Law Society of Ontario | Barreau de l'Ontario

TAB 1

The Annotated Will 2020

Annotated Will

January 23, 2020

TABLE OF CONTENTS

ANNOTATED WILL OF JOHN DOE[1]

INTRODUCTORY CLAUSE

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

This is the last will of me, JOHN DOE, of the City of Toronto, in the Province of Ontario, [insert occupation], [made this **XXX** day of January, 2020].

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

Including where the client resides will assist in differentiating the client from others who have a similar name. It will also assist in identifying in which court the probate application should be made. Sections 7, 11 and 12 of the Estates Act, R.S.O. 1990, c. E. 21 ("Estates Act") deal with where and how to file an application for a Certificate of Appointment. Including the client's occupation can also be a helpful differentiator; it is not essential, but it can also assist with the application since the deceased's occupation is one question on the application form.

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

This is the last will of me, JOHN DOE, resident in the City of London, in the United Kingdom, but domiciled in the Province of Ontario, Canada, [made this **XXX** day of January, 2020].

Some practitioners enter the date at the top of the first page of the will, others at the end of the will, while some put the date both at the beginning and at the end (with care taken to ensure both dates are consistent). Putting the date on the first page lets you know immediatelythe date of the will without having to flip to the last page. Either format is fine, although it is usually best to avoid a format that creates extra items to be updated, since that can lead to errors if special care is not taken.

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

If your client is preparing separate wills to deal with different categories of assets (e.g. assets located in multiple jurisdictions, or assets that require probate to administer vs. those that do not), the introductory clause should identify the restricted scope of the will (see the discussion of multiple wills below). Generally, identifying which will the will-maker is making in each specific case (e.g. "...this is my last will in regards to my Secondary Estate" or "my Ontario assets") suffices.

INTRODUCTORY CLAUSE FOR A WILL IN CONTEMPLATION OF MARRIAGE

Description of Clause: If the will is being made by the will-maker in contemplation of marriage, the introductory clause should include an additional statement.

This is the last will of me, JOHN DOE, of the City of Toronto, in the Province of Ontario, made [this **XXX** day of January, 2020] in contemplation of my marriage to JANE SMITH [on the 3rd day of February 2020], and is intended to take effect whether or not the marriage takes place.

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

A further clause can be included in the introductory provisions of the will to confirm that the will-maker intends the will to operate even if he or she does not marry as intended.

This clause cannot be used if the will-maker does not have a specific intention to marry a particular person at a particular time - a general intention to marry one's partner sometime in the future is not sufficient. The wording of the statute requires that the will be made "in contemplation of the marriage." Re Coleman, [1976] Ch 1, [1975] 1 All ER 675, [1975]2 WLR 213, construing the parallel provision in the English legislation, emphasizes the significance of "the" before "marriage" in the statute.

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

REVOCATION

Description of Clause: The clause expressly states that the will revokes any prior wills.

I revoke all wills and codicils previously made by me.

Annotation: Sections 15, 16 and 17 of the SLRA deal with the various means of revoking a will. In particular, making a new will that disposes of all the client's property revokes an older will (see ss. 15(b)). As a result, it is not, strictly speaking, necessary to include this clause, but to ensure the will-maker understands the effect of executing a new will, it is common practice to include it. In addition, subsection 15(c) provides for revocation of a will by a writing declaring

an intention to revoke. Other means of revocation include burning, tearing or otherwise destroying a will and marriage.

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

If your client is preparing separate wills to deal with different categories of assets (e.g. assets located in multiple jurisdictions, or assets that require probate to administer vs. those that do not), the revocation language should only revoke prior wills dealing with the particular assets governed by the will (see discussion of multiple wills below). The language used should make it plain that the will-maker does not intend to revoke wills dealing with assets not governed by the will in question.

DISPOSITION OF BODY

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

Pursuant to the *Trillium Gift of Life Network Act,* R.S.O. 1990, c. H.20, I consent to the use of my body or any part or parts of it after my death for therapeutic purposes only [*or,* for therapeutic purposes, scientific research, or medical education]. I request that my remains be cremated.

Annotation: This is one example of the many ways a client can express wishes regarding the disposal of remains. Many clients have faith-based requirements, concerns about the impact on the environment, a desire to make funds available for a funeral or disposal, or wishes about places for scattering of ashes, etc.

If referred to at all, the will-maker's wishes with respect to the disposition of his or her body should appear as early as possible in the will so that they can be easily found in time to be effective. The client should still be encouraged to discuss these wishes ahead of time with the family and executors, to register wishes with respect to organ donation with the Ministry of Health (http://www.health.gov.on.ca/english/public/pub/ohip/organdonor.html), to complete the organ donation card that comes with a new driver's licence, and perhaps to complete a funeral pre-planning questionnaire. The client should also be warned that funeral instructions are not legally binding. Finally, the client should be discouraged from inserting detailed funeral instructions into a will; instead, a separate letter or memorandum could be left for the executors and kept with the will.

REGISTERED PLANS

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

I designate my wife, JANE DOE, if she is living on the date of my death, as my beneficiary under each registered retirement savings plan and each other "plan", within the meaning of Part III of the *Succession Law Reform Act*, R.S.O. 1990, c. S.26 ("the Act"), that I own or under which I am entitled to benefits on the date of this will, to receive all proceeds payable under the plans after my death (including payments made as a consequence of my death and contractual payments continuing after my death). This is a designation within the meaning of the Act. I revoke any previous designation made in respect of each plan.

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

Under the Income Tax Act, R.S.C. 1985 (5th Supp.) c. 1 (the "Income Tax Act"), the owner of an RRSP is deemed to have disposed of their RRSP on death and the full amount of the RRSP is brought into income on their terminal return. As a result, income tax will be payable by the estate on its value in the year of death. This tax burden can be deferred in two circumstances:

The first deferral opportunity is where there is a surviving spouse, either legal or common law. The spouse may be designated as beneficiary of the deceased's RRSP, either on the plan itself or (because the SLRA s. 51(1) says that a beneficiary designation for an RRSP and similar plans requires only that it be by a signed instrument) in the will. Where the funds are paid to the surviving spouse, the amount of the RRSP is still included in the income of the deceased on the terminal return, but a deduction is available for the amount paid to the surviving spouse. The surviving spouse must include the amount received on their own income tax return. If the spouse contributes the proceeds to their own RRSP, they can claim a deduction against the amount included in their income. The result is a deferral of the income tax consequences until the surviving spouse draws upon the RRSP, at which time the spouse will have an income inclusion of the amount of RRSP drawn upon. However, if the spouse chooses to take a lump-sum payment instead, the spouse will pay tax on the lump sum.

The same deferral opportunity is available if the designated beneficiary is a financially dependent child or grandchild of the deceased owner of the RRSP. However, the deferral is only available until age 18. There is a longer deferral opportunity available if the child or grandchild is financially dependent by reason of physical or mental infirmity. Alternatively, RRSP proceeds may be rolled into a registered disability savings plan ("RDSP") established for a financially dependent child or grandchild of the deceased owner, if the RDSP beneficiary is under 59 years of age, the RDSP beneficiary and the plan holder consent to the transfer, and the total of all rollovers and contributions ever made to the RDSP in respect of that beneficiary remains at or

below $200,000. See sections 146 and 146.3 of the Income Tax Act for the provisions applicable to RRSPs and RRIFs, respectively.

A joint election is available under the Income Tax Act where the proceeds of an RRSP are payable to the legal representative of the estate, but would have qualified for a deferral opportunity if the surviving spouse or a financially dependent child or grandchild had been the designated beneficiary. If the requirements of the joint election are met, the election deems the amount to have been receivable by the surviving spouse or dependent child or grandchild, as the case may be, and not the personal representative of the estate. Solicitors are advised to consult the CRA's guidance on the criteria for using the joint election, in particular the now-archived Interpretation Bulletin IT-500R. A similar joint election is available for a RRIF, but only for a financially dependent child or grandchild.

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

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

I designate my wife, JANE DOE, if she is living on the date of my death, as the successor annuitant of each registered retirement income fund that I own or under which I am entitled to benefits on the date of this will…

In addition, by Ontario Regulation 54/95 to the SLRA, "Tax Free Savings Accounts" are prescribed as "plans" for purposes of Part III of the SLRA, and a beneficiary may be designated in the same manner as for an RRSP. Where the TFSA is to be left to the will- maker's spouse, however, the transfer of ownership is more easily effected by naming the spouse as the "successor holder" of the TFSA instead of the designated beneficiary, because if there is a successor holder, the existing TFSA will continue, all income generated after death will remain tax free, and the amount in the will-maker's TFSA will not affect the successor holder's contribution room. Such a designation also allows the spouse to retain the investments held in the TFSA, which may be beneficial in some cases. Beneficiaries can only receive a lump-sum in cash according to some financial institution policies. Where the successor holder is designated by will, the will must state that the successor holder acquires all the rights of the

original holder, including the right to revoke beneficiary designations. Therefore, if the client owns a TFSA, the following clause may be used:

I designate my wife, JANE DOE, if she is living on the date of my death, as the successor holder of each tax-free savings account that I own on the date of this will, and I give to her all my rights under each account, including the unconditional right to revoke any existing beneficiary designation in respect of each account. This is a designation within the meaning of Part III of the *Succession Law Reform Act*, R.S.O. 1990, c. S.26. I revoke any previous designation made in respect of each account.

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

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

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

If the named beneficiary may be a minor at the time of inheriting, however, consider the manner in which the plan proceeds should be administered, since the minor beneficiary may receive the plan proceeds at the age of 18. Depending upon the value of the plan proceeds, this may not be appropriate. In such cases, trust provisions should be considered, including incorporating residual trust provisions by reference, although some practitioners prefer to repeat trust provisions in beneficiary designations to ensure that no question arises regarding the designation being separate from the will-maker's assets passing through the will for probate purposes.

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

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

Where the RRSP has a designated beneficiary, it is not subject to the claims of creditors of the estate. RRSPs issued by a life insurance company have long received protection after death under the Insurance Act. In 2004, the same protection was extended in Ontario to non-insurance RRSPs payable to a designated beneficiary: Amherst Crane Rentals Ltd. v. Perring (2002), 46 E.T.R. (2d) 1 (Ont. S.C.J.), affirmed (2004), 241 D. L. R. (4th) 176 (Ont. C.A.); leave to appeal

refused, [2004] S.C.C.A. (430). This ruling was subsequently followed by s. 67(1)(b.3) of the Bankruptcy and Insolvency Act, RSC 1985, c B-3, which specifically exempts "property in a registered retirement savings plan or a registered retirement income fund, … other than property contributed to any such plan or fund in the 12 months before the date of bankruptcy" from the property divisible among creditors of a bankrupt. Note that whether a RRSP will be exempt from seizure by creditors during the lifetime of the plan-holder varies depending on the type of RRSP, whether the plan holder is bankrupt, when the contributions were made, and what relationship the designated beneficiary bears to the plan holder. A discussion of these conditions is outside the scope of the Annotated Will.

INSURANCE DECLARATION

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

I designate my wife, JANE DOE, if she is living on the date of my death, as beneficiary of the proceeds of Policy No. 01234 with the Life Insurance Company, no matter to whom the insurance proceeds are payable now under the terms of the policy or any prior declaration. This is a designation within the meaning of the *Insurance Act*, R.S.O. 1990, c. I.8. I revoke any previous designation in respect of the insurance proceeds.

Annotation: Section 192 of the Insurance Act includes the provisions relevant to the designation of beneficiaries of insurance policies by will. It is important to be aware that the Insurance Act allows for beneficiary designations in a number of forms, as long as there is a written declaration. If the insured makes a beneficiary designation in a document that is later in time than his or her will, the later document will govern. Some practitioners prefer to do their insurance designations in a separate document, not as part of the will, so that if the will is revoked or destroyed, the insurance designation remains in force. However, this may not be the will-maker's intention in every case. Further, jointly-owned life insurance policies require a separate joint beneficiary designation to be effective, since both owners must agree to change the beneficiary designation.

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

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

As with RRSPs, for estate administration tax purposes (probate fees), if a beneficiary of life insurance proceeds is designated such that the benefits do not fall into the control of the executor, then the value of the proceeds is not included for purposes of determining the value of the estate when calculating this tax. (See Forms 74.4 and 74.14 of the Rules applicable to the

bringing of an application for a Certificate of Appointment of Estate Trustee with or without a will).

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

INSURANCE TRUST

Description of Clause: The following provisions create an insurance trust of the proceeds for the benefit of the surviving spouse and issue, with the spouse named as the trustee of the insurance trust, and alternate trustees if the spouse dies before the will-maker.

I declare that the proceeds my policy of insurance on my life, Policy No. 01234 with the Life Insurance Company, no matter to whom the insurance proceeds are payable now under the terms of each policy or any prior declaration, shall be paid to my wife, JANE DOE, if she is living on the date of my death, as trustee of a separate insurance trust fund (the "Insurance Trust") for the beneficiaries named below in accordance with the provisions of this paragraph.

If my wife, JANE DOE, dies before me or is at any time unable or unwilling to act or to continue to act as the trustee of the Insurance Trust, I appoint my wife's father, JOHN SMITH, my wife's sister, SANDRA SMITH, and my brother, ROBERT DOE, or the survivor or survivors of them, to be the trustees of the Insurance Trust, to be held by them in accordance with the provisions of this paragraph, in her place.

The trustees of the Insurance Trust ("the Insurance Trustees"), whether original or substituted, have the same powers and rights in connection with the administration of the Insurance Trust as my Executors and Trustees under my will have for the administration of my estate. For that purpose, I incorporate by reference the provisions of paragraphs **[XXX]** to **[XXX]** [refer to paragraph numbers for administrative provisions only, not dispositive provisions] of my will into this paragraph of my will, *with the necessary modifications*, as terms of the Insurance Trust.

Whenever there are more than two persons acting as Insurance Trustees of the Insurance Trust, a decision of the majority of the trustees is final and binding upon all Insurance Trustees.

This is a declaration within the meaning of the *Insurance Act*, R.S.O. 1990, c. I.8 (the "Insurance Act"). For greater certainty, the Insurance Trust does not form part of my estate. It is a separate trust notwithstanding that one or more of the trustees of the Insurance Trust may be trustees of my estate.

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

The Insurance Trustees shall administer the Insurance Trust as follows:

(1) To invest and reinvest the Insurance Trust and to pay to or apply for the benefit of any one or more of [my wife, JANE DOE, and] ***[N.B. The above clauses contemplate the spouse receiving the insurance proceeds directly with an alternate insurance trust for issue. However, that clause can be eliminated and the insurance trust not made conditional on the spouse's death if desired by the will-maker.]*** my issue living from time to time, to the exclusion of the other or others, all or any part of the annual net income or capital of the Insurance Trust, at any time, in the shares and proportions that my Trustees in their absolute discretion consider appropriate.

(2) To accumulate all or any part of the annual net income of the Insurance Trust as the trustees in their absolute discretion consider appropriate, and to add that accumulated income to the capital of the Insurance Trust. If the Insurance Trustees are required by law to distribute the income in any year, to pay to or apply for the benefit of any one or more of my wife, JANE DOE, and my issue living from time to time, to the exclusion of the other or others, all of the annual net income of the Insurance Trust, in the shares and proportions that my Trustees in their absolute discretion consider appropriate. If the Insurance Trustees fail to exercise their discretion within thirty (30) days of the end of that year, to pay or apply the undistributed income to or for the benefit of my wife, JANE DOE, if she is then living, but if she is not then living, to divide the undistributed income among my issue in equal shares per stirpes.

(3) On the last to happen of:

(a) my death; ***[N.B. This event is included to provide for a scenario in which the will-maker's spouse predeceases and on the date of the will-maker's death all of the will-maker's children are over 35 years of age.]***

(b) the death of my wife, JANE DOE; and

(c) the date no child of mine is living and under the age of thirty-five (35) years,

to divide the balance of the Insurance Trust then remaining among my issue in equal shares *per stirpes*.

(4) If on the date of my death, or any time after the date of my death, none of my wife, JANE DOE, and my issue are living to take an absolutely vested interest in the Insurance Trust, to divide the Insurance Trust remaining on the date of death of the last survivor of me, my wife, JANE DOE, and my issue (the "Trust Distribution Date") among the same persons and on the same terms as provided in paragraph **[XXX]** [refer to paragraph number of "disaster clause"] of my will, but with the beneficiaries determined as if the [distribution date] in paragraph **[XXX]** [refer to paragraph number of "disaster clause" and use the defined term from that paragraph in place of distribution date] was the Trust Distribution Date.

<u>Annotation</u>: While the <u>Insurance Act</u> allows for beneficiary designations by written declaration or will, if the insured intends to have the insurance proceeds dealt with in a particular manner,

such as in trust for minor children, it is generally preferable to complete the designation in the will. (See ss. 190 to 194.) The written declaration forms provided by most insurance companies only provide for outright distributions of the insurance proceeds, and do not contain trust provisions or provide for the appointment of a trustee for minor beneficiaries.

If one of the purposes of making the designation is to avoid having the insurance trust considered part of the estate subject to probate fees, it is important that the insurance declaration occur before the vesting language in the will. It is also important to draft the insurance trust in such a way that the insurance proceeds clearly do not form part of the estate. Hence the precedent above essentially creates a complete self-contained trust, rather than simply adopting the dispositive provisions of the will. It incorporates the powers clauses of the will as the powers clauses of the Insurance Trust Fund, thereby buttressing the argument that the Insurance Trust Fund is truly separate from the residue of the estate so that probate fees should not be payable on its value.

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

Note that there is some debate as to whether the proceeds payable on death out of a group life insurance policy (such as a policy typically offered by employers to all employees) should be part of an insurance trust that is intended to be a testamentary trust for income tax purposes. Technical Interpretation dated March 23, 2001, Document number 2000-0059755, suggests that because the individual is not the "owner" of a group life insurance plan, the proceeds of a group insurance policy cannot form part of a testamentary trust. Recent changes to the Income Tax Act regarding testamentary trusts may make this issue moot. Other than certain disability trusts and a "Graduated Rate Estate" (which is essentially the estate of a deceased taxpayer during the 36 months after death, subject to certain conditions), testamentary trusts no longer enjoy progressive tax rates. All income of such trusts is now taxed at the highest marginal rate commencing January 1, 2016. As a result, failure to maintain an insurance trust as a testamentary trust for Income Tax Act purposes will not have the same adverse tax effects as in the past.

In 2007 the Saskatchewan Court of Queen's Bench, in Re Carlisle Estate (November 29, 2007), 2007 SKQB 435, found that a designation in favour of "the person who shall from time to time be acting as my Trustee" caused the insurance proceeds to pass through the estate and become subject to probate fees. The court came to this conclusion despite specific language in the will confirming that the proceeds "shall be paid to my Trustee in his capacity as insurance trustee, and not in his capacity as Trustee of my estate assets", that the proceeds would be held "upon the same trusts, terms and conditions, as if such proceeds had formed part of the residue of my

estate" and that the insurance trustee "shall have the same powers, rights, protections, obligations and duties in connection with the administration of the insurance fund or funds as he has as a Trustee of my estate assets for the administration of the residue of my estate." Until such time as an Ontario court has had the opportunity to comment on Re Carlisle Estate, most practitioners are taking the view that it does not represent the law of Ontario. However, a more cautious approach would be to create such an insurance trust as a separate document, in which case it would be necessary to set out in detail all the necessary trust powers clauses as shown above. Alternatively, naming the separate trustees rather than referencing the executors of the will should further bolster the argument that the insurance trust is a separate trust and does not form part of the estate for probate purposes.

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

AIR MILES DESIGNATION

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

I designate my wife, JANE DOE, if she is living on the date of my death, as beneficiary to receive all my Air Miles points in account number 1234567. If my wife, JANE DOE, dies before me, my Trustees [(as defined in paragraph **[XXX]**) refer to paragraph number where "Trustees" is defined] shall divide my Air Miles points equally between those of my son, JACK DOE, and my daughter, JILL DOE, living on the date of my death.

Annotation: Clients may have built up frequent flyer points or other reward points with significant value. As a result, you should canvas with your clients whether they have reward points, such as frequent flyer points. Each rewards program has its own rules about whether they can be specifically given away on death and to whom, and whether they can be dealt with by the executors if not specifically gifted. Most plans allow for a disposition of points to immediate family members. Unfortunately, there can be a significant cost. Most plans do not, however, allow for an exchange of points for money. To avoid any disputes concerning who is to receive the points and to avoid the necessity of any valuation in the event the points are not specifically disposed of, it is advisable to include a specific gift, although you should ensure that the will-maker understands that the program may not honour the gift to certain individuals.

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

JOINT ACCOUNTS

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

I own certain real and personal property as joint tenants with my daughter, JILL DOE. It was my intention when these joint interests were created, and it remains my intention that,

if my daughter, JILL DOE, is living on the date of my death, she be the sole legal and beneficial owner of that property by right of survivorship as a consequence of my death.

OR

I own [description of property] as joint tenants with my daughter, JILL DOE. It was my intention when these joint interests were created, and it remains my intention, that if my daughter, JILL DOE, is living on the date of my death, the property not pass to her by right of survivorship as a consequence of my death. Even though my daughter, JILL DOE, and I hold legal title to the property as joint tenants, we own our respective beneficial interests in the property as tenants-in-common (OR: Even though my daughter, JILL DOE, and I hold legal title to the property as joint tenants, my daughter holds legal title to the property in trust for me.) Myinterest in that property forms part of my estate to be dealt with in accordance with the provisions of my will.

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

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

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

the will is not covered by the clause and would be dealt with in accordance with the normal presumptions or evidence to the contrary.

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

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

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

> ***14. The rule of law applying a presumption of a resulting trust shall be applied in questions of the ownership of property between husband and wife, as if they were not married, except that***
>
> > ***(a) the fact that property is held in the name of spouses as joint tenants is proof, in the absence of evidence to the contrary, that the spouses are intended to own the property as joint tenants; and***
> >
> > ***(b) money on deposit in the name of both spouses shall be deemed to be in the name of the spouses as joint tenants for the purposes of clause (a).***

APPOINTMENT OF EXECUTORS

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

I appoint my wife, JANE DOE, of the City of Toronto, Ontario, to be the executor of my will and trustee of my estate. If she dies before me, or is at any time unable or unwilling to act or continue to act as executor of my will and trustee of my estate before all the trusts in my will have been fully performed, I appoint my friend ROBERT JONES of the City of Toronto, to

be the executor of my will and trustee of my estate, in her place. If my friend, ROBERT JONES, dies before me or is at any time unable or unwilling to act or continue to act as executor of my will and trustee of my estate before all the trusts in my will have been fully performed, I appoint my solicitor, LINDA LAWYER, of the City of Toronto, to be the executor of my will and trustee of my estate, in his place.

The expression "my Trustees" used throughout my will includes, where the context permits, the executor or executors and trustee or trustees for the time being of my will, whether original, additional, or substituted.

If any of my wife, JANE DOE, my friend ROBERT JONES or my solicitor, LINDA LAWYER, acts as Trustee, he or she is not required to post a bond as security. In addition, any Trustee who is not resident in Ontario is not required to post a bond as security for acting as Trustee.

<u>Annotation</u>: A preliminary note about terminology - the term "executrix" is traditionally used where the person appointed is female. However, it is now common to use gender-neutral language. Accordingly, the term "executor" is used in the above clause regardless of the person's gender. This has the added benefit of not requiring modification of the precedent used where gender changes occur.

There are any number of options as to who can be named the executor(s) and whether there is a sole executor or more than one. They can be family members, friends, professional advisors, or a trust company. The choice of executor(s) will differ depending upon your client's circumstances and the nature of the will plan. Choosing the executor(s) is likely one of the most important decisions your client will make. In our experience, it is best to leave the discussion of this person until you have obtained the requisite background information and discussed your client's goals about disposing of his or her estate. If you have taken the time to acquire enough background information from your client, by the end of this exercise you will understand your client's financial and personal affairs, as well as his or her goals and attitudes. It is only after you have completed this exercise that you will understand who may or may not be a suitable candidate for this position.

If the will plan is for an immediate distribution, for instance to the surviving spouse, then one or more of the beneficiaries are generally a good choice for executor. Beneficiaries may not be a good choice when:

- ***the beneficiary resides outside of a Commonwealth jurisdiction. (A foreign executor, including a resident of the US, is required to post a bond as security. This can add to the costs of administration. It is possible for the will-maker to include a direction that he or she does not intend for the foreign executor to have to post a bond as security. This direction is, however, not binding on the court. An application to the court will have to be made to have the necessity of a bond waived. While the application is an 'over-the-counter' procedure, affidavit evidence as to the value of the estate and whether all debts have been paid, will be required. Where there are beneficiaries who are not adult and capable, the court may not grant the application for the entire estate value.)***

- ***the beneficiary is a charity;***

- ***one of the beneficiaries may inherit while under the age of 18;***

- ***there are trusts for any of the beneficiaries;***

- ***the assets might require professional assistance to administer such as shares of a private company in which none of the beneficiaries are involved;***

- ***the beneficiary-executor may be in a perceived conflict of interest and should be balanced with an impartial executor; or***

- ***an executor with particular expertise is required (e.g. a literary executor to deal with an author's unpublished works).***

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

Where multiple executors are named, ensure that they will be able to cooperate - not all of the will-maker's children may be able to do this, and a frank discussion in this regard is sometimes warranted if the will is to set up a future battleground for them. Also, where a majority decision-making power is provided, an odd number of executors should be appointed to more easily allow them to get past any impasse.

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

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

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

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

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

My Trustees may from time to time, by an appointment in writing, appoint additional Trustees of my estate, or any particular trust established under my will, as the case may be, as my Trustees in their absolute discretion consider appropriate. If there are no Trustees, a majority of the beneficiaries of my estate or any particular trust established under my will, as the case may be, who have attained the age of majority and are mentally capable, may make that appointment in writing.

If there is only one (1) Trustee of my estate, or any particular trust established under my will, as the case may be, that Trustee may only resign pursuant to a court order made by a court of competent jurisdiction. If my estate or any particular trust established under my will, as the case may be, has more than one (1) Trustee, any Trustee may retire by providing ninety (90) days' written notice to the remaining Trustees personally or by registered mail, fax, or electronic transmission, or similar method, all charges prepaid, if applicable, to the last known addresses or electronic addresses of the remaining Trustees. The remaining Trustees may, by unanimous decision, agree to a shorter notice period, as they in their absolute discretion consider appropriate.

If a Trustee is declared incapable or bankrupt, that Trustee immediately ceases to be a Trustee and is deemed to have retired.

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

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

- ***the assets require the experience, expertise, and skills of a trust company;***
- ***the duties would impose too great a burden on individuals;***
- ***there are trust funds to be in existence for a number of years, such that the administration will require the continuity provided by a trust company;***
- ***a conflict among the beneficiaries requires an impartial executor;***
- ***your client wants the comfort of having a professional involved or has no obvious person in their life who would complete the responsibilities adequately.***

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

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

If the will plan involves a spousal trust for the surviving spouse and it is unlikely that an election will be made, then generally the surviving spouse should be one of the executors. Designating a minimum number of trustees and allowing for majority decision-making can avoid the spouse having a veto over decisions, but if a veto is in fact intended, the provision can go on to state that the spouse must form part of any majority, as the will-maker wishes. See below for a further discussion of majority decision-making clauses.

