WILLS

PRECEDENT CLAUSES

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SAVE TIME – Construct Wills with Digital Precedent Clauses

The Wills Precedent Clauses set out in this Chapter are also available in **digital format** on the USB Flash Drive (formerly CD) that accompanied your full version of the **Guide**. The digital clauses are a real time-saver as you can construct Wills, quickly and easily.

Aside from precedent clauses, the Flash Drive also has all of the other **Guide's** precedents in **digital format**, ready for your immediate use (over 175 documents, letters and checklists)! To obtain the latest Flash Drive, email: contact@ evinross.ca

Please note that the Flash Drive is not included with the student edition of the Guide. If you are a graduate and wish to obtain the Flash Drive, kindly email the above address.

OVERVIEW OF A WELL-CONSTRUCTED WILL

Although there are many different ways to prepare a Will, it is most efficient to begin with a "skeleton" document – one that contains the basic clauses required in every Will. The table on the following page shows the outline or the order of a "well-constructed" Will. The basic clauses (forming the "skeleton" or the master Will) are bolded.

If the supervising lawyer has a preferred set of clauses, substitute those for the ones provided in this **Guide**. The order need not be exactly as set out in this outline, but it is important that the order of the clauses is consistent so that no clause is omitted.

A suggested simple method to prepare a Will using word processing is:[1]

- retrieve the "Will Master" that contains the basic clauses (which we refer to as the "skeleton") from your precedent directory or the CD that contains the precedents;
- save this as your new document [1] (e.g. "Smith Barry – Will" or "Smith Jane – Will");
- insert additional clauses that are specific to the situation following the ***Will Instructions Form*** and instructions from the supervising lawyer;
- again, save the document;
- complete blanks. In order to minimize typing and later checking the spelling of names, ensure that you have a system for inserting the names – depending on word processing programmes such as macros, merges, autotext or data base;
- again, save the finished document.

N.B. This chapter deals with the contents of the clauses. Refer to the **Wills • Documents** chapter with respect to the preparation and appearance of the finished Will.

We recommend that, before attempting to prepare a Will, you familiarize yourself with the following chapters:

- **Overview** – **Wills and Will-Makers**, which explains the general concepts as they relate to Wills;
- **Wills – Procedure**; and
- **Wills – Documents**.

Notes: There may be tax consequences resulting from certain bequests and trusts as well as consequences to beneficiaries in receipt of federal disability pension benefits. Both are beyond the scope of this ***Guide.*** Advice from a professional should be sought in these circumstances.

When preparing a Will, and referring to a person who does not survive a deceased person:

- by five days; or
- by a longer period provided in an instrument (e.g. Will);

that person is conclusively deemed to have died before the deceased – or not survived the deceased. If a person survives a deceased person by five days, or longer as required by

[1] Check with your IT department (if your law firm has one) to determine the method of saving and follow the document management system used by your firm. This is only a practical suggestion that can be easily adopted by everyone.

the will, the person is referred to as "surviving". To avoid confusion, when applicable, the words "**did not survive the Deceased**" should be used instead of "predeceased the Deceased" or "died before the Deceased".

For clarity's sake, the clauses in the following precedents are not numbered. When preparing a Will or a Codicil, number sequentially both clauses and pages shown in the ***Sample Will*** (see the **Wills · Documents** chapter). The electronic precedents are numbered and have styles that fit into the skeleton (see above).

Sometimes, titles are inserted before each clause (such as **Appointments**, **Bequests**, **Residue**, or **Wishes** etc.). If this is the preferred style in your office, insert titles from the explanatory pages. The titles are included in the master Will. Deleting them will not affect the numbering.

Will clauses usually appear in the following order:

Headings or topic	Remarks
Introduction and Revocation	Introduces the Will-Maker, revokes prior Wills.
Appointment of Executors	Suggestion: provide at least two levels or ensure that there is at least one alternate Executor.
Appointment of Guardians	Only included if there are **minor** children. Usually the surviving spouse is the first Guardian. Suggestion: at least one other level consisting of two individuals.
Vesting Powers	The Will-Maker gives the estate to the Executors.
Specific Bequests	Only included if applicable. If a bequest fails, ensure that there are specific instructions as to where the bequest should go.
Residue Level I	This is the first level of disposition of the estate. If the first level is a trust, ensure that directions as to what happens to the trust are included. If outright gift or transfer, check what happens if the gift fails.
Levels II and III (or even IV)	This is the second level, in case the first level fails. A third level directs disposition should the first and second levels fail, etc.
Exclusions	Only included if there are persons excluded. Even then, this clause is not always included in the Will, as the Will-Maker may not wish the reason for the exclusion to be generally known. A separate letter referenced in the Will may be used.
Wishes/Directions	Describes funerary and any other "wishes," as well as directions to Executors.
Trustees' Powers	Standard clauses that are always included, they set out the powers of the Executors and Trustees.
Attestation (Execution)	This clause must not be broken – it must be contained on one page with at least two lines of text.

"**Level**", in this chapter of the **Guide,** refers to the Will-Makers first choice, or an alternative choice if the previous choice fails:

Level I This is the Will-Maker's first choice.

Level II This is the Will-Maker's alternate or contingent choice if the first choice fails. It usually starts with a preamble: "If ***{name of the person in Level I}*** does not survive me for [30] days..." or "is not alive at [some future date e.g. my death or failure date]…".

Level III This is the Will-Maker's third choice if the first and second choices (Levels I and II) fail and it also starts with the preamble.

Note: The wording in the three levels is often interchangeable and the levels may "loop". For example: "**Residue – Outright**" or "**Residue – In Trust**" may be used in Level I or in Level III (with the preamble "If ***{name}*** does not survive me for ***{number}*** days..." or "is not alive at [some future date e.g. my death or failure date]…".

The following are some examples of **levels** (**appointments** or **distribution** of estate):

Appointment of Executors and Trustees:

Level I The Will-Maker usually appoints his or her spouse to be the Executor.

Level II If the spouse does not survive the Will-Maker, the Will-Maker appoints his brother and sister-in-law as Executors jointly or the survivor of them.

Level III If either or both brother and sister-in-law do not survive the Will-Maker, the Will-Maker appoints his good friends John and Marielle, etc.

Appointment of Guardians: Follow the same steps as for Executors and Trustees.

Distribution of Residue: When referring to the distribution of assets of the estate, each level describes what happens to a gift if the person who is to receive such gift is unable to receive it at the death of the Will-Maker (the **dispositive** provisions or residue clauses).

In some circumstances, estates, portions of estates, or gifts are made **outright** (**directly)** to the beneficiary (or legatee). When an outright gift is made in the Will, it is customary to provide for an alternate beneficiary should the first beneficiary die before receiving such share or gift, or if such beneficiary does not survive the Will-Maker.

Examples of **outright** Levels:

Level I The entire estate is given outright to the spouse – s/he is the primary beneficiary.

Level II If the spouse does not survive the Will-Maker, the entire estate is given equally to the Will-Maker's children alive at the death of the Will-Maker (with a share being also created for a child who has died before the Will-Maker leaving children surviving him or her – per stirpes).

Level III If none of the Will-Maker's children survive him or her, and have left no children surviving the Will-Maker (i.e. there are no descendants of the Will-Maker), the estate is given to the Will-Maker's brother.

Level IV If the Will-Maker's brother does not survive the Will-Maker (without a spouse or children), the estate is given to a specified charity.

In other circumstances, a **trust is created**. This means that the residue of an estate (or a portion of an estate, or a gift) is held in trust for the benefit of a person or persons. When a property is held in trust, the Trustees have the legal title to the property, but the advantages of the property (or asset) accrue for the benefit of the beneficiary of such trust, not the Trustees.

For example, a Will may provide that, if a beneficiary under the Will is a minor when the Will-Maker dies, the minor's share of the estate will be held and invested by the Trustees, who will pay a specified amount either out of the interest or the capital (or both) of the share to the Guardian of the minor until the minor reaches a certain age, usually the age of majority (19). When the minor reaches that age, s/he will receive outright whatever is left of the share (capital plus any unused income).

Alternatively, the capital of the child's share may be paid out in several instalments when the child reaches certain ages; for example, when the child reaches the age of 19 years, he or she will receive 50 per cent of the trust, and when he or she reaches the age of 25 years, he or she will receive the remainder. During that entire time, the beneficiary may (or may not) continue to receive all or part of the income of the trust, depending on the trust terms set out in the Will-Maker's Will.

At the end of the trust, depending on the circumstances, the legal title to the asset may be transferred to (or "vest in") the beneficiary. If the beneficiary dies (or undergoes some other event specified in the Will) before receiving the entire share to which s/he is entitled, the trust may "cease" or be terminated, and the legal title to the property or asset will be transferred to someone else (Level II). Sometimes, the client requests a third level, in case the beneficiary in Level II does not receive the share of the estate (or if such share does not vest in – or pass to – the beneficiary).

When a trust is created for a beneficiary beyond the age of majority (say, until the age of 35 years), and title to the asset will ultimately vest in that beneficiary, an alternate beneficiary should be named in order to avoid the rule in Saunders v. Vautier. Saunders v. Vautier provides that, if all of the beneficiaries of a trust are adults and under no disability, the beneficiaries may apply to have the trustee transfer the balance of the trust to them and terminate the trust. However, if there is an alternate beneficiary, the trust cannot be terminated while there is a possibility of the alternate taking the property (which would occur, in our example, if the son did not reach the age of 35). The rule has been repeatedly affirmed in common law jurisdictions. For example, if a Will-Maker wants to create a trust for his son and does not want legal ownership in the property to vest in his son until the son reaches the age of 35, then the Will-Maker should name an alternate beneficiary in case his son does not reach the age of 35. Otherwise, the Will-Maker's son, once he is 19, can apply to court to terminate the trust and receive legal title to the asset.

Examples of **Trust** Levels:

Level I The estate is held in trust for the surviving spouse (until the spouse dies or remarries).

Level II When the spouse dies (and not if – as it is expected that the spouse will ultimately die), the remainder of the estate is held in separate and equal shares in trust for the Will-Maker's children until they reach a specified age (say, 35 years). As each child reaches the age of 35, that child receives his or her share outright.

Level III If a child dies before the age of 35, that child's share is held in trust for his or her surviving children (the Will-Maker's grandchildren) until they reach the age of 35, etc.

As in some circumstances, the trusts may continue for a very long time, you have to keep in mind the **Rule Against Perpetuities** (see the *Perpetuity Act*). This rule requires that generally the property of the Deceased must vest in, or be given outright to someone within 80 years of the Will-Maker's death. Thus, it prevents successive trusts from endlessly bogging down legal title to property. However, the Rule Against Perpetuities is quite complicated and the supervising lawyer should check the drafting.

Pursuant to section 10 of WESA, unless a longer period is provided in the Will, a person who does not survive the deceased by five days is conclusively deemed to have died *before* the Deceased for all purposes affecting the Deceased's estate or property disposed of under the Will. However, most lawyers will "use" a longer period, commonly 30 days. In other words, a beneficiary will receive a gift only if he or she survives the Deceased for 30 days. For a more detailed explanation of the concept of survivorship, see the **Overview** chapter – **Survivorship**.

When dealing with bequests, gifts of part of the residue, or the residue itself, insert a **survival proviso** in the event that the Will-Maker and the beneficiary die at the same time in a common disaster or die within a short time of each other.

Beneficiary designations

We have not included beneficiary designations in Will clauses on purpose, as it is more prudent to sign a beneficiary designation directly with the insurance company or the plan holder of an RRSP, RRIF or TSFA as they may or may not permit designations. We cover this issue in our reporting letter to the client.

Assembly

In this chapter, the information to be inserted is shown as follows ***{NAME OF PERSON}*** and the optional or alternate wording is set in [ ].

Electronic precedents have stop codes (◆) or **{NAME OF SPOUSE}** and the optional or alternate wording is highlighted in turquoise.

Notes: The legal assistant is to follow the instructions of the supervising lawyer (who has been instructed by the Will-Maker). The legal assistant does not make any decisions regarding who is to be appointed as Executor or Guardian, or any other contents of the Will, such as distribution of the assets. The above examples and descriptions are given as explanations only, to enable the user to better understand the reason why the various clauses are included in the Will.

