DRAFTING WILL PROVISIONS

by

MICHAEL E. O'CONNOR, ESQ.

DeLaney & O'Connor, LLP
Syracuse

DRAFTING WILL PROVISIONS
Table of Contents

DRAFTING WILL PROVISIONS

Michael E. O'Connor Esq
DeLaney & O'Connor, LLP
Syracuse, NY 13202

I. GENERALLY

A. Do not simply reduce the client's wishes to writing. Advise on disadvantages of desired provisions. (Expense of administration, vagueness, ruling from grave)

B. Be sure to develop exact extent and nature of assets.

C. Where testator has insurance policies, inquire into alternate beneficiaries, particularly if there are minor children. Infants should not be named beneficiaries.

II. CHOICE OF FORMS

A. Banks provide form books and books are available from publishers.

B. Develop your own forms for common clauses from all sources.

1. Wording will be consistent in all cases.

2. You can reduce those clauses which you use most often to forms so as to save time in Will drafting and avoid remembering when you last used the wording you want.

3. Eliminates extensive dictation, copying and opportunity for mistakes.

4. Reduces stylistic and grammatical differences which would make the Will look like it came from forms.

5. If you have word processing equipment, it streamlines Will drafting and speeds it up.

6. BEWARE of blindly following forms however. Each clause in each Will must be considered for appropriateness.

III. COMPLEXITY

A. Greatest volume of litigation in Surrogate's Court stems from deficiencies in Will drafting or estate planning.

B. Treat potential problems, not just the present problems. For example, if there is any possibility of an infant coming into a share, some provision should be made for handling that share. Do the job, don't save paper.

IV. WILL VS. REVOCABLE TRUST

A. General Treatment: When a revocable trust is used as the centerpiece of an estate plan, it is important that the disposition of property be handled with care. For example, a bequest under a Will would be impossible to carry out if all or substantially all of the client's assets were held in a revocable trust. It is generally preferable therefore that everything passing to a beneficiary be defined in the revocable trust and not in the Will.

1. Non-dispository language, such as a tax apportionment clause, should be considered between the Will and revocable trust carefully. First, similar provisions should not conflict with one another. Secondly, if tax is being paid from a fund, it should be one arising in the trust rather than under the Will. The Will may pass nothing if the trust is fully funded.

B. Revocation of Trust: Even though a trust is created at the time the Will is signed, and the trust is valid, it may not be at death. In addition to pouring over property from the estate into the revocable trust, the Will should provide an alternative disposition in the event the trust has been revoked. That alternative disposition in the Will would, presumably, be the same disposition as called for in the trust.

1. If the client makes dispositive amendments to the trust, the same amendments should be incorporated in a new Will each time, so as to keep them consistent.

SAMPLE PROVISION - Pour over Will.

XX : All the residue of my estate, both real and personal and wheresoever situate, I give, devise and bequeath to the Trustee of a living trust created under an agreement which I have executed immediately before my execution of this will, which is designated the JOHN DOE TRUST. If the living trust has terminated at my death, or if it is ineffective for any other reason, then I give the residue to my wife, MARY P. CLIENT, if she is living, or if not to my children then living and the issue of any deceased child, per stirpes.

V. GENERAL & SPECIFIC BEQUESTS

A. Types of Pre-Residuary Transfers: Pre-residuary gifts under a Will generally fall into 3 categories. They are specific, general or demonstrative dispositions.

1. Specific Gift: A gift of personal property or real property owned by the decedent and specifically identified in a devise or bequest is a specific gift. *EPTL §1-2.16.*

PRACTICE NOTE: The client should be discouraged from disposing of an entire estate by a series of specific bequests. The disposition of a bank account or general securities account is almost always inappropriate. Making such gifts allows an agent under a power of attorney or a guardian to manipulate the estate plan by depositing to or withdrawing from accounts specifically bequeathed. It also allows changes in the dispository plan by the client's mistake.

a. Ademption: If the decedent does not own the item specifically gifted at the time of death, then the gift fails. EPTL §3-4.3 An exception to this would occur where the specifically gifted property is lost or damaged and insurance proceeds are payable to the estate as a result. *EPTL §3-4.5.* Or if the committee or conservator of an incapacitated person transfers the specifically gifted property prior to death, in which case, the traceable proceeds pass to the beneficiary. *EPTL §3-4.4.*

b. Anti-Lapse Statute: When a testamentary benefit is provided for issue or brothers or sisters of a testator, the default rule is that the bequest does not lapse. For instruments executed prior to September 1, 1992, the benefit would pass to the surviving issue of the deceased, per stirpes. *EPTL §3-3.3(a)(1).* In the case of instruments executed on or after September 1, 1992, the issue of a deceased take by representation. *EPTL. §3-3.3(a)(2).*

PRACTICE NOTE: While gifts to issue, brothers or sisters may be intended by the client not to lapse, that is not always so. For example, a gift of a specific item of tangible property may be meant exclusively for the benefit of that beneficiary. If the intent is for the gift to lapse if the beneficiary dies, it should be specifically stated. Similarly, if a named alternate is intended, it should be stated.

2. General Gift: A general bequest is a gift of a dollar amount. It comes out of the general estate after payment of tax, debts and expenses of the estate. Since the gift does not look to any specific property, it does not adeem if the nature of the assets change.

a. Abatement of Dispositions: All of the property of a decedent is

subject to payment of administration and funeral expenses, debts of the decedent and taxes which the estate may owe. *EPTL. §13-1.3.* The expense of the estate obligations are applied to dispositions in the priority provided by the statute. *EPTL. §13-1.3(c)*. The expenses are applied to the following shares until they are fully consumed, at which time the expenses would begin being born by the subsequent share:

i. Distributive shares which pass by intestacy (not disposed of by Will).

ii. Residuary dispositions.

iii. General dispositions.

iv. Specific dispositions.

v. Any disposition to a surviving spouse which qualifies for the estate tax marital deduction.

b. Protecting Residue: Often clients are choosing the amount of general bequests so that the total of such bequests leaves a substantial residue. The residual beneficiary is typically the one of most importance to the client. Consideration should be given to limiting the general bequest by defining it as the *lesser* of the dollar amount or a percentage of the estate. If the estate shrinks to the point where the general bequests are too large, then the residual beneficiary would be entitled only to the percentage. Alternatively, the residuary beneficiary can be given a general bequest which would assume some priority, if the estate shrinks.

3. Demonstrative Disposition: A demonstrative disposition is a gift of property to be taken out of specific or identified property. *EPTL. §1-2.3.* Like a specific bequest, a demonstrative gift will fail if the subject property is not owned at death. It also may fail because of the need to use the property to pay the expenses of the estate. In that case however, a demonstrative disposition will have the same priority as a specific gift, thus staying in tact until all general bequests and residuary dispositions have been consumed. *EPTL. §13-1.3*.

a. Example: An example of a demonstrative gift would be "I direct that all of my shares of General Electric Co. common stock be sold and that the sum of Five Thousand Dollars ($5,000) from such sale

proceeds shall be paid to my brother, ROBERT F. SMITH".

