

# ESTATES

## CONTENTS

### PREPARING A WILL

[§4.01]	Introduction to Preparing a Will	19
[§4.02]	Taking Instructions	19
	1. Taking instructions directly	19
	2. Making notes of the meeting	19
	3. Obtaining background information	20
	4. Ascertaining the assets and liabilities	20
	5. Providing basic information to the client	20
	6. Naming executors and trustees	21
	7. Naming beneficiaries	23
	8. Tax considerations	24
	9. Naming guardians	24
	10. Enduring powers of attorney, representation agreements and adult guardianship legislation	25
	11. Using a memorandum	26
[§4.03]	Circumstances Requiring Special Consideration	27
	1. Homestead or dower Legislation	27
	2. Restrictions on alienation	27
	3. Life insurance declarations	27
	4. Registered retirement savings plans and similar assets	27
	5. Charitable gifts	27
	6. Understanding the rule against perpetuities	28
	7. Termination, revocation and variation of trusts	28
	8. Beneficiaries who are receiving disability assistance	29
[§4.04]	Practical Tips for Drafting the Will	29
	1. Planning for contingencies	29
	2. Language use	29
	3. Numbering, headings and order	30
	4. Organizing the contents of the will	31
	5. Drafting dispositive clauses	31
	6. Capital and stirpital distributions	33
	7. Clauses benefiting the executor and trustee	35
	8. Common drafting pitfalls	35
[§4.05]	Will Execution Procedures	36
[§4.06]	Post Execution Procedures	36
	1. Wills notices	36
	2. Wills storage	36
	3. Reporting to the client	37
	4. Destroying prior wills and will files	37
	5. Releasing a will from safekeeping	37
	6. Releasing a wills file	37
[§4.07]	Further Reading	37



## Chapter 4

### [§4.02] Taking Instructions

## Preparing a Will<sup>1</sup>

### [§4.01] Introduction to Preparing a Will

Although a will is merely one component of a client's overall estate plan, preparing it constitutes one of the most difficult and challenging aspects of a lawyer's practice in the estate planning field. To begin with, you need an understanding of a broad range of legal principles. In addition, the drafting skills necessary to produce a will present at least three unique difficulties.

First, unlike practice in commercial transactions, will drafting has no aspect of the bargain between competing individuals that results in the careful scrutiny of the legal documents by parties opposed in interest. Second, it is necessary to take into account contingencies that are not ordinarily apparent to non-lawyers (for example, an unexpected order of deaths). Third, and most significantly, difficulties arise from the fact that wills are interpreted by the court only after the testator dies. In this process, the court is ordinarily confined to the four corners of the will (and where admissible, in light of the surrounding circumstances). Generally, the court cannot have regard to the instructions given to the lawyer or to other direct evidence of the client's intentions.

Proper will planning requires a delicate balance to be maintained between implementing a client's instructions and advising the client on how his or her real, as opposed to perceived, estate planning goals can be best achieved. The unique difficulties of will drafting require close coordination between the lawyer and the client. The lawyer is not a mere scribe. The client usually understands the needs and circumstances of his or her family but the lawyer must advise the client of the legal and practical implications of meeting those needs. The lawyer must also assist the client in developing a will plan that will deal with contingencies and avoid pitfalls that the client might not have foreseen.

<sup>1</sup> Helen Low of Fasken Martineau Dumoulin LLP kindly reorganized and revised this chapter in April 2005. Reviewed and revised in March 1994 with the assistance of Raquel Goncalves, PLTC and Gordon B. MacRae, Vancouver. Reviewed and revised annually since March 1995 by Gordon and since 1999 by Genevieve N. Taylor and Gordon B. MacRae, both of Legacy Tax & Trust Lawyers. Reviewed for content relating to the *Indian Act*, in January 2002, by Roger D. Lee, Davis & Company, Vancouver. Reviewed for content relating to persons with disabilities, in January 2002, by Halldor Bjarnason, Vancouver.

#### 1. Taking instructions directly

When taking instruction for the preparation of a will, it is important that you take the instructions directly from the client. In addition it is preferable to meet with the client in person to receive those instructions. As well, where possible you should meet with the client alone. If this is not possible, you should obtain confirmation of the instructions from the client directly, and alone or at least in a setting that is conducive to the client being able to freely and fully describe his or her circumstances and express his or her wishes. Generally it is not prudent to take will instructions in the presence of a beneficiary.

In circumstances where a couple want to make wills at the same time and wish to be present with each other for the entire process, you must inform both that there is no solicitor-client privilege between you and each of them and that you are obliged to inform both of any information or instructions that you receive or give to either. You should communicate this from the outset and determine if the couple would prefer to retain separate lawyers.

The lawyer, rather than the paralegal, should be involved in the direct taking of instructions because part of the will preparation process involves not only obtaining the client's information and wishes but also providing legal advice from the lawyer as to how best to effect those wishes and the legal consequences of the particular objectives.

In some circumstances, it may be prudent to obtain the client's consent to secure information and to review the will plan with the client's other advisors (e.g. accountant, financial planner, foreign lawyer, etc.).

#### 2. Making notes of the meeting

Making complete notes of will instructions and retaining them as part of the permanent will file is good practice. The extent of the notes that are made may depend on whether certain issues are identifiable at the time you meet with the client. If the client is elderly or ill at the time the instructions are taken, consider whether the client has testamentary capacity and reflect your evaluation of same in your notes. If the dispositions contained in the will are likely to be contentious amongst the client's family, your notes should record your client's intentions and rationale for the particular distribution scheme. The recording of your client's intentions are also important in the event that there is subsequent litigation where the evidence of the testator's intention is admissible.

### 3. Obtaining background information

It is important to understand the family of the testator and the relationships he or she has in order that you can determine which persons might have legal claims against the estate. For example, a client may not appreciate that he or she is in a common law spousal relationship or that there is a child who has been dependent upon the client who could assert a claim for maintenance and support from his or her estate.

It is also important to consider not only the testator's family structure at the time of the taking of the instructions but also into the future, if death clearly is not imminent. This affects the provisions that might be made in respect to whether certain trusts should be established, who should be remaindermen of the estate and what contingencies might need to be considered.

Often it is helpful to review the earlier will of the client, if available, to identify provisions that the client wishes to keep and to alter.

If the client is a First Nations person, carefully consider whether a particular asset is located on reserve. This fact could have significant repercussions for tax planning and transmission, especially if it is real property. Under s. 50 of the *Indian Act*, land on reserve cannot be left to a person who does not have a right to reside on the reserve. For more information about the special status of real property, see the CLE *British Columbia Probate and Estate Administration Practice Manual* §20.13. See also S. Evans, "Aboriginal Estates—Policies and Procedures of INAC, BC Region", published in the "Practice Desk" area of the CLE website at [www.cle.bc.ca](http://www.cle.bc.ca).

### 4. Ascertaining the assets and liabilities

It is important to know your client's present financial circumstances, even though the will may not take effect until long into the future. This enables you to determine the appropriateness or comprehensiveness of the will as the estate planning vehicle. For clients whose death is more imminent, it is that much more critical for the lawyer to be aware of the nature of the assets and liabilities and their values, to ensure that the dispositions under the will are effective to achieve the testator's wishes.

The starting point is to understand what the client owns, what the nature of the interest owned is, and whether that asset would form part of the estate on death. To do this, it is advisable to review original documentation regarding the asset ownership (for example, brokerage statements, insurance

designation forms) or through your own investigation (for example, company or title search). Understanding title ownership to assets, direct beneficiary designations that might apply to assets and legislative schemes that govern disposition of assets (such as pensions) is necessary to determine what a client has to dispose of under his or her will. This will better ensure that you are able to devise an estate plan that reflects all of their testamentary wishes. For the same reason, having a clear picture of the testamentary liabilities, including contingent liabilities such as guarantees, is also a useful part of this exercise.

Knowing the scope and ownership of assets and the extent and nature of liabilities is necessary in order to provide tax advice on the manner by which the client is seeking to arrange his estate under his will. For example, where the client wishes to make specific bequests of personal assets or devises of real property, that are encumbered (for example, mortgaged) or subject to tax on disposition (for example, RRSP), then knowing the liabilities ensures that you address with your client whether the legatee of the specific gift or the estate is to bear the responsibility for the debt associated with the asset.

