

PROVISIONS TO BE CONSIDERED	NOTES
<p style="text-align: center;">INTRODUCTION</p> <p>Purpose and currency of checklist. This checklist is designed to be used with the CLIENT IDENTIFICATION AND VERIFICATION PROCEDURE (A-1), WILL PROCEDURE (G-1), and WILL-MAKER INTERVIEW (G-2) checklists. It should only be used as a guide. The provisions must be considered in relation to the particular facts at hand and augmented and revised as appropriate. This checklist is current to August 31, 2016.</p> <p>New developments:</p> <ul style="list-style-type: none"> • Graduated rate estate (GRE) and estate donation rules. In December 2014, amendments were made to the provisions of the <i>Income Tax Act</i>, R.S.C. 1985, c. 1 (5th Supp.) dealing with taxation of estates and testamentary trusts; these 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, proposed changes will extend the period in which payment must be made from 36 months to 60 months. • Pension Benefits Standards Act. The new <i>Pension Benefits Standards Act</i>, S.B.C. 2012, c. 30 came into force on September 15, 2015 (see B.C. Reg. 71/2015). • Articled students permitted to act as commissioners for taking affidavits. Effective September 1, 2015, articled students and temporary articled students are commissioners for taking affidavits in British Columbia (B.C. Reg. 142/2015, made pursuant to s. 60(1) of the <i>Evidence Act</i>, R.S.B.C. 1996, c. 124). Principals remain responsible for students' actions and must ensure that students understand the effect of acting as commissioner. • Law Society Rules. On July 1, 2015, revised and consolidated Law Society Rules came into effect. See www.lawsociety.bc.ca/page.cfm?cid=4089&t=Law-Society-Rules-2015. Lawyers acting as personal representatives and trustees outside the practice of law, where the appointment derives from practice, are relieved of some, but not all, of the responsibilities to the Law Society in that regard, while maintaining the Society's ability to regulate and audit lawyers' compliance (see definitions of "fiduciary property", "general funds", "trust funds", and "valuables" in Rules 1, 3-53, 3-55, 3-75, and 3-87). Also, a client must agree in writing to receive a bill by any means other than that specifically addressed in Rule 3-65(3). • Code of Professional Conduct for British Columbia (the "BC Code"). In July 2015, rule 3.7-9 was amended to require that a lawyer promptly notify the client, other counsel, and the court or tribunal of the lawyer's withdrawal from a file. Rule 3.6-3, commentary [1] was amended in June 2015 regarding the duty of candour owed to clients respecting fees and other charges for which a client is billed. 	

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<p>Of note:</p> <ul style="list-style-type: none"> • Wills, Estates and Succession Act. Most of the <i>Wills, Estates and Succession Act</i>, S.B.C. 2009, c. 13 (the “WESA”), as amended by the <i>Wills, Estates and Succession Amendment Act, 2011</i>, S.B.C. 2011, c. 6 came into force on March 31, 2014 (see B.C. Reg. 148/2013). Among many other changes, the WESA repealed and replaced the <i>Estate Administration Act</i>, R.S.B.C. 1996, c. 122, the <i>Probate Recognition Act</i>, R.S.B.C. 1996, c. 376, the <i>Wills Act</i>, R.S.B.C. 1996, c. 489, and the <i>Wills Variation Act</i>, R.S.B.C. 1996, c. 490. • Family Law Act. The <i>Family Law Act</i>, S.B.C. 2011, c. 25 came into force on March 18, 2013. It repealed and replaced the <i>Family Relations Act</i>, R.S.B.C. 1996, c. 128 and provides a new family property division regime, as well as changes to guardianship laws. • Additional resources. See also <i>Annotated Estates Practice</i>, 10th ed. (CLEBC, 2014), and <i>Wills Precedents—An Annotated Guide</i>, looseleaf and online (CLEBC, 1998). <p style="text-align: center;">CONTENTS</p> <ol style="list-style-type: none"> 1. Commencement 2. Revocation 3. Will-maker’s Declarations 4. Executors and Trustees 5. Guardians 6. Funeral Wishes 7. Bequest of General Estate 8. Trusts 9. Trustee’s Powers 10. Designation of Beneficiaries 11. Attestation Clause 12. Miscellaneous Drafting Points 13. Some Common Traps to Avoid <p style="text-align: center;">CHECKLIST</p> <ol style="list-style-type: none"> 1. COMMENCEMENT <ol style="list-style-type: none"> 1.1 Declaration of testamentary intention. 1.2 Confirm compliance with Law Society of British Columbia 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. <ol style="list-style-type: none"> .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. 	

