resources so that in the (unlikely) event of negligence or breach of trust, the beneficiaries would be in a better position to sue and recover than they would be if private individuals were acting as executors;
- The testator prefers to place the burden of responsibility for the administration of the estate on a corporate executor or trustee, rather than on a friend or family member, even where the estate may be straightforward;
- There are no beneficiaries that can act as executor, such as when the estate is being given to charity; and
- There are no individuals that reside in Canada that are good candidates to act, meaning a bond may be required.

In some cases, naming a trust company as a co-executor with an individual may be a good choice, providing the testator with the comfort of having professional expertise combined with the personal perspective. A trust company might also be named as an alternate executor to act in the event of the death or inability of the primary executor, as the trust company may be more capable of looking after unfinished business. However, that the trust

company may decline to act as executor in such circumstances or for smaller estates.

As many people are reluctant to act as executors, the testator should obtain the consent of all proposed executors to ensure they are willing to accept the appointment and to act when needed. This still does not prevent the executor from renouncing the role when it is time to administer the estate.

Be sure to appoint an alternate to act in case the appointed executor:

- predeceases the testator;
- decides not to accept the job and renounces; or
- accepts the job and commences the administration, but dies or becomes unable or unwilling to act before completion.

### ii. Executor Compensation

Be prepared to explain to the testator the remuneration to which the executor(s) may be entitled. Pursuant to *section 90(1)* of *The Trustee Act*, a trustee or personal representative (defined to include an executor, administrator and administrator with will annexed), is entitled to be paid "fair and reasonable" compensation for their efforts. This right is entirely statutory, as an executor had no such claim at common law. Section 90(1) of the *Act* is comparable to a similar section in Ontario (s. 61(1) of the *Ontario Trustee Act*), and there are numerous cases that provide guidance as to what constitutes a reasonable allowance.

The executor's compensation is a single amount, regardless of the number of executors appointed, so it is up to co-executors to decide between themselves how it is to be apportioned. In small estates, where a member of the testator's family acts as executor and is also one of the beneficiaries, it is not uncommon for the executor to decline to take a fee, however the relationship does not disentitle a family member from executor compensation. The job can be difficult, time consuming, often times thankless and can create legal liability if not properly done.

An executor's fee is income and must be included in the executor's personal income tax return in the year of receipt. Consequently, some clients choose instead to include a cash gift to the executor in their wills in lieu of executor compensation so that no tax is payable by the executor. This may be a problem if Canada Revenue Agency sees this as a ploy to avoid income tax.

It could also be a problem if the executor decides to seek compensation in addition to the cash gift. As well, if the nominated executor does not act as

executor for any reason they are still entitled to the specified gift. Such a gift should not refer to executor compensation in the will, will not prevent the executor from seeking compensation in addition to the gift and should be understood as being a legitimate gift. The executor may choose not to seek compensation, but that is their decision.

In rare circumstances, some of the executor fees paid may be deductible from the income of the estate on the T3 Trust Income Tax Return and Information Return that is filed by the estate with respect to any estate income arising after the date of death and prior to distribution. This would apply to the extent that the executor fees were incurred for the purposes of earning income.

Where an executor fee exceeds $30,000 in a year GST is applicable. In addition, CPP contributions are required to be paid on any amount of the executor compensation in excess of $3,500 per executor (threshold as of 2022). As of 2022 the contribution rate is 5.7% (this rate is subject to unpredictable change) of the amount above $3,500 per executor, calculated twice, once for the estate as employer and once for the executor as employee.

If the testator wishes to leave a legacy to an individual executor, you should discuss the above points.

### iii. Beneficiary Designations

- **Life Insurance:** If a change in beneficiary is required, consider whether it should be by will or with the insurer.

> Although a designation by will is valid (provided it is not intended to be irrevocable), advise the testator to notify the insurer as well. Otherwise, the insurance proceeds may be paid to the prior beneficiary before the insurer is made aware of the change made in the will.

*Section 168(1)(b)* of *The Insurance Act* provides that during their lifetime, a person may, in an insurance contract or by a declaration that is filed with the insurer and is not part of a will, designate a beneficiary irrevocably. *Section 168(3)* further provides that an attempt to designate a beneficiary irrevocably in a will renders the designation revocable. Care is required when drafting a beneficiary designation in a will related to an insurance policy.

- **Registered Retirement Savings Plans, Registered Retirement Income Funds, Tax-Free Savings Accounts,** and other similar plans: Check *The Beneficiary Designation Act (Retirement, Savings, and Other Plans),* C.C.S.M. c. B30 to see whether it applies to your client's assets. Note that Registered Education Savings Plans are not included.

  Check the documents to see who has been designated as beneficiary in the plan. If a change is required, consider whether it should be done by will or with the administrator of the plan, and ensure that the plan and law allow for the method selected. If the change is to be made in the plan documents, make certain that the new designation is communicated to the administrator of the plan.

  For a client who is married or in an opposite sex or same sex common-law relationship, consider the impact of Part IV of *The Family Property Act*. Under this legislation, a surviving spouse or common-law partner may apply for an accounting and may be found to be entitled to an equalization payment from the estate of their deceased spouse or common-law partner if the surviving spouse or common-law partner does not have at least one half of the total of the shareable assets and debts of the couple under Part IV.

  If RRSP or RRIF assets are designated directly to the surviving spouse or common-law partner by way of a direct beneficiary designation, then these assets are not included in the accounting, which may result in a greater equalization payment having to be made.

  If your client would like to ensure that RRSP or RRIF assets are taken into account in the accounting, then the plan proceeds must be designated to the estate and an equivalent gift made to the spouse under the will. It is still possible for the account proceeds to be "rolled over" into the surviving spouse's RRSP or RRIF through a joint tax election made by the executor and spouse.

  > This will have the potentially undesirable result of having the plan proceeds included in the estate and thereby being available to satisfy creditors.

  Understand the effect of *The Beneficiary Designation Act (Retirement, Savings, and Other Plans)* and consider: *Waugh Estate v. Waugh et al.,* 1990 CanLII 11224 (MB QB), *Pozniak Estate v. Pozniak,* 1993 CanLII 14734 (MB CA) and *Clark Estate v. Clark,* 1997 CanLII 22786 (MB CA).

The *Waugh* and *Pozniak* decisions suggested that the designation of a beneficiary does not protect the monies payable under the plan from creditors, unless the plan qualifies as an insurance plan under express statutory provisions such as those in *The Insurance Act*. A designation made in respect of a non-insurance plan is similar to a specific bequest of the plan proceeds to the beneficiary in a will, meaning they will still be subject first to the claims of creditors.

Subsequent to the *Pozniak* decision, *The Retirement Plan Beneficiaries Act* (as it was then called) was amended to provide that only the beneficiary can call for the enforcement of the designation.

The *Waugh* and *Pozniak* cases have been called into question by the Court of Appeal's later decision in *Clark.* The Queen's Bench decision in *Clark* suggested that a specific designation under *The Retirement Plan Beneficiaries Act* would take an RRSP out of the estate and out of a creditor's reach. The Court of Appeal confirmed that amendments to *The Retirement Plan Beneficiaries Act* work to reverse the decisions in *Pozniak* and *Waugh.*

*Clark* confirmed that the RRSP moneys do flow directly to the designated beneficiaries, and not through the estate. However, the Court of Appeal further held that a creditor of the estate would have the right to make a claim against the beneficiary of the RRSP plan, either against the funds themselves, or on a tracing. The court distinguished the RRSPs from insurance plans which are specifically exempt from any claims of creditors.

The later case of *Amherst Crane Rentals Ltd. v. Perring,* 2004 CanLII 18104 (ON CA), [2004] O.J. No. 2558, *Amherst Crane Rentals Ltd. v. Perring,* 2004 CanLII 18104 (ON CA) should also be considered. Although this is a decision of the Ontario Court of Appeal, leave to appeal to the Supreme Court of Canada was denied and the wording of the relevant Ontario legislation (*s. 53* in Part III of the *Succession Law Reform Act,* R.S.O. 1990, c. S.26 is very similar to the wording in the Manitoba legislation (*ss. 14* and *15* of *The Beneficiary Designation Act (Retirement, Savings, and Other Plans).*

*Amherst Crane Rentals Ltd*. concluded that the effect of the legislation is to exempt RRSP proceeds in the hands of the designated beneficiary from the claims of creditors of the estate of the deceased RRSP owner.

### iv. Methods of Gifting

While most testators have some idea how they would like their estates to be distributed in their wills, many are not familiar with the various methods of gifting available. You can be of great assistance in explaining the options and helping the testator find the most appropriate options for the intended beneficiaries. Some of the options include the following:

- an outright gift to the beneficiary;
- a life interest, with or without encroachment powers; and/or
- the use of trusts, whether for spouse or common-law partner, children or others.

Your input will also be very important where there are special circumstances. For example, if there is a child with a disability receiving social assistance, a parent typically wants to provide for the child while also ensuring that the social assistance payments will not be disturbed. You can advise the parent how to address these concerns, generally by establishing a carefully worded discretionary trust in the will.

### v. Personal Effects

You can provide guidance to the client about different ways to deal with the distribution of personal effects. This includes discussing the relative merits of disposing of personal effects by either specific gifts in the will or by a memorandum executed before the will and attached to the will (preferable for gifts of significant economic or sentimental value), or simply by trusting the executor to distribute items in accordance with the known intentions of the testator (useful for gifts that do not have significant economic or sentimental value).

> While some special personal effects might be dealt with in the will, the testator should be discouraged from including a long and detailed distribution list of personal effects in their will, since this may make it difficult for the testator to make changes to such a distribution list in the future should circumstances or the testator's intentions change.

Testators sometimes try to make changes to gifts in a will by striking out bequests on the original will without proper signing, initialling and witnessing, which can be problematic. Interlineations, alterations, erasures or obliterations in a will that have not been properly signed and initialled will not be valid unless they are shown to have existed before the will was signed or they are subsequently rendered valid by republication of the will (see Rule 74.02 of the King's Bench Rules).

One way to address this type of problem is to create a power of appointment in a will allowing the executor dispose of personal items in a manner of their ultimate choosing but done in accordance with the executor's understanding of the testator's intentions. The testator can then make changes from time to time by advising the executor verbally or by a separate written memoranda of

their instructions that is referenced in the will but not formally executed in accordance with *The Wills Act*.

Consideration might be given to having the testator prepare a handwritten memorandum, which should **not** be formally executed in accordance with *The Wills Act*, to avoid inadvertently being considered a later will revoking the earlier will.

### vi. Legacies

If the testator wishes to leave legacies to charities, children, parents or others, it is important to review the total amount of such gifts with the testator to ensure that they will not erode the value of the residue available for distribution more than the testator intends. This requires a proper exploration of the nature and extent of the testator's property at the time the will is being drafted, consideration of potential income tax implications arising on death and discussion of the potential impact future events, many unknown and speculative, may have on the value of the property in the future.

For charities, make certain that you have the correct name of the organization as well as the correct branch or chapter, if applicable. A telephone call to the charity or an online search is also warranted to ensure that it is properly identified in the will. The *Canada Revenue Agency* has an online searchable database which can assist in identifying registered charities and their proper name and registration number.

For cash gifts to individuals, you should clarify with the testator (and in the will) what should happen to a gift if the individual named predeceases the testator. Similarly, for charities the will should provide for contingent gifts or clarification of the destination of the gift should the charity cease to exist, change its name, amalgamate with another charity or lose its charitable tax status.

### vii.Loans and Gifts made by Testator

> It is important to canvass if any loans, gifts or advances were made by a testator to family or others during their lifetime. You should discuss with the testator whether loans are intended to be forgiven or continue as debts payable to the estate on death.

If they are to be repaid, recommend that the fact of repayment and terms, including time of repayment, are set out in in the will or otherwise documented in a way that can provide certainty of intention for all interested parties. For example, if parents had made a loan to one of their children, it may not be expected to be repaid until both parents have died.

With respect to gifts or advances made during the testator's lifetime (to one or more children, for example), you should discuss with the testator whether they are to be taken into account when distributing the estate.

The rule against double portions, a rule of equity, provides that where a testator gives a significant legacy to a beneficiary and subsequently, during life, gives the money to that beneficiary, then the legacy is satisfied.

Where a testator is liable to a person for a sum certain and leaves that person a legacy for that amount, equity presumes the legacy satisfies the debt provided certain factors exist.

In addition, consideration may be warranted when considering loans that may become statute barred. In such circumstances a testator may want to specify in their will that the debt, if statute barred, while uncollectable by the estate, would be treated as an advance.

For any loans, gifts or advances, the client should be strongly encouraged to keep accurate records of the amounts, including amounts of any repayments made and intentions related to repayment or forgiveness after death.

### viii. Funeral Directions

A will is generally not a good place to record funeral, burial or cremation instructions, for the simple reason that the will is generally not reviewed until after those arrangements have been made, when it may be too late to change. To lessen the risk, it is sound to advise a testator that any such instructions should be communicated to family members or executors, preferably in writing outside of the will and well in advance of death, even in circumstances where a testator wishes to include such instructions in their will.

It is useful to also point out to a testator that the manner of disposal of their remains and the funeral are the sole responsibility of the executor at the time of death, notwithstanding any expressed wishes in the will.

The executor has a duty to ensure that the remains are properly disposed of and to ensure that the funeral arranged for the deceased accords within the means of the estate. The executor may be personally liable to the beneficiaries of the estate if the funeral costs exceed a reasonable amount.

A charitable option is to enroll in the Service After Death Program, Department of Human Anatomy at the University of Manitoba. Testators can donate their body for medical purposes to assist with the education of students enrolled in health care professions. Enrollment occurs during the life of the testator and the application is signed by the testator and executor.

Upon being advised of death the program representatives promptly determine eligibility. When acceptable for the program all arrangements are made by the program. Upon completion of service the program cremates the body and provides for interment at Brookside Cemetery.

### ix. Guardians

Testators can name a guardian(s) of their minor children, which is intended to come into effect on the death of the last-to-die of the parents of the children. There is a distinction to be made between the guardian of the person and the guardian of the estate of the minor children.

**Guardian of the person** of a minor is someone who has responsibility for the minor's day-to-day care and control, maintenance and education. Application for formal guardianship of the person of a minor is made under *The Child and Family Services Act,* C.C.S.M. c. C80.

**Guardian of the estate of a minor** is someone who takes possession and control of the real and personal property of the minor. Application for guardianship of the estate of a minor is made under *The Infants' Estates Act,* C.C.S.M. c. I35.

> The testator should be advised that naming a guardian in a will is not final or conclusive; it indicates the testator's approval of that person. The person named must still apply to court to have the appointment made official. The court's ultimate decision is based on the best interests of the minor, but the appointment in the will can be persuasive as it provides information to the court of what the child's parent or parents believed to be in the best interests of the child.

Testators who may be delaying making a will due to uncertainty in their preferred named guardian should be encouraged to make their wills and not wait until that decision is made.

If a testator has a strong preference for a specific guardian for particular reasons, make detailed notes of these reasons and encourage the client to do so as well. At times it is also useful to include those reasons in the will.

It is generally preferable for the guardians appointed not to be the same individuals as those named as executors or alternate executors. If the guardians are also the executors and trustees, then they could also be the trustees of the trusts established for the children under the will. This gives rise to some potential conflict of interest concerns, as well as the potential risk of the guardians co-mingling the children's funds with their own.

The guardians could also be challenged by the children once they reach the age of majority as to how the guardians managed their trust.

To minimize these concerns, the testators should be encouraged to ensure that the guardians and executors are different individuals, or to at least name an additional trustee to act together with the guardians as trustees of the trusts for the children. In addition, testators should be encouraged to discuss appointments with all family members at the time of an appointment to ensure conflicts don't occur after death between family members that lead to contested guardianship hearings.

### x. Ultimate Beneficiary Clause

One of the goals of a will is to avoid an intestacy. There is merit to discussing a final clause in the will to provide for the disposition of the testator's estate in the event that all of the named beneficiaries have died, leaving undistributed assets in the estate.

This may be phrased as a common disaster clause or ultimate beneficiary clause. The former title may be a misdescription as it implies all beneficiaries die in temporal proximity to each other in a single event.

The more likely possibility is that the beneficiaries, where few, simply predecease the testator, and no contingent gifts are described in the will. In addition, where the will has trusts, beneficiaries may survive a testator but die while money is held in trust.

Care is needed in the wording of the will to ensure that it covers distribution of residue where all named estate beneficiaries have predeceased the testator and the distribution of the balance held in trust where all named trust beneficiaries have died. The client should consider the impact of *The Survivorship Act* and *The Intestate Succession Act* on their intended

distribution and whether they would be satisfied with the resulting effect on the distribution of their estate or the trust in those circumstances.

### xi. Ancillary Documents

A good estate planning engagement includes consideration and discussion of a power of attorney and a health care directive in addition to a will. In many cases there will be need for other documents as well.

**Power of Attorney**: In the course of your discussions with the testator at the time a will is being considered recommend the appointment of an attorney under an enduring general power of attorney, to enable someone to look after the client's financial matters in case of the client's incapacity. Although this is an important document for clients of all ages, it is especially important for an elderly or unwell client.

Be sure to familiarize yourself with *The Powers of Attorney Act,* C.C.S.M. c. P97. You should pay particular attention to the requirement that the attorney provide an accounting. You should also be clear on the requirements for witnessing an enduring power of attorney.

If the client is married or in a common-law relationship, then keep in mind that *The Homesteads Act* prohibits spouses or common-law partners from using a power of attorney to sign documents on behalf of each other with respect to their homestead property (usually the family home). Accordingly, these clients should consider naming a homestead attorney to deal with the homestead.

> Clients should be informed that if they have no enduring power of attorney, their spouse or other family members do not have the legal authority to make financial decisions on their behalf, if they become incapacitated. An application to court for the appointment of a committee would then be required.

**Health Care Directive**: You should also discuss preparation and signing of a health care directive, appointing someone to act as a proxy for the purposes of making health care decisions if the client is unable to make decisions or communicate their wishes or instructions. Be familiar with *The Health Care Directives Act,* C.C.S.M. c. H27.

# D. TESTAMENTARY CAPACITY: ESTATE PLANNING FOR CLIENTS WITH DIMINISHED CAPACITY/ DEATH BED WILLS*

## 1. Introduction

When a lawyer is called to the hospital bed to draft a will for a terminally ill client the situation is both demanding and rife with risk. The same is true in other situations where the client suffers from diminished capacity. This section canvasses the case law in this area and suggests some best practices.

## 2. The Standard for Testamentary Capacity

### a) In General

The time-honoured test for testamentary capacity was set out in *Banks v. Goodfellow:*[1]

> *It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have made.*

Another commonly quoted statement of the necessary mental capacity to make a will was set out by the Supreme Court of Canada in *Re Martin; MacGregor v. Ryan:*[2]

> *The propounder of a will must also show that the will was the free act of a testator who, at the time the will was made, had a disposing mind and memory.*

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* This article was originally prepared by John Poyser, Inkster Christie Hughes LLP for a Law Society of Manitoba continuing education program on December 8, 2009 entitled "Death Bed Wills: Estate Planning Where Capacity is at Issue". It has been revised.

1 *Banks v. Goodfellow* (1870), L.R. 5 Q.B. 549, [1861-73] All E.R. Rep. 47, [1871] L.R. 11 Eq. 472, 39 L.J.Q.B. 237, 22 L.T. 813 (Eng. Q.B.) (at page 565, cited to L.R.). It is still commonly cited as the leading authority on point in various text books on wills and probate in England.

2 *Re Martin; MacGregor v. Ryan*, [1965] S.C.R. 757, 53 D.L.R. (2d) 126 (S.C.C.).

In *Leger v. Porier*, Justice Rand said that a "disposing mind and memory" is:

> *...one able to comprehend of its own initiative and volition, the essential elements of will-making, property, objects, just claims to consideration, revocation of existing dispositions, and the like....* [3]

## b) The Diminishing Mind

Few people, young or old, sick or healthy, can hope to remember all of the details relating to their family tree and assets. It is always a matter of degree, and capacity can be seen to range on a continuum. As capacity diminishes, with age or disease, it is not uncommon to see a gradual failing of the memory. All of that has long been recognized in the case law.

Cockburn, C.J., made the following comment on point in *Banks v. Goodfellow:*[4]

> *It may be here not unimportant to advert to the law relating to unsoundness of mind arising from another cause – namely, from want of intelligence occasioned by defective organization, or by supervening physical infirmity or the decay of advancing age, as distinguished from mental derangement, such defect of intelligence being equally a cause of incapacity. In these cases it is admitted on all hands that though the mental power may be reduced below the ordinary standard, yet if there be sufficient intelligence to understand and appreciate the testamentary act in its different bearings, the power to make a will remains. It is enough if, to use the words of Sir Edward Williams, in his work on Executors, "the mental faculties retain sufficient strength fully to comprehend the testamentary act about to be done."*

The court in *Banks v. Goodfellow* quoted American case law on point with approval:[5]

> *In the case of Den v. Vancleve [2 Southard, at p. 660] the law was thus stated: "By the terms 'a sound and disposing mind and memory' it has not been understood that a testator must possess these qualities of the mind in the highest degree; otherwise, very few could make testaments at all; neither has it been understood that he must possess them in as great a degree as he may have formerly done; for even this would disable most men in the decline of life; the mind may have been in some degree debilitated, the memory may have become in some degree enfeebled; and yet there may be enough left clearly to discern and discreetly to judge, of all those things, and all those circumstances, which enter into the nature of a rational, fair, and just testament. But if they have so far failed as that these cannot be discerned and judged of, then he cannot be said to be of sound and disposing mind and memory."*

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3 *Leger v. Porier*, [1944] S.C.R. 152 at 161, [1944] 3 D.L.R. 1 (S.C.C.).

4 *Supra,* note 1, at page 566.

5 *Supra,* note [Banks] at pages 567-68.

Canadian courts have repeated and carried this point forward, including repeated and recent endorsements.

The point was expressed nicely by the British Columbia Supreme Court in *Woodward v. Grant* (citations omitted):[6]

> *Such things as imperfect memory, inability to recollect names and even extreme imbecility, do not necessarily deprive a person of testamentary capacity. The real question is whether the testator's mind and memory were sufficiently sound to enable him or her to appreciate the nature of the property he was bequeathing, the manner of distributing it and the objects of his or her bounty....*

It was reiterated by the Alberta courts in *Scramstad v. Stannard* as follows:[7]

> *However, what is also made clear in Goodfellow, and in my opinion, of equal and perhaps greater significance, is that the adoption of an overly strict test could and probably would result in many testators, especially the elderly, being stripped of the right to dispose of their assets as they see fit.*

The Alberta Court of Appeal, in *Stevens v. Crawford,* made the following comments on point (references omitted):[8]

> *A testator may have testamentary capacity even if she is not of entirely sound mind.... A person diagnosed with senile dementia may have testamentary capacity....*
>
> *Even if a disease is of a progressive nature, it is a question of fact whether she has sufficient mental awareness to appreciate and understand the testamentary act....*
>
> *Put simply, testamentary capacity is possible even where the testator has a disease of the mind. While medical or scientific evidence may be of assistance, the finding of testamentary capacity is a matter of fact for the trial judge to determine.*

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6 *Woodward v. Grant* (2007), 2007 B.C.S.C. 1192, 34 E.T.R. (3d) 26, [2007] B.C.W.L.D. 5321, 2007 CarswellBC 1842 (B.C.S.C.), at paragraph 125.

7 *Scramstad v. Stannard* (1996), 188 A.R. 23, 40 Alta. L.R. (3d) 324, [1996] A.W.L.D. 778, 1996 CarswellAlta 604 (Alta. Q.B.), at paragraph 132.

8 *Stevens v. Crawford* (2001), 281 A.R. 201, 248 W.A.C. 201, (sub nom. *Stevens v. Morrisroe*) 202 D.L.R. (4th) 577, 40 E.T.R. (2d) 276, 2001 CarswellAlta 945 (Alta. C.A.), at paragraphs 18, 19 and 20.

Thus, the question at the bedside is not whether the client has holes in their memory, but whether their memory is sufficiently intact to allow for a meaningful disposition of property to their heirs. Depending on the circumstances, it may not be a bar to testamentary capacity that the client is unable to recall the number and names of their grandchildren, the value of their investments, or that they believe their house to be worth a quarter of the fair market value it would realistically fetch if sold. It is not a bar if they cannot recall having met you before.

There will also be many circumstances where your conclusion on capacity is not black or white, but grey. A lawyer is often in the difficult position where they are unable to comfortably conclude that the client has capacity but are equally unable to comfortably conclude that the client does not. In that situation, the question becomes whether to draw the will and attend on its execution or to refuse to proceed further with the retainer.

# 3. Onus and Burden in the Probate Process

Putting a will to probate involves the shifting interplay of onus and burden.

If the person propounding the will proves:

1. that the will was executed with the necessary formalities, and
2. that it was read over by, or to, the will-maker and,
3. that the will-maker appeared to understand the will,

then a rebuttable presumption operates to establish that the will-maker knew and approved the content of the will and that the will-maker had the necessary testamentary capacity to make the will.[9]

A person attacking a will on the grounds that the will-maker failed to have the necessary mental capacity at the time must then convince the court that "suspicious circumstances" exist to bring the validity of the will into legitimate question.

In *Vout v. Hay*, in paragraph 25, the SCC said:

> *The suspicious circumstances may be raised by (1) circumstances surrounding the preparation of the will, (2) circumstances tending to call into question the capacity of the testator, or (3) circumstances tending to show that the free will of the testator was overborne by acts of coercion or fraud. Since the suspicious circumstances may relate to various issues, in order to properly assess what effect the obligation to dispel the suspicion has on the burden of proof, it is appropriate to ask the question "suspicion of what?" . . .*

9 *Vout v. Hay* (1995), 7 E.T.R. (2d) 209, 125 D.L.R. (4th) 431, [1995] 2 S.C.R. 876, 183 N.R. 1, 82 O.A.C. 161, J.E. 95-1367, 1995 CarswellOnt 186 (S.C.C.), at paragraph 26.

The burden to prove the presence of suspicious circumstances is on the person challenging the will, and suspicious circumstances have to be proven on the normal civil standard of balance of probabilities. In raising suspicious circumstances, the person attacking the will need only adduce or point "to some evidence which, if accepted, would tend to negative knowledge and approval or testamentary capacity."

. . .

Where suspicious circumstances have been shown to exist as to testamentary capacity, or as to whether the will-maker had knowledge and approval of the contents of the will the presumption is said to be spent. The onus of proof then shifts back to the person seeking to propound the will to satisfy the court, on the normal civil standard, that the deceased had the necessary mental capacity and knowledge and approval at the time the will was prepared and signed.

Different rules apply to allegations of undue influence.

# 4. The Theory of Negligence

## a) Liability to Intended Beneficiaries

A lawyer can be liable in negligence to thwarted heirs where the client communicates instructions to prepare a will on terms that would benefit a specific heir, and the heir fails to receive the intended benefit due to the negligence of the lawyer involved. The seminal case on point in England is *Ross v. Caunters.*[10]

The lawyer in that case prepared a will and sent it to the client for do-it-yourself execution, failing to warn the client that if the spouse of a named beneficiary acted as witness it would void a gift to the beneficiary. That occurred, and the lawyer failed to catch the error. The failure of the thwarted heir to inherit was considered foreseeable and the lawyer held liable in damages for the amount of the loss.

The House of Lords weighed in to the same effect fifteen years later in *White v. Jones*.[11] The lawyer in that case received instructions to prepare a new will for a client. He had been estranged from his daughters, but had recently reconciled and the new will was intended to reinstate his girls as beneficiaries. The new will was not signed due to delay and negligence on the part of the lawyer, and the client died with the old will in place. The lawyer was held liable in damages to each of the daughters for the amount of the lost inheritance.

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10 *Ross v. Caunters* (1979), [1980] 1 Ch. 297, [1979] 3 All E.R. 580, [1979] 3 W.L.R. 605 (Eng. Ch. Div).

11 *White v. Jones*, [1995] 1 All E.R. 691, [1995] A.C. 207 (U.K.H.L).

Canadian courts joined suit five years later. In *Earl v. Wilhelm,*[12] the Saskatchewan Court of Appeal adopted the rule in *White v. Jones*, accepting the principle that lawyers can be liable to a thwarted heir who is denied an intended benefit by virtue of professional negligence. In *Earl v. Wilhelm*, the client wanted to leave a parcel of land to a beneficiary and the will was drafted on that basis. The land, as it turned out, was not owned by the client but was held in a family farm corporation. The intended beneficiary did not receive the land at the death of the client. The lawyer was held liable in negligence to the intended beneficiary for the full value of the land.

The Ontario Court of Appeal dealt with lawyers' negligence again in *Hall v. Bennett Estate,*[13] endorsing and accepting the principle from *White v. Jones* as the law of Ontario.[14] The lawyer in that case met with a client at the hospital and concluded that the client did not have testamentary capacity. No will was drafted, and a thwarted heir sued. Charron, J.A., concluded that the lawyer had overwhelming grounds to conclude that the testator lacked capacity.[15] Accordingly, the court held that the lawyer was entitled to refuse the retainer to prepare a will, and absent a retainer there could be no liability to the client or the client's intended heirs in contract or negligence.[16]

Obiter comments in dissenting reasons from Supreme Court of Canada in *Lapointe Rosenstein Marchand Melançon LLP v. Cassels Brock & Blackwell LLP,*[17] confirmed the above case law (the reason for the dissent being unrelated to this issue).

From this it flows that if the lawyer and client agree to limitations in the retainer between them, those limitations can, under appropriate circumstances, restrict the liability of the lawyer not just to the client but also under the law of negligence to any intended beneficiaries who are thwarted.[18] For example, a client can instruct a lawyer not to conduct title searches to corroborate the ownership of lands the client wishes to gift by will, and in doing so will presumably limit the lawyer's liability if the land turns out to be owned in joint tenancy and passes by operation of law to a different person.

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12 *Earl v. Wilhelm* (2000), 2000 S.K.C.A.1, 183 D.L.R. (4th) 45, [2000] 4 W.W.R. 363, 189 Sask. R. 71, 216 W.A.C. 71, 31 E.T.R. (2d) 193, 1 C.C.L.T. (3d) 215, 2000 CarswellSask 49. (Sask. C.A.). See paragraphs 40 to 42.

13 *Hall v. Bennett Estate* (2003), 15 C.C.L.T. (3d) 315, 171 O.A.C. 182, 64 O.R. (3d) 191, 227 D.L.R. (4th) 263, 50 E.T.R. (2d) 72, 2003 CarswellOnt 1730 (Ont. C.A.). The facts of that case are dealt with at greater length later in this paper.

14 *Ibid.,* at paragraph 49 and environs.

15 *Ibid.,* at paragraph 58.

16 *Ibid.,* at paragraphs 56 and 57.

17 *Lapointe Rosenstein Marchand Melançon LLP v. Cassels Brock & Blackwell LLP,* 2016 SCC 30 (CanLII), [2016] 1 SCR 851 at para. 94.

18 *Earl v. Wilhelm* (2000), 2000 S.K.C.A.1, 183 D.L.R. (4th) 45, [2000] 4 W.W.R. 363, 189 Sask. R. 71, 216 W.A.C. 71, 31 E.T.R. (2d) 193, 1 C.C.L.T. (3d) 215, 2000 CarswellSask 49, at paragraph 37.

## b) Liability to Beneficiaries Under Prior Wills

While liability to an intended beneficiary is possible, it has been limited in other decisions to fall short of liability to beneficiaries under prior wills.

This issue was litigated in England in *Worby and Ors v. Rosser.*[19] The lawyer in that case supervised the execution of a will that later was challenged and struck down on the grounds that the maker of the will lacked capacity and was subject to undue influence. The heirs under an earlier will inherited, but only after being put to extensive legal expense in opposing probate of the invalid will.

The hearing took forty days. The costs of the successful party were pegged at £250,000 (roughly $440,000.00 in Canadian dollars). They sued the lawyer in a negligence action in a bid to recover those costs. The court concluded that the lawyer owed no duty to them, and no damages flowed. It is clear on the judgement that the result would have been different, and the lawyer liable in negligence, if the estate had paid the costs and sued for reimbursement.

The Alberta Court of Appeal considered the issue of liability to beneficiaries under prior wills in *Graham v. Bonnycastle*.[20] A valid prior will was in place in which the client appointed his children as executors and left them his estate as his residuary beneficiaries. He later remarried, and purported to put a new will in place, revoking the old, and leaving the residue of his estate to his new wife. The new will limited the children to small cash bequests.

The will was challenged by the children on the grounds that their father lacked testamentary capacity at the time, suffering from Alzheimer's Disease, and dementia, plus an organic brain disorder called Korzakoff's Disease. The case settled. The children were allowed to apply for probate but the settlement agreement included a significant settlement for the wife. Each child's inheritance was significantly reduced as a result.

They sued the lawyer alleging negligence and seeking damages equal to the difference between the smaller amount they were receiving under the settlement agreement and the larger amount they would have received if they had inherited in full under the old will.

The lawyer had made little effort to establish the father's testamentary capacity, and negligence was admitted for the purposes of the trial that ensued between the lawyer and the children. The court followed *Worby and Ors v. Rosser* and found that the

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19 *Worby and Ors v. Rosser*, [1999] 10 Lloyd's Rep 972 (Eng. C.A.).

20 *Graham v. Bonnycastle* (2004), 2004 A.B.C.A 270, 10 E.T.R. (3d) 167, 50 C.P.C. (5th) 233, 243 D.L.R. (4th) 617,354 A.R. 266, 329 W.A.C. 266, 36 Alta. L.R. (4th) 203, [2005] 4 W.W.R. 205, 2005 CarswellAlta 493 (Alta. C.A.).

lawyer did not owe a duty of care to the beneficiaries under the earlier will in such circumstances:[21]

> *…there is no need to extend the solicitor's duty of care to include the beneficiaries under the Original Will. Those beneficiaries have a right to challenge the New Will on the ground of lack of testamentary capacity. If the testator had testamentary capacity at the time of the New Will, the testator was entitled to do what he did and no loss is caused by any negligence of the solicitor. If the testator did not have testamentary capacity, the New Will is not admitted to probate and, in the absence of other objections, the Original Will takes effect. Costs properly incurred to challenge the probate of the New Will should be paid for by the estate. If the estate thereby suffers a loss, it has its own remedy against the negligent solicitor.*

Berger, J.A., concurred in the result but rendered minority reasons for decision. He suggests in *obiter* that there may be some circumstances where a court might find a lawyer liable to a third party. That might occur where an estate has been distributed prior to a successful attack on the will. Where that occurs, the wealth would be in the hands of wrongful heirs under the terms of an invalid will signed by a will-maker without capacity, and the proper heirs under an earlier, valid will would have no recourse except against the lawyers who assisted in drawing the invalid will. Quoting from those minority reasons for decision:[22]

> *Accordingly, without delineating each and every circumstance in which, arguably, a remedy will lie at the instance of a beneficiary under a former will, it is sufficient to say only that there may well be circumstances where the wills solicitor may be held liable to that beneficiary. A remedy would lie if the negligence of the solicitor did not come to light until after the impugned will had been admitted to probate and the estate assets distributed. I suggest that there is no principled reason to immunize a negligent solicitor when the beneficiary under a former will is deprived of a rightful bequest in circumstances where the later will, the product of a testator who lacks capacity, has been admitted to probate and the assets of the estate dissipated.*

# 5. Case Law Review

Each of the cases summarized below is an example of lawyer conduct in dealing with diminished capacity. The cases are selected as illustrative of best and worst practices, and are arrayed chronologically.

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21 *Ibid*., at paragraph 27.

22 *Ibid*., at paragraph 56.

### *Friesen et al. v. Friesen Estate*

The lawyer in *Friesen*[23] was woken from bed on a Sunday morning to go to the hospital and meet with a client who had, purportedly, announced the intention to make a new will. The lawyer had prepared a prior will for the same client twenty-seven days earlier. The lawyer arrived at the hospital at 5:00 a.m. with a stationer's pre-printed will in hand and a very general recollection regarding the content of the prior will. The client was 68 years old, wearing an oxygen mask and, known to all, in the process of dying. A relative was in the hallway who was unhappy with the content of the earlier will. The attending nurse told the lawyer that, in her opinion, the client was in a satisfactory mental state.

The lawyer exchanged words with the client and concluded that the client had his faculties about him. He did not ask any questions designed to assess capacity. No questions were asked about the client's assets or the extent of his family. He did not ask why the client wished to make a new will so soon after the prior one. In discussing specific bequests, the client was unable to explain the family connections between his heirs.

When the client gave instructions for the disposition of the residue of the estate the distribution was at odds with the earlier will. One beneficiary in particular was omitted, a step to the liking of the relative in the hall. The lawyer recalled asking about that change but could not in testimony recall the answer. The will was completed by the lawyer and signed. The client died 10 days later.

The party attempting to put the will to probate was unable to prove testamentary capacity. While sympathetic to the lawyer for having been dragged out of bed in the dark hours of the morning, the court was also critical of the lawyer who, essentially relied on the nurse's opinion and his own general observations. The court, in summarizing the law, stated: [24]

> *The duty upon a solicitor taking instructions for a will is always a heavy one. When the client is weak and ill, and particularly when the solicitor knows that he is revoking an existing will, the responsibility will be particularly onerous.*

A solicitor cannot discharge his duty by asking perfunctory questions, getting apparently rational answers, and then simply recording in legal form the words expressed by the client. A personal inquiry is necessary in order to be satisfied that true testamentary capacity exists, that the instructions are freely given, and that the effect of the will is understood.

If proper questions had been put to the client at the bedside, and the answers recorded, the client might have demonstrated capacity. A three day trial in this case might have been avoided if the parties to the dispute had access to real evidence to assess the merits of the case.

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23 *Friesen et al v. Friesen Estate* (1985), 24 E.T.R. 191, 33 Man. R. (2d) 98, 1985 CarswellMan 84 (Man. Q.B.).

24 *Ibid.,* appearing as separately numbered points enumerated at paragraph 77.

### *Re Abrahamson Estate*

The lawyer in *Re Abrahamson*[25] was called to a hospital to meet with an 87 year old woman diagnosed with a mental disorder causing forgetfulness and paranoia. He was told that a committeeship was pending relating to her financial affairs and that she wanted a new will.

