

ACTION TO BE CONSIDERED	NOTES
<p style="text-align: center;"><b>INTRODUCTION</b></p> <p><b>Purpose and currency of checklist.</b> This checklist is designed to be used with the CLIENT IDENTIFICATION AND VERIFICATION PROCEDURE (A-1), WILL PROCEDURE (G-1), and WILL DRAFTING (G-3) checklists. It is intended to be used as a guide to gathering information needed to advise the will-maker and draft the will. This checklist must be considered in relation to the particular facts at hand and augmented and revised as appropriate. It is current to September 1, 2018.</p> <p><b>New developments:</b></p> <ul style="list-style-type: none"> <li>• <b>Trust reporting requirements.</b> On July 27, 2018, the Department of Finance Canada released draft legislation proposing amendments to the <i>Income Tax Act</i>, R.S.C. 1985, c. 1 (5th Supp.) and the Regulations made thereunder, which will require certain trusts to report personal information (name, address, date of birth, jurisdiction of residence, and tax identification number) of all trustees, beneficiaries, settlors (as that term is broadly defined in subsection 17(15) of the <i>Income Tax Act</i>), and certain other persons having an ability to exert influence over trustee decisions regarding appointment of income or capital. If enacted as proposed, the new reporting requirements will take effect in 2021. An estate which qualifies as a graduated rate estate (“GRE”) will be exempt from the reporting requirements, but testamentary trusts and estates which extend longer than three years or otherwise do not qualify as a GRE will be required to comply. Penalties for failing to comply knowingly or in circumstances amounting to gross negligence will result in a penalty of 5% of the highest value of all of the trust’s property. If the omission spans more than one taxation year, the 5% penalty may apply in respect of each year.</li> <li>• <b>Private corporation tax amendments.</b> Amendments to the provisions of the <i>Income Tax Act</i> dealing with taxation of private corporations and their shareholders were introduced to take effect in 2018 and subsequent taxation years. The amendments may have significant tax consequences where private corporation shares are held by a taxpayer on death. Clients holding private corporation shares may wish to obtain tax advice specific to their situation regarding the impact of the amendments.</li> <li>• <b>Law Society Rules</b> <ul style="list-style-type: none"> <li>• <b>Juricert password.</b> When using the electronic filing system of the Land Title Office, a lawyer must not disclose the lawyer’s password or permit any other person, including an employee, to use the password or affix the lawyer’s e-signature (Law Society Rule 3-96.1).</li> <li>• <b>Temporary articulated student restrictions.</b> Temporary articulated students are restricted from making certain appearances in Supreme Court, but not Provincial Court (Law Society Rule 2-71(2)).</li> <li>• <b>Electronic transfer of trust funds.</b> The Rules were amended in December 2017, effective July 1, 2018, to allow lawyers to electronically transfer trust funds using an online banking platform (Law Society Rules 3-64(4) and (6) to (8); 3-64.1; 3-64.2; 3-65(1), (1.1), and (2); and 3-66(2)). For questions, contact trustaccounting@lsbc.org or 604.697.5810.</li> <li>• <b>Client identification and verification.</b> The Federation of Law Societies of Canada has proposed amendments to its Model Rule on Client Identification and Verification Requirements. If the Federation’s Council approves the amendments, they will be forwarded to the law societies for adoption. Changes to the Law Society of BC’s rules would require the Benchers’ approval and, if approved, may affect the CLIENT IDENTIFICATION AND VERIFICATION PROCEDURE (A-1) checklist current to September 1, 2018.</li> </ul> </li> </ul>	

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<ul style="list-style-type: none"> <li>• The Law Society Rules are published at <a href="http://www.lawsociety.bc.ca/support-and-resources-for-lawyers/act-rules-and-code/law-society-rules">www.lawsociety.bc.ca/support-and-resources-for-lawyers/act-rules-and-code/law-society-rules</a>.</li> </ul> <p><b>Of note:</b></p> <ul style="list-style-type: none"> <li>• <b>Fraud prevention.</b> Lawyers should maintain an awareness of the myriad scams that target lawyers, including the bad cheque scam and fraudulent changes in payment instructions, and must be vigilant about the client identification and no-cash rules. See the “Fraud Prevention” page, including the “Fraud Alerts” section, on the Law Society website at <a href="http://www.lawsociety.bc.ca/support-and-resources-for-lawyers/lawyers-insurance-fund/fraud-prevention">www.lawsociety.bc.ca/support-and-resources-for-lawyers/lawyers-insurance-fund/fraud-prevention</a>.</li> <li>• <b>Searches of lawyers’ electronic devices at borders.</b> In 2017, in response to the Law Society’s concerns about the searches of lawyers’ electronic devices by Canada Border Services Agency officers, the Minister of Public Safety advised that officers are instructed not to examine documents if they suspect they may be subject to privilege, if the documents are specifically marked with the assertion they are privileged, or if privilege is claimed by a lawyer with respect to the documents. View the Minister’s letter and Law Society’s response at <a href="http://www.lawsociety.bc.ca/our-initiatives/rule-of-law/issues-that-affect-the-rule-of-law">www.lawsociety.bc.ca/our-initiatives/rule-of-law/issues-that-affect-the-rule-of-law</a>. Lawyers are reminded to claim privilege where appropriate and to not disclose privileged information or the password to electronic devices containing privileged information without client consent or a court order. See also “Client Confidentiality—Think Twice before Taking Your Laptop or Smart Phone across Borders” in the Spring 2017 <i>Benchers’ Bulletin</i> and “Crossing the border into or out of the United States” in the Spring 2018 <i>Benchers’ Bulletin</i>.</li> <li>• <b>Graduated rate estate (GRE) and estate donation rules.</b> Amendments to the provisions of the <i>Income Tax Act</i> dealing with taxation of estates and testamentary trusts took effect January 1, 2016. Generally, income retained in estates and testamentary trusts is now subject to tax at the highest marginal rates applicable to individuals. However, an estate that qualifies as a GRE is eligible to claim graduated rates for the 36-month period following death. Other amendments also in effect from January 1, 2016, provide for greater flexibility for estates to benefit from charitable donations made under a will or by designations on registered plans or life insurance policies. Where the rules apply, the gift is deemed to be made by the estate, and the donation credit may be claimed in the estate or in the terminal year or the immediately prior taxation year of the deceased. In order to qualify, the estate must be a GRE at the time of death and when the gift is paid; however, the period in which payment must be made has been extended from 36 months to 60 months.</li> <li>• <b>Aboriginal law.</b> The <i>Indian Act</i>, R.S.C. 1985, c. I-5, applies to wills made by “Indians” (as defined in the <i>Indian Act</i>) and to estates of deceased Indians who ordinarily resided on reserve land. The Minister of Aboriginal Affairs and Northern Development is given broad powers over testamentary matters and causes (<i>Indian Act</i>, ss. 42 to 50). The formalities of execution of an Indian will are governed by the <i>Indian Act</i> (ss. 45 and 46) and the Indian Estates Regulations, C.R.C., c. 954, s. 15; the Minister may accept a document as a will even if it does not comply with provincial laws of general application. It is good practice, however, to ensure that an Indian will or testamentary document is executed in the presence of two witnesses, with those witnesses signing after the will-maker in the will-maker’s presence.</li> </ul>	

