WILL PLANNING
For First Nation Peoples Living on Reserve

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Chapter 1 – Preamble

This toolkit is intended as a general guide for drafting Wills for First Nations people who are registered under the *Indian Act* and are "ordinarily resident on reserve". It contains a brief summary of applicable law and sample clauses as a guide; however, it is not intended to be a comprehensive review of the law, nor should you rely on any of the information in this toolkit as a substitution for consulting with and retaining a lawyer.

Wills for First Nations people can be complex and no one's circumstances are identical, so it is recommended that you seek legal advice on your own First Nation laws, the laws of Canada and sometimes the laws of the Province or Territory where you live or where you own property. It is not recommended that you prepare your own Will and ***this toolkit is not intended to give you legal advice***.

This toolkit also does not apply to:

1) First Nations people living off-reserve or on treaty settlement lands, or
2) Métis or other aboriginal people who are not registered under the Indian Act.

References to "**Indian**" throughout this toolkit means a First Nation person registered as an "*Indian*" under the *Indian Act* and by "**First Nation Reserve**" by which we mean an Indian Reservation, both as defined in the under the *Indian Act*, R.S.C. 1985, c, I-5

Chapter 2 – Introduction

It is estimated that fewer than 50% of Canadians have a Will. Planning for your death is something everyone would naturally rather avoid, but in all honesty – you do not make a Will for yourself, but for those you leave behind. Not having a Will (or not including all of your property in your Will) can cause misunderstandings and disappointments for your survivors. If you don't express your wishes in a Will, your survivors have to guess and speculate.

Disputes over Wills (or a lack of one) are known to fracture families and even communities. Clearly it is difficult to decide who should be included in your Will and how your property should be divided, but doing nothing is much worse than just doing what you think is best at the time. Wills are never perfect and they can always be revised if you change your mind. Remember, however that you can only change a Will while you are mentally and physically capable of doing so. So, delay can be fatal (no pun intended).

What makes things even harder is that today's world is so complex. Families worry about undue influence over an elder and fraud. Rates of dementia are increasing as we live longer. Families become estranged and relationships change. People live with common-law partners, but may still be married to a spouse. Marriage between First Nation and non-First Nation partners is common. First Nation's peoples have assets on-Reserve and off-Reserve. Some have corporations and investments in businesses. Some have significant wealth and investments, others live day to day.

With the passage of the *Family Homes on Reserves and Matrimonial Interests or*

Rights Act, S.C. 2013, c.20, First Nation members now need to be aware of these new rules pertaining to real property on Reserve and whether they fall under the Act or laws made by their own individual First Nation.

Not getting your affairs in order, which includes making a Will and Powers of Attorney, only creates hardship for those you leave behind.

So – Make a Will (before it's too late!)

Chapter 3 – The Legal Stuff

The following is an overview of the unique legal regime governing Wills for First Nation peoples who are ordinarily resident on a First Nation Reserve in Canada.

Any First Nation person who is ordinarily resident[1] on reserve should make sure that whomever they hire to help them prepare a Will understands that there are laws and challenges unique to Wills for this community.

To understand these challenges, you must go back to how law-making powers were divided between the Federal and Provincial governments when Canada was formed under the *British North American Act, 1867* (now the *Constitution Act, 1867*[2]).

Canada has a federal system of government which means that the power to make laws is divided under *The Constitution Act, 1867* between three governments:

1. Indigenous people exercising self-government[3];
2. The Federal government (Section 91); and
3. The Provincial governments (Section 92).

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[1] "**ordinarily resident on reserve**" means that the person makes his or her home on reserve. A person may be considered ordinarily resident on reserve, even if they are away from the reserve for a while. For example, someone may have lived on reserve all of their life, but when they are elderly, they have to move into a care facility off-reserve. That person is still be considered to be ordinarily resident on reserve, even if they live in the care facility for many years. Someone who is away from home to attend school or do seasonal work is also still considered to be ordinarily resident on reserve. Writing Your Own Will. A Guide for First Nations People Living on Reserve (Writing Your Own Will, A Guide for First Nations People Living on Reserve, © 2013 Aboriginal Financial Officers Association of BC, Revised 2013)

[2] *The Constitution Act 1867,* 30 and 31, Victoria, c.3 (U.K.) https://laws-lois.justice.gc.ca/eng/const/page-1.html

[3] The rights of Indigenous peoples in Canada to make their own laws arose after years of litigation and it is still evolving.

(**Note:** Territories derive their power to make laws from a delegation of powers from the Federal government).

The right to make laws is divided by **subject matter** between Canada and the Provinces.

Section 92 of the *Constitution Act, 1867* gives the power to make laws pertaining to "***property and civil rights***" to the Provinces. Wills and Estates have been found to fall within this subject matter, so one could assume that Provincial laws apply to First Nation peoples who reside on a reserve within those Provinces, whether or not they have property on or off-Reserve.

To complicate matters, the *Constitution Act, 1867*[4] also gives the Federal government exclusive power to make laws pertaining to ***"Indians, and Lands reserved for the Indians"***[5]. So, if Canada has sole jurisdiction over "Indians" and "Lands reserved for the Indians", then you might assume that includes the power to make laws about First Nation Wills and Estates.

In fact, Canada does have *responsibility* for First Nation Wills, but it has not passed legislation to guide First Nations people in what the form of their Wills should look like. There are some provisions in the *Indian Act,* but they are largely prohibitive in nature and offer little assistance in prescribing how a First Nation Will should look.

The Provinces, having subject matter jurisdiction over Wills and Estates, have occupied the field and have developed comprehensive legislative rules (with common-law interpretations) about the execution, content and interpretation of Wills. Consequently, lawyers tend to draft First Nation Wills in the form accepted generally in the Province where Testator's First Nation is located. This will continue until (and if)

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[4] *Constitution Act, 1867,* Section 91(24)
[5] *Indian Act*, R.S.C., 1985,c. I-5, Subsection 91(24)

Canada or First Nations themselves develop more comprehensive laws in this area. Disputes over the interpretation of a First Nation Will can be sent to Provincial Superior Courts[6], with the consent of the Minister[7] and any decisions of the Minister made about the interpretation of a Will or the administration of the estate of an Indian can be appealed to the Federal Court of Canada.

Now that indigenous peoples' power to make their own law is expanding, it may be that First Nations will begin make their own laws which touch on or govern the making of Wills. With the passage of the *Family Homes on Reserves and Matrimonial Interests or Rights Act*[8] ("FHRMIRA"), that is now possible and encouraged. It also must be recognized that most First Nation peoples have assets and property both on and off-Reserve. They may have their family homes and businesses located on-Reserve, but may also have bank accounts, investments and real property (houses, cottages, hunt camps, farms, vacant land) off-Reserve.

Consideration must be given to income tax implications when developing an estate plan for First Nations peoples who have assets off-Reserve or where they conduct business under corporations which do not qualify as "Indians" for income tax purposes. For example, shares in a private corporation, although owned by a First Nation member, may be subject to capital gains tax triggered on the death of the shareholder. In addition, a spouse or common-law partner may have an interest in property on Reserve which property or structures may be used in the course of an on-Reserve business under *The Family Homes on Reserves and Matrimonial Interests or Rights Act*[8].

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[6] "Superior Court" in Ontario and Quebec; the "Court of Queen's Bench" in Alberta, Saskatchewan, Manitoba and New Brunswick; the "Supreme" Court in Newfoundland and Labrador, British Columbia, Nova Scotia, Prince Edward Island, Yukon and the Northwest Territories. Nunavut has a single, unified court, the "Nunavut Court of Justice")

[7] "Minister" means the Minister of Indigenous Services Canada (ISC)

[8] *The Family Homes on Reserves and Matrimonial Interests or Rights Act,* S.C. 2013, c. 20

With the passage of the *Family Homes on Reserves and Matrimonial Interests or Rights Act*[8], spouses and common-law partners now have more rights with respect to the use and occupation of land on Reserve.

In conclusion, most Canadians only have to worry about the laws of their Province or Territory when make a Will, whereas First Nation Canadians can be subject to their own First Nation laws, the laws of Canada and sometimes the Province or Territory where they live. All at the same time.

A lawyer drafting a Will for a First Nation member living on Reserve has a lot to consider.

Chapter 4 – Powers of the Minister to Change or Void a Will

In drafting a Will, you should be mindful of the powers that the Minister[9] has to amend, approve or void all or part of a First Nation person's Will.

Section 42(2) of the *Indian Act*[10] confirms the exclusive jurisdiction of the Federal government over deceased "Indians";

> "*all jurisdiction and authority in relation to matters and causes testamentary, with respect to deceased Indians,* ***is vested exclusively in the Minister*** *and shall be exercised subject to and in accordance with the regulations of the Governor in Council."*

Section 42(3) goes on to give the Minister[9] the power to make regulations applicable to the estates of Indians and bestows broad powers over an Indian's Will and administration of an Indian's estate, including the power to:

- **appoint executors** of wills and administrators of estates and remove them and appoint others in their place;
- **make or give any order, direction or finding** that in the Minister's[11] opinion is necessary or desirable to make with respect to any matter under the estate of an Indian.

In addition, the Minister[9] must consent to any matter pertaining to the interpretation of an Indian's Will or the administration of an Indian's estate being referred to a Provincial Court.

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[9] "Minister" means the Minister of Indigenous Services Canada from time to time, where he, she or they

[10] *Indian Act*, R.S.C., 1985,c. I-5

[11] "Minister" means the Minister of Indigenous Services Canada from time to time, whether he, she or they

Sections 45 and 46 of the *Indian Act* gives the Minister the ability to **declare the Will of an Indian to be void in whole or in part** if any of the following occur:

> **"***46 (1) The Minister may declare the will of an Indian to be void in whole or in part if he is satisfied that*
>
> *(a) the will was executed under duress or undue influence;*
>
> *(b) the testator at the time of execution of the will lacked testamentary capacity;*
>
> *(c) the terms of the will would impose hardship on persons for whom the testator had a responsibility to provide;*
>
> *(d) the will purports to dispose of land in a reserve in a manner contrary to the interest of the band or contrary to this Act;*
>
> *(e) the terms of the will are so vague, uncertain or capricious that proper administration and equitable distribution of the estate of the deceased would be difficult or impossible to carry out in accordance with this Act; or*
>
> *(f) the terms of the will are against the public interest.*"[12]

For "Indians" who ordinarily reside on Reserve, the current primary decision maker for determining the validity or interpretation of a Will is the Minister of Indigenous Services Canada ("ISC"), not the Provincial or Territorial Court of the Province in which the Testator ordinarily resides.

[12] *Indian Act,* R.S.C. 1985, c. I-5

Chapter 5 – Land Ownership on Reserves

1. Title to Indian Lands

Indians do not "own" the land on a Reserve. First Nation Councils may have some control over lands on a Reserve (subject to the consent of Canada), but they do not own it either.

Canada owns all Reserve lands under *The Constitution Act, 1867*[13], Section 91(24), which states in part that Canada has exclusive jurisdiction over "**Indians and lands reserved for Indians**" and therefore Indian Reserve lands are distinct from other lands in Canada. [14]

Under Section 20(1) of the *Indian Act*[10] no Indian is lawfully in possession of land on a reserve unless, with the approval of the Minister, possession of the land has been allotted to him by the council of the band."

Non-indigenous Canadians often do not appreciate the implications of this difference for First Nation peoples. They may weigh in on the quality of housing on First Nations, without understanding the limitations on First Nation peoples to own, finance or to develop their own property.

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[13] *Constitution Act 1867,* 30 and 31, Victoria, c.3 (U.K.) https://laws-lois.justice.gc.ca/eng/const/page-1.html

[14] Land Management Manual, December 2002, Indian Affairs and Northern Development Canada https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/enr_lds_pubs_lmm_1315105451402_eng.pdf

2. Land Registration Systems

There are two systems for recording interests in First Nation's land in Canada.

(a) The Indian Land Registration System (ILRS)

Indigenous Services Canada (ISC) maintains the ILRS. Similar to Provincial or Territorial land registration systems, the ILRS consists of documents related to interests in reserve lands that are administered under the *Indian Act*[15]. The Indian Land Registration System (ILRS) is web-based and located in Ottawa, Ontario. The records are available to First Nations, ISC staff and the general public.

(b) Framework Agreement on First Nations Land Management Act (FNLMA)

The First Nations Land Registry System (FNLRS) is used for land records of First Nations who operate under their own Land Code made under the *First Nations Land Management Act* (FNLMA)[16]. Once First Nations have joined and are signatories to the Framework Agreement, they are able to develop their own Land Code. Once that is completed and ratified by their First Nation community, land administration is transferred to that First Nation from Indigenous Services Canada.

3. How Reserve Lands can be Held

(a) Land Codes made under the *First Nations Land Management Act* (FNLMA)[16] pursuant to the *Framework Agreement on First Nation Land Management, 1996* (FNLMA)[17]

[15] *Indian Act,* R.S.C. 1985, c. I-5

[16] "Land Code" means a land management regime made in accordance with the Framework Agreement and the *First Nations Land Management Act,* S.C. 1999, c.24, Section 6.

[17] *First Nations Land Management Act,* S.C. 1999, c.24

Land Codes can include how individual members of that First Nation can occupy or possess lands on that First Nation. Reference should be made to the Testator's First Nation's Land Code[16] before making a Will.

(b) Under the *Indian Act*[5] there are several ways in which a First Nation member may possess land on a Reserve:

(i) Certificate of Possession under the Indian Act[18],

(ii) Certificate of Occupation under the Indian Act[19], or

(iii) Lease under the Indian Act[5].

4. Occupation of Land under the *Indian Act*[5]

(a) Certificate of Possession (CP) under Section 20(2) of the *Indian Act*:

A Certificate of Possession or "CP" is a document which gives an exclusive right to possess a parcel of land on the Reserve to a registered Indian[48] and it is granted by the Minister of Indigenous Services Canada under Section 20(2) of the *Indian Act*[10]. It does not create a "title" interest in the same way a deed or transfer would off-reserve because title to the land remains with Canada.

A Certificate can be held by one person alone or by more than one person as ***tenants in common*** (if one owner dies their undivided share passes to their estate) or as ***joint tenants*** (if one owner dies, their undivided interest passes to the surviving joint tenant(s) and not through his or her Will).

A First Nation member can be allotted or can purchase the CP land from the First Nation, can inherit it from another member, or can purchase it from another member of the same First Nation.

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[18] Sections 20(2) and 20(5) of the *Indian Act,* R.S.C. 1985, C.I-5
[19] Sections 20(2) and 20(5) of the *Indian Act,* R.S.C. 1985, C.I-5

Any transfers of a Certificate of Possession must be approved by the Minister and must be in conformity with regulations made under the *Indian Act.* Usually the parcel of land must be properly described with reference to a registered Canada Lands survey ("CLSR" plan). The First Nation member may sell or transfer lands held under a Certificate of Possession to other members of that First Nation, but only with the consent of the Minister[9] and in conformity with the *Indian Act*[10]. The house and buildings located on lands held under a Certificate of Possession are owned by the holder of the Certificate and title to those improvements usually pass with the land (unless the Buyer and Seller agree otherwise).

Lands held under a Certificate of Possession can be subject to liens or mortgages in favour of the First Nation or another member of the same First Nation, but other lenders (such as banks and credit unions) cannot mortgage lands on a Reserve because;

1) that would create an "interest" in land in favour of a non-Indian and Reserve lands are held for the exclusive use of Indians under the *Indian Act*[20]*;* and

2) Section 89 of the *Indian Act*[5] exempts all Reserve lands from seizure and mortgages by non-registered or non-member Indians (as defined in the *Indian Act)*.

NOTE: Lands held under a Certificate of Possession can be transferred by Will to a beneficiary or beneficiaries; however, any such transfer is subject to the approval of the Minister. The buildings fixed to the CP land pass with the right to possess.

[20] *Indian Act,* R.S.C. 1985, c. I-5

(b) Certificate of Occupation under the *Indian* Act Section 20(5)

A Certificate of Occupation may be issued by the Minister[9] as evidence that an Indian has a temporary right to occupy a parcel of land on reserve which has been allocated to that member by the band council. Any such occupation is subject to the approval of the Minister and is evidenced by the Minister issuing a Certificate of Occupation (with or without conditions and restrictions) until the Minister decides whether to grant permanent possession by issuing a Certificate of Possession.

A Certificate of Occupation can be subject to conditions imposed by the Minister and is granted for a period of up to two years unless that period is extended by the Minister under Section 20(6). If the Minister is satisfied that all conditions have been met, she may approve the possession of that parcel on a permanent basis and issue a Certificate of Possession. If the Certificate of Possession is not issued within the period of time set by the Minister (or as it may be extended), then the parcel is again made available to the Band for allotment to someone else.

NOTE: Will drafters must be very careful to review a Certificate of Occupation for the conditions attached to it. The Minister may include conditions such as the certificate is not transferable and therefore any devise of the right to occupy in a Will could be void or voidable.

(c) Lease and Permits made under the *Indian Act*:

A member who holds a Certificate of Possession (CP) for a certain parcel of land can lease that land to a third party, with the consent of the Minister and sometimes, the consent of the band council.

(i) Agricultural Permit:

Permits may be granted by the Minister to permit lands held under a CP to be used for agricultural purposes to a non-member of the First Nation under Section 28(2) of the *Indian Act*[10]. Such permits can be for terms of up to one year and for a longer period with the consent of the Band Council.

(ii) Lease for Personal Use:

Land can also be leased for personal use to a non-member under Section 58(3) of the *Indian Act*[10] provided the term of the lease is under 49 years. It is a policy of the Minister that any term over 49 years needs the consent of the band members.

NOTE: Will drafters must be careful to review the terms of any leases of CP lands when drafting a Will.

Leases can be used to give a right to possess land on Reserve to a spouse or common-law partner of an Indian. If the spouse or common-law partner is not a registered Indian or is a registered Indian, but not a member of the same First Nation where the Family Home or other matrimonial property is located, the Will Drafter could provide in a Will that it is the Testator's "wish" that the land be leased and the buildings on that land be transferred to the spouse or common-law partner. The lease will need the consent of the Minister and possibly the Band Council, but it may be a way to permit a surviving spouse to remain in possession of the Family Home[21] (as defined in the *Family Homes on Reserves and Matrimonial Interests or Rights Act*[22]) beyond the prescribed 180 days after the testator's death without having to obtain a Court Order under Section 36 of that Act. Care should be taken in trying to circumvent the general rule that land on reserve is held for the exclusive use of "Indians". Inquiries should be made at the time of making the Will as to whether or not an Executor and Trustee has the power to enter into a lease with Canada.

[21] *Family Homes on Reserves and Matrimonial Interests or Rights Act,* S.C. 2013, c. 20, Section 2(1)
[22] *Family Homes on Reserves and Matrimonial Interests or Rights Act,* S.C. 2013, c. 20, Section 2(1)

5. Custom Allotment

Another way of possession land on Reserve is by "custom allotment."

In a "custom allotment", the First Nation person and his or her family reside in a house located on land allocated to the member under a **custom allotment** made by the First Nation Band Council. The land occupied is usually not surveyed, but the property "limits" may be agreed upon or accepted the community.

The buildings or structures located on a custom allotment are usually owned by the First Nation Band, but not always. It is important when drafting a Will to determine:

(a) how the land is held,

(b) who owns the house and outbuildings located on the land,

(c) what the First Nation laws or customs or policies are with respect to transferring the house or property in a Will.

It may become evident that a disposition of land held under a custom allotment should not be included in a Will because the house and land and perhaps the outbuildings are not owned by the Testator.

NOTE: Custom allotments are not recognized by INAC as "ownership" in land therefore "title" cannot be transferred to anyone in a Will other than as an expression of wishes.

Only the First Nation band council can "re-allot" a custom allotment from one person to another.

6. Occupation of Land under the Framework Agreement on First Nations Land Management (FNLMA):

If a First Nation member's Reserve Lands are governed by a Land Code[16] for that First Nation must be reviewed to understand how land is held under that Land Code and whether such land can be transferred in a Will.

7. Financing First Nation Lands

For those First Nations where a Certificate of Possession is available, the ability to borrow and use the land as collateral security for a loan is limited because the Borrower (First Nation member) does not actually "own" the land as it is understood off-Reserve.

If a First Nation member wishes to finance construction of a house by a First Nation member on CP (Certificate of Possession) land, some options may be:

(a) First Nation Mortgage:

Some First Nations have access to funds which can be loaned to First Nation members to construct or renovate a house under the First Nation's internal Housing Loan programs. The First Nation Council can "mortgage" the interest of a member of its own First Nation. Funding is usually limited and the amount available to borrow is often far less than the current market cost of building a home, so many First Nations people buy "Pre-fab" or "modular" homes and must finance the balance in cash or personal loans.

(b) Personal Loan from Chartered Bank:

For those First Nation members with sufficient household income, it is possible to apply for a personal loan from a Canadian Chartered Bank (most credit unions in Canada will not provide financing on First Nation property). To

qualify for that loan, the member will need a Ministerial loan guarantee ("MLG") backed by the First Nation.

It should be noted that most First Nations consent to loans for houses, not outbuildings, barns or other structures. Any other improvements must be paid for by cash, unless the family income or investments are high enough that the Bank will make a personal loan or there are First Nation loans or grants available.

(c) Lease of Land:

There is another way for First Nation peoples to profit from land on Reserve and that is by leasing the land to non-First Nation individuals or corporations. For example, members who hold a Certificate of Possession (CP) in Reserve lands can request the consent of the Minister[9] to a lease of the CP land from Canada to non-First Nation individuals or corporations. This is usually done for cottage or agricultural purposes[23], but can be done for commercial purposes in some communities. Any rent earned flows through to the First Nation holder of the Certificate of Possession (the "Locatee"). Title to the land, however, remains in the Crown in Right of Canada.

8. Parcel Abstract Searches and Questions to Ask About Property Before Making a Will

Before drafting a Will, the Testator should meet with the person responsible for lands in their First Nation and should ask for the parcel abstract report of their lands. The lands may fall under the *Indian Lands Registration System (ILRS)* or the First Nation's Land Registry System (FNLRS) where there is a Land Code[16], depending on

[23] *Indian Act,* R.S.C. 1985, c. I-5, Sections 28 and 58.

which is applicable to that First Nation.

These are the types of inquiries which should be made:

A. What type of interest does the Testator have in the land? (CP Holder? Custom Allotments? Certificate of Possession or Occupation? Locatee? Lessor?)

B. If the Testator has a Certificate of Possession:

- Did the Testator receive the land in a Transfer approved and registered in the *Indian Lands Registration (IRS)* or *the First Nations Land Registry System (FNLRS)*?
- Is the Testator the sole owner or does someone else have an interest?
- Does the Testator have a spouse or common-law partner with whom he or she is no longer co-habiting who may have still an interest in the property?
- Is the property subject to any liens, caveats or encumbrances?
- Has the property been leased to a non-member or non-Status Indian?
- Is the property subject to any rights of way?
- Is there a registered survey of the property and does the property as shown on that survey match the property as it is actually occupied?
- Has any part of the land been sold and if so – was the transfer registered in the ILRS/FNLRS and if so, should the description for the Transferor's land be changed?
- Are there a person or persons who are dependent on the Testator (minor children, an ability challenged adult, elder?) residing in any buildings on the property such that the Testator must make provisions for them elsewhere?
- Do any other adults ordinarily reside in the house? Do they pay rent? Can they be evicted if the Testator transfers or directs the sale of the property and/or house in a Will?

- Is the property being used for commercial purposes? Is there a lease? Can it be terminated on death or assumed by someone else? Is the rent or terms of the lease in default?
- Are there any environmental concerns?
- Is there legal access to the property over a community road or is access by a right of way? Is that right of way surveyed and is it valid?
- Is the property subject to flooding?
- Is the property contaminated or environmentally sensitive?
- Was any septic system installed on the property inspected and approved by the appropriate authority?
- Is there a well on the property?
- Does anyone have a non-registered lease of the property – either to occupy buildings or land or to pasture or plant crops? What does the lease say about the Lessee's rights if the Testator sells or transfers the land?
- Is the property insured against risk of fire or damage? Who is the owner of the policy, who is the insured person and what is the coverage? Is there public liability insurance? Is the amount of insurance and terms adequate?

C. If the Testator is in Possession Pursuant to a Lease:

- Who are the parties to the Lease?
- Has the Lease been approved and registered?
- What land or buildings does the Lease apply to?
- Can that lease be assigned on the death of the Testator?
- Is the Testator, as a Lessee, in default of payment of rent to Canada or in the payment of any fees or levies to the First Nation?
- Is the Testator in default of any other terms of the Lease?
- Are there any Assignment Fees and if so, can the Estate of the Testator pay them?
- Does the description of the land in the Lease match the land actually occupied?

- Has the leased land been surveyed?
- Are there any environmental concerns?

D. First Nation laws or policies and Debt Owing to the First Nation:

- Are there any First Nation laws or policies which affect the use of the property, the occupation of the house and/or buildings or the ability of the Transferor to transfer land by Will?
- Are there any preconditions to transfers? For example, if the property is subject to a mortgage or lien in favour of the First Nation – does it have to be paid off or can the Testator's beneficiaries assume the debt)?
- Does the First Nation have a Housing Policy and what does it say about disposing of encumbered land on death?

E. Matrimonial Real Property Law

- Does the Testator have a spouse or common-law partner? Does the Testator have both?
- Does the Testator cohabit with that spouse? If not – is there a Separation Agreement or any Court Orders dealing with possession or title to the Family Home?
- Could the property be considered a "Family Home" under the *Family Homes on Reserves and Matrimonial Interests or Rights Act*[24] or are there any First Nation laws which govern Family Homes and matrimonial interests or rights*?*
- If the Testator does not cohabit with his spouse, does he live with a common-law partner?
- What is the Testator's intention as to the occupation of the Family Home on death?

[24] *Family Homes on Reserves and Matrimonial Interests or Rights Act,* S.C. 2013, c. 20

Chapter 6 – Matrimonial Interests

For a complete Guide to the *Family Homes on Reserves and Matrimonial Interests or Rights Act*[25] see the materials prepared by the Centre of Excellence for Matrimonial Real Property (coemrp.ca) which is hosted by the National Aboriginal Lands Managers Association (nalma.ca) in its Matrimonial Real Property (FHRMIRA) Toolkit. https://www.coemrp.ca/our-publications/matrimonial-real-property-toolkit/

The following is Chapter 1: "**Introduction: The Family Homes on Reserves and Matrimonial Interests or Rights Act – *What is it*?**

From: A Collection of Materials on the Family Homes on Reserves and Matrimonial Interests or Rights Act by the Centre of Excellence for Matrimonial Real Property (www.coemrp.ca)

What is Matrimonial Real Property?

Matrimonial real property can include land held by one or both spouses or common-law partners and used by the family, i.e. houses, sheds, mobile homes or other structures on that land. It does not include things such as cars, money, clothing or televisions. In the event of death, divorce or separation, people living off-reserve have provincial rights and protections regarding their family home. These provincial law rights and protections do not apply to those living on-reserve. To give people living on reserves comparable protections and rights as those living off-reserve, a law was put in place on December 16, 2013, called the *Family Homes on Reserves and Matrimonial Interests or Rights Act (the Act).*

[25] *Family Homes and Matrimonial Interests or Rights Act,* S.C. 2013, c.20

What Does the Act Do?

The *Act* gives First Nation communities the opportunity to either develop their own community matrimonial real property law or follow provisional federal rules. These rules, although intended to apply temporarily until a First Nation develops their own matrimonial real property law, can be followed for an indefinite period of time.

As of December 16, 2013, First Nation communities can make their own matrimonial real property laws under the *Act.* If a First Nation makes its own laws within one year (before December 16, 2014), the provisional federal rules will not apply to that community.

A First Nation may enact its own law at any time. However, on December 16, 2014, the provisional federal rules will apply until the First Nation law comes into force.

If a community develops its own laws, the content of the law has to be agreed upon by the First Nation and its members. All members of voting age, 18 years or older, regardless of whether or not they live on or off-reserve, have the opportunity to vote on the proposed law. Community members have the right to learn about the law and to know be made aware of when a vote on the law is taking place.

Protections

As of December 16, 2014, once the provisional federal rules are in effect, the following are examples of the protections and rights that would apply, should a First Nation community not have enacted its own community law:

Emergency Protection Orders

- In cases of domestic violence, a victim can apply to the court to remove their abusive partner from the family home. This application can be made by the victim or by someone else, such as a nurse or a social worker on behalf of the victim, without the presence of the spouse or common-law partner.

Family Home

- Either the spouse or common-law partner has the right to occupy the family home during the conjugal relationship.
- A family home cannot be mortgaged or sold without the consent of both people in the relationship.
- If a marriage or common-law relationship breaks down, a spouse or common-law partner can apply to the court to have time-limited exclusive occupation of the family home. That means that a court can order a spouse or common-law partner to leave the family home for a period of time.
- On the death of a partner who held an interest in the family home, the surviving partner may live in the family home for a period of up to 180 days.

Division of On-Reserve Matrimonial Interests or Rights

- In the event of separation, divorce or death, both partners are entitled to half the value of the family home.
- A court can enforce written agreements that set out the amounts that each spouse or common-law partner are entitled to receive in the event of separation or divorce.

Balancing Your Rights and the Rights of Your First Nation Community

The provisional federal rules specify:

- First Nation councils are to be notified about applications for an order made under the *Act,* such as an application made to the court for exclusive occupation of a family home.
- First Nation councils will not be notified in cases of emergency protection orders and confidentiality orders arising from domestic violence situations.
- Before issuing exclusive occupation orders, courts are to consider the collective interests of the First Nation members and any representation by the First Nation council with respect to that First Nation's cultural, social and legal context, etc.

What the *Act* Does Not Do

The *Act* does not

- Allow non-Indians or non-members to gain permanent possession of a family home;
- Give non-members of a First Nation the ability to sell reserve land; or
- Allow the minister responsible for Indigenous affairs to have a role in reviewing, cancelling, rejecting or altering First Nation laws.

Chapter 7 – Estate Planning Documents

1. The Will

(a) What is it?

A Will is a legal document in which a person (the "Testator"[26]) sets out in writing how they want their "Property"[27] (called the "Estate"[28]) to be administered and eventually distributed after their death. Wills can be made in the handwriting of the Testator, or typed and witnessed in a form similar to what is used in the Province or Territory in which the First Nation is located. First Nations may develop their own laws on the form of Wills in the future, but until then the Will Drafter must rely on the form of Wills in their own jurisdiction.

Sample Wills can be found on the internet and there are samples of Wills and standard Will clauses in this Toolkit, but there is no substitute for hiring a lawyer with experience in preparing Wills and particular, Wills for First Nation members living on Reserve.

A simple Will, handwritten by the Testator can certainly be a valid Will in some circumstances and in fact, under Section 45(1) of the *Indian Act*[5] gives the Minister the power to decide what constitutes a valid Will. However, Wills can be complex and gifts which may seem straightforward to the Testator can be

[26] Testator is the person who puts their wishes for the disposition of their real and personal property after death in a Will.
[27] "Property" includes *real* (immovable) property, such as land and buildings or structures and *personal* (moveable) property, such as personal effects, furniture, motor vehicles, art, bank accounts (which are not jointly owned).
[28] "Estate" is defined in Section 2(1) of the *Indian Act* as the "real and personal property and any interest in land"

misunderstood. For example, wording in a Will where the Testator says "I leave my house to my daughter" may not work without knowing what type of right or interest the Testator had to occupy that house (Certificate of Occupation, Certificate of Possession, Custom Allotment or Lease?). The house may also be a "Family Home" under the *Family Homes on Reserves and Matrimonial Interests or Rights Act*, S.C. 2013, c. 20 (FHRMIRA) or under First Nation laws and therefore subject to rights and interests of a spouse or common-law partner.