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

One of the more common potential conflicts to avoid is the naming of a business associate where the business is one of the assets of the estate. If the business associate is named as executor, he or she will be in a conflict if there is a buy-sell agreement between the deceased and the business associate or if there is a chance that the business associate may want to purchase the deceased's business interests. Therefore, if the business associate is named as executor, a provision must be included in the will allowing trustees to purchase trust property and expressly recognizing the business associate's conflict(s). This comment applies to any named executor who may be in a conflict of interest – express recognition will avoid or minimize future issues. (This will be discussed again in the context of the administrative provisions of the will.)

Note that changes in trustees of trusts that hold shares of private corporations may have income tax implications, such as a change of control. It is beyond the scope of the Annotated Will to provide further detail other than to remind readers to consider this issue further.

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

To avoid the principles relating to the devolution of executorship applying (see the preceding subsection and further discussion below) if a solicitor (or other professional) is named (or is in fact) the last surviving executor then he or she should name an alternate in their own will thereby avoiding having their own executor force to step in on those estates that they are an executor of in the event they die while the estate is in administration. This is particularly important for a professional who may be appointed as the executor of several estates. Accordingly, if this situation is applicable, the following precedent may be included:

If I am the sole Trustee of an estate, other than the estate of my wife, JANE DOE, or any person related to me, I appoint my colleague, LINDA LAWYER, to be the successor executor and trustee in my place, but if LINDA LAWYER dies before me or is at any time unable or unwilling to act or continue to act as the executor and trustee, I appoint my colleague, SAM SOLICITOR, to be the executor and trustee, in her place and stead.

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

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

DISPUTE RESOLUTION

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

If any difference of opinion exists at any time among my Trustees in relation to the commission or omission of any act in the execution of the trusts of my will, the opinion of my Trustees having the majority of votes prevails, notwithstanding that any one or more of my Trustees may be personally interested or concerned in the matter in dispute or question.

<u>Annotation</u>: Unless a contrary intention is stipulated, executors must make decisions unanimously. Disagreement among two or more executors can cause delay, loss to the estate due to the delay, costs of court proceedings, and general hostility. Therefore, it is wise to consider how decisions will be made by multiple executors. The majority provision above may prevent deadlock where there are three or more executors, as decisions can be made in the face of dissent. In some circumstances, it may be appropriate to give one executor a veto right. In other words, that executor must always be part of the majority. In this case the foregoing paragraph can be modified as follows:

If any difference of opinion exists at any time among my Trustees in relation to the commission or omission of any act in the execution of the trusts of my will, the opinion of my Trustees having the majority of votes, **of which [Name] must be one**, prevails, notwithstanding that any one or more of my Trustees may be personally interested or concerned in the matter in dispute or question.

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

If any difference of opinion exists at any time among my Trustees in relation to the commission or omission of any act in the execution of the trusts of my will, any Trustee may, by providing written notice to the other Trustees within thirty (30) days of the date of the dispute, request the appointment of an umpire (the "Umpire") to settle that dispute. The Umpire will be my accountant, *, but if my accountant has died or for any other reason is unable or unwilling to act or to continue to act as the Umpire, then the Umpire will be my solicitor, *, but if my solicitor has also died or for any other reason is unable or unwilling to act or to continue to act as the Umpire, then the Umpire will be any other person to which my Trustees agree. Once the Umpire has been determined, my Trustees (either individually or collectively) shall forward to the Umpire a statement in writing summarizing the matter in dispute and setting out the vote cast by each of the Trustees. The Umpire then has sixty (60) days to determine the matter in dispute and to provide written notice of the Umpire's determination to my Trustees. In coming to his or her determination, the Umpire has no fiduciary obligations to any of my beneficiaries and is not governed by any statute or law governing arbitrators or the arbitration process. The determination of the Umpire is final and binding on my Trustees and on the beneficiaries of my estate, and my Trustees must give effect to the determination as soon as is reasonably possible.

<u>DEFINITIONS OF RELATIONSHIPS</u>

<u>Description of Clause</u>: The provisions below define who is included in certain family relationships, such as children, grandchildren, issue, parent, and spouse.

Child or Grandchild

Any reference in my Will to a "child" or "grandchild" shall include, for greater certainty:

(a) any child or grandchild who has been legally adopted in any jurisdiction; and

(b) any person who comes within that description because of the relationship of parent and child set out in Part I of the *Children's Law Reform Act* ***[N.B. See also the additional language in the definition of "issue" that references the requirements in subsection 1.1(1) of the Succession Law Reform Act for posthumously-conceived persons to be included for succession purposes, and which could be adapted and included here with the necessary modifications]***; and

(c) any child or grandchild conceived before and born alive after the individual's death; and

Parent

Any reference in my Will to a "parent" shall include any person who comes within that description because of the relationship of parent and child as set out in Part I of the *Children's Law Reform Act*.

Issue

Any reference in my Will to "issue" means all lineal descendants of the named individual, and shall include, for greater certainty:

(d) a descendant conceived before and born alive after the person's death, and

(e) any descendant who has been legally adopted in any jurisdiction; and

(f) any descendant who comes within that description because of the relationship of parent and child set out in Part I of the *Children's Law Reform Act*, including for greater certainty a descendant conceived and born alive after the person's death, if the following are met;

(i) The person who, at the time of the death of the deceased person, was his or her spouse, must give written notice to the Estate Registrar for Ontario that the person may use reproductive material or an embryo to attempt to conceive, through assisted reproduction and with or without a surrogate, a child in relation to which the deceased person intended to be a parent;

(ii) The notice under paragraph (c)(i) must be in the form provided by the Ministry of the Attorney General and given no later than six months after the deceased person's death;

(iii) The posthumously-conceived child must be born no later than the third anniversary of the deceased person's death, or such later time as may be specified by the Superior Court of Justice under the applicable law; and

(iv) A court has made a declaration under section 12 of the Children's Law Reform Act establishing the deceased person's parentage of the posthumously-conceived child.

In Equal Shares Per Stirpes:

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

Annotation:

Use caution when using the phrase "in equal shares per stirpes" with limiting language such as the names of grandchildren. The use of 'per stirpes', in conjunction with the naming of specific beneficiaries in a will creates an apparent contradiction: a 'per stirpes' distribution means that each branch of a family is entitled to only one share of the gift, to be distributed among the members of the branch. Under a gift to issue alive at the testator's death per stirpes, this would mean the children of a deceased child of the testator would share the deceased child's share of the gift. In contrast, a per capita distribution means that each lineal descendant of a testator alive at the testator's death would receive one share of the gift. Determine your client's intentions then use the appropriate language

Since 1978, both persons born inside marriage and those born outside marriage are entitled to share equally in an estate, either on intestacy or where a Will does not express a contrary intention, for example by expressly excluding persons born outside marriage, or limiting when persons born outside marriage will be included. See subsection 1(3) of the SLRA and the rules for determining parentage in Part I of the Children's Law Reform Act, 1990, c. C. 12 (the "Children's Law Reform Act"). Accordingly, unless a contrary intention is shown in the Will, any words identifying a class of persons, such as "children", "issue", or "cousins", will be deemed to include both persons who were born inside or outside of marriage or those who claim through them.

Adoption severs the biological parental relationship for all purposes and an adopted child is subsequently included in the class of "children" and "issue" of the adoptive parent.

In 2016, new rules for determining parentage were introduced through the All Families Are Equal Act (Parentage and Related Registrations Statute Law Amendment), 2016, S.O. 2016, c. 23 (the "All Families Act"). The All Families Act amends several statutes, including the Children's Law Reform Act ("CLRA") and the SLRA. The rules for determining parentage are primarily contained in the new Part I of the CLRA, which replaced the former Parts I and II. To recognize advances in assisted reproduction, the new rules provide for the automatic recognition of certain persons as legal parents of a child who were formerly required to obtain a declaration of parentage or adopt. The rules are complex and should be reviewed by all drafting solicitors. The following is an overview of who is a legal parent of a child in Ontario under the new rules:

(1) an adoptive parent (see s. 4(2) CLRA);

(2) the birth parent, unless the birth parent is a surrogate (see s. 6 CLRA);

(3) if a child is conceived through sexual intercourse, the person who contributes sperm, unless there is a written pre-conception agreement that such individual is not intended to be a parent of the child (where there is such an agreement the method of conception is defined as "insemination by a sperm donor" and not sexual intercourse) (see s. 7 CLRA);

(4) the spouse of the birth parent if assisted reproduction or insemination by a sperm donor is used, but see the requirements in section 8 of the CLRA;

(5) up to 4 intended parents under a pre-conception parentage agreement (see the specific requirements in section 9 of the CLRA);

(6) up to 4 intended parents who are parties to a surrogacy agreement, or more than 4 intended parents if a declaration of parentage is obtained (see the specific requirements in sections 10 and 11 of the CLRA);

(7) a deceased person where that person's genetic material is used by the person who was, at the time of the deceased's death, the spouse of the deceased, to conceive a child using assisted reproduction. See the specific requirements in section 12 of the CLRA for recognition of the deceased as a parent, including the requirement to obtain a declaration of parentage. There are additional requirements in subsection 1.1(1) of the SLRA for a posthumously-conceived child to be considered a child or issue for purposes of succession and dependent's relief, including a notice requirement to the Estates Register and a requirement that the child be born within 3 years of the deceased's death, unless that timeline is extended by court order. The definition of "issue" above mirrors the statutory requirements in the SLRA; and

(8) any person in favour of whom a declaration of parentage is made.

Importantly, the new parentage rules provide that a person who provides genetic material for use in assisted reproduction is not for that reason alone a parent of a child, but must qualify as a parent in one of the ways described above.

The definitions above are expansive and are intended to include all parent and child relationships that are recognized at law in Ontario. Individual clients may have different views on who should and should not be included in class references such as children and issue. The definitions will need to be amended to reflect the client's intentions. For example, some clients may wish to exclude children born outside marriage unless certain conditions are met. In such circumstances the following provision may be used:

Unless otherwise specifically provided, any reference in my Will or in any Codicil to my Will to my children or to my more remote issue, or to the children or more remote issue of any other person or persons shall not include:

(a) a person born outside marriage,

(b) a person who comes within the description traced through another person who was born outside marriage,

provided that any person who was born outside marriage but whose parents subsequently married one another, or who in the sole and absolute opinion of my Trustees has had for some time during his or her lifetime a normal relationship with one of his or her natural parents, and any person who has been legally adopted, shall be regarded as having been born within marriage.

In other cases, a client may wish to exclude descendants who are posthumously-conceived, or shorten the timeframe within which they must be born to be considered for succession purposes. It is important for drafting solicitors to canvass with clients whether the client or any potential beneficiaries may have stored genetic material.

Consider also clauses to specifically exclude certain adopted or second-relationship children in situations where the testator does not consider the adopted or non-related child to be a family member and wishes to exclude those children. If there are un-adopted step-children in the family, specifically include such children in the class of intended beneficiaries or make the intention to exclude such children clear. These matters demonstrate the importance of thorough information-gathering and note-taking when discussing the testator's instructions and wishes.

DEFINITION OF SPOUSE

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

Any reference in my Will, or any Codicil to my Will, to the "spouse" of one of my issue means a person of either gender who is cohabiting with my issue in a conjugal relationship, whether or not such person is married to my issue. If my issue has died, the reference will include the person who was cohabiting with my issue in a conjugal relationship at the time of such issue's death.

Annotation: In Wills which allow or require distributions to the "spouse" of a beneficiary it is wise to indicate whether, and after what period of cohabitation, a common-law spouse qualifies. Where distributions are entirely within the discretion of a child or other blood relative of the testator, it may be appropriate to have a broad definition as set out above.

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

If a testator wishes to exercise greater control, the following definition, or the appropriate portions of it, may be used.

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

(a) is married to the individual and is not living separate and apart from the individual at the relevant time;

(b) has in good faith gone through a form of marriage with the individual, which is void or voidable, and the two of them are cohabiting or have cohabited within the previous twelve-month period;

(c) though not married to the individual, is cohabiting with him or her and has cohabited with him or her continuously for a period of not less than five [or some other quantum] years;

(d) though not married to the individual, is cohabiting with him or her in a relationship of some permanence where there is a child born of whom they are the legal parents; or

(e) is a person in favour of whom an order for support, alimony or maintenance has been made by a Court of competent jurisdiction against the individual under which such individual continues to have obligations;

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

LOCATION OF BENEFICIARIES

Description of Clause: If relationships are not adequately defined, executors may need to search for beneficiaries of class gifts or for illegitimate children, or if potential beneficiaries cannot be located, estate administrators will face challenges in administering the estate. The following clause addresses the circumstance where a beneficiary cannot be located:

(a) My Trustees shall pay or transfer one share to my stepson *, if he is alive at my death and if my Trustees can locate him by the second anniversary of my death (my Stepson's Share"),

(b) If my stepson * is not alive at my death or cannot be located but leaves issue alive at my death who can be located by the second anniversary of my death, my Trustees shall divide my Stepson's Share in equal shares per stirpes among that issue.

(c) Any person who has not been located by the second anniversary of my death shall be deemed to have predeceased me and my estate shall be distributed as if no share thereof had ever been set aside for such person.

I request that my Trustees use reasonable efforts in searching for my stepson * and his issue but I relieve my Trustees from any liability to any such person who is located after the second anniversary of my death so long as my Trustees have acted reasonably and in good faith.

Sections 24(1) and (2) of the Estates Administration Act, R.S.O. 1990, c. E.22 (the "Estates Administration Act"), states that a personal representative is not liable for failing to distribute

property to a person born outside marriage or a person claiming through such person, if the personal representative makes "reasonable" inquiries about that person and searches the records of the Registrar General relating to parentage. The legislation does not define "reasonable inquiries" and there is no jurisprudence to assist.

On occasion, potential beneficiaries cannot be located at the time of the testator's death or within a reasonable period thereafter. To avoid lengthy delay in the administration of an estate, a testator can set a maximum time after which a particular (or any beneficiary), who cannot be located, will lose his or her interest in the estate. Consider whether a definition of "reasonable efforts" to be made should be incorporated into this sort of clause, particularly if the executors stand to benefit personally from not locating the beneficiary in question. Such clauses should be used with caution and only in circumstances where they are likely to be applicable.

VESTING CLAUSE

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

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

Annotation: Section 9 of the Trustee Act vests legal title to the assets of the deceased in the trustee. The clause defines the property passing to the trustees broadly, to ensure there is no issue about what property is included.

The concept of a division of legal and beneficial title between the trustee and beneficiary respectively is unique to the common law. This clause will vest legal title to the assets of the deceased in the hands of the trustee, but only to carry out the trusts directed in the Will.

The sample clause includes any property that is the subject of a general power of appointment exercisable by the testator. A general power of appointment gives the testator the right to appoint the property that is the subject matter of the power in favour of anyone including him or herself.

If the testator exercises the power of appointment by Will, or fails to exercise it at all, there is a risk that the property which is the subject matter of the power will fall within the residue of the testator's estate and become subject to probate fees and claims of creditors. It is, therefore, generally better to explore with client who have a power of appointment how to exercise it outside of the will, if possible.

If a client is preparing separate Wills to deal with different categories of assets, the vesting clause in each Will should be limited to the appropriate set of assets.

Section 9 of the Estates Administration Act provides that where real property is not disposed of or distributed to the persons beneficially entitled to it within three years of death, then the real property will automatically vest in those persons without any conveyance. Automatic vesting does not apply in all cases. The inclusion of the power of sale for real property in the will

prevents automatic vesting (see Widdifield on Executors and Trustees, 6th Ed. at section 2.5.12, page 2-69.).

Where a power of sale for real property is not provided, executors should consider filing a caution on title to real property to prevent automatic vesting for an additional three years. Repeated filing of cautions is permitted. Automatic vesting occurs whether a Will has been probated or not. Even if there is automatic vesting, the property still remains liable for the debts of the deceased.

DISPOSITIVE CLAUSES

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

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

(a) Correct Names: Obtain the correct full name of all beneficiaries, particularly those being referred to by a relationship that is dependent upon birth or marriage. If you intend to describe persons by relationship ensure that they have the particular status in law. For instance, your husband's nieces and nephews are not your nieces and nephews as these relationships are only determined by blood not marriage. On the other hand, the children of another marriage of either of the testator's parents (half-brothers and half-sisters) are the testator's brothers and sisters and their children would be included in a gift to nieces and nephews.

(b) Minor Beneficiaries: If it is possible for a minor to inherit, you should discuss with your client at what age the minor is to inherit. If nothing is specified, the minor will be entitled to his or her inheritance upon attaining the age of 18. Depending upon the size of the inheritance, this may not be appropriate. If it is determined not to be appropriate, then consideration should be given to the inclusion of trust provisions.

Trust provisions will require thinking about when the child is to receive the capital of his or her inheritance; i.e. specific ages, reaching particular milestones in life, or certain anniversary dates of the testator's death. It will also require a consideration of how income is to be treated pending distribution of the capital; i.e. should it all be paid out or should it be paid out in the discretion of the trustees. If there is discretion as to the distribution of income, undistributed income may be accumulated and added to the capital of the trust, so the Accumulations Act, R.S.O. 1990, c. A.5 (the "Accumulations Act") should be considered. Under the Accumulations Act, income can only be accumulated for a maximum period of 21 years from the date the trust is established. If there is a possibility that the trust will continue for longer than 21 years, then you must provide for how the

income is to be distributed after the 21st anniversary of the trust. Attached as Appendix "A" is a "Roadmap to the Drafting of a Trust".

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

(d) Language: Use plain language where possible, with simplicity and brevity being the goal. Avoid redundancies like "have and hold", "all and every", "sole and exclusive", "rest, residue and remainder". Be consistent in the language used, as well as in the style of drafting. Avoid using different words to denote the same idea e.g. "if she survives the date of my death by a period of thirty days" versus "if she is living on the thirtieth day following the date of my death". Use the same terms to mean the same thing in all parts of the will and different terms if the same meaning is not intended - many cases have been decided based on the will usage as a whole. Avoid ambiguities. Sometimes this means that Latin phrases or terms of art should be used rather than plain language to ensure meaning is clearly delineated. Use punctuation accurately and appropriately. Many cases have been decided on punctuation. Use a systematic scheme within paragraphs and for the will as a whole. With computers today, one should not see a will with corrections unless absolutely necessary.

(e) Solicitor's Responsibility: When preparing and drafting a will it is your responsibility to: (1) prepare a document that is a legal and enforceable document; (2) ensure the will does not include any provisions that will likely lead to litigation due to ambiguities or a failure to provide for all reasonable contingencies; and (3) ensure that the will has the appropriate administrative powers so that the trustee can efficiently deal with the assets of the estate and accomplish the intentions of the will-maker. This last responsibility often leads solicitors to take the "include the kitchen sink" approach when drafting the administrative paragraphs in a will, rather than considering the appropriateness of any particular paragraph in each case. We write more about the suitability of specific powers in certain circumstances below.

SPECIFIC GIFT OF PARTICULAR ITEM OF PERSONALTY

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

My Trustees shall give my Rolex watch to my son, JACK DOE, if he is living at the date of my death.

***Annotation*:**

When making a specific gift, it is important to describe the property accurately so that it can be identified after death. Avoid making gifts that may require an interpretation to know their meaning – such as "my ring" -- or that may not accurately describe the item(s) to be gifted in the future, such as the "contents" of a room.

Section 22 of the SLRA states the general rule that the will "speaks from death" and not from the date of the will. When discussing your clients' intentions about dispositions of specific property, be aware of the doctrine of ademption. If the will-maker makes a gift of a specific asset that cannot be found on the date of death -- it may have been sold by the will-maker or destroyed -- then the gift adeems, and the beneficiary will receive nothing. Subject to two statutory exceptions, discussed below, the beneficiary will not be entitled to any substituted property from the estate. Accordingly, your client should be made aware that a gift may fail completely if he or she disposes of the property prior to death.

The first exception to ademption rule is found in subsection 20(2) of the SLRA, which gives a beneficiary rights, in certain circumstances, to property substituted for the property gifted to him or her in the will. In particular, it entitles the beneficiary to a chose-in-action, insurance proceeds or compensation, or a mortgage or other security interest, in relation to property that is the subject matter of the bequest and that is no longer owned by the will-maker on the date of death.

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

> ***"(1) The doctrine of ademption does not apply to property that is subject to a specific testamentary gift and that a guardian of property [or attorney under a continuing power of attorney] disposes of under this Act, and any one who would have acquired a right to the property on the death of the incapable person is entitled to receive from the residue of the estate the equivalent of a corresponding right in the proceeds of the disposition of the property, without interest.***
>
> ***(2) If the residue of the incapable person's estate is not sufficient to pay all entitlements under subsection (1) in full, the persons entitled under subsection (1) shall share the residue in amounts proportional to the amount to that they would otherwise have been entitled.***
>
> ***(3) Subsections (1) and (2) are subject to a contrary intention in the incapable person's will."***

The rationale of section 36 is that ademption is premised on the assumption that if the will-maker disposes of the property given away by will, then their intention was no longer give that property to the beneficiary. Where a guardian or attorney of property acting on behalf of an incapable person disposes of specifically bequeathed property, this rationale does not apply. As a result, the doctrine of ademption should not apply.

The application of section 36 may not be what a will-maker intends, so it should be discussed with your clients, particularly since section 35.1 of the SDA imposes a duty on guardians and attorneys not to dispose of property that is the subject of a specific testamentary gift, unless it is necessary to meet the needs of the incapable person or it is transferred to the beneficiary of that specific gift. In section 35.1 and 36, there is some uncertainty surrounding what is meant by the words "specific testamentary gift". While subsection 35.1(2) makes it clear that the anti-ademption provision does not apply to a specific gift of money, there remains uncertainty concerning what types of dispositions are covered by this language.

If a great many items of personalty are to be gifted, a memorandum to be incorporated by reference should be considered rather than placing all of the gifts in the body of the will - see below.

A further point to note in connection with gifts of specific property (indeed all gifts), is the condition that the beneficiary must be alive on the date of death to inherit. Without it, the anti-lapse provision in the SLRA may result in a gift to a child, grandchild, brother or sister being made to another person if the intended beneficiary dies before the will-maker. This may be what a client wants, but if not, a simple condition requiring the beneficiary to be alive at the will-maker's death will suffice. Many wills provide that all gifts are conditional on the beneficiaries being alive 30 days after the date of death. If this is the intention, a specific paragraph stating this for the entire will is easier to use than inserting the condition in each and every gift (as it is easy to overlook one).

When discussing your clients' intentions about dispositions of specific property, be aware of the doctrine of lapse. This doctrine will be discussed in greater detail below as part of the discussion of cash legacies.

GIFT OF REMAINING PERSONAL EFFECTS

Description of paragraph: The following paragraph gives away the remainder of the will-maker's personal effects to a named beneficiary who must survive for a period of 30 days.

My Trustees shall give the remaining articles of personal, domestic or household or garden use or ornament that I shall own at my death and all boats, automobiles and accessories thereto (collectively, "the Personal Articles"), to my wife, JANE DOE, if she is living on the 30th day following my death, and if she is not living on the 30th day following my death, my Trustees shall divide the Personal Articles among those of my children who are living on the 30th day following my death, in any manner that my children may agree upon, or, if they do not agree, then in any manner that my Trustees in their absolute discretion consider equitable.

Add, where applicable:

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

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

Avoid using the term "personal property" to refer to personal effects in this context, because this term this would refer to all personalty (being property that is not real property), including bank accounts, investments, etc.

Additional paragraphs to consider in the context of personal effects are powers to obtain insurance for the articles specifically, and a direction to pay the cost of any packing and delivery of the articles to any beneficiary from the estate (since the default is that beneficiaries would pay such cost themselves).

BINDING AND PRECATORY MEMORANDA

Description of paragraph: Specific articles of personal effects are directed to be disposed of by a memorandum that is incorporated by reference into the will.

I have made a memorandum dated 15 December, 2019, that gives certain articles of personal and household use and ornament to certain persons or organizations, and I have deposited it with my Will. I direct my Trustees to deliver the articles of personal and household use and ornament described in this memorandum in accordance with gifts in this memorandum.

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

An alternative is the use of a non-binding precatory memorandum that is not incorporated by reference. Precatory memoranda, while not legally binding, do express the wishes of the will-maker. If the memorandum is in the will-maker's handwriting or typed and signed by the will-maker, it can often have significant moral suasion over the beneficiaries and in our experience is usually, although of course not always, followed. The advantage of this method of disposing of personal effects is that changes to the memorandum do not require formal changes to the

will; in fact, it may be better for the will not to refer to a specific memorandum at all. Accordingly, these "letters of wishes" are very useful for those clients who frequently make changes to dispositions of personal effects or do not wish to place any binding obligation on their executors regarding the disposition of their articles. The following is an example of a paragraph referencing a precatory memorandum:

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

DISCRETIONARY POWER TO DISTRIBUTE PERSONALTY

Description of paragraph: Where the will-maker does not have children or wishes to give even greater discretion to the executors, the following paragraph can be used.

My Trustees shall distribute those articles of personal, domestic, or household or garden use or ornament that I own at my death and all boats, automobiles, and accessories to them, as my Trustees in their personal, and not fiduciary, capacities may appoint, including to themselves. Without imposing any legal obligation on them, it is my wish that my Trustees have due regard to any wishes I may have expressed, the interests of my family, the nature and quantity of my effects to be distributed, and the reasonable preferences expressed by one or more of my beneficiaries, and that they dispose of any articles not so distributed and add the proceeds of disposition, if any, to the residue of my estate.

Annotation: This discretion to dispose of personal effects is in the nature of a power of appointment. It is important to note that the executors are given this power in their personal capacities, and therefore are not required to exercise an even hand or otherwise adhere to any principles regarding their fiduciary duties, which they would otherwise be required to do. On the other hand, executors could be instructed to distribute the personal effects among a group of beneficiaries but in their capacity as fiduciaries, and having regard to making the distributions more or less equal.

One individual or a group of individuals (e.g. the children of the will-maker) may be given the responsibility of distributing personal effects. This paragraph may be particularly appropriate where the executor is a trust company or other professional who has no knowledge of the sentimental value of the personal effects.

Where some of the will-maker's personal effects are of significant fair market value and not solely of sentimental value, it should be carefully considered whether any equalization or valuation provisions should be included or whether certain items should simply be sold.

My Trustees shall deliver to one or more of my children living on the 30th day following my death, or any one or more of them, all the articles of personal, domestic, or household or garden use or ornament that I own at my death and all boats, automobiles, and accessories to them, in trust to distribute among themselves and among any other persons as they may unanimously agree. The receipt of the child or children to whom these articles are delivered shall be a sufficient discharge to my Trustees who shall be under no obligation to supervise the manner in which any subsequent distribution is carried out; however, if at any time my children are unable to agree upon the manner of distribution of any articles, they may seek the advice and direction of my Trustees, whose decision regarding the distribution, sale, or disposal of any articles shall be final and binding on my children and on all other persons interested in my estate.

PETS

Description of paragraph: The following paragraph contains a gift (or custodial appointment) of the will-maker's pets together with a sum to help defray the costs of care:

If NANCY NEIGHBOUR is living on the date of my death, my Trustees shall transfer and deliver to HER all dogs, cats, and other domestic animals living with me at my death (collectively, "my Pets"). If NANCY NEIGHBOUR dies before me, my Trustees shall transfer and deliver one or more of my pets to any family member, friend, or neighbour as my Trustees consider will provide my Pets with a loving and healthy home for the rest of my Pets' natural lifetime. It is my preference that all my Pets go to the same home so that they may continue to live together after my death, but I recognize and accept that this may not be possible. In addition, my Trustees shall pay the sum of FIVE THOUSAND DOLLARS ($5,000.00) to each family member, friend, or neighbour to whom my Trustees transfer one or more of my Pets, to assist this person in caring for my Pets or any of them and to express my appreciation to him or her for taking on this responsibility. Following delivery of my Pets and this legacy, my Trustees have no obligation to monitor either the care of my Pets or the use of the money transferred and paid to any family member, friend or neighbour.