PRACTICE NOTE: It is very rare for a demonstrative gift to be appropriate. It is not uncommon however for a client to suggest it. The risk of a demonstrative gift should be pointed out to the client and alternatives explored.

B. Gifts of Business Interest: Special care must be taken in designing the disposition of a client's business interest.

1. If the business is incorporated, then care must be given to adequately describe the stock being transferred. Is it voting stock only? Is it all stock? If a beneficiary of stock is non-participating in the business, how will he or she be assured of being treated fairly? Is it possible to substitute another asset for the non-participant family member? Could those in control of the business be delegated to purchase the shares of others over time?

2. If the business is a partnership, what are the terms of the partnership agreement? Can a new partner be admitted? Will the beneficiary want to be a partner?

3. If the client does business as a sole proprietor, then special care must be given to the definition of what will pass to the beneficiary of the business. It is often difficult to define business assets in such a case versus personal assets. If there is inventory, tools and equipment, customer lists, patents or trademarks, vehicles, office equipment and accounts payable, special consideration must be given to each of these assets. The client must determine whether they are necessary for the operation of the business, or whether they could pass other than to the beneficiary of the operating business. Cash contained in business bank accounts must also be considered carefully by the client.

4. If it is necessary for the fiduciary to operate and manage a business for any period of time during estate administration or as an asset of a trust, then it is important that specific authority be given the fiduciary to manage the business and that some method of compensation, apart from fiduciary commission, is allowed for.

SAMPLE PROVISION - Operation of Business.

(A) To retain and continue the operation of any business, either incorporated, unincorporated or limited or general partnership (whether or not income-producing or resulting in lack of diversification) which I may own or in which I may have an interest at the time of my death, and any successor business thereto; and to

purchase or otherwise acquire any business or interest in any business (incorporated or limited or general partnership) and to operate the same; and in connection with any business, to have the following authority and to exercise the following powers, as may be deemed advisable: to take part in the management of such business and to delegate such duties, with the requisite powers, to any employee, manager, partner or associate, without liability for such delegations; to reduce, expand, limit or otherwise fix and change the operation or policy of any such business and to act with respect to any other matter in connection with any such business; to advance money or other property from my estate or any other source to any such business as may be deemed advisable; to make loans of cash or securities to any such business and to guarantee the loans of others made to any such business; to borrow money for any such business from any lender and to secure such loan or loans by a pledge or mortgage of any part of my estate; to select and vote for directors, partners, associates and officers of any such business; to act as directors, general or limited partners, associates and officers of any such business and to reasonably compensate such directors, partners, associates and officers, including any person who is a beneficiary or fiduciary under this my Will; to establish and to join with others in establishing such partnerships, limited partnerships, corporations and other business organizations and associations for the carrying on of any such business, and to contribute to the capital of such business any part or all of my estate as may be deemed advisable; to deposit securities with a voting Trustee; to enter into stockholders' agreements with corporations in which my estate or any trust estate has an interest and/or with the stockholders of such corporations; to sell any such business, any interest in any such business, or any stock or other securities representing the interest of my estate or any trust estate in any such business; to liquidate, either alone or jointly with others any such business or any or any interest in such business; and generally, to exercise any and all powers as my Executor and Trustee may deem necessary with respect to the continuance, management, sale or liquidation of any such business.

(B) In the event "Subchapter S Corporation" stock is to be allocated to a trust created hereunder and the recipient trust must qualify as a "Qualified Subchapter S Trust" (QSST) or an "Electing Small Business Trust" (ESBT) as defined in the Code, the Trustee shall be authorized to amend the terms of such trust so as to qualify it as a QSST or ESBO, but only to the extent that doing so does not affect the availability of the estate tax marital deduction for such trust.

C. Gifts to Charity: A gift to charity under a Will is not too different from other bequests:

PRACTICE NOTE: In the case of bequest to charity, it is critical that the correct corporate name of the charity be identified and confirmed. If the local organization is an affiliate of a national organization, which is to receive the gift? If there are restrictions on the use of the funds, be clear concerning them. If the restrictions might cause the charity to refuse the gift, be sure that an alternate is provided.

1. Tax Considerations: If an estate is subject to estate tax, then the property passing outright to charity would be entitled to a charitable deduction, without limitation IRC §2055(a)(2) . Most estates are exempt from estate taxation however, either because the sum of the assets is less than the amount protected from the tax or because a marital deduction will defer the tax until the second spouse dies.

    a. Charitable Deduction: Since there is no estate tax due in the typical estate, and because there is no income tax charitable deduction applying to property passing to a charity by Will, there is no deduction for the charitable gift. Further, because the income tax basis on a decedent's capital assets is "stepped up" to the date of death value, *IRC §*1014(a) there is no avoidance of capital gain tax resulting from a gift to charity through a Will. A client with a non-taxable estate wishing to leave an amount to charity, should be counseled about alterative approaches which might be more tax efficient.

        i. IRA Beneficiary: A client with an IRA or qualified plan may name family members as beneficiaries. Those family members could receive the benefits of the plan subject to both estate tax (if the estate passing other than to a spouse is large enough) and income tax (in all cases). Even a non-taxable estate would result in income tax being due on all funds in such a plan as they pass out to the beneficiaries. If the client wishes to benefit a charity under a Will, and has a non-taxable estate, a good suggestion would be to name the charity as an IRA beneficiary instead. The amount passing to the charity would escape income taxation completely. The family members, on the other hand, who no longer are IRA beneficiaries could receive an equivalent increased amount from the estate, not subject to income taxation.

        ii. Precatory Bequest: Another approach in the non-taxable estate to generate an income tax deduction arises from the use of a precatory bequest to a trusted relative. In such a case, the relative is given an amount of money and requested (not directed) to contribute that amount to charity. The individual beneficiary then makes a voluntary

contribution which entitles him or her to an income tax deduction for the gift to charity. The following is suggested language to accomplish this:

SAMPLE PROVISION: "If my wife MARY X. SMITH survives me, I give and bequeath the sum of Ten Thousand Dollars ($10,000) to her. It is my wish and hope, but I do not direct, that she make a donation in my memory to SMITH MUSEUM, Syracuse, New York. If my wife does not survive me, I give such amount to that organization for its general uses and purposes."

iii. Bequest of IRD: A third option to maximize income tax savings is to direct that an asset constituting Income in Respect of a Decedent (IRD) be used to satisfy the bequest. For example, a client with substantial taxable interest from US Series EE savings bonds might leave those (or their proceeds) directly to a charity so that the IRD ends up passing to the non-taxable entity.

VI. TANGIBLE PERSONAL PROPERTY

A. Personal Property: Personal property is generally divided into two major categories. Tangible personal property is that which is "used" and has an intrinsic value. Intangible personal property is simply evidence of a value. For example, furniture would be tangible property, but a stock certificate would be intangible. No statute specifically defines tangible personal property and case law must be looked to when certain assets might be tangible or intangible. Examples of problematic assets are cash, coin or currency collections and collectible stamps.

