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BREAKFAST SERIES

**The Effects of Separation Agreements and Releases
on Wills, Joint Property and Beneficiary Designations**
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Indemnities and Releases for Executors

Multiple Wills Update
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The Effect of Separation Agreements on the Testamentary Disposition of Property by Intestacy, Will, Jointly Held Assets or Beneficiary Designations

By David M. Smith of Hull & Hull

1. Introduction

Separation Agreements may have a profound impact upon the disposition of an estate. However, the apparent intention of a party to a Separation Agreement may not always be realized on his or her death.

This article first considers the statutory and testamentary rights of a surviving spouse on the death of their spouse: (i) the rights given on an intestacy, (ii) the rights given under a Will, (iii) the rights provided by the provisions of the *Family Law Act*, (iv) the rights given under Part V of the *Succession Law Reform Act*, (v) the rights as a joint tenant, and (vi) the rights conveyed by beneficiary designation.

We then consider what is required in order for a Separation Agreement to effectively contract the surviving spouse out of such entitlements.

For the purposes of this article, the term "married spouse" is used to consider those entitlements which are only granted to those spouses who fall within the definition of marriage in Ontario. The term "unmarried spouse" is used to consider the entitlements of spouses who are not married but who are conferred benefits under the provisions of certain statutes.

This article touches on, but does not consider in detail, the issue of Marriage Contracts which would, in and of itself, be the subject of a separate discussion.

PART I – THE VARIOUS ENTITLEMENTS OF THE SURVIVING SPOUSE

(i) Rights of a married spouse on an intestacy

A surviving husband or wife, on an intestacy, receives the entire estate of his spouse if there are no children. If there are children, the surviving husband or wife still receives the first \$200,000.00 of the estate and either ½ of the remainder if there is one child or 1/3 of the remainder if there are two or more children of the marriage.

The entitlement of a married spouse on an intestacy is statutory: *Succession Law Reform Act, Part II*.

(ii) Rights of an unmarried spouse on an intestacy

A surviving unmarried spouse, on an intestacy, receives no entitlement. A spouse is defined for the purposes of Part II of the *Succession Law Reform Act* as either a man or a woman who is married.

Although there are some cases in other provinces which suggest that this statutory provision offends the equality provisions of the *Charter*, the only available statutory remedy for an unmarried spouse on an intestacy in Ontario is to bring an application for support under the provisions of Part V of the *Succession Law Reform Act*.

(iii) Rights of a married spouse under the *Family Law Act* where the deceased leaves a Will or dies intestate

If a Will is made, or if there is an intestacy, a husband or wife receives the benefit provided under the deceased spouse's Will or the intestacy provisions of the *Succession Law Reform Act*, respectively, or is entitled to elect to instead receive his or her benefit under the *Family Law Act*.

Such election will be made if the husband or wife will receive a more favourable benefit by receiving one half of the difference between the net family properties of the deceased spouse and the survivor respectively.

Note that the right to elect is restricted to married spouses.

(iv) Rights of a married or unmarried spouse under the Succession Law Reform Act where the deceased dies testate or intestate

If an election under the *Family Law Act* will not benefit the surviving spouse, the option remains for the surviving spouse to claim against the estate under the provisions of Part V of the *Succession Law Reform Act*. The position asserted by the surviving spouse on such a claim is that the deceased spouse, by the provisions of his or her Will or on a distribution on an intestacy, did not satisfactorily provide for the needs of his or her spouse.

As noted above, an unmarried spouse as defined in Part V of the *Succession Law Reform Act*, may similarly assert a claim for support against the estate. A spouse is defined for the purposes of Part V of the *Succession Law Reform Act* to include persons who have "cohabited for a period of not less than three years or in a relationship of some permanence if they are the natural or adoptive parents of a child."

(v) Rights of a married or unmarried spouse as a joint tenant

It is a common characteristic of spousal relationships for the two to jointly own property. The predominant characteristic of jointly held property is that each joint owner has a right to ownership on the death of the other joint holder, also known as a right of survivorship. This right is severable, with each joint owner having an entitlement to one-half of the property.

(vi) **Rights of a married or unmarried spouse as a designated beneficiary of the other's assets**

Many assets can be passed by beneficiary designation including RRSPs, RRIFs, insurance policies and pension plans.

The designation of the beneficiary is typically made as part of the contract between the plan holder and the recipient.

Pension Benefits, in particular, provide that if the member of the pension dies before he or she has started to collect on the pension, his or her spouse is entitled to a lump sum payment as the designated beneficiary unless they are living separate and apart at the date of death.

PART II – IMPACT OF SEPARATION AGREEMENTS ON RIGHTS OF A SURVIVING SPOUSE

(i) **A Separation Agreement or a Marriage Contract between married spouses may contract out of the rights afforded to married spouses by Statute**

Part IV of the *Family Law Act*, section 52(1) provides:

A man and a woman who are married to each other or intend to marry, may enter into an agreement under the marriage or on the separation, on the annulment or dissolution of the marriage, or on death, including:

- (a) ownership in or division of properties;
- (b) support obligations;
- (c) the right to direct the education and moral training of their children, but not the right of custody and access to their children; and,
- (d) any other matter in the settlement of their affairs [emphasis added].

If married spouses separate within the meaning of the *Family Law Act*, their relationship is typically governed by the provisions of a Separation Agreement.

A Separation Agreement is a contract and is governed by the common law as it relates to contracts.

As a general proposition, the intention of a Separation Agreement is generally assumed to be to ensure that the parties, as between themselves, contract to ensure that neither benefits from the other's property after the termination of the relationship.

(ii) Inter-relationship between a Domestic Agreement and the deceased spouse's Will & Estate

A contract may be set aside for a number of reasons including lack of financial disclosure and duress.

If the obligations contained in a Marriage Contract are incorporated into a Will, the obligations will continue notwithstanding the fact that the contract has itself been found to be invalid.

Unless the provisions in a Marriage Contract for the surviving spouse are clear and straightforward, there is a risk that the provisions in the Will may amplify the benefit flowing to the surviving spouse.

A Marriage Contract can not appoint executors, deal with custodial issues regarding children, or dispose of property which is not covered by the Contract

(iii) Unless carefully worded, a Separation Agreement between married spouses will not contract the parties out of the benefits conferred by their Wills

As a general proposition, spouses that have entered into a Separation Agreement do not typically intend their spouse to thereafter benefit from their estate. However, unless the Separation Agreement is very carefully worded, the

Wills made by the parties to the Separation Agreement, even if those Wills predate the Separation Agreement and appear on their face to be contrary to the intention of the Separation Agreement, will be found to prevail.

This is because the Court is loathe to override the testamentary dispositions contained in a Will unless the words used in the Separation Agreement are direct and cogent that such is the intention of the parties to the Separation Agreement.

A Separation Agreement is not a testamentary disposition. Rather, it is a contract whereby, insofar as the death of the parties is concerned, the parties contract out of their entitlements to receive statutory rights and testamentary dispositions if the Agreement uses direct and cogent language to effect such a result.

A Separation Agreement will rarely expressly address the situation in which the parties to the Agreement have not changed their Wills to exclude each other. However, it is not uncommon for just such a situation to arise. Although the intentions of the parties to the Separation Agreement is, typically, to exclude the other from any interest in their property and for such exclusion to be binding on their respective estates, the Court will not construe the intentions of the parties in their Separation Agreement to have contracted out of entitlements received as a beneficiary of the other's estate.

So, for example, where a Manitoba Separation Agreement states as follows:

“the payments and other provisions herein contained constitute a full and final settlement of all the wife's rights against the Husband but expressly including such rights as the Wife now has or might hereafter have under and by virtue of the Dower Act, the Devolution of Estates Act, the Testator's Family Maintenance Act, the Wives' and Children's Maintenance

Act, the Matrimonial Causes Act, and any other statute hereafter enacted to the same or similar effect..."

the Court found that the parties had not contracted out of the benefits conferred upon them by the other's Will which predated the Separation Agreement. Specifically, the Court reasoned that "the Wife had no right to claim to be named as beneficiary of her former husband's estate, but she did not by the agreement waive her right to claim if her husband chose not to alter his Will so as to eliminate her as a beneficiary." (*Goldfield v. Koslovsky* [1976] 2 W.W.R. 553).

Put another way, the Court will construe the fact that a married spouse did not change his or her Will to be "an affirmation of the intention to benefit his spouse." Accordingly, what is typically an inadvertent omission will be interpreted by the court as an act committed with the intent to benefit.

Put still another way, there is effectively a presumption that the Will has not been revoked by the terms of the Separation Agreement. Such presumption is rebuttable but only if there are direct and cogent words in the Separation Agreement which specifically contemplate the situation in which the parties fail to change Wills which predate the Separation Agreement and leave their respective estates to the other.

(iv) **Unless carefully worded, a Separation Agreement between married spouses will not contract the parties out of the benefits conferred by statute on an intestacy**

The Court will protect the rights afforded to a spouse on an intestacy by scrutinizing the Separation Agreement with just the same degree of exactitude as in cases where the spouse dies testate.

In *Cairns v. Cairns* (1990) 72 O.R.(2d) 217 (Ont. H.C.), a Separation Agreement included "a full and final release to any future claim by either party to a further

division of property or payment for net equalization pursuant to the Family Law Act or any relevant statute."

The Court held that "the words of the release are not clear enough, nor sufficiently direct and cogent to bar [the wife] from her preferential share on an intestacy under the *Succession Law Reform Act*."

Simply put, the Court inferred that the deceased's decision to not make a Will after the Separation Agreement was executed was a deliberate act designed to ensure that the surviving spouse receive her entitlements on an intestacy.

While the result must be respected, it is certainly questionable as to whether such was in fact the deceased's intent.

- (v) Even if carefully drafted, a Separation Agreement is but one factor for the Court to consider in determining whether to award support to a surviving spouse under Part V of the SLRA

Even if a Separation Agreement purports to preclude a surviving spouse from making an application for support under Part V of the *Succession Law Reform Act*, the Court may permit an application for support to proceed if the surviving spouse can show a material change of circumstances such as to justify a claim. The argument would be that it would be unconscionable for the Separation Agreement to bind the entitlements of the surviving spouse.

Section 62(1)(m) of the *Succession Law Reform Act* states that the Court shall consider "any agreement between the deceased and the dependant" in determining the amount and duration, if any, of support.

- (vi) Unless carefully worded, a Separation Agreement between spouses will not sever a joint tenancy

A Separation Agreement should reference the property in respect of which the parties wish to sever a joint tenancy. All too often, the surviving spouse will find that he or she has taken sole title to a jointly held property by right of survivorship, notwithstanding the existence of a Separation Agreement which appears to evidence an intention for the parties not to benefit from the other's property.

If the Court finds any ambiguity whatsoever in the Separation Agreement, the joint tenancy will be found to prevail.