The pair met for two hours. During that time she related the content of her family tree to the lawyer, enabling him to take extensive notes relating to her siblings and nieces and nephews. While she forgot some names, she also remembered many, and had 30 nieces and nephews to account for. She demonstrated a working knowledge of what she owned and what it was worth, answering the lawyer's questions on point with sufficient (although not perfect) detail to satisfy him. She told him where she wanted her wealth to go, and demonstrated comprehension to the satisfaction of the lawyer as they discussed and agreed on a *per stirpes* style of distribution. The pair met for another one and one-half hours on the next day, to review and sign the will. During that time she corrected a typographical error. That lawyer had no doubt as to her capacity.

The court commended the lawyer on his conduct throughout the matter and found the will to be valid notwithstanding an array of critical medical evidence thrown up in opposition. The doctors met with the client at different times, her condition caused fluctuating levels of mental competence, and they did not ask her questions relating to her assets and the natural objects of her bounty.

Efforts were made to criticize the lawyer for failing to discuss the client's medical condition directly with the medical staff. Those efforts were rejected. The lawyer had reached a point where he was satisfied as to her testamentary capacity. Additional enquiries might have added value, but were not necessary.

It is worth noting that death occurred eight years later, and testimony was given eleven years after the client meetings. The court did not comment on the records or notes that may have been kept by the lawyer, but it is clear that the lawyer was more than able to carry the value of his process forward into the court room.

### *Banton v. Banton*

In *Banton v. Banton,*[26] a lawyer was visited at his office by an 88 year old gentleman and his 31 year old bride. The gentleman told the lawyer he wanted a new will, appointing his wife as his executrix and making her his sole heir. The client was able to recount his assets, and his family tree – including several children who would be disinherited. He clearly understood what a will was and what a will did. A will was prepared.

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25 *Abrahamson Estate Re* (1994), 96 Man. R. (2d) 150, 1994 CarswellMan 325, (*sub nom. Swanson v. Ransom*) (Q.B.), upheld by *Abrahamson Estate Re*, 1995 CanLII 16380 (MB CA).

26 *Banton v. Banton* (1998), 164 D.L.R. (4th) 176, 66 O.T.C. 161, 1998 CarswellOnt 3423, and (additional reasons) 164 D.L.R. (4th) 176, 66 O.T.C. 161 at 244, 1998 CarswellOnt 4688 (Ont. Gen. Div.).

The lawyer met with the client again just prior to execution, without his wife present, and confirmed the instructions. The client told the lawyer that his children did not care for him, had neglected him, had moved him into a personal care facility against his wishes, and were only after his money. His new wife was going to move him into a love nest away from the personal care home. The lawyer prepared a memorandum to file detailing the course of the meetings and the engagement.[27]

Overall, the lawyer did a fairly good job of ascertaining the elderly gentleman's capacity, and properly so given the suspicious circumstances presented to him and the gravity involved in disinheriting the will-maker's children.

For all of those efforts, the will was held to be invalid on the grounds that the propounder of the will had failed to establish testamentary capacity. The court found that the client had been suffering from a delusion in wrongfully believing his children were neglectful and only after his money. He was not only wrong, but the misapprehension was caused by his underlying medical condition. It was a delusion, and one that had perverted his testamentary intent.

The case is interesting as an example of "hidden" incapacity. The lawyer was not in a position to uncover the delusion without making outside enquiries regarding the relationship between the client and his children, enquiries that would have been quite extraordinary and outside of the normal course of a solicitor's conduct in drawing a will, even with suspicious circumstances presenting. Moreover, contacting the children would have been inappropriate unless the client authorized it.

The lawyer might, through the broadest of interviews, have come to doubt some of the client's claims about his children, but to expect that level of enquiry would be to put the lawyer to an unreasonably high standard. Even if the lawyer had gone to the client's doctors, no one had diagnosed any delusionary form of illness or noted the possibility of delusions being present.

Generally, if a lawyer asks the right questions and takes the right steps, they will do a good job of assessing capacity. The lawyer will be a helpful witness if the will is challenged, and need not be fearful of the censure of the court or a negligence action. The *Banton* decision is one of those rare examples of a good lawyer following a good process, with the lawyer drawing the conclusion of capacity, and then seeing the will overturned at a later trial. A hidden delusion of this kind will be exceedingly hard to uncover. Thankfully, it will also be exceedingly rare in its occurrence and the court was complimentary of the lawyer's conduct. The quality of the process was protection against any suggestion of negligence. A lawyer is not a guarantor of capacity.

As a note in passing, if the will-maker in *Banton* had simply been wrong about his children, and there had been no underlying medical condition causing the delusion to take hold, then the will would probably have stood. A will-maker can be wrong or unreasonable about his

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27 *Ibid.,* as to the lawyers involvement, see paragraphs 1, 24-25 and 56.

family, but short of a medically driven delusion a will excluding the children should still withstand scrutiny.

### *Slobodianik v. Podlasiewicz*

The lawyer in *Slobodianik*[28] was approached by two stepchildren of the eventual will-maker to prepare a new will for their stepfather. Two days later, one of the two children took the lawyer to their stepfather's bedside in the personal care home where he resided. The will-maker told the lawyer that he wished to leave his estate to the two stepchildren. At that point the lawyer asked the stepson to leave.

The meeting with the eventual testator lasted fifteen minutes. The lawyer "…did not ask for an inventory of the testator's assets, and did not speak with the staff respecting the testator's functioning. He could not state for certain whether he asked about the other potential beneficiaries. He did not direct any specific questions to test the testator's mental functioning, nor did he make any notes of the conversation. The lawyer testified that it was a "simple instruction…a simple will," and that he had no concerns "whatsoever" about Mr. Mykytyn's testamentary capacity."[29] While the lawyer went to the trouble of bringing one of his partners along for the execution, no additional questioning took place. The will was signed. The testator died seven years later.

Scott, C.J.M, speaking for the Manitoba Court of Appeal, pointed out that only the lawyer, among all of the witnesses who had been called at the trial, was in a position to assess the testamentary capacity of the will-maker. The lawyer failed to follow a proper process, and had no evidence that could be used to buttress the will or allow the court to meaningfully draw conclusions as to the testamentary capacity of the maker. The court was highly critical of the lawyer and his efforts to assess capacity.[30]

This case is one of many examples in the case law where not one, but two lawyers were called into the interview process but to no avail. Two lawyers following bad process are as useless as one.

### *Hall v. Bennett Estate*

The lawyer in *Hall v. Bennet*[31] was called at home by a social worker requesting that he attend at the hospital to see Mr. Bennett, a patient who was terminally ill and wished to make a will. The lawyer agreed to meet Mr. Bennett that morning. He stopped on the way to the hospital to buy a will kit with the idea that he could do an on-the-spot will if the situation demanded it.

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28 *Slobodianik v. Podlasiewicz,* 2003 MBCA 74 (CanLII), 173 Man. R. (2d) 287, 228 D.L.R. (4th) 610, 293 W.A.C. 287, [2004] 3 W.W.R. 302, 6 E.T.R. (3d) 126, 2003 CarswellMan 220 (Man C.A.).

29 *Ibid.,* at paragraph 8.

30 *Ibid.,* at paragraphs 32 and 33.

31 *Hall v. Bennett Estate*, 2003 CanLII 7157 (ON CA), (2003), 15 C.C.L.T. (3d) 315, 171 O.A.C. 182, 64 O.R. (3d) 191, 227 D.L.R. (4th) 263, 50 E.T.R. (2d) 72, 2003 CarswellOnt 1730 (Ont. C.A.).

The lawyer attended at the deathbed and met with the patient for sixty-five minutes in the presence of a nurse. He questioned him over that period of time in a bid to take instructions for a will and assess his capacity. Mr. Bennett repeatedly drifted in and out of consciousness, often in midsentence, and had to be roused. The nurse later described the patient's vital signs as barely consistent with life. He had been taken off of pain medication in a bid to sharpen his mental function for the meeting with the lawyer.

Notwithstanding the pain, and his inability to stay consistently conscious, Mr. Bennett was able to reel off a list of specific bequests. Included among them was the wish to leave his store to his friend, a Mr. Hall. He was estranged from some of his family members and wanted them excluded from sharing in the estate except for some small cash gifts.

The lawyer asked repeatedly what the patient wanted to do with the residue, but the dying man would not or could not answer that question. The lawyer tried to explain that if the patient died intestate then the family members he wished to exclude would in fact inherit. The patient still was unwilling or unable to tell the lawyer what, if anything, he had in mind for the residue. The lawyer also tried to ask questions in a bid to work up an inventory of assets. The dying man would not or could not answer the questions.

The lawyer concluded that he could not take instructions, and further concluded that even if he could the patient's attention span would not allow the will to be read over, understood and signed. He discontinued the interview, and Mr. Bennett died intestate later that day.

Mr. Hall, who did not receive the store, sued the lawyer. He alleged that the deceased did have testamentary capacity at the time and the lawyer was negligent in not proceeding with the will.

In reversing a lower court decision, the Ontario Court of Appeal concluded that the lawyer was not liable. The court commented:[32]

> *…at the very least, [the lawyer] had undertaken to interview Bennett with a view to obtaining instructions to prepare a will. He therefore had to bring the skill of a reasonably prudent solicitor to this task. As discussed earlier, his first obligation was to inquire into Bennett's testamentary capacity before undertaking to do a will. It is my view that the evidence in support of [the lawyer's] opinion that he did not have sufficient instructions to prepare a will and that Bennett lacked testamentary capacity was overwhelming.*

The lawyer in *Hall v. Bennett* attended at the bedside willing and able to prepare a will for execution on the spot. He asked all of the right questions. The client was unable to inventory his assets or give instructions for the disposition of the residue of the estate, displaying a clear failure in testamentary capacity. This case can be contrasted with others where lawyers are too timid, or too polite, to ask the core questions necessary to assess capacity.

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32 *Ibid.,* at paragraph 58.

### *Graham v. Bonnycastle*

In *Graham v. Bonnycastle*,[33] a lawyer was contacted to draft a new will for a man who had just married. The lawyer knew that capacity was an issue, and took another lawyer with her to meet with the client. Both of the lawyers who attended for that purpose knew that the client was suffering from Alzheimer's disease, that a court process was underway to have him declared incompetent, and that the will they were being asked to draft would largely disinherit the client's children.[34] The lawyers were aware of the need to take special care. They concluded that the client had capacity and attended on the preparation and execution of a will.

The will was attacked on the grounds that the client did not have capacity. That case was resolved by settlement. The beneficiaries under the earlier will then commenced a second action, suing the lawyers and seeking the difference between what they would have received under the earlier will (all of the residue) and the lesser amount of the settlement.

The lawyers appear to have done such a poor job that their liability was dealt with as an admission by both sides in the case. The deficiencies in their conduct are itemized at paragraph 36 of the Court of Appeal decision, and included the failure to consult with the doctors involved with the client and failure to conduct a sufficient interview. Because negligence was admitted, not found by the court, the particulars of that negligence are not of particular note in this case.

That a pair of lawyers could go that far wrong in a case where they knew special steps were required to deal with capacity speaks volumes of the sometimes shocking inability of lawyers to adhere to reasonable standards in such circumstances. Like *Slobodaniak,* the lawyer brought along a second lawyer proving again, that two lawyers who don't know what they are doing are no better than one lawyer. There is no strength in numbers unless a correct process has been followed.

### *Townsend v. Johnson*

The lawyer in *Townsend v. Johnson*[35] was retained by an 88 year old client who indicated that a family member had applied to have him declared incompetent. The lawyer assisted in having the court proceedings dropped. Afterwards, the client announced his intention of having a new will and power of attorney put in place and made arrangements to instruct the lawyer in that regard.

There was some evidence of dementia. The lawyer had notes of each meeting and telephone call over the history of both of the retainers. Her testimony was taken ten years after she

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33 *Graham v. Bonnycastle*, 2004 ABCA 270 (CanLII), 10 E.T.R. (3d) 167, 50 C.P.C. (5th) 233, 243 D.L.R. (4th) 617, 354 A.R. 266, 329 W.A.C. 266, 36 Alta. L.R. (4th) 203, [2005] 4 W.W.R. 205, 2005 CarswellAlta 493.

34 The facts here are taken from the decision of the judge at the trial level, 2002 WL 31978118, 2002 CarswellAlta 1914, at paragraph 13.

35 *Townsend v. Johnson* (2007), 2007 A.B.Q.B. 461, 33 E.T.R. (3d) 214, [2007] A.W.L.D. 3152, [2007] A.W.L.D. 3153.

had met with the client and, admitting she did not always have a direct recollection of the events in question, she relied on her notes while testifying. She had been a lawyer for sixteen years and had a mixed practice of domestic law, wills and estates, and work with dependant adults.

The court described her testimony in making the will. She met with the client in her office to take instructions and recollected they were alone, which was her practice. She described her normal practice and her notes appeared to follow that pattern. She asked the client questions about his assets and made a list of them based on his answers. He knew that his important papers were kept in a family member's safety deposit box.

She then went through the names of his relatives and took instructions for the will. He had given her a piece of paper with his wishes set out on it. That was supplemented by her notes, addressing each testamentary decision that had to be made in the order that each appeared in her template will (as was her practice). She began with burial arrangements, followed by personal effects, gifts of particular assets and then disposition of residue. Her notes were detailed. After the client left, she instructed her paralegal on the contents of the will and asked the paralegal to conduct title searches to confirm the state of the title as related to her by the client.

She met with the client one week later to sign the will. Her notes indicated the meeting took ninety minutes. She reviewed the will clause by clause with the client, and made corrections and notes. Her notes indicated in point form that she was satisfied that he knew who was to benefit, that he wanted to be even handed, that he was paying close attention and reminded her to include certain bequests, and told her he had decided against one bequest as he would, instead, make a cash gift to that person while living. She testified that the use of the word "satisfied" in her notes was her code to indicate that she believed the client had testamentary capacity. The will was corrected and signed the same day, and her notes indicated that the client told her the will was just what he wanted.

There were a significant number of witnesses, lay and medical, to supplement the evidence of the lawyer. The trial judge concluded:[36]

> *In short, Ms. Gerhart's evidence was very clear and objective. I find that she acted throughout the relevant period as a competent solicitor. She made the necessary inquiries. She has no interest in this litigation. Her assessment of [her client's] capacity deserves considerable weight.*

### *Petrie v. Burnett*

In *Petrie v. Burnett*[37] a notary took instructions in hospital from a man suffering from pancreatic cancer and attended on the execution of the will three days later, mere hours

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36 *Ibid.,* at paragraph 118.

37 *Petrie v. Burnett* (2008), 2008 B.C.S.C. 1503, [2009] B.C.W.L.D. 39, [2009] B.C.W.L.D. 40, [2009] B.C.W.L.D. 41, [2009] B.C.W.L.D. 368, [2009] B.C.W.L.D. 376, [2009] W.D.F.L. 184, 44 E.T.R. (3d) 85, 2008 CarswellBC 2318, (B.C.S.C).

before the will-maker died. The notary did not ask the will-maker any questions about his assets. No inventory of assets was prepared. That occurred because the notary, who prepared approximately 150 wills each year, believed or predicted that the dying man would have refused to answer. He described the dying man in testimony as being "crabby" and as having refused to give the notary the names of his children. Based on that refusal, without testing, he formed the theory that the will-maker would have refused to answer the questions, if posed, about his assets.[38]

The new will re-directed the will-maker's assets to his friends and away from his four children. The court was still able, by considering circumstantial and tangential evidence, to conclude that the will-maker had testamentary capacity. The proper questions, if asked and competently answered, might have gone a long way in preventing the litigation that ensued.

# 6. Selected Issues Arising at Different Stages of the Retainer

## a) Accepting or Declining the Retainer

The lawyer's professional obligation to the client and to any thwarted heirs will generally come into play if and when the lawyer accepts a retainer to provide services.[39] If the lawyer never agrees to come to the bedside or meet with the family, it will be difficult to imagine circumstances where they could be liable.

An exception may lie where the lawyer commits to come to the bedside and then fails to do so, and loss is suffered on the basis of detrimental reliance. In that situation there may be liability even in the absence of a retainer.[40] That might occur if the family ceases efforts to find a lawyer, relying on the representation that help is on the way, and the competent patient then passes away with their testamentary wishes unrecorded and of no effect.

Unless the lawyer and client clearly and expressly understand the contrary, once the lawyer attends at the deathbed and commences a meeting with the patient, a retainer appears to spring into play. It is not the retainer to prepare a will, but a retainer to assess testamentary capacity. A lawyer who is negligent in the assessment of capacity, can be liable for failing to take the proper steps to do so, even when the lawyer refuses the retainer to prepare a will for the client.[41]

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38 *Ibid.,* paragraph 61.

39 *Hall v. Bennett Estate* (2003), 15 C.C.L.T. (3d) 315, 171 O.A.C. 182, 64 O.R. (3d) 191, 227 D.L.R. (4th) 263, 50 E.T.R. (2d) 72, 2003 CarswellOnt 1730 (Ont. C.A.), at paragraph 56.

40 *Ibid., Hall v. Bennett Estate*, at paragraph 56, citing *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, 115 Man. R. (2d) 241, 146 D.L.R. (4th) 577, [1997] 8 W.W.R. 80, 1997 CarswellMan 199 (S.C.C.).

41 *Hall v. Bennett Estate* (2003), 15 C.C.L.T. (3d) 315, 171 O.A.C. 182, 64 O.R. (3d) 191, 227 D.L.R. (4th) 263, 50 E.T.R. (2d) 72, 2003 CarswellOnt 1730 (Ont. C.A.), at paragraph 58.

As always, it is critically important to be clear with the client, or the client's family if they are acting as the client's agent in arranging for a lawyer to attend at the bedside. That clarity is required on two fronts: the point in time at which a retainer has or will be formed, and the scope of the retainer itself (discussed below).

The lawyer can propose a half-hour chat with the client prior to being retained. The lawyer can suggest that no retainer is in play until the client has countersigned a retainer letter – a measure not commonly employed in current wills and estate practices. It should be clear to the client whether in agreeing to attend at the hospital, the lawyer has already accepted the retainer or is not yet retained. Since obligation and liability grow out of the retainer, it is best to avoid confusion as to when the retainer commences.

## b) The Interview to Take Instructions

A lawyer is expected to conduct a full interview, specifically pursuing the heads of testamentary capacity outlined above, taking careful notes. If the client displays an inability to deliver on any one of the heads, then the client does not have testamentary capacity.

Thus when the client in *Hall v. Bennett* was unable to provide an inventory of assets, the enquiry was over. No mini mental, or doctor's report, or other step or measure can resuscitate the clients capacity in the eyes of the lawyer if the client cannot deliver on any one of those heads while giving instructions.

The lawyer cannot conclude that there is testamentary capacity, or the even the possibility of testamentary capacity, and can and should decline the retainer to prepare a will at that stage.[42]

A refusal to answer questions is different than the inability to answer questions. Inability proves incapacity while refusal is ambiguous. If a client refuses to answer questions about their assets, or their family, it puts the lawyer in the most difficult of situations.

42 *Hall v. Bennett Estate* (2003), 15 C.C.L.T. (3d) 315, 171 O.A.C. 182, 64 O.R. (3d) 191, 227 D.L.R. (4th) 263, 50 E.T.R. (2d) 72, 2003 CarswellOnt 1730 (Ont. C.A.), at paragraph 58.

If the client is stable, and neither death nor a plunging drop in capacity are in the offing, the best practice is to terminate the engagement based on a loss of confidence between lawyer and client.

If the client is near death, or there is any other reason to believe they will be unable to seek other counsel in time to do a will, the situation is different. At that point an issue of professional ethics comes into play. You would be well advised to counsel the client about the risks created by the refusal – the will might be struck down, and the heirs might be locked in expensive and withering litigation.

If the client still refuses the issue becomes this: do you believe that the client is refusing due to misguided obstinacy and could answer if the questions if they wished to, or do you believe that the client is refusing to answer to hide an inability to answer?

After answering that question, you should write down the reasons for coming to that conclusion as part of your notes and, if obstinacy is suspected, you might be justified in proceeding with the execution of the will. Again, this course is suggested as a possibility only if you cannot extricate yourself from the engagement without the fear of professional misconduct.

It is possible to argue the opposite view on this point. While terminating the engagement and leaving a terminally ill client in the lurch might effectively deny them access to counsel, a bad result, it can be said that the client brings it upon themselves by virtue of their irresponsible refusal to cooperate. By analogy, a lawyer cannot withdraw from a trial an hour before it commences, unless the client has announced an obstinate intention to lie on the stand. The analogy may not hold, but it illustrates the moral complexity of the situation under consideration. Irresponsible clients ought not to be allowed to engage in courses of conduct that waste the court's time.

The lawyer's evidence collected during the taking of instructions is generally the most relevant and probative evidence available to the court and is given great weight in many cases. This has been the subject of commentary:[43]

> *…where a testator is seriously ill or debilitated by terminal illness which is capable of affecting his state of mind, the solicitor's evidence is especially crucial. Typically in this situation the testator's mental presence is either highly variable over time or rapidly deteriorating. Naturally, where this is the case, the courts are interested in the testator's state of mind at the precise moment when instructions are given and/or the will is executed. In this situation the history of the testator's mental competence prior to his illness is irrelevant and therefore the observations and insights of persons who have interacted with the testator in his daily life become immaterial. The ill testator in his last days frequently has visitors who have an opportunity to observe his mental state but their impressions are usually general in the sense of not specifically being*

[43] M.M. Litman and G.B. Robertson, "Solicitor's Liability for Failure to Substantiate Testamentary Capacity" 62 Canadian Bar Review (Vol. 62), page 457, at pages 472-73.

*related to the various elements of testamentary capacity. Moreover, these persons tend to be interested parties whose evidence is not infrequently in conflict.*

## c) Capacity in the Grey Area - The Two Schools

A lawyer will sometimes be in a position where the client's capacity is uncertain. Does the lawyer proceed with the preparation and execution of a will if the client falls in that grey area or is it better to decline to proceed?

In *Scott v. Cousins*[44] Cullity, J. stated at paragraph 70, citations omitted,

> *The obligations of solicitors when taking instructions for wills have been repeatedly emphasised in cases of this nature. At the very least, the solicitor must make a serious attempt to determine whether the testator or testatrix has capacity and, if there is any possible doubt - or other reason to suspect that the will may be challenged - a memorandum, or note, of the solicitor's observations and conclusions should be retained in the file… Some of the authorities go further and state that the solicitor should not allow a will to be executed unless, after diligent questioning, testing or probing he or she is satisfied that the testator has testamentary capacity. This, I think, may be a counsel of perfection and impose too heavy a responsibility. In my experience, careful solicitors who are in doubt on the question of capacity, will not play God -- or even judge -- and will supervise the execution of the will while taking, and retaining, comprehensive notes of their observations on the question.*

The better practice is to supervise the execution of the will. This is only where the lawyer is unsure on the capacity question. If clearly that client does not have the capacity, then the lawyer must refuse to execute the will with the client, as might be the case where the client is utterly unable to recount their asset holdings.

Where the client is able to recount their assets, but miss some, or their estimates as to the value of those assets are out of kilter, it may leave the lawyer unsure as to whether the client has the necessary capacity to execute.

There are a variety of reasons to execute under those circumstances.

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44 *Scott v. Cousins* (2001), 37 E.T.R. (2d) 113, [2001] O.J. No. 19, 2001 CarswellOnt 50 (Ont. S.C.J.).

### i. The first reason to execute in the grey zone is liability control.

Consider and compare the range of possible outcomes if the lawyer supervises the execution of the will to those if the lawyer refuses and the will is not signed.

Consider the situation if the lawyer supervises the execution, and the will is signed. In that case, the will can be tested in court. If the client is held to have had the necessary capacity, then the intended beneficiaries under the impugned last will and testament will inherit under its terms. No one has suffered any loss except for the legal fees and other costs associated with the litigation. If the client is held not to have had the necessary capacity, then the impugned will fails and no one has suffered any loss except for those same legal fees.

Recall the general rule, that lawyers are not liable in negligence to the beneficiaries under prior wills.[45] There are two qualifications to this. First, the lawyer might be subject to an action for the recovery of costs. Second, the lawyer might be concerned, given the minority reasons expressed in *Graham v. Bonnycastle*.

Negligent lawyers can find themselves liable to the estate for the reimbursement of costs. As discussed earlier, a negligent lawyer might be liable to the estate, not the beneficiaries, if the estate pays the costs of the parties after a capacity challenge and the estate suffers diminishment as a result. It is submitted that if the lawyer follows an appropriate process, then the lawyer will not be liable in negligence and need not worry about an action for the recovery of costs. The risk of costs appears to be present in both scenarios, both if the will is signed or if the will is not signed.

The *obiter* comments, quoted earlier, from the minority reasons in *Graham v. Bonnycastle*[46] suggest that a court might find a lawyer liable to a third party if the estate were distributed to the wrong heirs under an invalid will prior to it being challenged.

To control for that risk, the lawyer would be in a greatly improved position if the will or the affidavit of execution attached to the will contained some reference to the doubts they had relating to the will-maker's testamentary capacity. This ensures that interested parties in the estate have the chance to consider the matter and take the matter before the courts if need be. If the lawyer wishes to avoid liability, they should leave some warning in a prominent location to be found by those who might blithely proceed forward without question relying on a potentially flawed will.

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45 *Graham v. Bonnycastle*[45] (2004), 2004 A.B.C.A. 270, 10 E.T.R. (3d) 167, 50 C.P.C. (5th) 233, 243 D.L.R. (4th) 617, 354 A.R. 266, 329 W.A.C. 266, 36 Alta. L.R. (4th) 203, [2005] 4 W.W.R. 205), 2005 CarswellAlta 493; *Worby and Ors v. Rosser*, [1999] 10 Lloyd's Rep 972 (Eng. C.A.). Both of these cases were discussed earlier in the section of this paper entitled "The Theory of Negligence."

46 *Graham v. Bonnycastle* (2004), (2004), 2004 A.B.C.A. 270, 10 E.T.R. (3d) 167, 50 C.P.C. (5th) 233, 243 D.L.R. (4th) 617, 354 A.R. 266, 329 W.A.C. 266, 36 Alta. L.R. (4th) 203, [2005] 4 W.W.R. 205), 2005 CarswellAlta 493 (Alta. C.A.), at paragraph 56.

A customized affidavit of execution can be prepared and sworn by the lawyer making it clear that the will-maker's testamentary capacity was at issue. In some provinces this may not be a matter of choice. The stock form of affidavit of execution in Manitoba states that the deponent is of the view that the testator was of sound mind at the time the will was signed. The affidavit is arguably false where the lawyer is of the view that capacity is at issue. It has to be changed, and cannot be sworn or allowed to be sworn without some amendment.

In other jurisdictions, the form of affidavit of execution fixed by court rules does not require a statement, on the part of the deponent, that the testator appeared to be of "sound mind" on the date of execution, but lawyers in each jurisdiction will have to satisfy themselves that the stock affidavit of execution is not rendered misleading in a grey area execution.

Some lawyers put a statement into the will itself, below the attestation clause, so it is part of the will itself. Affidavits of execution can be removed by unscrupulous family members.

Advance agreement on this point by the client might be critical. Otherwise, the client could demand that the notice or warning be removed from the will. Lawyers are generally obliged to follow instructions and maintain their client's confidentiality. A client cannot force a lawyer to swear a false affidavit or allow one to be sworn.

All of the above deals with the potential liability of the lawyer if the will is prepared and signed in the grey area where the testamentary capacity of the client is unclear to the lawyer.

Compare that to the possible outcomes if the lawyer refuses to prepare the will and supervise its execution under those circumstances.

If the will is not signed, then the thwarted heirs who would have inherited under the proposed but never executed will may decide to sue. If a judge is convinced that the client did indeed have capacity and that the lawyer was negligent in forming a mistaken conclusion of incapacity, then the lawyer may be liable to the thwarted heirs for the whole of the lost inheritance.

The court has no power to distribute the deceased's wealth in accordance with the thwarted testamentary wishes of the deceased, but can and may hold the lawyer responsible in damages. At this stage the lawyer is responsible for both damages and costs. Damages are the bigger concern.

If the lawyer refuses to proceed with the will, can they protect themselves using the principle from *Hall v. Bennett Estate*?[47] Assume that the engagement is structured as a two step retainer. The lawyer can always accept the retainer to assess capacity and reserve the right not to proceed with the second part of the engagement unless they are satisfied as to testamentary capacity.

If the lawyer found themselves in the grey area, they would refuse the second phase of the engagement and recommend the client see another lawyer who might be willing to proceed.

In a death bed situation, a lawyer could be responsible in showing up at the hospital as they might be liable on the principle of detrimental reliance. It appears that a lawyer could make it clear to each prospective client that the lawyer does not "do the tough cases" and "will not proceed to a will unless completely satisfied as to your testamentary capacity." If that was clear enough, and communicated in advance, the lawyer might be able to adopt that stance as a risk reduction measure and not execute wills where capacity was doubtful. While arguably tenable, this practice stance does not serve the public and does not serve a lawyer willing to go to the hospital. It is an "office lawyer" practice stance.

### ii. The second reason to execute in the grey zone involves professional conduct.

> Capacity can be a closing window of opportunity. If the client's capacity is degrading, and a lawyer refuses to supervise execution under those circumstances, it may effectively deny the client access to counsel. It may take hours if not days to arrange for another lawyer to attend at the bedside. It may be too late – the client may die during that interval or slide deeper into diminishing capacity and be unable to perform to the same level on re-interview.

This point was considered in *obiter* remarks in *Hall v. Bennett Estate.*[48] The court was of the view that there may be some circumstances where refusing the retainer to complete the will could amount to professional misconduct. This might be the case where the client is clearly dying and has limited time, and the lawyer undertakes to interview the client to take instructions, but then refuses to proceed with the

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47 *Hall v. Bennett Estate* (2003), 15 C.C.L.T. (3d) 315, 171 O.A.C. 182, 64 O.R. (3d) 191, 227 D.L.R. (4th) 263, 50 E.T.R. (2d) 72, 2003 CarswellOnt 1730 (Ont. C.A.).

48 *Hall v. Bennett Estate* (2003), 15 C.C.L.T. (3d) 315, 171 O.A.C. 182, 64 O.R. (3d) 191, 227 D.L.R. (4th) 263, 50 E.T.R. (2d) 72, 2003 CarswellOnt 1730 (Ont. C.A.) at paragraphs 58 to 62.

preparation and execution of a will, while believing the client may indeed have capacity.

The court also commented: "It is important to note, however, that while the Rules of Professional Conduct may inform a court's decision on the questions of duty and standard of care, they do not, *in and of themselves*, create legal duties that found a basis for civil liability."[49]

This point has been the subject of at least some commentary. Ian Hull has expressed the following view:[50]

> *To bring this concept down to its basic terms, if you, as the testator's or testatrix's solicitor think that the testator or testatrix has testamentary capacity, although you may have some doubts, you should draw the will. On the other hand, if you feel that the testator or testatrix does not have testamentary capacity you should not draw the will.*
>
> *In my view, it is always better to err in favour of drawing a questionable will than not drawing any will at all, where the circumstances warrant such a conclusion by a solicitor. Let a Judge whose duty it is to make such a determination make it. No solicitor should be criticized for so doing in these circumstances.*

In a case comment issued one year later, Rodney Hull commented:[51]

> *In such circumstances where doubt exists as to the testamentary capacity of the testator we are well advised to follow what I understand to be the rule that: If a solicitor has doubts that the testator has testamentary capacity, the Will should be drawn; however, if the solicitor is of the opinion that the testator does not have testamentary capacity, the Will should not be drawn.*

## d) Taking Notes

Taking notes is a core responsibility in a wills practice, particularly when capacity is in issue.

49 *Ibid.,* at paragraph 62.

50 Ian Hull, *Challenging the Validity of Wills* (Thomson Canada Limited: Toronto, 1996) pp 23-24.

51 Rodney Hull, "Lest We Forget Banks v. Goodfellow" (2007), 31 E.T.R. (3d) 15.

In *Scott v. Cousins,*[52] Cullity, J commented (citations omitted):

> *At the very least, the solicitor must make a serious attempt to determine whether the testator or testatrix has capacity and, if there is any possible doubt – or other reason to suspect that the will may be challenged – a memorandum, or note, of the solicitor's observations and conclusion should be retained in the file.*

Per Shapiro, J., in *Maw v. Dickey:*[53]

> *…might not a careful and experienced solicitor consider that he might at some later time be called upon in Court or otherwise, to relate the circumstances surrounding the drawing and execution of the will. What better way to refresh his memory than from notes he could make at the time of interview. The duty he owed his client was to properly support, at a later date if necessary, the will – once he was sure it expressed the sane and intended wishes of his client. I therefore find a specific duty on the part of the solicitor to ask questions in order to satisfy himself that his client had testamentary capacity and…a duty to reduce to some permanent form [his] impressions.*

# 7. Suggestions as to Best Practices

### 1. Question Extensively Before Being Retained

- If a family member of the client, or anyone else calls on their behalf, be greedy for information before booking the appointment or leaving the office for a house call.
    - Is capacity an issue?
    - Are beneficiaries being changed if a new will is prepared?
    - Does the client suffer from any diagnosed medical condition affecting memory?
    - Does the client handle their own finances or is someone else writing cheques for them at this stage?
- It is best to either ask those questions or have a detailed enough discussion with the client or the client's family to reach a point where some or all of those questions are clearly not relevant.

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52 *Scott v. Cousins* (2001), 37 E.T.R. (2d), 113, [2001] O.J. No. 19, 2001 CarswellOnt 50 (Ont. S.C.J.), at paragraph 70.

53 *Maw v. Dickey* (1974), 52 D.L.R. (3rd) 178 (Ont. Surr. Ct.), at pages 190-191. This passage is quoted with approval in M.M. Litman and G.B. Robertson, "Solicitor's Liability for Failure to Substantiate Testamentary Capacity" 62 Canadian Bar Review (Vol. 62), page 457, at page 470.

- Make it clear that you are not retained and have not agreed to act until you have met the client, and confirmed the fee arrangement, etc., and that booking the appointment does not reflect confirmation that you are retained.
- Be clear that if retained, you will be acting for the will-maker, not the family and can only have one client in the engagement. If you are first contacted by a friend or family member, consider faxing or emailing a PDF form of a retainer arrangement.

**2. Consider Refusing the Retainer**

- The best time to refuse the retainer is on the phone or during the first fifteen minutes of a meeting before wasting any of the client's time – it may be precious at that point.
- An early refusal is also best for you. You do not need to go the hospital to discover the client or family is not prepared to pay, or that the situation is so dire that the will is going to have to be fired up on the spot, or that the client needs four hours of help – now – before surgery later in the day.
- If refusing the retainer, consider sending an email, or letter making it clear that you are not retained.

**3. Propose and Secure a Separate Fee**

- As part of the process of structuring the retainer, confirm a separate fee for the capacity work, and an understanding under which there is some prospect of being paid regardless of whether the opinion formed as to capacity is favourable or unfavourable. This step should be part of the initial discussion prior to entering the retainer.

**4. Attend the Bedside Promptly**

- Once you agree to attend the bedside, you should do so promptly.

**5. Confirm the Retainer in Writing**

- Have a one page document, ready to sign, confirming a separate retainer to assess capacity.
- It should include terms relating to payment arrangements, no hidden clients, and confidentiality.
- It should be fill in the blanks style for easy and timely execution.
- Include a spot for alternate decision makers to sign too.
- The retainer document should include a provision expressly authorizing the lawyer, if need be, to include a notice or warning discussed earlier dealing with "grey area" executions.

## 6. Don't Send the Articling Student

There is a natural temptation to send someone less senior, a person who is still putting in dues. The junior tends to have a schedule that is more flexible. That temptation should be resisted. It is a critical care situation and requires training, confidence and the judgment that experience brings.

## 7. Be Prepared for an On-the-Spot Will

- You may find yourself in a position where an on-the-spot will is required.
- A simple will can be handwritten by the lawyer and then signed with a pair of witnesses and following all of the other necessary formality.
- A laser printer is not a requirement for a valid will. A handwritten or kit will can suffice in a pinch.
- If an on-the-spot will seems necessary, consider sending someone to secure witnesses in advance. Medical staff may be forced, by the policies of the facility that employs them, to refuse a request to act as witness.

## 8. Question for Undue Influence

- Given the faintest whiff of predatory behaviour, question the client to test for undue influence.
- Reduced capacity and vulnerability are an irresistible combination for shark-like family members. The person who invites the lawyer to the hospital is often the predator.

## 9. Take Copious Notes

- If the gravity of the situation is high, manuscript style notes are best, recording each question and answer as posed. It is also permissible to record selected questions and answers in the interests of time.
- Information for context should also be in the notes.
    - Who was in the room?
    - What time did the interview start?
    - What time did it end?
    - Who was present?
    - What questions were asked?
    - What answers were given?
    - How did the client present?

- If the gravity of the situation is low, it might be sufficient to generate a family tree, asset listing, and summarized instructions, making an endorsement to confirm that all of the information was solicited from the client using open ended questions. One or two sample questions might be written down to supplement that pattern of notes.

**10. Allow Sufficient Time for the Interview**

- Decline the retainer if you only have an hour to spend with the client and are not willing to clear your schedule for the rest of the day if need be.
- Having a second lawyer along for a second opinion does no good unless a full and proper interview is conducted.

**11. Have the Client Sign a Copy of the Instructions**

- If there is any reasonable prospect that the client may die over the short term, or may suffer from a rapid deterioration in capacity while the will is being prepared, have the client read over and sign a copy of the instructions, along with two witnesses, with an indication above the signature that the client wishes the notes to operate as their last will and testament until a more formal document can be prepared to give it effect.
- Initial each page if there is more than one.
- Provided that the necessary formalities are followed, and assuming that the notes are sufficiently detailed to stand on their own, it may be possible to put the notes to probate.[54] The standard is lower at execution, but the client may not succeed in even clearing that lower hurdle.

**12. Have The Client Sign a Release of Information**

- Have the client sign a release allowing you to secure medical and personal information from medical staff and others associated with the client and their care.
- It should extend to financial information as well as personal information, and allow you to make enquires to double check the client's understanding of their financial affairs against the understanding held by family or financial advisors.