B. Specific Bequests of Tangibles: It is almost always good practice to provide for the specific disposition of tangible personal property. The reasons are many:

1. Often tangible personal property, like household furniture, has very little market value and may be difficult to dispose of at more than a nominal price.

2. While tangible property often has very little economic value, it can have substantial sentimental value to those family members closest to the decedent. Forcing the sale of such property would often be contrary to the desires of the family members.

3. It may be advantageous for an estate to be capable of trapping taxable income at the estate level, so as to protect it from income taxation totally by use of estate deductions or to make use of the lower brackets of the

estate. To accomplish that objective, it is necessary to control distributions of the estate which would carry Distributable Net Income (DNI) with it. A distribution from the residue of an estate carries DNI out to the beneficiaries. IRC §662(a)(2). The distribution of a specific bequest does not. IRC §663.

4. If a trust is created from the residue of the estate, and if tangibles are not specifically bequeathed, the Trustee would be obligated to dispose of them and make the proceeds income producing, unless specific language to the contrary is provided authorizing retention of such tangibles.

5. If, on the other hand, the Trustee retains tangibles, how will the Trustee keep them under his control or in his possession? They should be insured in the name of the trust, which will be difficult or impossible to accomplish.

C. Drafting Considerations For Tangibles:

1. When tangibles are left to a class (such as children), should the anti-lapse statute be allowed to replace a deceased child with grandchildren? If the tangibles are of more emotional value than economic value, the question would be whether that emotional value applies only to the children or would be applicable to a grandchild. If the grandchildren are infants, the inclusion of one in the distribution of tangibles would complicate matters in that the infant would not be able to consent to or receipt for distributions personally. Most often in such a case therefore, the distribution of routine tangibles will be *per capita* rather than by representation or *per stirpes*.

2. What can be done if the intended beneficiaries of tangibles would not be expected to agree on their disposition, or if the beneficiaries do not get along with one another at all? Depending upon who has been named as Executor, authority may be given to that Executor to distribute the tangibles among the beneficiaries, using the Executor's discretion. In the alterative, some mechanism may be established in the Will for the beneficiaries to select items by lot or by bid.

3. The client may wish to provide for the disposition of tangibles in a separate writing (apart from the Will). New York law does not provide for the incorporation of an outside document by reference into a Will. An approach which can be used in New York would be a bequest of the tangibles to a single trusted individual with a precatory request that the individual distribute those items in accordance with the wishes of the client which will be provided in a separate writing. Because the assignment is so personal to the beneficiary under the Will, it is important that the anti-lapse statute *not* apply to this bequest.

4. Special consideration should be given to very valuable tangibles. Does the client want expensive jewelry and the automobile passing to children equally?

5. Special consideration should be given to tangible personal property used in conjunction with a business or some other special purpose. For example, farm equipment would typically best be passed to whomever receives the farm animals or land. A boat and motor would be useful to the person receiving lake front real estate.

6. Since title to specifically bequeathed personal property vests at death in the beneficiary, the costs of storing, shipping and insuring such property would be the beneficiary's. This result can be reversed if the client wishes, with the estate being directed to pay those costs out of the general estate assets.

7. Avoid describing tangibles as "contents of my house" or other such terms. This will allow fraud to be practiced by moving tangibles after death, or before.

SAMPLE PROVISIONS - Tangibles to spouse - alternate adult children:

> **__XX__: To my wife, MARY P. SMITH, if she survives me, I give and bequeath all of my tangible personal property, which shall mean all property that is not real estate and whose value is its own substance or uniqueness, such as furniture, jewelry or a coin collection. It does not include cash, books, documents or other papers which are only evidence of intangible property rights such as bank accounts, stock certificates, promissory notes, insurance policies, and the like. If my wife fails to survive me then such property shall pass equally to those of my children who survive me.**

SAMPLE PROVISIONS - Tangibles to beneficiary with precatory request to distribute:

> **__XX__: To _____ (personally, and not in a fiduciary capacity), I give and bequeath all of my tangible personal property, which shall mean all property that is not real estate and whose value is its own substance or uniqueness, such as furniture, jewelry or a coin collection. It does not include cash, books, documents or other papers which are only evidence of intangible property rights such as bank accounts, stock certificates, promissory notes, insurance policies, and the like. It is my wish, but I do not direct that the beneficiary will distribute such property in accordance with my instructions, which I shall provide during my life. If _____ fails to survive me, then I give such property to**

_____ with the same request.

DRAFTING NOTES: A clause such as this one allows the client to make elaborate lists and to revise them periodically, without the need of revising the Will. Unlike many other states, there is no provision in New York law allowing incorporation of an outside list into a Will, by reference. The above language might be a useful substitute for that concept. The risk of the beneficiary not carrying out the client's wishes must be pointed out. If there are tangibles which have substantial economic value, consideration should be given to excluding them from a clause such as this. Automobiles, jewelry and art work might better be disposed of specifically. An alternate beneficiary is also useful so as to prevent the anti-lapse statute from passing the tangibles to the children of the intended beneficiary. In the alternative, consider language requiring the beneficiary to be living to receive the bequest.

SAMPLE PROVISIONS - Tangibles to children with direction to select by lot:

The tangible personal property described above shall be divided among my children in approximately equal shares. If the children do not all agree on such division, I direct that they shall choose items individually in order of age, with the oldest child choosing one item first, followed by the second oldest and so on, until all items are selected or until the children have no interest in taking more items. For purposes of this paragraph, sets of items shall be considered single items. For example, a set of matched silverware, a set of matched dishes or a table and chair set shall each be treated as one item. If such a formal procedure is used, the Executor shall first have such items appraised, and the appraisal value of each item shall be the charge to the share of the child who chooses it. Any items not chosen by any child shall be disposed of by the Executor in whatever manner seems reasonable. Adjustments between the beneficiaries for items which have greater or lesser value than those selected by other beneficiaries may be made from the residuary share of each under this Will.

SAMPLE PROVISION - Tangibles to spouse, or if deceased to children, with formal procedure for disposition and equalization of value for each:

XX To my wife, MARY P. SMITH, if she survives me, I give and bequeath all of my tangible personal property, which shall mean all property that is not real estate and whose value is its own substance or uniqueness, such as furniture, jewelry or a coin collection. It does not include cash, books, documents or other papers which are only evidence of intangible property rights such as bank accounts, stock certificates, promissory notes, insurance policies, and the like. If my wife fails to survive me then such property shall pass equally to those of my children who survive me, subject however

to the following:

(A) It is my intent that the items of tangible personal property owned by me at my death will be distributed among my children fairly and consistent with their wishes, to the extent possible. It is also my wish that the economic value received by each will be approximately equal. To accomplish this objective, I direct that either my children reach unanimous agreement on the disposition of the tangible personal property or, in the alternative, that the Executor use the following procedure in order to dispose of such property:

(1) The Executor shall first obtain an appraisal of the fair market value of each item of my tangible personal property, except that items of little value may be assigned only a nominal dollar value.