Testators should also consider the provisions of the *Indian Act*[29] and in particular the provisions relating to the guardianship and management of money for minor children (for example). It is important to consult with a professional who understands the special circumstances facing First Nation peoples in preparing a will and in estate planning.

NOTE: The Testator must be over the age of majority[30] and capable of making a Will at the time the Will is made. If, at the time of signing a Will the Testator is not capable of making a Will, because they are under the age of majority or not able to understand what they are signing due to a mental or physical incapacity, the Will may be found by the Minister[7] or a Court[31] to be invalid. Similarly, if the Testator is under undue influence from others, a Will or parts of it could be held invalid by the Minister or a Court.

[29] *Indian Act*, R.S.C., 1985,c. I-5, Section 52
[30] The age of majority depends on which Province the Testator resides in when the Will is made – it is either 18 or 19 years of age.
[31] Court – The Minister has full jurisdiction and decision making power over the Estate of an Indian who dies resident on a Reserve, however the Minister may refer a Will or parts of a Will to a Provincial, Territorial or Federal Court for interpretation if the Minister deems it necessary.

(b) Special Rules for First Nation Peoples Ordinarily Resident on Reserve

Section 45(1) of the *Indian Act*[12] provides that nothing in that Act *"shall be construed to prevent or prohibit and Indian from devising or bequeathing his property by Will."*

The Wills of First Nation's peoples who *"ordinarily reside on Reserve"*[1] are currently subject to the oversight of the Minister of Indigenous Services Canada (ISC) under Sections 45 to 50(1) of the *Indian Act*[10]. The Minister[7] decides whether a certain written instrument made by a deceased constitutes a "Will" and no Will executed by an Indian is of any legal force or effect until approved by the Minister. The Minister can declare a Will to be void in whole or in part if certain conditions are met and has the power to appoint or remove executors and trustees named in a Will, or appoint an administrator if there is no Will (the "administrator").

So "Indians" can make a Will, however any document made is subject to the scrutiny of the Minister[7], in the exercise of a broad discretion.

"*Section 45(2)*

Form of will

(2) The Minister may accept as a will any written instrument signed by an Indian in which he indicates his wishes or intention with respect to the disposition of his property on his death."

(c) Will is not valid until approved by the Minister

In addition, Section 45(3) provides that no Will (whatever form it takes) is valid until it is approved by the Minister[7].

"*Section 45(3)*

Probate

No will executed by an Indian is of any legal force or effect as a disposition of property until the Minister has approved the will or a court has granted probate thereof pursuant to this Act. " Indian Act, R.S., c. I-6, s. 45"

(d) Minister may declare a Will Void in Whole or in Part

Under the *Indian Act*[12], the Minister[7] has powers similar to Provincial and Territorial Courts to review the circumstances, form and content of an Indian Will and to declare it in part, or in whole, to be invalid. The *Indian Act*[10] provides in part that the:

"Minister may declare will void

46 (1) The Minister may declare the will of an Indian to be void in whole or in part if he is satisfied that

(a) the will was executed under duress or undue influence;

(b) the testator at the time of execution of the will lacked testamentary capacity;

(c) the terms of the will would impose hardship on persons for whom the testator had a responsibility to provide;

(d) the will purports to dispose of land in a reserve in a manner contrary to the interest of the band or contrary to this Act;

(e) the terms of the will are so vague, uncertain or capricious that proper administration and equitable distribution of the estate of the deceased would be difficult or impossible to carry out in accordance with this Act; or

(f) the terms of the will are against the public interest."

(e) Risks of an Intestacy

When any part or all of a Will is declared void by the Minister[7], there will be a partial or whole intestacy. (See Chapter 8 of this Toolkit "Why make a Will or Power of Attorney").

(f) Form of the Will – Most Adopt Provincial or Territorial Format

The *Indian Act*[12] and the regulations[32] under that *Act* do not prescribe the form a Will or for the most part, the content of Wills. Where there are no First Nation laws to that effect, most Will drafters adopt the form of Will used in the Province or Territory where the First Nation in question is situate, subject of course to any modifications needed to comply with the *Indian Act*[12], the *Family Homes on Reserves and Matrimonial Interests or Rights Act*, S.C. 2013, c. 20 (FHRMIRA), any First Nation's own Matrimonial Real Property laws and any regulations, policies, directives and case law made under those documents.

There is an "architecture" or basic form of Will which is commonly used throughout Canada (other than Québec which is under the Civil Code).

(g) The "architecture" of a Will

Lawyers refer to the "architecture" of a Will – which is really the order that clauses are included in a Will so that it "flows". Clauses flow in an accepted order so that the Will makes sense.

The following is the general order of clauses for most Wills in Canada.

1. **Revocation of Prior Wills**

The Testator first revokes any previous or Wills he or she may have had so there is never more than one Will in effect at the same time.

2. **Appointment of Executor and Trustee**

The Testator then names or appoints one or more persons (it can include a spouse, family member, sibling, friend, trust company or

[32] See *Indian Estates Regulations (*C.R.C., c. 954)

professionals, such as a lawyer or accountant) whom they trust to manage the administration of the estate after the death of the Testator (the "Executor and Trustee").

The Executor wears two "hats". As "Executor", he is responsible for gathering and taking control of all the Testator's assets after death, making funeral arrangements, paying debts and distributing the estate. As "Trustee" he is responsible for administering any trusts established in the Will. The Executor and Trustee are usually the same person(s).

The Executor (and Trustee) must be over the age of majority[33] and be mentally capable of managing the Deceased's estate *at the time* they assume their role as Executor and Trustee.

The "Administrator" of a Will is the term used to refer to the person or persons appointed by the Minister after she approves a Will. The process for submitting a Will for approval to the Minister is set out in detail in the *Indian Estates Regulations*, C.R.C. c. 954.

The Minister has the power to replace an Executor named in a Will or appoint an Administrator of an estate where:

(a) there is a Will, in which case the named Executor becomes the "Administrator", or

(b) there is no Will, or

(c) the Will has been declared void in whole or part by the Minister; or

[33] The age of majority varies by Province or Territory but is usually 18 or 19 years of age. The age of majority is the age at which someone becomes legally capable of entering into contracts, suing or being sued.

(d) no Executor is named in the Will.

The Administrator must act in accordance with language in the Will after the Minister has Approved the Will and has appointed the Administrator under the *Indian Act*[12] and the *Indian Estate Regulations*[32]*.*

The Testator can name more than one Executor, but it is always recommended that the Testator be realistic about the relationship between any appointed Executors to ensure that they can work together. It is unusual to appoint more than two or three Executors.

The Executor is responsible for ensuring that the deceased's body is interred, that all the debts of the deceased are paid, that all personal effects and gifts of money are distributed to those named in the Will in accordance with the deceased's directions (if any) in the Will and that whatever remains is distributed or divided as the deceased directs in the Will.

The Minister[7] has jurisdiction over a Will made by an Indian ordinarily resident on reserve.

In the alternative, with the Minister's[7] prior consent, under Section 44 of the *Indian Act*[12]*,* a court in the Province or Territory which would have had jurisdiction over an estate had the deceased not been an Indian ordinarily resident on Reserve, may take jurisdiction over the estate of an Indian. In addition, under that same section the Minister may refer any question arising out of any will or the administration of any estate.

3. **Residue to Spouse**

If the Testator wishes all of his estate to pass to his surviving

spouse (or common-law partner) he can do so with an outright gift. Where there is an outright gift of the residue to a spouse, the spouse takes the estate assets subject to any debts owing by the Testator.

4. **Vesting of the estate in the Trustee**

If there is no spouse or the Testator does not wish to give control of the estate assets to his spouse or if the Testator has minor children or a developmentally challenged beneficiary, then the Will can provide that all the estate assets are to be "vested" in the Executor in his capacity as Trustee of the estate, to be held in trust pending compliance with all the conditions set out in the Will.

In that case, the Executor then changes "hats" and becomes the Trustee.

5. **Testamentary Trusts**

A "trust" is like a gift with conditions. A testamentary trust is one made under a Will. It means that the Trustee has control of the assets, but they do not belong to him personally. Instead they are held "in trust" by the Trustee for the beneficiaries of the Estate. A "trust" in a Will is usually subject to conditions, such as the payment of all funeral expenses, taxes and debts. There may be other conditions, like holding money for a minor child until they reach a certain age but using that money for the benefit of the child until they reach that age.

NOTE: Lands on Reserve cannot be held in Trust, so the Will should include an outright gift of an interest in lands on Reserve.

6. **Power to Sell and Pay Debts**

The next clause is usually one giving the Executor and Trustee the power to sell assets (if necessary) to pay the debts of the Estate. There is no positive obligation to sell however and whether or not estate assets are sold is at the discretion of the Executor and Trustee.

NOTE: If there is no member "Indian" to inherit land on the Reserve, then under Section 50 of the *Indian Act*[34] that land will have to be sold within 6 months of the Testator's death (or in such time as the Minister may direct) under Section 50 of the *Indian Act* or it may revert back to the First Nation band free of any claim by a beneficiary.

7. **Specific Bequests**

The Testator may have items of personal property (such as automobiles, personal effects: jewellery, motor vehicles, furniture, etc. and gifts of money) and/or sums of money he wishes to leave to certain individuals. For example, he may leave his boat and fishing equipment to his grandson and certain pieces of art to a sibling. The possibilities are endless. The key to these clauses is to ensure that the description of the gift is complete and descriptive enough that the Executor can identify the object.

The Testator can also make gifts of land (on or off reserve), but caution should be exercised when making gifts of land on Reserve. Land

[34] *Indian Act,* R.S.C. 1985, c. I-5

on a Reserve cannot be gifted to a non-member Indian (See Section 50 of the *Indian Act*).

The Testator also must consider the provisions of the ***Family Homes on Reserves and Matrimonial Interests or Rights Act***[21] or any laws made by the First Nation related to this area and in particular, the right of a spouse (Indian or non-Indian) to remain in possession of the Family Home or to a share of the value of any Family Home or Matrimonial Property on Reserve.

9. **Residue**

After all of the debts are paid (funeral, taxes, etc.) and specific gifts of personal property, money and land have been made, the Will should set out what happens to the remainder (residue) of the Estate.

There are many possible ways to distribute the residue of an estate. The residue can;

(a) pass directly to a surviving spouse,

(b) be divided between a surviving spouse and children,

(c) be held in trust for a spouse and/or children, or

(d) be divided among parents or grandchildren or whomever the Testator desires.

The benefits and risks of the various options are important to discuss with your advisor or lawyer.

10. **Guardians of Minor Children:**

The Will can also include a clause where the Testator appoints a guardian or guardians for minor children and trustees to manage property for those minor children until they reach a certain age (**trusts for land on Reserve are an exception**). A Will can include an expression of the Testator's wishes as to where his or her minor children should live (subject to the best interests of the child) and can provide that money will be made available to support their spouse and/or children on or off Reserve. It can provide for payments to a spouse and/or children over time. Be mindful of Section 52 of the *Indian Act* under which the Minister can be appointed as the guardian of the property of a child. In most cases, where there is a Will, the Minister will defer to the provisions in the Will provided those provisions are not adverse to the interests of a child.

11. **Support for Children or an Elder or Dependent Person**

A Will can also provide for the care and support of minor children, an elder, or a dependant person. It can provide that if a beneficiary dies before the Testator, then there is a "gift over" to another beneficiary to avoid an intestacy[35].

[35] "intestacy" is dying without a Will.

12. **A Will can be Subject to Contracts or Agreements**

A Will can stipulate that it is subject to the provisions of a domestic contract, court order, partnership or business agreement or the laws and policies of the Testator's First Nation. This is why it is so important to ensure that your legal advisor is aware of all your circumstances.

2. **Power of Attorney for Property**

A Power of Attorney is a document in which a capable person (the "Donor") who is over the age of majority appoints one or more other people (the "Donee" or "Attorney") to represent or act on the Donor's behalf in personal, business or other legal matters. "Attorney" in this context does not mean a lawyer.

It is usually used where the Donor is unable or incapable of executing a document because they are unavailable or incapable of signing due to mental or physical illness. Donors can also give permission to Donee's to sign on their behalf for convenience. For example, the Donor is out of Province and not available to sign.

Once signed and depending on the limitations in the document itself, the Power of Attorney grants power to the Donee/Attorney to sign documents, transfer land, enter into contacts or agreement or do anything legal the Donor could do, except make a Will. A Power of Attorney is only valid while the Donor is alive and when the Donor dies, the Power of Attorney is immediately void and of no effect and the Will then takes effect.

Until the First Nation makes its own laws, Powers of Attorney are legislated and governed by the law of the Province or Territory in which the

document is signed. They generally remain in effect until revoked in writing by the Donor or the Donor dies.

Powers of Attorney are very powerful documents. They are subject to abuse and should not be entered into lightly. There is always a risk of a Donor being taken advantage of and the appointed Attorney using the Power of Attorney to steal or commit fraud. Whomever the Donor appoints as the Attorney should be known to the Donor, be responsible, honest and trustworthy and the Donor should review all Powers of Attorney regularly to ensure that the Donee or Donees appointed remain appropriate for the Donor's needs.

Powers of Attorney for Property which are valid and legal may be recognized and accepted by the Minister[7] to permit a person other than the Indian to execute legal documents pertaining to assets located on Reserve. Before you execute or intend to rely on a Power of Attorney, it is best to verify that the Minister will accept the document.

Links to information on preparing a Power of Attorney for Property are attached at the end of this paper[i]

3. **Power of Attorney for Personal Care and Health Care Directives**

Until a First Nation makes its own laws, lawyers rely on the laws of Provinces and Territories in Canada which have legislation or a legal regime in this area. In most Provinces, an individual (the "Donor") can appoint a person or persons (the "Donee") to make medical decisions for the Donor in the event that the Donor cannot make his or her own decisions due to incapacity from mental or physical illness.

These documents could take the form of Advanced Directives for Care, a

Power of Attorney or other mechanisms as contemplated by the laws of the Province or Territory in which the First Nation is located. They give the Donee the legal authority to make decisions and give instructions as to the personal care of the Donor. Such designated "attorneys" or representatives can give instructions to medical professionals, hospitals, long term care homes and can consent to medical treatment, make end of life decisions or decisions about where the Donor should live during his or her incapacity.

4. **Trusts and Gifts Made During Lifetime**

A Trust is a gift with conditions. As an illustration, a gift **without conditions** would be "*Here is some candy."* A gift **with conditions** would be "*Here is some candy, but share it with your brother*."

It is a way of making a gift during the Donor's lifetime, while holding something back in the form of conditions on how the property can be used or distributed. An example would be making a gift of money to a young child and directing the Trustee to hold that money for the benefit of the child and to use some or all of it for the benefit of that child as they grow up. A trust can include not just money, but other property like land, buildings, investments or personal effects such as art or jewellery. It should be noted, however, that Reserve lands can never be held in a trust because to do so would potentially giving the benefit of Reserve lands to a non-member Indian contrary to the *Indian Act.*[5]

Usually, a trust made during someone's lifetime is for tax planning reasons or perhaps the Testator wants to make a gift of property now, but leave strings attached. The Trust is usually a written document and is subject to certain rules about whether or not it really constitutes a "trust" under law. In

the Trust document, the Donor appoints "Trustees" (one of whom could be the Donor), identifies the property included in the Trust and then specifies the terms or restrictions on the gift. For example, there could be limits on how much money can be taken out annually, or the money should or should not be invested, or what purposes the money or property can be used, or when the trust ends and how the remainder of the money is to be distributed to the beneficiaries.

There are an infinite number of ways to set up a trust. They can be used while the Donor is alive (an *inter vivos* Trust) or they can be inserted in a Will (a t*estamentary* Trust).

Trusts are very complex and beyond the scope of this paper, but they are a useful legal tool particularly for persons who have wealth, are in second marriages or have beneficiaries who cannot manage their own money or assets.

5. **Joint Ownership of Assets**

Property such as land (including land on Reserve held under a Certificate of Possession), leases, bank accounts and investments (as examples) can be owned by more than one person at time with different consequences if one person passes away.

For example, in most of Canada one or more persons can hold property as "**joint tenants**" (this rule may be different in Quebéc which is under a Civil Code). Joint tenancy means that if one owner dies, that owner's share is divided equally among the surviving joint owners or if there is only one surviving joint owner, all of that asset would pass to that surviving person. Any assets owned jointly pass to the beneficiary/surviving joint owner **outside the Will**. It is one

of the easiest ways for spouses or common-law partners to own assets because it means assets can pass to the surviving spouse or common-law partner without having to include that asset when a Will is approved by the Minister.[7] Examples are joint bank accounts or holding property on a First Nation under a Certificate of Possession. Caution should be exercised because if a sole owner transfers an interest in property to another (i.e. gifting or selling a 50% interest), it can be interpreted as a gift of that 50% interest or it may be interpreted as having been made for convenience only (like making a bank account joint with a child) and there was no intention to make a "gift" of an interest to the donee joint owner. Joint ownership can make elders vulnerable as a child who is a joint owner can withdraw ALL the funds in a joint bank account with a parent. Each joint owner is entitled to 100% of the property held – so if the child takes all of the money in a joint bank account, the elder parent may not be able to recover it.

Legal advice should be sought particularly when making assets joint with a parent or child.

6. **Registered Investments and Insurance Policies**

A registered investment is an investment which is given a tax-deferred or tax-sheltered status by the government so that income earned in the investment is not taxed until money is withdrawn from the plan or in some cases, like a TFSA – income is never taxed.

Examples of registered investments are:

(a) Registered Retirement Savings Plans (RRSP),

(b) Registered Retirement Income Fund (RRIF),

(c) Tax Free Savings Accounts (TFSA), and

(d) Registered Educational Savings Plan (RESP).

First Nations people resident on Reserve may use or have these types of investments because they are subject to income tax on off-reserve earned income. Taxable income can be reduced by making contributions to an RRSP and any income tax on funds inside an RRSP is deferred. Canadian taxpayers over 18 years can contribute up to $6,000 per year (as of 2020) to a TFSA and income earned inside a TFSA is tax free. An RESP is a way to save money and earn income on that money for the education of the Testator's children. Income earned on an RESP is tax deferred until the child for whom the plan was established starts to make withdrawals, at which time the funds withdrawn are taxed at the child's income tax rate (generally lower).

Most plans either permit the contributor to name a beneficiary (RRSP, RRIF) or to name a successor owner of an account (TSFA, RESP) within the plan and therefore these types of asset may not flow through the Will.

Life insurance policies allow the purchaser to name a beneficiary so that when the purchaser dies, the proceeds of the life insurance pass outside the purchaser's Will directly to the beneficiary.

Chapter 8 – Why Make a Will or Powers of Attorney?

1. **Why make a Will or Powers of Attorney?**

(a) **Don't Hide From Reality**

No one wants to contemplate death or incapacity, but unfortunately death is a certainty and incapacity (physical or mental) is a possibility for most Canadians.

Dementia is on the increase as Canadians age and failing to plan or to take responsibility for one's own affairs hurts only those left behind. Not taking the steps to legally appoint someone to make decisions for health care or property in the event of incapacity means families are left scrambling; most medical professionals, long term care facilities, hospitals, banks and most governmental bodies require written proof that one individual can make decisions for another. A Power of Attorney (Property or Personal Care) or an Advance Directive makes things significantly easier for caregivers. Powers of Attorney are relatively simple to prepare and there are excellent precedents available online. (See the citations at the end of this paper).

(b) **Certainty**

There is no question that drafting a Will and representation documents such as Powers of Attorney for Property and Personal Care or Advance Directives for medical care can be challenging. Making decisions about what happens after

you die or become ill are difficult and sad to think about.

But consider the alternative.

Almost everyone worries about what will happen after they die or become ill; this is true even more so as you grow older.

- Who will take care of the children?
- How will my mortgage or loans be paid?
- Can my ex-spouse move into my house?
- What if the kids fight?
- Whom should I give my house to?
- Who can live in my house?
- Is my common-law partner protected?
- Can my spouse, whom I have not lived with for years, make a claim against my estate?
- Who is the best person to take care of me when I am ill?
- Who decides if I have to move out of my home into long term care?
- Who can manage my estate and follow the instructions in my Will?
- How do I divide my art and treasures?
- Who will run my business?

Avoiding these types of decisions will not make them go away. By planning in advance, your voice is heard – even if you can no longer speak.

Planning brings certainty.

(c) The Risks of Intestacy

"Intestacy"[35] means dying without having a Will or dying with a Will, but part or all of that Will is found by the Minister[7] or a Court to be invalid. Sections 45 and 46 of the *Indian Act*[5] give the Minister[7] the ability to declare the Will of an Indian to be void in whole or in part if any of the following conditions are met:

> **"***46 (1) The Minister may declare the will of an Indian to be void in whole or in part if he is satisfied that*
>
> *(a) the will was executed under duress or undue influence;*
>
> *(b) the testator at the time of execution of the will lacked testamentary capacity;*
>
> *(c) the terms of the will would impose hardship on persons for whom the testator had a responsibility to provide;*
>
> *(d) the will purports to dispose of land in a reserve in a manner contrary to the interest of the band or contrary to this Act;*
>
> *(e) the terms of the will are so vague, uncertain or capricious that proper administration and equitable distribution of the estate of the deceased would be difficult or impossible to carry out in accordance with this Act; or*
>
> *(f) the terms of the will are against the public interest."*[36]

Section 48 of the *Indian Act*[36] dictates how an estate is to be distributed on an intestacy and it flows along bloodlines and relationships in accordance with the Act and subject to the *Family Homes on Reserves and Matrimonial Interests or Rights Act*, S.C. 2013, c. 20 (FHRMIRA) or a First Nation's Matrimonial Real Property Law.

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[36] *Indian Act,* R.S.C. 1985, c. I-5

For example; where there is no Will, the first $75,000 of an Indian's estate passes to the surviving spouse or common-law partner. If you are separated from your spouse or common-law partner, but don't have a separation agreement or domestic contract in which he releases all interest in your estate, then he could still receive the first $75,000 of value in your estate and possibly an interest in the Family Home or other matrimonial property on Reserve (See the Chapter on Matrimonial Rights below).

Understanding how an estate will be distributed when an Indian does not have a Will or has a Will, but that Will was found to be invalid (in whole or in part) can be a significant motivation to preparing a Will and also having a lawyer assist with the drafting of that Will.

(d) The Risks of Bequeathing Land on a Reserve Where the Beneficiary is not Entitled to Possession or Occupation

If an Indian dies and has made a gift of land to a named a beneficiary who is not entitled to possession of land on his reserve, then that gift can fail. This is subject, however to the rights of occupation and to a share in the value of a Family Home and Matrimonial Rights and Interests in favour of a spouse or common-law partner under the *Family Homes on Reserves and Matrimonial Interests or Rights Act*, S.C. 2013, c. 20 (FHRMIRA) (See the discussion in Chapter 8: Family Home and/or Matrimonial Interests or Rights on Reserve).

A beneficiary may not be entitled to permanent possession of land on a particular Reserve because;

(i) she is not an "Indian" or

(ii) she is an "Indian" but is not a member of the deceased's First Nation.

By failing to plan, there is a risk that control over a property on Reserve could be lost to your family.

Consider Section 50(1) of the *Indian* Act[5] which provides as follows:

"Devolution of Indian Lands where no Status Indian Beneficiary

50 (1) A person who is not entitled to reside on a reserve does not by devise or descent acquire a right to possession or occupation of land in that reserve.

(2) Where a right to possession or occupation of land in a reserve passes by devise or descent to a person ***who is not entitled to reside on a reserve****, that right* ***shall be offered for sale by the superintendent to the highest bidder*** *among persons who are entitled to reside on the reserve and the proceeds of the sale shall be paid to the devisee or descendant, as the case may be.*

(3) ***Where no tender is received within six months*** *or such further period as the Minister may direct after the date when the right to possession or occupation of land is offered for sale under subsection (2), the* ***right shall revert to the band free from any claim on the part of the devisee or descendant****, subject to the payment, at the discretion of the Minister, to the devisee or descendant, from the funds of the band, of such compensation for permanent improvements as the Minister may determine.*

(4) The purchaser of a right to possession or occupation of land under subsection (2) shall be deemed not to be in lawful possession or occupation of the land until the possession is approved by the Minister."

Indian Act, R.S.C. 1985, c. I-6, s. 50."

2. Special Considerations in Will Drafting for First Nations Peoples in Canada

A Will Drafter must consider the following when drafting a Will for an Indian:

(a) First Nation, Provincial and Federal Laws,

(b) The rules applying to the occupation and possession of property, on Reserves,

(c) "Status Indians" and membership in a First Nation.

(d) Different ways of holding Title to Lands on a First Nation ("Reserve").

(e) Special Issues facing Status Indians with Non-Status, non-Member Spouses or Common Law Partners or family.

(f) The implications of the *Family Homes on Reserves and Matrimonial Interests or Rights Act*, S.C. 2013, c. 20 (FHRMIRA) and laws made by First Nations under that Act.

(g) The implications of Land Codes[16] made under the *First Nations Land Management Act* (FNLMA)[37] and any laws made by a First Nation under its Land Code.

3. Why Have Your Will Prepared by a Lawyer

The services of a lawyer can be expensive. However, most fees are quite reasonable when you consider the complexity of estate planning. Making your own Will (handwritten or "holograph" or typed), using "Will Kits" or online Wills all carry significant risks for your survivors, particularly for on-Reserve First Nations peoples as they are bound by special laws which do not affect other off-Reserve Canadians.

[37] *First Nations Land Management Act,* S.C. 1999, c.24

It is easy to make mistakes which could have significant consequences for the beneficiaries under your Will.

For example, if:

(a) *You are "ordinarily resident on Reserve"*[1] and you have a spouse from whom you are separated, but not divorced and you do not have a domestic agreement which settles property issues between you and your spouse;

(b) *Your spouse or common-law partner is not a First Nation person* or is a First Nation person, but is not a member of the First Nation where your family assets or property is located;

(c) *You have both a common-law partner and a spouse*;

(d) *You have a child or children* whom you wish to name as beneficiaries under your Will and any one of them is under the age of majority, is developmentally challenged, is dependent on you or any of them are not members of your First Nation or they do not have status as Indians;

(e) *You have an interest in property on Reserve*;

(f) You have a *Family Home*[38] *on Reserve*; or

(g) You have a business or businesses on Reserve,

then it is strongly recommended that you retain a lawyer with experience and expertise in First Nation Wills to assist you. Litigation costs when sorting a poorly drafted Will are significantly higher than the cost of simply preparing a proper Will.

[38] *Family Homes on Reserves and Matrimonial Interests or Rights Act*, S.C. 2013, c. 20 (FHRMIRA)

Chapter 9 – Annotated Wills for First Nation Peoples
(ordinarily resident on Reserve)

NOTE: This chapter relies heavily on materials provided by The Law Society of Ontario in its continuing professional education course entitled:

"The Annotated Will 2019 (January 2019)".

Co-Chairs Susannah Roth, TEP, of O'Sullivan Estate Lawyers LLP and Mary-Alice Thompson, C.S. TEP, Cunningham Swan Carty Little & Bonham LLP. The full text of the materials is available from The Law Society of Ontario.

NOTE: There is a general format for Wills across Canada, but you are advised to consult with a lawyer to ensure these samples have wording appropriate to your First Nation. **Nothing in this paper is intended to give you legal advice**. The sample clauses in this Chapter are only some of the most basic, standard clauses. Your lawyer will customize your Will to reflect what you want and how you wish to express your wishes.

This paper may not be useful to those residing in Québec as it is subject to the civil code of law, rather than common-law which applies elsewhere in Canada.

1. INTRODUCTORY CLAUSES

THIS IS THE LAST WILL of me, **[INSERT YOUR FULL LEGAL NAME]**[39] resident[40] in **[INSERT FULL NAME OF FIRST NATION WHERE YOU RESIDE]**[41], being Indian Reservation No. **[insert number of First Nation in Canada]**, in the Province of **[insert Province in which your First Nation is located]**, made this **[insert day Will is signed]** day of **[insert month and year Will is signed]**.

This clause is the first clause in the Will and it identifies the person making the Will, including that person's residence and the date the Will is being made.

For Indigenous Services Canada (ISC) to take jurisdiction over and to administer the estate of an "Indian" under the Indian Act[5], the Testator (the Will Maker) must be "ordinarily resident" on-Reserve at death[1]. If you make a Will when you are ordinarily resident on a First Nation Reserve and then move off the Reserve, it is advised that you review your Will with your lawyer to see if you need any changes to reflect your change in residence.

If you live on Reserve, but your Executors wish to have your Will administered under the laws of the Province or Territory in which you reside, your Executors must first seek the consent of the Minister[9] under Section 44(1) of the Indian Act[42].

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[39] It is important to use your proper name, the one which appears on your identification. If you have a tribal name, First Nation or nickname name or other name by which you are commonly known, insert it after your legal name "also known as **[insert Tribal or nickname]**

[41]Make sure you use the actual legal name of your First Nation as recognized by the Minister of Indigenous Affairs and Northern Canada (ISC) and if your First Nation is identified under a traditional name, you can add that name in brackets as follows: (also known by its traditional name "**X** "). Because the Will may be administered by ISC, it is important to include the name used by ISC, even if it is not a name your First Nation uses by custom.

[42] *Indian Act,* R.S.C. 1985, c. I-5

It is up to the Minister[9] as to whether or not a written instrument (it can be handwritten or typed) constitutes a "Will" and the Minister can accept as a will "any written instrument signed by an Indian in which he indicates his wishes or intention with respect to the disposition of his property on death."[43]

Introductory Clause Where Marriage Pending:

THIS IS THE LAST WILL of me, **[INSERT YOUR FULL LEGAL NAME][44]** resident[45] in **[INSERT FULL NAME OF FIRST NATION WHERE YOU RESIDE][46]**, being Indian Reservation No. **[insert number of First Nation in Canada]**, in the Province of **[insert Province in which your First Nation is located]**, made this **[insert day Will is signed]** day of **[insert month and year Will is signed]** in contemplation of my marriage to **[insert full legal name of intended spouse]** on **[insert planned date of marriage if available]**

If you are in a common-law partnership, but you are contemplating marriage to your partner shortly after making your Will, you should consider this clause because some Provinces and Territories have laws that **automatically revoke (or cancel) a Will if you marry after the date of the Will.**

[43] *Indian Act,* Section 45(2)

[44] It is important to use your proper name, the one which appears on your identification. If you have a tribal name, First Nation or nickname name or other name by which you are commonly known, insert it after your legal name "also known as **[insert Tribal or nickname]**

[45]

[46]Make sure you use the actual legal name of your First Nation as recognized by the Minister of Indigenous Affairs and Northern Canada (ISC) and if your First Nation is identified under a traditional name, you can add that name in brackets as follows: (also known by its traditional name "**X** "). Because the Will may be administered by ISC, it is important to include the name used by ISC, even if it is not a name you customarily use.

2. REVOCATION

1. Revocation of Prior Wills and Codicils: I REVOKE all wills and codicils previously made by me.

This clause makes it clear that if there are any other Wills or documents which could be interpreted as a "Will", they are revoked as of the date of this new Will. This makes it clear that it is the Testator's intention that she have only one "Will" at a time.

You should never have more than one Will, except where your lawyer uses "multiple wills" for estate planning purposes or if you have property in different jurisdictions (i.e. different Wills for each Province, Territory or country in which you reside or have assets). A discussion of multiple Wills is beyond the scope of this Toolkit.