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

Specific non-charitable trusts

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

Idem

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

Accordingly, it is possible to establish a trust for a non-charitable purpose for a period of up to twenty-one years. At the end of the twenty-one-year period, any unexpended income or capital will then pass to the persons who would have been entitled to it if the trust had been invalid from inception. Typically, a trust for the care of pets will not last for longer than twenty-one years, given the lifespan of most pets.

Alternatively, a trust that provides for certain payments out to the successor owners of the will-maker's pets for the lifetime of the pets and a gift-over of the remaining trust fund to a specific beneficiary or beneficiaries or in accordance with the residuary provisions would avoid some of the problems noted above. Depending on the value of the trust, the length of time it is intended to exist, and the compensation to be paid to the trustee(s), it may not be economical to set up a trust for pets, and a legacy to defray costs may be preferable.

SOCIAL MEDIA

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

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

(a) if I own the domain name "Testatrix.com" on the date of my death, my Trustees shall remove the website associated with that domain name following the date of my death, but my Trustees shall, from the income or capital or both of my estate, purchase the rights to the domain name for the longest period then allowed, which as of the date of this my will is a period of ten years, and hold the rights to that domain name in trust. At the end of the period for which the rights to this domain name have been purchased by my Trustees, my Trustees shall allow the rights and interests in that domain name to expire;

(b) if JANE DOE is living on the 30th day following my death, my Trustees shall transfer all rights and interests I have in the domain name "Doe.ca" to JANE DOE. All remaining "Doe.ca" domain names that I own on the date of my death shall be divided among those of my siblings living on the 30th day following my death in any manner that they agree upon; however, if agreement cannot be reached with respect to any of these domain names or if there are any of these domain names that my siblings do not wish to retain, they shall be sold by my Trustees, and my family members (which for greater certainty shall include any spouse, issue, parent, brother, sister, nephew or niece or next of kin of mine) shall have the first right to purchase one or more of the domain names in any manner and upon any terms and conditions as determined by my Trustees in the exercise of their absolute discretion; and

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

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

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

My Trustees shall as soon as practicable after the date of my death set aside a fund, to operate as a separate trust (hereinafter referred to as the "Website Fund") that will, in the opinion of my Trustees, be sufficient to provide for the costs of maintaining these websites for the maximum period that is permitted by law and my Trustees shall hold the Website Fund for that period. When the Website Fund has been set aside, all costs of maintaining these websites shall be paid out of the Website Fund and there shall be no further liability on the residue of my estate in connection with maintaining these websites. Any income, if any, earned in the Website Fund in

any year not used for the purpose of maintaining these websites shall be added to and be dealt with as part of the capital of the Website Fund, but subsequent to the Accumulation Period, any of this income shall fall into and form part of the residue of my estate to be dealt with as part of it and in accordance with the provisions of this my Will. After the websites have been maintained for the maximum period that is permitted by law, any amount remaining in the Website Fund shall fall into and form part of the residue of my estate to be dealt with as part of it and in accordance with the provisions of this my Will, and my residuary beneficiaries shall be determined as of the date the amount remaining in the Website Fund falls into the residue of my estate.

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

REGISTERED EDUCATION SAVINGS PLAN

Description of paragraph: The following paragraph directs the trustees to take necessary steps to ensure an RESP account is maintained for the benefit of the will-maker's children. The trustees will become the successor subscribers to the RESP and may make contributions to the RESP from the estate.

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

(a) the date there are no longer any funds available in the RESP;

(b) the date none of the Qualifying Children qualifies or may qualify for educational assistance payments, this determination to be made by my Trustees in their absolute discretion; and

(c) the date all of the Qualifying Children have completed a qualifying educational program at a post-secondary educational institution and so no longer require the RESP, this determination to be made by my Trustees in their absolute discretion;

and during this period, my Trustees shall manage the RESP for the benefit of the Qualifying Children in their absolute discretion, and shall have all the powers and authorities granted to them pursuant to the provisions of this my Will. Notwithstanding anything in this my Will to the contrary, my Trustees may set aside any amount or amounts from the income or capital or both of the residue of my estate as my Trustees in exercise of their absolute discretion determine appropriate, and shall contribute any amount or amounts so set aside to the RESP to be dealt with as part of it.

Upon the RESP Termination Date, the RESP or any portion of it then remaining shall be dealt with by my Trustees in the following manner; but it is my intention that the following provisions not conflict with any applicable contractual provisions governing the RESP and to the extent of any conflict, the contractual provisions governing the RESP shall prevail: **[applicable distributive provisions to be inserted here]**.

Despite anything to the contrary above, if my Trustees determine that it would be administratively more efficient or cost effective to terminate the RESP and transfer the funds to any trust funds established for the Qualifying Children under my Will, then they have the authority to do so in their absolute discretion, provided they take into consideration any income tax consequences.

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

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

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

An RESP is a property interest of the deceased subscriber, in that the subscriber has the right to a return of contributions which right devolves to his or her executors. Accordingly, if the will-maker has not set out any directions to the contrary, the executor's obligation is arguably to withdraw the RESP contributions for the benefit of all the beneficiaries of the estate. This is likely not what the deceased subscriber would intend. If the will-maker intends that the RESP be continued, it is necessary to determine who will become the successor subscriber. This is particularly significant because the subscriber can withdraw contributions and receive accumulated income payments that can be rolled over into the his or her own RRSP if there is unused contribution room.

An individual other than the original subscriber can generally only become a subscriber to an RESP in one of the following situations:

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

(b) a public primary caregiver of a child (for example, where the child is a ward of the state, the department agency or institution that maintains the beneficiary or the public trustee or curator in the province in which the child resides) attains rights as a subscriber under the RESP pursuant to a written agreement;

(c) the contractual terms of the RESP allow an individual to continue making contributions to the RESP after the death of the subscriber (the subscriber's estate can also make such contributions); or

(d) after the death of the subscriber of the RESP, an individual acquires the subscriber's rights to the RESP plan.

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

In the paragraph above, the will-maker has provided for his or her trustees to become the successor subscribers to the RESP, and has authorized them to continue to make contributions to the RESP. Another possibility is for the will-maker to direct the trustees to set aside an amount for another individual to contribute to the RESP, so that individual will then become the successor or new subscriber. In the following paragraph, the will-maker has directed the trustees to make a payment to the guardian of the will-maker's child with an obligation on the guardian to ensure an RESP account is maintained for the benefit of the will-maker's children.

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

(a) that the guardian contribute this sum to a Registered Education Savings Plan ("the Plan") established for the benefit of this qualified child in order that the guardian become the subscriber for the Plan;

(b) that the guardian agree to take any further steps necessary in order for the Plan to be maintained by her or him for the benefit of this qualified child, until the date this qualified child qualifies or may qualify for educational assistance payments; and

(c) that the guardian agree that should any funds remain in the Plan immediately before the date on which the Plan must be terminated pursuant to its terms, and should the qualified child not qualify for educational assistance payments at that time, the guardian shall take any steps necessary and permitted under the Plan to obtain a

refund of payments or an accumulated income payment or both on behalf of the qualified child, either by transferring the right to withdraw contributions to this child, or by withdrawing all contributions and transferring them to this child for his or her own use absolutely.

If all the above conditions are not met, the RESPs shall be collapsed and the net proceeds shall fall into and form part of the residue of my estate to be dealt with as part of it, and my residuary beneficiaries shall be determined as of the date the RESPs fall into the residue of my estate.

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

Generally speaking, accumulated investment income in an RESP that is terminated is treated as income to the subscriber for tax purposes. In addition, it is subject to a special tax at a flat rate of 20% (12% in Quebec). Both these taxes can be avoided if the subscriber directs that the accumulated income be paid to a Canadian designated educational institution. Alternatively, two possible rollovers are available. First, up to $50,000 of income may be transferred to the subscriber's RRSP or to a spousal RRSP, if the subscriber had sufficient contribution room. Second, if the beneficiary of the RESP is eligible for the disability tax credit at the time of termination, the income may instead be rolled over to a registered disability savings plan (RDSP) in the name of the beneficiary. This second rollover is only available if the beneficiary has a severe and prolonged mental impairment that can reasonably be expected to prevent him or her from pursuing post-secondary education, or if the RESP has been in existence for at least 35 years (or at least 10 years if all the beneficiaries are over the age of 21 and are not pursuing post-secondary education). The rollover to the RDSP is also subject to the usual restrictions on an RDSP, that the beneficiary must be under the age of 59 at the time of the contribution, that the total lifetime contributions in respect of any one beneficiary may not exceed $200,000, and that the beneficiary and the holder of the RDSP must both consent to the contribution. This last requirement may be problematic if the beneficiary is incapable of managing property and has no guardian to consent.

DEBTS, FUNERAL AND TESTAMENTARY EXPENSES

Description of paragraph: This paragraph directs the trustees to pay all debts and taxes that are payable as a result of the will-maker's death.

My Trustees shall pay my just debts, funeral and testamentary expenses, and taxes, including but not limited to income taxes, and all estate, legacy, succession or inheritance duties and taxes whether imposed pursuant to the laws of Ontario or any other jurisdiction that may be payable in connection with any property passing on my death (or deemed so to pass) or in connection with any proceeds of any insurance and/or annuities on my life or any gift or benefit given or conferred by me either in my lifetime or by survivorship or by my will or any Codicil

thereto and whether these duties and taxes be payable in respect of estates or interests that fall into possession at my death or at any subsequent time. All these debts, expenses, duties and taxes are to be paid out of and be a charge on the capital of my estate. I authorize my Trustees in their unfettered discretion to commute or prepay or defer the payment of any of these duties or taxes.

***Annotation**: As a result of this paragraph all debts of the deceased, all funeral and testamentary expenses, all unpaid income taxes and other taxes and any estate or succession duties or taxes are to be paid out of the residue of the estate. In certain circumstances this may have unintended and inequitable results. For instance, consider the situation of one child being the named beneficiary of an RRSP or the specific beneficiary of a cottage property, with a second child being the beneficiary of the residue of the estate. To the extent there is an income tax liability in the year of death as a result of the deemed disposition of the RRSP or cottage, this income tax liability will be borne by the beneficiary of the residue of the estate. In this circumstance, it is possible to impose the tax burden of a particular property, such as an RRSP or cottage, upon the beneficiary who will receive the specific property. If this is the intended result, then the debts paragraph should be amended to exclude the specific property from its operation or the debts paragraph should be subject to the paragraphs that specifically impose the tax burden on the beneficiary of the specific property. However, in the case of an RRSP, this may not be sufficient given the Canada Revenue Agency's position regarding collection of income tax owing on death in regards to RRSP proceeds, and further steps may need to be taken to ensure the proper individual pays the income tax.*

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

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

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

If the client has family members who will need travel expenses covered to attend the funeral and who likely lacks the ability to pay for such expenses, then the direction to pay for funeral expenses should be expanded to capture these additional expenses. The following might be appropriate:

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

(a) my visitation, wake, burial, or cremation;

(b) any tombstone, marker, or monument associated with my grave or columbarium; and

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

POWERS OF SALE AND RETENTION

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

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

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

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

distribute those assets in kind. It should be noted, however, that as with any powers there are limits on these powers, and they are subject to review by the court for reasonableness, etc. If the will-maker desires that a specific asset not be sold or converted into an income producing asset, the will should specifically say that.

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

Section 9 of the Estates Administration Act provides that where real property is not disposed of or distributed to the persons beneficially entitled to it within three years of death, then the real property will automatically vest in those persons without any conveyance. Automatic vesting does not apply in all cases. The inclusion of the power of sale for real property in the will prevents automatic vesting (see Widdifield on Executors and Trustees, 6th Ed. at section 2.5.12, page 2-69.).

Where a power of sale for real property is not provided, executors should consider filing a caution on title to real property to prevent automatic vesting for an additional three years. Repeated filing of cautions is permitted. Automatic vesting occurs whether a Will has been probated or not. Even if there is automatic vesting, the property still remains liable for the debts of the deceased.

CASH LEGACIES

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

My Trustees shall pay Ten Thousand Dollars ($10,000) to my sister, CARRIE CUSTODY, if she is living on the date of my death.

Annotation: A solicitor should always be concerned about the application of the doctrine of lapse. At common law, when a gift is made to an individual who dies before the will-maker, the gift lapses so that no gift is made. Section 31 of the SLRA, however, saves the gift with a substitutional gift where the predeceased beneficiary stood in a certain relationship to the will-maker. It also allows the will-maker to indicate a contrary intention, in which case, the doctrine of lapse will apply.

Section 31, known as the "anti-lapse provision", provides as follows:

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

(c) if that person had died without debts; and

(d) if section 45 had not been passed."

In other words, if the pre-deceased beneficiary is a child, grandchild, brother or sister of the will-maker, there will be a gift over to his or her spouse or issue or both. The substituted beneficiaries will take in the proportions in which the predeceased beneficiary's own estate would have been distributed if he or she had died intestate, except without payment of any preferential share to the surviving spouse.

As the drafting solicitor, you have a duty to ask your client what is to happen if the named beneficiary predeceases. If the gift is to persons who fall outside section 31 (that is not, a child, grandchild, brother or sister), you should ask whether a gift over is intended if the named beneficiary predeceases. If no gift over is intended, no further statement is required, since the doctrine of lapse will result in the failure of the gift, and s. 31 will not save it for substituted beneficiaries.

If the gift is to persons who fall within section 31, however, you should determine whether your client wants section 31 to apply. Most clients do not want to benefit spouses of family members, and so they need their will to oust s. 31. If your client does not want section 31 to apply, which is generally our experience, then include a statement of contrary intention. A contrary intention can be exhibited by:

- ***a condition that the named beneficiary must survive the will-maker;***
- ***a gift over to specified persons, or***
- ***a general statement that s. 31 is not to apply to any gift in the will.***

It is redundant and confusing to include statements such as "provided that if s/he does not survive me such legacy shall lapse" or other language to signify an intention that section 31 is not to apply as part of a gift to a beneficiary who does not fall within the anti-lapse provisions.

If you are preparing "mirror" wills for a husband and wife providing for identical legacies to be paid on the second death, include language which avoids the doubling up of legacies in the event the husband and wife die together or in circumstances rendering it uncertain who has predeceased the other, or within the survivorship period, if you are using one. In such circumstances, the SLRA provides that the spouses are deemed to have predeceased each other and to have held jointly-owned property as tenants-in-common rather than as joint tenants. [N.B. The SLRA provisions apply to any persons who die in such circumstances, and not just to spouses.] The relevant provisions are subsection 55(1) and 55(2) as follows:

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

Simultaneous death of joint tenants

(2) Unless a contrary intention appears, where two or more persons hold legal or equitable title to property as joint tenants, or with respect to a joint account, with each other, and all of them die at the same time or in circumstances rendering it uncertain which of them survived the other or others, each person shall be deemed, for the purposes of subsection (1), to have held as tenant in common with the other or with each of the others in that property.

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

John's Will:

If my wife is not living on the 30th day following my death, then on the death of the survivor of my wife and me, my Trustees shall pay Ten Thousand Dollars ($10,000) to my sister, CARRIE CUSTODY, if she is living on the 30th day following my death.

Jane's Will:

If my husband is not living on the 30th day following my death, then on the death of the survivor of my husband and me, my Trustees shall pay Ten Thousand Dollars ($10,000) to my sister-in-law, CARRIE CUSTODY, if she is living on the 30th day following my death, but if my husband and I die within thirty (30) days of each other, then this legacy shall be reduced by any amount paid to Carrie Custody under paragraph * of my husband's will.

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

Another way of dealing with the problem of double legacies is to make the legacy in both wills conditional of the spouse not surviving for the survivorship period, and then include the following statement in both wills:

I wish to advise my Trustees that the will of my husband, JOHN DOE, makes provision for a similar legacy to the one above in this Will. If my husband, JOHN DOE, and I die within 30 days of each other or in circumstances such that the order of our deaths cannot be determined, we intend that the legacy is to be paid once only, either out of my husband's estate or out of mine, and my Trustees shall make such arrangements as are necessary to give effect to that intention, including that this legacy be reduced by any amount paid to the legatee under my husband's will.

If a legacy is given to an individual who could be a minor and the amount is greater than the amount permitted under the Children's Law Reform Act, consider including trust obligations or making the gift conditional upon the legatee attaining age 18 or expressly refer to the ability

to pay the amount to a parent as a trustee of the amount. Currently the amount permitted under the Children's Law Reform Act to be paid on behalf of a minor is $10,000.

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

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

CHARITABLE GIFT

Description of Clause: This clause pays a cash legacy to a named charity. Once the trustees obtain the receipt of the proper officer they are discharged and need not see to the manner in which the charity uses the legacy.

My Trustees shall pay Ten Thousand Dollars ($10,000) to THE KIDS CHARITY (BN123456789RR0001). [The receipt of the treasurer or other proper officer of this organization shall be a sufficient discharge to my Trustees.]

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

It is also important to consider providing for what is to happen if the chosen charity no longer exists at the date of the will-maker's death: should there be a gift over to another charity or should the gift lapse. Doing so will save the trustees having to decide whether to bring an application to the court to have the gift applied cy-près (see the discussion below).

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

If any charitable organization is not in existence at my death, my Trustees may transfer the sum set aside for that organization to any another charitable or community organization that is the successor to the named organization or that carries on similar works for the benefit of a similar group of people, as determined by my Trustees in the exercise of an absolute discretion.

If the will-maker wishes to place restrictions on the use of the funds, the charity may not be able to accept them if the terms are too restrictive. Or, as societal needs change over time, the stated purposes may no longer be practical. The will-maker can allow the governing board of the charity to repurpose the funds, thus saving the charity the expense of a variation application.

In the event that circumstances make the specified use of this gift no longer practical or desirable, the Board of [Directors/Trustees] of the <<Charity>> is hereby authorized to make changes in its use in keeping as far as possible with the spirit and general intent of the gift.

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

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

Effective January 1, 2016, the following rules apply to determine whether a charitable gift made in a will or by beneficiary designation will be eligible for a charitable donation tax credit and to which taxation years the credit may be applied:

- ***The value of the gift will be determined at the time that it is made by the estate, not at the date of death. As a result, two separate valuations may be required.***

- ***If the gift is made by an estate that is a graduated rate estate (i.e. in the first 36 months of the estate if the other conditions to be a GRE are met), the tax credit may be claimed in the taxation year in which the gift was made, in any preceding taxation year of the estate, in the year of death of the individual (up to 100% of the deceased's income for that year), or in the year preceding the year of death (also up to 100% of the deceased's income for that year), or it may be allocated among any two or more of these years.***

- ***In addition, if an estate makes a charitable gift after the expiry of the graduated rate estate period but within 60 months of the date of the will-maker's death and would otherwise qualify as a graduated rate estate but for the expiry of the 36-month period, the charitable credit can be claimed in the year the estate makes the gift, in any preceding year in which the estate was a graduated rate estate, in the year of death, or in the year preceding the year of death.***

- ***The same flexibility of timing applies where a charity is directly designated as the beneficiary of a life insurance policy or a registered plan. A donation made under the terms of a separate life insurance trust (whether inside or outside the will), however, would only qualify for a credit in the year in which the donation is actually made, or in any of the five following years, and only against 75% of the trust's income in those years. Furthermore, where the goal is to have the separate life insurance trust benefit from a charitable credit against its taxable income, it is important that the gift be seen to be made by the exercise of the trustee's discretionary power to make the charitable gift, not by the direction of the will-maker. Accordingly, the terms of the trust must include a discretionary power to make a charitable gift.***

- ***Similarly, if the gift is delayed beyond 60 months after the date of death (for example, because of litigation, waiting for a clearance certificate, or disposing of an illiquid asset), a credit can only be claimed in the year in which the donation is actually made, or in one of the five following years, and only against 75% of the estate's income in those years.***

- ***There is a limited ability to claim a charitable tax credit and apply it to the deemed disposition that occurs on the death of a spouse who is the life interest beneficiary of a testamentary spousal trust. When the spouse dies, the trust is deemed to have disposed of its capital property and reacquired it at fair market value. There is also a deemed year-end for tax purposes. If the trust makes the charitable gift within 90 days after the end of the calendar year in which the spouse dies, then the charitable credit can be applied in any of 1) the year the gift is made, 2) the deemed year-end for tax purposes in which the deemed disposition occurs, or 3) one of the 5 years following the year the gift is made. Since the gift must qualify as a gift at common law and must therefore be voluntary, the trustees must make the gift pursuant to a discretionary power, rather than a direction to make the gift.***

- ***The amount of the gift can be left up to the discretion of the executors without jeopardizing the tax credit. Keep in mind, however, that the discretion could create conflict between the executors and the residuary beneficiaries of the estate.***

- ***The gifted property must have been received by the estate on and as a consequence of the individual's death or have been substituted for such property. Dividends paid on shares owned by the estate do not constitute substituted property for the shares. The estate may not borrow funds to satisfy a gift.***

- ***The charitable donation credit cannot be claimed by the surviving spouse of the deceased donor.***

These new tax rules, as well as the fact that the client may want the estate to be a "graduated rate estate" for a period of 36 months following death, mean that the will-maker may want to give the executors the discretion to make the gift at any time during the period that the estate is a graduated rate estate or in the two following years. For this purpose, the following clause may be used:

My Trustees shall pay Ten Thousand Dollars ($10,000) to THE KIDS CHARITY (BN123456789RR0001) at any time within 60 months following the date of my death, without

interest. [The receipt of the treasurer or other proper officer of this organization shall be a sufficient discharge to my Trustees.]

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

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

Without limiting the discretion of my Trustees, I request them to satisfy all or part of this legacy by transferring publicly traded securities if the accrued capital gains otherwise payable by my estate can thus be exempted from income tax.

GIFT OF REAL ESTATE

Description of paragraph: This paragraph makes an outright gift of real estate to a named beneficiary.

My Trustees shall transfer and convey to my wife, JANE DOE, if she is living on the 30th day following my death, whatever interest I may have at my death in the residential property municipally known as XXX Road, North Bay [and legally described as Part 6 on Plan 1982], subject to any encumbrance on it.

Annotation: Although section 32 of the SLRA already provides that, in the absence of a contrary intention, a gift of real property passes subject to any mortgage, it is wise to state this intention in the will to ensure that the will-maker has considered the consequence of the encumbrance and to avoid disputes by beneficiaries that such a consequence was not intended.

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

The property to be devised needs to be described with sufficient particularity to ensure that it can be accurately identified after the will-maker is gone. Generally, the municipal address will suffice but a legal description can be added for maximum clarity, if you are certain that it is accurate.

PRINCIPAL RESIDENCE TRUST

***Description of paragraph**: This paragraph provides that the will-maker's spouse will have the use and occupation of the will-maker's principal residence for life. As a result of changes to the eligibility of personal trusts to use the principal residence exemption ("PRE"), discussed further in the annotations below, the trust has been drafted to meet the requirements of a qualifying spousal trust under the Income Tax Act, on the assumption that the will-maker intends the trust to be able to use the PRE if the trust disposes of the principal residence. The annotation below should be carefully reviewed before using this clause.*

If my wife, JANE DOE, is living on the date of my death, my Trustees shall deal with any interest that I may have on the date of my death in my urban **[or primary]** residence at XXX Road, London in accordance with the provisions of this paragraph. If on the date of my death, my wife and I are not living at XXX but are living together in another home that I own, the provisions of this paragraph shall apply equally to any property that I own and am using as an urban **[or primary]** residence on my death. XXX Road, London or any property substituted for it shall be referred to in this my will as "the Residence". My Trustees shall hold the Residence in trust upon the following terms:

(1) Subject to the following provisions of this paragraph, so long as my wife, JANE DOE, is living, my Trustees shall allow her the exclusive benefit, use, occupation and enjoyment of the Residence, free of rent;

(2) My wife, JANE DOE, shall pay all costs of operating and maintaining the Residence other the capital expenditures, including without limitation all costs of maintenance and upkeep of the Residence, maintenance and administrative fees, realty, municipal, or other taxes associated with the Residence, costs of insuring the Residence, all costs of utilities necessary for the enjoyment of the Residence, and all other costs of every nature and kind associated with the use of the Residence other than capital expenditures;

(3) Subject to paragraph XXX(5), my Trustees have the power to sell, partition, exchange, or otherwise dispose of the whole or any part or parts of the Residence in any manner and at any time or times and on any terms as to price, credit, or otherwise as my Trustees determine, with power to my Trustees to accept purchase money mortgages for any part of the purchase or exchange price. My Trustees may use the net proceeds of sale to purchase and provide for or contribute toward the purchase, lease or other use of another Residence, anywhere in the world, for the exclusive benefit, use, occupation and enjoyment of my wife, JANE DOE, during her lifetime upon the same terms and conditions as provided in this paragraph and so on from time to time. Any portion of the net proceeds of sale that is not used for the provision of another Residence shall be held in trust by my Trustees and, during the lifetime of my wife, my Trustees shall pay to or for the benefit of my wife all of the annual net income derived from the fund during her lifetime, at the time or times that my Trustees determine.

(4) Subject to paragraph XXX(5), my Trustees have the power to lease all or any portion of the Residence for any length of time upon commercially reasonable terms, covenants, and conditions, as my Trustees shall determine. During the lifetime of my wife, JANE DOE,

my Trustees shall pay all of the net lease income that arises during her lifetime to or for the benefit of my wife at the time or times that my Trustees determine;

(5) So long as my wife, JANE DOE is living and not mentally incapable, she has sole authority to direct my Trustees in respect of the retention, sale, substitution, lease, and other use of the Residence. For greater certainty, my wife, while she is living and not mentally incapable, has full and sole authority to direct my Trustees to:

(a) sell any Residence held pursuant to the provisions of this paragraph;

(b) purchase any Residence selected by my wife using for this purpose the net proceeds of sale of any previously sold Residence, plus any amount held in trust pursuant to this paragraph, but in determining the proceeds of sale available my Trustees shall not deduct the amount of debts secured thereon; or

(c) sell the Residence and use the net proceeds of sale and any resulting trust fund to pay rental or lease costs of accommodation of any type selected by my wife.

(6) Subject to the foregoing, my Trustees shall not be responsible for the care, maintenance, or supervision of the Residence except as they in the exercise of their absolute discretion consider appropriate, and they shall not be liable for waste;

(7) On the date of death of my wife, JANE DOE, the Residence and the balance of any fund held in trust in accordance with this paragraph, including for greater certainty all of the net income derived from such a fund after the date of death of my wife and any net lease income arising after the date of death of my wife, shall fall into the residue of my estate to be dealt with in accordance with the provisions of paragraph YYY of this my will, but with the beneficiaries thereof determined as of the date of death of my wife.

Annotation: This section establishes a trust to hold the will-maker's principal residence in trust for the exclusive use and enjoyment of the will-maker's spouse during the spouse's lifetime. The spouse is given the power to direct that the Residence be sold and a replacement property be purchased. Alternatively, if the Residence is sold and no replacement is purchased, the proceeds are held in trust for the spouse with all of the income payable to the spouse. Upon the death of the spouse, the Residence and any funds held in trust are added to the residue of the will-maker's estate and divided accordingly, with the beneficiaries determined as of the date of death of the spouse.

This trust has been drafted to meet the requirements of a qualifying spousal trust under the Income Tax Act as a result of changes to the PRE rules enacted in 2016 for taxation years beginning in 2017.