The precedent clauses set out here are examples of the most commonly used Will clauses. They should be sufficient to prepare the average Will. For more unusual clauses, the legal assistant should consult the supervising lawyer, who will assist in their drafting. Once drafted and checked, those clauses should be included in your precedent book for future use.

Be careful when using the prepositions "among" and "between". "Between" denotes that there are two objects or persons, and "among" denotes that three or more.

INTRODUCTION AND REVOCATION

The following two clauses are always included at the beginning of a Will:

- the **introduction** which introduces and describes the Will-Maker; and
- the **revocation** which **revokes** or cancels previous Wills and Codicils.

Introduction

The first paragraph sets out the identity of the Will-Maker by showing the legal name, the Will-Maker's occupation and address. The last two are optional but recommended practice.

Revocation

Section 15 of the former *Wills Act* stated that a Will was **revoked** by the marriage of the Will-Maker, except where there was a declaration in the Will that it was made "in contemplation of the marriage" to a specific person. The Will-Maker's marriage that occurred **before** Part 4 of WESA came into force revoked a Will and such revoked Will was not revived when Part 4 of WESA came into force.

Part 4 of WESA abolished such revocation. Accordingly, the Will-Maker's marriage that occurs **on or after** the effective date of Part 4 does not revoke a Will.

A general revocations clause included in the Will do not revoke a beneficiary designation in a Registered Retirement Saving Plan or insurance policy (also see the **Overview** chapter - **Benefit Plans**) because they are not specific enough.

In general, a spouse's entitlement to the gifts and appointments is revoked if the spousal relationship with the Will-Maker ends before the Will-Maker dies. Section 56 of WESA states that if a Will-Maker makes a gift to, appoints as executor or trustee, or confers a general or special power of appointment on a person who was, or becomes his/her spouse and then after the Will is made but before the Will-Maker's death, that person and the Will-Maker cease to be spouses, unless a contrary intention appears in the Will, the gift, appointment or power of appointment is revoked as if the spouse had died before the Will-Maker (see the **Overview** chapter – **Wills and Will Makers** – **Revocation of gifts or appointment**).

The revocation is not affected or reversed by a subsequent reconciliation of the Will-Maker and the spouse.

INTRODUCTION AND REVOCATION

The Title "Last Will" above the introduction is optional and some lawyers prefer to omit it.

❶ Insert the Will-Maker's "official" name with any aliases (names that the Will-Maker commonly uses). Always show the names in full. Do not use initials and names in brackets. For example: JOHN ALEXANDER TAYLOR also known as JOHNNY TAYLOR. "Also known as" may be shortened to "a.k.a". Never assume what the official name is, and always verify it with the client. Don could be short for Donavon or Donald; Ted may or may not be Edward; Bill's official name may be William, or it may actually be his legal name. Also, ensure that all names under which the Will-Maker owns real property are included as aliases. This will make it easier for the Executor to deal with the Land Title Office when the time comes.

You may also insert the Will-Maker's occupation in the introduction, but that is optional. If you do so, and the Will-Maker owns real property, it may be prudent to use the occupation that appears on title to such property.

❷ Insert the Will-Maker's current address. If the Will-Maker subsequently moves, the Will is still valid.

❸ Insert this clause if a Will exists in another jurisdiction. If the Will-Maker is making a Will dealing with assets in British Columbia, he should appoint different executors whose scope is limited to the British Columbia assets. When referring to "Executors and Trustees", identify them as "British Columbia Executors and Trustees". For Multiple Will see page 53.

❹ Always insert this clause, even when you are advised that the Will-Maker never made a previous Will (s. 14 of WESA).

❺ Insert this revocation clause if the Will-Maker advises that he or she has made a Will in another jurisdiction (dealing with assets outside British Columbia).

This clause may also indicate that the Will-Maker revokes all British Columbia Wills and Codicils, rather than referring to a "surviving" Will by date.

❻ When a client that has, in addition to Canadian property, assets in one or multiple foreign jurisdictions, the estate planning is more complicated and the supervising lawyer may suggest that the client consult with a lawyer in the jurisdiction(s) where the foreign assets are held. In addition, there may be tax implications in the foreign jurisdiction(s) which need to be addressed.

If a client has a Will in another jurisdiction to govern his or her foreign assets, then the client's Will here becomes his or her Canadian Will and this clause may be used.

❼ Insert the full name of the spouse from whom the Will-Maker (Testator) is either separating or divorcing.

LAST WILL

THIS IS THE LAST WILL of me, ❶***{NAME OF WILL-MAKER}***, ***{occupation}*** of ❷***{residential address, including postal code}***.

❸ **THIS WILL** deals only with all my property in British Columbia (my "British Columbia Will").

❹ **I REVOKE** all my prior Wills and Codicils.

❺ With the exception of my Will in ***{other jurisdiction}*** and dated ***{date}***, **I REVOKE** all my prior British Columbia Wills and Codicils.

❻ This Will (sometimes called my "Canadian Will") deals only with all of my property of every kind situated in Canada at my death (both moveable and immovable), including but not limited to, any interests in land(s), and all of my bank accounts, investments, Registered Retirement Savings Plans and / or Registered Retirement Income Funds (where the designated beneficiary is my Estate), held with any and all institutions located in Canada (my "Canadian Property"). I may have also prepared other Wills that deal with my property of every kind situated in jurisdictions other than Canada (my "Foreign Property"), to be applicable as at the date of my death (sometimes called my "Foreign Will(s)"). In this regard, it is my express wish that my Canadian Will govern the distribution of my Canadian Property, and that my Foreign Will(s) govern the distribution of my Foreign Property, as may be applicable. In the absence of any Foreign Will(s), it is my further wish that the provisions of my Canadian Will shall apply as to the distribution of my Foreign Property to the extent this may be possible.[1]

❼

I MAKE this last Will in contemplation of my forthcoming divorce/separation from ***{NAME OF SPOUSE}***❼ and I declare that no gift, appointment or power of appointment will be revoked pursuant to Section 56 of the *Wills, Estates and Succession Act (the "Act")* when ***{NAME OF SPOUSE}*** and I cease to be spouses pursuant to Section 2(2) of the Act.

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(1) Author: Vanessa DeDominicis, Pushor Mitchell LLP Lawyers.

APPOINTMENT OF EXECUTORS AND TRUSTEES

The Will-Maker must appoint an Executor of the Will and Trustee of the estate. The appointment clause usually appears after the introduction and revocation clauses. Usually, there are several Executors appointed in the Will (see page 4 describing the levels of appointments). Select the clause appropriate to the situation and insert the full legal name of the Executor (or Executors).

Most of the time, the persons named as Executors in the Will are the same as the Trustee[s] and are, therefore, usually referred to in the Will as the "Trustees".

Never include a 30 day (or any other) survivorship clause, as this will prevent the Executor from carrying out his or her duties as executor for that period of time and will delay the application for an estate grant.

The following **may not be appointed** to act as Executors:

- a corporate Executor, unless it is a trust company or a credit union that has a business authorization to carry on trust business (s. 70 of the *Financial Institutions Act*) or a law corporation (s. 1(1) of the *Legal Profession Act*). However, the appointment of a corporate trustee is relatively rare, as in order for a trust company to accept an executorship, the estate must be substantial and the fees for professional trust administration are very expensive;
- an employee, contractor or volunteer of an extended care facility or a private hospital (s. 4.1 of the *Hospital Act*), unless such person is a child, parent or spouse of the patient or former patient;
- an officer, director, agent, designate or employee of a community care and assisted living facility (s. 18 of the *Community Care and Assisted Living Act*), unless such person is a child, parent or spouse of the person in care or formerly in care.

One additional word of caution: If an Executor who is not a Canadian resident is appointed, there may be adverse tax consequences.

When the Will-Maker dies:

- the **Executors** take legal title to the Will-Maker's estate and stand in place of the Will-Maker (unless a contrary intention appears in the Will). The Executors' task is then to settle the estate (pay the debts, if any, and distribute the assets according to the terms of the Will);
- the **Trustees** take care of the estate (or a designated part of the estate) and apply the proceeds to the family needs. Theirs is a long-term job. The Trustees are bound to do what the Will says as long as the Will does not require something illegal.

APPOINTMENT OF EXECUTORS AND TRUSTEES

Continued

Both section 16 of the *Wills Act* and section 56 of WESA revoke the appointment of the Executor in the case of a divorce, judicial separation or annulment of marriage (in the case of the *Wills Act*) and of the spouses ceasing to be spouses (in the case of WESA) **unless** the Will specifically states that it is made in contemplation of such divorce, judicial separation or annulment on one hand and the spouses ceasing to be spouses on the other hand (see above and the **Overview** chapter – **Wills and Will-Makers – Revocation of Gifts and Appointments**).

If there is a possibility of confusion with respect to the identity of the Executor - for example, if the Will-Maker has a brother and a son both named "Michael George" - clearly state the relationship (e.g. "my brother, Michael George Smith") or provide an address.

Appointing alternate Executors and Trustees reduces the possibility of an application for a Grant of Administration with Will Annexed if the first Trustee cannot act (because he or she is incapable or unwilling to act or dies intestate). However, if a corporate trustee (such as a trust company) is appointed, one trustee may be sufficient.

The printed precedents on these pages, as well as those in electronic ones, always refer to Trustees in plural. If only one Trustee is appointed, you may want to adjust the wording, but then you may run into the issue of gender (i.e. the Trustee in his/her discretion). However, discrepancies in number and gender should not affect the substance of the document.

APPOINTMENT OF EXECUTORS AND TRUSTEES

Level I – One Executor

I APPOINT ***{FULL LEGAL NAME}*** to be the Executor and Trustee of this Will.

Level I – Two Executors

I APPOINT ***{FULL LEGAL NAME}*** and ***{FULL LEGAL NAME}***, [jointly] or the survivor of them, to be the Executors and Trustees ("Trustees") of this Will.

Levels II and III – One original Executor and one or two alternates

If ***{FULL LEGAL NAME}*** does not survive me, or is unable or unwilling to act or continue to act or dies before the administration of my estate is completed, then I appoint ***{FULL LEGAL NAME}*** to be the Executor and Trustee of my Will.

If ***{FULL LEGAL NAME}*** does not survive me, or is unable or unwilling to act or continue to act or dies before the administration of my estate is completed, then I appoint ***{FULL LEGAL NAME}*** and ***{FULL LEGAL NAME}***, [jointly] or the survivor of them, to be the Executors and Trustees of my Will.

Level II and III– Two original Executors and one or two alternates

If either ***{FULL LEGAL NAME}*** or ***{FULL LEGAL NAME}*** does not survive me, or is unable or unwilling to act or continue to act or dies before the administration of my estate is completed, then I appoint ***{FULL LEGAL NAME}*** to fill the office of Trustee.

If either ***{FULL LEGAL NAME}*** or ***{FULL LEGAL NAME}*** does not survive me, or is unable or unwilling to act or continue to act or dies before the administration of my estate is completed, then I appoint ***{FULL LEGAL NAME}*** and ***{FULL LEGAL NAME}***, [jointly] or the survivor of them, to be the Executors and Trustees of my Will.

If both ***{FULL LEGAL NAME}*** and ***{FULL LEGAL NAME}*** do not survive me, or are unable or unwilling to act or continue to act or die before the administration of my estate is completed, then I appoint ***{FULL LEGAL NAME}*** and ***{FULL LEGAL NAME}***, [jointly] or the survivor of them, to be the Executors and Trustees of my Will.

In all Wills

I hereinafter refer to my Executors as my Trustees, and the expression "Trustees" shall mean and include the Executor or Executors, Executrix or Executrices and the Trustee or Trustees whether original, additional or substituted.

APPOINTMENT OF GUARDIANS

A Guardian is a person appointed by the Will-Maker to have the care and management of the person and the estate of his minor (or infant) children (i.e. children who are not yet 19 years of age). The guardian is appointed to look after the minors' care, education and upbringing and has all the rights, duties and responsibilities of a parent.