Some examples of things which can revoke a prior will are:

(a) handwritten, signed and dated notes made by the Testator after the date of the Will which change the original Will;

(b) a typed document made after the Will which the Minister[9] could interpret as a change to an existing Will or a new Will;

(c) handwritten notes made on the original Will. If those notes are undated, this can lead to confusion as to what the Testator intended, or

(d) a typed Will or video "will" made after the date of the prior will.

Do not make any marks or write anything on an original Will which has already been signed, nor should you make notes which could be interpreted as a "Will". Seek legal advice if you want to change your Will.

It is also strongly recommended that the Testator verify with a legal advisor as

to the appropriate words to use for a revocation clause under any applicable First Nation, Province or Territory laws.

3. JOINTLY OWNED ASSETS

It is not uncommon for a Testator during her lifetime to make assets jointly owned with someone else.

A joint asset means that more than one person holds title to the asset (like a bank account, investment or property on or off Reserve). "Joint" ownership means that if one of the joint owners die, the asset is then owned by the surviving joint owner or owners equally without passing under a Will.

An common example is where a Testator adds a spouse or child as a joint owner on a bank account. This can be for convenience or it may be the intention of the Testator that when they die, the asset is automatically transferred to the surviving joint owner or owners and does not pass through a Will.

Another example is land held under a Certificate of Possession or Lease where the interest is held jointly with a spouse or common-law partner or with a child or child(ren). (Not applicable in Québec).

The intentions of a donor in setting up jointly owned assets (like bank accounts and investments) are sometimes difficult to discern and can result in legal disputes after the death of a joint owner. As a result, banks and credit unions are now much more careful and before making a bank account or investment joint, they now require that the original owner swear a declaration stating their intentions before the second owner is added to the account. This hopefully will avoid any misunderstandings as to the original owner's intention.

The Will drafter should ask the Testator whether it was their intention that the

bank account or investment fall under the assets in the Testator's Will so the money could be used to pay debts and/or distributed in accordance with the Will or not?

Determining the intention of Testator is the subject matter of many lawsuits in Canada, so it is important to be clear and put something in writing (preferably prepared by a lawyer) which makes it clear what the Testator's wants. In addition, the Testator could consider adding clauses to the Will which make her intention clear.

It is also advisable to be very careful with jointly held land on a First Nation Reserve. The Minister[7] requires that certain documents be signed when moving lands held on Reserve under a Certificate of Possession[47] to joint ownership. Will drafters should be mindful that a statement of intention in a Will may not be sufficient to displace the intentions of the Donor as stated in a declaration filed with the Minister.[7]

It is generally not a good idea to make any assets (land or bank accounts) joint with a child under the age of majority because depending on where you live, your Executor may need a court order to deal with those assets while as a child under the age of majority may be able to hold an interest in the land, but lack the legal capacity to sell, lease, encumber or dispose of it until that person reaches the age of majority.

It is recommended that before making an asset joint, research should be undertaken to ensure the Donor has a full understanding of what that means, both during the Donor's lifetime and after death.

If you have jointly owned assets, but it is NOT your intention that that asset pass automatically to the joint owner on your death, this should be made clear in your Will with the advice of your lawyer.

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[47] A Certificate of Possession is one way of an "Indian" holding an interest in lands on Reserve.

Joint Assets Do Not Pass to Joint Owner:

2. Joint Assets to Form Part of Estate: I own certain real and personal property with my daughter, **[INSERT LEGAL NAME OF DAUGHTER]**. It was my intention when these joint interests were created, and it remains my intention, that if my daughter, **[INSERT LEGAL NAME OF DAUGHTER]** is living at the date of my death, the property shall not pass to her by right of survivorship as a consequence of my death. Even though my daughter, **[INSERT LEGAL NAME OF DAUGHTER]**, and I hold legal title to the property as joint tenants, my daughter holds legal title to the property in trust for me and my interest in that property forms part of my estate to be dealt with in accordance with the provisions of my Will.

NOTE: Real Property on Reserve cannot be held jointly with another person who is (a) not a registered "Indian" or (b) is a registered Indian, but is not a member of the same First Nation where the real property is located. Therefore, real property on reserve would not be owned jointly with a non-registered Indian or non-member at the death of the Testator.

Joint Assets DO pass to Joint Owner

2. Joint Assets to Form Part of Estate: I own certain real and personal property with my daughter, **[INSERT LEGAL NAME OF DAUGHTER]**. It was my intention when these joint interests were created, and it remains my intention, that if my daughter, **[INSERT LEGAL NAME OF DAUGHTER]** is living at the date of my death, she shall be the sole legal and beneficial owner of that property by right of survivorship as a consequence of my death.

4. EXECUTORS, TRUSTEES AND ADMINISTRATORS

The **Executor and Trustee** of a Will is the person (or persons and/or institution, like a trust company) who is appointed in a Will to take control of all the Testator's assets at death (except jointly held assets and assets where there is a named beneficiary) and to distribute them in accordance with the Will. Words such as "**Executor of the Will**" and "**Trustee of the Estate**" are often used.

The Executor and Trustee are usually the same person wearing different "hats", but their roles overlap. The different names are used by lawyers to denote what role the person is taking at any particular time and that role evolves over time as the Estate is administered.

Generally, the Executor is responsible for taking control of the deceased's assets at death to make sure they are secure. The Executor also takes care of the deceased's body and makes funeral arrangements.

The duties of the Executor change as the estate is administered, so the Executor role evolves into the role of "Trustee" as she holds the assets on behalf of the estate and uses those assets to pay debts and then distributes those assets in accordance with the directions in the Will.

An Executor and Trustee of the estate of a First Nation person who was ordinarily resident on Reserve[1] or resided off Reserve does not need to be an "Indian"[48].

When the Will of an Indian is submitted to the Minister[49] for approval the Minister appoints the "**Administrator**" of the estate. The Administrator is usually the same person or persons as the Executor and Trustee named in the Will, but if there is no Will or the Executor named in the Will has died or cannot act or is unacceptable, the Minister can appoint someone else as Administrator (usually in consultation with the beneficiaries).

If there is no Will or no one is named in the Will as the Executor and Trustee, then the Minister chooses the person who will act as the Administrator.

There can be more than one Executor and Trustee, but care should be taken to ensure that if more than one person is appointed that they all can work together and get along. Relationships do not usually improve after death.

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[48] "Indian" as defined in the *Indian Act,* R.S.C. 1985, c. I-5 Section 2(1)
[49] Minister of Indigenous Services Canada

It is good practice to have alternate Executors and Trustees in case the person or persons initially appointed are unable or unwilling to act after the Testator's death.

As to the choice of an Executor and Trustee, they can be a spouse or common-law partner, a child or children over the age of majority, family members, friends, or other relatives. Even professional advisors like a lawyer, accountant or a trust company can be appointed, but they will have to be paid and they will usually have the Testator sign a fee agreement when the Will is made.

Executors and Trustees are also entitled to be compensated for their time. Compensation is usually waived where the Executor and Trustee are the same person as the beneficiary (such as a spouse), but there are rules in most Provinces that permit Executors and Trustees to claim payment for their troubles and reimbursement of expenses. The Testator should consider including a compensation clause in the Will (there is a sample below).

The choice of Executor and Trustee also depends on the complexity of your estate. The more complex your estate is (for example, a business must be operated or wound down), the more experienced and sophisticated the Executor and Trustee must be.

The Testator should be realistic in deciding who is best to handle the job. Persons who may **not be good choices as Executor and Trustee** would be:

(a) a spouse (married or common-law) with whom you are not living at your death and with whom you do not have a good relationship;

(b) a minor (someone under the age of 18 years) unless they are being appointed with an adult;

(c) a person who is insolvent or bankrupt;

(d) a person who is not trustworthy or cannot manage money;

(e) a person with a gambling addiction;

(f) a person with substance abuse issues to such an extent that they may not be able to carry out their duties;

(g) a person who does not live in the Province where the deceased died or lives outside Canada;

(h) a person who has a perceived conflict of interest, like the beneficiary of a trust in your Will, or a business partner;

(i) if more than one person, those who do not get along and rarely agree; or

(j) too many people.

If you appoint more than two Executors and Trustees, you should add a "Conflict Resolution" clause in the Will in case they disagree.

Some of the duties of the Executor and Trustee are:

(a) **To locate your Will and to make sure that it is your last Will.** Hopefully the Testator informed the Executor of the location of his or her last Will, but if it cannot be found the Executor should search the Testator's home, safety deposit box, safe, contact the Testator's usual lawyer, contact friends and relatives if there is an indication the Will may be with them, contact ISC[50] thorough search of the Testator's home and safety deposit box;

(b) **To make arrangements for your burial and funeral** (to be paid out of your estate money). To obtain certified copies of your Funeral Director's Statement of Death or Death Certificate (depending where you live);

(c) **To locate and take control of all your assets**, which means locking your house, taking your car keys, letting your bankers know you have

[50] Indigenous Services Canada (ISC)

died so they will flag your bank accounts and investment, taking control of your personal assets such as boats, guns, personal effects, jewellery;

(d) **To submit the Will for approval to the Minister** with all required supporting documents;

(e) Once Approval of the Minister[7] has been obtained **to pay all lawful debts** of the deceased (with the money from the Estate), or if there are not sufficient assets to pay all the debts, to negotiate and settle all debts), and

(f) to **faithfully administer the Will in accordance with its terms**.

Appointment of Spouse with Alternate Children

3. (a) Appointment of Executor and Trustee: I appoint my spouse, **[INSERT FULL LEGAL NAME OF SPOUSE]** (hereinafter called my "Spouse") to be the Executor of my Estate and Trustee of my Will. If she dies before me, or at any time is unable or unwilling to act or to continue to act as Executor of my Will and Trustee of my Estate before all the trusts in my Will have been fully performed, I appoint my sister, **[INSERT FULL LEGAL NAME OF SISTER]** of **[INSERT CURRENT ADDRESS OF SISTER]** to be the Executor of my Will and Trustee of my Estate in her place. If my sister, **[INSERT FULL LEGAL NAME OF SISTER]** dies before me or is at any time unable or unwilling to act or to continue to act as executor of my Will or trustee of my estate before all the trusts in my Will have been fully performed, I appoint my brother, **[INSERT FULL LEGAL NAME OF BROTHER]** of **[INSERT CURRENT ADDRESS OF BROTHER]** to be the executor of my Will and Trustee of my estate, in her place.

The expression "my Trustees" used throughout my Will includes, where the context permits, the executor or executors and trustee or trustees for the time being of my Will, whether original, additional, or substituted.

Appointment of Spouse with Alternate Siblings

Annotation: If three or more children are appointed as Executors it is wise to include a

conflict resolution clause so majority rules on any dispute.

3. (a) Appointment of Executor and Trustee: I appoint my spouse, **[INSERT FULL LEGAL NAME OF SPOUSE]** (hereinafter called my "Spouse") to be the Executor of my Estate and Trustee of my Will. If she dies before me, or at any time is unable or unwilling to act or to continue to act as Executor of my Will and Trustee of my Estate before all the trusts in my Will have been fully performed, I appoint my children, **[INSERT FULL LEGAL NAME OF CHILD 1], [INSERT FULL LEGAL NAME OF CHILD 2]** and **[INSERT FULL LEGAL NAME OF CHILD 2]** to be the Executors of my Will and Trustees of my Estate in her place.

If both my children, **[INSERT FULL LEGAL NAMES OF CHILDREN]** die before me or are both at any time unable or unwilling to act or to continue to act as executors of my Will or trustees of my estate before all the trusts in my Will have been fully performed, I appoint my brother, **[INSERT FULL LEGAL NAME OF BROTHER]** of **[INSERT CURRENT ADDRESS OF BROTHER]** to be the executor of my Will and Trustee of my estate, in her place.

The expression "my Trustees" used throughout my Will includes, where the context permits, the executor or executors and trustee or trustees for the time being of my Will, whether original, additional, or substituted.

(b) Conflict Resolution: If any difference of opinion exists at any time among my Trustees in relation to the commission or omission of any act in the execution of the trusts in my Will, the opinion of my Trustees having the majority of votes prevails, notwithstanding that one or more of my Trustees may be personally interested or concerned in the matter in dispute or question.

Appointment of Adult Child and Alternate Children

Annotation: If there is no spouse, or the Testator and her spouse are separated, one or more of the Testator's adult children can be appointed as Executor(s).

3. (a) Appointment of Executor and Trustee: I appoint my son, **[INSERT FULL LEGAL NAME OF SON]** of **[INSERT CURRENT ADDRESS OF SON]** to be the Executor of my Estate and Trustee of my Will. If he dies before me, or at any time is unable or unwilling to act or to continue to act as Executor of my Will and Trustee of my Estate before all the trusts in my Will have been fully performed, I appoint my children, **[INSERT FULL LEGAL NAME OF CHILD 1]** and **[INSERT FULL LEGAL NAME OF CHILD 2]** and **[INSERT FULL LEGAL NAME OF CHILD 2]** to be the Executors of my Will and Trustees of my Estate in his place.

The expression "my Trustees" used throughout my Will includes, where the context permits, the executor or executors and trustee or trustees for the time being of my Will, whether original, additional, or substituted.

(b) Conflict Resolution: If any difference of opinion exists at any time among my Trustees in relation to the commission or omission of any act in the execution of the trusts in my Will, the opinion of my Trustees having the majority of votes prevails, notwithstanding that one or more of my Trustees may be personally interested or concerned in the matter in dispute or question.

OR

Appointment of Adult Child and Alternate Sibling

3. (a) Appointment of Executor and Trustee: I appoint my son, **[INSERT FULL LEGAL NAME OF SON]** of **[INSERT CURRENT ADDRESS OF SON]** to be the Executor of my Estate and Trustee of my Will. If he dies before me, or at any time is unable or unwilling to act or to continue to act as Executor of my Will and Trustee of my Estate before all the trusts in my Will have been fully performed, I appoint my brother, **[INSERT FULL LEGAL NAME OF BROTHER]** of **[INSERT CURRENT ADDRESS OF BROTHER]** to be the executor of my Will and Trustee of my estate, in his place.

The expression "my Trustees" used throughout my Will includes, where the context permits, the executor or executors and trustee or trustees for the time being of my Will, whether original, additional, or substituted.

Compensation for Third Party Executor

Annotation: You should **never, ever appoint someone as your Executor without first asking their permission to do so.** If you place this burden on only one of your children or a more distant relative or a friend, consider whether and how you should compensate them taking on this role.

Regardless of what you may have heard, being an executor is not an "honour". It is usually a thankless job. Executors not only have significant responsibility for someone else's property, they often have to referee family disputes and make difficult, often contentious choices. Many executors see nothing but grief from the beneficiaries. Executors of smaller estates are rarely paid and if paid, the amount does not come close to compensation them for the time actually spent and the responsibilities undertaken. **It is therefore important to ask permission before you make an appointment in your Will.** It is unfair to have them find out after your death and if you want an Executor to be paid, you should say so in the Will.

Here is an example:

(b) Trustee Compensation – Third Party Trustees. I direct that any person, other than my spouse ("Third Party Trustees"), while serving as my Executor of my Will or Trustee of my Estate shall be entitled to receive and shall be paid such fair and reasonable compensation for the care, pains and trouble, and the time expended in acting as the Executor and Trustee of my Will. In addition, Third Party Trustees shall be entitled to reimbursement for any travel, mileage, accommodation or other expenses incurred in performance of their duties hereunder. I authorize my Third-Party Trustees to take and transfer to themselves, at reasonable intervals, from the income and/or capital of my estate amounts on account of compensation which they shall reasonably anticipate will be requested at the end of the accounting period in progress, either upon the audit of the estate accounts or on approval by the beneficiaries of my estate. Provided, however, that if the amount subsequently awarded on court audit or agreed to by the beneficiaries is less than the amount so pretaken, the difference shall be repaid forthwith to my estate without interest.

5. SPECIFIC BEQUESTS

The Testator can make gifts of specific property to individuals with the remainder (the "residue") passing to a spouse or other family. Specific bequests should be included in a Will BEFORE the power to sell in a Will. This prohibits the Executor of the Will or Administrator of the estate from selling that item.

Some examples of specific bequests are:

(a) gift of personal effects, i.e. specific furniture or household goods, art, ceremonial regalia, family treasures, books, jewelry; or

(b) gift of a specific parcel of land on reserve to a member of the First Nation where the land is located (it cannot be gifted to someone who is not a member of the Testator's First Nation);

(c) gifts of money; or

(d) gift of a pet (pets are considered personal property).

Usually, personal effects are disposed of or distributed at the discretion of the Executor. There are, however circumstances where it is important to the Testator that a particular person receive a certain article belonging to the Testator after her death. Usually these are items of spiritual, sentimental or ceremonial importance to the Testator.

For example, "I direct my Trustee to give my original painting of the brown horses by [name the painter] to my grandson, [insert name of grandson]" or "I direct my Trustee to give all my regalia to my granddaughter, [insert name of granddaughter] to use it in ceremony as she wishes."

These clauses are limited only by the Testator's wishes, but it is important to describe the gift so that the Executor understands what you mean and can identify the

item being gifted. Instead of my turquoise necklace, perhaps it could be "my three-strand turquoise necklace with the large stone in the centre which was given to me by my mother", instead of "my turquoise necklace."

Pets are actually considered personal property, but before "gifting" a pet, you should make sure the recipient wants and can care for a pet and you may consider gifting a sum of money with the pet to ensure the recipient can afford to take on that responsibility.

6. FAMILY HOME AND/OR MATRIMIONIAL INTERESTS AND RIGHTS ON RESERVE

(a) Introduction:

With the passage of the *Family Homes on Reserves and Matrimonial Interests or Rights Act*[51] (referred to as the "FHRMIRA") and its coming into effect on December 16, 2014 or for those First Nations under the Framework Agreement on First Nations Land Management made under the *First Nations Land Management Act*[16], spouses (and common-law partners) with family homes and other property on a First Nation Reserve now have more protections in the event of a family breakdown or death of a spouse.

NOTE: Inquiries should be made to what law applies to your First Nation. Your First Nation may have used its law-making authority under FHRMIRA or under its Land Code[16] to govern the occupation of the Family home and the value of matrimonial interests or rights on a Reserve after death.

The Act[8] was passed to address a deficiency in the *Indian Act*[10] in that it did not adequately address the right to occupy the "Family Home" on Reserve or the matrimonial property issues for First Nation members who hold an interest or right on

[51] *Family Homes on Reserves and Matrimonial Interests or Rights Act,* S.C. 2013, c. 20

land on a Reserve. Since provincial and territorial laws do not apply to disputes over family homes and matrimonial interests or rights on First Nation territory, spouses and common-law partners residing on First Nation Reserves were left in a legislative vacuum. The preamble to the MRP Act provides in part that it is intended to "introduce measures to provide a spouse or common-law partner with rights and remedies during a conjugal relationship, when that relationship breaks down **or on the death of a spouse or common-law partner…"**

FHRMIRA regulates the:

(i) use occupation and possession of family homes on reserves, including exclusive occupation of those homes in the cases of family violence, and;

(ii) division of the value of any interests or rights that they may hold in or to structures and lands on those reserves.

When FHRMIRA was passed on December 16, 2013, it created Provisional Federal Rules which apply until the First Nation enacted its own laws, it also granted First Nations the power to pass their own matrimonial real property laws on or before December 14, 2014. If a First Nation did not pass its own laws by that date, then the provisional rules in the FHRMIRA remain in effect until such time as the First Nation enacts its own laws under the *Family Homes on Reserves and Matrimonial Interests or Rights Act*[8], or under its Land Code[16] made under the Framework Agreement on First Nations Land Management made under the *First Nations Land Management Act*[16].

Any laws made by the First Nation are subject to community approval and any proposed law is not valid unless First Nation members are given notice and an opportunity to vote under Section 8 of FHRMIRA. If the law is passed in accordance with the requirements of Section 8, the First Nation community law supersedes FHRMIRA. If a First Nation makes its own Matrimonial Real Property law, the Minister[7]

cannot review, cancel, reject or alter that law.

The Act applies to First Nations which fall under the provisions for land under the Indian Act[5] and also First Nations which fall under the Framework Agreement on First Nations Land Management made under the First Nations Land Management Act[16] (FNLMA).

FHRMIRA does not give spouses or common-law partners permanent possession of a family home, nor does it give them the ability to sell reserve land. The Act does, however, make provision for them to receive a share of the value of on-Reserve assets on the death of a spouse or common-law partner. It is therefore critical that spouses and common-law partners who are not on title to land on a Reserve become familiar with all matrimonial laws which apply on his or her First Nation.

The Family Homes on Reserves and Matrimonial Rights or Interests Act[8] ("FHRMIRA") contemplates the death of a spouse throughout the Act.

Some of these provisions are as follows:

(b) **Right to Possession of the "Family Home" (Section 14):**

Section 14 of FHRMIRA provides that a surviving spouse or common-law partner has the right to occupy a family home for **up to 180 days** from the date of death of the Testator, as follows:

> "14. When a spouse or common-law partner dies, a survivor who does not hold an interest or right in or to the family home may occupy that home for a period of 180 days after the day on which the death occurs, whether or not the survivor is a First Nation member or an Indian."

This period of 180-day period can be extended by an application for exclusive

occupation by the surviving spouse under Section 21.

> "21(1) A court may, on application by a survivor whether or not that person is a First Nation member or an Indian, order that the survivor be granted exclusive occupation of the family home and reasonable access to that home, subject to any conditions and for the period that the court specifies."

FHRMIRA gives courts the power to consider the provisions of a Will and vary those terms if the court deems it necessary to meet the deceased's obligations to a surviving spouse or common-law partner.[52]

(c) Right to a Share in Value of the Family Home and other Interests or Rights (Section 34)

Section 34(1) of FHRMIRA sets out the entitlement of a surviving spouse or common-law partner to share in the value of the "Family Home" and any "Matrimonial Interests or Rights" located on-Reserve. The surviving spouse and the executor of a will or administrator of an estate may agree on the value of these assets (Section 34(4)), but where there is no agreement, a surviving spouse can make application under Section 36 to a Court for a determination of the value of the Family Home and other Matrimonial Interests or Rights and directing that the surviving spouse be paid. The Court also has the ability to vary the terms of any trust in a Will so that the amount payable under Section 34 is paid.

"**Matrimonial interests or rights**" is defined in Section 2(1) of FHRMIRA as follows:

> "*2(1)* ***matrimonial interests or rights*** *means interests or rights, other than interests or rights in or to the family home, held by at least one of the spouses or common-law partners*

[52] *Family Homes on Reserves and Matrimonial Interests or Rights Act,* S.C. 2013, c. 20, Sections

(a) that were acquired during the conjugal relationship;

(b) that were acquired before the conjugal relationship but not in specific contemplation of the relationship; or

(c) that were acquired before the conjugal relationship but not in specific contemplation of the relationship and that appreciated during the relationship.

It excludes interests or rights that were received from a person as a gift or legacy or on devise or descent, and interests or rights that can be traced to those interests or rights."

The value of the share is set out in a formula in Section 34 and the "valuation date" is defined in Section 34(6) as:

Section 34(6)

(6) For the purposes of this Section, valuation date means

(a) in the case of spouses, the earliest of the following days:

(i) the day before the day on which the death occurred;

(ii) the day on which the spouses ceased to cohabit as a result of breakdown of marriage, and

(iii) the day on which the spouse who is now the survivor made an application to restrain improvident depletion of the interest or right in or to the family home and of the matrimonial interests or rights that is subsequently granted; or

(b) in the case of common-law partners, the earlier of the following days:

(i) the day before the day on which the death occurred; and

(ii) the day on which the common-law partner who is now the survivor made an application to restrain improvident depletion of the interest or right in or to the family home and of the matrimonial interests or rights that is subsequently granted.

(d) **Appeals of Amount Owed Under Section 34 (Subsection 35)**

Section 35 provides that an Executor of a will or an administrator of an estate may make application to a court and the court may, by order, vary the amount owed to the survivor under Section 34 if the spouses or common-law partners had previously resolved the consequences of the breakdown of the conjugal relationship by agreement or judicial decision, or if that amount would be unconscionable, having regard to, among other things, the fact that the children of the deceased individual would not be adequately provided for.

(e) **Disputes over Valuation Can be Referred to Court (Subsection 36(1))**

Within 10 months of the date of death of the spouse or common-law partner, the surviving spouse may make application to Court for a determination of the spouse's entitlement to a share in the value of the Family Home (Section 34) or the value of the deceased's matrimonial interests or rights in lands or structures on-Reserve (Section 35).

(f) **Variation of a Testamentary Trust (Subsection 36(4))**

On application to court by a survivor (spouse or common-law partner), by the executor of a will or the administrator of an estate, the court may vary the terms of a trust in a Will so that the survivor receives what he or she is entitle so under the Act[8].

It is important to recognize as well that in calculating the value of the share of a surviving spouse or common-law partner, one should refer to Section 34 of the *Act*[21] for the valuation date and the formula for calculating the value of the interest of survivors.

(g) **Survivor's Choice (Section 37)**

If a court decides on the amount payable to a spouse or common-law partner under Section 36, the survivor may not, "in respect of the interest or right in or to the family home and of the matrimonial interests or rights, benefit from the deceased Indian's will or sections 48 to 50.1 of the Indian Act."

(h) **Distribution of Estate (Section 38(1))**

An executor of a will or administrator of an estate **must not proceed** with the distribution of an estate until one of the following occurs:

> "38(1) Subject to subsection (2), an executor of a will or an administrator of an estate must not proceed with the distribution of the estate until one of the following occurs:
>
> (a) the survivor consents in writing to the proposed distribution;
>
> (b) the period of 10 months referred to in subsection 36(1) and any extended period the court may have granted under subsection 36(2) have expired and no application has been made under subsection 36(1) within those periods; or
>
> (c) an application made under subsection 36(1) is disposed of."

(i) **Two Survivors (Subsection 38(3))**

Will drafters must be mindful of the provisions in the Act[52] which pertains to Testators who died with a spouse (by marriage) and a common-law partner.

> "38(3) Where there are two survivors – a common-law partner and a spouse with whom the deceased individual was no longer cohabiting – and an amount is

payable to both under an order referred to in section 36, the executor of the will or the administrator of the estate must pay the survivor who was the common-law partner before paying the survivor who was a spouse."

(j) **Sample Clauses for Testator's Wishes for Occupation of Family Home**

Annotation: The following sample Will clause is just one example of the many ways in which a testator may provide for occupation of a family home by a spouse or common-law partner in his Will.

For the purposes of this sample, "she" is used but it can be "he" or they" (depending on how the spouse identifies). "Spouse" has the same meaning as Section 2(1) of the Act[8]. It is recommended that you name the person you consider your "spouse" so there is no misunderstanding as to who you mean by "Spouse" in your Will. The Will Drafter should be mindful that no one other than an "Indian" registered under the Indian Act, R.S.C. 1985, c. I-5, Section 50(1) who is also a member of the First Nation where the land is located can have or acquire by will a permanent right to possess or an "interest or right" in Indian lands[53]. That "interest or right" could be under a Certificate of Possession, Certificate of Occupation, a permit under Section 28(2)[54], a lease or a right to possess under a Land Code[16] (for those First Nations who have passed a Land Code), or under any laws made by the First Nation or by a decision of a court. "Custom Allotments" made by a First Nation Council where certain parcels of land on Reserve are allocated to an individual or individuals in accordance with tradition are not recognized by Canada and therefore that right cannot be transferred in a Will except as an expression of wishes.

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[53]See definitions Section 2.(1) of the *Family Homes on Reserves and Matrimonial Interests or Rights Act,* S.C. 2013, c.20
[54] Section 28(2) of the *Indian Act,* R.S.C. 1985, c. I-5

Will drafters should also be mindful that where there is a devise of a right to possess or occupy Reserve land to a non-member Indian or to a non-Indian, the Superintendent of Indigenous Services Canada can offer that right for sale to the highest bidder to persons who are entitled to possess that land and the proceeds of sale are paid to the devisee in the Will[55] or to the descendants of the deceased. If there are no offers to purchase within six months or such further period as the Minister directs, the right to possess the land reverts back to the band free of any claim by the devisee or descendent other than payment for improvements.

A "Family Home" is defined in section 2(1) of the *Family Homes on Reserves and Matrimonial Interests or Rights Act*, S.C. 2013, c.20 is "a structure – that need not be affixed but that must be situated on reserve land". The "Family Home" therefore does not include the right to possess the land underneath the Family Home and a non-registered Indian[58] or a registered Indian who is not a member of the First Nation where the land is located cannot have an interest or right in that land because it is set aside by Canada for only the members of that First Nation. The Family Home is defined as a structure located on Reserve land where the spouses or common-law partners "habitually resided" on the day the Testator died. It does not necessarily include all of the structure but "only the portion of the structure that may reasonably be regarded as necessary for the residential purpose." The right of a non-member or non-registered spouse or common-law partner can only be expressed as a "wish" of the testator as any attempt to devise an interest in Reserve land to a non-member or non-Indian will be void or voidable.

[55] *Indian Act,* R.S.C. 1985, c. I-5, Section 50

Family Home on Reserve and Matrimonial Interests or Rights

3. If my spouse, namely **[INSERT FULL LEGAL NAME OF SPOUSE]** (my "Spouse") is living on the date of my death, it is my strong wish that she be permitted to remain in occupation of our home (the "Family Home") situate at **[insert street address of family home on Reserve if available]** on **[insert full legal description of land from Certificate of Possession on which family home is located, for example "Lot 6-21 on Plan 12345 C.L.S.R."]** in **[? First Nation, in the Province or Territory of ?]** (the "First Nation") in accordance with the provisions of this paragraph.

(a) In the event that she wishes to remain resident on my First Nation and because my spouse is not a member of my First Nation ("my First Nation being **[insert name of First Nation]**"), then it is my wish that the Family Home and all other matrimonial interests or rights I may have at my death (both as defined in Section 2(1) of the *Family Homes on Reserves and Matrimonial Interests or Rights Act*, S.C. 2013. C. 20) be transferred to **[insert full legal name of the First Nation member or members to whom all interest in the Family Home and the land it is situate is to be transferred]** (the "Transferee") subject to the provisions of paragraph 3(b) and 3(c) below. If the Transferee so named has died before me or is unable or unwilling to enter into the written agreement as required in paragraph 3(b) below, then it is my wish that the said Family Home and all my matrimonial interests and rights be transferred to **[insert full legal name of the alternate First Nation member or members to whom all interest in the Family Home and the land it is situate is to be transferred]** ("Transferee 2")**.** If on the date of my death, my Spouse and I are not living at the Family Home described above, but are living together at another Family Home on the said First Nation, the provisions of this paragraph shall apply to whatever Family Home I own at my death. Nothing in this paragraph 3 shall be interpreted as a prohibiting my Spouse, as Executor and Trustee of my Will to sell or otherwise dispose of the Family Home and all or any part of our "*matrimonial rights or interests"* (as defined in Section 2(1) of the *Family Homes on Reserves and Matrimonial Interests or Rights Act*, S.C. 2013. C. 20) to a third party as she, in her absolute and sole discretion deems advisable.

