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WILLS AND ESTATE PLANNING BASICS
PAPER 4.1

Considerations in Drafting Wills

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CONSIDERATIONS IN DRAFTING WILLS

I. Introduction

A properly drawn and executed will is the foundation of any estate plan. As such, care and attention should be given to ensuring it is tailored to the client's circumstances and meets the client's present and future needs. To do this, a lawyer must spend time and effort fully apprising himself of the client's situation and wishes and drafting the will accordingly. The will should also reflect any other planning that has been undertaken. In an increasingly complex and regulated world, preparation of a "simple will," if there is even such a thing, is a rarity. Lawyers need to spend time to do a good job and also educate their clients on the importance of a properly drafted will.

This paper is intended to review some of the basic considerations in preparing a will. Beyond the basics, it also includes a discussion of some specific clauses you should consider including in a will as well as some common drafting errors to be avoided. Many good books and resource materials have been written on will drafting[1] and this paper is not in any way intended to be exhaustive. However, the intention is to equip you with a basic understanding of drafting wills.

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1 For example, you may wish to refer to *Wills Precedents, An Annotated Guide*, Peter. W. Bogardus, QC and Mary B. Hamilton, the Continuing Legal Education Society.

II. Property Disposable by Will

Before drafting a will, it is important that you not only understand what assets the client owns but that you also appreciate the different ways that different assets can be transferred on death. Understanding what assets form part of an estate and hence, are subject to the terms of a deceased's will is essential. Many assets may not form part of the deceased's estate and failing to appreciate that fact may lead to unintended results, adverse tax issues, administrative problems and potentially, claims of negligence against the lawyer who prepared the will.

Throughout this course, there will be more detailed discussion of the different kinds of property and how it may be distributed on death. A one page summary of how different assets may be transferred on death prepared by Jane A.G. Purdie, QC is contained in Appendix A in these course materials. This is a good reference to keep handy when you are first starting out in practice and could also be used with clients when explaining how assets move on death.

Below is a brief discussion of the different kinds of assets that you may come across and how they may be dealt with on death. For a more detailed discussion, see *Financial & Estate Planning for the Mature Client*, Fiona Hunter and Hugh McLellan, LexisNexis Canada, 2000, chapter 2 and the *British Columbia Probate & Estate Administration Practice Manual* (CLEBC).

A. Assets Held in Joint Tenancy versus Assets Held as Tenants in Common

On the death of an owner, assets held in joint tenancy pass by right of survivorship to the surviving owner(s) outside of the deceased owner's will. In contrast, assets held as tenants in common do not pass outside of an owner's will. On the death of an owner in a tenant in common arrangement, the deceased owner's interest forms part of his estate.

With the increasing use of joint tenancy between parents and children, it is also important to keep in mind the implications of *Pecore v. Pecore*[2] and consider whether there is a resulting trust that may be imposed. For example, if a parent transfers title to a property into joint tenancy with a child, you need to consider whether that was a true gift (and whether the gift was documented) or whether it was transferred for mere convenience. In the latter situation, a resulting trust may be imposed on the interest received by the surviving owner with the result that that interest actually forms part of the estate of the first owner to die.

B. Life Insurance

It is possible to designate a beneficiary of a life insurance policy[3] so that the proceeds pass directly to the named beneficiary outside of a client's will. If no beneficiary is named, the proceeds are paid to the personal representative of the deceased. Understanding the details of the policy is essential. For example, whose life is insured, who owns the policy, and the kind of insurance can affect who is entitled to designate beneficiaries and how the proceeds will pass on death of the insured. A "joint and last to die" policy will only be paid out on the death of the survivor whereas a "joint and first to die" policy will pay out on the death of the first of the insured. Where a life insurance policy is owned by a private company and the company is the designated beneficiary, the proceeds will be paid to the company and not to your client who may own the shares of the company. Clients often to not appreciate the differences in ownership and kinds of policies and for this reason, you should confirm the policy details in order to assess how the proceeds will be handled as part of an estate plan.

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2 2007 SCC 17.

3 *Insurance Act*, R.S.B.C. 1996, c. 226, ss. 48 and 49.

C. RRSPs, RRIFs, TFSAs

It is also possible to designate beneficiaries of a registered plan[4] so that the proceeds are paid directly to the named beneficiary and therefore do not form part of the testator's estate. Care should be taken in designating beneficiaries for RRSPs and RRIFs as the beneficiaries will usually receive the gross amount of any plan whereas the deceased's estate will be responsible for the income tax arising from such plans as a consequence of death. Often a mismatch arises where the tax bill does not reside with the recipients of the plan.

D. Registered Education Savings Plans

Most clients do not appreciate that an RESP is not a trust nor is it like an RRSP where a beneficiary can be designated so that is passes outside of their wills. An RESP is the property of the subscriber and if a person is a sole subscriber, the RESP will form part of his estate. Often specific provisions are included in a will to give the executor the ability to effectively deal with the RESP.[5]

E. Employment Pension Plans

There is provincial legislation that governs who can be designated as beneficiary of such plans.[6] It is possible to designate a beneficiary and care should be taken in confirming who is designated. If there is no surviving spouse or beneficiary designated, any benefits payable on death will be paid to the personal representative(s) of the deceased.

F. Other Assets Held in the Client's Sole Name

Assets that are held in a client's sole name and where no beneficiary can be or has been designated, will form part of a deceased's estate and be subject to his or her will. Examples include non-registered investment accounts, real estate, bank accounts, vehicles, personal property, and shares in companies.

G. Assets Held in Trust

If the client has transferred assets into an *inter vivos* trust or is the beneficiary of a trust otherwise created (e.g., by a parent), those assets are not personally owned by the client. As such, those assets will not generally form part of a deceased's estate but will distributed according to the terms of the trust agreement. As such, it is important to review the trust agreement not only to understand what the client's interest in the trust is but also to understand how the trust assets are to be distributed. If necessary, the client's will should be drafted to complement the terms of the trust. For example, in some instances, the trust agreement may provide that the trust assets are to be distributed in accordance with a person's will or the trust agreement may confer a power of appointment on a beneficiary which may be exercised by will.

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4 *Law and Equity Act*, R.S.B.C. 1996, c.253, ss. 49 and 51.

5 For a more detailed discussion about RESPs, see F. Carey, "RESPs and Estate Planning," 2008 Volume 28 E.T.P.J. at 124. See also L. West, "Drafting Issues Arising with RESPs," 10th Annual Estates and Trust Summit, November 5, 2007, The Law Society of Upper Canada.

6 *Pension Benefits Standards Act*, R.S.B.C. 1996, c.352, ss. 34 and 35.

III. Preparing an Outline

Along with the use of questionnaires to gather a client's personal information and take instructions, using a checklist or outline before starting to prepare a will can also be valuable. The Law Society of British Columbia has a good checklist for preparing wills which is available on its website. You may want to develop your own outline to use in your practice. This will help to clarify in your mind the provisions that are required and also help with instructing assistants or paralegals in your office who may be assisting you with the will drafting.

IV. Preparing a Basic Will

There is no such thing as a "simple" or "standard" will. Each circumstance is unique and will present its own challenges. However, there are some provisions that should be included in most, if not all, wills.

A. Identification of Testator

The will should use the full legal name of the testator and should also reference any other names that the testator uses or names in which property of the testator has been registered. Including these variations in the will helps to alert the executor to the fact that it may be necessary to obtain a Grant of Probate or Letters of Administration in all the various names of the testator.

It can also be helpful to include the address of the testator and his domicile not only to clearly identify the testator but also to provide evidence that may be helpful for other purposes (e.g., for tax purposes).

B. Revocation

It is important to include a revocation clause in order to "clear the slate" ensuring that this is the last will of the testator. However, care should be taken if there are multiple wills so as not to revoke any existing will that should be maintained (e.g., a will in a foreign jurisdiction to deal with assets in that jurisdiction).

C. Appointment of Executors and Trustees

This is one of the most important provisions in a will. The will should appoint not only a primary executor but also alternate executors. The circumstances under which an alternate is appointed to act should also be carefully considered. For example, if the will provides that B acts as executor only if A predeceases, if A is incapable but has not died, then B's appointment will not operate. This kind of drafting error often arises and is discussed in more detail later in this paper. As a consequence, you may want to include language such as "if A is unable or unwilling to act or to continue to act, then I appoint B as my executor."

When two or more executors are appointed to act together, if one of them is unable or unwilling to act or to continue to act, consider specifying whether the others may continue to act on their own. Also, if there are three of more executors, you should consider whether to include a majority rule clause.

Often executors will become the trustees of any trusts created pursuant to a will. Consideration should be given to including a defined term that encompasses both (e.g., "Trustee" includes both the executor of the will and trustee of the estate). However, if a separate trustee is to be appointed for a specific trust, this trustee should be separately identified and defined.

If there are ongoing trusts established by the will, you may want to consider including specific provisions that address how the trustees of any trusts may be changed over time. For example, if a discretionary trust is established for a disabled beneficiary, you may want to name replacement trustees and/or specify who has the power to appoint new trustees. You may also want to include

provisions for how a trustee may be removed or may resign. While there are some provisions in our legislation[7] that can be of assistance in the absence of specific provisions, these legislative provisions are often problematic.

D. Appointment of Guardians

If the testator has minor children, the appointment of a guardian should be included in his will. The *Family Relations Act*[8] governs who is a guardian. Generally, if a parent dies, the surviving parent is the guardian of any minor child. It is advisable to consult the provisions of the Act to confirm guardianship as there are some exceptions to this rule. As such, the appointment of a guardian is usually drafted to only take effect if the surviving parent is unable to act. Note as well that the *Family Relations Act* will be replaced entirely by the *Family Law Act*[9] and the new Act contains new provisions regarding appointment of guardians.[10]

As with an executor, the testator should not only include a primary guardian but should also consider whether to appoint alternate guardians in the event that the primary guardians are unable or unwilling to act or to continue to act.

A common request by clients is to appoint a couple to act as guardians of their children. Care should be taken regarding such an appointment in light of the potential for a future marriage breakdown of the guardians. Under our current legislation, if a couple were appointed to act as joint guardians, their appointment would stand even if they were separated or divorced, unless there was express language in the will otherwise. Under the new *Family Law Act*,[11] the appointment of a guardian only takes effect if the guardian accepts the appointment. As such, if there are situations in the future where two guardians are appointed together and it is not practical that they act together, one may be able to decline to act by refusing the appointment.

E. Dispositive Provisions

There is an infinite amount that can be written about the dispositive provisions in a will and the many variations on different kinds of gifts. Below is a short summary of some common issues to consider.

1. Introductory Language

Many will templates have introductory language in the dispositive clauses which include reference to powers of appointment. For example, "I give all of my property of every nature and kind and wheresoever situate, including any property over which I have a general power of appointment to my Trustees upon the following trusts ..." The intent is to vest all of the property which is owned by the testator in the executor. However, with the increasing use of powers of appointment, a lawyer should canvas with their client whether there is a power of appointment in their favour and adjust this language accordingly if the intention is not to exercise the power. Unfortunately, a client may not always be aware of a power of appointment granted to him (e.g. in his parent's will or in an *inter vivos* trust).