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<ul style="list-style-type: none"> <li>• <b>Family Homes on Reserves and Matrimonial Interests or Rights Act.</b> This federal legislation applies to married and common-law spouses living on reserve land where at least one spouse is a First Nations member or an Indian. Sections 13 to 52 apply to First Nations who have not enacted their own matrimonial real property laws. Sections 14 and 34 to 40 pertain to the consequences of the death of a spouse or common-law partner.</li> <li>• <b>Additional resources.</b> See also <i>Annotated Estates Practice</i>, 10th ed. (CLEBC, 2014); <i>Wills Precedents: An Annotated Guide</i> (CLEBC, 1998–); <i>Wills, Estates and Succession Act Transition Guide</i> (CLEBC, 2010–); <i>British Columbia Estate Planning and Wealth Preservation</i> (CLEBC, 2002–); <i>British Columbia Probate and Estate Administration Practice Manual</i>, 2nd ed. (CLEBC, 2007–); <i>Incapacity Planning: The New Law</i> (CLEBC, 2011); <i>Family Law Act Transition Guide</i> (CLEBC, 2012–), all available at <a href="http://www.cle.bc.ca">www.cle.bc.ca</a>; and <i>Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide</i> (British Columbia Law Institute, 2012), available at <a href="http://www.bcli.org">www.bcli.org</a>.</li> </ul> <p style="text-align: center;"><b>CONTENTS</b></p> <ol style="list-style-type: none"> <li>1. Information about the Will-maker’s Family</li> <li>2. Information about the Will-maker’s Estate</li> <li>3. Testamentary Capacity</li> <li>4. Fraud, Undue Influence, Suspicious Circumstances</li> <li>5. Testamentary Wishes</li> <li>6. Attestation Clause</li> <li>7. Acknowledgement of Instructions as a Pro Tem Testamentary Clause</li> </ol> <p style="text-align: center;"><b>CHECKLIST</b></p> <ol style="list-style-type: none"> <li>1. <b>INFORMATION ABOUT THE WILL-MAKER’S FAMILY</b> <ol style="list-style-type: none"> <li>1.1 Confirm compliance with Law Society Rules 3-98 to 3-109 on client identification and verification; complete the CLIENT IDENTIFICATION AND VERIFICATION PROCEDURE (A-1) checklist. Provide the client with terms of engagement in writing, including an explanation of fees, disbursements, and other charges. See <i>BC Code</i>, s. 3.6 as to fees and disbursements. Note rule 3.6-3, commentary [1] regarding the duty of candour owed to clients respecting fees and other charges for which a client is billed. <ul style="list-style-type: none"> <li>.1 Joint retainer. Review <i>BC Code</i> rules 3.4-5 to 3.4-9. Note the requirements in rule 3.4-5, commentary [2] and [3] regarding specific advice the lawyer must give to clients when receiving will instructions from spouses or partners, the consent that should be obtained, and what to do if, subsequently, one spouse communicates new instructions.</li> </ul> </li> <li>.2 Conflicts—clauses that should not appear in the will. Review <i>BC Code</i> rules 3.4-37 to 3.4-39. You must not include a clause directing the executor to retain the lawyer’s services for estate administration (see rule 3.4-37). The will-maker may communicate in the will or by a separate document the will-maker’s wish that the executor retain a particular lawyer or firm to act for the estate, although such a statement by the will-maker would be advisory only (Ethics Committee April 4, 2013). <p>Do not include a clause giving the lawyer, the lawyer’s partner, or an associate a gift or benefit, unless the client is a family member (see rule 3.4-38). Also consider rule 3.4-26.1 to 26.2. “Family member” is</p> </li> </ol> </li> </ol>	

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<p>not defined in the <i>BC Code</i>, but the BC Lawyers' Compulsory Professional Insurance policy defines "family member" as a spouse, children, parent, or siblings. The lawyer must not accept a gift, other than a nominal gift, from the client unless the client has received independent legal advice (see rule 3.4-39).</p> <p>1.2 Obtain additional client information, including:</p> <ol style="list-style-type: none"> <li>.1 Aliases.</li> <li>.2 Date of birth.</li> <li>.3 Place of birth.</li> <li>.4 Domicile.</li> <li>.5 Social insurance number.</li> <li>.6 Marital status, including any plans to marry.</li> <li>.7 Date of marriage (if applicable).</li> <li>.8 Place of marriage (if applicable).</li> <li>.9 Name of spouse, including a person with whom the will-maker is in a marriage-like relationship.</li> <li>.10 Marriage-like relationship: duration and other particulars of the relationship.</li> <li>.11 Particulars of marriage agreement, cohabitation agreement, or separation agreement.</li> <li>.12 Particulars of divorce and any spousal support obligations.</li> <li>.13 Domicile at time of marriage (or beginning of marriage-like relationship).</li> <li>.14 Married in community property jurisdiction?</li> <li>.15 Citizenship (inquire carefully about any U.S. connection, e.g., was the will-maker or a parent born there, or married to a U.S. citizen).</li> </ol> <p>1.3 Identity of spouse, including person with whom the will-maker is in a marriage-like relationship.</p> <ol style="list-style-type: none"> <li>.1 Name.</li> <li>.2 Date of birth.</li> <li>.3 Place of birth.</li> <li>.4 Occupation.</li> <li>.5 Social insurance number.</li> <li>.6 Home address.</li> <li>.7 Domicile.</li> <li>.8 Citizenship (inquire carefully about any U.S. connection, e.g., was the spouse or a parent born there, or married to a U.S. citizen).</li> </ol> <p>1.4 Identity of children and step-children, including those born out of wedlock, adopted, or now dead.</p> <ol style="list-style-type: none"> <li>.1 Names.</li> </ol>	