Note: The explanation of the guardianship appointments relates to Wills only, not to any other agreements.

For the appointment clause in a Will to take effect, the supervising lawyer will have to determine the guardianship of the Will-Maker and consider the following issues:

- in order to appoint a guardian for his or her children, the Will-Maker must be the guardian of those children (though not necessarily be the parent);
- while the Will-Maker must have the children's **guardianship** or **custody,** and does not need to be that child's parent; he or she cannot appoint someone with more rights than the Will-Maker possesses (s. 56 of the *Family Law Act*);
- the Will-Maker must be the surviving guardian;
- a surviving parent (mother or father of the child) who is not a guardian of the child does not become the guardian of the child automatically (s. 54 of the *Family Law Act*). If the Will-Maker is the **sole** guardian of a child and wishes the other parent to become the child's guardian upon his or her death, the surviving parent must be specifically appointed as the child's guardian:
    - in a Will (s. 53(1)(a) of the *Family Law Act*); or
    - in a form prescribed by section 53((1)(b) of the *Family Law Act*; or
    - by court order (s. 51 of the *Family Law Act)*.

Should both parents die, or should there be no surviving parent who has legal custody of the infant children, it is important that an alternate guardian or guardians be appointed. Often, several levels of alternate guardians are appointed in the Will to ensure that there is someone to look after the minor children.

In some family situations, the supervising lawyer will have to determine if the Will-Maker has guardianship and custodial rights and, therefore, has the right to appoint a guardian. It may be necessary to consult a lawyer who specializes in family matters.

If there is no surviving guardian or no guardian is appointed in the Will or in any other way, the Public Guardian and Trustee will become guardian of the **estate** of the minor, and the Director of Child, Family and Community Services will be the guardian of the **person** of the child.

APPOINTMENT OF GUARDIANS

Surviving parent first, then one alternate (Level I)

[If [my spouse or the child[ren]'s other guardian], ***{FULL LEGAL NAME}***, does not survive me,] I appoint ***{FULL LEGAL NAME}*** to be the guardian of my children during their respective minorities.

Surviving parent first, then two alternates (Level I)

[If [my spouse or the child[ren]'s other guardian], ***{FULL LEGAL NAME}***, does not survive me,] I appoint ***{FULL LEGAL NAME}*** and ***{FULL LEGAL NAME}*** jointly or either of them if the other is unwilling or unable to act, to be the guardians of my children during their respective minorities.

One or two alternates if Level I cannot act (Level II)

If both ***{FULL LEGAL NAME}*** and ***{FULL LEGAL NAME}*** do not survive me, or die before all of my children have reached the legal age of majority, or are unable or unwilling to act, then I appoint ***{FULL LEGAL NAME}*** and ***{FULL LEGAL NAME}*** jointly, or either of them if the other is unwilling or unable to act, to be the guardians of my children during their respective minorities.

If either ***{FULL LEGAL NAME}*** or ***{FULL LEGAL NAME}*** does not survive me, or dies before all of my children have reached the legal age of majority, or is unable or unwilling to act, then I appoint ***{FULL LEGAL NAME}*** to be the guardian of my children during their respective minorities.

VESTING POWERS

This is the clause in which the Will-Maker gives all the estate to the Executors and Trustees (referred to as "Trustees" in the Will). This clause sets out general instructions as to the manner in which the Trustees should administer the estate; that is:

- pay the debts;
- administer the estate; and
- distribute the estate assets.

There are different versions of the **vesting powers**, which all basically accomplish the transfer of the estate to the Trustees.

Check with the supervising lawyer to determine what changes, if any, should be made, and then insert it into the "master" or "skeleton" – see above.

❶ Where there are assets in other jurisdictions, and the Will-Maker has made Multiple Will in other jurisdictions and named different Trustees in the different jurisdictions, use the following clause:

> ***"I GIVE** all my property of every nature and kind situate in British Columbia, including any property over which I may have power of appointment, to my Trustees on the following trusts:"*

❷ Continue with the remainder of the Will. The clauses in the following sections (bequests, residue, trusts, etc.) are sub-paragraphs of this clause:

VESTING POWERS

❶ **I GIVE** all my property of every nature and kind and wheresoever situate, including any property over which I may have a power of appointment, to my Trustees on the following trusts:

(a) to use their uncontrolled discretion in the realization of my estate, with power to my Trustees to sell, call in and convert into money or otherwise dispose of any part of my estate not consisting of money at such time or times, in such manner and on such terms as they may, in their uncontrolled discretion, decide and either for cash or other assets or investments or on credit or any combination thereof, with power and discretion to postpone such conversion of my estate or any part or parts thereof for such length of time as they may think best, and I declare that my Trustees shall have a separate and substantive power to retain any portion of my estate in the form in which it may be at my death, notwithstanding that the same may not be in the form authorized under this Will, and whether or not there may be any liability attached thereto, for such length of time as they, in their absolute discretion, deem in the best interest of my estate, and my Trustees shall not be held responsible for any loss that may happen to my estate by reason of their so doing.

(b) to pay out of and charge to the capital of my general estate:

(i) my funeral and other expenses relating to my Will and my death;

(ii) my just debts including income taxes up to and including my death;

(iii) all succession duties and inheritance and death taxes, whether imposed by or pursuant to the law of this or any province, state, country or jurisdiction whatsoever that may be payable in connection with:

(A) any insurance on my life;

(B) any registered retirement savings plan, registered retirement income fund, annuity, pension, or superannuation benefits payable to any person as a result of my death;

(C) any gift or benefit given by me either in my lifetime or by survivorship or by this Will or any Codicil thereto;

and whether such duties and taxes are payable in respect of estates or interests which fall into possession at my death or at any subsequent time; and I hereby authorize my Trustees to pay such duty or tax prior to the due date thereof, or to commute the duty or tax on any interest in expectancy.

I DIRECT my Trustees to: ❷

BEQUESTS

Read ***Legal Effect of a Will*** in the **Overview** chapter – ***Wills and Will-Makers*** section, which covers in depth issues regarding bequests, their revocation, and their failure.

Legacies (gifts of money) and bequests (gifts of articles of personal property) (or simply "gifts") may be given to various individuals or charities before the bulk (or residue) of the estate is distributed. If the Will-Maker wishes to make such gifts, the appropriate clause or clauses are usually inserted after the appointment clauses and before the clause disposing of the residue of the estate.

If the person named in the Will as the beneficiary of a gift is also the residuary beneficiary (e.g. the spouse), it is not necessary to list the object of the gift in the Will.

There are three issues to consider when dealing with bequests:

- the Will-Maker must own the property that is the subject of the gift at the time of his or her death; otherwise, the gift may adeem;
- the intended beneficiary must survive the Will-Maker for at least five days unless a longer period is provided in the Will, otherwise the gift may lapse; and
- whether or not the gift is revoked by statute.

Ademption of Gift

If a gift listed in the Will no longer exists, whether because it has already been transferred to the beneficiary inter-vivos (during the life of the Will-Maker), or has been disposed of prior to the Will-Maker's death, or simply cannot be located (e.g. a piece of jewellery which was lost by the Deceased or a fur coat that was eaten by moths), the gift is said to **adeem** – in other words, it fails.

On the other hand, if the Will-Maker leaves a bank account to a beneficiary, but closed the bank account and opened another one with the proceeds, this may or may not result in an ademption of the funds held in the original bank account. In any event, consult the supervising lawyer.

To clarify the difference between lapsed gifts and adeemed gifts:

- gifts **lapse** when the beneficiary did not survive the Will-Maker or refuses the gift;
- gifts **adeem** when the specific gift either no longer exists or is no longer owned by the Will-Maker. If the Will-Maker disposed of the specific gift himself or directed that a nominee (or agent) dispose of it on his behalf while he had the capacity to do so, then the gift adeems.

However, if the specific gift was disposed of by the Will-Maker's nominee during the Will-Maker's lifetime without the Will-Maker's knowledge or consent, that does not constitute an ademption.

Beneficiary to survive

If a gift in a Will fails for any reason, including because a beneficiary dies:

- before the Will-Maker; or

- before or after the Will is made;

the gift may lapse and the property that is the subject of the gift must be distributed according to the following priorities (s. 46(1)) unless a contrary intention appears in the Will:

- firstly: to the alternative beneficiary of the gift, if any, named in the Will;
- secondly: if there is no alternative beneficiary named in the Will, and the deceased beneficiary was the sibling (brother, sister) or a descendant of the Will-Maker, to the descendants, if any, of such deceased beneficiary (sibling or descendant), alive at the Will-Maker's death, per stirpes;
- lastly: if there is no alternative beneficiary and the beneficiary was not a sibling or a descendant of the Will-Maker, to the surviving residuary beneficiaries, if any, named in the Will, in proportion to their interests – in other words, such gift would fall into and form part of the residue of the estate.

Revocation by statute

In addition, consider the revocation of a gift if after making the Will:

- the Will-Maker (Testator) was judicially separated, divorced, or the Will-Maker's marriage was annulled or declared void by the courts (s. 16 of *Wills Act)*;
- the Will-Maker and his/her spouse cease to be spouses pursuant to section 2(2) of WESA (s. 56 of WESA).

Both these sections provide that a gift to a spouse is revoked on dissolution of marriage or when the spouses cease to be spouses. The Will is valid but such separated or divorced spouse will be treated as if the spouse had died before the Will-Maker and the gift will fail unless the Will specifically states that it is made **in contemplation** of such divorce, judicial separation or annulment (for precedent clause: see **Introduction and Revocation** above).

Also, a gift to:

- an employee of an extended care facility or a private hospital, the employee's spouse, relative or friend (s. 4.1 of the *Hospital Act*);
- an officer, director, agent, designate or employee of a community care and assisted living facility or their spouse, relative or friend (s. 18 of the *Community Care and Assisted Living Act*);

is void if the Public Guardian and Trustee has not given written consent to such gift.

If a gift is included in a Will or Codicil made before the Will-Maker was a patient or in the care of an extended care facility, a private hospital, or a community care and assisted facility, these provisos do not apply.

And of course, a gift to witnesses is revoked by both the *Wills Act* and WESA.

Bequests (Continued)

❶ Select the clauses that are appropriate to the situation and, when required, insert the following for each such clause:

- the **description of the items** of property (or the amount of money) being given in sufficient detail to distinguish them from the rest of the Will-Maker's property; and
- the **full names of the beneficiaries** who are to receive such bequests.

❷ Insert this clause if the Will-Maker instructs that the estate (not the recipient of the gift) should pay the cost of transportation to the recipient. Such expense may be substantial.

❸ When describing an amount of money (pecuniary bequest), only use figures $1,000.00 and not "$1,000.00 (ONE THOUSAND DOLLARS)".

Bear in mind that each paragraph is a direction from the Will-Maker to the Trustees and the continuation of the vesting clause on page 16 which contains directions to the Trustees.

Continued…

❶Bequest of a specific articles or personal possessions

(#) if [my {*relationship},*] ***{NAME OF BENEFICIARY},*** survives me for ***{number}*** days, to deliver to him/her ***{describe article[s] given}***;

(#) if [my {*relationship},*] ***{NAME OF BENEFICIARY}***, survives me for ***{number}*** days, to deliver to him/her:

(i) ***{describe article[s]}***; and

(ii) ***{describe article[s]}***;

❷to pay all expenses relating to the delivery of such article[s] including packing, freight and insurance for the transportation of such article[s].

Articles to be divided among a class of beneficiaries (e.g. children or siblings)

(#) to divide all articles of personal, domestic, and household use or ornament, [including automobiles, boats and accessories thereto,] belonging to me at my death among such of my [children] as shall survive me for [30] days in such manner as my [children] may agree, and in default of agreement, in such manner as my Trustee thinks fit;

Outright gift of jewellery

(#) to deliver all my jewellery to my daughter, ***{FULL LEGAL NAME}***, if she survives me for ***{number}*** days, and to my daughter, ***{FULL LEGAL NAME}***, if she survives me for ***{number}*** days, to be divided equally between/among them as they shall agree and, if they do not agree, then in such manner as my Trustees may, in their discretion, decide.

