Wills

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Precedents:

Introduction

This paper has been written as a practical guide for young lawyers who have had very little experience with wills. This is not meant to be a textbook on wills, but rather is intended to give articling students a basic understanding of various aspects of wills.

The law in the area of wills and the legislation that has an impact on wills and estates has been going through changes these past few years; therefore, readers of this material are cautioned that any part of this paper could become obsolete at any given time.

It should also be kept in mind that each of us has our own way of doing things. This paper reflects the writers' biases, opinions and way of doing things and it should be read in that light.

Types of Wills

The Wills Act, 1996 (the "*Act*") as amended (SS 1996 c. W-14.1), recognizes two types of wills.

- holographic wills
- formal wills.

The importance of the distinction is that the rules for the valid execution of each type differ greatly.

Holograph Will

According to the *Act*, a holograph will is a will that has been written out wholly in the handwriting of the testator and is signed by the testator without further formality or any requirement as to the presence of, or attestation, or signature, by a witness (s. 8).

A will that has been written out for a testator in the handwriting of a person, other than the testator, is not a holograph will. Likewise a printed form of will that has blanks to be completed by the testator does not constitute a holograph will, even if the blanks are completed in the testator's handwriting.

Lawyers are from time to time called upon to draw a will for a client whose death is imminent. The lawyer may not have time to take instructions, draw the will, have it typed and take it back to the client for signature. Hence, it may become necessary for the lawyer to write or print out the will for the client's signature at the client's bedside. It must be kept in mind that such a will is not a holograph will because the will has been written or printed in the lawyer's handwriting and not in the handwriting of the client.

Any will that cannot be classed as a "holograph will" is considered to be a "formal will" for all purposes.

Formal Will

Requirements

The term "formal will" has been used to describe all wills, except those that can be rightfully classed as "holograph."

In order for a formal will to be valid, assuming the testator(rix) is competent and there has been no fraud, or undue influence, it must be in the following form (s. 7(1) and 7(2)):

> 7(1) Unless provided otherwise in this *Act*, a will is not valid unless:
>
> (a) it is in writing and signed by the testator or by another person in the testator's presence and by his or her direction;
>
> (b) it is apparent on the face of the will that the testator intended to give effect by the signature to the writing signed as his or her will;
>
> (c) the signature is made or acknowledged by the testator in the presence of two or more witnesses who are in the presence of the testator at the same time; and
>
> (d) at least two of the witnesses in the presence of the testator:
>
> (i) attest and sign the will; or
>
> (ii) acknowledge their signatures on the will.
>
> (2) No form of attestation by the witnesses is necessary.

Execution of Formal Will

Having the Will Executed

In *Worrell*, the Judge made it abundantly clear that a will should not be handed over to a third party to have it executed, which in that case just happened to be the beneficiary who had consulted the lawyer to draw the will for the testator, in the first place.

It is the duty of a lawyer, among other things, to ensure that the will, as drawn, represents the testator's true intentions (absence of undue influence) and that the testator has the testamentary capacity to make a will.

Signature of Testator

The majority of clients for whom lawyers draw wills are quite capable of signing their names. Although the will should be drawn using the testator's full legal name, it is preferable, although not necessary, that the testator sign the will using his or her normal signature, since his or her normal signature may be more readily recognized as his or her signature than if he or she is asked to sign his or her full legal name, if that is not the manner in which he or she normally signs his or her name.

In some cases, the testator may be incapable of signing his or her name either through illiteracy or physical disability.

Most people who are incapable of signing because of illiteracy will be accustomed to signing documents using a mark such as a cross or an "X," which is considered to be a sufficient signing. If the testator is illiterate, but understands the English language, the will must be read over to the testator. It is recommended that, in that event, an alternative form of attestation clause be used, such as the following:

IN WITNESS WHEREOF I have to this my Last Will and Testament written upon this and the _____ preceding pages of paper, subscribed my name this _____ day of _____, 20_____.

SIGNED, PUBLISHED AND DECLARED)
by the above named Testat_____,)
_____ with h_____mark as h_____)
Last Will and Testament, the same having been read)
over to h_____ and he or she seeming thoroughly to)
understand the same, in the presence of us both) His/Her Mark
present at the same time, who at h_____ request, in) _____
h_____ presence and in the presence of each other,) (Name of testator – typed)
have hereunto subscribed our names as witnesses.)

NAME:_____)
ADDRESS:_____)
_____)
OCCUPATION:_____)

NAME:_____)
ADDRESS:_____)
_____)
OCCUPATION:_____)

It should be noted that if someone is signing a will (or other legal document) using a mark, it is recommended that the words "His Mark" or "Her Mark" be placed at or near where the mark is to be made by the testator, or testatrix (see example above).

If the testator is literate, but through physical disability is incapable of signing his or her normal signature, the testator may be capable of signing with a cross or an "X," which is quite acceptable. If this is the case, it is again recommended that the

normal attestation clause be modified, using a version such as the following:

IN WITNESS WHEREOF I have to this my Last Will and Testament written upon this and the _____ preceding pages of paper, subscribed my name this _____ day of _____, 20_____.

SIGNED, PUBLISHED AND DECLARED by the above named Testat_____, _____ with h_____mark as h_____ Last Will and Testament, the same having been read over to h_____ and he or she seeming thoroughly to understand the same, in the presence of us both present at the same time, who at h_____ request, in h_____ presence and in the presence of each other, have hereunto subscribed our names as witnesses. He or she being physically incapacitated from writing his/her name.

His/Her Mark
_____
(Name of testator – typed)

NAME:_____
ADDRESS:_____
_____
OCCUPATION:_____

NAME:_____
ADDRESS:_____
_____
OCCUPATION:_____

There are times when a lawyer is faced with a situation where the testator, through physical disability, is incapable of signing or making his or her mark. In this situation, the testator can request someone to sign his or her name for him or her. In such a situation, if the testator reads the will over himself or herself, the lawyer should go over it with the testator to ensure it represents his or her wishes.

It is probably best, however, to read the will over to the client and explain it as one goes along. If the testator cannot read the will, then it must be read over to him or her and explained. Once again, an alternative attestation clause should be used and the following is an example:

IN WITNESS WHEREOF I have to this my Last Will and Testament written upon this and the _____ preceding pages of paper, subscribed my name this _____ day of _____, 20_____.

SIGNED by _____ with the name of the said _____ as h_____ Last Will and Testament, the same having been previously read over to h_____ and h_____ seeming thoroughly to understand the same, in h_____ presence and by h_____ direction, and in the presence of us, both present at the same time, who at h_____ request, in h_____ presence and in the presence of each other, have hereunto subscribed our names as witnesses.

He or she being incapacitated from writing his/her name.

His/Her Mark

_____

(Name of testator – typed)

NAME:_____

ADDRESS:_____

_____

OCCUPATION:_____

NAME:_____

ADDRESS:_____

_____

OCCUPATION:_____

If a testator does not understand the English language, then the will must be read over to the testator and translated (from English into the testator's language) by someone familiar with the testator's language. If the testator can sign his or her name, then the following is a suggested attestation clause one might use:

IN WITNESS WHEREOF I have to this my Last Will and Testament written upon this and the _____ preceding pages of paper, subscribed my name this _____ day of _____, 20_____.

SIGNED, PUBLISHED AND DECLARED by the above named Testat_____, _____ as and for _____ Last Will and Testament, in the presence of us, both present at the same time, who at _____ request, and in _____ presence, and in the presence of each other, have hereunto subscribed our names as witness.

THAT previous to the execution of the said Will by the Testat_____, the same was read over to h_____ and translated to h_____ by _____, and the Testa_____ at such time had knowledge of its contents and appeared to perfectly understand the same.

_____
(Name of testator – typed)

NAME:_____
ADDRESS:_____
_____
OCCUPATION:_____

NAME:_____
ADDRESS:_____
_____
OCCUPATION:_____

If the testator does not understand English and has to sign with a mark, then the following attestation clause could be used:

IN WITNESS WHEREOF I have to this my Last Will and Testament written upon this and the _____ preceding pages of paper, subscribed my name this _____ day of _____, 20_____.

SIGNED, PUBLISHED AND DECLARED)
by the above named Testat_____,)
_____ with h_____mark as h_____)
Last Will and Testament, that previous to the execution)
of the said Will by the Testat_____,)
the same was read over to h_____ and translated to)
h_____ by _____, and the)
Testat_____ at such time had)
a knowledge of its contents and appeared to perfectly)
understand the same, in the presence of us both)
present at the same time, who at h_____ request, in) His/Her Mark
h_____ presence and in the presence of each other,) _____
have hereunto subscribed our names as witnesses.)

NAME:_____)
ADDRESS:_____)
_____)
OCCUPATION:_____)

NAME:_____)
ADDRESS:_____)
_____)
OCCUPATION:_____)

Choosing the Witnesses

Consider the following:

A. The witness must be of the full age of majority, which is presently 18 years of age in Saskatchewan.

B. The witness must be mentally competent.

C. DO NOT USE a beneficiary or the spouse of a beneficiary as a witness. While using a beneficiary or a spouse of a beneficiary as a witness does not invalidate the will, it does cause the devise, legacy, estate, interest, gift or appointment made to the witness, or the witness's spouse, to be void (s. 13(2)), although a court on application may declare that an interest is not void if it is satisfied there was no improper or undue influence exercised on the testator (s. 13(5)).

   Such an application must be made to the court within six months from the date Letters Probate or Letters of Administration with will Annexed were issued. If it is not made within that time, the devise, legacy, etc. remains void against the "tainted" beneficiary (s. 13(6)).

   If a lawyer inadvertently, or otherwise, asks a beneficiary or the spouse of a beneficiary to be a witness, the lawyer would, at the very least, be liable for the costs of the application to the court, assuming such an application is successful.

   If the application is unsuccessful or the law applicable to the will is not Saskatchewan law, and there is no similar saving provision in the law applicable to the will, the lawyer is most likely going to be liable in damages to the disqualified beneficiary to the extent of the beneficiary's loss, which would be the value of the inheritance lost plus costs of the law suit brought against the lawyer: *Whittingham* v. *Crease & Co*. 3 ETR 97 (B.C.C.A.).

D. Try to use witnesses who are likely to live longer than the testator, and are likely to remain in the area or can be readily traced. Lawyers and anyone who has strong ties to the area are good choices. Lawyers also make good witnesses because they are usually easy to find.

E. Avoid using people who are likely to move away, i.e., people subject to transfer or people who are not well known to the lawyer or the testator's family.

   Neighbours and casual friends of a testator are not a particularly good choice because five, ten or fifteen years

later, the testator may have lost touch with the neighbour or friend and upon the testator's death, the executor's lawyer (which may be you) could be hunting all over trying to find at least one of the witnesses to take the Affidavit proving execution of the will. This can be a very time consuming and tedious exercise. There is nothing preventing the solicitor from having a witness execute the affidavit of execution immediately after executing the Will. If this is done, the wording of form 107 would have to be changed to reflect the present tense (so rather than saying "I knew X late of Saskatoon" it would say "I know X late of Saskatoon.")

If an affidavit of execution was not executed and, neither witness can be located, after considerable effort is made to find them, then the signature of the testator must be proven by an affidavit sworn by someone familiar with the testator's handwriting but who is not beneficially interested in the estate.

Taking Instructions

Duty of Lawyer

In *Worrell*, Clare, Surr. Ct. J. made the following comments regarding the solicitor's actions at pp 41 and 42:

> I consider it necessary in this action to comment on the conduct of the solicitor who drew the will that is at issue. The solicitor impressed me as an honest, conscientious person, and yet on his own evidence he acted as set out hereunder:
>
> (a) he prepared a will for a testator for whom he had never acted and whom he never saw and knew the testator concerned was 82 years of age and confined to a home for the aged,
>
> (b) he drew the will without any knowledge of the size of the testator's estate or the nature of its assets,
>
> (c) he drew the will leaving a substantial portion of the estate to the person who consulted him,
>
> (d) he drew the will with changes from the original letter of instructions signed by the testator without any consultation with the testator,

(e) he handed the will to the beneficiary who had consulted him, to take out and have executed,

(f) he kept no docket entries or other records dealing with the matter in issue.

It seems incredible that a competent solicitor, the head of a respected law firm, would act in this manner. It seems even more incredible that he gave no indication in the witness-box which would indicate that he realized he had acted improperly.

The Judge in the *Worrell* case, *supra* stated that the law as to a solicitor's duty in drafting a will has been set out many times and he went on to deal with the solicitor's actions (as set out above) in the following manner at pp. 42 and 43:

(a) *Jarman on Wills*, 8th ed., pp. 2073–4, in app. A – "Suggestions to Persons Taking Instructions for Will" (pp. 2073–4) deals with the responsibility of a solicitor in regard to wills and the editor, in a footnote, comments that these suggestions are reprinted verbatim from the original text so that they have been considered a proper guide to the profession for over 100 years. A portion only of the suggestions is set out:

> Few of the duties which devolve upon a solicitor, more imperatively call for the exercise of a sound, discriminating, and well-informed judgment, than that of taking instructions for wills. It frequently happens, that, from a want of familiar acquaintance with the subject, or from the physical weakness induced by disease, (where the testamentary act has been, as it too often is, unwisely deferred until the event which is to call it into operation seems to be impending), testators are incapable of giving more than a general or imperfect outline of their intention, leaving the particular provisions to the discretion of their professional adviser. Indeed, some testators sit down to this task with so few ideas upon the subject, that they require to be informed of the ordinary modes of disposition under similar circumstances of family and property, with the advantages and disadvantages of each; and their judgment in the selection of one of these modes is necessarily influenced by, if not wholly dependent on, professional recommendation …. [p. 2073–4]

> To the preceding suggestions, it may not be useless to add, that it is in general desirable, that professional gentlemen taking instructions for wills should receive their instructions immediately from the testator himself, rather than from third persons, particularly where such persons are interested. In a case in the Prerogative Court [*Rogers* v. *Pittis* (1882), 1 Add. 30 at p.46, 162 E.R. 12 – see p.48], Sir J. Nicholl "admonished professional gentlemen generally, that where instructions for a will are given by a party not being the proposed testator, *a fortiori*, where by an interested party, it is their bounden duty to satisfy themselves thoroughly, either in person, or by the instrumentality of some confidential agent, as to the proposed testator's volition and capacity, or in other words, that the instrument expresses the real testamentary intentions of a capable testator, prior to its being executed *de facto* as a will at all." [p. 2077]

I would suggest that in this day of speedy methods of transportation there should be no occasion when a solicitor should prepare a will without receiving his instructions from the testator. It is certainly improper for a solicitor to draft a will without taking direct instructions from the testator and then not to attend personally when the will is executed. For example, a son of an old client might come to the solicitor's office and advise that his father, a widower, is in hospital and wants a will leaving his whole estate equally among his children. In such circumstances, the solicitor might properly, for convenience, engross such a will and attend on the testator, but should – under no circumstances – say to the testator: "I understand you want a will leaving your property thus and so, and I have drawn such a will. Is this satisfactory?" This, especially with older people is a dangerous practice and the solicitor should, on attending the testator say: "I understand you want a will drawn and will you tell me how you wish your estate to go on your death." The asking of leading questions by a solicitor obtaining instructions from an elderly testator is a practice to be avoided. Too often the elderly person, if asked leading questions, will reply in the affirmative, but if simply asked "What property do you have?," or "How do you wish your estate to go on your death?," may exhibit complete lack of comprehension.

No better statement of the duties of a solicitor in drafting a will can be found than in the judgment of Chancellor Boyd in *Murphy* v. *Lamphier*, [1914] 31 O.L.R. 287 at pp. 318 to 321 inclusive, and in particular [p. 319]: "The Court reprobates the conduct of a solicitor who needlessly draws a will without getting personal instructions from the testator."

(b) Chancellor Boyd in the above cited case of *Murphy* v. *Lamphier* deals with the necessity for a solicitor to enquire as to the nature and extent of the testator's property. It seems clear that a solicitor who does not have this information is not in a position to properly advise the testator as to the incidence of estate tax or other problems of draftmanship. As I have pointed out above, this realization of the extent of his assets is a further test of the competency of the testator.

(c) Without the necessity of quoting authorities, it should be clear that a solicitor taking instructions from a major beneficiary under a proposed will rather than from the testator, should be at once alerted and should, in the language previously quoted from app. A of Jarman, satisfy himself thoroughly that the instrument expresses the real testamentary intentions of a capable testator, prior to its being executed *de facto* as a will at all. In the case before us, the solicitor took no such precautions and to my mind when the beneficiary prepared a typewritten letter of instructions, the signature of the testator thereto in no way absolved the solicitor of his responsibilities.

(d) I simply cannot conceive how the solicitor can justify drawing a will not in accordance with the written instructions received from the testator. The solicitor acted after obtaining information from Mr. Barfoot, the beneficiary, and one cannot escape the conclusion that the solicitor, whether consciously or unconsciously, was taking instructions from Mr. Barfoot and ignoring the testator's written instructions which were his only connection directly with the testator.

(e) The fact that the solicitor handed the will, as engrossed, to the beneficiary to have executed is improper for the reasons set out in (a) above.

(f) I consider that any solicitor drawing a will should make full docket entries in regard to all details thereof. Especially is this so in the case of an elderly testator, and even more so in the circumstances in this case. Chancellor Boyd, at p. 321 of *Murphy* v. *Lamphier* said "Nor is it a counsel of perfection to suggest that a

memorandum of results, apart from the formally expressed will, should be jotted down and preserved." The practice of keeping solicitors' dockets may be falling into disuse, but in regard to testamentary matters they are essential. As was stated by Ferguson, J., in the recent case *Re Dingwall*, which is unreported, **"It is the most elementary of teaching in regard to the drafting of wills that the draftsman should preserve his notes of the testator's intentions."** With no docket entries, the solicitor in this case was unsure as to whether he had recommended to Barfoot that he might get a letter from a doctor or somebody at the Simcoe Manor with regard to the capacity of the testator. I should point out that the solicitor rendered an account to Mr. Worrell in the amount of $30 for preparation of a will and Power of Attorney. This account is dated February 9, 1967 (ex. 5), and was paid by Mr. Worrell's cheque of the same date."