In circumstances where a client is reluctant to disclose information about his or her wealth, and you cannot convince them otherwise, you should inform the client that their will may not end up reflecting their testamentary wishes and that the relevant legal advice cannot be provided. Qualification should be expressly communicated to the client and noted in your file.

### 5. Providing basic information to the client

It is good practice for a solicitor to discuss with the client some administrative matters relating to the use of a will as an estate planning tool at the same time the solicitor is taking instructions for the preparing a will. Areas that should be discussed, depending on the sophistication of the clients and the particular circumstances and testamentary wishes, might include:

- the application and calculation of probate fees;
- the availability and purpose of the registration of the will with the Department of Vital Statistics;
- the alternatives available for the storage of the original will;
- the basis upon which the fee to the client will be charged;

- the possible preparation of other estate and personal planning tools, such as a power of attorney, representation agreement, *inter vivos* trust, deed of gift, property transfer documents;
- the general probate process;
- the advisability of informing third parties about the will or its contents.

## 6. Naming executors and trustees

### (a) Appointment

Clients will generally have a person(s) in mind for this role, although they may not fully understand the role themselves. You should explain to them that the executor is responsible for the administration of the estate and the trustee is responsible for administering any trusts created under the will. The two positions are usually held by one or more persons acting in both roles but in some cases it may be prudent or appropriate for a different person to be named as trustee of some special trust created under the will. Also, if the will provides for more than one testamentary trust, different persons may be appointed as trustees for the different trusts.

An executor's duties include arranging for the funeral and disposition of remains, collecting and protecting estate assets until distribution, conversion of assets to money where appropriate, payment of debts of the estate and distribution of estate to the beneficiaries or trustees as directed under the will.

Remember that, because of the risk of personal liability and the onerous and time-consuming nature of the job, many people are reluctant to act as an executor; the testator should approach them before the will is executed.

A typical testator may find his or her choice of executors to be one or more of the following:

#### (i) One or more of the residuary beneficiaries

This is appropriate in most circumstances as they are the recipients of the estate, except possibly where:

- a beneficiary resides outside of the province,
- the residuary beneficiary is a charity or a minor,
- there is an anticipated dispute amongst beneficiaries, or

- the estate is of a complex nature requiring special expertise on the part of the executor.

#### (ii) Spouse

This is usually the appropriate choice when the whole of the client's estate is left to the surviving spouse.

When the spouse is the life tenant of a trust, the client should consider naming the spouse to act as one of the co-trustees. The advantage to appointing the spouse to act as one of the co-trustees of a spouse trust is that he or she has a role in the exercise of any discretion, particularly where there is a right to encroach on capital in favour of the spouse. The disadvantage may be the possibility of actions taken to frustrate the others, which could be eliminated by an odd number of trustees, with a direction that the spouse's views be considered by the trustees, together with a majority rule provision to avoid a deadlock.

#### (iii) Adult Children

It may be advantageous to name children who are beneficiaries as a way of reducing the costs of administration. However, the appointment of a number of children, or children and a spouse who is not the parent of the children, can be problematic. It is a rare case where the step-children and spouses can happily work together as co-trustees of spousal trusts.

#### (iv) Close relatives and friends

When your client is concerned about avoiding acrimony among the beneficiaries, one option is to appoint a person(s) close to the family but who is not a beneficiary. You should ask your client about possible conflicts of interest between the suggested executor and the beneficiaries and avoid an appointment where potential conflicts exist.

#### (v) Business associate or professional advisor

The choice of a business associate, lawyer, accountant or other professional to act alone or together with a beneficiary is often appropriate where additional expertise is required or where the presence of a neutral party may be of assistance in the administration of the estate or trust. Where the client chooses a professional as one of the executors/trustees, you should canvass the

client regarding the client's wishes regarding remuneration for the professionals. As well, it is usually helpful to canvass the professional to determine his or her willingness to act on that basis. Many will prefer that they be compensated based on their normal professional fees and not on the basis prescribed by the *Trustee Act*.

Succession clients need to be fully and properly informed regarding succession of executorship. Ordinarily this is best addressed through the use of alternate executor appointment provisions in the executed will. Where a professional is being appointed as one of the executors, the client may wish to specifically provide for the appointment of a replacement professional. Depending upon the nature of the estate, the complexity of the will and the particular wishes of the testator, the executor appointment clause can be quite complicated.

(vi) Lawyers

Lawyers, and in particular the solicitor preparing the will, are often asked by clients to be their executor/trustee. Before doing so, you should consider the extent of your liability coverage for performing the duties of executor/trustee; whether acting would place you in a conflict in respect of the estate in the future; and the remuneration that you would be entitled to receive. If you are the executor and also witness the will, notwithstanding that you have provided for a professional charging clause to permit you to receive remuneration on the basis of your professional charges, you will be limited to the amounts set out in the *Trustee Act* because you cannot receive a benefit under a will that you witness. As well, you will be prohibited from being remunerated for providing legal services to the estate if there is a charging clause and you have witnessed the will. Your partners are similarly prejudiced.

(vii) Corporate Executor

In some cases, it will be appropriate for your client to appoint a trust company either to act alone or as one of the executors/trustees. This is especially so where:

- the nature and complexity of the assets require the experience,

expertise and skill of a trust company;

- the duties of the administration are likely to be too onerous for individuals;
- there are assets to be held over a period of years and continuity in the administration, which can be provided by a trust company, is required;
- the testator wishes to take advantage of the security (for example, retaining valuables), protection against default (for example, negligence) that is offered by a trust company; and
- there is a high probability of a dispute or conflict due to the particular makeup of the family members.

You should also advise your client of the limitations of appointing a trust company, over an individual who is familiar with the testator and the testator's family, which may include the following:

- trust companies may be limited in how they can deal with decisions that require the exercise of discretion in relation to the administration of a discretionary trust and the joint appointment of a family member or close friend to give guidance to a corporate trustee may be appropriate;
- trust companies will have demands as to their fees before they will agree to act and these arrangements should be, where possible, secured when the testator is making his will; and
- the statutory limits for remuneration under the *Trustee Act* may make it difficult to have both a trust company and other individuals appointed together to act as trustee.

(viii) Specific executors for foreign assets

Where the client owns assets in foreign jurisdictions, which pass under the British Columbia will, it is important to consider whether the executor named in the will is the appropriate person to deal with the foreign assets or whether it is better to appoint an executor in that foreign jurisdiction to deal specifically with the foreign assets.

## (ix) Numerous executors

There is no legal limit on the number of executors that may be appointed. However, there is a practical consequence to the efficiency, cost and effectiveness of having more than one executor and trustee. With respect to executors who do not need to act unanimously (except with respect to matters concerning real property), the actions of one executor binds the other, even if that action has not been approved by the others. With respect to trustees, they are required to act unanimously on all trustee matters, unless the will provides otherwise. The potential for lack of agreement and conflict amongst the executors/trustees is a practical consideration for not having too many act at one time. Even the largest of estates do not warrant more than five executors and generally three is sufficient in circumstances where more than one or two executors are thought to be required. The appointment of alternatives is a possible answer to the problem of excessive numbers of trustees.

## (b) Compensation

It is important to advise your client that an executor/trustee is entitled to statutory compensation, even if the will is silent, on the basis set out under the *Trustee Act*, unless the will expressly provides otherwise or there is a contractual arrangement between the testator and the executor, separate from the will. Executor's compensation is paid out of the residue of the estate and therefore, any estate accounting and claim for remuneration is to be approved by the residuary beneficiaries unless there is a governing contract between the testator and the executor.

If the executor is also a beneficiary of the estate, you should confirm with your client whether it is intended that the executor receive remuneration in addition to the gift made to the person under the will. In some circumstances, the law will presume that the gift under the will to the executor is to compensate the executor for acting, unless the will provides otherwise.

You may also alert your client to the possibility of securing a fee agreement, which can be set out in the will or in a separate document incorporated by reference in the will, which provides for the amount of remuneration and the timing for payment of

remuneration. This fee agreement may be agreed to by the executor/trustee during the testator's lifetime or on death if the executor/trustee accepts the appointment and commences acting under the will.