Jewellery in trust for a beneficiary

(#) to hold in safekeeping all my jewellery until my youngest child attains the age of ***{age}*** years and then to deliver such jewellery to such of my children as are then alive, to be divided equally among them as they shall agree, and if they do not agree, then in such manner as my Trustees may, in their discretion, decide.

Legacy of an amount of money

(#) if ***{FULL LEGAL NAME}*** survives me for ***{number}*** days, to pay to him/her the amount of $❸ [without interest,] as soon as is practicable after my death.

(#) to pay to each of my children who survive me for ***{number}*** days the amount of $❸, [without interest,] as soon as is practicable after my death.

Bequest to the guardian of infant children

(#) [if my spouse, ***{FULL LEGAL NAME}***, does not survive me, and there are minor children of ours alive at my death,]to pay the amount of $❸, [without interest,] to the person[s] herein appointed as guardian[s] of my children, on the condition that the guardian[s] shall accept such appointment, my intent being to enable the guardian[s] to make room for the said child or children, including the purchase by the guardian[s] of a larger home or vehicle.

Bequests (continued)

Bequests to charitable organizations

❶ Ascertain the exact purpose of the gift (e.g. if the bequest is going to a university, determine the reason for the gift: research, bursary, etc.). Then call the charity's office and find out its full legal name and confirm the wording to be inserted in the Will. The internet is a good place to find the contact information. Some institutions have sample clauses available online, although it is still a good idea to contact the charity in question to ensure it is appropriately named and the proposed clause is appropriately worded to give effect to the client's intentions.

No doubling-up of gifts or legacies

❷ If a couple (spouses) wish to make similar gifts, legacies, or set up similar trusts, and it is their intention that the gift, legacy, or trust be paid only once and from the estate of the last to die of the spouses, preface the gift or legacy clauses with:

"If I survive ***{FULL LEGAL NAME}*** …" or

"If ***{FULL LEGAL NAME}*** does not survive me…" or

"If I am the last to die of ***{FULL LEGAL NAME}*** and me …";

or include the wording in this paragraph in both Wills.

❸ When describing an amount of money (pecuniary bequest), only use figures $1,000.00 and not "$1,000.00 (ONE THOUSAND DOLLARS)".

Forgiveness of debts

Common presumptions against double portions or advancement of a portion were abrogated when WESA came into effect. Therefore, a subsequent gift given during the Will-Maker's life (an "inter-vivos" gift) is no longer presumed to satisfy a gift given by prior Will (see the **Overview** chapter – ***Wills and Will-Makers – Common law presumptions abrogated***).

If the Will-Maker wishes to forgive an inter-vivos loan, ascertain that the loan is still outstanding and take note of the security received, (e.g. mortgage registered against the residence of the debtor), and in such case, obtain a Land Title Office search.

The Will-Maker should be made aware that the Will-Maker's (or later, estate's) claim for payment of a debt so forgiven is statute barred.

Continued…

Bequests to charitable organizations❶

(#) ❷to pay the following cash bequests [*or:* the amount of $❸,] without interest, to the following organizations, societies, associations, corporations, or the like, as are in existence at my death:

(a) the amount of $❸ to ***{NAME OF CHARITY}***; and

(b) the amount of $❸ to ***{NAME OF CHARITY}***.

For the purpose of this Will, the receipt of any person purporting to be the secretary or treasurer, or other officer, or officers, as the case may be of any organization, society, association, or corporation, or the like, being a legatee or beneficiary hereof, shall be a full and sufficient receipt and discharge to my Trustees as to such bequests, and my Trustees shall neither be bound to see to the application thereof, nor to enquire as to the authority to give any such receipt.

No doubling-up of gifts or legacies

(#) ❷if the Will of ***{SPOUSE'S NAME}*** contains similar provisions to the legacies specified in paragraph ***{number}*** of this Will (the "Legacies"), then I direct the Trustees of my Will, together with the Trustee of the Will of ***{SPOUSE'S NAME}***, to determine from which estate or in what proportions our respective estates will pay the Legacies, with the intent and to the effect that the Legacies will not be paid in full twice and that the aggregate amount of the Legacies from my estate and from the estate of ***{SPOUSE'S NAME}*** to be paid to the legatees described in such paragraph ***{number},*** shall be the amount specified in paragraph ***{number}*** of this Will;

Forgiveness of debts

(#) to release and forgive ***{NAME OF BENEFICIARY}*** from the payment of all debts, whether for principal or interest and whether secured or unsecured, which at the time of my death may be owing by ***{NAME OF BENEFICIARY}*** to me and to give to ***{NAME OF BENEFICIARY}*** a full release and discharge of all securities or any claim under them. Any expense incidental to such cancellation or discharge is to be paid out of my Estate;

Continued...

Bequests (Continued)

Gifts of real estate

When a gift of an interest in real estate is included, always obtain a Land Title Office search to avoid surprises. The Will-Maker may have already transferred the property to someone, or it may not be registered as the Will-Maker believes (for example, not in joint tenancy).

❶ If there are financial encumbrances registered against the property, obtain a copy and ascertain the status of the encumbrance. For example, it may be that the mortgage registered against the property quite a while ago has been paid in full and no discharge has been obtained. It is important to determine whether the gift is subject to such financial encumbrance or if the estate is responsible for it (see **Wills and Will-Makers – Property encumbered by security interest**).

❷ Select the appropriate clause depending on whether the estate or the beneficiary will be responsible for the charges.

Outright gift of a residence

(#) to transfer any interest I may have in ***{address of residence}***, or whatever real property I may own and be using as my residence at my death, [together with the contents thereof] [clear of / ❶subject to any financial encumbrances registered against my residence], to ***{FULL LEGAL NAME}*** if s/he survives me for ***{number}*** days.

Outright gift of real property (not residence)

(#) to transfer to ***{FULL LEGAL NAME}*** any interest I may have at my death in lands and premises located at:

> ***{address}*** in ***{city}***, Province of British Columbia
> ***legally described as***:
> ***{legal description}***

[❶clear of / subject to any financial encumbrances registered against the property];

Residence (or real property) held *in trust* for a beneficiary (life estate)

(#) to hold any interest I may have in whatever real property I may own and be using as my residence at my death [together with the contents thereof], as a home for the personal use, occupation and enjoyment of *{**NAME OF BENEFICIARY**}*:

(#) for ***{number}*** year[s] from the date of my death;

(***or:***)

(#) until s/he:

(i) dies;

(ii) remarries;

(iii) lives with another person in a marriage-like relationship for a period of ***{number of months}*** months;

(iv) vacates the residence;

(v) notifies my Trustees that s/he no longer desires to reside in the residence;

whichever event shall occur first;

(select the paragraph below if the estate is responsible for charges:)

❷to pay all taxes, municipal rates, monthly maintenance payments, insurance premiums, repairs, mortgage payments, interest, and any other charges or amounts necessary for the general upkeep of the property held under the terms of this subparagraph out of the residue of my estate, either out of income or capital, or partly out of income and partly out of capital, as my Trustees, in their discretion, consider advisable.

(select the paragraph below if the recipient is responsible for charges:)

❷***{NAME OF THE BENEFICIARY}*** to pay all taxes, municipal rates, monthly maintenance payments, insurance premiums, repairs, mortgage payments, interest, and any other charges or amounts necessary for the general upkeep of the property held under the terms of this subparagraph;

MEMORANDUM TO WILL

When a Will-Maker wants to distribute personal belongings (or in legal terminology "make bequests") to a large number of family members and friends, has an extensive and detailed list of articles, or has some elaborate wishes about such bequests, it is sometimes too cumbersome to include a list of items or to describe the wishes in the Will. In this instance, a separate Memorandum is prepared and attached to the Will (**Wills • Documents** chapter).

Often, the client will prepare such Memorandum and bring it with him or her and it is not retyped by the legal assistant.

The notes regarding the ademption of an item or the survivorship of the beneficiary on page 18 (**Bequests**) apply to the articles gifted in the Memorandum.

For a Memorandum to be binding, it must be:

- included by reference in the Will – that is, be specifically mentioned in the Will;
- dated **on** or **prior** to the Will's date;
- signed; and
- in existence at the time of the Will-Maker's death.

Once the Will is signed, the Memorandum **cannot** be altered (or a new one prepared) without re-executing the Will or preparing a Codicil to the Will that confirms such alteration (or the execution of a new Memorandum).

Select the appropriate clause opposite and insert it in the Will, either where the "bequest" clause is usually located (that is, before the residue clause) or in any other location as directed by the supervising lawyer.

Note: When personal effects are distributed in the Will in addition to those already listed in the Memorandum, the bequest clause in the Will should state that these items are distributed subject to the Memorandum. For example, the Memorandum may list some specific rings to be given to named nieces. The Will states that all the jewellery is to be given to the Will-Maker's daughters. In this instance, add the following to the bequest clause:

> *"…subject to the jewellery distributed in the Memorandum dated* ***{date}*** *and attached to my Will..."*

MEMORANDUM TO WILL

Clause to be included in the Will for a Memorandum which lists beneficiaries and articles or personal effects

(#) to deliver my personal effects described in the Memorandum dated ***{date}*** and signed by me before I signed this Will to those persons listed in the Memorandum who survive me [for [30] days] and in accordance with the directions contained in such Memorandum.

General clause to be included in the Will – articles or personal effects not distributed by the Memorandum will form part of the residue of the estate

(#) to deliver such of my personal effects as are described in a Memorandum dated ***{date},*** which was made and signed by me prior to this Will and subject thereto, provided that any articles of personal, domestic or household use or ornament, as well as any consumable stores not otherwise specifically and effectively disposed of by the said Memorandum or by this Will, or any Codicil thereto, shall form part of the residue of my estate.

Wishes / direction set out in the Memorandum (also, see wishes, page 42)

(#) I direct my Trustees to follow the wishes/directions/instructions set out in the Memorandum dated ***{date}***.

RESIDUE

LEVEL I

The residue or "the bulk of the estate" is what is left once the debts have been paid, specific bequests have been distributed, and specific trusts have been established. The clause disposing of the estate is sometimes referred to as the **residue** clause.

Also consider the number of days for which a person must survive the Will-Maker to receive his or her share of the estate. 30 days is the most commonly used interval.

Although the legal assistant will only follow the supervising lawyer's instructions, he or she should have an idea of the overall picture, i.e. who receives the residue, whether they are minors or mentally incompetent persons, whether the residue is given outright or a trust is created, and what happens to the trusts and contingent beneficiaries.

There should always be at least two levels of distribution. In the event all persons named in the Level I predecease the Will-Maker, provide at least one alternate level of distribution (Level II).

The residue clauses shown in this ***Guide*** should never be treated as "boilerplate" precedents, and each situation should be considered very carefully before a clause is inserted in an actual Will.

❶ In Level I, when transferring the residue or a portion of the residue directly to a person, bear in mind that if that person dies, an alternate beneficiary should be provided – Level II. Each subsequent level should start with the words:

> "If ***{FULL LEGAL NAME}*** does not survive me for ***{number}*** days[(1)]..."

❷ If this clause is to be used in Levels II and III (that is if, for example, it is used to describe what happens to the residue after a trust fails), the reference to the time of death of the Will-Maker should be changed to the "Failure Date" or in certain circumstances, the "Material Date". Ensure that the preamble to this clause defines the Failure Date (see page 37 **Preambles**).

> "…to divide the residue of my estate in equal shares among/between ***{NAMES}*** (individually the "Designated Beneficiary") who are alive on the Failure Date, except if either/any of Designated Beneficiary is not alive on the Failure Date and leaves one or more of his or her children alive on the Failure Date, an equal share will also be created for the deceased Designated Beneficiary, but will be divided equally between/among those of his or her children who are alive on the Failure Date."

❸ Go to Level II and insert further instructions as to what happens to the shares.

You can specify different alternatives for each paragraph or combine them. For example, the Will-Maker may want the gift to siblings to be per capita and the gift to children to be per stirpes. S/he may want a failed gift to a charity to be divided equally among the remaining charities, and name an alternate or authorize the Trustees to select an alternate charity should all the gifts fail. Or the clause may simply say that should any of the gifts fail, the failed share or shares are to be distributed to a similar charity to be selected by the Trustees.