[emphasis added]

From Whom Can Instructions Be Taken?

The Testator

It is always the best practice for the lawyer to take instructions directly from the testator and, in so doing, should have a private discussion with the testator when taking the will instructions. The lawyer should invite the testator into his or her office alone and try to discourage any so called "well meaning" family, friend, or staff, of the testator from being present.

Spouses most often make a joint appointment to have their wills drawn and will usually expect to meet with the lawyer together. This normally works well if both parties are independent, self-assured people living in a normally happy relationship. However, one must be sensitive to the situation. If one or other of the spouses seems uncomfortable or seems afraid to ask questions or voice his or her view, invite both spouses, after the interview, to contact you if they have any questions. In some instances a day or two later a call will be received from the uncomfortable spouse and matters can usually be resolved.

If there is a problem, then at that point a lawyer has to consider his or her position, since the lawyer may be in a position of conflict. If matters are deteriorating, then discretion and ethics must be relied on. If there is a conflict or a potential conflict, then each spouse has to be advised of the situation. If there is a conflict, the lawyer is out of there. If there is a potential for conflict, then it has to be discussed with the clients and they have to decide, unless the lawyer decides to bail out before the conflict arises. In each case, the lawyer should explain to the clients what is happening and why the lawyer is sending both away (each spouse must have his or her own lawyer, if there is a conflict problem).

Other Persons

As we have seen in *Worrell*, referred to herein under the heading "III. A. Duty of Lawyer," the lawyer was severely chastised by the Judge for drawing a will for an elderly person, not known to him, based on a letter prepared by a beneficiary but signed by the testator.

If one does receive instructions from someone other than the testator, and if the will is prepared in anticipation of seeing the testator, the lawyer must not say to the testator "I understand you want a will leaving your property thus and so, and I have drawn such a will. Is this satisfactory?" As His Lordship in *Worrell* indicated, that would be a very dangerous practice especially when dealing with older people. Instead, the lawyer should say, "I understand you want a will drawn and will you tell me to whom you wish to leave your estate upon your death."

Who Should Attend on the Execution of the Will

In *Worrell*, the Judge, among other things, made it abundantly clear that a will should not be handed over to a third party to have it executed, which in that case "just happened" to be the beneficiary, who had consulted the lawyer to draw the will for the testator.

It is the duty of a lawyer to ensure that the will, as drawn, represents the testator's true intentions (absence of undue influence) and that the testator has the capacity to make a will. Accordingly, it is the lawyer who should attend on its execution.

Capacity

Minors

A minor is a person who has not yet attained the age of majority, which in the Province of Saskatchewan in June 2009, is 18 years of age. A minor cannot make a valid will, except in the following circumstances (s. 4):

1. A person who is or has been married or cohabiting in a spousal relationship can make a valid will, or at least, the fact that such a person is under 18 years at the time he or she makes his or her will does not invalidate the will (s. 5).
2. In other words, while his or her purported will may be invalid for some other reason, the fact the testator was under 18 years of age when he or she made it will not invalidate the will if he or she is or was married or cohabiting in a spousal relationship.
3. A member of the armed forces in actual service or a sailor in the course of a voyage may make a will in writing signed by him or her or by some other person in his or her presence without any further formality or any requirement as to the presence of a witness (s. 6(1)). Further, the will is not invalid in the event he or she was under the age of 18 years (s. 6(3)). A member of the armed forces is deemed to be in actual service after he or she has taken some steps under the orders of a superior officer in view of and preparatory to joining the forces engaged in hostilities (s. 6(2)).

Lawyers in private practice will not likely see the (b) situation, since it is the practice of the Canadian military to have all recruits execute a will.

Persons of Unsound Mind

Many wills over the years have been attacked on the basis that the testator lacked the necessary mental capacity to make his or her will.

If a lawyer draws a will for someone who is later adjudged to have been mentally incapacitated at the time the will was made, without having taken reasonable precautions to ascertain the person's mental capacity, the lawyer could be liable for the costs of the court application to set the will aside: *Orleski* v. *Reid*, 18 ETR 305 (Sask.Q.B.), appealed to 31 ETR 249 (Sask.C.A.).

Over the years, the courts and legal scholars have classified those persons, who are or could be, of unsound mind, into various classes. No doubt the reason for having classifications was that different considerations and presumptions applied depending on what class a person fell into. The following are some of the older classes and one or two new ones.

Senility

Given that people are now able to live much longer than in the past, there are more people living than ever before who lack the necessary mental capacity to make a will because of senile dementia.

Accordingly, as more people suffer from senile dementia the more likely and more often lawyers will have to make, what is, in some instances, a tough decision on whether someone still has the necessary testamentary capacity to make a Will.

Senile dementia is considered to be a progressive condition. A testator diagnosed as suffering from senile dementia may still meet the criteria for a "sound and disposing" mind for a while after the first onset of the condition is noticed or the initial diagnosis is made. The difficulty becomes at what point does the person suffering from senile dementia cease to have a sound and disposing mind or does the point shift back and forth with the person having lucid intervals and intervals of confusion? If it can be established that a testator gave instructions for and executed his or her will during a lucid interval, then the will is valid. In reality, the difficulty is to be able to prove to the satisfaction of the court, if the validity of the will is challenged, that the testator was, in fact, in a lucid interval at the time the instructions were taken and the will was executed (*Williams on Wills*, p. 19). If possible, obtain the opinion of a physician qualified to give an opinion as to whether a person has mental capacity or not. Not all general practitioners seem to have the necessary credentials to give such an opinion. Of course, the issue remains a legal issue.

Insanity

General insanity presents much the same problems as senile dementia. The question becomes as follows: "Is the person's insanity to the point that the person no longer meets the criteria for a sound and disposing mind?" If so, does the person have lucid intervals during which a valid will could be made? Again, as with senility, a valid will can be made during a lucid period.

The older texts refer to "general insanity" and include in that classification mentally challenged persons (then unkindly referred to as "idiots"), persons born deaf and mute with or without the addition of blindness, persons certified insane and detained in a

mental hospital and persons with respect of whose estate a Receiver has been appointed.

> In such cases the possibility of making a will is *prima facie* excluded, but it by no means follows, except perhaps in the case of an idiot, that such possibility is absolutely excluded and certainly not where a lucid interval is shown. (*Williams on Wills*, p. 17)

Intellectually challenged people should not be dismissed out of hand. It is a question of fact whether or not the person meets the criteria of having a sound and disposing mind. If necessary, a medical opinion, or opinions, could be obtained.

Delusions

A delusion is defined in *Williams on Wills* to be as follows:

> … a belief in the existence of something which no rational person could believe and, at the same time, it must be shown to be impossible to reason the patient out of the belief ….
>
> To avoid a will, the delusion must be such as to influence the testator in making the particular disposition made. The existence of a delusion is quite compatible with the retention of the general powers and faculties of the mind. It is a question of fact whether the delusion affects the disposition, and, even where the delusion is connected with the subject matter of the disposition, it is not a necessary conclusion that the delusion affected it. A parent may take a harsh view of the character and conduct of his children or relations without being subject to such a delusion as will avoid a will, but there is a point where such a view ceases to be a harsh unreasonable judgment and must be held to proceed from some mental defect. For the will to stand the testator's mind must not be dominated by an insane delusion so as to overmaster his judgment to such an extent that he is incapable of disposing of his property reasonably and properly or of taking a rational view of the matters to be considered in making a will. (p. 19–20)

Drugs and Alcohol

Drugs, whether legal or illegal, can affect a person to the point that he or she is no longer in possession of a sound and disposing mind. For this reason drugs and alcohol have been included as a class in this material, although they do not appear to have been mentioned in the textbooks.

Drugs are always a concern when taking instructions from persons seriously ill or injured. It is wise to speak with the

attending physician to determine what, if any, medication the person is receiving and whether it could be affecting the patient's mind.

Alcohol can also affect ones mind. If the person is obviously intoxicated, do not take the instructions.

If the person is known to have a drinking problem, then make sure he or she is sober when taking the instructions and when having the testator sign the will.

What Constitutes a "Sound and Disposing Mind"?

In order for a person to be capable of making a valid will, the testator must be of sound and disposing mind at the time the will or Codicil is made. The testator should be of sound and disposing mind both at the time the instructions are received from him or her and when the will is signed. Sound testamentary capacity consists of the following elements, each of which must exist at the same time:

- testators must understand that they are giving their property to one or more objects of their regard
- testators must understand and recollect the extent of their property
- testators must also understand the nature and extent of the claims upon them – both of those whom they are including in their will and those whom they are excluding from their will
- testator must realize that they are signing a will.

(*Williams on Wills,* p. 16)

In addition to the above, there must be an absence of any disorder of the mind that would

> poison the testator's affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it, which if the mind had been sound, would not have been made.
>
> (p. 16–17).

The foregoing has been widely accepted as being the test for testamentary capacity, which is from *Banks* v. *Goodfellow* (at paragraph 240).

In the *Sample Estate*, Martin C.J.S. quoted with approval the following passage from *Bank*s v. *Goodfellow*:

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

Subsequent incapacity does not revoke an otherwise valid will.

> A will made by a person of full capacity is not revoked by the fact that he subsequently becomes incapable of making a will and a will made by a sane person is not revoked by his subsequent insanity. (*Williams on Wills*, p. 14)

On the other hand, a will made by a person while mentally incapacitated will not be validated if he or she subsequently recovers (p. 14, 16).

Burden of Proof

The issues regarding the burden of proof, relative to a sound and disposing mind, have been discussed in many court decisions. The issues are as follows:

- Who bears the burden of proof?
- What is the degree of proof required?

Unless the issue of incapacity is alleged, then the testator is presumed to have had the necessary capacity to make the will. Once the capacity of the testator is brought into question, the burden of proof of testamentary capacity lies with the executor(s) or other person(s) who propound the will for probate: *Sherman Estate* v. *Sherman*, [1989] 31 ETR, 254 at p. 259.

Over the years the issue of the degree of proof required has been debated. Some judges equated it to the burden placed on the Crown in criminal matters, i.e., beyond a reasonable doubt. Others felt it is the civil standard of "on a balance of probabilities." Today it is clear that capacity must be proven on the civil standard which is 'on a balance of probabilities'. *Feeney's The Canadian Law of Wills* (at § 2.18 cites *Vout* v. *Hay*, [1995] 2 S.C.R. 876 at 888 and other cases including Sherman for the following statement:

"The burden of proving both a sound and disposing mind and knowledge and approval of the contents is carried by the propounder of the will. The extent of the burden of proof on the propounders is the ordinary civil burden of the balance of probabilities."

Feeney's quotes Mr. Justice Sopinka in *Vout* v. *Hay* where he said "…it has now been established that the civil standard of proof on a balance of probabilities applies. The evidence must, however, be scrutinized in accordance with the gravity of the suspicion."

Mr. Justice Wright in the *Sherman* case took the position that "Equating that burden with the one placed on the Crown in a criminal case is, with deference, not reasonable" (*Sherman Estate*, p. 259).

His Lordship goes on at p. 259 to mention two cases where reference is made to an executor "affirmatively" proving capacity. His Lordship then quotes from p. 36 of *Theobald on Wills* 14th Ed, where the author talks about what constitutes "affirmative proof":

> Affirmative proof … must be strong enough to satisfy the court **in the particular** circumstances. The greater the degree of suspicion, the stronger must be the affirmative proof to remove it. The suspicion may be slight and easily dispelled. It may … be so grave it can hardly be removed.
>
> [emphasis added]

His Lordship also referred to two Saskatchewan Queen's Bench cases that were decided prior to the *Sherman* case, which relied on the "balance of probabilities" test. His Lordship concluded "that the test to be applied depends on the particular circumstances" (*Sherman Estate*, p. 259). His Lordship further states the following:

> The more suspicion raised regarding the testator's capacity, the further the propounder must go in discharging the burden. The burden is discharged once the executor shows that mental capacity is more probable than not. (p. 260)

A challenge to a will involves two levels of hearings (*Dieno Estate* v. *Dieno Estate*):

- firstly, a chamber hearing to determine if sufficient evidence exists to warrant a trial of the issue(s)
- secondly, the trial itself.

Mr. Justice Baynton in the *Dieno* decision, sets out the burden of proof and evidentiary standards at the chamber level (p. 281, p. 219 and p. 220) and at the trial level (p. 220, 0. 221 and p. 222).

Knowledge and Approval of Contents

Generally

A testator must have both knowledge and approval of the contents of his or her will for it to be valid.

The burden of proving "knowledge and approval" by a testator rests with the person or persons propounding the will. However, in the absence of anyone bringing the testator's knowledge and approval of the will into issue, it is discharged by proof in common form of the execution of the will (35 CED (West 3d) at paragraph 51, pages 151 to 93): see also *Dieno* v. *Dieno*, *supra*.

Undue Influence

> Undue influence means coercion to make a will in particular terms. The principle has thus been stated by Sir J.P. Wiede in *Hall* v. *Hall* (p. 482):
>
> > Persuasion is not unlawful, but pressure of whatever character, if so exerted as to overpower the volition without convincing the judgment of the testator, will constitute undue influence, although no force is either used or threatened.
> >
> > (*Williams on Wills*, p. 23 and p. 24)

Note: also see 35 CED (West.) (3d) paragraphs 55, 56, 57 and 58, at pp. 151-94, 151-95, and 151-96 and *Sample Estate* (1955), 15 WWR(NS) 193 at 198 (Sask. C.A.).

If a lawyer believes that a client, or a proposed client, is being unduly influenced to make his or her will, then the lawyer should not take instructions until the lawyer is satisfied that the client is capable of giving instructions that reflect the client's own free will. Undue influence is most likely to occur if a person is in failing health or suffers from diminished mental capacity, although it is not impossible for it to occur otherwise.

> But though undue influence is not impossible in the case of a testator of sound health and understanding, it is far more common in the case of a testator of weak or impaired mental capacity or in failing health.
>
> (*Williams on Wills,* p. 23)

Please also refer to *Vout* v. *Hay*, [1995], 7 E.T.R. (2d) 209 (S.C.C.).

It seems logical, however, that "undue influence" could also be perpetrated by an abuser on his or her victim in an abusive relationship.

Legislation

There are a number of statutes that can have an impact on a will, which a lawyer should be aware of when taking instructions in order to fully inform the client. Lawyers have to be aware of the potentially adverse consequences that some legislation may have on the testator's intentions, and the positive aspects of some legislation, which may give the testator the opportunity to do some estate planning or to take advantage of something that the legislation allows the testator to do that is to the beneficiary's(ies') or the estate's advantage.

For example, if the testator says he or she wants to deal with a certain asset in a specific way in his or her will and if the lawyer knows that if he or she does it that way, it could trigger adverse tax consequences to the estate or beneficiary(ies), then the lawyer must advise the client of any alternatives that would avoid such consequences in order for him or her to make an informed decision. If the client does not heed his or her lawyer's advice and the lawyer knows that the testator's choice will, or could have, an adverse affect upon the beneficiary(ies) or the estate, the lawyer should make sure that he or she sends the testator a letter confirming the lawyer's advice and the fact that the testator did not take it and the possible consequences that could result. The letter, along with the file containing the instructions, must be kept.

The Miscellaneous Statutes (Domestic Relations) Amendment Act, 2001 and *The Miscellaneous Statutes (Domestic Relations) Amendment Act, 2001 (No. 2)* were passed in 2001. Prior to this legislation certain legal results were triggered by marriage. For example marriage would revoke a will (unless the will was written in contemplation of the marriage). Today certain legal results are triggered by being in a spousal relationship. *The Wills Act* now provides that a Will is also revoked when the testator has

lived for two continuous years in a spousal relationship (unless the will was written in contemplation of the spousal relationship). This legislation has the effect of treating persons who live in a "spousal relationship" for two years as if they were married. It must always be kept in mind that the law, when referring to marriage or living in a spousal relationship for two years, is the same whether it is a marriage or spousal relationship between a man and a woman or same sex partners.

This change to the law causes an unusual situation, according to the family law lawyers. One now has the situation where a couple lives together in a common law relationship from today for a period of two years. During this period, the couple is cohabiting as if they were married but they are not for the purposes of the legislative changes considered "spouses." If they split up during the first two years, then any rights they may have are derived from the common law. If, however, the couple lives together for five years and then go their separate ways, the rights of each spouse for the first two years of the relationship are determined pursuant to the common law.

The Wills Act (SS 1997, as amended, c.51) states that their rights after the first two years less a day are as if they were married on the two year anniversary of their cohabitation until they separate and then their rights are construed pursuant to *The Family Property Act*. As a result, one has to be careful about using the term "spouse" since it is no longer a generic term. When drawing a will for someone about to enter into a cohabitation arrangement or someone who is still under the two years, do not refer to the cohabiting partner as a "spouse." Only when the couple have cohabited for two years or more can one refer to one as the "spouse" of the other.

This section on legislation is not intended to be a full review of the statutes that are mentioned, but rather to bring them, and the possible effect they may have on a testator's will, to the reader's attention.

The Intestate Succession Act, 1996

The Intestate Succession Act, 1996 now includes a detailed definition of spouse (SS 1996, c.I-13.1). Pursuant to s. 2:

> 2 "**spouse**" means:
>
> (a) the legally married spouse of the intestate; or
>
> (b) if the intestate did not have a spouse within the meaning of clause (a) or had a spouse within the

meaning of clause (a) to whom section 20 applies, a person who:

(i) cohabited with the intestate as spouses continuously for a period of not less than two years; and

(ii) at the time of the intestate's death was continuing to cohabit with the intestate or had ceased to cohabit with the intestate within the 24 months before the intestate's death.

The Dependants' Relief Act, 1996

As a result of the 2001 amendments to *The Dependants' Relief Act, 1996* (SS 1996 c.D-25.01), a cohabitant becomes a dependant after only two years of continuous cohabitation (as opposed to three years in the prior legislation) and same sex cohabitants have the same rights as opposite sex cohabitants. Thus, it is now possible for a court to make an order requiring reasonable maintenance to be paid to a person out of the estate of his or her deceased spouse.