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7 *Trustee Act*, R.S.B.C. 1996, c.464, ss. 28-31.

8 R.S.B. 1996, c.128.

9 Which received Royal Assent on November 24, 2011. While not yet in force, it is anticipated to be brought into force sometime in 2013.

10 *Ibid.*, Division 3. Interestingly, this legislation will also allow guardians to be appointed in circumstances other than the death of a parent. A "standby guardian" can be appointed if a guardian faces terminal illness or permanent mental incapacity. However, such appointments would likely occur outside of a will.

11 *Ibid.*, s. 57.

2. Specific Bequests and Legacies

The distribution of personal effects can often be a contentious issue. As such, consideration should be given to including a specific clause in the will to address the distribution of those items. There are many different ways to address the distribution of personal effects including naming specific items to specific individuals, incorporating by reference a separate memorandum (but be careful that this is done properly), giving the executor the ability to decide how to distribute personal property among a class of beneficiaries (and possibly with reference to a non-binding memorandum), or including a procedure as to how beneficiaries may divide property (e.g., drawing lots). Whatever the method that best suits the client's situation, it is important to use language that is as clear and as precise as possible. For example, if you are including a specific bequest, the property should be described with sufficient detail to be easily identified. If there is a class of beneficiaries, be sure the language is not too vague. For example, a direction to divide personal effects among "my family members" is not clear and should be narrowed to make it workable for the executor (e.g. my children and siblings). If a procedure for selection is being included, ensure there is sufficient detail that the executor can easily carry out your wishes. Consider including directions regarding the cost of shipping items to beneficiaries—will these costs be borne by the estate or by the individual beneficiary?

With respect to legacies, care should be taken when preparing wills for spouses to ensure the same gift is not paid twice. As well, with charities, it is important to not only properly identify it using its correct legal name but also to consider including a *cy- pres* clause to avoid a gift to charity lapsing. Gifts to charity are discussed in more detail later in this paper.

With all gifts in a will, a lawyer should consider whether to name alternate beneficiaries in the event that the primary beneficiary predeceases.

3. Trusts

If there is specific property that is intended to be held in trust, it is important to clearly identify the property and set out the terms of the trust. For example, if a home is to be held in trust for a surviving spouse, consider whether the home includes any future replacement property. Who will be responsible for paying the expenses associated with the property? Once the life tenant dies, who will receive the property? With trusts where income is likely to arise, who is entitled to it and how much? Is the trustee allowed to encroach on capital and if so, in favour of whom and to what extent?

4. Residue

Every will should include a clause that addresses the distribution of the residue of an estate. Often the best way to approach the distribution of the residue is by giving shares or percentages of the residue rather than specific amounts or property. In drafting a residue clause, it is essential to consider and provide a distribution scheme in the event that a beneficiary predeceases. One of the most common mistakes is not to fully provide for the distribution of the residue which may give rise to a partial intestacy. This is discussed in more detail later in this paper. Including a "total disaster clause" can often avoid this result. The bottom line is that care should be taken to ensure that all reasonable possibilities have been addressed.

With respect to gifts to children and others who are minors, it is important to consider at what age they are to receive their interest. In BC, if a will is silent, minors are to receive their interest at age 19. Often this does not accord with a client's wishes. For this reason trust provisions are included to address not only the age at which beneficiaries are to receive their interest but also how funds may be used in the interim for their benefit. This is discussed in more detail later in this paper.

F. Administrative Provisions

There are a number of administrative provisions that should be considered depending on the client's circumstances. Think of these as the "toolbox" for the executor and tailor them accordingly. Here are some common powers you may want to include:

(a) make payments to guardians;

(b) sell or retain property;

(c) distribute assets in kind;

(d) invest;

(e) hire professionals;

(f) deal with real estate in a more extensive way;

(g) insure property ;

(i) deal with business interests and carry on business;

(j) make income tax elections;

(k) settle claims;

(l) borrow and lend;

(m) purchase property from the estate.

Some of these are discussed in more detail later in this paper. Under our current laws, the statutory powers of executors and trustees are somewhat antiquated and in many ways, do not reflect modern society and practices. Including additional or more comprehensive powers in a will provides a clear set of rules that govern so that it is not necessary to resort to the legislation.

> *WESA alert:*
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> Section 142 of *WESA* will give personal representatives all the same powers as the testator would have if he was living. Notwithstanding this broad language, until the scope of those words are clearly defined by case law or otherwise, it is likely that many of the administrative clauses will continue to be included.

G. Funeral Wishes

Technically, the executor has authority to dispose of a person's remains. However, the written wishes of the deceased are binding on the executor unless compliance with those wishes would be unreasonable, impractical or would cause hardship.

Including funeral wishes is often overlooked and can often give rise to conflict particularly at a time when emotions may be running high. Encourage your clients to consider their wishes and either include them in the will or in a separate letter of wishes that is kept with the will. If funeral arrangements have already been made by the testator during his lifetime, it is advisable to make note of that to ensure the executor is aware of those arrangements and abides by them rather than making other arrangements. If the wishes of the testator may be unreasonable, consider advising him when drafting the will that his wishes may not be carried out.[12]

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12 *Cremation, Interment and Funeral Services Act*, S.B.C. 2004, c.35, s.6.

It is not advisable to include language in the will regarding organ donation as these instructions are often not found and read before death. If a client wishes to be an organ donor, he should register online.[13]

Encourage your clients to discuss their wishes and any funeral arrangements they may have made with family members in advance.

H. Attestation

A proper attestation clause should be included in every will. While there are standard attestation clauses, if there are special circumstances (e.g., the testator cannot read the will), then this clause should be modified to reflect the situation. This is discussed in more detail below.

V. Additional Clauses to Consider Including in Your Will

In addition to the clauses discussed in the previous section, there are a host of other provisions that you may want to consider including in a will. While not exhaustive, below is a discussion of some clauses that are frequently omitted in wills but which are often critical to the administration of an estate.

A. Survival Clause

Particularly when preparing wills for spouses, it is important to consider the possibility of a common accident. In that regard, inclusion of a survival clause is useful to avoid unintended consequences as well as the possibility of having to obtain a Grant of Probate and pay the accompanying probate fees twice on the same assets. Such a clause essentially requires that in order for a beneficiary to take an interest in the will, he or she must survive the testator by a specified period of time (such as 30 days). Here is an example of such a clause:

> For purposes of this will, a beneficiary is deemed to have survived me only if he or she is living on the thirtieth day following the date of my death.

Consider what would happen in the absence of such a clause. For example, if a husband's will left the residue of his estate to his wife "if she survives me" without any qualification on how long she has to survive him for in order to take, and his wife dies the day after he died, the residue still vests in the wife and the husband's executor is required to distribute the residue of his estate to the wife's executor. There are two main consequences to consider. First, if their wills do not contain the same provisions regarding the distribution of their estates on the death of the survivor of them, the husband's estate may go to unintended beneficiaries under his wife's will (this often arises in second marriages). Second, if the husband's estate is comprised of assets that require a Grant of Probate in order to transfer them (i.e., real estate registered in his own name), not only will the husband's executor have to apply for a Grant and pay probate fees on the assets in the husband's estate in order to transfer them to the wife's executor but also a Grant will be required by the wife's executor in order to transfer the assets to her beneficiaries thus resulting in additional legal fees and possibly the payment of probate fees twice with respect to the same assets.

In each case, whether such a clause should apply to all beneficiaries should be considered. For example, often such a clause is drafted to be applicable only to spouses and children who are more likely to die in a common accident together. Gifts to friends may not need to be subject to the same requirements. As well, although 30 days is the most common length of time chosen, a testator can

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13 Individuals can sign up on the British Columbia Transplant Society's "Organ Donor Registry" at www.transplant.bc.ca.

choose any length of time. When choosing the length of time, a balance must be struck between selecting a reasonable period after which a beneficiary is likely to survive but also not so long that it will delay the administration of the estate.

> *WESA alert:*
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> Under *WESA*, there will be significant changes to the presumption of death and survivorship rules that may necessitate special consideration. See in particular, ss. 5, 6 and 10.

B. Holding Provisions for Minors

Special consideration should be given to minor beneficiaries. There are a few key issues that should be addressed when drafting provisions regarding gifts to minors. First, the age at which a minor beneficiary is to receive his or her interest should be carefully considered. In BC, the earliest age at which a beneficiary can receive his or her interest is 19 years and if the will is silent, 19 is the default rule. While in some circumstances the default rule is sufficient, often it is preferable to specify an older age such as 25 or 30 years. The beneficiary may be more mature and better able to handle an inheritance at an older age. Concerns over division of assets upon the breakdown of a first marriage and the desire not to destroy a beneficiary's motivation to be successful in his or her own right are also reasons an older age might be specified. It is also common to stagger the distribution (i.e., one half at 25, balance at 30).

Second, if an older age than 19 is specified, the will should be drafted to avoid the application of the rule in *Saunders v. Vautier*. This rule provides that if all of the relevant beneficiaries (including contingent beneficiaries) are over the age of majority, are not under a disability and all of them consent, the beneficiaries can require that the trust to be terminated and the trust property distributed before the intended distribution date. Thus, the trust can be prematurely wound up contrary to the testator's intention. The most common drafting technique used to avoid the application of this rule is to specify a contingent class of beneficiaries that either includes minors or is unlikely to be fully ascertained before the intended age for distribution. An example would be to provide that if a beneficiary dies before the age of 25 years (the intended age of distribution), his or her interest is instead to be divided in equal shares *per stirpes* among his or her issue. "Issue" is often a class that has not yet been ascertained (as the beneficiary is typically young and has not yet had issue of his or her own but may do so in the future) and thus, those issue cannot provide the consent required to wind up the trust under the *Saunders v. Vautier* rule. The point is that if a testator wants to specify an older age at which a beneficiary is to receive his or her interest, in order to ensure his wishes are carried out, the rule in *Saunders v. Vautier* must also be addressed at the same time.

Finally, regardless of whether 19 or an older age is specified, it is advisable to expressly give the trustee the power to use and apply the income and possibly capital for the beneficiary's maintenance and benefit before that time. In the absence of an express power in a will, a trustee is confined to the powers conferred by ss. 24 and 25 of the *Trustee Act*. Section 24 permits a trustee to use the income from a trust fund for a minor beneficiary's maintenance and education in the trustee's sole discretion. However, the ability to encroach on capital is more restricted. Section 25 permits a trustee to sell a capital asset and apply the proceeds if the income is insufficient for the beneficiary's maintenance and education but only with a court order. Rather than being confined to the statutory powers and the potential requirement for a court order, it is preferable to expressly provide powers in a will. For greatest flexibility, a testator may want to give the trustee complete discretion as to whether and how to use the income and capital. The advantage of giving the trustee broad discretion is that he may be better able to respond to the needs and requirements of the beneficiary which may have changed or have been unforeseen when the will was executed. Alternatively, if the testator is not comfortable with such discretion, it is possible to draft parameters around how and when the income and capital can be used. If parameters are included, care should be taken to ensure that sufficient language is included to

adequately address all of the intended purposes. Whether the use of income and capital is within the sole discretion of the trustee or is subject to express limitations, including a carefully drafted clause can avoid costly court applications and afford greater flexibility to a trustee to respond to the beneficiary's needs.