## 7. Naming Beneficiaries

- (a) **Spouse and children.** If your client informs you of intended beneficiaries of his or her estate, and they do not include the client's married or common law spouse (of the same or opposite sex) or children, you need to inform the client of the possible legal and moral obligations owed to those persons and their entitlement to apply for a variation of the will pursuant to the *Wills Variation Act* (see chapter 19). If the client's exclusion of his or her spouse and children is intended, then you should consider whether the will is the appropriate planning tool for the client or whether the client's interests are better met with planning devices that are not subject to judicial variation. If the will remains the appropriate planning tool, then you should consider preparing a memorandum of the client's reasons that may be used to clarify the testator's rationale if an application for variation is ultimately brought.
- (b) **Separated spouse.** If there is a provision in a will made for a spouse and there is subsequently a judicial separation, final order of divorce or declaration of nullity, the gift is automatically voided. If your client does not intend this result, then you must draft a provision that expresses a contrary intention, namely that the benefit is conferred notwithstanding the occurrence of the events under s. 16 of the *Wills Act* that would void the gift.
- (c) **Future spouse.** If your client is making a will that includes a provision for a future spouse, the testator must expressly provide that the will is made in contemplation of marriage to the name of the future spouse. Otherwise, a will is revoked by the subsequent marriage of the testator (s. 15 of the *Wills Act*).
- (d) **Complex families.** If your client's family involves complex arrangements (such as a second spouse and children from a first spouse, children from separate spouses, stepchildren, common law relationships, married but separated spouses), you should make sure that you advise your client as to the various problems that certain dispositions can create. For example, having the children from a first marriage as the trustees of the spousal

trust for a second wife might create practical problems. Also, separated legal spouses still retain rights of variation against the estate, even if the client is in a common law spousal relationship at time of death. Children to whom the testator stood as *parentis in loco*, though they may have rights against the testator in the event of a relationship breakdown, do not have rights to seek a share of the testator's estate, notwithstanding that they have been supported by the testator.

- (e) **Minors.** If your client names beneficiaries who may be minors at the time the will takes effect, you should advise your client as to the implications of this. They may wish to create a trust for any gifts to minors such that the minor does not take the gift until he or she reaches a certain age. If that age is beyond the age of majority, the minor can on reaching age of majority, seek to collapse the trust and receive the whole of the gift under the principle established in *Saunders v. Vautier*, unless the will provides for a gift-over in the event that the minor does not survive until the age that he or she is entitled to the whole of the gift.

If no trust is created and no provision is made to permit the executor to pay the gift to the minor's guardian, the gift must be paid to the Public Guardian and Trustee, who will retain the funds, as trustee, until the minor reaches majority. During the period of minority, the Public Guardian and Trustee may apply the income earned on the funds for the maintenance, education or benefit of the child. However, in practice, the Public Guardian and Trustee will only provide for those needs where they cannot be otherwise met, without undue hardship, by the minor's guardians or some other source.

- (f) **Charities.** Many clients, who want to leave a gift to charity, do not have the proper legal name of the charity. You should advise your client that you will research the proper name and you should discuss any confusion where there are similar charities with similar names and make provision for the gift in the event that the particular charity is no longer in existence at the time the will takes effect. You should also advise your client regarding including a clause in the will to protect the executor in respect of to whom at the charitable organization the benefit may be paid.

- (g) **Solicitor.** If your client informs you that you are to be named as a beneficiary, you should not prepare the will and have the client seek another lawyer to assist. If you are the lawyer drafting the will where another lawyer is the beneficiary, you should inquire into the circumstances of the bequest, and clearly record the testator's explanation, in order to ensure that the wishes of the testator in making such a bequest is upheld in the event of a future challenge.

## 8. Tax considerations

You should inform your client of those general tax implications arising from death and arising from the manner that your client is disposing of his or her estate under their will, however, you should also advise your client to seek specific tax advice from a tax lawyer or tax accountant where the circumstances warrant. You should know of the general tax issues (see chapter 14).

You should inform your client that while there are no succession taxes per se applicable in British Columbia, assets that pass on death under the client's will may be subject to capital gains tax and other taxes arising from the deemed disposition of assets on death, including potential double taxation (unless proper planning is effected) on certain assets such as shares in a company.

If the client is a First Nations person with assets located on a reserve, the tax situation in such an estate will be different and you need to seek, or have your client seek, specific tax advice.

## 9. Naming guardians

In British Columbia a person under the age of 19 is legally an "infant".

A parent can appoint a guardian of the person and estate (or a different person for each) of his or children by deed or by will (s. 50 of the *Infants Act*). A guardian may not appoint a successor guardian and therefore, you should advise your client to consider naming an alternate in the will. If no guardian is named in a will and no individual is appointed by the court under the *Family Relations Act*, the Act provides that Director of Child, Family and Community Services is the guardian of the minor's person and the Public Guardian and Trustee is the guardian of his or her estate.

A guardian named by a parent under a will might not necessarily be appointed the legal guardian on the testator's death but the inclusion of such a provision means that the court will take into account the testator's wishes.

10. Enduring powers of attorney, representation agreements and adult guardianship legislation

Except where caused by a physical trauma or an accident, the onset of mental incapacity seldom just happens. Sometimes, a diminished capacity exists for a long time. Sometimes a mental incapacity occurs over time and is characterized by alternating periods of incapability and lucidity. When discussing a will with a client, it is useful to discuss whether the client would like to plan for these circumstances.

It may be appropriate for the client to execute a special power of attorney called an “enduring power of attorney” or to use a “representation agreement” to authorize other people to make decisions about their financial and other affairs in the event the client loses capacity. What planning tool to use and what tools would remain available has been the subject of a lot of debate.

On March 12, 2002, the Attorney General announced that the government’s review of powers of attorney and representation agreements was complete. The Ministry of Attorney General released the “Review of Representation Agreements and Enduring Powers of Attorney” (the “Report”) by Professor Albert McClean, QC. In particular, the Report recommended that enduring powers of attorney be the primary tool for advance planning in financial and property matters. The government has accepted this key recommendation. The Report also recommended that representation agreements be used for advance planning around personal, health-care, and some limited financial decisions. Both tools continue to be available in their current forms. A brief description of each tool follows.

When an adult person is incapable (or has a diminished capacity) and significant health decisions need to be made, those decisions can be made by:

- a representative under a representation agreement;
- a committee under the *Patients Property Act*; or
- a temporary substitute decision maker under the *Health Care (Consent) and Care Facility (Admission) Act*, R.S.B.C. 1996, c. 181 (Supp.).

The client may not want decisions made by the persons nominated under the *Health Care (Consent) and Care Facility (Admission) Act* (s. 16). The client may not want his or her health care decisions made by a committee because of the delays and costs involved with court

proceedings, or for other reasons. For this client, a representation agreement may be an option for planning around health care decisions.

There are benefits and imperfections to the representation agreement as a tool. Perhaps one of the more serious imperfections is that these agreements are complex. The complexity can lead to increased costs both for preparing and advising about the agreement, and later in monitoring. Instead, the client may want to deal with health-care decisions by using a power of attorney and nominating a committee, which *can* be less complicated and less expensive.

In an enduring power of attorney, the person appoints a family member, trust company or other trusted individual(s) as his or her attorney. This power of attorney is said to be *enduring* because the attorney’s authority *endures* or continues despite any mental incapacitation. At common law, a power of attorney terminates when the principal becomes mentally incompetent. However, under s. 8 of the *Power of Attorney Act*, R.S.B.C. 1996, c. 370, an enduring power of attorney can be created.

The main advantage of an enduring power of attorney is that it is much less costly and time-consuming than an application for the appointment of a committee under adult guardianship legislation. It can be also less costly and simpler than preparing a representation agreement. Also, an enduring power can be used if the individual’s mental incapacity is not of a degree requiring appointment of a committee. Some drawbacks of an enduring power of attorney are:

- (a) the agent (i.e. the donee of the power) cannot be compelled to act;
- (b) the principal is unable to supervise the attorney’s actions or revoke the power of attorney following the onset of mental incapacity; and
- (c) subject to an express contrary direction contained in the power of attorney, the agent cannot use the principal’s assets for the benefit of the agent or the principal’s family.