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[54] Interestingly, the lawyer in *Banks v. Goodfellow* (1870), L.R. 5 Q.B. 549, [1861-73] All E.R. Rep. 47, [1871] L.R. 11 Eq. 472, 39 L.J.Q.B. 237, 22 L.T. 813 (Eng. Q.B.), was described by the court as having adopted the same practice: "he always pursued this course when his clients lived at a distance from him, and time would be required between the taking of instructions and the final completion of the will. The distance between Keswick and Arkleby is about twenty miles, and the road is said to be bad."

### 13. Identify Substitute Decision Makers for Later Contact

- Find out if the client is handling their own decision making at present or has a proxy appointed or acting for that purpose.
- If the client is a ward of the court, or the Public Trustee or has a Legal Guardian, be in contact with them with a view to collecting information and acting in concert with those other persons.

### 14. Record an Express Opinion on Capacity

- Record an opinion as to capacity.
- In most cases, that begins as a handwritten notation and should always be followed up with a typed memo to file (discussed below).

### 15. Share Opinion with Client Immediately

- If the client does not satisfy the lawyer that they have testamentary capacity, advise the client immediately.
- If the client has family at the bedside, and has released confidentiality by involving them in the process, then the opinion can be shared with the family as well.
- Expressing the view immediately allows the client or their family to obtain a second opinion, or to express a theory as to why the client may have failed to exhibit the necessary elements to demonstrate capacity.
- Canvass the possibility of return visits and return interviews. Capacity has been known to be a moving target, and a client who fails to exhibit the hallmarks of capacity on a Monday afternoon may do so on the Tuesday following.

### 16. Be On Guard for Foul Play

- Always be on guard for foul play, particularly if the new will is to effect a change in who would otherwise inherit from the client.

### 17. Enlist Help from Medical Staff

- Be quick to seek help from medical staff, but do not use their availability as an excuse to abdicate responsibility to formulate a personal opinion as to capacity.
- Collect any prior reports or assessments from medical staff that might speak to capacity.
- Get the names of doctors involved in the client's care.
- Ask the staff whether any formal type of capacity assessment has been done or is in progress.

- Ask the staff whether the client is considered competent to handle their own affairs or whether a proxy or other substitute decision maker is involved.
- Consider commissioning a medical report or assessment to supplement your opinion as to capacity.
- Ask for names and telephone numbers.

**18. Dictate Memo to File**

- Dictate a detailed note to file.
- Include an indication as to how long the interview was, who was present, confirm that open ended questions were employed, and state an express opinion as to testamentary capacity.
- Your opinion should include a separate statement on each head of testamentary capacity.
- Where the case warrants, the whole of the interview can be recapped, using the same question and answer format that was employed during the interview.
- State any concerns, along with why they tip you towards or away from a conclusion that the client has testamentary capacity or does not. An example: "Mr. Smith was able to answer open ended questions relating to his family tree, giving the names of all of his children and grandchildren, telling me whether they were married or single and telling me where they lived. As an exception, he could not tell me the names of his two grandchildren through his son Eric. He explained that by stating that they lived in a different city and he rarely saw them. That is a concern, but given the detail and apparent accuracy of the other information he provided, it was not a major concern to me...."
- Consider taping the interview, on audio tape or even video tape. There is no objection to that so long as you have permission, and it is used to supplement rather than replace notes made at the time and the memo to file dictated later. The tape must then be stored. The maker of the tape must be available to testify. Judicial commentary in the case law suggests that such tapes, when available, are valuable to the court. Dangers: if you rely solely on the recording, you may discover that the tape is lost, or portions unintelligible.

**19. Consider Signing Will Midstream**

- The will can and often should be signed notwithstanding the fact that enquiries are still ongoing.

- If medical information has yet to be received, or if double checks are still ongoing with outside sources to corroborate the client's understanding of their finances, the will can still be signed. This will be a judgment call. If there is urgency, the will can be finalized and the information can come into the file later.
- If no urgency appears to be present, you can also wait until the additional information is in hand.

**20. Prepare the Will Expeditiously**

- Proceed quickly with the preparation of the will.
- Consider having a copy of your notes signed at the bedside.
- Given the prospect for immediate death or incapacity, consider having the client sign a fast holograph will or a fast kit will during the first meeting. There may not be a second one.

**21. Lesser Test at Execution**

- The lawyer who conducts the interview to determine capacity should be the lawyer who attends on the client to execute the finalized will.

**22. When in Doubt Sign**

- See discussion earlier on this point.

**23. Do Not Destroy the File**

- The file has to be carefully preserved. If the law firm has a policy of destroying files, the file must be protected in some reliable way. The physical file folder and its contents are best.
- A scanned version may, depending on local law society rules, be acceptable as an alternative.

> Original wills should be stored separately in a secure manner.

**24. Do Not Destroy Earlier Wills**

- If the new will is successfully impugned, any earlier will then has to be put to probate. For that to occur, the old will must still be available.
- It should be stored in a secure storage location, or you should warn the client, and, if appropriate, the client's family or other advisors, to carefully secure and keep the old will to be available should it be necessary to put it to probate.

**25. Assume You Will Be a Witness**

- Do not destroy the file.
- Assume that your firm will *not* be handling the estate. This underscores the importance for you of either committing yourself to the estate plan as a *pro bono* venture, or charging sufficient fees to warrant the engagement and potentially testifying as a legitimate "for profit" enterprise.

# 8. Suggestions as to Minimum Practice

The following are suggested as minimum practice guidelines to ensure that you have acted competently:

- **Draw a Family Tree** – Ask the client open ended questions and draw a family tree with a significant level of detail, or as much detail as is possible, including some or all of items such as names, relationships, dates of birth and death, ages and places of residence. Record the results in notes.
- **Create a List of Assets** – Ask the client open ended questions and draw a list of assets with a significant level of detail, or as much detail as is possible, including types of assets, location of assets, and value of assets. The results should be recorded in notes.
- **Record Wishes for Wealth Transfer** – Ask the client open ended questions about where they want to see their wealth to go at death, and about decisions relating to any items coming up for inclusion or exclusion from the will. This potentially covers topics including executors, gifts, gifts over, remains and the like. The results should be recorded in notes with a view to recording the instructions and lending insight into the client's decision-making process and understanding.
- **Retain Notes** – Retain the original notes at the end of the engagement, keeping them in a safe place.

Taking the above steps places you in a position to inform the court as to each of the main heads of the test for capacity. Additional steps will often, if not always, be warranted.

Taking the minimum steps described here will not necessarily protect you from censure by the court later when your conduct comes under scrutiny. However, failing to take those basic steps will generally, if not always, amount to negligence. No one case can be cited standing for that conclusion. This position is predicated on the view that the court and the public ought to be able to expect that any lawyer attending on a client to prepare a will can be relied on to understand the basic test for testamentary capacity, the need to form an opinion relating to the client's capacity employing that test, and the need to create a written record of the results to supplement the lawyer's memory.

# E. WILL DRAFTING

## 1. Introduction

Drafting a will is not a simple task. The lawyer preparing a will undertakes, among other things, to prepare a document which reflects the testator's wishes and which will be enforceable on the testator's death.

Not only is an understanding of a broad range of legal principles required, but the drafting skill necessary to produce an effective will presents certain unique challenges. You must anticipate contingencies not ordinarily apparent to your client.

In addition, unlike commercial documents, a will is interpreted at a time when direct evidence from the client as to their intentions is no longer available.

Inevitably, a lawyer who dabbles in the area of will preparation does the client no service. The poorly planned or badly drafted will can cause endless litigation, expense and family bitterness. If you intend to practise in this area, you must be prepared to take the time necessary to perfect your drafting skills and to continually remain up-to-date on the law and developments in this area.

Preparing a will is usually a time-consuming task. Even experienced lawyers will find that the time required to take instructions, verify information, prepare an initial draft, review and revise the draft as necessary, and attend on execution is more than they are likely to recover in fees, at least in respect of the simpler wills. Some time-saving measures are available, but there is no substitute for thorough planning and careful consideration.

## 2. General Comments

### a) Review the Plan

Before embarking on the initial draft of a will, particularly one creating consecutive interests, carefully consider the overall plan of disposition of the testator's assets. This should ensure that everything is properly addressed. You should consider the following examples:

- Have all of the assets been distributed in either specific or general descriptions of assets?
- For each gift, is the survival of the beneficiary, spouse, common-law partner or children or issue of the beneficiary crucial to the intended gift?

- Have you planned for an unexpected sequence of deaths? Is an alternate disposition contemplated in the plan, or would a partial intestacy result?
- What other contingencies might broaden a class of beneficiaries contemplated, or, alternatively, eliminate a beneficiary from consideration?
- Where assets are to be held in trust, and the distribution postponed, is provision clearly made for distribution or accumulation of the income? Is capital encroachment available (if intended by the testator)? If so, are the purposes clear? Are the dates for distribution of income and of capital clear and certain?
- In formulating the plan, has consideration been given to the tax consequences?

You may wish to prepare a distribution plan to verify that these various questions have been appropriately addressed.

## b) Use of Language

The paramount objective in drafting a will should be to set out the client's testamentary wishes as clearly as possible. In addition to being well-organized, the provisions of the will should be simple and precise.

> Good drafting and proper explanation ensure not only that the client understands the will, but also that their intentions are clear to third parties relying on the will or administering it.

Clarity in drafting is essential in order to determine what the beneficiaries take, and also to enable the executors to determine their particular course of conduct.

Some general drafting hints include:

1. **Be consistent**. For example, do not refer to an interest in the estate as a "share" in one place in a will and then later in the will as a "portion." Using different words suggests that a different meaning is intended;
2. **Avoid ambiguity**. For example, the expression "for the use of A exclusively for general farm purposes" has two possible meanings. It could mean that the asset is to be used by A, exclusive of others. Alternatively, it could mean that the asset is to be used exclusively for farm purposes. Another common pitfall arises with conditional gifts. If "X is to receive $50,000 on attaining age 21," is X's interest vested now, but to be paid later? Alternatively, does X receive $50,000 **only** if they reach age 21?

3. **Use technical or legal terms correctly.** For example:

   The word devise refers to a gift of real property and the word bequest refers to a gift of personal property. The two should not be confused or used interchangeably.

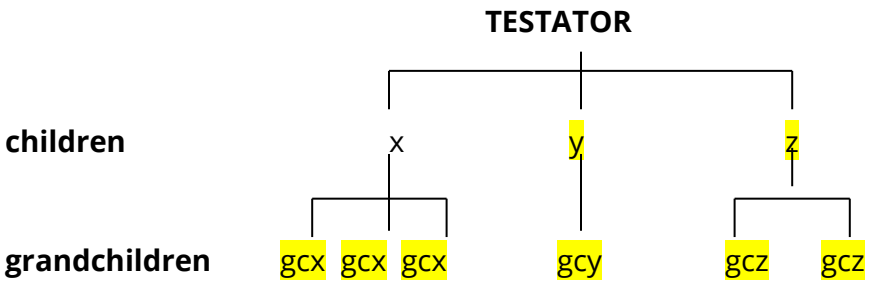
   The primary meaning of the word “issue” is all lineal descendants, including children, grandchildren, etc.

   The proper meanings of the terms *per stirpe*s (by branches) and *per capita* (by heads) should be fully understood by the lawyer and client before they are used in a will.

   The only proper way to use *per stirpes* is with the word "issue" as in the following phrase "issue in equal shares *per stirpes*". Any other use of the term *per stirpes* is not legally correct and will potentially create a serious interpretation problem.

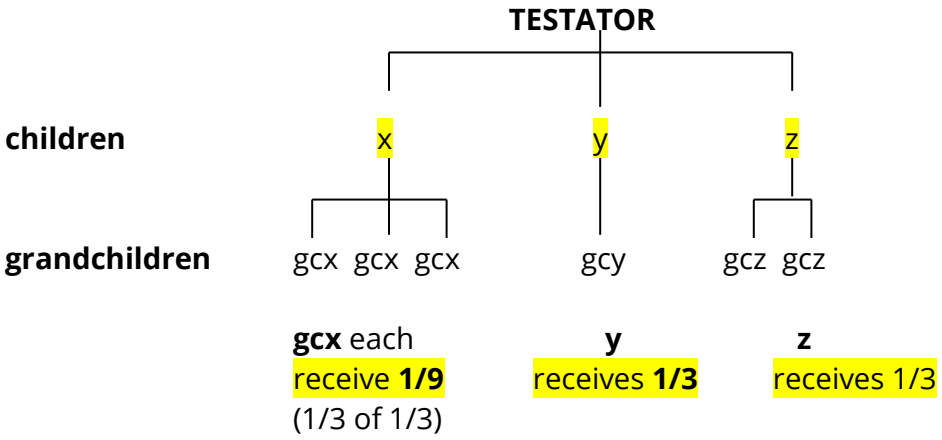
**Example of *Per Capita* Distribution:**

The will provides for the residue to be divided equally among the issue of the testator, *per capita*. The *prima facie* meaning of this is that one equal share is to be given to each and every living descendant of the testator. In the situation below, child **x** predeceased the testator, leaving 3 children alive. Child **y** is alive and has one child alive. Child **z** is alive and has two children alive. The testator thus has 8 surviving issue (2 children and 6 grandchildren) each of whom would each receive **1/8** of the residue.



**Example of Per Stirpes Distribution:**

The will provides for the residue to be divided among the issue of the testator, *per stirpes.* In the same facts as set out above, unlike the *per capita* distribution, in a *per stirpes* distribution, the residue would be split into three parts, at the first generation where the testator has descendants (i.e., at the level of children), with the following results:




Examples of incorrect uses of "*per stirpes*" include:

"to my children in equal shares *per stirpes*" – this does not make logical sense as the class of beneficiaries includes only one generation of individuals and a per stirpital division requires there to be multiple generations. Canadian courts have typically interpreted this to mean a gift to children in equal shares and have usually construed this not to include a gift to descendants of a child who had predeceased.

However, in some cases, a gift over to the children or other descendants of a deceased child has been inferred. A fairly recent example is the Ontario Court of Appeal's decision in *Dice v. Dice Estate*, 2012, ONCA 468.

These cases each turn on their particular facts. In cases such as these where there is ambiguity on the face of the will, the courts must interpret the will in light of the surrounding circumstances at the time the will was executed.

"to my grandchildren *per stirpes*" – same problem as above.

"to John Henry *per stirpes*" – again, this description makes no sense when attached to a gift to a named individual - see judgment of Justice Cullity in *Lau v. Mak* described further below.

The key point to remember is that the phrase *per stirpes* does not identify or add beneficiaries. It merely describes the manner of division among the class of beneficiaries.

4. **Be sensitive to possible ambiguities in the meanings of non-technical words, and if necessary, add additional explanatory wording.** For example, using the word "deliver" in relation to chattels being gifted will likely result in the costs of shipping being payable by the estate, while the word "give" may not. Similarly, a gift to "my nieces and nephews" in the will of a married person could be interpreted either as a gift to only those who are related through the testator's own family, or as a gift to those who are also nieces and nephews through marriage;

5. **Be brief**. Never use two or more words or phrases when one will do. For example, in the clause appointing the executor, why use the phrase "nominate, constitute and appoint" when the word "appoint" would be sufficient? It is easy to prepare a will containing redundancies, so try to eliminate these.

   At the same time, although brevity is an admirable goal in good drafting, do not be so brief as to obscure the intended meaning. Sometimes repetition is needed for clarity or to express the testator's true intention;

6. **Adopt good grammar and writing skills**. Needless confusion may result from sloppy use of modifiers or pronouns.

   If there is more than one executor, have you referred to the executors throughout the will in the plural?

   Consider carefully your choice of words. For example, between and among are often misused.

   Although proper punctuation can often assist in clarifying meaning, its careless inclusion or use has resulted in much unnecessary litigation.

   A simple interpretation provision at the end of the will is useful which confirms that singular, feminine, masculine or personal pronouns are to be construed as meaning plural, masculine, feminine, or body corporate where the context requires.

   Gender neutral terms are better. Avoid antiquated references to testatrix, executrix and executrices. Even the court is now adopting gender neutral terms as evident by the definitions section in the revised Court of King's Bench Rules that came into effect October 1, 2022;

7. **Consider an appropriate style**. Since a will is your client's expression of their last disposition of assets, a client usually appreciates a user-friendly will drafting style. This softens the legal language and reads more as the client's own personal expression of intentions, similar to a letter by the testator to the

beneficiaries. For example, many wills contain numerous references to "my said wife ABCD." Describing her as "my wife A," as the testator would have addressed her in life, is just as clear. For the same reason, try to use short, simple phrases or sentences.

## c) Numbering, Headings and Order

For clarity and ease of reference, include both paragraph numbers and page numbers in the will. Use headings to organize the will and assist the reader (including the client) in locating particular paragraphs.

Organize the various provisions of the will logically. A typical will is structured in the following order:

(a) A preamble identifying the testator and confirming that the will is intended to be their last will;

(b) Revocation of all former wills and codicils. Avoid using the term testamentary dispositions since this could cause uncertainty or confusion as to what a testamentary disposition is. It may also have a possible unintended effect on the testator's will dealing with assets in other jurisdictions.

If the client intends to revoke (and change) existing designations made in RRSPs or RRIFs, this should generally be done in the plan documents, although a beneficiary designation contained in a will is valid. Where done in a will, encourage the client to advise the plan issuer of the change, and change the designation on the forms used by the plan issuer to coincide with the designation in the will. The later of the 2 governs;

(c) Specific directions and designations such as:

(i) the appointment of a guardian(s) for minor children;

(ii) RRSP, RRIF, or other retirement plan beneficiary designations, if applicable;

(iii) tax-free savings account beneficiary designations, if any. Where there is a spouse it is better to name the spouse as a successor holder rather than to designate them as a beneficiary since a successor holder spouse can add the proceeds of a deceased spouse's TFSA to their TFSA without need for additional contribution room; and

(iv) life insurance beneficiary designations, if any. It is prudent that any change to a beneficiary of insurance in a will is communicated to the insurer and the insurer's records should be updated. The best course of action is to change the beneficiary with the insurer's forms to coincide with the designation in the will. The later of the 2 governs;

(d) Appointment of executors and trustees and, where appropriate, alternates if the first appointed are unable or unwilling to act or to continue to act;

(e) A clause giving all of the testator's property to the executor and trustee upon the trusts specified in the will, which may include:

(i) gifts of personalty or other specific assets;

(ii) an authorization to the executor and trustee to use their discretion in converting any assets which are not in the form of investments approved by the executor and trustee into money, and, if desired, a separate and substantive power to retain the assets in the form in which the executor and trustee receives them;

(iii) a direction to the executor and trustee to pay debts, funeral and administration expenses.

This clause, where appropriate, may also include a direction to pay all duties, probate fees, and estate taxes payable in respect of the provisions of the will or arising as a consequence of the death of the testator in respect of gifts made by the testator, interests in life insurance policies on the life of the testator or property held with the testator in joint tenancy.

If a specific beneficiary is intended to bear any income tax payable relative to an asset gifted to that beneficiary, the will must so provide;

(iv) payment of pecuniary legacies, listed consecutively;

(v) distribution of the residue. This is typically where provision for the surviving spouse or common-law partner and/or children will be included.

For the spouse or common-law partner, the gift may be outright and/or through a trust. If using a trust, beware of Part IV of *The Family Property Act* and, if appropriate, consider whether the trust should qualify as a spousal trust for purposes of the *Income Tax Act*.

In most cases, the provisions for children will apply only if the spouse or common-law partner fails to survive, or on the death of the spouse or common-law partner where a spousal trust has been established, or if the surviving spouse or common-law partner is not the parent of the testator's children (i.e., the children are from a previous relationship);

(vi) trust clauses if one or more testamentary trusts are being established; and

(vii) provision for the disposition of the estate if all expected beneficiaries do not survive the testator or, having survived, die before their interests under their trusts have vested ("ultimate beneficiary" scenario discussed above).

(f) administrative powers, which may include a power:

- of sale and retention, if not contained earlier in the will;
- to borrow against the estate assets;

- to value assets and distribute property *in specie*;
- to pay monies for beneficiaries of any trusts, including minors, to the beneficiaries directly or to their parents or guardian(s) or to others on their behalf;
- to retain investment counsel and to delegate investment decision making power to them; and
- that is special, to deal with specific assets (i.e., real estate, business, shares, etc.).

# 3. Drafting Specific Clauses

## a) Designation of Beneficiaries

In drafting a will, it is very important to be familiar with all of the applicable legislation and cases concerning beneficiary designations. It is also important to ensure that the client's objectives are properly carried out. For example:

(i) Pursuant to *The Insurance Act* of Manitoba, a person may designate the beneficiary of a life insurance contract in a will, superseding all designations made by the testator prior to execution of the will. Similarly, *section 169(2)* of *The Insurance Act* states that a designation in a life insurance contract made after the making of a will invalidates the designation in the will.

In drafting such a designation, consider whether it should apply to all policies in force, or only to certain specified contracts. To ensure that the change in designation will be effective, the client should be advised to notify the insurer of the change so that the insurer will not rely on any previous designation when proceeds become payable.

*Section 169(3)* of *The Insurance Act* states that a designation made by a will is automatically revoked in the event that the will is revoked by operation of law or otherwise. However, *section 169(1)* of the *Act* states that a designation in an instrument purporting to be a will is not ineffective by reason only that the instrument is invalid as a will, or that the designation is invalid as a bequest under the will.

Wills are considered to speak from the moment of death, meaning that the terms of the will apply to all of the testator's assets owned at death, even if those assets were acquired after the date of the will. However, the same does not apply to beneficiary designations, even those contained in a will. This means that a life insurance beneficiary designation in a will that purports to designate a beneficiary for all life insurance policies on the life of the deceased will not have any effect and will not designate a beneficiary on a policy acquired after the date of the will.

(ii) A testator may also designate by will a beneficiary of a "plan" as that term is defined under *The Beneficiary Designation Act (Retirement, Savings and Other Plans),* which definition includes, but is not limited to, pension plans, registered retirement savings plans (RRSP), registered retirement income funds (RRIF) and tax-free savings plans.

Given limitations on the *inter vivos* designations allowed by *The Pension Benefits Act,* C.C.S.M. c. P32, it may be wise to confirm in the will designations otherwise attempted by the testator in their lifetime that may be invalid. Such designations will supersede prior designations.

In addition, as noted earlier, the decision of the Manitoba Court of Appeal in the *Clark* case has established that retirement plans designated directly to beneficiaries do not form part of the estate for probate purposes or satisfaction of estate creditors. This should be the case whether the beneficiary designation is contained in the will or in another written instrument.

(iii) Insurance proceeds payable to a named beneficiary are free from the claims of creditors of the estate. Where protection from creditors is not a concern, a testator may choose, by will or otherwise, to designate their estate as beneficiary. This might be considered for purposes such as providing funds to pay expected income taxes payable by the estate, or to fund testamentary trusts or other gifts contemplated in the will, or for the purposes of *The Family Property Act.*

(iv) Under *section 37* of *The Family Property Act,* the value of insurance or pension benefits that are designated to the surviving spouse or common-law partner are not included in any accounting on death under Part IV. Where a testator is not intending to leave the bulk of their estate to the spouse or common-law partner, consideration should be given to designating the estate as beneficiary of insurance and pension benefits (instead of designating the spouse or common-law partner), and then gifting these benefits to the spouse or common-law partner under the will. This would create a credit for the value of the benefits for the purposes of any accounting under *The Family Property Act*. This must be balanced against the resulting inclusion of the insurance proceeds, making them subject to the claims of any creditors of the deceased.

(v) Where the designation of beneficiaries is possible and is intended to be done in the will, it is important to make sure that the wording in the will reflects a designation and is not a dispositive clause. If the goal is to change a previous designation of beneficiary in the will, wording that amounts to a dispositive clause will not change the earlier designation because the insurance proceeds would not form part of the estate.

Conversely, if the insurance proceeds are payable to the estate and the will attempts to designate a beneficiary by a provision which amounts to a dispositive clause, the

result will be that the insurance proceeds will be included in the estate assets. The insurance proceeds would, if included in the estate, be subject to the claims of estate creditors.

## b) Appointment of Executor(s)

(i) Be sure to properly identify the person(s) to be appointed as executor(s). Whenever the testator is naming one or more individuals, especially if any are older than the testator, ask the testator to consider making provision for an alternate.

(ii) Be clear and complete in delineating the circumstances in which the alternate is to act. These should include not just the death of the first-named executor, but also the possibility of the first or other prior named executors being unwilling or unable to act or to continue to act.

There should be no reference to the executor surviving for a period of time (such as 30 days) in the executor clause. This is not relevant to the executor appointment and only delays the administration of the estate, as the executor must wait the stipulated number of days before being able to act, including doing necessary things such as making funeral arrangements.

(iii) Where two or more executors are named jointly, indicate what is to happen if one of them dies or is unable to act. Are the survivors to complete the administration, or should a substitute be named?

(iv) Specify whether the general rule requiring unanimity is to apply, or whether the decision of the majority or of one of the executors is to prevail where there are more than one and an even number may be acting.

(v) If a trust company is to act as a co-executor with another person, a provision may be added directing that the corporate trustee is to assume primary responsibility for the estate administration, and entitling the corporate trustee to all or a greater share of the compensation as a result. The trust company should also clearly be the one to look after the estate accounts and to have custody of all the securities and documents of the estate. Trust companies should not be ambushed with appointments. (See the discussion above with respect to trust companies and fee agreements.)

In addition, trust companies will require certain powers and other clauses to be inserted in a will when they are asked to act. A named trust company is not required to act, so complying first with the trust company's requirements is a precondition of it acting. Since other circumstances dissuade trust companies from acting consideration should be made for alternate appointments.

(vi) If an advisor, such as a lawyer, accountant or other professional, is included as one of the executors, consider whether the advisor may also continue to assist in a professional capacity (and be paid as such). If so, express provision should be made in the appointment clause or later in the administrative clauses. It is generally not

recommended that lawyers act as executors. The job is time consuming, creates significant possibilities for liability and is often thankless.

(vii) Where appropriate, provision should be made to allow a friend or family member named as an executor to deal with the estate in their personal capacity (i.e., allowing them to purchase an estate asset) without the need for a court order. Typically, the person involved should not be involved in the decisions on the matter, so that the estate would be represented by the remaining executors in that regard.

(viii) If a minor is named as an executor, they will only be permitted to act once they become an adult. One or more other executors should also be named in case the minor has still not attained majority when the testator dies.

(ix) Consider also whether special executor appointments are required for specific jurisdictions or particular assets.

(x) Contemplate and address other potential conflict situations that may arise for the named executor(s).

## c) Drafting Dispositive Provisions

Because of the virtually unlimited number of ways the assets of the estate can be distributed, the dispositive clauses of the will must almost invariably be tailored to fit the client's instructions. Such clauses, because they are original and because they can become very complex, give rise to the greatest number of drafting errors.

In drafting the dispositive provisions of the will consider the following:

### i. Simplify

Ensure not only that the client's wishes are accurately reflected in the language of the will, but also that the result achieved is practical from the perspective of the administration of the estate. Some simplification of the client's instructions may be necessary to achieve these dual ends. For example, naming many residual beneficiaries can be very onerous for the executor, who must provide accountings to each beneficiary and obtain the consent of each beneficiary for many matters, including approval of the fees payable to the lawyer acting for the personal representative in the administration of the estate.

### ii. Correct Names

When referring to a beneficiary:

(i) by name, use their full legal name;

(ii) by relationship dependent on birth, marriage or common-law relationship, ensure that the person in fact has that legal status and refer to the proper affiliation;

(iii) if a charity, verify the full, proper name of the organization, and confirm with the testator which chapter (local/provincial/national) is to benefit. Some organizations have a charitable foundation through which the gifts should be made. Some clients may wish to state the purpose for which the money is given, but they should be informed that this may not be legally binding on the charity or may be impossible for the charity to comply with if the purpose is not within the charity's mandate.

If it is important to the testator that the charity is a registered charity for purposes of issuing tax receipts then take the time to search the organization's name on CRA's website. Particulars of charitable status including full registered name, current address and charitable registration number can be added to the will to provide certainty of the intended beneficiary.

If the charity is not registered discuss that with the testator, who may be expecting a charitable tax receipt and wrongly presumes one will issue. That conversation may lead to reconsideration of the named beneficiary. Make notes of the conversation, confirm them in writing and it doesn't hurt to include the fact that testator knows that the entity is not registered, in the dispositive provision.

### iii. Anticipating Future Events

When receiving instructions and drafting dispositive clauses, where appropriate, obtain instructions in respect of possibilities such as:

(i) an unexpected sequence of deaths;

(ii) adoption or birth of additional persons whom the testator may wish to include as beneficiaries;

(iii) divorce, separation, or termination of a common-law relationship of the testator or of a beneficiary;

(iv) the mental incapacity of a beneficiary;

(v) concerns about a young, inexperienced adult receiving a substantial inheritance at too early an age; and

(vi) an application by a surviving spouse or common-law partner for an accounting and equalization under *The Family Property Act*.

### iv. Survivorship Period

Consider whether it is desirable to provide for a survivorship period in the case of outright gifts. Such a provision is most common with spouses/partners who may die in a common disaster where one may survive the other for a short period of time. Without a survivorship period, if both the testator and the beneficiary die within a short time of each other, whether as a result of a common accident or other reason (i.e., the testator dies immediately and the

beneficiary afterwards, perhaps even minutes afterwards), the following would occur:

(i) prior to the elimination of probate charges in Manitoba, additional probate charges and additional administrative expenses would be incurred because the same assets would be administered twice (first when they pass to the surviving beneficiary and the second time on the beneficiary's death). Older wills often include survivorship periods that are arbitrarily set but often are between 10 and 30 days. Since probate charges could re-surface in the future give thought to whether such a provision still has prospective value; and

(ii) the estate may be distributed in an unintended manner if the provisions of the survivor's will are not the same as those of the first to die.

A survivorship period should never be used in the case of a life interest being left to a spouse or in connection with the executor appointment.

Common survivorship periods are 10 days to 30 days, although there is no magic to any number within that range. The assumption is made that if a person survives for at least the survivorship period, then it is likely that they will survive for a much longer period, and therefore should take the full benefit under the will.

Keeping the survivorship period reasonably short will not cause undue inconvenience to the beneficiary nor will it unduly delay the administration of the estate (especially since it usually takes at least a month for an inventory of assets and liabilities to be prepared and to obtain probate). A longer survivorship period is seldom desirable because of the inconvenience to the beneficiaries, particularly if the spouse of the deceased is the only beneficiary. A prior requirement under the King's Bench rules provided that an application for probate could not be made until 7 days after death. That rule has been eliminated in the revised rules which took effect October 1, 2022.

Where there is no survivorship clause, *The Survivorship Act* provides special rules for determining interests where two or more persons die in circumstances where it is impossible to determine who died first. That act provides that:

(i) the estate of each person is to be disposed of as if they had survived the other or others;

(ii) if property is held in joint tenancy by two or more victims of a common accident, the property is deemed to be held by them as tenants in common.

In obtaining instructions from the testator, explain the consequences of not inserting a survivorship clause where the possibility of a common accident involving the beneficiary and the testator exists.

Prior to the enactment of Part IV of *The Marital Property Act* (which preceded *The Family Property Act)*, it was common to insert a gift for the surviving spouse in case they die after the testator but before the stipulated survivorship period. As there are no exceptions to the right to a Part IV accounting, such a provision is no longer appropriate.

### v. Lapse

Always consider including a gift over provision to cover the possibility of a gift lapsing – that is, where the beneficiary has predeceased the testator or, in the case of a charity, where the charity no longer exists. For example, suppose the will says "to my friend, John, the sum of $1,000." If John is dead, the gift would fail, even though the testator, if asked, might have wanted to benefit John's wife or children in case of John's death.

You have a duty to ask the testator to consider such gift-overs and obtain clear instructions related to same, and draft the will accordingly. If no gift-over is to be made, then use clear words, such as: "to my friend, John, if he survives me, the sum of $1,000", or "to my friend, John the sum of $1,000 and if he has not survived me this gift shall lapse and form part of the residue of my estate".

Generally, lapsed specific gifts, legacies and devises will be distributed as part of the residue (see *s. 25* of *The Wills Act*), unless the anti-lapse provision contained in *section 25.2* of *The Wills Act* applies.

> A gift of residue that lapses does not fall back into residue to be re-distributed but will instead be distributed as if there was an intestacy of the testator. Careful drafting is required to ensure that a lapsed gift of residue is distributed to an alternate beneficiary or re-distributed to the remaining residuary beneficiaries if that is what the testator intends.
>
> Section 25.2 of *The Wills Act* provides that where a testator makes a devise or bequest to a child, grandchild, brother or sister who predeceases the testator but leaves issue who survive, the gift does not lapse but is distributed to the deceased relative's issue as if they had died intestate without a spouse.

For example, where the client's will leaves a gift to a brother who died before the testator, leaving three children alive, and there is no alternate beneficiary

named in the will, the anti-lapse rules in section 25.2 will apply and the gift will then be distributed among the deceased brother's children.

The anti-lapse provision will not apply, however, if the testator expresses a contrary intention. Such a contrary intention could be expressed by stating "provided he survives me by 30 days" after the gift in the will. The anti-lapse provisions in section 25.2 apply to specific gifts and gifts of residue. Manitoba decisions discussing lapsed gifts and moral obligation as an exception to the doctrine include *Novotny v. Novotny,* 2006 MBQB 237 (CanLII) and *Estate of Dolly Wonsch,* 2010 MBQB 122 (CanLII).

In all cases of residuary gifts and testamentary trusts advise the testator of the anti-lapse provision and suggest including gift-over provisions.

### vi. Expressing Reasons

Where a testator has specific reasons for excluding certain persons from the will, or for making a certain kind of gift rather than another (i.e., a protective trust rather than an outright gift), consider whether those reasons should be expressed in the will. If included in the will, those stated reasons would be before the court on any future application for variation under *The Trustee Act,* or for relief under *The Dependants Relief Act* (*see s. 8(2)(c)*), even if the lawyer's notes are no longer available. This may assist in understanding whether there was a drafting error or a conscious decision made on the part of the testator.

### vii. Gifts of Personalty

In drafting a provision respecting personal items:

(i) Consider whether there should be any exclusions from a general disposition of personalty and household effects (i.e., art collection or investment pieces, office art, antique items, heirlooms, etc.);

(ii) A disposition of only a few specific items to named beneficiaries can be conveniently provided for in a will. On the other hand, where the list is lengthy, consider attaching the list as a separate memorandum to the will, incorporated by reference (see comments below under the heading "Use of Memoranda in Will Drafting");

(iii) For specified items, be sure to include a sufficiently detailed description to distinguish the items, especially in the case of jewellery;

(iv) If minors are among the beneficiaries, state what is to happen if the minor is not old enough to make use of the item - is it to be stored and if so at the expense of the estate? or may it be sold?

(v) If personalty is to be divided among certain individuals "as they may agree," include a time limit, i.e., "within 120 days after my death." The period should not be so short as to unintentionally create distribution issues. Also, provide for what should occur if they do not agree within the specified time: i.e. the trustees could decide what is equitable, or the items in dispute are to be sold, and the proceeds added to the residue. Where the trustees are to decide and one or more of the trustees is also a beneficiary, consider measures to deal with the potential conflict of interest that could arise;

(vi) If personalty is given to one individual to be distributed as they see fit, state whether or not that individual may keep any of the assets themselves;

(vii) If the testator has detailed wishes regarding items primarily of sentimental value, consider a simple direction that a named individual dispose of these items in accordance with their understanding of the testator's wishes with regard to such personalty;

(viii) Consider including a provision in the will dealing with the costs involved in delivering items to beneficiaries, so that it is clear whether the estate or the recipient is to pay these costs. Costs would include packing, shipping and insurance, which could be significant depending on where the beneficiaries are residing.

### viii. Gifts to Children or to Underage Beneficiaries

Where there is a possibility that children or other underage beneficiaries may be entitled to any interest in an estate, discuss how or when such beneficiaries are to receive funds or personal possessions so that the will is drafted accordingly.

(i) If a testamentary trust is to be used and there are two or more children, also discuss the relative advantages and disadvantages of having one trust for all of the children, or separate trusts for each child's share. See the comments below regarding trust wills which address some of the potential issues.

(ii) Beneficiaries are entitled to receive their full share at the age of majority unless otherwise set out in the will. Where the inheritance is large, it is a good idea to suggest to the testator that the child's share be held in trust. A trust protects the child's inheritance until they are more financially responsible. It may also result in a larger inheritance due to tax savings.

(iii) Depending on the testator's wishes, the will could allow for funds to be made available from the trust for the child's benefit, and may stipulate when the capital should be distributed to the child. This may be in one payment when the child has reached the desired age, or through staged distributions, such as certain percentages at ages 21, 25 and 30. Alternatively, the child could receive, for example, a specific cash amount at a certain age (such as 18 or 21) and the balance at age 25. Alternatively, the trust could remain in place until

the trustees exercise their discretion and wind up the trust using their power to encroach on capital.

(iv) If there is a possibility that a minor child of the testator or another young beneficiary may become entitled to an interest, it is important to ensure that the will confers the appropriate powers on the trustees, such as:

- The power to hold funds for a minor and to pay income and/or capital to or for the benefit of the child. *Section 29* of *The Trustee Act* confers the power to distribute income only (but not capital) for the minor's benefit. If the testator wishes to allow the income to be distributed on a discretionary basis after the beneficiary has reached the age of majority, the will should state this. Unless all the income is directed to be paid out to the beneficiary, there must be a direction to add undistributed income to capital;
- The power to encroach on the capital. This would allow the trustees the discretion to assess the child's individual needs and to make appropriate payments out of capital without requiring a court order. For example, the testator may want the trustees to encroach on capital if needed in order to pay a child's private school fees. Depending on the testator's wishes, the power to encroach on capital may be unlimited, or may be limited to a specific amount or percentage of capital, or to certain purposes. It is generally preferable to make the power to encroach as broad as possible as it is impossible to predict the circumstances of the beneficiary or the trust property into the future;
- The power to transfer personal possessions to a minor and to accept the child's receipt for the items even though the child has not attained the age of majority;
- The power to make any payments for an underage beneficiary not just to the parent or guardian of the beneficiary, as contemplated under *The Trustee Act,* but also to any other person, including the beneficiary, where the trustee considers it appropriate. This enables a trustee to pay, for example, university tuition directly to the educational institution.

(v) It is extremely important to remember to include these provisions whenever there may be minor beneficiaries. If there is no provision in the will for the trustees to hold funds for children and there is no parent or guardian, the minor's interest, if worth over $1,000, must be paid over to the guardian of the estate of the minor appointed in accordance with *The Infants Estates Act*.