(2) Upon receipt of the appraisal, a copy will be provided to each of my children. With each of them present (or with each of their representatives present), they shall be allowed to select items which they wish to receive, with the oldest child choosing first, followed by the second oldest, and so on. Each child may select one (1) item at each round of the selections. For purposes of this Article, sets of items shall be considered single items. For example, a set of matched silverware, a set of matched dishes, or a table and chair set shall each be considered one (1) item. The selection will continue until all children have chosen everything they wish to.

(3) After the completion of the selection process, as described above, there may be remaining items which one or more children have an interest in receiving, but which they do not believe to be worth the appraised value. If that is the case, each of my children may institute an auction of any remaining item. Each child will be entitled to bid, and the child who bids the greatest amount will be entitled to receive the item. All such bidding shall be open and will continue until there is a winner.

(4) The Executor shall record the value of each item selected by each of my children, either from its value on the appraisal or, if not selected in that stage, then its value from the auction. If the value of the items selected by one child is less than his or her equal share of the total of all such items, then cash shall be paid from the general estate to that beneficiary to make up any difference. If the value of such items is greater than the child's equal share, then cash will be paid from the general estate to those other children who received less than their equal share, so as to make the distribution of tangibles equal among all children.

(5) Any items not selected in the above process shall be disposed of by the Executor in accordance with any method agreed to unanimously by all of my children. If there is no such agreement, then the remaining items shall be disposed of in a commercially reasonable manner. Items which have no reasonable sale value may be donated to charity or given to grandchildren or more remote descendants of mine. Any net proceeds from the sale of any such property shall become part of the value being distributed to my children pursuant to this Article.

VII. GIFTS OF REAL PROPERTY

A. Specific Devise: For a number of reasons, it may be desirable for a client to specifically devise real property. For example, a primary residence may be devised to a spouse in order to prevent it passing into a trust. A seasonal residence may be devised to some or all of the children to facilitate its being retained long into the future.

1. Advantages of specific devise of real property:

a. Vest title immediately in the beneficiary.

b. Eliminates the asset from being used to compute the commission of the Executor.

c. Gives priority to the devise over property passing in the residue.

d. Avoids any part of the real property being deemed as income and carrying out income earned in the estate. IRC §662 & §663.

2. Disadvantages of specific devise of real property:

a. If the beneficiary does not want the property, it is no longer possible to sell it as an estate asset and distribute it with the residue.

b. An Executor may sell real property owned as part of the residue of the estate without it being subject to liens of the beneficiaries. Specifically devised real property however would be subject to such liens**.**

c. Unless specifically provided otherwise, the beneficiary will take the real property subject to liens and mortgages. *EPTL§3-3.6.*

B. Special Detail: Real property should be described with as much detail and specificity as possible. Try to avoid over-broad descriptions such as "all my real

estate, wherever located". Such language raises the question of whether it is intended that all forms of real property (such as leases, partnerships, cooperative apartments, real estate investment trusts and condominiums are to be included). Such broad language also would pass property acquired after the Will is made, such as an inheritance from another.

1. At least the street address of the property, with municipality and county, should be provided. Better practice is to refer to the deed(s) by which title was taken, a tax map number or even the legal description.

2. Often with a devise of a vacation home, the client desires to include the furniture and other tangibles in the gift. Use of the word "contents" as defining tangibles to be included should be avoided. During the period the client is occupying the property, there may be valuable jewelry or other property which is not necessary for the operation of the real property and not intended to be included with it. Specificity in defining the tangibles to go with real property is critical. Consider language such as **"together with all furniture, rugs, appliances, dishes, silverware, art work permanently maintained in the property and tools necessary for the maintenance and operation of the property".**

3. Beware of the anti-lapse statute causing an infant to become an owner of an interest in real property. If the objective is to provide ownership to pass through multiple generations, a trust should be considered instead of a specific devise.

4. Out of state property creates special concerns. The probate of a Will in New York does not give authority to an Executor to administer or dispose of real property in another state. Such authority must be gotten by the ancillary probate of the Will in the state where the property is located.

    a. To avoid the complications of ancillary probate, it may be helpful to have it pass other than by the Will. This can be accomplished by putting the property in joint ownership, by conveying it to a revocable trust or partnership or by deeding it to the ultimate beneficiaries with a life use retained by the client.

C. Life Estate Transfers: On occasion, a client will wish to grant use of real property to someone for life, with the remainder passing to others. It is used primarily where there are not sufficient funds available to create a trust with the property and other assets to pay for its maintenance and operation.

1. If the life beneficiary fails to maintain the property and pay the taxes, the remaindermen may be adversely affected. This type of transfer is very difficult for the remaindermen to adequately monitor what is going on with such property, and it may be lost before they know there is a problem. A devise of real property for life is an approach which should be used sparingly, and only when there are no other alternatives available.

SAMPLE PROVISIONS - Language for Devise of Life use of Real Property:

XX : To WINONA SMITH (beneficiary), if she survives me, I give and devise the real property located at 123 Main St., Pristine Forest, NY 12345 in the County of St. Lawrence and State of New York, together with all appurtenances and improvements used in connection therewith. Such devise shall, however, be only for the period of the beneficiary's life, or until she ceases to use the property as her principal residence, whichever occurs first.[1] If she fails to reside in the said property for a continuous period of one hundred eighty (180) days, she will be deemed to have changed principal residence, and her interest therein shall terminate.

(A) The beneficiary shall be required to pay all costs of maintenance, assessments, insurance premiums, taxes, water charges, and repairs to the property. Upon failing to pay any such charge, any one or more of the remaindermen may pay the same, and in such event, the person or persons shall be entitled to reimbursement from the beneficiary, and shall have a lien against the property for the amount so expended plus interest at nine (9%) percent per annum. If the property is sold to a bonafide purchaser for value, such lien shall be deemed extinguished as to the real property, but shall follow the proceeds, payable first from the beneficiary's share of the proceeds, if any.

(B) The beneficiary shall obtain and keep in force a policy of insurance (at her own expense) with sufficient fire insurance coverage to represent the replacement value of all structures from time to time; and personal injury liability coverage in a minimum amount of $150,000. Such policy shall include the remaindermen as additional insureds.

(C) No bond or other security shall be required of the beneficiary.

(D) Upon the termination of the interest of the beneficiary in the said property, I give and devise it to my then living children, equally per capita and not be representation.

(E) If any beneficiary under this Article is a minor, the property distributable to the minor may be delivered to the guardian or other person with whom the child resides, without further responsibility to the child. Any cash proceeds due a minor may be paid or held as otherwise provided under the terms of this Will.

---

[1] This provision would prevent the estate tax martial deduction if the life beneficiary is a spouse. QTIP trusts require interest for life, and no shorter period.

VIII. ESTATE TAX TREATMENT

A. Federal Estate Tax: The Federal Estate Tax has permanently set the exemption which one individual may leave to any beneficiary to $5,250,000. The federal tax continues to have a gift tax and, because the gift tax and estate tax exemptions have been unified, it has a lifetime exemption of $5,250,000. It also has an annual exclusion of $14,000 per person. This exclusion is inflation adjusted, but it only rises when inflation causes it to go up by an even $1,000. New York has no gift tax.