In *Parnall (Attorney of) v. B.C. (Registry of Land Titles)* 2002 BCSC 599, reversed 2004 BCCA 100, the Court was asked to consider “whether a “springing” power of attorney which provides that the power “may only be exercised during any subsequent mental infirmity on [the donor’s] part”, without establishing how that status may be established, is an enduring power of attorney under s. 8(1) of the *Power of*

*Attorney Act*, R.S.B.C. 1996, c. 370, and thus within s. 56(3) of the *Land Title Act*, R.S.B.C. 1996, c. 250. The chambers judge held that the Registrar was correct not to register the documents, drawing a distinction between enduring powers of attorney under s. 8 and springing powers of attorney. The Court of Appeal, however, held (paragraphs 25, 26) that:

“While the learned trial judge concluded that the word “continue” in s. 8(1) precluded the power becoming operative upon mental infirmity, in my view s. 8 was intended to address termination of the power of attorney, and does not deal with a power of attorney that springs into effectiveness upon the happening of an event. The issue under s. 8(1) is not the word “continue”; rather it is that which continues - the “authority”. The authority, in my view, is created at the moment of execution although on the words of the power of attorney the condition on which it may be exercised may not yet exist. Although the analogy with contract law is far from perfect, it is not unlike the suspension effect of the condition discussed by Dickson J. in *Dynamic Transport Ltd. v. O.K. Detailing Ltd.*, [1978] 2 S.C.R. 1072.

Just as a power of attorney may provide as a condition that “this power of attorney may not be exercised so long as I am resident in British Columbia”, a power of attorney may provide “this power of attorney may not be exercised while I am not mentally infirm”. In my view there is no conceptual difference between the latter condition and the language of the power of attorney in this case. The reservation in this power of attorney is, effectively, a restriction as to its use.”

Section 19 of the *Patients Property Act*, R.S.B.C. 1996, c. 349 purports to void all powers of attorney once the person becomes a patient. Section 8 of the *Power of Attorney Act* says that an enduring power of attorney terminates:

(2) . . . on the making of an order under section 3 of the *Patients Property Act* or on the appointment of a committee under section 6(1) of that Act.

Section 19 deals with a committee appointed by court order. If the committee is appointed by court order, then the power of attorney cannot be saved. However, if the Public Guardian and Trustee is appointed as a result of a certificate issued by a provincial mental health or psychiatric unit, the power will not automatically terminate.

Some lawyers have been recommending and preparing representation agreements for their clients for the limited purpose of giving others authority over health-care decisions, and preparing enduring powers of attorney for their financial affairs. Before discussing options with the client, make sure that you understand the benefits and imperfections of each approach. A discussion of the options is beyond the scope of this chapter. For more information and precedent material for both enduring powers of attorney and representation agreements, see Chapters 28 and 30 in *Wills Precedents—An Annotated Guide* (Vancouver: CLE).

When advising about the estate of a Status Indian, who may be incompetent, it is important to know that under s. 51 of the *Indian Act* the Minister of Indian and Northern Affairs Canada has exclusive authority over the property of that person. Provincial statutes govern the process by which the aboriginal person would be declared incompetent, but administration of the person’s estate would be in the hands of the Minister or whomever the Minister appoints.

## 11. Using a Memorandum

When there are many specific items to be gifted, you should advise your client to consider the use of a separate memorandum. There are two types of memoranda: one that forms part of the will, and one that does not.

For the document to be a valid testamentary document, it must be in writing and the testator must sign it before the will is executed and it must be specifically incorporated in the will by reference. You should advise your client that it is necessary for the assets to be clearly identified in any memorandum incorporated by reference because the memorandum, as a testamentary document, is subject to the same strict rules of construction that apply to a will. Any changes to such memoranda require an amendment to the will and therefore, you should advise your client of the limitations of the use of such memoranda.

It is also possible to create a memorandum that is not intended to be a legally binding testamentary document, which can be freely amended by the testator as he or she desires, without the involvement of a lawyer. These memoranda can be provided to the trustee to guide them in the exercise of their discretion in respect to the distribution of assets in specie. Such memoranda can go beyond guidance about dealing with distribution of specific assets, such as advising as to the principles that could be used on the exercise

of the power of encroachment on income or capital for the benefit of a beneficiary.

**[§4.03] Circumstances Requiring Special Consideration**

1. Homestead or dower legislation

If the client is domiciled in a jurisdiction in which there is homestead or dower legislation (there is none in British Columbia), consider what effect the rights conferred by such legislation on a spouse may have on his or her ability to alienate his or her property freely.

2. Restrictions on alienation

Are there restrictions on alienation of either movables or immovables under the applicable law or by personal covenant?

Consider, for example:

- (a) community of property;
- (b) joint tenancies;
- (c) limited interest, e.g., estates for life or years, partnership property;
- (d) corporate shares with limitations on transfer;
- (e) franchises;
- (f) currency controls;
- (g) laws restricting absentee ownership of property;
- (h) rules of professional or business associations;
- (i) agreements relating to any of the client's assets;
- (j) property subject to a lien or charge; and
- (k) property located on reserve.

3. Life insurance declarations

Any written and signed document is sufficient to effect the beneficiary designation under a life insurance policy (s. 29 of the *Insurance Act*). If the will is the instrument used to make a direct beneficiary designation, you should advise your client to provide the insurance company with notice of the designation in the will. For that reason, it may be prudent to draw the declaration in a separate instrument from the will. Further, if the designation is made in the will, any alteration would require an amendment to the will itself and if the will is revoked, intentionally or not, the designation would be revoked.

4. Registered retirement savings plans and similar assets

A person may designate, by a will, a registered retirement savings plan, a registered home ownership savings plan or a registered retirement income fund (ss. 46 and 49 to 51 of the *Law and Equity Act*). If the terms of the RRSP or RRIF contract requires the designation to be made in a specific manner and does not specifically permit the designation to be made by will, it is unclear whether the designation by will is effective. You should advise your client to investigate the terms of the contract.

A person may not designate, by will, an employee pension, retirement, welfare or profit sharing fund, trust or plan (s. 46 of the *Law and Equity Act*). The *Pension Benefits Standards Act* also restricts, in some cases, the right of the testator to dispose of pension benefits as certain pre and post-retirement benefits are statutorily provided to a surviving married or common law spouse, including a former spouse, unless there is a specific waiver by the spouse in respect of the statutory entitlements.

5. Charitable gifts

If the client wants to benefit a charitable organization, be sure that the organization is registered with the Canada Revenue Agency. Be sure also that the correct name of the organization is used in the will, to avoid the expense and inconvenience of an application to court for advice and directions. See the discussion in §11.07 on *cy-pres* applications.

It is also prudent to include a clause that:

- (a) exonerates the personal representative if the gift is paid to a person professing to be an authorized representative of the organization, and
- (b) relieves the personal representative of any obligation to see to the application of the gift by the charity. It is useful also to include, where the client wishes, a provision that a gift to a charity may be paid to a successor organization.

## 6. Understanding the rule against perpetuities

The common law rule against perpetuities is that any provision that creates a future interest in property is void *ab initio* if it is not absolutely certain at the outset of the creation of the provision that the vesting of the interest would occur before the later of either 21 years from the death of the testator or 21 years from the death of a “life in being” (any person alive at the date of the Deceased’s death expressly or by necessary implication mentioned in the will). Examples follow.

A testatrix leaves her estate in trust for her son with a right for him to receive capital and income during his lifetime, with the remainder on his death to be paid to his children who reach the age of 21 years. This provision does not offend the rule against perpetuities.

A testatrix leaves her estate in trust for her son, with a right for him to receive capital and income during this lifetime with the remainder to be paid to his children who reach the age of 25 years. This provision offended the common law rule against perpetuities because it was not absolutely certain that the capital would vest within the requisite time (being John’s life plus 21 years).

The *Perpetuity Act* did not repeal the common law rule against perpetuities but enacted a number of saving provisions to ameliorate the harsh consequences of breaches of the common law rule. The *Act* permits a “wait and see” approach to whether the vesting in fact occurs within the time allowed by the common law rule. If the vesting occurs within the time, the provision is effective; if the vesting does not occur within the time, the gift falls into the residue of the estate. Future or contingent interests, at the outset, are presumed valid until the actual events establish that the gift did not vest within the perpetuity period. Additionally, the *Act* permits an 80 year perpetuity period if the will expressly or by necessary implication provides that the 80 year period is to govern.