The following is the definition of a "dependant" for the purposes of *The Dependants' Relief Act, 1996:*

2(1) "**dependant**" means:

(a) the wife or husband of a deceased;

(b) a child of a deceased who is under the age of 18 years at the time of the deceased's death;

(c) a child of a deceased who is 18 years or older at the time of the deceased's death and who alleges or on whose behalf it is alleged that:

(i) by reason of mental or physical disability, he or she is unable to earn a livelihood; or

(ii) by reason of need or other circumstances, he or she ought to receive a greater share of the deceased's estate than he or she is entitled to without an order; or

(d) a person with whom a deceased cohabited as spouses:

(i) continuously for a period of not less than two years; or

(ii) in a relationship of some permanence, if they are the parents of a child …

If a testator fails to make "reasonable provision" for a dependant or dependants by the terms of his or her will, an application can be made by, or on behalf of, the dependant to the Court of Queen's Bench. Pursuant to s.6, the Court can make an order charging the whole or any portion of the estate in whatever amount it deems proper, with the payment of an allowance sufficient for the maintenance of the dependant as the Court thinks reasonable in the circumstances. When making such an order, the court may impose whatever conditions and restrictions it considers appropriate (s. 6 of *The Dependants' Relief Act, 1996*).

The Court has it within its power, pursuant to s. 7(1), to provide the allowance by way of the following:

> 7(1) The court may direct that maintenance may be by way of:
>
> (a) an amount payable annually or otherwise;
>
> (b) a lump sum to be paid;
>
> (c) specified property to be transferred or assigned, either absolutely or for life or for a term of years, to the dependant or for the use and benefit of the dependant; or
>
> (d) a trust fund established pursuant to section 9.

As is readily apparent, this statute gives the Court the power, in essence, to rewrite the testator's will if he or she fails to properly provide for a dependant.

The purpose of this legislation is to provide proper maintenance for a dependant and not to enhance the dependant's estate.

If the testator fails to make adequate provision for a dependant child from a previous marriage, there could and probably would be a *Dependants' Relief Act, 1996* application brought on behalf of the dependant child, irrespective of whether the testator has a new spouse.

If any child/children of the testator is/are mentally or physically challenged and, therefore, has/have special needs, it is the writer's understanding that a parent must leave a fair share of the estate for a special needs child. Fair share in most estates would mean an equal share with the dependant child's/children's siblings. However, in a very large estate and depending on the ability of the special needs child/children to function with financial assistance, it may not be necessary for an equal amount to be set aside for such a child if something less would be more than adequate to cover his or her needs, including any extras in life that

such a share could provide and such child/children could make use of.

A trust fund provision was added in 1996 to *The Dependants' Relief Act, 1996* to permit the court, upon an application on behalf of a dependant (adult), to allow for the establishment of a trust fund to help the dependant to become more independent or to meet his or her special needs or to provide occasional gifts for the dependant. In determining the amount of the trust to be established, "the Court shall consider that any assistance provided to or on behalf of the dependant, pursuant to *The Saskatchewan Assistance Act* and any other similar assistance programs funded (*sic*) by the Government of Saskatchewan, will continue to be provided to the dependant"(s. 9). The limit on the amount of the trust fund is set out in the *Regulations* and can change from time to time.

The capital of and income from such trust fund is not to be considered as an asset or income of the dependant for the purposes of determining the dependant's eligibility for assistance pursuant to *The Saskatchewan Assistance Act* or any similar assistance program funded by the Government of Saskatchewan (s. 9).

If a deceased parent does not provide for a disabled child in the manner that meets with the Public Trustee's policy guidelines, then it is open for *The Dependants' Relief Act a*pplication to be brought against the estate to have proper maintenance provided for the child. Reasonable provision can also be made outside the estate, such as by providing a life insurance policy on the testator's life, payable to the dependant.

Anyone drawing wills needs to read and understand the impact of this legislation.

The Family Property Act

Part IV of *The Family Property Act* (SS 1996 c.M6.11) gives a surviving spouse the right to bring or maintain an application for division of the family property against the estate of the deceased spouse. The relevant definition of "spouse" is found in s. 2 of the *Act*:

> 2(1) In this *Act*:
>
> "**spouse**" means either of two persons who:
>
> (a) at the time an application is made pursuant to this *Act*, is legally married to the other or is married to the other by a marriage that is

> voidable and has not been voided by a judgment of nullity;
>
> (b) has, in good faith, gone through a form of statutory marriage with the other that is void, where they are cohabiting or have cohabited within the two years preceding the making of an application pursuant to this *Act*; or
>
> (c) *is cohabiting or has cohabited with the other person as spouses continuously for a period of not less than two years;*
>
> [emphasis added]
>
> and includes:
>
> (d) a surviving spouse who continues or commences an application pursuant to section 30 and who was the spouse, within the meaning of clause (a), (b) or (c), of the deceased spouse on the day of the spouse's death; and
>
> (e) where the applicant is a spouse within the meaning of clause (b), the other party to the void marriage; (« conjoint ») …

The gist of the concern that a lawyer should have as to the possible impact of this provision on a testator's will is the following: if the deceased spouse had more than their share of the family property in their name at the time of their death, and if the deceased spouse purports to leave all or some of the family property in their name to someone other than their spouse, the surviving spouse could make an application for a division of the family property after the deceased spouse's death. After the order is made in favour of the surviving spouse requiring the personal representative of the estate to deliver up that portion of the estate that rightfully belongs to the surviving spouse as his or her share of the family property, the will then settles on what remains. This could drastically change the end result of what each beneficiary of the estate is entitled to receive. It should be noted that does not appear to be possible to launch a *Family Property Act* application for the division of property where both spouses perish.

Spouses can, of course, always prevent an application by having an Interspousal Contract or Cohabitation Agreement that settles the family property issue.

In the absence of such a contract or agreement the only thing the lawyer can do, besides point out to the testator the possibility of such an application being made, is to insert a clause requiring the surviving spouse to bring the property received pursuant to an

Order made under *The Family Property Act* and/or the common law into account by way of hotchpot against his or her share of the estate to be received pursuant to the terms of the will: see page WE-A-1-33 of the Appendix for an example.

The result of using such a clause is that the amount that the surviving spouse/common law partner will receive from the Family Property Order/common law and the will will be the greater of his or her share of the estate as per the will or the amount awarded by the Court.

This statute does not preclude a subsequent *Dependants' Relief Act, 1996* application being made by the surviving spouse whether or not a "family property"/"common law" clause has been inserted in the will. An Order made under *The Dependants' Relief Act, 1996* could erode any benefit derived from the insertion of the "family property"/"common law" clause in the will.

If the testator is leaving his or her entire estate to the spouse/common law partner, then it is obvious that one does not have to be concerned about an application, pursuant to *The Family Property Act* or the common law for division of the family property after the testator's death.

Income Tax Act (Canada)

The *Income Tax Act* (Canada) is a complex piece of legislation that has been amended many times and represents a potential "hornets' nest" to the inexperienced will drafter, and even to an experienced drafter in a moment of mental lapse.

Rollovers

The *Income Tax Act* (Canada) presents a major concern because of the various provisions of the *Act* that allow for certain specified assets upon the death of a taxpayer to pass to a spouse, a spousal trust or to the taxpayer's child/children on a "tax deferral basis" ("rollover") if certain conditions set out in the *Act* are met. This means that the potential tax liability is either postponed or passed on to the beneficiary(ies). If the will is drafted in such a way so that the conditions for a rollover cannot be met, then the tax liability regarding such asset will be triggered in the deceased testator's terminal tax return. This can be a significant amount of tax that becomes payable prematurely.

It is suggested that the definition of "spouse" under the *Income Tax Act* (Canada) be reviewed from time to time.

Section 70(6) of the *Act* sets out the requirements for a "spousal trust" that must be met in order for the spousal trust to qualify, as

such, under the provisions of the *Act*: see the CRA bulletin, "Testamentary Spousal Trusts." If in drawing the will, the lawyer fails to cover all of the requirements for a qualified "spouse trust," it will cause the accrued capital gains on all of the testator's capital assets, if he or she has any, to be prematurely triggered in the testator's terminal tax return rather than being allowed to be deferred until either the spousal trust disposes of the asset or the surviving spouse dies. It could also be an asset that can be passed down to the next generation on a rollover either directly upon the testator's death or following the spouse's death.

There is a provision in the *Income Tax Act* (Canada) that allows the personal representative of the deceased to elect out of a rollover and to trigger the tax. Many have done this where the deceased has unused capital gains deduction available. Since the original $100,000 deduction that everyone was given is long gone, one now sees the election being made in situations where the super capital gain deduction relative to farmland and certain qualifying corporate shares is available. Not everyone qualifies for the super capital gains deduction. Once again, there are conditions that must be met to qualify for the super capital gains deduction.

RRSPs and RRIFs

Registered Retirement Savings Plans ("RRSPs") and Registered Retirement Income Funds ("RRIFs") represent "non-tax-paid money" and for this reason they can represent a substantial amount of tax payable in the taxpayer's terminal return unless the proceeds of the plan become payable, as a result of the taxpayer's death, to the surviving spouse either as named beneficiary of the plan(s) or by the terms of the taxpayer's will.

If the taxpayer's spouse is entitled to receive all of the proceeds of the RRSP, then Canada Revenue Agency (CRA) ignores the estate for the tax and looks to the surviving spouse. If the surviving spouse has the RRSP proceeds transferred into his or her own RRSP, RRIF or an annuity, then the proceeds pass, in effect, tax free from the deceased spouse's plan to the surviving spouse's plan. If the surviving spouse simply takes the proceeds and does not put them into an RRSP, RRIF or annuity then the proceeds will become fully taxable in the surviving spouse's tax return for the year the proceeds were received.

RRSP proceeds can also pass on a tax deferral basis to a financially dependent child/grandchild of the testator.

A "child"/"grandchild" is not financially dependent on the testator for support at the testator's death if the income of the child/grandchild for the taxation year preceding the taxation year in which the individual died exceeded the basic personal exemption

for the preceding year (s. 118(1) of the *Act*), unless the financial dependency was because of mental or physical infirmity, in which case it is $6,180 adjusted for each such preceding taxation year that is after 2002 in the manner set out in s. 117.1.: see also s. 146(1.1).

As the *Income Tax Act* (Canada) stands as of March 1, 2004, there is no longer a limit on the amount one can bequeath or designate to a financially dependent "child" ("grandchild"). The catch is that while an annuity can be purchased for the financially dependent child/grandchild, and thus defer the tax until the child receives the annuity payments, the annuity must pay out in full by the time the dependent child/grandchild reaches 18 years of age unless the child's/grandchild's financial dependency is due to the mental or physical disability of the child/grandchild. If the child/grandchild is, through physical or mental disability, unable to earn a livelihood, he or she can defer all of the tax on the refund of premiums by purchasing an RRSP, a life or term-to-age 90 annuity.

The restriction on the age of a financially dependent child/grandchild appears to have been removed for all financially dependent children/grandchildren and the test is whether the child made less than the personal exemption in the year prior to the taxpayer's death.

Section 146(8.9)(b) of the *Income Tax Act* (Canada) permits a deduction in the testator's terminal tax return in the amount of the refund of premiums received by the financially dependent beneficiary. If the beneficiary is not entitled to receive the refund of premiums within the 4-year limit allowed for reassessment of the testator's terminal return, then no deduction can be claimed unless a waiver is filed. Under certain circumstances, the testator's personal representative and the beneficiary can elect to designate the beneficiary as having received the refund of premiums (s. 146(8.1) of the *Act*).

If the beneficiary who is financially dependent is under 18 years of age but not physically or mentally unable to earn a livelihood, then the funds can only be used to purchase an annuity to age 18 for the beneficiary(ies). If the beneficiary(ies) is(are) over the age of 18, then the only advantage of the rollover would be to have the refund of premiums taxed in the beneficiary's(ies') hands as opposed to the testator's terminal return (see the CRA bulletin, "Registered Retirement Savings Plans – Death of an Annuitant," paragraphs 10 and 27).

Due to the possible rollover with respect to RRSP's, it is a good idea if the surviving spouse is not receiving all of the estate to specifically bequeath to the spouse any amounts paid out of an RRSP that might be payable to the estate. One would think that most people have named their spouse, on their respective plans, as the designated beneficiary of the RRSP proceeds, but not always.

This occurs sometimes through error or neglect. If there is no surviving spouse but there is a potential for there to be a financially dependent child/grandchild, then the RRSP proceeds should be specifically bequeathed to the child/grandchild, with power to the executor to make whatever elections are necessary with respect to the RRSP's to reduce the burden of tax.

Farm Property

Farm property (depreciable and non-depreciable capital property) and shares in a family farm corporation roll over under the *Act* if a surviving spouse receives it/them outright or the property rolls into a qualifying spousal trust. If a spousal trust is being used, it has to meet the requirements for a spousal trust as referred to previously (CRA, "Testamentary Spousal Trusts").

A rollover to a child/children of farm property and/or shares in a family farm corporation is available on the parent's death, provided all the requirements of the *Income Tax Act* (Canada) are met:

1. the property can be established to have become vested indefeasibly in the child within 36 months of the taxpayer's death or such further time as the Minister of National Revenue considers reasonable, provided the taxpayer's representative requests such consideration within the 36-month period

   [This provision has always been strictly interpreted, unless the Minister of National Revenue becomes less rigid. In other words, a simple application to the Minister of National Revenue may not resolve the matter. You may find it is not so readily available.]
2. the property was used in the business of farming by the taxpayer or the spouse, or any child of the taxpayer immediately before the death
3. the child was resident in Canada immediately before the taxpayer's death.

The child does not have to use the farm property in the business of farming after receiving it to maintain the rollover.

The term "used in the business of farming" has never been defined by Canada Revenue Agency, but Canada Revenue Agency has always taken the position that renting the land either under a crop-share lease or a cash lease does not qualify unless the taxpayer rents to his or her spouse or a child/grandchild who carries on the business of farming. Farmers need to be aware of this when they are considering retiring from active farming. This can be discussed when taking will instructions.

The *Act*, as stated, requires the land to vest indefeasibly in the child within 36 months of the taxpayer's death. If a farmer is purporting to leave farm property to his or her children, a children's trust can prevent the indefeasible vesting from taking place if the child(ren) is/are not entitled to receive the land within the 36-month period. Accordingly, if the testator is relying on the rollover, one has to make absolutely certain that the vesting takes place within the prescribed 36 months. The testator may have to make a hard decision about what is more important -- receiving the rollover or keeping the child(ren) from having outright control of the land at age 18. This can be a difficult decision because many farmers have concerns about children receiving farm property at age 18 (CRA, "Intergenerational Transfers of Farm Property on Death").

The alternative is to allow the capital gains to be triggered in the hope that the super capital gains deduction for farm land is still available at the farmer's death.

The Trustee Act, 2008

This legislation received Royal Assent on March 31, 2009. It has not been proclaimed as of June 3, 2009.Once it is proclaimed, the law relating to perpetuities in Saskatchewan will drastically change. The so-called 'rules against perpetuities' will be abolished in Saskatchewan, by Part XI (sections 57-60). These rules include the rules regarding remoteness of vesting and perpetual duration, as well as the *Accumulations Act 1800* (also known as the *Thellusson Act*). Lawyers should of course read the entire *Act* so as not to be taken by surprise by other changes.The *Perpetuities and Accumulations (Abolition) Act (1995)*

The Wills Act, 1996

The following are comments relating to certain provisions of *The Wills Act, 1996* (SS 1996 c.W-14.1.), which are not dealt with elsewhere and which should be noted.

Anti-Lapse Provision

Under the common law, a devise or bequest to a beneficiary lapses if the beneficiary predeceases the testator, unless the terms of the will state otherwise.

Section 22 of *The Wills Act, 1996* provides, in essence, that unless a contrary intention is shown in the will, a devise or bequest made

to a brother, sister, child or other issue of the testator either as an individual or a member of a class does not lapse if the person predeceases the testator leaving a spouse or children living at the testator's death but takes effect as if the devise or bequest had been made directly to the persons:

> 22(2) … among whom and in the shares in which the estate of the person would have been divisible if he or she had died intestate and without debts immediately after the death of the testator, except that surviving spouse of that person is not entitled to receive the preferential share provided for in … *The Intestate Succession Act*.

If a testator does not intend to benefit the spouse of a deceased brother, sister, child or other issue (of the testator), then care has to be taken to ensure that a contrary intention is shown that the primary beneficiary must survive to inherit and then a gift over can be provided to the beneficiary's children, or other issue, if the Testator wishes to provide for the gift to go to the issue of a deceased beneficiary. If this is not done, then the testator's intention could be frustrated by the application of s. 22.

Substantial Compliance

Section 37 of *The Wills Act, 1996* gives the court the power to save some wills that prior to the enactment of the section would have been invalid because they were not executed in accordance with the formal requirements of *The Wills Act, 1996.*

It also gives the Court the power to give effect to the following, notwithstanding that the document does not meet the requirements for the execution of a will (s. 37):

> 37(b) the intentions of a deceased to revoke, alter or revive a will of the deceased, or the testamentary intentions of the deceased embodied in a document other than a will ….

International Wills

Sections 41 to 51 of *The Wills Act, 1996* specifies how to create "International Wills." Jurisdictions which have adopted the *Convention Providing a Uniform Law on the Form of an International Will* recognize an International Will as a valid will in their respective jurisdiction. Anyone intending to draft a will that will qualify as an International Will must read the provisions of *The Wills Act, 1996* relating to such and the *Convention* to ensure full compliance with all of the requirements: As of June 2009 the USA does not recognize International Wills. Once they do, there will be increased call upon Canadian lawyers to draft International Wills.

Divorce/Ceasing to Cohabit in a Spousal Relationship for Two Years or More

If the testator becomes divorced or the marriage is found to be void or declared a nullity by a court in a proceeding to which the testator is a party or the testator has ceased to cohabit in a spousal relationship for at least 24 months after executing a will, the will is not revoked by the divorce or or subsequent nullity of the marriage or ceasing to cohabit in a spousal relationship for 24 months; however, s. 19 of *The Wills Act, 1996* provides that in any of the stated situations, unless a contrary intention is shown in the will, any

- devise or bequest of a beneficial interest in property made to a spouse in the will;
- appointment of the spouse as executor or trustee of the will; or
- general or special power of appointment conferred upon a spouse in the will

is effectively revoked since the will is to be construed as if the spouse had predeceased the testator.