B. New York Estate Tax:

1. New York repealed its state estate tax, but the structure of the repeal causes the tax to be resurrected as the federal government eliminates the state death tax credit. New York's estate tax has been be automatically reinstituted, with the New York exemption equivalent frozen at $1,000,000.

2. The consequence of New York law is that the estate of a person dying with a taxable estate of $2,500,000 in 2013 will bear a New York estate tax of $138,800.

C. Planning Approaches: Because of the dramatic changes scheduled in the federal estate tax exemption and the possibility of a substantial New York estate tax being applied even if a spouse survives, estate tax planning has become far more uncertain.

1. For those with a combined family estate of $1,000,000 or only slightly more, the avoidance of federal estate tax will be quite easy, because the federal exemption will exceed the family wealth.

2. Special care must be taken to avoid paying a substantial New York estate tax in an effort to avoid a federal estate tax which may not apply any longer. Flexibility in planning becomes most important.

D. Planning Options: There are several drafting alternatives which could be used to protect against estate tax exposure in this uncertain time.

1. Disclaimer: For several years, it has been common to incorporate use of the disclaimer into a Will so as to allow a surviving spouse to choose whether a credit trust should be created to protect the estate tax exemption, and if so, how large that trust should be. This planning technique becomes even more important as the uncertainty of the tax intensifies.

SAMPLE PROVISION - Disclaimer in Wills:

__XX:__ All the residue of my estate, whether real or

personal and wheresoever situate, I give, devise and bequeath to my wife, MARY P. CLIENT, if she survives me. In the event my wife validly disclaims all or any part of this legacy, I direct that the disclaimed interest shall pass pursuant to Article XXX hereof and that my wife may enjoy such interest provided her thereunder.

The provisions of New York Estates, Powers and Trusts Law, Section 2-1.11, or any similar subsequent New York statute concerning renunciation or disclaimer shall control, regardless of my domicile at death. A disclaimer which would be sufficient in form and manner of service thereunder shall be deemed sufficient for my estate.

XXX: In the event my wife fails to survive me, or having survived me, disclaims all or part of her legacy under this Will, I give, devise and bequeath all of the undisposed portion or residue of my estate, whether real or personal and wheresoever situate, including any part of the bequest to my wife under Article XX which she may have disclaimed, as follows:

(A)(1) If my wife survives me, all of the property passing under this Article shall pass to the Trustee, hereinafter named, IN TRUST, to invest and reinvest the same, to collect and receive the income therefrom, and to pay or apply the income not less frequently than quarterly to or for my wife.

(2) I authorize my Trustee, at any time and from time to time, to invade the principal and to distribute such amounts to or for the benefit of my wife. Such invasions may be made whenever the Trustee determines it to be appropriate to provide for the support, education, health and maintenance of my wife during her life.

(3) Upon the death of my wife, the trust shall terminate and the Trustee shall transfer the remaining trust principal, together with any accrued income to such of my descendants as would share in the residue of my estate if my wife had failed to survive me and I had died immediately following her death (pursuant to (B) following).

(B) If my wife fails to survive me then the residue shall pass to my surviving children and the living descendants of any deceased child, per stirpes.

2. Limiting Size of Credit Trust: Pre-residual credit shelter trusts have traditionally been defined as holding the greatest amount which can pass free of *federal* estate tax. Such language would create a New York estate tax potentially. If it is appropriate for the client to avoid that tax, it may be desired to limit the amount of the credit trust to the amount which can pass

free of *New York* estate tax. This would cause the credit trust to be frozen at $1,000,000, but would eliminate the possibility of federal estate tax at the first death. If it is likely that the surviving spouse would not have an estate later sufficient to generate a federal estate tax, this may be a good solution.

SAMPLE PROVISION - Limited Credit Shelter Provision - Medicaid Protected:

XX: (A) If my wife survives me, I give and bequeath an amount equal to the largest amount, if any, by which my [New York] taxable estate (determined before giving effect to this Article XX) may be increased without causing an increase in the [New York] estate tax payable by reason of my death, to the Trustee hereinafter named.

(B) The Trustee shall receive such property IN TRUST, for the following uses and purposes: To hold, manage, and invest the property, to collect the income thereof and to pay over or apply so much or all of the net income, to or for the benefit of my wife and any living descendant of mine from time to time, to such extent, in such amounts or proportions, equal or unequal, and to the exclusion of any of them, and at such time or times, as the Trustee (other than any then eligible income beneficiary), in the exercise of absolute discretion, shall deem advisable. Any net income not so paid or applied shall be accumulated and added to the principal of the trust at the end of each calendar year.

(C) In addition, the Trustee shall be authorized at any time to pay over to or apply for the benefit of any then eligible income beneficiary, out of the principal of the trust, any amount, including the whole thereof, as the Trustee, other than any then eligible income beneficiary, in the exercise of absolute discretion shall deem advisable, without limitation. Without in any way limiting the absolute discretion given the Trustee, it is my intention that my wife be considered the primary beneficiary of the trust and that her present and future needs be given primary consideration.

Payments of income or principal for any beneficiary shall only continue, however, subject to the provisions of paragraphs "1" and "2" following. This trust is created to supplement, not replace any and all available public benefits and entitlements, and to supplement the support of a beneficiary. It is intended to allow a beneficiary to live independently or at home in reasonable comfort. It is the intent of this Will that the trust's income and principal is not to be considered income to, nor assets of any beneficiary for any purposes as stated in statute, rules or regulations of any governmental unit, agency or department.

(1) In applying the income or principal for the benefit of a beneficiary, the Trustee shall have absolute discretion to pay to or apply the income or principal to provide for the needs of such beneficiary over and above basic maintenance, support, medical, and dental care, paid for by any local, State or Federal government or agency or department thereof. Nothing herein shall preclude the Trustee from purchasing those services and items which promote the beneficiary's happiness, welfare and development, including but not limited to, vacation and recreation trips away from place of residence, expenses for a traveling companion (if requested), entertainment expenses, clothing, transportation costs, education and training costs, medical, dental and insurance needs. Under no circumstances shall my Trustee exercise discretion to utilize funds for the payment of such services that would otherwise be borne by any publicly funded program. There shall be no invasion of principal for the benefit of any beneficiary of this trust ordered by any court pursuant to EPTL §7-1.6(b) or any other provision of law.

(2) The income and the principal of the trusts established under this Will shall not in any way or manner be subject to or liable for any of the debts, contracts, engagements or liabilities of the respective beneficiaries thereof, and shall not be liable to anticipation, sale or pledge, nor subject to attachment, execution or sequestration under any legal, equitable or other process of law.

(D) My wife shall have the power to appoint any part or all of the principal of the trust property to any or all of my lineal descendants and to impose such additional trusts or conditions as she deems appropriate, except that no appointment shall be made to my wife, her estate, her creditors, or the creditors of her estate. The exercise of this power of appointment shall be made in her Will and by specific reference to this power. To the extent the power is not validly exercised, then the trust property shall pass according to the terms of this Will. If the Trustee has not received actual notice of the existence of a will of my wife within 90 days of her death, and if no such will has been offered for probate in the appropriate court, then the remainder of this trust may be distributed as if such power had not been exercised, and the Trustee shall be released from any liability for distributing pursuant to the provisions of this Will.