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(1) See the explanation regarding the survival clause on page 6.

❶ DIRECTLY/OUTRIGHT

Residue to one beneficiary (e.g. spouse)

(#) to give the residue of my estate to [my spouse,] ***{NAME OF BENEFICIARY OR SPOUSE}***, if s/he survives me for ***{number}*** days;

Residue equally to adult children then outright to grandchildren

(#) [if ***{FULL LEGAL NAME}*** does not survive me for ***{number}*** days,]to divide the residue of my estate [then remaining] in equal shares between/among my children alive at my death, except if any child of mine dies before me and leaves one or more of his or her children alive at my death, to create an equal share for that deceased child and to divide such share equally among those of his or her children who are alive at my death.

Residue divided equally among a *class* of adult beneficiaries

(#) ❷[if ***{FULL LEGAL NAME}*** does not survive me for ***{number}*** days,] to divide the residue of my estate [then remaining] into as many equal shares as I have [children/siblings] who are alive at my death, except if either/any of my [children/siblings] die[s] before me and leave[s] one or more of his or her children alive at my death, to create an equal share for that deceased child/sibling, and to …❸

Residue divided equally among designated adult beneficiaries

(#) ❷[if ***{FULL LEGAL NAME}*** does not survive me for ***{number}*** days,] to divide the residue of my estate in equal shares among/between ***{NAMES}*** (individually "Designated Beneficiary") who survive me, except if either/any Designated Beneficiary dies before me and leaves one or more of his or her children alive at my death, to create an equal share for the deceased Designated Beneficiary, and to divide such share equally among those of his or her children who are alive at my death;

Residue divided into equal shares with but with shares distributed unequally

(#) To divide the residue of my estate into ***{number of shares}*** equal shares and to give:

(i) ***{number of shares}*** share[s] to ***{NAME OF BENEFICIARY}***;❸

(ii) ***{number of shares}*** share[s] to ***{NAME OF BENEFICIARY}***; ❸and

(iii) ***{number of shares}*** share[s] to ***{NAME OF BENEFICIARY}.***❸

Residue directly to different beneficiaries in unequal shares

(#) to divide the residue of my estate into *{**number of shares}* shares so there shall be one share for each of the following beneficiaries [who survive me for ***{number}*** days] [are alive on the Division Date/Failure Date] and to give such shares as follows:

(i) one share consisting of ***{percentage}*** to ***{NAME OF BENEFICIARY}***;

(ii) one share consisting of ***{percentage}*** to *{**NAME OF BENEFICIARY}*;

If a beneficiary in paragraph ***{number}*** [does not survive me for ***{number}*** days] [is not alive on the Division Date/Failure Date], to [add the share to which he or she would have been entitled, if living, to the residue of my estate}.

Residue *(Continued)*

❶ Residue to be held in trust (creation of trust)

When the Will-Maker wishes to make a gift to a beneficiary (in this case – Level I), but does not wish to give that beneficiary control of the property immediately, a trust is created. The Trustees named in the Will shall hold and invest the gift for the benefit of the beneficiary. The beneficiary of a trust either:

- never receives the property but only derives some benefits from it, (for example, a trust is created for the duration of life of a specific beneficiary). In this case another beneficiary must be provided to receive the remainder of the property at the end of the trust (Level II); or
- receives the property after a certain event (such as reaching a certain age, marrying, graduating from college, etc.) in which case, an alternate beneficiary (Level II) is provided should that event not happen and the first beneficiary (Level I) does not receive the entire property.

A very strong note of caution: Any time a trust is created, the tax implications should be considered, the supervising lawyer should double-check the wording of each clause very carefully, and the advice of an accountant should be sought. This is particularly important in the case of a trust created for a spouse (ss. 70(6) and 252(3) of the *Income Tax Act*). In case of a spousal trust, never use the survival clause.

Additionally, if a trust beneficiary is in receipt of federal disability pension benefits, one must ensure that the trust does not affect the beneficiary's entitlement to the pension benefits.

❷ On termination of any trust, the remainder of the trust has to vest in (or be paid or transferred to) someone "for their own use absolutely". See Level I for wording.

Note: Careful when using the prepositions "among" and "between". "Between" denotes that there are two objects or persons, and "among" denotes that three or more.

Continued...

❶ **IN TRUST**

Residue in trust for a designated beneficiary (without conditions)

(#) to invest, and keep invested, the residue of my estate, and to pay so much of its income and capital as may be necessary or advisable in my Trustees' discretion for [my spouse/child], ***{FULL LEGAL NAME}***'s maintenance, education or benefit during his/her lifetime with power/no power to my Trustees to encroach upon the capital, and to use for the benefit of ***{FULL LEGAL NAME}*** such parts of the capital as my Trustees, in their discretion consider necessary or advisable. ❷

Education Fund in trust

(#) to hold the amount of $***{amount}*** in trust for the education of my children ("the Education Fund") and to use the Education Fund to assist my children to acquire a suitable education which may include trade school, vocational school, university or higher education, or any other form of education which my Trustees in their absolute discretion consider to be in the interest of my children to advance them in life. When the last of my children has completed his or her education [graduated from university/college], to add the Education Fund or so much as remains thereof, to the residue of my Estate;

Residue in trust for a designated beneficiary (with conditions)

(#) to invest, and keep invested, the residue of my estate, and to pay so much of its income and capital as may be necessary or advisable in my Trustees' discretion for ***{FULL LEGAL NAME}***'s maintenance or benefit until s/he:

(a) dies;

(b) remarries; or

(b) lives with another person in a marriage-like relationship for a period of ***{number of months}*** months.

whichever event shall occur first; ❷

Continued...

LEVEL II

A Level II clause is inserted in the Will to provide for circumstances where Level I fails. This clause usually follows the clause **Residue to one beneficiary** (e.g. **spouse**) (see previous page). Also refer to the explanations at the beginning of this chapter.

This precedent provides that if the spouse, who is the residuary beneficiary in Level I, dies before the Will-Maker, the residue of the estate is to be paid **outright** to the **adult** children of the Will-Maker in equal shares per stirpes. If a child is dead, an equal share is created for that deceased child and held in trust for his or her children (the Will-Maker's grandchildren) who are alive when the Will-Maker dies. This trust is held, until the grandchildren reach certain ages, with partial distributions along the way. This is sometimes called **staggered** or **staged distribution**. This clause is different from the clause on the next page, which provides that the residue of the estate is held in trust for the children of the Will-Maker.

❶ If this clause is used in Level I (that is because there is no surviving spouse), delete the preamble "If ***{FULL LEGAL NAME}*** does not survive me for ***{number}*** days,...".

❷ Refer to the client's instructions as set out in the ***Will Checklist*** regarding:

- the age at which a child receives a share of the estate; and
- the percentage or portion of the estate to be paid out at that age.

If there are several different ages, repeat this clause as many times as necessary. To minimize typing, copy the clause into the text as many times as there are distributions before completing the blanks. For example, the portion of this clause would read as follows:

> *"(ii) when my grandchild attains the age of [19] years, to give [10] per cent of the capital of the sub-share to him or her; and*
>
> *(iii) when my grandchild attains the age of [23] years, to give [25] per cent of the capital of the sub-share to him or her; and*
>
> *(iv) when my grandchild attains the age of [27[years, to give [25] per cent of the capital of the sub-share to him or her; and*
>
> *(v) when my grandchild attains the age of [30] years, to give the remainder of the capital of the sub-share to him or her;".*

❸ The grandchildren referred to in this clause are the grandchildren of the Will-Maker's child or the Will-Maker's great-grandchildren. As the Will-Maker may not wish to give a share of the estate to great-grandchildren:

- delete the words between the two ❸ in sub-paragraphs (b) (iv) and (b)(v) ensuring that the words "…to add the sub-share…" at the end of paragraph (b)(v) are now at the end of paragraph (b)(iv); and
- delete the words "or grandchildren" in sub-paragraph (c).

Continued...

Outright to adult children (if spouse has died before the Will-Maker) then in trust for grandchildren

❶ [If [my spouse,] ***{FULL LEGAL NAME}*** does not survive me for ***{number}*** days, to divide the residue of my estate [then remaining] into equal shares so that there shall be:

(a) one share for each child of mine alive at my death and to pay such share to him or her; and

(b) one share for each child of mine who has died before me, leaving a child or children alive at my death (my "grandchild" or "grandchildren") and to hold one equal sub-share separately for each of my grandchildren on the following trusts:

(i) to invest and keep invested the sub-share and to pay so much of its income and capital as may be necessary or advisable in my Trustees' discretion for my grandchild's maintenance, education or benefit during his or her minority (to add any income not so paid in any year to the capital of the sub-share) and when my grandchild attains the age of majority, to pay the income to him or her;

❷ (ii) when my grandchild attains the age of ***{number}*** years, to give ***{percentage}*** per cent of the capital of the sub-share to him or her;

(iii) when my grandchild attains the age of ***{number}*** years, to give ***{percentage}*** per cent of the capital of the sub-share to him or her; and

(iv) when my grandchild attains the age of ***{number}*** years, to give the remainder of the capital of the sub-share to him or her;

(v) if my grandchild dies receiving the entire sub-share of my estate to which he or she is entitled under this sub-paragraph leaving children alive at his or her death, ❸to divide the sub-share or the amount thereof remaining among his or her children (my great-grandchildren) who are alive at that grandchild's death, in equal sub-shares and to hold the sub-share of each of my great-grandchildren on the same trust, mutatis mutandis, as hereinbefore provided for the sub-share of each of my grandchildren; or

(vi) if my grandchild dies before receiving the entire sub-share of my estate to which he or she is entitled under this sub-paragraph, leaving no child alive at his or her death, ❸to add the sub-share or the amount thereof remaining equally to the other shares of the residue of my estate.

(c) If any child of mine has died before me leaving no child ❸[or grandchild]❸ alive at my death, to divide the share of deceased child equally among those of my children alive at my death.

Continued...

LEVEL II *(Continued)*

This precedent provides that if the spouse, who is the residuary beneficiary in Level I, dies before the Will-Maker, the residue of the estate is to be held in trust for the children of the Will-Maker in equal shares per stirpes. If a child of the Will-Maker is dead leaving children, an equal share is created for the deceased child and also held in trust for the deceased child's children (the Will-Maker's grandchildren) until certain ages with partial distributions along the way. This is sometimes called **staggered** or **staged distribution**.

N.B. This clause is different from the clause on the previous page, which provides that the residue of the estate is paid outright to **adult** children and, if a child of the Will-Maker has died before him or her, the share created for that child is to be held in trust for that child's children (the Will-Maker's grandchildren).

❶ If there is no spouse, omit the words: "If ***{FULL LEGAL NAME}*** does not survive me for ***{number}*** days, ...".

❷ Follow the client's instructions as set out in the ***Will Checklist*** regarding:

- the ages at which a child receives a share of the estate; and
- the percentages or portion of the estate to be paid out at that age;

If there are several different ages, repeat this clause as many times as necessary. To minimize typing, copy the clause into the text as many times as there are distributions before completing the blanks. For example, the portion of this clause would read as follows:

"(ii) when my child attains the age of [19] years, to give [10] per cent of the capital of the sub-share to him or her; and

(iii) when my child attains the age of [23] years, to give [25] per cent of the capital of the sub-share to him or her; and

(iv) when my child attains the age of [27] years, to give [25] per cent of the capital of the sub-share to him or her; and

*(v) when my child attaining the age of **{number}** years, to give the remainder of the capital of the sub-share to him or her;".*

❸ This is the wording for the Rule Against Perpetuities, as referred to on page 5 in this chapter. If, for example, a trust is created for the Will-Maker's grandchildren (or even great-grandchildren) who are not yet born, insert this clause.

