

THE PROBATER

Volume 2, Issue 2

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WILL DRAFTING -- PREVENTING PROBLEMS LATER

- **Forfeiting the Right to Contest the Will**

Some clients may insist that a clause be set out in the will providing that a beneficiary forfeits his/her rights if they take proceedings to contest the validity of the will.

These clauses are frequently referred to as “in terrorem” clauses. The enforceability of the clause itself is always a problem; however, it is not in most circumstances illegal or invalid. Courts have confirmed that such clauses are only illegal when they attempt to oust the jurisdiction of the court to determine questions of construction and other such issues.

The following clause probably goes far enough to meet the wishes of most will-makers who insist on a clause of this kind:

“I declare that if any beneficiary of this my Will shall, within ____ years after my death without the consent in writing of my Trustees, which Trustees in their discretion may give or withhold, institute any action or proceeding in which the validity of this my Will or an Codicil thereto is sought to be impeached, then, in every such case, such beneficiaries shall absolute forfeit and lose all interest in any right to any gift to him or her hereunder or any Codicil hereto and every gift so forfeited shall fall into my residuary estate unless it is a gift of a share of my residuary estate, in which case it shall devolve as though such beneficiary had died at the time such action or proceeding was instituted.”¹ (see Histrop, Lindsay, Estate Planning Precedents: A Solicitor's Manual (Carswell, 1989).

- **Contracts Not to Contest the Will**

In circumstances where those who would be considered to be the likely beneficiaries of an estate know that the will maker has favoured one beneficiary over the other and then changed his or her mind and subsequently changed his or her will, a contract not to contest the will may be considered.

This is of course a unique situation where the solicitor may be approached by the children in a family where it is well known that the father had from time to time favoured one child over the other or to the exclusion of the others. It can be useful to try to anticipate such a dispute and to avoid the legal costs of a will challenge by entering into Minutes of Settlement between the beneficiaries that provides for the executor of the father's estate to divide the assets of the estate equally to all of the parties, notwithstanding the terms of the will. It may be useful to add in a provision that deals with any inter vivos gift or gifts to any of the signatories to the agreement within six months of the date of the agreement that those gifts also be redistributed equally amongst the children or brought into hotchpot. If you are interested in receiving a copy of a precedent of a contract of this nature, please contact Lori Bacque at (416) 863-1000.

- **Advising Beneficiaries**

In circumstances where the will maker clearly wishes to favour one child over the other as a result of that child's dutiful and time consuming work to assist the testator in his or her later years, or for any other reason, it can be helpful, although usually not practical to have the will maker advise the child who is not favoured of his or her decision at the time the will is made.

- **RECENT PUBLICATIONS**

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| January 29, 1998 | "Changing and Removal of Trustees" - Ian M. Hull - Canadian Bar Association - Ontario Trusts and Estates - Institute. |
| January 23, 1998 | "Vetting the Will to Protect Your Client and Yourself From Potential Disaster" - Ian M. Hull - Lecture for Strategy Institute. |
| January 19, 1998 | "Production of Hospital Records in Estate Litigation Matters" - Ian M. Hull, (1997) 18 <u>E.T.R.</u> (2d) 187. |
| December, 1997 | "A Current File With an Unsigned Will: A Loose Cannon in the Solicitor's Office" - Rodney Hull, Q.C. [1997] 17 <u>Estates, Trusts and Pensions Journal</u> 31. |
| November 24, 1997 | "Conflicts and ILA" - Ian M. Hull - Lecture for the Canadian Bar Association - Ontario Trusts and Estates Section. |
| 1997 | Prior Wills and Testamentary Documents: "Know When to Hold Them, Know When to Fold them", Ian M Hull, (1997) 16 <u>E.T.R.</u> (2d) 94. |

For information relating to any of the articles referred to above, please contact Lori Bacque at (416) 863-1000.

**Please note: *The Probater* is a quarterly newsletter provided as an information service. It is a summary of current legal issues of concern to estate law practitioners. The comments and articles are not meant as legal opinions and readers are cautioned not to act on information provided without seeking specific advice with respect to the particular situation.