The *Perpetuity Act* applies only to property devolving under the law of British Columbia and not to real property situated outside of the province. Therefore, it is not prudent in most circumstances to create contingent interests that may vest outside of the perpetuity period permitted under common law if there are out of province assets in the estate. However, if provisions are being drafted that may offend the common law rule, you may be well advised to provide that the interest will vest, if it has not vested at the expiration of the 80 year period permitted under the

*Act* or the period permitted by common law, whichever is shorter.

## 7. Termination, revocation and variation of trusts

A trust may be varied or prematurely brought to an end in one of two ways: under the rule in *Saunders v. Vautier* (1841), 41 E.R. 482 (Ch.) or under the *Trust and Settlement Variation Act*, R.S.B.C. 1996, c.463.

### (a) Termination under *Saunders v. Vautier*

The rule in *Saunders v. Vautier* may defeat a trust created by will or by *inter vivos* grant, in certain circumstances. The rule applies if the trust meets the following conditions:

- (i) it gives the beneficiary or beneficiaries an absolute vested gift in the whole of the trust property that is payable at a future event (usually the beneficiary reaching a stipulated age), and
- (ii) it directs the trustee either to pay the income to the beneficiary or to accumulate it and pay it with the capital.

In such a case, the beneficiaries, if they all agree, are of the age of majority, and have mental capacity, may require the trustee to distribute the capital of the trust regardless of the testator or settlor’s direction not to pay out until the stipulated event has taken place.

For example, the rule in *Saunders v. Vautier* would operate in the following situations:

- where a legacy of \$50,000 is made payable to A on his 25th birthday, with the income to be payable to him annually until he attains that age.

In this case, A (assuming he is mentally competent) could require the trustees, as soon as he reaches the age of 19, to pay him the whole of the \$50,000.

- where \$80,000 is payable to the children of T (the testator), the capital to be divided equally between them on the youngest attaining the age of 25, with the power of maintenance in favour of the class in the meantime, and surplus income to be accumulated and added to the capital.

In this case, as soon as the youngest child of T reaches the age of 19, as long as all the children are in agreement and have capacity, they can require the trustee to divide the capital among them.

If this rule applies, without a doubt, the trustees should on request terminate the trust without requiring a court order to that effect, provided that they are fully indemnified from those having a beneficial interest. In case of doubt, however, it is proper and advisable to apply for construction of the will.

(b) Revocation and variation under the *Trust and Settlement Variation Act*

A trust that cannot be terminated pursuant to the rule in *Saunders v. Vautier*, can possibly be varied or terminated pursuant to the *Trust and Settlement Variation Act* (“the Act”). This requires the court’s approval of the proposed variation or termination on behalf of the non-*sui juris* beneficiaries (generally, the contingent interests of unborn or minor children or incapable adults). In addition, all of the *sui juris* beneficiaries must agree to the proposed variation or termination.

For example, a common application brought under the Act is to seek a revocation of a trust to entitle an adult beneficiary to acquire the capital of a trust immediately by acquiring life insurance on the beneficiary’s life to provide for the contingent beneficiaries in the event that the beneficiary were not to survive to the stipulated date under the trust provision.

The Act permits the court the discretion to approve trust variation based on the standard of a “prudent adult motivated by intelligent self interest and sustained consideration of the expectancies and risks of the proposal would be likely to accept” (*Russ v. British Columbia Public Trustee* (1994) 89 BCLR (2d) 35 (CA)). The preservation of the “basic intention” of the testator does not form part of the consideration.

Little can be done to avoid the *Trust and Settlement Variation Act* applications but you should inform your client of the possibility that the trust arrangement may not ultimately be effected as he or she has instructed. This is most likely to arise where trusts are created for children either for their lives or with a distribution date far into the future.

8. Beneficiaries who are receiving disability assistance

The use of a testamentary trust to provide for people with disabilities is relatively common. However, special considerations arise that you should discuss with your client. If the person is receiving or may be entitled to receive BC disability assistance, a trust can be established in a

way that the maximum benefits are preserved for the beneficiary who is disabled. This is important given that certain asset levels will disentitle a person who is disabled from receiving those benefits. A fully discretionary trust (one in which the beneficiary has no vested entitlement to the receipt of any income or capital from the trust and where the beneficiary is not the sole trustee) does not qualify as an asset of the beneficiary and therefore, is not taken into the calculation of the disabled person’s assets.

The Planned Lifetime Advocacy Network, at 604-439-9566, is a superb resource for further information on estate planning for situations involving family members with disabilities.

#### [§4.04] Practical Tips for Drafting the Will

1. Planning for contingencies

When there are a number of consecutive interests created under the will, or when there are many beneficiaries, it is frequently useful to draw a chart summarizing the client’s dispositive instructions before beginning the first draft of the will. A chart of this kind will ensure that

- (a) no intestacies will arise in the event of an unexpected sequence of deaths;
- (b) all the assets have been distributed; and
- (c) during periods in which the distribution of capital is postponed, the income is directed either to be accumulated or paid out.

2. Language use

The use of clear and precise language and proper explanation is important to ensure that the testamentary wishes are reflected in the will. Reference should be made to the numerous sources for drafting clauses.

(a) Be consistent

Do not, for example, refer to an interest in the estate as a “share” in one place in the will and then later in the will refer to the same interest as a “portion”. Using different words to mean the same thing is inadvisable, because the court may conclude that the change in language was intended to reflect a change in meaning.

(b) Avoid ambiguity

The phrase “for the use of ‘A’ exclusively for general farm purposes” may mean that the asset is to be used by ‘A’ exclusive of others or, alternatively, may mean that the asset is to

be used exclusively for farm purposes.

(c) Use technical words correctly

One example will illustrate this point. “Devise” refers to a gift of real property; “bequeath” refers to a gift of personal property. The two verbs were confused in the will considered in *Patton v. Toronto General Trust Corporation*, [1930] A.C. 629 (P.C.) at 633. Likewise, do not interchange the words “issue” and “children”: the former encompasses all lineal descendants, whereas the latter encompasses the first generation of descendants only.

(d) Avoid ambiguities in the meanings of non-technical words

The use of the word “deliver” will likely result in shipping costs for specifically gifted chattels being paid out of the residue of the estate; whereas the use of “gift” will leave the burden of such costs on the specific legatee. The words “between” and “among” are also often misused.

(e) Avoid redundancies

There is a tendency in legal drafting to use multiple words and expressions which have the same meaning. The use of couplets such as “have and hold” in legal documents arose for historical reasons. Uncertainty as to which English word was preferable when translating a Latin or Norman French law term led to such redundancies. Moreover, the practice of paying for legal documents according to their length also led to wordy wills. Why, for example, should one use the phrase “nominate, constitute and appoint”, when appointing the executor of the will? The word “appoint” by itself would be sufficient. Other common redundancies include the following:

- (i) for and during the period;
- (ii) release and discharge;
- (iii) sole and exclusive;
- (iv) then and in that event;
- (v) order and direct;
- (vi) known and described as;
- (vii) full force and effect;
- (viii) all and every;
- (ix) from and after; and
- (x) rest, residue and remainder.

While brevity is good, do not be so abrupt as to obscure the testator’s intended meaning. Repetition may be the best way to express the testator’s true intention.

(f) Punctuate with care

Although proper punctuation assists in clarifying meaning, its careless inclusion has resulted in much unnecessary litigation. One way to test for clarity of meaning is to have another lawyer read the will before it is presented to the testator for execution.

(g) Beware of interlineations

While sometimes unavoidable, interlineations should be avoided whenever possible. A document is more presentable to your client, to the beneficiaries and to a court, if changes are incorporated in the original form rather than by handwritten corrections.

For further guidance on use of plain language in wills, refer to Margaret James, “Plain Language Wills” in *Wills Drafting—1991* (Vancouver: CLE, October 1991) and *Wills Drafting Workshop* (Vancouver: CLE, May 1995).

3. Numbering, headings and order

For clarity, number the paragraphs and subparagraphs of the will. The use of headings may be useful in organizing a will and in assisting the reader (and the client) to locate a particular paragraph.

Always try to insert the various provisions of the will in a logical sequence. For example:

- (a) all specific gifts should be inserted before the clause containing the executor’s power to convert unauthorized investments into money;
- (b) a specific gift of money should logically follow the power to convert unauthorized investments into money; and
- (c) gifts out of residue should follow specific gifts.