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<ul style="list-style-type: none"> <li>.2 Dates of birth.</li> <li>.3 Places of birth.</li> <li>.4 Home addresses.</li> <li>.5 Occupations.</li> <li>.6 Domiciles, citizenship, and tax residence.</li> <li>.7 Any disabilities, and their nature.</li> <li>.8 Whether child of a former marriage (or marriage-like relationship).</li> <li>.9 Consider whether there is viable reproductive material stored (see <i>WESA</i>, s. 8.1, regarding the rights of posthumous descendants).</li> <li>1.5 Other intended beneficiaries.               <ul style="list-style-type: none"> <li>.1 Names.</li> <li>.2 Addresses.</li> <li>.3 Dates of birth, if minors.</li> <li>.4 Relationship to will-maker.</li> <li>.5 Domicile, citizenship, and tax residence.</li> <li>.6 Any disabilities, and their nature.</li> </ul> </li> <li>1.6 Other close relatives.               <ul style="list-style-type: none"> <li>.1 Names.</li> <li>.2 Addresses.</li> <li>.3 Relationship to will-maker.</li> </ul> </li> <li>1.7 Identity of executors and alternates, if applicable.               <ul style="list-style-type: none"> <li>.1 Names.</li> <li>.2 Addresses.</li> <li>.3 Occupations.</li> <li>.4 Domicile, citizenship, and tax residence.</li> </ul> </li> <li>1.8 Guardians and alternates, if required.               <ul style="list-style-type: none"> <li>.1 Names.</li> <li>.2 Addresses.</li> <li>.3 Occupations.</li> <li>.4 Domicile, citizenship, and tax residence.</li> </ul> </li> <li>1.9 Trustees and alternates, if not same as executors.               <ul style="list-style-type: none"> <li>.1 Names.</li> <li>.2 Addresses.</li> <li>.3 Occupations.</li> <li>.4 Domicile, citizenship, and tax residence.</li> </ul> </li> </ul>	

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<p><b>2. INFORMATION ABOUT THE WILL-MAKER'S ESTATE</b> (in all cases determine location)</p> <p>2.1 Cash.</p> <p>.1 Bank and term deposits.</p> <p>(a) Amount.</p> <p>(i) Joint accounts. Find out whose names are on all accounts, the will-maker's relationship to the joint account-holder, and the will-maker's intention with respect to passing by right of survivorship. What evidence is there of this intention? (See <i>Pecore v. Pecore</i>, 2007 SCC 17, regarding presumptions of resulting trust and of advancement.)</p> <p>(ii) Sole accounts.</p> <p>(iii) If e-banking, consider the executor's access to passwords.</p> <p>.2 Life insurance.</p> <p>(a) Cash value.</p> <p>(i) Personal policy.</p> <p>(ii) Third-party policy.</p> <p>(b) Named beneficiaries. Consider the will-maker's relationship with the beneficiaries and the will-maker's intention with respect to proceeds passing outright or impressed with trusts. What evidence is there of this intention?</p> <p>(c) Names of policy holders.</p> <p>(d) Names of insurance companies.</p> <p>(e) Policy numbers.</p> <p>(f) Purpose of insurance.</p> <p>2.2 Liquid assets.</p> <p>.1 Bonds.</p> <p>(a) Cash value.</p> <p>(b) Name in which registered.</p> <p>(c) Location.</p> <p>.2 Stock in public companies.</p> <p>(a) Cash value.</p> <p>(b) Name in which registered.</p> <p>(c) Location of share certificates (consider recommending consolidation in brokerage account).</p> <p>(d) Any restrictions on trade.</p> <p>(e) Acquisition cost.</p> <p>.3 Stock in private companies.</p> <p>(a) Estimated value.</p> <p>(b) Copy of most recent financial statement.</p> <p>(c) Name in which registered.</p> <p>(d) Location of share certificates.</p>	

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<p>(e) Share rights and restrictions (voting, dividend rights, redeemable, retractable).</p> <p>(f) Buy-sell agreements, or other restrictions on transfer. (Is life insurance in place to fund buy-sell agreement?)</p> <p>(g) If will-maker controls the company and is sole director, consider alternate director.</p> <p>(h) Acquisition cost.</p> <p>(i) Shareholder loan balances.</p> <p>.4 Interest in pension plan.</p> <p>(a) Estimated value.</p> <p>(b) Named beneficiary.</p> <p>(c) Owner.</p> <p>.5 Annuities.</p> <p>(a) Estimated value.</p> <p>(b) Named beneficiary.</p> <p>(c) Any guaranteed term.</p> <p>.6 RRSPs and RRIFs.</p> <p>(a) Estimated value.</p> <p>(b) Named beneficiary. Consider the will-maker's relationship with the beneficiaries and the will-maker's intention with respect to proceeds passing outright or impressed with trusts.</p> <p>(c) Plan holder or trustee.</p> <p>(d) Owner.</p> <p>.7 Tax-free savings accounts</p> <p>(a) Estimated value.</p> <p>(b) Named beneficiary. Consider the will-maker's relationship with the beneficiaries and the will-maker's intention with respect to proceeds passing outright or impressed with trusts.</p> <p>2.3 Non-liquid assets.</p> <p>.1 Interest in real property.</p> <p>(a) Estimated value.</p> <p>(i) Sole ownership.</p> <p>(ii) Joint tenancy.</p> <p>(iii) Tenancy in common.</p> <p>(iv) Options.</p> <p>(v) Mortgages (as mortgagee). Include amount owing and whether insured.</p> <p>(vi) Acquisition cost and additions to cost base.</p> <p>(b) Name in which interest registered.</p> <p>(c) Nature of interest.</p> <p>(i) Fee simple.</p> <p>(ii) Life estate.</p> <p>(iii) Leasehold.</p>	