Although the availability of the doctrine of resulting trust can potentially be of some assistance, the Court may well be hesitant to apply the doctrine in a case where a spouse stands to take the property in question by right of survivorship.

Such was the case in *Berry v. Berry*, a recent unreported decision of the British Columbia Supreme Court. In this case, the Court refused to sever the joint tenancy or declare a resulting trust over one-half of the property for the benefit of the deceased spouse's estate, notwithstanding that the spouses had separated prior to his death.

(vii) Unless carefully worded, a Separation Agreement between spouses will not contract the parties out of the benefits conferred by beneficiary designations

Many assets can be passed by beneficiary designation including RRSPs, RRIFs, Insurance policies and Pension Plans.

A Separation Agreement may purport to release the parties from all claims including any claims to a share in company pension plans, RRSPs, RHOSPs, etc.

The statutory provisions relating to the designation of beneficiaries of interests in funds and plans are found in Part III of the *Succession Law Reform Act*

Section 51(1) of the SLRA states:

A participant may designate a person to receive a benefit payable under a plan on the participant's death,

(a) by an instrument [emphasis added] signed by him or her or signed on his or her behalf by another person in his or her presence and by his or her direction; or

(b) by will,

and may revoke the designation by either of those methods [emphasis added].

Section 51(2) states:

A designation in a will is effective only if it relates expressly to, a plan, either generally or specifically

A Separation Agreement can be an "instrument" as that term is referenced in s. 51(1) of the Act although the term itself is not described in the statute. The Court of Appeal in *Burgess v. Burgess Estate* [2000]O.J. No. 4846 (Ont. C.A.) confirmed this fact by reference to dictionary definitions of "instrument."

In *Burgess v. Burgess Estate*, the deceased had designated his first wife as beneficiary of the whole his deferred pension sharing plan (DPSP), which he held with his employer, during the course of his marriage. He subsequently entered into a Separation Agreement in which he reduced her entitlement to one half of the DPSP. He subsequently remarried and made a new Will leaving his entire estate to his second wife and the children of his first marriage.

On an application before Madam Justice Haley, the first wife sought a declaration that she was entitled to the whole of the DPSP. The first wife essentially made the same argument which was accepted by the courts in the line of cases in which Wills which were inconsistent with Separation Agreements were found to prevail: in her submission, she did not, by the Separation Agreement, "waive the right to claim if the deceased spouse chose not to alter his or her beneficiary designation so as to eliminate her as a beneficiary."

Madam Justice Haley accepted the reasoning: the contract between the employer and its employee was separate from the marriage. Not being a party to the Separation Agreement, the employer, with whom the deceased filed his beneficiary designation, could not be said to have been bound by the Agreement. If the deceased truly intended to eliminate or reduce the entitlement of his spouse, he would have changed the beneficiary designation at the source. Accordingly, Justice Haley found that the Separation Agreement had no effect on the beneficiary designation.

This decision was reversed on appeal. The Court of Appeal determined that the Separation Agreement was an instrument that revoked the beneficiary designation on file with the holder of the Plan. The subsequent Will, not "relating expressly to, a plan, either generally or specifically" did not effect the beneficiary designation of the Plan contained in the Separation Agreement.

In *Klassen Estate v. Klassen* (1998) 22 E.T.R. (2d) Man. Q.B.), the Court considered a situation in which a second wife was named as beneficiary under several instruments notwithstanding the fact that: (i) she was divorced from her deceased husband, (ii) she had entered into a Separation Agreement; and (iii) he had made a new will leaving all his property to the children of his first marriage. The Court in this case considered parol evidence of the deceased's intention which was clearly to exclude the benefit to his second wife. Although the Court could not find a legal basis to set aside the beneficiary designation, it found that the second wife, as designated beneficiary, held such assets on a resulting trust for the benefit of the estate.

Klassen therefore provides a creative option to litigation counsel to seek to find a way out of the dilemma posed by a defective Separation Agreement. However, this case has, to the best of the writer's knowledge, not been applied in Ontario.

Summary

Spouses, by Separation Agreements, typically intend to contract out of their entitlements provided by statute. Rarely is there any question that a Separation Agreement intends to preclude the rights afforded to a surviving spouse under the provisions of either the *Family Law Act* or Part V of the *Succession Law Reform Act*.

If spouses, when they separate, wish to disentitle their surviving spouse from any interest in their estate, consideration must also be given to the status of their Wills. Counsel of caution suggests that a new Will (or a first Will!) should always be made after a Separation Agreement.

The Court will find in favour of a surviving spouse on an intestacy or in accordance with the provisions of a Will predating the Separation Agreement unless there is direct and cogent wording used by which the surviving spouse has clearly contracted out of his or her entitlement to receive a benefit either on an intestacy or under a Will.

The use of direct and cogent wording would appear to be a requirement in any Separation Agreement that also seeks to sever a joint tenancy or revoke a beneficiary designation.

Ultimately, when acting for an executor or surviving spouse, an application for the opinion, advice and direction of the Court may be required to determine the issue.

(A) INDEMNITIES AND RELEASES FOR TRUSTEES

"The risk of personal liability is an incident of the office of trustee."¹

Given the personal consequences attached to the position of a trustee, some consideration must be given to the nature and extent of the releases and rights of indemnification that may be available to a trustee.

Usually these issues are considered at the final stage of an Estate administration when the trustee is dealing with the distribution and winding up of the assets of the estate or trust.

This paper will briefly review some of the substantive and practical issues relating to the whole question of rights of indemnity and releases for trustees.

In order to properly determine just what a trustee should receive in the form of a release, acknowledgement or indemnity, some consideration must be given to specifically the nature and extent of the obligations and liabilities that are expected of the trustee when he or she takes on the role.

In short, a trustee is a fiduciary and as such his or her fiduciary obligations are owed to beneficiaries, and in some circumstances third parties.

¹ Cullity, M.C.C. "Personal Liability of Trustees and Rights of Indemnification", 16 E.T.J. 115 at p. 115.

Given this, the whole question of what a trustee can expect in the form of an acknowledgement, release or indemnity is a difficult one. Presumably, the trustee's rights of indemnification out of the trust property arise as a result of the fact that the trustee merely holds the legal title to the property and does not hold the beneficial interest in the property.

Liability of Trustees to Beneficiaries

Generally speaking, a trustee must of course act in accordance with the terms of the trust instrument and must adhere closely to the fiduciary standards expected of a trustee. Failing which, a claim for breach of trust can give rise to personal liability to the beneficiaries.

An early issue to be considered when defending a trustee is the whole question of the impact of the trust document itself.

For example, a trust document may or may not include exculpatory provisions that appear to absolve a trustee from consequences of a breach of trust or abuse of discretion.

There is, however, always a risk that a court will construe any exculpatory provision strictly and, will hold it repugnant to the fiduciaries and a trustee if the right circumstances exist.²

With respect to liability and trustees as third parties, there is really no limit to the extent of liability that a trustee can incur.

A trustee can of course incur liabilities to persons other than beneficiaries.

² See Cullity, M.C.C., "Trustees' Duties, Powers and Discretions – Exercising Discretionary Powers, [1980] Special Lectures of the Law Society of Upper Canada, at p. 19-21.

As trustees are principals and not agents of the beneficiaries, they will, prima facie, be personally liable on obligations owed to third parties and trustees may incur personal liability in tort for under such statutes such as the *Environmental Protection Act, R.S.O. 1990 as Amended*.³

The trustee may limit the extent of the personal liability to the value of the trust asset or limit it to the extent that the right of indemnity exist only against such assets. Furthermore, where the trustee has the right of indemnity out of the trust assets, creditors will, as a general rule, be entitled to be subrogated to it.⁴

As to the question limiting the liability of a trustee, Falconbridge on Mortgages states⁵:

If the trustee or personal representative covenants to pay, he will be personally liable on his covenant, even though he covenants as trustee or as personal representative, even though he adds a proviso that he shall not be personally liable, such proviso being repugnant to the covenant to pay and therefore void. He may, however, validly limit his liability without destroying it, as, for example, if the covenant is to pay out of a certain fund, with a proviso that the covenantor shall not be liable after he ceases to be entitled to administer the fund. So, if a trustee covenants "as trustee and not otherwise", or "qua trustee only", or if an executor covenants "as executor, and as executor only", the covenantor is personally liable to pay, but only to pay out of the assets of the

³ Cullity, M.C.C. "Personal Liability of Trustees and Rights of Indemnification", 16 E.T.J. 115 at pp. 115 and 127.

⁴ Cullity, M.C.C. "Personal Liability of Trustees and Rights of Indemnification", 16 E.T.J. 115 at pp. 127-128.

⁵ (4th Ed.) (1977), p. 428-429.

estate or to the extent that he has assets.

This strict rule attempting to limit a trustee's personal liability has been weakened and modified by the courts.⁶

A comprehensive review of the principles in respect of determining when trustees have personal rights of indemnity against beneficiaries is set out in the Australian decision of J.W. Broomhead (Eic.) Pty. Ltd. (in liquidation) v. J.W. Broomhead Pty. Ltd.⁷

In that decision, McGarvie J. set out the following propositions:

- The general principle is that a trustee is entitled to an indemnity for liabilities properly incurred in caring out the trust and that right extends beyond the trust property and is enforceable in equity against a beneficiary who is sui juris.

- The basis of the principle is that the beneficiary who gets the benefit of the trust should bear its burdens unless he can show some good reason why the trustee should bear the burdens alone.

- The right of indemnification is not confined to the case where there is only one beneficiary. It applies to cases of multiple beneficiaries as long as they are all sui

⁶ For a review of the impact of ability of the trustee to limit his or her liability see Cullity, M.C.C. "Personal Liability of Trustees and Rights of Indemnification", 16 E.T.J. 115 at pp. 129-133 and see Gordon v. Roebuck (1992), 92 D.L.R. (4th) 670, 9 O.R. (3d) 1 at p. 7-10 (C.A.).
⁷ [1985] V.R. 891 (S.C.Vic.), see Cullity, M.C. "Personal Liability of Trustees and Rights of Indemnification", 16 E.T.J. 115 at pp. 134-135.

juris and entitled to the same interest as absolute owners of the trust property between them.

- The liability to indemnify could apply to a trustee of subtrusts that were beneficiaries of the principle trust.
- Prima facie, the beneficiaries share the liability in proportion to the extent of their respective beneficial interests in the trust.

Acknowledgment, Release, Discharge, Receipt, and Indemnity

Ultimately, where a trustee administers the assets of the trust, the two most effective and important releases that are available to be obtained are (1) the Clearance Certificate from Revenue Canada and (2) an Order of the Court in a Passing of Accounts.

Having said that, while a Clearance Certificate is of course sought in most circumstances, a formal Passing of Accounts is not always obtained by a trustee.