(vi) In some cases, it may not make sense to hold up the final administration of the estate by continuing to hold small gifts to children until they reach a certain age. This might be addressed in several ways. One way might be to give the executor the power to purchase an asset such as a bond or annuity that would mature at about the same date that the minor would be entitled to the money.

Another option would be for the testator to include a provision in the will that a gift to the minor be given to a parent or other individual to hold in trust on the child's behalf until the child reaches majority. This would be coupled with a direction that upon payment to the parent or other person, the executor would be released from liability, and need not see to the application of the gift for the child's benefit.

### ix. Ademption

If a testator makes a gift of a specific asset and that asset doesn't exist at the date of death (for example, it may have been destroyed or otherwise disposed of), the gift fails and is said to have adeemed. This applies only to specific gifts.

When drafting a will that includes a gift of a specific asset, address the possibility that the gift may fail completely if the asset is not in the testator's possession at death. For example, consider the illustration "to my friend, John, my gold watch." If at death no gold watch can be found, the gift would adeem and John would not receive anything. If this is not what the testator wants, some form of substitution can be made, such as "to my friend, John, my gold watch, but if I do not have a gold watch at my death, I give to him, if he survives me, the sum of $1,000."

### x. Abatement

Abatement occurs when the testator's net assets are insufficient to satisfy all the debts and bequests made in the will. In such a case, the gifts are said to abate. The order of abatement depends on the type of legacy or devise. Generally, after the residue has been exhausted to pay the debts, general and pecuniary legacies abate rateably first, followed by specific legacies, which, again, abate rateably. Devises (that is, specific gifts of real property) abate only after all general and specific legacies are exhausted.

When drafting a will where there is any possibility of abatement, the testator should be made aware of the possible effects of the abatement rules so that if desired, the testator can express a different priority scheme for payments of debts and gifts in the will.

### xi. Trust Wills

Clauses establishing trusts and setting out trust provisions must be carefully drafted. The following should be considered:

(i) How and when the capital is to be allocated. For example, the capital may be held in one trust for the benefit of one or more beneficiaries, for a fixed period after the testator's death, (i.e., until the youngest child attains the age of 18 or 21). On the other hand, it may be divided immediately into separate shares for each of the beneficiaries, with each beneficiary's share held in trust until a certain age or time. See item (iii) below as well.

(ii) How to deal with the income of the trust. For example, the payment of income may be left totally within the discretion of the trustee. Alternatively, the trust might direct that the income be paid to the beneficiary(ies). If there are two or more beneficiaries, income may be payable to each in fixed proportions or as determined by the trustees, in their discretion. If it is possible that not all income is paid out in any given year, the will must include a direction that any income that has not been paid out is to be added to the capital of the trust.

(iii) If the trust is a discretionary trust in that the trustee has discretion with respect to payments of income and/or capital and there is more than one beneficiary of the trust, be sure to include a statement making it clear whether the trustee may deal with each of the beneficiaries differently. Without such a statement, the trustee would be obligated to act with an even hand — that is, the trustee would have to treat all of the beneficiaries equally.

Discretionary trusts with more than one beneficiary can be very problematic for the trustees. For example, a request for a capital payment for one of the beneficiaries must be evaluated carefully, since the payment would reduce the capital of the trust, which would consequently have a potentially significant effect on the future income of the trust as well as on the ability of the trustees to make further capital payments to one or more other beneficiaries. For these reasons alone, it is usually preferable for the estate to be divided immediately and each beneficiary's share to be administered as a separate trust from the beginning.

(iv) Sometimes the interests of the lifetime beneficiary(ies) of the trust are very different from those of the ultimate capital beneficiary(ies) of the trust, where those interests are divided between certain individuals or classes of individuals. For example, the life tenants of the trust may want to maximize income payments and capital encroachments, but these would have a detrimental effect on the interests of the remaindermen.

It is therefore important to set out clearly, in the will, whether the testator wants the trustee to act with an even hand as between the life tenants and remaindermen, or whether this requirement is to be waived. If it is to be waived, the will should be clear as to whose interests are to be favoured.

(v) If a spousal trust is intended, be careful that the requirements of the *Income Tax Act* are met (if this is important in the client's situation). Under the *Income Tax Act,* the deemed disposition of capital property on death (other than where property is transferred to a spouse or to a qualifying spousal trust) can give rise to significant capital gains which will be subject to tax. Failure to create a qualifying trust, if that is what is intended, can therefore be costly to the estate and subject the drafting solicitor to potential liability.

(vi) If a spousal trust is intended, whether for income tax purposes or otherwise, a spousal or common-law relationship agreement releasing the surviving spouse's or common-law partner's rights on death under Part IV of *The Family Property Act* may be advisable. Note that some of the tax benefits of trusts have been changed since 2016, including the loss of entitlement to marginal tax rates, with some exceptions for graduated rate estates and lifetime benefit trusts;

(vii) Where a trust is established for a disabled or other special needs beneficiary, special planning and drafting considerations arise:

- Who is going to see to the special needs beneficiary's ongoing needs? The executor of the estate is not necessarily the appropriate person.
- Will a vested interest in income or capital jeopardize the beneficiary's entitlement to social assistance? If there is any possibility that it might, and if the intention is only to supplement that assistance, not replace it, care must be taken that the trustees of this trust have absolute discretion as to all payments made to or for the benefit of the beneficiary from time to time. A non-vested interest subject to discretion does not affect the beneficiary's entitlement to social assistance: *Quinn v. Director of Social*

*Services*[55] and *Thomas v. Director, Employment and Income Assistance Programs.*[56]

(viii) In all trusts, ensure that all necessary gift-over possibilities have been covered by the will. Make sure that if a trust is created that provides a life interest for the primary beneficiary that the capital is fully disposed of upon the life tenant's death. Make sure there is a gift over in a trust for a minor or young adult that delays distribution of the trust fund until the beneficiary attains a certain age - for example the age of majority, or 25 or 35.

These are valid trusts and, even without a gift over if the beneficiary fails to reach the stipulated age, are not subject to the beneficiary being able to "bust" the trust. Manitoba has legislation which in effect overrules the common law rule in *Saunders v. Vautier* by requiring court approval to an early termination of a trust.

However, there is a practical reason why it still makes sense to recommend including a gift over. What happens if the beneficiary dies one year short of age 25 and there is no gift over? The result is that the property may have already fully vested in the beneficiary and would then form part of the beneficiary's estate to be distributed under the terms of their will or in accordance with the laws of intestacy that apply to them or worse, to their creditors. Most testators want to control the destination of any balance remaining in the trust on the death of the primary beneficiary.

(ix) Ensure that sufficient gift-overs and contingency gifts exist that contemplate death of residuary beneficiaries whether the gift to them is outright or in a trust. For example, don't simply have all residue form a trust for a spouse without also contemplating what happens if the spouse predeceases the testator.

(x) Don't create remainder interests in trusts that vest on the death of the testator. For example, if a trust in a will provides for payment of income to the surviving spouse for life with the remainder to the children who survive the testator (as opposed to the children who survive the survivor of the testator and the spouse), the children have vested interests in the remainder on of the estate immediately upon the testator's death. If a child dies during the lifetime of the surviving spouse, the child's interest has already vested and goes to the child's estate to be dealt with under their will, or distributed to their intestate successors or creditors, all after the death of the surviving spouse.

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55 *Quinn v. Executive Director and Director (Westman Region) of Social Services*, 1981 CanLII 3526 (MB CA),), 9 Man.R. (2d) 161 (C.A.).

56 *Thomas v. Director, Employment and Income Assistance Programs*, 2013 MBCA 91 (CanLII).

### xii. Residue

(i) It is important to carefully consider and draft the clauses that deal with distribution of the residue. Depending on the client's wishes, the residue may be distributed immediately or trustees may be directed to hold some, or all, of it in one or more trusts for a period of time.

Clauses dealing with an immediate distribution do not often cause problems as long as the gifts are worded clearly and appropriate provision is made for the possible death of a beneficiary prior to the time for distribution of the residue.

(ii) If the residue is to be divided among several beneficiaries, it may be preferable to define distributive interests in shares rather than percentages, especially if the provision has inadequate gift-over wording. For example, use a preamble to the allocation of shares of residue that provides "divide the residue of my estate into as many equal shares as shall be required to make the following distributions..." and then set out the list of beneficiaries entitled to shares, each one with the condition "provided they survive me".

This is a simple way to reduce the number of shares created where one or more of the named beneficiaries fails to survive the testator without needing gift-over wording. Another example would be wording in the preamble that divides the residue of the estate into 4 equal shares followed by 4 specific paragraphs that deal with each specific share and provides for gift-overs should the initial primary beneficiary of each share have predeceased the testator.

(iii) Be careful with the description of a stirpital distribution (discussed above in "The Use of Language"). It is common to see the expression "in equal shares *per stirpes*" used in wills when a testator desires lineal descendants of a deceased beneficiary to take the share of that beneficiary if they have predeceased the testator.

This expression is often improperly used, by a phrase such as "to my children alive at my death in equal shares *per stirpes*". This is an inaccurate use of the phrase that can cause confusion of the testator's intentions. The meaning of a distribution to children of the testator is limited to the first generation of descendants of the testator, whereas the purpose of a stirpital distribution is intended to include all lineal descendants of the testator, where later generations may share in the distribution payable to a member of an earlier generation who has died leaving lineal descendants.

Thus, the wording "to my children in equal shares *per* stirpes" or "to my children alive at the time of my death in equal shares *per stirpes*" leads to confusion as to whether the testator wished to limit gifts to children, thereby ignoring the issue of deceased children, or wished to include issue of deceased children. In order to avoid this problem, the simplest solution would be not to use this phrase, but instead to draft all alternate gifts long hand. However, don't be afraid to use the phrase, as long as it is used properly.

> The proper expression is "to my issue, in equal shares per stirpes" or alternatively "to my lineal descendants, in equal shares per stirpes". This wording will clearly cover all generations or lineal descendants. If the client does not wish to benefit later generations, then the wording should be "to my children, then alive, in equal shares."

(iv) Where residuary gifts are made in a will to a spouse with a gift-over to children and their issue, it is useful to include a provision governing distribution of the residue if all of the testator's spouse and all children (and their issue) have predeceased the testator. (See the comments above under titled "Ultimate Beneficiary".)

Remember that this might occur as a result of a common accident (i.e., an accident or tragedy that claims the lives of all the named beneficiaries), by separate unrelated deaths of all named beneficiaries or by a combination of a common accident killing some of the named beneficiaries and separate unrelated deaths of the others. For example, the testator and the testator's spouse might be killed along with three of their four children, leaving the residue in trust for the fourth child until they reach the age of 25. If the fourth child died several years later, say at age 19, then the will should contemplate what happens to the balance held in the trust.

Addressing the worst case scenario situation ensures that undistributed assets in the estate or trust are dealt with in accordance with the testator's wishes, rather than by the provincially legislated formula under *The Intestate Succession Act*.

Often a gift over will be divided in certain proportions among named individuals, certain classes of relatives, named charities, or some combination of these. If the testator chooses to divide the residue at that point among next-of-kin, or others, be sure that the testator understands the potential results of the application of *The Intestate Succession Act*.

### xiii. Partial Intestacies

Great care must be taken in drafting the will to avoid possible partial intestacies. Partial intestacies, and resulting problems, frequently occur in two situations. The first concerns a clause in a trust which directs payments of capital to be made at certain times or once beneficiaries attain certain ages, but fails to address how the income is to be dealt with between those payments. The second occurs when gifts of residue are made and there are no gifts over in the event that the gifts fail.

As noted, where there are different interests, or many beneficiaries in an estate, it is very useful to draw a chart in order to be sure that all the assets have been distributed. A chart can also help ensure that there are specific directions regarding income to be either accumulated or paid out to beneficiaries during periods in which distribution of capital is postponed.

### xiv. Class Gifts

If property is to be divided among members of a class, it is important to clarify at what point in time membership in the class is to be determined. Otherwise, difficulties may arise and one must resort to the rules of construction, which are complex and often difficult to apply.

In describing the class, be clear and as specific as possible as to who qualifies. For example:

(i) Are relatives restricted to blood kinship or by marriage? For example, "my nieces and nephews" may or may not be intended to include a spouse's nephews and nieces. Similarly, a testator in a second marriage may or may not treat a spouse's grandchildren as the testator's own, so the solicitor should expressly indicate in the will if these "step-grandchildren" are to be included within that phrase.

(ii) Are adopted children of the testator or any beneficiary intended to be included? The laws of Manitoba specify that adopted children take as natural issue unless a contrary intention is indicated. If the estate involves significant assets in other jurisdictions, it is especially important that the testator's intentions be clearly expressed.

(iii) Are children born outside marriage to be included? *Section 35(1)* of *The Wills Act* includes any such child, except where a contrary intention is expressed in the will.

(iv) Gifts to the spouse of the testator are revoked by divorce (see *s. 18(2)* of *The Wills Act* and *s. 18(4)* regarding the termination of a common-law relationship) but gifts to a spouse of a beneficiary or other third party are not. If a gift is intended to benefit a person and their spouse only if they are married at the time of the testator's death then the provision needs to be drafted accordingly.

For example, a gift of "$100,000 to my son Robert and his spouse Mary" is not affected by section 18(2) of *The Wills Act*. Notwithstanding a divorce after the date of the will, it will likely be construed as giving each of Robert and Mary $50,000.

In addition, it should be determined whether it is sufficient that Robert and Mary were married at the time of Robert's death if Robert predeceases the testator. Also, "marriage" at the time of Robert's death may not be sufficient, since they may be separated or one of them may have initiated proceedings or steps in recognition of the breakdown of their relationship.

Possible ways of setting out the testator's intention would be for the gift to state: "$100,000 to my son Robert and his spouse Mary, for their joint own use and benefit, provided that at the time of my death Robert and Mary are both alive, are married to each other, are not legally separated and have not taken any steps in recognition of the breakdown of their relationship. If Mary has predeceased me but Robert survives me, then the $100,000 shall be paid to Robert for his own use and benefit. If Robert has predeceased me but Mary survives me, then the $100,000 gift shall be paid to Mary for her own use and benefit provided that at the time of Robert's death, Robert and Mary were married to each other, were not legally separated and had not taken any steps in recognition of the breakdown in their relationship. The determination of whether or not Robert and Mary, or either of them, were at the relevant time legally separated or at the relevant time had taken any steps in recognition of the breakdown of their relationship shall be that of my Trustees whose decision shall be binding on my estate."

Or alternatively:

"If Robert has predeceased me but Mary survives me then the $100,000 gift shall lapse and it shall be added to and form part of the residue of my estate."

Joint gifts to a beneficiary and their spouse can be problematic and need to be properly considered to address the beneficiary's death/divorce/termination of relationship. Where the continued existence of the particular marriage or common-law relationship is important to the gift, be specific

(v) If the class is not too large and is ascertained at the time of executing the will, it may be preferable to name the members of the class to avoid any ambiguity.

## d) Assisted Human Reproduction and Death; Legal Considerations

Clients may have or intend to store reproductive material. Many clients who have stored reproductive material wish for their common-law partner or spouse to be able to use this reproductive material to have a child after they die. This is especially common when the couple already has a child and the use of this reproductive material is the only manner in which to provide their existing child with a biological sibling, or the only manner in which the surviving spouse can conceive a child.

In order to give effect to this wish of a spouse, proper written consent must be executed in accordance with the federal *Assisted Human Reproduction Act* S.C. 2004, c. 2 (*AHRA*). A simple direction in a Last Will and Testament is not sufficient. For a detailed discussion, see Chapter 8 of the Family Materials in the Practice Fundamentals section of the LSM Education Center.

## e) Funeral Instructions and Donation of Organs

It is possible for a testator to provide funeral instructions or to provide directions for the donation of organs or body in the will. However, the will is not usually read until after the funeral and these instructions are not legally binding on the executor. The testator should, therefore, be advised to let the executor and next-of-kin know their wishes. *The Human Tissue Gift Act* , C.C.S.M. c. H180 applies.

## f) Use of Memoranda in Will Drafting

### i. Precatory Memoranda

Precatory memoranda are used to express some of the testator's wishes, but are not binding on executors. A common reference to such a memorandum is the direction for certain assets to be disposed of "in accordance with X's understanding of my wishes." Precatory memoranda might cover matters such as funeral arrangements, burial, distribution of articles having little economic value (where trustees are given discretion), comments on how trustees are to exercise their discretion, guardianship of children, etc.

### ii. Legal Memoranda

Legal memoranda are intended to be legally binding on trustees. Such memoranda must already be in existence at the time the will is signed, and must be specifically referred to in the will in a way that is sufficient to identify them. A legal memorandum becomes a part of a will under the doctrine of incorporation by reference. It is, therefore, subject to the same rules of construction and can only be amended by a codicil or a new will. This type of

memorandum can be an effective way for the testator to deal with long lists of bequests of furniture, silver, china, etc.

### iii. Other Memoranda

In some cases, testators are prepared to finalize their wills, but may not have yet finalized their wishes regarding the distribution of personal effects. Such clients are, therefore, not able to meet the requirements for the legal memoranda (since they are not yet ready to make a memorandum that could be referred to in the will). To address their needs, consider a direction in the will that the executors should distribute certain assets in accordance with a "memorandum that the testator may prepare."

It is **not recommended** that testators be given general advice to complete documents on their own after signing their will to address simple distribution of such personal items. If such a memorandum is made, extreme caution is required. It is crucial that the document not be construed as a will which could have the effect of revoking the earlier will. If the document meets all of the requirements for the execution of a will (i.e., either completely in the testator's own handwriting, and signed and dated, or signed (and dated) by the testator in the presence of two independent witnesses who also sign as witnesses), the document could potentially be seen as a new will. Prior wills are revoked by a later will that is valid under *The Wills Act* (see *s. 16(b)*). Obviously, a testator doesn't wish their earlier will to be revoked by one that does nothing more than distribute personal effects and which would remove the appointment of an executor.

While there can be disagreement among family members in the administration of personal effects that are not specifically dealt with in a will, it would still be better to have family members fighting over the distribution of personal effects than to have unintentionally created an intestacy related to the balance and most significant aspect of an estate.

An often overlooked option is to draft provisions related to the distribution of personal effects by giving the executor or another person a general or special power of appointment over the distribution of personal effects. It would then be useful to clearly define in the will what constitutes such personal effects. Such a provision would not typically be used where any personal effect has a significant economic or sentimental value or where the testator has a specific destination for such an item in mind.

### g) Wills Made in Contemplation of Marriage or a Common-Law Relationship

Subsequent marriage revokes a will, with some exceptions (see *s. 17* of *The Wills Act*). One exception is a declaration in the will confirming that it is made in contemplation of the marriage (see s. 17(a)). Another exception is a declaration in the will that it is made in contemplation of the testator's common-law relationship with a person the testator subsequently marries (see s. 17(a.1).

If you are aware that your client is planning to be married or to enter into a common-law relationship and they want the will to survive the marriage or the possible later marriage to the common law partner, it is important to ensure that the will provides the requisite declaration. Properly drafted, the will should contain a reference to the name of the intended spouse or common-law partner. The will should address the distribution of the estate if the contemplated marriage or common-law relationship does not occur or if a contemplated common-law relationship does not result in a later marriage. (See precedents section for sample wording.)

## 4. Drafting Administrative Provisions

### a) Express and Implied Powers

The basic rule is that unless the will provides to the contrary, trustees' powers are limited to those powers given by statute or created by the common law. Consequently, it is important that all wills allow for the use of certain powers, in addition to those provided for in *The Trustee Act,* so that the estate can be administered efficiently and with a minimum of expense and delay. The powers conferred by *The Trustee Act* may be repeated in the will and reviewed with the testator.

In deciding what powers to add to those given or implied by law, consider the nature of the assets in the estate, how the testator wishes to dispose of them and what elections or determinations may be required to do so efficiently. Complicated business interests may require numerous additional powers. You should be familiar with the powers implied by statute, which include:

- to pay debts from capital and/or income as may be appropriate;
- to accept payment or security for payment, compromise, or otherwise settle any debt, claim or anything whatever relating to the estate;
- to enter into, renew or surrender any leasehold belonging to the estate;

- to employ and pay an agent to do any act required to be done in the administration of the estate (and the trustee is not to be responsible for the default of such agent, if employed in good faith);
- where there is a power of sale or conversion, there is implied a power to postpone the sale or conversion of assets;
- where there is a power of sale, there is implied a power to lease or give options;
- to insure against loss or damage any insurable property up to its full value;
- to bring, continue, or otherwise deal with any action or cause of action in tort with limitations; and
- to invest in any property of any kind whatsoever provided that the trustee acts prudently.

The specific section references in *The Trustee Act* are:

- Payment of Debts - *sections 32, 40, 41, 46, 51, 52* and *63*
- Power to Retain Assets - *section 33*
- Power to Manage Realty (power to lease and grant options) - *sections 27, 28* and *38*
- Power to Deal with Corporate Shares - *section 74*
- Power to Delegate - *sections 35* and *36*
- Power to Insure - *section 37*
- Power to Sue - *section 53*
- Powers regarding Infant Beneficiaries - *sections 29* and *31*
- Power to Invest - *sections 68 - 73*
- Power of Surviving Spouse to Carry On Operations - *section 47*

## b) Additional Trustee Powers

Additional powers that should be considered include the following:

- power of sale and conversion;
- power to encroach on capital for the benefit of a beneficiary;
- power to deal with interests in corporations, partnerships or other businesses;
- expanded powers to lease and maintain real estate (i.e., until the market is more favourable for a sale);

- power to issue or continue notes or guarantees on behalf of the testator;
- power to divide the estate *in specie*, that is, to divide assets among beneficiaries without first converting them to cash or, similarly, to allocate assets among trusts created by the will;
- power to determine whether certain receipts and expenses are capital or income (i.e., in respect of dividends paid to the estate);
- power to borrow (i.e., if the estate has insufficient liquid assets to pay its taxes and other debts);
- power to take compensation prior to a passing of accounts;
- power to compromise the claims of creditors;
- power to insure estate property;
- power to make elections for income tax purposes;
- power to establish reserves;
- relief from bonding requirements for named foreign executors;
- power to distribute the estate prior to issuance of a clearance certificate under the *Income Tax Act* where the trustee is satisfied adequate provision for taxes has been made;
- power to purchase assets from the estate;
- indemnity for actions taken in good faith, in the absence of fraud;
- power to delegate the trustee's investment powers, including the power to invest in mutual funds, pooled funds and common trust funds, and to delegate to discretionary money managers or investment counselors.

Administrative provisions might also include express limitations on powers otherwise implied. For example, a testator may prefer to limit the power to invest, or may wish to designate the investment advisor or solicitor whom the trustees should retain. Wherever possible, it is preferable to provide maximum flexibility for the trustees, particularly where the estate administration may take a long time. Where appropriate, therefore, limitations such as those described above should be expressed as preferences, not as limitations in the discretionary powers that the trustees would otherwise have.

Finally, administrative provisions may include specific directions by the testator as to the disposition of certain business interests or other assets. For example, the trustees may be required to provide a first option to purchase the family farm to one of the testator's children. In such a case, the testator may have also directed the trustees to run the farm operation in a particular manner, or on a given individual's directions, until the sale is completed to the child.

## c) Compensation to Executor/Trustee

Under *section 90(1)* of *The Trustee Act,* a trustee, guardian, or personal representative is entitled to such fair and reasonable allowance for their care, pains, and trouble, and their time expended in and about the estate, as may from time to time be allowed by a judge of the court or by any master or referee to whom the matter may be referred.

The remuneration for services performed by trustees can, in some cases, amount to more than the usual compensation granted by the court. If the testator intends the remuneration to be different than what would normally be awarded, they should so provide in the will. For example, the will might provide for:

- a scale for determining compensation;
- payment of a legacy in lieu of compensation;
- provision for minimum compensation;
- trustee to serve without remuneration, for example, where spouse is acting as co-executor; or
- compensation in addition to bequests received under the will.

However, it is important to note that the law in Manitoba is that even if compensation was referred to in the will or agreed to by the testator and executor, it would not be legally binding. In order to be legally binding, compensation requires court approval. This is based on *section 90(5)* of *The Trustee Act* which states:

> *Any agreement, instrument or document executed by a testator or any person on his behalf fixing the amount of compensation or allowance that may be paid to a trustee, guardian or personal representative with respect to the administration of the estate of the testator, is not valid unless it is approved by a judge.*

A primary function of compensation agreements and compensation clauses in wills in Manitoba is to act as a cap on compensation (i.e., an executor would have a hard time in being awarded compensation in excess of what they agreed to in writing). In addition, a compensation agreement may also be an important relevant factor that a master or judge would take into account in determining appropriate compensation.

When discussing executor compensation with clients make them aware that such fees are taxable, that GST will apply if the fee is over $30,000 in a year and that CPP contributions may be payable based on the amount of compensation payable in a year.

# 5. Guardianship

A testator may wish to name a guardian for their children in the event that the other parent is also not alive. The appointment of a guardian is within the exclusive jurisdiction of the court, having regard to the best interests of the child at the time of appointment. At best, the testator may indicate a preference for a particular person or persons. If the testator has specific reasons for that preference, these may also be expressed in the will, as they will likely be given weight by a judge in determining guardianship.

# 6. Holograph Wills and Stationer's Wills

A holograph will is one that is wholly in the testator's handwriting and is signed by them, and is valid in Manitoba. (See *s. 6* of *The Wills Act* and Rule 74.02(9) of the *King's Bench Rules.*) Holograph wills can be problematic. They are often incomplete and may unintentionally create an intestacy. They often omit appointment of executors. They are a poor replacement for a properly considered and lawyer drafted will. The use of holograph wills should be discouraged and, at most, limited to emergency situations.

A stationer's form will is not considered to be a holograph will, and must therefore be properly executed by the testator and two independent witnesses. If not properly executed, the handwritten portions of the document may, in some cases, be admitted to probate if considered to be a complete expression of the testator's wishes. If a shortcut is necessary and proper witnesses are not available, the testator might simply copy the wording of a stationer's form in long hand, effectively making a holograph will. This course of action is not advisable and should only be used in emergency situations.

# 7. International Wills and Multiple Wills

*The Wills Act* includes, as a schedule, the "Convention Providing a Uniform Law on the Form of an International Will." A testator who has assets in more than one country may be advised to make an international will. The formalities of execution are set out in the convention and should be carefully followed.

As an alternative, it may be advisable for the testator to make a separate will in each foreign jurisdiction in which they have assets. This will ensure that the local laws are considered and that the proper form and language are used. On the testator's death, each will would then be probated in the court of the particular jurisdiction. This would avoid possible problems in obtaining foreign grants of probate and/or translating the testator's domestic will.

Of course, there would be additional costs to the testator for the preparation of a foreign will, as it would be necessary to retain legal counsel in the foreign jurisdiction to prepare and see to the execution of the will. The additional cost may be a poor excuse for not having multiple wills for assets in different jurisdictions, as the administrative cost in probating a single will in one jurisdiction and resealing it in another jurisdiction may far exceed the initial cost that would have been required to create 2 wills.

If multiple wills are being prepared, be sure that the revocation clause is not so broad as to revoke the will in the other jurisdiction. The Manitoba will should also be carefully worded to clarify that it deals with all assets, except those located in the foreign jurisdiction(s).

A multiple will strategy was also useful in a single jurisdiction, including Manitoba, as a strategy to reduce probate charges. Since there are no probate charges in Manitoba as of the date of the preparation of these materials, the multiple will strategy has less value.

Briefly, the strategy contemplated a primary and a secondary will being signed to deal with assets in Manitoba. The primary will governed probatable assets, and the secondary will governed non-probatable assets. What constituted probatable/non-probatable property was listed specifically and generally in both wills. Both wills referred to the existence of the other. The wills were signed consecutively on the same date and the later signed will specifically referenced the existence of the other will and that it did not revoke the earlier signed will. This strategy is more complex. The drafting requires significant care and caution. It is not recommended where there is doubt as to the appropriate provisions.

# 8. Precedents, Computers and Paralegals

When used properly, precedents can help in making will preparation a more cost- efficient process. However, even those wills or clauses that have originated from standard texts on will drafting should be reviewed regularly to ensure that they continue to be appropriate, particularly in light of legislative changes or new case law.

Modern technology has certainly improved the drafting process. Care obviously still needs to be taken when relying on templates and final proof-reading is still essential. A missing line or word, or a misplaced or missing punctuation mark can have serious consequences. Also, every time a clause is added or revised, it must be reviewed before anyone receives a final copy. It is also wise to review the contents of precedents stored once in a while, to make sure that they are correct and up-to-date.

The role of paralegals is to assist the lawyers with detailed work in a more cost-effective way. However, allowing work to be done by any staff member (secretary, paralegal or student) without proper training and supervision is a dangerous practice.

When it comes to will drafting, a qualified paralegal might be able to prepare a first draft of the will and other related estate planning documents based on the information obtained by the lawyer. Some lawyers have the paralegal sit in on the client meetings, in order to gather the information needed, but this must be properly presented to the client and the client must consent. At all times, documents produced by a paralegal must be reviewed by the lawyer before the final product is prepared and sent to the client.

# F. EXECUTION OF THE WILL

## 1. Preliminary Considerations

In every instance, you should review the provisions of the will clause by clause with your client at the time of execution. If your client has poor eyesight, you should read the will out loud, and discuss each clause as you proceed. In preparing for this review, consider the following:

a) Even if you have previously provided a draft to your client to review, the client may have reconsidered and/or may have changes or questions or may not have read the draft.

b) This may be the only occasion for you to explain properly the effect of each provision and to prompt questions. Often clients are hesitant to ask for explanation or clarification, particularly about more general administrative provisions.

c) In reviewing the will, you can confirm whether your draft captured your client's true intentions.

d) Generally, in most will engagements there will be no question of testamentary capacity either at the time instructions are received or at a later time of signing. However, capacity issues do arise, and they need to be investigated and determined during the consultation process, **and** at the time of execution.

Generally, a testator needs full capacity at the time of signing. However, an exception applies in a 2-staged consultation/signing process, where a will is signed later, after an earlier consultation. In that case a testator, who exhibits full capacity during the consultation/instruction stage can exhibit a lower level of capacity at the time of signing. In such a situation the testator needs to understand that they are signing a will and that it reflects instructions earlier provided.

As John E.S. Poyser notes in his book *Capacity and Undue Influence* at page 90, "Provided that vestigial thread of capacity remains, and full testamentary capacity had been present earlier, it will not defeat the will even though the will-maker's capacity has diminished to the point where he or she can no longer understand the terms of the will, or no longer has the powers of mind to understand the instruction he or she gave earlier, or has lost the capacity to reformulate those instructions."

e) Particularly where there are medical concerns, where instructions may have been received initially through third parties (interested or otherwise), or where there have been any other suspicious circumstances, it is incumbent upon you to satisfy yourself, prior to the document being signed, that it properly reflects the testator's wishes.

Where a combination of circumstances exists which raise doubts as to the testamentary capacity of the testator, the burden on the propounder of the will is increased: *Re Carvell Estate,* 1977 CanLII 2387 (NB QB) (1977), 21 N.B.R. (2d) 642 (Prob. Ct.). A lawyer assisting in

the preparation and execution of the will may be criticized for not sufficiently appreciating the client's medical condition: e.g., *Re Fergusson's Will* (1981), 43 N.S.R. (2d) 89 (C.A.).

In many cases the courts have accepted the evidence of a layperson, such as a lawyer, as to a testator's capacity over that of a physician or psychiatrist. Medical capacity and testamentary capacity are not necessarily the same thing. You should, however, be sufficiently aware of your client's condition, medication and medical history, to ascertain what further efforts or evidence will be required to substantiate that capacity existed at the time of execution of the will.

In most instances, as when taking instructions, the review and execution of the will should be done with the client alone, unless the client requests otherwise or circumstances require someone else to be present. For example, spouses may prefer to review complementary wills together, or some assistance may be required for you to communicate with the client.

When it is determined that provision made for the spouse or common-law partner under the testator's will would not satisfy the right to an equalization under Part IV of *The Family Property Act,* you should consider having the spouse or common-law partner obtain independent legal advice in connection with the will and any spousal, cohabitation or other agreement regarding rights on death related to the will.

As in the taking of instructions, keep detailed notes of your meeting with the client at the time of execution, particularly as they relate to capacity and any questions the client has with respect to the provisions of the will.

When you are satisfied that the will is in accordance with the testator's wishes, it is in proper form for execution, and capacity is not an issue or concern, arrange for two witnesses over the age of majority to attend for execution.

Have only one copy of the will signed.

Note that *Form 74D* (affidavit of execution) prescribed by the King's Bench Rules makes it clear that only one copy should be signed. This was incorporated into the rules to address the problems that were created in the past when lawyers had clients sign two or more copies of a will. An issue could arise later wherefor example a testator might have altered or destroyed one copy bringing into question the validity of the altered gift or the revocation of the will itself. On death another original of that document could be inadvertently probated, contrary to the testator's wishes.

The best practice is to give custody of the original will to the client for them to store. Have the client acknowledge receipt in writing, and best practice is for the written acknowledgement to confirm that all original pages were present when the client accepted custody of the original. Reasonable practice would be to keep at least a scanned copy and maybe a paper copy in a physical file.

## 2. Formalities of Execution

If a personal effects memorandum or other document is to be incorporated by reference into the will, ensure that the memorandum or document is in existence prior to the signing of the will. Usually it is recommended that the testator sign and date the memorandum for identification purposes. Signing of such a memorandum is not strictly required and need not meet the formalities of will execution. [See comments above "Use of Memoranda in Will Drafting".] The testator may sign it alone.

In executing the will itself, have the testator and both witnesses, in turn:

- Ensure proper execution of any changes (including the date if it is inserted in handwriting) in the margin or opposite or otherwise close to the alteration (see *s. 19* of *The Wills Act*). There is a practice that lawyers usually only instruct testators and witnesses to initial changes, which is sufficient when these are being made prior to execution. However, for changes made after execution, section 19 of *The Wills Act* actually speaks to signatures, not simply initialing of changes. Read the provision carefully. The preferred way to make a change after a will is signed is by formal codicil;
- Initial or sign each page in the bottom right hand corner. (Note this is part of the King's Bench Rules not *The Wills Act*. See Rule 74.02(7)). The absence of initialling or signing by both or any of the testator and the subscribing witnesses on each sheet of paper in the will other than the signed page will require further evidence of the execution of the will as deemed necessary by the court, usually taking at least the form of an affidavit from one of the witnesses confirming the pages were the ones that were part of the signed will at the time of execution; and
- Sign the will at its end using ordinary signatures.

In attending on execution of a will, keep the following sections of *The Wills Act* in mind:

- *Section 12* voids gifts to witnesses or to the then spouses or common-law partners of witnesses. (*Section 12(3)* does provide that such gifts can be validated by the court on application in certain circumstances);
- *Section 13* deals, in a similar way, with gifts to a person who signs the will for the testator or to the then spouse or common-law partner of that person;
- An executor may be a witness to the will (*s. 15*) but should not be if the will contains special compensation provisions;

- Rule 74.02(4) provides that no affidavit of execution of a will shall be sworn by a witness before another witness to the will. This would also apply to codicils;
- The testator must sign or acknowledge their signature in the presence of both witnesses at the same time, but both witnesses need not actually sign at the same time: *section 4* of *The Wills Act* and *Chester v. Baston,* 1980 CanLII 2290 (SK CA).

Sending out the will to the client for execution, even with instructions regarding proper execution, is not good practice under any circumstances and is strongly discouraged.

Bear in mind that lawyers have been sued successfully for negligence in connection with the execution of wills: see *Wittingham v. Crease* (1977), 3 E.T.C. 97 (B.C.C.A.) and *Ross v. Caunters*, [1979] 3 All E.R. 580 (Ch.).

> Note the remote witnessing regulation 81/2021 allowing for signing of wills by videoconferencing. The rule is specific as to the method of signing and the evidence to be given in the affidavit of execution. Read the regulations carefully when signing remotely.

## 3. Affidavit of Execution

*Practice Direction 88-01* Affidavits of Execution of Wills from the Law Society provides:

> *The Discipline Committee is concerned with the failure of some practitioners to ensure that an Affidavit of Execution is completed by a witness upon execution of a will. The profession is reminded that the best practice to follow when preparing a will is to draw and attach the Affidavit to the will at the time of execution. This avoids the problem of trying to locate the witnesses at a later date when an application for probate is made.*
>
> *The Discipline Committee also advises the profession that when drawing a will it is inappropriate to charge an additional fee for the preparation of the Affidavit of Execution of the will*
>
> *(September 1988)*

In your practice, be sure to have an affidavit of execution sworn immediately following the execution of the will. Otherwise, there may be unnecessary delay and expense at the time of probating the will, especially where witnesses may have died or may be difficult, if not impossible, to locate.

Where there is any likelihood that the estate will include assets from another jurisdiction or where a testator may move from the province, the witness should swear the affidavit of execution before a notary public. Some firms swear all affidavits of execution before a notary public as a matter of course which ensures that the affidavit will be accepted both in and beyond the borders of Manitoba.

The affidavit of execution must be sworn by one of the witnesses before a notary public or a commissioner for oaths who should initial any changes in the affidavit. The affidavit of execution must be attached to the original will and the original will should be stamped or marked on the back of the last page of the will with an exhibit stamp.

The exhibit stamp should be completed as follows:

> This is Exhibit "A" referred to in the Affidavit of
> (name of the witness to the will) sworn (or affirmed)
> before me this (date) day of (month), (year).
>
> (Notary Public Signature & SEAL)_____
> A Notary Public / Commissioner for Oaths
> in and for the Province of Manitoba

The notary public must sign and seal with their notary seal both the exhibit and the affidavit. The commissioner for oaths does not have a seal, but must sign both the exhibit and the affidavit and ensure the words "Commissioner for Oaths in and for the Province of Manitoba" are written or stamped below their signature.

# 4. Signing Remotely

Remote witnessing of wills is now authorised by *sections 4.1(1)* and *4.1(2)* of *The Wills Act* and *Regulation 81/2021* which came into force on October 1, 2021. The regulation sets out the procedure for an authorised person to witness a testator signing or acknowledging a signature on a will without being in the presence of the testator and attesting and subscribing a will without being in the presence of the testator. The procedure is set out in the regulations. A form of witness statement is set out in section 6(2) of the regulations.