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<ul style="list-style-type: none"> <li>(iv) Vendor's interest in agreement for sale.</li> <li>(v) Other (specify).</li> <li>(d) Nature of property.               <ul style="list-style-type: none"> <li>(i) Principal residence.</li> <li>(ii) Rental property.</li> </ul> </li> <li>.2 Business interests.               <ul style="list-style-type: none"> <li>(a) Estimated value.</li> <li>(b) Nature of interest.                   <ul style="list-style-type: none"> <li>(i) Sole proprietor.</li> <li>(ii) Partner. Obtain partnership agreement and review regarding effect of death of a partner.</li> <li>(iii) Assignee of book debts.</li> <li>(iv) Stock in private company (see item 2.2.3).</li> </ul> </li> </ul> </li> <li>.3 Personal loans receivable.               <ul style="list-style-type: none"> <li>(a) Borrower.</li> <li>(b) Balance owing and terms of repayment.</li> <li>(c) Documentation (loan agreement, promissory note). Consider impact of the <i>Limitation Act</i>, S.B.C. 2012, c. 13, on enforceability of demand loans.</li> <li>(d) When loan was made and last paid or acknowledged. Consider impact of the <i>Limitation Act</i> on enforceability of demand loans.</li> </ul> </li> <li>.4 Personal effects.               <ul style="list-style-type: none"> <li>(a) Estimated value.                   <ul style="list-style-type: none"> <li>(i) Home furnishings.</li> <li>(ii) Automobiles, and how registered.</li> <li>(iii) Boats, and how registered.</li> <li>(iv) Collectibles and antiques.</li> <li>(v) Art and jewelry.</li> <li>(vi) Other.</li> </ul> </li> <li>(b) Location.</li> </ul> </li> <li>.5 Interests in other estates or trusts.               <ul style="list-style-type: none"> <li>(a) Estimated value.</li> <li>(b) Copies of will or trust to determine nature of interest.</li> </ul> </li> <li>.6 Other substantial assets.               <ul style="list-style-type: none"> <li>(a) Estimated value.</li> <li>(b) Nature (specify).</li> <li>(c) Location.</li> </ul> </li> <li>.7 Powers of appointment (general or limited).</li> <li>.8 RESPs               <ul style="list-style-type: none"> <li>(a) Estimated value.</li> <li>(b) Named beneficiary.</li> </ul> </li> </ul>	



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<p>(c) Promoter, trustee, subscriber(s), and successor subscriber(s).</p> <p>.9 Foreign Assets</p> <p>(a) Estimated value.</p> <p>(b) Nature (specify).</p> <p>(c) Location.</p> <p>(d) Does the will-maker have a will in another jurisdiction?</p> <p>.10 Digital Assets</p> <p>(a) Note: may/may not be transferable on death.</p> <p>(b) Does the will-maker keep a list of account passwords?</p> <p>2.4 Liabilities. Note that <i>WESA</i>, s. 47, imposes liability on the recipient of land or tangible personal property to pay the “purchase money security interest” attributable to the secured property, subject to a specific contrary intention.</p> <p>.1 Mortgages on real property.</p> <p>(a) Balance due.</p> <p>(b) Property covered.</p> <p>(c) Name of mortgagee.</p> <p>(d) Term of mortgage.</p> <p>(e) Purpose of mortgage.</p> <p>(f) Insured.</p> <p>.2 Chattel mortgage/security agreement.</p> <p>(a) Balance due.</p> <p>(b) Property covered.</p> <p>(c) Name of mortgagee/secured party.</p> <p>.3 Conditional sales agreement/security agreement.</p> <p>(a) Balance due.</p> <p>(b) Property covered.</p> <p>(c) Name of vendor or assignee.</p> <p>.4 Other debts.</p> <p>(a) Balance due.</p> <p>(b) Type of debt.</p> <p>(c) Name of creditor.</p> <p>2.5 Estimated net value of estate.</p> <p>.1 Total assets.</p> <p>.2 Total debts.</p> <p>.3 Net estate.</p> <p>2.6 Other financial obligations.</p> <p>.1 Guarantees.</p> <p>.2 Indemnities.</p> <p>.3 Agreements to purchase property.</p>	

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<p>.4 Separation agreements.</p> <p>.5 Support orders.</p> <p>2.7 Other information about the estate.</p> <p>.1 Investment dealer or life insurance representative.</p> <p>    (a) Name.</p> <p>    (b) Address.</p> <p>.2 Accountant.</p> <p>    (a) Name.</p> <p>    (b) Address.</p> <p>.3 Individual who prepared last income tax return.</p> <p>    (a) Name.</p> <p>    (b) Address.</p> <p>2.8 Has there been a separation pursuant to the <i>Family Law Act</i>, S.B.C. 2011, c. 25? If so, have property division and support obligations been determined by agreement or by the court? Under the <i>Family Law Act</i>, in general, the parties share equally the increase in value of property acquired during the relationship, and the increase in value of “excluded property”. The latter includes property brought into the relationship, gifts, and inheritances received by one spouse during the relationship, as well as certain interests in trusts. A person with whom the will-maker is in a marriage-like relationship under the <i>Family Law Act</i> will have the same rights to division of property as a legally married spouse.</p> <p>2.9 Claims under constructive or resulting trusts against the estate assets.</p> <p>2.10 Is the client an executor under an existing will?</p> <p>2.11 Other possible restrictions on alienation of property, such as a marriage agreement, separation agreement, shareholders’ agreement, and joint ventures.</p>	
<p><b>3. TESTAMENTARY CAPACITY</b></p> <p>3.1 <i>WESA</i>, s. 36 sets the minimum age for making a valid will at 16, and s. 38 carries forward the provisions for armed forces members on active service permitting holographic wills.</p> <p>3.2 Mental capacity. See <i>BC Code</i> rule 3.2-9 and item 2.4 of the WILL PROCEDURE (G-1) checklist. Does the will-maker show:</p> <p>.1 An understanding of the nature of a will and its effects on claimants.</p> <p>.2 An understanding of the extent of their estate.</p> <p>.3 An appreciation of the claims to which they ought to give effect and an ability to rationally balance the competing claims.</p> <p>.4 That they are free of delusions that may affect the foregoing decisions.</p> <p>3.3 Evidentiary considerations where the will-maker’s capacity is suspect.</p> <p>.1 Keep a detailed record of answers to questions that are relevant to the issue of testamentary capacity.</p> <p>.2 Review reasons for changing any existing testamentary instruments.</p>	