From a practical standpoint, where all of the beneficiaries are sui juris, the trustee of course has the opportunity to obtain a Clearance Certificate and then merely circulate a release to all persons with an interest.

In so doing, some consideration must be given to the question of independent legal advice and whether or not it is necessary to insist that the

beneficiary obtain such prior to signing the release. Without the benefit of independent legal advice, there is the question as to the strength of any release.

Having said that, in practical terms, many estates and many trusts are wound up on the basis of the execution of the appropriate release of the beneficiaries.

From a practical statement, when seeking a final release from the beneficiary, a copy of the accounts should be included and may be in an informal format or in court format, depending on the circumstances.

A condition contained in the will to execute a release is enforceable and upon refusal to do so the legatee may forfeit the gift.⁸ Furthermore, it has been held that where in the release is to be executed within a stated time this must be complied with.⁹

The form of a release or receipt depends on the nature of the gift itself. When beneficiaries receive the specific bequest you should only need to provide the person who presented the gift an acknowledgement of receipt of the particular item received.

A residuary beneficiary of course has a right to consider pursuing a formal court audit or should be expected to sign an acknowledgement, release and indemnity.

In conclusion, the substantive issues relating to the whole question of release, indemnity and receipt are of course important to keep in mind when you are dealing with the form of a receipt, acknowledgement or indemnity.

⁸ Williams on Wills (7th Ed.) Butterworths 1995 at p. 374.

⁹ Simpson v. Vickers (1807) 14 Ves. 341.

Amendments to Trustee Act - Prudent Investor Rule

Recent amendments to the *Trustee Act* took effect on July 1, 1999.

The *Trustee Act of Ontario* has been amended to replace the old "authorized investments list" with the prudent investor rule.

The amendments to Section 26 of the *Trustee Act* eliminate the previously defined "authorized investments".

The list set out in the old *Trustee Act* has been eliminated and where the trustee is authorized to invest property he or she is no longer restricted by the "authorized investments" list.

Section 27 of the *Trustee Act* now provides for a "prudent investor" standard of care and the "authorized investments" list no longer prevails.

Furthermore, there is a specific entitlement for the "prudent investor" to invest in mutual funds or if the trustee is a Trust Company to invest in common trust funds.

As to the question of diversification, Section 27 (6) provides that a trustee must diversify the investment to an extent that is appropriate.

It is interesting to note that Section 27 (8) provides that it is not a breach of trust for a trustee to rely on advice obtained if a prudent investor would rely on the advice under comparable circumstances.

As a result, it is anticipated that a trustee should very seriously consider obtaining advice in relation to the investment of trust property and use the seeking of that advice as further support of the "prudent investment" decision making process.

Section 28 of the Amended Act provides that a trustee is not liable for loss to the trust arising from the investment of trust property if the conduct of the trustee that lead to the loss conformed to a plan or strategy for the investment of the trust property, comprising reasonable assessments of risk and return, that a prudent investor could adopt under comparable circumstances.

Again, it may be helpful for the trustee to seek the investment advice and document such advice so that the trustee can continue to seek protection from liability.

Section 29 of the *Trustee Act* now provides for the court to consider the overall performance of investments in respect of assessment of damages.

Previously, when considering a portfolio managed by a trustee the court could focus on only the poorly performing assets without considering the strongly performing assets.

Pursuant to Section 29 of the *Trustee Act* if a trustee is liable for a loss of the trust arising from the investment of trust property, the court in assessing the damages may take into account the overall performance of the investments.

It is important to note that Section 35 of the *Trustee Act* has been amended and the relief available to trustees committing a technical breach of trust has been significantly reduced.

Section 35 of the *Trustee Act* currently provides that if a trustee has committed a technical breach of trust, but has acted honestly and reasonably, the court may relieve the trustee either wholly or partly from personal liability.

However, with the amendments to the *Trustee Act*, Section 35 include an additional restriction as follows:

(2) Subsection (1) does not apply to liability for a loss to the trust arising from the investment of trust property.

Based on the new provisions of Section 35, there appears to be significant limit to the relief for technical breaches arising from investments.

The amendments to the *Trustee Act* are significant and it is still too soon to predict how the courts will define the term "prudent investor"; however, it appears that based on the language of the amendments to the *Trustee Act* the standard of care has been raised and it is likely that even higher investment expectations will be imposed upon trustees in the future.

Sections 26 to 34 of the *Trustee Act* are repealed. Sections 26 and 27 of the *Trustee Act* provides:

26. **Other Acts** - If a provision of another Act or the regulations under another Act authorizes money or other property to be invested in property in which a trustee is authorized to invest and the provision came into force before section 16 of Schedule B of the *Red Tape Reduction Act*, 1998, the provision shall be deemed to authorize investment in the property in which a trustee could invest immediately before the coming into force of section 16 of Schedule B of the *Red Tape Reduction Act*, 1998.

27. **Standard of Care** - (1) In investing trust property, a trustee must exercise the care, skill, diligence and

judgment that a prudent investor would exercise in making investments.

(2) Authorized Investments - A trustee may invest trust property in any form of property in which a prudent investor might invest.

(3) Mutual Funds - Any rule of law that prohibits a trustee from delegating powers or duties does not prevent the trustee from investing in mutual funds.

(4) Common Trust Funds - If trust property is held by co-trustees and one of the co-trustees is a trust corporation as defined in the *Loan and Trust Corporations Act* any rule of law that prohibits a trustee from delegating powers or duties does not prevent the co-trustees from investing in a common trust fund, as defined in that Act, that is maintained by the trust corporation.

(5) Criteria - A trustee must consider the following criteria in planning the investment of trust property, in addition to any others that are relevant to the circumstances:

- General economic conditions.
- The possible effect of inflation or deflation.
- The expected tax consequences of investment decisions or strategies.
- The role that each investment or course of action plays with the overall trust portfolio.
- The expected total return from income and the appreciation of capital.
- Needs for liquidity regularity of income and preservation or appreciation of capital.
- An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

(6) Investment Advice - A trustee must diversify the investment of trust property to an extent that is appropriate to do.

- (a) the requirements of the trust; and
- (b) general economic and investment market conditions.

- (7) **Investment Advice** - A trustee may obtain advice in relation to the investment of trust property.
- (8) **Reliance on Advice** - It is not a breach of trust for a trustee to rely on advice obtained under subsection (7) if a prudent investor would rely on the advice under comparable circumstances.
- (9) **Terms of trust** - This section does not authorize or require a trustee to invest in a manner that is inconsistent with the terms of the trust.

28. **Protection from liability** - A trustee is not liable for a loss to the trust arising from the investment of trust property if the conduct of the trustee that led to the loss conformed to a plan or strategy for the investment of the trust property, comprising reasonable assessments of risk and return, that a prudent investor could adopt under comparable circumstances.

29. **Assessment of damages** - If a trustee is liable for a loss to the trust arising from the investment of trust property, a court assessing the damages payable by the trustee may take into account the overall performance of the investments.

30. **Application** - Sections 27 and 29 apply, after section 16 of Schedule B of the *Red Tape Reduction Act, 1998* comes into force, to trusts created before or after section 16 of Schedule B of the *Red Tap Reduction Act, 1998* comes into force.

Section 35 of the Act is amended by adding the following subsection:

- (2) Subsection (1) does not apply to liability for a loss to the trust arising from the investment of trust property.

Estate, Not Designated Beneficiary, Bears RRSP/RRIF Tax Burden

The question of who bears the taxes payable as a result of the deemed realization of RRSPs and RRIFs – the estate or the deemed recipient of such plans – has been a cause for concern among estates practitioners for some time. However, two recent decisions of the Ontario Superior Court of Justice suggest that the uncertainty surrounding this issue may be coming to an end.

Both *Curley v. MacDonald* and *Banting v. Saunders Estate*, unreported decisions of the Ontario Superior Court of Justice, stand for the proposition that the estate, and not the designated beneficiary of an RRSP or RRIF, must bear the tax liability triggered by the deemed realization of such plans upon the death of the taxpayer.

The uncertainty around this issue has arisen from the fact that the *Income Tax Act* (Canada) provides that the taxpayer (i.e. the estate) and the deemed recipient of an RRSP are jointly and severally liable for taxes owing as a result of the deemed realization of the plan on death. The *Income Tax Act* is not clear, however, on which of the two bears the liability in circumstances where sufficient assets exist in the estate to satisfy the tax liability.

The issue was thrown into considerable confusion in Ontario by the decision in *C.I.B.C. v. Beshara* (1989), 68 O.R. (2D) 443 which allowed creditors of an estate to claim against and realize upon the proceeds of an RRSP or RRIF which passed to a designated recipient. This decision highlighted the unique nature of RRSPs and RRIFs insofar as the proceeds of such assets could be made

accountable to estate creditors in cases where an estate was insolvent. The finding, however, was seen by many to imply that the beneficiary, and not the estate, should bear the tax liability resulting from the deemed realization of such assets on death. Put another way, the proceeds of RRSPs and RRIFs, according to the decision in *CIBC v. Beshara*, were effectively assets of the estate, leaving the deemed recipient of the plan to shoulder the tax burden.

The more recent trend in Ontario case law clearly delineates between assets in an RRSP or RRIF which pass to a deemed recipient, on the one hand, and estate assets, on the other. In the absence of an appellate Court decision in Ontario on the issue, Ontario Courts have looked to *Clarke Estate v. Clarke* (1997, 15 E.T.R. (2d) 113, a decision of the Manitoba Court of Appeal, for some guidance. The decision has clearly held that RRSPs and RRIFs which pass to a deemed beneficiary are not assets of the estate but are subject to creditor's claims where the assets of the estate are insufficient to satisfy such claims.

The principal that RRSPs and RRIFs are not estate assets has assisted the courts in concluding that the estate, and not the RRSP beneficiary, bears the liability for income tax triggered by deemed disposition on death.

In *Banting v. Saunders Estate*, the Court also considered the intent of the *Income Tax Act*: for tax purposes, the RRSP or RRIF is deemed to have been cashed out by the annuitant (i.e. the deceased) immediately before death. As such, it logically follows that the estate bears the tax burden.

In practice, the tax burden occasioned by the deemed realization of RRSPs and RRIFs must be taken into account in any estate plan. In small estates, where the RRSP is by far the largest asset in the estate, the testator must be advised of the impact of the tax burden upon his or her estate plan.

A carefully drafted provision in the Will can ensure that this circumstance is addressed by the testator to achieve the intended results.

PRECEDENT - GENERAL WILL

I, ■, DECLARE that this is my Last Will and Testament with respect to my property other than my Corporate Properties (as hereinafter defined).

REVOCATION

1. I HEREBY REVOKE all former Wills and other testamentary dispositions of every nature and kind whatsoever at any time heretofore made by me before 200■ and declare this to be and contain my Last Will and Testament with respect to my property other than my Corporate Properties (as hereinafter defined), and I hereby further declare that the within document is the only executed copy of my Last Will and Testament with respect to my property other than my said Corporate Properties.