Below is an example of a clause that addresses all of the issues discussed above and is applicable to all beneficiaries in the will:

> If any beneficiary becomes entitled to a share of my estate while under the age of 25 years, unless otherwise specifically provided in this Will, I direct my Trustee to hold and invest such share until such beneficiary attains the age of 25 years. While such share is held, my Trustee may pay or apply as much of the income and capital therefrom to or for the benefit of such beneficiary as my Trustee considers appropriate in his absolute discretion. If any income is not so paid or applied, it shall be added to the capital of the said share. Upon the beneficiary attaining the age of 25 years, my Trustee shall pay the balance of such share to such beneficiary, provided however, that if such beneficiary dies before attaining the age of 25 years, my Trustee shall instead divide the balance of his or her share then remaining in equal shares *per stirpes* among his or her issue who survive him or her.

Where the needs and circumstances of individual beneficiaries may differ, separate clauses may be preferable and additional language required. For example, if a beneficiary has special requirements due to a medical condition, a separate clause outlining how his trust funds are to be used may be preferable. As well, if a testator wants to permit his trustee to purchase a home for the beneficiary, including express language to that effect is often advisable.

C. Power to Distribute to Guardians

Sometimes an executor will find himself in a position where he would like to distribute property to a minor or an otherwise incompetent beneficiary. This often arises when distributions of income or capital are made to minors from trust funds as discussed above or where gifts of modest value are made to minors. For example, if a grandmother gave a $5,000 gift to each of her grandchildren and one of them was five years old at the time of her death and this was the only remaining gift to be made before completion of the administration of the estate, it may be more convenient for the executor to distribute that property to a parent on behalf of the child rather than holding those funds in trust until the child attains the age of majority (or perhaps an older age if an older age is specified in the will). If a will does not contain a clause specifically dealing with this situation, the executor is placed in a difficult position. If he distributes property, he will want a release to be signed by the beneficiary at the time of distribution in order to protect against future claims by the beneficiary but such a beneficiary cannot sign a valid release. For this reason, it is advisable to include a clause that would allow your executor the ability to distribute gifts to the guardian or legal representative of an incompetent beneficiary. Below is an example of such a clause:

> My Trustee may make a payment or distribution on behalf of any beneficiary who is under the age of majority or who is otherwise incompetent to such beneficiary's parent, guardian, or other legal representative as my executor considers appropriate in his absolute discretion and the receipt of such parent, guardian, or other legal representative shall be a sufficient discharge to my Trustee.

Note: the new *Family Law Act* includes provisions in Part 8 that will allow trustees to deliver property to a guardian for small amounts (to be set by regulation) and for larger amounts, it will be possible to apply to court to have a trustee appointed. However, regardless of these changes, a clause giving express authority may still be preferable.

D. Total Failure Clause

An important part of a solicitor's role is to explain to the testator the various scenarios that may exist at his or her death and to ensure that the will adequately provide a distribution scheme for those scenarios. While it is essential to include a residue clause that names primary beneficiaries and contingent beneficiaries, it is also advisable to include a "total failure" clause that addresses distribution in the event that all or part of the residue fails to vest in any of the named beneficiaries even if the possibility of a failure is remote. In the absence of such a clause, a partial intestacy may result which may or may not reflect the testator's wishes.

While there may be circumstances where such a clause is not required (i.e., where a charity is named as the residuary beneficiary), in most cases such a clause should be included out of an abundance of caution. The degree of importance of such a clause will depend on the circumstances. For example, such a clause is less likely to be operative where a testator has many children and grandchildren than if the testator has a young family. Below is an example of an introduction to a total failure clause:

> In the event that any part of my estate should fail to vest in any person because none of my spouse and my issue survive me or for any other reason, on the date that it becomes certain that a particular part will not vest, my Trustee shall divide that part of my estate as follows ...

Such a clause should address not only the situation where a beneficiary fails to survive the testator but also where the beneficiary survives the testator but his or her interest fails to vest (i.e., where a trustee is directed to hold property until a beneficiary attains a specified age and the beneficiary survives the testator but dies before the specified age).

As a practical matter, when drafting mirror wills for spouses, in most cases a total failure clause should be the same in each will in order to avoid a situation in which one spouse's family (assuming that family members are named as beneficiaries) may be inadvertently disinherited. For example, if a couple and their young children are in a car accident in which the husband and children die but the wife survives but dies two months later, the wife will presumably inherit her husband's estate and her estate will ultimately pass to the beneficiaries named in her will. If her will provides that those beneficiaries are only members of her family, the husband's family will receive nothing. One common way of addressing this situation is either to agree on the same group of named beneficiaries who will benefit or to direct that the failed part be divided into two portions with one portion being distributed in accordance with the husband's wishes and the other being distributed in accordance with the wife's wishes. Here are some examples:

> In the event that any part of my estate should fail to vest in any person because none of my spouse and my issue survives me or for any other reason, on the date (the "Failure Date") that it becomes certain that a particular part will not vest, my Trustee shall divide that part of my estate in equal shares per capita among X, Y and Z who are living on the Failure Date.
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> Or
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> In the event that any part of my estate should fail to vest in any person because none of my spouse and my issue survives me or for any other reason, on the date (the "Failure Date") that it becomes certain that a particular part will not vest, my Trustee shall divide that part of my estate into two equal portions and distribute such portions as follows:
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> (i) one portion shall be divided in equal shares among my siblings, V and W, who are living on the Failure Date, provided that if V or W is not then living but has left children of his or hers who are then living, then the share that such deceased sibling would have received if he or she had then been living shall instead be divided in equal shares per capita among his or her children who are living on the Failure Date; and

> (ii) one portion shall be divided in equal shares among my husband's siblings, X, Y and Z, who are living on the Failure Date, provided that if X, Y or Z is not then living but has left children of his or hers who are then living, then the share that such deceased sibling would have received if he or she had then been living shall instead be divided in equal shares per capita among his or her children who are living on the Failure Date.

These are just a few examples. Every case will depend on the circumstances and wishes of the testator. The point is that a catch all clause is advisable even if it is unlikely to ever be operative and in the case of spouses, such a clause should ideally reflect both of their wishes.

E. Power to Keep or Convert

Unless the will specifically provides otherwise, an executor has a duty to sell all wasting, hazardous or speculative assets as soon as practicable and invest the proceeds in investments authorized for trustees. However, there may be circumstances where it would be desirable to retain such assets. For example, an executor may want to retain and hold in trust a personal item, like a piano or a vehicle, for a minor child until he or she reaches the age of majority. For this reason, giving the executor the power to keep an asset in its original form or to convert it is a standard clause in most wills. Giving the executor flexibility regarding whether to retain or sell assets and in the case of the latter, at what price and on what conditions can enable him to carry out his duties effectively and may minimize his exposure to criticism from beneficiaries (who may, for example, have competing interests). Here is an example of such a clause:

> My Trustee shall gather in the assets of my estate and may sell the assets at such times, for such price and upon such terms as my Trustee considers appropriate in his absolute discretion. I expressly authorize my Trustee to retain any assets that I own at my death, without liability for loss or depreciation, for as long as my Trustee considers appropriate in his absolute discretion, notwithstanding that it may not be an investment which by law a trustee may invest in.

F. Power to Allocate Assets in Specie

Given that it can often be difficult to predict what assets will ultimately form part of a person's estate, including such a power gives the executor some flexibility when determining how to distribute the estate. It gives the executor a choice as to whether to retain specific assets and distribute them in kind or whether to liquidate the assets and distribute cash. For example, if one of the residuary beneficiaries wants the testator's vehicle, such a power would enable the executor to distribute the vehicle to the beneficiary as part of his residuary interest. However, language should also be included which gives the executor the authority to determine the value of the property distributed in kind in order to avoid criticism or disagreement. Here is an example of a typical clause:

> My Trustee may allocate the assets of my estate in kind to any share or interest created in this Will in such manner and at such valuations as my Trustee considers appropriate in his absolute discretion. Any value my Trustee may fix shall be binding on all persons concerned.

G. Power to Carry on Business

Although not all testators own a business, for those that do, they should consider including a specific clause in their wills that would allow their executors to carry on their businesses after their deaths. In the absence of an express power, the general rule is that an executor has no authority to carry on the business of the testator. An executor only has a very limited power to carry on business as long as it is reasonably necessary to sell the business as a going concern. This is in keeping with the general duty

to convert as mentioned above. There is no statutory authority to carry on the testator's business as both the *Estate Administration Act* and the *Trustee Act* are silent regarding such a power. For this reason, if there is a possibility that the testator may own a business on death and there may be circumstances where it would be beneficial to enable the executor to carry on the business, such a clause should be included. Here is an example:

> My Trustee may carry on any business, whether or not incorporated, which I may have an interest in on my death for such length of time as my Trustee considers appropriate in his absolute discretion. My Trustee may do all things necessary or advisable for the carrying on, incorporation, reorganization, amalgamation, winding up or sale of such business or my interest in the same to the same extent as I could if I were alive. My Trustee shall not be liable for any loss to my estate as a result of exercising these powers.

Although an executor with such a power may still simply decide to sell the business as soon as possible, including such a clause gives the executor the flexibility to respond to the circumstances that exist at the time of the testator's death. Of course, the scope of the power conferred should be discussed with the testator to ensure that it reflects his wishes and gives his executor sufficient power to effectively carry on the business. Depending on the nature of the business, it may be appropriate to add additional language.

H. Power to Deal with Real Estate

Real estate is a common asset of most estates and special consideration should be given to it. Generally, unless a will provides otherwise, an executor has a duty to maintain an even hand between income and capital beneficiaries and as mentioned above, to convert estate assets into assets that are authorized trustee investments. As real estate can be speculative and tends to favour capital beneficiaries over income beneficiaries, in the majority of cases real estate is sold as soon after the testator's death as is reasonable and practicable. However, there may be circumstances where it would be beneficial for the executor to delay selling the property or to make improvements to the property. For example, if the real estate market is soft at the time of the testator's death, it may be advisable to retain the property and lease it in the interim until the market strengthens. Alternatively, the property may be dilapidated and expending funds to repair it may substantially increase the value for which it could be sold. As it is difficult to predict the circumstances that may exist at death, including a clause that gives the executor flexibility can be very useful. Here is an example of such a clause:

> If any real or leasehold property forms part of my estate, my Trustee may lease or rent such property on such terms and may expend funds out of the income or capital of my estate on repairs or improvements as my Trustee considers appropriate in his absolute discretion. My Trustee may grant any options and may renew any mortgage or borrow money on any real estate upon any mortgage and may pay off any mortgage that exists on the date of my death as he considers appropriate in his absolute discretion.

