

# Contents

Preface.....	v
Introduction.....	xvii
<b>PART I</b>	
<b>Chapter 1 The Trust.....</b>	<b>1</b>
Trust defined.....	1
Obligations of the trustee .....	2
Using a trust .....	2
Forming (or “settling”) the trust .....	3
The three certainties of a trust.....	3
Certainty of intention.....	4
The trust property (certainty of subject matter) .....	5
The beneficiaries (certainty of objects).....	5
Trusts for persons .....	5
Trusts for purposes .....	6
Drafting the trust document .....	8
Why the trust?.....	8
What is the trust property?.....	8
Who are the beneficiaries? .....	9
Who are the trustee(s)?.....	11
How will decisions be made? .....	11
How is the trust property to be shared?.....	11
When will the trust end?.....	12
When must the trust end?.....	12
Rule against perpetuities .....	13
The Accumulations Act.....	15
Perpetuities and accumulation — income tax implications .....	16
<b>Chapter 2 The Continuing Power of Attorney for Property.....</b>	<b>17</b>
What is a power of attorney for property?.....	17

Continuing Power of Attorney .....	18
Due diligence considerations.....	20
When does the continuing power of attorney end?.....	21
Duties of the attorney under a Continuing Power .....	22
Gifts and loans to friends and relatives .....	23
Accounts .....	23
How much should the attorney under a Continuing Power of Attorney be paid? .....	24
What happens if there is no Continuing Power of Attorney? .....	24
Ontario Law Reform Commission Recommendations .....	25
<b>Chapter 3 The Power of Attorney for Personal Care.....</b>	<b>27</b>
What is a power of attorney for “personal care”?.....	27
Signing a power of attorney for personal care .....	27
When is someone incapable of making personal care decisions? .....	28
Restrictions on a power of attorney for personal care — the “living will” .....	29
Duties of the attorney .....	31
Records of decisions.....	32
Can more than one attorney be appointed? .....	32
When does the power of attorney for personal care end?.....	33
What happens if there is no power of attorney for personal care? .....	33
<b>Chapter 4 The Will.....</b>	<b>35</b>
Revoking the will .....	35
Incorporating another document into the will.....	36
The codicil .....	36
Alterations to the will.....	37
Gifts to beneficiaries to be determined later.....	37
Drafting the will.....	39
Structure .....	39
Know your client .....	39
Know what will work.....	39

TABLE OF CONTENTS ix

Keep it simple .....	40
Prepare an outline .....	40
List the assets and liabilities .....	40
What are the assets? .....	40
How is title held? .....	40
Are there restrictions on transferring assets? .....	41
What are the liabilities? .....	41
Will the spouse make a claim against the estate? .....	41
Have the dependents been provided for? .....	42
Moral claims against the estate .....	42
Resulting and constructive trusts .....	42
Who will pay the debts? .....	43
Who are the beneficiaries? .....	43
What if the spouses die in a common accident? .....	44
The spouse or common-law partner trust .....	44
Granting the power to later choose beneficiaries .....	45
Co-ownership by children .....	45
Are adopted children included? .....	46
Appointing a guardian of a child .....	46
When there isn't enough — abatement .....	47
When the asset is gone — ademption .....	47
If the beneficiary dies first — lapse .....	48
What is the “residue”? .....	48
Life insurance designations .....	49
Designations of pensions and registered investments (RRSPs, RRIFs, TFSAs) .....	50
Who are the estate trustees? .....	50
Different trustees for different tasks .....	51
Separate trusts for special assets .....	51
PROTECTING THE PLAN .....	52
Suspicious circumstances, notes .....	52
Claims against the estate for constructive trusts .....	53
Mutual wills for a couple .....	53
DRAFTING THE WILL .....	54

x ESTATE PLANNING HANDBOOK

Who? .....	54
What? .....	55
When?.....	55
Where?.....	55
<b>Chapter 5 The Contract.....</b>	<b>57</b>
Contracts in estate planning .....	57
Drafting considerations .....	58
For a contract to be binding .....	59
Some examples of contracts in estate planning .....	60
Non-revocation agreement for a couple .....	60
Agreement to hold funds received on trust .....	60
Agreement among beneficiaries to distribute an estate differently .....	61
<b>Chapter 6 The Corporation .....</b>	<b>63</b>
Share structure .....	64
Shareholders' Agreement .....	65
<b>Chapter 7 Insurance .....</b>	<b>67</b>
Life insurance.....	67
Capital needs analysis .....	68
Insurance proceeds and matrimonial claims.....	69
Designating the beneficiary.....	69
Life insurance as an income tax planning tool .....	70
<b>PART II</b>	
<b>Chapter 8 Estate Administration.....</b>	<b>73</b>
When there is no Will .....	73
Settling debts.....	74
Income tax returns of the deceased.....	74
Distributions .....	74
The Duty of Impartiality .....	75
Allocating expenses .....	76
Estate accounts and compensation .....	77