Appointment of Executors

2. (a) I APPOINT my wife, ■, my friend, ■, and my friend, ■, to be the Executors and Trustees of this my Will, provided that in the event that my said wife shall not survive me or shall otherwise be or become unwilling or unable to act as an Executor and Trustee before the trusts hereof have been fully performed, I APPOINT my wife's mother, ■, to be Executor and Trustee in her place and stead; I DECLARE that the expression "my Trustees" used throughout this Will shall include, where the context permits, the Executor or Executors and Trustee or Trustees for the time being hereof, whether original, additional or substitutional; and I DECLARE that if any of the above-mentioned persons acts as an Executor and Trustee of this my Will, he or she shall not be required to post any bond or security for so acting;

Birth Outside Marriage

(b) ANY REFERENCES in this my Will to a "child", "children" or "issue" of a particular person include adopted persons but do not include a person born outside marriage nor a person who comes within the description traced through another person who was born outside marriage unless such person comes within the description by virtue of adoption. Notwithstanding the foregoing, a person born outside of marriage shall be considered to be born within marriage to his or her mother or father, as the case may be, for the purposes of this my Will where the person's mother or father, as the case may be, has, in the unanimous opinion of my Trustees, demonstrated a settled intention to treat the person as his or her child; and

Definitions

(c) I DECLARE THAT in this my Will the following terms shall be interpreted in accordance with the following rules:

- (i) "Corporate Properties" shall mean any shares or securities, including debt obligations, of ■ Inc. or any shares or securities into which such shares or securities may be converted, changed, reclassified, re-divided, re-designated, subdivided or consolidated, any shares or securities of ■ Inc. which are received by me as a stock dividend or distribution payable in shares or securities of ■ Inc. and any shares or securities of ■ Inc. or of any successor or continuing company or corporation to ■ Inc. which may be received by me on an issuance, a reorganization, amalgamation, consolidation or merger, statutory or otherwise;
- (ii) "my property" and "my estate" shall, unless the context otherwise requires, not include my Corporate Properties; and
- (iii) "Income Tax Act", or any reference to a specific provision or specific provisions thereof, shall mean the *Income Tax Act*, Revised Statutes of Canada 1985, Fifth Supplement, as amended, or such provision or provisions, as the case may be, as amended from time to time, or any legislation of the Parliament of Canada from time to time in force of like or similar effect, and any legislation of any legislature of any province of Canada (including without limiting the generality of the foregoing the *Income Tax Act*, Revised Statutes of Ontario 1990, Chapter 1.2) from time to time in force of like or similar effect.

DISPOSITIVE PROVISIONS

3. I GIVE, DEVISE AND BEQUEATH all my property of every nature and kind wheresoever situate, other than my Corporate Properties, including any property over which I may have a general power of appointment, to my Trustees upon the following trusts, namely:

Personal Effects

(a) PROVIDED she shall survive me by thirty (30) days, TO TRANSFER AND DELIVER to my wife, ■ ("■"), for her own use absolutely all articles of personal, domestic or household or garden use or ornament wherever situate which I shall own at my death including, without limiting the generality of the foregoing, all household goods, furniture,

furnishings, books (except books of account), artwork, pictures, silver, plate, plated goods, linen, glass, china, manuscripts (but not any copyright I may own), musical instruments, wines, liquors, consumable stores and provisions, wearing apparel, jewellery, boats, automobiles and accessories thereto, provided that if my said wife shall fail to survive me by thirty days my Trustees shall divide such articles among my children alive at the death of the survivor of me and my said wife as my children shall agree and, failing agreement or, if in the sole judgment of my Trustees, any child of mine is not competent to make such an agreement, as equally as practicable, any of such articles not so divided to be added to the portion of my estate to be dealt with in accordance with the provisions of subparagraph 3(c) of this my Will;

Life Trust

(b) to allocate, set aside and maintain in respect of ■, as a separate trust fund from and out of the remaining assets in my estate a fund (hereinafter in this my Will referred to as the "Life Trust") the value or amount of which shall equal the sum of one dollar, provided that my Trustees shall have unfettered discretion and authority within thirty-six months of my death to add any other such remaining property or properties of mine to the Life Trust to be treated for all purposes as part thereof which they shall consider to be in the best interests of my estate and any one or more of the beneficiaries thereof, and any such exercise by my Trustees of the discretion and authority hereinbefore provided shall be binding on all the beneficiaries of my estate whether or not such would have the effect of conferring an advantage on one or more of the beneficiaries at the expense of any one or more of the other beneficiaries or could otherwise be considered but for the foregoing as not being an impartial exercise by my Trustees of their duties, powers and discretion under this my Will or as not maintaining an even hand among the beneficiaries, and to stand possessed of the capital and income of the Life Trust and to keep the same invested and to deal with the same as hereinafter provided:

- (i) to pay out of the property included in the Life Trust all estate, legacy, succession or other inheritance taxes or duties whether imposed by or pursuant to the laws of this or any province, state, country or jurisdiction whatsoever that may be payable in connection with the property comprising the Life Trust or any interest in the Life Trust, provided that the foregoing direction in this clause 3(b)(i) of this my Will shall not extend to nor include any such taxes or duties that may be payable by a purchaser or transferee in connection with any property transferred to or acquired by such purchaser or transferee on or after my death under any agreement made by me or any condition or restriction attaching to the transfer or acquisition of any such property; and I hereby authorize my Trustees in their unfettered discretion to commute or prepay any such taxes or duties or defer the payment of any such taxes or duties as they shall consider advisable;

- (ii) until the death of ■ to pay and transfer all of the income arising therefrom to ■ for her own use absolutely in such manner and in such convenient instalments as my Trustees shall in their unfettered discretion determine, with full power to pay and apply the whole or such part or parts of the capital of the Life Trust (or so much thereof as shall from time to time remain), as my Trustees shall from time to time in their unfettered discretion determine, to or for the benefit of ■ at such time or times and in such manner and in such amounts as my Trustees shall in their unfettered discretion determine; provided, however, that notwithstanding the foregoing provisions of this clause 3(b)(ii) of this my Will in the event that ■ shall become a sole Trustee of my estate, then at such time or times during which she may be a sole Trustee of my estate my Trustees shall make no payment or payments of any part or parts of the capital of the Life Trust to or for the benefit of ■; and

- (iii) on the death of ■ to hold the portion of the capital of the Life Trust which shall not have become vested in possession in ■ on or before her death in accordance with the provisions of this subparagraph 3(b) of this my Will for such period of time not exceeding two years (hereinafter referred to in this my Will as the "Continuation Period") as my Trustees in their unfettered discretion deem appropriate, and during the Continuation Period to pay the income arising during the Continuation Period to or for the benefit of my issue in equal shares *per stirpes* based upon my issue alive at the date of payment, or if my Trustees unanimously agree otherwise to pay and transfer such income to or for the benefit of one or more of my issue alive at the date of payment or payments, at such time or times and in such amounts as my Trustees shall in their unfettered discretion unanimously determine and immediately after the Continuation Period to add the said capital of the Life Trust to and to form part of the portion of my estate to be dealt with in accordance with the provisions of subparagraph 3(c) of this my Will, whether distributed or undistributed, to be treated for all purposes as a part thereof;

Remaining Residue

(c) to stand possessed of and keep invested the balance of the residue of my estate remaining after giving effect to the foregoing subparagraphs of this paragraph 3 of this my Will (hereinafter called the "Remaining Residue") and to deal with the same as hereinafter provided:

- (i) to pay all indebtedness for taxes, interest and penalties which are payable pursuant to the provisions of the *Income Tax Act* in respect of any taxation year of mine including the taxation year in which I shall die, all such indebtedness to be paid out of and be a charge on firstly the personal property and secondly the real property constituting the Remaining Residue, and I hereby authorize my Trustees to make any election or elections pursuant to the *Income Tax Act* in connection with the payment of any taxes pursuant thereto including without limiting the generality of the foregoing any election or elections to defer any or all of such taxes, or to pay any or all of such taxes in annual instalments, or any election or elections pursuant to subsection 164(6) of the *Income Tax Act*, which my Trustees in their unfettered discretion shall consider advisable;

- (ii) to pay my other just debts, funeral and testamentary expenses, and all estate, legacy, succession or inheritance duties and taxes (all of which duties and taxes are hereinafter in this clause 3(c)(ii) of this my Will collectively referred to as "Death Taxes") whether imposed by or pursuant to the laws of this or any province, state, country or jurisdiction whatsoever that may be payable in connection with any property passing on my death (or deemed so to pass by any governing law) or in connection with any proceeds, payments or distributions with respect to any insurance and/or annuities on my life or any gift or benefit given or conferred by me either in my lifetime or by survivorship or by this my Will or any Codicil thereto (all of which property, proceeds, payments, distributions, gifts and benefits are hereinafter in this clause 3(c)(ii) referred to collectively as "Taxable Benefits") and whether such Death Taxes be payable in respect of estates or interests which fall into possession at my death or at any subsequent time, all such debts, expenses and Death Taxes to be paid out of and be a charge on firstly the personal property and secondly the real property constituting the Remaining Residue; provided that the foregoing direction contained in this clause 3(c)(ii) shall not extend to nor include:
 - (A) any Death Taxes that may be payable by a purchaser or transferee in connection with any property transferred to or acquired by such purchaser or transferee on or after my death under any agreement made by me or any condition or restriction attaching to the transfer or acquisition of such property; or

- (B) any Death Taxes that may be payable in connection with Taxable Benefits passing on my death (or deemed so to pass by any governing law), transferred, given or conferred pursuant to the provisions of subparagraph 3(b) of this my Will;

and I hereby authorize my Trustees in their unfettered discretion to commute or prepay any such Death Taxes or defer the payment of any such Death Taxes as they shall consider advisable; and I further authorize my Trustees to determine in their discretion how my said just debts, funeral and testamentary expenses and Death Taxes shall be allocated between that part of my estate dealt with pursuant to this my Will in respect of my property other than my Corporate Properties and that part of my estate dealt with pursuant to my Will in respect of my Corporate Properties;

- (iii) until the death of ■ to pay and transfer all of the income arising from the Remaining Residue to ■, for her own use absolutely in such manner and in such convenient instalments as my Trustees shall in their unfettered discretion determine, with full power to pay and apply the whole or such part or parts of the capital of the Remaining Residue (or so much thereof as shall from time to time remain), as my Trustees shall from time to time in their unfettered discretion determine, to or for the benefit of any one or more of ■, my children and the issue of any deceased children of mine, alive at the date of such payment or payments, at such time or times and in such manner and in such amounts as my Trustees shall in their unfettered discretion determine; provided, however, that in the event ■ shall become a sole Trustee of my estate, then at such time or times during which she may be a sole Trustee of my estate my Trustees shall make no payment or payments of any part of parts of the capital of the Remaining Residue to or for the benefit of ■; and
- (iv) upon the death of the survivor of me and ■ to divide the balance of the Remaining Residue in equal shares *per stirpes* among my issue alive at the date of death of the survivor of me and ■, to hold each such share in a separate trust and to deal with the same in accordance with the terms and conditions set out in paragraph 4 of this my Will (such terms and conditions are hereinafter referred to in this my Will as the "Children's Trusts"); and