It is often important to families that a surviving spouse or common-law partner of the Testator be able to continue to occupy the Family Home, but the land on which the Family Home rests must be transferred to a member of the First Nation. This clause is an expression of the Testator's "wishes" that the right to possess that land be transferred (with the consent of the Minister of Indigenous Services Canada) to a member of the First Nation (usually a child or relative) with the wish that the Spouse be permitted to continue occupying the Family Home for as long as the Spouse wishes. It is contemplated that the Transferee and Spouse enter into an agreement as to the value of the Family Home and matrimonial interests and rights within 6 months of the Testator's death and if they fail to reach such an agreement, the lands go to the secondly named Transferee still subject to reaching an agreement in writing. If the Spouse is unable to reach an agreement with any of the named Trustees, she can seek an order from the appropriate Court under Section 36 of *The Family Homes on Reserves and Matrimonial Interests or Rights Act, S.C. 2013. C. 20* if such application is made within 10 months of the date of death of the testator or such other date as may be permitted by the Court**.**

(b) Before transferring the Family Home and all my matrimonial interests or rights to the Transferee as set out in paragraph 3(a) above and no later than six (6) months from the date of my death, my Spouse in her capacity as the sole Executor and Trustee of my Will and as the sole beneficiary of my Will shall enter into a written agreement with the Transferee in which they agree on the value of the Family Home and the matrimonial interests or rights made in accordance with the provisions of Sections 34(3) and 34(5) of the ***Family Homes on Reserves and Matrimonial Interests or Rights Act, S.C. 2013, c.20*** and such other terms as they may otherwise agree in writing. My Spouse shall not be deemed to be in conflict of interest in entering into such an agreement because she is both the Executor and Trustee and also the sole beneficiary of my estate.

(c) It is further my wish that the Transferee permit my Spouse to remain in occupation of the Family Home for at least one hundred and eighty days (180) following the date of my death as permitted under Section 14 of the *Family Homes on Reserves and Matrimonial Interests or Rights Act*, S.C. 2013. C. 20 as amended from time to time and thereafter for as long as my Spouse is alive, wishes to and is able to remain in occupation of the Family Home on a rent-free basis, notwithstanding that the Family Home may have been transferred to the Transferee. It is my wish that provisions to that effect be included in the Agreement between my Spouse and the Transferee as set out in paragraph 3(b) above.

Annotation: Transferring the right to possess the land on which the Family Home is located to a family member avoids the risks of Section 50 of the Indian Act where the Superintendent can force a sale. However, the Will drafter should be mindful of how the non-member or non-Indian spouse will be paid the value for the Family Home. The Will could stipulate as a wish that the Family Home be sold to the family member, but complications arise if the Transferee does not want the gift or cannot or will not pay the

value of the Family Home to the spouse. In addition, the non-member Indian or non-Indian spouse cannot take back security on the sale (like a mortgage) because that would be conferring an "interest or right" in Indian land to a non-Indian or non-member person.

The spouse is entitled to compensation under Section 34(1) of the *Family Homes on Reserves and Matrimonial Interests or Rights Act*, S.C. 2013. C. 20 on application under Section 36 of that Act, to one-half of the value (as at the date of death) of the Family Home. In addition, the Spouse would receive the other "half" in the value of the Family Home as the residual beneficiary of the estate. The question is – how can the Spouse be fairly compensated if her Family Home is transferred to a family member. One possible solution may be to transfer the right to possess to an adult child of the Testator and then the Testator expresses a "wish" in the Will that the land on which the Family Home is located be leased back to the non-Indian or non-member Spouse. This is not a recommendation, but simply a possible solution and any solution involves significant trust between the spouse and the Transferee. In addition, the Will Drafter may want to include provision in the Will that the Spouse "defer", but not release her right to payment of the value in the Family Home. Again, this requires a significant amount of trust in the Transferee to abide by the Testators wishes and the Will Drafter must be very careful not to contravene the provisions of the Indian Act.

(d) If the Transferee refuses to agree in writing to permit or to continue to permit my Spouse to occupy the Family Home for as long as she wishes or is able to after the initial one hundred and eighty days (180) following the date of my death or if my Spouse and the Transferee are unable to agree on the matters contemplated in Section 3(b) and 3(c) of this my Will within the time period prescribed in that paragraph, the firstly named Transferee named in paragraph 3(a) above shall be replaced by the secondly named

Transferee (Transferee 2) in that paragraph. It is also my wish that should my Spouse or her personal representative deem it necessary, they may make application under Section 21 of *Family Homes on Reserves and Matrimonial Interests or Rights Act*, S.C. 2013. C. 20 for exclusive occupation of the Family Home and/or for an order under Section 36 of that Act to determine the value of the Family Home and Matrimonial Interests or Rights. It is my wish that the Court and any Band or authority shall accept the provisions of this paragraph 3 as an expression of my wishes with respect to possession of the Family Home by my Spouse and the valuation of all Matrimonial Rights and Interests in my property on the First Nation. I declare that I do not consider my Spouse to be in conflict of interest in making any such applications with her role as Trustee of my estate.

(e) During her period of occupation of the Family Home, and unless otherwise agreed between my Spouse and the Transferee, it is my wish that my Spouse not pay rent to the Transferee, but my Spouse shall pay all costs of operating and maintaining the Family Home other than capital expenditures and without limitation; all costs of maintenance and upkeep of the Family Home, the cost of insuring the Family Home, all costs of utilities necessary for the enjoyment of the Family Home and all other costs of every nature and kind associated with the enjoyment of the Family Home, other than capital expenditures (the "maintenance costs"). The Transferee may, at his discretion waive all or any part of the maintenance costs.

(f) I further wish that my Spouse and the Transferee consider making application to the Minister under Section 58(3) to lease the land on which the Family Home is located to my Spouse for any length of time upon reasonable terms, covenants and conditions as the Transferee and my Spouse may agree.

7. SPECIAL PROVISIONS

The Testator may wish to provide instructions for certain assets, such as:

(a) a bequest of air miles (subject to the rules of the airline);

(b) consent to access and/or cancel social media accounts;

(c) money set aside to care for a pet;

(d) instructions that money or property be donated to a third party (university, First Nation council, museum, library, etc.)

8. POWER TO SELL AND PAY DEBTS

Every Will should include the power to sell assets of the estate to pay debts. If this clause is not specifically included in a Will, it is often implied to be a right of the Executor and Trustee by the Courts. An estate cannot be distributed without paying or making provision for the payment of the Testator's debt first. If an estate is distributed without paying all the debts, the beneficiary of the residue of the estate takes the estate subject to payment of those same debts.

It is important not to put the clause for the payment of debt before the clauses for specific bequests because the Testator does not want those items sold to pay debts. If the estate is insolvent however the Executor may be required by creditors to override the Will and sell special bequest assets to pay debts. This is usually only done as a last resort.

9. RESIDUE

Your "estate" is all the real property (immovable - such as land and buildings or structures) and personal property (moveable - such as cars, bank accounts,

investments, furniture, personal effects, art, jewellery, regalia) which you own at your death. The "residue" of an estate is everything left over after all debts are paid and specific bequests are made. The residue can all go to a surviving spouse or common-law partner, to a spouse and children, or to child or children or to anyone else the Testator wants.

When making decisions of the residue, the Testator should know that there may be laws which prevent you from doing what you want. For example, if you try to ignore a spouse or common-law partner in your Will, *The Family Homes on Reserves and Matrimonial Interests or Rights Act,* S.C. 2013, c. 20 may apply to give them an interest in your estate anyway. In addition, as outlined above gifts of an interest or right in Reserve land to a non-member could be found to be void or voidable.

If you try to leave anything to someone under the age of majority or who is incapable of receiving the gift (due to mental or physical incapacities), that person's personal representative (Power of Attorney for Property) could end up taking the gift and holding it for the incapable person.

(a) Where the Spouse or Common-law Partner is First Nation Member of the Testator's First Nation:

If the Testator has a spouse or common-law partner who is not already on title to lands on-Reserve and the spouse or common-law partner is an "Indian"[48] and a member of the Testator's First Nation, then the Testator may wish to leave all of her estate, (which would include any interest she has in any property located on their First Nation Reserve) to her spouse or common-law partner.

(b) Where the Spouse is NOT a First Nation Member of the Testator's First Nation:

The Testator cannot leave an outright gift of an interest in on-reserve land to a non-member spouse or common-law partner, but the spouse or common-law partner is entitled to occupy the Family Home for 180 days after death and to a share in the value of both the Family Home and other matrimonial interests or rights in on-Reserve land under FHRMIRA.[8]

Anything which is not an interest in Indian Land can be transferred to a spouse or common-law partner, or the Testator can set up a trust for her spouse where, for example, the Executor manages money because the spouse is not able to manage their own financial affairs.

You can, however, express your "wishes" as to the occupation of the Family Home (beyond the automatic right for a spouse or common-law partner to occupy the Family Home for up to 180 days of the date of your death under FHRMIRA[8] or the First Nation's own matrimonial property laws), but they cannot "own" the property because Indian lands and Reserves are set aside for the exclusive use and occupation of Indian members of that particular Reserve.

As to other "matrimonial interests or rights" in on-Reserve lands, your non-First Nation's spouse is entitled to a share of the value of those interests, but a permanent interest cannot be owned by a non-member Indian.

So for example, if you leave the all residue of your estate to your spouse, they would be entitled to 50% of the value of the Family Home and other "matrimonial interests or rights" on-Reserve under FHRMIRA[8] and the value of the remaining 50% of your estate as the sole beneficiary under your Will.

If your spouse or common-law partner wanted to keep an interest in the Family Home or in other land on-Reserve, s/he would have to convey the land to a member Indian (the "Transferee") under an agreement so that if the Transferee cannot pay for the land or later wants to sell it, the non-First Nation's spouse or common-law partner would be entitled to the value of their interest in the property under the Will or under FHRMIRA (whichever is more). A clause to defer payment to a spouse or common-law partner must be agreed to in writing to be effective.

In addition, any interests the Testator may have in lands on-Reserve cannot fall under a **trust** in the Will – so the Will Drafter should be aware.

(c) Two Spouse Rule:

You should be particularly careful where you have BOTH a spouse (with whom you are not living) and a common-law partner (with whom you are living) at the date of your death.

"Spouses" as defined in FHRMIRA[8] include a person to whom the Testator is still married even though the couple no longer cohabits in a conjugal relationship. As a "Spouse" they may have an interest the on-Reserve Family Home or other matrimonial interests or rights FHRMIRA. Even if they have no interest in the on-Reserve Family Home or other matrimonial interests or rights, they may still have a claim against other estate assets if the deceased never settled the division of matrimonial property after separation.

Section 38(3) of FHRMIRA sets out the priority of payment where an order under Section 36 is made for the valuation of property on reserve. The common-law partner with whom the testator was living gets paid before the spouse.

It is best to identify the person you consider your "spouse" or "common-law

partner" by name so there is no misunderstanding about whom you are talking. It is best to resolve all matrimonial property rights with a spouse from whom you are separated before you die. Enter into a domestic contract which survives your death, get a court order and get a divorce.

(d) Jointly owned Assets or Assets with Named Beneficiaries

For "jointly" owned assets (such as bank accounts, land or investments), the asset may pass outside the Will to the surviving joint owner unless the Will or other documents provide otherwise.

For assets where there is a named beneficiary, such pensions, annuities, life insurance policies, Registered Retirement Income Funds (RRIF), Registered Retirement Income Funds (RRIF) or Tax-Free Savings Accounts (TFSA), usually these types of assets also do not pass through the Will (unless the Will stipulates otherwise). If you name your common-law partner as the beneficiary, but you have a spouse and have not settled property issues with that spouse, he could challenge the beneficiary designation and claim all or part of the asset as the surviving spouse. If you do not have a domestic contract in which the spouse releases his interest in these types of assets, you risk causing hardship to your common-law partner.

(e) Residue to a First Nation Member Spouse or Common-law Partner

This is an example of a simple clause giving all of the residue of the estate to your spouse:

4. I give all of my property of every kind, both real and personal and wherever located, including any property over which I may have a general power of appointment, to my spouse, **[INSERT FULL LEGAL NAME OF SPOUSE]**.

(f) Residue to a NON First Nation Member Spouse

In this case, you would deal with all on-Reserve land as specific bequests before you deal with the residue, otherwise the Minister[7] could force the sale of the land within 6 months and if there is no buyer, the land would revert to the First Nation without compensation to your spouse or common-law partner. Your spouse or common-law partner can also make a claim under FHRMIRA[8] for occupation and a share of the value of on-Reserve matrimonial interests or rights.

4. I give all of my property of every kind, both real and personal and wherever located, including any property over which I may have a general power of appointment, to my common-law partner, **[INSERT FULL LEGAL NAME OF COMMON –LAW PARTNER]**.

10. TRUST WILLS AND TESTAMENTARY TRUSTS

A testator may decide to place the residue of his property in a "trust" after his death so that the Executor and Trustee have control and can use estate assets to pay debts, support a common-law partner, spouse, children or dependants or use funds as directed in the Will. This is often the case where a Testator dies without a spouse or common-law partner surviving her or where a surviving spouse is incapable of managing their own affairs due to physical or mental incapacity.

As a reminder: Rights or interests in First Nation land cannot be included in a trust.

(a) What is a Trust?

A "trust" is like a gift with conditions. It means that the Executor and Trustee, wearing his "Trustee" hat, takes control of the assets, but they do not belong to him

personally. Instead they are held "in trust" by the Trustee for the beneficiaries of the Estate. A "trust" in a Will can be subject to conditions, such as the payment of all funeral expenses, taxes and debts. There may be other conditions, like holding money for a minor child until they reach a certain age with instructions that the Trustee manage the money and perhaps use that money to support the child (depending on what the Will says).

Sample1: Placing the Residue of an Estate in a Trust (Vesting Clause)

4. I give all of my property of every kind, both real and personal and wherever located, including any property over which I may have a general power of appointment, to my Trustees upon the following trusts, namely:-

Or

5. <u>Alternate Bequest of Residue:</u> IN THE EVENT that my common-law partner, **[INSERT FULL LEGAL NAME OF COMMON-LAW PARTNER]** has predeceased me, dies at the same time as I have or dies in circumstances rendering it uncertain which of us survived the other, upon the death of the survivor of **[INSERT FULL LEGAL NAME OF COMMON-LAW PARTNER]** and me (the "**Division Date**"), I give all of my property of every kind, both real and personal and wherever located, including any property over which I may have a general power of appointment, **to my Trustees upon the following trusts**, namely:-

Chapter 10 – Checklist To Prepare for Meeting with Lawyer

The following is a sample checklist with most of the questions a lawyer will ask you when you are getting ready to prepare a Will. By answering these questions in advance and having all of your documents ready, your lawyer will have a better understanding of your circumstances which will save multiple meetings and potential costs.

CHECKLIST TO PREPARE FOR MEETING WITH A LAWYER

ALL INFORMATION PROVIDED TO A LAWYER IS SUBJECT TO SOLICITOR CLIENT PRIVILEGE AND IS STRICTLY CONFIDENTIAL

CLIENT 1	Date:
Any Reason for Urgency? ☐ No ☐ Yes	
Personal Information	
Name (in full)	
Address:	Postal Code:
Telephone No:	Cell No:
Email:	Date of Birth: D/M/YY
Your Occupation:	Employer:
Employer Telephone No:	
Date of Birth:	Place of Birth (include country):
Citizenship:	SIN No:
U.S. Green Card? ☐ Yes ☐ No	
Father's Place of Birth?	Mother's Place of Birth?
First Nation Membership	
Are you resident on Reserve? ☐ Yes ☐ No	Indian Status No:
Name of First Nation:	
Address of First Nation:	
Marital Status	
☐ Single? ☐ Married? ☐ Common Law? ☐ Widow? ☐ Engaged? ☐ Separated?	
☐ Separated? ☐ Separation Agreement? Date of Separation Agreement?	
☐ Divorced? ☐ Any Court Orders? (support, custody)?	
Spouse's Name (in full)	
Is your Spouse a member of a First Nation? ☐ No ☐ Yes	Name of Spouse's First Nation:
Citizenship of Spouse:	Is Spouse disabled? ☐ Yes ☐ No

Do you have a Will now? ☐ Yes ☐ No	If yes, do you have a copy? ☐ Yes ☐ No
Are you on any medication that affects your mood or thinking? (legal or illegal) ☐ Yes ☐ No	Have you had any capacity-related diagnosis? ☐ Yes ☐ No Name of Doctor?
Who is your family doctor?	Accountant?
Financial Advisor?	

Children (use additional sheet if necessary)

1	Name:		Date of Birth:
	Address:		Place of Birth:
	Citizenship:	First Nation Member? ☐ Yes ☐ No	Occupation:
	Marital Status (Circle one): S/M/CL/W/Sep/Div	Child of 1/2/Both (Circle One)	How many children?
	Any grandchildren under 18 years? ☐ Yes ☐ No	Child a Status Indian? ☐ Yes ☐ No	Resident on Reserve? ☐ Yes ☐ No
2	Name:		Date of Birth:
	Address:		Place of Birth:
	Citizenship:	First Nation Member? ☐ Yes ☐ No	Occupation:
	Marital Status (Circle one): S/M/CL/W/Sep/Div	Child of 1/2/Both (Circle One)	How many children?
	Any grandchildren under 18 years? ☐ Yes ☐ No	Child a Status Indian? ☐ Yes ☐ No	Resident on Reserve? ☐ Yes ☐ No

Bank Accounts and Investments (Canada) (use separate sheet or provide copies)

Institution Name	Address	Ownership
		☐ Joint? ☐ Sole Owner?
		☐ Joint? ☐ Sole Owner?
		☐ Joint? ☐ Sole Owner?

Bank Accounts and Investments outside Canada (if any)

Institution Name	Address	Ownership
		☐ Joint? ☐ Sole Owner?
		☐ Joint? ☐ Sole Owner?

Pension Plans and Registered Investments (RRSP/RRIF/TFSA)

Institution Name	Address	Ownership
		☐ Named Beneficiary?

		☐ Spouse? ☐ Other?
		☐ Named Beneficiary? ☐ Spouse? ☐ Other?
		☐ Named Beneficiary? ☐ Spouse? ☐ Other?

Life Insurance

Institution Name	Policy No.	Ownership
		☐ Named Beneficiary? ☐ Spouse? ☐ Other?
		☐ Named Beneficiary? ☐ Spouse? ☐ Other?
		☐ Named Beneficiary? ☐ Spouse? ☐ Other?

Loans Receivable (Does anyone owe you money?)

Details:

Property On-Reserve?

Do you possess land on-Reserve? ☐ Yes ☐ No	How many parcels?
Property 1 Address:	Registered Holder:

☐ Certificate of Possession? ☐ Certificate of Occupancy? ☐ Lease? ☐ Custom Allotment?

Do you have a copy of your ILRS or FNLMA parcel abstract from your lands manager? ☐ Yes ☐ No

(Please bring copies of the search and documents with you to first appointment)

Property 2 Address:	Registered Holder:

☐ Certificate of Possession? ☐ Certificate of Occupancy? ☐ Lease? ☐ Custom Allotment?

Do you have a copy of your ILRS or FNLMA title search from your lands manager? ☐ Yes ☐ No

(Please bring copies of the search and documents with you to first appointment)

Property Off-Reserve? (attach list of any other property)

Do you own property off-Reserve? ☐ Yes ☐ No	How many parcels?

What kind of property? ☐ Principal Residence? ☐ Vacation? ☐ Business? ☐ Investment?

Property 1 Address:

Legal Description: Lot _____ Plan _____ Concession/Section_____

Township/Square:	County:	Province:
Registered Owner(s):	☐ Joint? Name of other owner: ☐ Sole Owner?	
Do you have a copy of your ILRS or FNLMA title search from your lands manager? ☐ Yes ☐ No (Please bring copies of the search and documents with you to first appointment)		
Property 2 Address:	Registered Holder:	
☐ Certificate of Possession? ☐ Certificate of Occupancy? ☐ Lease? ☐ Custom Allotment?		
Do you have a copy of your Transfer/Deed of Land? ☐ Yes ☐ No	(Please bring copies of the report from your lawyer and title documents with you to first appointment)	

Mortgages

Institution Name	Bank/Loan Company	Balance Owing (approx.)	Life Insured?	Joint with spouse?
			☐ Yes ☐ No	☐ Yes ☐ No
			☐ Yes ☐ No	☐ Yes ☐ No

Liabilities (other than mortgages listed above)

Institution Name	Bank/Loan Company	Balance Owing (approx.)	Life Insured?	Joint with spouse?
			☐ Yes ☐ No	☐ Yes ☐ No
			☐ Yes ☐ No	☐ Yes ☐ No
			☐ Yes ☐ No	☐ Yes ☐ No

Business Assets (attach additional sheets if necessary)

Do you have a business? ☐ Yes ☐ No Is the business located on-Reserve? ☐ Yes ☐ No		
Is it incorporated? ☐ Yes ☐ No	Do you have partners? ☐ Yes ☐ No	Do you have a partnership or shareholder's agreement? ☐ Yes ☐ No
What is the approximate value of the Business? $	Is the business in debt? ☐ Yes ☐ No	Did you Guarantee any business debt? ☐ Yes ☐ No
What is the nature of the business?	What do you want to happen to the business after you die?	

Other Assets (if so, please provide details)

Do you have any of the following:

Valuable Art? ☐ Yes ☐ No	Safety Deposit Box? ☐ Yes ☐ No	Digital Assets? ☐ Yes ☐ No
Genetic Material? ☐ Yes ☐ No	Pre-Arranged Funeral ? ☐ Yes ☐ No	Burial Instructions? ☐ Yes ☐ No

Are you executor of anyone else's Will? ☐ Yes ☐ No	If yes – Whose Will?

Is there anything else you think we should know? (please describe)

For example: Beneficiary has special needs? Marriage breakdown? Someone is dependent on you? Pending Criminal Charges or convictions? Drug or Substance abuse issues? Do not want to meet lawyer with spouse? You are worried about something?

Chapter 11 – Sample Wills

SAMPLE WILL 1:

ALL TO SPOUSE OR COMMON-LAW PARTNER WHO IS A MEMBER OF FIRST NATION WITH GIFT OVER TO ADULT CHILDREN

LAST WILL OF [**INSERT FULL LEGAL NAME OF TESTATOR]**

This is the last will of me, **[INSERT FULL LEGAL NAME OF TESTATOR]** of **[INSERT ADDRESS OF TESTATOR]**, being ordinarily resident on **[INSERT NAME OF FIRST NATION OR TREATY LANDS]** First Nation, in the Province of [INSERT PROVINCE OR TERRITORY], Canada , made this () day of (), 202().

Revocation

1. (a) Revocation of Prior Wills and Codicils: I REVOKE all wills and codicils previously made by me.

(b) No Change to Designations Made Before This Will: This Will does

not alter any designations of a beneficiary I may have made prior to the date of this Will, and other than by will, under any policy of life insurance, pension, registered plan, annuity, or other plan or policy under which I am competent to designate a beneficiary other than by will.

NOTE: If the Testator has an insurance policy, pension, RRSP or RRIF for example, this paragraph makes it clear that the Testator does not intend to revoke any beneficiary designation made before the date of this Will. The designation can, however, be changed with the Holder (Insurance company or Bank for example) AFTER the date of the Will.

Executors and Trustees

2. (a) Appointment of Executor and Trustee: I appoint my spouse (or common-law partner – delete one), **[INSERT FULL LEGAL NAME OF SPOUSE OR COMMON-LAW PARTNER]** (hereinafter called my "Spouse") of **[insert address of spouse or common-law partner]** to be the Executor of my Estate and Trustee of my Will.

NOTE: The "two spouses" problem. If the Testator is married, but no longer cohabiting with that person and has never settled matrimonial property issues with her spouse and is at death in a common-law relationship with a new partner, this can create significant issues for the estate. Under the *Family Homes on Reserves and Matrimonial Interests or Rights Act,* S.C. 2013, c.20, a spouse to whom the Testator is still married (but not cohabiting with) may make a claim under *Section 34* for an amount equal to one half of the value of an "interest or right" in or to the Family Home and potentially any other interest or right in other Reserve Lands. This could have significant

consequences for the common-law partner. *Section 38* of that Act directs that where there are two spouses, the executor must pay the survivor who was the common-law partner first before paying the survivor who was the spouse, but nothing prevents a married spouse from contesting that right and bringing a court application to contest the distribution under the estate – especially if the Testator has minor children living with the married spouse who are dependent on the Testator. It is strongly recommended that a Testator finalize the division of assets and get a divorce from a married spouse during his or her lifetime.

If my said Spouse (or common-law partner – delete one) dies before me, or at any time is unable or unwilling to act or to continue to act as Executor of my Will and Trustee of my Estate before all the trusts in my Will have been fully performed, I appoint my son, **[INSERT FULL LEGAL NAME OF SON]** currently of **[insert current address of son]**, my daughter, **[INSERT FULL LEGAL NAME OF DAUGHTER1]** currently of **[insert current address of daughter1]** and my daughter, **[INSERT FULL LEGAL NAME OF DAUGHTER2]** currently of **[insert current address of daughter2]** to be the Executors of my Will and Trustees of my Estate in place of my said Spouse. The expression "my Trustees" used throughout my Will includes, where the context permits, the executor or executors and trustee or trustees for the time being of my Will, whether original, additional, or substituted.

NOTE: It is very important to actually name a child and properly identify that child, rather than just say "my son" or "my daughter". This makes it clear whom you are talking about. Inserting the current address of the Trustee just makes it easier to find them.

(b) No Security Required: I DIRECT that no security shall be required of any of my Trustees in any court, notwithstanding that any of them may not be resident or located within any first nation, province or country in which I may own assets at the time of my death.

(c) Conflict Resolution: If any difference of opinion exists at any time among my Trustees in relation to the commission or omission of any act in the execution of the trusts in my Will, the opinion of my Trustees having the majority of votes prevails, notwithstanding that one or more of my Trustees may be personally interested or concerned in the matter in dispute or question.

NOTE: It is best to keep the number of Executors and Trustees to a minimum. You do not have to appoint your children. You can appoint anyone whom you trust and whom you know will be able to administer your estate in accordance with your wishes set out in your Will. If you have someone you trust, then appoint that person alone. If you feel more comfortable having more than one Executor and Trustee, then don't appoint them together if they can never agree on anything or do not get along. Be pragmatic when considering your children's relationship with each other. It is better to choose the most responsible and reasonable child to act alone and have another child as an alternate if your children do not get along. If you wish to appoint more than one Executor and Trustee, it is better to have an odd number and then provide that in the event of disagreement, majority rules. If you have a business, you can consider appointing a separate Estate Trustee to manage and distribute your business assets, if you feel your family members do not possess the necessary skills.

Residue to Spouse

3. My Trustees shall pay and transfer the residue of my estate to my Spouse, **[INSERT FULL LEGAL NAME OF SPOUSE]** if she is living on the thirtieth day following my death.

NOTE: Two Spouses Problem: It is strongly advised that all matters be settled in writing or by Court Order with any spouse the Testator is no longer living with prior to death. Otherwise the common-law partner will have to deal with a potential claim from the Spouse, which can subject the common-law partner to unnecessary stress, both financially and emotionally.

NOTE: The Spouse takes the estate subject to the payment of all the Testator's funeral, testamentary and other debts.

Alternate Bequest of Residue

4. If my Spouse **[INSERT FULL LEGAL NAME OF SPOUSE]** dies before me or is not living on the thirtieth (30th) day following my death, then on the death of the survivor of my Spouse and me (the "Division Date"), I GIVE, DEVISE, BEQUEATH AND APPOINT my Estate to my Trustees upon the following trusts, namely:-

(a) Memorandum - Personal and Household Articles: I have made a memorandum dated **[insert date – must before the date of the Will]** that gives certain articles of personal and household use and ornament to certain persons, and I have deposited it with my Will. I direct my Trustees to deliver the articles of personal and household use and ornament described in this memorandum in accordance with the gifts in this memorandum.

OR – AN ALTERNATE CLAUSE:

(a) Letter of Wishes - Personal and Household Articles: I wish to advise my Trustees that I have prepared a letter of wishes (the "Letter of Wishes"), that I have left among my personal papers, regarding the division and disposition of articles of personal and household use and ornament owned by me on the date of my death (collectively, the "Personal and Household Articles"). I wish to advise further that it is my strong wish and desire that my Trustees, together with those of my children who are living on the date of my death, give effect to the terms of the Letter of Wishes, although I recognize that there is no legal obligation upon them to do so, regarding the division and disposition of the Personal and Household Articles listed on the Letter of Wishes. If I do not leave the Letter of Wishes or in the event the Letter of Wishes I have left does not deal with the division and disposition of all of the Personal and Household Articles, I direct that the Personal and Household Articles that have not been divided and disposed of pursuant to the Letter of Wishes shall be divided among those of my children who are living on the date of my death, in any manner as they may agree upon, or if they do not agree, then in any manner as a majority of my Trustees in an absolute discretion consider equitable.

NOTE: Who gets what of the Testator's personal items is one of the most contested parts of administering an estate. Testators sometimes tell beneficiaries (usually family) one thing and then do another (or forget) when preparing a written Memorandum. Personal Articles often have more sentimental value than monetary value. Family treasures which are passed through generations are important and the Testator should talk to their children when deciding what to do with these items. Even better, if you are an elder and you are not using something – give it away when you are alive. Don't set your family up for a fight or disappointment. Don't wait until you are gone. And talk to your children. Grief heightens emotions to the point where beneficiaries can be unreasonable and bonds can be broken forever over an item that the Testator would never have imagined would cause a dispute. It is also more meaningful to make a gift in person, while you are alive rather than have it pass in a Will. Lawyers see families stop speaking to each other over some personal items all of the time.

The first sample is legally binding on the Estate Trustees. So the list must be in existence before the Will is made; the Will must refer to it as an existing document and the document must be described sufficiently that the Trustee can identify it. This can be inconvenient, particularly because Testator's often change their minds and if you change the Memorandum you must amend your Will.

The second sample is a non-binding expression of wishes, but if it is typed by the Testator or is in the Testator's handwriting – it can have significant moral suasion on the beneficiaries. The benefit of the second sample is that the it can be changed as many times and whenever the Testator wants without having to make changes to the Will.

However, if the Testator makes gifts of the special items before death, a Statement of Wishes or Memorandum may not even be needed.

(b) Gift of Remaining Personal Articles: My Trustees shall divide the remaining articles of personal, domestic or household or garden use or ornament that I shall own at my death and all regalia, art, jewelry, boats, hunting equipment, automobiles and accessories thereto (collectively called "the Personal Articles") as equally as possible among those of my children who are living on the 30th day following my death, in any manner that my children may agree upon, or if they do not agree, then in any manner that my Trustees in their absolution discretion consider equitable.

Power of Sale and Retention

5. (a) Power to Sell or Retain: I authorize my Trustees to use their unfettered discretion in the realization of my estate. My Trustees have the power to sell or otherwise convert into money any part of my estate not consisting of money, at the time and upon whatever terms my Trustees shall decide, with power and discretion to decide against the conversion in connection with all or any part of my estate or to postpone the conversion of my estate or any part of it for any length of time. I authorize and empower my Trustees to retain any portion of my estate in the form in which it may be at my death (whether it is in the form of investments that would be prudent investments for trustees or in which trustee are by law authorized to invest trust funds and where there may be any liability attached thereto) for any length of time that my Trustees consider to be in the best interests of my estate, and I also declare that no property not in fact producing income shall be required or deemed to proper income.