In trust for infant children (if spouse died before the Will-Maker)

❶ [If [my spouse,] ***{FULL LEGAL NAME}***, does not survive me for ***{number}*** days,] I give the residue of my estate to my Trustees on the following trusts:

(a) to divide the residue of my estate then remaining into equal shares so that there shall be:

(i) one share for each child of mine alive at my death; and

(ii) one share for each child of mine who has died before me leaving a child or children alive at my death;

(b) to hold one share for each child of mine alive at my death separately on the following trusts:

(i) to invest and keep invested the share and to pay so much of its income and capital as may be necessary or advisable in my Trustees' discretion for my child's maintenance, education or benefit during his or her minority (and to add any income not so paid in any year to the capital of the share) and when my child attains the age of majority to pay the income to him or her;

❷ (ii) when my child attains the age of ***{number}*** years, to give ***{percentage}*** per cent of the capital of the share to him or her;

(iii) when my child attains the age of ***{number}*** years, to give ***{percentage}*** per cent of the capital of the share to him or her;

(iv) when my child attains the age of ***{number}*** years, to give the remainder of the capital of the share to him or her;

(v) if my child dies before receiving the entire share of my estate to which he or she is entitled under this sub-paragraph, leaving children alive at his or her death, to divide the share or the amount thereof remaining among his or her children who are alive at that child's death, in equal sub-shares and to hold the sub-share of each of his or her children alive at his or her death, on the same trust, mutatis mutandis, as hereinbefore provided for the share of each child of mine; or

(vi) if my child dies before receiving the entire share of my estate to which he or she is entitled under this sub-paragraph, leaving no child alive at his or her death, to add the share or the amount thereof remaining equally to the other shares of the residue of my estate;

(c) to divide the share of each child of mine who has died before me and left children equally among his or her children who are alive at my death and to hold the sub-shares on the same trust, mutatis mutandis, as hereinbefore provided for the share of each child of mine;

❸ (d) unless an earlier vesting occurs in accordance with the provisions of my Will, I direct that every share of the residue of my estate shall vest in interest on the date which is 21 years after the date of death of the last to die of my descendants who survive me or the date which is 80 years less one day after the date of my death, whichever date is the later.

LEVEL III – MISCELLANEOUS RESIDUE CLAUSES – FAILURE CLAUSES

In the unlikely event that all of the beneficiaries named in Levels I and II die before the Will-Maker, or a beneficiary dies before receiving the entire share of the estate to which s/he would be entitled, or trusts are created with distribution in the future, the Will-Maker may wish to consider what would happen if the bequests fail or a trust does not vest. The date of such failure is referred to as "failure date". In order to avoid the possibility of intestacy or partial intestacy, the client may wish to provide another level of disposition in case the preceding levels fail.

Again, the supervising lawyer will discuss the matter with the client and the legal assistant is to draft the Will document following the supervising lawyer's instructions.

The clauses opposite are sometimes referred to as "Failure Clauses" and they consist of two parts:

- the **Preamble**, which explains the failure and introduces the second part;
- an explanation of **what happens** when there is failure (disposition of the share of the estate).

The precedent clauses shown opposite are examples of family situations most commonly encountered when preparing Wills.

If a **Residue** clause is used for a failure clause, change the reference to the time of death of the Will-Maker to the "Failure Date". Ensure that the preamble to this clause defines the Failure Date (see opposite "**Preambles"**).

❶ Check the **Will Checklist** to ascertain client's wishes and:

- select the appropriate clause or clauses; and
- complete the obvious blanks.

❷ In this example, the residue of the estate is left to a **class** of beneficiaries (e.g. children or siblings) per stirpes. That is, if a person is not alive at the distribution date, his or her children will take equally the share of their deceased parent.

❸ When referring to a **class** of beneficiaries (e.g. siblings – brothers and sisters of the Will-Maker – or more distant relatives), sometimes a "per capita" distribution is used. If one of the persons of that class is **not** alive at the distribution date, the children of the deceased person of that class are excluded and do not receive the share of their deceased parent.

❹ Continue with failure clauses on the next page.

Continued…

Preamble

if no child or other descendant of mine acquires an absolutely vested interest by virtue of the trusts herein declared [(the date of that failure being the "Failure Date")], to ***{describe what happens}***…

(***or:***)

if there is a failure of any of the trusts of the residue of my estate which is not provided for above [(the date of that failure being the "Failure Date")], to ***{describe what happens}***…

(***or:***)

if ***{FULL LEGAL NAME}*** does not survive me for ***{number}*** days, and the trusts set out in paragraph ***{number}*** fail [(the date of that failure being the "Failure Date")], to ***{describe what happens}***…

What happens

… divide the residue of my estate [then remaining] equally among/between ***{FULL LEGAL NAME}*** and ***{FULL LEGAL NAME}***, or the survivor[s] of them. If that both [all] ***{FULL LEGAL NAME}***, ***{FULL LEGAL NAME}*** and ***{FULL LEGAL NAME}*** are then deceased, to give the residue of my estate [then remaining] equally to ***{FULL LEGAL NAME}*** and ***{FULL LEGAL NAME}***, or the survivor[s] of them;

(***or):***

❷… divide the residue of my estate [then remaining] equally among my sister[s] and my brother[s] (my "siblings") alive on the Failure Date. If one of my siblings has died leaving children then alive, to give the share to which such deceased sibling would have been entitled, if living on the Failure Date, equally to his or her children who are then alive. If one of my siblings has died before the Failure Date leaving no children then alive, to give the share to which such deceased sibling would have been entitled, if living, to my surviving sibling[s]; provided that if no sibling or child of sibling survives me, to …❹

(***or:***)

❸… to divide the residue of my estate [then remaining] equally between/among the following beneficiaries who are then alive [alive at my death/at the Failure Date]:

(a) ***{FULL LEGAL NAME}***; and

(b) ***{FULL LEGAL NAME}***.❹

(***or:***)

❸…to divide the residue of my estate then remaining as follows and to pay:

(a) ***{percentage}*** per cent of the residue of my estate to ***{FULL LEGAL NAME}***;

(c) ***{percentage}*** per cent of the residue of my estate to ***{FULL LEGAL NAME***}.

If any beneficiary named in this paragraph (individually, "Designated Beneficiary"; collectively, "Designated Beneficiaries") dies before me [***or before*** the Failure Date], to give the share of my estate to which the deceased Designated Beneficiary would have been entitled under this sub-paragraph, to. ***{describe what happens}***.❹.

Continued…

LEVEL III – MISCELLANEOUS RESIDUE CLAUSES – FAILURE CLAUSES

(Continued)

N.B. Always follow the client's instructions and if in doubt as to the choice of a clause consult the supervising lawyer.

The wording of each subsequent level (that is, what happens if the previous level fails) must be introduced with a preamble; for example:

- "if ***{FULL LEGAL NAME}*** does not survive me for ***{number}*** days …"; or
- "if ***{FULL LEGAL NAME}*** is not alive at my death…"; or
- "if ***{FULL LEGAL NAME}*** is not alive on the Failure Date…"
- "if there is a failure of any of the trusts of the residue of my estate which is not provided for above…";

and then the wording from precedent clauses from another level repeated, for example:

- "to divide the residue of my estate then remaining equally among my …"; or
- "to hold the residue of my estate then remaining in trust for …"

In other words, the wording of the different levels is interchangeable and with the appropriate preamble, may be used in any level.

(choose as applicable:)

…equally among the remaining Designated Beneficiaries alive at my death [***or at*** the Failure Date].

(***or:***)

(a) to the surviving spouse of the deceased Designated Beneficiary, if any;

(b) if the Designated Beneficiary has no surviving spouse, to the surviving children of the deceased Designated Beneficiary, if any;

(c) if the Designated Beneficiary has no surviving spouse or surviving children, equally among the Designated Beneficiaries then alive.

(or:)

... to the following organizations, societies, associations, corporations, or the like, as are in existence at my death:

(a) ***{percentage}*** per cent to ***{NAME OF CHARITY}***;

(b) ***{percentage}*** per cent to ***{NAME OF CHARITY}***.

For the purpose of this my Will, the receipt of any person purporting to be the secretary or treasurer, or other officer, or officers, as the case may be of any organization, society, association, or corporation, or the like, being a legatee or beneficiary hereof, shall be a full and sufficient receipt and discharge to my Trustees as to such bequests, and my Trustees shall neither be bound to see to the application thereof, nor to enquire as to the authority to give any such receipt:

EXCLUSIONS

If one of the following classes of people are to be excluded from the Will:

- a spouse or a child of the Will-Maker who could apply for a share of the estate under Part 4 Division 6 of WESA [Variation of Wills] and could contest the Will by applying to the court to vary the provisions of the Will and secure adequate maintenance and support; or
- a person who would inherit on an intestacy (see **Intestacy – Overview**);

include clear and specific reasons for the exclusion in the Will or in a Memorandum thereto. The reasons for the exclusion should not overtly contravene public policy, nor the *Human Rights Act,* which states that one cannot discriminate against another person because of this person's:

> *"…race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered."*

Sometimes, a Will-Maker prefers that the explanation for an exclusion be included in a letter from the Will-Maker to the Executor or in a Memorandum or Statutory Declaration. The reason for not showing the exclusion in the Will is because, when a person dies, the contents of the Will may become public knowledge when the Will is proved by the Supreme Court. At that time, a copy of the Will is mailed to all beneficiaries named in the Will and to all heirs-at-law (s. 121 of WESA and the **Notices** chapter). In other words, the Will-Maker may not want everyone to know why the excluded person is not receiving anything under the Will.

The exclusions are usually drafted by the supervising lawyer. The exclusions provided on the opposite page are simply examples of the typical exclusions encountered in most common family circumstances of a Will-Maker.

❶ Always insert the full names of the person to be excluded and that person's relationship to the Will-Maker.

EXCLUSIONS

(#) **I MAKE** no bequest to: ...

(choose as applicable:)

Daughter/son

…my ❶[son/daughter], ***{FULL LEGAL NAME}***, as s/he has not treated me with the proper respect during the past ***{number}*** years as a son/daughter should treat his/her father/mother.

Children from a previous marriage

…the children of my first marriage as they are presently in the custody of my ex-wife (and her [common-law] husband) and are being well provided for.

Separated spouse

…my spouse, ***{FULL LEGAL NAME}***, as we have been separated since ***{date}***, all financial matters have been settled between us in a written Separation Agreement, and s/he is able to support him/herself.

Divorced spouse

…my former spouse, ***{FULL LEGAL NAME}***, as we are divorced pursuant to a Final Order dated ***{date}*** [***or*** have been separated since ***{date}***].

WISHES / DIRECTIONS

Wishes of the Will-Maker may be set out in the Will. The most common ones refer to funeral arrangements, donations of organs, or the disposition of remains or ashes.

As mentioned above (**Exclusions –** page 40), wishes should not overtly contravene public policy, nor the *Canadian Human Rights Act*.

Familiarize yourself with the *Cremation, Interment and Funeral Services Act* to determine if the Will-Maker's instructions comply with that Act; for example, there may be locations where the scattering of ashes is not allowed.

Set out opposite are some simple examples of wishes frequently expressed by clients. Complicated or involved wishes are usually dictated by the supervising lawyer.

Wishes are not legally binding on the Executor and are not enforceable. So, if something must be done, it should be a **direction** to the Trustees. However, you could use: "it is my wish..." if the Memorandum contains conditional gifts that may not be enforceable, or if the Will-Maker has given the Trustees discretion in the distribution of the gifts contained in the Memorandum. For example, a clause may read:

> *"to give all my jewellery to my daughter **{Name}** upon her graduation [with an undergraduate degree from an accredited university]. [It is my further wish that she complete a B.A. in religious studies.]"*

Once the Will has been executed, the Will-Maker should inform the prospective Executor of the wishes (especially with regard to funeral arrangements, organ donation, etc.). The practical reason being that, after the Will-Maker's death, the Will is often located and read after the funeral and thus too late to fulfil those wishes, especially those relating to organ donation.

Wishes may be left out of the Will entirely and instead set out in a letter addressed to the Executor. This preserves their secrecy or confidentiality.

WISHES / DIRECTIONS

Disposition of remains (cremation and funeral arrangements)

I WISH/DESIRE/WANT that …

(choose as applicable)

…pursuant to arrangements which I have made with the ***{NAME OF MEMORIAL SOCIETY}***, my remains be cremated at my death and my ashes be disposed of in ***{location}***.

