

Contents

Preface	v
Introduction	xv
Part I	Tools
Chapter 1	Trusts
Trust Defined	1
Using a Trust	1
Establishing or Settling the Trust	2
The Three Certainties of a Trust	2
Certainty of Intention	2
The Trust Property (Certainty of Subject Matter)	3
The Beneficiaries (Certainty of Objects)	3
Trusts for Persons	3
Trusts for Purposes	4
Drafting the Trust Document	5
Why the Trust?	5
What is the Trust Property?	5
Who are the Beneficiaries?	6
Who are the Trustee(s)?	7
How will Decisions be Made?	8
How is the Trust Property to be Shared?	8
When will the Trust end?	8
When must the Trust End?	9
Rule Against Perpetuities	9
The Accumulations Act	11
Perpetuities and Accumulation – Income Tax Implications	12

viii ESTATE PLANNING HANDBOOK

Chapter 2 Continuing Power of Attorney for Property

What is a Power of Attorney for Property? 13

Continuing Power of Attorney 14

 Due Diligence Considerations 15

 When does the Continuing Power of Attorney End? 16

 Duties of the Attorney under a Continuing Power (Agent) 17

 Gifts and Loans to Friends and Relatives – *Substitute Decisions Act* 17

Accounts 18

 How Much should the Attorney under a Continuing Power of Attorney for Property be Paid? 19

 What Happens if There is No Continuing Power of Attorney? 19

Chapter 3 Power of Attorney for Personal Care

What is a Power of Attorney for Personal Care? 21

Signing a Power of Attorney for Personal Care 21

When is Someone Incapable of Making Personal Care Decisions? 22

Restrictions on a Power of Attorney for Personal Care —

 The “Living Will” 23

 Duties of the Attorney 23

 Records of Decisions 24

 Can More Than One Attorney Be Appointed? 25

 When Does the Power of Attorney for Personal Care End? 25

 What Happens if There is No Power of Attorney for Personal Care? 25

Chapter 4 Wills

Drafting the Will 27

 Structure 27

 Know Your Client 28

 Know What Will Work 28

 Keep it Simple 28

 Prepare an Outline 28

List the Assets and Liabilities 28

 What are the Assets? 28

 How is Title Held? 29

 Are there Restrictions on Transferring Assets? 29

 What are the Liabilities? 29

 Will the Spouse Make a Claim Against the Estate? 30

TABLE OF CONTENTS ix

Have the Dependants Been Provided for?	30
Resulting and Constructive Trusts	30
Who will Pay the Debts?	31
Who are the Beneficiaries?	31
What if the Spouses die in a Common Accident?	31
The Spouse or Common-Law Partner Trust	32
Granting the Power to Later Choose Beneficiaries	32
Co-Ownership by Children	33
Are Adopted Children Included?	33
Appointing a Guardian of a Child	34
When There Isn't Enough - Abatement	34
When the Asset is Gone — Ademption	34
If the Beneficiary Dies First — Lapse	35
What is the “Residue”?	35
Life Insurance Designations	36
Designations of Pensions and Registered Investments (RRSPs, RRIFs, TFSAs)	37
Who are the Estate Trustees?	37
Different Trustees for Different Tasks	38
Separate Trusts for Special Assets	38
Protecting the Plan	38
Suspicious Circumstances, Notes	38
Claims Against the Estate for Constructive Trusts	39
Revoking the Will	39
Mutual Wills for a Couple	40
Drafting the Will	40
Who?	41
What?	41
When?	41
Where?	41
 Chapter 5	
Contracts	
Contracts in Estate Planning	43
Drafting Considerations	44
 Chapter 6	
Corporations	
Share Structure	47
Shareholders' Agreement	48
 Chapter 7	
Insurance	
Life Insurance	52
Capital Needs Analysis	53
Insurance Proceeds and Matrimonial Claims	53

x ESTATE PLANNING HANDBOOK

	Designating the Beneficiary	53
	Life Insurance as an Income Tax Planning Tool	54
Part II	Planning Considerations	
Chapter 8	Estate Administration	
	The Certificate of Appointment of Estate Trustee –	
	“Probate”	58
	What does it Cost?	58
	Will the Estate Trustee Need a Certificate of	
	Appointment?	59
	Assets that do not Require a Certificate	
	of Appointment to be Administered	60
	How to Reduce or Eliminate the Estate Administration	
	Tax	60
	Hold Assets Jointly	60
	Make Use of a Bare Trust	61
	Designate Beneficiaries on Policies and Plans	61
	Two Wills	61
	For the Primary Will	62
	For the Secondary Will	62
	An “Alter-Ego” or “Joint-Partner” trust	63
	When There is No Will	64
	Settling Debts	64
	Income Tax Returns of the Deceased	65
	The Duty of Impartiality	65
	Allocating Expenses	66
	Trustee Investments	66
	Estate Accounts and Compensation	66
Chapter 9	Ontario Family Law Act	
	Equalization of Net Family Property	67
	Net Family Property — How is it Calculated?	68
	Election on Death of a Spouse	69
	The Matrimonial Home	70
	Variation in Payment — If “Unconscionable”	70
	Other Trust and Support Claims Against the Estate	71
	Planning for a Spouse’s Election on Death	72
	Avoiding Equalization Claims When Giving to a	
	Beneficiary	73
Chapter 10	Incapacity	
	Financial Decisions	75
	Temporary Guardian of Property	77

