

LEGAL EDUCATION SOCIETY OF ALBERTA

DRAFTING CONSIDERATIONS

WILLS AND ESTATES BOOT CAMP

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DRAFTING CONSIDERATIONS

I. INTRODUCTION

This is a very brief explanation of the essential considerations in drafting Wills, Enduring Powers of Attorney and Personal Directives. The fundamental approach to drafting any such documents is firstly, to ensure that they reflect the client's needs and wishes and, secondly, from the perspective of the party which will be named to carry out those wishes, whether the personal representative, attorney or agent, as to whether those wishes can be fulfilled based on the powers which have been given to that party. It is also important to make these documents as understandable as possible for both the party putting the document into place (i.e. the testator) and to the party charged with carrying out that intent (i.e. the personal representative) and, therefore, as much clear common language as possible should be employed. Obviously, there is less risk in omitting essential clauses if a standard structure is used for these documents as a starting point and it is then customized for the client and their particular circumstances.

II. WILLS

In drafting a Will, it is normally broken down into four essential sections:

1. Preliminary Matters
 - Revocation
 - Appoint personal representatives
 - Instructions regarding remains
 - Designations of beneficiaries for insurance/registered plans and dealing with RESP's/RDSP's
 - Guardianship
 - "Survivorship" definition

2. Disposition of the Estate
 - all property appointed and given to personal representatives subject to trusts
 - Debts + taxes paid

- Household and personal property
- Legacies and bequests
- Residue – insure that no risk of intestacy

3. Administrative Powers

- Realization – ability to liquidate assets
- General trust for minors
- Payments for Minors
- Capitalization of Income
- Distribution in Kind
- Investment Powers
- Borrowing to Facilitate Administration
- Deal with Real Property
- Deal with Claims against estate
- Businesses and Corporations
- Employ Agents
- Custodians
- Apportion Assets – capital vs. income
- Renew Security
- Tax Elections + Determinations
- Compensation of PR
- Forgiveness of Debts
- Receipt by charities
- Maintenance Obligations
- Challenges
- Acknowledgement of spouse/child not taking under the Will

4. Execution

Each of these sections is important in its own right and failure to deal with any of these sections properly can result in an invalid or unworkable Will.