# G. AFTER EXECUTION CONSIDERATIONS

## 1. Storage of the Will

As discussed above, the best practice is to give custody of the original will to the client for them to store. The Law Society of Manitoba frowns on lawyers retaining originals. Have the client acknowledge receipt in writing, and best practice is for the written acknowledgement to confirm that all original pages were present when the client accepted custody of the original. Reasonable practice would be to keep at least a scanned copy and perhaps a paper copy in a physical file.

Advise the testator to keep the original in a safe, fireproof container or cabinet, or a safety deposit box, a location that surviving relatives will often look first on the client's death. The testator should tell the executor and other family members of the location of the original unless there is a concern with doing so.

A location document signed by the client and kept with a copy in the residence of the testator or in a place where other important documents are stored by the testator, or delivered to the executor and others is a useful means of ensuring everyone knows where the original is intended to be stored.

If the testator wishes to have the original will sent after the signing rather than taking it with them after the signing it should be delivered by courier or sent by registered mail (within Canada) or security registered mail (outside Canada) and a record should be kept in your file of the manner of delivery (see sample reporting letters later in this chapter). An acknowledgement of receipt of the original, including confirmation all pages were present when taken, is a further useful document.

If a corporate trustee is named as an executor, the trust company will generally vault the original will for the client.

## 2. General Considerations

You should stress to your client the importance of reviewing their will regularly to ensure that it continues to reflect their wishes (see sample reporting letters). A good recommendation would be to review wills every three to five years, or sooner in the event of a significant change of circumstances. You should explain that the firm has no obligation to advise the client of any legislative or other changes which may necessitate amendments to the will, and that any amendments to the will must originate from the client.

Estate planning files are unique in terms of storage. Unlike other files they should be stored at least in a complete electronic format until it is known the testator has changed their will or until their death and the successful probating of their will. Before closing your file, consider how you intend to keep a permanent record of all information acquired during the planning stages that may be necessary to thwart or at least address any claims of invalidity of the will for any reason.

# H. PRECEDENTS

## 1. Will Instructions Checklist

**PERSONAL PARTICULARS**

Testator's Full Name:

Spouse or Common-Law Partner's Name:

List any other names you are known by:

List any other names known by:

Address & Postal Code:

Address & Postal Code:

Home/Business/Cell Phone:

Home/Business/Cell Phone:

Occupation:

Occupation:

Employer:

Employer:

Employer's Address:

Employer's Address:

Date of Birth:

Date of Birth:

Place of Birth:

Place of Birth:

Citizenship:

Citizenship:

**MARRIAGE INFORMATION**

Status: Married ( ) Common-Law ( ) Single ( ) Widow(er) ( )
Separated ( ) Divorced ( ) Terminated Common-Law Relationship ( )

Date of Marriage:_____

Marriage Contract:_____

Date of Commencement of
Cohabitation (if common-law or married):_____

Date of Registration of Common-Law
Relationship under *The Vital Statistics Act*:_____

Testator's Prior Marriage to, or Prior
Common-Law Relationship with:_____

Date of Divorce/Termination of
Common-Law Relationship/Death:_____

Place of Divorce/Termination of
Common-Law Relationship:_____

Date of Separation from Spouse or
Common-Law Partner:_____

If Common-Law Relationship terminated by
Registration, Date of this Registration:_____

Is Will to be in Contemplation of Marriage
or Common-Law Relationship:_____

To Whom/With Whom:_____

**CHILDREN**

List all children, including children of present marriage, children of previous relationship(s) (P), adopted children (A), children born outside marriage (O) and stepchildren (S).

| Full Name | Address | Date of Birth | Marital Status | Names and Ages of Their Children |
|---|---|---|---|---|
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |

Are any of your grandchildren adopted, stepchildren, born outside marriage? YES/NO

If yes to any of the above give details:_____

_____

_____

Are any of the children or grandchildren mentally or physically incapacitated? YES/NO

If yes, please describe:_____

_____

_____

Have any children or grandchildren predeceased you? YES/NO

If yes, give the name and date of death of the deceased child and the names of their children, if any:_____

_____

_____

**FINANCIAL INFORMATION (of testator and or spouse/common-law partner)**

**Assets**

**Real Estate:** For each item of real estate please provide:

Type (i.e., residential, commercial, farm, condominium, tenant, owned):_____

Street Address: Note location, particularly if outside of Manitoba:_____

Legal Description:_____

Estimated Fair Market Value:_____

Date of Purchase or Acquisition and Acquisition Cost:_____

Registration in the Name of:_____

Joint Tenancy or Tenancy in Common:_____

Encumbrances:
Details of mortgage on property:_____

Is mortgage life insured?:_____

**Personal Property:** List all automobiles, boats, jewellery, paintings, etc. and values:

Description and Value:_____

Location:_____

**Bank Accounts:**

Estimated Value:_____

Registered in Name of (sole or joint):_____

Bank Branch and Type of Account:_____

**Guaranteed Investment Certificates and Term Deposits:**

Location:_____

Maturity Date:_____

**Stock (Listed):**

Location: Name of Brokerage Firm
and Account Number:_____

Estimated Value, Number and
Type of Shares:_____

Registered in the Name of:_____

Acquisition Date and Costs:_____

**Bonds:**

Location:_____

Estimated Value:_____

Registered in Name of:_____

**Life Insurance:**

Estimated Face Value, Policy Number
and Company:_____

Named Beneficiary:_____

Type of Insurance
(term, permanent, other):_____

Name of Owner:_____

**Business Interests:** (i.e., in private company, partnership, etc.):

Describe:_____

**Pension Benefits:**

Company, Plan Number, Beneficiary:_____

**Shares:**

Private Company – Name:_____

Copy of latest Financial Statement:_____

Buy-Sell Agreement, Shareholder Agreement:_____

**TFSAs, RRSPs, RRIFs and DPSPs:**

Policy or Account Number and Company:_____

Estimated Value:_____

Name of Beneficiary:_____

**Mortgages Payable to You:**

Describe:_____

**Interests in Other Estates/Assets:**

Describe:_____

Any interests in assets outside Manitoba? Canada?_____

Have you made any loan or advances to family members?
Are these to be repaid or forgiven?_____

**<u>Liabilities</u>**

**Creditors:**

Name:_____

Amount Owing:_____

**Separation Agreements:**

Support and Maintenance:_____

Other Commitments:_____

**Spousal, Pre-nuptial or Cohabitation Agreements:**

Commitments:_____

**Other Substantial Liabilities:** (i.e., guarantees, security)

Describe:_____

**TESTAMENTARY WISHES**

**Executors and Trustees**

Name(s), Address(es), Relationship:_____

_____

_____

Number of:_____

Is Majority to Bind Minority:_____

**Alternates:**

Name(s), Address(es), Relationship:_____

_____

_____

**Trustee Powers:**

Sale:_____

Investment - broad powers or restrictive powers:_____

Appointment of agents:_____

Postponement of sale:_____

Carry on business:_____

Mortgage property to raise funds
without selling:_____

Exercise voting rights:_____

Distribute *in specie*:_____

Other:_____

**Compensation:**

How do you want to compensate your executor/trustee?

_____

_____

**Guardians** (How are the children, if minor, to be cared for if other parent not alive?)

Name(s), Address(es), Age, Relationship:_____

_____

_____

**Alternates:**

Name(s), Address(es), Age, Relationship:_____

_____

_____

**Financial Provisions:**_____

_____

**Beneficiaries**

(a) How is spouse or common-law partner to be provided for?

Does all estate go to spouse?_____

Outright Bequest:_____

Income Trust:_____

Encroachment:_____

Insurance:_____

Separate Property:_____

(b) If spouse or common-law partner does not survive you, to whom do you wish your estate to pass?_____

(c) How are children to be provided for?_____

*Inter vivos* trust or gifts:_____

Outright gift even if spouse or common-law partner alive:_____

Outright gift, on death of first spouse or common-law partner:_____

Trust on death of second spouse or common-law partner:_____

Direct beneficiary designation of Life Insurance:_____

Other:_____

If child beneficiary is not alive at the date of your death, do you wish their share to pass to their children or do you wish their share to be divided equally among your other living children?_____

(d) Have the minimum requirements of *The Family Property Act* and *The Dependants Relief Act* been satisfied?_____

(e) Consider who is to be the beneficiary in the event of a common disaster or worst case scenario where all expected beneficiaries have died._____

**Personal Effects**

Furniture:_____

_____

Automobile, etc.:_____

_____

**Bequests (specific)**

_____

_____

Financial Agreement (lump sum, monthly stipend, etc.)_____

_____

Cash Legacies:_____

_____

Residue:_____

_____

**Charitable Wishes**

_____

_____

_____

# 2. Will Drafting Checklist *

## 1. Commencement

1.1 Declaration of testamentary intention.

1.2 Full name, address and occupation of testator, including any additional name(s) by which testator is known.

## 2. Revocation

2.1 Consider wording (there is some concern that the use of the words "other testamentary dispositions" can be interpreted to include RRSP designations of beneficiaries, thus revoking the designation. But see *Re Bottcher Estate* (1990), 39 E.T.R. 19 (B.C.S.C.).

## 3. Testator's Declarations

3.1 Declaration that will made in contemplation of marriage (*s. 17 The Wills Act*) or in contemplation of a common-law relationship and the name of the contemplated spouse or common-law partner

3.2 Declaration that will disposing only of assets in particular jurisdiction.

3.3 Special clause declaring that testator has a will disposing of property in another jurisdiction. Ensure that the revocation clause does not revoke those wills.

3.4 Statement of testator's domicile, if in doubt.

3.5 Other declarations as required (i.e., insurance or RRSP designation, see item 10.1).

## 4. Executors and Trustees

4.1 Original appointment.

.1 Appointment.

.2 Name(s) and address(es).

.3 Occupation(s) or relationship(s).

---

* **Adapted** from Practice Checklists Manual, a copyright publication of The Law Society of British Columbia, Vancouver, B.C., Canada. Used in this form with the consent of The Law Society of British Columbia.

4.2 Substitute executors and trustees.

.1 Event requiring substitution (should address predecease or refusal/inability of original trustee to act or to continue to act). Specifics as to who is to replace whom, if applicable.

.2 Name(s) and address(es).

.3 Occupation(s) or relationship(s).

.4 Survivor of joint executors, or personal representative(s) of sole executor named in will may act in the event of death of executor (*s. 6* of *The Trustee Act*).

4.3 Consider the use of a "majority rules" provision in a will with multiple executors/trustees. Beware of circumstances in which it would not be appropriate.

4.4 Consider designating to one executor/trustee (i.e., professional) the responsibility for custody of assets and maintenance of accounts.

4.5 Define the term "trustee" to include executor original or substituted, etc.

4.6 If executor is a solicitor or other professional, address issue as to whether both executor fee and compensation for other professional services are payable.

4.7 Consider clause enabling family member executor/trustee to deal with estate personally, in which case other trustees represent estate.

4.8 Executor's compensation. Consider whether gift in will to be in lieu of executor's compensation. Note *section 90* and in particular *section 90(5)* of *The Trustee Act*. See also *Re Greenaway Estate,* (1954), 12 W.W.R. 228 (Man. Surr. Ct).

4.9 Executor as witness. *Section 15* of *The Wills Act* provides that the executor may be a witness to the will.

## 5. Guardians

5.1 Event triggering appointment of guardians (i.e. death of surviving spouse or other parent of child). Note: appointment persuasive only.

5.2 Appointment.

.1 Name(s) and address(es) of guardian(s).

.2 Relationship(s) or

.3 Full names of children.

5.3 Gifts to guardians in addition to or in lieu of guardian's compensation.

**6. Funeral Wishes**

6.1 Point out to client that the wishes are not binding on the executor, and may not be seen prior to the arrangements being made.

6.2 Burial or cremation.

6.3 Organ donation.

6.4 Consider putting these into a memorandum of testator's wishes.

**7. Bequest of General Estate**

7.1 To trustee(s).

7.2 Upon stated trusts (see below).

**8. Trust**

8.1 Administrative trusts. These are preliminary matters to which the executors are required to attend, including requirement to:

.1 Call in the property of the estate and convert it into money, including express power of sale and consider including a power to postpone the conversion.

.2 Payment of debts, taxes and testamentary expenses. Consider including succession duties and estate taxes.

8.2 Bequests of specific articles.

.1 Describe articles in enough detail to identify them.

.2 Identify beneficiary; name(s), address(es) and relationship. Must beneficiary survive to take? (see *s. 25.2* of *The Wills Act*).

.3 Consider a provision for packing, insurance and freight charges. Does testator wish estate or the beneficiary to pay?

.4 If there is a long list of specific bequests consider the use of a memorandum made before the will, incorporated by reference into the will.

8.3 Disposition of personal effects.

.1 Bequest to spouse or common-law partner.

.2 Bequest to children.

(a) As children may agree amongst themselves within specific time period, failing which executor to distribute or sell.

(b) Discretion in executor to distribute equitably or to sell or retain in trust if children are minors.

8.4 Cash legacies.

.1 Individuals. Carefully identify the beneficiaries, including name and address. Must beneficiary survive to take or does legacy devolve to issue or other alternate? See the anti-lapse provisions in *section 25.2* of *The Wills Act*.

.2 Charities. Ensure that the charity is specifically identified, including branch if testator desires. Consider the provision of an alternate beneficiary in the case of the non-existence of the designated charity at the date of the testator's death. Expressly state the purpose(s) for the legacy, if applicable. Include clause discharging executor/trustee upon receipt of proper officer of charity.

8.5 Powers of appointment.

.1 Where testator has such power, ensure instructions are consistent with original powers given. Otherwise exercise of power may be invalid.

8.6 Provision for spouse.

.1 Bequest of all or portion of estate.

(a) Consider survivorship clause.

(b) Consider effect of *The Family Property Act.*

.2 Life estate:

(a) Do not include survivorship clause.

(b) Consider defining property included.

(c) Income to spouse or common-law partner.

(d) Designate remainder beneficiaries.

(e) Power of encroachment. Consider whether power is to be restrictive or liberal.

(f) Events which will alter or prematurely end life estate (i.e. remarriage), but don't include if trust is to qualify as a spousal trust for tax purposes.

8.7 Disposition of the family residence

.1 If the home is jointly held, it may not be part of the estate, and may pass to a surviving joint owner by the law of survivorship. The true nature of jointly held assets needs to be determined. Are all joint owners beneficial owners? Is one or are more a legal owner only without a beneficial interest? Proper nature of ownership must be discussed with testators.

.2 Be aware of possible homestead rights for a surviving spouse or common law partner, which give the survivor a life estate

.3 Gift outright to spouse or children. Consider express direction to pay mortgage from estate.

.4 Life estate to spouse or children.

(a) Payment of taxes, insurance and other expenses. Is estate or life tenant responsible? If the estate is responsible, source of the funds.

(b) Maintenance, responsibility of estate or life tenant.

(c) Income in lieu of occupation.

(d) Right of estate to sell home and buy another.

(e) Events which might end life tenancy prematurely.

(f) Restricting use to personal use of life tenant.

8.8 Provisions for Children.

.1 Trust to provide for children until majority or until later for preservation and tax benefits:

(a) Power to encroach on income and/or capital.

(b) Circumstances in which power should be exercised.

.2 Provision for handicapped children where child at majority may be eligible for social assistance, ensure trust is discretionary (see *Quinn v. Director of Social Services,* (1981), 9 Man. R (2d) 161 (C.A.) and *Ontario (Minister of Community and Social Services) v. Henson* (1987), 28 E.T.R. 121 (Ont. Div. Ct), aff'd (1989), 36 E.T.R. 192 (Ont. C.A.)) and *Thomas v. Director, Employment and Income Assistance Programs,* 2013 MBCA 91 (CanLII).

.3 Bequest of property (share):

(a) On majority.

(b) At specified age or ages. Consider distribution or accumulation of income in interim and power to encroach on capital.

.4 Gift over. Consider all possible contingencies so as to avoid partial intestacy.

8.9 Residue.

.1 To spouse.

.2 To children.

.3 Effect of predecease.

.4 Gift over. Where children are at home, consider total common disaster circumstance, with gift over to designated family members/charities. Ask whether any member of a class has died prior to making of the will: see

*section 25.2* of *The Wills Act* and *Sterling v. Navjord,* (1989), 32 E.T.R. 237 (B.C.C.A.).

.5 If dividing residue between multiple beneficiaries, ensure proper gifts over to avoid partial intestacy if one beneficiary predeceases.

## 9. Trustee's Powers

The testator grants the trustee powers to enable them to deal with the assets in the estate effectively and efficiently and to carry out the trusts in the will.

9.1 Investment powers:

.1 *The Trustee Act* (i.e. restatement of prudent trustee rule).

.2 Alternate or additional specific investment powers:

(a) Limited to allowed by the laws of Canada for insurance companies and allocations thereunder.

(b) Mutual funds.

(c) Securities held by the testator at his death.

(d) Real estate.

(e) If executor is corporate trustee, common trust funds.

(f) Unlimited investment power.

(g) Power to accumulate miscellaneous receipts for investment.

.3 Limitation of trustee liability for investments made in good faith.

9.2 Enabling powers to:

.1 Delegate trustee duties.

.2 Retain, lease, repair and improve property.

.3 Partition, appropriate and distribute property of the estate *in specie*.

.4 Insure the estate property.

.5 Grant and deal with leases and options.

.6 Compromise or settle claims against the estate.

.7 Borrow on behalf of the estate and give security.

.8 Employ professionals or trades people.

.9 Subdivide land.

.10 Exercise all the rights and powers of an individual with respect to investments.

.11 Allocate tax benefits amongst beneficiaries, make all elections and designations, and use exemptions available.

.12 Postpone distribution.

.13 Carry on business. Must be subject to applicable agreements in effect at death.

.14 Allocate assets to various trusts.

.15 Pay monies for minors to parents or guardians.

.16 Invest and distribute monies for minors.

9.3 Special powers.

.1 Purchase property personally from the estate.

## 10. Designation of Beneficiaries

10.1 Insurance.

10.2 TFSA, RRSP or RRIF (Consider tax issues if designated beneficiary is not the spouse). See *Re Waugh Estate* (1990), 63 Man. R. (2d) 155 (Q.B.) and *Clark v. Clark Estate.*

10.3 Where insurance and RRSP form major part of testator's assets, consider dependants' claims and creditors' claims.

## 11. Attestation Clause

11.1 Boiler plate clauses indicating all steps required by *The Wills Act* have been met.

## 12. Miscellaneous Drafting Points

12.1 Wills are drafted in the first person.

12.2 Consistency in terminology is important for interpretation.

12.3 Care in use of tense is important. The testator is speaking from the date of the will in appointing executors and trustees, and in making gifts (i.e., present tense). Instructions to executors and trustees should be in future tense.

# 3. Sample Will #1 – Gift to Spouse, Gift over to Issue, *Per Stirpes*

The following are sample will clauses. They are intended to be illustrative, are not exhaustive, and for obvious reasons we disclaim any liability for any use to which they may be put.

THIS IS THE LAST WILL of me, _____, of the City of _____, in the Province of _____, (occupation).

1. I revoke all former Wills and Codicils made by me.

2. I appoint _____ sole Executor and Trustee of this my Will, but if _____ is not alive or is unable or unwilling to act or continue to act, I appoint _____ Executor and Trustee in _____ place. In this Will, I refer to my Executor and Trustee _____ for the time being as "my Trustee."

3. In the event of the death of both me and my Spouse _____ before any of my children have attained the age of 18 years then I appoint my friend/sibling, _____, to be the guardians of the persons and estate of such of my children who have not yet reached the age of 18 years and I hereby authorise my friend/sibling, _____, to use their unfettered discretion in making satisfactory arrangements for the maintenance, care, upkeep benefit, education, health and advancement in life of any of my children during their minority. If my friend/sibling, _____, are not willing or able to act as the guardian of any of my minor children during their minority then I appoint my (name alternate friend/sibling), _____, as the guardian of my children during their minority with the same unfettered discretion in making satisfactory arrangements for the maintenance, care, upkeep benefit, education, health and advancement in life of any of my children during their minority.

(OR, alternative naming joint guardians, which should be considered carefully in the event that one dies or is unwilling or unable to act or if they are married the effect of their potential separation/divorce.)

3. In the event of the death of both me and my Spouse before any of my children have attained the age of 18 years then I appoint, my friend/sibling, _____, and my

friend/sibling, _____, jointly, or the survivor among them, to be the guardians of the persons and estates of my children during their minority, and I hereby authorise the said _____ and to use their unfettered discretion in making satisfactory arrangements for the maintenance, care, upkeep, benefit, education, health and advancement in life of my said children during their minority. If neither _____ or _____ are willing or able to act as the guardians of the persons and estates of my children during their minority then I appoint, my friend/sibling, _____, to be the guardian of the persons and estates of my children during their minority, with the same unfettered discretion in making satisfactory arrangements for their maintenance, care, upkeep, benefit, education, health and advancement in life as if they were originally appointed guardian herein.

4. (For Plan Benefits) - I designate my Spouse, _____, to be the beneficiary of any amount, refund of premiums, or other benefit (called "plan benefits") that may become payable or available after the date of my death out of any plan, as that term is defined under *The Beneficiary Designation Act (Retirement, Savings and Other Plans)* of Manitoba, and without intending to limit the meaning of that term, it includes, pension funds, retirement income funds (RRIF), retirement savings plans (RRSP), locked-in retirement accounts (LIRA), locked-in retirement income funds (LRIF), or other plans in which I am an annuitant, participant or owner but does not include any of my tax-free savings accounts (TFSA) which shall be dealt with in accordance with the paragraph below titled "TFSA". If my Spouse has predeceased me, then I designate my Trustees appointed under this my Will to be the beneficiaries of my plan benefits, directing that such plan benefits form part of my general estate. This declaration is intended to be a designation made under *The Beneficiary Designation Act (Retirement, Savings and Other Plans)*, of Manitoba.

5. (For Tax-Free Savings Accounts) - I designate my Spouse, _____, to be the successor holder of any tax-free savings accounts ("TFSA") I may own at my death, with the intention that they shall, as successor holder, acquire all of my rights thereunder, including the unconditional right to revoke beneficiary designations, or similar directions imposed by me under any of my TFSA arrangements or relating to property held in connection with any of my TFSA arrangements. If my Spouse has predeceased me, then I appoint my _____, _____, to be the beneficiary of my TFSA in place and stead of my Spouse directing that such shall form part of my general estate to be held by them as trustee and distributed by them in accordance with the terms of this my Will. This declaration is intended to be a designation made under *The Beneficiary Designation Act (Retirement, Savings and Other Plans)* of Manitoba.

6. I give all my property, including all real and personal property and any property over which I may have a general power of appointment, to my Trustee upon the following trusts:

(a) Except as otherwise expressly provided in this Will, to use discretion in the realization of my estate and to sell, call in and convert into money any part of my estate which my Trustee does not wish to maintain, in such manner and upon such terms, at such time, either for cash or credit or part cash and part credit as my Trustee thinks best;

(b) To pay out of the capital of my estate my debts, funeral and testamentary expenses, and all duties and taxes payable in any jurisdiction in respect of my estate, or by this Will or any codicil, or in respect of my estate or any insurance on my life or property passing by survivorship by reason of joint tenancy, because it is my intention and I direct that all of the foregoing gifts, benefits, insurance and property shall be free of duties and taxes to the beneficiary. This direction shall not extend to or include any such taxes that may be payable by a purchaser or transferee in connection with any property transferred to or acquired by such purchaser or transferee upon or after my death pursuant to any agreement with respect to such property;

OR simple version:

To pay out of and charge to the capital of my general estate my just debts, funeral and testamentary expenses, income taxes, and any estate, inheritance and succession duties or taxes whether imposed by or pursuant to the law of this or any other jurisdiction whatsoever.

(c) [Insert disposition of personalty and/or specific bequests, if any];

(d) If my spouse/partner, _____, survives me by thirty (30) days, to pay or transfer to him/her the residue of my estate;

(e) If my spouse/partner, _____, does not survive me by thirty (30) days, to divide the residue of my estate equally among my children;

[but if any of my children fail to survive me by thirty (30) days and if any issue of that deceased child survive me by thirty (30) days, the issue shall take the share of residue to which such deceased child would have been entitled if then living, in equal portions *per stirpes*.]

(f) If none of my spouse/partner and issue survive me by thirty (30) days, I direct my Trustee to divide and distribute the residue as follows:

(insert instructions)

6. My Trustee may make any division of my estate or set aside or pay any share or interest either wholly or in part, using the assets forming my estate at the time of my death or at the time of such division, setting aside or payment, and I declare that my Trustee shall have the absolute discretion fix the value of my estate or any part thereof for the purpose of making any such division, setting aside or payment and the decision of my Trustee shall be final and binding.

(Insert any administrative provisions which may apply.
Samples are set out in the later precedents.)

IN WITNESS WHEREOF I have to this my last Will, written upon this and the preceding (___) pages, subscribed my name this ____ day of _____, 2___.

SIGNED, PUBLISHED )
AND DECLARED by the )
above named Testator )
_____ )
as and for ___ last Will and ) _____T_____
Testament, in the presence )
of us, both present at the )
same time, who at _____ )
request and in _____ presence )
and in the presence of each )
other, have hereunto )
subscribed our names as )
witnesses. )

_____A_____
Witness

_____B_____
Witness

**Instructions to lawyer:**
**Place exhibit stamp on the <u>back of the last page of the Will</u> and make sure the exhibit stamp is signed by the notary or commissioner who takes the witness's affidavit of execution (*see precedent example on next page*).**

This is Exhibit "A" referred to in the Affidavit of _____B_____ sworn (or affirmed) before me this ____ day of _____, 2___.

_____
A Notary Public / Commissioner for Oaths
in and for the Province of Manitoba

# 4. Affidavit of Execution

Form 74D

**THE KING'S BENCH**
**WINNIPEG CENTRE**

**AFFIDAVIT OF EXECUTION**

**IN THE MATTER OF THE LAST WILL AND TESTAMENT OF** _____, deceased. *(note: the affidavit of execution should be signed at the time the will is executed, in which case the word "deceased" should be deleted.)*

I, _____, of Winnipeg, Manitoba, MAKE OATH AND SAY:

1. THAT I know _____, of Winnipeg, Manitoba.

2. THAT on _____, I was personally present and did see the document marked as Exhibit "A" to this affidavit, executed by _____, as their last will, by signing their name at the end of the document and that at the time of execution of the will the testator was of the full age of 18 years and, in my opinion, the testator was of sound mind, memory and understanding at the time of execution of the will.

NOTE: If the will was signed by a third party for and on behalf of the testator at the testator's request, paragraph 2 should read: THAT on the _____, I was personally present and did see the document marked as exhibit "A" to this affidavit signed by _____, as the last will of _____ by signing the name of the testator to the will at the request of, and in the presence of, the testator, who was physically unable to sign their) name or make their mark, at the end of that document and that at the time of the execution of the will the testator was of the full age of 18 years and, in my opinion, the testator was of sound mind, memory and understanding at the time of execution of the will.

3. THAT the will was so executed by the testator in my presence and the presence of _____, of Winnipeg, Manitoba, who were both present at the same time; whereupon we in the presence of the testator, attest and subscribe the said will as witnesses.

4. THAT neither I nor _____ is a beneficiary, nor the spouse of a beneficiary, named in the said will (or the contrary, as the case may be).

(*Note: complete paragraph 5 only if the will or codicil was executed on or after June 30, 2004*).

5. THAT neither I nor _____ is a beneficiary, nor the common-law partner of a beneficiary, named in the will (or the contrary, as the case may be).

NOTE: Subsection 12(1) of *The Wills Act* defines "common-law partner" as follows:

"**common-law partner**" of a person means

(a) another person who, with the person, registers a common-law relationship under section 13.1 of *The Vital Statistics Act*, and who is cohabiting with the person, or

(b) another person who, not being married to the person is cohabiting with him or her in a conjugal relationship of some permanence.

6. THAT no other copy of the will was executed by the testator.

SWORN before me at Winnipeg, Manitoba, this ____ day of _____, 2____. )
)
)
)
)

_____

_____

A Notary Public in and for the
Province of Manitoba.

(* The necessary modifications should be made to this form if it relates to the execution of a codicil.)

# 5. Commentary on Sample Will Clauses (Based on Sample Will #1)

The following are sample will clauses with commentary on each. They follow a format used by Cheryl L. Daniel in a paper prepared for the Legal Education Society of Alberta. The attached precedents and comments are intended to be illustrative of some practical considerations only, not to be exhaustive, and for obvious reasons we disclaim any liability for any use to which they may be put.

**THIS IS THE LAST WILL of me, _____, of the City of _____, in the Province of _____.**

In the event the testator is known by other names in any official documents, these should be included and can be inserted by saying "also known as John Theodore Doe".

Thought should also be given to including the testator's current address, occupation, and/or spousal relationship to ensure proper identification and to give greater certainty. An example is as follows:

> *"John Theodore Doe, also known as Ted Doe, currently of the City of _____, blacksmith, husband of Jane Doe."*

If the will is made in contemplation of marriage or a common-law relationship, always include the name of the intended spouse or common-law partner to comply with *section 17* of *The Wills Act*. Keep in mind the line of cases which state that a general reference to marriage only will not save the will from revocation on a subsequent marriage.

If some or all of the will provisions are to be conditional upon the marriage taking place or the common-law relationship commencing, the will should say so expressly.

**1. I revoke all former Wills and Codicils made by me.**

Every will should include a revocation clause. Failure to include it may result in a previous will remaining valid, to be read with the current will except insofar as the latter may be inconsistent with the former. Be familiar with *section 16* of *The Wills Act*.

*Quaere*: Does the later will, in the absence of a revocation clause, revoke an earlier will?

If the previous will has not been revoked by a revocation clause in a later will or by the destruction of the prior will with the intention of revoking it, note the conclusions of the Supreme Court of Ontario in the case of *Bishop Estate v. Reesor* (1990), 39 E.T.R. 36 (Ont. H.C.).

In this case the testatrix attempted to cancel a previous will by writing diagonally across the face of the will the words "cancelled the 13th day of May, 1988" and then signed her name. The court held that this constituted a holograph will which validly revoked the previous will.

Revocation clauses frequently include "wills and other testamentary dispositions", a reference to documents and instruments which are testamentary in character. These are valid dispositions only if they comply with the terms of *The Wills Act*, or are otherwise saved or given effect to under *section 23* of *The Wills Act*. In *Re Bottcher Estate,* 1990 CanLII 710 (BC SC) *(*1980), 39 E.T.R. 19 (B.C.S.C.) the words "I hereby revoke all my former wills and testamentary dispositions heretofore made by me and I declare this shall be my last will and testament" were not sufficient to cause the court to rule that such a clause revoked an RRSP designation. The court held that to revoke such a disposition, a clearer intention must be expressed in the will.

As the revocation clause is seldom intended by the testator to revoke beneficiary designations, it is better to avoid the phrase "other testamentary dispositions" and avoid the potential problem of revoking more than the testator probably intends. Note however that careful wording must be used where the client has made or intends to make a will in another jurisdiction in order to deal with property in that other jurisdiction.

**2. I appoint _____ sole Executor and Trustee of this my Will, but if _____ is not alive or is unable or unwilling to act or continue to act, I appoint _____ Executor and Trustee in _____ place. I hereinafter refer to my Executor__ and Trustee__ for the time being as "my Trustee."**

This clause provides for a substitute appointment, not only in the event of the originally named executor not surviving the testator, but in the event of that person being unwilling or unable to act or continue to act as executor at any time. Accordingly the clause will avoid having to obtain letters of administration with will annexed if the executor named cannot or will not act for a reason, such as death, incapacity, or unwillingness to act.

For ease of reference, consider including a statement in the will that the executor(s) and trustee(s), whether original or substituted or whether singular or plural, would be referred to in the will as "my Trustee" or "my Trustees."

Be familiar with *section 15* of *The Wills Act.* A person who is appointed executor in a will is not by that reason alone incompetent to act as a witness to the will.

**4. I declare that the proceeds of my registered retirement savings plans, registered retirement income funds, deferred profit sharing plans, tax free savings accounts, and other pension benefits owned by me at the time of my death shall be payable to my _____ if ___ survives me as if my _____ were the designated beneficiary thereof. If my _____ shall have predeceased me, the plans or funds or accounts shall form part of the residue of my estate and be treated in the same way as the residue.**

**(OR: instead of the last line above: "If my _____ (person named above as beneficiary) shall have predeceased me, I designate _____ as beneficiary of the proceeds of my REGISTERED RETIREMENT SAVINGS PLANS and REGISTERED RETIREMENT INCOME FUNDS . . .)**

**OR**

**4. I designate my Spouse, _____, to be the beneficiary of any amount, refund of premiums, or other benefit (called "plan benefits") that may become payable or available after the date of my death out of any plan, as that term is defined under *The Beneficiary Designation Act (Retirement, Savings and Other Plans)* of Manitoba, and without intending to limit the meaning of that term, it includes, pension funds, retirement income funds (RRIF), retirement savings plans (RRSP), locked-in retirement accounts (LIRA), locked-in retirement income funds (LRIF), or other plans in which I am an annuitant, participant or owner but does not include any of my tax-free savings accounts (TFSA) which shall be dealt with in accordance with the paragraph below titled "TFSA". If my Spouse has predeceased me, then I designate my Trustees appointed under this my Will to be the beneficiaries of my plan benefits, directing that such plan benefits form part of my general estate. This declaration is intended to be a designation made under *The Beneficiary Designation Act (Retirement, Savings and Other Plans)*, of Manitoba.**

**AND for Tax-Free Savings Accounts**

**4.1 I designate my Spouse, , to be the successor holder of any tax-free savings accounts ("TFSA") I may own at my death, with the intention that they shall, as successor holder, acquire all of my rights thereunder, including the unconditional right to revoke beneficiary designations, or similar directions imposed by me under any of my TFSA arrangements or relating to property held in connection with any of my TFSA arrangements. If my Spouse has predeceased me, then I appoint my , , to be the beneficiary of my TFSA in place and stead of my Spouse directing that such shall form part of my general estate to be held by them as trustee and distributed by them in accordance with the terms of this my Will. This declaration is intended to be a designation made under *The Beneficiary Designation Act (Retirement, Savings and Other Plans)* of Manitoba**

**Where the testator has registered plans among their assets,** consideration should be given to confirming the designation of beneficiary in the will (after first verifying that all of the designations are in keeping with the testator's intentions).

**Note:** Be aware that in any Part IV accounting, *section 37* of *The Family Property Act* removes the value of RRSP or pension benefits from consideration if the surviving spouse or common-law partner is designated as beneficiary in the registered plan documents. If appropriate, consideration might be given to designating the *estate* as beneficiary in the plan document, with the will then directing the proceeds to be payable to the spouse or common-law partner. The income tax rollover is still available by way of a joint election between the spouse and executor, but the assets would then be reflected in *The Family Property Act* accounting. Please make sure you find out who is intended to pay the income taxes on the RRSP proceeds and make this clear in the will.

The designation of a beneficiary in an insurance policy, an RRSP, RRIF, TFSA, or a pension plan is a disposition of a benefit which is testamentary in character. Note that between spouses it is more efficient to name the surviving spouse/common-law partner as a successor holder rather than a beneficiary, as there is otherwise a limited time after death of the first-to-die for the survivor to fold the deceased spouse/common-law partner's TFSA into their own.

Be familiar with the statutory provisions which permit this disposition or designation to be made without compliance with *The Wills Act.*

Realize the effect and the limitation of the statutory provisions:

(i) *The Insurance Act*, *section 167(1)*: The life insured may designate a beneficiary to receive the insurance money. If the insured wishes to change the beneficiary, they must give notice to the insurance company.

*The Insurance Act*, *section 171(1):* If one beneficiary predeceases the life insured, unless there is a contingent provision in the declaration to address that event, the proceeds are divisible among the remaining beneficiaries in accordance with their number. So, if there are 3 beneficiaries and they all survive the insured they each receive one third. If 1 of the 3 predeceases the insured, and there is no contingent distribution for that person, then the surviving 2 beneficiaries each receive one-half. If there are no surviving beneficiaries, the insurance money is payable to the estate of the life insured.

*The Insurance Act, section 193:* If both the life insured and the beneficiary die at the same time or in circumstances rendering it uncertain which survived the other, the insurance money is payable as if the beneficiary had predeceased.

*The Insurance Act*, *sections 148(1)* and *(2)*: A beneficiary of an insurance company RRSP may be designated in the contract in some cases. To the extent that some RRSPs qualify as "life insurance contracts", the provisions of this *Act* will apply to RRSPs as well as life insurance policies as such.

(ii) *The Beneficiary Designation Act (Retirement, Savings, and Other Plans), section 2:* This section permits the designation of a beneficiary under a "plan" (as defined in the *Act*). The *Act* now applies to all TFSAs, RRSPs and RRIFs as defined in *Income Tax Act* (Canada). It also applies to pension plans. Query whether the *Act* requires express reference to each individual plan for a designation to be effective.

Be aware of income tax ramifications of failing to designate a beneficiary of an RRSP or RRIF by a will or having an ineffective designation made in the policy or plan contract.

The lack of beneficiary designation could cause the proceeds to fall into the residue of the estate. Consequently, the proceeds could be subject to the claims of creditors and/or could be shared by persons other than the spouse or common-law partner, resulting in the possible loss of the tax rollover.

**5. I GIVE all my property, including any property over which I may have a general power of appointment, to my Trustee__ upon the following trusts:**

Occasionally, a testator may have a "power of appointment" that could be exercised in their will. A general power of appointment is a power given by a donor to a donee allowing the donee to appoint property in favour of anyone they wish, sometimes including themselves. The power should be capable of being exercised by deed or by will.

There are also special powers of appointment. Powers of appointment are not a simple legal construct and won't be delved into deeply here. An example of a power of appointment is giving authority to an income beneficiary of a trust to determine to whom the capital in the trust is given on their death. A father may leave a will that establishes a trust for the benefit of his son while the son is alive and then states that on the son's death, the son is given the power of appointment over the capital remaining in the trust.

The exercise of a power of appointment in a will is not common and while there are historical case law references to the inability of a testator to delegate testamentary powers, the principle seems to have been accepted (if not by *stare decisis*, at least by *obiter dicta*) on the ability of a testator to delegate the distribution of their property to another person. It is arguable that there is no rule against delegation. (See Oosterhoff on Wills, 8th edition).