TABLE OF CONTENTS xi

How is Someone Found Incapable of Managing Property?	77
Personal Care Decisions	78
Medical Treatment Decisions and Admissions to a Care Facility	79
Planning for Incapacity	81
Joint Bank Accounts	81
Agency Arrangements	82
Powers of Attorney	82
Alter-Ego and Joint Partner Trusts	82
Chapter 11 Income Taxes and the Death of a Taxpayer	
Canadian Income Taxes	83
Implications of the Death of a Taxpayer	84
Investments in Marketable Securities	84
Rental Properties	85
Family-Use Properties	85
Avoiding Tax on RRSPs and RRIFs at Death	86
Personal-Use Property	87
Paying the Deceased's Income Tax Liability	87
Revisiting Deemed Dispositions	88
Capital Loss Utilization without Capital Gains	89
Foreign Taxes, Estate Taxes	89
Which Law Applies?	90
United States — Estate Tax	90
U.S. Estate Tax Exemptions	91
Canadian Foreign Tax Credit for U.S. Estate Taxes Paid	92
Chapter 12 Income Tax Returns to be Filed for the Deceased	
Personal Income Tax Returns	93
Income Tax Return for the Estate	94
Final Personal Income Tax Return of the Deceased	94
Advantage of Filing Optional Personal Income Tax Returns	95
Personal Income Tax Return for Rights or Things	96
Other Optional Personal Income Tax Returns	96
Chapter 13 Estate Planning Income Tax Tips While Alive, On Death and After Death	
Early Inheritances	99
Employment	100
\$750,000 Capital Gains Exemption	100

xii ESTATE PLANNING HANDBOOK

	Farming and Fishing Property	100
	Lock-In Income Tax Due on Death Now — The Estate Freeze	101
	Pass Assets to Surviving Spouse — or Better, a Spousal Trust	102
	RRSPs and RRIFs	103
	TFSA's	103
	Charitable Donations	104
	Medical Expenses	104
	Life Insurance	105
	Alternative Minimum tax	105
	Post Death Losses	105
	Foreign Owned Assets	106
Chapter 14	Taxation of Trusts and Trust Beneficiaries	
	Types of Trusts, Differences in Income Tax Treatment	107
	Calculation of Trust's Income / Flow-Through of Income to Beneficiaries	108
	Transfer of Trust Assets to Beneficiaries	108
	Each 21st Anniversary of a Trust	109
	Caution! — A Revocable Inter-vivos Trust	109
Part III	Example Situations	
Chapter 15	The Young Family	
	Their Real Concern	112
	Decisions to be Made	112
	Survivorship	112
	Insurance	112
	Guardianship	113
	Estate Trustee and Trustee of the Children's Trust	113
	The Children's Trust	113
	Other Considerations	114
Chapter 16	The Second Marriage	
	Their Concerns	116
	Tools	116
	Marriage Contract	116
	The Home	117
	Support	118
	RRSPs, RRIFs and TFSA's	118
	Right to Occupy the Home	119
	Spousal Trust	120

TABLE OF CONTENTS xiii

	Trust for Trevor	121
	Estate Administration Tax	122
	Powers of Attorney	123
Chapter 17	The Family Business	
	The Business Life-Cycle	125
	Planning for the Beginning Years	126
	Planning and the Middle Years	127
	The Later Years	128
Part IV	Precedents	
Chapter 18	Drafting Documents	
	Structure	131
	Plain Language	132
Chapter 19	Will for an Older Couple with Children and Grandchildren	133
Chapter 20	Will for a Younger Couple with Children	147
Chapter 21	Alter-Ego Trust	
	Background	157
	The Rose Smith Alter-Ego Trust	157
Chapter 22	Non-Beneficial Transfer	
	Acknowledgement and Power of Attorney	169
	Continuing Power of Attorney for Property	171
Chapter 23	Continuing Power of Attorney for Financial Matters	
	Continuing Power of Attorney for Property	174
Chapter 24	Power of Attorney for Personal Care, the “Living Will”	
	Power of Attorney for Personal Care	177
	Index	179