(***or:***)

…my remains be cremated at my death and my Trustees make such disposition of the ashes as my Trustees consider appropriate.

(***or:***)

my remains be buried at ***{location}***.

(***or:***)

my Trustees arrange a high mass funeral service at ***{location}***.

(***or:***)

…there be no funeral or memorial service held for me.

(***or:***)

…any funeral or memorial services held for me (with or without the presence of my remains) be conducted with unostentatious simplicity.

(***or:***)

…the services of the ***{A.B.C. MEMORIAL SOCIETY OF ...}*** be used for my funeral.

I DIRECT my Trustees to follow the instructions set out in the Memorandum dated ***{date}***.

Organ Donation

I DIRECT my Trustee to follow any written directions for the donation or utilization of any of my body organs.

(***or:***)

I DIRECT my Trustees to observe and give effect to any arrangements I conclude in my lifetime regarding disposal at my death of my remains or any part thereof. In this respect, I contemplate donating my eyes to the ***{CANADIAN NATIONAL INSTITUTE FOR THE BLIND}*** [and the remainder of my body to the ***{FACULTY OF MEDICINE AT THE UNIVERSITY OF BRITISH COLUMBIA}***] and subject thereto that my remains to be cremated and my ashes scattered.

TRUSTEES' POWERS

The powers given to the Executors and Trustees by the *Trustee Act* are supplemented by additional or specific powers which are included in the Will. The clauses set out on the following pages are examples of general directions to Executors and as with all clauses set out in this *Guide*, they are intended to be used under the guidance and instructions of the supervising lawyer.

❶ This clause is included to cover the situation when a minor (person under the age of majority) may benefit under the Will, and there are no specific trust provisions included in the Will for that person. If there is no Trustee or specific trust created for the share of a minor, on distribution of the estate, the minor's share must be paid to the Public Guardian and Trustee in trust for the minor until the minor reaches the age of majority (s. 153 of WESA). This may prove a very onerous alternative because of the trust administration fees charged by the Public Guardian and Trustee. The minor's share may include any property, other than money, such as real estate, shares in a company, brokerage account, etc.

Do not change the age of 19 (the age of majority) in this clause as it may fall into the trap of the Saunders v. Vautier Rule (see page 5). Use the clause below instead.

❷ If you want to change the age to an age older than 25 years, change the clause to read:

"(c) Except as otherwise provided herein, if any person becomes entitled to any share in my estate before attaining the age of [25] years, to invest and keep invested the share of such person and to pay so much of its income and capital as may be necessary or advisable in my Trustees' discretion for that person's maintenance, education or benefit until he or she attains the age of [25] years (and to add any income not so paid in any year to the capital of the sub-share) and when that person attains the age of [25] years, to pay the residue of the income and capital of that share to him or her. If that person dies before receiving the entire share of my estate to which he or she is entitled under this sub-paragraph:

(i) leaving children alive at the deceased person's death, to divide the share of the deceased person, or the amount remaining of that share, among the deceased person's children who are alive at the deceased person's death, in equal sub-shares and to hold the sub-share of each of the deceased person's children alive at the deceased person's death, on the same trust, mutatis mutandis, as provided herein for the share of the deceased person; or

(ii) leaving no child alive at the deceased's person's death, to add the share or the amount thereof remaining equally to the other shares of the residue of my estate.

Continued...

Subject to the foregoing, my Trustees shall have the following powers:

(a) ❶To pay or apply the capital and income, or either, of the then expectant, presumptive or vested share of any beneficiary in the residue of my estate, whether a minor or not, for or towards the maintenance, education, advancement, or benefit of any such beneficiary and my Trustees shall not be bound to see to the application thereof.

(b) ❶To make any payments for any person under the age of ❷19 years to a parent or guardian of such person whose receipt shall be sufficient discharge to my Trustees.

(c) ❶Except as otherwise provided herein, if any person becomes entitled to any share in my estate before attaining the age of ❷19 years, to invest and kept invested the share of such person and to use the net income and capital or so much thereof as my Trustees, in their absolute discretion, consider advisable, for the benefit of such person until he or she attains the age of ❷19 years.

(d) To 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, in their absolute discretion, to fix the value of my estate or any part thereof, for the purpose of making any such division, setting aside or payment, and the decision of my Trustees shall be final and binding on all persons concerned.

(e) As to any investments held by my estate, including any investment in or in connection with any company or corporation, to join in or take any action in connection with such investments or to exercise any rights, powers and privileges which, at any time, may exist or arise in connection with any such investments to the same extent and as fully as I could if I were alive and the sole owner thereof.

(f) If, at the time of my death, I am liable as endorser, guarantor, surety or otherwise for any company or person or persons, to renew from time to time, in their discretion, the bills, notes, guarantees or other securities or contracts evidencing such liability and for that purpose, to enter into new bills, notes or other securities or contracts for and on behalf of my estate.

(g) To raise money, either without security or by a mortgage or charge or renewal thereof, on any part of my estate to carry out the Trustees' duties and powers hereunder and the trusts hereof.

(h) So long as any real or leasehold property forming part of my estate shall remain unsold, to let or lease the same from month to month, year to year, or for any term of years and subject to such covenants and conditions as they shall think fit, to accept surrenders of leases and tenancies, to expend money in repairs and improvements and generally to manage the property. My Trustees shall be at liberty to renew and keep renewed any Mortgage or Mortgages on any of my real estate, or to borrow money on any of my real estate on any Mortgage or Mortgages, and to pay off any Mortgage or Mortgages or any renewal thereof which may be in existence at the time of my death.

Continued...

TRUSTEES' POWERS - ***Continued***

❶ Include this clause (called the "charging clause") if there is a possibility that a professional (for example: an accountant or a lawyer) will act as Trustee. This clause authorizes the Trustee to compensate the professional for his or her professional services at the usual rate, and not at a professional rate as Trustee.

Note: As the professional will benefit under the Will (by charging for his or her professional services), the professional (or his/her spouse) cannot act as witnesses under the Will.

❷ This clause (sometimes referred to as the "pre-taking") is **optional** but it must be inserted if a lawyer or any professional is appointed as trustee. Otherwise, they will not be able to get paid without consent or a court order. This clause is also often required if a trust company is appointed as trustee. The clause authorizes the Trustees to be compensated without the approval of the beneficiaries and before passing accounts.

If the Will-Maker appoints a trust company as the Executor and Trustee, contact the trust company's officer in charge to find out whether the trust company has its own directions which should be included in the Will. The supervising lawyer will normally do this or instruct the legal assistant accordingly.

❸ Section 15.1 of the *Trustee Act* authorizes a trustee to invest the estate assets in any "form of property or security in which a prudent investor might invest, including a security issued by a mutual fund as defined in the *Securities Act*".

The only requirement is that the Trustee invest in a prudent manner, that is "exercise the care, skill, diligence and judgement" necessary for such investment (s. 5 (2) of the *Trustee Act*) and that, if there is an existing trust in the Will, the Trustee must invest in a manner that is consistent with such trust.

❹ The clause appointing the law firm as solicitors for the estate is only included with the consent of the client and on the supervising lawyer's instructions.

TRUSTEES' POWERS - ***Continued***

(i) To employ accountants, lawyers, financial advisors or other professional advisors in the administration of my estate and the trusts established by this Will, and to pay all professional charges and disbursements in relation thereto.

(j)❶ Any Trustee of my Will being a lawyer or chartered accountant or engaged in any other profession or business may make and be paid all usual professional and other charges for work done by them or their firm or any partner of theirs in relation to the probate of this Will or any Codicil hereto or the trusts thereof, or either, in the same manner in all respects as if they were not Trustees hereof, and also their reasonable charges in addition to disbursements for all work and business done and all time spent by them or their firm or any partner of theirs in connection with matters arising in the premises, including any matters which might or should have been attended to in person by a Trustee not being a lawyer or chartered accountant, or other professional person, but which matters might be reasonably required to be done by a lawyer or chartered accountant or other professional person.

(k)❷ If ***{NAME OF TRUST COMPANY or Lawyer}*** is my Trustee, I authorize such Trustee to appropriate and pay to itself from the income and capital of my estate such amounts on account of its remuneration as my Trustee as it, in its discretion, determines to be reasonable and appropriate from time to time notwithstanding that it shall have the use of the funds prior to any order of any court of competent jurisdiction, or prior to the approval of the estate accounting by the beneficiaries entitled to so approve. That remuneration will not be considered as a reserve with respect to remuneration to be claimed, nor will any interest accrue to my estate on any excess remuneration appropriated by my Trustees.

(l)❸ I authorize my Trustees, when making investments for my estate, to invest and reinvest any property belonging to my estate in such investments as my Trustees consider advisable, including units or other interests of any mutual funds, common trust funds, pooled investment funds, unit trusts or similar investments which may otherwise be considered to be an improper delegation of duty, and to change and vary the same from time to time as my Trustees consider advisable.

(m) I authorize my Trustees to vary and transpose such investments from time to time without the consent of any beneficiary not being a Trustee of this Will.

(n) My Trustees shall not be held liable for any loss that may happen to my estate by reason of such investments made by my Trustee in good faith.

(o)❹ I desire that the services of ***{FULL LEGAL NAME}***, Barristers and Solicitors/Lawyers, of the City of ***{City}***, in the Province of British Columbia, be retained where any services of a legal nature are required in respect of this Will, any Codicil thereto, and of the trusts and provisions thereof and my estate and its administration.

ATTESTATION OR EXECUTION CLAUSES

The attestation or execution clause is the last clause to be typed in a Will (or Codicil). This is place where:

- the Will-Maker signs the Will (or Codicil) in the presence of the two witnesses; and
- the witnesses also sign the Will in the presence of the Will-Maker and each other.

A common example is shown opposite. If the Will-Maker cannot read or sign the Will (because of illness, blindness or ignorance of the English language) special arrangements have to be made. This may involve reading or translating the Will and the attestation clause must reflect the particular circumstances under which the Will was executed (see the following pages for examples).

This clause should fit entirely on one page, should not be "broken," and should not appear on the last page of the Will by itself. At least two lines of text should appear on the last page with the attestation clause. This is to ensure that no text is later inserted between the attestation clause and the preceding paragraph. If there is insufficient room to type the attestation clause in its entirety (i.e. you cannot quite fit it all on one page), move the last two lines of text from the preceding paragraph **and** the attestation clause to the next page. The resulting blank at the bottom of the page preceding this page is filled with a "Z" (see ***Wills • Documents*– *Sample Will*** for an example).

❶ Leave the date blank. It will ultimately be completed when the Will is signed.

To determine how a Will is signed, see **Wills • Procedure – Execution**.

Continued...

Show at least two lines from previous page on this page

I HAVE SIGNED THIS WILL on the __❶__ day of _____, 20__.

We were both present at the request of ***{NAME OF WILL-MAKER}*** when s/he signed this Will. We then signed as witnesses in his/her presence and in the presence of each other.

_____
Signature of Witness

_____
Printed Name

Address: _____

_____

Occupation: _____

_____
Signature of Witness

_____
Printed Name

Address: _____

_____

Occupation: _____

_____
{NAME OF WILL-MAKER}

Precedent attestation clause for a blind Will-Maker

THIS WILL having first been read over to the Will-Maker, ***{NAME OF WILL-MAKER}***, in our presence when the said Will-Maker appeared thoroughly to understand the same and to approve the contents thereof, which Will was signed by the said Will-Maker as and for his/her last Will 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.

_____
Signature of Witness

_____
Printed Name

Address: _____

_____

Occupation: _____

_____
Signature of Witness

_____
Printed Name

Address: _____

_____

Occupation: _____

_____
{NAME OF WILL-MAKER}

Precedent attestation clause for Will-Maker with insufficient knowledge of English

THIS WILL having first been read over to ***{NAME OF WILL-MAKER}***, who understands the ❶ language but has [no] [an imperfect] knowledge of, and cannot read the English language, by ***{NAME OF FIRST WITNESS}*** in English and having been truly interpreted to ***{NAME OF WILL-MAKER}*** by ***{NAME OF SECOND WITNESS}*** who understands both the English and the ❶ languages which reading and interpretation were both done in our presence, when ***{NAME OF WILL-MAKER}*** appeared thoroughly to understand this Will and to approve its contents. The Will was then signed by ***{NAME OF THE WILL-MAKER}*** [❷with his/her mark] as his/her last Will 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.