The testator should, nevertheless, be asked if they have any power of appointment which they should execute through their will. If so, specific reference to the particular power of appointment being exercised should be included in the will so as to avoid the result in *Re Von*

*Riedemann Estate* (1987), 26 E.T.R. 74 (B.C.S.C.) where the exercise of the power of appointment was held not to be valid as the will used "boiler plate" language and did not specifically refer to the instrument conferring the powers nor did it accurately describe the powers.

**5. I GIVE all my property, including any property over which I may have a general power of appointment, to my Trustee__ upon the following trusts:**

**(a) Except as otherwise expressly provided in this Will, to use ____ discretion in the realization of my estate and to sell, call in and convert into money any part of my estate which my Trustee___ do ____ not wish to maintain, in such manner and upon such terms, either for cash or credit or part cash and part credit and at such times as my Trustee think best.**

It is important that the will give the executor the power to sell as this power is not otherwise implied by *The Trustee Act.*

Where a power to sell is given, *sections 27, 28* and *38* of *The Trustee Act* imply the power to lease and the power to give options.

**5. (b) To pay out of the capital of my estate my debts, funeral and testamentary expenses, and all duties and taxes payable in any jurisdiction in respect of my estate, or by my Will or any Codicil to my Will, or in respect of any insurance on my life or property passing by survivorship by reason of joint tenancy, because it is my intention and I direct that all of the foregoing gifts, benefits, insurance and property shall be free of duties and taxes. This direction shall not extend to or include any taxes that may be payable by a purchaser or transferee in connection with any property transferred to or acquired by such purchaser or transferee upon or after my death pursuant to any agreement with respect to such property.**

**OR, simple version:**

**To pay out of and charge to the capital of my general estate my just debts, funeral and testamentary expenses, income taxes, and any estate, inheritance and succession duties or taxes whether imposed by or pursuant to the law of this or any other jurisdiction whatsoever.**

Be familiar with *sections 36(1)* and *36(2)* of *The Wills* Act. Unless there is an explicit direction in a will, the general direction for the payment of debts does not apply to the payment of a mortgage that encumbers property of the testator. If a beneficiary receives a gift of a piece of land under the will and the land is subject to a mortgage at the time of the testator's death, the land will continue to be subject to the mortgage when it is transferred to the beneficiary pursuant to the will, as the general direction in the will to pay debts does not apply to such a mortgage.

Estate or succession duties are not levied in Canada at this time although the laws may change from time to time. It is possible that the testator may have non-resident beneficiaries to whom the payment of such duties would apply. The payment of such duties are usually the responsibility of the beneficiary and not the estate, and the testator should be canvassed as to whether he or she wishes the estate to bear such levies. This clause is often included to address the possibility that estate and succession duties could apply again in Canada at a future time.

**5. (c) To give (and deliver) to my _____, _____, if _____ survives me by thirty (30) days, all my personal belongings such as clothing and jewellery, and all my household furniture, furnishings, and household effects and any personal automobiles and accessories thereto which I may own at the time of my death. If my _____ should predecease me or fail to survive me by thirty (30) days, my Trustee__ shall divide all the said articles among my children surviving me as my children shall within three (3) months after my death agree among themselves or, if they do not agree within three (3) months after my death, as my Trustee__ may in ___ discretion consider equitable; [provided, however, that if in the opinion of my Trustee__ my children are not old enough to make use of all the said articles, my Trustee__ may in ___ discretion dispose of them, or any of them, as ____ consider__ advisable and add the proceeds to the residue of my estate. The receipt of any minor child of mine shall be a good and sufficient discharge to my Trustee__ for any articles delivered to such child.]**

It should be noted that a gift "To transfer and deliver my 1991 Cadillac Automobile to my son, Robert Doe" where Robert lives in Ontario, would require that the estate would bear the cost of delivering/shipping the vehicle to him.

If the Cadillac has been replaced at the time of death with another vehicle, the gift has adeemed. To avoid ademption, where the gift was intended to include any replacement vehicle be specific about the gift including any replacement vehicle if the Cadillac doesn't exist on death, using phrasing such as "or whatever automobile or automobiles I may own at the date of my death if the Cadillac does not exist on my death."

If disposing of personalty by giving beneficiaries flexibility to agree on how certain items are to be dealt with, consider giving a limited time frame without being too limiting on time as to create an urgency to beneficiaries dealing with distribution matters. Detail what happens if an agreement cannot be reached by them. For example, if the beneficiaries are unable to agree within the time specified, the trustees could then have the authority to distribute the disputed item(s) as they see fit, as in the example above. Alternatively, they could instead be given the authority to sell the item(s) in dispute and add the proceeds to the residue of the estate.

The property being gifted should be adequately described so that the interest that is being gifted can be ascertained with certainty. Sometimes the testator may wish to leave certain bonds or guaranteed investment certificates of the testator to a certain beneficiary. Make certain the bonds, etc. are adequately described. Is it a gift of just the bond itself, or is it a gift of the bond with any matured coupons thereon, or is it a gift with the bond and accrued interest to date of death? This was the question before the court in *Re Paxton Estate* (1974), 43 D.L.R. (3d) 321 (Ont. H.C.). The testator directed his executor to sell his bonds and to divide the proceeds in a specific way. The bonds had matured but uncashed coupons were attached to them and there was also interest accruing on the bonds from the last payment date to the date of death. The question before the court was whether the term "bonds" included these other two features. The problem could have been avoided if the gift had been adequately described.

**5. (d) To pay the following sums:**

**(i) to _____ if _____ survives me, the sum of $_____; and**

**(ii) to XYZ Organization the sum of $_____ to be used for _____. The receipt of the Treasurer or other proper officer of the organization shall be a full and sufficient discharge to my Trustee__ and my Trustee__ shall not be bound to see to its application, nor to inquire as to the authority to give such receipt.**

If the testator is leaving a legacy to an organization or society, it should be contacted to ensure the correct name spelling and address are obtained and inserted in the will. Some charities exist on a national, provincial and local level and it is important to determine which chapter is intended to be the beneficiary. Check the CRA website for registered status of charities/organizations.

The testator should be canvassed to determine whether they wish the legacy to a charity to be used for a specific purpose or just for the general purposes of the charity. The testator should be encouraged to be reasonable and, if possible, to provide an alternate use if the primary use is not feasible. The executor would not be responsible for monitoring whether the charity uses the funds as intended.

**5. (e) If my _____ survives me by thirty (30) days, to pay or transfer to _____ the residue of my estate;**

As noted earlier a survival period such as a "30 day" clause serves to define survivorship and addresses the situation where testator and beneficiary (usually spouses) die within a short time of each other (whether as a result of a common accident or other reason). This clause prevents unintended results (based on unexpected order of deaths) and duplication of administration of estate assets, more of a concern when probate fees apply. The survivorship period may be any length. Some prefer 15 days to avoid undue delay.

It should be kept in mind that neither jointly owned property passing by right of survivorship nor property that passes through beneficiary designation (see clause 3) will pass pursuant to this clause, but will instead pass outside the will directly to the surviving joint tenant or named beneficiary. Consider making the designation of RRSPs, RRIFs, etc. in clause 3 conditional upon a consistent survivorship period.

You should also check with the testator whether the surviving partner has sufficient assets or income to manage during the "30 day" period. If not, then some provision will need to be made for that person during that time period.

**5. (f) If my _____ fails to survive me by thirty (30) days, to divide and distribute the residue of my estate equally among my children; but if any child of mine shall then be dead and if any issue of such deceased child shall then be living, such issue shall take the share of the residue to which such deceased child would have been entitled if then living, in equal shares *per stirpes*.**

As noted above, lawyers need to exercise care when using the term *per stirpes* (and other phrases that have a precise legal definition) when drafting wills. See section 2.(b) "Use of Language" earlier in this chapter. In addition, the article by Carmen S. Theriault entitled "*Hamel Estate v. Hamel*: Should Will Drafters Abandon the Use of Issue Per Stirpes" (1998) 18 Est. & Tr. Q. 127 discusses several cases involving the improper use of "*per stirpes*." This article and the 2004 Ontario case *Lau v. Mak,* 2004 CanLII 6673 (ON SC), 10 E.T.R. (3d) 152 (Ont. S.C.)) are recommended reading for anyone who is uncertain as to whether they understand the implications of using the "*per stirpes*" terminology in will drafting.

If the lawyer is unsure of the correct use of a shorthand word or phrase, it would be preferable to come up with other plain language terminology to express the testator's intention.

**ALTERNATE CLAUSES 5(e) and 5(f) - Spousal Trust Followed by Provision for Children**

**5. (e) If my spouse survives me, then my Trustee shall set aside and hold for the sole and exclusive benefit of my spouse, during ___ lifetime, a fund equal in amount to _____ of my remaining estate. My Trustee shall invest and keep invested such fund and shall pay to my spouse the net annual income derived from such fund and shall pay or apply the whole or such part or parts of the capital of such fund to or for the benefit of my spouse.**

Note: This is a very simplified provision to hold funds in trust for a spouse and it will not necessarily be complete enough to be relied upon for that purpose.

The testator may not wish to leave the entire estate outright to the spouse or common-law partner, but rather to establish a spousal trust and to provide for the income of the trust to go to the spouse or common-law partner during their lifetime. The testator may wish to do this for tax reasons or to ensure that the testator's children would not be disinherited.

Where a spousal trust is established, the rights of the spouse or common-law partner under Part IV of *The Family Property Act* may not be satisfied, and a spousal or common-law relationship agreement may have to be executed by the spouses or common-law partners to ensure the trust will be effective. If the testator owns capital property and there are or may be capital gains concerns, it will be very important to ensure that the terms of the spousal trust will qualify the trust as a "spousal trust" within the meaning of the *Income Tax Act*.

To retain a trust's status as a spousal trust, within the meaning of the *Income Tax Act*, the spouse must be entitled to receive all of the income of the trust during their lifetime, meaning they have to have a legal right to enforce payment of the income. The right must be exclusive. The wording should not allow for any possibility that any income might be withheld from the spouse. In addition, no other person other than the spouse can be entitled to receive capital in the trust or have the use of the capital in the trust. The spousal trust provisions must be carefully drafted to ensure no person other than the spouse can encroach on income or capital.

**5. (f) Upon the death of my spouse/common law partner, _____, or, if he/she fails to survive me, upon my death, I direct my Trustee to divide the residue of my estate then remaining into equal shares for each of my children then alive and for each child of mine who is not then alive and who has left a child or children then alive, in which case the share of the deceased child is to be divided equally among his or her children who are then alive.**

**The shares of each such child or grandchild of mine (hereafter referred to as "beneficiary") are to be dealt with as follows:**

**(i) The share of any beneficiary who has attained the age of [ ] shall be paid directly to the beneficiary.**

**(ii) The share of any beneficiary who has not yet attained the age of [ ] is to be held and kept invested by my Trustee in a separate trust for the benefit of such beneficiary. My Trustee shall have the discretion to pay to or for the benefit of the beneficiary so much of the income and/or capital of the beneficiary's share as my Trustee may consider necessary or advisable for in my Trustee's unfettered discretion. Any income not paid out in a year is to be added to and form part of the capital of the trust. In addition, my Trustee shall pay the capital of the beneficiary's share as follows:**

**a) On the beneficiary attaining the age of ___ years, ___ per cent of the capital then remaining is to be paid or transferred to him or her;**

**b) On the beneficiary attaining ____ years, ____ per cent of the capital then remaining is to be paid or transferred to him or her;**

**c) On the beneficiary attaining the age of ____ years, the balance of the capital and income then remaining is to be paid or transferred to him or her;**

**(iii) If the beneficiary shall die under the age of ____ years, my Trustees shall divide the beneficiary's share (or the amount of the share then remaining) among the issue of the beneficiary who survive him or her, in equal shares *per stirpes*. If such individual leaves no issue, the part shall be divided among the siblings of such individual alive at the death of such individual in equal shares *per capita.***

Note: In 5(f)(ii)(b) above clarity may be added that if at the time a share is payable to a beneficiary under (b) is between the ages set out in (b) and (c) that the beneficiary is entitled to receive the cumulative percentages set out in (a) and in (b).

The above is a trust where both income and capital are in the trustee's discretion, with payment of capital to take place in several installments over time. The client's wishes may be different. For example, if there is a wish to have income paid out to the beneficiary directly commencing at a certain age, then the wording would be changed accordingly. Similarly, some clients may want to allow for encroachments of capital to be permitted for limited purposes only, or they may want to completely prohibit encroachments. Note that the implied power given by *section 29* of *The Trustee Act* authorizes the trustee to use only income for a minor, with no ability to encroach on capital.

The will should also include a clause authorizing payment on behalf of the beneficiary of the trust, including a minor, to a parent or guardian of the beneficiary or to such other person as the trustee considers advisable and allowing a receipt to the executor from such a person (see *s. 31* of *The Trustee Act*). In the absence of such a provision, no receipt or discharge is available in respect of payments to or on behalf of a minor until the child attains the age of majority or unless the trustee passes their accounts with the court.

Precedent clauses for beneficiaries with special needs (whether minors or adults) are found elsewhere in the materials.

| | | |
|---|---|---|
| **5.** | **(g)** | **If none of the beneficiaries named in the preceding paragraphs of my Will survives me or if they all die before my estate is absolutely vested in any one or more of them, upon the failure of all or part of my estate to vest, to divide the balance of my estate then remaining as follows:** |

Where children are young, consider the possibility of a common accident involving all members of the immediate family or a "worst case scenario" (as previously discussed). Spouses should consider distribution in such circumstances in the context of their combined estates, and not of each separate estate, if that is the intention. Similarly, spouses should consider all classes of eligible or appropriate beneficiaries and not just the family of the particular testator, with both wills including the same provision, if that is the intention. That way, the beneficiaries are the same, regardless of the order in which the spouses die, if that is the intention.

**6. My Trustee__ may make any division of my estate or set aside or pay any share or interest either wholly or in part, using the assets forming my estate at the time of my death or at the time of such division, setting aside or payment, and I declare that my Trustee__ shall in ___ absolute discretion fix the value of my estate or any part thereof for the purpose of making such division, setting aside or payment and ____ decision shall be final and binding upon all persons concerned.**

This clause will allow the trustee flexibility to pass estate assets, including, for example, chattels, to the beneficiaries *in specie*, if practical, so that the property does not have to be sold to parties outside the family in order to turn assets into cash. There is an excellent article by J. Albert Brulé ["Specie Distribution in Estates" (1976-77) 3 Est. & Tr. Q. at 28] which sets

forth the application of *specie* distribution, the value of having such a power given to the executor and the result if such power is not provided for in the will.

The interplay of the power to sell/convert, the power to retain and the power to distribute property *in specie* can create an issue where there are multiple executors who disagree on whether to sell/convert or retain and distribute *in specie,* and where there are multiple beneficiaries some of whom desire one or more assets to be sold and some of whom desire one or more assets to be given to them as part of their share of the estate. There is no rule of paramountcy between the powers absent specific provision in the will.

Where all the beneficiaries agree on the form of distribution then the executors are required to follow that direction. Where there is a possibility that specific property may be desired by one or more, but not necessarily all beneficiaries there should be consideration of whether there is need for a specific provision in the will requiring an executor to either sell or to retain and distribute *in specie*.

**6. I authorize my Trustee___, if ____ considers__ it advisable, to borrow the money for the purposes of the administration of my estate, and the decision of my Trustee__ as to the terms of such borrowing and as to what assets are to be pledged as security, if any, shall be absolute and final and not open to question by any person.**

This helps to address liquidity problems that could arise because of income tax and/or capital gains liability or where the estate is comprised mainly of investments that are not maturing for several months after the death of the testator. Ask the testator specifically whether they wish to insert such a clause.

**6. I AUTHORIZE my Trustee__ to pay, commute or prepay any taxes or duties which may arise during the administration of my estate and I also authorize my Trustee as _____ may deem advisable, to use any exemptions which may be available and to enter into and make any elections, designations or determinations which in _____ discretion _____ shall determine to be necessary or preferable, without limitation including specifically any election under the provisions of the *Income Tax Act* (Canada) or any other taxing statute.**

There are numerous provisions in the *Income Tax Act* (Canada) which permit a legal representative to make elections or designations. The elections or designations may affect the taxation of the deceased taxpayer for their year of death, the taxation of their estate, the taxation of the beneficiaries of their estate or any combination of them. Some of the elections and designations to consider are as follows:

(a) Separate Return - Value of Rights and Things - section 70(2) of the *Income Tax Act:*

One of the income items that must be included in the deceased's terminal return is the value of all rights or things (i.e., amounts that were due but unpaid at the

time of death). However, under section 70(2) a legal representative can elect to file a separate income tax return for these amounts as if the deceased was another taxpayer whose only income was the value of the rights and things.

(b) Separate Return - for Business Income From a Partnership or Proprietorship - section 150(4) of the *Income Tax Act.*

Where the deceased was a partner or sole proprietor, the legal representative can elect to file a separate return for the deceased's business income from the partnership or sole proprietorship, as the case may be, for the period beginning from the end of the fiscal year of the business to the date of death. The return would be filed as if it were a return for a separate person whose sole income was from the partnership or the proprietorship.

(c) Separate Return for The Deceased's Income From Trust – section 104(23)(d) of the *Income Tax Act:*

Under section 104(23)(d) a legal representative can elect to file a separate return for income the deceased received from a testamentary trust if the deceased died after the end of the taxation year of the trust but before the end of the calendar year in which the taxation year of the trust ended.

(d) Spousal Rollover – section 70(6.2) of the *Income Tax Act*:

Where, on the death of the taxpayer, property is distributed to his or her spouse or common-law partner or to a qualifying testamentary spousal trust, such property (provided certain conditions are met) is transferred on a "rollover" or "tax deferred" basis. This rollover automatically applies unless the legal representative elects pursuant to the provisions of section 70(6.2) not to have the rollover provisions apply to a particular property. Accordingly, the legal representative is able to select those properties for which they do not desire a rollover.

(e) Tainted Spousal Trust - section 70(7) of the *Income Tax Act*:

Where the will of the deceased provides that all debts, funeral expenses and taxes and duties are to be paid out of trust property, such provisions prevent the trust from being a qualified spousal trust. However, section 70(7) permits the personal representative to file a separate election, the effect of which, is to treat the otherwise tainted spousal trust as a qualifying spousal trust.

(f) Farm Rollovers - sections 70(9) and 70(9.2) of the *Income Tax Act*:

Sections 70(9) and 70(9.2) provide for certain rollovers in respect of "farm property", shares of a "family farm corporation" or an interest in a "family farm partnership" where such property is being transferred to a child or grandchild of the deceased (who are very broadly defined to include other individuals as well). These rollovers will automatically apply unless the legal representative elects to transfer the property at an amount between its fair market value and its adjusted cost base, in the case of land, or its undepreciated capital cost, in the case of depreciable capital property.

(g) Reserves - section 72(2) of the *Income Tax Act*:

The *Income Tax Act* does not allow any reserves to be claimed in the year of death except where the right to receive the income in respect of which the reserve is being claimed is transferred to the deceased's spouse or common-law partner or to a qualifying spousal trust. However, the reserve is available only where the legal representative and spouse or common-law partner, or the trust, as the case may be, jointly elect.

(h) Preferred Beneficiary Election - section 104(14) of the *Income Tax Act*:

A preferred beneficiary election allows a trust to deduct from its income an amount in respect of which a preferred beneficiary election is made. In order for the trust to be entitled to this deduction, the beneficiary and the trust must make a joint election within 90 days of the end of the trust's taxation year.

However, the Preferred Beneficiary Election for taxation years of trusts that begin after 1995 is limited to beneficiaries who have a certain relationship with the settlor and who are either entitled to a tax credit under section 118.3(1) of the *Income Tax Act* (Canada) for mental or physical impairment, or who are over 18 years old and dependent on certain other persons because of mental or physical infirmity.

(i) Flow Through Provisions - section 104 of the *Income Tax Act*:

Special provisions are included in section 104 which permit a trust, if the trust so designates, to "flow through" to a beneficiary dividends from a taxable Canadian corporation, interest, taxable capital gains and foreign source income, as well as a refund of premiums from a registered retirement savings plan and single payments out of a pension fund or employee death plan. However, it should be noted that several pre-conditions must be satisfied prior to the trust being able to make any such designations.

(j) Payment of Tax Liabilities in Instalments - section 159(5) of the *Income Tax Act*:

Section 159(5) permits the legal representative to elect to pay the deceased's tax in respect of certain items in up to ten equal annual consecutive instalments with interest payable on the unpaid balance at the prescribed rate in effect at the time of the election.

(k) Capital Losses of The Estate - section 164(6) of the *Income Tax Act*:

Section 164(6) permits a legal representative to elect to treat certain capital losses and/or terminal losses of the estate for its first taxation year as capital losses and/or terminal losses of the deceased taxpayer for the year in which they died.

# 6. Sample Will #2 - Gift to Spouse and Gift Over to Children, in Trust (Not *Per Stirpes*)

THIS IS THE LAST WILL AND TESTAMENT of me, CAROL JOAN SMITH, of the City of Winnipeg, in the Province of Manitoba, Physician.

1. I REVOKE all wills and codicils made by me up to this date.

2. I APPOINT my husband, LARRY CHARLES GRANT, to be the executor of my will and trustee of my estate, but if my husband shall predecease me or otherwise be unable or unwilling to act as executor and trustee, then I APPOINT my brother, ROBERT GARY SMITH, and my brother-in-law, GEORGE WILLIAM JONES, to be the executors and trustees in his place. I declare that the expression "my trustee" used throughout my will shall mean the executor and trustee or the executors and trustees for the time being, whether original or substituted.

3.

**3. I declare that the proceeds of my registered retirement savings plans, registered retirement income funds, deferred profit sharing plans, tax free savings accounts, and other pension benefits owned by me at the time of my death shall be payable to my _____ if ___ survives me as if my _____ were the designated beneficiary thereof. If my _____ shall have predeceased me, the plans or funds or accounts shall form part of the residue of my estate and be treated in the same way as the residue.**

**(OR: instead of the last line above: "If my _____ (person named above as beneficiary) shall have predeceased me, I designate _____ as beneficiary of the proceeds of my REGISTERED RETIREMENT SAVINGS PLANS and REGISTERED RETIREMENT INCOME FUNDS . . .)**

**OR**

**4. I designate my Spouse, _____, to be the beneficiary of any amount, refund of premiums, or other benefit (called "plan benefits") that may become payable or available after the date of my death out of any plan, as that term is defined under *The Beneficiary Designation Act (Retirement, Savings and Other Plans)* of Manitoba, and without intending to limit the meaning of that term, it includes, pension funds, retirement income funds (RRIF), retirement savings plans (RRSP), locked-in retirement accounts (LIRA), locked-in retirement income funds (LRIF), or other plans in which I am an annuitant, participant or owner but does not include any of my tax-free savings accounts (TFSA) which shall be dealt with in accordance with the paragraph below titled "TFSA". If my Spouse has predeceased me, then I designate my Trustees**

**appointed under this my Will to be the beneficiaries of my plan benefits, directing that such plan benefits form part of my general estate. This declaration is intended to be a designation made under *The Beneficiary Designation Act (Retirement, Savings and Other Plans)*, of Manitoba.**

**AND for Tax-Free Savings Accounts**

**4.1 I designate my Spouse, , to be the successor holder of any tax-free savings accounts ("TFSA") I may own at my death, with the intention that they shall, as successor holder, acquire all of my rights thereunder, including the unconditional right to revoke beneficiary designations, or similar directions imposed by me under any of my TFSA arrangements or relating to property held in connection with any of my TFSA arrangements. If my Spouse has predeceased me, then I appoint my , , to be the beneficiary of my TFSA in place and stead of my Spouse directing that such shall form part of my general estate to be held by them as trustee and distributed by them in accordance with the terms of this my Will. This declaration is intended to be a designation made under *The Beneficiary Designation Act (Retirement, Savings and Other Plans)* of Manitoba**

**[*Commentary on clause 3 above:**

See earlier comments on beneficiary designations for plan benefits under the Commentary on Sample Will Clauses (Based on Sample Will #1). In addition, it is generally preferable for beneficiary designations for registered plans to be made in the registered plan documents. Where designations are made by Will the issuer should be advised so it has the corrected/changed/updated designations on their records.

However, for some purposes, a designation made in the Will is desirable. For example, to ensure that registered plan proceeds form part of an accounting under *The Family Property Act*, the registered plan documents would name the estate as the beneficiary, and a clause in the dispositive part of the will (that is, as a clause in paragraph 4, below) would then gift the registered plan proceeds to the spouse or common-law partner. In this case, the following wording could be used in the body of the Will:

provided my husband, LARRY CHARLES GRANT, survives me by thirty days, to pay and transfer to him the proceeds of any registered retirement savings plan or registered retirement income fund payable to my trustee provided that my trustee and my said husband make a joint election under the *Income Tax Act* to have the said proceeds added to a registered plan in my husband's name such that the proceeds of the said plan shall not be included in my taxable income or that of my estate.**]**

4. I GIVE all my assets and property, both real and personal, of every nature and kind where ever situate, including any property over which I may have a general power of appointment, to my trustee upon the following trusts:

(a) to use their unfettered discretion in the realization of my estate. My trustee 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 trustee 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 trustee 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 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 trustee considers to be in the best interests of my estate, and I also declare that no property not in fact producing income shall be treated as producing income;

(b) to pay out of the capital of my estate my just debts, my testamentary and funeral expenses, all income taxes, all capital gains taxes, and all estate, inheritance and succession duties or taxes whether imposed by or pursuant to the law of this or any other jurisdiction whatever that may be payable in connection with any property passing or being disposed of (or deemed so to pass or deemed to be disposed of by any governing law) on my death or in connection with any insurance on my life or by survivorship or by my will or any codicil to it and whether such duties or taxes be payable in respect of estates or interests which fall into possession at my death or any subsequent time; and I authorize my trustee to commute or prepay or defer any such duties or taxes. This direction shall not extend to or include any such taxes that may be payable by a purchaser or transferee in connection with any property transferred to or acquired by such purchaser or transferee upon or after my death pursuant to any agreement with respect to such property;

(c) If my husband is alive on the tenth (10th) day following the date of my death (the "Distribution Day"), my trustee shall pay or transfer the residue of my estate to my husband, for his own use and benefit;

(d) If my husband is not alive on the Distribution Day, my trustee shall divide the residue of my estate into equal shares for my children who are alive on the Distribution Day, and shall deal with each child's share as follows:

1. If a child has attained the age of 25 years, my trustee shall pay such child's share to him or her, for his or her own use and benefit.

2. If a child has not yet attained the age of 25 years, his or her share is to be held and keep invested by my trustee as a separate trust. During the period of time that the child is under the age of twenty-one (21) years, my trustee shall have the

absolute discretion to pay or apply to or for the benefit of the child all or any part or parts of the income derived from the child's share as my trustee in his uncontrolled discretion shall decide. Any income not so paid or applied in any year shall be added to the capital of the child's share. Between the child's twenty-first (21st) birthday and twenty-fifth (25th) birthday, my trustee shall pay to the child the net annual income derived from his or her share, in such annual or more frequent periodic installments as shall be convenient. When the child attains the age of twenty-one (21), my trustee shall pay or transfer one-half (1/2) of the capital of the child's share to the child, for his or her own use and benefit. When the child attains the age of twenty-five (25), my trustee shall pay or transfer the remainder of the capital of the child's share to the child, for his or her own use and benefit. Notwithstanding any other provision of this my will, my trustee may, at any time and from time to time, pay to or for the benefit of the child such amounts out of the capital of the share set aside for the child as my trustee in his uncontrolled discretion considers advisable.

3. If a child shall die before his or her twenty-fifth (25th) birthday, his or her share or the amount remaining shall be divided into equal shares between my children then alive and one (1) of such equal shares shall be added to the share of each of my children held in trust as set forth in this will;

(e) If any portion of the residue of my estate should at any time fail to vest indefeasibly in accordance with the provisions of this will, I direct my trustee to deal with the residue of my estate at such time as follows:

1. To pay or transfer one-half of the residue remaining in equal shares to my father, JOHN ROBERT SMITH, and my mother, SUSAN EMILY SMITH, for their own use and benefit, but if one of my parents is not then alive, my trustee shall pay or transfer this one-half portion to my surviving parent, for his or her own use and benefit. If both of my parents are not then alive, then this one-half portion is to be added to the other one-half portion and dealt with accordingly;

2. To pay or transfer one-half of the residue remaining in equal shares to my father-in-law, DANIEL EDWARD GRANT, and my mother-in-law, JUDITH JANE GRANT for their own use and benefit, but if one of my father-in-law or my mother-in-law is not then alive, my trustee shall pay or transfer this one-half portion to the survivor, for his or her own use and benefit. If both my father-in-law and mother-in-law are not then alive, then this one-half portion is to be added to the other one-half portion and dealt with accordingly.

5. I DECLARE that my trustee, when making investments for my estate including any testamentary trusts provided for under this will, shall not be limited to investments authorized by law for trustees, but may make any investments which in his or her uncontrolled discretion he or she considers advisable and my trustee shall not be liable for

any loss that may happen in connection with any such investment made by him or her in good faith.

6. IN ADDITION to all powers conferred by law, I confer upon my trustee the following powers which may be exercised from time to time without the consent or intervention of any beneficiary under this will and without obtaining any judicial authority:

(a) From time to time, to sell, exchange, mortgage, call in or convert, any or all of the investments which my trustee may originally make and to invest and re-invest them as my trustee in his or her uncontrolled discretion considers advisable.

(b) To borrow money for the purposes of my estate at such time, in such amounts, at such rates of interest and upon such terms and conditions as he or she may consider advisable, with power to mortgage, hypothecate, or pledge any property belonging to my estate as security.

(c) To lend funds or make advances upon terms of repayment and interest payments as my trustee considers an advisable investment within the scope of his or her investment power, and upon any security which my trustee deems sufficient, or upon no security whatsoever, in the uncontrolled discretion of my trustee.

(d) To give any guarantees regarding the fulfillment of any obligations or other matters in connection with my estate to the same extent as I could do if alive, and particularly if at the time of my death I am liable as guarantor, in order that the person or corporation for whom I may liable may not be unduly embarrassed.

(e) If at any time and for so long as any real and leasehold property shall form part of my estate, to let or lease any such real or leasehold property from month to month, year to year or for any term of months or years subject to such covenants and conditions as he or she shall consider advisable, to accept surrenders of leases and tenancies, to expend money in repairs and improvements and generally to manage the property, and to give any options with respect to the property or properties as he or she considers advisable in his or her uncontrolled discretion.

(f) If at any time my trustee holds in my estate any investment in or in connection with any company or corporation, my trustee 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.

(g) To make, or refrain from making, in his or her uncontrolled discretion, any elections, determinations, and designations permitted by any statute, or regulation enacted by any legislative or governmental body of any jurisdiction, and such exercise of discretion by my trustee shall be final and binding upon all the beneficiaries of my

estate notwithstanding that it may confer a tax advantage upon any beneficiary or beneficiaries at the expense of any other beneficiary or beneficiaries.

(h) To transfer or distribute any part of my estate in kind or in its actual state of investment for the shares of my beneficiaries and for that purpose to determine the value of all or any part of my estate; in that regard the decision of my trustee shall be final and binding despite any market fluctuations and, if he or she wishes, my trustee may employ the services of evaluators.

7. If my husband fails to survive me, I APPOINT my sister, MARGARET ELIZABETH SMITH, ("Margaret"), and my brother-in-law, GEORGE WILLIAM JONES, ("George"), jointly, or the survivor between them, to be the guardians of the persons and estates of my children who have not yet attained the age of majority, and I hereby authorize Margaret and George to use their unfettered discretion in making satisfactory arrangements for the maintenance, care, upkeep, benefit, education, health and advancement in life of my said children during their minority. If neither Margaret or George are willing or able to act as the guardians of the persons and estates of my children during their minority then I appoint, my friend/sibling, _____, to be the guardian of the persons and estates of my children during their minority, with the same unfettered discretion in making satisfactory arrangements for their maintenance, care, upkeep, benefit, education, health and advancement in life as if they were originally appointed guardian herein.
(Note: When naming joint guardians, considered carefully the event that one dies or is unwilling or unable to act or if they are married the effect of their potential separation/divorce.)

8. I AUTHORIZE my trustee to make any payments for any beneficiary of a trust, including a person under the age of majority or otherwise under disability, to a parent or guardian or person in *loco parentis* of any such person or to anyone to whom my trustee in his or her uncontrolled discretion deems it advisable to make such payments, whose receipt shall be a sufficient discharge to my trustee who shall not be bound to see to the application of any monies so paid. I expressly authorize the parent or guardian or person in *loco parentis* of any person under the age of majority or otherwise under a disability to make any election or elections on behalf of such person for the purposes of the *Income Tax Act* (Canada) or any similar legislation of any province or other jurisdiction in force from time to time.

9. I EXONERATE my trustee from any responsibility or liability for loss or damage which may be occasioned to my estate through a *bona fide* exercise by my trustee of any of the discretions vested in my trustee, whether as to retention, realization, conversion or investment.

10. MY TRUSTEE may employ and pay for such professional or other assistance as my trustee may deem requisite in the discharge of his or her duties as trustee, and without restricting the generality of the foregoing, in the event that my trustee shall be a solicitor, chartered accountant or other person engaged in any profession or business, to employ him

or her and to pay all usual professional and other charges for business transacted, time expended and acts done by him in connection with the carrying out of the provisions of my will including any act which my trustee not being a solicitor or chartered accountant or other person engaged in any profession or business could have done personally.

11. MY TRUSTEE is to be relieved from giving any bond or security for the administration of my estate in any part of Canada or in any other country or place unless mandatory by law.

IN TESTIMONY WHEREOF I have to this my last Will and Testament subscribed my name this 14th day of July, 2____, at the City of Winnipeg, in the Province of Manitoba.

SIGNED, PUBLISHED AND DECLARED )
by the above named Testator, )
CAROL JOAN SMITH, as and for her )
last Will and Testament, in the )
presence of us, both present )
at the same time, who at her )
request and in her presence and )
in the presence of each other, )
have hereunto subscribed our )
names as witnesses. )

_____
CAROL JOAN SMITH

_____
Witness

_____
Witness

# 7. Sample Will #3 – Plain Language Will with Corporate Executor

Adapted from an article originally written by Timothy Taylor

**LAST WILL OF [ ]**

I, **[ ]**, of the City of Winnipeg in Manitoba, (occupation), revoking all my former Wills and Codicils, declare this to be my Last Will.

**Executors of my Will**

1. I appoint my husband, **[ ]** ("[ ]") as my sole executor and trustee. If **[ ]** is unable or unwilling to act or continue acting in that capacity, then I appoint my ___, **[ ]**, of (name of city, province…) ("[ ]"), and **ROYAL TRUST CORPORATION OF CANADA** ("*Royal Trust*"), to act jointly as my executors and trustees. If for any reason [ ] is unable or unwilling to act or to continue acting, then I appoint [ ], **[ ]**, of (city, province,…) to act or continue acting in his place. In this Will I shall refer to my Executors and Trustees simply as "*my Trustees*".

2. If Royal Trust is acting as an executor and trustee, it is to have custody of all securities and documents of my estate, and is to keep all accounts, and its decision shall prevail if any difference of opinion arises between my Trustees.

**TFSAs, RRSPs, RRIFs and Similar Plans**

3. I DESIGNATE my husband, **[ ]**, as the beneficiary of any amounts payable to me or to my estate, or of any interest of mine under any TFSA or tax free saving account, superannuation plan, pension plan, deferred profit-sharing plan, registered retirement savings plan, or any registered retirement income fund, and such amounts or interest shall not form part of my estate. In the event that my said husband does not survive me, the said amounts and any such interest shall fall into my estate and shall be dealt with in accordance with my Will. I declare that in this paragraph of my Will, the terms "TFSA", "registered retirement savings plan", "registered retirement income fund" and "deferred profit-sharing plan" shall have the same meanings as in the *Income Tax Act* (Canada), as amended. This designation shall be a designation within the meaning of *The Beneficiary Designation Act (Retirement, Savings and other Plans*) (Manitoba) and where inconsistent shall revoke designations made by instrument in writing in respect of the said plans.

**Collection and Distribution of Property**

4. I give all of my property, wherever situated (my "*estate*"), to my Trustees upon the following trusts, namely:

(a) to pay out of the capital of my estate all debts, funeral and testamentary expenses; all estate and inheritance taxes and succession duties imposed or payable in any jurisdiction in connection with any property passing or deemed to pass upon my death; the costs of administering my estate and any trusts I have created; and all taxes or duties levied or imposed in any jurisdiction on my estate or in connection with any insurance on my life, pensions, registered retirement savings plans, registered retirement income funds, and tax free savings plans, by survivorship or by my Will or any Codicil to it, whether such duties or taxes are payable in respect of estates or interests which fall into possession at my death or at any subsequent time; and I hereby authorize my Trustees to commute or prepay any such taxes or duties;

(b) to deliver all remaining household furnishings, personal effects, jewellery and similar items to **[ ]** if he survives me by 30 days or, if he fails to survive me by 30 days, then in accordance with the memorandum of distribution I may have prepared and which may be found with this Will, a copy of this Will or amongst my personal papers at my death. Any items not so distributed shall be divided among my children in shares as nearly equal as they may agree or, failing agreement, as my Trustees may in their discretion determine. In making any such division, my Trustees may cause any or all of those chattels to be evaluated and may allocate them as my Trustees may deem appropriate. For greater clarity, it is my intention that my beneficiaries should not have to account for the value of any items so taken. The costs of delivering any property to or for the benefit of my beneficiaries (including, without limitation, the costs of packing, insuring and transporting) are to be paid by my Trustees from the residue of my estate;

(c) to pay and transfer the residue of my estate to **[ ]**, if he survives me by 30 days;

(d) if **[ ]** fails to survive me by 30 days, then to divide and distribute the residue of my estate to my children who survive me by thirty days, in equal shares provided that, if any of my children fails to survive me by 30 days, but has issue who survive me by 30 days, then such child's issue shall take (and, if there are more than one, then in equal shares *per stirpes)* the share to which my deceased child would have been entitled, if living;

(e) if none of my said husband or my issue survives me or if they all die before my estate is absolutely vested in any one or more of them, upon the death of the survivor of me, my said husband and all of my issue, then to divide and distribute the residue of my estate as follows: ■

**Underage Beneficiary**

5. If, as the result of the distributions provided for in my Will, any child or more remote issue of mine becomes entitled to receive any amount of the capital of my estate before attaining age 25, the amount (referred to in this paragraph as **"the part"**) shall be held and invested by my Trustees as a separate trust upon the following terms:

(a) Until such individual attains age 25, my Trustees shall pay to him or her or apply for his or her benefit so much of the income and capital of the part that my Trustees in the exercise of an absolute discretion consider appropriate from time to time. My Trustees shall accumulate and add to the capital of the part for all purposes of my Will any income not so paid or applied in any year;

(b) For greater certainty, my Trustees shall have full power to make any payment on behalf of such individual while a minor directly in payment of any expense of support, maintenance, advancement, education, or medical care of such minor individual, even if the minor individual's parent or parents may also be liable for the support of such individual;

(c) When such individual attains age 25, my Trustees shall transfer the balance of the part then remaining to him or her; and

(d) If any such individual dies before attaining age 25, my Trustees shall divide the part (or the amount of the part then remaining) among the issue of such individual who survive him or her, in equal shares *per stirpes*. If such individual leaves no issue, the part shall be divided among the siblings of such individual alive at the death of such individual in equal shares *per capita*.