All divorced clients, soon to be divorced clients and people who have ceased to cohabit in a spousal relationship for two years or more or have separated for less than two years should be advised to draw a new will following their separation or ceasing to cohabit. People who are going through a separation will often draw a new will to reflect the division of the family property that may have taken place or it may simply be to remove the spouse as a beneficiary until the divorce takes place or the two years expires for unmarried people ending a spousal relationship. Until the divorce occurs or the two years expires, however, the spouse may still have enforceable rights under *The Family Property Act* and *The Dependants' Relief Act, 1996* and/or the common law.

It should be noted that for unmarried spouses, there is a time limit on an application under *The Family Property Act*. Applications brought by these spouses, as opposed to legally married spouses, must be made either while they are cohabiting or within two years after the cohabitation ceases.

Revocation of Wills

Section 16 of *The Wills Act, 1996* provides the following:

> 16 No will or any part of a will is revoked other than:
>
> (a) in accordance with section 17;
>
> (b) by another will executed in accordance with this *Act*;
>
> (c) by some writing declaring an intention to revoke the will or part of the will and executed in accordance with this *Act*; or
>
> (d) by burning, tearing or otherwise destroying the will or part of the will by the testator, or by some person in his or her presence and by his or her direction, with the intention of revoking it.

Revocation by Subsequent Marriage or Cohabitation

A Will has been revoked when the testator becomes a spouse through marriage or by two years of continuous cohabitation. Section 17 reads:

> 17(1) A will is revoked when:
>
> (a) the testator marries; or
>
> (b) the testator has cohabited in a spousal relationship continuously for two years.
>
> (2) Subsection (1) does not apply where:
>
> (a) there is a declaration in the will that it is made in contemplation of the marriage or cohabitation in a spousal relationship; or
>
> (b) the will is made in exercise of a power of appointment of real or personal property that would not in default of the appointment pass to the heir, executor or administrator of the testator or to the persons entitled to the estate of the testator if he or she died intestate.
>
> (3) Clause (1)(a) does not apply where the testator marries a person with whom he or she is cohabiting and has cohabited in a spousal relationship continuously for two years.

If a client wishes to draw a new will or his or her first will due to his or her impending marriage, then the following wording should be used:

> THIS IS THE LAST WILL AND TESTAMENT OF ME, _____, of _____, in the Province of Saskatchewan, made in contemplation of my marriage to [or my entering a spousal relationship with] _____.

When taking instructions for a will to be made in contemplation of marriage, it should be clearly set out what, if any, provisions of the will do not apply if the testator dies before the marriage takes place. If the testator intends for it all to apply, whether he or she dies before the wedding or not, then there should be a stipulation at the end of the will that the terms of the will apply in their entirety whether the marriage is solemnized or not.

The following is an example of such wording:

> All of the provisions of this my will shall apply whether my marriage to _____ shall have been solemnized or not [or whether X and I become spouses or not].

Be clear as to whether the Will or certain provisions within are it are conditional upon the spousal relationship being formed, or alternatively whether they are to take effect even if the parties do not become spouses.

A will made in contemplation of marriage or other spousal relationship must be made in contemplation of marriage to or other spousal relationship with a particular person.

If a lawyer takes instructions from a client who the lawyer knows is intending to marry or cohabit or has been cohabiting for less than two years, then in all likelihood the lawyer has a duty to inform the client that the subsequent marriage or cohabiting for two years will revoke the will unless the will is drawn as a "will made in contemplation of marriage or the cohabitation." Failure to warn and probably failure to make the will in contemplation of the marriage or cohabitation may result in extensive damages being awarded against the lawyer in favour of those beneficiary(ies) that lost out by virtue of the revocation of the will (*Canadian Law of Wills*, pp. 84, 85, 86, and 87). The Saskatchewan Court of Appeal in *Ratzlaff Estate* v. *Ratzlaff* found no separate 'declaration' of contemplation of marriage be incorporated into the Will. Mr. Justice Vancise held (at paragraph 32): "The statute requires at a bare minimum: 1) a statement referable to a marriage to take place subsequent to the making of

the will; and, 2) the statement must refer to the marriage of the testator which took place subsequent to the execution of the will."

For unmarried spouses who have lived together for at least two years, the drafter should consider the testator's wishes in the event that the cohabitation ends. Unless the Will expresses a contrary intention, gifts to the spouse, and the appointment of the spouse as executor would remain valid until the spouses have ceased living in a spousal relationship for 24 months.

In situations where the couple is either contemplating embarking on a cohabitation arrangement or they have been cohabiting for less than two years the following wording may be appropriate:

> This Will is made in contemplation of my continued cohabitation with _____ [or my commencing a cohabitation relationship with _____] pursuant to section 17 (2) of *The Wills Act* and, therefore, I intend that this Will shall survive my continued cohabitation with _____.

Revocation Clause

Each time a testator has a new will drawn, the new will should contain a revocation clause. In most formal wills, at least those drawn by lawyers, it will normally be the first clause of the will.

The reason for a revocation clause is to prevent any previous wills from being read with the current will because, in the absence of a general revocation clause, the new will only revokes a previous will to the extent that the two are inconsistent.

If the testator has more than one will, then care has to be taken that the revocation clause makes it clear which will or wills is/are being revoked.

Amending or Changing a Will

If a client wishes significant changes to his or her will, or if his or her present will is not well drawn, then it is best to draw an entirely new will.

In some cases, a person wishes only to change an executor or guardian, either of which can be done by way of a Codicil to the will.

If a Codicil is being used, it should refer specifically to the testator by name and should refer to the will being changed by its date. After setting out the changes, the rest of the will should be confirmed by using a clause such as "In all other respects I confirm my said will." This is known as "republication," which "confirms a valid will and makes it operate as if it were executed on the date of republication" (*Canadian Law of Wills*, p. 114): for an example see page WE-A-1-35 in the appendix.

The proper way to amend a formal will on its face is to make the alteration and then have it initialled by both witnesses and the testator in the presence of each other (s. 11(2) of *The Wills Act*). This means the testator and both witnesses must be present when the amendment is made and it is initialled by them. Also, the change(s) would be valid if made wholly in the handwriting of, and signed by, the testator (s. 11(3) of the *Act*).

Changes on the face of a formal will should be restricted to those done at the time the will is reviewed with the client and prior to its execution. Other changes should be done by a Codicil or a new will. In other cases, it is unlikely that the changes will be properly executed and as a result the fate of the changes becomes questionable.

Drafting

General

The function of the drafter is to produce a will that properly reflects the testator's intention and will give effect to the testator's intention upon death.

The tendency for some drafters is to try to pigeonhole all of their clients into one standard will. The danger in this practice is that the specific needs of each individual client may not be met. Not everyone needs the same type of will. Some clients have very specific needs that need to be considered, discussed and dealt with.

The technology that is available allows us to store clauses and to build a will clause by clause.

The drafter must know and understand each clause that goes into the will and understand why it is being inserted. All the clauses have to fit together like pieces of a puzzle to make a clear picture,

otherwise the draftsperson could wind up with inconsistent provisions in the will. If an inconsistency occurs in the will, it will, at the very least, mean an application to the court for interpretation and the draftsperson could become liable for the costs. At the worst, in addition to the application and the costs, the draftsperson could be liable for damages to any persons who may have suffered a loss by reason of the inconsistency.

In some cases, lawyers use paralegals or legal assistants to draft wills. This is extremely risky practice. The lawyer is responsible for the Will representing and implementing the testator's intentions.

In situations where a client is very ill or has difficulty understanding complicated matters, then the will should be kept as simple as the testator is capable of understanding.

Very often, in an imminent death situation, a client's only concern is to make sure everything goes to his or her spouse. If that is the case, one could do a simple Will leaving everything to the testator's spouse and forgo gifts over to contingent beneficiary(ies) in the event the spouse does not survive: see the appendix (page WE-A-1-32) for a very simple will, which probably emanated many years ago from *The Canadian Law of Wills*.

Although much of the law that forms the basis of wills and Estates law is very old, much has changed significantly in the past few years. One has to be vigilant about changes to the law, particularly in view of the potential for liability if the drafter should commit an error that results in someone suffering damages.

Beginning of the Will

> THIS IS THE LAST WILL AND TESTAMENT of me, _____, of _____, in the Province of Saskatchewan.

This identifies the testator and also identifies the document as a will.

If the testator knows what his or her proper legal name is, then use it. However, if the testator uses an assumed name or a different variation of his or her name, then it is a good idea to include the following wording: "(also known as _____)" or if need be, "(also known as _____, _____, and _____)" after his or her proper legal name.

If the testator has a very common name which results in confusion between the testator and some other person or persons, then one

can include the testator's occupation and/or his or her full street address to identify the testator.

If the testator is about to get married or begin to cohabit with someone then, as previously mentioned, words identifying the will as one made by the testator in contemplation of marriage to, or cohabitation with, a particular person should be used. See the section entitled "Revocation by Subsequent Marriage or Cohabitation" for suggested wording to be used when drafting a will for a person contemplating marriage to a particular person or contemplating cohabiting with someone without making a trip down the aisle.

Revocation Clause

Typically, a general revocation clause is the clause of choice. Here is an exception.

If a testator has chosen to have one will to deal with his or her Canadian assets and a separate will to deal with his or her assets in a foreign jurisdiction, then any revocation clause to be used in a subsequent Canadian will has to clearly exclude from revocation any foreign will that is to remain in place with respect to those assets situate outside of Canada.

There appears to be somewhat of a trend in Ontario for individuals to have more than one will, the rationale being to deal with assets that would require probate in one will and assets that would not require probate in another will. This is done to avoid paying probate fees on the entire estate. The legislation in Ontario, according to the Ontario courts, permits more than one will.

It appears that due to s. 8 of *The Administration of Estates Regulations* (Saskatchewan), such an attempt at probate fee avoidance would not work in Saskatchewan. Section 8 requires the payment of probate fees on all deceased's assets, except for those passing outside of the estate and real property situated outside of Saskatchewan. Where the deceased was domiciled outside Saskatchewan at the date of death, personal property located outside Saskatchewan is not considered property of the estate for the purpose of calculating the estate's value. This would be relevant if the deceased owned real estate in Saskatchewan but lived elsewhere.

If a will is conditional upon the happening of some future event for its validity, then the revocation clause contained in the conditional will should be stated to be effective upon the will becoming effective. One author has suggested the following

wording: “Upon this will becoming effective, I declare that all former wills, Codicils or testamentary dispositions previously made by me, shall be revoked” (*Practical Wills Drafting*, p. 51).

Appointment of Executors

Every will should name at least one executor since an executor’s powers arise upon the death of the testator.

A person who is named as an executor is not required to assume the office of executor and he or she may renounce. In addition, executors sometimes predecease the testator or are unable to act. For example, the executor could be mentally incapacitated by the time the testator dies. In view of this, it is prudent to name one or more alternative executors.

It is possible to name two or more executors to act together or one can name an alternate (or alternates) to fill any vacancy that may occur due to the primary executor or one of the primary executors predeceasing or being unable to act or being unwilling to act.

If two or more executors are named to act together, then the executors should be prepared to act as one unless a majority rule provision is contained in the Appointment of Executors clause. From a practical point of view, if there is more than one executor, then all of the executors must sign cheques and documents since in most cases the banks, etc. require all executors to sign.

A trust company, licensed to do business within the jurisdiction, can be appointed to act alone or with one or more individuals. In some instances, a spouse or another person is appointed to act with a trust company. It can be stated that it is the testator’s intention that the spouse or other person act in an advisory capacity and be consulted on all matters of importance but that the burden of the administration shall rest upon the trust company. A further provision is usually added in such a situation whereby the testator directs that the trust company shall have charge of all accounts and shall keep in its possession all the estate assets.

An executor must be of legal age. Accordingly, if a testator wishes to name a child who is not yet of legal age then the child’s appointment should be made conditional upon having reached the age of majority. If the child is not one of several executors appointed, then someone should be appointed to act if the child is under age at the time of the testator’s death.

Honesty, integrity, common sense, the ability to manage assets and the ability to stand up to the beneficiaries are some of the attributes one might want or need in an executor.

Insurance Declaration

The Saskatchewan Insurance Act (RSS 1978, C.S-26, s. 152) allows an insured in a contract or a declaration to designate his or her personal representative or a beneficiary to receive insurance money.

The designation, if contained in a will, cannot be made irrevocable: "Notwithstanding *The Wills Act*, a designation in a will is of no effect against a designation made later than the making of the will" (s. 154(2) of *The Saskatchewan Insurance Act,* RSS 1978 c.S-26).

An insured may in a contract or a declaration appoint a trustee for a beneficiary and may alter or revoke the appointment by a declaration (s. 155(1) of *The Saskatchewan Insurance Act,* RSS 1978 c.S-26).

The use of an insurance declaration in a will has been a practice employed by many lawyers over the years. However, a 1992 decision by the Court of Queen's Bench, Judicial Centre of Saskatoon has brought the use of an insurance declaration in a will into question: *Re Estate of Jacob Abraham Brown*.

In the *Brown* case, it appears that the Judge had problems with the wording used in that particular designation. However, it was also suggested that an executor should not be named as trustee. With all due respect, is the person who is named executor not the most appropriate person to act, as an insurance trustee, and since when can a person not act in two distinct capacities -- firstly, as executor and trustee of the estate assets and, secondly, as trustee of the insurance proceeds.

The following is merely one example: [Note the attempt to make it clear that the executor receives the proceeds as an "insurance trustee" and not as an executor. Also note that confirmation at the commencement of the clause is to avoid disturbing a beneficiary designation in favour of the spouse that has been made on the insurance policy.]

> I CONFIRM that the proceeds of all policies of insurance on my life owned by me at the time of my death shall be payable and paid to my [wife/husband/spouse or the name of some other person], provided she/he shall survive me, in accordance with the terms of such policies. In the event, however, that my [wife/husband/spouse or the name of some other person] predeceases me, I HEREBY DECLARE that the proceeds of all policies of insurance on my life owned by me at the time of my death shall be

> payable and paid to the persons who shall from time to time be acting as my Trustees, but such proceeds shall be paid to my Trustees, in their capacity as insurance trustee, and not in their capacity as Executors and Trustees of my estate assets, and the proceeds shall be held by my insurance trustee, in trust for my children and other issue upon the same trusts, terms and conditions as if such proceeds had formed part of the residue of my estate, but the said proceeds shall be held in an insurance trust pursuant to the terms of *The Saskatchewan Insurance Act*, or the applicable legislation of another jurisdiction having a similar provision, and shall not form part of my estate. The terms "Trustees" and "Executors and Trustees" shall include the singular number and the feminine or masculine or neuter gender where applicable. This declaration shall be a declaration within the meaning of *The Saskatchewan Insurance Act,* or the applicable legislation of some other jurisdiction.

Examples given in *Canadian Forms of Wills* are what had been used for many years, but their wording is now in doubt in Saskatchewan.

If an insurance declaration is used in a will, it should be positioned by itself and away from the provisions of the will dealing with the estate assets. Placing the clause as the next clause following the executors clause has been a popular place for it.

Some experts hold that such a clause will not cover insurance policies purchased after the execution of the will. Others say it includes those that the proceeds of which would, without the clause, fall into the estate (i.e., no beneficiary is designated on the later policy(ies)). The latter makes more sense.

Funeral, Burial or Cremation Instructions

Placing instructions for one's funeral, burial or cremation in the will has never seemed like the ideal place to make one's wishes known because wills are not always located and read prior to the funeral. However, some folks choose to place such instructions in the will and in that case the testator should be cautioned to inform the executor to review the will prior to making the arrangements. The testor should also be informed that the decision making authority with respect to these arrangements rests with the executor.

Debts Clause

The practice has been to include a "payment of debts clause" in wills, although the debts are really a charge on the estate and the executor is responsible for seeing that the debts are satisfied whether such a clause is contained in the will or not.

W.A. McIntyre in *Practical Wills Drafting* suggests that the standard debts clause that has been adopted by many lawyers should be modified if the testator is making a gift to a creditor because a general debts clause will rebut the presumption that the gift to the creditor is in satisfaction of the debt, unless the testator intends the gift to be in addition to the satisfaction of the debt, then a statement should be inserted in the will to make the testator's intentions clear (p. 53).

Mr. McIntyre suggests further that where a gift is being given to a creditor that the clause state clearly that the gift is in satisfaction of the debt. The standard debts clause should also be amended so as to make it clear that the creditor is not to receive both the gift and payment of the debt, if that is the testator's intention.

If a piece of real property is specifically devised to a beneficiary and the land has a mortgage registered against the title, the general rule is that the beneficiary receives the land subject to the mortgage unless a contrary intention is shown in the will. A general direction to pay debts does not amount to a contrary intention: s. 25(2) of *The Wills Act*. If the mortgage is to be paid out of the general estate, then the debts clause should state that fact.

By law the debts of the estate are payable, firstly, out of the residue of the estate (including both real and personal property). Once the residue is exhausted then general legacies abate rateably, then specific bequests and demonstrative legacies rateably, and then, lastly, specific devises of real property.

Realization Clause

A realization clause should be included in the will to give the executor(s) the power to turn into cash the assets of the estate. If there are special bequests of particular assets stated in the will, then the realization clause should clearly state that it is subject to those bequests.

Some realization clauses also give the executor the power to retain assets as investments of the estate, even though such assets

may not be in the form of investments allowed by *The Trustees Act* for trustees and executors to invest in. Such clause often also authorizes postponement of realization. These provisions are useful because the testator may have had some very good investments and the executor may wish to keep them until he or she is ready to distribute the estate or until they are required to pay an indebtedness.

The postponement provision can be useful if the market is in a slump and it is in the best interests of the estate to wait a reasonable length of time until it improves before disposing of the assets that are affected by the down turn in the market. In such a case, it would be in the interest of the executor(s) to have the written authorization and direction of the beneficiary(ies) to do so and, even then, the executor(s) might be liable for losses sustained by the estate because the executor(s) did not dispose of a risky asset as soon as possible. If the beneficiary(ies) have been given all the facts and they instruct the executor(s) not to sell until the market improves, it is difficult to understand why a court would hold the executor(s) liable but, apparently, in British Columbia, a number of years ago the Court did so, but perhaps the facts were different.