The changes to the PRE significantly restrict the types of personal trusts that can claim the PRE where a trust disposes of a housing unit. For 2017 and future taxation years, the only personal trusts that can use the PRE, if the other requirements under s. 54 (i.e. the principal residence rules) of the Income Tax Act are met, are spousal and joint partner trusts, alter ego trusts, self-benefit trusts, qualifying disability trusts, trusts for minor children whose parents are both deceased, and testamentary trusts for a minor child where a deceased parent of the minor child

is the settlor of the trust. To use the PRE in any particular year, the housing unit must be occupied by a specified beneficiary of the trust, or a spouse/common-law partner, former spouse/common-law partner, or child of the specified beneficiary. In the case of a testamentary spousal trust, the specified beneficiary is the spouse of the deceased will-maker. In the case of a testamentary trust for a minor, the specified beneficiary is the minor. In the case of a qualified disability trust ("QDT"), which must be testamentary, the specified beneficiary is the "electing beneficiary" provided the electing beneficiary is the spouse/common-law partner, former spouse/common-law partner, or child of the settlor (i.e. the deceased will-maker). The person occupying the residence must be a Canadian resident. [N.B. As they are not relevant to the will context, we have not reviewed the specified beneficiary requirements for alter ego, joint partner, and self-benefit trusts.]

Prior to 2017 a principal residence trust for a spouse could be a trust that is not a qualifying spousal trust and still receive significant tax benefits. The PRE could be used on the terminal tax return to shelter the capital gain arising as a result of the deemed disposition on death, such that a rollover to a qualifying spousal trust wold not be required to defer the realization of the gain. Thereafter, the trust could use the PRE if the trust disposed of the housing unit. As noted above, however, under the new PRE rules the trust must be a qualifying spousal trust to use the PRE if it disposes of the housing unit. It is a very real possibility that the trust may need to dispose of the housing unit if the trust is likely to last for an extended period or the age of the spouse is such that downsizing or a move to a retirement residence is likely, and it is not desirable to transfer the housing unit directly to the spouse. To ensure that the trust qualifies as a spousal trust, any proceeds of sale that are not used for the acquisition of a replacement housing unit are directed to be held in trust and all of the annual net income paid to the spouse. Similarly, any net lease income from the housing unit is directed to be paid to the spouse. If additional flexibility is desired, the terms of the trust can be modified to also permit distributions of capital, including the housing unit itself, to the spouse.

It should be noted that if the trustees intend to keep the PRE available for all taxation years during which the trust owns the housing unit, then neither the spouse nor any member of the spouse's family unit can designated another housing unit as a principal residence for those years. For this purpose, the specified beneficiary's family unit includes the spouse/common-law partner of the specified beneficiary, and any children of the specified beneficiary other than those who are married, in a common-law partnership, or 18 years of age or older. If the specified beneficiary is not married, in a common-law partnership, or 18 years of age or older, the family unit also includes the parents of the specified beneficiary, and the siblings of the specified beneficiary, other than those siblings who are married, in a common-law partnership, or 18 years of age or older. Accordingly, it will be necessary for the trustees of the spousal trust to confer and coordinate with the spouse regarding the intended use and availability of the PRE.

The terms of this trust require the spouse to pay the ordinary operating costs and the costs of ordinary maintenance and repairs related to the Residence, other than the capital expenditures. The trust does not specifically mandate who is responsible for the payment of capital expenditures. Under common law, capital expenditures are chargeable to the capital of the trust (see <u>Widdifield on Executors and Trustees</u>, 6th edition, chapter 4.8, and <u>Smith Re</u> **(1929), [1930] 1 Ch. 88 (Eng. Ch. Div.))** ***If the only asset of the trust is the Residence, then from a practical***

perspective the spouse may be required to satisfy the capital expenditures or the Residence may need to be sold.

It should be noted that in T.I. 2002-01544350, the Canada Revenue Agency ("CRA") commented on the implications of a beneficiary of a testamentary trust satisfying expenses such as capital expenditures "which would otherwise be payable by the trust." The CRA concluded that "such a payment would be considered to be a contribution where the payment is made as a capital expenditure in respect of the trust's property…" By contrast, payment of general operating expenses as a condition of using the property will not generally be a contribution to the trust. Since a contribution to the trust by a beneficiary would not be a contribution to the trust on and as a consequence of the death of the will-maker, the contribution would taint the trust's status as a testamentary trust (see the definition of testamentary trust in subsection 108(1) of the Income Tax Act). If the only asset of the trust is the Residence, this is not a concern if the trust continues to qualify as a spousal trust, discussed below, such that the PRE is still available to shelter the gain on the Residence if it is sold. If there are other assets in the trust, such as a fund created from the portion of net proceeds of sale not used for a replacement Residence, all of the annual net income of the trust must be paid to the spouse and will be taxed in the hands of the spouse at the spouse's graduated rates. It should be noted that capital gains are not "income" for trust law purposes and accordingly are not automatically paid or payable to the spouse. Accordingly, capital gains arising in the fund would be taxed at the highest marginal rate. In order to pay or make payable capital gains to the spouse there must be a capital encroachment power in the trust. It should be noted that this applies whether or not the trust is testamentary, since income (for tax purposes) that is accumulated in both inter vivos and testamentary trusts is taxed at the highest marginal rate, with the only exceptions being a QDT or GRE.

The primary concern is whether a contribution by a beneficiary that taints the trust as a testamentary trust also taints the trust as a spousal trust, since that would preclude the trust from using the PRE. Certainly to claim the rollover on the contribution of property to a testamentary spousal trust, the property must be property owned by the deceased at the time of death and transferred to the trust on and as a consequence of the death of the deceased. However, neither subsection 70(6) (i.e. the rollover provision) nor subparagraphs 104(4)(a)(i.1) and (iii) (i.e. the provisions that are relevant to the definition of principal residence in s. 54) of the Income Tax Act specifically require the spousal trust to be testamentary. Rather, the requirement is that the trust be created by the taxpayer's will, which arguably would still be satisfied by a tainted testamentary trust. Another option to address the issue of capital expenditures would be to set aside a fund for that purpose, if there are sufficient funds in the estate to permit that flexibility. For an example of such a fund please refer to the cottage trust that follows below. If the fund is held within the same trust as the Residence trust, the terms of the fund would need to provide for the payment of all of the income derived from the fund to the spouse, with only the capital being used to satisfy capital expenditures. If the fund is held separate and apart from the Residence trust, it would not necessarily need to meet the requirements of a spousal trust; however, that may be desired to qualify for a rollover of assets into the fund. A contribution to the Residence trust from a separate fund established under the will should not taint the trust as a testamentary trust in the same way that an inter vivos contribution from the spouse would do, since paragraph 248(8)(a) of the Income Tax Act should deem the contribution to be on and as a consequence of the will-maker's death.

If for any reason the spousal trust is tainted as a spousal trust, then if the trust permits capital distributions to the spouse, the provisions of subsection 40(7) of the Income Tax Act may provide some relief where a disposition of the Residence is contemplated. If the Residence is distributed to the spouse from the trust on a rollover basis pursuant to the s. 107(2) of the Income Tax Act, subsection 40(7) deems the beneficiary (i.e. the spouse in this example) to have owned the property continuously since the trust last acquired it, provided the beneficiary to whom the property is distributed is also the person who ordinarily inhabited the housing unit.

Although this trust is drafted as a spousal trust, it can be adapted as required if the Residence is being held for a minor or an electing beneficiary under a QDT. However, in such cases the issue of the payment of capital expenditures is a primary concern. The definition of qualified disability trust in subsection 122(3) of the Income Tax Act specifically requires a QDT to be a testamentary trust. If the trust for a minor is a trust where one parent of the minor child is deceased and that parent is the settlor of the trust, the trust must arise on and as a consequence of the death of the parent. This language is sufficiently similar to the definition of testamentary trust in subsection 108(1) of the Income Tax Act that it is unclear if a tainted testamentary trust for a minor would continue to qualify for the PRE. Accordingly, where the above trust is adapted for a QDT or a trust for a minor, the capital expenditures should not be paid by a beneficiary. Rather, a fund should be included to satisfy capital expenditures as described above.

Two additional points should be noted regarding trusts for disabled beneficiaries and minors that hold a Residence:

- ***If a Henson Trust is used for a disabled beneficiary but the beneficiary does not qualify for the federal disability tax credit, the trust cannot be a QDT and therefor the PRE will not be available. This may be problematic if it is not advisable to distribute the Residence to the beneficiary outright prior to a disposition.***

- ***Where a trust for children is set up in the expectation that it will hold the family home until all of the children have left home, the PRE will not be available for taxation years after the last child residing in the Residence turns 18.***

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

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

In this my will, "Cottage Property" means whatever interest I own at my death in my cottage property located on Herring Lake and municipally known as 111 Herringway Drive, L'Ardoise, Ontario, and legally described as Part of Lot 3, Concession 25, Leicester Township, County of Dedlock, together with all boats, motors and accessories, household goods, chattels, furniture, and articles of domestic and household use or ornament located in the cottage or on the property and used in connection with it.

TRUST OF COTTAGE PROPERTY

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

If on the date of my death I have any interest in the Cottage Property (as defined above), I direct my Trustees as follows:

(a) My Trustees shall hold the Cottage Property until the Cottage Property Termination Date (as defined below).

(b) The Cottage Property Termination Date shall be the earlier of:

(i) five (5) years from the date of my death; and

(ii) any earlier date that my children unanimously agree upon and so advise my Trustees in writing.

(c) Until the Cottage Property Termination Date my trustees shall allow my children and their respective families the use and enjoyment of the Cottage Property, free of rent. My children shall agree among themselves on the use and care of the Cottage Property. All decisions in this respect shall be left to my children; including all decisions relating to whether they use the Cottage Property on a partially or totally shared basis or set aside specific time periods for the exclusive use by their respective families, but if my children are unable to agree on any of these decisions, then that decision shall be made by my Trustees in their absolute discretion.

(d) My Trustees shall set aside and keep invested in a separate fund (hereinafter referred to as the "Cottage Fund") any assets of my estate that my Trustees in their absolute discretion consider sufficient to satisfy the following payments (the "Cottage Property Payments") until the Cottage Property Termination Date, having regard both to the capital of the Cottage Fund and the annual net income that will be derived from the Cottage Fund:

(i) insurance of the Cottage Property against damage or destruction as well as public liability indemnity insurance;

(ii) local and municipal taxes in respect of the Cottage Property;

(iii) maintenance costs and repairs including expenses related to opening and closing the Cottage Property, storage costs associated with any of the cottage contents, and repairs and maintenance of any road or other allowances required to ensure full enjoyment of the Cottage Property; and

(iv) all utilities.

(e) My Trustees shall pay all Cottage Property Payments each year, first out of the annual net income of the Cottage Fund and then, to the extent of any deficiency, out of the capital of the Cottage Fund. If the annual net income exceeds the amount of the charges in any year, any excess shall be accumulated and added to the capital of the Cottage Fund at the end of each year. Except for the payments noted above, my Trustees shall not be responsible for the care, maintenance, or supervision of the Cottage Property and shall not be liable for waste.

(f) Upon the Cottage Property Termination Date, my Trustees shall divide and distribute the Cottage Property among my children who are then living, in any manner that they unanimously agree upon. This agreement may involve a division of the real and personal property comprising the Cottage Property among all or any number of my children, but if fewer than all of my children acquire an interest in the Cottage Property (or if any child of mine is not then living but has left issue then living), then, subject to the provisions below, any acquisition shall be by purchase from my estate at the then fair market value with complete payment to my estate, in cash or by certified cheque, upon the closing of any transaction.

(g) Fair market value shall be determined by my Trustees after obtaining and considering one or more appraisals obtained from qualified real estate appraisers, and appraisers of personal effects (if my Trustees consider is advisable to have the personal effect appraised), but the ultimate decision shall be made by my Trustees in their absolute discretion and shall be binding on all of the beneficiaries of my estate.

(h) If my children are not able to agree how the Cottage Property is to be divided by the Cottage Property Termination Date, then my Trustees shall sell the Cottage Property, and the net proceeds of this sale shall fall into and form part of the residue of my estate to be dealt with as part of it in accordance with the provisions of [RESIDUE paragraph] of my will with all references there to the date of my death being read as references to the Cottage Property Termination Date.

(i) Upon the Cottage Property Termination Date, my Trustees shall add any part of the Cottage Fund then remaining to the residue of my estate to be dealt with as part of it in accordance with the provisions of [RESIDUE paragraph] of my will with all references there to the date of my death being read as references to the Cottage Property Termination Date.

<u>Annotation</u>: One option in defining the Cottage Property, which has been used here, is to usea definition of the Cottage property that includes the contents, assuming that they will be disposed of together, that saves cumbersome repetitions of "and the contents" and the risk that if you

omit to mention the content at any point there is an implication that in that respect the contents are to be treated separately from the cottage itself.

The cottage is often an asset of significant emotional value. For this reason, it is generally advisable to avoid provisions that provide for long term trusts for all of the children or that provide for elaborate schemes of shared use of the property by children. If a trust is appropriate, then it is important to consider how expenses will be shared, how use will be shared, how upkeep and maintenance will be shared, the length of the trust (keeping in mind the 21-year deemed disposition rule under the Income Tax Act), and how disputes will be resolved. The above provisions contemplate the children agreeing on these matters, with the trustees exercising a tie-breaker or parental role if they cannot agree. If the trustees are the children, and in particular if not all of the children are trustees, this provision should be carefully considered and possibly another person appointed to make decisions if the children disagree.

In some circumstances it may be appropriate to transfer a cottage directly to a beneficiary, or more than one beneficiary (in which case the transfer would normally be to the beneficiaries as tenants-in-common although that decision can also be left to the beneficiaries). If the property has accumulated capital gains, it is important to be aware that the tax burden of those capital gains (that are deemed realized on death) is borne by the residuary beneficiaries under the will and not the beneficiary of the cottage. It is also possible that the cottage may qualify for the principal residence exemption under the Income Tax Act, in which case the capital gain may be totally or partially exempted from tax. Accordingly, it may be appropriate to charge the beneficiary of the cottage with the tax liability attributable to the cottage. If this is the case, then the gift of the cottage should be conditional upon the beneficiary satisfying the tax liability. The gift should go on to provide what is to happen if the beneficiary does not satisfy the tax liability. The following paragraph makes the gift conditional on paying the income tax liability, the Estate Administration Tax, and all costs and expenses associated with the transfer of the cottage. Note, however, that the paragraph as drafted does not make the beneficiary responsible for general maintenance, utilities, or the like during the period between date of death and transfer to the beneficiary, since the beneficiary typically has no control over how long the transfer takes to be completed. Alternatively, all expenses after a period from death could be chargeable to the beneficiary.

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

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

(b) The amount by which the estate administration tax or any similar tax actually payable by my Trustees exceeds the amount of this tax that would have been payable if I had transferred the Cottage Property prior to my death;

(c) All legal fees paid by my Trustees in connection with the transfer of the Cottage Property to Carrie Custody; and

(d) All other costs necessary or advisable to give effect to this gift of the Cottage Property, as determined by my Trustees acting reasonably. For greater certainty, it is my intention that no beneficiary of the residue of my estate shall receive less [than this beneficiary would have received if I had not owned the Cottage Property at all] because I have made the gift set out in this section.

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

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

OPTION TO PURCHASE COTTAGE PROPERTY

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

The paragraph below provides for the purchase price to be reduced by 5% to allow for the costs (e.g., real estate commission and carrying costs during a typical listing and closing period) that will be saved by the estate as a result of selling to the family member instead of on the open market. A different percentage, or none, may be appropriate, depending on the location of the cottage and the will-maker's wishes.

If on the date of my death I own or have any interest in the Cottage Property (as defined above), I direct my Trustees as follows:

(a) My Trustees shall give to my sister, Carrie Custody, if she is living on the date of my death, a first option to purchase from my estate the Cottage Property at 95% of the fair market value at my death. Fair market value is to be determined after obtaining and considering one or more appraisals by qualified real estate appraisers, and appraisers of personal effects (if my Trustees consider is advisable to have the personal effect appraised), but the ultimate decision shall be made by my Trustees

in their absolute discretion and shall be binding on all of the beneficiaries of my estate. Complete payment to my estate, in cash or by certified cheque, must be received by my estate before the registration of any transfer affecting the Cottage Property. Carrie Custody has thirty (30) days from the date that express written notice from my Trustees of this option is given to her to exercise the option by entering into an enforceable agreement of purchase and sale in standard form with my Trustees to purchase the Cottage Property on the terms set out above and such other usual terms as my Trustees shall in their absolute discretion consider advisable, failing which Carrie Custody's option under this paragraph shall terminate.

(b) If Carrie Custody is not living on the date of my death or does not exercise her option pursuant to the provisions set out above, then on the date of my death or at the time of such failure, as the case may be, my Trustees shall give to my eldest child then living the option to purchase the Cottage Property on the same terms and conditions which were offered to Carrie Custody. That child has thirty (30) days from the date that express written notice of this option is given by my Trustees to that child to enter into an enforceable agreement of purchase and sale in standard form with my Trustees to purchase the Cottage Property on the terms set out above and such other usual terms as my Trustees shall in their absolute discretion consider advisable, failing which that child's option shall terminate, and my Trustees shall give to the next eldest child of mine living at my death the option to the purchase the Cottage Property in accordance with the provisions of this paragraph, and so on to each of my children in turn.

(c) If neither Carrie Custody nor any child of mine living on the date of my death purchases the Cottage Property as provided for above, then my Trustees shall sell the Cottage Property for any amounts and to any person or persons and on any terms and conditions as my Trustees may in their absolute discretion determine.

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

EDUCATION TRUST FOR GRANDCHILDREN

Description of paragraph: The following paragraph sets aside a sum to pay the education expenses of all the will-maker's grandchildren.

If any grandchild of mine is living on the date of my death and has not then attained the age of twenty-five (25) years, my Trustees shall set aside a separate fund (the "Education Fund") from the assets of my estate having a value of THREE HUNDRED THOUSAND DOLLARS ($300,000.00) for those grandchildren living on the date of my death who have not attained the age of twenty-five (25) years and shall hold the Education Fund in trust until the Education Fund Termination Date (as defined below) on the following terms:

(a) The Education Fund Termination Date is the date that there is no grandchild of mine (including any grandchild born after my death but before the Education Fund Termination Date) living and under the age of twenty-five (25);

(b) Until the Education Fund Termination Date, my Trustees shall pay, firstly out of the annual net income of the Education Fund and then, to the extent of any deficiency, out of the capital of the Education Fund, all or any part as my Trustees think fit of the Education Expenses (as defined below) related to those of my grandchildren who are from time to time under the age of twenty-five (25) years, or any one or more of them to the exclusion of the other or others and in any proportions that my Trustees think fit.

(c) Education Expenses includes tuition, ancillary fees, the cost of books and materials, rent, reasonable living expenses, the costs of travelling between a grandchild's ordinary place of residence and the institution attended by this grandchild, and any other expenses that my Trustees in their absolute discretion determine to be related to the education of that grandchild.

(d) When making distributions, whether of annual net income or capital of the Education Fund, my Trustees should have regard to the income tax consequences applicable to these distributions. Any part of the net income not applied to these expenses shall be accumulated and added to the capital of the Education Fund at the end of the year, but after the expiration of the maximum period for accumulation of income permitted by law, my Trustees shall divide the income in equal shares per capita among those of my grandchildren then living who have not attained the age of twenty-five (25) years.

(e) On the Education Fund Termination Date, the Education Fund or the part of it then remaining shall fall into and form part of the residue of my estate to be dealt with as part of it in accordance with this my will with all references to the date of my death being read as references to the Education Fund Termination Date.

RESIDUE

There are many options for dealing with the residue of the estate. The first set of options establishes benefits for the surviving spouse – by outright distribution or by spousal trus. The second set of options establishes outright gifts to or trust funds for the will-maker's children with gifts over to the issue of predeceased children. Finally, there is a provision applicable if all of the will-maker's blood lineage dies before the estate is fully distributed.

GIFTS TO SPOUSE

OUTRIGHT GIFT OF RESIDUE TO SURVIVING SPOUSE

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

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

Annotation: An outright distribution to a surviving spouse is perhaps the most common distribution of estates of average complexity and value. Generally, the wills of spouses are identical to each other; for example, an outright distribution to the survivor, with the survivor

being the sole executor. These wills are often referred to as "mirror Wills", which are not to be confused with "mutual" wills. Depending upon the nature and extent of assets, there may be tax-driven reasons to avoid an outright distribution to a surviving spouse. A further discussion is found below, under 'Trust Fund for Surviving Spouse.'

The 30-day survivorship period is intended to deal with the situation of both spouses dying within a short period of time or in a common event such as an accident. If the order of deaths is known, the estate of the first to die will pass to the survivor, and then the estate of the second to die will be distributable once again according to his or her will. A survivorship clause can minimize or prevent double estate administration costs and double probate taxes. There is no legislative or common law rule establishing a survivorship period. We have seen periods as little as 15 days and as long 60 days or more.

The use of survivorship clauses can lead to drafting problems. Ensure that wills with survivorship periods provide for the distribution of an estate if the will-maker's spouse actually survives the period. The courts have considered what to do if those instructions are missed from a will, and the jurisprudence goes both ways in terms of whether the missing words can be read into the will.

Where the order of spouses' deaths are uncertain, such as a common accident, and wills do not contain a survivorship clause, Part IV of the SLRA will govern the distribution of the spouses' estates. Section 55 provides as follows:

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

Each beneficiary who died at the same time as the will-maker is deemed to have predeceased the will-maker and the gift to that beneficiary will not take effect. In the context of spouses, this means that the alternate beneficiary provisions in both wills take effect. Section 55 goes on to direct that if joint tenants die in such circumstances, then each joint tenant is deemed to have held as a tenant-in-common.

If the spouse does not survive the necessary period to take the outright gift, the appropriate wording for the first alternate gift to the issue of the will-maker is:

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

If you use a survivorship clause, ensure that the phrasing of the gift to the first beneficiary (usually the spouse) and to an alternate beneficiary mirror each other.

In Re Barbeau Estate, [2012] OJ No 3881, 2012 ONSC 3249 (SCJ), the court was called on to interpret the phrase, "provided [Ms. Barbeau] survives me for a period of 30 days", holding that the phrase meant "30 clear days", excluding the date of Mr. Barbeau's death from the calculation of the survivorship period. Ms. Barbeau died on day 30; the court inferred that Mr.

Barbeau intended his will to require her to survive him for a period of thirty <u>full</u> days, so that she would have to have to be living at some point on the thirty-first day in order to be entitled to receive the residue of the estate.

<u>TRUST FUND FOR SURVIVING SPOUSE</u>

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

My Trustees shall hold the residue of my estate in trust during the lifetime of my wife, JANE DOE. My Trustees shall pay the net income to my wife and may pay to or use for the support of JANE DOE, such amounts out of the capital as my Trustees in their absolute discretion consider appropriate.

The interests of my spouse are my primary concern and my Trustees shall not be obliged to maintain an even hand between my spouse and the other beneficiaries of my estate.

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

Under the <u>Income Tax Act</u>, a taxpayer is deemed to dispose of his or her capital property on his or her death with the result that any accumulated capital gains are deemed realized – this may trigger a significant tax liability on the death of the first spouse which a family wishes to delay or defer until the death of the second spouse.

The tax liability can be deferred if the capital property is left to the surviving spouse or to a trust which qualifies as a spousal trust under the <u>Income Tax Act</u>. (This deferral opportunity is often described as a "rollover".) If capital property is left outright to a surviving spouse, then the surviving spouse inherits the tax attributes of the capital property. In particular, when the spouse disposes of the capital property or dies, there will be a realization of the capital gains that accumulated both during the taxpayer's lifetime as well as during the time the surviving spouse held the property.

Like an outright distribution to a surviving spouse, the use of a spouse trust which meets the requirements of the <u>Income Tax Act</u> will allow for a deferral of the income tax consequences of the deemed disposition of capital property, until the death of the spouse or until the trustees dispose of the capital property. See subsection 70(6) of the <u>Income Tax Act</u> for the requirements of a spouse trust. Interpretation Bulletins IT-305R4, IT-449R and IT-381R3 will help to determine whether a spouse trust has been created. The only two points we will make in respect of the requirements is that often clients will want a spouse trust to terminate if the spouse remarries. If a condition, such as remarriage, is imposed as a terminating event, the spouse trust will not qualify for purposes of the rollover provisions (however, remarriage could terminate the right to capital distributions from the trust). In addition, the spouse trust must be drafted such that no person other than the spouse can receive income or capital from the trust during

the lifetime of the spouse. This latter requirement may seem easy to fulfill in terms of drafting the trust itself. However, CRA has successfully taken the position that if the administrative powers are used in a manner that permits someone other than the spouse to obtain the use of the capital of the estate, this will taint the spouse trust. In Balaz v Balaz, 2009 CanLII 17973 (Ont Sup Ct), the particular power at issue was the ability to lend money to other beneficiaries on a non-interest bearing basis, and the clause inadvertently resulted in tainting the spousal trust. Although the judge concluded that the testatrix could not have intended those clauses to be included, and rectified the will, it is prudent to include a provision in the will which directs the trustees not to use any of the administrative powers in a manner that will offend subsection 70(6) of the Income Tax Act. (See the clause entitled "Maintain Spousal Trust Status Under the Income Tax Act" below.)

A common drafting error made when using spouse trusts is to fail to provide for the distribution of the estate on the spouse's death or if the spouse predeceases the will-maker. This error can be avoided with the use a residue clause which follows the spouse trust and includes language making the clause applicable in both circumstances. After the death of the surviving spouse, or if the will-maker is the surviving spouse, the appropriate wording for the alternate gift is:

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

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

For purposes of this Paragraph X of my Will, the term "Division Date" means the third anniversary of the date of death of the last to die of my wife, JANE DOE, and me or, in the absolute discretion of my Trustees, an earlier date. The earlier date shall not fall before the date of death of the last to die of my wife, JANE DOE, and me.

Until the Division Date, my Trustees shall keep the residue of my estate invested and shall deal with the residue of my estate as follows:

(a) During the lifetime of my wife, JANE DOE, my Trustees shall pay the annual net income derived from the residue of my estate to or for the benefit of my wife, JANE DOE, in such periodic instalments as my Trustees in their absolute discretion consider advisable.

(b) During the lifetime of my wife, JANE DOE, my Trustees, in the exercise of a complete discretion may pay to or for the benefit of my wife, JANE DOE, any amount out of the capital of the residue of my estate, in such amounts and frequency as my Trustees see fit.

(c) My Trustees, when exercising their discretion to make capital payments to or for the benefit of my wife, shall consider that it is my intention that my wife, JANE DOE, be maintained at the same standard of living to which she was accustomed to living during my lifetime. When investing and reinvesting the residue of my estate and when exercising their discretion to make capital payments to my wife, JANE DOE, my Trustees shall be entitled to prefer the interests of my wife, JANE DOE, over the interests of those beneficiaries who may be entitled to the capital of the residue of my estate on the Division Date.

(d) After the date of death of the last to die of my wife, JANE DOE, and me, and until the Division Date, my Trustees shall pay the annual net income from the residue of my estate to or for any of my issue. These payments of income may be made to one or more of my then-living issue, in the amounts and proportions and subject to the terms that my Trustees in their absolute discretion determine.

(e) After the date of death of the last to die of my wife, JANE DOE, and me, and until the Division Date, my Trustees shall have the power to pay to any amounts out of the remaining capital of the residue of my estate to or for the benefit of my then-living issue, as my Trustees in their absolute discretion may determine.