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<p>.3 Before presenting the will for execution, ask once more what was wanted, and avoid leading the will-maker into yes/no answers.</p> <p>.4 At the time of execution, there should be independent witnesses (i.e., non-beneficiaries) including, if necessary, several individuals who know the will-maker, and a qualified medical person.</p> <p>.5 Written opinions from the witnesses. (If they are lay persons, they should be asked for observations, not opinions.)</p> <p>.6 If necessary, obtain a medical opinion.</p> <p>3.4 Capacity under foreign law where the will disposes of:</p> <p>.1 Movables under the law of a foreign domicile.</p> <p>.2 Immovables under the law of the foreign jurisdiction in which they are situated.</p> <p>3.5 If mental capacity is suspect, consider retaining any prior will in case the new will is determined to be invalid.</p> <p><b>4. FRAUD, UNDUE INFLUENCE, SUSPICIOUS CIRCUMSTANCES</b></p> <p>4.1 Question the client to make sure they know the true facts and really wants to make a will. Question the client alone; get a third-party interpreter if required. (Be especially careful if taking instructions from someone other than the will-maker.) Watch for red flags that may indicate undue influence, and follow recommended practices for screening for undue influence. See <i>Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide</i> (British Columbia Law Institute, 2011), available online at <a href="http://www.bcli.org">www.bcli.org</a> and on the Law Society website (<a href="http://www.lawsociety.bc.ca">www.lawsociety.bc.ca</a>) under “Support and Resources for Lawyers”.</p> <p>4.2 Record questions and answers.</p> <p>4.3 Ensure that the attestation clause of the will reflects the fact that the will has been translated or interpreted for the will-maker.</p> <p><b>5. TESTAMENTARY WISHES</b></p> <p>5.1 Executors and trustees.</p> <p>.1 Number.</p> <p>.2 Names.</p> <p>.3 Status.</p> <p>(a) Spouse.</p> <p>(b) Child.</p> <p>(i) One child or several.</p> <p>(ii) Provision for substitution of other children.</p> <p>(c) Other relative.</p> <p>(d) Friend.</p> <p>(e) Business associate.</p> <p>(f) Trust company.</p> <p>(g) Trust company and spouse.</p> <p>(i) With power in the spouse to substitute another trust company at any time.</p>	

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<ul style="list-style-type: none"> <li>(ii) With the spouse acting only in an advisory capacity.</li> <li>(iii) Trust company to have custody of estate assets.</li> <li>.4 Suitability of persons chosen as executors.               <ul style="list-style-type: none"> <li>(a) Age and health (consider expected period of administration for estate and all trusts).</li> <li>(b) Expressed willingness to act and practical ability (e.g., location of executor).</li> <li>(c) Business and administrative ability and expertise.</li> <li>(d) Possible conflict of interest (e.g., co-owner of will-maker's business), life tenant, or remainder beneficiary of a trust.</li> <li>(e) Relationship with the beneficiaries.</li> <li>(f) Time to act.</li> <li>(g) Income tax implications if executor is not a Canadian resident.</li> <li>(h) Securities regulations implications for instructing investment brokers if the executor is not a Canadian resident.</li> </ul> </li> <li>.5 Provision if an executor or trustee predeceases the will-maker: alternatives (see item 5.16.1(c)).</li> <li>.6 Provision for the replacement of an executor or trustee in the event that such person refuses to act or is unable to act or to continue to act.</li> <li>.7 Fees.               <ul style="list-style-type: none"> <li>(a) Refer to prior contractual arrangement (e.g., trust company as executor).</li> <li>(b) Provision that any gift under the will to the executor is (or is not) in addition to any remuneration otherwise claimable.</li> <li>(c) See also item 5.16.5.</li> </ul> </li> <li>5.2 Disposal of remains (advise the client that the executor is bound by wishes in the will or a "prepaid cemetery or funeral services contract" unless they would be unreasonable, impracticable, or cause hardship; see <i>Cremation, Interment and Funeral Services Act</i>, S.B.C. 2004, c. 35, s. 6).               <ul style="list-style-type: none"> <li>.1 Burial.</li> <li>.2 Cremation.</li> <li>.3 Consent, under <i>Human Tissue Gift Act</i>, R.S.B.C. 1996, c. 211, s. 4, to use of the body after death for therapeutic purposes, medical education, or scientific research. (Note that a written or electronic "decision record" may be registered on the British Columbia Transplant Society's "Organ Donor Registry"; see the Consent to Donation Regulation, B.C. Reg. 65/99, and <a href="http://www.transplant.bc.ca">www.transplant.bc.ca</a>.)</li> <li>.4 Have any pre-paid arrangements been made?</li> </ul> </li> <li>5.3 Payment of debts and taxes.               <ul style="list-style-type: none"> <li>.1 All duties and taxes as a debt of the estate.</li> <li>.2 Tax to be paid by the purchaser or transferee of assets.</li> </ul> </li> </ul>	