Specific Bequests

A specific bequest is usually a gift to a particular person of a specific item or items that has or have special meaning to the testator. It is a good idea to make it clear in the wording of a specific bequest that the give takes effect only if the item forms part of the testator's estate.

It should also be determined what the testator's intention is with respect to the specific bequest if the beneficiary should predecease him or her. Is the article to fall into residue or is it to go to another person as a gift over?

Some parents will provide in their will for all of the furniture, furnishings and other household effects to be delivered to the children alive at the surviving parent's death for distribution between/among them in such manner as the children agree, or if they don't agree, then in such manner as the executor considers fair and reasonable.

Cash Legacies

Cash legacies, or more commonly known as "pecuniary legacies," are used by testators to leave a specific amount of money to a particular person.

Grandparents sometimes use pecuniary legacies to leave each grandchild a specified amount of money. Usually it is done as a token of remembrance.

People also use pecuniary legacies to provide gifts to their favourite charity or charities.

The only danger in having a whole raft of pecuniary legacies in the will is that the testator may not have sufficient assets in his or her estate to pay the debts and expenses plus all of the cash legacies. If this occurs, then, as previously mentioned, the pecuniary legacies have to abate rateably which may or may not be the testator's intention.

If this possibility exists, then the lawyer should ascertain from the testator whether a rateable abatement of the cash legacies is his or her intention. If not, then state the testator's intention.

Demonstrative Legacies

A "demonstrative legacy" is where a beneficiary is to receive a certain amount of money out of a particular pool of funds (e.g., out of the net sale proceeds of the house, the executor is directed to pay to the testator's grandchild, X, the sum of $5,000).

Beneficiaries

Spouse (Lawful)

This pertains to the spouse whether married or those that meet the definition of a "spouse" pursuant to the applicable provincial statutes.

In many cases, testators will wish to leave their entire estate to their spouse and vice versa.

In other cases, the testator may choose, for one reason or another, to leave the spouse something less than all of the estate.

Irrespective of the portion of the estate earmarked for the spouse's benefit, the testator has to decide whether to provide financially for his or her spouse by way of outright gift or by way of a spousal trust.

Spousal Trust
If the testator chooses to provide for his or her spouse by way of a spousal trust then the wording of the spousal trust clause must meet the criteria set out below if capital assets are going to be

allowed to roll from the testator into the spousal trust on a tax deferral basis.

To qualify as a "spouse trust," the *Income Tax Act* (Canada) requires the following criteria to be met (s. 70(6) interpreted by CRA, "Testamentary Spouse Trusts"):

1. The spouse must be entitled to receive all the income of the trust arising before the spouse's death.
2. No one but the spouse may receive or otherwise obtain the use of any of the income or capital of the trust before the spouse's death.
3. The trust property must vest indefeasibly in the spousal trust within 36 months of the testator's death or such further time as the Minister of National Revenue considers reasonable.
4. The property must vest indefeasibly in the trust fund before the spouse's death.
5. The testator must have been resident in Canada immediately before his or her death and the trust created by the testator's will must be resident in Canada immediately after the time the property vested indefeasibly in the trust.

A testator may choose to use a spousal trust for any one of the following reasons:

- the spouse may be mentally incapacitated
- the spouse suffers from some addiction which renders the spouse incapable of making sound business decisions
- the testator may wish to preserve an asset, such as farmland, for the benefit of the spouse during his or her lifetime, but may wish to ensure that the farmland passes to one or more of the children upon the surviving spouse's death
- this may be the testator's second marriage or the testator may have been cohabiting for two years or more and he or she may have children from a previous marriage or otherwise that he or she wishes to benefit upon the surviving spouse's death.

Outright Gift

The testator may choose not to use a spousal trust but rather leave some or all of his or her assets to the surviving spouse outright.

Children

The following are considerations that have to be taken into account when taking instructions for a will from a testator who has children:

- How old are the children?
- Are the children all from the testator's current marriage or are some or all of the children from a previous marriage?
- Are any of the children incapacitated?
- Is there likelihood of further children?
- Are the children to receive any benefit under the terms of the will if the testator's spouse survives or do the children only benefit on the death of the survivor of the testator and the testator's spouse?

If it is unlikely that the testator will have more children, then the children should be named in the will. If the testator expects to have more children, then it is best simply to refer to "children" in general, and define the term "children" to mean: "my children X, Y, and Z and any other children hereafter born of my marriage to A.B." or "those children born of my marriage to A.B." or whatever is appropriate to describe the children to be included.

If the children are under 18 years, then there should be a trust set up for each infant child until the infant reaches at least the age of 18 years. It is not uncommon, since the age of majority has been lowered to 18 from 21, for parents to wish to postpone a child becoming entitled to receive all of the capital until an age beyond 18. It is also not uncommon for parents to wish to have the capital paid out to a child in two or more stages rather than have the child receive the capital in one lump sum.

If the parents survive until their children reach an age beyond 18 years, the time will come when the parents will be quite satisfied for the children to receive their shares of the estate upon the surviving parent's death without the use of a children's trust or trusts. Often at this stage, the parents decide to have new wills drawn.

Bequests or gifts to a beneficiary cannot be postponed once the gift has vested indefeasibly and the beneficiary has reached the age of majority: see *Saunders* v. *Vautier*. Accordingly, in order to keep a child from having the court terminate his or her trust upon the child reaching 18 years of age, the wording of the trust should contain the following:

1. no words of immediate gift
2. a gift over to someone else in the event the child dies before reaching the age of indefeasible vesting (preferably

> unascertained infants such as the issue of the deceased child).

In other words, have no words conveying the capital to the beneficiary until he or she attains the specified age and if he or she dies while under that age, specify an alternative beneficiary(ies) to whom the gift is to pass, preferably unascertained beneficiary(ies) so they cannot get together with the primary beneficiary and agree to collapse the trust prematurely.

The Saskatchewan Court of Appeal considered the application of the *Saunders* v. *Vautier* decision to the facts in *Berwick* v. *Canada Trust Co.*, [1948] SCR 151; [1948] 3 DLR 81; affirming (*sub nom Berwick*) [1947] 2 WWR 799; [1948] 1 DLR 139, which latter case was quoted with approval by MacDonald, J.A. in *Salterio* (p. 177 and p. 178) when he stated:

> With deference I do not think that the decision in *Saunders* v. *Vautier* … applies to this case. There the gift was to trustees of East India stock upon trust to accumulate the dividents (sic) until D.W.V. should attain the age of 25 years and then to transfer the principal with such accumulations to D.W.V., his executors, administrators or assigns absolutely. There was thus no gift over; instead there was an absolute gift to the legatee, his executors, administrators or assigns, with an attempted postponement of its enjoyment.
>
> Here the gift to the legatee of the second half of the residue is contingent on his surviving the testatrix by 10 years: [34 Hals.,] 2nd ed., p. 374; *Jarman on Wills*, 7th ed., p. 1373. If he does not so survive the testatrix and does not make an appointment by will, then the said residue is to be distributed [as provided for in subcl. (d) above]. There is thus a gift over, for if the son does not outlive the testatrix by 10 years and does not make an appointment by will those then entitled would take, not through devolution by law, but through the will of the testatrix.
>
> The Supreme Court of Canada upheld the judgement of this Court. Estey J., in delivering judgment, wrote at p.155 S.C.R:
>
> > Under both of the above paragraphs (c) and (d) the son has but a right to the property if he lives the period of 10 years and can exercise his power of appointment only through the medium of his will. The position is as Mr. Justice Macdonald, speaking on behalf of the Court of Appeal [p. 802 W.W.R.] stated: 'There is thus a gift over, for if the son does not outlive the testatrix by 10 years and does not

> make an appointment by will those then entitled would take, not through devolution by law, but through the will of the testatrix.
>
> Alexander Raymond Berwick has not under the will of his mother 'an absolute vested gift' and therefore his request does not come within the rule of *Saunders* v. *Vautier* (1841) 4 Beav. 115, 49 E.R. 282, [affirmed on appear Cr. & Ph. 240, 41 E.R. 482], as explained by Lord Davey in *Wharton* v. *Masterman* [189] A.C. 186. (p. 177 and p. 178)

If the children are all from the testator's current marriage, then both parents have an equal legal responsibility to provide for a dependant child.

If the testator is the lawful parent of a child born of a previous marriage or relationship, then the testator's current spouse has no legal obligation to his or her stepchild, unless he or she has legally adopted the stepchild. Accordingly, this should be brought to the testator's attention.

The testator also needs to be reminded that even though the current spouse has made provision for the stepchild in his or her current will, there is no guarantee if the testator dies first that the current spouse will not subsequently revoke his or her will and have a new one drawn, which makes no provision for the stepchild. The stepchild would also have no claim on the step-parent's estate.

It has to be determined whether the testator's children are to receive a benefit if the testator's spouse survives or only on the death of the survivor of the testator and his or her spouse. If parents wish to leave certain specific bequests to children or other beneficiaries following the death of the surviving spouse, those items may or may not wind up in the surviving spouse's estate, depending on whether the surviving spouse inherits the items or not. If it is possible for the surviving spouse to inherit items intended for the children or someone else upon the death of the surviving spouse, the specific bequest(s) should appear in each spouse's will so that the designated child(ren) or other person will receive the items irrespective of which spouse survives, assuming such items still exist at the surviving spouse's death.

When referring to those items that the spouse may have inherited from his or her spouse one should state "if it forms part of my estate" or "if my spouse's gold watch should form part of my estate, then …." It has to be kept in mind that if a 30-day clause is used and if the testator's spouse survives the testator for 30 days or more, such items will pass to the surviving spouse and such items will be distributed in accordance with the surviving

spouse's will. On the other hand, if the spouse predeceases or survives the testator for less than 30 days, assuming a 30-day clause is in the will, such items will not form part of the spouse's estate and they will be distributed according to the Testator's will.

Consideration should also be given to whether the testator intends the issue of a deceased child to receive a deceased child's share or whether the share of a deceased child is to go to the Testator's own surviving children.

Gifts to children, or other issue, brothers and sisters must be made conditional upon the person surviving the testator if the provisions of s. 22 of *The Wills Act, 1996*, as amended, do not represent the testator's intention

The writer would not use the term "spouse" in a will to describe a lawfully married husband or wife because most married people want the world to know they are married. In such a case the term husband and/or wife would be preferable.

Single People

If a single person has no children and no spouse that he or she is required by law to provide for, then that single person can provide for parents, siblings, nieces, nephews or other relatives and/or friends and/or charities or whomever he or she wishes.

Setting up a testamentary trust for a niece or nephew requires the same considerations as those for any child's trust, which are as follows:

1. When is the capital to vest indefeasibly?
2. Is the beneficiary entitled to income in the interim?
3. Is the trustee authorized to encroach on the capital for the beneficiary's benefit?
4. Who do the trust funds pass to if the primary beneficiary dies before becoming entitled to receive it?

Common Disaster Clauses

Lawyers normally insert a clause that requires a spouse to survive for a specified number of days before becoming entitled to inherit assets outright by the terms of the testator's will. This is often 30 days, 60 days, 20 days or 10 days depending on the lawyer's preference. There is nothing magical about these time periods. A spouse could just as easily survive the time period by one day, then die. This has become less important as a result of the provisions of *The Survivorship Act, 1993* which provides for a five-day period.

In reciprocal-spouse wills, the purpose of a common disaster clause is to attempt to prevent administering the same assets through two estates in order to get the assets to the person(s) that the spouses intend to receive the assets in the first place.

The condition that someone survive for "X" number of days should be used for any beneficiary that spends a good deal of time with the testator or with whom the testator travels, since the testator and such person could both be in an accident and both could die as a result of their injuries, but they may not die at the same moment or even on the same day.

A common disaster clause can also take the form of a clause that provides for the distribution of the estate in the event the testator, his or her spouse and all of their children die leaving no other issue of the testator living (assuming the will contains a gift over to the issue of any deceased child).

In cases where the testator and spouse have acquired what they own by their own efforts, the testator and his or her spouse will often provide for the division of whatever is left in each estate into two equal shares: one share to be distributed to certain named persons on the testator's side of the family and the other share to be distributed to certain named persons on the spouse's side of the family. By taking care of the residue of the estate in this way, it does not matter whose estate all or some of the assets wind up being distributed out of since the testator's family and the spouse's family are treated equally in both the testator's will and the testator's spouse's will.

In cases where a parent or one set of parents has/have by will or *inter vivos* gift given land or other assets to the testator or to the testator and spouse, it may be the testator's intention that those assets should go back to the side of the family from where they came, in the event of a common disaster. In such a case, both wills should reflect what assets are to go back to one or other of the families.

If it was a cash gift in a fixed amount of money, one has to make sure that the amount is not paid out of both estates if that is not intended since it is unlikely that such an occurrence is intended. This can be taken care of by placing the same clause in each spouse's will, but also placing in one spouse's will words such as "less the amount, if any, paid, pursuant to a similar provision in my husband's/wife's will. It is not my intention nor that of my husband/wife that this gift be paid in full out of both estates, although my trustee(s) may pay it partly out of one estate and partly out of the other." This prevents a cash legacy from being paid out of each spouse's estate if it was intended to be paid only out of one spouse's estate or partly out of one and partly out of the other, if need be.

If spouses have mostly jointly owned (with right of survivorship) assets, it is impossible to tell in advance which assets will wind up in each estate. It really becomes a matter of luck who ends up with them. *The Survivorship Act, 1993* provides that if two people die within five days of each other, and the survivor has not created in himself/herself or some third party an interest in any jointly held property within that five-day period, then each party is deemed to have owned an undivided one-half interest and each estate winds up with an undivided one-half interest in the property. If one spouse survives six days or more, this provision of the *Act* does not apply.

With respect to property owned exclusively by each person, if both the testator and the proposed beneficiary die at the same time, the property is to be disposed of as if the owner had survived.

The Survivorship Act, 1993 deems two or more persons dying in the following circumstances to have died at the same time:

- they die in circumstances where it is uncertain who survived the other or others
- they die within five days of each other.

Other Assets That May Need Special Treatment

Shares in a Private Corporation

If the testator owns shares in a private corporation, he or she may be subject to a Shareholder's Agreement that contains a buy-sell provision that is triggered upon the testator's death.

If the buy-sell provision is mandatory, then the surviving shareholders are required to buy the deceased shareholder's shares or the corporation is required to buy them or redeem them.

Accordingly, testators have no right to bequeath the shares to someone in their will.

On the other hand, a buy-sell provision may simply give the surviving shareholders an option to acquire the testator's shares. In this case, the testator may wish to bequeath the shares to his or her spouse for tax reasons; however, the surviving shareholders would still have the right to purchase the shares, but now the shares would be purchased from the spouse.

Partnership Interests

A partnership interest could be subject to a partnership agreement giving rights to the surviving partners to buy-out a deceased partner's interest.

In this case, the same considerations as noted with shares in a private corporation could apply to the partnership interest.

Assets Owned by a Corporation

Keep in mind that assets that are transferred to or purchased by a corporation as far as the testator is concerned are assets of the corporation and not assets of the shareholder(s) since the corporation is a separate legal entity from the shareholder(s). Accordingly, no shareholder can dispose of assets owned by the corporation by his or her will even if he or she is the sole shareholder. The shareholder may be able to bequeath his or her shares in the corporation by his or her will but not the actual assets of the corporation. This may seem rather trite but shareholders do sometimes confuse what is owned by their corporation and what they own personally and, unfortunately, lawyers can become unwitting pawns of the testator. The bottom line is that many people do not understand that the assets the corporation owns are not their assets, even if the testator is the sole shareholder of the corporation.

The danger is in a client coming to you to make a will and he or she does not mention he or she owns a corporation. The client then proceeds to devise or bequeath certain specific assets to specific people. If the client is purporting to bequeath real property, conduct a search of the property at Information Services Corporation (ISC) to see who is the registered owner. It could be in a joint tenancy, which cannot be broken by a will or it may be in the name of a corporation. Also check the endorsements against the title to ensure there is/are no adverse interest(s) registered, i.e., someone claiming an interest under an Agreement for Sale, a Trust Agreement, an unregistered transfer or some other adverse claim. As for other assets the testator may wish to specifically bequeath, they may be more difficult to check, but do your best.

Often clients will refer to an asset as being one thing when in fact it is really something else.

The *Re: Thornton Estate, 1989* case sent shock waves through the legal community when the trial level decision was written in 1989. The Saskatchewan Court of Appeal level decision is referred to by the name of *Wilhelm* v. *Hickson*. All of the decisions, particularly the decision of Mr. Justice Dielschneider at trial and Mr. Justice Sherstobitoff at the Court of Appeal should be read.

Power Clauses

It is very important when drawing a will that one consider the powers that the executor or trustee is going to need in order to effectively carry out the terms of the will. If a trustee has not been given the power to do certain things, it can result in an application to the court for authorization to do so. This can put the estate to needless additional expenses and can also cause unnecessary delays in the administration of the estate.

There are, of course, a great number of power clauses around and they can be found in any number of will precedent textbooks. The following are some examples of the more common ones that are used:

General Infant Beneficiaries Trust

This involves the power to hold in trust any share of the estate, which someone under 18 years of age may be entitled to receive: see the Appendix, clause 7 of "Sample 1: Last Will and Testament."

This is a general clause that applies to those shares of the estate that have **vested** in an infant beneficiary. [emphasis added]

This clause need not be included if the only possible beneficiaries of the estate are adults.

This clause will deal with the gifts over to issue in the event of the death of a child (assuming the gift over vests on the death of the survivor of the testator and the child).

If this clause is not included in the will and if there is an infant beneficiary(ies) and no other trust provisions are set out in the will dealing with the infant's share of the estate and the infant is entitled to an outright share of the estate, the executor will be required to pay the infant's share over to the Office of the Public Guardian and Trustee upon distributing the estate. In other words, no provision has been made for the personal representative

(executor or Administrator with will Annexed) to hold the infant's share in trust.