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

GIFTS TO ISSUE

The following clauses are intended to follow the gifts to a spouse, and can be used whether the gift to the spouse was an outright gift or was held in one or more trusts. If the will-maker is unmarried when the Will is prepared, or is not leaving the residue of his or her estate to his or her spouse, then all references to "the Division Date" should be replaced with references to "the death of the survivor of my spouse and me", except in the outright distribution clause which is designed to provide for a gift over to issue on the will-maker's death if their spouse does not survive them or on the Division Date for the spouse trust.

OUTRIGHT DISTRIBUTION TO ISSUE

Description of Clause: The following clause provides for a distribution per stirpes among the issue of the will-maker who are alive at the death of the survivor of the will-maker and his or her spouse.

If my wife is not living on the 30th day following my death or upon the Division Date, as the case may be, my Trustee shall divide the residue of my estate among my issue in equal shares *per stirpes*.

***Annotation*: With class gifts, for example to "my children", a will must generally identify the point in time when membership of the class is to be determined. A per stirpes distribution, however, creates a distribution only to the next generation, unless one of that generation has died, in which case he or she will be represented by his or her children. It is not necessary to use qualifying terms such as "among my issue who survive me" to identify the point in time for determining membership in the class with "issue per stirpes".**

Using qualifying terms in conjunction with "issue per stirpes" can lead to confusion. Use of phrases such as "among my issue living at the date of division in equal shares per stirpes" have led courts to interpret the gift as a gift to issue in equal shares per capita. It is easy to avoid the risk of having the Will mis-interpreted this way by simply avoiding unnecessary qualifications of issue per stirpes.

SIMPLE TRUST FOR ALL ISSUE

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

My Trustees shall divide the residue of my estate so that there is:

(a) one equal part for each child of mine living on the Division Date; and

(b) one equal part for each child of mine not then living with issue then living.

My Trustees shall deal with such parts as follows:

(a) My Trustees shall set aside one part for each child then living and shall keep the part invested. Until my child attains age 25, my Trustees shall pay to him or her or apply to his or her support and education so much of the income and capital of the part as my Trustees in the exercise of an absolute discretion consider appropriate from time to time. Any surplus income shall be accumulated and added to the part until the longest period allowed at law to accumulate income has expired. Thereafter, the net income shall be paid to my child.

(b) When my child attains age 25, my Trustees shall transfer the balance of the part to him or her.

(c) If my child dies before attaining age 25, my Trustees shall divide the part, or the amount of it not yet received by my child, equally per capita among the children of my child who survive him or her, each such share to be held in trust subject to the provisions of this paragraph. If my child leaves no child surviving him or her and I have issue then living, the part shall be divided among my issue in equal shares *per*

stirpes, each such share to be held in trust subject to the provisions of this paragraph.

(d) If, however, an interest passes to any issue of mine for whom a part of my estate is being held in trust under my Will, that interest shall be added to the trust for that issue of mine and shall be administered in the same manner.

(e) My Trustees shall set aside one part for the issue of each child of mine not living on the Division Date, but who has issue then living, and shall divide the part among that child's issue in equal shares *per stirpes*, and the share of any issue who has not attained the age of 25 years shall be held in trust subject to the provisions of this paragraph.

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

***Annotation*: If a gift is made to a person with a condition that he or she is not to receive it until reaching a specified age that is more than the age of majority, there must be clause naming a contingent beneficiary. This clause will avoid the application of the rule in Saunders v. Vautier.**

The rule in Saunders v. Vautier permits the beneficiaries of a trust, when all are capable adults, to call upon the trustees to terminate the trust and distribute the trust property. If a gift over is made, the beneficiaries' interests do not vest, and they will NOT have the right to demand the termination of the trust.

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

STAGED DISTRIBUTIONS TO CHILDREN

Description of Clause: This clause contains two capital distributions for children and incorporates provisions for a child to become a trustee for his or her own part at a specified age.

My Trustees shall divide the residue of my estate so that there is:

(a) one equal part for each child of mine living on the Division Date; and

(b) one equal part for each child of mine not then living with issue then living.

My Trustees shall deal with such parts as follows:

(a) My Trustees shall set aside one part for each child then living and shall keep each part invested until my child attains age 25. Until my child attains age 21, my Trustees shall pay to him or her, or apply for his or her support and education, so much of the income and capital of the part as my Trustees in the exercise of an absolute discretion consider appropriate from time to time. Any surplus income shall be accumulated and added to the part.

(b) When my child reaches age 21, my Trustees shall pay and transfer 1/3 of the part then remaining to my child for his or her own use absolutely.

(c) When a child reaches age 21, he or she shall become a Trustee of the part with my Trustees for the time being, and the assets of the part shall vest legally in him or her with my Trustees. My child shall have all the same powers and discretion that I have given to my Trustees in my Will. For convenience, I will refer to my Trustees, including my child with respect to the part, as my "Trustees".

(d) Thereafter my Trustees shall pay the net income to my child until he or she reaches age 25.

(e) At any time prior to my child's reaching age 25, my Trustees may pay to or for the benefit of my child any amounts out of the capital of the part as my Trustees in the exercise of an absolute discretion consider appropriate for the support and education of my child.

(f) When my child attains age 25, my Trustees shall transfer the balance of the part to him or her.

(g) If my child dies before attaining age 25, my Trustees shall divide the part, or the amount of it not yet received by my child, equally per capita among the children of my child who survive him or her, each such share to be held in trust subject to the provisions of this paragraph. If my child leaves no child surviving him or her and I have issue then living, the part shall be divided among my issue in equal shares *per stirpes*, each such share to be held in trust subject to the provisions of this paragraph.

(h) If, however, an interest passes to any issue of mine for whom a part of my estate is being held in trust under my Will, that interest shall be added to the trust for that issue of mine and shall be administered in the same manner.

(i) My Trustees shall set aside one part for the issue of each child of mine not living on the Division Date, but who has issue then living, and shall divide the part among

that child's issue in equal shares *per stirpes*, and the share of any issue who has not attained the age of 25 years shall be held in trust subject to the provisions of this paragraph.

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

***Annotation*: A typical discretionary trust allows the trustees to distribute income and capital at any time and for any purpose upon the request of the beneficiary.**

A staged distribution allows a beneficiary to receive part of the capital of a trust fund without having to justify its use to trustees, and balances the risk of a beneficiary squandering his or inheritance over the course of several payments.

By having a child act as trustee of his or her own part, the hope is that he or she will learn some financial responsibility and management skills.

Clients will usually identify what proportion of the original amount of the inheritance should be distributed at each age. Amounts should be expressed as percentages or fractions rather than as dollar amounts in case the total trust fund at any time is more or less than originally expected.

Additional staged fractional or percentage distributions can be added as the clients wish. Ages for any provision can also be tailored for clients' wishes.

HOTCHPOT CLAUSE

***Description of Clause*: If a beneficiary, for instance one child of the will-maker, has received an advance from the will-maker or owes a debt to the will-maker that the will-maker would like to have taken into account when dividing the residue of the estate, then a "hotchpot" clause may be used in the Will. This sample clause is for loans, and should be suitably modified for gifts.**

I have loaned XXX DOLLARS ($xxx) to my son, JACK DOE. This loan shall be forgiven, and the outstanding amount of the loan, [plus interest calculated at the rate of 2% per year from the date of my death until the date of the distribution of the residue], shall be brought into hotchpot by my son JACK DOE, [or anyone claiming under him], and taken into account by my Trustees upon the division of the residue of my estate in accordance with Paragraph xxx of this will, whether the debt is legally enforceable at my death or not.

***Annotation*: A hotchpot clause will equalize the advances received by beneficiaries during the life of the will-maker, whether the advances were made by gifts or are debts owed to the will-maker. The clauses which otherwise provide for the division of the residue of the estate should be expressly made subject to the hotchpot clause by referencing the hotchpot clause in them.**

If the hotchpot clause is used to equalize debts that are owed by beneficiaries (as opposed to gifts made to beneficiaries), it is important that you ensure there is a release of the debt either in the hotchpot clause itself (as above) or in a separate forgiveness of debts provision in the Will. Otherwise the debt will still be owing to the estate and the beneficiary will be doubly impacted. A hotchpot clause may provide the only means to address debts that are barred by operation of limitation periods: see Hare v. Hare (2006), 218 O.A.C. 164 (C.A.).

If the will-maker is using more than one will, a version of the hotchpot clause should appear in both wills, referring to the complementary will, taking care not to deduct the gift or loan twice.

GIFTS IF THERE ARE NO SURVIVING SPOUSE OR ISSUE

Description of Clause: The following clause, sometimes referred to as a "common disaster" clause, provides for a distribution of the will-maker's estate if the will-maker's spouse and issue have all predeceased. Again, all references to "the Division Date" should be replaced with references to "the death of the survivor of my spouse and me" if a spouse trust is not used.

If none of my spouse or issue are living on the Division Date, or at any subsequent time, to take an absolutely vested interest in the residue of my estate or any part of it, then upon the date of death of the last to die of me, my spouse, and my issue (the "Date of Final Distribution"), my Trustees shall divide the balance of the residue of my estate or the part of it then remaining into the requisite number of equal shares to give effect to the following provisions:

(a) If any one or more of my brother, GARY DOE, my sister, CARRIE CUSTODY, my mother, JESSICA DOE, and my father, JUSTIN DOE, are living on the Date of Final Distribution, to divide one equal share into the requisite number of equal parts to give effect to the following provisions:

(i) if my brother, GARY DOE is then living, to pay one equal part to him;

(ii) if my sister, CARRIE CUSTODY is then living, to pay one equal part to her; and

(iii) if either or both of my mother, JESSICA DOE and my father, JUSTIN DOE, are then living, to divide one equal part into equal portions and pay one equal portion to my mother, JESSICA DOE, and one equal portion to my father, JUSTIN DOE, if they are both then living, or all to the survivor of them if only one of them is then living; and

(b) If any one or more of my brother-in-law, SAM SMITH, my sister-in-law, SOPHIE SMITH, my mother-in-law, STEPHANIE SMITH, and my father-in-law, WILLIAM SMITH are living on the Date of Final Distribution, to divide one equal share into the requisite number of equal parts to give effect to the following provisions:

(i) if my brother-in-law, SAM SMITH, is then living, to pay one equal part to him;

(ii) if my sister-in-law, SOPHIE SMITH, is then living, to pay one equal part to her; and

(iii) if either or both of my mother-in-law, STEPHANIE SMITH, and my father-in- law, WILLIAM SMITH, are then living, to divide one equal part into equal portions and pay one equal portion to my mother-in-law, STEPHANIE SMITH, and one equal portion to my father-in-law, WILLIAM SMITH, if they are both then living, or all to the survivor of them if only one of them is then living.

***Annotation**: The above clause would apply where (i) there is no spouse or issue of the will-maker alive at his or her death, (ii) the residue of the estate was being held in a spouse trust and there are no issue of the will-maker alive at the death of the spouse, or (iii) there are issue alive at either of the foregoing dates but they die before their trust funds are fully distributed (this last option is often not contemplated by the will-maker). The clause provides for a very typical distribution where half the estate is divided equally among the surviving siblings and parents of one spouse and the other half of the estate is divided equally among the surviving siblings and parents of the other spouse. The division of each half of the estate depends upon which members of that spouse's family are alive. For instance, in the case of the will-maker's side, if Carrie Custody, Jessica Doe, and Justin Doe have all died, then Gary Doe will take the full share which will equal 50% or one half of the estate (i.e. the full share set aside for the will-maker's side will not be divided into parts other than the part for Gary Doe). Note that this clause does not provide for gifts to the issue of any predeceased siblings. If the will-maker wishes to provide for a gift over to the issue of a predeceased sibling, then the following language can be added to the gifts to the siblings:*

…but if Gary Doe is not living on the Date of Final Distribution but has left issue then living, my Trustees shall divide that one equal part among his issue in equal portions *per stirpes*.

When drafting "mirror wills" for spouses, have clients consider using an Alternate Gift of Residue clause that is the same in each spouse's Will. After the death of a first spouse, the second spouse's Will determines the distribution of the entire estate. Since there is no way to know the order in which the spouses will die or the time that may elapse between deaths, if spouses do not provide for the same provisions then the order of deaths will determine the identity of the ultimate beneficiaries, which is typically not what clients wish. The lawyer must also warn both spouses that in the absence of a contract not to change their wills, either spouse may change the Alternate Gift of Residue clause (or, for that matter, any other part of his or her will) without the consent of the other, either before or after the other's death. The reporting letter often contains a reminder regarding this matter, and also the fact that the drafting solicitor will not act for a spouse wishing to change his or her will without the knowledge of the other spouse because of the solicitor's obligation to both clients in a joint retainer situation (unless the spouses legally separate or divorce).

"HENSON TRUST" FOR DISABLED BENEFICIARY

***Description of Clause**: This clause may be used for a share or amount set aside for a beneficiary who is disabled and is or may become reliant upon Ontario Disability Support Program ("ODSP") payments and the other benefits (such as a dental care and drug card) that come with qualifying for ODSP. Again, all references to "the Division Date" should be replaced with*

references to "the death of the survivor of my spouse and me" if a spouse trust is not used. In this case, the gift of a share of the residue of the will-maker's estate would be made subject to the terms of the paragraph of the Will setting out the terms of the Henson Trust.

If my daughter, ANN DOE ("Ann"), is living on the Division Date, my Trustees shall pay or transfer the share of my estate for Ann to my son, JACK DOE, to hold in a separate trust (the "Ann Doe Trust Fund"). The term "Ann's Trustees" refers to my son and any other person or persons acting as trustees of the Anne Doe Trust Fund from time to time. Ann's Trustees have all the same powers, authorities, and discretions as my Trustees. Ann's Trustees shall invest and reinvest the Ann Doe Trust Fund and deal with it as follows:

(a) During the lifetime of Ann, to pay or apply all or any part of the income or capital of the Ann Doe Trust Fund to or for the benefit of Ann, in the amounts, and subject to any trusts, terms, and conditions, including giving discretion to a trustee or others, as Ann's Trustees in the exercise of their absolute discretion consider appropriate, at any time;

(b) To deal with anyincome that is not paid to or applied for the benefit of Ann in any year as follows:

(i) until the 21st anniversary of the Division Date, to accumulate that income and add it to the capital of the Ann Doe Trust Fund;

(ii) after the 21st anniversary of the Division Date, to pay that income to the issue of Ann living at the time of the income payment in any shares that Ann's Trustees in their absolute discretion consider appropriate. If Ann does not have issue living at that time that income shall be paid to my issue in any shares that Anne's Trustees in their absolute discretion consider appropriate;

(c) The Ann Doe Trust Fund, any interest in the Ann Doe Trust Fund, and any income derived from the Ann Doe Trust Fund, shall not vest in Ann. The only interest Ann has in the Anne Doe Trust Fund is in payments actually made to her, or on her behalf, and received by her;

(d) Without binding the discretion of Ann's Trustees, I wish that, when exercising their discretion, Ann's Trustees provide extra comforts and amenities of life for Ann without impairing the benefits that Ann receives or might receive from other sources, including but not limited to governmental sources, to the extent that is reasonable in the circumstances;

(e) Ann's Trustees are not required to maintain an even hand between Ann and any other beneficiaries of the Ann Doe Trust Fund when exercising their powers, but may prefer Ann's interests. Ann's Trustees have access to all of the income and capital of the Ann Doe Trust Fund to make any payments to or for the benefit of Ann, as they in their absolute and unfettered discretion consider appropriate. In addition, Ann's Trustees are not required to maintain an even hand between Ann and any other beneficiaries of the Ann Doe Trust Fund when managing its

investments, and may adopt an investment policy that favours Ann at the expense of the other beneficiaries; and

(f) On the death of Ann, to divide the Ann Doe Trust Fund then remaining, and any accumulated income, among the issue of Ann, in equal shares *per stirpes*, subject to the provisions of paragraph XXX, or if Ann has no issue, to pay the Ann Doe Trust Fund then remaining, and any accumulated income, to my issue in equal shares *per stirpes*, subject to the provisions of paragraph XXX.

***Annotation**: **The Ontario Disability Support Program Act, 1997**, S.O. 1997, c. 25, Sch, B (the "ODSPA") came into effect on June 1, 1998. The purpose of the ODSPA is to provide income support to people who are qualified and over the age of eighteen.*

There are three ways to qualify for income support under the ODSPA. First, a person may be "grandparented" as a former family benefits recipient. Second, a person may be a member of a prescribed class such as a recipient of a Canada Pension Plan disability pension, or a resident of certain facilities or homes such as psychiatric hospitals and homes for special care. Third, a person may qualify under the ODSPA definition of "person with a disability".

Generally, to qualify as a person with a disability, one must have a substantial physical or mental impairment that is expected to last at least 12 months and substantially limits one's activities of daily living in at least one of the following three areas, namely: personal care; activities in the community; or activities in the workplace. The impairment, its likely duration, and its impact on the person's activities of daily living must be certified by an Ontario physician or certain other specified health professionals.

Eligibility for ODSPA is also determined by financial testing. Once a person has qualified as a person with a disability, certain financial eligibility tests must be met, as set out in the General Regulation under the ODSPA, Ontario Regulation 222/98. A single person is entitled to have up to $40,000 (formerly $5,000) worth of assets and still qualify for income support. If the disabled person has a spouse, the disabled person is allowed a further $10,000 (formerly $2,500) worth of assets for a total of $50,000 (formerly $7,500). In addition, the disabled person is allowed an additional $500 for every other dependant, other than a spouse (e.g. minor children). The asset limit increases became effective on September 1, 2017.

Certain personal use property is excluded in calculating the above asset limit, such as an interest in a principal residence, an interest in a second property if required for health and well-being of the disabled person, a motor vehicle of any value, a second motor vehicle up to $15,000 in value if it is needed by a dependant for work, an RESP, an RDSP, trust funds derived from an inheritance or life insurance, to a maximum of $100,000, where the income and capital is available to be used for maintenance, the cash surrender value of life insurance, and a prepaid funeral.

Certain additional assets and funds are exempt from the asset limits in s. 27 of the Regulation. In addition, the accumulating income in such funds is exempt from inclusion in the disabled person's income as described further below. One of the most important of these funds is a trust fund of any amount if it is an absolute discretionary trust (commonly known as a Henson trust).

The trusts derive their name and effectiveness from the case of Ministry of Community and Social Services v. Henson[2]. In the Henson case, Audrey Henson was a beneficiary of a trust fund created under the will of her father. The provisions of the trust were as follows:

> ***"To pay so much of the income therefrom, or the whole of the income therefrom, together with so much of the capital thereof to or for the benefit of my daughter AUDREY JOAN HENSON as my Trustees shall in the exercise of their absolute and unfettered discretion consider advisable from time to time. Any income not so paid in any year shall be accumulated by my Trustees and added to the capital of the residue of my estate, provided, however, that if it becomes unlawful for my Trustees to continue such accumulation of income, then the income not so paid in any year to or for the benefit of my said daughter shall be paid to The Guelph and District Association for the Mentally Retarded Incorporated.***
>
> ***The residue of my estate and the income therefrom shall not vest in my said daughter and the only interest she shall have therein shall be the payments actually made to her, or on her behalf, and received by her or for her benefit therefrom. Without in any way binding the discretion of my Trustees, it is my wish that in exercising their discretion in accordance with the provisions of this paragraph, my Trustees take account of and insofar as they may consider it advisable take such steps as will maximize the benefits which my said daughter would receive from other sources if payment from the income and capital of the residue of my estate were not paid to her for her own benefit, or if such payments were limited to an amount or time. In order to maximize such benefits, I specifically authorize my Trustees to make payments varying in amounts and at such time, or times, as my Trustees in the exercise of their absolute discretion may consider in the best interests of my said daughter."***

The Will further provided that upon the death of Audrey Henson, the trustees were to transfer the remainder of the estate to the Guelph District Association for the Mentally Retarded Incorporated.

The question considered by the Divisional Court was whether Audrey Henson had a beneficial interest in assets held in trust and available to be used for maintenance. The Divisional Court ruled that Audrey Henson did not have such an interest since the trustees had absolute and unfettered discretion and could not be compelled to make payments to her.

In the Ministry of Community and Social Services v. Powell[3], the Divisional Court found that a testamentary trust fund was includable in determining the eligibility of a disabled person for family benefits. Thomas Powell was a beneficiary under the Will of his father. The Will provided as follows:

> ***"To keep invested the residue of my Estate and to pay the net income derived therefrom to or for my son, Thomas James Powell, for his support, maintenance, medical attention and assistance as my Trustee in his uncontrolled discretion***

---

2 (1987), 28 E.T.R. 121 (Ont. Div. Ct.), affirmed at (1989), 36 E.T.R. 192 (O.C.A.).

3 (1989), 38 E.T.R. 205 (Ont. Div. Ct.).

may decide, with power and authority to my said Trustee to pay to or for the benefit of my son, such part or parts or the whole of the said capital of the said residue of my Estate as he in his uncontrolled discretion considers advisable until my son dies."

In this case the Divisional Court found that the direction in the will to pay the net income derived from the residue of the estate to Thomas Powell constituted a mandatory requirement to pay to him all of the net income. Thomas Powell had an enforceable right to the net income. The difference between the clause in the Powell Will and that contained in the Henson Will was that there was no discretion in the Powell Will as to the amount of the income that could be paid to Thomas Powell, nor was there a power to accumulate unpaid parts of the income. The Divisional Court found, however, that the discretion as to the payment of capital to Thomas Powell put the capital beyond the beneficiary's reach and thus he had no interest in the trust capital for purposes of determining his entitlement to income support.

The Powell case illustrates the importance of careful drafting in the creation of discretionary trusts if it is necessary that the beneficiary maintain his or her entitlement to income support.

Although there is no limit on the value of the capital that can be put into a Henson trust, it is very important to remember that distributions from the Henson Trust are subject to the limits imposed by the ODSPA and the regulations made under that statute. Distributions from a Henson Trust fall within the broader category of "voluntary payments", which also includes gifts and payments from a life insurance policy. An individual who receives ODSP benefits can receive voluntary payments of up to $10,000 (formerly $6,000) in any 12-month period. In addition to this amount, an unlimited amount can be paid to a benefits-recipient for pre-approved disability related items or services that will not be reimbursed. Those amounts must be approved in writing by the Director of ODSP before a distribution or payment is made, or else the amount is counted toward the $10,000 limit for voluntary payments. As of September 1, 2017, a voluntary payment is also exempt if it is received for the purpose of acquiring a principal residence, a vehicle that is permitted under the regulations, or to pay first and last month's rent, so long as the payment is used for that purpose as soon as practicable after it is received. The increase in the voluntary payment amount from $6,000 to $10,000 also became effective on September 1, 2017.

Henson Trusts can be very useful in allowing money to be set aside to be used to provide extra comforts and pleasures for the disabled person without jeopardizing the person's entitlement to income support. Often, the amount available to be left by the will-maker in a Henson Trust would not be sufficient to provide full support to the beneficiary if income support under the ODSPA were not available. However, because of the nature of a Henson Trust, there is potential for abuse. Since the trust is fully discretionary and the beneficiary has no enforceable entitlement, there is the potential for an inappropriate trustee to refuse to make payments from the trust to the disabled person and merely to accumulate the income in favour of the residuary beneficiaries. If a will-maker chooses to provide benefits for a beneficiary by way of a Henson Trust, the choice of trustees is of crucial importance in order to be assured that the funds will be managed and used in a responsible manner. It is perfectly appropriate to name a mentally competent disabled beneficiary as a co-trustee of his or her own Henson Trust, although not advisable for the beneficiary to act as the sole trustee as the ODSPA requires a beneficiary to take positive steps to obtain payment of all assets and income to which he or she may be entitled,

and a claim could be made that this obligation also requires a beneficiary acting as a trustee to make payments to him or herself.

With the recent introduction of registered disability savings plans, a will-maker should consider providing in his or her Will for a gift to an established RDSP instead of or in addition to establishing a Henson Trust. Benefits that an RDSP have over a Henson Trust include the tax-deferred status of income and capital gains earned in the RDSP; the availability of government contributions (although this is a minor consideration where the funding for the RDSP is received in a lump sum such as a legacy rather than in annual contributions); and the exempt status of both the capital and income in the RDSP and income distributed from the RDSP in determining the beneficiary's entitlement to ODSP benefits. Limitations to the RDSP include the facts that no contributions may be made after the beneficiary turns 59, that both the plan-holder and the beneficiary must consent to a contribution from any other source, and that the lifetime maximum contribution to an RDSP from all sources is $200,000 in respect of any one beneficiary.

From 2016 on, it will also be possible for the trustees of a testamentary trust for a disabled beneficiary to elect for the trust to be a Qualified Disability Trust under subsection 122(3) of the Income Tax Act (Canada) ("ITA"). These provisions will apply to a trust for a beneficiary who suffers from a severe and prolonged impairment in physical or mental function. A QDT is created when the executor of a testamentary trust jointly elects, with one or more beneficiaries under the trust, in its T3 return of income for the year, to be a qualified disability trust for the year. In order to make the election there are some requirements for information -- such as the electing beneficiary's social insurance number - to be provided in the return, and:

- ***each electing beneficiary must be <u>named</u> as a beneficiary in the will, which appears to require the actual name of the beneficiary, rather than, for example, a reference to "my issue" or "my children", such as might be used if the will included a general discretionary trust applicable to any beneficiary who is or may be under a disability. Such references would not suffice to meet the QDT definition.***

- ***each electing beneficiary must be certified as eligible for the disability tax credit (i.e., an individual with a severe and prolonged impairment in physical or mental function and in respect of whom the certification required for the disability tax credit has been filed with the CRA). Essentially, this means that each electing beneficiary must qualify for the disability tax credit under paragraphs 118.3(1)(a) and (b) of the ITA.***

- ***no electing beneficiary can elect with any other trust for the other trust to be a qualified disability trust in the beneficiary's taxation year;***

Since a QDT must be a testamentary trust that arose on and as a consequence of a particular individual's death, a QDT can only be created by will. Moreover, since the mind and management of the trust must be in Canada in order to maintain its Canadian residence, the selection of a resident trustee will be especially important where there is a possibility that the trust for a disabled beneficiary may be electing as a QDT.

The advantage of an election for the trust to be a QDT is that the income that is not paid to the beneficiary, but retained in the trust, will be taxed as graduated rates, rather than at the top

marginal tax rates that would otherwise apply to a testamentary trust after the introduction of the new rules on taxation of testamentary trusts in the 2014 budget.

There may be some disadvantages to electing as a QDT. There are several pitfalls that practitioners should be aware of when considering the use of a QDT. The filing requirements are stringent and the deadlines tight, with no relief for a late-filed election.

The disability tax credit, under paragraphs 118.3(1)(a) and (b) of the Income Tax Act, may not be available to all disabled individuals. For example, not all individuals who qualify for provincial disability benefits also qualify for the federal disability tax credit. Such individuals will not be able to benefit from the QDT designation.

A QDT may be subject to a recovery tax under subsection 122(2) in respect of a previous year. The intent of the recovery tax is to claw-back tax savings for income taxed at graduated rates that is subsequently distributed as capital to a non-electing beneficiary. The formula for the calculation of the recovery tax is somewhat complicated; however, it effectively equals the amount of tax that would have been paid in a previous year if the trust had been subject to the highest marginal rate and taxable income for that year excluded amounts that were subsequently distributed as capital to the electing beneficiary.