TABLE OF CONTENTS xi

The Certificate of Appointment of Estate Trustee —	
“Probate” .....	77
What does it cost? .....	78
Will the estate trustee need a certificate of appointment? ....	78
Assets that do not require a certificate of appointment to be administered .....	79
How to reduce or eliminate the Estate Administration Tax .....	80
Hold assets jointly .....	80
Make use of a bare trust .....	81
Designate beneficiaries on policies and plans .....	81
Two Wills .....	81
An “alter-ego” or “joint-partner” trust .....	83
<b>Chapter 9 The Ontario Family Law Act .....</b>	<b>85</b>
Equalization of net family property .....	85
Net family property — how is it calculated? .....	86
Election on death .....	87
The matrimonial home .....	88
Variation in payment, if “unconscionable” .....	89
Other trust and support claims against the estate .....	90
Planning for a spouse’s election on death .....	91
Limiting equalization claims when giving to a beneficiary .....	92
<b>Chapter 10 Incapacity .....</b>	<b>95</b>
Financial decisions .....	95
Temporary guardian of property .....	97
How is someone found incapable of managing property? .....	97
Personal care decisions .....	99
Medical treatment decisions and admissions to a care facility ...	100
Planning for incapacity .....	102
Joint bank accounts .....	102
Agency arrangements .....	103
Powers of Attorney .....	103
Alter-Ego and Joint-Partner Trusts .....	103

<b>Chapter 11 Taxes and the Death of a Taxpayer .....</b>	<b>105</b>
CANADIAN INCOME TAXES .....	105
Implications of the death of a taxpayer .....	106
Investments in marketable securities .....	106
Rental properties.....	107
Capital gains and losses.....	107
Recapture and terminal loss .....	107
Family-use properties .....	108
Avoiding tax on RRSPs and RRIFs at death .....	109
Personal-use property .....	110
Paying the deceased's income tax liability.....	111
Revisiting deemed dispositions .....	111
Capital loss utilization without capital gains.....	113
FOREIGN TAXES, ESTATE TAXES .....	114
Which law applies?.....	114
United States — estate tax .....	114
U.S. estate tax exemptions.....	115
Canadian foreign tax credit for U.S. estate taxes paid .....	116
<b>Chapter 12 Income Tax Returns to be Filed for the Deceased .....</b>	<b>117</b>
Personal income tax returns .....	117
Income tax return for the estate .....	118
Final personal income tax return of the deceased .....	118
Advantage of filing optional separate personal income tax returns .....	119
Personal income tax return for rights or things.....	120
Other optional separate personal income tax returns .....	121
<b>Chapter 13 Estate Planning Income Tax Tips — While Alive,     on Death and after Death .....</b>	<b>123</b>
Early inheritances.....	123
Employment.....	124
Capital gains exemption .....	124
Farming and fishing property.....	125
Lock-in tax due on death now — the estate freeze .....	125

TABLE OF CONTENTS xiii

Pass assets to surviving spouse — or perhaps better, a  
 spousal trust ..... 126  
 RRSPs and RRIFs..... 127  
 TFSAs ..... 128  
 Charitable donations ..... 128  
 Medical expenses..... 129  
 Life insurance..... 129  
 Alternative minimum tax (AMT)..... 130  
 Post-death losses ..... 130  
 Foreign owned assets ..... 131

**Chapter 14 The Taxation of Trusts and Trust Beneficiaries ..... 133**

Types of trusts ..... 133  
 Different income tax treatments for different trusts ..... 134  
 Graduated rate estate (GRE)..... 135  
 Qualified disability trust (QDT)..... 136  
 Other testamentary trusts ..... 136  
 Calculation of a trust’s income/flow-through of  
 income to beneficiaries ..... 137  
 Transfer of trust assets to beneficiaries ..... 138  
 Early 21st anniversary of a trust..... 138  
 Caution — a revocable trust..... 139

**PART III — EXAMPLE SITUATIONS**

**Chapter 15 The Young Family..... 141**

Their real concern ..... 141  
 Decisions to be made ..... 142  
     Survivorship ..... 142  
     Insurance ..... 142  
     Guardianship ..... 143  
     Estate trustee and trustee of the children’s trust ..... 143  
     The children’s trust ..... 143  
     Other considerations ..... 144

<b>Chapter 16 The Second Marriage .....</b>	<b>145</b>
Their concerns.....	146
Tools .....	146
Marriage contract .....	146
The home.....	147
Support.....	148
RRSPs, RRIFs and TFSAs.....	148
Right to occupy the home .....	149
Spousal Trust.....	150
Trust for Trevor.....	151
Estate Administration Tax .....	153
Powers of Attorney .....	154
<b>Chapter 17 The Family Business.....</b>	<b>155</b>
The business life-cycle .....	155
Planning for the beginning years .....	156
Planning and the middle years.....	158
The later years .....	158
<b>Chapter 18 The Vulnerable Client .....</b>	<b>161</b>
Your concerns.....	162
Suggestions .....	162
What if it gets worse?.....	166
<b>PART IV — PRECEDENTS</b>	
<b>Chapter 19 Drafting Documents .....</b>	<b>167</b>
Structure .....	167
Plain language.....	168
<b>Chapter 20 Sample Will for a Young Couple with Children.....</b>	<b>169</b>
<b>Chapter 21 Sample Will for an Older Couple with Children     and Grandchildren .....</b>	<b>175</b>
Clauses for a Spousal Trust.....	182



TABLE OF CONTENTS xv

**Chapter 22 The Non-Beneficial Transfer.....185**  
ACKNOWLEDGEMENT AND POWER OF ATTORNEY .....185  
CONTINUING POWER OF ATTORNEY FOR PROPERTY .....187

**Chapter 23 Sample Continuing Power of Attorney for Financial  
Matters .....189**  
CONTINUING POWER OF ATTORNEY FOR PROPERTY .....190  
    Background facts — memo to file .....190

**Chapter 24 Power of Attorney for Personal Care, the  
“Living Will” .....193**  
POWER OF ATTORNEY FOR PERSONAL CARE .....193

Index .....195