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<p>5.4 Provision for spouse.</p> <ul style="list-style-type: none"> <li>.1 Five-day (or 30-day) common disaster clause. Consider the effect of <i>WESA</i>, ss. 5 to 11, and in particular the deemed severance of joint tenancies where no joint tenant survives the other for five days. However if the will includes a spousal trust, see note at 5.4.4.</li> <li>.2 Bequest of the entire estate.</li> <li>.3 Bequest of a portion of the estate or a designated fund to provide an annuity for life.</li> <li>.4 Spousal income trust: <ul style="list-style-type: none"> <li>(a) All income payable to spouse for trust to qualify for rollover provisions in <i>Income Tax Act</i>, R.S.C. 1985, c. 1 (5th Supp.), s. 70(6).</li> <li>(b) With or without power to encroach on capital. Consider the tainting effect of <i>Income Tax Act</i>, s. 70(6) if power is given to encroach for a beneficiary other than a spouse.</li> <li>(c) Consider whether the trust will be a Canadian resident trust, and consider the effect of <i>Income Tax Act</i>, s. 70(6) if it is not.</li> <li>(d) With lifetime occupancy of family residence and expenses.</li> </ul> </li> <li>.5 Life estate with remainder over. Consider whether a legal life interest (i.e., not by way of a trust) complies with <i>Income Tax Act</i>, s. 70(6).</li> <li>.6 Wills variation considerations: <ul style="list-style-type: none"> <li>(a) Possibility of variation application under <i>WESA</i>, ss. 60 to 72. Advise will-maker of their legal and moral obligations.</li> <li>(b) Explanation in the text of treatment (previous gift, etc.) or in separate memorandum executed by the will-maker as to why obligations have been met.</li> </ul> </li> </ul> <p>5.5 Provision for children.</p> <ul style="list-style-type: none"> <li>.1 Division of estate.</li> <li>.2 Division of residue on death of spouse.</li> <li>.3 Income or fully discretionary trust which is to terminate: <ul style="list-style-type: none"> <li>(a) On death of spouse.</li> <li>(b) On children reaching age 19, or other specified age; in portions at specified ages. Consider the rule in <i>Saunders v. Vautier</i> (1841), 49 E.R. 282 (Eng. Ch. Div.) (see item 13.1 of the WILL DRAFTING (G-3) checklist).</li> </ul> </li> <li>.4 In discretion of spouse (i.e., power of appointment granted to spouse).</li> <li>.5 Life insurance policy. Consider use of separate life insurance trust declaration.</li> <li>.6 Specific bequests to take effect on will-maker's death.</li> <li>.7 Special fund for child's benefit or education.</li> <li>.8 Wills variation considerations. See 5.4.6.</li> </ul>	

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<p>5.6 Care of minor children if spouse dies.</p> <p>.1 Appointment of guardians (<i>Family Law Act</i>, ss. 39 and 53 to 57. Note provisions for standby guardians in the event of terminal illness).</p> <p>(a) Names.</p> <p>(b) Relationship to children.</p> <p>(c) Suitability.</p> <p>(i) Age.</p> <p>(ii) Financial capacity.</p> <p>(iii) Willingness to serve.</p> <p>(iv) Potential conflicts of interest if also trustee(s).</p> <p>(d) Any court orders or separation agreements regarding joint guardianship with the child's other parent?</p> <p>.2 Education.</p> <p>(a) Special trust fund.</p> <p>(b) Type of school or level of education.</p> <p>.3 Accommodation.</p> <p>(a) Occupation of family residence by minor children and guardian.</p> <p>(b) Minor children to live in residence of guardian. If so, consider a legacy or other provision for compensation.</p> <p>5.7 Does the will-maker want to make provisions for:</p> <p>.1 Stepchildren.</p> <p>.2 Wards or others to whom the will-maker stands in loco parentis.</p> <p>5.8 Disposition of family residence.</p> <p>.1 Joint tenancy or outright gift to spouse.</p> <p>.2 Outright gift to adult children.</p> <p>.3 Life estate to spouse with remainder over to:</p> <p>(a) Children.</p> <p>(b) Other relatives.</p> <p>(c) As appointed by spouse.</p> <p>.4 Occupancy trust for spouse or children.</p> <p>(a) Expenses.</p> <p>(b) Right to income in lieu of occupation.</p> <p>(c) Right to purchase substitute residence.</p> <p>(d) Consider ongoing eligibility for capital gains exemption for principal residence: <i>Income Tax Act</i> s. 54 "principal residence" (c.1)(iii.1)(A) or (C).</p> <p>.5 Family residence to pass with general estate.</p> <p>.6 Applicability of provisions to summer home. (Consider capital gains tax implications if the gift is to a non-spouse.)</p> <p>.7 Source of funds for payment of expenses.</p>	

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<p>5.9 Disposition of articles.</p> <ul style="list-style-type: none"> <li>.1 Specific bequests to named beneficiaries. Can be set out in the will, a codicil, or a binding memorandum executed before the will and incorporated by reference in the will.</li> <li>.2 Gift of (remaining) articles to spouse.</li> <li>.3 Gift of (remaining) articles to children or other relatives. <ul style="list-style-type: none"> <li>(a) As they may agree among themselves (or failing such agreement, as the executor shall determine).</li> <li>(b) Will-maker can make and amend an informal, non-binding list to guide the beneficiaries and the executor.</li> </ul> </li> <li>.4 To executor or another person together with a general power of appointment, with or without a non-binding list of wishes.</li> <li>.5 Personal property to pass with residue of estate.</li> <li>.6 Specific disposition of: <ul style="list-style-type: none"> <li>(a) Home furnishings.</li> <li>(b) Clothes.</li> <li>(c) Jewelry.</li> <li>(d) Valuable collections.</li> <li>(e) Automobiles (and accessories).</li> <li>(f) Boats (and accessories).</li> <li>(g) Any digital property (noting that licensed property, e.g., iTunes, expires on death).</li> </ul> </li> <li>.7 Who bears the expense of delivery of the gifts.</li> </ul> <p>5.10 Cash legacies.</p> <ul style="list-style-type: none"> <li>.1 Individuals.</li> <li>.2 Organizations.</li> <li>.3 Cash legacy to spouse equal to life insurance proceeds received by trustees.</li> <li>.4 Provisions to deal with the inability of a named beneficiary to take a gift.</li> <li>.5 Provision to be paid with or without interest from death or the anniversary of the will-maker's death.</li> <li>.6 If the will-maker intends to make an outright gift to a disabled beneficiary, consider whether the beneficiary would be capable of managing the gift, and whether the gift would diminish any government benefits or require significant expense to rearrange the gift in order to preserve benefits. Consider the benefits of a discretionary trust, or a "qualified disability trust" (<i>Income Tax Act</i>, s. 122(3)).</li> </ul> <p>5.11 Distribution of estate on the predecease of spouse or on termination of the spouse's life estate.</p> <ul style="list-style-type: none"> <li>.1 Equal division among children. <ul style="list-style-type: none"> <li>(a) Interest to vest at age of majority or other specified age.</li> <li>(b) Interest to vest immediately or in portions at specified ages.</li> </ul> </li> </ul>	