Gift Over

(d) In the event that ■ shall not survive me and all of my issue shall not survive me or shall die before my estate is absolutely vested in any one or more of them, on the death of the survivor of me, my said wife and all of my issue (the "Division Date") to divide the said residue in equal shares *per stirpes* among the issue of my sister, ■, alive at the Division Date, to hold each such share in a separate trust and to deal with the same in accordance with the Children's Trusts;

CHILDREN'S TRUSTS

Interpretation

4. (a) FOR THE PURPOSES of this paragraph 4 of this my Will, each share allocated to one of my issue pursuant to clause 3(c)(iv) of this my Will or to one of the issue of my sister, ■, pursuant to subparagraph 3(d) of this my Will is hereinafter referred to as a "Share" and the individual to whom each Share has been so allocated is hereinafter referred to as the "Beneficiary"; and

Provisions of Children's Trusts

(b) MY TRUSTEES shall hold each Share in trust:

Primary Trusts

(i) to pay and transfer to the Beneficiary one-quarter of the capital of the Share when he or she attains the age of twenty-five years for his or her own use absolutely, to pay and transfer to the Beneficiary one-third of the capital of the Share remaining when he or she attains the age of thirty years for his or her own use absolutely, and to pay and transfer to the Beneficiary all of the capital of the Share remaining when he or she attains the age of forty years for his or her own use absolutely and meanwhile to stand possessed of the capital and income of the Share and to pay or apply the whole or such part or parts of the capital and income thereof as my Trustees shall from time to time in their unfettered discretion determine to or for the benefit of the Beneficiary at such time or times and in such manner and in such amounts as my Trustees shall in their unfettered discretion from time to time determine necessary or advisable for any reason whatsoever and, until the expiration of the maximum period permitted by law for the accumulation of income, to accumulate and add to the capital of the Share for all purposes of this my Will any income not so paid or

applied in any year and to pay all such income arising after the expiration of that period to or for the benefit of the Beneficiary for his or her own use absolutely;

Death of Primary Beneficiary

- (ii) if at any time the Beneficiary shall die under the age of forty years before the whole of the capital of the Share shall have been fully distributed to divide and allocate the Share, or the part thereof then remaining, in equal portions *per stirpes*,
 - (A) where the Beneficiary is one of my issue, among the issue of the Beneficiary, if any, then alive or, failing such issue, among the issue of the parent of the Beneficiary who is me or one of my issue, if any, then alive, or failing such issue, among the issue of the grandparent of the Beneficiary who is me or one of my issue, if any, then alive, or failing such issue, among my other issue then alive;
 - (B) where the Beneficiary is one of the issue of my sister, ■, among the issue of the Beneficiary, if any, then alive or, failing such issue, among the issue of the parent of the Beneficiary who is my said sister or one of her issue, if any, then alive or, failing such issue, among the issue of the grandparent of the Beneficiary who is my said sister or one of her issue, if any, then alive, or failing such issue, among the other issue of my said sister then alive,

in each case in equal portions *per stirpes* and to deal with each such portion in accordance with the provisions of clause 4(b)(i) of this my Will as if references therein to the "Beneficiary" referred to such of issue of me or my said sister (as the case may be) to whom such portion shall have been so allocated and as if references in the said clause 4(b)(i) to a "Share" referred to such portion;

Death of More Remote Issue

- (iii) the provisions of clause 4(b)(ii) of this my Will shall apply *mutatis mutandis* on the death before attaining the age of forty years of any persons to whom a Share or portion of my estate has been allocated pursuant to clause 4(b)(ii) or clause 4(b)(iii) of this my Will; and

Perpetuity Provision

- (iv) notwithstanding any of the foregoing provisions of subparagraph 4(b) of this my Will, in the event that, on the twentieth (20th) anniversary (the "perpetuity date") of the death of the last survivor of me, my wife, ■, my said sister, ■, and all of the issue of me and my said sister alive at my death, any Share or portion shall be held by my Trustees in trust to apply the capital and income thereof in accordance with any of the foregoing provisions of this said subparagraph 4(b) for the benefit of any person who shall not then have attained the age of forty years, the beneficial interest of such person in the capital and income of such Share or portion shall thereupon vest absolutely in possession in such person for his or her own use absolutely as if such person had on the perpetuity date attained the age of forty years.

MINORS

Payments During Minority

5. (a) IF ANY BENEFICIARY shall acquire a vested interest in any share, portion, part or parts of my estate before attaining the age of majority, the interest of such beneficiary shall be held and kept invested by my Trustees and, subject to the applicable law against accumulations and the provisions of this my Will providing for distribution of any share, portion, part or parts of my estate later than upon a beneficiary attaining the age of majority, the income and capital, or so much thereof as my Trustees shall in their unfettered discretion determine necessary or advisable, shall be paid, applied or used for the benefit of such beneficiary until he or she attains the age of majority; and

Receipts

- (b) IN MAKING from time to time and at any time or times any payment or transfer to, or in applying any amounts to or for the benefit of, any beneficiary under the age of majority in accordance with the provisions of this my Will, my Trustees are hereby authorized and empowered to make such payment or transfer, or apply such amounts, to any one or more of the following persons:

- (i) such beneficiary;
- (ii) any parent of such beneficiary;
- (iii) the legal guardian of such beneficiary; and

- (iv) any other person or persons, whether or not the legal guardian of such beneficiary, who, in the sole and unfettered opinion of my Trustees, shall have the care and custody of such beneficiary;

and my Trustees shall not be under any obligation to see to the application of any funds so paid, transferred or applied and the receipt of the recipient thereof shall be a good and sufficient discharge to my Trustees.

POWERS OF SALE AND RETENTION

6. I AUTHORIZE my Trustees to use their unfettered discretion in the realization of my estate, with power to my Trustees to sell, call in and convert into money any part of my estate not consisting of money, at such time or times, in such manner and upon such terms and either for cash or credit or for part cash and part credit as my Trustees shall in their unfettered discretion decide, with power and discretion to decide against such conversion in connection with all or any part of my estate or to postpone such conversion of my estate or any part or parts thereof for such length of time as my Trustees may think best, and I hereby authorize and empower my Trustees to retain any portion of my estate in the form in which it may be at my death (notwithstanding that the same may not be in the form of an investment or investments in which trustees are by law authorized to invest trust funds and whether or not there may be any liability attached thereto) for such length of time as my Trustees may in their unfettered discretion deem to be in the best interests of my estate, and I declare that my Trustees, when making any investments for my estate or for any trust created in this my Will, shall not be limited to investments authorized by law for trustees but may make any investments which they consider advisable and my Trustees shall not be held responsible for any loss that may happen to my estate by reason of my Trustees so doing and I also declare that no property not in fact producing income shall be treated as producing income.

GENERAL ADMINISTRATIVE POWERS

7. IN ADDITION to all other powers vested in trustees by law or otherwise and without in any way restricting the general powers, discretions and authorities in this my Will given to my Trustees, my Trustees, without the interposition of any person entitled hereunder, shall have from time to time and at any time or times power, discretion and authority to deal with the assets of my estate (which for the purposes of the interpretation of this my Will shall include the assets held from time to time in any trust created in this my Will) as follows:

- (i) to invest the moneys of my estate (including moneys arising from the sale and conversion referred to in paragraph 6 of this my Will) in any

investment or investments and any units, shares or fractional interests in any mutual fund, unit trust or other investment corporation, trust or partnership whether such units, shares or fractional interests are widely held or are closely held by any one or more of the following, namely my Trustees, the beneficiaries and any other persons, trusts, corporations or other legally recognized entities and whether or not the purchase of such units, shares or fractional interests might otherwise be considered as a delegation of the powers conferred upon my Trustees, as involving a commingling of all or part of my estate with the assets, investments or property of other persons, estates or trusts or as in any other respect a breach of the fiduciary responsibilities of my Trustees, which my Trustees shall in their absolute discretion deem advantageous to my estate, not being limited to investments expressly authorized by law, including to make advances or loans, with or without security, to any person or persons, and in like manner from time to time to alter or vary such investments; I hereby exonerate my Trustees from any responsibility or liability for loss or damage which may be occasioned to my estate through a *bona fide* exercise by them of any of the discretions vested in them, whether as to retention, realization, conversion or investment;

- (ii) if at any time my Trustees hold in my estate any investment in or in connection with any company or corporation, to join in or take any action in connection with such investment or to exercise any rights, powers and privileges which at any time may exist or arise in connection with any such investment to the same extent and as fully as I could if I were alive and the sole owner of such investment and to retain as an investment of my estate for such length of time as in their discretion they deem advisable any asset or other interest whatsoever acquired by them through the exercise of the powers hereinbefore given to them;
- (iii) if at any time and for so long as any real or leasehold property shall form part of my estate, to sell or mortgage such property upon such terms and conditions as my Trustees think fit; to let or lease such property from month to month, year to year or for any term of months or years and subject to such covenants and conditions as my Trustees shall think fit; to accept surrenders of leases and tenancies; to expend money in repairs and improvements and generally to manage the property; and to give any options with respect to such property or properties as they may consider advisable;

- (iv) to renew and keep renewed any mortgage or mortgages upon any real estate forming part of my estate and to pay off or renegotiate any mortgage or mortgages which may be in existence at any time;
- (v) at any time and from time to time upon such terms and subject to such conditions as my Trustees see fit to borrow on behalf of my estate such amount or amounts as in their uncontrolled discretion they may deem necessary or advisable and for the repayment of any amount so borrowed to mortgage, pledge, hypothecate or otherwise charge any of the assets of my estate;
- (vi) to employ and remunerate any investment counsel or other investment advisors to assist them in investing the assets of my estate and the trusts created hereunder on such terms and with such delegated powers as they may consider advisable including, for greater certainty, delegated power to choose, acquire and dispose of investments from time to time and I DECLARE that my Trustees shall not be liable for any losses incurred as a consequence of the exercise, or failure to exercise, any such delegated powers by any such investment counsel or investment advisor;
- (vii) notwithstanding the references in this my Will to equal shares or a portion of my estate, to make any division of my estate or set aside or pay any share or interest therein, either wholly or in part, in such of the assets forming my estate at the time of my death or at the time of such division, setting aside or payment as my Trustees in their absolute discretion determine (even if the result of such determination is that one or more shares or interests in my estate do not have allocated, set aside or paid to or for them certain of my assets or a portion of certain of my assets in the same proportion as the value of such share or interest bears to the value of my estate), and I expressly will and declare that my Trustees shall in their absolute discretion fix the value of my estate or any part thereof for the purpose of making any such division, setting aside or payment and may in their absolute discretion calculate the liability for income tax assumed by a beneficiary who will have an interest in such assets, and take such liability into account in making any such division, and the decision of my Trustees shall be final and binding on all persons concerned whether or not such would have the effect of conferring an advantage on any one or more of the other beneficiaries or could otherwise be considered but for the foregoing as not being an impartial exercise by my Trustees of their duties, powers and discretions under this my Will or as not maintaining an even hand among the beneficiaries;