Keep in mind that the scope of the power conferred should be reviewed in each case with the testator particularly if the scope of the power is broad.

In the absence of such a clause, if an executor wishes to spend estate funds on improvements and no provision is made in the will, he may need to resort to s. 11 of the *Trustee Act* which requires court approval to expend such funds and only if necessary or expedient in the interests of the relevant parties. Although it may be possible to avoid s. 11 if consent of all of the relevant beneficiaries is obtained, sometimes such consent is not possible as there may be disagreement among beneficiaries or not all of the beneficiaries are *sui juris* (i.e., there may be minor beneficiaries involved).

I. Remuneration

In the absence of any provision in a will, s. 88 of the *Trustee Act* provides a default scheme regarding the remuneration available to an executor/trustee. For many reasons, it may be preferable to expressly provide in a will the terms upon which remuneration will be paid. One of the obvious disadvantages of relying on s. 88 is that the trustee may have to make an application to court for approval unless all beneficiaries are *sui juris* and consent. A court application would be necessary, for example, if there was a minor residuary beneficiary as such a beneficiary could not approve compensation himself and the Public Guardian and Trustee has no statutory authority to grant such approval on his behalf either.

As well, there are limits on the amount of remuneration that can be taken under s. 88. In the majority of cases, the statutory limits are fair and appropriate. However, there may be circumstances where it would be preferable to depart from those limits. For example, if an estate is likely to be complex but is relatively modest in value, a testator may want to authorize remuneration beyond the statutory limits particularly if there is some concern about whether the appointed executor will agree to act. However, as any provisions in a will regarding remuneration will override s. 88, care must be taken to ensure that the provisions are fair and do not become irrelevant or obsolete over time.

When considering how to draft a remuneration clause, several issues should be considered. First, the testator should consider how much remuneration his executor or trustee will be entitled to and how that remuneration will be approved. Here is an example of a remuneration clause:

> My Trustee is entitled to reasonable remuneration for acting as trustee of my estate. If a majority of the adult residuary beneficiaries under this Will approve the amount of remuneration proposed by my Trustee, then the approval of such remuneration shall be binding upon all beneficiaries of my estate. In the absence of such approval, the amount of remuneration to which my Trustee is entitled shall be determined by the court.

Although the use of the word "reasonable" is non-specific, it allows the remuneration to more fairly reflect the work that was actually undertaken by the executor/trustee. The circumstances that exist at death and the amount of work involved in the administration of an estate can be difficult to predict. What is reasonable for a simple estate will be different than what is reasonable for a complex estate and having the ability to adjust the remuneration accordingly is advisable. This clause also provides a mechanism for approval without resort to the courts, which is particularly useful when minor residuary beneficiaries are involved.

When dealing with the appointment of a trust company as an executor/trustee, express provisions regarding compensation should be included. However, rather than specifying the terms of compensation in the will, most trust companies will want to be compensated in accordance with a compensation agreement signed by the testator. Typically, these agreements are signed prior to the execution of a will and are incorporated by reference into the will. Below is an example of a clause where the agreement is incorporated by reference:

> If ACB Trust Company is appointed as my Trustee, it is entitled to be paid from my estate such remuneration and other amounts for acting as my Trustee as are outlined in the compensation agreement dated * and signed by me prior to the execution of this Will.

Keep in mind that as a general rule, when dealing with the appointment of a trust company it is advisable to confirm in advance with it whether that the terms of the will are acceptable in order to avoid a situation where the company declines to act due to deficiencies in the will.

A second issue to consider when drafting a remuneration clause is whether the executor/trustee will be permitted to pre-take remuneration prior to the completion of the administration of the estate or trust. In the absence of any provision in a will, pretaking is prohibited without the consent of all beneficiaries (which may not be possible) or court approval. For situations where the administration of an estate may take several years or there are ongoing trusts, the ability to take interim remuneration may be desirable. Here is an example of additional language that may be included in a compensation clause to address this issue:

> My Trustee may, from time to time, pay to himself or herself as remuneration for acting as trustee such reasonable amounts from income and capital as my Trustee considers appropriate in his absolute discretion, notwithstanding that the approval of the court or the beneficiaries entitled to approve my Trustee's accounts has not been obtained before such compensation is taken. However, the amount of remuneration taken in advance of a final accounting is subject to the subsequent approval of the court or the beneficiaries entitled to approve accounts and if the amount subsequently approved is less than the amount already taken, my Trustee shall repay the difference to my estate without interest.

A third issue to consider is if the executor/trustee is also a beneficiary under the will, whether the executor/trustee is entitled to receive remuneration in addition to any other benefits specified under the will. The general rule is that unless a will states otherwise, there is a presumption that a legacy to an executor/trustee is intended to be in lieu of compensation to which the executor/trustee would otherwise be entitled. Interestingly this presumption does not arise with gifts of residue. Notwithstanding the distinction made between legacies and gifts of residue, such a clause is advisable in most cases (provided the testator wishes the executor/trustee to take remuneration on top of any benefits received as a beneficiary). Below is an example of language that can be included to address this situation:

> My Trustee may claim remuneration for acting as trustee in addition to any benefits that he or she may be entitled to receive as a beneficiary of my Will or any Codicil thereto.

Finally, if the appointed executor/trustee is also a professional, such as a lawyer or an accountant, the testator may want to consider whether the executor/trustee is entitled to charge his professional fees for professional services rendered in the course of acting as executor/trustee. This is referred to as a "charging clause." If there is no such clause, an executor/trustee is not entitled to charge his professional fees for such services; rather, he is only entitled to be compensated at the level of an executor/trustee. Normally, charging clauses are drafted to permit an executor/trustee to charge professional fees for only professional services rendered rather than for all activities as executor/trustee. However, there may be circumstances where a testator would want his executor/trustee to be remunerated at professional rates for all services rendered. Below is an example of a charging clause that limits the executor/trustee to only charging professional fees for professional services rendered:

> If my Trustee is a lawyer, accountant or other professional person, my Trustee or his firm may charge all usual professional fees and other charges for services rendered by my Trustee or his firm in the course of the administration of my estate.

As a practical point, a solicitor should be mindful of the fact that if a will includes a clause outlining the remuneration to which an executor/trustee is entitled and the executor/trustee or his spouse is an attesting witness to the will, the provisions are void so far as the executor/trustee's ability to claim remuneration (see s. 11 of the *Wills Act*). However, in those circumstances an executor/trustee would still be entitled to seek remuneration pursuant to s. 88 of the *Trustee Act*.

WESA alert: Gifts to attesting witnesses or their spouses may be saved under s. 43 of *WESA* but will require a court application.

VI. Common Drafting Errors

There are a number of drafting errors that often arise and give rise to problems and unintended results. Below is a discussion of some of the most common errors that occur.

A. Tainted Spousal Trust

Pursuant to the *Income Tax Act* (the "*ITA*"), a deemed disposition of all the capital property of a deceased taxpayer occurs immediately before the time of death,[14] with the result that any capital gains and recapture on that property is taxed in the tax payer's hands in the year of his or her death. However, the *ITA* allows qualifying testamentary spousal trusts to take advantage of a "rollover" that defers the tax consequences that would otherwise be triggered at death.[15] Under the rollover, the trust property is not taxed until the surviving spouse dies or the trust disposes of the trust property.[16]

To qualify as a testamentary spousal trust for the purposes of the *ITA*, the trust must, among other things:

(a) be created by a will;

(b) entitle the spouse to all the income of the trust during his or her lifetime; and

(c) not permit any person other than the spouse to receive or otherwise obtain the use of any income or capital from the trust.[17]

Careless drafting of the terms of the spousal trust in a will can result in the trust being "tainted" such that it is no longer a qualifying testamentary spousal trust. The trust property will then be deemed to have been disposed of upon the testator's death. If this results in a significant tax liability, it can be a hardship for the testator's family.

1. Drafting Errors that Will Taint a Spousal Trust

a. Trustee Requirement or Discretion to Withhold Trust Income

In order for a spousal trust to qualify for the tax rollover, the spouse must be entitled to all the trust income during his or her lifetime. A provision in the will that directs or permits the trustee to withhold income from the spouse will therefore "taint" the trust.[18] The same result arises if the will provides that the trust must pay the spouse an annual income fixed as a percentage of the value of the trust property during the year. It is possible that the trust income in a given year may exceed the stated percentage, in which case the trust would require the trustee to withhold the balance of the income from the spouse.[19]

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14 *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp), s. 70(5).

15 For more information on testamentary spousal trusts, see CRA's Income Tax Interpretation Bulletin No. IT-305R4.

16 *Income Tax Act*, s. 70(6).

17 *Income Tax Act*, s. 70(6). Note that there are many other requirements, such as Canadian residency of the testator. A discussion of all the requirements of a qualifying testamentary spousal trust is beyond the scope of this paper. For a detailed explanation of spousal trusts, see Larry Frostiak, John Pyser & Grace Chow, *Taxation of Trusts and Estates: A Practitioner's Guide* (Toronto: Thomson Reuters, 2009) chapter 2 [Frostiak].

18 Frostiak, *supra*, n. 17 at 63.

19 *Ibid*.

b. Direction to Pay Debts, Obligations or Expenses Out of the Trust

The payment of debts and other expenses out of the trust offends the rule that only the spouse can receive or obtain the trust income and capital. Therefore, a direction in the will to pay various debts, obligations, death duties or expenses out of the trust generally taints the trust. Fortunately, there are several exceptions. Section 108(4) of the *ITA* states that no person is deemed to have received or obtained the trust income or capital when the trust pays income tax on the trust income or estate, legacy, succession or inheritance duties owing upon the taxpayer's death. The *ITA* makes a further exception is for payments that fall within the definition of a "testamentary debt."[20] Examples of testamentary debts are debts of the testator that were outstanding immediately before his or her death and funeral expenses. Finally, payments made from the spousal trust for the benefit of the spouse or to pay a debt or obligation incurred for the benefit of the spouse will generally not disqualify the trust.[21] See s. 19 of Income Tax Interpretation Bulletin No. IT-305R4 for a list of payments that will or will not taint the spousal trust.

c. Allowing a Person Other than the Spouse to Access the Trust Property

The spousal trust will be tainted if the language of the will allows for the possibility that any other person might receive the use of income or capital of the trust during the spouse's lifetime, whether or not that actually occurs. One example is a provision that vests the trust capital in other beneficiaries immediately upon the spouse's remarriage.[22] A provision that permits the trust funds to be loaned to third parties will also taint the trust if the terms allow the trust to receive inadequate consideration (that is, consideration more favourable to the borrower than that which is commercially available).[23]

2. Curing a Tainted Spousal Trust

There are few opportunities to cure a tainted spousal trust after the testator's death. CRA's position is that a spousal trust that has been varied by the courts cannot qualify as a testamentary spousal trust for the purposes of the *ITA* because the trust was not created by a will or as a consequence of death.[24]

The court may amend the terms of a testamentary spousal trust by exercising its power to rectify mistakes in a will. As discussed below in section VII., the court may sever terms from a will when the testator did not know of and approve those terms. The Ontario Superior Court of Justice untainted a will in this fashion in *Balaz v. Balaz*.[25] The testatrix instructed her solicitor to draft a testamentary spousal trust. As worded, the trust could confer a benefit on someone other than the testatrix's spouse and was therefore tainted. The Court held that the testatrix had no knowledge and approval of the offending wording and ordered that it be severed so that the will would conform to her wishes.