ACTION TO BE CONSIDERED	NOTES
<ul style="list-style-type: none"> <li>(c) Interest to vest immediately subject to divestment if child dies before age of majority or other specified age.               <ul style="list-style-type: none"> <li>(i) Per stirpes (if gift made to issue).</li> <li>(ii) Per capita.</li> </ul> </li> <li>(d) Representation of issue where child predeceases or fails to reach specified age.</li> <li>(e) Timing of distribution.               <ul style="list-style-type: none"> <li>(i) When youngest child reaches age of majority or other specified age.</li> <li>(ii) Immediately with shares of minor children to be held in trust pending age of majority or other specified age.</li> </ul> </li> <li>.2 Children entitled to life estate with remainder over to grandchildren.               <ul style="list-style-type: none"> <li>(a) Per stirpes (if gift over to “issue”).</li> <li>(b) Per capita.</li> </ul> </li> <li>.3 Children beneficiaries under a discretionary trust. Consider:               <ul style="list-style-type: none"> <li>(a) Accumulation of annual income if not fully distributed.</li> <li>(b) Scope of purposes for income distributions or capital encroachments (e.g., education, medical, maintenance, or any purpose at the trustee’s discretion).</li> <li>(c) Consider power to exhaust capital in a discretionary trust for disabled beneficiary.</li> <li>(d) Timing of winding-up, and identity and respective entitlements of beneficiaries.</li> <li>(e) Letter of wishes to address will-maker’s non-binding preferences regarding trustee’s exercise of discretion.</li> </ul> </li> <li>.4 Unequal division between children or exclusion of one or more children.               <ul style="list-style-type: none"> <li>(a) Possibility of variation application under <i>WESA</i>, ss. 60 to 72.</li> <li>(b) Explanation in the text of the will of unequal division or exclusion (previous gifts, etc.), or in a separate memorandum (note <i>WESA</i>, s. 62).</li> <li>(c) Gifts made before or after the will to be taken into account or forgiven.</li> <li>(d) Use of a fully discretionary trust to protect child who is mentally or physically disabled, is a spendthrift, has an addiction, or may be subject to matrimonial property claims.</li> </ul> </li> <li>.5 Division among other relatives or other beneficiaries. Consider “common disaster” provision.</li> <li>.6 Consider application of the rule against perpetuities as modified by the <i>Perpetuity Act</i>, R.S.B.C. 1996, c. 358.</li> <li>.7 Consider the rule in <i>Saunders v. Vautier</i> (1841), 41 E.R. 482, and gifts over in order to avoid collapsing trust at age of majority.</li> <li>5.12 Charitable gifts.               <ul style="list-style-type: none"> <li>.1 Consider problems arising if the will-maker wishes to benefit a charity not registered under the <i>Income Tax Act</i> or make a gift for a charitable purpose.</li> </ul> </li> </ul>	



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<p>.2 If a client wishes to name a charity as a beneficiary, explain to the client the importance of using the correct legal name. Then either verify the charity’s correct name or confirm that the client will perform the verification. If the gift is intended for a specific purpose, the client should determine that the charity can actually fulfill that purpose. It may be appropriate to discuss the provision of an alternate beneficiary in the event the charity no longer exists on the date of the client’s death. The Canadian Donor’s Guide and Canada Revenue Agency’s online searchable “List of charities” will provide information about a charity.</p> <p>.3 Consider additional tax benefits of gifts of publicly-traded securities, cultural property, or ecologically sensitive land.</p> <p>.4 Consider giving the executor discretion to make gifts to charity from estate assets.</p> <p>.5 Confirm estate will have GRE status and executors will be able to pay gift within 60 months of death, as required by <i>Income Tax Act</i>, s. 118.1(5).</p> <p>5.13 Trusts for sale.</p> <p>.1 Consider which assets should be subject to an express trust for sale and which to an express trust to hold, or separate and substantive powers to hold or sell.</p> <p>.2 Consider what powers should be granted ancillary to the trusts.</p> <p>.3 Consider the application of the even hand rule.</p> <p>.4 Income from corporations—consider clauses stipulating that:</p> <p>(a) Bonus shares representing accumulated income are to be treated as if they were income.</p> <p>(b) Dividends representing the proceeds of the sale of corporate assets other than inventory are to be treated as if they were capital.</p> <p>5.14 Trustees’ investment powers (see <i>Trustee Act</i>, R.S.B.C. 1996, c. 464, ss. 15.1 to 15.6 and 17.1, which establish a “prudent investor” standard).</p> <p>.1 Power to delegate investment decisions to professional investment advisors.</p> <p>.2 Power in trustees to act on majority vote with respect to investment decisions.</p> <p>.3 Regardless of other provisions, power to retain any investment existing at the date of death.</p> <p>.4 Consider granting a third party (perhaps a beneficiary) veto control over certain investment decisions (e.g., holdings in a private corporation).</p> <p>5.15 Trustees’ administrative powers.</p> <p>.1 Short-form boiler plate. <i>WESA</i>, s. 142, gives the executor a broad general authority to deal with estate assets, subject to a contrary intention in the will, but this provision does not extend to a trustee. Consider extending a similar general power to the trustee.</p> <p>.2 Long-form boiler plate.</p> <p>.3 Special provisions.</p> <p>(a) Trustees may act on majority vote (or consider non-beneficiary trustee as mandatory member of majority).</p>	