A QDT will be subject to the recovery tax under the following circumstances: (i) none of the beneficiaries at the end of the trust year was an electing beneficiary for a preceding year, (ii) the trust ceased to be resident in Canada, or (iii) a capital distribution is made to a non- electing beneficiary. There are several issues to note regarding the recovery tax. The first condition applies to the year in which a qualifying beneficiary dies and in that year, the recovery tax will apply. In addition, special attention must be paid to the administration of the trust to ensure that its mind and management are in Canada so that it does not become a non-resident trust, triggering the recovery tax under the second condition. Finally, if there will be multiple beneficiaries of the trust and not all such beneficiaries are disabled, then consideration should be given to the terms of the trust in allowing capital contributions to non-electing beneficiaries. One might consider setting aside a separate trust or trusts for such individuals so that capital can still be distributed to those beneficiaries without the concern of the recovery tax applying.

PAYMENTS DURING MINORITY

Description of Clause: This clause applies to a beneficiary under the age of majority (18 years old) whose inheritance is not otherwise directed to be held in trust. If there are no specific trust provisions for the shares of minor beneficiaries, various difficulties arise.

Subject to any specific provisions above, if any beneficiary acquires a vested interest in a share of my estate before attaining the age of majority, my Trustees shall hold that beneficiary's share and keep it invested, and shall pay or apply all or any part of the income or capital of that share, as my Trustees in their absolute discretion consider appropriate, for the benefit of that beneficiary until he or she attains the age of majority.

Annotation: Persons under age 18 can own property but cannot enter into contracts or otherwise deal with their property. If a beneficiary inherits before age 18, and there is no direction to the Trustees to hold the beneficiary's inheritance, then it must be paid to the Accountant of the

Superior Court of Justice. Including a clause like this avoids the cumbersome process of making a payment into court (and later out of court) and for the beneficiary's parent having to request the Children's Lawyer's approval for any payments out of court during the beneficiary's minority.

A common drafting error in wills is to amend a standard clause such as the one above by changing "age of majority" to a later age such as 21 or 25. This will not change the fact that the beneficiary's gift is fully vested. The clause does not contain an alternate gift in the event the beneficiary fails to attain the specified age and so the rule in Saunders v. Vautier applies - the beneficiary can demand payment of his or her gift upon reaching age 18. As this clause is intended to be a "just in case" clause, it should not be used as a general trust provision for children or grandchildren who could inherit before attaining a more mature age.

RECEIPTS

Description of Clause: Because of the incapacity to manage property, minors cannot contract and cannot sign receipts or releases for amounts paid to them or on their behalf by the trustees. This clause allows the trustees to pay out money they are holding on behalf of minors to other persons.

Subject to any specific provisions above, if my Trustees pay or transfer income or capital to or for the benefit of a beneficiary who is under the age of majority or who is incapable of managing property, my Trustees may make the payment or transfer to one or more of the following persons:

(a) the beneficiary;

(b) a parent of the beneficiary;

(c) a legal guardian of the beneficiary;

(d) any other person or persons who, in the sole and unfettered opinion of my Trustees, has the care and custody of the beneficiary; and

(e) the personal representatives of a beneficiary who is not a minor but is otherwise under a legal disability.

My Trustees are under no obligation to see to the application of a payment or transfer so made, and any reasonable evidence that my Trustees made the payment or transferis a good and sufficient discharge to my Trustees.

Annotation: In Ontario, parents are not guardians of their minor children's property unless they have been appointed under the Children's Law Reform Act. Parents cannot give receipts and releases to the trustees for distributions made to the parent in respect of inheritances of their minor children. Section 51 of the Children's Law Reform Act does permit payment of amounts owing to a child under the amount of $10,000.00 by paying the amount to the child if the child has a legal obligation to support another person or to the parent or person with legal custody of the children. To ensure the trustees have the authority to make payments out of trust

funds of more than $10,000.00 held for minors, and to discharge their liability with respect to such payments, it is necessary to include this clause.

The above clause does not authorize the trustee to transfer the full amount and the responsibility of the trust over to a parent of a minor, as the succeeding trustee: Hedley v. Grant, [1998], O.J. No. 5270 (Gen. Div.). If the will-maker wishes to provide this power to the trustee, the following paragraph may be added.

Without limiting the generality of the foregoing, my Trustees may pay or apply any funds held for an individual who is under the age of majority or who is mentally incapable of managing property to [a parent, guardian, committee, attorney for property, or person standing in place of a parent to that beneficiary, or to] any [other] person my Trustees in their absolute discretion consider to be a proper recipient, to hold the funds in trust. My Trustees may accept the receipt of that recipient as a full release and are not required to see to the administration of the funds. The recipient as Trustee under this paragraph has, with necessary modifications, all the same powers, authority, discretion and privileges as the Trustees of my estate.

GENERAL ADMINISTRATIVE PROVISIONS

Description of Clause: The Trustee Act, R.S.O. 1990, c. T.23, confers administrative powers to trustees as well as the entitlement to claim compensation. The powers conferred by the Trustee Act, however, are not broad enough to give modern trustees the range of powers required to administer many estates. The drafter must therefore ensure that the Will has the administrative provisions required to give an estate trustee sufficient authority and flexibility to manage a modern estate.

If no administrative powers are included in a will, the powers conferred in sections 17–31 of the Trustee Act will apply. Section 67 of the Trustee Act states that the powers, rights and immunities conferred by the Trustee Act are in addition to those conferred by the instrument creating the trust.

The initial clause introduces the powers which follow. This precedent includes powers that may exceed the powers required for the administration of an estate of average complexity, although not foreseeing a reason for the use of a particular power should not necessarily be the sole arbiter of whether or not to include it in a client's Will.

Clients who are executors or trustees often reach the conclusion that because they have the power to do something, they can or should do it in any circumstance. It is important to ensure your clients understand that simply because a power is available to them, this does not mean it should be exercised in particular circumstances. Trustees are still under a fiduciary obligation to determine whether the power should be exercised. Trustees should consider obtaining appropriate advice before exercising a power, as some situations might involve legal or tax ramifications, for example, which trustees are not aware of.

In addition to all other powers vested in trustees by law or otherwise, and without restricting the general powers, discretions, and authorities given to my Trustees in my will, my Trustees have the power, discretion, and authority to deal with my estate, including any particular

trust established under my will, without the interference of any person entitled under the provisions of my will, as follows:

INVESTMENTS

***Description of Clause*: This clause provides for the investment powers of the trustees. It is intended to adopt the provisions of the Trustee Act.**

My Trustees shall make investments for my estate in accordance with the provisions of the *Trustee Act* R.S.O. 1990, c.T.23, as amended from time to time, and for greater certainty my Trustees may invest the assets of my estate in any form of property in which a prudent investor might invest, including mutual funds and common trust funds. My Trustees are fully exonerated from any liability for any loss that happens to my estate by reason of any investment made by them in good faith.

***Annotation*: Prior to 1999 a trustee's authority to make investments was limited by provisions of the Trustee Act and common law. For example, the "anti-netting rule" prevented trustees from netting out investment losses against gains, making trustees strictly liable for investment decisions. Trustees were not permitted to invest in mutual funds or to create discretionary investment accounts. Both of these activities were seen to violate the anti-delegation rule, which provides that those who are themselves delegates, may not further delegate.**

The current rules provided that when planning the investment of trust property, trustees are required to consider the following seven criteria, "in addition to any others that are relevant to the circumstances": (i) general economic conditions, (ii) the possible effect of inflation or deflation, (iii) the expected tax consequences of investment decisions or strategies, (iv) the role that each investment or course of action plays within the overall trust portfolio, (v) the expected total return from income and the appreciation of capital, (vi) needs for liquidity, regularity of income and preservation or appreciation of capital, and (vii) an asset's special relationship or special value, if any, to the purposes of the trust or to any one or more of the beneficiaries. In addition, there is an express obligation on a trustee to diversify the trust property to the extent that is appropriate to the needs of the trust and general economic and investment market conditions.

The failure to comply with the statutory requirements, including those pertaining to the adoption of an investment plan and the use of an investment advisor (see below), will leave a trustee without recourse to the sections of the Trustee Act allowing for relief for technical breaches of trust.

RELIEF FROM LIABILITY

***Description of Clauses*: These clauses are intended to provide the trustees with protection from certain claims of the beneficiaries.**

No Trustee is liable for any loss or damage to my estate or any part of it (including without limitation any company or other entity whose shares or ownership interests are part of my estate), or the income of my estate, at any time from any cause whatsoever, unless that loss or damage is caused by the Trustee's own actual fraud or gross negligence. A Trustee is not liable,

answerable, or accountable for any loss or damage that results from the exercise of a discretion or a refusal to exercise a discretion. A Trustee is liable, answerable, and accountable for the Trustee's own dishonesty or gross negligence. A Trustee is only liable, answerable, and accountable for money and securities the Trustee actually receives, even if the Trustee signs 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 that has custody of any part of my estate, and is not liable, answerable, or accountable for any loss of money or security for money unless that happens through the Trustee's own dishonesty or gross negligence. Honesty and good faith are presumed in favour of each Trustee.

Every Trustee is entitled to be indemnified out of my estate against all expenses and liabilities, even if the exercise was a breach of that Trustee's duties, unless it was brought about by the Trustee's own actual fraud or gross negligence. This indemnity extends to any expenses and liabilities incurred by a Trustee in the management or administration of any company or other entity whose shares or ownership interests are part of my estate and in any legal proceedings brought by beneficiaries, even if the proceedings relate to an alleged breach of duty by that Trustee, unless it is established that the breach of duty was brought about by that Trustee's own actual fraud or gross negligence.

Annotation: These clauses provide the trustees with an indemnity against the estate, in the event an action is brought against them and they are found negligent. It should be noted however that certain negligence or actions or failure to take action will not be excused, no matter how broad a relief from liability clause is included. Gross negligence and fraud should be excluded from any indemnity clause since such matters would be found to not be covered by an indemnity clause regardless of whether or not they are expressly excluded.

INVESTMENT COUNSEL

Description of Clause: This clause allows the trustees to employ investment counsel.

It is a prudent and reasonable exercise of discretion for my Trustees to employ the services of one or more professional discretionary investment counsel or advisors. My Trustees are not liable for any losses that are incurred because an investment counsel or advisor exercises, or fails to exercise, any power delegated to them.

Annotation: With the amendments to the Trustee Act in 2001, a trustee can now enter into a contract with an "agent" for the provision of investment services on a discretionary basis. The requirements of the agency relationship are carefully defined, including a written agreement, the development of an investment plan, and periodic reporting. The premise is that the prudent choice and ongoing supervision of an investment agent is a duty that prudent trustees can be trusted to carry out. Adhering to the provisions of the Trustee Act regarding proper delegation of investment management to an agent should relieve the trustee from liability pursuant to section 28 of that Act.

There is, however, some uncertainty as to whether an investment advisor can choose mutual funds as an investment. This uncertainty is based upon the decision in Haslam v. Haslam, (1994) 114 D.L.R. (4th) 562. In this case Judge Rosenberg held that an investment in a mutual fund was an unauthorized delegation of investment decision-making. While mutual funds are

now expressly deemed to not violate the rule against delegation, there is a concern that if an investment agent, to whom decision-making has been delegated, invests in a mutual fund that this will be seen as a sub-delegation. Accordingly, this clause removes this uncertainty.

It should also be noted that one recent case held that even professional trustees such as trust companies are entitled to retain investment advisors, and such services are a reasonable expense of an estate (see In the Estate of Alaine Jackson Young, 2012 ONSC 343). Trust companies often have their own preferred investment clauses designed to ensure that retainer of a related entity by the trustee is expressly allowed, as well as to deal with other matters of specific concern.

EMPLOYMENT OF AGENTS

Description of paragraph: This paragraph allows the trustees to use third parties to perform some of their functions.

I authorize my Trustees to engage agents as they in their discretion shall select to assist them in the administration of my estate or to do any act they consider reasonable or necessary in respect of this administration. They have the power to delegate to any of these agents any authority as they consider appropriate in all the circumstances of my estate, provided they shall not delegate to this agent the discretionary right to distribute the income or the capital from my estate. My Trustees shall pay the charges for any of these services either out of the income or the capital of my estate as they shall see fit, notwithstanding that one or more of my Trustees may be a member of or associated with any agent so employed.

Annotation: At law, trustees are not permitted to delegate their duties except in certain circumstances where courts have found that in the usual mode of conducting business of a like nature, persons acting with reasonable care and prudence on their own account would ordinarily conduct affairs through mercantile agents. There is a further exception in section 20 of the Trustee Act where there is a limited power to appoint a banker or solicitor as an agent to receive funds or property on behalf of the trust. The paragraph clarifies and extends these exceptions by allowing the trustees to hire agents such as lawyers, real estate agents, brokers, and accountants to perform some of their functions. It is important to note that all decision-making must be completed by the trustees, but the carrying out of decisions can be delegated to agents pursuant to this paragraph.

If the will-maker wishes to provide the trustees with the ability to retain a trust company to act as agent for the trustees and in essence do their jobs, a separate paragraph should be included in the will providing for this power.

The paragraph goes on to provide that the agents can be remunerated out of the estate. In the event an agent performs a function that is a function the trustee is expected to perform, such as the preparation of the trustee's accounts, and the estate pays the agent's remuneration, the agent's remuneration may be deducted from the compensation allowed to the trustees. If the will-maker wishes the trustee to obtain assistance with preparing accounts or tax returns, without impacting on the trustee's claim for compensation, the following sentence may be added. However, it should be noted that it now appears to be settled law that trustees can retain a tax advisor to provide tax advice and prepare tax returns, and this is no longer considered to be part of a trustee's essential functions.

Without limiting the generality of the foregoing, I authorize my Trustees to engage a lawyer or accountant to assist them in preparing accounts for presentation to the beneficiaries for approval or submission to the court on a passing of accounts, and in preparing tax returns for myself, my estate, and any trust created by my will, and the reasonable costs of obtaining this assistance shall not be deducted from any compensation to which my Trustees may otherwise be entitled.

CORPORATIONS

***Description of paragraph*: This paragraph permits the trustees to deal with corporate interests as the will-maker could.**

If at any time my Trustees hold in my estate any interest in or in connection with any company or corporation, my Trustees may join in or take any action in connection with this interest or exercise any rights, powers, and privileges that at any time may exist or arise in connection with this interest to the same extent as I could if I were living and the sole owner of this interest.

***Annotation*: There is some uncertainty in the law with respect to whether trustees can engage in transactions, such as amalgamations and winding-up proposals, in connection with corporate interests. This paragraph permits the trustees to do so.**

In the event the estate will include shares of an active private company, it will also be necessary to give the trustees the power to carry on the business:

Without in any way restricting the general power and discretion in this my Will given to my Trustees, I specifically authorize and empower them to continue and carry on any business I may own or I may be interested in at the time of my death, either alone or in partnership with any person or persons who may be a partner or partners therein for the time being, for any length of time as in their uncontrolled discretion my Trustees may consider to be in the best interests of my estate. I give to my Trustees power to do all things necessary or advisable for the carrying on of this business and in particular, but without limiting the generality of the foregoing, my Trustees shall have the following powers:

(a) 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;

(b) they may employ therein or withdraw therefrom any capital that may be employed therein on my death, or advance, with or without taking security, any additional capital that they may deem desirable for effectually carrying on this business;

(c) they may arrange and agree: to the introduction at any time or times of any person or persons as a partner or partners therein; to the division of the profits thereof, or the payment of any sum or sums in lieu of profits to any partner; to the hiring or employment of any person or persons therein (including any one or more of my Trustees) at any salary or remuneration as they shall think proper; and to the

extension or curtailment of the business thereof or the adoption of any new line of business; and

(d) they may form or join in forming a limited company for the purpose of taking over or purchasing the whole or any part of this business or may sell the same to a limited company at any price, subject to any terms and conditions as my Trustees may determine, and in consideration for this taking over or sale may accept cash, bonds, notes, preference or common shares of any company, or any combination thereof, whether or not this company is the company taking over or purchasing the business, as my Trustees may think fit. Any bonds, notes, or preference or common shares so received shall be authorized investments under this my Will.

With respect to my interests in this business, I specifically authorize my Trustees to engage professional management as they in their discretion shall select to assist them in the management and carrying on of the business and they have the power to delegate to this professional management any authority they consider appropriate. My Trustees shall pay the charges for any of these services either out of the income or the capital of my estate as they shall see fit, notwithstanding that one or more of my Trustees may be a member of or associated with any agent so employed.

***Annotation*: In addition to the foregoing, it may be advisable where there are significant private company interests to allow the estate to do post-mortem reorganizations:**

Without in any way limiting the other powers given to my Trustees:

(a) my Trustees may incorporate and organize one or more corporations for the purpose of acquiring assets of my estate; and

(b) my Trustees may sell any assets of my estate to one or more corporations incorporated by my Trustees, in return for common or preferred shares (whether entitled to discretionary or fixed dividends) or debt obligations, with or without a fixed rate of return, whether secured or unsecured, of this corporation or any combination of these securities and may invest funds of my estate in these shares or obligations. Any of these shares or obligations shall be authorized investments of my estate and may be retained for any length of time as my Trustees in their discretion may determine.

REAL ESTATE

***Description of paragraph*: This paragraph allows the trustees to deal with real estate as the will-maker could.**

My Trustees have unfettered discretion to sell, mortgage, or lease any real or leasehold property that forms part of my estate upon any terms and conditions as my Trustees think fit. My Trustees may accept surrenders of these leases and tenancies. My Trustees may expend money in repairs and improvements and generally manage any of these properties. My Trustees may give any options with respect to any of these properties as they consider advisable. My

Trustees may renew and keep renewed any mortgage or charge upon any of these properties and may pay off or renegotiate any mortgage or charge that may be in existence at any time.

***Annotation*: Historically in England real property was considered a special asset that trustees would presumptively be required to hold. This paragraph allows the trustees to deal with real estate in any manner the will-maker could. It also allows the trustees the power not to sell real estate if it is not appropriate to do so and to manage the real estate in a business-like manner pending sale.**

EXECUTOR INSURANCE

***Description of paragraph*: The following paragraph is designed to allow executors to purchase liability insurance using the assets of the estate to pay the premiums. There are some insurance products available for this purpose. They all have their own features, costs, and limitations. If a person who is not a beneficiary of the estate is acting as an executor, the will-maker may desire to offer that executor the ability to obtain liability insurance, at the expense of the estate. Without a specific paragraph permitting the use of estate assets for this purpose, it is likely that the executor would not be authorized to use estate assets in this way and would instead have to purchase such insurance personally or that the cost would be deducted from their compensation.**

My Trustees are authorized to purchase executor liability insurance if they in their absolute discretion consider it appropriate to do so having regard to the assets, liabilities, and beneficiaries of my estate and notwithstanding that doing so will directly benefit my Trustees. If my Trustees determine it is appropriate for them to acquire executor liability insurance, the cost of this insurance may be charged to the capital or income of my estate in any proportions as my Trustees in the exercise of an absolute discretion consider appropriate and shall be considered to be a proper expense of my estate and not deductible from any compensation otherwise payable to my Trustees.

BORROWING

***Description of paragraph*: This paragraph permits the trustees to borrow.**

My Trustees may borrow money, from themselves individually or from others, for any purposes (including for the payment of taxes, debts, duties, legacies, or expenses) and upon any terms and conditions they shall deem advisable, and may secure the repayment of the money so borrowed, and may mortgage, pledge, hypothecate, or otherwise encumber any of the property, real or personal, entrusted to them or from time to time held by them under my Will.

***Annotation*: At law trustees are not permitted to borrow. While generally trustees will not want to borrow, there may be circumstances where borrowing is necessary or advisable. For instance, to avoid the unnecessary liquidation of assets at an inappropriate time or to pay initial estate expenses to avoid incurring certain penalties (for example, from a beneficiary, although the income tax limitations of such a loan should be carefully reviewed before doing so), a trustee may want to borrow to satisfy liabilities (such as a tax liability arising upon death) to avoid penalties or interest from arising or accumulating further. This power allows the trustees to do so if it is reasonable.**

LOAN TO BENEFICIARIES

***Description of paragraph*: This paragraph allows the trustees to engage in certain lending transactions.**

I authorize and empower my Trustees to lend the whole or any part of my estate upon any security they may deem sufficient or upon no security whatsoever, to enter into guarantees or indemnifications for the benefit of the beneficiaries of my will and persons, firms, or corporations other than the beneficiaries of my will and to give security therefor as my Trustees may in their discretion decide, and to renew and keep renewed these guarantees and indemnifications as my Trustees think fit.

***Annotation*: This can be a useful power to give trustees. It is often seen to be a necessary power to include where capital encroachments are permitted in the trustees' discretion. For instance, in the event a beneficiary wants a capital encroachment to acquire a house, the trustees can determine not to make the encroachment but instead take back a mortgage for part of the purchase price. This will ensure that the trust fund is not inappropriately exhausted. This can be particularly useful where the encroachment requested would represent a sizable portion of the trust fund or to protect a beneficiary from creditor or matrimonial claims.**

USE OF ASSETS BY BENEFICIARIES

***Description of paragraph*: This paragraph allows the trustees to purchase assets for the use of a beneficiary.**

My Trustees may use any assets held in trust for a beneficiary of my will to purchase or lease a residential property or any chattels, and may permit this beneficiary or any member of this beneficiary's family to use the residential property or chattels either free of any cost or upon any conditions as to payment of related expenses and for any period and generally upon any terms as my Trustees may determine.

***Annotation*: In some situations, the trustees may wish to provide comforts for a beneficiary such as a home, furniture, or a vehicle, without making large capital distributions to the beneficiary. This power can protect a beneficiary whose own assets may be subject to seizure by the beneficiary's creditors, or who is not responsible enough to own and maintain real estate.**

DISTRIBUTION IN KIND

***Description of paragraph*: This paragraph allows the trustees to distribute assets in kind.**

Notwithstanding the references in my will to equal shares or a portion of my estate, my Trustees may make any division or distribution of the assets of my estate in specie and at any valuations as my Trustees in their unfettered discretion consider appropriate. In determining these valuations, my Trustees may take account of potential liabilities or benefits relating to any assets. The decision of my Trustees shall be final and binding on all persons concerned notwithstanding any fluctuation in market value and notwithstanding that one or more of my Trustees may be beneficially interested in any of the assets so valued.

***Annotation**: As already noted, a trustee has an obligation to convert assets to cash. This paragraph allows the trustees to not sell assets in order to make a distribution to the beneficiaries. Instead, the trustees can distribute assets in kind (also referred to as "in specie"). The issue then becomes one of valuation of the assets distributed in kind.*

ELECTIONS

***Description of paragraph**: This paragraph allows the trustees to engage in elections under the Income Tax Act.*

My Trustees may exercise all discretions and make all designations, elections, determinations and applications under the *Income Tax Act*, R.S.C. 1985 (5th Supp.) c. 1, as amended, as my Trustees shall in their absolute discretion think fit.

My Trustees have the discretion, if they deem it appropriate, to allocate, designate, pay to or apply as part of the dispositive provisions of my will related to income and capital, the entirety or any portion of the income and capital gains (including deemed and "phantom" income and gains).

***Annotation**: Under the Income Tax Act there are certain elections available to be made. For instance, the preferred beneficiary election is available in the context of beneficiaries who are entitled to the disability tax credit. Further, if a spouse is not named a beneficiary of an RRSP but is otherwise the beneficiary of the estate, the Income Tax Act allows for an election to have the spouse treated as the beneficiary of the RRSP. This paragraph gives the trustees the power to determine whether to take advantage of the elections available in the Income Tax Act.*

GRADUATED RATE ESTATES

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

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

- ***The estate is a "testamentary trust". This means that all of its contributions must be as a consequence of the individual's death.***
- ***The individual's social insurance number is provided in the estate's Part I tax return for the year and each previous year that ended after 2015.***
- ***The estate designates itself as the GRE of the individual in its Part I tax return for its first taxation year that ends after 2015.***

- ***No other estate designates itself as the GRE of the individual.***

- ***A GRE only retains its status as a GRE for the first 36-months after the individual's death. After that 36-month period, it will no longer qualify as a GRE.***

Due to the fact that an estate can enjoy graduated progressive tax rates for 36 months, some clients may want to take advantage of this tax opportunity by explicitly providing that the executors can delay the distribution of the estate (or the creation of testamentary trusts) for 36 months. The following clause can be used for such purpose:

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

Despite the income tax advantages, practitioners should be careful to discuss with their clients whether it is appropriate that the estate distribution be delayed and whether a delay may harm the financial interests of any beneficiaries. For example, a delay in distribution may cause economic hardship for beneficiaries who do not have adequate income to meet their needs.

GRE status is linked to a number of other benefit, including:

- ***the ability to choose any year-end up to the first anniversary of the date of death, such that there could be up to 4 taxation years during the 36-month GRE period;***

- ***an exemption from the requirement to pay tax installments, which will now otherwise be required for testamentary trusts;***

- ***an exemption from the $40,000 alternate minimum tax, which will no longer be available to other testamentary trusts;***

- ***the ability to carry back losses realized in the first year of the estate to the terminal return under s. 164(6) of the Income Tax Act, which is one of the strategies available to mitigate the potential for double taxation where the assets of the estate include shares of a private company; and***

- ***access to the flexible charitable donation tax credit rules in section 118.1 of the Income Tax Act.***

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

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

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

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

GUARANTEES

Description of paragraph: This paragraph permits the trustees to deal with guarantee obligations of the will-maker.

If at the time of my death I am liable as endorser, guarantor, or otherwise for any liability of any person or entity, my Trustees may, in their unfettered discretion, renew from time to time the bills, notes, guarantees or other securities or contracts evidencing this liability and for that purpose may enter into, execute or issue new bills, notes, guarantees or other securities or contracts for or on behalf of my estate. My intention in conferring upon my Trustees these powers

and discretions is to give them any powers and authorities as are necessary to assist in the gradual liquidation of the liabilities that I may be under in order that the person for whom I may be liable may not be overly inconvenienced.

***Annotation**: If the will-maker is a guarantor of a debt, this potential liability will devolve to the trustees. This power gives the trustees the authority to continue to deal with the guarantee and to settle the liabilities to which the guarantee attaches.*

SIGNING OF DOCUMENTS

***Description of paragraph**: This paragraph allows the trustees to delegate the signing of documents to a trustee.*

My Trustees may appoint any one or more of my Trustees to sign all or any banking documents, stock transfers, receipts, promissory notes, negotiable instruments and any other documents of any kind required to be signed by my Trustees at any time.

***Annotation**: Where there is more than one trustee appointed it is necessary for all, or a majority if the will allows for it, of the trustees to be involved in the decision-making including the signing of documentation. The requirement for all trustees to sign documents may be impractical. At law it is possible for trustees to delegate to one trustee the power to sign documents, once the trustees collectively have made the decision. This power confirms the trustees' authority to do so. Having express confirmation in the will is important when dealing with financial institutions, real estate transfers and other third parties. Consideration should be given to excluding this confirmation if the dynamic among multiple trustees is likely to be contentious.*

PURCHASE BY TRUSTEES

***Description of paragraph**: This paragraph permits a trustee to purchase trust assets without court approval.*

Any of my Trustees may purchase in their personal capacity any assets from my estate if the purchase price and other terms are unanimously approved by my Trustees and the adult beneficiaries of my estate. My Trustees shall not be required to obtain the approval of any court to this a purchase.