(E) In computing the amount to pass pursuant to this Article, the final determination in the federal estate tax in my estate shall control. The value of assets used to satisfy this bequest shall be the value of such assets on the date of distribution, but the total value of all assets so distributed shall be the amount calculated to pass under this Article. To the extent such assets are available for this purpose, this trust shall be funded with assets which are ineligible for the

marital deduction under the federal estate tax, and assets which are not productive of income. To the extent practicable, I direct that this legacy not be satisfied with assets which are items of gross income in respect of a decedent such as individual retirement accounts or qualified pension or profit sharing plans.

(F) I recognize that the amounts passing to the Trustee under this Article may be partially reduced or totally eliminated by nondeductible gifts and the payments of certain estate taxes and charges required by other provisions of this Will and that such amount may be affected by determinations or elections made by my Executor or in the exercise of discretion under this Will or under the provisions of the Internal Revenue Code.

(G) The trust shall terminate upon my wife's death, or when the trust property has been exhausted, and, subject to the valid exercise of the power of appointment granted her under "D" of this Article, the remaining principal shall pass to those individuals, and in those proportions, as my residuary estate would pass under Article XXX hereof, if I had died immediately after my wife's death.

3. QTIP Trust: Structuring a residuary provision of the Will or the terms of a trust to receive the maximum amount protected by the federal credit to qualify for QTIP election (marital deduction) would allow an Executor to partially elect QTIP so as to prevent New York estate tax. Unlike the limitation in the last paragraph, there would be some flexibility to pay a tax if it appeared after death that it would be advantageous.

   A. The ideal solution to the QTIP election would be if New York allowed a separate QTIP election to be made just for New York tax purposes. In this way, both the federal and New York estate tax credits could be optimized with any resulting tax being paid at the second death. At this time, there is no proposal to enact a New York specific QTIP, because of a concern that the surviving spouse would leave the State of New York after the first death, causing the state to never receive its tax at the second death.

4. Clayton QTIP: The Clayton QTIP is a variant of a single divisible QTIP. In planning for the Clayton QTIP, two trusts would be created under the Will or trust agreement. One trust would not be eligible for the marital deduction and might have sprinkling income and principal among family members. The second trust would provide all income to the spouse and would be qualified for the marital deduction. The allocation of the assets between the two trusts is controlled by the share of the estate which the Executor elects to qualify for QTIP treatment. Whatever the Executor does not qualify for the marital deduction would automatically go to the non-qualified trust. This technique is approved in IRC Reg. 20-2056(d)(3).

a. The advantage of the Clayton approach is that the non-qualified trust can be designed in any way the client wishes, increasing flexibility. As the QTIP election does not have to be made until the extended due date of the return, then there are 15 months, rather than the 9 months available for a disclaimer.

b. The disadvantage of the Clayton election is that a fiduciary (Executor) is making disposition decisions over the client's property. The inherent conflict of interest of the spouse if he or she is the Executor (or any other beneficiary who is Executor) suggests that an independent party should be making that election. Many clients are hesitant to give dispositional control of their estates to anyone other than a spouse or, occasionally, a child. In the case of a second marriage, the surviving spouse might have to elect against the Will, or risk the Executor electing QTIP in such a way that the spouse has little or no benefit because all is in the credit trust. The Executor can wait until the time to elect has expired, and then allocate the property by the QTIP election.

5. Tax Apportionment Clause: The payment of estate tax should be provided for. For example, client usually wants tangibles to pass free of tax contributions. It is typical to charge the tax against the residue of the estate, rather than apportioning it.

a. If client owns a large IRA or life insurance policy passing to beneficiaries or joint accounts passing, should the estate tax on these assets pass free of tax, but reducing or even eliminating the residue with the burden of estate tax?

b. Following is language to charge the estate tax or probate assets to the residue of the estate, but to otherwise apportion tax on non-probate property pursuant to statute.

SAMPLE PROVISION - Tax Apportionment.

XX : All estate, inheritance, succession, transfer and other death taxes, including any interest and penalties thereon, paid to any domestic or foreign taxing authority, with respect to all property taxable by reason of my death, whether such taxes be payable by my estate or any recipient of any such property shall be charged against and paid without apportionment out of my residuary estate; provided, however, that any non-probate property which is included in my estate for estate tax purposes shall bear its proportionate share of all such taxes to the extent any such property generates a tax by reason of my death.

c. Following is language to charge tax on probate assets to the residue, but to protect any charitable share from bearing that tax:

SAMPLE PROVISION - Charitable Share.

__XX__: All estate, inheritance, succession, transfer and other death taxes, including any interest and penalties thereon, paid to any domestic or foreign taxing authority, with respect to all property taxable by reason of my death, whether such taxes be payable by my estate or any recipient of any such property shall be charged against and paid without apportionment out of that portion of my residuary estate for which no charitable deduction is allowed for federal estate tax purposes; provided, however, that any non-probate property which is included in my estate for estate tax purposes shall bear its proportionate share of all such taxes to the extent any such property generates a tax by reason of my death.

IX. RESIDUARY GIFTS

A. Powers of Appointment: A power of appointment may be created under any Will or trust. If the client is a beneficiary of such a power, then it is important for the attorney to know that and to consider whether the power should be exercised or not. Knowledge of such a power is critical even if it is drafted in such a way that specific reference to the document which is the source of the power must be made in order to effectively exercise it.

1. If a power of appointment is held by the client, and if the terms of the instrument created that power does not require specific reference in order to exercise, then the residuary clause of the client's Will will exercise it. *EPTL §10-6.1 (a)(4).*

   PRACTICE NOTES: If there are powers of appointment unknown to the client, or if the client expects to be a beneficiary of multiple family trusts, then it may be advantageous to specifically provide that no powers of appointment are intended to be exercised by the terms of the Will.

B. Trusts for Infants: An issue of primary importance to younger clients is the protection of their underage children in the event of both parents dying. The financial concerns fall into two categories. First, the clients wish to protect the needs of their youngest children until they are "out of the nest". Once all of the children have reached adulthood, the second priority is to treat them all equally.

1. In order to provide for the needs of the youngest, it is most often desirable to keep the funds together in a single trust so that they can be applied for the needs of the youngest without concern about equality. This is referred to as a Sprinkling Trust or a Pot Trust.

2. After the children have reached adulthood, or typically when the youngest has had an opportunity to complete an undergraduate education, the

preferred approach is to divide the trusts so that each has a separate fund. This prevents the needs of one adult child from consuming the share of another. The ultimate outright disposition to the individual child can then be tailored to the desires of the client. Where the children are very young, so that the parent does not know how they will turn out, or when the children are older and the parent is not totally satisfied with how they turned out financially, multiple distributions may improve the chances that the child will use the benefits more responsibly, or at least some of them.

SAMPLE PROVISION - Gift of residue to spouse with alternate to children. (Sprinkling to 21 and Distribution at 30/35):

__XX__: All the rest, residue and remainder of my estate, both real and personal and wheresoever situate, I give, devise, and bequeath to my wife, MARY P. CLIENT, if she survives me.