The court may also create or amend a spousal trust pursuant to its jurisdiction under the *Wills Variation Act*, which is dependants' relief legislation. The *Wills Variation Act* allows the BC courts to vary the terms of a will when it does not make adequate provision for the proper maintenance and

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20 *Income Tax Act*, s. 70(7). See s. 70(8)(c) for the definition of testamentary debt.

21 Frostiak, *supra*, n. 17 at 73.

22 *Ibid.* at 99. See also s. 19(d) of Bulletin No. IT-305R4.

23 *Ibid.* at 73. See also s. 16 of Bulletin No. IT-305R4.

24 *Ibid.* at 84. See also s. 12 of Bulletin No. IT-305R4.

25 2009 CanLII 17973.

support of the testator's spouse or children.[26] A trust so created or amended is still considered a trust established by a will for the purposes of the *ITA*.[27]

B. Undefined Terms

When drafting a will, it is important to remember that the testator will not be alive to answer questions when the executor probates the will and attempts to administer the estate. The terms of the will must be as clear and comprehensive as possible in order to reflect the testator's intentions. It is generally helpful to define terms, particularly terms that are vague or capable of more than one interpretation. When the meaning of a term in a will is uncertain, the executor may be required to apply to the court for directions.

There is a distinction between the interpretation and construction of a will. Interpretation refers to ascertaining the testator's actual intentions from the language of the will and the surrounding circumstances.[28] When interpretation is not possible, the court will construe the will to determine the testator's presumed intention with the aid of various legal rules and assumptions, such as the presumption against intestacy.[29]

The BC Court of Appeal recently confirmed the rules for interpretation in *Smith v. Smith Estate*.[30] When interpreting a will, the court must look first to the language of the will. If the court cannot ascertain the testator's intentions from the will itself, the court will consider the will in light of the testator's surrounding circumstances. This is known as the "armchair rule." Indirect evidence of the testator's circumstances, such a family relationships, is admissible whereas direct evidence, such as the testator's instructions to the solicitor who drafted the will, is not.[31]

Perrin v. Morgan[32] is a classic English case involving the interpretation of vague wording which has been considered many times in various court decisions. In this case, the testatrix drafted her own will, in which she left "all moneys of which I die possessed" to her nieces and nephews. Her estate included cash, accrued dividends and rent, an income tax refund and various goods. The main asset of the estate was a large investment portfolio. The issue before the court was the proper interpretation of "moneys." The traditional definition of money includes cash and cash receivables, but excludes investments. The lower court applied this meaning to the testatrix's will, with the result that the bulk of the estate passed on intestacy.

On appeal, the House of Lords found that the word "money" may have several meanings, each of which in appropriate circumstances may be regarded as natural. The court declined to prefer the legal meaning to the term "money" over the popular meaning. Therefore, it was not necessary to construe "moneys" to exclude the investments. To do otherwise would probably defeat the testatrix's intention as it was unlikely that she wished to provide for her whole family with some small sums and let the large investments pass on intestacy.

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26 *Wills Variation Act*, R.S.B.C. 1996, c. 490, s. 2.

27 Frostiak, *supra*, n. 17 at 80. See also s. 12 of Bulletin No. IT-205R4.

28 Edward F. Macaulay, "Interpretation of Wills" in *Estate Litigation Basics – 2010 Update* (Vancouver: Continuing Legal Education Society of British Columbia, 2010) at 4.1.2.

29 *Ibid*.

30 2010 BCCA 106.

31 *Re Eberwein Estate*, 2012 BCSC 250.

32 [1943] AC 399, 1 All ER 187 (HL).

In a recent case, the Saskatchewan Court of Queen's Bench considered a testator's intentions in interpreting the term "rent free`." A clause in the testator's will gave his wife a life estate in a condominium in Saskatoon for her use, rent free, during her lifetime or until she remarried. Under the lease agreement, a small monthly occupancy fee was due to preserve the right to use the condominium.

The issue before the court was whether the wife or the estate was responsible for paying the occupancy fee. The wife took the position that by directing that she be permitted to use the condominium "rent free," the testator intended for the estate to pay the occupancy fee. The executrix argued that the wife was entitled to live in the condominium without paying the estate for the privilege, but that the estate should not pay the occupancy fee owed pursuant to the lease agreement. That was an obligation that should be borne by the wife.

The Court considered the *Black's Law Dictionary* definition of rent and determined that the occupancy fee should be considered rent. Regarding the testator's intentions, the court applied the armchair approach by examining the testator's circumstances at the time he drafted the will. The Court concluded that the testator intended to care for his wife financially. The wife had meagre finances when they married and the testator had paid the occupancy fee and other expenses without seeking her assistance while he was alive. The testator's bank book also contained entries that displayed his habit of referring to the occupancy fee by various names, including "condo rent." The Court therefore held that the testator, by using the phrase "rent free," intended for the estate to pay the occupancy fee.

As these cases demonstrate, seeking the court's assistance in interpreting a will can be a complicated and time-consuming matter requiring evidence of the testator's circumstances. It can also be a financial drain on the estate, especially when beneficiaries hotly contest the proper definition of a term.

WESA clarifies the issue of what evidence is admissible on an application for the court's construction of a will by expressly allowing extrinsic evidence in certain circumstances:

> 4(2) Extrinsic evidence of testamentary intent, including a statement made by the will-maker, is not admissible to assist in the construction of a testamentary instrument unless
>
> (a) a provision of the will is meaningless,
>
> (b) a provision of the testamentary instrument is ambiguous
>
> (i) on its face, or
>
> (ii) in light of evidence, other than evidence of the will-maker's intention, demonstrating that the language used in the testamentary instrument is ambiguous having regard to surrounding circumstances, or
>
> (c) extrinsic evidence is expressly permitted by this Act.

C. Misuse of Common Terminology

Estate law is full of terms that might be misused when drafting a will. Such an error may affect the distribution of property made pursuant to the will or introduce ambiguity that requires the court's clarification. Some commonly misused terms are "issue," "per stirpes" and "per capita."

1. Per Capita

"*Per capita*" means "by the heads" and refers to a distribution among all individuals in a class of beneficiaries. If a will gifts property "to my issue per capita," the class of beneficiaries is the testator's issue (i.e., lineal descendants) and the property will be distributed equally among all the testator's living issue. For instance, the property of a testator who is survived by three children, each of whom

has a child, will be divided into six equal shares. If the testator left six children, fifteen grandchildren and two great-grandchildren, each will receive 1/23 of the property. A per capita distribution is often less appropriate when the testator has many descendants or a small estate or where one branch of the family includes many more descendants than another.

2. Issue

The only definition of "issue" in any of the BC succession statutes appears in the *Estate Administration Act*. For the purposes of the intestacy provisions, the Act defines "issue" to include all lineal descendants of the ancestor.[33] At common law, "issue" is a technical term that refers to all lineal descendants of the remotest degree, unless the context clearly indicates that the testator means "children."[34]

3. Per Stirpes

"*Per stirpes*" is Latin for "by the roots." The distribution is slightly complicated since it involves more than simply counting heads and dividing the estate accordingly. The following is a useful explanation of "per stirpes":

> When used in the context of a gift to issue, it indicates that the gift will be divided among a certain number of 'stirpes' on the date that the gift vests, and will be distributed within each stirpe according to generation. Children never take concurrently with their parents in a stirpital distribution. Instead, all generations of descendants represents their ancestors and take the share to which those ancestors would have been entitled had they survived until the distribution date.[35]

In the above example, a testator who is survived by three children, each of whom has a child, a gift of property "to my issue in equal shares per stirpes" will be distributed among the children with each receiving one-third of the property. If one of those children predeceases the testator, the property is still divided into thirds, but the deceased child's share passes to his or her child (the testator's grandchild). Had the deceased child been survived by two children, the grandchildren would split the deceased child's share, with each one receiving a one-sixth portion of it.

4. Misuse of Terminology

Misuse of a technical term may thwart the testator's intentions. For instance, drafting a *per capita* distribution when the testator wanted a *per stirpes* distribution might change the number of beneficiaries who inherit the gift, as well as the share that each beneficiary receives.

Since "issue" refers to descendants of all degrees, it cannot be substituted for a term such as "children" without affecting the distribution. For instance, a common drafting error in wills is a gift "to my children *per stirpes*." While the testator's intention is a stirpital distribution, with the children forming the "roots" of the distribution, the clause as drafted cannot have that effect. The term "children" does not contemplate any further descendants. Therefore, the gift will begin and end with the children. If a child predeceases the testator, the gift to that child will fail.

Another misuse of "issue" is a gift of property "to the issue of my children." The testator's intention is clearly a testamentary gift to the descendants of each of his or her children. Unfortunately, "issue of my children" refers to issue that the testator's children create together. Since it is highly unlikely that such beneficiaries exist, the gift will fail.

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33 *Estate Administration Act*, R.S.B.C. 1996, c. 122, s. 81 [*EAA*].

34 *Re Acreman Estate*, 2001 BCSC 678.

35 *Fraser Estate, Re* (1986), 23 E.T.R. 57 at 66 (O.N.H.C.).

WESA does not define any of the above terms. However, s. 42(4) specifies the that use of the term "issue" in a will may result in the same distribution scheme applied in an intestacy:

> A gift of property to a class of persons that
>
> (a) is described as a will-maker's "issue" or "descendants" or by a similar word, and
>
> (b) encompasses more than one generation of beneficiaries,
>
> must be distributed as if it were part of an intestate estate to be distributed to descendants.

D. Gift of Property that Does Not Belong to the Testator

A testator cannot give property that he or she does not own at the time of death. This problem typically arises when the will gives property owned by a company of which the testator is a shareholder or property that the testator sold after drafting the will and prior to death. Under those circumstances, the gift would fail and the disappointed beneficiary would not be entitled to compensation from the estate in satisfaction of the failed gift. However, the disappointed beneficiary might have a professional negligence claim against the solicitor who drafted the will.