Power to Make Payments to Parent or Guardian of Infant Beneficiary

This enables the executor or trustee to make any income and capital payments advanced for the benefit of an infant beneficiary during his or her minority to the beneficiary's parent or guardian.

From a practical point of view, the executor may not always be able to accompany the infant beneficiary and his or her parent or guardian when goods and services are being purchased for or on behalf of the infant beneficiary. This clause allows the executor to give the money to the parent or guardian in exchange for a receipt since an infant beneficiary cannot give an executor or trustee a valid receipt for a payment while under the age of majority.

To the extent that it is possible to do so, an executor can pay directly for the goods and services being acquired by or for the benefit of the infant beneficiary, but this may not always be practical.

Executor's Investment Powers

Some lawyers automatically include a power to broaden the executor or trustee's powers of investment beyond those set out in *The Trustee Act* (RSS 1978, T-23).

After seeing what can happen to estate assets when executors have become carried away with investing in all sorts of speculative ventures, it makes one wonder whether placing a clause to broaden an executor's powers of investment in a will might not give an executor some false belief that he or she can invest in whatever speculative ventures he or she desires. If it is decided to broaden the executor's powers, make sure that it is documented in the file that the client requested the clause, after being cautioned about the potential for abuse.

There seems to be somewhat of a trend developing where lay executors or trustees believe they can administer an estate without the advice of a lawyer. In these situations, there may not be a lawyer on the scene to inform the executor or trustee about his or her powers and duties regarding the investment of the estate assets. Accordingly, in the wrong hands, a clause that broadens the powers of investment of a trustee can be dangerous. The testator must be fully informed of the meaning of such a clause before it is inserted in the will and the testator must approve it being included. A lawyer might be held liable to some extent if such a clause were included in a will and it was abused by the executor(s) if the lawyer could not show that the testator understood the nature of the clause.

Division in Specie

This type of clause gives the executor or trustee the power to make division of the estate or to set aside in trust or to pay any share or interest, in the actual assets of the estate. This clause works really well.

The executor or trustee may use this clause to distribute a really good investment owned by the deceased at his or her death, *in specie*, to a trust created in the will or to a beneficiary or divide it among several beneficiaries. Except if the beneficiary or trust is the sole beneficiary, the asset is valued and attributed to the trust or the beneficiary(ies), as the case may be. This keeps things equal where there are two or more beneficiaries who are to share the estate equally but the executor and/or the beneficiaries do not wish certain assets to be sold in order to distribute the estate.

This clause also works if a beneficiary asks to have a specific asset from the estate, the asset can be valued and the beneficiary can take the asset in lieu of that amount of cash assuming the beneficiary is entitled to that amount of cash as an outright gift.

Elections and Determinations for Tax Purposes

The tax accountants are concerned that Canada Revenue Agency may prevent executors from making elections and determinations allowed under the *Income Tax Act* (Canada) unless the power to do so is contained in the will. This concern also applies to the *Excise Tax Act, 2001* that contains election provisions. Such a clause seems to give the accountants a degree of comfort, although it has not been the writer's experience that Canada Revenue Agency has ever insisted that the executor had to have the power set out in the will in order to make the elections or determinations.

Power to Lease Real and Leasehold Property

If an executor has an infant beneficiary interested in the estate and the executor wishes to enter into a lease of estate-owned real property, he or she will require the Public Guardian and Trustee's or the Court's consent. Normally, the first question the Public Guardian and Trustee asks when approached for consent is "Does the executor have the power to lease?" In other words, is there power given to the executor in the will to enter into a lease?

For this reason, a "power to lease" clause is usually used in situations where the testator has some form of commercial real property and the executor is likely to have to lease it either because the property is being held in trust for someone, the executor is unable to find a buyer, the asset is a good investment and the beneficiaries wish to keep the real property, or perhaps real property values are temporarily depressed and the executor wishes to wait for a better market.

Power to Vote Shares

If the testator has shares in a private corporation or corporations, the executor can be given the power to vote the shares to the same extent and as fully as the testator.

While the shares remain part of the estate, the executor is the legal owner in his or her capacity as executor. The executor has no beneficial ownership in the shares except if he or she is also a beneficiary entitled to share in the distribution of the corporate shares pursuant to the terms of the will. Without such a power clause, the executor's right to vote could be challenged.

Inserting such a clause in the will also gives the executor some idea about what he or she can do since many executors have no idea what their powers, duties and liabilities may be except for professional executors (i.e., trust companies and lawyers who are more knowledgeable about trust matters).

Other Powers Dealing with Corporate Shares and Corporate Reorganization

If the estate is likely to have shares in a corporation where people other than the deceased own shares, then out of an abundance of caution one should give the executor the power to fully participate in certain activities involving the corporation in order to protect the integrity of the estate's position in the corporation.

Such a clause can give to the executor *inter alia* the ability to take up any portion of the increased capital allotted to the executor so as not to have the estate's shares in the corporation diluted or the executor can sell the right to such share allotment.

The executor is also authorized to participate in any reconstruction or reorganization of the corporation, or the amalgamation of the corporation with another. There are often other powers that are also included in clauses of this type: see the Appendix, clause 14 of "Sample 1: Last Will and Testament."

Power to Operate a Business

If the testator operates a business or controls a corporation that operates a business, the executors may need powers related to carrying on the business whether it is to be eventually sold as a going concern or the business or the shares in the corporation are being kept as an investment of a testamentary spousal trust or children's trust or the shares are required by the will to be held and ultimately transferred to a child or other beneficiary either after the beneficiary(ies) reach(es) a specified age or upon the death of the spouse: see the Appendix, subclause 6(f) of "Sample 1: Last Will and Testament."

Guardians

Parents are entitled by section 4 of *The Children's Law Act, 1997* (ss. 1997 c.8.2) to name a guardian for their infant children by will, if the parent is of age pursuant to the terms of *The Wills Act, 1996* to make a valid will or by deed if the parent is not of legal age pursuant to the terms of *The Wills Act, 1996*.

Parents can appoint one person as guardian with an alternative or they can appoint two or more and then appoint another two or more alternatives. From a practical point of view, if the parents choose to appoint more than one guardian, it should be a couple or at least people who live together or in close proximity to each other.

If the clients are married to each other and have children of their marriage, then in such cases the guardianship clause should be worded to take effect upon the death of the surviving parent.

For those clients who are separated or divorced, *The Children's Law Act, 1997* in certain circumstances, allows the parent with custody to appoint a guardian. If s. 4(3) of *The Children's Law Act, 1997* does not apply, then the surviving parent of a child is the child's legal custodian and may appoint one or more persons as legal custodian to take effect upon the surviving parent's death (s. 4(1)(b)).

In the absence of such an appointment, the court will be required to appoint a guardian who may or may not be the person that the parent(s) would have chosen.

One can also provide in the guardianship clause for what happens to the infant child/children if the guardians separate or divorce or if one or both of them die or give up custody of the child/children or become incapacitated from acting or simply get tired of the job: for an example, see "Additional Clauses: Children – Guardian" in the Appendix.

Intention Not to Benefit Spouse(s) of Beneficiary(ies)

There may be some jurisdictions which have legislation that allows a testator to make a devise or bequest to a beneficiary(ies) and to declare that it will not become part of the beneficiary's(ies') family property if the beneficiary is married or living in a spousal relationship when the inheritance vests. So far, in Saskatchewan, we do not have such legislation, however, there is apparently a line of case law that has developed whereby, depending on whether the beneficiary has used the inheritance for family matters or has kept it separate from the family property assets the beneficiary may be able to have it excluded. If it was kept separate from the family assets, then apparently the court

will consider excluding it. Some family law lawyers feel it should be in a will, but others seem less concerned about having it included.

Clients, particularly parents and grandparents of children and grandchildren who are experiencing matrimonial or spousal relationship difficulties often wish to prevent the child's/grandchild's spouse from having a claim on the child's/grandchild's inheritance.

Although clauses such as the one shown in clause 15 of "Sample 1: Last Will and Testament" in the Appendix are used from time to time, the client has to be advised that until the law of Saskatchewan changes, probably such a clause itself has no effect in Saskatchewan. It may be that it really depends on how the beneficiary deals with the inheritance that determines how the court will view it. However, there is no harm in including such a clause and it may be important that the court knows the testator did not intend to benefit the beneficiary's(ies') spouse if the beneficiary's(ies') marriage breaks down after the inheritance is received or the beneficiary's(ies') right to the inheritance has vested.

Summary

The Law Society of Saskatchewan errors and omission insurers consider that wills are a high risk area of practice. The decision in *Hickson* v. *Wilhelm* (also known as *Wilhelm* v. *Hickson*) decision serves to confirm the insurer's belief.

One has to remember that a will drafted today may come back to haunt the lawyer who drew it many years in the future when the testator dies. For this reason, one should never treat wills lightly.

Our errors and omission insurers wish us to keep our instructions and any other notes and memoranda, we may collect during the will making process. These are not records that can be safely destroyed after five or 10 years.

Lawyers should not become slaves to their precedents. Precedents help to save time but in the final result most often some adjustment has to be made to the precedent clauses to fit the client's needs.

It seems that the duty imposed upon lawyers with regard to wills continues to expand, which in some ways is a little unfair in view of the fact that the price paid for wills and which the public is prepared to pay usually bears little comparison to the enormous potential for liability placed on lawyers by the courts.

Estate Planning Checklist

Date:_____

Solicitor:_____

1. All clients answer

Name:_____

Birth date & place:_____

Occupation:_____

Address:_____

_____

_____

Phone (Land):_____

Cell Phone:_____

Email:_____

2. Please answer the following if married, or divorced, or separated:

Spouse's name:_____

Spouse's birth date & place:_____

Occupation:_____

Where were you married?:_____

_____

Marriage or domestic contract?:_____

_____

(Provide copy)

Citizenship: Spouse A _____ Spouse B _____

Domicile: _____

Previous marriage by either spouse: _____

If so, particulars of which spouse: _____

(a) Date and place of divorce: _____

(b) Name of previous spouse: _____

3. Children/Grandchildren

Name	Address	Date of Birth

4. Principal Residence

Owned: Yes_____No_____

In whose name registered (if owned) Value and date of purchase

_____ _____

Location and mortgage: _____

_____

5. Pension Plans and Life Insurance

Name of company: _____

_____

Death Benefit/Survivors' Benefits available: _____

_____

Designated beneficiary: _____

_____

Life insurance policies:

Company	Beneficiary
_____	_____
_____	_____
_____	_____

6. Registered Retirement Savings Plans

Company	Beneficiary designated
_____	_____
_____	_____
_____	_____

7. Registered Retirement Income Funds and Annuities

Company	Beneficiary
_____	_____
_____	_____
_____	_____

8. Other Properties:

Cottage property (in whose name?) Value and date of purchase

_____ _____

Location & mortgage: _____

_____

Other real estate (in whose name?) Value and date of purchase

_____ _____

Location & mortgage: _____

9. Personal Effects – Ownership

Furniture Value and date of purchase

who owns what? _____ _____

jointly owned? _____ _____

Auto, other vehicles Type Who purchased

_____ _____

_____ _____

_____ _____

10. Special Collections

Collection Type Who purchased

_____ _____ _____

_____ _____ _____

_____ _____ _____

11. Investments

Nature of Investment	Approximate value in total	When purchased
Stocks & shares in public companies		
Canada Savings Bonds		
Other bonds, GICs & term deposits		
Miscellaneous		

12. Interest in Private Companies

Names of Companies	Share Structure	Value

13. Banking

Name of Bank: _____

Location: _____

Type	Amount
Accounts jointly held:	
Accounts in your name:	
Safety deposit box:	

Name of Bank: _____

Location: _____

Type	Amount
Accounts jointly held:	
Accounts in your name:	
Safety deposit box:	

14. Other Assets (specify)

Instructions for Will

Date:_____

Solicitor:_____

1. Executors

Initial Executor (e.g., spouse – where applicable)

_____

_____

Alternate Executors (if initial predeceases or is unable to act or if spouse makes statutory entitlement election)

_____

_____

Special Executorship Provisions (e.g., majority? foreign executor? agency? business? power of attorney? if spouse makes entitlement)

_____

_____

_____

_____

2. Disposition of clothing. jewellery, personal effects, household goods, furniture, automobiles

_____

_____

_____

_____

3. Provision for Children (including age at which they receive)

4. Other Beneficiaries

5. If no spouse or children alive, who will participate?

6. Disaster Clause (if none of the above beneficiaries are alive or if all die in common accident)

7. Funeral Instructions

8. Custody of children and guardianship of their assets

9. Miscellaneous

Instructions for *Inter Vivos* Trust Checklist

1. Settlor

Name: _____

Residence: _____

_____

_____

Relationship to proposed beneficiaries: _____

_____

_____

_____

2. Trustee(s)

_____

_____

_____

3. Alternate trustee(s)

_____

_____

_____

4. Conditions for changes of trustee(s) (e.g., death, resignation, removal)

5. Beneficiaries

Names and relationships to settlor/trustees:

6. Name of trust

7. Termination date and conditions

8. Specific terms and directions

_____

_____

9. Miscellaneous

_____

_____

_____

_____

Sample 1: Last Will and Testament

THIS IS THE LAST WILL AND TESTAMENT of me, _____, of _____, in the Province of Saskatchewan.

1. I HEREBY REVOKE all Wills and testamentary dispositions of every nature and kind whatsoever by me heretofore made.

2. I NOMINATE, CONSTITUTE AND APPOINT my [*husband/wife*], _____, sole [*Executor/Executrix*] and Trustee of this my Will, but if my [*husband/wife*] should predecease me, or die within a period of thirty (30) days following my decease, or without having proved this my Will, or if my [*husband/wife*] should be, or become incapacitated from acting, or unwilling to act, then, on the death of the survivor of my [*husband/wife*] and me, or upon my [*husband's/wife's*] incapacity, or unwillingness to act, as the case may be, I NOMINATE, CONSTITUTE AND APPOINT _____, of _____, to be the [*Executor/Executrix*] and Trustee of this my Will in the place and stead of my [*husband/wife*]. I DECLARE that the expression "my Trustee" used throughout this Will shall include, where the context permits, the [*Executor/Executrix*] and *Trustee* for the time being of this my Will whether original or substituted.

3. I DESIRE that my body shall be cremated and the ashes _____.

4. I CONFIRM that the proceeds of all policies of insurance on my life owned by me at the time of my death [including the proceeds of all group policies] shall be payable and paid to my [*husband/wife*], _____, provided [*he/she*] survives me, in accordance with the terms of such policies. In the event, however, that my said [*husband/wife*] predeceases me, I HEREBY DECLARE that the proceeds of all policies of insurance on my life owned by me at the time of my death shall be payable and paid to the person who shall from time to time be acting as my *Trustee*, but such proceeds shall be paid to my *Trustee*, in [*his/her*] capacity as insurance trustee, and not in [*his/her*] capacity as *Executor* and *Trustee* of my estate assets and the proceeds shall be held by my insurance trustee in trust for my [*sons/daughters/children*] and other issue, and for my mother, father, mother-in-law and father-in-law, upon the same trusts, terms and conditions as if such proceeds had formed part of the residue of my estate, but the said proceeds shall be held in trust pursuant to the terms of *The Saskatchewan Insurance Act*, or the applicable legislation of another jurisdiction having a similar provision and shall not form part of my estate. The term "Trustee" and "Executor and Trustee" shall include the plural number and the feminine and neuter gender where applicable. This declaration shall be a declaration within the meaning of *The Saskatchewan Insurance Act*.

5. IF [*he/she*] survives me for thirty (30) days, then I HEREBY GIVE, DEVISE AND BEQUEATH UNTO my [*husband/wife*], _____, of _____, in the Province of Saskatchewan, all my real and personal property of whatsoever nature and wheresoever the same may be situated, including any property over which I may have a general power of appointment, for [*his/her*] sole use and benefit absolutely.

6. IF my [*husband/wife*] should predecease me, or survive me for a lesser period than thirty (30) days, I GIVE, DEVISE AND BEQUEATH all my real and personal property, of whatsoever nature and wheresoever the same may be situate, including any property over which I may have a general power of appointment, to my *Trustee* on the trusts hereinafter set out, that is to say:

(a) If _____ is living at the death of the survivor of my [*husband/wife*] and me, to deliver the following items to _____, for [*his/her*] own use absolutely; namely:

(*list items*)

(b) If _____ is living at the death of the survivor of my [*husband/wife*] and me, to deliver the following items, if they should form part of my estate, to _____, for [*his/her*] own use absolutely, namely: my [*husband's/wife's*] diamond ring and my [*husband's/wife's*] gold watch.

(c) Subject to subclauses (a) and (b) of this Clause 6, to divide all articles of personal, domestic and household use or ornament belonging to me at my death, including consumable stores, but not including any automobile then owned by me, among those of my [*sons/daughters/children*] who shall survive me in such manner as my surviving [*sons/daughters/children*] shall within three (3) months of my death agree upon, and in default of agreement in such manner as my *Trustee* thinks appropriate.

[Next clause to be used where spouse gets all of estate, but if spouse predeceases or dies within 30 days, the residue is held in trust for the children, who are financially dependent on the testator. If there is no financially dependent child/or other issue then there is no need for the clause. Some believe that the clause is unnecessary in any case.]

(d) If on my death my estate is entitled to receive any amount out of, or under, a Registered Retirement Savings Plan owned by me at the time of my death, then subject to the provisions hereinafter contained, to pay or transfer the amount so received from such Registered Retirement Savings Plan to those of my [*sons/daughters/children*], who are living at the death of the survivor of my [*husband/wife*] and me, in equal shares if more than one. If my estate shall, in connection with or in respect of such amount, be liable for the payment of any tax under the provisions of the *Income Tax Act* (Canada) or any income taxes payable in the Province of Saskatchewan and/or any other Province or Territory of Canada, the amount to be divided and paid or transferred to my said [*sons/daughters/children*] shall, subject to the provision hereinafter contained, be reduced by the amount of such tax payable by my estate. If, however, by virtue of any provisions of the *Income Tax Act* (Canada) which allow for any exemptions or deductions of such tax payable by reason of a special or different status of any of my said [*sons/daughters/children*] then the amount of the exemption or deduction allowed for any of my said [*sons/daughters/children*] in reduction of the tax that might otherwise be payable shall be paid by my *Trustee* to such [*son/daughter/child*] as its share of the proceeds, notwithstanding that in the result all of my said [*sons/daughters/children*] may not share equally in the said proceeds. I hereby empower my *Trustee* to make elections, designations or determinations in connection with or in respect of the amount so received as may be necessary or which, in the opinion of my *Trustee* may be advisable in order to reduce the burden of tax payable by my estate or by any infant beneficiary.