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<p>(b) Trustees may delegate decision-making powers beyond that specifically permitted under the <i>Trustee Act</i> (for example, s. 15.5 allows for delegation of investment authority, and s. 7 allows the appointment of a solicitor as a fiscal agent to receive trust money).</p> <p>(c) Power to make distribution of beneficiaries' shares in specie on the basis of a binding valuation by the trustee.</p> <p>(d) Power in trustee to purchase from the estate.</p> <p>(e) Power in trustee to act on a majority vote on trust matters generally.</p> <p>(f) Power in trustee to act as director and retain remuneration.</p> <p>(g) Power to carry on business.</p> <p>(h) Power to borrow money (including by way of mortgage).</p> <p>(i) Power to repair and improve assets.</p> <p>(j) Power to sell assets, including real estate, on terms determinable by the trustee.</p> <p>(k) Power to loan assets on terms determined by the trustee.</p> <p>(l) Power to purchase.</p> <p>(m) Power to hold real estate even if it is not income-producing.</p> <p>(n) Power to hold other non-income-producing assets for a disabled beneficiary.</p> <p>5.16 Other administrative provisions.</p> <p>.1 Appointment of successors to trustees.</p> <p>(a) No express provision: <i>Trustee Act</i>, ss. 27 and 31.</p> <p>(b) Power in spouse to appoint a replacement trustee.</p> <p>(c) Appointment in the will of a substitute executor to replace an executor who is unwilling or unable to act.</p> <p>(d) Power in the executor to appoint a substitute.</p> <p>(e) Other provision.</p> <p>.2 Mechanism for resignations by trustees.</p> <p>(a) No express provision: <i>Trustee Act</i>, ss. 27 and 28.</p> <p>(b) Express provision.</p> <p>.3 Removal of trustees.</p> <p>(a) No express provisions: <i>Trustee Act</i>, ss. 27, 30, 31, 35, and 36.</p> <p>(b) Express provisions.</p> <p>.4 Minimum number of trustees.</p> <p>.5 Trustee remuneration.</p> <p>(a) No express provision: <i>Trustee Act</i>, s. 88.</p> <p>(b) Provision that benefits to trustees under the will are not in lieu of remuneration.</p> <p>(c) Clause allowing lawyers or accountants who are trustees to charge for work done in a professional capacity.</p> <p>(d) Other express provision, including incorporation by reference of a compensation agreement.</p>	

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<p>5.17 Some special clauses that are commonly included in wills.</p> <ul style="list-style-type: none"> <li>.1 Testamentary life insurance declaration pursuant to the <i>Insurance Act</i>, S.B.C. 2012, c. 1, s. 61 (note <i>Re Carlisle</i>, 2007 SKQB 435, regarding the designation of a beneficiary in a will).</li> <li>.2 Designation of beneficiary under an RRSP, RRIF, TFSA, pension, or other kind of benefit plan, if permitted by the plan (note <i>WESA</i>, s. 84, may override a prohibition under a plan; see generally <i>WESA</i>, Part 5, Division 3). Note the <i>Pension Benefits Standards Act</i>, S.B.C. 2012, c. 30, which applies to survivor rights and transferability of pension assets.</li> <li>.3 Domicile clause where domicile is in doubt.</li> <li>.4 Provision for required Canadian residence of trustees and administration of the trust in Canada.</li> <li>.5 Provision for mandatory future administration outside Canada and resignation of Canadian trustees on demand by a spouse who wishes to live in another country.</li> <li>.6 Power to appoint an executor in another jurisdiction if required to obtain ancillary grant.</li> <li>.7 Financial “first aid” for injured or penurious spouse during long qualifying survival period.</li> <li>.8 Provision for pets.</li> <li>.9 Forgiveness of indebtedness.</li> <li>.10 Loans brought into hotchpot (respecting gifts or advances to children).</li> <li>.11 Confirming joint bank accounts to pass by survivorship with no resulting trusts; confirming life insurance and registered plan proceeds to pass to designated beneficiaries with no resulting trusts.</li> <li>.12 Will made in contemplation of marriage (note that under <i>WESA</i>, s. 55(2), a change in circumstances will not be sufficient to show an intention to alter a will).</li> <li>.13 Provision for upkeep of a family burial plot.</li> <li>.14 Maintenance to divorced spouse.</li> <li>.15 Provision regarding preferred beneficiary election and other elections and designations pursuant to the <i>Income Tax Act</i> (e.g., that the trustee has power to make or join in making the election).</li> <li>.16 Directions as to the application of certain assets to satisfy specific tax liabilities at death (for example, taxation of RRSP proceeds on death may be satisfied from RRSP rather than from the residue). Consider whether to apply on pro rata basis or as “last” dollars taxed.</li> </ul>	
<p><b>6. ATTESTATION CLAUSE</b></p> <ul style="list-style-type: none"> <li>6.1 Ensure that the clause reflects any special circumstances (e.g., blind will-maker, signing with a mark).</li> </ul>	

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<p><b>7. ACKNOWLEDGMENT OF INSTRUCTIONS AS A PRO TEM TESTAMENTARY INSTRUMENT</b></p> <p>7.1 Consider the effect of <i>WESA</i>, s. 58, that a document representing the testamentary intentions of a deceased person may be ordered by a court to be fully effective as though it had been made as a will. Where there are exigent circumstances making it impossible or impractical to arrange for timely execution of a formal will, the client may wish to confirm in writing their testamentary intentions on the will instructions. Discuss with client, including discussion of costs and uncertainties involved in such an application.</p>	