1. Gift of Property Held by a Corporation

Solicitors must take care to establish exactly who has title to all the property that the will purports to pass. This is particularly important when a testator uses a corporation to hold property. The shareholder of a corporation does not own the corporation's property; he or she owns the shares of the corporation that owns the property. This remains true even if the shareholder owns all of the shares of a company. Therefore, a testator may give his or her shares in the corporation or (if he or she is in a controlling position) direct that his or her executors use their reasonable efforts to cause the corporation to transfer property to a beneficiary, but the testator cannot gift the corporate property directly.

An example of this problem arose in *Re Meier (Estate of)*.[36] Gary Meier was the sole shareholder and director of Meier Auctions Ltd. In his will, Gary devised farmlands to his brother, Bob Meier. At the time of Gary's death, Meier Auctions Ltd. was the owner of the farmlands. Bob brought an action in which he claimed that he was entitled to the farmlands under the will.

One of Bob's arguments was that Gary Meier, as sole shareholder, was the beneficial owner of the corporate assets, and that the farmlands therefore formed part of Gary's estate and could be devised by the will. The court rejected this argument, finding that it is a well-established principle of law that corporate assets belong to the corporation and not the shareholder, even a sole shareholder. The Court noted that Gary's intention to give the farmlands to his brother was clear; nevertheless, the Court held that Gary could not devise property that he did not own. The gift failed and the farmlands fell into the residue of the estate.

Bob brought a subsequent action against the solicitor who drafted Gary Meier's will.[37] The issue before the court was whether the solicitor was negligent in failing to ask Gary who owned the farmlands or in failing to conduct a land title search to ascertain or confirm ownership. The evidence was that Gary demanded a hurried preparation of the will prior to leaving for a vacation and the solicitor accommodated him by preparing the will in one day. The solicitor had worked for Gary many times in the past. He knew that Gary used a corporate vehicle to hold some of his lands and that Gary tended not to distinguish between his personal and corporate ownership of land.

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36 2004 ABQB 352.

37 *Meier v Rose*, 2012 ABQB 82.

It is an established principle of law that a solicitor who drafts a will may owe a duty of care to the beneficiaries named in the will.[38] In this case, the Court had no trouble finding that the solicitor owed a duty of care to Bob. Based on expert evidence, the Court concluded that a reasonably competent solicitor in those circumstances would have asked who owned the lands or performed a search to ascertain ownership. The time constraint did not affect the standard of care. Following this decision, solicitors would be wise to make land title searches a routine part of their preparations prior to drafting wills.

2. Gift of Property that the Testator Sold Prior to Death

Failure of a gift may also occur if the will gives property that the testator has sold or otherwise disposed of prior to death, with the result that the subject matter of the gift does not form part of the estate or conform to the description under the will. Under the common law rule, the beneficiary has no claim to any equivalent benefit under the will. The proper term for a gift that fails under these circumstances is an ademption.[39]

Section 19 of the *Wills Act* mitigates somewhat the effect of the common law rule. It states that:

> A conveyance of or other act relating to property comprised in a devise or bequest or other disposition, made or done after the making of a will, does not prevent operation of the will with respect to any estate or interest in the property that the testator had power to dispose of by will at the time of the testator's death.

Section 19 thus saves a testamentary gift from ademption when a testator retains some estate or interest in the property at the time of death. The will then passes that remaining estate or interest, such as a lesser interest. For instance, if the testator gifts a house, which after the making of the will he subsequently sells and leases from the new owner, the beneficiary will inherit the lease.

While in some circumstances s. 19 may save a gift from failure, careful drafting will ensure that a beneficiary need not rely on s. 19 to avoid ademption. If there is reason to suspect that the testator might sell or otherwise dispose of the property in the future, the language of the will could cover this eventuality. The will may do so generally by giving the property "or any interest [the testator] may have in that property." Alternatively, a clause may specify that the beneficiary is to receive the property or, if sold, an amount equal to the proceeds from the sale of the property or perhaps even any substituted property subject to any tracing concerns.

> *WESA alert:*
>
> Section 51(1)(a) of *WESA* reiterates that a gift of property that the will-maker does not own is void.
>
> Section 48 overrides the law of ademption in some circumstances when certain parties dispose of the will-maker's property prior to the will-maker's death. Section 48(2) provides that
>
> > If property that is the subject of a gift in a will is disposed of by a nominee, the beneficiary of the gift is entitled to receive from the will-maker's estate an amount equivalent to the proceeds of the gift as if the will had contained a specific gift to the beneficiary of that amount.
>
> A nominee includes a committee, an attorney under an enduring power of attorney or a representative under a representation agreement (section I.). However, the provision does not

38 *White v. Jones,* [1995] 1 All E.R. 691 (HL). See also *Hickson v. Wilhelm*, 2000 SKCA 1, leave to appeal denied 2000 SKCA 1.

39 *Church v. Hill*, [1923] S.C.R. 642.

apply if the disposition is made to carry out instructions given by the will-maker at a time when the will-maker was legally capable of giving instructions or if a contrary intention appears in the will. This provision contemplates that a testator may lose capacity before death and that his or her personal representative may dispose of the testator's property on his or her behalf. Under these circumstances, the beneficiary will be entitled to an amount equivalent to the proceeds of the gift.

E. Improper Appointment of an Alternate Executor

A will might fail to appoint an alternate executor to act in the event that the first executor dies. Another common occurrence is a will that appoints an alternate executor if the first executor dies, but fails to specify that the alternate also assumes the executorship if the first executor is unable or unwilling to act or to continue to act. If the first executor dies before completing the administration of the estate and the will does not appoint an alternate, the executorship will pass to the executor of the first executor's will by virtue of s. 64 of the *Estate Administration Act*.

The court's assistance may be necessary to rectify the above scenarios. In the event that the first executor is alive but unwilling or unable to act, it is necessary for the surviving spouse or next of kin (or both) to apply for letters of administration with the will annexed.[40] If the estate includes real estate, "the heirs at law and devisees of the real estate, if not the next of kin, are equally entitled to the grant with the next of kin."[41]

To avoid these complications, the clause appointing executors should attempt to address at least some of these eventualities. An example is to appoint an alternate to act if the first executor is "unable or unwilling to act or to continue to act for any reason." If the will establishes ongoing trusts, it is wise to appoint further successive executors or give to some person or persons the power to do so, to ensure that the administration of the property always passes in accordance with the testator's wishes.

F. Misnamed Charities

Testators often include charities as beneficiaries under their wills. Unfortunately, charities are sometimes improperly identified such as when:

- the testator provides a vague name that could apply to several charities;
- the charity named no longer exists or never existed; or
- the name of the charity has changed.[42]

When the identity of a beneficiary is unclear, the executor may be required to apply to court for directions. Sitting as a court of construction, the court will examine the language of the will and the testator's surrounding circumstances to determine whether it is possible to identify the charity that the testator intended to benefit. If it is impossible to determine the proper beneficiary, or the beneficiary no longer exists, the court must determine whether the gift may be saved through a *cy-près* distribution.

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40 *EAA*, *supra*, n. 33 at s. 6.

41 *Ibid.*

42 Margaret M. Mason and Michael P. Blatchford, "The Philanthropic Client: Bequest Planning and Private Foundations" in *Estate Planning and Administration – 2009 Update* (Vancouver: Continuing Legal Education Society of British Columbia, 2009) at 5.1.2.

The *cy-près* analysis requires the court to examine the provision in the will to determine whether it displays a general charitable purpose or a specific purpose.[43] If the court finds a general charitable purpose, the court may give effect to that purpose by directing the gift to be distributed cy-près to another charity that will, as closely as possible, carry out the testator's intentions. A specific purpose to benefit only a particular charity indicates that the testator intended to benefit that charity only.[44] Accordingly, that benefit cannot be conferred *cy-près* on another charity and the gift will fail.

An example arose in *Gray Estate (Re)*.[45] William Gray's will disposed of the residue of his estate to the "Society of the Retarded Children of British Columbia, Haney Society or Division." No such society had ever existed. The Ridge Meadows Association for Community Living ("RMACL") and the BC Association for Community Living ("BCACL") both claimed the gift. RMACL argued that its society had changed names three times since incorporation and the charity under its original name, the Maple Ridge Association for Retarded Children, is the charity that Gray had in mind when he drafted his will. BCACL made the same argument, claiming that Gray meant BCACL under its former name, British Columbians for Mentally Handicapped People.

On the facts, the Court held that William Gray intended to benefit the former Maple Ridge Association for Retarded Children and simply misnamed the society. Gray had long resided in Haney, in the District of Maple Ridge, and clearly intended to benefit mentally handicapped children. Furthermore, the description Gray used in the will was sufficiently distinctive to indicate an intention to benefit RMACL under its former name, not the BCACL. Had it been necessary to apply *cy-près*, the Count determined that William Gray had a general charitable intention to benefit children suffering from a mental handicap and that the residue could be distributed *cy-près* to RMACL.

In order to avoid the cost of a court application, a solicitor should confirm the proper legal name of all charities that the testator wishes to benefit. A good starting point is the searchable database of registered charities that CRA's Charities Directorate maintains.[46]

G. Errors in Codicils

A codicil is a testamentary instrument which modifies a will executed on an earlier date by adding, deleting or replacing a portion of its contents. The will and any codicils must therefore be read together. A codicil republishes the will as of the date of the codicil, which means the will is deemed to have been made at the time of republication.[47] The effect of republication is that the provisions of the will are generally interpreted in light of the circumstances existing at the date of the most recent codicil.

Codicils were more common prior to the invention of computers because they allowed solicitors to amend a will without having to rewrite the will in full. With today's technology, it often takes no more time to prepare a new will than to prepare a codicil. Drafting errors are commonly found in codicils, especially where there is more than one. For this reason, it is often advisable to err on the side of caution by preparing a new will.

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43 A.H. Oosterhoff et al., *Oosterhoff on Trusts: Texts, Commentary and Materials*, 6th ed (Toronto: Thomson, 2004) at 411.

44 *Ibid*. See, for example, *Re Eberwein Estate*, 2012 BCSC 250, in which the court declined to apply *cy-pres* to save a gift to a charity that was no longer in existence. The testator made nine separate bequests to nine charities with a range of subject matters. The specific identification of each charity suggested that the testator would not have wanted the gift to go to another charity.

45 1999 CanLII 6045 (B.C.S.C.).

46 The database may be found at http://www.cra-arc.gc.ca/charities/.

47 *Wills Act*, R.S.B.C 1996, c. 489, s. 20(1).

Many problematic codicils are the result of the simplest drafting errors. Examples include:

- attaching the codicil to the wrong will;
- duplicating a paragraph in the will that the codicil was supposed to remove;
- accidentally deleting a defined term from the will; and
- replacing or deleting the wrong paragraph in a will.

In some circumstances, the courts will correct an error. A testator's knowledge and approval of the contents of a will is an essential element of a valid will. If an error is the result of the solicitor's slip or omission, or the solicitor failed to turn his or her mind to the ramifications of an errant clause, and the clause was not brought to the testator's attention, then the court might find that the testator did not know of or approve the error,[48] and will sever the clause.