(e) Subject to subclauses (a), (b), (c) and (d) of this Clause 6, to use [*his/her*] discretion in the realization of my estate, with power to my *Trustee* to sell, call in and convert into money any part of my estate not consisting of money at such time or times, in such manner, upon such terms and either for cash or credit or part cash and part credit, as my *Trustee* may in [*his/her*] uncontrolled discretion decide upon, or to postpone such conversion of my estate or any part or parts thereof for such length

of time as [*he/she*] may think best. I hereby declare that my said *Trustee* may retain any portion of my estate in the form in which it may be at my death (notwithstanding that it may not be in the form of an investment in which trustees are authorized to invest trust funds, and whether or not there is a liability attached to any such portion of my estate) for such length of time as my said *Trustee* may in [*his/her*] discretion deem advisable. My *Trustee* shall not be held responsible for any loss that may happen to my estate by reason of [*his/her*] so doing.

(f) Without limiting in any way the general power and discretion herein given to my *Trustee*, I authorize [*him/her*] to retain as authorized investments of my estate for such length of time as [*he/she*] in [*his/her*] absolute discretion consider[*s*] advisable the shares of _____, and of any other companies in which at my death I may hold the controlling interest, either directly or indirectly, and while these shares are so retained I authorize my *Trustee* to do all things in connection with the shares and with the operation of the said company or companies to the full extent that I could do if living.

I further authorize my *Trustee* to employ a manager to manage any business or businesses that I may own directly or indirectly at my death, including the business carried on by _____ _____, until such time as the business or businesses, including the business carried on by _____, can be sold and to pay to such person a salary in such amount as my *Trustee* in [*his/her*] absolute discretion consider[*s*] reasonable from time to time; and my *Trustee* shall be entitled to rely on such manager's management of the business or businesses, including the business carried on by _____, without having to inquire into the day-to-day operations thereof and shall be relieved of responsibility for so doing.

[The following paragraph is optional, depending on the testator's intent.]

It is my wish that prior to selling the shares of _____, that my *Trustee* give to _____ the option of purchasing the said shares at a price and upon terms which my *Trustee* in [*his/her*] absolute discretion consider[*s*] advisable, and I declare that the decision of my *Trustee* as to price, terms, time within which the option must be exercised and generally in all matters relating to the provisions of this paragraph shall be final and binding upon all persons concerned.

(g) To pay out of and charge to the capital of my general estate my debts, funeral and testamentary expenses.

(h) To keep invested the residue of my estate and to pay to, for, or on behalf of any [*son/daughter/child*] of mine alive at the death of the survivor of my [*husband/wife*] and me, the whole or such part of the net income derived therefrom and so much of the capital of the residue of my estate as my *Trustee* in [*his/her*] uncontrolled discretion, consider[*s*] advisable or necessary for the benefit, maintenance, care, support and education (including higher vocational and university education) of any surviving [*son/daughter/child*] of mine, or some one or more of them, in such proportions and in such manner as my *Trustee*, in [*his/her*] absolute discretion consider[*s*] advisable from time to time until there is no longer any [*son/daughter/child*] of mine living and under the age of _____ years. Any income not so used in any year shall be added to the capital of the residue of my estate and shall be dealt with as part thereof.

[NOTE: Only use this capitalization clause if the child's share of residue will paid out in full within 21 years of the testator's death.]

When there is no longer any *child* of mine living and under the age of _____ years, I DIRECT my *Trustee*[*s*] to pay, transfer and deliver the residue of my estate, then remaining, to those of my [*sons/daughters/children*], _____, _____, and _____, who shall be then alive, in equal shares. If any [*son/daughter/child*] of mine shall then be dead and if any issue of such deceased [*son/daughter/child*] shall then be living, such deceased [*son/daughter/child*] of mine shall be considered alive for the purposes of division and my *Trustee* shall divide, pay and transfer the share, which my deceased [*son/daughter/child*] would have been entitled to, if [*he/she*] had not died, among my deceased [*son/daughter/child*]'s issue, in equal shares *per stirpes*.

(i) If at the death of the last survivor of my [*husband/wife*], my [*sons/daughters/children*] and me, no other issue of mine is living and if the residue of my estate, or any portion thereof, is indisposed of in accordance with the foregoing provisions, I direct my *Trustee* to divide the residue of my estate, or such portion thereof as shall be then remaining, into two (2) equal shares and to make the following distribution of such two (2) equal shares, namely:

i. To pay, transfer and deliver one (1) of such equal shares to my father, _____, and my mother, _____, in equal shares if both are living at the death of the survivor of my [*husband/wife*], my children and me, or to pay, transfer and deliver the entire one (1) equal share to the survivor if only one of them is living at the death of the survivor of my [*husband/wife*], my [*sons/daughters/children*] and me.

ii. To pay, transfer and deliver the remaining one (1) equal share to my father-in-law, _____, and my mother-in-law, _____, in equal shares if both are living at the

death of the survivor of my [*husband/wife*], my children and me, or to pay or transfer the entire one (1) equal share to the survivor if only one of them shall be living at the death of the survivor of my [*husband/wife*], my [*sons/daughters/children*] and me.

7. IF any person shall be entitled to any share of my estate before attaining the age of eighteen (18) years, the share of such person shall be held and kept invested by my *Trustee* and the income and capital, or so much thereof as my *Trustee* in [*his/her*] absolute discretion consider[*s*] necessary or advisable, shall be used for the benefit of such person until he or she attains the age of eighteen (18) years and then such share shall be delivered to him or her.

8. I AUTHORIZE my *Trustee* to make any payments for any person under the age of eighteen (18) years to the parent or guardian of such person for the time being, whose receipt shall be a sufficient discharge to my *Trustee*.

9. I HEREBY DECLARE that my *Trustee* when making investments for my estate shall not be limited to investments authorized by law for trustees, but may make any investments which [*he/she*] in [*his/her*] uncontrolled discretion consider[*s*] advisable and my said *Trustee* shall not be liable for any loss that may happen to my estate in connection with any such investment made by [*him/her*] in good faith.

[NOTE: Do not use clause 9 unless testator fully understands its implications and you have something in writing in your file to confirm this.]

10. MY *TRUSTEE* may make any division of my estate or set aside or pay any share or interest therein, either wholly or in part, in the assets forming my estate at the time of my death or at the time of such division, setting aside or payment, and I expressly will and declare that my *Trustee* shall, in [*his/her*] absolute discretion, fix the value of my estate or any part thereof for the purpose of making such division, setting aside or payment, and the decision of my *Trustee* shall be final and binding upon all persons concerned (notwithstanding that *my Trustee* may be beneficially interested in the property appropriated or partitioned).

11. I HEREBY GIVE to my *Trustee* the following additional powers in the administration of my estate:

(a) To make any elections, designations or determinations that may be necessary or in the opinion of my *Trustee* advisable under the provisions of the *Income Tax Act* (Canada) and the *Excise Tax Act* or any statute of like general effect.

(b) The sole discretion to determine whether any stock dividends, tax-free corporate distributions or gains arising from the disposition of capital assets of my estate constitute income or capital for the purpose of this my Will and the trusts herein created.

12. I HEREBY AUTHORIZE AND EMPOWER my *Trustee* if at any time and for so long as any real or leasehold property shall form part of my estate to let or lease such property from month to month, year to year or for any term of months or years and subject to such covenants and conditions as [*he/she*] shall think fit, to accept surrenders of leases and tenancies, to expend money in repairs and improvements and generally to manage the property, and to give any options with respect to such property or properties as [*he/she*] may consider advisable. I further authorize and empower my *Trustee* to renew and keep renewed any mortgage or mortgages upon any real estate forming part of my estate and to borrow money on any real estate forming part of my estate upon any mortgage or mortgages to pay off any mortgage or mortgages which may be in existence at the time of my death or any renewal thereof.

13. I DIRECT that any shares in any body corporate or other legal entity held as part of my estate shall be voted by my *Trustee* to the same extent and as fully as I could if living.

14. IF any company or corporation in which I or my estate may hold shares or other interests increases its capital, I AUTHORIZE my *Trustee* to subscribe for and take up the proportion of that increased capital to which as holders of shares or other interests in the company or corporation [*he/she*] may be entitled and to pay for it out of the capital of my estate. In the alternative, my *Trustee* may sell [*his/her*] rights to such allotment. I further authorize my *Trustee*, if in [*his/her*] opinion it would be in the interests of my estate, to subscribe and pay for or purchase additional shares in any such company or corporation.

I FURTHER AUTHORIZE my *Trustee* to join in any plan for the reconstruction or reorganization of any such company or corporation or the amalgamation of a company or corporation with any other company or corporation for the sale of the assets of a company or corporation or any part thereof. My *Trustee* may in pursuance of any such plan accept any shares or securities in lieu of or in exchange for the shares or other interest held by my estate in a company or corporation.

I FURTHER AUTHORIZE my *Trustee*, if in [*his/her*] discretion [*he/she*] consider[*s*] it in the best interests of my estate, to enter into any pooling or other agreement in connection with the interest of my estate in a company or corporation and in the case of sale to give any options [*he/she*] may consider advisable.

IN GIVING to my *Trustee* these powers, it has been and is my intention to give to [*him/her*] power to deal with the interest held by my estate in any company or corporation to the same extent as fully as I could do if I were alive.

15. IT is my express intention and I hereby declare that in making any bequests or devises to beneficiaries, including my children and other issue of mine, in this my Will, or any Codicil hereto, that I do

so with a strict desire of benefiting only such beneficiary and specifically not benefiting the respective spouses of my beneficiaries, or any of them, unless the spouse is specifically referred to as a beneficiary in this my Will or in any Codicil to this my Will.

[CAUTION: this clause probably has marginal effect, given the current state of family property law in Saskatchewan.]

16. IN THE EVENT that my [*husband/wife*] shall predecease me and upon the condition that they consent to act as the guardian of all of my infant [*sons/daughters/children*], and take actual physical custody of all infant children of mine, I HEREBY APPOINT _____ and _____, to be the guardians of all of my infant [*sons/daughters/children*]; provided that if _____ and _____, shall not be cohabiting as [*husband/wife*] at the time of my death, or if they shall cease to do so after my death, but while there are still children of mine living and under the age of eighteen (18) years, then in either event, I APPOINT _____, as the sole guardian of my infant children during their respective minorities.

I SPECIFICALLY DECLARE and direct that my infant children shall not be separated during their minority without their consent and the appointment of any guardian of my infant children is conditional upon the said guardian consenting and continuing to act as the guardian of all of my infant children and taking and keeping actual physical custody of all of my infant children.

IN WITNESS WHEREOF I have to this my Last Will and Testament written upon this and the nine (9) preceding pages of paper, subscribed my name this _____ day of _____, 2_____.

SIGNED, PUBLISHED AND)
DECLARED by the above named)
[*Testator/Testatrix*], _____,)
as and for [*his/her*] Last Will)
and Testament, in the presence of)
us, both present at the same)
time, who at [*his/her*] request, and)
in [*his/her*] presence, and in the)
presence of each other, have)
hereunto subscribed our names)
as witnesses.)

_____
(*Testator/Testatrix name*)

NAME:_____)

ADDRESS:_____)

OCCUPATION:_____)

NAME:_____)

ADDRESS:_____)

OCCUPATION:_____)

[NOTE: This example was done for a testator who is married. If one was doing a Will for a testator who has been living with someone for more than 2 years, one could put in the appropriate cohabitation clause referred to previously in this paper and use the term spouse in place of husband or wife.]

Sample 2: Last Will and Testament

(Spouse as first choice as executor, all to spouse, gift over to adult children equally)

[Note: The trustee powers that are shown in all of the following complete will forms are not exhaustive as the powers that may be used, or may be needed under specific circumstances. For any client with substantial or varied assets, many additional trustee powers clauses may be necessary and advisable. The clauses shown in the sample wills are the minimum trustee powers that should be put into any will.]

THIS IS THE LAST WILL AND TESTAMENT of me, (*testator*), of the [*City/Town/Village/Township*] of _____ in the [*County/District/Regional Municipality*] of _____, and Province of Saskatchewan.

1. I HEREBY REVOKE all Wills, Codicils, and other testamentary dispositions that I have made before the time of signing this Will, and declare this only to be my last Will.

2. I HEREBY APPOINT _____, to be the [*Executor/Executrix*] and Trustee of this my Will. In the event that _____ fails to survive me or declines to act or is incapable of acting as [*Executor/Executrix*] and Trustee, I appoint _____ and _____ to be the Executor(s) and Trustee(s) of this my Will and I hereafter refer to [*him/her/them*] as my "Trustees."

3. I GIVE THE WHOLE of my property of whatsoever nature and kind and wheresoever situate, including any property over which may have a general power of appointment, to my Trustee(s), upon the following trusts, namely:

a. To pay out of and charge to the capital of my Estate:

   i. my just debts, funeral, and testamentary expenses;

   ii. all Estate, inheritance, succession, and death duties or taxes payable in consequence of my death, whether imposed by or pursuant to the law of any domestic or foreign jurisdiction whatsoever, that may be payable in connection with the property passing (or deemed to pass by any governing law) on my death, or in connection with any insurance on my life, or .in connection with any gifts or benefits given or conferred by me either in my lifetime or by survivorship or by this my Will or any Codicil thereto, and whether such duty or tax be payable in respect of Estates or interests that fall into possession at my death or al any subsequent time; and I authorize my Trustee(s) in [*him/her/them*] uncontrolled discretion to pay any such duty or tax prior the due date thereof or to commute any such duty or tax on any interest in expectancy, provided that the direction contained in this subparagraph (ii) to payout of and charge to the capital of my Estate all Estate, inheritance, succession, and death duties or taxes shall not extend to or include any such duties or taxes that may be payable by a purchaser or transferee (other than one who is a beneficiary of or under this my Will or any Codicil thereto) in connection with any property transferred to or acquired by such purchaser or transferee upon or after my death pursuant to any agreement with respect to such property;

   iii. the expenses of administering my Estate and the trusts created by this my Will and any Codicil to this my Will.

b. To deliver to _____ for [*him/her/them*] own use absolutely, all articles of personal, domestic and household use or ornament belonging to me, about or belonging to or used in connection with my home, and my automobiles and accessories thereto and insurance thereon.

c. Subject as hereinbefore provided, I authorize my Trustee(s) to use [*him/her/them*] discretion in the realization of my Estate, with power sell, call in and convert into money all or any pmt or parts of my Estate not consisting of money at such time or times, in such manner and upon such terms and either for cash or credit or for part cash and part credit as my said Trustee(s) may in [*him/her/them*] absolute discretion deem advisable, with power and discretion to postpone the conversion of my Estate or any part or parts thereof for such length of time as [*him/her/them*] may deem advisable, and I hereby declare that my said Trustee(s) may retain any portion of my

Estate in the form in which it may be at my death as an investment of my Estate for such length of time as my said Trustee(s) may in [*him/her/them*] discretion deem advisable and my Trustee(s) shall not be held responsible for any loss that may happen to my Estate by reason of so doing. I authorize my Trustee(s) to invest the monies of my Estate, from time to tinle, in any kind of property, real, personal, or mixed, as my Trustee(s) in [*him/her/them*] absolute discretion consider advisable, and my said Trustee(s) shall not be liable for any loss that may happen to my Estate in connection with any such investment made by [*him/her/them*] in good faith.

d. I direct my Trustee(s) to pay, transfer and deliver the residue of my Estate to _____ for [*his/her*] own use absolutely, provided _____ survives me for a period of Thirty (30) days.

e. If _____ fails to survive me for a period of Thirty (30) days, to divide the residue of my Estate into as many equal shares as there shall be children of mine alive at the time of my death, and deliver the said shares accordingly. I declare that if any child of mine shall have predeceased me, leaving issue alive al the time of my death, such child shall be considered alive for the purpose of such division and the share of such deceased child shall be divided among his or her issue then alive, in equal shares *per stirpes*, and delivered accordingly.

f. That any time prior to the final distribution of all capital forming the residue of my Estate (the "Final Distribution Date"), there are none of my [*husband/wife*], my children or .my more remote issue of mine alive, I direct that the residue of my Estate, or so much as is remaining at the Final Distribution Date shall be paid and delivered to _____.

g. If any person should become entitled to a share or other interest in my Estate before attaining the age of majority, my Trustee(s) [*is/are*] authorized to hold the share or other interest of such person and to keep the same invested and the income and capital, or so much thereof as my Trustee(s) in [*his/her/their*] absolute discretion may consider necessary or advisable, may be used for the general welfare, education, advancement and benefit of such person until he or she attains the age of majority and the receipt of the parent or guardian of such child shall be a sufficient discharge to my Trustee(s) for any such payments made during the minority of such child.

h. I authorize my Trustee(s) to make any payments for any person under the age of majority or under any disability to any person responsible for the care and control of that child or disabled person, and the receipt of such parent, guardian or person with care and control shall be a sufficient discharge to my Trustee(s).