_____
{NAME OF WILL-MAKER}

_____
Signature of Witness

_____
Printed Name of Witness

Address: _____

_____

Occupation: _____

_____
Signature of Witness

_____
Printed Name of Witness

Address:_____

_____

Occupation: _____

❶ Insert the appropriate language (e.g. French, Polish, etc.).

❷ Include this text only if the Will-Maker cannot write the English language and signs with a mark.

Precedent attestation clause for Wills remotely executed:

Note: Adapt this clause to the situation. For example, if one of the witnesses was physically present and one was electronically present.

Obtain hard copies of the Will signed by the Will-Maker and by each witness.

This Will is signed in accordance with Section 35.2 of the *Wills, Estates and Succession Act.* We were both electronically present, at the request of ***{NAME OF WILL-MAKER}***, when s/he signed this Will. We then each signed the Will in each other's *{electronic}* presence and in the electronic presence of ***{NAME OF WILL-MAKER}***.

_____
Signature of Witness

_____
Printed Name of Witness

_____

_____
Address

_____
Occupation

_____
Signature of Witness

_____
Printed Name of Witness

_____
Address

_____

_____
Occupation

_____
{NAME OF WILL-MAKER}

MULTIPLE WILLS

For the explanation of the concept and use of Multiple Wills, see chapter **II A – Wills Procedure** – of the ***Guide*** and refer to the instructions below to incorporate the additional paragraph changes to the will master in the following sections.

- Introduction;
- Revocation;
- Appointment
- Description of property
- Payment of Debts Clause
- Vesting Powers

The descriptions, explanations, instructions and precedents contained in this chapter are provided only as a starting point for drafting Multiple Wills as part of the Will-Maker's estate planning. They should not replace the advice and instruction of tax counsel, they should not be considered tax advice and should not be used without the guidance and input of tax advisors engaged by the Will-Maker. Such advisors must provide specific instructions in the implementation of an advanced tax transaction to result in a favourable outcome for the client and they must review the prepared materials as you must rely on their having a thorough understanding of the client's entire tax plan.

There are several ways of naming Multiple Wills, for example:

- primary and secondary wills;
- public and private wills;
- probate and non-probate wills;
- general wills and restricted wills.

We have chosen the most common names: **General Wills** and **Restricted Wills** especially in the case of non-probate wills as they may ultimately be probated.

Multiple Wills must be carefully drafted so that, for example, it is clear which assets and which beneficiaries bear the burden of any debts and taxes, and that legacies and bequests are fully funded, but not duplicated.

If one of the Multiple Wills is being updated, the other will has to be considered. The wills should be drafted so they act harmoniously together. For any subsequent changes, it is not recommended to use codicils with Multiple Wills.

CLAUSES FOR MULTIPLE WILLS

To draft Multiple Wills, use the clauses for the regular Will in this chapter with the changes set out below.

INTRODUCTION

Add the following introduction clause in each will:

General Will

> **THIS WILL** (my "General Will") deals only with my General Property as hereinafter defined.

Restricted Will

> **THIS WILL** (my "Restricted Will") deals only with my Restricted Property as hereinafter defined.

REVOCATION

A Will normally includes a clause revoking all previous Wills. That kind of clause must be carefully drafted to ensure that Multiple Wills do not inadvertently revoke one another.

In the General Will

> I revoke all my prior wills and codicils, except the separate Will (my "Restricted Will") executed on ***{month, day, year}***, immediately prior to the execution of this General Will, which Restricted Will is intended to dispose of my Restricted Property (as defined below in this General Will), which Restricted Will shall have effect concurrently with this General Will and which Restricted Will I do not intend to revoke by the provisions of this General Will.
>
> Note: This revocation clause should be used in the General Will when concurrently preparing a Restricted Will. The Will-Maker must execute the General Will **after** executing the Restricted Will. This clause revokes all prior wills except the Restricted Will which is executed immediately before the General Will.

In the Restricted Will

> I revoke all my prior wills and codicils, except the separate Will (my "General Will") executed on ***{month, day, year}***, which General Will is intended to dispose of my General Property (as defined below in this Restricted Will), which General Will shall have effect concurrently with this Restricted Will and which General Will I do not intend to revoke by the provisions of this Restricted Will.
>
> Notes: This revocation clause should be used in the Restricted Will when concurrently preparing the General Will. The Will-Maker must execute the Restricted Will

before executing the General Will. This clause revokes all prior wills except the General Will which is executed immediately after the Restricted Will.

APPOINTMENT OF TRUSTEES

Use the appropriate **Appointment Clauses** with additional changes below, keeping in mind that different executors are appointed in each Multiple Will.

In the General Will

The executor(s) must be different from the executor(s) appointed in the Restricted Will,

Change the appropriate appointment clauses to describe the Executor and Trustee as "General Executor and Trustee".

In the Restricted Will

The executor(s) must be different from the executor(s) appointed in the General Will,

Change the appointment clauses to describe the Executor and Trustee as "Restricted Executor and Trustee".

DESCRIPTION OF PROPERTY

Add the following paragraphs. If your will does not include headings, also add a heading.

In the General Will

Add a clause defining the general property. It should be the same as the one in the Restricted Will.

General Property:

All property irrespective of its nature, location or value, that passes to my General Trustee in my General Trustee's capacity as my personal representative (herein referred to as my "General Property"), save and except my Restricted Property as defined herein:

{Copy the description of Restricted Property from the Restricted Will}.

In the Restricted Will

Add a clause defining the restricted property, for example:

Restricted Property

The assets forming the Restricted Property are:

(a) the shares of XYZ Holdings Ltd.; a company incorporated under the laws of the Province of ***{British Columbia}***, on ***{date}***, under Certificate of Incorporation No. ***{number}*** and in any interest I may have resulting from any conversion, stock dividend, stock split, rearrangement, reconstruction, reorganization or

amalgamation of XYZ Holdings Ltd., and any interest in any company formed upon that rearrangement, reconstruction, reorganization or amalgamation;

(b) any monies which may be owing to me at the date of my death by XYZ Holdings Ltd., including any amounts owing to me by XYZ Holdings Ltd. or any company so formed whether such debt is evidenced or not by any promissory note, loan agreement or book entry;

(c) articles *{describe}* (exclude motor vehicles),

and is hereinafter referred to as my "Restricted Property".

PAYMENT OF DEBTS

As Multiple Wills are usually part of bigger estate planning that has been decided upon by the client and the client's accountants, the issue of the payment of debts must be clarified when the supervising lawyer takes instructions. Is it the intention that the General Estate or the Restricted Estate or both are responsible for the payment of debts?

Depending on the client's instructions as to which estate (General or Restricted) will be responsible for such payment when using the clause in the ***Master Will*** – **Administration of my Estate** – the supervising lawyer will have to carefully adjust the precedent to the situation. Although the legal assistant will only follow the supervising lawyer's instructions (who has been instructed by the Will-Maker), the legal assistant should have an idea of the overall picture.

There are several circumstances that have to be addressed regarding the intention of the client and the general estate planning decided upon by the client and the accountants:

- the Will-Maker may intend that the assets forming part of the General Estate will be charged with all administration expenses and liabilities relating to both the General Estate and the Restricted Estate as well as the costs associated with effecting the gifts set out in both Wills. Although we refer to a General Estate and a Restricted Estate, for tax purposes, the Will-Maker only has one estate;
- the Will-Maker may intend that the liability for duties and taxes be shared, in some proportion, between the Restricted Estate and the General Estate (such as when the deceased's tax liabilities might exceed the fair market value of the assets forming the restricted estate or exceed the appropriate share of those taxes to be borne by the Restricted Estate).
- the General Trustee may request that the Restricted Trustee pay whatever is required by the General Trustee without having to review the financial situation of the General Estate to avoid the costs and potential liabilities with that review.

We have assumed that the Restricted Estate is comprised solely of private company shares and articles which will be transferred to the beneficiaries leaving no funds from which to pay debts and expenses. However, given the potential for significant capital gains in private company shares, the supervising lawyer should discuss with the client whether:

- it is realistic for the General Estate to cover the income taxes on those capital gains—especially if the beneficiaries of the two wills are not identical; and

- the General Estate will be sufficient to cover all the liabilities and cash legacies without having to sell other assets that are specifically gifted under the General Will.

ALL OTHER CLAUSES IN THE WILL

Entire Will: change as appropriate:

- "Trustees" to "General Trustees" or "Restricted Trustees" as appropriate.

- Estate *or* Property to "General Estate *or* General Property" or "Restricted Estate *or* Restricted Property" as appropriate

Vesting Powers: change as appropriate:

> "I give all my General Property (or Restricted Property) as herein defined, including any property over which I may have a power of appointment to my General (Restricted) Trustee on the following terms:"

AFFIDAVIT OF WITNESS
(To Multiple Wills)

General Notes

In order to avoid confusion with respect to the order of signing of Multiple Wills, it is good practice to prepare an affidavit to be signed by one of the two witnesses (and naming the other witness) to document the sequence of signing Multiple Wills.

The precedent opposite assumes that the supervising lawyer and another person in the office of the law firm such as a paralegal or legal assistant witnesses the Multiple Wills.

Preparation

❶ Insert all the names of the Will-Maker from the Wills.

❷ Copy the description of Restricted Property from the Restricted Will.

Processing

This Affidavit should be sworn concurrently with the signing of the Multiple Wills. The original should be safeguarded with the original Wills.

IN THE MATTER OF THE WILLS OF ❶ *{NAME OF WILL-MAKER}*
DATED *{DATE OF MULTIPLE WILLS}*

AFFIDAVIT OF WITNESS

I, ***{NAME OF LAWYER}***, Lawyer, of ***{address}***, **SWEAR/AFFIRM THAT**:

1. I am the lawyer who prepared the multiple wills of the client, ❶***{NAME OF WILL-MAKER}***. and am one of the subscribing witnesses to the multiple wills which are both dated the ***{day}*** day of ***{month}***, 20__.

2. Two wills were intentionally prepared for ❶***{NAME OF WILL-MAKER}***:

   (a) the first Will (the "Restricted Will") dealing with the client's ❷***{description assets of restricted estate}***; and

   (b) the second Will ("General Will") dealing with the client's general assets and estate.

   Both Wills are meant to have effect concurrently.

3. I attended a meeting with ***{NAME OF WILL-MAKER}*** and ***{my legal assistant, paralegal}***, ***{NAME OF ASSISTANT, PARALGAL}*** on ***{date}*** to sign the Wills.

4. The Restricted Will was signed first. ***{NAME OF WILL-MAKER}*** acknowledged that ***{he/she}*** had read and understood the Restricted Will and approved its contents. ***{NAME OF WILL-MAKER}*** then initialled the Restricted Will on each page and duly executed the Restricted Will by placing ***{his/her}*** signature as the Will-Maker on the last page of the Will, in the presence of both myself and ***{NAME OF THE OTHER WITNESS}***, who then also signed as the subscribing witnesses, in the presence of ***{NAME OF WILL-MAKER}*** and each other.

5. The General Will was signed after the Restricted Will. ***{NAME OF WILL-MAKER}*** acknowledged that ***{he/she}*** had read and understood the General Will and approved its contents. ***{NAME OF WILL-MAKER}*** then initialled the General Will on each page and duly executed the General Will by placing ***{his/her}*** signature as the Will-Maker on the last page of the Will, in the presence of both myself and ***{NAME OF THE OTHER WITNESS}***, who then also signed as the subscribing witnesses, in the presence of ***{NAME OF WILL-MAKER}***.

SWORN/AFFIRMED BEFORE ME at)
{Name of City/Town}, ***{British Columbia}***,)
this ___ day of _____, 20__)
)
)
_____)
A commissioner for taking affidavits)
for British Columbia)
)
{print name or affix stamp of commissioner})

_____
{NAME OF LAWYER}