#### 4. Organizing the contents of the will

Determine which numbering system you are comfortable with and so long as it is clear, simple and typical, routinely use that system. Descriptive headings can also be useful in drafting, in particular for long, complex wills. The various provisions in the will should also be ordered in a logical fashion. A typical, well organized will, might be structured as follows:

- (a) preamble identifying the testator and confirming his or her intention that the will is intended to be his or her last will;
- (b) revocation of all former wills and codicils;
- (c) appointment of the executors and trustees and, where appropriate, alternatives if the first appointed are unable or unwilling to act or to continue to act;
- (d) appointment of a guardian or guardians for minor children of the testator;
- (e) RRSP or RRIF beneficiary designations, if any;
- (f) life insurance beneficiary designations, if any;
- (g) gift of the testator's property to the executors and trustees upon the trusts specified in the will, which might include,
  - (i) gifts of specific assets;
  - (ii) a trust for the executor and trustee to use his or her discretion in converting into money any assets which are not in the form of investments approved by the executor and trustee, and, if desired, a separate and substantive power to retain the assets in the form in which the executor and trustee receives them;
  - (iii) a direction to the executor and trustee to pay debts, funeral and administration expenses, and, where appropriate, a direction to pay all duties, probate fees, and estate taxes payable in respect of the provisions of the will or arising as a consequence of the death of the testator in respect of gifts made by the testator during his or her lifetime, interests in life insurance policies on the life of the testator or property held with the testator in joint tenancy. If a specific beneficiary is intended to bear any income tax or other costs payable relative to an asset gifted to that beneficiary, the will must so provide;
  - (iv) payment of cash legacies;
  - (v) provision for surviving spouse, perhaps outright, or in a trust (if desired, a trust qualifying as a "spouse trust" for purposes of the *Income Tax Act*);
  - (vi) provision for children if the spouse fails to survive or, in the case of a trust, on the death of the spouse. If the children are minors or have not attained the age for distribution chosen by the testator, then further trusts are usually established for their benefit; and
  - (vii) provision for the disposition of the estate if the spouse and children all fail to survive the testator or, having survived, if they die before their interests under their trusts have indefeasibly vested in interest;
- (h) administrative powers, which might include,
  - (i) a power of sale, if not contained earlier in the will;
  - (ii) a power to compromise claims of creditors;
  - (iii) a power to value and distribute property in specie;
  - (iv) a power to pay monies for minors to their guardian;
  - (v) a power of investment;
  - (vi) a power to carry on and invest in any business conducted by the testator;
  - (vii) a power to borrow secured by mortgage or pledge;
  - (viii) a power to manage, lease or option real estate; and
  - (ix) a power to make income tax elections and designations.

#### 5. Drafting dispositive clauses

Because of the virtually unlimited number of ways that the assets of an estate can be distributed, the dispositive clauses of the will must be specifically drafted to reflect the testator's instructions. Where the scheme of distribution is complex, ensuring the accurate drafting of the dispositive provisions is a common problem. At times, the complexity arises from the instructions of the client and for practical reasons, you may want to encourage your client to simplify the distribution scheme to make the administration of the estate more efficient and less likely to result in problems or disputes.

When drafting the dispositive provisions, clearly identify the beneficiary by using the full legal name and the beneficiary's relationship to the Deceased. Where there is a class gift, describe the class with particularity. For example, a gift to "my nephews and nieces" raises an ambiguity as to whether the class refers only to the testator's siblings' children or includes the testator's spouses' siblings' children.

Many clients will provide instructions based on their family arrangements that exist at the time. In advising your clients, you should review with them how they would want their estate distributed in the event of:

- (a) unusual sequence of deaths, including the beneficiary predeceasing the testator;
- (b) marriage or marriage breakdown;
- (c) adoption or birth of children;
- (d) other potential future beneficiaries; or
- (e) minor, incapable or financially immature beneficiaries.

Ademption occurs when the subject matter of the gift is disposed of during the testator's lifetime. When specific gifts are made in a will and the testator does not intend an ademption of a specific gift, then you need to obtain instructions as to whether a substitute gift, of money or otherwise, is to be made in the event of the ademption of the original devise or bequest.

Consider whether it is desirable to provide for a survivorship period in the case of outright gifts. Without a survivorship period, if both the testator and the beneficiary are involved in a common accident

- (a) additional duties, probate fees and estate taxes and additional administrative expenses will be incurred because the same assets will be administered twice; and
- (b) an unintended distribution may occur if the provisions of the survivor's will are not the same as those of the first to die.

The most common survivorship periods are 10 days, 30 days or 60 days. The assumption is made that if a person survives for at least the survivorship period, it is unlikely that he or she has died as a direct result of the common accident. If the survivorship period is not too long, it will not cause undue inconvenience to the beneficiary nor delay the administration of the estate unduly. It usually takes at least a month before an inventory of assets and liabilities can be prepared and probate obtained. A longer survivorship period is seldom desirable because of the inconvenience to the

beneficiaries, particularly if the spouse of the deceased is the only beneficiary.

The drafter should always consider, and where appropriate deal in the will, with the possibility of a beneficiary predeceasing the testator.

When creating ongoing trusts, consider including provisions dealing with the following matters, namely:

- (a) The distribution or accumulation of income

For example, the income may be payable to the beneficiaries in fixed proportions or as determined by the trustees in their discretion. On the other hand, the trustees may have the discretionary power to accumulate some or all of the income as well as to distribute it unequally among the beneficiaries.

- (b) The distribution of the capital

The capital may be held intact for a fixed period after the death of the testator. For example, it might be held intact until the youngest child attains the age of majority or age 21. Alternatively, the capital may be divided immediately into shares for the beneficiaries. The individual shares might then be held for a fixed period, for example, until the beneficiary attains a specified age.

If the capital is to be divided among several beneficiaries, it is usually better to divide it into "shares" or "parts" rather than percentages. This practice makes it easier to avoid an inadvertent intestacy if one of the beneficiaries predeceases the testator or survives the testator but dies before the date of distribution. When the beneficiaries are young, consider distributing their shares of capital in several stages, for example, at ages 25, 30 and 35. It is also prudent to give the trustees a discretionary power of encroachment on the capital during the period they are holding it. The power of encroachment may be unlimited or may be limited to a specific amount to a percentage of the value of the capital or for specific purposes (for example, medical or other emergencies).

Whenever an ongoing trust is created, the lawyer must ensure that he or she has provided, to the extent reasonable, for a gift over in case the trust property fails to vest absolutely in interest.

## 6. Capital and stirpital distributions

Ensure that you secure the client's understanding, instructions and approval as to whether a distribution is to be *per stirpes* or *per capita*.

As the following explanation shows, the concepts are not complex. (See the chart on following page.)

### (a) Distribution per capita

*Per capita* ("by the head") is used to reflect a scheme of distribution where the beneficiaries must be alive at the time of the death of the testator in order to take their shares of the estate. If any of the beneficiaries predeceases the testator, that deceased's beneficiaries share passes to the other beneficiaries who are living at the time of the testator's death and does not fall into the estate of the deceased beneficiary and does not pass to the intestate heirs or wills beneficiaries of the deceased beneficiary.

For example, Andrew Bates, a widower, makes a will leaving his estate to his children per capita. At the date he makes his will, Mr. Bates has five children, all over the age of majority.

At the date of his death, Mr. Bates leaves an estate worth \$100,000. One of his children, Craig, has died before him. Craig leaves behind a wife, Denise, and two children, Elizabeth and Frank. Mr. Bates' other four children survived him.

Mr. Bates' will contains a clause that directs his Trustee "to divide the residue of my estate among my children who are living at my death in equal shares per capita".

Because the distribution is per capita, each of Mr. Bates' four surviving children receives \$25,000. Denise, Elizabeth, and Frank, Craig's next of kin, receive nothing.

### (b) Per stirpes distribution

*Per stirpes* ("by the root") is used to reflect a scheme of distribution that recognizes each line of lineal descendants of a named beneficiary as a root. If the beneficiary predeceases the testator, his or her share of the estate passes on to his or her lineal descendants (i.e. issue).