- (viii) to exercise all discretions and to make all designations, elections, determinations and applications under the *Income Tax Act*, as my Trustees shall in their absolute discretion think fit; providing that no election made for the purpose of the *Income Tax Act* by my Trustees shall create any right, entitlement or property in or to the assets of my estate which are the subject of any election, and provided further that the making of such an election by my Trustees shall not alter, reduce, limit or predetermine in any way any discretion, authority or power given to my Trustees under this my Will to determine the beneficiaries of the income, the capital, or both, of my estate;
- (ix) to appoint any one or more of my Trustees to sign all or any banking documents, stock transfers, receipts, promissory notes, negotiable instruments and any other documents of any kind required to be signed by my Trustees at any time; and
- (x) if at the time of my death I am liable as endorser, guarantor, surety or otherwise for any liability of any person or persons, to renew from time to time in the absolute discretion of my Trustees the bills, notes, guarantees or other securities or contracts evidencing such liability and for that purpose to enter into, execute or issue new bills, notes, guarantees or other securities or contracts for or on behalf of my estate; my intention in conferring upon my Trustees the powers and discretions by this subparagraph 7(x) of this my Will conferred is to give them such powers and authorities as will enable them to assist in the gradual liquidation of the liabilities which I may be under in order that the person or persons for whom I may be liable as aforesaid may not be unduly embarrassed.

FAMILY LAW ACT

8. I DECLARE that all property

- (i) acquired by a person as a result of my death; or
- (ii) acquired by a person as a result of a gift made by me,

together with any property into which such property can be traced, and all income from such property or properties into which such property can be traced, including income on such income, shall be excluded from such person's net family property for the purposes of Part I of the *Family Law Act*, Revised Statutes of Ontario 1990, Chapter F.3, as amended from time

to time and for the purposes of any provisions in any successor legislation or other legislation in any jurisdiction whatsoever. For the purposes of this paragraph 8, the term "net family property" includes any property available for division or for satisfying any financial claim, between spouses upon separation, divorce, annulment or death of one of them and, for greater certainty, such term includes any net family property within the meaning of the said *Family Law Act*. This declaration shall be an express statement within the meaning of paragraph 4(2)2 of the said *Family Law Act* and shall have effect to the extent permitted by that statute, any successor legislation thereto or any other legislation in any jurisdiction whatever.

CUSTODY AND GUARDIANSHIP OF PROPERTY

9. IN THE EVENT of the death of my wife, ■, and myself before all my children have attained the age of eighteen (18) years, I hereby appoint my mother-in-law, ■, to have custody of any infant child of mine and desire that she shall be the guardian of property of such infant children. If ■ does not survive me or otherwise is or becomes unable or unwilling to act as guardian and custodian, I APPOINT my friend, ■, to have custody of any infant child of mine and desire that he shall be the guardian of property of such infant children. In the event that ■ or ■ consents to have custody of any such infant child and be guardian of such child's property, I request him or her to apply to a court of competent jurisdiction within ninety days of my death for appointment as the custodian and the guardian of the property of such child. My Trustees shall, to the extent reasonable, assist ■ or ■ or any other person who may be appointed as the custodian and guardian of an infant child of mine by making available mortgage financing or by paying a portion of the mortgage or rental payments and other expenses to provide comfortable accommodation for my said infant children, including the payment of a nanny or housekeeper or other such assistance. I wish to emphasize to my Trustees that I consider it very important that my children not be separated from each other and that liberal payments be made to the custodian of my children, in order that a very happy home life should be created for my children while they are growing up. I desire my Trustees to place emphasis on the financial needs of the custodian during this period of time, rather than to be unduly concerned about the fact that any such payment would reduce the funds available to my children when reaching any age specified in this my Will.

CERTIFICATE OF APPOINTMENT

10. FOR GREATER CERTAINTY, I DECLARE that my Trustees shall have no obligation to obtain a grant of letters probate, a Certificate of Appointment of Estate Trustee or the equivalent thereof with respect to this my Will in any jurisdiction if, in their unfettered discretion, they determine that they will otherwise be able to perform their responsibilities hereunder and they shall not be liable for any loss suffered by my estate, or by any of the beneficiaries hereunder, as a consequence of their not obtaining a grant of letters probate, such certificate or the equivalent thereof.

NO REVOCATION OF CORPORATE PROPERTIES WILL

11. FOR GREATER CERTAINTY, nothing in this my Will shall revoke, or
override, any Will made by me on that purports to dispose
of my Corporate Properties.

IN TESTIMONY WHEREOF I have to this my Last Will and Testament,
written upon this page and the fourteen (14) preceding pages of paper, subscribed my name
this _____ day of _____, 200█.

SIGNED, PUBLISHED AND DECLARED)
by the said Testator, █,)
as and for his Last Will and Testament,)
in the presence of us, both present at the)
same time, who at his request, in his presence)
and in the presence of each other have)
hereunto subscribed our names as witnesses:) _____
█

Signature _____

Printed Name _____

Address _____

Occupation _____

Signature _____

Printed Name _____

Address _____

Occupation _____

PRECEDENT - CORPORATE PROPERTIES WILL

I, ■, DECLARE that this is my Last Will and Testament with respect to my Corporate Properties (as hereinafter defined).

REVOCATION

1. I HEREBY REVOKE all former Wills and other testamentary dispositions of every nature and kind whatsoever at any time heretofore made by me before 200■ and declare this to be and contain my Last Will and Testament with respect to my Corporate Properties (as hereinafter defined), and I hereby further declare that the within document is the only executed copy of my Last Will and Testament with respect to my said Corporate Properties.

Appointment of Executors

2. (a) I APPOINT my wife, ■, my friend, ■, and my friend, ■, to be the Executors and Trustees of this my Will, provided that in the event that my said wife shall not survive me or shall otherwise be or become unwilling or unable to act as an Executor and Trustee before the trusts hereof have been fully performed, I APPOINT my wife's mother, ■, to be Executor and Trustee in her place and stead; I DECLARE that the expression "my Trustees" used throughout this Will shall include, where the context permits, the Executor or Executors and Trustee or Trustees for the time being hereof, whether original, additional or substitutional; and I DECLARE that if any of the above-mentioned persons acts as an Executor and Trustee of this my Will, he or she shall not be required to post any bond or security for so acting;

Birth Outside Marriage

(b) ANY REFERENCES in this my Will to a "child", "children" or "issue" of a particular person include adopted persons but do not include a person born outside marriage nor a person who comes within the description traced through another person who was born outside marriage unless such person comes within the description by virtue of adoption. Notwithstanding the foregoing, a person born outside of marriage shall be considered to be born within marriage to his or her mother or father, as the case may be, for the purposes of this my Will where the person's mother or father, as the case may be, has, in the unanimous opinion of my Trustees, demonstrated a settled intention to treat the person as his or her child; and

Definitions

(c) I DECLARE THAT in this my Will the following terms shall be interpreted in accordance with the following rules:

- (i) "Corporate Properties" shall mean any shares or securities, including debt obligations, of ■ Inc. or any shares or securities into which such shares or securities may be converted, changed, reclassified, re-divided, re-designated, subdivided or consolidated, any shares or securities of ■ Inc. which are received by me as a stock dividend or distribution payable in shares or securities of ■ Inc. and any shares or securities of ■ Inc. or of any successor or continuing company or corporation to ■ Inc. which may be received by me on an issuance, a reorganization, amalgamation, consolidation or merger, statutory or otherwise;
- (ii) "my property" and "my estate" shall, unless the context otherwise requires, include only my Corporate Properties; and
- (iii) "Income Tax Act", or any reference to a specific provision or specific provisions thereof, shall mean the *Income Tax Act*, Revised Statutes of Canada 1985, Fifth Supplement, as amended, or such provision or provisions, as the case may be, as amended from time to time, or any legislation of the Parliament of Canada from time to time in force of like or similar effect, and any legislation of any legislature of any province of Canada (including without limiting the generality of the foregoing the *Income Tax Act*, Revised Statutes of Ontario 1990, Chapter 1.2) from time to time in force of like or similar effect.

DISPOSITIVE PROVISIONS

3. I GIVE, DEVISE AND BEQUEATH all of my Corporate Properties to my Trustees upon the following trusts, namely:

Life Trust

(a) to allocate, set aside and maintain in respect of ■, as a separate trust fund from and out of the remaining assets in my estate a fund (hereinafter in this my Will referred to as the "Life Trust") the value or amount of which shall equal the sum of one dollar, provided that my Trustees shall have unfettered discretion and authority within thirty-six months of my death to add any other such remaining property or properties of mine to the

Life Trust to be treated for all purposes as part thereof which they shall consider to be in the best interests of my estate and any one or more of the beneficiaries thereof, and any such exercise by my Trustees of the discretion and authority hereinbefore provided shall be binding on all the beneficiaries of my estate whether or not such would have the effect of conferring an advantage on one or more of the beneficiaries at the expense of any one or more of the other beneficiaries or could otherwise be considered but for the foregoing as not being an impartial exercise by my Trustees of their duties, powers and discretion under this my Will or as not maintaining an even hand among the beneficiaries, and to stand possessed of the capital and income of the Life Trust and to keep the same invested and to deal with the same as hereinafter provided:

- (i) to pay out of the property included in the Life Trust all estate, legacy, succession or other inheritance taxes or duties whether imposed by or pursuant to the laws of this or any province, state, country or jurisdiction whatsoever that may be payable in connection with the property comprising the Life Trust or any interest in the Life Trust, provided that the foregoing direction in this clause 3(a)(i) of this my Will shall not extend to nor include any such taxes or duties that may be payable by a purchaser or transferee in connection with any property transferred to or acquired by such purchaser or transferee on or after my death under any agreement made by me or any condition or restriction attaching to the transfer or acquisition of any such property; and I hereby authorize my Trustees in their unfettered discretion to commute or prepay any such taxes or duties or defer the payment of any such taxes or duties as they shall consider advisable;
- (ii) until the death of ■ to pay and transfer all of the income arising therefrom to ■ for her own use absolutely in such manner and in such convenient instalments as my Trustees shall in their unfettered discretion determine, with full power to pay and apply the whole or such part or parts of the capital of the Life Trust (or so much thereof as shall from time to time remain), as my Trustees shall from time to time in their unfettered discretion determine, to or for the benefit of ■ at such time or times and in such manner and in such amounts as my Trustees shall in their unfettered discretion determine; provided, however, that notwithstanding the foregoing provisions of this clause 3(a)(ii) of this my Will in the event that ■ shall become a sole Trustee of my estate, then at such time or times during which she may be a sole Trustee of my estate my Trustees shall make no payment or payments of any part or parts of the capital of the Life Trust to or for the benefit of ■; and