(b) To Pay debts: My Trustees shall pay my just debts, funeral and testamentary expenses, and taxes, including but not limited to income taxes, and all

estate, legacy, succession or inheritance duties and taxes whether imposed pursuant to the laws of my First Nation, Canada or the Province or in any other jurisdiction in which I may hold assets or have income at my death and that may be payable in connection with any property passing on my death (or deemed to so pass) or in connection with any proceeds of any insurance and/or annuities on my life or any gift or benefit given or conferred by me either in my lifetime or by survivorship or by my will or any Codicil thereto and whether these duties and taxes be payable in respect of estates or interests that fall into possession at my death or at any subsequent time. All these debts, expenses, duties and taxes are to be paid out of and be a charge on the capital of my estate. I authorize my Trustees in their unfettered discretion to commute or prepay or defer the payment of any of these duties and taxes.

(c) Insurance Proceeds: I direct that my Trustees may use insurance proceeds that are available for such purpose (together with liquid assets and converted assets hereunder) to pay any such taxes or administration costs.

(d) Residue: If my Spouse is not living on the 30th day following my death or upon the Division Date, as the case may be, my Trustee shall divide the residue of my estate into as many equal shares as are requisite to give effect to the following:-

(i) To pay or transfer ONE (1) SHARE of the residue of my estate to my son, **[INSERT FULL LEGAL NAME OF CHILD1]** PROVIDED THAT if he is not alive at the Division Date, I DIRECT my Trustees to equally divide his share among his children alive at the Division Date and should he die leaving only one child alive at such time, then all to that child; PROVIDED FURTHER THAT should he die leaving no child or children alive at the Division Date; this share

shall fall into and form part of the residue of my estate; and

(ii) To pay or transfer ONE (1) SHARE of the residue of my estate to my daughter, **[INSERT FULL LEGAL NAME OF CHILD2]** PROVIDED THAT if she is not alive at the Division Date, I DIRECT my Trustees to equally divide her share among her children alive at the Division Date and should she die leaving only one child alive at such time, then all to that child; PROVIDED FURTHER THAT should she die leaving no child or children alive at the Division Date; this share shall fall into and form part of the residue of my estate; and

(iii) To pay or transfer ONE (1) SHARE of the residue of my estate to my daughter, **[INSERT FULL LEGAL NAME OF CHILD3]** PROVIDED THAT if she is not alive at the Division Date, I DIRECT my Trustees to equally divide her share among her children alive at the Division Date and should she die leaving only one child alive at such time, then all to that child; PROVIDED FURTHER THAT should she die leaving no child or children alive at the Division Date; this share shall fall into and form part of the residue of my estate.

Payments to Persons Under 21 Years or Disabled Beneficiaries

6. SUBJECT AS IS SPECIFICALLY PROVIDED HEREIN, if any person entitled under the provisions of this Will to receive any share of income or capital of the my estate while such person is under the age of twenty-one (21) years or while under any other disability as defined by the **[insert with name of appropriate Act if beneficiary is receiving disability support from a Province or Territory]**, or any succeeding legislation as the case may be, the Trustees shall keep such share of

income or capital invested until, for a beneficiary that is under the age of twenty-one (21) years, such Beneficiary attains the age of twenty-one (21) years, or for a beneficiary under a disability, until such beneficiary ceases to be disabled as defined by the Ontario *Disability Support Program Act 1997*, c.25, Sch B, or any succeeding legislation as the case may be; provided that the Trustees may in the exercise of an absolute discretion pay such income or any part thereof together with the whole or any part of the capital thereof to a parent, or to a person entitled to the custody of such person, or to the guardian of the property of such person or to any other person standing in *loco parentis* to such Beneficiary, whose receipt shall be a good acquittance to the Trustees or the Trustees may apply the same as they, in the exercise of an absolute discretion, think fit to or for the benefit of such Beneficiary or further they may pay any part of such income or capital directly to such Beneficiary notwithstanding that he or she is under the age of twenty-one (21) years if in their discretion they consider it advisable so to do and the *de facto* payment of such income or capital to such Beneficiary shall be a complete release to the Trustees and in addition, the Trustees shall have the power to accumulate and add to the capital of such Beneficiary's share any income not so paid out.

Bequest Not to Form Part of Beneficiary's Net Family Property:

7. Any benefit, whether as to income or capital, or income from capital to which any person shall become entitled in accordance with the provisions of this Will or any Codicil thereto, shall not fall into any community of property as amended from time to time, any benefit, whether as to income or capital, or income from capital to which any person shall become entitled in accordance with the provisions of this my Will or any Codicil thereto, shall not fall into any community of property which may exist

between any such person and his or her spouse and shall not form part of her or his net family property for any purpose or purposes of the the *Family Homes on Reserves and Matrimonial Interests or Rights Act*, S.C. 2013. C. 20 as amended from time to time or **[insert reference to applicable Family Law Act *off reserve* for the Province or Territory in which the beneficiary lives]** , but shall be paid by my Trustees to such person on the condition that the same shall remain the separate property of such person, free from the control of her or his spouse. The separate Release or Receipt of such person shall be a discharge to my Trustees in respect of any such payment.

NOTE: This clause makes it clear that the Testator's intention is that a gift made to a child under this Will is to that child alone and not to the child and his or her spouse. Most Provinces and Territories exclude inheritances from "family property" that is divided when a couple separates, but these types of clauses can be helpful when a child is trying to prove a particular gift was made only to the child. Not the child and her spouse.

Definition of Relationships (Not all the clauses below may be applicable)

8. Spouse: Any reference in my Will to "Spouse" shall mean **[INSERT LEGAL NAME OF SPOUSE]** as named in paragraph 2 of this Will.

9. Spouse of a Beneficiary: Whenever my Trustees are authorized or directed in my Will to make a payment or distribution to the spouse of a living individual, the payment or distribution may only be made to a person who, in the opinion of my Trustees:

(a) is married to the individual and is not living separate and apart from the individual at the relevant time;

(b) has in good faith gone through a form of marriage with the

individual, which is void or voidable, and the two of them are cohabiting or have cohabited within the previous twelve-month period;

(c) though not married to the individual, is cohabiting with him or her in a relationship of some permanence where there is a child born of whom they are the legal parents; or

(d) is a person in favour of whom an order for support, alimony or maintenance has been made by a Court of competent jurisdiction against the individual under which such individual continues to have obligations;

and wherever payment or distribution is authorized or directed to be made to a spouse of a deceased individual the payment or distribution may only be made to a person to whom a payment or distribution might have been made as the spouse of such individual immediately before the individual's death. Before making any payment or distribution to a person as the spouse of an individual, my Trustees may require the person to provide my Trustees evidence to establish to my Trustees' satisfaction that person's entitlement to the payment or distribution.

NOTE: Your lawyer may decide this clause is not needed if you do not include the spouse of your child as an alternate beneficiary of a share of your estate. This is given for illustration purposes only. Also – Your lawyer should make sure these definitions are in accordance with the law in your First Nation, Province or Territory.

10. Child or Grandchild: Any reference in my Will to a "child" or "grandchild" shall include, for greater certainty:

(a) any child or grandchild who has been legally adopted in any jurisdiction, including customary adoptions under the customs of my First Nation; and

(b) any child or grandchild conceived before and born alive after the individual's death.

NOTE: Care should be taken in using the clauses in paragraph 10 and legal advice should be obtained to decide whether or not children adopted through customary adoptions should be included in this definition.

11. Persons Born Outside Marriage: Unless otherwise specifically provided, any reference in my Will or in any Codicil to my Will to my "children" or to my more remote issue, or to the children or more remote issue of any other person or persons shall not include:

(a) a person born outside marriage,

(b) a person who comes within the description traced through another person who has been born outside marriage,

provided that any person who was born outside marriage but whose parents subsequently married one another, or who in the sole and absolute opinion of my Trustees has had for some time during his or her lifetime a normal relationship with one of his or her natural parents, or in the sole and absolute opinion of my Trustees has been adopted by custom adoption common to the First Nation of which I am a member at my death, and any person who has been legally adopted shall be regarded as having been born within marriage.

NOTE: The purpose of this clause is to limit who can claim to be a child of the deceased under the Will. The best practice is to never use the word "child" without then including the name of that child. Making broad references to "children" or "grandchildren can mean individuals whom the Testator does not consider his child may be included. This is, of course, particularly applicable to men.

Trustee Powers

12. IN ADDITION to all other powers by this my Will or any Codicil thereto or by Statute or Law conferred upon them, but subject to the other provisions of this my Will, my Trustees in the administration of my estate or any trust or fund created under the provisions hereof shall have power in their sole and absolute discretion:

(a) To invest and re-invest: To invest and reinvest the moneys of my estate or any trust thereof in any investments which my Trustees consider advisable.

(b) Considerations in Making Investments: When making investments for my estate or any trust thereof, my Trustees may consider the following criteria in planning the investment of trust property, in addition to any others that are relevant in the circumstances:

1. general economic conditions;
2. the possible effect of inflation or deflation;
3. the expected tax consequences of investment decisions or strategies;
4. the role that each investment or course of action plays within the overall trust portfolio;
5. the expected total return from income and the appreciation of

capital;

6. needs for liquidity, regularity of income and preservation or appreciation of capital; and

7. an asset's special relationship or special value, if any, to the purpose of the trust or to one or more of the beneficiaries.

(c) To Make Divisions and Fix Value: To make any division of my estate or set aside or pay any share or interest therein, either wholly or in part, in the assets forming my estate at the time of my death or at the time of such division, setting aside or payment, and I expressly will and declare that my Trustees shall in their absolute discretion fix the value of my estate or any part thereof for the purpose of making any such division, setting aside or payment and the decision of my Trustees shall be final and binding upon all persons concerned, notwithstanding one or more of my Trustees may be beneficially interested in the property appropriated or partitioned. It is my desire that in exercising this power, my Trustees shall, with proper advice, consider the effect of tax on capital gains, in selecting assets to be distributed or allocated rather than sold so as not to attract tax unnecessarily or at an earlier time than required.

(d) To Renew Debt Obligations: To renew from time to time any bills, notes, guarantees or other securities or contracts evidencing any liability of mine as endorser, guarantor, surety or otherwise and for that purpose to enter into new bills, notes, or other securities or contracts for and on behalf of my estate, my intention being to give to my Trustees sufficient authority to enable them to assist in the gradual liquidation of the liabilities which I may be under in order that the companies or persons for whom I may be liable may not be unduly embarrassed.

(e) To Exercise Options: To exercise any options to which I may be

entitled, at such time or times as my Trustees consider advisable, or to refrain from exercising any such option and allow the same to lapse, or to sell or surrender any such option for such consideration as my Trustees consider advisable, and my Trustees shall not be held accountable for any loss that may be suffered by my estate or any beneficiary thereof as a result of their failure to exercise any option or the surrender thereof, or the exercise of any such option at a particular time.

(f) To Settle Claims: Without the consent of any beneficiary under this my Will to compromise, settle and waive any claim or claims at any time due to or by my estate.

(g) To Purchase or Retain Real Property: To purchase or retain as an investment of my estate, real estate for the purpose of residence of any income beneficiary of this my Will, as an alternative to investing for income for such beneficiary, and again as an investment to pay off any mortgage on such real estate, or to make improvements or to make repairs necessary to preserve its value.

(h) To Delegate to Trust Company: In addition to the power of delegation authorized by law, to delegate any powers, duties or discretions to any trust company or other proper person, but without thereby avoiding continuing legal responsibility for the proper administration of my estate; and with the further power from time to time to revoke any such delegation in whole or in part and, if so decided, to substitute another trust company.

(i) To Retain Professionals: From time to time to employ and pay for such professional, expert, specialized or other assistance (such as the services of any accountant, appraiser, agent, solicitor or any other professional advisor) as my Trustees may deem requisite in the discharge of their duties as Trustees, with power to act or not to act, in their absolute discretion, on any opinion, advice or information so

obtained. My Trustees shall not be responsible for any loss, depreciation or damage occasioned by their action or non-action, in accordance therewith.

(j) To Collapse Trust Not Advantageous to Beneficiary: Notwithstanding anything else contained in this my Will or any Codicil hereto, if my Trustees are holding a share of my estate in trust for a beneficiary other than my children and my Trustees in their absolute discretion deem that the continuation of the trust is not advantageous to such beneficiary, I authorize my Trustees to pay or transfer the remainder of such share to such beneficiary, or to pay or transfer such share in trust on the same terms as herein provided for my Trustees to the parent, custodian, legal guardian or person standing in loco parentis to such beneficiary, or to such other person or institution for the benefit of such beneficiary, as my Trustees in their absolute discretion consider advisable. The payee's receipt shall be a sufficient discharge to my Trustees, who shall not be required to see to or account for the subsequent disposition thereof.

(k) Power to Deal As If I was Alive: In addition to the foregoing authorities, it is my intention that my Trustees shall have power and authority to deal as fully and effectively with the interest of my estate in any asset owned by me or subsequently by my estate, or any trust thereof as I could have were I living, including the power and authority to sell any asset or assets privately or otherwise, to any beneficiary hereunder without requiring the approval of others of them.

(l) To Make Tax Elections: I FURTHER GIVE to my Trustees, in addition to all other powers contained in this, my Will, power to make all such elections, allocations, designations and distributions as they shall deem in their absolute discretion to be in the best interests of my Estate as a whole and specifically, any elections, allocations, designations and distributions as may be necessary under the

Income Tax Act (Canada) and the provisions thereof in force from time to time. Where any specific funds, shares or residue are created under my said Will, my Trustees shall have the absolute power of determination as to the specific assets which shall form such fund, share or residue, as the case may be. I specifically exonerate my Trustees from any responsibility with respect to any such elections, allocations, designations and distributions which may result in liability to my Estate or to any beneficiary thereof if they act *bona fide* in the exercise of such power.

(m) To Purchase Estate Assets in Personal Capacity: I AUTHORIZE AND EMPOWER any or all of my Trustees to purchase in their personal capacities any of the assets of my estate at a price agreed upon by all *sui juris* beneficiaries, and if no agreement can be reached, at a price approved by the Court.

(n) To Gradually Liquidate My Liabilities: NOTWITHSTANDING any direction to my Trustees to pay all my just debts, I AUTHORIZE AND EMPOWER my Trustees to make arrangements for the gradual liquidation of any liabilities owing by me at the time of my death, including, without limiting the generality thereof, claims against my Estate arising before or after my death under the *Family Law Act*, R.S.O. 1990, c. F.3, and amendments thereto, and to compromise, settle, waive or pay any claim at any time owing by my Estate, or which my Estate may have against others, for such consideration or no consideration, and upon such terms and conditions as my Trustees may deem advisable, and to refer to arbitration all such claims that my Trustees deem same advisable and I HEREBY specifically exonerate my Trustees in connection with any such settlements if they act *bona fide*.

(o) To Distribute in Kind: My Trustees may divide, distribute or allocate any asset of my estate in kind and at the valuation to be determined by my Trustees in their absolute discretion. In determining the valuation, my Trustees may

consider future expectations for the asset as my Trustees in their absolute discretion consider appropriate, including any tax liability or credit. Any decision made by my Trustees in this regard shall be binding on all persons concerned.

(p) Trust Too Small: If, at any time, my Trustee holds any trust, which, in the sole and absolute discretion of my Trustee is of a small size such that it is inefficient or not in the best interest of the beneficiary or beneficiaries of that trust to continue to hold that trust, my Trustee may, at its unfettered discretion, terminate that trust and pay the amount of such trust then remaining to the beneficiaries or beneficiaries in accordance with their respective interests.

(q) Loans to beneficiaries: Except during the lifetime of my spouse, my Estate Trustees may lend money or other assets of my estate, or guarantee or continue any existing guarantees for loans, to any beneficiary of my Will, or any company owned or controlled by my estate or by any beneficiary or in which my estate or beneficiary may have an interest, for such length of time and upon such terms and at such rate of interest or without interest, and with such security or without security, all as my Estate Trustees in the exercise of an absolute discretion consider appropriate.

(r) To Act as Prudent Person: Until the final distribution of my estate and until the trusts set out in this Will have been fully performed, my Trustees have the power to perform, without court authorization, every act which a prudent person would perform for the purposes of the trusts under my Will.

(s) To Do Supplementary or Ancillary Acts: My Trustees may do all supplementary or ancillary acts or things and execute all instruments to enable them to carry out the intent and purpose of the powers here set out.

13. Investment in Corporation: If, at any time, my Trustees hold in my Estate any investment in or in connection with any company or corporation, I

AUTHORIZE my Trustees to join in or take any action, or to exercise any rights, powers and privileges which, at any time may exist or arise in connection with it to the same extent and as fully as I could if I were alive and the sole owner of the investment. I also authorize my Trustees to retain as an investment of my Estate for such length of time as in their discretion they deem advisable, any assets or other interest whatsoever acquired by my Trustees through the exercise of the powers hereinbefore given to my Trustees.

14. Continue to Carry on Business: Without in any way restricting the general power and discretion given to my Trustees and to the extent my Trustees are lawfully entitled to do so, I HEREBY AUTHORIZE Trustees to continue and carry on any business which I may own or control or which I may be interested in at the time of my death, either alone or in partnership with any person or persons, for such length of time as in their uncontrolled discretion they consider to be in the best interests of my Estate, and I GIVE to my Trustees power to do all things necessary or advisable for the carrying on of any such business and, in particular, but without limiting the generality of the foregoing, my Trustees shall have the following powers, namely:-

(a) to change the objects of such business or corporation;

(b) to continue to employ therein, or withdraw therefrom any capital which may be employed therein at my death, or advance, with or without taking security, any additional capital which they may deem desirable for effectually carrying on such business;

(c) to arrange and agree to the continuation of employment or to hiring of any person or persons therein (including any one or more of my Trustees) at such salary or remuneration as they shall think proper, and to such extension or curtailment of business thereof or the adoption of a new line of business;

(d) to form or join in forming a limited company for the purpose of taking over or purchasing the whole or any part or parts of such business or may sell the business at such price and such terms and conditions as they may determine. In consideration for any such transaction, my Trustees may accept all or any of the following: cash, bonds, notes, preference or common shares of any company, whether or not such company is the company taking over or purchasing, as they may think fit, and any bonds, notes, preference or common shares so received will be an authorized investment under this, my Will.

15. Trustee Compensation: I DIRECT that my Trustees shall be entitled to the usual compensation and I FURTHER DIRECT that such usual compensation shall be in addition to every gift and benefit given by me by this, my Will, or by any Codicil thereto to my Trustees.

16. Alternative Dispute Resolution: Any difference of opinion that may arise during the administration of my estate should be resolved as early as possible and with a minimum of formality through the mediation process. I have every confidence this wish will be honoured.

17. Governing Law: My Will shall be governed by and construed in accordance with the laws of **Canada [or a Province or Territory – depending on your lawyer's advice).**

IN WITNESS WHEREOF I have signed my name to this my Will written on this and **insert number of preceding pages]** preceding pages of paper, the day and year first above written.

Signed in the presence of)
)

)
)
)
)
)
_____)
)
(Signature of Witness above)) [Testator signs here – usual signature]
)
)
)
_____) _____
)
Address of Witness) **[INSERT FULL LEGAL NAME OF TESTATOR]**
)
)
)
)
)
_____)
)
(Signature of Witness above))
)
)
)
)
_____)
)
Address of Witness)
)
)
)
)

SAMPLE WILL 2:

ALL TO SPOUSE OR COMMON-LAW PARTNER WHO IS A NON-MEMBER OF FIRST NATION WITH GIFT OVER TO ADULT CHILDREN

LAST WILL OF [**INSERT FULL LEGAL NAME OF TESTATOR]**

This is the last will of me, **[INSERT FULL LEGAL NAME OF TESTATOR]** of **[INSERT ADDRESS OF TESTATOR]**, being ordinarily resident on **[INSERT NAME OF FIRST NATION OR TREATY LANDS]** First Nation, in the Province of [INSERT PROVINCE OR TERRITORY], Canada , made this () day of (), 202().

Revocation

1. (a) Revocation of Prior Wills and Codicils: I REVOKE all wills and codicils previously made by me.

(b) No Change to Designations Made Before This Will: This Will does not alter any designations of a beneficiary I may have made prior to the date of this Will, and other than by will, under any policy of life insurance, pension, registered plan, annuity, or other plan or policy under which I am competent to designate a beneficiary other than by will.

NOTE: If the Testator has an insurance policy, pension, RRSP or RRIF for example, this paragraph makes it clear that the Testator does not intend to revoke any beneficiary designation made before the date of this Will. The designation can, however, be changed with the Holder (Insurance company or Bank for example) AFTER the date of the Will.

Executors and Trustees

2. (a) Appointment of Executor and Trustee: I appoint my spouse (or common-law partner – delete one), **[INSERT FULL LEGAL NAME OF SPOUSE OR COMMON-LAW PARTNER]** (hereinafter called my "Spouse") of **[insert address of spouse or common-law partner]** to be the Executor of my Estate and Trustee of my Will.

NOTE: The "two spouses" problem. If the Testator is married, but no longer cohabiting with that person and has never settled matrimonial property issues with her spouse and is at death in a common-law relationship with a new partner, this can create significant issues for the estate. Under the *Family Homes on Reserves and Matrimonial Interests or Rights Act,* S.C. 2013, c.20, a spouse to whom the Testator is still married (but not cohabiting with) may make a claim under *Section 34* for an amount equal to one half of the value of an "interest or right" in or to the Family Home and potentially any other interest or right in other Reserve Lands. This could have significant consequences for the common-law partner. *Section 38* of that Act directs that where there are two spouses, the executor must pay the survivor who was the common-law partner first before paying the survivor who was the spouse, but nothing prevents a married spouse from contesting that right and bringing a

court application to contest the distribution under the estate – especially if the Testator has minor children living with the married spouse who are dependent on the Testator. It is strongly recommended that a Testator finalize the division of assets and get a divorce from a married spouse during his or her lifetime.

If my said Spouse (or common-law partner – delete one) dies before me, or at any time is unable or unwilling to act or to continue to act as Executor of my Will and Trustee of my Estate before all the trusts in my Will have been fully performed, I appoint my son, **[INSERT FULL LEGAL NAME OF SON]** currently of **[insert current address of son]**, my daughter, **[INSERT FULL LEGAL NAME OF DAUGHTER1]** currently of **[insert current address of daughter1]** and my daughter, **[INSERT FULL LEGAL NAME OF DAUGHTER2]** currently of **[insert current address of daughter2]** to be the Executors of my Will and Trustees of my Estate in place of my said Spouse. The expression "my Trustees" used throughout my Will includes, where the context permits, the executor or executors and trustee or trustees for the time being of my Will, whether original, additional, or substituted.

NOTE: It is very important to actually name a child and properly identify that child, rather than just say "my son" or "my daughter". This makes it clear whom you are talking about. Inserting the current address of the Trustee just makes it easier to find them.

(b) No Security Required: I DIRECT that no security shall be required of any of my Trustees in any court, notwithstanding that any of them may not be resident or located within any first nation, province or country in which I may own

assets at the time of my death.

(c) Conflict Resolution: If any difference of opinion exists at any time among my Trustees in relation to the commission or omission of any act in the execution of the trusts in my Will, the opinion of my Trustees having the majority of votes prevails, notwithstanding that one or more of my Trustees may be personally interested or concerned in the matter in dispute or question.

NOTE: It is best to keep the number of Executors and Trustees to a minimum. You do not have to appoint your children. You can appoint anyone whom you trust and whom you know will be able to administer your estate in accordance with your wishes set out in your Will. If you have someone you trust, then appoint that person alone. If you feel more comfortable having more than one Executor and Trustee, then don't appoint them together if they can never agree on anything or do not get along. Be pragmatic when considering your children's relationship with each other. It is better to choose the most responsible and reasonable child to act alone and have another child as an alternate if your children do not get along. If you wish to appoint more than one Executor and Trustee, it is better to have an odd number and then provide that in the event of disagreement, majority rules. If you have a business, you can consider appointing a separate Estate Trustee to manage and distribute your business assets, if you feel your family members do not possess the necessary skills.

Family Home on Reserve and Matrimonial Interests or Rights

3. If my spouse (or common-law partner – delete one), namely **[INSERT FULL LEGAL NAME OF SPOUSE]** (my "Spouse") is living on the date of my death, it is my strong wish that she be permitted to remain in occupation of our home (the "Family Home") situate at **[insert street address of family home on Reserve if available]** on **[insert full legal description of land from Certificate of Possession on which family home is located, for example "Lot 6-21 on Plan 12345 C.L.S.R."]** in **[? First Nation, in the Province or Territory of ?]** (the "First Nation") in accordance with the provisions of this paragraph.

NOTES:

1. For the purposes of this sample, "she" is used but it can be "he" or they" (depending on how the spouse identifies).

2. "Spouse" is defined in paragraph 8 below. Your lawyer may revise this depending on your circumstances, but it is important to name the person you consider your "spouse" so there is no misunderstanding as to who you mean as "Spouse" in your Will.

3. No one other than an "Indian" registered under the *Indian Act*, R.S.C. 1985, c. I-5, Section 50(1) **who is also a member of the First Nation where the land is located can have or acquire a permanent right to possess or an "*interest or right*" in Indian lands[56]. That "*interest or right*" could be under a Certificate of Possession, Certificate of Occupation, a permit under Section 28(2)[57], a lease or a right to possess under a Land Code[16] (for those First Nations who have passed a Land Code). "Custom Allotments" made by a First Nation Council where certain parcels**

[56]See definitions Section 2.(1) of the *Family Homes on Reserves and Matrimonial Interests or Rights Act,* S.C. 2013, c.20

[57] Section 28(2) of the *Indian Act,* R.S.C. 1985, c. I-5

of land on Reserve are allocated to an individual or individuals in accordance with tradition is unfortunately not recognized by Canada and therefore that right cannot be transferred in a Will except as an expression of wishes.

4. Will drafters should also be mindful that where there is a devise of a permanent right to possess or occupy Reserve land to a non-member Indian or to a non-Indian, the Superintendent of Indigenous Services Canada can offer the land for sale to the highest bidder to persons who are entitled to possess that land and the proceeds of sale are paid to the devisee in the Will[58] or to the descendants of the deceased. If there are no offers to purchase within six months or such further period as the Minister directs, the right to possess the land reverts back to the band free of any claim by the devisee or descendent other than payment for improvements.

5. A "Family Home" is defined in section 2(1) of the *Family Homes on Reserves and Matrimonial Interests or Rights Act, S.C. 2013, c.20* **is "a structure – that need not be affixed but that must be situated on reserve land". A spouse or common-law partner has an automatic right to remain in possession of the "Family Home" (as defined in FHMIRA[8] for 180 days after the death of the Testator and for such longer period as the Minister[7] may direct. The Family Home is defined[56] as a structure located on Reserve land where the spouses or common-law partners "habitually resided" on the day the Testator died. It does not necessarily include all of the structure but "*only the portion of the structure that may reasonably be regarded as necessary for the residential purpose.*" The right of a non-member or non-registered spouse or common-law partner can only be expressed as a "wish" of the testator as any attempt to devise an interest in Reserve land to a non-member or non-Indian will be void or voidable.**

[58] *Indian Act,* R.S.C. 1985, c. I-5, Section 50

(a) In the event that she wishes to remain resident on my First Nation and because my Spouse is not a member of my First Nation ("my First Nation being **[insert name of First Nation]**"), then it is my wish that the Family Home and all other matrimonial interests or rights I may have at my death (both as defined in Section 2(1) of the *Family Homes on Reserves and Matrimonial Interests or Rights Act*, S.C. 2013. C. 20) be transferred to **[insert full legal name of the First Nation member or members to whom all interest in the Family Home and the land it is situate is to be transferred]** (the "Transferee") subject to the provisions of paragraph 3(b) and 3(c) below. If the Transferee so named has died before me or is unable or unwilling to enter into the written agreement as required in paragraph 3(b) below, then it is my wish that the said Family Home and all my matrimonial interests and rights be transferred to **[insert full legal name of the alternate First Nation member or members to whom all interest in the Family Home and the land it is situate is to be transferred]** ("Transferee 2")**.** If on the date of my death, my Spouse and I are not living at the Family Home described above, but are living together at another Family Home on the said First Nation, the provisions of this paragraph shall apply to whatever Family Home I own at my death. Nothing in this paragraph 3 shall be interpreted as a prohibiting my Spouse, as Executor and Trustee of my Will to sell or otherwise dispose of the Family Home and all or any part of our "*matrimonial rights or interests"* (as defined in Section 2(1) of the *Family Homes on Reserves and Matrimonial Interests or Rights Act*, S.C. 2013. C. 20) as she in her absolute and sole discretion deems advisable.

NOTE: It is often important to families that a surviving spouse or common-law partner of the Testator be able to remain in possession of the Family Home,

but the land on which the Family Home rests must be transferred to a member of the First Nation. This clause is an expression of the Testator's "wishes" that the right to possess that land be transferred (with the consent of the Minister of Indigenous Services Canada) to a member of the First Nation (usually a child or relative) with the wish that the Spouse be permitted to continue occupying the Family Home for as long as the Spouse wishes. It is contemplated that the Transferee and Spouse enter into an agreement as to the value of the Family Home and matrimonial interests and rights within 6 months of the Testator's death and if they fail to reach such an agreement, the lands go to the secondly named Transferee still subject to reaching an agreement and writing. If the Spouse is unable to reach an agreement with any of the named Trustees, she can seek an order from the appropriate Court under Section 36 of the *Family Homes on Reserves and Matrimonial Interests or Rights Act*, S.C. 2013. C. 20 **.**

(b) Before transferring the Family Home and all my matrimonial interests or rights to the Transferee as set out in paragraph 3(a) above and no later than six (6) months from the date of my death, my Spouse in her capacity as the sole Executor and Trustee of my Will and as the sole beneficiary of my Will shall enter into a written agreement with the Transferee in which they agree on the value of the Family Home and the matrimonial interests or rights made in accordance with the provisions of Sections 34(3) and 34(5) of the ***Family Homes on Reserves and Matrimonial Interests or Rights Act,*** **S.C. 2013, c.20** and at such other value and upon such other terms as they may otherwise agree in writing. My Spouse shall not be deemed to be in conflict of interest in entering into such an agreement because she is both the Executor and Trustee and also the sole beneficiary of my estate.

(c) It is further my wish that the Transferee permit my Spouse to remain in occupation of the Family Home on a rent free basis for at least one hundred and eighty days (180) following the date of my death as permitted under Section 14 of the *Family Homes on Reserves and Matrimonial Interests or Rights Act*, S.C. 2013. C. 20 as amended from time to time and thereafter for as long as my Spouse is alive, wishes to and is able to remain in occupation of the Family Home, notwithstanding that the Family Home may have been transferred to the Transferee. It is my wish that provisions to that effect be included in the Agreement between my Spouse and the Transferee as set out in paragraph 3(b) above.