***Annotation**: At common law, a trustee is not entitled to self-deal, prohibiting trustees from purchasing trust assets. A will-maker may wish that his or her trustees have the option to purchase estate assets – for example, a family cottage. This clause permits the purchase of estate assets by a trustee, without court order. The wording above requires the approval of all of the adult beneficiaries of the estate, which can include contingent beneficiaries depending on the will terms. In some circumstances, the approval of the other trustees may be a sufficient safeguard, and the wording can be adjusted.*

SETTLEMENT OF DEBTS

***Description of paragraph**: This paragraph allows the trustees to settle debts owing by or to the will-maker.*

I direct that my Trustees shall have absolute discretion to deal with any debts owing to or by me on the date of my death, including without limitation the authority to enforce immediate collection, to postpone or defer enforcement, or to compromise or settle the debts for less than full value, as my Trustees consider to be in the best interests of my estate and the beneficiaries of my will.

***Annotation*: The general rule is that trustees should not settle debts or claims against the estate without obtaining a court order. This may not be practical or cost-effective. This power allows the trustees to settle debts and claims.**

SETTLEMENT OF CLAIMS

***Description of paragraph*: This paragraph empowers trustees to settle litigation without court order.**

Without the consent of any person interested under my will, my Trustees may compromise, settle, contest or waive any claim at any time due to or by my estate and may make any agreement with any person, government or corporation, and the agreement shall be binding on all persons interested in my estate.

***Annotation*: The Trustee Act confers a partial set of powers to deal with debts and to settle claims. Although a trustee may be well advised not to settle any claims without the benefit of a court order, in small estates with family executors, a will-maker may wish to allow the trustee to settle claims without court approval in certain circumstances.**

STOCK DIVIDENDS

***Description of paragraph*: This paragraph declares that stock dividends are to accrue to the benefit of the capital beneficiary.**

I direct that all dividends paid in the form of stock received by my Trustees in connection with any shares of stock from time to time held by them shall be deemed to be and shall be dealt with as capital of my estate.

***Annotation*: There is jurisprudence relating to whether a dividend in kind, such as a stock dividend, is to be treated as income or capital for trust law purposes. Generally, the jurisprudence has held that dividends in kind are to be treated as capital. To remove any issues concerning the treatment of stock dividends, include this paragraph if appropriate. In some circumstances stock dividends should not be treated as capital. For example, when a surviving spouse is reliance upon trust income for his or her support, treating all stock dividends as capital may leave insufficient income for the spouse.**

COMBINE TRUSTS

***Description of paragraph*: This paragraph allows trustees to combine trusts for the same beneficiary or beneficiaries to ease administration and reduce costs.**

Notwithstanding any other provision in my will, I authorize my Trustees in their absolute discretion to transfer any share or interest in my estate held by them to the trustees of any

other trust to be held as part of this trust if my Trustees are of the opinion that the persons beneficially interested in the other trust are the same persons and have sufficiently similar interests in the other trust as the beneficiaries of this share or interest, and the terms of the other trust are substantially identical to the terms upon which my Trustees are to hold this share or interest. The receipt of the trustees of the other trust shall be a sufficient discharge to my Trustees for the assets transferred. The transfer of this share or interest shall be in satisfaction of all of the capital interests of all beneficiaries in this share or interest.

***Annotation*: There are circumstances where the same trustees are administer two or more trusts with similar or identical terms and beneficiaries. For example, two spouses who die simultaneously may leave wills which divide the residue of their respective estates equally among their minor children. The ability to combine the two trusts may be expedient, however, trustees ought to be cautioned to consider the availability of GRE status and the impact of combining trusts upon that availability.**

COMPENSATION

***Description of paragraph*: This paragraph allows trustees to pre-take compensation. In the absence of such a paragraph, the trustees do not have the right to take compensation prior to it being awarded by the court or authorized by all of the beneficiaries.**

I authorize my Trustees to take and transfer at reasonable intervals from the income and/or capital of my estate amounts on account of their compensation that my Trustees reasonably anticipate will be requested at the end of the accounting period in progress, either upon the audit of the estate accounts or on approval of the then adult beneficiaries of my estate. If the amount subsequently awarded on Court audit or agreed to by the then adult beneficiaries is less than the amount so taken, the excess shall be repaid to my estate without interest.

***Annotation*: The statutory basis for fees charged by executors and trustees is section 61 of the Trustee Act. Section 61 provides as follows:**

(1) A trustee, guardian or personal representative is entitled to such fair and reasonable allowance for the care, pains and trouble, and the time expended in and about the estate, as may be allowed by a judge of the Superior Court of Justice.

(2) The amount of such compensation may be settled although the estate is not before the court in an action.

(3) The judge, in passing the accounts of a trustee or of a personal representative or guardian, may from time to time allow a fair and reasonable allowance for care, pains and trouble, and time expended in or about the estate.

Over time a court-recognized "tariff" has developed as to what is fair and reasonable compensation. This is not a legislated tariff but is a guideline. It is subject to increase or decrease depending upon the facts. It has also been ignored in certain cases and other approaches adopted, such as fees on the basis of docketed time.

The tariff applies percentages to the various components of the trustees' accounts. It provides as follows:

- ***2½ % of the value of the capital receipts being original assets realized;***
- ***2½ % of the value of the capital disbursements;***
- ***2½ % of the value of revenue receipts;***
- ***2½ % of the value of revenue disbursements;***
- ***an annual care and management fee of 2/5th of 1 % of the average market value of the capital of the trust.***

Compensation for capital disbursements cannot be taken until the capital asset is either liquidated and disbursed, or distributed to a beneficiary in specie. If original assets are maintained and distributed in specie, it is only when the distribution is actually made that the capital disbursement fee can be taken.

The care and management fee is applicable where there is a trust to be held for a period of time and is not normally awarded if the will provides that the estate is immediately distributable.

Court decisions about the amount of compensation payable to trustees show that trustees should do more than just calculate the 'tariff' amount. Trustees should provide evidence to justify their claim, including: the time spent (here docketed time is useful), the results achieved, the skill and ability displayed, the complexity of the estate, the length of the administration, and the care and responsibility needed.

Trustee compensation is meant to be for all services provided by trustees rather than by agents used by trustees. Amounts paid to agents ought to be deducted from the trustee's compensation.

If an estate has different income and capital beneficiaries, compensation should be paid proportionately from capital and revenue. The fees calculated on the value of capital receipts and disbursements are charged to the capital beneficiaries and those applicable to revenue are charged to the income beneficiaries. The care and management fee is generally charged 2/3 to capital and 1/3 to revenue but this general rule can be modified.

The liability for disbursements can be apportioned based upon which class of beneficiaries benefit from the disbursement in question. The calculation can be complex: charging disbursements to capital decreases capital, which in turn reduces the income that can be earned, and impacts both capital and income beneficiaries. This area is complicated and any more detail is beyond the scope of our paper.

Unless the trustees have obtained the approval of all of the beneficiaries, or the will otherwise permits, trustees are not entitled to take compensation until their accounts have been approved by the courts.

To avoid uncertainty about the amount or the timing of the payment of compensation, you can make express provision for compensation in the will. You can also incorporate by reference a separate fee agreement incorporated into the will. Sections 23 (2) and 61(5) of the Trustee Act provide for the fixing of compensation by agreement and remove the court's jurisdiction to determine compensation in the face of a compensation agreement. In particular, trust companies that are named executors and trustees will ordinarily require a fee agreement to be entered into at the time the will is prepared.

I declare that THE ABC TRUST CORPORATION may receive and shall be paid out of my estate, as compensation for its acting as an Executor and Trustee of and under my will, the fees, reimbursement and other compensation provided for in the Compensation Agreement between THE ABC TRUST CORPORATION and myself signed on the * day of *, 20**, prior to the execution of my will and I declare that the terms of this Compensation Agreement shall be valid and binding in all respects to fix the compensation payable to THE ABC TRUST CORPORATION as though the Compensation Agreement was expressly embodied in my will.

A professional person other than a trust company is more likely to seek compensation on an hourly basis so that the task of administering the estate is equivalent to any other client work. The following paragraph ensures that compensation is payable both for professional services and for ordinary executor's work:

If any of my Trustees is a chartered accountant, lawyer or other professional (referred to as a "Professional"), they may charge their hourly rate (as on the date of my death) as compensation for acting as an Executor and Trustee. This compensation shall include time spent by this Trustee on matters that might or should have been attended to in person by a Trustee who is not a Professional, and for matters that might or should have been attended to by Professional.

I direct that the professional firm of any of my Trustees who is a professional shall be paid its reasonable charges and disbursements for all work done and time spent by this firm or any member of it (inclusive of my Trustees) in connection with matters arising in the administration of my estate or of any trust fund created in my will, including matters that might or should have been attended to in person by a Trustee not being a member of this firm but that my Trustees might reasonably require to be done by this firm.

When a lawyer, accountant or other professional acts as an executor and trustee, questions often arise about whether the individual is entitled both to compensation for acting as the executor and trustee and to compensation for professional services rendered. Section 61(4) of the Trustee Act seems to give support to the proposition that a solicitor is not disentitled from charging both fees in this situation, and the Courts have also found this to be the case in some circumstances. The above paragraph avoids any uncertainty over this issue, and extends the right to receive both kinds of compensation to other types of professionals.

Note that the fees need to be reasonable and for a matter which would not otherwise have been deductible from compensation. For example, if a solicitor is performing trustee functions and charging legal fees for those services, the amount of legal fees must be deducted dollar for dollar from the solicitor's claim for trustee compensation. You cannot be compensated twice for performing the same service. The authors recommend that a professional who is named as an executor set up two time-keeping matters. When providing legal or other professional advice

and services, such as for a solicitor bringing a probate application or a passing of accounts application or for an accountant completing a tax return, the trustee should docket to one matter and when performing trustee functions, like the preparation of estate accounts or the gathering of information pertaining to assets, he or she should docket to another matter. This way it becomes a relatively easy exercise to determine the amount of the fees that must reduce the professional's trustee compensation claim.

In October 2014 new Rule 3.4-38 was added to the Rules of Professional Conduct providing that "Unless the client is a family member of the lawyer or the lawyer's partner or associate, a lawyer must not prepare or cause to be prepared an instrument giving the lawyer or an associate a gift or benefit from the client, including a testamentary gift." If a compensation paragraph in the will may result in greater compensation to a solicitor-executor than the usual tariff, this might be considered a benefit disqualifying the solicitor from drafting the will at all. At the very least, it would be wise for the drafting solicitor to send the client for independent legal advice in respect of the compensation paragraph.

Where the executor is an individual other than a professional, it is common for the will-maker to set compensation unilaterally:

My Trustees may claim and receive from the capital of my estate, as compensation for their time, trouble, care and skill in administering my estate, compensation in the amount of XXX Thousand Dollars ($XXX,000.00). This amount may be taken at intervals, without the pre-approval of any beneficiary or the court, but is subject to proration should any single Trustee not complete the task of administering my estate.

Alternatively, the will-maker may prohibit any claim for compensation and simply leave a legacy to the person appointed to act as executor and trustee. This has several advantages. First, it avoids a claim for compensation that the will-maker would have considered excessive. Second, it relieves the trustee of embarrassment in making a claim for compensation that has the effect of reducing the interest of the residual beneficiaries. Finally, whereas executor's compensation is subject to income tax in the year it is received, a legacy is normally non-taxable to the recipient. The following paragraph prohibiting compensation may be used with or without a legacy to the executor:

My named Trustees shall not be entitled to claim or receive compensation from my estate, but may receive reimbursement for all expenses incurred in acting as my Trustees. Without limiting the generality of the foregoing, these expenses may incur fees paid to an accountant or bookkeeper to prepare tax returns and executor's accounts, fees paid to obtain valuations of my assets, travel expenses including mileage, and long distance telephone and postage costs.

An executor may refuse to act if the amount of compensation available appears insufficient. For this reason, a blanket disentitlement to compensation is unwise. A named estate trustee may refuse or be unable to complete the estate administration, and it can be difficult to find an alternate trustee to administer an estate if the will prohibits the payment of compensation.

BOOKKEEPING AND ACCOUNTING

My Trustees must keep appropriate books and records of the administration of my estate and of its investments and provide those books and records to the adult and capable beneficiaries of my estate and to the parent(s) or guardians(s) of any beneficiary who is not adult and capable on an annual basis. My Trustees need not maintain or produce accounts in any particular form. If my Trustees retain an auditor to report on financial statements of my estate, and:

(a) the auditor is a firm of chartered public accountants or a public accountant licensed in Ontario; and

(b) the auditor makes an unqualified report on the financial statements;

then the audited statement shall be a complete accounting of my Trustees' administration for the period and assets to which it relates. My Trustees need not give any further or better accounting to any beneficiary.

***Annotation**: Trustees are obliged to keep records of their administration of an estate, and may be required to present their records in court format if it becomes necessary to obtain court approval for the administration of an estate. The Rule 74.17 of the Rules of Civil Procedure sets out the content of 'court format' accounts. Trustees should maintain records showing:*

***(1)** a statement of the assets at the date of death, cross-referenced to entries in the accounts that show the disposition or partial disposition of the assets;*

***(2)** an account of all money received, excluding investment transactions;*

***(3)** an account of all money disbursed, including payments for trustee's compensation and payments made under a court order, excluding investment transactions*

***(4)** where the estate trustee has made investments, an account setting out,*

(a) all money paid out to purchase investments,

(b) all money received by way of repayments or realization on the investments in whole or in part, and

(c) the balance of all the investments in the estate at the closing date of the accounts;

***(5)** a statement of all the unrealized assets in the estate;*

***(6)** a statement of all money and investments in the estate at the closing date of the accounts;*

***(7)** a statement of all the liabilities of the estate, contingent or otherwise, at the closing date of the accounts;*

***(8)** a statement of the compensation claimed by the estate trustee and, where the statement of compensation includes a management fee based on the value of the assets of the estate, a statement setting out the method of determining the value of the assets; and*

(9) such other statements and information as the court requires.

MAINTAIN SPOUSAL TRUST STATUS UNDER THE INCOME TAX ACT

Description of Clause: This clause is necessary to ensure that a spouse trust will qualify for rollover treatment under the Income Tax Act.

Notwithstanding anything in my Will to the contrary, during the lifetime of my wife, Jane Doe, none of the administrative provisions of my Will, and, in particular, paragraphs * through * inclusive, shall authorize or empower my Trustees to act in a manner which may jeopardize the trust fund established pursuant to the provisions of paragraph * of my Will from qualifying as an exclusive spousal trust in accordance with subsection 70(6)(b) of the Income Tax Act, and more particularly in this regard my Trustees are prohibited from carrying out any act (through commission or omission) which may permit someone other than my wife from, directly or indirectly, receiving or otherwise obtaining the use of any of the income or capital of such trust fund during the lifetime of my wife.

Annotation: The deferral of income tax available to a spousal trust requires that all of the income of the spousal trust be paid to the surviving spouse and that no person other than the surviving spouse be entitled to receive or otherwise obtain the use of any of the income and the capital from the spousal trust. This provision makes clear that none of the administrative provisions of the Will are intended to allow distributions from the spousal trust that will "taint" the spousal trust. For example, a loan to a person other than the spouse on non-commercial terms, which would give that other person the use of the loaned property, is prohibited by the above clause.

MAINTAIN TESTAMENTARY TRUST STATUS UNDER THE INCOME TAX ACT

Description of Clause: This clause is advisable to ensure that no transaction occurs that might "taint" the testamentary trust status of a graduated rate estate or a qualified disability trust during a period that it otherwise qualifies for graduated tax rates, an off-calendar year and other benefits.

Notwithstanding anything in my Will to the contrary, during any period that my estate might otherwise qualify as a graduated rate estate within the meaning of section 248(1) of the Income Tax Act, or that any trust fund established pursuant to the provisions of this my Will might otherwise qualify as a qualified disability trust within the meaning of section 122(3) of the Income Tax Act, none of the administrative provisions of this my Will, shall authorize or empower my Trustees to act in a manner which may jeopardize my estate or a trust established under my will from qualifying as a testamentary trust in accordance with the definition provided for in subsection 108(1) of the Income Tax Act.

My Trustees are prohibited from carrying out any act or omission which may result in my estate, or a trust fund established under my will, incurring a debt or obligation owed to or guaranteed by:

(a) a beneficiary of my estate; or

(b) a non-arm's length trust fund, other person or partnership with whom any beneficiary or my estate or trust established under my will, deals, except as permitted in subsection 108(1) of the Income Tax Act or any successor section.

***Annotation**: As noted above, various tax benefits are available to a graduated rate estate, and one of the criteria for qualification as a GRE is that the estate be a "testamentary trust" as defined in s. 108(1) of the Income Tax Act. Similarly, only a testamentary trust may qualify as a qualified disability trust, the income of which will be taxed at the graduated rates available to individuals rather than the top marginal tax rate (as with income retained in an inter vivos trust) or the beneficiary's marginal tax rate (as with income paid or payable to the beneficiary). An estate or trust will not qualify as testamentary if any of its property has been contributed "otherwise than by an individual on or after the individual's death and as a consequence thereof." For example, if the trustees were to borrow money from a living person without paying market value interest, the trust would have received value otherwise than from a deceased individual. The above clause alerts the trustees to the fact that they must consider such consequences when exercising their administrative powers.*

SURVIVORSHIP

***Description of Clause**: This clause imposes a 30-day survivorship condition on all beneficiaries.*

Any person who does not survive me by at least thirty (30) clear days shall be deemed to have predeceased me for all purposes of my Will, and the income from my estate during the period of thirty (30) clear days from my death shall be accumulated and added to the capital thereof. Notwithstanding the foregoing, any person appointed an Executor by my Will may act as such from the date of my death.

Annotation: As mentioned above in the 'residuary gift to a spouse', it is common to insert a requirement that a spouse survive the will maker for 30 (or some other number) days in order to be entitled to their outright gift. The survivorship period is intended to prevent the imposition of double estate administration tax and double costs of administration where both spouses die within a short period of time. Although the likelihood of a beneficiary other than a spouse or minor children dying within thirty days of the testator is much less, an alternative solution is to describe all gifts (including to the spouse) as being contingent on surviving the testator (without specifying any number of days), and then to insert a general survivorship clause in the form above. Note that the Estates Court will not allow the executors to submit a Will for "probate" within the survivorship period, because until the survivorship period has passed, the beneficiaries under the Will are uncertain.

FAMILY LAW ACT

***Description of Clause**: This clause indicates the testator's intention that inheritances received by a beneficiary, income earned on inheritances, and property into which inheritances can be traced, are to be excluded from the net family property calculation of a beneficiary.*

All property:

(a) acquired by a person as a result of my death; or

(b) acquired by a person as a result of a gift made by me during my lifetime;

together with any property into which that property can be traced, and all income from that property and from any property into which that property can be traced, including income on that income, is excluded from that person's net family property for the purposes of Part I of the *Family Law Act*, R.S.O. 1990, c. F.3, as amended (the "Family Law Act") and for the purposes of any provisions in any successor legislation or other legislation in any jurisdiction. For the purposes of this paragraph, the term "net family property" includes any property available for division or for satisfying any financial claim between spouses upon separation, divorce, annulment or the death of one of them and, for greater certainty, that term includes any net family property within the meaning of the Family Law Act. This declaration is an express statement within the meaning of paragraph 4(2)2 of the Family Law Act and has effect to the extent permitted by that statute, any successor legislation, or any other legislation in any jurisdiction.

***Annotation**: Part I of the Family Law Act provides the mechanism for the division of property between spouses who are separating or divorcing. In particular, it provides for an equalization of the "net family properties" of the spouses. Net family property is defined in subsection 4(1) of the Family Law Act. In general, it means the growth in a spouse's net worth since the date of marriage. Certain property is expressly excluded from falling within net family property. In particular, subsection 4(2) provides for the exclusion of six different types of property. The two of relevance in the context of estates are defined as follows:*

- ***Property, other than a matrimonial home, that was acquired by gift or inheritance from a third person after the date of marriage.***

- ***Income from property referred to in paragraph 1, if the donor or testator has expressly stated that it is to be excluded from the spouse's net family property.***

As a result of these two paragraphs, it is common practice in drafting Wills to include a provision which confirms that inheritances received by a beneficiary do not fall into the beneficiary's net family property and to go on to direct that income earned on the inheritance is also excluded from the beneficiary's net family property. It is important to bear in mind that excluded property treatment for gifts or inheritances only applies to those beneficiaries who are married at the date of inheriting i.e. it is only property that is inherited during the marriage that is excluded. Property that was inherited prior to marriage and thus brought into the marriage is treated like other property i.e. there is a deduction for the value of the property at the date of marriage. (The complexities of how net family property is calculated is beyond the scope of this paper.) Note that the above clause may not be effective to retroactively exclude income from property that was gifted during the lifetime of the testator; instead, a deed of gift should be prepared for all inter vivos gifts that includes a clause excluding the income from the gift, or property substituted for the gift, from the net family property of the gift recipient.

It is important to note that including this clause is not intended to defeat spouses. Rather, its purpose is to give beneficiaries who are married the choice as to how to deal with inherited property. They can either maintain the excluded property treatment by keeping the inherited property separate from property created by the spouse's partnership or they can commingle the inherited property with marital property or use inherited property for marital purposes. Given

inherited property is not property created as a result of the spousal partnership, this choice would appear to be a reasonable one to provide married beneficiaries.

At present there are no similar statutory provisions that apply to common law couples. Under certain circumstances, a common law spouse may have a claim to a partial division of property upon death or separation under the decision in Kerr v. Baranow (and Vanasse v. Seguin, released together with the same reasons), [2011] 1 SCR 269, 328 D.L.R. (4th) 577. Because the rights under Kerr v. Baranow are created by judicial decision, there is no corresponding statutory language provided in subsection 4(2) of the Family Law Act that allows common law spouses to keep inherited assets and the gain on such assets free from division with spouses. Presumably the principles set out in Kerr v. Baranow could be used to keep such assets free from division.

CUSTODY AND GUARDIANSHIP OF PROPERTY

Description of Clause: This clause appoints named persons to have custody of the testator's minor children and guardianship of their property. It goes on to give directions to the trustees of the estate with respect to making payments to the custodian/guardian.

If my wife, Jane Doe, and I both die before all my children have attained the age of eighteen years, I appoint my sister, CARRIE CUSTODY, to have custody of each minor child of mine and, to the extent that I can, I appoint my sister, CARRIE CUSTODY, to act as the guardian of the property for each minor child of mine. If Carrie Custody dies before me or otherwise is or becomes unable or unwilling to act, I appoint my brother, GARY DOE, to have custody of each minor child of mine and, to the extent that I can, I appoint my brother, GARY DOE, to act as the guardian of the property for each minor child of mine. If Carrie Custody or Gary Doe consents to have custody, I ask that he or she apply to a court of competent jurisdiction within ninety (90) days of my death to have custody of each minor child of mine and to act as the guardian of the property of that child.

My Trustees shall, to the extent reasonable, assist any person who may be appointed as the custodian of a minor child of mine by making available mortgage financing or by paying a portion of the mortgage or rental payments and other expenses to provide comfortable accommodation for my minor children, including the payment of a nanny or housekeeper or other similar assistance. I consider it very important that my children not be separated from each other, and I request that liberal payments be made to the custodian of my children from any trust fund held for the benefit of my children in order that a happy home life be created for my children while they are growing up. I desire my Trustees to place emphasis on the financial needs of my minor children and their custodian, rather than being unduly concerned about reducing the funds available to my children when they reach the age specified in my Will.

Annotation: Section 61 of the Children's Law Reform Act allows a testator to appoint by Will individuals to be the custodians of his or her minor children. If the testator has previously been appointed by the court as the guardian of his or her children's property (which is very uncommon), the testator may also appoint a successor guardian by Will. While the statute distinguishes between custodians and guardians they are often the same person, although there may be situations where this is not appropriate.

The appointment of a custodian is only effective if there is no other person entitled to custody of the child at the testator's death. This is particularly relevant in the context of spouses who are separated or divorced. In this situation, it is important that your client understands that the custodial arrangements for the children of divorced or separated parents will ultimately be determined by the surviving spouse's Will. Accordingly, this may be an issue your client wants to have resolved with his or her spouse prior to his or her death. It may in fact be something negotiated in any custodial orders or agreements. (This point is equally important for parents who are together. Often spouses have differing views on who should have custody of their minor children. If these differences persist to the point of the spouses naming different individuals, it will be the Will of the surviving spouse that governs.)

The appointment of a custodian/guardian is a temporary appointment, effective for only 90 days. Under the CLRA, on or before the expiry of 90 days, a court application must be brought for an order formally appointing a guardian. The commencement of the court application within 90 days extends the effectiveness of the testamentary appointment until the application is disposed of. It is important that your client appreciates the temporary nature of the custodian/guardian appointment. The policy reason for only providing for a temporary appointment stems from the overriding concern of ensuring that the best interests of the child are met. For instance, your client may appoint someone who at the time the Will is prepared is an appropriate choice as custodian, but by the date of the client's death, is no longer appropriate. In this event, the court has the ability to rectify the situation at the time the application is brought. Despite the temporary nature of the appointment, it is still useful to include an appointment in the Will as it is strong evidence of the testator's opinion of the proposed guardian and custodian.

TESTIMONIUM

Description of Clause: ***The testator signs the Will in the presence of two witnesses.***

I have signed this, my Last Will, written upon [Number of Pages] pages, including this page, this day of , 201 .

SIGNED	)	
by John Doe	)	
, in the presence of us both present at the	)	
same time who, at his request, in his	)	
presence and in the presence of each other	)	**JOHN DOE**
have hereunder subscribed our names as	)	
witnesses.		

Signature: _____

Printed Name: _____

Address: _____

_____

Occupation: _____

Signature: _____

Printed Name _____

Address:: _____

_____

Occupation: _____

<u>Annotation</u>: In order for a formal Will to be valid, it must be executed in accordance with the requirements prescribed by section 4 of the SLRA. It is generally advisable that your client attend at your office or you attend at your client's home for execution purposes. Clients will often ask to have the Will sent home with instructions on how to execute. There are recent English cases which have held a solicitor negligent in circumstances where a Will was sent to a client with instructions for execution which the client followed incorrectly.

The requirements are as follows:

(a) the Will must be signed by the testator at its end in the presence of two witnesses who must also sign the Will in the presence of the testator and in the presence of each other;

(b) to avoid any issues as to whether pages were added to the Will after it was signed, it is good practice to have the testator and the witnesses initial each page;

(c) similarly, any handwritten changes made to the Will before execution should be initialed by the testator and the witnesses to prove that the changes had been made before the Will was executed;

(d) the testator should sign the Will using his or her normal signature; and

(e) a witness should not be a beneficiary or the spouse of a beneficiary. This includes contingent beneficiaries. While the execution will be valid, the gift to that beneficiary is presumed void unless the beneficiary can establish that no undue influence was exerted over the testator. An executor or spouse of an executor can act as a witness provided s/he is not a beneficiary.

A Will may be signed by a person other than the testator, but in the presence of and at the direction of the testator. This alternative should only be used in special circumstances where the testator is physically unable to sign for him or herself (keeping in mind that even a mark, such as an X, made by the testator's hand, foot or mouth, can count as a signature). On an application for a Certificate of Appointment of Estate Trustee With a Will, the court will expect to see an explanation in the affidavit of execution as to any special circumstances that resulted in the Will being signed by another person or by a mark.

To avoid unnecessary expense and delay in estate administration, it is recommended that the affidavit of execution be completed at the time the Will is executed. Searches for witnesses years after a will has been signed often fail, and if no affidavit of execution can be sworn, obtaining probate may require proof in solemn form.

Only one original Will should be executed. Copies and scans can then be made of the signed original. If more than one original is made, the doctrine of revocation will apply to the one that was executed first. (See section 15 of the SLRA which provides that a Will is revoked by the execution of another Will.) Since both Wills are the same, it may not be possible to know which was executed last with the result that it is unclear which is the valid Will.