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<p>.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> <p>Do not include a clause giving the lawyer 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 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 without unless the client has received independent legal advice (see rule 3.4-39)</p> <p>2. REVOCATION</p> <p>2.1 Declaration that all other wills be revoked. Consider restricting the scope of the general revocation clause so that it does not extend to beneficiary designations contained in any RRSPs and insurance policies owned by the will-maker unless they are specifically dealt with in the will; in considering this issue, note that <i>WESA</i>, s. 97 provides that a revocation clause must relate “generally or specifically” to a designation not in a will in order to revoke it.</p> <p>2.2 If the will-maker has multiple wills in different jurisdictions, ensure that a revocation clause in any one will does not inadvertently revoke other existing wills.</p> <p>3. WILL-MAKER’S DECLARATIONS</p> <p>3.1 Declaration that the will is being made in contemplation of marriage. Note that under the <i>WESA</i>, marriage will no longer revoke a will, but it may still be prudent to mention an anticipated change in circumstances.</p> <p>3.2 Declaration that the will is being made in contemplation of divorce or separation. If the will-maker wants a gift to spouse or appointment of spouse as trustee to survive the separation, the will should clearly state this intention to overcome the presumption in <i>WESA</i>, s. 56.</p> <p>3.3 Declaration that the will disposes of only assets in a particular jurisdiction.</p> <p>3.4 Special clause declaring that the will-maker has a will disposing of property in another jurisdiction. Ensure that the revocation clause does not revoke those wills.</p> <p>3.5 Statement of the will-maker’s domicile or residence, if in doubt.</p> <p>3.6 Other declarations as required (e.g., insurance designation).</p> <p>4. EXECUTORS AND TRUSTEES</p> <p>4.1 Original appointment.</p> <p>.1 Appointment.</p> <p>.2 Name(s) and address(es).</p> <p>.3 Occupation(s) or relationship(s).</p>	

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<p>4.2 Substitute executors and trustees.</p> <ul style="list-style-type: none"> .1 Event requiring substitution (e.g., predecease or refusal/inability of the original trustee to act or to continue to act). .2 Name(s) and address(es). .3 Occupation(s) or relationship(s). .4 Consider granting the power for the substitute executor(s) to appoint a replacement executor in his or her own will. <p>4.3 Consider the use of a “majority rules” provision in a will with multiple executors/trustees. Beware of circumstances in which it would not be appropriate. Consider whether an independent trustee must be a member of the majority.</p> <p>4.4 Define the term “trustee” to include executor and trustee, original or substituted.</p> <p>4.5 Consider a charging clause if the executor is a lawyer or other professional.</p> <p>4.6 Executors’ compensation. Consider whether a gift in the will is meant to be in lieu of executor’s compensation. If any institutional executor is appointed, refer specifically to a governing fee agreement.</p> <p>5. GUARDIANS</p> <p>5.1 Event triggering appointment of guardians (e.g., death of surviving spouse or former spouse sharing custody).</p> <p>5.2 Appointment. Avoid appointing married couples as guardians; choose the party with the closest relationship to the will-maker, to avoid problems if the marriage breaks down. Consider provisions affecting the appointment of a guardian in <i>Family Law Act</i>, s. 39 and Part 4, Division 3.</p> <ul style="list-style-type: none"> .1 Name(s) and address(es) of guardian(s). .2 Relationship(s) or occupation(s). .3 Full names of children. <p>5.3 Gifts to guardians in addition to or in lieu of guardian’s compensation. See <i>Trustee Act</i>, R.S.B.C. 1996, c. 464, s. 88 in this regard.</p> <p>6. FUNERAL WISHES</p> <p>6.1 Point out to the client that the wishes are binding on the executor unless they are unreasonable, impracticable, or cause hardship (<i>Cremation, Interment and Funeral Services Act</i>, S.B.C. 2004, c. 35, s. 6). Recommend that the client advise the family of these wishes, as the funeral usually precedes reading of the will.</p> <p>6.2 Burial or cremation.</p> <p>6.3 Organ donation (see item 5.2.3 of the WILL-MAKER INTERVIEW (G-2) checklist).</p> <p>6.4 Wishes for a funeral or memorial service (or none), party, wake, memorial bench or similar, and powers to trustee to pay all such expenses from estate.</p> <p>6.5 Consider putting these wishes into a memorandum of the will-maker’s wishes.</p>	