7. My Trustees shall have the discretion to make any payments for any beneficiary under the age of majority, or otherwise under a disability, either to the beneficiary in question or to any other person (including the parent or guardian of that beneficiary), as my Trustees consider advisable. The receipt by such parent, guardian or other person shall be a sufficient discharge to my Trustees. For greater clarity, and notwithstanding any other provision of this Will, I hereby specifically authorize my Trustees to encroach upon the capital of any trust established under this Will, even to the extent of terminating it, without the necessity of a court order, if in their absolute discretion they deem it to be in the best interests of the beneficiary or beneficiaries.

**Gifts Not Community Property**

8. For greater clarity I declare my intention that any benefit given to any person under this Will or any Codicil hereto, and any income therefrom, capital gains thereon or other accretions thereto, are intended to benefit that person exclusively, free from all claims, rights or controls by his or her spouse or common-law partner. I do not intend that any gift should fall into any community of property, partnership or other form of sharing or division of property that may exist between a beneficiary and his or her spouse or common-law partner under *The Family Property Act* of Manitoba and any similar or successor legislation that may be in force or enacted in any other applicable
jurisdiction.

**Guardians**

9. If **[ ]** dies before me, then I appoint **[ ]** to be my children's guardian during their respective minorities.

**Trustee Powers**

10. To facilitate the proper administration of my estate, my Trustees shall have the discretion to exercise any or all of the following powers:

(a) **General**: to take any action and exercise any rights or powers in connection with any assets of my estate in the same manner and to the same extent as I could, were I alive and the sole owner of those assets, including (without limitation) the powers to sell, lease, mortgage, improve, repair, insure, convey and in any other manner deal with or dispose of any real or personal property from time to time forming part of my residuary estate, at the expense of capital or income or both;

(b) **Sale**: to sell and convert into money all or any part of my estate as does not consist of money at such time or times, in such manner and on such terms as my Trustees may in their absolute discretion think best, and to postpone the sale or conversion of all or any part of my estate until, in their discretion, they deem a sale to be desirable or advantageous;

(c) **Distribution in Kind**: to transfer or distribute any part of my estate in kind or in its actual state of investment for the shares of my beneficiaries and for that purpose to determine the value of all or any part of my estate; in that regard the decision of my Trustees shall be final and binding despite any fluctuations in market values and, if they wish, my Trustees may employ the services of evaluators for the purposes of this paragraph;

(d) **Invest**: to invest in any kind of property, whether real, personal or mixed, provided always that my Trustees shall exercise the judgment and care that a person of prudence, discretion and intelligence would exercise in administering the property of others. Without limitation, my Trustees shall be authorized to invest in any common trust funds or other funds permitted for trust funds, including those operated and managed by Royal Trust Corporation of Canada or any related corporation, including members of Royal Bank Financial Group and their subsidiaries, and securities or investment certificates issued by Royal Trust Corporation of Canada or any related corporation, including members of Royal Bank Financial Group and their subsidiaries. For all purposes under this Will, investments in such pooled or common or other trust funds shall be deemed to be authorized investments;

(e) **Retain Investments**: to retain as an investment for my estate any part of my estate, real or personal, and whether in the form of a trustee security or otherwise, without my Trustees being responsible or liable for loss that may happen as a result;

(f) **Allocations of Capital and Income**: to decide any question that may arise as to whether all or part of any monies, profit, dividends or other property flowing from any assets of my estate should be treated as capital or income, and to allocate all or any portion thereof between capital and income as they in their absolute discretion think best, and their decision in that regard shall bind all beneficiaries hereunder;

(g) **Borrowing**: to borrow money for and to advance money to my estate, whether by way of mortgage or other security against any assets of my estate, or otherwise;

(h) **Claims**: to compromise, vary or settle any claims made to or by my estate;

(i) **Corporate Securities**: to deal with any shares, securities or other corporate holdings I may hold at the date of my death or my Trustees may hold as investments for my estate, and to exercise any rights, powers, options or privileges in connection therewith, and to deal with any businesses or partnerships in which I may be involved or have an interest at the date of my death, in each case as fully as I might, if living;

(j) **Business Interests**: to continue any business, whether incorporated or otherwise, in which I may have an interest at the date of my death, or to sell or discontinue it, at such time, upon such terms and subject to such conditions as they in their discretion consider to be in the best interests of my estate and beneficiaries; and

(k) **Tax Elections**: to make any election or exercise any option available to them or which, were I alive, would be available to me under any section of any taxing statute, whether federal, provincial, or foreign, to reduce, defer or eliminate tax on behalf of the estate or beneficiaries including, to the extent possible, taking advantage of any lifetime capital gains exemption which was available but unused at the date of death, provided it will be of benefit to my beneficiaries.

**Environmental Matters**

11. In addition to the foregoing powers, my Trustees shall have the power to take any action and expend any amounts from my estate that they deem advisable in their absolute discretion to comply with all environmental laws and regulations and to prevent, correct, manage, study, sample, monitor or investigate (collectively "*environmental action*") any actual or potential environmental problem, whether currently existing or subsequently arising, in connection with any property held in my estate, including without limitation, real property owned or operated directly by my Trustees and real property owned or operated by a corporation or by a general or limited partnership in which my Trustees as such have an ownership or management interest; and my Trustees may also, in their absolute discretion, take any environmental action they deem advisable to avoid actual or potential loss to the estate or to my Trustees even though no requirement that my Trustees take environmental action has been made by a governmental authority or third party; and my Trustees may, in their absolute discretion, allocate between income and capital of my estate the following:

(a) any expenditures from my estate made pursuant to this power; and

(b) reimbursements or other funds received from third parties relating to expenditures for environmental action.

**Delegation**

12. For greater clarity, **[ ]** may in his absolute discretion at any time and for any period of time delegate to Royal Trust his investment powers and responsibilities relating to the management or administration of any trust or estate funds and, if he does so delegate, then he shall not be held liable for any loss that may arise while the assets are being managed by Royal Trust.

**Interpretation**

13. Wherever the masculine is used in this Will, it shall be deemed to include the feminine and neuter, the singular shall include the plural, and vice versa, as the context requires.

On the day of **[ ]**, 2___ I signed this Will and initialed the previous ( ) pages in the presence of two witnesses, who signed in my presence and in the presence of each other.

| | | |
|---|---|---|
| | ) | |
| | ) | |
| _____ | ) | |
| Witness | ) | _____ |
| | ) | |
| _____ | ) | |
| Witness | ) | |

(Note: As noted in earlier parts of these materials it would be more efficient to name spouses as successor holders of tax-free savings accounts, rather than as beneficiaries. It is not fatal to name them as beneficiaries, however there is a limited time after death of the first-to-dies spouse, being the end of the year following the year of death, for the surviving spouse to add the deceased spouse's TFSA to their own TFSA without affecting contribution limits.)

# 8. Additional Clauses to Consider

## (a) Sample Family Property Clause

Under *The Family Property Act,* inheritances received by either spouse are excluded from sharing in the absence of provision to the contrary (s. 7(3)). The following clause may be appropriate where circumstances might otherwise imply an intention by a testator to benefit the couple, rather than an individual:

**I declare that any benefit given to any person under this Will is intended by me to benefit that person exclusively, as is any income derived therefrom, capital gains thereon or other accretions thereto, and I make this declaration in the context of *The Family Property Act* of Manitoba and any other similar legislation in any other jurisdiction that may apply to a beneficiary of mine.**

Note, however, that if the beneficiary ceases to keep the benefit separate and shares or commingles it with their spouse's property, or uses the benefit to acquire a family asset, then the benefit becomes a family asset, notwithstanding the existence of this clause in the will.

Where the inheritance is significant, consideration might be given to requiring the beneficiary to execute a spousal contract in which the spouse waives any interest in the inheritance. This could be a condition precedent to the vesting of the inheritance.

## (b) Sample Clauses Contemplating Marriage or Common-Law Relationship

### (i) Marriage

A will is revoked on the marriage of the testator unless the will contains a declaration that it is made in contemplation of marriage. To ensure there is no uncertainty, the will should be clear that it is made in contemplation of the testator's marriage to a certain named individual.

**This is the last Will and Testament of me _____ of the City of _____ in the Province of Manitoba, _____ made in contemplation of my marriage to _____ being solemnized.**

If the testator has a different executor appointment and/or distribution plan in mind depending on whether the marriage does or does not take place, then preface the applicable clauses as follows:

**IF MY MARRIAGE to _____ shall be solemnized, . . .**
**or**
**IF MY MARRIAGE to _____ shall not be solemnized, . . .**

For example:

**IF MY MARRIAGE to _____ shall be solemnized, I APPOINT _____ sole Executor and Trustee of this my Will, but if such marriage shall not be solemnized, or if _____ is not alive or is unwilling or unable to act or to continue to act, I APPOINT _____ and _____ to be the Executors and Trustees of this my Will, in the place and stead of _____. I declare that the expression "my Trustee__" used throughout this my Will shall include (where the context permits) the Trustee__ for the time being of this my Will whether original or substituted.**

[If the marriage takes place, the paragraphs so prefaced continue in effect notwithstanding the marriage. If the marriage is not solemnized, only the paragraphs so prefaced will be of no effect.]

### (ii) Common-Law Relationships

The proposed amendments to *The Wills Act* regarding the automatic revocation of a testator's will on their partner becoming a common-law partner were not proclaimed in force when the balance of the *Act* was proclaimed on June 30, 2004. However, it may be advisable to include a specific statement in the will of a common-law partner along the following lines in case these provisions are proclaimed at some later date.

**This will is made in the context of a common-law relationship and is intended by me to remain in full force and effect notwithstanding any provision of *The Wills Act* as it may be amended from time to time.**

### (c) Sample Burial /Cremation Clauses

**I desire that my body shall be cremated and the ashes deposited _____.**
**I desire that my body shall be buried in my family vault in the _____ cemetery.**

**Note:**

The executor, and not the testator's surviving spouse, has the right to determine the place and manner of burial (*Hunter v. Hunter* (1930), 65 O.L.R. 586 (Weekly Court). Directions contained in the will with respect to the disposal of the testator's remains are not legally binding (*Williams v. Williams* (1882), 20 Ch. D. 659). Directions in the will with respect to funeral arrangements that are objectionable and repugnant to the members of the testator's family may be omitted from the probate (*In the Goods of Bowker*, [1932] P. 93). It is better to put directions about funeral arrangements in a memorandum to be read on the testator's death, as wills are often not read until after the funeral.

It should also be noted that the common law provides that the executor should take care to arrange a funeral in keeping with the deceased's "station in life"; if the estate is unable to bear the cost, the executor may be personally responsible. If the estate is small, the executor should be careful not to overspend without first clarifying who will pay. But compare *Clark Estate v. Clark (1997)* (1997), 115 Man. R. (2d) 48 (C.A.). This case seems to indicate that a spouse, even a separated spouse, has a duty to cover funeral expenses. In *Clark Estate*, the estranged husband remained liable for funeral expenses exceeding the value of the estate, but the Court of Appeal suggested that he might then be able to recover in a separate action against the RRSPs owned by the deceased which had been transferred to designated beneficiaries, via the Public Trustee's office.

### (d) Sample Clauses for Beneficiaries with Special Needs*

### (i) Sample Lifetime Trust - Where Social Assistance Benefits is Not a Concern; Trustees Other than Executor

**To pay the sum of $_____ to A and B in trust as trustees jointly, or the survivor of them, (referred to in this clause as "X's Trustees") TO BE HELD by them IN TRUST for the exclusive benefit of X during X's lifetime. X's Trustees shall invest such sum and keep it invested, and from such fund shall pay the following to or for the costs of maintaining X:**

**(A) 75% of the net annual income (after payment of related tax and administrative expenses);**

**(B) from the remaining net annual income such further amount or amounts, if any, as X's Trustees in their discretion shall consider from time to time reasonably necessary or advisable to meet the reasonable costs of maintaining X. Any net income not used in any year shall be added to the capital of the fund for X;**

**(C) if in the discretion of X's Trustees, the net income in any year is not sufficient to meet the reasonable costs of maintaining X, such amount or amounts of the capital of such fund as may be required from time to time to meet those costs.**

* Most of the materials in this part have been adapted from M. Braunstein, *Estate Planning for Beneficiaries With Special Needs,* a Continuing Legal Education program of The Law Society of Manitoba presented on May 8, 1985.

**For the purposes of this clause, "the reasonable costs of maintaining X" shall include, but shall not be limited to, all reasonable costs to pay for the general living expenses, health and medical expenses, education or training costs, and travel expenses of X as well as any other expense necessary or advisable for X's welfare and general advancement in life. The determination of X's Trustees as to what is a proper expenditure shall be binding on all interested parties.**

**Upon the death of X, X's Trustees shall pay for X's funeral and testamentary expenses from the fund and shall divide the balance then remaining among my children then living, in equal shares [or to my issue then living in equal shares, *per stirpes*].**

**I HEREBY RELIEVE X's Trustees from their duty to maintain an even hand between X as life tenant and the remaindermen of this trust.**

### (ii) Sample General Interpretation Clause Regarding a Beneficiary with a Mental Disability

**Our daughter D has a mental disability. D has never been institutionalized and we hope that she will never be institutionalized. We are presently endeavouring to make every possible effort to integrate D into the mainstream of society by making available to her all possible opportunities to fully participate in community living. We hope that she will be able to have dignity and that she will always experience and participate in community living. I HEREBY DIRECT that this my will shall be interpreted in accordance with our wishes as contained in this paragraph.**

### (iii) Sample Discretionary Trust for Adult Beneficiary with Special Needs Where Preservation of Social Assistance Benefits is of Concern

(adapted from M. Braunstein, *supra*)

The following sample clause deals with the special concerns which arise when a testator wants to provide in a will for a beneficiary who receives or may receive social assistance. On this topic, also see *Quinn v. Executive Director of Social Services,* (1981), 9 Man. R. (2d) 161 (Man. C.A.). It is suggested that the Braunstein article be reviewed when dealing with this type of situation.

**My Trustees shall invest and keep invested [one quarter (¼)] of the residue of my estate ("the Fund") in trust for my daughter D during her lifetime. From the Fund, my Trustees may pay to or for D's benefit and maintenance such amount or amounts of the net income and capital of the Fund from time to time as my Trustees in their absolute and unfettered discretion consider advisable. Any income not so used in any year shall be added to the capital of the Fund. No interest in the Fund or the income thereon or any portion of either shall vest in D; the only interest she shall have shall be in any sums paid to her, or on her behalf, or any property purchased for her, by my Trustees.**

**Without in any way binding the discretion of my Trustees, my Trustees in exercising their discretion should consider the following in making payments from the Fund:**

**a) my wish that D have travel expenses for vacations and/or visits to friends and/or relatives not living in Winnipeg;**

**b) my wish that D be involved in any program(s) where her participation would be in her best interests; provided that my Trustees endeavour, wherever reasonably possible, to pay only that portion not otherwise paid for by other sources, including government;**

**c) my desire that my Trustees in their discretion provide extra comforts and amenities of life for D without, to the extent reasonable in the circumstances, impairing the benefits or allowances which she may receive from other sources, including government; and**

**d) my desire that my Trustees take account of, and wherever possible maximize the benefits which D would be eligible to receive from other sources, including government, if payments from the Fund were not made to her or on her behalf, or were limited in amount or time.**

**I specifically relieve my Trustees of their duty to maintain an even hand between D and the residual beneficiaries of the Fund, it being my intention that the Trustees have access to the entire Fund, in their discretion, for payments on behalf of D.**

**On D's death, my Trustees shall pay D's funeral and testamentary expenses, and divide the balance of the Fund, if any, equally *per stirpes* among my other issue then living.**

### (iv) Sample Clause re: Home in Trust for Special Needs Beneficiary - Tenancy At Will (adapted from M. Braunstein, *supra*)

**The Trustees shall be permitted to retain and hold our house for the use of our daughter D until she attains the age of majority, and all expenses necessary to maintain our home, including, without limitation, taxes, utilities, insurance and repairs, shall be paid from that portion of the residue of my estate set aside as a Fund for D under clause ___ of this Will. Once D has attained the age of majority, my Trustees may sell the home whenever they in their absolute discretion consider it advisable to do so. Until the home is sold, our daughter D may stay in the home as a tenant-at-will provided that at least one person, whether a guardian or someone hired by my Trustees to care for D, resides with her. The expense of hiring such a person may be paid from the Fund set aside for D under clause ___ of this Will. The proceeds of the sale of our home, after payment of all expenses related to the sale, shall be added to the residue of my estate and disposed of as a part thereof.**

When drafting a trust for a person with a disability, you should consult additional resources as there can be several layers to consider, and changes to federal tax laws and provincial social assistance rules results in this area evolving much more often than other estate areas. Some examples of topics that you should consider:

- Whether the beneficiary qualifies for the Disability Tax Credit (which not only applies to tax credit eligibility and is often a requirement for many other programs or tax rollovers).

- The ability for the parents to potentially rollover their RRSP/RRIF into a RDSP for their child with a disability.

- The specific requirements of ensuring that the trust also is a Qualified Disability Trust ("QDT"), if necessary. Whether the trust qualifies as a QDT will have profound effect on how the trust will be taxed (and which only became an issue in 2016 when substantial tax changes took effect for testamentary trusts).

- The province where the person with a disability resides, as social assistance rules are provincial, so Manitoba rules only apply if your client's child also lives in the province. If the child lives in a different province, then you need to consider the social assistance rules related to that province.

## (e) Sample Administrative Clauses

### (i) Interpretation

Where used in this will:

(i) Paragraph headings are inserted only as a matter of convenience and for reference and in no way define, limit or extend any provision of this will nor are they intended to affect its interpretation.

(ii) The singular or masculine or personal pronouns shall be construed as meaning the plural or feminine or body corporate where the context requires.

(iii) "Spouse" means the wife or husband of the Testator, as the case may be.

(iv) "Child" or "children" means all of my children alive at the date of my death including all children born subsequent to the date of this will and all adopted children whether adopted before or after the date of this will.

(v) "Trustee" includes executors and trustees, whether original or substituted.

(vi) "Give" means give, devise and bequeath.

### (ii) Conversion and Retention

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 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 treated as producing income.

### (iii) Borrowing for Debts and Taxes

My Trustees may borrow on behalf of my estate such amounts upon such terms as my Trustees in their uncontrolled discretion consider advisable and my Trustees may mortgage or otherwise charge any of the assets of my estate.

**(iv) Additional Trustee Powers**

IN ADDITION to all other powers vested in trustees by law or otherwise and without in any way restricting the general powers, discretions and authorities given in this my will to my trustees, my trustees, without the interposition of any person entitled hereunder, shall have from time to time and at any time or times power, discretion and authority as follows:

Investments

(i) My Trustees shall invest the moneys of my estate (including moneys arising from the sale and conversion referred to in my Will) in any investment or investments which my Trustees shall in their absolute discretion deem advantageous to my estate, not being limited to investments expressly authorized by law, including advances or loans, with or without security, to any person or persons, and in like manner from time to time to alter or vary such investments;

Business

(ii) without being liable for any loss occasioned thereby to enter into or continue any business or businesses whether or not owned by me or by any corporation or corporations, including any business which I may own or in which I may be interested or which I may control at the time of my death, either alone or in partnership or association with any person or persons for such length of time as my trustees shall in their unfettered discretion determine to be in the best interest of my estate and the beneficiaries thereof, provided that my trustees shall be indemnified out of my estate for any loss, liability, costs or expenses suffered or incurred by reason of carrying on such business or businesses, and my trustees may do all things they shall consider in their unfettered discretion necessary or advisable for the carrying on of any such business or businesses, and in particular, but without limiting the generality of the foregoing:

(A) they may employ in any such business or businesses, for effectually carrying it or them on, or withdraw therefrom, all or any part of the capital or income of my estate from time to time, with or without taking security;

(B) 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; and

(C) they may arrange and agree as to the introduction at any time or times of any person or persons as a partner or partners therein and in the case of any business operated by a corporation, of any person or persons as a shareholder of such corporation, and as to the division of the profits thereof, and as to the hiring or employment of any person or persons therein (including any one or more of my trustees and the beneficiaries hereunder) at such salary or remuneration as they shall think proper, and as to the extension or curtailment of the business thereof or the adoption of any new line of business;

(D) If any of my Trustees actively performs in a management or executive capacity or serves as an officer or director for any corporation in which my estate has an interest, he or she shall be entitled to receive reasonable compensation for those services in addition to the remuneration to which he or she may be entitled as a Trustee of my estate;

Incorporation of Companies

(iii) at the expense of my estate to incorporate or to cause to be incorporated alone or in conjunction with any person or persons one or more corporations (any portion of the outstanding shares of which may form part of my estate) under the laws of the Province of Manitoba or any other jurisdiction, which corporation or corporations may have whatever objects and undertakings, and to continue or carry on any business or businesses that my trustees shall in their unfettered discretion at any time or times sell, convey or otherwise transfer to any such corporation at such prices and subject to such terms and conditions as my trustees shall in their unfettered discretion determine advisable and in consideration for any such sale, conveyance or transfer, my trustees may accept cash, negotiable instruments, real or personal property or securities (including common, preference and/or special shares in the capital of such corporation) whether or not such securities have been issued by such corporation and any such consideration so received shall be an authorized investment under this my will;

Disposition of Property

(iv) to sell, transfer, assign, exchange, convey, mortgage, lease, grant options with respect to or otherwise dispose of the whole or any part of the property, securities or investments from time to time constituting my estate, in any manner and at any price and upon such terms and conditions as my trustees shall in their unfettered discretion determine advisable and my trustees shall not be bound to secure the consent or approval of any person, official, authority, tribunal or court whomsoever or whatsoever, and for greater certainty but not so as to restrict the generality of the foregoing from time to time to sell, transfer, assign, exchange, convey, mortgage, lease, grant options with respect to or otherwise dispose of the whole or any part of such property, securities or investments to any corporation or corporations or to any trust or trusts in which any one or more of the beneficiaries hereunder have or may from time to time have an interest at such price or prices and upon such terms as my trustees shall in their unfettered discretion consider advisable and to accept as payment therefor, in the case of a corporation, such shares, evidences of indebtedness or other securities of such corporation, whether or not secured and whether or not interest-bearing or, in the case of a trust, such securities held in such trusts or evidence of indebtedness, whether or not secured and whether or not interest-bearing, as my trustees shall in their unfettered discretion consider advisable and any such sale so made or the price paid or the manner of payment or the other terms agreed upon in reference thereto shall not be subject to question by any person who may be entitled hereunder or by any person, official, authority, court or tribunal whatsoever and whomsoever;

Mortgages

(v) to renew and keep renewed any mortgage or mortgages upon any assets from time to time forming any part of my estate and to borrow money on the security by way of mortgage or otherwise of any assets from time to time forming any part of my estate and to pay off or renegotiate any mortgage or mortgages which may be in existence at any time;

Real and Leasehold Property

(vi) 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;

Acquisition of Fractional Interests

(vii) to acquire, in any manner whatsoever, any interest or interests, whether whole or fractional or undivided, in any real, leasehold or personal property or properties, including without limiting the generality of the foregoing, any interest or interests, whether whole or fractional or undivided, with other persons as tenants in common, as joint tenants or as partnership property;

Purchasing from Beneficiary

(viii) notwithstanding anything herein otherwise contained or any rule of law to the contrary, to purchase as an investment or as part of my estate, any property, real or personal, from any person, whether owned by such person in his personal capacity or otherwise, who may be a beneficiary or who may be a trustee (other than a sole trustee) hereunder, whether during the lifetime of any such person or forming part or all of the estate of such person, at such prices (payable in cash or on credit or part in cash and part on credit) and subject to such terms and conditions as my trustees shall in their unfettered discretion determine advisable and any such purchase so made, or the price paid or terms and conditions agreed upon in reference thereto, shall not be subject to question by any person who may be entitled hereunder or by any person, official, authority, court or tribunal whatsoever and whomsoever;

Sale to Beneficiary or Trustee

(ix) notwithstanding anything herein otherwise contained or any rule of law to the contrary, to sell, convey or transfer any of the property, real or personal, from time to time forming all or part of my estate to any person, whether in his personal capacity or otherwise, who may be a beneficiary or who may be a trustee (other than a sole trustee) hereunder at such prices (payable in cash or on credit or part in cash and part on credit) and subject to such terms and conditions as my trustees shall in their unfettered discretion determine advisable and any such sale, conveyance or transfer so made, or the price paid or terms and conditions agreed upon in reference thereto, shall not be subject to question by any person who may be entitled hereunder or by any person, official, authority, court or tribunal whatsoever and whomsoever;

Distribution in Kind

(x) 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;

Lending

(xi) to make advances or loans (upon any security which my trustees shall in their unfettered discretion determine sufficient or without security) to any person, or to guarantee the contracts, debts or liabilities of, or to otherwise assist, any persons or corporation in which my estate may be directly or indirectly interested through stock or debt ownership or otherwise and to give security on all or any part of my estate for any liability so incurred;

Agreements

(xii) to enter into any agreement with any person with respect to any property forming part of my estate that my trustees in their unfettered discretion may deem to be in the interest of one or more beneficiaries hereunder;

Signing of Documents

(xiii) To 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;

Professional Assistance

(xiv) to employ and pay for such professional or other assistance as my trustees may deem requisite in the discharge of their duties as trustees and, without restricting the generality of the foregoing, in the event that any one or more of my trustees shall be a barrister, solicitor, chartered accountant or other person engaged in any profession or business, to employ such person and to pay such person or persons all usual professional and other charges for business transacted, time expended and acts done by him, his clerk or his firm in connection with the trusts hereof including any act which such trustee or trustees not being a barrister, solicitor, chartered accountant or other person engaged in any profession or business could have done personally;

Act on Professional Advice

(xv) to act on the opinion or advice of or information obtained from any lawyer, accountant, financial adviser, valuer, surveyor, broker, auctioneer or from other experts and professional persons, and my trustees shall not be responsible for any loss, depreciation or damage occasioned by acting, or not acting, in accordance with such opinion, advice or information;

Determination of Questions

(xvi) to determine all questions and matters of doubt which may arise in the course of the management, administration, realization, liquidation, partition or winding up of my estate;

Legal Proceedings

(xvii) to institute and defend proceedings at law and to proceed to the final determination thereof or compromise the same as my trustees shall in their unfettered discretion determine to be advisable;

Situs of Assets

(xviii) to hold my estate or any part or parts thereof at any place or places and to move the same from time to time from place to place inside or outside Manitoba; and

Cash Deposits

(xix) to deposit any cash funds forming part of my estate at any time in any chartered bank or trust company duly registered to carry on the business of a trust company in the jurisdiction in which such deposit is made.

## (f) Other Sample Clauses

### (i) *Income Tax Act*

I FURTHER DECLARE that my trustees shall have full, absolute and unfettered discretion from time to time and at any time to make or not to make any election or elections pursuant to any section of the *Income Tax Act* that they deem to be in the best interest of my estate and the beneficiaries thereunder whether or not such would have the effect of conferring an advantage on any one or more of the beneficiaries at the expense of any one or more of the other beneficiaries or could otherwise be considered but for the foregoing as not being an impartial exercise by my trustees of their duties hereunder or as not being the maintaining of an even hand among the beneficiaries, and all such exercises of their discretion shall be binding upon all the beneficiaries and shall not be subject to question by any person, official, authority, court or tribunal whatsoever or whomsoever.

### (ii) Existing Endorsements and Guarantees

IF AT THE TIME of my death I am liable as an endorser, guarantor, surety or otherwise for any liability of any person or persons, I authorize and empower my trustees to renew from time to time in their absolute discretion the bills, notes, guarantees or other securities or contracts evidencing such liability and for that purpose to 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 the powers and discretions conferred by this paragraph _____ of this my will is to give them such powers and authorities as will enable them to assist in the gradual liquidation of the liabilities which I may be under in order that the person or persons for whom I may be liable as aforesaid may not be duly embarrassed.

### (iii) Exercise of Powers, Discretions and Authority

I FURTHER DECLARE that the powers, discretions and authorities conferred upon my trustees by this my will shall be unfettered, absolute and uncontrolled and may be exercised from time to time and at any time by a majority of my trustees for the time being hereunder, provided however that my Spouse shall be one of such majority.

### (iv) Security

MY TRUSTEES and each of them shall be exempt from the giving of any bond or security in connection with the administration of my estate and the discharge of the trusts hereunder in any country, state, province, territory or other jurisdiction in which this my will or any codicil thereto is required to be proved or in which ancillary probate of this my will or any codicil thereto or letters of administration of my estate are required to be obtained, notwithstanding the laws of any such country, state, province, territory, or jurisdiction.

# 9. Trustees' Powers in Wills in Manitoba

**2013 MBA Mid-Winter Conference**
**Trustees' Powers in Wills in Manitoba**

Presented and prepared by: Caroline G. S. Kiva
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The annotation attached has been compiled based on *The Annotated Will* by Laura H. Kerr, Jennifer A. Pfuetzner and Corina S. Weigl, used by The Law Society of Upper Canada, for a Continuing Legal Education program, 2008 which has the kind permission of authors to reproduce, and with reference to *Drafting Wills in Canada: A Lawyer's Practical Guide* by Robyn Solnik and Mary-Alice Thompson, published by CCH, 2012. Both resources have proved to be invaluable.

The authors of this annotation have attempted to provide clauses commonly in use in Manitoba (many of which are copied from the CPLED material in use in this jurisdiction, also with the permission of the Law Society of Manitoba) and an explanation of their meaning with any relevant statutory references from Manitoba legislation.

January 25, 2013

## Commonly Included Powers

Unless a Will provides otherwise, trustees' powers are limited to those powers given by statute or created by the common law. All references to *The Trustee Act* are to C.C.S.M. c.T160. The powers included in a Will or expressed through *The Trustee Act* are used to assist in the administration of the estate. To be an effective drafter, the circumstances of the testator must be considered and the appropriate provisions added to suit the circumstances.

The following are a list of trustee powers that should be considered for inclusion in Wills:

### 1. Power to Sell, Convert and Postpone Conversion

I give, devise and bequeath all my assets and property to my Trustees upon the following trusts:

(1) to use their discretion In the realization of my estate with the power to my Trustees to:

(a) to sell and convert into money all or any part of my estate (save and except those assets or property which I have gifted, devised or bequeathed outright *in specie* or directed under this Will to be held in a testamentary trust under this my Will) as does not consist of money at such time or times, in such manner and on such terms as my Trustees may in their absolute discretion think best, and to postpone the sale or conversion of all or any part of my estate until, in their discretion, they deem a sale to be desirable or advantageous;

(b) to retain as an investment for my estate any part of my estate, real or personal, and whether in the form of a trustee security or otherwise, without my Trustees being responsible or liable for loss that may happen as a result; ...

*Note: Often the clause is placed immediately before the distribution of property provisions of the Will. It does not matter if it is contained there or within the list of powers. As a drafting tip, if the power to sell, convert and postpone is contained in both places in the Will (i.e., before distribution of property and in the list of powers), ensure consistent wording so that the scope of the power is clear. The cardinal rule of interpretation of wills is the intention of the testator so consistency within the Will is important.*

In addition to all powers conferred by law, I confer upon my Trustees the following powers which may be exercised from time to time without the consent or intervention of any beneficiary under this my Will, and without obtaining any judicial authority:

**Sale, Conversion, Postponement**

(a) to sell and convert into money all or any part of my estate as does not consist of money at such time or times, in such manner and on such terms as my Trustees may in their absolute discretion think best, and to postpone the sale or conversion of all or any part of my estate until, in their discretion, they deem a sale to be desirable or advantageous;

(b) to retain as an investment for my estate any part of my estate, real or personal, and whether in the form of a trustee security or otherwise, without my Trustees being responsible or liable for loss that may happen as a result.

*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 assets will be deemed 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 (i.e. distribution in specie), allow an executor the ability to hold onto assets of the deceased and to distribute those assets in kind.*

*The power to postpone is usually included with the power to sell. Unless there is a contrary intention in the Will, there is a statutory power to postpone in The Trustee Act. It is not an unrestricted power to postpone.*

*A power of sale can be implied, but the law relating to an implied power of sale is beyond the scope of this presentation.*

*The Trustee Act:*

Power to sell by auction, etc. *section 25(1)*

Power to postpone sale or conversions. *section 33(1)*

*The Law of Property Act:*

Where there is no power of sale in a Will*, consideration must be made of *section 17.7(1)-(5)*

*Common interpretation held by Manitoba practitioners and the Office of the Public Trustee (without judicial authority)

## 2. Power to Pay Debts

To pay out of the capital of my estate, all indebtedness for taxes, interest and penalties, which are payable pursuant to the provisions of the *Income Tax Act* [or pursuant to the laws of any foreign jurisdiction] in respect of any taxation year of mine including the taxation year of my death and any subsequent year during which a portion of my estate is under administration.

To pay out of the capital of my estate my just debts, funeral and testamentary expenses, and all estate, legacy, succession or inheritance duties and taxes or gift tax, whether they relate to any period prior to my death, or while any portion of my estate is under administration (collectively referred to as "**Death Taxes**"), if any; **AND I HEREBY AUTHORIZE** my Trustees with unfettered discretion to commute or prepay any such Death Taxes as my Trustees shall consider advisable.

*Annotation:*

*As a result of these clauses 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 inclusion in income of the RRSP or the deemed disposition of 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.*

*When considering the tax burden, consideration of land transfer taxes and whether the beneficiary or the estate will be responsible for the payment should be addressed.*

*If the estate is going to hold foreign assets, the clause should be amended to allow for the payment of foreign taxes if necessary.*

*If the testator has family or friends 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 Trustee Act:*

Debts *sections 32, 40, 41, 46, 49, 51, 52(1)* and *63*

*Note the statutory requirement to advertise for creditors at section 41(1), the form of notice under section 41(5) and requirement for publication at section 41(6).*

*The Wills Act:*

*Special notice should be given to section 36 of The Wills Act, which 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 the testator wishes to specifically gift real property that is the subject of a mortgage, he or she should be made aware that the beneficiary will be responsible for the mortgage unless the Will provides otherwise. A general direction in the Will (as in the sample clauses above) for the payment of debts out of the estate is not sufficient to indicate a contrary intention. See subsection 36(2) of The Wills Act.*

36(1) Where a person dies possessed of, or entitled to, or under a general power of appointment by will disposes of, an interest in freehold or leasehold property which, at the time of the death of the person, is subject to a mortgage, and the deceased has not, by will, deed, or other document, signified a contrary or other intention, the interest is, as between the different persons claiming through the deceased, primarily liable for the payment or satisfaction of the mortgage debt; and every part of the interest, according to its value, bears a proportionate part of the mortgage debt on the whole interest.

36(2) A testator does not signify a contrary or other intention within subsection (1) by
(a) a general direction for the payment of debts or of all debts of the testator out of his personal estate or his residuary real or personal estate; or
(b) a charge of debts upon that estate;
unless he further signifies that intention by words expressly or by necessary implication referring to all or some part of the mortgage debt.

## 3. Power To Invest

My Trustees when making any investments for my estate shall not be limited to investments authorized by law for trustees, but may make any investments which they consider to be in the best interests of my estate.

My Trustees shall invest the moneys of my estate (including moneys arising from the exercise of the power of sale and conversion in my Will) in any investment or investments which my Trustees shall in their absolute discretion deem advantageous to my estate, not being limited to investments expressly authorized by law, including mutual funds, pooled funds or common trust funds if my Trustees deem it advisable to do so, notwithstanding that such investments may be considered a delegation of investment discretion, and in like manner from time to time to alter or vary such investments.

*Annotation:*

*The Trustee Act:*

Trustee Investments *sections 68-75*

*Earlier versions of The Trustee Act limited trustees in their investments to the "legal list". In addition, as a result of the anti-netting rule i.e. the inability to net out losing investments against winning investments, trustees were, in effect, strictly liable for their investment decisions.*

*Trustees may now invest in any kind of property, real, personal or mixed. The standard of care for trustees in making investment decisions is that the trustee must exercise the judgment and care that a person of prudence, discretion and intelligence would exercise in administering the property of others. See section 68 of The Trustee Act. The focus is on the portfolio as a whole, rather than individual investments i.e. The anti-netting rule was abolished. Section 79 of The Trustee Act provides a defence to a trustee so that the trustee will not be liable in connection with a loss arising from a particular investment if the trustee satisfies the court that the investment was made as the result of a general policy of investing the funds making up the trust property and that the general policy was not speculative and was a policy which a person of prudence, discretion and intelligence would follow if he were administering the property of others.*

*There is case law in other provinces to the effect that the investment by a trustee in mutual funds would violate the common law anti-delegation rule applicable to trustees. This rule provides that those who are themselves delegates may not further delegate. This is based upon the Ontario Superior Court of Justice decision in Haslam v. Haslam, (1994) 114 D.L.R. (4th) 562. In this case Justice Rosenberg held that an investment in a mutual fund was an unauthorized delegation of investment decision making. Ontario amended its Trustee Act to specifically allow for the investment in mutual funds. The Manitoba Trustee Act does not contain such a provision. The second sample investment clause above addresses this issue. It should be noted on the other hand that section 76 of The Trustee Act specifically authorizes a trust corporation to invest trust funds into one or more common trust funds of the trust corporation, subject to the consent of its co-trustee, if any.*

## 4. Investment Counsel

My Trustees may employ and remunerate any investment counsel to assist them in investing the assets 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 power to choose, acquire and dispose of investments, including the ability of such investment counsel to sub-delegate such discretionary powers and to invest the assets in any form of investments that my Trustees are permitted to invest in under the terms of my Will, including mutual funds, pooled funds or common trust funds. I further authorize my Trustees to pay from the income or capital of such assets for which the services of an investment counsel have been retained, the remuneration of such investment counsel as my Trustees determine to be appropriate, which remuneration shall not be taken into account in determining my Trustees' compensation but is to be in addition thereto. 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.