NOTE: Transferring the right to possess the land on which the Family Home is located to a family member avoids the risks of Section 50 of the *Indian Act* **where the Superintendent can force a sale. However, the Will drafter should be mindful of how the non-member or non-Indian spouse will be paid the value for the Family Home. The Will could stipulate as a wish that the Family Home be sold to the family member, but complications arise if the Transferee does not want the gift or cannot or will not pay the value of the Family Home to the spouse. In addition, the non-member Indian or non-Indian spouse cannot take back security on the sale (like a mortgage) because that would be conferring an "interest or right" in Indian land to a non-Indian or non-member person. The spouse *is* entitled to compensation under Section 34(1) of the** *Family Homes on Reserves and Matrimonial Interests or Rights Act*, S.C. 2013. C. 20 **on application under Section 36 of that Act, to one-half of the value (as at the date of death) of the Family Home. In addition, the Spouse would receive the other "half" in the value of the Family Home as the residual beneficiary of the estate. The question is – how can the Spouse be fairly compensated if her Family Home is transferred to a family member. One possible solution may be to transfer the right to possess to an adult child of the Testator and then the Testator expresses a "wish" in the Will that the land on which the Family Home is located be leased back to the non-Indian or non-member Spouse. This is not a recommendation, but simply a possible solution and any solution involves significant trust between the spouse and the Transferee. In addition, the Will Drafter may want to include provision in the Will that the Spouse "defer", but not release her right to payment of the value in the Family Home. Again, this requires a significant amount of trust in the Transferee to abide by the Testators wishes and the Will Drafter must be very careful not to contravene the provisions of the** *Indian Act***.**

(d) If the Transferee refuses to agree in writing to permit or to continue to permit my Spouse to occupy the Family Home as provided above, for as long as she wishes or is able to after the initial one hundred and eighty days (180) following the date of my death or if my Spouse and the Transferee are unable to agree on the matters contemplated in Section 3(b) and 3(c) of this my Will within the time period prescribed in that paragraph (if any), the firstly named Transferee named in paragraph 3(a) above shall be replaced by the secondly named Transferee (Transferee 2) in that paragraph. It is also my wish that should my Spouse or her personal representative deem it necessary, they may make application under Section 21 of *Family Homes on Reserves and Matrimonial Interests or Rights Act*, S.C. 2013. C. 20 for exclusive occupation of the Family Home and/or for an order under Section 36 of that Act to determine the value of the Family Home and Matrimonial Interests or Rights. It is my wish that the Court and any Band or authority shall accept the provisions of this paragraph 3 as an expression of my wishes with respect to possession of the Family Home by my Spouse and the valuation of all Matrimonial Rights and Interests in my property on the First Nation. I declare that I do not consider my Spouse to be in conflict of interest in making any such applications with her role as Trustee of my estate.

(e) During her period of occupation of the Family Home, and unless otherwise agreed between my Spouse and the Transferee, it is my wish that my Spouse not pay rent to the Transferee, but my Spouse shall pay all costs of operating and maintaining the Family Home other than capital expenditures and without limitation; all costs of maintenance and upkeep of the Family Home, the cost of insuring the Family Home, all costs of utilities necessary for the enjoyment of the Family Home and all other costs of every nature and kind associated with the enjoyment of the Family

Home, other than capital expenditures (the "maintenance costs"). The Transferee may, at his discretion waive all or any part of the maintenance costs.

(f) I further wish that my Spouse and the Transferee may at any time agree to enter into a lease of any of my on-Reserve land from the Queen in Right of Canada to my Spouse for any length of time upon terms, covenants and conditions as the Transferee and my Spouse may agree.

Residue to Spouse

4. My Trustees shall pay and transfer the residue of my estate to my Spouse, [**INSERT FULL LEGAL NAME OF SPOUSE]** if she is living on the thirtieth day following my death.

NOTE: Two Spouses Problem: It is strongly advised that all matters be settled in writing or by Court Order with any spouse the Testator is no longer living with prior to death. Otherwise, the common-law partner will have to deal with a potential claim from the Spouse, which can subject the common-law partner to unnecessary stress, both financially and emotionally.

NOTE: The Spouse takes the estate subject to the payment of all the Testator's funeral, testamentary and other debts.

Alternate Bequest of Residue

5. If my Spouse **[INSERT FULL LEGAL NAME OF SPOUSE]** dies before me or is not living on the thirtieth (30^{th}) day following my death, then on the death of the survivor of my Spouse and me (the "Division Date"), I GIVE, DEVISE, BEQUEATH AND APPOINT my Estate to my Trustees upon the following trusts, namely: -

(a) Memorandum - Personal and Household Articles: I have made a

memorandum dated **[insert date – must before the date of the Will]** that gives certain articles of personal and household use and ornament to certain persons, and I have deposited it with my Will. I direct my Trustees to deliver the articles of personal and household use and ornament described in this memorandum in accordance with the gifts in this memorandum.

OR – AN ALTERNATE CLAUSE:

(a) Letter of Wishes - Personal and Household Articles: I wish to advise my Trustees that I have prepared a letter of wishes (the "Letter of Wishes"), that I have left among my personal papers, regarding the division and disposition of articles of personal and household use and ornament owned by me on the date of my death (collectively, the "Personal and Household Articles"). I wish to advise further that it is my strong wish and desire that my Trustees, together with those of my children who are living on the date of my death, give effect to the terms of the Letter of Wishes, although I recognize that there is no legal obligation upon them to do so, regarding the division and disposition of the Personal and Household Articles listed on the Letter of Wishes. If I do not leave the Letter of Wishes or in the event the Letter of Wishes I have left does not deal with the division and disposition of all of the Personal and Household Articles, I direct that the Personal and Household Articles that have not been divided and disposed of pursuant to the Letter of Wishes shall be divided among those of my children who are living on the date of my death, in any manner as they may agree upon, or if they do not agree, then in any manner as a majority of my Trustees in an absolute discretion consider equitable.

NOTE: Who gets what of the Testator's personal items is one of the most contested parts of administering an estate. Testators sometimes tell beneficiaries (usually family) one thing and then do another (or forget) when preparing a written Memorandum. Personal Articles often have more sentimental value than monetary value. Family treasures which are passed through generations are important and the Testator should talk to their children when deciding what to do with these items. Even better, if you are an elder and you are not using something – give it away when you are alive. Don't set your family up for a fight or disappointment. Don't wait until you are gone. And talk to your children. Grief heightens emotions to the point where beneficiaries can be unreasonable and bonds can be broken forever over an item that the Testator would never have imagined would cause a dispute. It is also more meaningful to make a gift in person, while you are alive rather than have it pass in a Will. Lawyers see families stop speaking to each other over some personal items all of the time.

The first sample is legally binding on the Estate Trustees. So the list must be in existence before the Will is made; the Will must refer to it as an existing document and the document must be described sufficiently that the Trustee can identify it. This can be inconvenient, particularly because Testator's often change their minds and if you change the Memorandum you must amend your Will.

The second sample is a non-binding expression of wishes, but if it is typed by the Testator or is in the Testator's handwriting – it can have significant moral suasion on the beneficiaries. The benefit of the second sample is that the it can be changed as many times and whenever the Testator wants without having to make changes to the Will.

However, if the Testator makes gifts of the special items before death, a Statement of Wishes or Memorandum may not even be needed.

(b) Gift of Remaining Personal Articles: My Trustees shall divide the remaining articles of personal, domestic or household or garden use or ornament that I shall own at my death and all regalia, art, jewelry, boats, hunting equipment, automobiles and accessories thereto (collectively called "the Personal Articles") as equally as possible among those of my children who are living on the 30th day following my death, in any manner that my children may agree upon, or if they do not agree, then in any manner that my Trustees in their absolution discretion consider equitable.

Power of Sale and Retention

6. (a) Power to Sell or Retain: I authorize my Trustees to use their unfettered discretion in the realization of my estate. My Trustees have the power to sell or otherwise convert into money any part of my estate not consisting of money, at the time and upon whatever terms my Trustees shall decide, with power and discretion to decide against the conversion in connection with all or any part of my estate or to postpone the conversion of my estate or any part of it for any length of time. I authorize and empower my Trustees to retain any portion of my estate in the form in which it may be at my death (whether it is in the form of investments that would be prudent investments for trustees or in which trustee are by law authorized to invest trust funds and where there may be any liability attached thereto) for any length of time that my Trustees consider to be in the best interests of my estate, and I also declare that no property not in fact producing income shall be required or deemed to proper income.

(b) To Pay debts: My Trustees shall pay my just debts, funeral and testamentary expenses, and taxes, including but not limited to income taxes, and all

estate, legacy, succession or inheritance duties and taxes whether imposed pursuant to the laws of my First Nation, Canada or the Province or in any other jurisdiction in which I may hold assets or have income at my death and that may be payable in connection with any property passing on my death (or deemed to so pass) or in connection with any proceeds of any insurance and/or annuities on my life or any gift or benefit given or conferred by me either in my lifetime or by survivorship or by my will or any Codicil thereto and whether these duties and taxes be payable in respect of estates or interests that fall into possession at my death or at any subsequent time. All these debts, expenses, duties and taxes are to be paid out of and be a charge on the capital of my estate. I authorize my Trustees in their unfettered discretion to commute or prepay or defer the payment of any of these duties and taxes.

(c) Insurance Proceeds: I direct that my Trustees may use insurance proceeds that are available for such purpose (together with liquid assets and converted assets hereunder) to pay any such taxes or administration costs.

(d) Residue: If my Spouse is not living on the 30th day following my death or upon the Division Date, as the case may be, my Trustee shall divide the residue of my estate into as many equal shares as are requisite to give effect to the following: -

(i) To pay or transfer ONE (1) SHARE of the residue of my estate to my son, **[INSERT FULL LEGAL NAME OF CHILD1]** PROVIDED THAT if he is not alive at the Division Date, I DIRECT my Trustees to equally divide his share among his children alive at the Division Date and should he die leaving only one child alive at such time, then all to that child; PROVIDED FURTHER THAT should he die leaving no child or children alive at the Division Date; this share

shall fall into and form part of the residue of my estate; and

(ii) To pay or transfer ONE (1) SHARE of the residue of my estate to my daughter, **[INSERT FULL LEGAL NAME OF CHILD2]** PROVIDED THAT if she is not alive at the Division Date, I DIRECT my Trustees to equally divide her share among her children alive at the Division Date and should she die leaving only one child alive at such time, then all to that child; PROVIDED FURTHER THAT should she die leaving no child or children alive at the Division Date; this share shall fall into and form part of the residue of my estate; and

(iii) To pay or transfer ONE (1) SHARE of the residue of my estate to my daughter, **[INSERT FULL LEGAL NAME OF CHILD3]** PROVIDED THAT if she is not alive at the Division Date, I DIRECT my Trustees to equally divide her share among her children alive at the Division Date and should she die leaving only one child alive at such time, then all to that child; PROVIDED FURTHER THAT should she die leaving no child or children alive at the Division Date; this share shall fall into and form part of the residue of my estate.

Payments to Persons Under 21 Years or Disabled Beneficiaries

7. SUBJECT AS IS SPECIFICALLY PROVIDED HEREIN, if any person entitled under the provisions of this Will to receive any share of income or capital of the my estate while such person is under the age of twenty-one (21) years or while under any other disability as defined by the **[insert with name of appropriate Act if beneficiary is receiving disability support from a Province or Territory]**, or any succeeding legislation as the case may be, the Trustees shall keep such share of

income or capital invested until, for a beneficiary that is under the age of twenty-one (21) years, such Beneficiary attains the age of twenty-one (21) years, or for a beneficiary under a disability, until such beneficiary ceases to be disabled as defined by the **[insert appropriate legislation]** Ontario *Disability Support Program Act 1997*, c.25, Sch B, or any succeeding legislation as the case may be; provided that the Trustees may in the exercise of an absolute discretion pay such income or any part thereof together with the whole or any part of the capital thereof to a parent, or to a person entitled to the custody of such person, or to the guardian of the property of such person or to any other person standing in *loco parentis* to such Beneficiary, whose receipt shall be a good acquittance to the Trustees or the Trustees may apply the same as they, in the exercise of an absolute discretion, think fit to or for the benefit of such Beneficiary or further they may pay any part of such income or capital directly to such Beneficiary notwithstanding that he or she is under the age of twenty-one (21) years if in their discretion they consider it advisable so to do and the *de facto* payment of such income or capital to such Beneficiary shall be a complete release to the Trustees and in addition, the Trustees shall have the power to accumulate and add to the capital of such Beneficiary's share any income not so paid out.

Bequest Not to Form Part of Beneficiary's Net Family Property:

8. Any benefit, whether as to income or capital, or income from capital to which any person shall become entitled in accordance with the provisions of this Will or any Codicil thereto, shall not fall into any community of property as amended from time to time, any benefit, whether as to income or capital, or income from capital to which any person shall become entitled in accordance with the provisions of this my Will or any Codicil thereto, shall not fall into any community of property which may exist

between any such person and his or her spouse and shall not form part of her or his net family property for any purpose or purposes of the the *Family Homes on Reserves and Matrimonial Interests or Rights Act*, S.C. 2013. C. 20 as amended from time to time or **[insert reference to applicable Family Law Act *off reserve* for the Province or Territory in which the beneficiary lives]** , but shall be paid by my Trustees to such person on the condition that the same shall remain the separate property of such person, free from the control of her or his spouse. The separate Release or Receipt of such person shall be a discharge to my Trustees in respect of any such payment.

NOTE: This clause makes it clear that the Testator's intention is that a gift made to a child under this Will is to that child alone and not to the child and his or her spouse. Most Provinces and Territories exclude inheritances from "family property" that is divided when a couple separates, but these types of clauses can be helpful when a child is trying to prove a particular gift was made only to the child. Not the child and her spouse.

Definition of Relationships (Not all the clauses below may be applicable)

9. Spouse: Any reference in my Will to "Spouse" shall mean **[INSERT LEGAL NAME OF SPOUSE]** as named in paragraph 2 of this Will.

10. Spouse of a Beneficiary: Whenever my Trustees are authorized or directed in my Will to make a payment or distribution to the spouse of a living individual, the payment or distribution may only be made to a person who, in the opinion of my Trustees:

(a) is married to the individual and is not living separate and apart from the individual at the relevant time;

(b) has in good faith gone through a form of marriage with the

individual, which is void or voidable, and the two of them are cohabiting or have cohabited within the previous twelve-month period;

(c) though not married to the individual, is cohabiting with him or her in a relationship of some permanence where there is a child born of whom they are the legal parents; or

(d) is a person in favour of whom an order for support, alimony or maintenance has been made by a Court of competent jurisdiction against the individual under which such individual continues to have obligations;

and wherever payment or distribution is authorized or directed to be made to a spouse of a deceased individual the payment or distribution may only be made to a person to whom a payment or distribution might have been made as the spouse of such individual immediately before the individual's death. Before making any payment or distribution to a person as the spouse of an individual, my Trustees may require the person to provide my Trustees evidence to establish to my Trustees' satisfaction that person's entitlement to the payment or distribution.

NOTE: Your lawyer may decide this clause is not needed if you do not include the spouse of your child as an alternate beneficiary of a share of your estate. This is given for illustration purposes only. Also – Your lawyer should make sure these definitions are in accordance with the law in your First Nation, Province or Territory.

11. Child or Grandchild: Any reference in my Will to a "child" or "grandchild" shall include, for greater certainty:

(a) any child or grandchild who has been legally adopted in any jurisdiction, including customary adoptions under the customs of my First Nation; and

(b) any child or grandchild conceived before and born alive after the individual's death.

NOTE: Care should be taken in using the clauses in paragraph 10 and legal advice should be obtained to decide whether or not children adopted through customary adoptions should be included in this definition.

12. Persons Born Outside Marriage: Unless otherwise specifically provided, any reference in my Will or in any Codicil to my Will to my "children" or to my more remote issue, or to the children or more remote issue of any other person or persons shall not include:

(a) a person born outside marriage,

(b) a person who comes within the description traced through another person who has been born outside marriage,

provided that any person who was born outside marriage but whose parents subsequently married one another, or who in the sole and absolute opinion of my Trustees has had for some time during his or her lifetime a normal relationship with one of his or her natural parents, or in the sole and absolute opinion of my Trustees has been adopted by custom adoption common to the First Nation of which I am a member at my death, and any person who has been legally adopted shall be regarded as having been born within marriage.

NOTE: The purpose of this clause is to limit who can claim to be a child of the deceased under the Will. The best practice is to never use the word "child" without then including the name of that child. Making broad references to "children" or "grandchildren can mean individuals whom the Testator does not consider his child may be included. This is, of course, particularly applicable to men.

Trustee Powers

13. IN ADDITION to all other powers by this my Will or any Codicil thereto or by Statute or Law conferred upon them, but subject to the other provisions of this my Will, my Trustees in the administration of my estate or any trust or fund created under the provisions hereof shall have power in their sole and absolute discretion:

(a) To invest and re-invest: To invest and reinvest the moneys of my estate or any trust thereof in any investments which my Trustees consider advisable.

(b) Considerations in Making Investments: When making investments for my estate or any trust thereof, my Trustees may consider the following criteria in planning the investment of trust property, in addition to any others that are relevant in the circumstances:

1. general economic conditions;
2. the possible effect of inflation or deflation;
3. the expected tax consequences of investment decisions or strategies;
4. the role that each investment or course of action plays within the overall trust portfolio;
5. the expected total return from income and the appreciation of capital;
6. needs for liquidity, regularity of income and preservation or appreciation of capital; and
7. an asset's special relationship or special value, if any, to the purpose of the trust or to one or more of the beneficiaries.

(c) To Make Divisions and Fix Value: To make any division of my estate or set aside or pay any share or interest therein, either wholly or in part, in the

assets forming my estate at the time of my death or at the time of such division, setting aside or payment, and I expressly will and declare that my Trustees shall in their absolute discretion fix the value of my estate or any part thereof for the purpose of making any such division, setting aside or payment and the decision of my Trustees shall be final and binding upon all persons concerned, notwithstanding one or more of my Trustees may be beneficially interested in the property appropriated or partitioned. It is my desire that in exercising this power, my Trustees shall, with proper advice, consider the effect of tax on capital gains, in selecting assets to be distributed or allocated rather than sold so as not to attract tax unnecessarily or at an earlier time than required.

(d) To Renew Debt Obligations: To renew from time to time any bills, notes, guarantees or other securities or contracts evidencing any liability of mine as endorser, guarantor, surety or otherwise and for that purpose to enter into new bills, notes, or other securities or contracts for and on behalf of my estate, my intention being to give to my Trustees sufficient authority to enable them to assist in the gradual liquidation of the liabilities which I may be under in order that the companies or persons for whom I may be liable may not be unduly embarrassed.

(e) To Exercise Options: To exercise any options to which I may be entitled, at such time or times as my Trustees consider advisable, or to refrain from exercising any such option and allow the same to lapse, or to sell or surrender any such option for such consideration as my Trustees consider advisable, and my Trustees shall not be held accountable for any loss that may be suffered by my estate or any beneficiary thereof as a result of their failure to exercise any option or the surrender thereof, or the exercise of any such option at a particular time.

(f) To Settle Claims: Without the consent of any beneficiary under this

my Will to compromise, settle and waive any claim or claims at any time due to or by my estate.

(g) To Purchase or Retain Real Property: To purchase or retain as an investment of my estate, real estate for the purpose of residence of any income beneficiary of this my Will, as an alternative to investing for income for such beneficiary, and again as an investment to pay off any mortgage on such real estate, or to make improvements or to make repairs necessary to preserve its value.

(h) To Delegate to Trust Company: In addition to the power of delegation authorized by law, to delegate any powers, duties or discretions to any trust company or other proper person, but without thereby avoiding continuing legal responsibility for the proper administration of my estate; and with the further power from time to time to revoke any such delegation in whole or in part and, if so decided, to substitute another trust company.

(i) To Retain Professionals: From time to time to employ and pay for such professional, expert, specialized or other assistance (such as the services of any accountant, appraiser, agent, solicitor or any other professional advisor) as my Trustees may deem requisite in the discharge of their duties as Trustees, with power to act or not to act, in their absolute discretion, on any opinion, advice or information so obtained. My Trustees shall not be responsible for any loss, depreciation or damage occasioned by their action or non-action, in accordance therewith.

(j) To Collapse Trust Not Advantageous to Beneficiary: Notwithstanding anything else contained in this my Will or any Codicil hereto, if my Trustees are holding a share of my estate in trust for a beneficiary other than my children and my Trustees in their absolute discretion deem that the continuation of the trust is not advantageous to such beneficiary, I authorize my Trustees to pay or

transfer the remainder of such share to such beneficiary, or to pay or transfer such share in trust on the same terms as herein provided for my Trustees to the parent, custodian, legal guardian or person standing in loco parentis to such beneficiary, or to such other person or institution for the benefit of such beneficiary, as my Trustees in their absolute discretion consider advisable. The payee's receipt shall be a sufficient discharge to my Trustees, who shall not be required to see to or account for the subsequent disposition thereof.

(k) Power to Deal As If I was Alive: In addition to the foregoing authorities, it is my intention that my Trustees shall have power and authority to deal as fully and effectively with the interest of my estate in any asset owned by me or subsequently by my estate, or any trust thereof as I could have were I living, including the power and authority to sell any asset or assets privately or otherwise, to any beneficiary hereunder without requiring the approval of others of them.

(l) To Make Tax Elections: I FURTHER GIVE to my Trustees, in addition to all other powers contained in this, my Will, power to make all such elections, allocations, designations and distributions as they shall deem in their absolute discretion to be in the best interests of my Estate as a whole and specifically, any elections, allocations, designations and distributions as may be necessary under the *Income Tax Act* (Canada) and the provisions thereof in force from time to time. Where any specific funds, shares or residue are created under my said Will, my Trustees shall have the absolute power of determination as to the specific assets which shall form such fund, share or residue, as the case may be. I specifically exonerate my Trustees from any responsibility with respect to any such elections, allocations, designations and distributions which may result in liability to my Estate or to any beneficiary thereof if they act *bona fide* in the exercise of such power.

(m) To Purchase Estate Assets in Personal Capacity: I AUTHORIZE AND EMPOWER any or all of my Trustees to purchase in their personal capacities any of the assets of my estate at a price agreed upon by all *sui juris* beneficiaries, and if no agreement can be reached, at a price approved by the Court.

(n) To Gradually Liquidate My Liabilities: NOTWITHSTANDING any direction to my Trustees to pay all my just debts, I AUTHORIZE AND EMPOWER my Trustees to make arrangements for the gradual liquidation of any liabilities owing by me at the time of my death, including, without limiting the generality thereof, claims against my Estate arising before or after my death under the *Family Law Act*, R.S.O. 1990, c. F.3, and amendments thereto, and to compromise, settle, waive or pay any claim at any time owing by my Estate, or which my Estate may have against others, for such consideration or no consideration, and upon such terms and conditions as my Trustees may deem advisable, and to refer to arbitration all such claims that my Trustees deem same advisable and I HEREBY specifically exonerate my Trustees in connection with any such settlements if they act *bona fide*.

(o) To Distribute in Kind: My Trustees may divide, distribute or allocate any asset of my estate in kind and at the valuation to be determined by my Trustees in their absolute discretion. In determining the valuation, my Trustees may consider future expectations for the asset as my Trustees in their absolute discretion consider appropriate, including any tax liability or credit. Any decision made by my Trustees in this regard shall be binding on all persons concerned.

(p) Trust Too Small: If, at any time, my Trustee holds any trust, which, in the sole and absolute discretion of my Trustee is of a small size such that it is inefficient or not in the best interest of the beneficiary or beneficiaries of that trust to continue to hold that trust, my Trustee may, at its unfettered discretion, terminate that

trust and pay the amount of such trust then remaining to the beneficiaries or beneficiaries in accordance with their respective interests.

(q) Loans to beneficiaries: Except during the lifetime of my spouse, my Estate Trustees may lend money or other assets of my estate, or guarantee or continue any existing guarantees for loans, to any beneficiary of my Will, or any company owned or controlled by my estate or by any beneficiary or in which my estate or beneficiary may have an interest, for such length of time and upon such terms and at such rate of interest or without interest, and with such security or without security, all as my Estate Trustees in the exercise of an absolute discretion consider appropriate.

(r) To Act as Prudent Person: Until the final distribution of my estate and until the trusts set out in this Will have been fully performed, my Trustees have the power to perform, without court authorization, every act which a prudent person would perform for the purposes of the trusts under my Will.

(s) To Do Supplementary or Ancillary Acts: My Trustees may do all supplementary or ancillary acts or things and execute all instruments to enable them to carry out the intent and purpose of the powers here set out.

14. Investment in Corporation: If, at any time, my Trustees hold in my Estate any investment in or in connection with any company or corporation, I AUTHORIZE my Trustees to join in or take any action, or to exercise any rights, powers and privileges which, at any time may exist or arise in connection with it to the same extent and as fully as I could if I were alive and the sole owner of the investment. I also authorize my Trustees to retain as an investment of my Estate for such length of time as in their discretion they deem advisable, any assets or other interest whatsoever acquired by my Trustees through the exercise of the powers hereinbefore given to my Trustees.

15. Continue to Carry on Business: Without in any way restricting the general power and discretion given to my Trustees and to the extent my Trustees are lawfully entitled to do so, I HEREBY AUTHORIZE Trustees to continue and carry on any business which I may own or control or which I may be interested in at the time of my death, either alone or in partnership with any person or persons, for such length of time as in their uncontrolled discretion they consider to be in the best interests of my Estate, and I GIVE to my Trustees power to do all things necessary or advisable for the carrying on of any such business and, in particular, but without limiting the generality of the foregoing, my Trustees shall have the following powers, namely:-

(a) to change the objects of such business or corporation;

(b) to continue to employ therein, or withdraw therefrom any capital which may be employed therein at my death, or advance, with or without taking security, any additional capital which they may deem desirable for effectually carrying on such business;

(c) to arrange and agree to the continuation of employment or to hiring of any person or persons therein (including any one or more of my Trustees) at such salary or remuneration as they shall think proper, and to such extension or curtailment of business thereof or the adoption of a new line of business;

(d) to form or join in forming a limited company for the purpose of taking over or purchasing the whole or any part or parts of such business or may sell the business at such price and such terms and conditions as they may determine. In consideration for any such transaction, my Trustees may accept all or any of the following: cash, bonds, notes, preference or common shares of any company, whether or not such company is the company taking over or purchasing, as they may think fit, and any bonds, notes, preference or common shares so received will be an authorized

investment under this, my Will.

16. Trustee Compensation: I DIRECT that my Trustees shall be entitled to the usual compensation and I FURTHER DIRECT that such usual compensation shall be in addition to every gift and benefit given by me by this, my Will, or by any Codicil thereto to my Trustees.

17. Alternative Dispute Resolution: Any difference of opinion that may arise during the administration of my estate should be resolved as early as possible and with a minimum of formality through the mediation process. I have every confidence this wish will be honoured.

18. Governing Law: My Will shall be governed by and construed in accordance with the laws of **Canada [or a Province or Territory – depending on your lawyer's advice).**

IN WITNESS WHEREOF I have signed my name to this my Will written on this and **insert number of preceding pages]** preceding pages of paper, the day and year first above written.

Signed in the presence of	
_____	
(Signature of Witness above)	[Testator signs here – usual signature]
_____	_____
Address of Witness	**[INSERT FULL LEGAL NAME OF TESTATOR]**
_____	
(Signature of Witness above)	
_____	
Address of Witness	

SAMPLE WILL 3

ALL TO SPOUSE WHO IS A MEMBER OF FIRST NATION WITH GIFT OVER TO MINOR CHILDREN

LAST WILL OF [**INSERT FULL LEGAL NAME OF TESTATOR]**

This is the last will of me, **[INSERT FULL LEGAL NAME OF TESTATOR]** of **[INSERT ADDRESS OF TESTATOR]**, being ordinarily resident on **[INSERT NAME OF FIRST NATION OR TREATY LANDS]** First Nation, in the Province of [INSERT PROVINCE OR TERRITORY], Canada , made this () day of (), 202().

Revocation

1. (a) Revocation of Prior Wills and Codicils: I REVOKE all wills and codicils previously made by me.

(b) No Change to Designations Made Before This Will: This Will does not alter any designations of a beneficiary I may have made prior to the date of this Will, and other than by will, under any policy of life insurance, pension, registered plan, annuity, or other plan or policy under which I am competent to designate a beneficiary other than by will.

NOTE: If the Testator has an insurance policy, pension, RRSP or RRIF for example, this paragraph makes it clear that the Testator does not intend to revoke any beneficiary designation made before the date of this Will. The designation can, however, be changed with the Holder (Insurance company or Bank for example) AFTER the date of the Will.

Executors and Trustees

2. (a) Appointment of Executor and Trustee: I appoint my spouse (or common-law partner – delete one), **[INSERT FULL LEGAL NAME OF SPOUSE OR COMMON-LAW PARTNER]** (hereinafter called my "Spouse") of **[insert address of spouse or common-law partner]** to be the Executor of my Estate and Trustee of my Will.

NOTE: The "two spouses" problem. If the Testator is married, but no longer cohabiting with that person and has never settled matrimonial property issues with her spouse and is at death in a common-law relationship with a new partner, this can create significant issues for the estate. Under the *Family Homes on Reserves and Matrimonial Interests or Rights Act,* S.C. 2013, c.20, a spouse to whom the Testator is still married (but not cohabiting with) may make a claim under *Section 34* for an amount equal to one half of the value of an "interest or right" in or to the Family Home and potentially any other interest or right in other Reserve Lands. This could have significant consequences for the common-law partner. *Section 38* of that Act directs that where there are two spouses, the executor must pay the survivor who was the common-law partner first before paying the survivor who was the spouse, but nothing prevents a married spouse from contesting that right and bringing a court application to contest the distribution under the estate – especially if the Testator has minor children living with the married spouse who are dependent on the Testator. It is strongly recommended that a Testator finalize the division of assets and get a divorce from a married spouse during his or her lifetime.

If my said Spouse (or common-law partner – delete one) dies before me, or at any time is unable or unwilling to act or to continue to act as Executor of my Will and Trustee of my Estate before all the trusts in my Will have been fully performed, I appoint my son, **[INSERT FULL LEGAL NAME OF SON]** currently of **[insert current address of son]**, my daughter, **[INSERT FULL LEGAL NAME OF DAUGHTER1]** currently of **[insert current address of daughter1]** and my daughter, **[INSERT FULL LEGAL NAME OF DAUGHTER2]** currently of **[insert current address of daughter2]** to be the Executors of my Will and Trustees of my Estate in place of my said Spouse. The expression "my Trustees" used throughout my Will includes, where the context permits, the executor or executors and trustee or trustees for the time being of my Will, whether original, additional, or substituted.

NOTE: It is very important to actually name a child and properly identify that child, rather than just say "my son" or "my daughter". This makes it clear whom you are talking about. Inserting the current address of the Trustee just makes it easier to find them.

(b) No Security Required: I DIRECT that no security shall be required of any of my Trustees in any court, notwithstanding that any of them may not be resident or located within any first nation, province or country in which I may own assets at the time of my death.

(c) Conflict Resolution: If any difference of opinion exists at any time among my Trustees in relation to the commission or omission of any act in the execution of the trusts in my Will, the opinion of my Trustees having the majority of votes prevails, notwithstanding that one or more of my Trustees may be personally

interested or concerned in the matter in dispute or question.

NOTE: It is best to keep the number of Executors and Trustees to a minimum. You do not have to appoint your children. You can appoint anyone whom you trust and whom you know will be able to administer your estate in accordance with your wishes set out in your Will. If you have someone you trust, then appoint that person alone. If you feel more comfortable having more than one Executor and Trustee, then don't appoint them together if they can never agree on anything or do not get along. Be pragmatic when considering your children's relationship with each other. It is better to choose the most responsible and reasonable child to act alone and have another child as an alternate if your children do not get along. If you wish to appoint more than one Executor and Trustee, it is better to have an odd number and then provide that in the event of disagreement, majority rules. If you have a business, you can consider appointing a separate Estate Trustee to manage and distribute your business assets, if you feel your family members do not possess the necessary skills.

Residue to Spouse

3. My Trustees shall pay and transfer the residue of my estate to my Spouse, **[INSERT FULL LEGAL NAME OF SPOUSE]** if she is living on the thirtieth day following my death.

NOTE: Two Spouses Problem: It is strongly advised that all matters be settled in writing or by Court Order with any spouse the Testator is no longer living with prior to death. Otherwise the common-law partner will have to deal with a potential claim from the Spouse, which can subject the common-law partner to unnecessary stress, both financially and emotionally.