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<p>7. BEQUEST OF GENERAL ESTATE</p> <p>7.1 To trustee(s).</p> <p>7.2 Upon stated trusts (see item 8).</p> <p>8. TRUSTS</p> <p>8.1 Administrative trusts. There are preliminary matters to which the executors are required to attend:</p> <ul style="list-style-type: none"> .1 Call in the property of the estate and convert it into money. Consider including a power to postpone the conversion. .2 Payment of debts, taxes and testamentary expenses (e.g., property purchase tax). If there are additional wills for property in another jurisdiction, consider which estate should (or has the ability) to pay taxes arising on the deemed disposition of particular assets. <p>8.2 Bequests of specific articles. Consider the use of a memorandum made before the will, incorporated by reference into the will, if there is a long list of specific bequests.</p> <ul style="list-style-type: none"> .1 Describe articles in enough detail to identify them. Consider the impact of ademption (i.e., identify a substitute gift in case a specific article contemplated is disposed of prior to the will-maker's death). .2 Identify beneficiary; name(s), address(es) and relationship. .3 Consider a provision for packing, insurance, and freight charges. Does the will-maker wish the estate or the beneficiary to pay? .4 Consider the effect of <i>WESA</i>, s. 47 if any personal property is encumbered (e.g. automobile loans). <p>8.3 Disposition of personal effects.</p> <ul style="list-style-type: none"> .1 Bequest to spouse. .2 Bequest to children or other relatives. <ul style="list-style-type: none"> (a) As they may agree amongst themselves (or failing such agreement, as the executor shall determine). (b) Consider use of a non-binding statement of wishes to guide the children and the executor. .3 Bequest to executor or another person together with a general power of appointment, with or without a non-binding list of wishes. <p>8.4 Cash legacies.</p> <ul style="list-style-type: none"> .1 Individuals. Carefully identify the beneficiaries, including names and addresses. Consider the potential adverse impact of an outright gift to any disabled beneficiary (see item 13.10). .2 Charities. Ensure that the charity is specifically identified, including its branch, if the will-maker desires. Consider the provision of an alternate beneficiary in the case of the non-existence of the designated charity at the date of the will-maker's death, or considering including a <i>cy-près</i> clause. <p>8.5 To invest.</p>	

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<p>8.6 To accumulate income.</p> <p>8.7 Provision for spouse.</p> <ol style="list-style-type: none"> .1 Survivorship clause. .2 Bequest of all or a portion of the estate. .3 Life estate: <ol style="list-style-type: none"> (a) Define the property included. (b) Income to spouse. (c) Designate remainder beneficiaries. (d) Power of encroachment. .4 If tax-deferral is desired, ensure that the requirements of the <i>Income Tax Act</i>, R.S.C. 1985, c. 1 (5th Supp.) for a “spousal or common-law partner trust” are met, including the requirement that a spouse or common-law partner be entitled to <i>all</i> trust income during his or her life and <i>only</i> the spouse or common-law partner is entitled to capital distributions during his or her life (see <i>Income Tax Act</i>, ss. 104(4) and 107(4), and the definition of “common-law partner” in s. 248(1)). <p>8.8 Disposition of the family residence.</p> <ol style="list-style-type: none"> .1 Gift outright to spouse or children. .2 Life estate to spouse or children. <ol style="list-style-type: none"> (a) Payment of taxes, insurance and other expenses. Is the estate or life tenant responsible? If the estate is responsible, specify the source of the funds. (b) Maintenance. Is it the responsibility of the estate or the life tenant? Who pays for capital repairs? (c) Income in lieu of occupation. (d) Right of trustee to sell the home and buy another. (e) Events which might end the life tenancy prematurely. (f) Restricting use to the personal use of the life tenant. <p>8.9 Provision for children.</p> <ol style="list-style-type: none"> .1 Income or fully discretionary trust to provide for children until majority or other specified age: <ol style="list-style-type: none"> (a) Power to encroach and to pay to guardian of a minor. (b) Circumstances in which power should be exercised. .2 Provision for disabled children. .3 Bequest of property (share): <ol style="list-style-type: none"> (a) On majority. (b) At specified age. .4 Gift over on lapse or on failure of the beneficiary to survive to a specified age. <p>8.10 Residue.</p> <ol style="list-style-type: none"> .1 To spouse. 	

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<ul style="list-style-type: none"> .2 To children. .3 Effect of predecease. .4 Gift over on lapse. 	
<p>9. TRUSTEE’S POWERS</p> <p>The will-maker grants the trustee powers to enable him or her to deal with the assets in the estate and to carry out the trusts in the will.</p> <p>9.1 Investment powers (see the <i>Trustee Act</i>, ss. 15.1 to 15.6 and 17.1, which have replaced the former list of authorized investments with a “prudent investor” standard).</p> <p>9.2 Enabling powers to:</p> <ul style="list-style-type: none"> .1 Make payment to parent, or to guardian in the case of an infant. .2 Delegate trustee duties (including investment powers). .3 Repair and improve property. .4 Insure the estate property. .5 Grant and deal with leases and options. .6 Compromise or settle claims against the estate. .7 Borrow on behalf of the estate, and give security. .8 Employ professionals or tradespeople. .9 Subdivide land. .10 Exercise all the rights and powers of an individual with respect to investments. .11 Allocate tax benefits amongst beneficiaries, and make all elections and designations. .12 Postpone distribution. .13 Carry on business. .14 Same powers as the will-maker with respect to corporation, including power to reorganize. .15 Loan trust property, with or without security. .16 Distribute in specie (including appreciated securities in satisfaction of a charitable legacy). .17 Sell real estate. .18 Purchase. .19 Invest in real estate, even if it is not income-producing, or other non-income-producing property for a disabled beneficiary. <p>9.3 Special powers.</p> <ul style="list-style-type: none"> .1 Purchase property personally from the estate. 	