- (iii) on the death of ■ to hold the portion of the capital of the Life Trust which shall not have become vested in possession in ■ on or before her death in accordance with the provisions of this subparagraph 3(a) of this my Will for such period of time not exceeding two years (hereinafter referred to in this my Will as the "Continuation Period") as my Trustees in their unfettered discretion deem appropriate, and during the Continuation Period to pay the income arising during the Continuation Period to or for the benefit of my issue in equal shares *per stirpes* based upon my issue alive at the date of payment, or if my Trustees unanimously agree otherwise to pay and transfer such income to or for the benefit of one or more of my issue alive at the date of payment or payments, at such time or times and in such amounts as my Trustees shall in their unfettered discretion unanimously determine and immediately after the Continuation Period to add the said capital of the Life Trust to and to form part of the portion of my estate to be dealt with in accordance with the provisions of subparagraph 3(b) of this my Will, whether distributed or undistributed, to be treated for all purposes as a part thereof;

Remaining Residue

(b) to stand possessed of and keep invested the balance of the residue of my estate remaining after giving effect to the foregoing subparagraphs of this paragraph 3 of this my Will (hereinafter called the "Remaining Residue") and to deal with the same as hereinafter provided:

- (i) to pay all indebtedness for taxes, interest and penalties which are payable pursuant to the provisions of the *Income Tax Act* in respect of any taxation year of mine including the taxation year in which I shall die, all such indebtedness to be paid out of and be a charge on firstly the personal property and secondly the real property constituting the Remaining Residue, and I hereby authorize my Trustees to make any election or elections pursuant to the *Income Tax Act* in connection with the payment of any taxes pursuant thereto including without limiting the generality of the foregoing any election or elections to defer any or all of such taxes, or to pay any or all of such taxes in annual instalments, or any election or elections pursuant to subsection 164(6) of the *Income Tax Act*, which my Trustees in their unfettered discretion shall consider advisable;
- (ii) to pay my other just debts, funeral and testamentary expenses, and all estate, legacy, succession or inheritance duties and taxes (all of which duties and taxes are hereinafter in this clause 3(b)(ii) of this my Will

collectively referred to as "Death Taxes") whether imposed by or pursuant to the laws of this or any province, state, country or jurisdiction whatsoever that may be payable in connection with any property passing on my death (or deemed so to pass by any governing law) or in connection with any proceeds, payments or distributions with respect to any insurance and/or annuities on my life or any gift or benefit given or conferred by me either in my lifetime or by survivorship or by this my Will or any Codicil thereto (all of which property, proceeds, payments, distributions, gifts and benefits are hereinafter in this clause 3(b)(ii) referred to collectively as "Taxable Benefits") and whether such Death Taxes be payable in respect of estates or interests which fall into possession at my death or at any subsequent time, all such debts, expenses and Death Taxes to be paid out of and be a charge on firstly the personal property and secondly the real property constituting the Remaining Residue; provided that the foregoing direction contained in this clause 3(b)(ii) shall not extend to nor include:

- (A) any Death Taxes that may be payable by a purchaser or transferee in connection with any property transferred to or acquired by such purchaser or transferee on or after my death under any agreement made by me or any condition or restriction attaching to the transfer or acquisition of such property; or
- (B) any Death Taxes that may be payable in connection with Taxable Benefits passing on my death (or deemed so to pass by any governing law), transferred, given or conferred pursuant to the provisions of subparagraph 3(a) of this my Will;

and I hereby authorize my Trustees in their unfettered discretion to commute or prepay any such Death Taxes or defer the payment of any such Death Taxes as they shall consider advisable; and I further authorize my Trustees to determine in their discretion how my said just debts, funeral and testamentary expenses and Death Taxes shall be allocated between that part of my estate dealt with pursuant to this my Will in respect of my Corporate Properties and that part of my estate dealt with pursuant to my Will in respect of my property other than my Corporate Properties;

- (iii) until the death of ■ to pay and transfer all of the income arising from the Remaining Residue to ■, for her own use absolutely in such

manner and in such convenient instalments as my Trustees shall in their unfettered discretion determine, with full power to pay and apply the whole or such part or parts of the capital of the Remaining Residue (or so much thereof as shall from time to time remain), as my Trustees shall from time to time in their unfettered discretion determine, to or for the benefit of any one or more of ■, my children and the issue of any deceased children of mine, alive at the date of such payment or payments, at such time or times and in such manner and in such amounts as my Trustees shall in their unfettered discretion determine; provided, however, that in the event ■ shall become a sole Trustee of my estate, then at such time or times during which she may be a sole Trustee of my estate my Trustees shall make no payment or payments of any part of parts of the capital of the Remaining Residue to or for the benefit of ■; and

- (iv) upon the death of the survivor of me and ■ to divide the balance of the Remaining Residue in equal shares *per stirpes* among my issue alive at the date of death of the survivor of me and ■, to hold each such share in a separate trust and to deal with the same in accordance with the terms and conditions set out in paragraph 4 of this my Will (such terms and conditions are hereinafter referred to in this my Will as the "Children's Trusts"); and

Gift Over

(c) In the event that ■ shall not survive me and all of my issue shall not survive me or shall die before my estate is absolutely vested in any one or more of them, on the death of the survivor of me, my said wife and all of my issue (the "Division Date") to divide the said residue in equal shares *per stirpes* among the issue of my sister, ■, alive at the Division Date, to hold each such share in a separate trust and to deal with the same in accordance with the Children's Trusts;

CHILDREN'S TRUSTS

Interpretation

4. (a) FOR THE PURPOSES of this paragraph 4 of this my Will, each share allocated to one of my issue pursuant to clause 3(b)(iv) of this my Will or to one (1) of the issue of my sister, ■, pursuant to subparagraph 3(c) of this my Will is hereinafter referred to as a "Share" and the individual to whom each Share has been so allocated is hereinafter referred to as the "Beneficiary"; and

Provisions of Children's Trusts

- (b) MY TRUSTEES shall hold each Share in trust:

Primary Trusts

- (i) to pay and transfer to the Beneficiary one-quarter of the capital of the Share when he or she attains the age of twenty-five years for his or her own use absolutely, to pay and transfer to the Beneficiary one-third of the capital of the Share remaining when he or she attains the age of thirty years for his or her own use absolutely, and to pay and transfer to the Beneficiary all of the capital of the Share remaining when he or she attains the age of forty years for his or her own use absolutely and meanwhile to stand possessed of the capital and income of the Share and to pay or apply the whole or such part or parts of the capital and income thereof as my Trustees shall from time to time in their unfettered discretion determine to or for the benefit of the Beneficiary at such time or times and in such manner and in such amounts as my Trustees shall in their unfettered discretion from time to time determine necessary or advisable for any reason whatsoever and, until the expiration of the maximum period permitted by law for the accumulation of income, to accumulate and add to the capital of the Share for all purposes of this my Will any income not so paid or applied in any year and to pay all such income arising after the expiration of that period to or for the benefit of the Beneficiary for his or her own use absolutely;

Death of Primary Beneficiary

- (ii) if at any time the Beneficiary shall die under the age of forty years before the whole of the capital of the Share shall have been fully distributed to divide and allocate the Share, or the part thereof then remaining, in equal portions *per stirpes*,
- (A) where the Beneficiary is one of my issue, among the issue of the Beneficiary, if any, then alive or, failing such issue, among the issue of the parent of the Beneficiary who is me or one of my issue, if any, then alive, or failing such issue, among the issue of the grandparent of the Beneficiary who is me or one of my issue, if any, then alive, or failing such issue, among my other issue then alive;

- (B) where the Beneficiary is one of the issue of my sister, ■, among the issue of the Beneficiary, if any, then alive or, failing such issue, among the issue of the parent of the Beneficiary who is my said sister or one of her issue, if any, then alive or, failing such issue, among the issue of the grandparent of the Beneficiary who is my said sister or one of her issue, if any, then alive, or failing such issue, among the other issue of my said sister then alive,

in each case in equal portions *per stirpes* and to deal with each such portion in accordance with the provisions of clause 4(b)(i) of this my Will as if references therein to the "Beneficiary" referred to such of issue of me or my said sister (as the case may be) to whom such portion shall have been so allocated and as if references in the said clause 4(b)(i) to a "Share" referred to such portion;

Death of More Remote Issue

- (iii) the provisions of clause 4(b)(ii) of this my Will shall apply *mutatis mutandis* on the death before attaining the age of forty years of any persons to whom a Share or portion of my estate has been allocated pursuant to clause 4(b)(ii) or clause 4(b)(iii) of this my Will; and

Perpetuity Provision

- (iv) notwithstanding any of the foregoing provisions of subparagraph 4(b) of this my Will, in the event that, on the twentieth (20th) anniversary (the "perpetuity date") of the death of the last survivor of me, my wife, ■, my said sister, ■, and all of the issue of me and my said sister alive at my death, any Share or portion shall be held by my Trustees in trust to apply the capital and income thereof in accordance with any of the foregoing provisions of this said subparagraph 4(b) for the benefit of any person who shall not then have attained the age of forty years, the beneficial interest of such person in the capital and income of such Share or portion shall thereupon vest absolutely in possession in such person for his or her own use absolutely as if such person had on the perpetuity date attained the age of forty years.

MINORS

Payments During Minority

5. (a) IF ANY BENEFICIARY shall acquire a vested interest in any share, portion, part or parts of my estate before attaining the age of majority, the interest of such beneficiary shall be held and kept invested by my Trustees and, subject to the applicable law against accumulations and the provisions of this my Will providing for distribution of any share, portion, part or parts of my estate later than upon a beneficiary attaining the age of majority, the income and capital, or so much thereof as my Trustees shall in their unfettered discretion determine necessary or advisable, shall be paid, applied or used for the benefit of such beneficiary until he or she attains the age of majority; and

Receipts

(b) IN MAKING from time to time and at any time or times any payment or transfer to, or in applying any amounts to or for the benefit of, any beneficiary under the age of majority in accordance with the provisions of this my Will, my Trustees are hereby authorized and empowered to make such payment or transfer, or apply such amounts, to any one or more of the following persons:

- (i) such beneficiary;
- (ii) any parent of such beneficiary;
- (iii) the legal guardian of such beneficiary; and
- (iv) any other person or persons, whether or not the legal guardian of such beneficiary, who, in the sole and unfettered opinion of my Trustees, shall have the care and custody of such beneficiary;

and my Trustees shall not be under any obligation to see to the application of any funds so paid, transferred or applied and the receipt of the recipient thereof shall be a good and sufficient discharge to my Trustees.