The options available to the court to rectify a codicil depends on whether or not the will has been probated. The court of probate is limited to deleting words, even if this results in gaps in the will. If a will has been probated, the court of construction can add, strike and amend words as necessary in order to give effect to a testator's intentions. The court will also interpret any gaps in a will left by the court of probate.

Re Morris[49] is a classic example of how a careless codicil can have a significant impact on a will. In this case, the testatrix made 20 separate bequests in clause 7 of the will, each identified by a numeral. By codicil, the testatrix attempted to revise clause 7(iv) but a drafting error in the codicil revoked all of clause 7 and replaced it with a single bequest originally intended to replace only 7(iv). The testatrix glanced through the codicil prior to executing it but did not examine it , relying on the solicitor to have carried out her instructions. The court of probate struck out the codicil's reference to clause 7 for want of the testatrix's knowledge and approval. This left a gap in the will to be interpreted by the court of construction.

Machray v. Simpson[50] was an action brought against a notary public for negligence in preparing a codicil. Robert and Violet Machray were spouses who executed similar wills. Clause 3 of each will appointed the same alternate executor and set out the distribution of the estate. Eight years later, they retained the defendant notary to revise their wills in order to appoint a different alternate executor. The notary prepared a codicil that deleted and replaced Clause 3 in each will. However, the effect of the codicil was to delete the entire distribution clause of each will. As a result, the beneficiaries disagreed over how the will was to be interpreted and launched a court action, which eventually settled.

John Machray, son of the testator Robert, sued the notary for damages resulting from the codicil. The Court held that the notary owed John a duty of care. John did not call evidence regarding the proper standard of care, but the Court held that evidence was not necessary to find that the notary fell below the standard of care of a reasonably prudent notary public.[51]

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48 [1970] 1 All ER 1057.

49 *Ibid*.

50 2011 BCPC 309.

51 *Ibid.* at para 24.

WESA alert:

WESA discards the distinction between court of probate and court of construction for purposes of rectification and specifies those errors that the courts may rectify, as well as the admissible evidence:

> 59(1) On application for rectification, court (sitting as court of construction or probate) may order rectification of will IF court determines *will fails to carry out the WM's intentions* because of
>
> (a) an error arising from an accidental slip or omission,
>
> (b) misunderstanding of the WM's instructions, or
>
> (c) failure to carry out WM's instructions.
>
> 59(2) Extrinsic evidence, incl. evidence of WM's intent, is admissible to prove existence of a circumstance (1).

H. Failure to Include a Gift Over in Holding Provisions

As discussed earlier in this paper, many wills are drafted to establish a testamentary trust that directs a trustee to hold a beneficiary's share of the estate until or beyond the age of majority. There are a number of reasons for establishing such holding provisions. For instance, parents might believe that their child will lack the maturity to manage a large gift of property until later into adulthood. A simple example of a holding provision is a clause directing the executor to "hold Jane's share of the estate in trust until Jane reaches 30 years of age."

When drafting the holding provision, it important to include a gift over to a class of beneficiaries, at least some of whom will remain unascertained or under the age of 19 until the date of distribution of the trust, in the event that the first named beneficiary dies before reaching the stated age. Failure to properly draft a gift over can defeat the testator's intentions in two ways:

1. If the beneficiary dies before he or she is entitled to the trust property, the gift will fail and, if the gift was a portion of the residue, an intestacy of that portion will occur.
2. Once the beneficiary reaches the age of majority, the beneficiary may terminate the trust and receive the trust property before the stated later age.

Absent a properly drafted gift over, the age requirement (if it is beyond majority) is essentially meaningless because the beneficiary, upon attaining the age of majority, can terminate the trust call for the trust property to be transferred to him or her.

The law of termination of trusts by an act of the beneficiary is known as the rule in *Saunders v. Vautier*, an 1841 decision of the England and Wales High Court (Chancery Division). A testator bequeathed stocks to Vautier upon trust to accumulate the dividends until Vautier turned 25, at which point Vautier would receive the capital and accumulated dividends. Vautier demanded transfer of the fund to him when he reached the age of majority (21). The Court held that a beneficiary may unilaterally terminate a trust provided the beneficiary:

(a) has reached the age of majority;

(b) is of sound mind; and

(c) is absolutely entitled to the trust property.

A beneficiary who meets these criteria is not bound to wait until the expiration of the holding period and may require payment of the trust property the moment he or she is competent to give a valid discharge. Note that an age requirement in a holding provision does not affect the beneficiary's absolute entitlement to the trust property. The beneficiary's interest in the trust property vests upon

the testator's death because the beneficiary has an assured right to receive the property upon reaching the stated age. The holding provision merely delays the receipt of trust property and does not establish a condition precedent pursuant to which no gift is intended unless and until the condition is fulfilled.

A beneficiary successfully terminated a trust in *Re Monroe Estate*.[52] The testatrix's will gave a pension, house and personal property to her daughter, Veronica Monroe. The will directed that all cash payments given to Veronica through the will were to be invested and given to Veronica "if and only if she shall attain the age of thirty (30) years." None of the other clauses in the will referred to a gift over of the cash bequest should Veronica not survive her 30th birthday, although there were gifts over established for the other testamentary gifts. Veronica brought an application for a ruling that, having reached the age of majority, she was entitled to the cash payment immediately.

The Court determined that a gift to a person "if," "when," "as soon as" or "provided" he or she attains a certain age does not affect the vesting of the gift. It simply makes receipt of the gift contingent on attaining the stated age. Furthermore, the phrase "if and only if" is superfluous and means no more than "if." Therefore, the gift to Veronica "if and only if" she reached 30 years of age did not affect Veronica's absolute entitlement to the gift and she was free to invoke the rule in *Saunders v. Vautier*.

A recent decision of the New Brunswick Queen's Bench, *Re Rogers Estate*,[53] provides an example of the proper way to draft a holding provision. The testator left the residue of the estate to his two sons on the following trust:

> to divide the then accrued balance into as many equal shares as there may be the two said sons of mine alive at the time of my death, and to set aside one such equal share for each of my said sons and keep such share invested until a son of mine attains the age of Forty-five (45) years of age at which time I then direct my Trustee to pay or transfer the then accrued principal and interest to my said son for his own use absolutely. Should a son of mine die before attaining the age of Forty-five years of age or should it be the case that one of my two named sons should predecease me but in either case leave him surviving issue, I then direct my Trustee to divide the share to which my deceased son would have been entitled had he been alive at the time of division of my estate into as many equal portions as there may be children of my deceased son then alive, and to set aside such share and pay such share to or for such grandchild of mine ...[54]

The executrix asked the court to determine whether or not she could distribute the residue to the testator's sons before they attained the age of 45 years. The Court held that the holding provision contained a clear gift over. Therefore, the sons were not entitled to the residue before attaining the age of 45 years and could not terminate the trust by invoking the rule in *Saunders v. Vautier*.

I. Assuming a Certain Order of Death

Another common drafting error is a failure to plan for all contingencies. A properly drafted will should include substitutionary gifts to alternate beneficiaries in case the primary beneficiary predeceases the testator. Spouses who draft their wills together might assume that one spouse will die before the other. The following are some examples of wills that display an assumed order of deaths:

(1) Spouse A's will leaves everything to Spouse B and names an alternate beneficiary in the event that Spouse A and Spouse B die together in a common accident. This will omits distribution instructions in the event that Spouse A survives Spouse B.

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52 1995 CanLII 5904, [1995] 9 W.W.R. 372.

53 2006 NBQB 423.

54 *Ibid.* at para. 3.

(2) Spouse A and Spouse B leave their estates to one another and neither will names an alternate beneficiary. Both wills omit distribution instructions in the event that the testator survives his or her spouse.

(3) Spouse A's will leaves everything to Spouse B. Spouse B's will leaves everything to Spouse A, with an alternate beneficiary named in the event that Spouse A dies first. Spouse A's will omits distribution instructions in the event that Spouse B dies first.

In each of the above scenarios, it is possible to correct the omission after the first spouse dies. This simply requires the surviving spouse to prepare a new will. But the surviving spouse might fail or be unable to amend his or her will following the first spouse's death. The surviving spouse might die before he or she has the opportunity to prepare a new will. He or she might simply forget to update the will. If the surviving spouse does not prepare a new will, an intestacy will generally occur upon his or her death.

The executor may apply to the court to correct the omission in order to save the estate from passing on an intestacy. However, the court has only a limited jurisdiction to do so. The court may supply the omitted words if the court is satisfied that an omission occurred and can determine what the omission was.[55] In other words, when the court can divine a testator's intention, the court may read in the omitted words in order to give effect to that intention.

In *Taylor v. Montgomery*, the testator's residuary clause made several bequests to his wife and children. Clause 3(b) also established a $500,000 trust for the benefit of his wife. Clause 3(c) directed the trustees to pay the interest on the trust property to his wife annually. In the event that his wife predeceased him, clause 3(d) directed the trust to remain invested for five years after the testator's death, at which point the income and capital would be divided among the testator's surviving children. Clause 3(i) gave the remainder of the residue to his wife. Clause 3(j) stated that if his wife predeceased him, her share was to be divided among the surviving children.

There were several drafting errors in the will, such as the conflict between clauses 3(j) and 3(d). More importantly, the will omitted to distribute the trust fund after the wife's death. The wife's position was that the trust fund should be part of the residuary estate to be paid to her under clause (i). The trial judge disagreed, holding that such an interpretation of the will rendered clauses 3(b) and 3(c) meaningless. The trial judge resolved the problem by amending clause 3(c) to direct the trustees to pay the trust income to the wife for life and divide the capital among the issue *per stirpes* upon the wife's death.

The Court of Appeal upheld the trial decision based on the wording in clause 3(j), which displayed an intention for the children to enjoy all the residue if the wife predeceased the testator. The Court held that it should ascribe to the testator an intention to benefit the children upon the wife's death in order to give effect to the trust provisions in clauses (b) and 3(c).

The Court of Appeal revisited the issue of omissions in a will in *Howell v. Estate of Howell*.[56] The testator's will left all his real and personal property to his wife, with the exception of "articles of personal, domestic and household use or ornament" that were to be divided between his sons, Ronald and Lee. The will did not make any provision for Warren, the testator's other son by a previous marriage. The testator's wife predeceased him, leaving the main distribution clause inoperative.

Warren took the position that the residue should be divided according to the intestacy provisions of the *Estate Administration Act*, pursuant to which he was entitled to one-third. Ronald and Lee took the position that effect of the gift they received under the will was to leave the entire estate to them in equal shares. They relied on the presumption against intestacy, claiming father intended to dispose of the entire estate and further intended to disinherit Warren.

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55 A.H. Oosterhoff, *Oosterhoff on Wills and Succession*, 7th ed (Toronto: Thomson, 2011) at 506.

56 1999 BCCA 371.