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<p>10. DESIGNATION OF BENEFICIARIES</p> <p>10.1 Insurance (consider the effect of <i>Re Carlisle</i>, 2007 SKQB 435, which concerns designating an insurance trustee as beneficiary where the insurance trustee is also named as executor of the will).</p> <p>10.2 RRSP, RRIF, TFSA, or employee benefit plans. (Consider the tax implications of death of the annuitant. See <i>WESA</i>, Part 5.) Note that plans administered by insurance companies continue to be governed by the <i>Insurance Act</i>, S.B.C. 2012, c. 1.</p> <p>10.3 Pension. (Consider the impact of the <i>Pension Benefits Standards Act</i>, R.S.B.C. 1996, c. 352, particularly ss. 34, 35, 63, and 64, which may affect such a testamentary designation. Note the new <i>Pension Benefits Standards Act</i>, S.B.C. 2012, c. 30 came into force on September 15, 2015 (see B.C. Reg. 71/2015) and applies to survivor rights and transferability of pension assets.)</p> <p>11. ATTESTATION CLAUSE</p> <p>11.1 Boilerplate clause indicating that all steps required by <i>WESA</i>, s. 37 have been met.</p> <p>11.2 Consider special clauses in attestation in unusual circumstances, e.g., where the will-maker does not speak English, is too weak to sign, or is blind.</p> <p>12. MISCELLANEOUS DRAFTING POINTS</p> <p>12.1 Wills are drafted in the first person.</p> <p>12.2 Consistency in terminology is important for interpretation. Consider use of definitions (e.g., define “discretion”).</p> <p>12.3 Care in use of tense is important. The will-maker in appointing executors and trustees, and in making gifts, is speaking from the date of the will, i.e., the present tense. Instructions to executors and trustees should be in the future tense.</p> <p>13. SOME COMMON TRAPS TO AVOID</p> <p>13.1 Rule in <i>Saunders v. Vautier</i> (1841), 49 E.R. 282 (Ch. Div.). Where there is an absolute vested gift made payable at a future event (usually the beneficiary reaching a stipulated age), with directions to the trustees to retain possession and accumulate the income or pay it to the beneficiary, the beneficiary is entitled to have the property transferred to him or her when he or she reaches the age of majority, unless a gift over is provided.</p> <p>13.2 Rule against perpetuities, as modified by the <i>Perpetuity Act</i>, R.S.B.C. 1996, c. 358. Consider adopting an 80-year vesting period under s. 7.</p> <p>13.3 Do not use “issue” as a synonym for “children” because its <i>prima facie</i> meaning is “descendants of any degree”. This may mean that a provision that the draftsman believed to be valid contravenes the rule against perpetuities; it can also cause administrative and interpretation difficulties.</p> <p>13.4 Avoid (or use carefully) the terms “survive” and “survivors”, and “in equal shares per stirpes”, since they may give rise to problems of construction.</p> <p>13.5 If a class gift is created, clearly identify the time at which membership in the class is to be determined (e.g., the will-maker’s death).</p>	

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<p>13.6 Protect a gift from “lapsing” by identifying alternate beneficiaries to prevent a lapsed gift from unintentionally passing to the intended beneficiary’s descendants. (Note <i>WESA</i>, s. 46, and also consider the effect of survivorship provisions in <i>WESA</i>, ss. 5, 6, 9, and 10.)</p> <p>13.7 Clearly identify the assets of any specific bequests and consider the consequences of ademption if the will-maker sells or otherwise disposes of the asset during his or her lifetime.</p> <p>13.8 Avoid any potential for double payments of cash legacies under mirror image wills that provide for identical cash legacies (typically, complementary spouse wills, each with a survivorship clause).</p> <p>13.9 Ensure that the terms “per stirpes” and “per capita” are used correctly. Consider using other words, or defining the terms.</p> <p>13.10 If the will-maker intends to make an outright gift to a disabled beneficiary, consider whether the beneficiary would be capable of receiving and 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)).</p>	