(A) If my wife does not survive me, and I leave no child under 21 years of age, I give all the residue of my estate in equal shares to my living children, and the issue of any deceased child, per stirpes, subject however to the provisions of Article __XX__ hereof.

(B) If my wife does not survive me, and if any of my living children (including any afterborn child) is under 21 years of age, I give the residue to the Trustee, hereinafter named, IN TRUST, to invest and reinvest the same, to collect, receive and accumulate the income therefrom, and to pay or apply said income and the principal in the sole and uncontrolled discretion of the Trustee, for the support, maintenance, health, education and cost of a wedding of my children and the descendants of any child who dies (whether before or after my death) as their respective circumstances may indicate, without regard to inequality among the beneficiaries in respect of sums so paid or applied, even to the extent of exhausting the entire principal. It is my wish that priority be given to the needs of my children who have not reached the age of 21 years. The trust shall continue until such time as there is no living child of mine under 21 years, whereupon the trust shall terminate and the remaining principal, together with all accumulated or accrued income shall be divided among my then living children and the then living descendants of any deceased child, per stirpes, subject to the provisions of Article __XX__hereof.

__XX__: In the event any beneficiary under this Will is under the age of 35 years at the time he or she becomes entitled to a principal share hereunder (even at the conclusion of a trust hereunder), I direct that the amount due such person be paid to or retained by the Trustee, IN TRUST, to invest and reinvest the same, to collect, receive and accumulate the income therefrom, and to pay or apply said income and the principal, in the sole and uncontrolled

discretion of the Trustee for the support, maintenance, health, education or cost of a wedding of said individual as his or her circumstances may indicate, even to the extent of exhausting the entire principal. For all purposes of this Will, education expenses shall include the costs of tuition, room, board and transportation expenses for college, post-graduate programs, private primary or secondary schools and occupational training programs. Upon the beneficiary reaching the age of 30 or upon creation of this trust if the beneficiary has already reached that age, an amount equal to one half of the value of the property held for such beneficiary shall be distributed to the beneficiary. The trust shall continue until such time as the beneficiary reaches the age of 35 years or sooner dies, whereupon the trust shall terminate and the remaining principal together with all accumulated or accrued income shall be paid to the beneficiary, if living, or to his or her Executor or administrator if deceased.

X. **FIDUCIARY APPOINTMENTS -** The fiduciaries commonly appointed in a Will are Executor, Trustee and Guardian of an infant.

A. Executor: An Executor can be any natural person or an institution authorized to be a fiduciary, so long as the individual is not an infant, incompetent, a non-domiciliary alien, a felon or unable to fulfill the duties due to "drunkenness, dishonesty, improvidence or want of understanding". *SPCA § 707.*

1. The most commonly appointed Executor is the beneficiary who is entitled to the largest share. Such an individual would be most likely to waive the statutory commission. If the commission is not waived, then it would be passing to the person who would have received the same benefit as an inheritance anyway. If there is no single predominant beneficiary, then the next most frequently chosen individual is one of several residuary beneficiaries. That person should have the client's absolute trust, as well as the respect of the other beneficiaries.

   Often when there is no candidate from among the beneficiaries to act as Executor, the client will choose a friend or professional advisor (accountant or attorney). A corporate fiduciary can also be designated.

2. Conflicts of interest must be considered in the selection of Executors and other fiduciaries. For example, a business partner might be very close to the client and trusted, but after the death of the client the partner might have personal interests which are in conflict with those of the estate. An attorney should be careful to draft his or her own appointment only in those circumstances where the selection is in the best interest of the client.

B. Co-Executors: Frequently when there are two equal beneficiaries, Co-Executors will be considered. If the primary beneficiary is not comfortable handling the assignment of Executorship, there may be a Co-Executor to help him or her. A

Co-Executor may also be useful where the estate will hold assets requiring specialized knowledge. An example of this would be the estate of an author or painter. In such a case, the duties of the Executors can be divided by specific drafting, so that the Executor with specialized knowledge handles only those assets requiring it.

1. Where Co-Executors are designated, there can be difficulties encountered. For example, certain documents must be signed by each Executor, and delay can result from having to circulate to each and possibly in different parts of the country. Multiple Executors also cause multiple compensation to be paid.

C. Executor Compensation: The statutory commission for an Executor is provided at *SPCA §2307.* If the commissionable estate amounts to less than $100,000, then only one commission is paid, regardless of how many Executors may act together. If the estate is $100,000 or more, but less than $300,000, up to two commissions can be divided among multiple Executors. If the commissionable estate is $300,000 or more, then three commissions can be divided among three or more Co-Executors.

1. The Will can provide any specific compensation plan the client would like. For example, a family Co-Executor might be prohibited from taking any commission, while a professional Co-Executor is allowed a full commission, regardless of how small the estate is.

   a. It is not good practice to name two individuals as Co-Executors who do not get along with each other. Such a situation tends to make more court involvement necessary and frequent. It does not encourage the efficient settlement of the estate, and may be a circumstance where an Executor from outside the family would be appropriate to consider.

D. Alternate & Successor Executors: Depending upon the age of the client and other circumstances, it is important to have one or more alternate or successor Executors designated for the possibility of the original appointees being unable or unwilling to serve through the whole estate administration. If no alternate is named, then an Administrator CTA (with Will annexed) will be designed. *SPCA §1418.* An Administrator CTA would be subject to the requirement of a bond and the selection of the fiduciary could be the cause for dispute among the beneficiaries. If there are no alternates agreeable to the client, then a suggestion should be made that the primary appointee be given authority to select his or her own successor. *SPCA §1418 (1).*

E. Trustees: The legal requirements to serve as a Trustee are the same as those of an Executor. *SPCA §707.* Because the term of the trust can be very long, the mortality of individuals becomes a factor in selection of Trustees. It can be very disruptive to a trust to have a Trustee become incapacitated so as to be unable even to resign. It is therefore more common to see corporate fiduciaries used as

Trustees than as Executors.

1. The duties of a Trustee fall into two major categories. First, the Trustee is responsible for investment of the trust funds so as to generate income and/or growth for the trust beneficiaries. Secondly, the Trustee must make decisions about distributions, particularly those distributions which are made in the discretion of the Trustee. For this reason, it is common to have Co-Trustees designated on family trusts. One Trustee would be chosen because of skills in managing the assets or the ability to seek out adequate managers. Another Trustee would be chosen because of familiarity with the family and understanding of the circumstances each beneficiary will be in.

F. Alternate Trustees: It is even more important that alternates be designated as Trustee, because the term of the trust is likely far longer than the term of the estate administration.

G. Removal of Trustees: A Trustee can become inappropriate after the passage of time, even though that individual or institution was an appropriate choice initially. For example, the sole beneficiary of a trust created in New York might live his or her adult life in California. A California Trustee would become more appropriate. A Trustee might become senile or otherwise incapacitated with age, but be unwilling to resign. The Trustee might even lose touch with the family members who are beneficiaries, and be incapable of adequately performing the duties expected. For all of these reasons, and others not mentioned, it is useful to provide the flexibility to replace a Trustee, even against the Trustee's wishes.