NOTE: The Spouse takes the estate subject to the payment of all the Testator's funeral, testamentary and other debts.

Alternate Bequest of Residue

4. If my Spouse **[INSERT FULL LEGAL NAME OF SPOUSE]** dies before me or is not living on the thirtieth (30th) day following my death, then on the death of the survivor of my Spouse and me (the "Division Date"), I GIVE, DEVISE, BEQUEATH AND APPOINT my Estate to my Trustees upon the following trusts, namely:-

(a) Memorandum - Personal and Household Articles: I have made a memorandum dated **[insert date – must before the date of the Will]** that gives certain articles of personal and household use and ornament to certain persons, and I have deposited it with my Will. I direct my Trustees to deliver the articles of personal and household use and ornament described in this memorandum in accordance with the gifts in this memorandum.

OR – AN ALTERNATE CLAUSE:

(a) Letter of Wishes - Personal and Household Articles: I wish to advise my Trustees that I have prepared a letter of wishes (the "Letter of Wishes"), that I have left among my personal papers, regarding the division and disposition of articles of personal and household use and ornament owned by me on the date of my death (collectively, the "Personal and Household Articles"). I wish to advise further that it is my strong wish and desire that my Trustees, together with those of my children who are living on the date of my death, give effect to the terms of the Letter of Wishes, although I recognize that there is no legal obligation upon them to do so, regarding the division and disposition of the Personal and Household Articles listed on the Letter of Wishes. If I do not leave the Letter of Wishes or in the event the Letter of

Wishes I have left does not deal with the division and disposition of all of the Personal and Household Articles, I direct that the Personal and Household Articles that have not been divided and disposed of pursuant to the Letter of Wishes shall be divided among those of my children who are living on the date of my death, in any manner as they may agree upon, or if they do not agree, then in any manner as a majority of my Trustees in an absolute discretion consider equitable.

NOTE: Who gets what of the Testator's personal items is one of the most contested parts of administering an estate. Testators sometimes tell beneficiaries (usually family) one thing and then do another (or forget) when preparing a written Memorandum. Personal Articles often have more sentimental value than monetary value. Family treasures which are passed through generations are important and the Testator should talk to their children when deciding what to do with these items. Even better, if you are an elder and you are not using something – give it away when you are alive. Don't set your family up for a fight or disappointment. Don't wait until you are gone. And talk to your children. Grief heightens emotions to the point where beneficiaries can be unreasonable and bonds can be broken forever over an item that the Testator would never have imagined would cause a dispute. It is also more meaningful to make a gift in person, while you are alive rather than have it pass in a Will. Lawyers see families stop speaking to each other over some personal items all of the time.

The first sample is legally binding on the Estate Trustees. So the list must be in existence before the Will is made; the Will must refer to it as an existing document and the document must be described sufficiently that the Trustee can identify it. This can be inconvenient, particularly because Testator's often change their minds and if you change the Memorandum you must amend your Will.

The second sample is a non-binding expression of wishes, but if it is typed by the Testator or is in the Testator's handwriting – it can have significant moral suasion on the beneficiaries. The benefit of the second sample is that the it can be changed as many times and whenever the Testator wants without having to make changes to the Will.

However, if the Testator makes gifts of the special items before death, a Statement of Wishes or Memorandum may not even be needed.

(b) Gift of Remaining Personal Articles: My Trustees shall divide the remaining articles of personal, domestic or household or garden use or ornament that I shall own at my death and all regalia, art, jewelry, boats, hunting equipment, automobiles and accessories thereto (collectively called "the Personal Articles") as equally as possible among those of my children who are living on the 30th day following my death, in any manner that my children may agree upon, or if they do not agree, then in any manner that my Trustees in their absolution discretion consider equitable.

Power of Sale and Retention

5. (a) Power to Sell or Retain: I authorize my Trustees to use their unfettered discretion in the realization of my estate. My Trustees have the power to sell or otherwise convert into money any part of my estate not consisting of money, at the time and upon whatever terms my Trustees shall decide, with power and discretion to decide against the conversion in connection with all or any part of my estate or to postpone the conversion of my estate or any part of it for any length of time. I authorize and empower my Trustees to retain any portion of my estate in the form in which it may be at my death (whether it is in the form of investments that would be prudent investments for trustees or in which trustee are by law authorized to invest trust funds and where there may be any liability attached thereto) for any length of time that my Trustees consider to be in the best interests of my estate, and I also declare that no property not in fact producing income shall be required or deemed to proper income.

(b) To Pay debts: My Trustees shall pay my just debts, funeral and testamentary expenses, and taxes, including but not limited to income taxes, and all

estate, legacy, succession or inheritance duties and taxes whether imposed pursuant to the laws of my First Nation, Canada or the Province or in any other jurisdiction in which I may hold assets or have income at my death and that may be payable in connection with any property passing on my death (or deemed to so pass) or in connection with any proceeds of any insurance and/or annuities on my life or any gift or benefit given or conferred by me either in my lifetime or by survivorship or by my will or any Codicil thereto and whether these duties and taxes be payable in respect of estates or interests that fall into possession at my death or at any subsequent time. All these debts, expenses, duties and taxes are to be paid out of and be a charge on the capital of my estate. I authorize my Trustees in their unfettered discretion to commute or prepay or defer the payment of any of these duties and taxes.

(c) Insurance Proceeds: I direct that my Trustees may use insurance proceeds that are available for such purpose (together with liquid assets and converted assets hereunder) to pay any such taxes or administration costs.

(d) Residue: I DIRECT my Trustees to invest and keep invested the residue of my estate in investments authorized by law for Trustees, subject to the power to retain investments made by me in my lifetime above conferred, and to use as much of the income therefrom and such part of the capital as my Trustees, in their absolute discretion deem necessary or advisable for the care, maintenance and education of my children until the youngest of them attains the age of twenty-five (25) years: -

(i) If at the "Division Date" (as defined in paragraph 4 of this Will) my youngest child has attained the age of twenty-one (21) years or upon such youngest child attaining the age of twenty-one (21) years, I DIRECT my Trustee to equally divide fifty (50%) per cent

of the capital and accumulated income of the trust fund among my children alive at such time for their own use absolutely; and if there be only one child living at such time, then all to that child; and

(ii) If at the Division Date, my said youngest child has attained the age of twenty-five (25) years or upon such child attaining the age of twenty-five (25) years, I DIRECT my Trustee to equally divide and to pay what remains of the capital and accumulated income of this trust fund to my children alive at such time for their own use absolutely and if there be only one child living at such time, then all to that child.

(iii) In the event that any of my said children are not alive at the Division Date, or shall die before my youngest child having attained the age of twenty-five (25) years, and such deceased child leaves a child or children surviving them (my grandchild or grandchildren) then that deceased child's share of the residue of my estate or the balance of the capital and accumulated income of the trust fund, as the case may be, shall be equally divided among the children of my deceased child, or if there be only one child then all to that child, in accordance with the trust in paragraph 5 of this, my Will and if any of my children die leaving no child or children surviving them at such time, then my deceased child's share shall held in trust for my surviving child or divided equally among my children alive at such time and shall be held in accordance with the trust provisions described in this paragraph 5(d) of this, my Will and such deceased

child's share may be added to the trust being held for my surviving child or children thereunder.

(e) Catastrophic Accident: In the event that I leave no child, grandchild or grandchildren alive at the Division Date or all my children should die before the termination of the trusts in paragraph 5(e) of this, my Will, I direct my Trustees to divide the residue of my estate into as many shares as are requisite to give effect to the following: -

(i) To pay or transfer divide FIFTY (50) SHARES of the residue of my estate between my brother, **[INSERT FULL LEGAL NAME OF BROTHER]** if he is alive at the Division Date; and

(ii) To pay or transfer divide FIFTY (50) SHARES of the residue of my estate between my sister, **[INSERT FULL LEGAL NAME OF SISTER]** if she is alive at the Division Date.

Guardianship of Minor Child

6. (a) Meaning of "Guardian" or "Guardians": I hereinafter refer to the Guardians of my minor child, from time to time acting, as the "Guardians" notwithstanding the fact that there may be only one person who may be acting as the sole Guardian of my said minor child. I direct that where the context so requires, any reference in this my Will to "Guardians" shall be construed to mean the Guardian of the property of my minor child and I further direct that where the context so requires or permits, the plural shall be read as the singular.

(b) Appointment of Guardians: If at the Division Date either of my children are under the age of majority, I NOMINATE, CONSTITUTE AND APPOINT my sister, **[INSERT FULL LEGAL NAME OF SISTER]** to have custody of my minor

children during their minority and to the extent that I am capable so of doing, to be Guardian of the property of such minor children. IN THE EVENT that my sister, **[INSERT FULL LEGAL NAME OF SISTER]**, dies before me, or surviving me, is or becomes unable or unwilling to have custody of any minor children of mine, I NOMINATE, CONSTITUTE AND APPOINT my brother, **[INSERT FULL LEGAL NAME OF BROTHER]** to have custody of my minor children and to the extent that I am capable so of doing, to be Guardian of the property of such minor children.

(c) No Administrative Bond: It is my wish that any person acting as a guardian for a child of mine shall not be required to furnish an administration bond in respect of the appointment.

(d) No Financial Hardship for Caregiver: I do not wish that a person who undertakes the care of a child of mine should suffer financial hardship as a result. My Trustees are, therefore, authorized to make payments from the income and capital of any share of my estate being held for a child of mine who is under the age of majority, to any person who has custody of that child, including a person acting as Trustee of this Will (referred to as the "Guardians") for any expenses that in the opinion of my Trustees are reasonably incurred by the Guardians in providing a home for a child of mine. My Trustees may advance funds for expenses such as additional daily living costs, reasonable payments for enlarging the Guardians' home or acquiring a new home, or the cost of a new automobile. Funds may be loaned to the Guardians on such terms and conditions as my Trustees in their discretion consider reasonable, or may be given outright to the Guardians. In exercising their discretion, I express my wish that my Trustees bear in mind the best interests of my child and my desire to provide for him as happy a home life as possible.

(e) Memorandum of Wishes: I request that as soon as possible following the death of me and my Spouse, that the Guardians named herein read and consider the wishes of me and my Spouse pertaining to permanent guardianship of our minor children as expressed in any Memorandum that I may leave with this, my Will.

(f) Application for Custody: It is further my wish that before the expiration of ninety (90) days from the date of my death, that the said Guardian apply to have custody of such minor child and be appointed as Guardian of the property of such minor child pursuant to the provisions of the **[Insert the appropriate statute for the First Nation on which you reside or as a Court may order]** as from time to time amended.

(g) Consultation with Guardians even if Not Appointed:

Whether or not the said Guardians shall be appointed by the Court, I request my Trustees to consult the said persons with regard to the arrangements to be made from time to time for the care and management of my child, and I EXPRESSLY AUTHORIZE my Trustees to make any payments to or for the benefit of my child, and to accept the receipt of such persons as a sufficient discharge thereof.

(h) Financial Assistance to Caregiver: My Trustees shall, to the extent reasonable, assist any person who may be appointed as the custodian of a minor child of mine by making available mortgage financing or by paying a portion of the mortgage or rental payments and other expenses to provide comfortable accommodation for my minor child, including the payment of a nanny or housekeeper or other such assistance. I wish to emphasize to my Trustees that I consider it very important that liberal payments be made to the custodian of my child in order that a very happy home life should be created for my child while he is growing up. I desire my Trustees to place emphasis on the financial needs of my minor child and the custodian during this period

of time, rather than to be unduly concerned about the fact that any such payment would reduce the funds available to my child when reaching any age specified in my Will.

Payments to Persons Under 21 Years or Disabled Beneficiaries

7. SUBJECT AS IS SPECIFICALLY PROVIDED HEREIN, if any person entitled under the provisions of this Will to receive any share of income or capital of the my estate while such person is under the age of twenty-one (21) years or while under any other disability as defined by the **[insert with name of appropriate Act if beneficiary is receiving disability support from a Province or Territory]**, or any succeeding legislation as the case may be, the Trustees shall keep such share of income or capital invested until, for a beneficiary that is under the age of twenty-one (21) years, such Beneficiary attains the age of twenty-one (21) years, or for a beneficiary under a disability, until such beneficiary ceases to be disabled as defined by the **[insert with name of appropriate Act if beneficiary is receiving disability support from a Province or Territory** or any succeeding legislation as the case may be; provided that the Trustees may in the exercise of an absolute discretion pay such income or any part thereof together with the whole or any part of the capital thereof to a parent, or to a person entitled to the custody of such person, or to the guardian of the property of such person or to any other person standing in *loco parentis* to such Beneficiary, whose receipt shall be a good acquittance to the Trustees or the Trustees may apply the same as they, in the exercise of an absolute discretion, think fit to or for the benefit of such Beneficiary or further they may pay any part of such income or capital directly to such Beneficiary notwithstanding that he or she is under the age of twenty-one (21) years if in their discretion they consider it advisable so to do and the *de facto* payment of such income or capital to such Beneficiary shall be a complete

release to the Trustees and in addition, the Trustees shall have the power to accumulate and add to the capital of such Beneficiary's share any income not so paid out.

Bequest Not to Form Part of Beneficiary's Net Family Property:

8. Any benefit, whether as to income or capital, or income from capital to which any person shall become entitled in accordance with the provisions of this Will or any Codicil thereto, shall not fall into any community of property as amended from time to time, any benefit, whether as to income or capital, or income from capital to which any person shall become entitled in accordance with the provisions of this my Will or any Codicil thereto, shall not fall into any community of property which may exist between any such person and his or her spouse and shall not form part of her or his net family property for any purpose or purposes of the the *Family Homes on Reserves and Matrimonial Interests or Rights Act*, S.C. 2013. C. 20 as amended from time to time or **[insert reference to applicable Family Law Act *off reserve* for the Province or Territory in which the beneficiary lives]** , but shall be paid by my Trustees to such person on the condition that the same shall remain the separate property of such person, free from the control of her or his spouse. The separate Release or Receipt of such person shall be a discharge to my Trustees in respect of any such payment.

NOTE: This clause makes it clear that the Testator's intention is that a gift made to a child under this Will is to that child alone and not to the child and his or her spouse. Most Provinces and Territories exclude inheritances from "family property" that is divided when a couple separates, but these types of clauses can be helpful when a child is trying to prove a particular gift was made only to the child. Not the child and her spouse.

Definition of Relationships (Not all the clauses below may be applicable)

9. Spouse: Any reference in my Will to "Spouse" shall mean **[INSERT LEGAL NAME OF SPOUSE]** as named in paragraph 2 of this Will.

10. Spouse of a Beneficiary: Whenever my Trustees are authorized or directed in my Will to make a payment or distribution to the spouse of a living individual, the payment or distribution may only be made to a person who, in the opinion of my Trustees:

(a) is married to the individual and is not living separate and apart from the individual at the relevant time;

(b) has in good faith gone through a form of marriage with the individual, which is void or voidable, and the two of them are cohabiting or have cohabited within the previous twelve month period;

(c) though not married to the individual, is cohabiting with him or her in a relationship of some permanence where there is a child born of whom they are the legal parents; or

(d) is a person in favour of whom an order for support, alimony or maintenance has been made by a Court of competent jurisdiction against the individual under which such individual continues to have obligations;

and wherever payment or distribution is authorized or directed to be made to a spouse of a deceased individual the payment or distribution may only be made to a person to whom a payment or distribution might have been made as the spouse of such individual immediately before the individual's death. Before making any payment or distribution to a person as the spouse of an individual, my Trustees may require the person to provide my Trustees evidence to establish to my Trustees' satisfaction that person's

entitlement to the payment or distribution.

NOTE: Your lawyer may decide this clause is not needed if you do not include the spouse of your child as an alternate beneficiary of a share of your estate. This is given for illustration purposes only. Also – Your lawyer should make sure these definitions are in accordance with the law in your First Nation, Province or Territory.

11. Child or Grandchild: Any reference in my Will to a "child" or "grandchild" shall include, for greater certainty:

(a) any child or grandchild who has been legally adopted in any jurisdiction, including customary adoptions under the customs of my First Nation; and

(b) any child or grandchild conceived before and born alive after the individual's death.

NOTE: Care should be taken in using the clauses in paragraph 10 and legal advice should be obtained to decide whether or not children adopted through customary adoptions should be included in this definition.

12. Persons Born Outside Marriage: Unless otherwise specifically provided, any reference in my Will or in any Codicil to my Will to my "children" or to my more remote issue, or to the children or more remote issue of any other person or persons shall not include:

(a) a person born outside marriage,

(b) a person who comes within the description traced through another person who has been born outside marriage,

provided that any person who was born outside marriage but whose parents subsequently married one another, or who in the sole and absolute opinion of my Trustees has had for some time during his or her lifetime a normal relationship with one of his or her natural parents, or in the sole and absolute opinion of my Trustees has been adopted by custom adoption common to the First Nation of which I am a member at my death, and any person who has been legally adopted shall be regarded as having been born within marriage.

NOTE: The purpose of this clause is to limit who can claim to be a child of the deceased under the Will. The best practice is to never use the word "child" without then including the name of that child. Making broad references to "children" or "grandchildren can mean individuals whom the Testator does not consider his child may be included. This is, of course, particularly applicable to men.

Trustee Powers

13. IN ADDITION to all other powers by this my Will or any Codicil thereto or by Statute or Law conferred upon them, but subject to the other provisions of this my Will, my Trustees in the administration of my estate or any trust or fund created under the provisions hereof shall have power in their sole and absolute discretion:

(a) To invest and re-invest: To invest and reinvest the moneys of my estate or any trust thereof in any investments which my Trustees consider advisable.

(b) Considerations in Making Investments: When making investments for my estate or any trust thereof, my Trustees may consider the following criteria in planning the investment of trust property, in addition to any others that are relevant in the circumstances:

1. general economic conditions;

2. the possible effect of inflation or deflation;

3. the expected tax consequences of investment decisions or strategies;

4. the role that each investment or course of action plays within the overall trust portfolio;

5. the expected total return from income and the appreciation of capital;

6. needs for liquidity, regularity of income and preservation or appreciation of capital; and

7. an asset's special relationship or special value, if any, to the purpose of the trust or to one or more of the beneficiaries.

(c) To Make Divisions and Fix Value: To make any division of my estate or set aside or pay any share or interest therein, either wholly or in part, in the assets forming my estate at the time of my death or at the time of such division, setting aside or payment, and I expressly will and declare that my Trustees shall in their absolute discretion fix the value of my estate or any part thereof for the purpose of making any such division, setting aside or payment and the decision of my Trustees shall be final and binding upon all persons concerned, notwithstanding one or more of my Trustees may be beneficially interested in the property appropriated or partitioned. It is my desire that in exercising this power, my Trustees shall, with proper advice, consider the effect of tax on capital gains, in selecting assets to be distributed or allocated rather than sold so as not to attract tax unnecessarily or at an earlier time than required.

(d) To Renew Debt Obligations: To renew from time to time any bills, notes, guarantees or other securities or contracts evidencing any liability of mine as

endorser, guarantor, surety or otherwise and for that purpose to enter into new bills, notes, or other securities or contracts for and on behalf of my estate, my intention being to give to my Trustees sufficient authority to enable them to assist in the gradual liquidation of the liabilities which I may be under in order that the companies or persons for whom I may be liable may not be unduly embarrassed.

(e) To Exercise Options: To exercise any options to which I may be entitled, at such time or times as my Trustees consider advisable, or to refrain from exercising any such option and allow the same to lapse, or to sell or surrender any such option for such consideration as my Trustees consider advisable, and my Trustees shall not be held accountable for any loss that may be suffered by my estate or any beneficiary thereof as a result of their failure to exercise any option or the surrender thereof, or the exercise of any such option at a particular time.

(f) To Settle Claims: Without the consent of any beneficiary under this my Will to compromise, settle and waive any claim or claims at any time due to or by my estate.

(g) To Purchase or Retain Real Property: To purchase or retain as an investment of my estate, real estate for the purpose of residence of any income beneficiary of this my Will, as an alternative to investing for income for such beneficiary, and again as an investment to pay off any mortgage on such real estate, or to make improvements or to make repairs necessary to preserve its value.

(h) To Delegate to Trust Company: In addition to the power of delegation authorized by law, to delegate any powers, duties or discretions to any trust company or other proper person, but without thereby avoiding continuing legal responsibility for the proper administration of my estate; and with the further power from time to time to revoke any such delegation in whole or in part and, if so decided,

to substitute another trust company.

(i) To Retain Professionals: From time to time to employ and pay for such professional, expert, specialized or other assistance (such as the services of any accountant, appraiser, agent, solicitor or any other professional advisor) as my Trustees may deem requisite in the discharge of their duties as Trustees, with power to act or not to act, in their absolute discretion, on any opinion, advice or information so obtained. My Trustees shall not be responsible for any loss, depreciation or damage occasioned by their action or non-action, in accordance therewith.

(j) To Collapse Trust Not Advantageous to Beneficiary: Notwithstanding anything else contained in this my Will or any Codicil hereto, if my Trustees are holding a share of my estate in trust for a beneficiary other than my children and my Trustees in their absolute discretion deem that the continuation of the trust is not advantageous to such beneficiary, I authorize my Trustees to pay or transfer the remainder of such share to such beneficiary, or to pay or transfer such share in trust on the same terms as herein provided for my Trustees to the parent, custodian, legal guardian or person standing in loco parentis to such beneficiary, or to such other person or institution for the benefit of such beneficiary, as my Trustees in their absolute discretion consider advisable. The payee's receipt shall be a sufficient discharge to my Trustees, who shall not be required to see to or account for the subsequent disposition thereof.

(k) Power to Deal As If I was Alive: In addition to the foregoing authorities, it is my intention that my Trustees shall have power and authority to deal as fully and effectively with the interest of my estate in any asset owned by me or subsequently by my estate, or any trust thereof as I could have were I living, including the power and authority to sell any asset or assets privately or otherwise, to any

beneficiary hereunder without requiring the approval of others of them.

(l) To Make Tax Elections: I FURTHER GIVE to my Trustees, in addition to all other powers contained in this, my Will, power to make all such elections, allocations, designations and distributions as they shall deem in their absolute discretion to be in the best interests of my Estate as a whole and specifically, any elections, allocations, designations and distributions as may be necessary under the *Income Tax Act* (Canada) and the provisions thereof in force from time to time. Where any specific funds, shares or residue are created under my said Will, my Trustees shall have the absolute power of determination as to the specific assets which shall form such fund, share or residue, as the case may be. I specifically exonerate my Trustees from any responsibility with respect to any such elections, allocations, designations and distributions which may result in liability to my Estate or to any beneficiary thereof if they act *bona fide* in the exercise of such power.

(m) To Purchase Estate Assets in Personal Capacity: I AUTHORIZE AND EMPOWER any or all of my Trustees to purchase in their personal capacities any of the assets of my estate at a price agreed upon by all *sui juris* beneficiaries, and if no agreement can be reached, at a price approved by the Court.

(n) To Gradually Liquidate My Liabilities: NOTWITHSTANDING any direction to my Trustees to pay all my just debts, I AUTHORIZE AND EMPOWER my Trustees to make arrangements for the gradual liquidation of any liabilities owing by me at the time of my death, including, without limiting the generality thereof, claims against my Estate arising before or after my death under the *Family Law Act*, R.S.O. 1990, c. F.3, and amendments thereto, and to compromise, settle, waive or pay any claim at any time owing by my Estate, or which my Estate may have against others, for such consideration or no consideration, and upon such terms and conditions as my

Trustees may deem advisable, and to refer to arbitration all such claims that my Trustees deem same advisable and I HEREBY specifically exonerate my Trustees in connection with any such settlements if they act *bona fide*.

(o) To Distribute in Kind: My Trustees may divide, distribute or allocate any asset of my estate in kind and at the valuation to be determined by my Trustees in their absolute discretion. In determining the valuation, my Trustees may consider future expectations for the asset as my Trustees in their absolute discretion consider appropriate, including any tax liability or credit. Any decision made by my Trustees in this regard shall be binding on all persons concerned.

(p) Trust Too Small: If, at any time, my Trustee holds any trust, which, in the sole and absolute discretion of my Trustee is of a small size such that it is inefficient or not in the best interest of the beneficiary or beneficiaries of that trust to continue to hold that trust, my Trustee may, at its unfettered discretion, terminate that trust and pay the amount of such trust then remaining to the beneficiaries or beneficiaries in accordance with their respective interests.

(q) Loans to beneficiaries: Except during the lifetime of my spouse, my Estate Trustees may lend money or other assets of my estate, or guarantee or continue any existing guarantees for loans, to any beneficiary of my Will, or any company owned or controlled by my estate or by any beneficiary or in which my estate or beneficiary may have an interest, for such length of time and upon such terms and at such rate of interest or without interest, and with such security or without security, all as my Estate Trustees in the exercise of an absolute discretion consider appropriate.

(r) To Act as Prudent Person: Until the final distribution of my estate and until the trusts set out in this Will have been fully performed, my Trustees have the power to perform, without court authorization, every act which a prudent person would

perform for the purposes of the trusts under my Will.

(s) To Do Supplementary or Ancillary Acts: My Trustees may do all supplementary or ancillary acts or things and execute all instruments to enable them to carry out the intent and purpose of the powers here set out.

14. Investment in Corporation: If, at any time, my Trustees hold in my Estate any investment in or in connection with any company or corporation, I AUTHORIZE my Trustees to join in or take any action, or to exercise any rights, powers and privileges which, at any time may exist or arise in connection with it to the same extent and as fully as I could if I were alive and the sole owner of the investment. I also authorize my Trustees to retain as an investment of my Estate for such length of time as in their discretion they deem advisable, any assets or other interest whatsoever acquired by my Trustees through the exercise of the powers hereinbefore given to my Trustees.

15. Continue to Carry on Business: Without in any way restricting the general power and discretion given to my Trustees and to the extent my Trustees are lawfully entitled to do so, I HEREBY AUTHORIZE Trustees to continue and carry on any business which I may own or control or which I may be interested in at the time of my death, either alone or in partnership with any person or persons, for such length of time as in their uncontrolled discretion they consider to be in the best interests of my Estate, and I GIVE to my Trustees power to do all things necessary or advisable for the carrying on of any such business and, in particular, but without limiting the generality of the foregoing, my Trustees shall have the following powers, namely:-

(a) to change the objects of such business or corporation;

(b) to continue to employ therein, or withdraw therefrom any capital which may be employed therein at my death, or advance, with or without taking

security, any additional capital which they may deem desirable for effectually carrying on such business;

(c) to arrange and agree to the continuation of employment or to hiring of any person or persons therein (including any one or more of my Trustees) at such salary or remuneration as they shall think proper, and to such extension or curtailment of business thereof or the adoption of a new line of business;

(d) to form or join in forming a limited company for the purpose of taking over or purchasing the whole or any part or parts of such business or may sell the business at such price and such terms and conditions as they may determine. In consideration for any such transaction, my Trustees may accept all or any of the following: cash, bonds, notes, preference or common shares of any company, whether or not such company is the company taking over or purchasing, as they may think fit, and any bonds, notes, preference or common shares so received will be an authorized investment under this, my Will.

16. Trustee Compensation: I DIRECT that my Trustees shall be entitled to the usual compensation and I FURTHER DIRECT that such usual compensation shall be in addition to every gift and benefit given by me by this, my Will, or by any Codicil thereto to my Trustees.

17. Alternative Dispute Resolution: Any difference of opinion that may arise during the administration of my estate should be resolved as early as possible and with a minimum of formality through the mediation process. I have every confidence this wish will be honoured.

18. Governing Law: My Will shall be governed by and construed in accordance with the laws of **Canada [or a Province or Territory – depending on your lawyer's advice).**

IN WITNESS WHEREOF I have signed my name to this my Will written on this and **insert number of preceding pages]** preceding pages of paper, the day and year first above written.

Signed in the presence of)
)
)
)
)
)
_____)
(Signature of Witness above)) [Testator signs here – usual signature]
)
)
)
_____) _____
Address of Witness) **[INSERT FULL LEGAL NAME OF TESTATOR]**
)
)
)
_____)
(Signature of Witness above))
)
)
)
_____)
Address of Witness)
)
)

SAMPLE WILL 4

ALL TO SPOUSE WHO IS A NON-MEMBER OF THE SAME FIRST NATION WITH GIFT OVER TO MINOR CHILDREN

LAST WILL OF [INSERT FULL LEGAL NAME OF TESTATOR]

This is the last will of me, **[INSERT FULL LEGAL NAME OF TESTATOR]** of **[INSERT ADDRESS OF TESTATOR]**, being ordinarily resident on **[INSERT NAME OF FIRST NATION OR TREATY LANDS]** First Nation, in the Province of [INSERT PROVINCE OR TERRITORY], Canada , made this () day of (), 202().

Revocation

1. (a) Revocation of Prior Wills and Codicils: I REVOKE all wills and codicils previously made by me.

(b) No Change to Designations Made Before This Will: This Will does not alter any designations of a beneficiary I may have made prior to the date of this Will, and other than by will, under any policy of life insurance, pension, registered plan, annuity, or other plan or policy under which I am competent to designate a beneficiary other than by will.

NOTE: If the Testator has an insurance policy, pension, RRSP or RRIF for example, this paragraph makes it clear that the Testator does not intend to revoke any beneficiary designation made before the date of this Will. The designation can, however, be changed with the Holder (Insurance company or Bank for example) AFTER the date of the Will.

Executors and Trustees

2. (a) Appointment of Executor and Trustee: I appoint my spouse (or common-law partner – delete one), **[INSERT FULL LEGAL NAME OF SPOUSE]** (hereinafter called my "Spouse") of **[insert address of spouse]** to be the Executor of my Estate and Trustee of my Will.

NOTE: The "two spouses" problem. If the Testator is married, but no longer cohabiting with that person and is at death in a common-law relationship with a new partner, this can create significant issues for the estate. Under the *Family Homes on Reserves and Matrimonial Interests or Rights Act,* S.C. 2013, c.20, a spouse to whom the Testator is still married (but not cohabiting with) may make a claim under *Section 34* for an amount equal to one half of the value of an "interest or right" in or to the Family Home and potentially any other interest or right in other Reserve Lands). This could have significant consequences for the common-law partner. *Section 38* of that Act directs that where there are two spouses, the executor must pay the survivor who was the common-law partner first before paying the survivor who was the spouse, but nothing prevents a married spouse from contesting that right and bringing a court application to contest the distribution under the estate – especially if the Testator had minor children with the married spouse. It is strongly recommended that a Testator finalize a divorce from a married spouse during his or her lifetime.

If my said Spouse dies before me, or at any time is unable or unwilling to act or to continue to act as Executor of my Will and Trustee of my Estate before all the

trusts in my Will have been fully performed, I appoint my son, **[INSERT FULL LEGAL NAME OF SON]** currently of **[insert current address of son]**, my daughter, **[INSERT FULL LEGAL NAME OF DAUGHTER1]** currently of **[insert current address of daughter1]** and my daughter, **[INSERT FULL LEGAL NAME OF DAUGHTER2]** currently of **[insert current address of daughter2]** to be the Executors of my Will and Trustees of my Estate in place of my said Spouse. The expression "my Trustees" used throughout my Will includes, where the context permits, the executor or executors and trustee or trustees for the time being of my Will, whether original, additional, or substituted.

NOTE: It is very important to actually name a child and properly identify that child, rather than just say "my son" or "my daughter". This makes it clear whom you are talking about. Inserting the current address of the Trustee just makes it easier to find them.