The signed original Will should be kept in safe-keeping such as your fire-proof vault or your client's safety deposit box, so long as the client is not the only person with access to the box.

Finally, your client should let his or her executors know where the original is being kept.

SPECIAL CLAUSES

MULTIPLE WILLS FOR ONTARIO PROBATE PLANNING PURPOSES

The Estate Administration Tax Act, 1998, S.O. 1998, c. 34, Sched., ("Estate Administration Tax Act, 1998") provides for the payment of an estate administration tax (commonly referred to as probate fees or probate tax) on the value of the estate. The tax must be paid before a certificate of appointment will be issued by the court in respect of the estate. The value of the estate includes all property that belonged to the deceased person at the time or his or her death less the actual value of any encumbrances on real property. The forms of Application for Certificate of Appointment authorized under the Rules of Civil Procedure (see Form 74.4 or 74.14 as examples) provide that real property situated outside of Ontario is not included in the value of

the estate, nor is jointly owned property that passes by right of survivorship to another person, or life insurance payable to a named beneficiary. It is also accepted that RRSPs and RRIFs payable to a named beneficiary are not included in calculating the value of the estate.

From a practical point of view, certain estate assets can be administered by the executors of the estate without a probated Will, such as personal effects and shares or debt in private corporations, the transfer of which can be consented to by the directors of the corporation upon evidence they deem sufficient. However, if probate of the Will is required in order to administer any asset of the estate, the value of all assets dealt with under that Will must be included in the value of the estate. The practice has now developed of executing a separate Will for the assets that will require probate and another for the assets that will not generally require probate. A Certificate of Appointment will be obtained only with respect to the Will dealing with the assets for which probate is required. The Application for Certificate of Appointment in this case is made on Form 74.4.1 or 74.5.1, pursuant to new Rules brought into effect following confirmation by Madam Justice Greer in Granovsky Estate v. Ontario, (1998) 156 DLR (4th) 557; 21 ETR (2d) 25; [1998] OJ No 508 (QL); 77 ACWS (3d) 684 that multiple will planning is effective to limit the Estate Administration Tax payable by an estate.

The incentive to execute a separate Will for assets that will not require probate to transfer has increased with the implementation on January 1, 2015 of new regulations under the Estate Administration Tax Act, 1998. Whereas in the past, the applicant for a Certificate of Appointment would merely swear to the total value of the deceased's estate (divided into real property and personal property) on the application for the Certificate of Appointment, that person now has an obligation to file an estate information return within 180 days after issuance of a Certificate of Appointment of Estate Trustee providing a full inventory of all property forming part of the estate, with very detailed prescribed information and values. In addition, if the estate trustee subsequently becomes aware that certain information on the return (see subsection 4(1) of Ontario Regulation 310/14 for the specified information) was incomplete or incorrect, or if any additional property is subsequently discovered, the estate trustee must file an amended information return with the Ontario Ministry of Finance and an affidavit regarding subsequently discovered assets with the Court disclosing the subsequently discovered property and pay the additional Estate Administration Tax. The information return is subject to audit and the estate trustee is subject to penalties (including fines and imprisonment) for failing to file a return or for providing false or misleading information. To avoid the filing requirement, the need for professional valuations and appraisals to substantiate the values listed, and the risk of penalties, a second Will – or other probate planning strategies such as an alter ego or joint partner trust, or ownership as joint tenants with right of survivorship - may be considered even for assets with a relatively low value, where the amount of the estate administration tax that could be saved might not on its own justify the additional complexity and professional fees of having multiple Wills.

When drafting multiple Wills for a client it is vital that the execution of the second Will does not result in the revocation of the first Will. In addition, it is important that the assets dealt with under each Will are carefully defined so that there is no overlap, nor any assets that are not dealt with under either Will.

INTRODUCTORY CLAUSE

***Description of Clause**: For each Will, the normal introductory clause will make reference to the fact that the Will is limited to certain property of the testator.*

For the "non-probate" or Private Assets Will:

This is the last will of me, JOHN DOE, of the City of Sudbury, Province of Ontario with respect to my Private Assets (as defined below), made this XXX day of January, 2018.

For the "probate" or General Will:

This is the last will of me, JOHN DOE, of the City of Sudbury, Province of Ontario with respect to my Public Assets (as defined below), made this XXX day of January, 2018.

***Annotation**: It does not matter what terminology is adopted, so long as it is used consistently. Some solicitors use the terms "General Estate" and "Special Estate" Others will use "Probate Estate" and "Non-Probate Estate"; "Primary Estate" and "Secondary Estate"; "Public Assets" and "Private Assets". The Canada Revenue Agency has confirmed that it views all property belonging to a deceased individual, wherever situated, to be a single estate; but some lawyers avoid any terms that might appear to create two separate estates. It should be considered whether the same persons should be appointed as executors of both Wills to avoid any dispute among them, including over whether one set of property or the other should be designated as a GRE, although in Ontario it is not necessary to do so (note that in B.C. it is necessary to do so in order to effectively create multiple wills due to the differences in the B.C. legislation).*

REVOCATION

***Description of Clause**: These clauses revoke all Wills made before the date that the dual Wills are executed. This ensures that the second Will signed does not revoke the first Will signed. See also the additional clauses provided under the heading "Confirmation of No Revocation".*

For the "non-probate" or Private Assets Will:

I revoke all wills made by me with respect to my Private Assets (as defined below) and declare this to be my Last Will with respect to my Private Assets. I have an existing general Will dealing with my Public Assets (as defined below) which was executed on the XXX day of January, 2018, and which I do not intend to revoke by this Will with respect to my Private Assets.

For the "probate" or General Will:

I revoke all wills made by me with respect to my Public Assets (as defined below) and declare this to be my Last Will with respect to my Public Assets.

***Annotation**: The use of revocation clauses that refer to the specific date of execution of the dual Wills should also avoid any problem caused by a later republication of one or both of the Wills by the execution of a Codicil or Codicils. If a Codicil were made to one of the Wills and the Will contained a typical revocation clause revoking all Wills previously made, upon republication of the Will, the revocation clause would be read as of the date of republication and may have the*

inadvertent result of revoking the other Will. This is another reason why a general revocation clause revoking all prior Wills and Codicils, that is not limited to the assets governed by that Will, should not be used in the context of multiple wills. The best assurance that a Codicil will not inadvertently revoke an earlier will through the doctrine of republication is to re-execute new Wills and avoid the use of Codicils; however, in some circumstances Codicils may still be preferable (for example, where an elderly and possibly incapable will-maker wants to make a minor amendment to his/her will).

DEFINITIONS

Description of Clause: It is necessary to define what is meant by "Private Assets" and also to define what it meant in the particular Will when the phrases "my estate" and "my property" are used.

For both wills:

(1) In this Will the term "Private Assets" means:

(a) any shares owned by me at my death in the capital stock of ABC LIMITED, XYZ INC., 1234 LIMITED, and any other corporation none of the shares of which are listed on a public stock exchange (in this Will collectively referred to as the "Corporations"), those of my assets held in trust for me by any of the Corporations and all amounts owing to me, including declared but unpaid dividends, from any of the Corporations;

(b) any interest I have in any limited partnership, partnership, or joint venture (in this Will collectively referred to as the "Partnerships"), those of my assets held in trust for me by any of the Partnerships, and all amounts owing to me from any of the Partnerships;

(c) any beneficial interest I have in any trust, including a bare or resulting trust;

(d) any interest I have in any real property in Ontario which on the date of my death qualifies for the exemption known as the "first dealings exemption" such that it can be transferred by my executors without a grant of a certificate of appoint of estate trustee ***[Note – Please refer to the annotation below regarding the implications of Re Milne Estate.]***;

(e) all personal and household articles (as defined below) owned by me at my death;

(f) all amounts owing to me by any person, trust or trustees; and

(g) all property over which I may have a general power of appointment to the extent such property is comprised in (a) to (f) above.

(2) In this Will the term "Public Assets" means all my property of every nature and kind other than my Private Assets.

For both wills:

(3) Any references in this will to "my property," "my estate," "my Will," and related terms, unless the context requires otherwise, include all my [Private/Public] Assets but not any of my [Public/Private] Assets.

Annotation: The approach used above for the definitions of "Private Assets" and "Public Assets" is, with one exception, an "exclusionary" model (the exception being the reference to the first dealings exemption which is discussed in more detail below). Under the exclusionary model, which is the model used in Granovsky Estate, the Private Assets Will deals with a defined list of assets, and the General Will deals with all assets other than the assets governed by the Private Assets Will. In other words, the assets fall into one Will or the other at the time of death; the determination of which Will governs a particular asset is not dependant on whether, after the date of death, a Certificate of Appointment is required to administer the asset.

In the exclusionary model, it is important that the assets covered by the "non-probate" Will be carefully examined to determine if there is any risk that a third party with custody of the asset, or with whom the executors may need to transact (e.g. if the asset is to be sold), may insist on a Certificate of Appointment. If the executors are required to apply for a Certificate of Appointment for the "non-probate" Will, estate administration tax is payable on the value of the entire "non-probate" estate, and not only the assets for which the Certificate of Appointment is required (but see the clause below that permits the executors to renounce their interest in specific assets). Accordingly, it is important to draft the definition of the assets covered by the "non-probate" Will carefully to reduce the risk of tainting.

For example, although the directors of a private corporation may agree to transfer title to a deceased shareholder's share to his or her executors without a Certificate of Appointment, the decision to do so is at the discretion of the directors; they are not required to do so. For this reason, the general provision for "any other private company shares" is often limited to only those private companies all of the shareholders of which are family members. Care must be taken where a private company has arm's length directors or shareholders. Similar precautions should be taken in the case of partnership interests.

With respect to debts owing to the deceased, secured debts should be investigated to determine if a Certificate of Appointment will be needed to discharge the security. In the case of unsecured debts, the identity of the debtor should be considered to determine the risk that he or she may insist on a Certificate of Appointment before dealing with the executors. For this reason, personal debts governed by the "non-probate" Will are often limited to unsecured debts owing by family members.

Another strategy to avoid the risk of tainting the "non-probate" Will is to prepare a third (or fourth, etc.) Will to govern the assets for which there is some risk that probate may be required. Additional Wills are often used for such assets as an art collection or a private company where there is some risk the directors may require a Certificate of Appointment. For example, if a separate will is used for an art collection, the "Art Will" would define the specific art or class of art that is governed by that Will (e.g. "Art Assets"). The Private Assets Will would specifically define the Private Assets governed by it. Finally, the General Will would govern the Public Assets, which would be defined as all assets other than the Private Assets and the Art Assets.

However, there is always a risk that unanticipated circumstances will make it impossible to administer without probate an asset that the testator and his or her solicitor expected could be dealt with under the Private Assets Will (for example, a private corporation may have taken on some unrelated directors who refuse to transfer the shares without a Certificate of Appointment, or the Land Titles Registrar may decline to exercise his or her discretion to allow property to be transferred without probate even though it is the first transfer since conversion to the land titles system). As noted above, should it be necessary to probate the Private Assets Will to deal with a single asset, the value of all the Private Assets will become subject to probate fees. Two primary strategies have developed over time to address this risk, the allocation model and the disclaimer model. These are sometimes combined with each other and the exclusionary model.

In the allocation model, the determination of which assets are governed by the General (i.e. probate) Will versus the Private Assets (i.e. non-probate) Will depends, in whole or in part, on a determination by the executors as to whether they require a Certificate of Appointment to administer any particular asset. There are two main approaches used for this model. In one approach, the individual categories of assets in the definition of Private Assets are each modified by the phrase "for which my Trustees determine a grant of a Certificate of Appointment of Estate Trustee is not required to administer" or similar language. Some practitioners use an even broader approach by including in the definition of Private Assets "any other assets for which my Trustees determine a grant of a Certificate of Appointment of Estate Trustee is not required to administer".

The use of allocation clauses was recently considered by the Ontario courts. In Re Milne Estate, 2018 ONSC 4174, Dunphy J. considered Primary (i.e. "probate") and Secondary (i.e. "non-probate") Wills that used allocation language, ruling that Primary Will was invalid because the will, which the court ruled is necessarily a common law trust, failed because it did not meet the test for certainty of subject matter, one of the "three certainties" to create a valid trust at common law. The decision of the Superior Court was appealed to the Divisional Court. In Milne Estate (Re), 2019 ONSC 579, the Divisional Court, in a unanimous decision, allowed the appeal. The Divisional Court ruled that a Will, while it may create a trust, is not in itself a common law trust, and accordingly the three certainties are not relevant to the determination of the validity of the Will; even if the vesting provision in subsection 2(1) of the Estates Administration Act creates a trust, it is a statutory trust such that the three certainties are also not relevant. The Divisional Court also ruled that even if the three certainties do apply to the determination of the validity of a Will, the Primary Will did not fail the test for certainty of subject matter because the assets governed by the Primary Will could be ascertained on a sufficiently objective basis, namely through the executors ascertaining whether a Certificate of Appointment is required to transfer or realize a particular asset.

It is important to bear in mind that the Divisional Court ruled on the validity of the Wills, but did not consider the statutory scheme governing the estate administration tax, namely the Estate Administration Tax Act and the Estates Act. Thus, while the use of the allocation clause in Re Milne Estate will not render the Wills invalid, the issue of whether the allocation clause is effective to reduce estate administration tax has not been decided by a court. In the March 2019 issue of Money & Family Law, Anne M. Werker considers allocation clauses post-Milne in detail and argues that there is real risk that such clauses may not be effective to reduce estate administration tax. See Anne M. Werker, "What Milne Does Not Solve: Allocation Clauses in

Multiple Wills and Ontario Estate Administration Tax", Money & Family Law, March 2019, Issue 34-3. Practitioners who choose to use allocation clauses should be aware of the risk that they may not be effective to reduce estate administration tax.

With respect to the language used in the above definition of Private Assets for real property that qualifies for the "first dealings exemption" on the date of death, that language is different than a standard allocation clause in that it is intended to rely on the first dealings rules as they apply at the time of death, rather than a determination by the executors after the time of death. In that way, it may address the issues raised in the Anne M. Werker article cited above. As this language has not been judicially considered by the Ontario courts, practitioners should also consider alternative strategies for reducing estate administration tax in respect of real property, such as using a third will for specific real property that, when the Will is made, qualifies for the first dealings exception, or using a nominee corporation to hold bare legal title to the real property (such that the real property comes within definition of Private Assets as an asset held in trust by a "Corporation").

As an alternative to using allocation clauses, or in conjunction with them or the exclusionary model, some practitioners use the disclaimer model. In the disclaimer model, the trustees of the Private Assets Will are given a power to renounce their interest in an asset if they determine that it does require a Certificate of Appointment to administer. The following is an example of such a power:

If the executors and trustees of this Will determine that they cannot deal with any asset listed in paragraph * without obtaining a Certificate of Appointment of Estate Trustee With a Will, they may renounce their interest in that asset by instrument in writing delivered to the executors and trustees of my General Will (as defined above) and the definition of my Private Assets shall be deemed to exclude, and always to have excluded, the interest renounced.

In addition to the power to renounce an asset set out above, the definition of the Public Assets should be modified to include the following phrase:

"…and includes any property disclaimed by the executors and trustees of my Private Assets Will."

Disclaimer provisions such as those included above have not been judicially considered by the Ontario courts. Accordingly, it is an open question whether a disclaimer will be effective to prevent the Private Assets Will from being tainted if one of the Private Assets requires a Certificate of Appointment to administer. The exclusionary model remains the safest model to achieve probate tax savings, but the risk of unexpected tainting of the Private Assets Will should be explained to the will-maker. If an allocation clause or a disclaimer power is used, the uncertainty surrounding their effectiveness to reduce estate administration tax should be explained to the will-maker.

Note that where a parent has put title to assets owned by the parent into the joint names of the parent and one or more adult children, the Supreme Court of Canada decision in Pecore v. Pecore, 2007 SCC 17, 2007 deems such asset to be presumptively held upon resulting trust for the estate of the deceased parent. Absent independent evidence rebutting such a presumption, this means that the child owning such property must return the property to the deceased parent's

estate, thereby bringing such asset into probate. Often, this will undermine the very reason for putting the asset into joint names. Executing multiple Wills, where assets held in trust for the deceased parent are dealt with under the non-probate Will, will solve this problem.

In the event that different persons are named executors of the two (or more) estates, it may be prudent to provide instructions in all wills to ensure that the estate, as a whole, is a graduated rate estate. The following clause may be used for this purpose:

My Trustees shall consult with the executors of my Private Assets Will [or Public Assets Will, as applicable] and take all necessary steps to manage my assets so that my entire estate, being both my Private Assets and my Public Assets, will be a "graduated rate estate" as defined in the Income Tax Act (Canada). My Trustees may use the assets of my estate to retain tax advisors to provide advice and direction for this purpose. My Trustees may, in their discretion, make any designation, election, allocation, or distribution that they determine is necessary to maintain my estate as a graduated rate estate for a period of up to 36 months after my death.

NO OBLIGATION TO OBTAIN PROBATE OF PRIVATE ASSETS WILL

Description of Clause: This clause will appear in the non-probate or Private Assets Will to clarify that the executors are not required to obtain probate of the Will.

For greater certainty, my Trustees are not obliged to obtain a Certificate of Appointment of Estate Trustee for this Will if, in their unfettered discretion, they determine that they can perform their responsibilities without the Certificate. My Trustees are not liable for any loss to my Private Assets, or to any beneficiary under this Will, because my Trustees did not obtain a Certificate.

CONFIRMATION OF NO REVOCATION

Description of Clause: For greater certainty, each of the two Wills may contain a clause confirming that the Wills are not meant to revoke or override each other:

(4) For greater certainty, nothing in this will revokes or overrides a Will made by me on the XXX day of January, 20[XX], dealing with my [Public/Private] Assets; nor do I intend by the execution of another Will dealing with my [Public/Private] Assets to revoke this Will; rather, I intend to have two will which operate concurrently.

ADDITION TO DEBTS CLAUSE

Description of Clause: The addition of this language to the end of the clause providing for the payment of debts, taxes etc. gives the trustees the discretion to determine how to allocate the debts, taxes etc. between the General and Private Assets parts of the estate. It also confirms that, although the direction to pay debts, taxes, etc. appears in both Wills, they are not to be paid more than once.

For both wills:

It is not my intention that my just debts, funeral and testamentary expenses, duties and taxes be paid more than once. My Trustees, along with the Trustees of my [Public/Private]

Will, shall determine in their discretion how to allocate my just debts, funeral and testamentary expenses, duties, and taxes between my Public and Private Assets.

***Annotation*: Double payment may result when multiple Wills are used and the direction to make the payment appears in both Wills because the executors and trustees may require access to the assets of both estates to satisfy a payment. If a direction appears in both Wills, then each Will should include a provision to clarify the testator's intention that the payment be made only once, and that the executors and trustees have discretion to determine how the payment will be allocated between the two estates. In addition to the debts and taxes, a double payment might arise where a cash legacy is directed or where a specific amount is set aside in trust for a beneficiary or class of beneficiaries. It can also occur with respect to executor's compensation, where an hourly rate or a specified annual amount replaces the percentage guidelines. Compensation Agreements should be carefully reviewed and modified as required to avoid this outcome.**

LEGACIES

***Description of Clause*: This language can be used where a legacy is set out in both wills, and the trustees have discretion to determine whether it will be satisfied from the General or the Private Assets, or partly from each. It also confirms that, although the legacy appears in both Wills, it is not to be paid more than once.**

My [Public/Private] Will provides for a similar legacy to the legacy set out in this paragraph. It is my intention that this legacy be paid once only, either out of that part of myestate dealt with pursuant to this Will, or out of that part of my estate dealt with pursuant to my [Public/Private] Assets Will, or partly from each of them. My Trustees must consult with the Trustees of my [Public/Private] Assets Will to determine how to allocate the legacy between the parts of my estate.

***Annotation*: For some testators it may be clear that the assets governed by one of the wills will be sufficient to pay the legacy and accordingly the direction to pay the legacy may appear in only one of the wills. Including the direction in both wills, however, eliminates any risk of a deficiency (i.e. assuming the aggregate value of the assets governed by the wills is sufficient) by giving the Trustees access to the assets governed by both wills to satisfy the legacy.**

MULTIPLE WILLS FOR ASSETS SITUATE IN DIFFERENT JURISDICTIONS

In today's world of freely moving people and capital, it is very common to have clients with assets in several jurisdictions. Consider, for example, the typical Canadian snowbird. S/he will have a residence in Canada and a residence in any one of Florida, Arizona or California. While one Will can dispose of all those assets, it is a common planning technique to prepare separate Wills to deal with the disposition of assets situate in different jurisdictions.

The advantage of separate situs Wills is that the probate process can be completed independently in each jurisdiction. (Where a single Will is used to dispose of all assets, it is necessary to reseal or obtain an ancillary appointment of the original or primary appointment.) Sections 34 to 42 of the SLRA are the conflict of laws rules pertaining to the formal validity of Wills and the rules for dispositions of real and personal property.

To ensure that no assets are inadvertently missed (for example, if the client unexpectedly inherits or otherwise acquires property in a country other than Canada and the US), it is a good idea for one Will to refer to the "worldwide estate" or the "general estate" of the testator. Typically, this would be the Will created according to the laws where the testator is ordinarily resident although it can also be the one created according to the laws of the jurisdiction with the lowest probate fees. The Will or Wills dealing with properties in particular "foreign" jurisdictions (e.g. Florida) would refer to the "Florida Estate" of the testator. If multiple will planning is being done in Ontario, it should be considered if the probate will should be the general or worldwide will so that a resealing or ancillary grant can be obtained in other jurisdictions if needed.

In addition to the clauses set out below, the Wills dealing with assets in multiple jurisdictions should incorporate an addition to the normal debts clause and a Confirmation of No Revocation clause similar to those described in the Private Assets situation above.

Note that when preparing a Will dealing with assets in another jurisdiction, it is important to ensure that the Will complies with the laws of the relevant jurisdiction. A solicitor qualified in the relevant jurisdiction should review the Will before execution. In some civil law jurisdictions, rules of forced heirship may override the provisions of a standard Canadian Will. However, European Union Regulation 650/2012, which applies to deaths that occurred on or after August 17, 2015, permits a client to expressly elect in his or her Will that the law of his or her nationality (or if the client has more than one nationality, whichever one the client stipulates) will apply to his or her property in any European Union country except Denmark, the UK and Ireland, instead of that country's local laws. A Canadian testator may now wish to include such an election in his or her Will in order to retain testamentary freedom over assets located in Europe.

In addition, it is important to recognize that there may be significant tax implications not dealt with in the Annotated Will where either the testator or a beneficiary is a citizen or is resident in another jurisdiction. For example, special planning may be required where the client or his or her spouse is a US citizen to avoid US estate tax and generation skipping tax. For this reason as well, it is important that a solicitor qualified in the relevant jurisdiction review or participate in the preparation of the Will.

INTRODUCTORY CLAUSE

Description of Clause: When the assets of the testator are divided between a "non-probate" or Private Assets Will and a "probate" or General Will (as discussed above), the introductory clause in each Will should refer to the fact that the Will is limited to certain property of the testator.

For the Will dealing with property in a particular jurisdiction:

This is the last will of me, JOHN DOE, of the City of Belleville, in the Province of Ontario, with respect to my Florida Estate (as defined below).

For the "worldwide" or General Will:

This is the last will of me, JOHN DOE, of the City of Belleville, in the Province of Ontario, with respect to my property other than my Florida Estate (as hereinafter below).

REVOCATION

Description of Clause: The following revocation clauses will be used if the wills dealing with property in different jurisdictions are prepared by the same lawyer (or in collaboration with lawyers from the different jurisdictions) and signed at the same time.

For the Will dealing with property in a jurisdiction outside Ontario:

I revoke all wills made by me before the 18th of January, 20[XX]. This is my last will with respect to my Florida Estate (as defined below), and this is the only executed copy of my will with respect to my Florida Estate.

For the "worldwide" or General Will:

I revoke all wills made by me at any time before the 18th of January, 20[XX]. This is my last will with respect to my property other than my Florida Estate (as defined below), and this is the only executed copy of my will with respect to my property other than my Florida Estate.

If the wills are signed at different times but each will contemplates the existence of the other, then the revocation clause in the will to be signed second must be adapted. However, if at all possible multiple wills should be signed at the same time.

I revoke all wills made by me before today, other than my will dated the 10th day of January, 20[XX], which deals with [my Florida Estate (as defined below) OR all my property other than my Florida Estate (as defined below)] …

If the will dealing with property in a particular jurisdiction is signed second, and the previous will purported to deal with all the testator's property, wherever situate, use the following clause:

I revoke all wills made by me before today, to the extent that they deal with any of my assets forming part of my Florida Estate (as defined below). For greater certainty, I intend that my will dated the 18th of January, 2018 shall continue to cover all my assets, wherever they are located, except for any assets forming part of my Florida Estate, which are covered by this will.

This clause might also be used when the client is resident in a jurisdiction other than Ontario, and the lawyer has been retained to prepare a Will dealing only with a piece of real estate or other property in Ontario (replacing references to "my Florida Estate" with references to "my Ontario Estate").

DEFINITIONS

For both wills:

In this will:

(1) "my Florida Estate" means

(a) [describe the foreign property existing at the date of the will]

(b) any [other] real property physically located in the State of Florida in which I may have an interest at the date of my death, and

(c) any bank accounts and investments administered pursuant to the laws of the State of Florida in which I may have an interest at the date of my death.

(2) "my property" and "my estate" shall, unless the context otherwise requires, include [only OR all my property other than] my Florida Estate.

ROADMAP FOR DRAFTING OF A TRUST IN A WILL

1. Who are the beneficiaries to be?

2. When are the beneficiaries to be determined?

3. For how long is the trust to exist? When should it terminate? Are there alternative dates and if so should a termination date definition be used?

4. How is the annual net income to be dealt with?

5. If income is distributed on a discretionary basis, then

   (a) for what purposes can it be distributed;

   (b) can it be paid directly to beneficiaries or to a third party on their behalf;

   (c) if the trustees don't exercise their discretion to pay income in a year, how is the income to be dealt with?

6. If undistributed income is accumulated, what is to happen after the accumulation period?

7. Are capital distributions permitted? If yes,

   (a) for what purposes;

   (b) can capital be distributed directly to beneficiaries or to a third party on their behalf; and

   (c) how often?

8. Is any beneficiary to be preferred in paying income or capital or both?

9. Is a minimum amount to be paid out to a beneficiary each year? If so, should this be subject to a cost-of-living adjustment ("COLA")? If yes, when should the COLA calculation start? Should there be a cap on the COLA calculation given current investment returns and the possibility of serious erosion of capital long-term, particularly if the income beneficiary/beneficiaries are young or live longer than expected?

10. When the trust ends, how is the capital to be distributed? Will this be different depending on which event terminates the trust? Is a beneficiary to be given the power to determine the capital distribution, either entirely or only upon certain termination events (e.g. after that beneficiary's death)? If so, will this power be general or limited to proportions and trust terms among a group (e.g. the beneficiary's issue)? Are there to be further trust terms on termination, e.g. if a capital beneficiary is under a certain age?

11. If the trust is to last until a young beneficiary past the age of 18 years, what should happen to the capital if the beneficiary doesn't live to the specified age? In general, ensure all

contingent events are provided for and gift-over provisions included. Tip: draw a rough chart as an aid to ensure gift-over drafting is inclusive.