4. FOR ALL PURPOSES contained in this my Will, in addition to all other powers conferred on my Trustee(s) by this my Will or by any statute or law, my Trustee(s) shall have the following powers:

a. To sell, partition. exchange, or otherwise dispose of, or deal with, the whole or any part of my real property, in such manner, at such time, and upon such terms as credit or otherwise as my Trustee(s) in [*his/her/their*] uncontrolled discretion may consider advisable, with power to accept mortgages for any part of the purchase price; also to mortgage, lease without being limited as to term, repair, alter, improve, add to, or remove any buildings thereon, and generally to manage such real estate. I also give my Trustee(s) power to execute and deliver such deeds, mortgages, leases, or other instruments as may be necessary to effect such a sale, mortgage, lease, or other disposition or dealing. The power of sale herein is discretionary and not mandatory.

b. I authorize my Trustee(s) to act for and represent my Estate as a Shareholder in any corporation in which my Estate may at any time hold stock in the fullest and most unrestricted manner and as fully as I could if I were alive. This authority shall extend to and include the right to authorize any variation in the capital stock of the corporation, subscribe for and take up any capital shares and other securities of the corporation, and to approve or reject any proposed amalgamation or reorganization or subdivision or dissolution of the said corporation. Any action so taken shall be binding on all beneficiaries of this my Will.

c. To make all such allocations, elections, determinations, designations, and distributions as my Trustee(s) in [*his/her/their*] uncontrolled discretion shall consider to be in the best interests of my Estate as a whole, and specifically any allocations and elections as may be necessary under the *Income Tax Act* (Canada) or any similar legislation of any province or other jurisdiction in force from time to time. Where any specific funds, shares, or residue are created under this my Will, my Trustee(s) shall have the absolute power of determination as to the specific assets which shall form such fund, share, or residue, as the case may be. Any such allocations and elections once made are not to be subject to review by anyone.

5. UNLESS OTHERWISE specifically provided, any reference in this my Will or in any Codicil hereto to a person in terms of a relationship to another person determined by blood or marriage shall not include a person born outside marriage, or a person who comes within the description traced through another person who was born outside marriage, provided that any person who was born outside marriage but whose parents subsequently married one another shall not be regarded as a person being born outside marriage but shall be regarded as having been born in lawful wedlock to his or her parents, provided further that any person who has been legally adopted shall be regarded as having been born in lawful wedlock to the adopting parent.

6. EVERY BENEFIT and bequest provided by this my Will, or gift made by me during my lifetime, to the extent to which I am permitted by law so to designate (as to the capital, the income derived therefrom, or any asset substituted for such capital, and the income derived from such substituted asset), is to be and remain the private and separate property of the respective beneficiary concerned and is not at any time to form part of any community of property which may exist between any such beneficiary under this my Will and his or her consort or any net Family Property as defined by the *Family Law Act*, as amended, my intention being that the property hereby so bequeathed is to constitute the separate and private property of each relevant beneficiary concerned.

IN TESTIMONY WHEREOF I have to this my last Will, written upon this and

_____(_____) preceding pages of paper, subscribed my name this _____day of _____ [*month*], 20_____.

SIGNED, PUBLISHED AND DECLARED by the said (*testator name*) , as and for [*his/her*] Last Will and Testament, in the presence of us both present at the same time, who at [*his/her*] request, in [*his/her*] presence and in the presence of each other, have hereunto subscribed our names as witnesses.	)	_____ (*testator name*)

Name:_____ Name:_____

Signature:_____ Signature:_____

Address:_____ Address:_____

_____ _____

Occupation:_____ Occupation:_____

Additional Clauses: Children (Sample 1)

[NOTE: If the *Testator/Testatrix* is legally married, then I would refer to the spouse as a *husband/wife,* as the case may be. If the *Testator/Testatrix* is not legally married but cohabiting with someone, then I would suggest the clause previously suggested be added in for someone who is in a cohabitation relationship and if they have cohabited for 2 years or more you may refer to the other partner as a spouse but, if not, simply refer to the partner by *his/her* name.]

To divide the residue of my estate into as many equal shares as there shall be those of my [*sons/daughters/children*], _____, _____, _____ and _____, alive at the death of the survivor of my [*husband/wife/common-law partner/spouse*] and me; provided that if any [*son/daughter/child*] of mine shall then be dead, and if any issue of such deceased [*son/daughter/child*] shall then be living, such deceased [*son/daughter/child*] of mine shall be considered alive for the purpose of such division. My Trustee shall deal with the said shares as follows:

1.To pay, transfer and deliver (1) of such equal shares to each of my [*sons/daughters/children*], who shall be living and of the full age of ____ 25 ____ years, or more, at the death of the survivor of my [*husband/wife/common-law partner /spouse*] and me.

2.My Trustee shall set aside one (1) of such equal shares for each [*son/daughter/child*] of mine who shall be living, but under the age of ____25____ years at the death of the survivor of my [*husband/wife/common-law partner/spouse*] and me. My Trustee shall keep such share invested and shall pay so much of the net income derived therefrom, as my Trustee considers necessary or advisable, to or for such [*son/daughter/child*] until he or she attains the age of ____25____ years, or sooner dies. Upon such [*son/daughter/child*] attaining the age of ____25____ years, such share shall be paid or transferred to him or her.

[Use the following paragraph if trusts vest in 21 years.]

Any income not so paid in any year shall be added to the capital of such share and shall be dealt with as part thereof.

OR –

[Use the following paragraph if vesting could occur after 21st anniversary of the testator's death, possibly vesting outside of 21 years.]

Any income not so paid in any year (during the first twenty-one (21) years following my death) shall be added to the capital of such share and dealt with as part thereof. Notwithstanding the foregoing, if any child of mine shall be living, but under the age of _____25_____ years on the 21st anniversary date of my death, then from the 21st anniversary date of my death, until such child attains the age of _____25____ years, or sooner dies, all of the income from such share shall be paid to or for such child.

If any [*son/daughter/child*] shall die before becoming entitled to receive the whole of [*his/hers*] share of my estate, such share, or the amount thereof remaining, shall be held in trust by my Trustee for the issue of such deceased [*son/daughter/child*], in equal shares *per stirpes*. If any such [*son/daughter/child*] shall leave no issue him or her surviving, such share or the amount thereof remaining shall, subject to the proviso hereinafter set forth, be held by my Trustee in trust for my issue in equal shares *per stirpes*; but if a [*son/daughter/child*] of mine shall become entitled to any part of the residue of my estate pursuant to the terms of this provision before attaining the age of ___25____ years, such [*son/daughter/child's*] part shall be added to the capital of the share of my estate hereinbefore directed to be held in trust for such [*son/daughter/child*] and shall be dealt with as part thereof.

3.My Trustee shall set aside one (1) of such equal shares for each [*son/daughter/child*] of mine who shall have predeceased the survivor of my [*husband/wife/common-law partner/spouse*] and me, but shall have left issue alive at the death of the survivor of my [*husband/wife/common-law partner/spouse*] and me, and shall divide such share among the issue of such deceased [*son/daughter/child*] in equal shares *per stirpes*.

My Trustee may, at any time or times, pay to or for the benefit, maintenance, care, support and education (including higher vocational and university education) of any person out of any share of my residuary estate set aside for such person, such amount or amounts of capital of such share as my Trustee in [*his/her*] absolute discretion considers advisable or necessary.

[NOTE: The age of 25 has been used arbitrarily for illustration purposes. Any age over 18 could have been used.]

Additional Clauses: Children (Sample 2)

[NOTE: Do not use the term spouse if the testator and his/her partner have not lived together for 2 years or more.]

To divide the residue of my estate into as many equal shares as there shall be those of my *sons/daughters/children*, who shall be alive at the death of the survivor of my husband/wife/common-law partner/spouse and me; provided that if any *son/daughter/child* shall then be dead, and if any issue of such deceased *son/daughter/child* shall then be living, such deceased *son/daughter/child* of mine shall be considered alive for the purpose of such division. The terms "child of mine" or "children of mine" or words of similar import shall refer to my *sons/daughters/children*, _____, _____, _____ and _____, and any further children born of my marriage to my husband/wife/[or my relationship with _____ (name of common-law partner)] [or my spousal relationship with _____]. My *Trustee* shall deal with the shares as follows:

(i) My *Trustee* shall pay, transfer and deliver one (1) of such equal shares to each *son/daughter/child* of mine, who shall be living and of the full age of twenty-eight (28) years or more at the death of the survivor of my husband/wife/common-law partner/spouse and me.

(ii) My *Trustee* shall set aside one (1) of such equal shares for each *son/daughter/child* of mine, who is living and of the full age of twenty-five (25) years or more but under the age of twenty-eight (28) years at the death of the survivor of my husband/wife/common-law partner/spouse and me and shall pay one-half (1/2) of the capital of such share to such *son/daughter/child*, for *his/her* own use absolutely. My *Trustee* shall keep the remaining one-half (1/2) of the capital of such share invested, and the income derived therefrom, or so much thereof as my *Trustee* in *his/her* absolute discretion considers necessary or advisable shall be paid to or for such *son/daughter/child* until *he or she* attains twenty-eight (28) years of age, or sooner dies. Upon such *son/daughter/child* attaining twenty-eight (28) years, the balance of such share shall be paid to *him or her*.

(iii) My *Trustee* shall, subject to the provisions hereinafter contained, set aside one (1) of such equal shares for each *son/daughter/child* of mine, who shall be living, but under the age of twenty-five (25) years at the death of the survivor of my husband/wife/common-law partner/spouse and me, and shall keep such share invested and shall pay the net income derived therefrom, or so much thereof as my *Trustee* considers necessary or advisable, to or for such *son/daughter/child* until *he or she* attains the age of twenty-five (25) years, or sooner dies. Upon such *son/daughter/child* attaining the

age of twenty-five (25) years, one-half (1/2) of the remaining capital of the share set aside for such *son/daughter/child* shall be paid or transferred to *him or her*. Thereafter the said income, or so much thereof as my *Trustee* in *his/her* absolute discretion considers necessary or advisable, from the remainder of such share shall be paid to or for such *son/daughter/child* until *he or she* attains the age of twenty-eight (28) years, or sooner dies. Upon such *son/daughter/child* attaining the age of twenty-eight (28) years, the remaining balance of the capital of the said share shall be paid or transferred to *him or her*.

Any income not so paid in any year during the first twenty-one (21) years following my death shall be added to the capital of such share and dealt with as part thereof. Notwithstanding the foregoing, if a *son/daughter/child* of mine shall be living, but under the age of twenty-eight (28) years on the twenty-first (21st) anniversary date of my death, then from the twenty-first (21st) anniversary date of my death, until such *son/daughter/child* attains the age of twenty-eight (28) years, or sooner dies, all of the income from such share shall be paid to or for such *son/daughter/child*.

If a *son/daughter/child* of mine should die before becoming entitled to *his/her/their* entire share of my estate leaving issue *him or her* surviving, such share, or the amount thereof remaining, shall be divided by my *Trustee* among the issue of such deceased *son/daughter/child*, in equal shares *per stirpes*. If such *son/daughter/child* should leave no issue *him or her* surviving, such share or the amount thereof remaining shall, subject to the provision hereinafter contained, be held by my *Trustee* in trust for my issue, in equal shares *per stirpes*. If a *son/daughter/child* of mine shall become entitled to any part of the residue of my estate pursuant to the terms of this provision before attaining the age of twenty-eight (28) years, such *son/daughter/child*'s part shall be added to the capital of the share of my estate hereinbefore directed to be held in trust for such *son/daughter/child* and shall be dealt with as part thereof.

(iv) My *Trustee* shall set aside one (1) of such equal shares for each *son/daughter/child* of mine who shall have predeceased the survivor of my husband/wife/common-law partner/spouse and me, but shall have left issue alive at the death of the survivor of my husband/wife/common-law partner/spouse and me, and shall divide such share among the issue of such deceased *son/daughter/child*, in equal shares *per stirpes*.

My *Trustee* may, at any time or times, pay to or for the benefit, maintenance, care, support, education, (including higher vocational and university education) of any person out of any share of my estate set aside for such person, such amount or amounts of capital of such share as my *Trustee* in *his/her* absolute discretion consider(s) advisable or necessary.

Hotchpot

I HEREBY DECLARE that in the event of a court of competent jurisdiction granting a family property order pursuant to the provisions of *The Family Property Act,* and/or a property order pursuant to the common law, then in such event, the money paid or property transferred or required to be paid or transferred to my husband/wife/common-law partner/spouse, or to *his/her* estate under a family property order and/or common-law-property order, shall be brought into account by way of hotchpot against him/her with respect to the share of my estate to be paid to *him/her* pursuant to the provisions of this my Will and shall be brought into account against *him/her* with respect to the value of the assets to be transferred and delivered to *him/her* pursuant to the provisions of this my Will.

[NOTE: The latter part of the above clause would have to correspond with the wording of the Will.]

Additional Clauses: Children – Guardian

IN THE EVENT that my husband/wife/common-law partner/spouse shall predecease me and upon the condition that they consent to act as the guardian*(s)* of all of my infant *sons/daughters/children*, and take actual physical custody of all infant children of mine, I HEREBY APPOINT _____, to be the guardian*(s)* of all of my infant *sons/daughters/children*; provided that if _____ and _____ (names of guardians) shall not be cohabiting as husband and wife, spouses or in a common-law relationship at the time of my death, or if they shall cease to do so after my death, but while there are still children of mine living and under the age of eighteen (18) years, then in either event, I APPOINT _____, as the sole guardian of my infant children during their respective minorities. [-or- I appoint _____ and _____ as the guardian of my infant children during their respective minorities.]

I SPECIFICALLY DECLARE and direct that my infant children shall not be separated during their minority without their consent and the appointment of any guardian of my infant children is conditional upon the said guardian consenting and continuing to act as the guardian of all of my infant children and taking and keeping actual physical custody of all of my infant children.

Codicil

THIS IS A CODICIL to the Last Will and Testament of me, _____, of _____, in the Province of Saskatchewan, which Last Will and Testament bears the date the _____ day of _____, 20_____.

1. I HEREBY REVOKE clause _____ of my said Last Will and Testament [and replace it with the following clause, namely]:**OR** [and substitute in the place and stead thereof the following clause, namely:]

2. IN ALL OTHER RESPECTS, I confirm my said Will.

IN TESTIMONY WHEREOF I have to this Codicil to my Last Will and Testament written upon this and the preceding page of paper or pages of paper, subscribed my name this _____ day of _____, 20____.

SIGNED, PUBLISHED AND DECLARED)
by the said Testator, _____ as and for)
a Codicil to his _____Last Will and)
Testament, in the presence of us, both present)
at the same time, who at his request, in his)
presence, and in the presence of each other, have) _____
hereunto subscribed our names as witnesses.)

NAME:_____)

ADDRESS:_____)

OCCUPATION:_____)

NAME:_____)

ADDRESS:_____)

OCCUPATION:_____)

Imminent Death: Simple Will

LAST WILL AND TESTAMENT

THIS IS THE LAST WILL AND TESTAMENT of me, _____, of _____, in the Province of Saskatchewan.

1. I HEREBY REVOKE all Wills and testamentary dispositions of every nature or kind whatsoever by me heretofore made.

2. I GIVE, DEVISE AND BEQUEATH all of my property of every nature and kind and wheresoever situate, including any property over which I may have a general power of appointment to my husband/wife/common-law partner/spouse, _____, for *his/her* own use absolutely and I appoint my husband/wife/common -law partner/spouse sole *Executor/Executrix* of this my Will.

IN WITNESS WHEREOF I have to this my Last Will and Testament written upon this and the preceding page of paper, subscribed my name this _____ day of _____, 20_____.

SIGNED, PUBLISHED AND DECLARED)
by the said Testator, _____ as and)
for a Codicil to his Last Will and Testament,)
in the presence of us, both present at the same)
time, who at his request, in his presence, and)
in the presence of each other, have hereunto) _____
subscribed our names as witnesses.)

NAME:_____)

ADDRESS:_____)

OCCUPATION:_____)

NAME:_____)

ADDRESS:_____)

OCCUPATION:_____)

Form A:
International Will Registration Form

[Section 4 of *The Wills Act, 1996*]

To the Registrar
Court House,
Regina, Saskatchewan

Name in full of testator: _____

Address in full of testator: _____

_____

_____

Description of testator

(i) date of birth: _____ _____ _____
(*day*) (*month*) (*year*)

(ii) occupation: _____

(iii) marital status: ☐ married ☐ widow(er) ☐ separated ☐ divorced ☐ single

_____

_____

Name in full of spouse of testator or, if single, name of father and mother with mother's maiden name:

_____

_____

Nature of testamentary document: ☐ will ☐ codicil ☐ revocation ☐ other

specify: _____

Execution of document: _____ _____ _____

(*day*) (*month*) (*year*)

Place of safekeeping of document if not deposited with registry, if known:

_____

_____

_____

Name(s) and address(es) of executor(s), personal representatives(s) or other proper person(s):

_____

_____

_____

_____

**Dated this _____ day of _____, 20_____
and certified to be correct by:**

_____
(*Type name below signature*)

_____
(*Typed name of Lawyer if other than above*)

_____
(*Typed Firm name and address of lawyer*)

****This form is to be filed with the registrar, in a sealed envelope, before the tenth day of the month following the date of execution.****

Form B: Certificate of Deposit of Will for Safekeeping

[Clause 8(d) of *The Wills Act, 1996*]

This is to certify that there has this day been deposited in my office for safekeeping an envelope purporting to contain a will (or codicil) particulars of which are stated to be as follows:

Name in full of testator: _____

Address in full of testator: _____

_____

_____

Date of execution of document: _____

Name(s) and address(es) of executor(s), personal representative(s) or other proper person(s):

_____

_____

_____

_____

Dated at the City of Regina, in the Province of Saskatchewan, this _____ day of

_____, 20_____.

_____

Registrar

Form C: International Will Search Application

[Section 10 of *The Wills Act, 1996*]

Warning: No information contained in the International Will Registry System concerning the international will of a testator is to be released from the system, except in accordance with section 49 of *The Wills Act, 1996*.

To the Registrar
Court House,
Regina, Saskatchewan

Name in full of testator: _____

Address in full of testator: _____

_____

_____

Description of testator:

(i) date of birth: _____ _____ _____
(*day*) (*month*) (*year*)

(ii) occupation: _____

(iii) marital status: ☐ married ☐ widow(er) ☐ separated ☐ divorced ☐ single

Name in full of spouse of testator or, if single, name of father and mother with mother's maiden name:

If deceased:

(i) date of death _____ _____ _____
(*day*) (*month*) (*year*)

(ii) place of death: _____

_____

_____

Application for search made by: _____
(*Name of Applicant in Full*)

_____

_____

_____
(Address of Applicant in Full)

_____

_____

_____

Phone Number: _____

Date: _____

Relationship to testator: _____

Signature: _____