Consider again the Bates fact pattern and assume that Mr. Bates has distributed the residue of his estate to "my issue in equal shares per stirpes". In such a case, the 1/5 or \$20,000 that would have gone to Craig had he survived the testator passes to Craig's issue: Elizabeth and Frank each receives \$10,000,

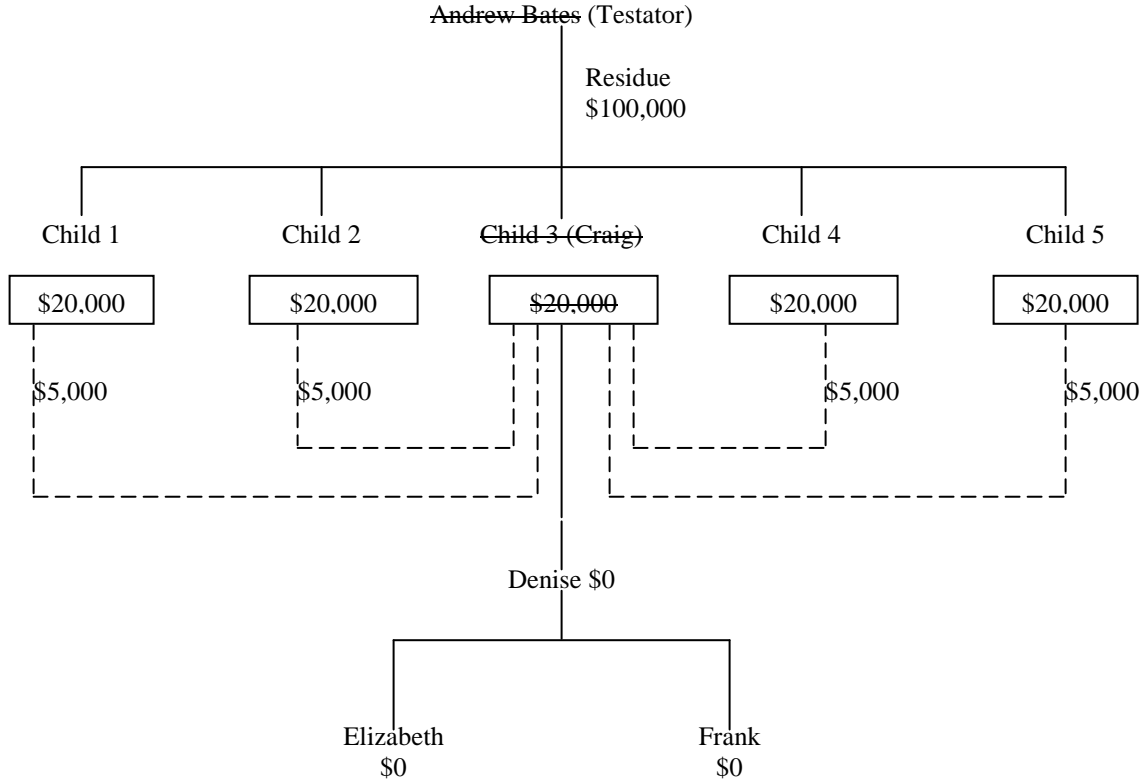
being 1/2 of Craig's share or 1/10 of the residue. Denise, because she is not issue of Mr. Bates, receives nothing. If Craig had died before the testator, and had no children who survived him, then there would be only four shares to distribute. Accordingly, each of the four surviving children would receive \$25,000.

The phrase "per stirpes" does not of itself specify the generation in which the stirp (root) should commence. For example, if Mr. Bates was not survived by any of his five children, but did have eight grandchildren who survived him, then it would not be clear whether there should be five shares or eight shares. In order to prevent this ambiguity, the will should specify whether the lineal line should commence in the first generation of descendants or in the first generation in which there is at least one living descendant.

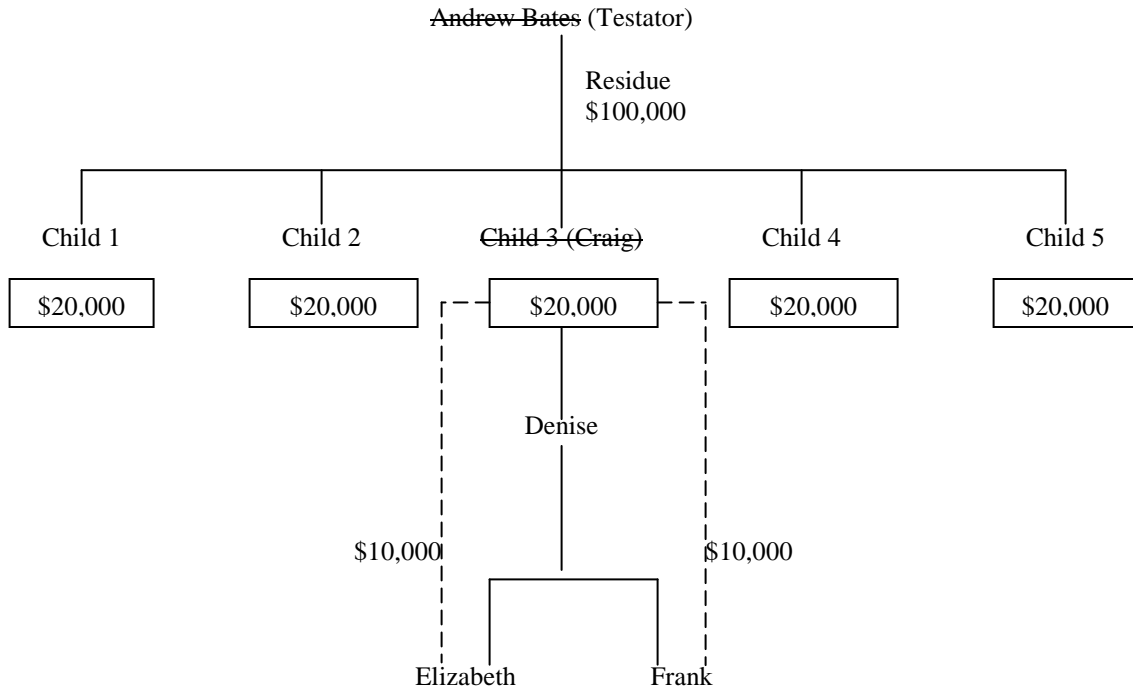
For a discussion of recent case law and drafting tips on the use of the phrases *per stirpes* and *per capita* see C.S. Thériault, "*Hamel Estate v. Hamel: Should Will Drafters Abandon the Use of Issue Per Stirpes?*" (1998) 18 Est. and Tr. Journ. 127.

The two schemes distribution can be graphically illustrated as follows:

**1. Capital Distribution**



**2. Stirpital Distribution**



## 7. Clauses benefiting the executor and trustee

### (a) Purchasing assets

If the testator wants the executors and trustees to be able to purchase assets from or sell assets to the estate, he or she must specifically empower them to do so. Also provide for how the terms of the sale will be determined. In the absence of such a power, the executors and trustees could only purchase assets from or sell assets to the estate if all of the beneficiaries beneficially interested under the will were *sui juris* and agree.

### (b) Remuneration

If the testator intends the executor and trustee to receive remuneration calculated on a different basis than under s. 88 of the *Trustee Act*, 1996 R.S.B.C. 1996, c.464, then this should be set out in the will. Provisions which you may wish to consider include:

- (i) if appropriate, a provision that any pecuniary legacy is given in addition to any remuneration to which the executor and trustee may be entitled;
- (ii) payment of a lump sum in lieu of other remuneration; and
- (iii) provision for a minimum level of remuneration.

### (c) Employment of experts

Consider including in the will a power for lay executors and trustees to employ and delegate discretionary powers to trust companies, solicitors, accountants, investment counsel or other experts to assist in the administration of the estate, and an exoneration of the executor and trustee for following or failing to follow any advice received.

### (d) Gifts to executor and trustee

It is prudent to provide that any gift to an executor and trustee is not given conditional upon his or her so acting and is to be enjoyed beneficially.

## 8. Common drafting pitfalls

The following are illustrations of some of the problem areas which can, in great measure, be avoided by a combination of obtaining proper instructions and good drafting.

### (a) Class gifts

It is very important to ensure that the class is clearly defined. For example, suppose the residue of the estate is given to “my nieces and nephews”. In addition to the problem of determining when the class is to close, it may be unclear whether the phrase “nieces and nephews” was intended to mean only the children of the testator’s brothers and sisters, or to include children of the testator’s spouse’s brothers and sisters.