POWERS OF SALE AND RETENTION

6. I AUTHORIZE my Trustees to use their unfettered discretion in the realization of my estate, with power to my Trustees to sell, call in and convert into money any part of my estate not consisting of money, at such time or times, in such manner and upon such terms and either for cash or credit or for part cash and part credit as my Trustees shall in their unfettered discretion decide, with power and discretion to decide against such

conversion in connection with all or any part of my estate or to postpone such conversion of my estate or any part or parts thereof for such length of time as my Trustees may think best, and I hereby authorize and empower my Trustees to retain any portion of my estate in the form in which it may be at my death (notwithstanding that the same may not be in the form of an investment or investments in which trustees are by law authorized to invest trust funds and whether or not there may be any liability attached thereto) for such length of time as my Trustees may in their unfettered discretion deem to be in the best interests of my estate, and I declare that my Trustees, when making any investments for my estate or for any trust created in this my Will, shall not be limited to investments authorized by law for trustees but may make any investments which they consider advisable and my Trustees shall not be held responsible for any loss that may happen to my estate by reason of my Trustees so doing and I also declare that no property not in fact producing income shall be treated as producing income.

GENERAL ADMINISTRATIVE POWERS

7. **IN ADDITION** to all other powers vested in trustees by law or otherwise and without in any way restricting the general powers, discretions and authorities in this my Will given to my Trustees, my Trustees, without the interposition of any person entitled hereunder, shall have from time to time and at any time or times power, discretion and authority to deal with the assets of my estate (which for the purposes of the interpretation of this my Will shall include the assets held from time to time in any trust created in this my Will) as follows:

- (i) to invest the moneys of my estate (including moneys arising from the sale and conversion referred to in paragraph 6 of this my Will) in any investment or investments and any units, shares or fractional interests in any mutual fund, unit trust or other investment corporation, trust or partnership whether such units, shares or fractional interests are widely held or are closely held by any one or more of the following, namely my Trustees, the beneficiaries and any other persons, trusts, corporations or other legally recognized entities and whether or not the purchase of such units, shares or fractional interests might otherwise be considered as a delegation of the powers conferred upon my Trustees, as involving a commingling of all or part of my estate with the assets, investments or property of other persons, estates or trusts or as in any other respect a breach of the fiduciary responsibilities of my Trustees, which my Trustees shall in their absolute discretion deem advantageous to my estate, not being limited to investments expressly authorized by law, including to make advances or loans, with or without security, to any person or persons, and in like manner from time to time to alter or vary such

investments; I hereby exonerate my Trustees from any responsibility or liability for loss or damage which may be occasioned to my estate through a *bona fide* exercise by them of any of the discretions vested in them, whether as to retention, realization, conversion or investment;

- (ii) if at any time my Trustees hold in my estate any investment in or in connection with any company or corporation, to join in or take any action in connection with such investment or to exercise any rights, powers and privileges which at any time may exist or arise in connection with any such investment to the same extent and as fully as I could if I were alive and the sole owner of such investment and to retain as an investment of my estate for such length of time as in their discretion they deem advisable any asset or other interest whatsoever acquired by them through the exercise of the powers hereinbefore given to them;
- (iii) if at any time and for so long as any real or leasehold property shall form part of my estate, to sell or mortgage such property upon such terms and conditions as my Trustees think fit; to let or lease such property from month to month, year to year or for any term of months or years and subject to such covenants and conditions as my Trustees shall think fit; to accept surrenders of leases and tenancies; to expend money in repairs and improvements and generally to manage the property; and to give any options with respect to such property or properties as they may consider advisable;
- (iv) to renew and keep renewed any mortgage or mortgages upon any real estate forming part of my estate and to pay off or renegotiate any mortgage or mortgages which may be in existence at any time;
- (v) at any time and from time to time upon such terms and subject to such conditions as my Trustees see fit to borrow on behalf of my estate such amount or amounts as in their uncontrolled discretion they may deem necessary or advisable and for the repayment of any amount so borrowed to mortgage, pledge, hypothecate or otherwise charge any of the assets of my estate;
- (vi) to employ and remunerate any investment counsel or other investment advisors to assist them in investing the assets of my estate and the trusts created hereunder on such terms and with such delegated powers as they may consider advisable including, for greater certainty, delegated power to choose, acquire and dispose of

investments from time to time and I DECLARE that my Trustees shall not be liable for any losses incurred as a consequence of the exercise, or failure to exercise, any such delegated powers by any such investment counsel or investment advisor,

- (vii) notwithstanding the references in this my Will to equal shares or a portion of my estate, to make any division of my estate or set aside or pay any share or interest therein, either wholly or in part, in such of the assets forming my estate at the time of my death or at the time of such division, setting aside or payment as my Trustees in their absolute discretion determine (even if the result of such determination is that one or more shares or interests in my estate do not have allocated, set aside or paid to or for them certain of my assets or a portion of certain of my assets in the same proportion as the value of such share or interest bears to the value of my estate), and I expressly will and declare that my Trustees shall in their absolute discretion fix the value of my estate or any part thereof for the purpose of making any such division, setting aside or payment and may in their absolute discretion calculate the liability for income tax assumed by a beneficiary who will have an interest in such assets, and take such liability into account in making any such division, and the decision of my Trustees shall be final and binding on all persons concerned whether or not such would have the effect of conferring an advantage on any one or more of the other beneficiaries or could otherwise be considered but for the foregoing as not being an impartial exercise by my Trustees of their duties, powers and discretions under this my Will or as not maintaining an even hand among the beneficiaries;
- (viii) to exercise all discretions and to make all designations, elections, determinations and applications under the *Income Tax Act*, as my Trustees shall in their absolute discretion think fit; providing that no election made for the purpose of the *Income Tax Act* by my Trustees shall create any right, entitlement or property in or to the assets of my estate which are the subject of any election, and provided further that the making of such an election by my Trustees shall not alter, reduce, limit or predetermine in any way any discretion, authority or power given to my Trustees under this my Will to determine the beneficiaries of the income, the capital, or both, of my estate;
- (ix) to appoint any one or more of my Trustees to sign all or any banking documents, stock transfers, receipts, promissory notes, negotiable instruments and any other documents of any kind required to be signed by my Trustees at any time; and

- (x) if at the time of my death I am liable as endorser, guarantor, surety or otherwise for any liability of any person or persons, to renew from time to time in the absolute discretion of my Trustees the bills, notes, guarantees or other securities or contracts evidencing such liability and for that purpose to enter into, execute or issue new bills, notes, guarantees or other securities or contracts for or on behalf of my estate; my intention in conferring upon my Trustees the powers and discretions by this subparagraph 7(x) of this my Will conferred is to give them such powers and authorities as will enable them to assist in the gradual liquidation of the liabilities which I may be under in order that the person or persons for whom I may be liable as aforesaid may not be unduly embarrassed.

FAMILY LAW ACT

8. I DECLARE that all property

- (i) acquired by a person as a result of my death; or
- (ii) acquired by a person as a result of a gift made by me,

together with any property into which such property can be traced, and all income from such property or properties into which such property can be traced, including income on such income, shall be excluded from such person's net family property for the purposes of Part I of the *Family Law Act*, Revised Statutes of Ontario 1990, Chapter F.3, as amended from time to time and for the purposes of any provisions in any successor legislation or other legislation in any jurisdiction whatsoever. For the purposes of this paragraph 8, the term "net family property" includes any property available for division or for satisfying any financial claim, between spouses upon separation, divorce, annulment or death of one of them and, for greater certainty, such term includes any net family property within the meaning of the said *Family Law Act*. This declaration shall be an express statement within the meaning of paragraph 4(2)2 of the said *Family Law Act* and shall have effect to the extent permitted by that statute, any successor legislation thereto or any other legislation in any jurisdiction whatever.

CUSTODY AND GUARDIANSHIP OF PROPERTY

9. IN THE EVENT of the death of my wife, ■, and myself before all my children have attained the age of eighteen (18) years, I hereby appoint my mother-in-law, ■, to have custody of any infant child of mine and desire that she shall be the guardian of

property of such infant children. If ■ does not survive me or otherwise is or becomes unable or unwilling to act as guardian and custodian, I APPOINT my friend, ■, to have custody of any infant child of mine and desire that he shall be the guardian of property of such infant children. In the event that ■ or ■ consents to have custody of any such infant child and be guardian of such child's property, I request him or her to apply to a court of competent jurisdiction within ninety (90) days of my death for appointment as the custodian and the guardian of the property of such child. My Trustees shall, to the extent reasonable, assist ■ or ■ or any other person who may be appointed as the custodian and guardian of an infant child of mine by making available mortgage financing or by paying a portion of the mortgage or rental payments and other expenses to provide comfortable accommodation for my said infant children, including the payment of a nanny or housekeeper or other such assistance. I wish to emphasize to my Trustees that I consider it very important that my children not be separated from each other and that liberal payments be made to the custodian of my children, in order that a very happy home life should be created for my children while they are growing up. I desire my Trustees to place emphasis on the financial needs of the custodian during this period of time, rather than to be unduly concerned about the fact that any such payment would reduce the funds available to my children when reaching any age specified in this my Will.

CERTIFICATE OF APPOINTMENT

10. FOR GREATER CERTAINTY, I DECLARE that my Trustees shall have no obligation to obtain a grant of letters probate, a Certificate of Appointment of Estate Trustee or the equivalent thereof with respect to this my Will in any jurisdiction if, in their unfettered discretion, they determine that they will otherwise be able to perform their responsibilities hereunder and they shall not be liable for any loss suffered by my estate, or by any of the beneficiaries hereunder, as a consequence of their not obtaining a grant of letters probate, such certificate or the equivalent thereof.

NO REVOCATION OF GENERAL WILL

11. FOR GREATER CERTAINTY, nothing in this my Will shall revoke, or
override, any Will made by me on that purports to dispose
of my property other than my Corporate Properties.

IN TESTIMONY WHEREOF I have to this my Last Will and Testament,
written upon this page and the fourteen (14) preceding pages of paper, subscribed my name
this _____ day of _____, 200█.

SIGNED, PUBLISHED AND DECLARED)
by the said Testator, █,)
as and for his Last Will and Testament,)
in the presence of us, both present at the)
same time, who at his request, in his presence)
and in the presence of each other have)
hereunto subscribed our names as witnesses:) _____
█

Signature _____

Printed Name _____

Address _____

Occupation _____

Signature _____

Printed Name _____

Address _____

Occupation _____