The Chambers judge held that the bequest to Ronald and Lee was not drafted broadly enough to include the residue, with the result that an intestacy arose. On appeal, Ronald and Lee argued that the judge should have put himself in the testator's position in order to consider the testator's estrangement with Warren and his desire to dispose of the entire estate. The Court of Appeal upheld the decision. The Court agreed that the testator likely did not intend to create an intestacy. Nevertheless, he failed to provide for the residue in the event that his wife predeceased him and it was not for the court to guess the testator's intentions in those circumstances:

> It is one thing to try to give effect to a testator's intention where he has used an ambiguous word or phrase—it is entirely another thing to supply a missing bequest out of thin air. No authority was cited for the proposition that the court can do so or that it can ignore perfectly clear language in order to avoid an intestacy.[57]

J. Lack of Provision for Failed Gifts

As several of the above sections demonstrate, various drafting errors and omissions may result in a failed gift. Examples include:

(a) a gift of the residue that lapses because the beneficiary predeceases the testator and the gift is not saved by a gift over or by statutory anti-lapse[58];

(b) a will that lacks a residue clause or fails to distribute the entire residue of the estate;

(c) a will that is void for improper execution; and

(d) a will that presumes a certain order of death without planning for alternative scenarios.

In all these circumstances, a full or partial intestacy may arise.[59] Full intestacy occurs when a person owning property dies without a valid will.[60] Partial intestacy occurs when the deceased's estate is not fully disposed of by a will.[61]

The failed testamentary gift will then pass according to the intestacy provisions in Part 10 of the *Estate Administration Act*:

- If the deceased left a surviving spouse but no issue, the spouse inherits the entire estate.[62]
- If the deceased left a spouse and issue, the spouse will receive a life estate in the spousal home, the household furnishings and the first $65,000 from the estate. The balance of the estate will be divided among the spouse and issue according to the number of children the deceased had[63]:
  - If the deceased left a spouse and one child, each will receive half of the balance.[64]

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57 *Ibid.* at para. 10.

58 See s. 29 of the *Wills Act* for the statutory anti-lapse provisions.

59 For more information, see A. John Lakes, "Partial Intestacy" in *Estates: Out of the Ordinary Problems* (Vancouver, Continuing Legal Education Society of British Columbia, 2008).

60 *EAA*, *supra*, n. 33 at s. 1.

61 Section 94 of the *Estate Administration Act* recognizes partial intestacy whenever part of the estate is not disposed of by will.

62 *EAA*, *supra*, n. 33 at s. 83.

63 *Ibid.* at ss. 85 and 96.

64 *Ibid.* at s. 85(5)(a).

- If there are multiple children, the spouse will receive one-third of the balance and the children will receive equal shares of the remaining two-thirds.[65]
- If one of the deceased's children pre-deceased the deceased, the deceased child's children will receive the deceased child's portion in equals shares.

- If the deceased left no spouse or issue, the property will pass in equal shares to the deceased's parents, or to the surviving parent.[66] If neither parent is alive then the property will pass in equal shares to the deceased's siblings.[67] Failing that, the property will pass to any living nieces and nephews,[68] and finally to any next of kin.[69]

WESA alert:

There are several significant changes to the intestacy regime under *WESA*. For instance, distributions will be made such that the descendants of the nearest common ancestor will inherit the deceased's estate before the descendants of a more remote ancestor. *WESA* increases the preferential share of the surviving spouse to $300,000 if all of the deceased's children were also children of the surviving spouse. If not, the spouse's preferential share is $150,000. Half of the residue is distributed to the spouse and the other half to the deceased's descendants. The surviving spouse's life interest in the matrimonial home is replaced with an option to purchase the home.

VII. Technical Requirements for Formal Execution

It is essential in any estate practice to follow a consistent procedure when meeting with a client to sign the final version of a client's will. This will not only avoid making mistakes but if you are ever questioned years later about the execution of the will, even if you do not remember the client or meeting with them, you can say with confidence what your usual practice is when meeting with clients.

Be sure to meet with your client on his own. If a family member or caregiver brings them to your office, be sure to insist that they wait while you meet with the client to sign the will.

Once alone with the client, the first step is to review all the clauses of the final version of the will with him. This may include highlighting changes you made over the drafting process. More time should be spent highlighting the significant clauses including the appointment of executors and guardians and dispositive provisions. Once you have reviewed the will, you should confirm that the client understands it and does not have any questions. You should also confirm that they wish to sign the will. If you have any concerns regarding testamentary capacity or undue influence, these should be investigated further before proceeding. These topics are discussed in more detail in another paper in this course.

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65 *Ibid.* at s. 85(5)(b).

66 *Ibid.* at s. 86.

67 *Ibid.* at s. 87. If a sibling is dead, the children of the deceased sibling take the share their parent would have taken if living.

68 *Ibid.* at s. 88.

69 *Ibid.* at s. 89.

There are certain technical requirements prescribed by the *Wills Act*[70] that must be adhered to:

(a) The will must be in writing;

(b) The testator must be 19 years of age (unless the testator or married or is a member of the Canadian Forces);

(c) There must be two witnesses to the will (except if the testator is a member of the Canadian Forces in which case s. 5 of the *Wills Act* outlines the witnessing requirements involved);

(d) The will must be signed by the testator at its end or signed by another person in the presence of the testator and at his direction and this must occur in the presence of the two witnesses. The two witnesses must also sign at the end of the will. The testator and the witnesses must be present together throughout the signing by everyone. If it is necessary for someone to leave, the signing must stop and should only be continued once the person has returned;

(e) The testator and the witnesses must initial each prior page on the bottom right hand corner; and

(f) If any handwritten changes are made to the will, the testator and the witnesses should also initial beside those changes.

There may be special circumstances that arise that may require additional steps to be taken. For example, if the testator:

(a) signs with a mark;

(b) cannot read the will (e.g., either because he is blind or illiterate);

(c) cannot sign the will (e.g., not physically able);or

(d) does not speak or read English well;

you will need to not only modify the attestation clause to reflect that fact but you may need to modify your procedure in reviewing and executing the will. For example, if the testator is blind, you will need to read the will to him. If the testator does not speak or read English, you will need an interpreter at the meeting to translate the will. It is preferable to have an independent and certified interpreter. A list of interpreters can be found in the CBA Directory. Sometimes, however, you may have a lawyer or paralegal in your office that speaks the same language. Care should be taken to avoid using family members for translation. As well, in those circumstances it is advisable to have the translator swear an affidavit at that time outlining his qualifications and swearing that he has accurately translated the will to the client and that the client approves of the contents of the will. This affidavit may be required later during the probate process or if there is a challenge to the will.

Note also that certain individuals should not act as witnesses to the will. If a beneficiary or his spouse witnesses the will, s. 11 of the *Wills Act* provides that any gifts under the will to the beneficiary is void. If an executor witnesses the will, this does not invalidate his appointment. However, if the executor is a lawyer and the will contains a charging clause, such a clause is considered a legacy to the executor and under s. 11, such a legacy will be void.

If you will not be witnessing the will, you should give your client detailed written instructions as to how to properly execute the will. Once the signed will is returned to you, you should review it to ensure it was, in fact, properly executed at least on its face.

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70 See sections 3 – 6.

WESA alert:

WESA largely mirrors the current execution requirements but does make some changes. First, s. 36 changes the minimum age to make a will from 19 to 16 years old. As well, gifts to witnesses or spouses of witnesses may be saved by the court under s. 43. In addition, s. 58 is new and gives the court the power to cure deficiencies including deficiencies in the execution of a will.

Once the will has been signed, it is good practice to then complete a detailed memorandum to file immediately following the meeting documenting what occurred. The memorandum should include:

(a) Confirmation that you have followed the procedures outlined above and that the client understood the will and wished to sign it;

(b) notes as to where the original will is to be stored and whether a Wills Notice is to be filed;

(d) any special instructions or issues that arose in the course of the meeting; and

(e) general observations regarding the client. For example, this might include observations about his appearance, who brought the client to the meeting, questions asked by the client, preferences expressed by the client.

This information is helpful if ever there is a concern regarding capacity or undue influence and you are asked to testify. The more detailed the memorandum, the better.

VIII. Filing a Wills Notice

A Wills Notice is a one page form that is filed with Vital Statistics that indicates the date and location of a will. The Notice includes information regarding the testator, his address, the date upon which he executed a will and the location of that will. A copy of the will is not filed with the Notice and this is a fact that is often misunderstood by the public. While filing a Wills Notice is a voluntary process in BC, it is highly advisable to complete one. At a cost of less than $20, it can be an essential tool for locating a will if the whereabouts is unknown.

IX. Reporting to Your Client

When your client has executed his or her documents and you have filed the Wills Notice (if your client wishes to do that), it is time to send your invoice and report to your client. Consider including in your reporting letter the following:

- date on which the documents were signed;
- location of original documents;
- if you are holding the original documents, your instructions regarding their release;
- confirm that your client will initiate any further contact;
- instructions on revoking documents;
- reminder to client to review his or her personal circumstances periodically and consider whether any changes need to be made to the documents;
- confirm that certain information relied upon in preparing the documents was provided by the client and not verified by you;
- confirm advice given that your client chose not to follow;

- list any final matters you will take care of; and
- list any final matters your client should take care of.

For a sample reporting letter, please see The Law Society of British Columbia website, *Practice Resources* section.

X. Conclusion

Drafting wills is a complex and technical task. A carefully drafted will assists the executors and trustees is their task and provides the basis for an efficient administration. A poorly drafted will may result in unintended consequences, confusion or, in some cases, litigation. This paper highlights some of the clauses you should consider including in your repertoire and also explains some common errors you should keep in mind when you are drafting wills. There are also some exceptional resources available to assist you in developing, revising or updating your precedents, some of which have been referred to in this paper.

XI. Appendix A—Disposition on Death Chart

Prepared by Jane A.G. Purdie, QC

DISPOSITION ON DEATH

	DEATH	Disposed by "Operation of Law" at your death	By Will or by laws of Intestacy (no will) Court application usually necessary
Joint Bank Account		Joint owner - subject to resulting trust presumption unless intention provable otherwise - Deed of Gift	
Joint Tenancy ownership of real estate		Joint registered owner of real estate - subject to resulting trust presumption unless intention provable otherwise	
Tenants in Common ownership of real estate			Your interest is disposed of according to will/law
Life Insurance Proceeds		If named beneficiary of life insurance	If no named beneficiary or if estate named as beneficiary
Joint personal property including investments		Joint registered – subject to resulting trust presumption unless intention provable otherwise	To Estate if not owned jointly – registered and beneficially
RRSPs / RIFs		Named Beneficiary on investments; taxable if not to spouse / dependent child with limits	If no named beneficiary or if estate named as beneficiary – may be tax-free if spouse gets residue
All other Assets in your sole name			Disposed of in accord with will or the law

Probate Fees (tax) of ~1.4%

Subject to possible income and capital gains tax