### (b) Ademption

Ademption occurs when the subject matter of a gift is disposed of during the lifetime of the testator. Consider, for example, a provision which states “To my friend, John, if he survives me all my shares in the capital of ABC Company Ltd.” If at the death of the testator, the testator owns no shares in the ABC Company Ltd., the gift adeems and John receives nothing. Is this what the testator wants? If not (and only by discussing it with the testator will you find out), perhaps some form of substitution can be made, such as: “To my friend, John, if he survives me all my shares in the capital of ABC Company Ltd., but if I do not have any shares in the capital of ABC Company Ltd. at my death, I give to him if he survives me the sum of \$1,000.”

### (c) Gifts to infants

It is rarely sensible to hold up completion of the administration of an estate by compelling the executors and trustees to retain small gifts in specie to infants until they attain the age of majority. Unless a will otherwise provides, an executor must pay money passing to a minor to the Public Guardian and Trustee in trust for the minor (*Estate Administration Act*, R.S.B.C. 1996, c. 122, s. 75). Two alternatives should be considered:

- (i) include a provision in the will that the gift may be paid or delivered to the guardians or guardian of the infant to hold for the benefit of the infant until he or she is of age. Couple this with a direction that upon such payment or delivery the executor and trustee is discharged from all liability in respect of the gift; or
- (ii) to specifically provide for the executor to purchase an asset, such as a bond, which will mature when the infant is entitled to his or her money.

It is also important to set out what access should be permitted to money being held in trust for an infant during his or her minority. In the absence of specific provisions in the will, s. 24 of the *Trustee Act* allows access to income for “maintenance and education” only and s. 25 permits access to capital only with the court’s approval.

#### [§4.05] Will Execution Procedures

You must thoroughly familiarize yourself with the formalities for the execution of a will as required by the *Wills Act* (see chapter 2). Because of the very strict formalities in British Columbia, it is always best to personally attend on execution or have another lawyer or notary do so. When the will is being executed in your absence, you must ensure that the directions to the testator and the witnesses are complete and clear or otherwise you could face liability in negligence (*Ross v. Caunters*, [1980], Ch. 297 (Ch.D.)). See Appendix 2 for a sample of instructions for out of office execution of wills.

If you have not taken instructions from the testator directly, then you must attend on execution, or meet with the testator prior to the execution of the will, in order to confirm the testator’s wishes or later risk a claim that the will did not reflect the testator’s intentions. When confirming the instructions from an elderly or possibly incapacitated client who has not given you the instructions directly, you should not ask the person to indicate his or her agreement to the provisions, but rather, ask them to inform you what their dispositive intentions are, to ensure that they have knowledge and approval of the will you have drafted (*Re Worrell* (1969), 8 D.L.R. (3d) 36).

There is a presumption that the execution requirements have been complied with where there is a proper attestation clause, unless there is evidence to the contrary. Nevertheless it is still important to engage in a consistent practice for the execution of wills and the selection of witnesses (who may be available to testify if necessary). If the client has special needs (e.g. blind, illiterate, is unable to read the English language and requires translation), the testimonium clause should be amended to reflect the circumstance in which the will was executed so as to record compliance with the *Wills Act*. See Appendix 1 for examples of special testimonium clauses.

#### [§4.06] Post Execution Procedures

##### 1. Wills notices

After the will is executed, a wills notice should be filed with Vital Statistics, setting out the full name, address, occupation, date and place of birth of the testator and the date of execution and location of the will. Since a wills notice search must be conducted before a grant is applied for, this filing though not mandatory, is recommended as a useful protection for the client and also for the lawyer if the lawyer is storing the will for the client.

##### 2. Wills storage

Wills should be kept in safekeeping in a place where they can be readily located and retrieved when required and free from risk of accidental loss or destruction. If you are retaining the will as the solicitor, you must ensure appropriate storage of the original will, and deal directly with your client regarding any storage expenses and the delineation of responsibilities. If the client is retaining the will, you should advise the client to store it in a safety deposit box.

Best practice indicates that if you retain the will in safekeeping, you should:

- (a) ensure that the will is stored in an appropriate place and that you have a copy in another location;
- (b) insist on filing a wills notice;
- (c) ensure that you have negated in writing any obligation to the client that might be implied by retaining the will to keep the client informed of any changes to the law that might affect the estate planning effected under the will or otherwise; and
- (d) maintain a wills index system to readily ascertain the location of the will when required, which should include the following information:
  - (i) name and address of testator;
  - (ii) index number of the wills file;
  - (iii) name and address of executor;
  - (iv) date of execution of will; and
  - (v) exact location of will.

### 3. Reporting to the client

After the will has been executed and a wills notice has been filed, you should report to your client in writing. If you have not already done so, this is the time to provide them with a copy of the will and to confirm the location of the original. You might also take the opportunity to recommend periodic reviews of their will to ensure it is up to date as the testator's circumstances change. As well you may want to remind them at that time that marriage revokes their will.

### 4. Destroying prior wills and will files

Once a will has been revoked unconditionally by a later valid will the client or the lawyer under express written instructions of the client, may safely destroy it.

A lawyer should not destroy a wills file in respect of an unrevoked will until after the testator has died and the limitation period for claims by disappointed beneficiaries against the solicitor has expired. Note that if the distribution date under the will is postponed, this could be a period of many years after probate is obtained.

### 5. Releasing a will from safekeeping

A will should only be released by a lawyer from safekeeping in accordance with and on receipt of written instructions for the client or from the executor named in the will, and once there is satisfactory proof of death of the client and identity of the executor. In all circumstances, a copy of the executed will and written receipt should be placed on the file. Where appropriate, the obligation to verify these matters may be asked, on undertaking if necessary, of the lawyer acting for the client or the executor.

### 6. Releasing a wills file

During the period of the testator's life, the file may be released to the client at his or her request. The law provides that the solicitor-client privilege with respect to a wills file passes to the executor on the death of the testator. There is a general common law exception to solicitor-client privilege that permits the admission of solicitor-client communications dealing with the existence, execution, tenor or validity of wills.

If after death of the client, you are asked to release your wills file, you should give consideration to the law regarding the release of solicitor-client communications in the context of the particular legal issue that has given rise to the request for the file.

For a detailed discussion of this see M. A. Laidlaw, "Solicitor - Client Privilege: to Disclose or Not to Disclose . . . Remains the Question, Even After Death" (1995) 15 Est. and Tr. Journ. 56.

## [§4.07] Further Reading

For more detailed information on drafting wills, refer to the following publications:

Bogardus, Peter W. and Mary B. Hamilton, *Wills Precedents—An Annotated Guide*. Vancouver: CLE (looseleaf).

Histrop, Linda Ann and Donna C. Cappon, *Estates Planning Precedents, A Solicitor's Manual*. Toronto: Carswell (looseleaf & computer disks).

McIntyre, W.A., *Practical Wills Drafting*. Toronto: Butterworths, 1992.

*O'Brien's Encyclopedia of Forms*. 11th edition. Division V. *Wills and Trusts*. Aurora: Canada Law Book (looseleaf, computer disk & CD-ROM).

Scott-Harston, J.C. and P.A. Johnson, *Tax Planned Will Precedents*, 3rd edition. Toronto: Carswell (looseleaf & computer disks).

Sheard, Hull and Fitzpatrick, *Canadian Forms of Wills*. 4th ed. Toronto: Carswell, 1982.

*The Encyclopaedia of Forms and Precedents*. 5th ed. London: Butterworths.

In addition, refer to the appropriate checklists from the Law Society's *Checklists Manual* found on the website: <http://www.lawsociety.bc.ca> following the *Practice Support* link. A few precedents are appended to Chapter 6.

For commentary on wills and intestate succession claims under the *Wills Variation Act*, R.S.B.C. 1996, c. 490 and constructive and resulting trusts, the impact of marriage and separation agreements, and using trusts, see *Estate and Succession Law for Family Lawyers* (Vancouver: CLE, March 1998); *Current Issues in Wills, Estates & Trusts* (Vancouver: CLE, March 1999); *Estate Litigation – 2001 Update* (Vancouver: CLE, November, 2001), and *Estate Planning for Aging Clients* (Vancouver: CLE, October 1999).

For commentary and strategy for estate planning issues relating to wills, see *BC Estate Planning & Wealth Preservation*. Vancouver: CLE.