1. Giving the beneficiary the right to replace the Trustee can have substantial tax disadvantages. For example, a trust which is created to prevent the inclusion of the trust principal in the beneficiary's estate, when the beneficiary dies, could suffer tax inclusion if the beneficiary is given discretion to remove the Trustee and appoint another, particularly where distributees can be made without an ascertainable standard.

2. The client may be hesitant to give authority to remove a Trustee to a beneficiary also because of the client's distrust of the beneficiary's judgment. It is possible to select an independent individual who has authority to remove a Trustee and appoint another. This would solve the tax problem created by the beneficiary having the power and also might satisfy the client that the beneficiary would not misuse the power. **An example of such a power follows**:

   I hereby appoint _____ of _____ as the Trust Protector. The Trust Protector is authorized, in the exercise of absolute discretion, to remove any and all Trustees acting hereunder (other than my wife), to designate successor Trustees in their place and to appoint co-Trustees; provided, however, no Trust Protector may appoint as Trustee himself or herself, any relative or employee of a

Trust Protector, or any person who has a beneficial interest in any trust hereunder or who is married to, related to or employed by any person who has such a beneficial interest. The Trust Protector also is authorized, in the exercise of absolute discretion, to designate, by instrument in writing delivered to the Trustee, a successor Trust Protector to act if there is not a Trust Protector otherwise appointed hereunder who is willing and capable of serving, and to revoke any such designation before it becomes effective. Any successor Trust Protector shall have all the powers of the initial Trust Protector.

I am not imposing any fiduciary responsibility on the Trust Protector to monitor the actions of the Trustee or otherwise. Except for any matter involving the Trust Protector's own individual willful misconduct or negligence proved by clear and convincing evidence, no Trust Protector shall incur any liability by reason of any error of judgment, mistake of law, or action of any kind taken or omitted to be taken hereunder if in good faith reasonably believed by such Trust Protector to be in accordance with the provisions and intent hereof. The Trust Protector shall not be liable for failure to remove any Trustee even if cause exists. Each trust existing hereunder shall indemnify the Trust Protector against all costs of legal proceedings which involve the Trust Protector, including legal fees.

H. Trustee Compensation: An individual Trustee is entitled to commission computed at the statutory rates provided in *SCPA §2309*. As with Executors, if there are multiple Trustees, then there may be multiple commissions payable, depending upon the size of the trust. *SCPA §2309 (6).* As with executorial commissions, the Will can provide for specific compensation for a Trustee, or for an alternate method of computing it.

1. Unlike an individual, a corporate Trustee will be entitled to such commissions as "may be reasonable" if the trust value exceeds $400,000. *SPCA §2312 (2).* In drafting for a corporate Trustee, it is important that the proposed Trustee have an opportunity to review the document. Most will want specific language concerning commissions. Typically, a minimum commission will be called for, no matter how small the trust becomes.

I. Guardians: Guardians of a minor child's person are responsible for the child's upbringing. They take over the role of the parents. Guardians of a child's property are charged with protecting, preserving and managing the property of the infant. *SPCA §1723.* The Court has power over the property of an infant. *SCPA §1701.* An annual account is required of the Guardian and no payments can be made from Guardian funds without authorization by the Court.

1. When the client has selected a Trustee in whom the client has confidence, it is the objective of the planning process to prevent any funds from falling into a court supervised Guardianship. Rather, all assets left for the benefit of any infant would be best contained in trust. Even with careful drafting,

funds can come into ownership of an infant, particularly if the infant is named specifically as an alternate beneficiary of life insurance, an IRA or some other type of beneficiary account.

2. A client with multiple children will be concerned about the ability of the Guardian to care for those children. There may also be a concern with keeping all of the children in a single household. Further, the client may be concerned about the financial burden being put upon the Guardian in taking on this assignment.

SAMPLE PROVISION: The following is sample language for lifting the financial burden for Guardianship. Such language might not be appropriate if the Guardian and sole Trustee are the same individual:

(A) I am relying upon the Guardian of the person of my children to take care of them. This will result in increased living expenses for her and may require her to buy a larger home or to add to the house in which she already lives. It is my wish that the shouldering of the burden of my children should not cost her anything, and I therefore authorize and direct my Trustee to pay any amounts to her for any added out-of-pocket expense resulting from her doing so, even though, as in the case of an addition to the Guardian's existing house for the purpose of housing my children, the expense may be of direct benefit to her. My Trustee shall make such payments out of the trust.

(B) My Trustee shall be under no duty to seek, nor the Guardian to make, repayment for any benefit she may receive hereunder.

(C) My Trustee shall be entitled to rely upon statements of fact made by the Guardian in arriving at the amount of any payment made hereunder, without any further verification.

J. Guardian Compensation: A Guardian of the property is entitled to the same compensation as an Executor. *SCPA §2307 (1).* If income is received and paid over, the Guardian is entitled to annual commissions at the principal rate. *SCPA §2307 (4).* As with other compensation, the Will can provide some specific alternative compensation. *SCPA §2307 (5).*

K. Guardianship After Divorce: Even though a deceased was the custodial parent, he or she cannot appoint a Guardian that will take priority over the surviving, non-custodial parent. *DRL §81.* An ineffective appointment results in the appointee becoming a donee of a power to manage property during minority, subject to all of the provisions of the Guardianship statute. *SCPA §1714.* The effect of such an appointment is to leave management of the property of the infant in the hands of the person selected by the client, rather than the surviving parent of the infant.

XI. **IN TERROREM CLAUSE:** When the client is concerned that one or more of the distributees will contest the will, a solution may lie in an In Terrorem Clause which takes away the benefit left to any contesting distributee. Such clauses are strictly and narrowly construed. It is not possible to prevent an incompetent or infant from contesting by such a clause. EPTL §3-3.5(b)(2). Further, the effectiveness of the clause is proportionate to the size of the bequest which would be forfeited. The greatest protection comes where a substantial benefit would be lost by the distributee who chooses to contest.

A. The following is language which could be used to discourage a contest:

_____: In the event that any beneficiary named herein shall, directly or indirectly, under any pretense or for any cause or reason whatever, oppose the probate of my last Will and Testament, or institute, abet, take or share, directly or indirectly, in any action or proceeding against my estate to impeach, impair, set aside, or invalidate any of the provisions of my Will, or make any agreement, direct or indirect, in connection with any of the foregoing, with any person instituting, abetting, taking or sharing in such action directly or indirectly, I do hereby revoke any and all devises, bequests, trusts, or other provisions to or for the benefit of any such person, and I direct that any such devises, bequests, trusts, or other provisions, to or for the benefit of any such person, shall become part of my residuary estate, except that if such person shall be entitled to share in or benefit from my residuary estate, then the share of such person shall be disposed of as if such person had predeceased me, without leaving issue surviving him or her. Any beneficiary who makes or attempts to make any inquiry about the Will, other than those permitted by EPTL 3-3.5 and SCPA 1404 shall forfeit his or her share of the estate.