*Annotation:*

*If the executors might have the need to hire investment counsel, it is advisable to include a clause that allows the investment decisions to be delegated (and subdelegated). Subdelegation should be included where discretionary management is possible i.e., mutual funds or a discretionary account where the fund manager picks the investments. The above provision does anticipate sub-delegation by the investment counsel. In addition, the above sample clause makes it clear that the testator's intention is for the executor to pay the investment counsel's fees out of the estate and not have the fees deducted from the executor's compensation. There is case law in Ontario that supports the position that it is proper for an executor and trustee to retain investment counsel and to have the investment counsel's fees paid out of the estate (as opposed to deducted from the executor's compensation). See: Estate of Alaine Jackson Young, 2012 ONSC 343 (CanLII). However, consider including this power in the Will so that reliance on such case law is not required.*

*The Trustee Act:*

There is no provision in *The Trustee Act* that appears to authorize the general delegation of discretionary decision making, such as the making of investment decisions, by trustees.

## 5. Distribution in Kind ("in Specie")

To transfer or distribute any part of my estate in kind or in its actual state of investment for the shares of my beneficiaries and for that purpose to determine the value of all or any part of my estate; in that regard the decision of my Trustees shall be final and binding despite any fluctuations in market values and, if they wish, my Trustees may employ the services of evaluators for the purposes of this paragraph.

*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"). This avoids cashing out assets which would be more valuable to a beneficiary if held for a period of time. The issue then becomes one of valuation of the assets distributed in kind.*

*The Trustee Act:*

No particular provisions.

## 6. Power to deal with Real Property

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 such property and may pay off or renegotiate any mortgage which may be in existence at any time.

*Annotation:*

*This power 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.*

*The Trustee Act:*

*Sections 27, 28* and *38* deal with granting of leases and options by trustees.

## 7. Power to Make Elections

To make any election or exercise any option available to them or which, were I alive, would be available to me under any section of any taxing statute, whether federal, provincial, or foreign, to reduce, defer or eliminate tax on behalf of the estate or beneficiaries including, to the extent possible, taking advantage of any lifetime capital gains exemption which was available but unused at the date of death, provided it will be of benefit to my beneficiaries.

To make or refrain from making any election, determination, designation, allocation or exercise any option available to my Trustees under any section of any governing legislation, whether federal [including, without limitation the *Income Tax Act (Canada)]*, provincial, or foreign, to reduce, defer or eliminate tax on behalf of the estate or beneficiaries, and such exercise of discretion shall be final and binding upon all the beneficiaries of my estate notwithstanding that it may confer a tax advantage upon any beneficiary or beneficiaries at the expense of any other beneficiary or beneficiaries.

*Annotation:*

*Under the Income Tax Act Canada ("ITA") there are many elections available to be made by trusts. Examples include: the preferred beneficiary election available in the context of beneficiaries who are entitled to the disability tax credit; if a spouse is not named a beneficiary of an RRSP/RRIF but is otherwise the beneficiary of the estate, the ITA allows for an election to have the spouse treated as the beneficiary of the RRSP/RRIF so that there is a "roll over" and tax is not paid by the estate but paid by the spouse when the RRSP/RRIF is "withdrawn". This clause gives the trustees the power to determine whether to take advantage of the elections available in the ITA and to so elect, if determined appropriate.*

*The elections in the ITA dealing with spouses, also deal with common law partners. It is important to determine the appropriate definition of a common law partner in the governing statute as definitions are not uniform and a person may be a common law partner under one statute and not another. Under the ITA section 248(1) a common law partner is a person living in a conjugal relationship with the taxpayer and has so cohabited for a continuous period of <u>one</u> year, or is the parent of a child of whom the taxpayer is a parent.*

*The Trustee Act:*

No particular provisions.

## 8. <u>Power to Borrow</u>

My Trustees may borrow money from time to time for any purpose in connection with the administration of my estate upon such terms and conditions as my Trustees may deem advisable and as security for any money so borrowed to mortgage, pledge, or otherwise charge any property of my estate. I further authorize my Trustees to pay all debts and to compromise, settle or waive any claim or claims at any time due to or by my estate.

*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, trustees may want to borrow to satisfy liabilities. i.e. An estate where the bulk of the estate is in corporate shares of a private company. Lack of liquidity to pay taxes may trigger a need to borrow. This power allows the trustees to do so.*

*The Trustee Act:*

Limited power to borrow money *section 52(1)*

## 9. Power to Appoint Agents

My Trustees may employ and have my estate pay for such professional assistance, financial advisors or other assistance or advice as my Trustees in their absolute discretion may deem requisite in the discharge of their duties as trustees, and without restricting the generality of the foregoing, in the event that any one or more of my Trustees shall be a solicitor, chartered accountant or other person engaged in any profession or business, to employ such person and to pay such person or persons out of my estate all usual professional and other charges for business transacted, time expended and acts done by him or his firm in connection with the carrying out of the provisions of this my Will including any act which such Trustees not being a solicitor or chartered accountant or other person engaged in any profession or business could have done personally.

My Trustees may if they wish to do so, appoint an agent to manage my estate and from time to time in their discretion terminate any such appointment and make another. They are further authorized to fix the remuneration to be paid to any such agent and such remuneration is to be a charge upon my estate and payable out of the capital or income thereof in such proportions as my Trustees from time to time decide upon. The amount of any such remuneration is to be taken into account and deducted from the compensation to which my Trustees would from time to time be otherwise entitled.

I authorize my Trustees in their discretion to employ a solicitor or any corporation duly licensed to carry on the business of a trust company in the Province of Manitoba, as agent for them, and to delegate to the agent those of their functions and duties that are of an administrative nature and that relate to the management of my estate, including the custody of the documents of title to the assets of my estate and other estate papers, the keeping of accounts and other records, collecting money and giving receipts, disbursing money, and any other matters incidental to the management of my estate, and my Trustees may pay such agent its reasonable and customary fees for such tasks from the residue of my estate.

*Annotation:*

*As previously indicated, at law trustees have a duty to act personally and are not permitted to delegate their fiduciary duties. However, this rule should not be interpreted to mean that trustees are prohibited from hiring agents for the purpose of carrying out administrative tasks on behalf of the trustees or for the purpose of implementing discretionary decisions made by the trustees. In such a case, the trustees are merely hiring an agent without delegating any discretionary powers to the agent. Examples would include the hiring of a bookkeeper, real estate agent or stock broker.*

*The sample clauses above will allow 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 the decisions can be delegated to agents pursuant to this clause. Note that the clauses make various provisions for payment of the agent's remuneration. This should be discussed with the testator.*

*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 for provision to the beneficiaries or for a court passing and the estate pays the agent's remuneration, the agent's remuneration would usually be deducted from the compensation allowed to the trustees. If the testator does not wish that to be the case, specific provision should be made in the Will.*

*The Trustee Act:*

General power for trustees to employ agents *section 35*

*Section 36* sets out an explicit exception from the common law rule prohibiting trustees from delegating their duties. It allows trustees to delegate any or all of their discretionary powers to another person by power of attorney but only during such time as the trustee is out of the Province.

Further subsections provide that the power of attorney is only effective while the trustee is out of the province and that the trustee is liable for the acts and defaults of the attorney.

## 10. Payment to Parent/Guardian

**I AUTHORIZE** my Trustees to make any payments for any person under the age of majority or otherwise under disability to a parent or guardian or person in *loco parentis* of any such person or to anyone to whom my Trustees in their absolute discretion deem it advisable to make such payments, whose receipt shall be a sufficient discharge to my Trustees who shall not be bound to see to the application of any monies so paid. I expressly authorize the parent or guardian or person in loco parentis of any person under the age of majority or otherwise under a disability to make any election or elections on behalf of such person for the purposes of the *Income Tax Act* (Canada) or any similar legislation of any province or other jurisdiction in force from time to time.

*Annotation:*

*This clause does not create a sub trust in the hands of the parent. At law, the trustees may pay funds belonging to a child to the guardian of the estate of that child. A parent is not, without court order, the guardian of the estate of his/her child (as opposed to guardian of the person). A minor has no capacity to give a receipt to a trustee. The clause purports to allow a common sense approach to also allowing trustees to pay to a parent without the formality of a court order of guardianship of the estate of that child.*

*Where a payment is made to a parent, without the last part of the first sentence ("…whose receipt shall be sufficient…."), the trustees have an obligation to take reasonable care to ensure that the sum is properly used for the infant and not misappropriated. Notwithstanding the clause, if the trustees are aware or should be aware that that funds are not being properly used or are misappropriated, this clause may not protect them. It would be unwise for arm's length trustees to make large payments to the parent of a minor relying on this clause.*

*Likewise, the clause purports to allow a common sense approach to allowing trustees to accept an election by a parent, guardian or person in loco parentis, but in technical terms, it would be the person at law who had the legal authority to make decisions respecting the property of the minor or disabled who could make the election. A number of elections are joint elections, requiring the estate and the beneficiary to elect.*

*The Trustee Act:*

No particular provisions.

*The Infants Estates Act:*

## 11. General Power to Hold for Minors

If any person should acquire a vested interest in any share or portion of my estate before attaining the age of majority, subject to any specific provision to the contrary contained herein, the interest of such person shall be held and kept invested by my Trustees and the income and capital, or so much thereof as my Trustees, using absolute discretion, consider necessary or advisable, shall be paid to or for the benefit of each such person until he or she attains the age of majority, at which time the remainder of each such respective share remaining in the hands of my Trustees shall be paid to each such person for his or her own use absolutely, provided, however, that at any time in my Trustees' absolute discretion, my Trustees shall be permitted to distribute *in specie* any article of personal, domestic or household use or ornament belonging to me at my death which has been retained by my Trustees and not previously distributed.

*Annotation:*

*Persons under the age of majority do not have capacity to deal with their own property or execute releases. 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 either in a formal trust or as a bare trustee/nominee, then the trustees will need to be aware of the provisions of The Infants Estate Act. With outright gifts to a minor, a guardian of the estate of the infant must be appointed (who can be the Public Trustee) or the trustees "take their chances" on any distribution (see comments above in paragraph 10).*

*Accordingly, it is prudent to include a clause like this as it avoids the need to ensure that there is a guardian of the estate of an infant. It is important to note that since the beneficiary's inheritance is fully vested [i.e., if they die before age 18, the inheritance would be part of the beneficiary's estate (distributed in accordance with his/her will or The Intestate Succession Act ("ISA") if the beneficiary dies without a Will)], the trustees are acting in a bare trustee/nominee capacity when "holding" the beneficiary's inheritance pursuant to this clause.*

*If the testator wishes to have the property held for a longer period of time, provision to allow this should be included. Attention in such a circumstance should be paid to whether the property vests in the beneficiary and is held until that specified age, or whether there is to be an alternate gift specified by the testator. Such a gift would stipulate that if the beneficiary fails to reach the specified age, the alternate gift to another beneficiary or beneficiaries is made (in such a circumstance the gift to the first named beneficiary is not vested until he/she reaches that age). Descriptions of the gifts and alternate gifts would not be located in the powers section of trustee powers, but in the body of the Will where the distribution of property is located.*

*It is typical to see Wills contain this same clause but setting to an older age rather than the age of majority (i.e., 25 years). If an outright gift is made to beneficiary in the body of the Will (i.e., to my daughter, Laura) and this provision is found in the general powers (i.e., hold to majority or age 25), the share is vested (and if Laura dies after the testator and before the specified age, her Will or the ISA governs the distribution of this gift).*

*The Trustee Act:*

Variation of trusts *section 59*

*Comment on the law. The rule in Saunders v. Vautier does not apply in Manitoba. This is the rule that can be summarized: if all beneficiaries of a trust: (1) can be ascertained; (2) are adults; (3) with mental capacity; (4) all of whose interests are absolutely vested, those beneficiaries can require the trustees make immediate distribution of the trust property and terminate the trust. In other jurisdictions where the rule applies and in Manitoba before the amendments to The Trustee Act, the rule was avoided by a gift over. (i.e., to my grandchild upon reaching age 21, and if he dies before his 21st birthday, this gift shall be paid or transferred to Winnipeg Harvest.) Section 59 requires court approval to wind up a trust.*

## 12. Securities

If at any time my Trustees holds 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.

If at any time my Trustees hold any investment in or in connection with any company or corporation, **I AUTHORIZE AND EMPOWER** my Trustees to join in or take action in connection with any such investment, or to exercise any rights, powers and privileges which at any time may exist or arise in connection with any such investment to the same extent and as fully as I could if I were alive and the sole owner of such investment. **I ALSO AUTHORIZE** my Trustees to retain as an investment of my estate for such length of time as my Trustees, using discretion, may deem advisable any assets or any other interests whatsoever acquired by my Trustees through the exercise of the powers hereinbefore given to my Trustees.

**MY TRUSTEE IS HEREBY EMPOWERED:** to acquire and deal with shares in any company or corporation forming part of my estate. To vote all shares and stocks forming part of my estate, and to exercise all rights incidental to the ownership of shares, stocks, bonds, debentures or other securities or investments forming part of my estate and to issue proxies therefore to others; and to vote for the election of themselves to any executive or other board or committee of any such company or corporation or association, and to serve in any such office or on any such board or committee and accept and receive remuneration for

such services without diminution of their compensation as fiduciaries hereunder; to sell or exercise any subscription rights and, in connection with the exercise of subscription rights to use any portion of the my estate for such purpose; to consent to and join in any plan for reconstruction, re-organization, amalgamation, consolidation, readjustment, liquidation, dissolution or winding up in respect of any company or corporation whose shares, stocks, bonds, debentures or other securities in exchange for the shares, stocks, bonds, debentures or other securities then forming part of my estate; and generally to act in respect of any securities or investments forming part of my estate as fully and effectually as if the same were not part of my estate, but always in such manner as my Trustees shall in my Trustees' absolute discretion consider to be in the best overall interests of the persons entitled hereunder.

*Annotation:*

*There is some uncertainty in the law with respect to whether trustees can engage in corporate transactions, such as amalgamations and winding-up proposals, in connection with corporate interests. This clause permits the trustees to do so.*

*The Trustee Act:*

*Section 74* may confer authority.

**13. Relief from Liability**

I exonerate my Trustees from any responsibility or liability for loss or damage which may be occasioned to my estate through a *bona fide* exercise by my Trustees of any of the discretions vested in my Trustees, whether as to retention, realization, conversion or investment.

I hereby declare that my Trustees shall not be answerable to or responsible for any loss or damage directly or indirectly caused to or suffered by any of the persons who may take under this my Will by reason of any act of commission or omission done or omitted to be done in good faith and further that my Trustees shall be indemnified from the assets forming my estate for all proper costs and expenses, if any, in the administration of the trusts undertaken by my Trustees hereunder. In no case and under no circumstances shall my Trustees become answerable or responsible to account for any property or monies except such as are actually received by my Trustees.

**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 for money and securities for money 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:*

*In discharging their duties, trustees must demonstrate honesty (good faith) and a standard of care (see The Trustee Act s. 68(2)). Drafters of Wills must take note of the use of terms such as "absolute and unfettered (uncontrolled)" discretion. By doing so, this implies that the Trustees are at liberty to make decisions with no interference from the Court. "The rule of behavior required of trustees in the discharge of their duties is good faith and the care of the reasonable business person. Yet...the conferment of discretion appears to make the trustees their own judges of what is reasonable" (Waters, Gillen, Smith, 2005, pg.931).*

*In Fales v Canada Permanent Trust Co., 1976 CanLII 14 (SCC), [1977] 2 SCR 302, Dickson, J. (as he then was) stated the law as follows at p. 750: Traditionally, the standard of care and diligence required of a trustee in administering a trust is that of a man of ordinary prudence in managing his own affairs ... and traditionally the standard has applied equally to professional and non-professional trustees. The standard has been of general application and objective though, at times, rigorous ...*

*... Every trustee has been expected to act as the person of ordinary prudence would act. This standard, of course, may be relaxed or modified up to a point by the terms of a Will ... But however wide the discretionary powers contained in the Will, a trustee's primary duty is preservation of the trust assets, and the enlargement of recognized powers does not relieve him of the duty of using ordinary skill and prudence nor from the application of common sense.*

*The sample clauses provide the trustees with an indemnity against the estate in the event an action is brought against them and they are found negligent.*
*Though these clauses appear to be valid, there is Canadian authority (Alta) that this type of clause does not relieve a trustee from liability for gross negligence.*

*Clauses which attempt to exonerate a trustee for gross negligence or fraud may be held to be invalid since it is more than likely that the testator would not wish to relieve the trustee of liability where acts were committed "knowingly". It is best to deal with each direction specifically and set out the level of discretion permitted by the Trustee. Drafters may also wish to discuss the use of liability insurance for executors with the testator. However, drafters should consider including that there is a specific direction (clause) in the Will that the cost of the insurance may be paid by the estate.*

*The Trustee Act:*

Court may Indemnify *section 80*

Court may relieve if bona fides shown *section 81*

## 14. Sale to a Beneficiary or Trustee

Notwithstanding anything herein otherwise contained or any rule or law to the contrary, to sell, convey or transfer any of the property, real or personal from time to time forming all or part of my estate to any person, whether in his personal capacity or otherwise, who may be a beneficiary or who may be a trustee (other than a sole trustee) hereunder at such prices (payable in cash or on credit or part in cash and part on credit) and subject to such terms and conditions as my Trustees shall in their discretion determine advisable and any such sale, conveyance or transfer so made, or the price paid or terms and conditions agreed upon in reference thereto, shall not be subject to question by any person who may be entitled hereunder, or by any official, authority, court or tribunal whatsoever and whomsoever.

I hereby authorize my Trustees in my Trustees' personal capacities to purchase any assets from my estate if the purchase price and other terms are unanimously approved by my Trustees and by the residuary beneficiaries of my estate. My Trustees shall not be required to obtain approval of any court for that purchase.

*Annotation:*

*"One who undertakes a task on behalf of another must act exclusively for the benefit of the other, putting his own interests completely aside." The overriding obligation of the Trustee is to act in the best interests of the beneficiaries. The Trustee is a fiduciary and is bound by a duty of loyalty. There is an obligation of utmost good faith in their behavior and actions.*

*At common law, a trustee is not entitled to self-deal. The Trustee is not to gain a benefit from their position (of trust), such as purchasing assets from an estate (or even taking remuneration). They are not to profit from their position (though they are to be reimbursed for reasonable expenses. i.e. out of pocket expenses).*

*It may be 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 so long as all the beneficiaries consent, or as in Sample one, where it is explicitly allowed by the Will.*

*Provided that the trust beneficiary acts with full knowledge of the trust affairs, a sale by him of his interest to a Trustee is a valid contract. The onus of proof is on the Trustee (or fiduciary) to show that the beneficiary did have all the relevant facts that were known to the Trustee. If even one beneficiary cannot consent (such would be the case of a minor beneficiary or a beneficiary who is mentally incapacitated), then the Trustee cannot obtain the fully informed consent which would secure the transaction. In situations where a transaction has occurred without fully informed consent, the transaction is voidable and will be left to a Court to determine whether the transaction should be set aside.*

*The Trustee Act:*

No particular provisions.

## 15. Additional clauses to be considered for special circumstances - Wills appointing a trust corporation as executor and trustee:

**Power to invest in own securities**

My Trustees may invest in the securities, shares, obligations or other interests of, (including any form of property offered for purchase as an investment by), my Trustees or an agent of or advisor to my Trustees, including **ABC Trust Co.** or any affiliated, subsidiary, holding or related company or companies of any of my Trustees or any agent or advisor to my Trustees, notwithstanding that my Trustees and/or my Trustees' agent or advisor may benefit therefrom; and my Trustees shall not be required to account for, or to give up, any such benefit.

**Deposit of Assets**

My Trustees may deposit estate and trust assets in a financial institution in which my Trustees or an agent of or advisor to my Trustees have an interest, notwithstanding that my Trustees and/or my Trustees' agent or advisor may benefit therefrom, and my Trustees shall not be required to account for, or to give up, any such benefit. In particular, it shall not be improper for my Trustees to deposit moneys of my estate or any trust created by my Will in **ABC Trust Co.** or its affiliated, subsidiary, holding or related companies.

*Annotation:*

*At common law, trustees are generally prohibited from personally benefiting from their position, however, the terms of the Will or trust can allow for this.*

*When a trust company is chosen as executor, it is usually convenient and desirable for the trust company to be able to invest estate assets in its own securities or those of an affiliated company.*

*The Trustee Act:*

*Section 76* specifically authorizes a trust corporation to invest trust funds into one or more common trust funds of the trust corporation, subject to the consent of its co-trustee, if any.

## 16. Environmental

In addition to the foregoing powers, my Trustees shall have the power to take any action and expend any amounts from my estate that they deem advisable in their absolute discretion to comply with all environmental laws and regulations and to prevent, correct, manage, study, sample, monitor or investigate (collectively "*environmental action*") any actual or potential environmental problem, whether currently existing or subsequently arising, in connection with any property held in my estate, including without limitation, real property owned or operated directly by my Trustees and real property owned or operated by a corporation or by a general or limited partnership in which my Trustees as such have an ownership or management interest; and my Trustees may also, in their absolute discretion, take any environmental action they deem advisable to avoid actual or potential loss to the estate or to my Trustees even though no requirement that my Trustees take environmental action has been made by a governmental authority or third party; and my Trustees may, in their absolute discretion, allocate between income and capital of my estate the following:

(a) any expenditures from my estate made pursuant to this power; and

(b) reimbursements or other funds received from third parties relating to expenditures for environmental action.

For the guidance of my Trustees and others, I declare it is my general intention that my Trustees be enabled to make full inquiry, at the sole expense of my estate, allocated between accounts as my Trustees see fit, into environmental or regulatory issues which may affect property held or considered for acquisition for my estate. I also intend that my Trustees and their representatives be fully protected, to the full extent of my estate if necessary, from any financial liabilities which it may incur in the administration of my estate.

I hereby authorize my Trustees to undertake any action, and to pledge, expend, reserve and set aside any amounts, or indefinitely delay distribution, notwithstanding anything to the contrary

in this my will, of any amounts from the income and capital of my general estate or any portion thereof as they in their sole and absolute discretion deem advisable to:

(i) conduct or cause to be conducted any environmental investigations whatsoever of any trust property, or any property being considered for acquisition as trust property, as my Trustees in the exercise of their absolute discretion deem advisable;

(ii) to take, or refrain from taking, any action whatsoever which my Trustees in the exercise of their absolute discretion deem advisable in order to identify, prevent, contain, clean up, remove, or monitor in any way any actual or potential environmental problem;

(iii) to institute, join in, or defend any legal proceedings, claims, and demands whatsoever as my Trustees in the exercise of their absolute discretion deem advisable;

(iv) to contest, pay, compromise, settle, or comply in any way with any legal proceedings, claims, demands, orders, or penalties of any nature whatsoever brought by any party whatsoever, and

(v) to retain and act upon the advice of any advisors or agents, including consultants and legal counsel, to assist with or perform any such undertakings.

My Trustees shall be fully exonerated for any loss or expense to my estate arising from any such action undertaken in good faith. My Trustees shall be entitled to fully reimburse and indemnify themselves from the estate or from any fund, reserve or portion thereof out of capital or income or partly out of capital and partly out of income as my Trustees in their absolute discretion consider advisable for, from, and against any and all liabilities including, but not limited to fees and disbursements paid to agents and advisors, legal counsel and consultants, obligations, penalties and fines, costs, and expenses of any kind or nature whatsoever relating to any existing or potential trust property (herein called "Liabilities and Costs"), even if the Liabilities and Costs equal the entire value so held.

My Trustees shall not be liable for any Liabilities or Costs or any loss or depreciation in value of trust property as a result of my Trustees retaining or acquiring any property on which an environmental problem exists or may exist, unless my Trustees caused the liability, cost, loss or depreciation through wilful default, wilful misconduct or gross negligence. Provided further, my Trustees shall have no right to indemnification or reimbursement hereunder for any Liabilities or Costs due solely to my Trustees' wilful misconduct or gross negligence.

All current and former directors, officers, and employees of my Trustees and their related or affiliated corporations, and whether or not they are or were acting or appointed as directors, officers, employees or agents of any corporations currently or formerly part of my general estate or any part thereof, shall be indemnified for, from, and against any such Liabilities and Costs from my general estate or from any fund, reserve or portion thereof, out of capital or income or partly out of capital and partly out of income as my Trustees in their absolute discretion consider advisable.

*Annotation:*

Where a testator owns a farm, non-residential or commercial property or a business, it may be advisable to include a clause such as either of these. If there is a direction in the Will, it will preclude beneficiaries from complaining about the cost or the time involved. As discussed with prior clauses there are elements of delegation and costs (reimbursement) and relief from liability (especially in the case of delay).

*The Trustee Act:*

No particular provisions.

## 17. Powers in Respect of Charitable Beneficiaries

### Cy Près

If at the time of distribution, any of the above named charitable beneficiaries no longer exists or has amalgamated with another charitable beneficiary or has changed its name or objects, any provision for it in my Will shall not fail and I declare that notwithstanding the particular form of the bequest, my paramount intention is to benefit a general charitable purpose and my Trustees are hereby authorized in my Trustees' absolute discretion to pay the bequest to the charitable organization that my Trustees consider most closely fulfils the objects I intend to benefit.

### Receipts and Cy Près

I declare that a receipt for any amounts payable to a charitable organization under my Will from any officer, director or person authorized to accept donations on behalf of such charity shall be a complete release and discharge of my Trustees with respect to the portion of my estate to be paid to the charity. If at the time of distribution, any of the organizations named in my Will has amalgamated with another organization or organizations, or has changed its name or location of its work, the bequest or share of residue provided for it shall not fail but my Trustees shall in their sole discretion, pay the same to the organization they deem to be the successor organization. If in the sole discretion of my Trustees, my Trustees determine that any of the organizations named in my Will has ceased to operate or exist or has never operated or been in existence (as distinct from having amalgamated, changed its name or location of its work) my Trustees shall pay the bequest or share of my estate to the organization which in my Trustees' sole discretion has objects which most closely resemble those of the organization I intended to benefit, provided that if such bequest shall fail for any reason, then I declare that, notwithstanding the particular form of the bequest, my paramount intention is to benefit a general charitable purpose.

*Annotation:*

*If a gift is made to a charitable organization that never existed or which had ceased to exist at the death of the deceased, the gift would lapse or a cy-près application would have to be made to the court to have the funds applied to another charity.*

*The court has a common law cy-*près *jurisdiction to design the "next best thing" to carry out the donor or settlor's intention, where the indicated method fails. That doctrine is, speaking broadly, one which enables the court to carry out the general intention of the donor or settlor of a fund when the particular method of carrying out which is indicated by the instrument, fails, or the instrument fails to, or does not fully, indicate the method of fulfilling the general intention … In such cases the court moulds the trust as nearly as possible to the intention of the settlor. [quoted in The Canada Trust Company v. Shaver, 2007 BCSC 54 (CanLII).]*

*The sample clauses above would give a similar discretion to the executor to apply the funds intended for charitable purposes to another charity, avoiding the delay, expense and uncertainty of bringing an application to court to request the court exercise its cy-près jurisdiction.*

*Note that the second example also contains a useful provision allowing the executor to accept receipts for any funds paid to a charity from any officer of the charity and this acts as a complete discharge to the executor.*

*The Trustee Act:*

No particular provisions.

## 18. Power of Encroachment

If any person (the "Beneficiary") becomes entitled to any share of my estate before attaining the age of 21 years, my Trustees shall hold the Beneficiary's share and invest it until the Beneficiary attains the age of 21 years when the capital of the share shall be paid and transferred to the Beneficiary. Provided, however that until the Beneficiary reaches the age of 21 years:

a. my Trustees may at any time or times pay to or for the benefit of the Beneficiary all, part or none of the annual income derived from the share as my Trustees consider appropriate. Any part of the annual income not so paid out shall be accumulated and added to the capital of the Beneficiary's share;

b. my Trustees may at any time or times pay to or for the benefit of the Beneficiary such further amounts out of the capital of the Beneficiary's share as my Trustees consider appropriate, even to the complete exhaustion of the capital. I further confirm that should the Trustees encroach on the capital to its complete exhaustion of capital of

the Beneficiary's shares so held, the natural duration of such trust shall end and such trust shall thereby be terminated;

c. [if appropriate, insert provision to confirm what happens to share if Beneficiary dies before 21 or ensure it has been dealt with in the gift section.]

Until each child attains the age of 25 years, my Trustees shall pay or apply for the benefit, maintenance, support, education and advancement of the child so much of the income or capital of that child's part as my Trustees consider appropriate from time to time. Any undistributed income shall be added to capital of that child's part.

*Annotation:*

*The "power of encroachment" is the power to draw on the capital (for whatever purpose specified) by the trustees to benefit the named beneficiary. It is commonly found with the gift provisions, not in the powers of trustees. To include a general provision relating to holding funds in trust or encroachment in the general powers is not inappropriate, but the use of consistent wording if the clause is found in both places in the Will is important.*

*The first example provides a general power of encroachment for the purpose identified (i.e. for the "benefit" of the beneficiary) and the second example uses additional wording in addition to "benefit" within the powers.*

*When funds are held for the benefit of a beneficiary (commonly seen in most wills for an infant child but could be any other beneficiary), the drafter should consider the terms specified in the Will for the general use of the funds held for that beneficiary. Even without provisions in the Will, both the ability to provide maintenance and to advance capital is set forth under The Trustee Act. in jurisdictions where there is no statutory provision, the court has inherent jurisdiction to bestow both powers on the trustees.*

*Can a trustee encroach on capital and wind up the trust?*

*In Sabo Estate v. Sabo Estate, 1995 CanLII 9006 (AB QB) the Alberta court held that a trustee cannot use the power to encroach on capital to terminate the trust, without first obtaining court approval given the provisions of section 42 of the Trustee Act (Alberta) which is identical to section 59 of The Trustee Act (Manitoba). While not binding in Manitoba, this may be persuasive to a Manitoba court. Most trust lawyers and academics are critical of the case. Consider that the inclusion of the words found at the end of (b) in the first example, namely "*I further confirm that should the Trustees encroach on the capital to its complete exhaustion of capital of the Beneficiary's shares so held, the natural duration of such trust shall end and such trust shall thereby be terminated" *may allow the termination of the trust without court order.*

*Caution: Hedley Estate v. Grant [1998] O.J. 5270, considered a Will that directed shares of infant beneficiaries be held until age 18 with the authority to pay amounts of income or capital to a parent or guardian on behalf of an infant. The Ontario court confirmed that a payment of the whole residual share of an infant to a parent was not a proper exercise of discretion merely because the executor (first trustee) wished to be relieved of the trust.*

*The Trustee Act:*

Variation of trusts *section 59*

Power of Maintenance *section 29(1) – (10)*

*These sections set out a statutory power of maintenance. It can be excluded from a Will if the testator has so chosen. This is the statutory authority to apply income for the immediate and recurring needs of a beneficiary. The term "maintenance" implies a payment from income to support the beneficiary with the necessities of life but the statute is not so restricted.*

Power of Advancement *section 30(1) – (4)*

*Advancement is a payment from capital, to set up beneficiary in life. Payment of an advancement is not a payment of a casual nature. Making an advancement using the statutory provision requires court approval.*

*The Infants Estates Act:*

*Section 10(1)*

*The court has authority to make orders for sale or other disposition of minor's real property where it is in the best interests of the minor (i.e., maintenance or education).*

## 19. Small Trusts

I direct my Trustees to deliver to [name of parent] "Parent Trustee", the sum of $5,000 to hold and keep invested as a separate testamentary trust to be known as the "[name of child]'s Trust" and the income and capital, or so much thereof as Parent Trustee with absolute unfettered discretion considers necessary or advisable, shall be paid to or for the benefit of such child until he/she reaches the age of eighteen (18) years. The Parent Trustee, with absolute discretion from time to time may decide to pay none all or part of the income derived to or for the benefit of such child. Failing an expression by the Parent Trustee to either pay out or to accumulate the income, any income derived from [name of child]'s Trust which is not paid or applied in any year or within ninety (90) days thereafter shall be deemed be accumulated by the Parent Trustee and added to the capital of [name of child]'s Trust. For greater certainty, I confirm that the Parent Trustee is authorized at any time and from time to time to pay or apply for the benefit of such child such part or parts of the capital of [child]'s Trust

as the Parent Trustee with absolute uncontrolled and unfettered discretion considers advisable for the maintenance, education, benefit or comfort or advancement in life of [name of child]. Should the Parent Trustee encroach on the capital to its complete exhaustion, the natural duration of [child]'s Trust shall end and [child]'s Trust shall thereby be terminated. If any [name of child] should die before reaching the age of eighteen (18) years the amount then held in the [name of child]'s Trust shall be paid or transferred to [specify alternate beneficiary].

The following provisions shall apply with respect to the trustees of each trust established under my Will:

a. such trustees shall have the same powers, rights, protections, obligations and duties in connection with the administration of any trust established under my Will as my Trustees have in connection with the administration of the rest of my estate;

b. the power to appoint one or more additional or substitutional trustees shall be vested in the trustees for the time being and may be exercised by them from time to time for any reason they may deem sufficient;

c. any trustee may at any time resign by giving thirty days' notice to the continuing trustee or trustees, if any, or if there shall be no continuing trustee upon the appointment of, and acceptance by, a substitutional trustee;

d. any trustee who suffers from mental incompetence within the meaning of *section 1* of *The Powers of Attorney Act* (Manitoba), as amended at the date of my Will, shall thereupon cease to be a trustee.

*Annotation:*

*Of importance in taking instructions is consideration of any gifts to minors, especially small gifts. The administration of small trusts may not be cost effective and these gifts may cause more difficulties and expense for trustees than warranted. When testators consider small gifts to infants, one option is an inter vivos gift, which of course can be discussed at the time of taking instructions. If small gifts are made in Wills, the solutions in drafting are: (1) allow the trustees the power to encroach on the capital to its complete exhaustion and pay it all out; or (2) create a trust wherein the parent is the trustee of the small trust (see first example above) in the Will; (3) allow a replacement trustee (second example above).*

*Option (1): See the comments under paragraphs 10 and 18 as this option may not be helpful if there are infants without a guardian of the estate appointed and payment of the whole amount raises the issues in the Sabo case.*

*Option (2): This is an appropriate option to consider and is often referred to as a "sub trust". The parent will be a trustee and it is important to ensure the parent is vested with all the powers as the executors/trustees of the Will (see paragraph (a) in the second example above).*

*Option (3): If there is a replacement trustee capable and willing to assume the trusteeship, the second example (b), (c) and (d) above should provide a solution.*

*It is well beyond the scope of this presentation, but gifts to be held in trust for non-resident beneficiaries (including infants) by a Canadian trust (i.e. executor/trustee is a Canadian resident) warrant special planning and consideration.*

*The Trustee Act:*

No particular provisions.

# 10. Sample Reporting Letter (Original Will Provided to Client)

[DATE]

Mr. John Doe
123 Any Street
Winnipeg, Manitoba
R1A 2B2 REGISTERED MAIL

Dear Sir:

**Re: Last Will and Testament**

As you will recall, you attended at our office and executed your will on [DATE of Signing].

This matter is now completed and accordingly, we enclose the following:
1. The original signed will of John David Doe and the affidavit of execution of the will signed by me;
2. A photocopy of the signed will of John David Doe;
3. An acknowledgement of receipt of the original will; and
4. Our statement of account for services rendered and disbursements incurred on your behalf, payment of which in due course would be appreciated.

We would remind you that the enclosed is the only signed copy of your will. The affidavit of execution is an important document required to probate the will. They are important legal documents and should both be kept together in a place of safekeeping.

Please sign the enclosed acknowledgement of receipt and return it to our office by mail, or by scanning a copy and sending it to us by email. The acknowledgement confirms that you received all pages of the original will along with the affidavit of execution.

As discussed, you may change the contents of your will at any time, but these must be documented and executed in the proper form and manner in order to be effective. It is wise to review your will every few years or if there is a change in your circumstances.*****

If you have any questions, please do not hesitate to contact the writer. We are pleased to have been of service to you in this matter.

Yours truly,

*** Letter should also include, if appropriate:**
1. confirmations of advice given but not followed by the client;
2. reminders to client to follow up on certain matters such as changing beneficiary designations in plan documents, etc.

# 11. Sample Reporting Letter (Original Will in Safekeeping)

(Note that it is not recommended practice that lawyers keep original wills. The Law Society of Manitoba recommendation is to give originals to clients for them to store. There may be liability for losing an original will. Keep a good record of the transfer of the original to the client should the need of proving same arise.)

[DATE]

Mr. John Doe
123 Any Street
Winnipeg, Manitoba
R1A 2B2 REGISTERED MAIL

Dear Sir:

**Re: Your Will**

As you will recall, you attended at our office and executed your will on [DATE of signing].

This matter is now completed and accordingly, we enclose the following:
1. A photocopy of the signed will of John David Doe and the affidavit of execution of the will signed by me; and
2. Our statement of account for services rendered and disbursements incurred on your behalf, payment of which in due course would be appreciated.

In accordance with your instructions, the original signed copy of your will and the affidavit of execution have been placed in our offices for safekeeping. Should you wish at any time for the originals to be delivered to you, please notify our offices in writing or attend at our offices in person, and we shall be pleased to provide you with them.

As discussed, you may change the contents of your will at any time, but these changes must be documented and executed in the proper form and manner in order to be effective. It is wise to review your will every few years or if there is a change in your circumstances.*****

If you have any questions, please do not hesitate to contact the writer. We are pleased to have been of service to you in this matter.

Yours truly,

***Letter should also include, if appropriate:**
1. confirmations of advice given but not followed by the client.
2. reminders to client to follow up on certain matters such as changing beneficiary designations in plan documents, etc.