(b) No Security Required: I DIRECT that no security shall be required of any of my Trustees in any court, notwithstanding that any of them may not be resident or located within any first nation, province or country in which I may own assets at the time of my death.

(c) Conflict Resolution: If any difference of opinion exists at any time among my Trustees in relation to the commission or omission of any act in the execution of the trusts in my Will, the opinion of my Trustees having the majority of votes prevails, notwithstanding that one or more of my Trustees may be personally interested or concerned in the matter in dispute or question.

NOTE: It is best to keep the number of Executors and Trustees to a minimum. You do not have to appoint your children. You can appoint anyone whom you trust and you know will be able to administer your estate in accordance with your wishes set out in your Will. If you have someone you trust, then appoint that person alone. If you feel more comfortable having more than one Executor and Trustee, then don't appoint them together if they can never agree on anything or do not get along. Be pragmatic when considering the relationships between your children. It is better to choose the most responsible and reasonable child to act alone with another child as an alternate if the original child cannot act (they have died or are unable to act due to illness or incapacity). If you wish to appoint more than one Executor and Trustee, it is better to have an odd number and then provide that in the event of disagreement, majority rules. If you have a business, you can consider appointing a separate Estate Trustee to manage and distribute your business assets, if you feel your family members do not possess the necessary skills.

Family Home on Reserve and Matrimonial Interests or Rights

3. If my spouse (or common-law partner – delete one), namely **[INSERT FULL LEGAL NAME OF SPOUSE]** (my "Spouse") is living on the date of my death, it is my strong wish that she and my children be permitted to remain in occupation of our home (the "Family Home") situate at **[insert street address of family home on Reserve if available]** on **[insert full legal description of land from Certificate of Possession on which family home is located, for example "Lot 6-21 on Plan 12345 C.L.S.R."]** in **[? First Nation, in the Province or Territory of ?]** (the "First Nation") in accordance with the provisions of this paragraph.

NOTES:

1. For the purposes of this sample, "she" is used but it can be "he" or they" (depending on how the spouse identifies).

2. "Spouse" is defined in paragraph 8 below. Your lawyer may revise this depending on your circumstances, but it is important to name the person you consider your "spouse" so there is no misunderstanding as to who you mean as "Spouse" in your Will.

3. No one other than an "Indian" registered under the *Indian Act*, R.S.C. 1985, c. I-5, Section 50(1) **who is also a member of the First Nation where the land is located can have or acquire a permanent right to possess or an "*interest or right*" in Indian lands[59]. That "*interest or right*" could be under a Certificate of Possession, Certificate of Occupation, a permit under Section 28(2)[60], a lease or a right to possess under a Land Code[16]). "Custom Allotments" made by a First Nation Council where certain parcels of land on Reserve are allocated to an individual or individuals in accordance with tradition is unfortunately not recognized by Canada and therefore that right cannot be transferred in a Will except as an expression of wishes.**

4. Will drafters should also be mindful that where there is a devise of a permanent right to possess or occupy Reserve land to a non-member Indian or to a non-Indian, the Superintendent of Indigenous Services Canada can offer the land for sale to the highest bidder to persons who are entitled to possess that land and the proceeds of sale are paid to the devisee in the Will[61] or to the descendants of the deceased. If there are no offers to purchase within six months or such

[59]See definitions Section 2.(1) of the *Family Homes on Reserves and Matrimonial Interests or Rights Act,* S.C. 2013, c.20
[60] Section 28(2) of the *Indian Act,* R.S.C. 1985, c. I-5
[61] *Indian Act,* R.S.C. 1985, c. I-5, Section 50

further period as the Minister directs, the right to possess the land reverts back to the band free of any claim by the devisee or descendent other than payment for improvements.

5. A "Family Home" is defined in section 2(1) of the *Family Homes on Reserves and Matrimonial Interests or Rights Act, S.C. 2013, c.20* **is "a structure – that need not be affixed but that must be situated on reserve land". A spouse or common-law partner has an automatic right to remain in possession of the "Family Home" (as defined in FHMIRA[8] for 180 days after the death of the Testator and for such longer period as the Minister[7] may direct. The Family Home is defined[56] as a structure located on Reserve land where the spouses or common-law partners "habitually resided" on the day the Testator died. It does not necessarily include all of the structure but "*only the portion of the structure that may reasonably be regarded as necessary for the residential purpose.*" The right of a non-member or non-registered spouse or common-law partner can only be expressed as a "wish" of the testator as any attempt to devise an interest in Reserve land to a non-member or non-Indian will be void or voidable.**

(a) In the event that she wishes to remain resident on my First Nation and because my Spouse is not a member of my First Nation ("my First Nation being **[insert name of First Nation]**"), then it is my wish that the Family Home and all other matrimonial interests or rights I may have at my death (both as defined in Section 2(1) of the *Family Homes on Reserves and Matrimonial Interests or Rights Act*, S.C. 2013. C. 20) be transferred to **[insert full legal name of the First Nation member or members to whom all interest in the Family Home and the land it is situate is to be transferred]** (the "Transferee") subject to the provisions of paragraph 3(b) and 3(c) below. If the Transferee so named has died before me or is

unable or unwilling to enter into the written agreement as required in paragraph 3(b) below, then it is my wish that the said Family Home and all my matrimonial interests and rights be transferred to **[insert full legal name of the alternate First Nation member or members to whom all interest in the Family Home and the land it is situate is to be transferred]** ("Transferee 2")**.** If on the date of my death, my Spouse and I are not living at the Family Home described above, but are living together at another Family Home on the said First Nation, the provisions of this paragraph shall apply to whatever Family Home I own at my death. Nothing in this paragraph 3 shall be interpreted as a prohibiting my Spouse, as Executor and Trustee of my Will to sell or otherwise dispose of the Family Home and all or any part of our "*matrimonial rights or interests"* (as defined in Section 2(1) of the *Family Homes on Reserves and Matrimonial Interests or Rights Act*, S.C. 2013. C. 20) as she in her absolute and sole discretion deems advisable.

NOTE: It is often important to families that a surviving spouse or common-law partner of the Testator be able to remain in possession of the Family Home, but the land on which the Family Home rests must be transferred to a member of the First Nation. This clause is an expression of the Testator's "wishes" that the right to possess that land be transferred (with the consent of the Minister of Indigenous Services Canada) to a member of the First Nation (usually a child or relative) with the wish that the Spouse be permitted to continue occupying the Family Home for as long as the Spouse wishes. It is contemplated that the Transferee and Spouse enter into an agreement as to the value of the Family Home and matrimonial interests and rights within 6 months of the Testator's death and if they fail to reach such an agreement, the lands go to the secondly named Transferee still subject to reaching an agreement and writing. If the Spouse is unable to reach an

agreement with any of the named Trustees, she can seek an order from the appropriate Court under Section 36 of the *Family Homes on Reserves and Matrimonial Interests or Rights Act*, S.C. 2013. C. 20 **.**

(b) Before transferring the Family Home and all my matrimonial interests or rights to the Transferee as set out in paragraph 3(a) above and no later than six (6) months from the date of my death, my Spouse in her capacity as the sole Executor and Trustee of my Will and as the sole beneficiary of my Will shall enter into a written agreement with the Transferee in which they agree on the value of the Family Home and the matrimonial interests or rights made in accordance with the provisions of Sections 34(3) and 34(5) of the ***Family Homes on Reserves and Matrimonial Interests or Rights Act,*** **S.C. 2013, c.20** and at such other value and upon such other terms as they may otherwise agree in writing. My Spouse shall not be deemed to be in conflict of interest in entering into such an agreement because she is both the Executor and Trustee and also the sole beneficiary of my estate.

(c) It is further my wish that the Transferee permit my Spouse to remain in occupation of the Family Home on a rent free basis for at least one hundred and eighty days (180) following the date of my death as permitted under Section 14 of the *Family Homes on Reserves and Matrimonial Interests or Rights Act*, S.C. 2013. C. 20 as amended from time to time and thereafter for as long as my Spouse is alive, wishes to and is able to remain in occupation of the Family Home, notwithstanding that the Family Home may have been transferred to the Transferee. It is my wish that provisions to that effect be included in the Agreement between my Spouse and the Transferee as set out in paragraph 3(b) above.

NOTE: Transferring the right to possess the land on which the Family Home is located to a family member avoids the risks of Section 50 of the *Indian Act* **where the Superintendent can force a sale. However, the Will drafter should be mindful of how the non-member or non-Indian spouse will be paid the value for the Family Home. The Will could stipulate as a wish that the Family Home be sold to the family member, but complications arise if the Transferee does not want the gift or cannot or will not pay the value of the Family Home to the spouse. In addition, the non-member Indian or non-Indian spouse cannot take back security on the sale (like a mortgage) because that would be conferring an "interest or right" in Indian land to a non-Indian or non-member person. The spouse *is* entitled to compensation under Section 34(1) of the** *Family Homes on Reserves and Matrimonial Interests or Rights Act*, S.C. 2013. C. 20 **on application under Section 36 of that Act, to one-half of the value (as at the date of death) of the Family Home. In addition, the Spouse would receive the other "half" in the value of the Family Home as the residual beneficiary of the estate. The question is – how can the Spouse be fairly compensated if her Family Home is transferred to a family member. One possible solution may be to transfer the right to possess to an adult child of the Testator and then the Testator expresses a "wish" in the Will that the land on which the Family Home is located be leased back to the non-Indian or non-member Spouse. This is not a recommendation, but simply a possible solution and any solution involves significant trust between the spouse and the Transferee. In addition, the Will Drafter may want to include provision in the Will that the Spouse "defer", but not release her right to payment of the value in the Family Home. Again, this requires a significant amount of trust in the Transferee to abide by the Testators wishes and the Will Drafter must be very careful not to contravene the provisions of the** *Indian Act***.**

(d) If the Transferee refuses to agree in writing to permit or to continue to permit my Spouse to occupy the Family Home as provided above, for as long as she wishes or is able to after the initial one hundred and eighty days (180) following the date of my death or if my Spouse and the Transferee are unable to agree on the matters contemplated in Section 3(b) and 3(c) of this my Will within the time period prescribed in that paragraph (if any), the firstly named Transferee named in paragraph 3(a) above shall be replaced by the secondly named Transferee (Transferee 2) in that paragraph. It is also my wish that should my Spouse or her personal representative deem it necessary, they may make application under Section 21 of Family Homes on Reserves and Matr*imonial Interests or Rights Act*, S.C. 2013. C. 20 for exclusive occupation of the Family Home and/or for an order under Section 36 of that Act to determine the value of the Family Home and Matrimonial Interests or Rights. It is my wish that the Court and any Band or authority shall accept the provisions of this paragraph 3 as an expression of my wishes with respect to possession of the Family Home by my Spouse and the valuation of all Matrimonial Rights and Interests in my property on the First Nation. I declare that I do not consider my Spouse to be in conflict of interest in making any such applications with her role as Trustee of my estate.

(e) During her period of occupation of the Family Home, and unless otherwise agreed between my Spouse and the Transferee, it is my wish that my Spouse not pay rent to the Transferee, but my Spouse shall pay all costs of operating and maintaining the Family Home other than capital expenditures and without limitation; all costs of maintenance and upkeep of the Family Home, the cost of insuring the Family Home, all costs of utilities necessary for the enjoyment of the Family Home and all other costs of every nature and kind associated with the enjoyment of the Family

Home, other than capital expenditures (the "maintenance costs"). The Transferee may, at his discretion waive all or any part of the maintenance costs.

(f) I further wish that my Spouse and the Transferee may at any time agree to enter into a lease of any of my on-Reserve land from the Queen in Right of Canada to my Spouse for any length of time upon terms, covenants and conditions as the Transferee and my Spouse may agree.

Residue to Spouse

4. My Trustees shall pay and transfer the residue of my estate to my Spouse, **[INSERT FULL LEGAL NAME OF SPOUSE]** if she is living on the thirtieth day following my death.

NOTE: Two Spouses: Again, it is strongly advised that all matters be settled in writing or by Court Order with any spouse the Testator is no longer living with prior to death. Otherwise the common-law partner will have to deal with a potential claim from the Spouse, which can subject the Spouse to unnecessary stress, both financially and emotionally.

NOTE: The Spouse takes the estate subject to the payment of all the Testator's funeral, testamentary and other debts.

Alternate Bequest of Residue

5. If my Spouse **[INSERT FULL LEGAL NAME OF SPOUSE]** dies before me or is not living on the thirtieth (30th) day following my death, then on the death of the survivor of my Spouse and me (the "Division Date"), I GIVE, DEVISE, BEQUEATH AND APPOINT my Estate to my Trustees upon the following trusts, namely:-

(a) Memorandum - Personal and Household Articles: I have made a

memorandum dated **[insert date – must before the date of the Will]** that gives certain articles of personal and household use and ornament to certain persons, and I have deposited it with my Will. I direct my Trustees to deliver the articles of personal and household use and ornament described in this memorandum in accordance with the gifts in this memorandum.

OR – AN ALTERNATE CLAUSE:

(a) Letter of Wishes - Personal and Household Articles: I wish to advise my Trustees that I have prepared a letter of wishes (the "Letter of Wishes"), that I have left among my personal papers, regarding the division and disposition of articles of personal and household use and ornament owned by me on the date of my death (collectively, the "Personal and Household Articles"). I wish to advise further that it is my strong wish and desire that my Trustees, together with those of my children who are living on the date of my death, give effect to the terms of the Letter of Wishes, although I recognize that there is no legal obligation upon them to do so, regarding the division and disposition of the Personal and Household Articles listed on the Letter of Wishes. If I do not leave the Letter of Wishes or in the event the Letter of Wishes I have left does not deal with the division and disposition of all of the Personal and Household Articles, I direct that the Personal and Household Articles that have not been divided and disposed of pursuant to the Letter of Wishes shall be divided among those of my children who are living on the date of my death, in any manner as they may agree upon, or if they do not agree, then in any manner as a majority of my Trustees in an absolute discretion consider equitable.

NOTE: Who gets what of the Testator's personal items is one of the most contested parts of administering an estate. Testators sometimes tell beneficiaries (usually family) one thing and then do another (or forget) when preparing a written Memorandum. Personal Articles often have more sentimental value than monetary value. Family treasures which are passed through generations are important and the Testator should talk to their children when deciding what to do with these items. Even better, if you are an elder and you are not using something – give it away when you are alive. Don't set your family up for a fight or disappointment. Don't wait until you are gone. And talk to your children. Grief heightens emotions to the point where beneficiaries can be unreasonable and bonds can be broken forever over an item that the Testator would never have imagined would cause a dispute. It is also more meaningful to make a gift in person, while you are alive rather than have it pass in a Will. Lawyers see families stop speaking to each other over some personal items all of the time.

The first sample is legally binding on the Estate Trustees. So the list must be in existence before the Will is made; the Will must refer to it as an existing document and the document must be described sufficiently that the Trustee can identify it. This can be inconvenient, particularly because Testator's often change their minds and if you change the Memorandum you must amend your Will.

The second sample is a non-binding expression of wishes, but if it is typed by the Testator or is in the Testator's handwriting – it can have significant moral suasion on the beneficiaries. The benefit of the second sample is that the it can be changed as many times and whenever the Testator wants without having to make changes to the Will.

However, if the Testator makes gifts of the special items before death, a Statement of Wishes or Memorandum may not even be needed.

(b) Gift of Remaining Personal Articles: My Trustees shall divide the remaining articles of personal, domestic or household or garden use or ornament that I shall own at my death and all regalia, art, jewelry, boats, hunting equipment, automobiles and accessories thereto (collectively called "the Personal Articles") as equally as possible among those of my children who are living on the 30th day following my death, in any manner that my children may agree upon, or if they do not agree, then in any manner that my Trustees in their absolution discretion consider equitable.

(c) Insurance Proceeds: I direct that my Trustees may use insurance proceeds that are available for such purpose (together with liquid assets and converted assets hereunder) to pay any such taxes or administration costs.

(d) Residue: I DIRECT my Trustees to invest and keep invested the residue of my estate in investments authorized by law for Trustees, subject to the power to retain investments made by me in my lifetime above conferred, and to use as much of the income therefrom and such part of the capital as my Trustees, in their absolute discretion deem necessary or advisable for the care, maintenance and education of my children until the youngest of them attains the age of twenty-five (25) years:-

(i) If at the "Division Date" (as defined in paragraph 4 of this Will) my youngest child has attained the age of twenty-one (21) years or upon such youngest child attaining the age of twenty-one (21) years, I DIRECT my Trustee to equally divide fifty (50%) per cent of the capital and accumulated income of the trust fund among my children alive at such time for their own use absolutely; and if there be only one child living at such time, then all to that child;

and

(ii) If at the Division Date, my said youngest child has attained the age of twenty-five (25) years or upon such child attaining the age of twenty-five (25) years, I DIRECT my Trustee to equally divide and to pay what remains of the capital and accumulated income of this trust fund to my children alive at such time for their own use absolutely and if there be only one child living at such time, then all to that child.

(iii) In the event that any of my said children are not alive at the Division Date, or shall die before my youngest child having attained the age of twenty-five (25) years, and such deceased child leaves a child or children surviving them (my grandchild or grandchildren) then that deceased child's share of the residue of my estate or the balance of the capital and accumulated income of the trust fund, as the case may be, shall be equally divided among the children of my deceased child, or if there be only one child then all to that child, in accordance with the trust in paragraph 5 of this, my Will and if any of my children die leaving no child or children surviving them at such time, then my deceased child's share shall held in trust for my surviving child or divided equally among my children alive at such time and shall be held in accordance with the trust provisions described in this paragraph 5(d) of this, my Will and such deceased child's share may be added to the trust being held for my surviving child or children thereunder.

(e) Catastrophic Accident: In the event that I leave no child, grandchild or grandchildren alive at the Division Date or all my children should die before the termination of the trusts in paragraph 5(e) of this, my Will, I direct my Trustees to divide the residue of my estate into as many shares as are requisite to give effect to the following:-

(i) To pay or transfer divide FIFTY (50) SHARES of the residue of my estate between my brother, **[INSERT FULL LEGAL NAME OF BROTHER]** if he is alive at the Division Date; and

(ii) To pay or transfer divide FIFTY (50) SHARES of the residue of my estate between my sister, **[INSERT FULL LEGAL NAME OF SISTER]** if she is alive at the Division Date.

Guardianship of Minor Child

6. (a) Meaning of "Guardian" or "Guardians": I hereinafter refer to the Guardians of my minor child, from time to time acting, as the "Guardians" notwithstanding the fact that there may be only one person who may be acting as the sole Guardian of my said minor child. I direct that where the context so requires, any reference in this my Will to "Guardians" shall be construed to mean the Guardian of the property of my minor child and I further direct that where the context so requires or permits, the plural shall be read as the singular.

(b) Appointment of Guardians: If at the Division Date either of my children are under the age of majority, I NOMINATE, CONSTITUTE AND APPOINT my sister, **[INSERT FULL LEGAL NAME OF SISTER]** to have custody of my minor children during their minority and to the extent that I am capable so of doing, to be Guardian of the property of such minor children. IN THE EVENT that my sister,

[INSERT FULL LEGAL NAME OF SISTER], dies before me, or surviving me, is or becomes unable or unwilling to have custody of any minor children of mine, I NOMINATE, CONSTITUTE AND APPOINT my brother, **[INSERT FULL LEGAL NAME OF BROTHER]** to have custody of my minor children and to the extent that I am capable so of doing, to be Guardian of the property of such minor children.

(c) No Administrative Bond: It is my wish that any person acting as a guardian for a child of mine shall not be required to furnish an administration bond in respect of the appointment.

(d) No Financial Hardship for Caregiver: I do not wish that a person who undertakes the care of a child of mine should suffer financial hardship as a result. My Trustees are, therefore, authorized to make payments from the income and capital of any share of my estate being held for a child of mine who is under the age of majority, to any person who has custody of that child, including a person acting as Trustee of this Will (referred to as the "Guardians") for any expenses that in the opinion of my Trustees are reasonably incurred by the Guardians in providing a home for a child of mine. My Trustees may advance funds for expenses such as additional daily living costs, reasonable payments for enlarging the Guardians' home or acquiring a new home, or the cost of a new automobile. Funds may be loaned to the Guardians on such terms and conditions as my Trustees in their discretion consider reasonable, or may be given outright to the Guardians. In exercising their discretion, I express my wish that my Trustees bear in mind the best interests of my child and my desire to provide for him as happy a home life as possible.

(e) Memorandum of Wishes: I request that as soon as possible following the death of me and my Spouse, that the Guardians named herein read and consider the wishes of me and my Spouse pertaining to permanent guardianship of our

minor children as expressed in any Memorandum that I may leave with this, my Will.

(f) Application for Custody: It is further my wish that before the expiration of ninety (90) days from the date of my death, that the said Guardian apply to have custody of such minor child and be appointed as Guardian of the property of such minor child pursuant to the provisions of the **[Insert the appropriate statute for the First Nation on which you reside or as a Court may order]** as from time to time amended.

(g) Consultation with Guardians even if Not Appointed:

Whether or not the said Guardians shall be appointed by the Court, I request my Trustees to consult the said persons with regard to the arrangements to be made from time to time for the care and management of my child, and I EXPRESSLY AUTHORIZE my Trustees to make any payments to or for the benefit of my child, and to accept the receipt of such persons as a sufficient discharge thereof.

(h) Financial Assistance to Caregiver: My Trustees shall, to the extent reasonable, assist any person who may be appointed as the custodian of a minor child of mine by making available mortgage financing or by paying a portion of the mortgage or rental payments and other expenses to provide comfortable accommodation for my minor child, including the payment of a nanny or housekeeper or other such assistance. I wish to emphasize to my Trustees that I consider it very important that liberal payments be made to the custodian of my child in order that a very happy home life should be created for my child while he is growing up. I desire my Trustees to place emphasis on the financial needs of my minor child and the custodian during this period of time, rather than to be unduly concerned about the fact that any such payment would reduce the funds available to my child when reaching any age specified in my Will.

Payments to Persons Under 21 Years or Disabled Beneficiaries7.

SUBJECT AS IS SPECIFICALLY PROVIDED HEREIN, if any person entitled under the provisions of this Will to receive any share of income or capital of the my estate while such person is under the age of twenty-one (21) years or while under any other disability as defined by the **[insert with name of appropriate Act if beneficiary is receiving disability support from a Province or Territory]**, or any succeeding legislation as the case may be, the Trustees shall keep such share of income or capital invested until, for a beneficiary that is under the age of twenty-one (21) years, such Beneficiary attains the age of twenty-one (21) years, or for a beneficiary under a disability, until such beneficiary ceases to be disabled as defined by the **[insert with name of appropriate Act if beneficiary is receiving disability support from a Province or Territory** or any succeeding legislation as the case may be; provided that the Trustees may in the exercise of an absolute discretion pay such income or any part thereof together with the whole or any part of the capital thereof to a parent, or to a person entitled to the custody of such person, or to the guardian of the property of such person or to any other person standing in *loco parentis* to such Beneficiary, whose receipt shall be a good acquittance to the Trustees or the Trustees may apply the same as they, in the exercise of an absolute discretion, think fit to or for the benefit of such Beneficiary or further they may pay any part of such income or capital directly to such Beneficiary notwithstanding that he or she is under the age of twenty-one (21) years if in their discretion they consider it advisable so to do and the *de facto* payment of such income or capital to such Beneficiary shall be a complete release to the Trustees and in addition, the Trustees shall have the power to accumulate and add to the capital of such Beneficiary's share any income not so paid out.

Bequest Not to Form Part of Beneficiary's Net Family Property:

8. Any benefit, whether as to income or capital, or income from capital to which any person shall become entitled in accordance with the provisions of this Will or any Codicil thereto, shall not fall into any community of property as amended from time to time, any benefit, whether as to income or capital, or income from capital to which any person shall become entitled in accordance with the provisions of this my Will or any Codicil thereto, shall not fall into any community of property which may exist between any such person and his or her spouse and shall not form part of her or his net family property for any purpose or purposes of the the *Family Homes on Reserves and Matrimonial Interests or Rights Act*, S.C. 2013. C. 20 as amended from time to time or **[insert reference to applicable Family Law Act *off reserve* for the Province or Territory in which the beneficiary lives]** , but shall be paid by my Trustees to such person on the condition that the same shall remain the separate property of such person, free from the control of her or his spouse. The separate Release or Receipt of such person shall be a discharge to my Trustees in respect of any such payment.

NOTE: This clause makes it clear that the Testator's intention is that a gift made to a child under this Will is to that child alone and not to the child and his or her spouse. Most Provinces and Territories exclude inheritances from "family property" that is divided when a couple separates, but these types of clauses can be helpful when a child is trying to prove a particular gift was made only to the child. Not the child and her spouse.

Definition of Relationships (Not all the clauses below may be applicable)

9. Spouse: Any reference in my Will to "Spouse" shall mean **[INSERT**

LEGAL NAME OF SPOUSE] as named in paragraph 2 of this Will.

10. Spouse of a Beneficiary: Whenever my Trustees are authorized or directed in my Will to make a payment or distribution to the spouse of a living individual, the payment or distribution may only be made to a person who, in the opinion of my Trustees:

(a) is married to the individual and is not living separate and apart from the individual at the relevant time;

(b) has in good faith gone through a form of marriage with the individual, which is void or voidable, and the two of them are cohabiting or have cohabited within the previous twelve month period;

(c) though not married to the individual, is cohabiting with him or her in a relationship of some permanence where there is a child born of whom they are the legal parents; or

(d) is a person in favour of whom an order for support, alimony or maintenance has been made by a Court of competent jurisdiction against the individual under which such individual continues to have obligations;

and wherever payment or distribution is authorized or directed to be made to a spouse of a deceased individual the payment or distribution may only be made to a person to whom a payment or distribution might have been made as the spouse of such individual immediately before the individual's death. Before making any payment or distribution to a person as the spouse of an individual, my Trustees may require the person to provide my Trustees evidence to establish to my Trustees' satisfaction that person's entitlement to the payment or distribution.

NOTE: Your lawyer may decide this clause is not needed if you do not include the spouse of your child as an alternate beneficiary of a share of your estate. This is given for illustration purposes only. Also – Your lawyer should make sure these definitions are in accordance with the law in your First Nation, Province or Territory.

11. Child or Grandchild: Any reference in my Will to a "child" or "grandchild" shall include, for greater certainty:

(a) any child or grandchild who has been legally adopted in any jurisdiction, including customary adoptions under the customs of my First Nation; and

(b) any child or grandchild conceived before and born alive after the individual's death.

NOTE: Care should be taken in using the clauses in paragraph 10 and legal advice should be obtained to decide whether or not children adopted through customary adoptions should be included in this definition.

12. Persons Born Outside Marriage: Unless otherwise specifically provided, any reference in my Will or in any Codicil to my Will to my "children" or to my more remote issue, or to the children or more remote issue of any other person or persons shall not include:

(a) a person born outside marriage,

(b) a person who comes within the description traced through another person who has been born outside marriage,

provided that any person who was born outside marriage but whose parents

subsequently married one another, or who in the sole and absolute opinion of my Trustees has had for some time during his or her lifetime a normal relationship with one of his or her natural parents, or in the sole and absolute opinion of my Trustees has been adopted by custom adoption common to the First Nation of which I am a member at my death, and any person who has been legally adopted shall be regarded as having been born within marriage.

NOTE: The purpose of this clause is to limit who can claim to be a child of the deceased under the Will. The best practice is to never use the word "child" without then including the name of that child. Making broad references to "children" or "grandchildren can mean individuals whom the Testator does not consider his child may be included. This is, of course, particularly applicable to men.

Trustee Powers

13. IN ADDITION to all other powers by this my Will or any Codicil thereto or by Statute or Law conferred upon them, but subject to the other provisions of this my Will, my Trustees in the administration of my estate or any trust or fund created under the provisions hereof shall have power in their sole and absolute discretion:

(a) To invest and re-invest: To invest and reinvest the moneys of my estate or any trust thereof in any investments which my Trustees consider advisable.

(b) Considerations in Making Investments: When making investments for my estate or any trust thereof, my Trustees may consider the following criteria in planning the investment of trust property, in addition to any others that are relevant in the circumstances:

1. general economic conditions;

2. the possible effect of inflation or deflation;
3. the expected tax consequences of investment decisions or strategies;
4. the role that each investment or course of action plays within the overall trust portfolio;
5. the expected total return from income and the appreciation of capital;
6. needs for liquidity, regularity of income and preservation or appreciation of capital; and
7. an asset's special relationship or special value, if any, to the purpose of the trust or to one or more of the beneficiaries.

(c) To Make Divisions and Fix Value: To make any division of my estate or set aside or pay any share or interest therein, either wholly or in part, in the assets forming my estate at the time of my death or at the time of such division, setting aside or payment, and I expressly will and declare that my Trustees shall in their absolute discretion fix the value of my estate or any part thereof for the purpose of making any such division, setting aside or payment and the decision of my Trustees shall be final and binding upon all persons concerned, notwithstanding one or more of my Trustees may be beneficially interested in the property appropriated or partitioned. It is my desire that in exercising this power, my Trustees shall, with proper advice, consider the effect of tax on capital gains, in selecting assets to be distributed or allocated rather than sold so as not to attract tax unnecessarily or at an earlier time than required.

(d) To Renew Debt Obligations: To renew from time to time any bills, notes, guarantees or other securities or contracts evidencing any liability of mine as endorser, guarantor, surety or otherwise and for that purpose to enter into new bills, notes, or other securities or contracts for and on behalf of my estate, my intention being to give to my Trustees sufficient authority to enable them to assist in the gradual liquidation of the liabilities which I may be under in order that the companies or persons for whom I may be liable may not be unduly embarrassed.

(e) To Exercise Options: To exercise any options to which I may be entitled, at such time or times as my Trustees consider advisable, or to refrain from exercising any such option and allow the same to lapse, or to sell or surrender any such option for such consideration as my Trustees consider advisable, and my Trustees shall not be held accountable for any loss that may be suffered by my estate or any beneficiary thereof as a result of their failure to exercise any option or the surrender thereof, or the exercise of any such option at a particular time.

(f) To Settle Claims: Without the consent of any beneficiary under this my Will to compromise, settle and waive any claim or claims at any time due to or by my estate.

(g) To Purchase or Retain Real Property: To purchase or retain as an investment of my estate, real estate for the purpose of residence of any income beneficiary of this my Will, as an alternative to investing for income for such beneficiary, and again as an investment to pay off any mortgage on such real estate, or to make improvements or to make repairs necessary to preserve its value.

(h) To Delegate to Trust Company: In addition to the power of delegation authorized by law, to delegate any powers, duties or discretions to any trust company or other proper person, but without thereby avoiding continuing legal

responsibility for the proper administration of my estate; and with the further power from time to time to revoke any such delegation in whole or in part and, if so decided, to substitute another trust company.

(i) To Retain Professionals: From time to time to employ and pay for such professional, expert, specialized or other assistance (such as the services of any accountant, appraiser, agent, solicitor or any other professional advisor) as my Trustees may deem requisite in the discharge of their duties as Trustees, with power to act or not to act, in their absolute discretion, on any opinion, advice or information so obtained. My Trustees shall not be responsible for any loss, depreciation or damage occasioned by their action or non-action, in accordance therewith.

(j) To Collapse Trust Not Advantageous to Beneficiary: Notwithstanding anything else contained in this my Will or any Codicil hereto, if my Trustees are holding a share of my estate in trust for a beneficiary other than my children and my Trustees in their absolute discretion deem that the continuation of the trust is not advantageous to such beneficiary, I authorize my Trustees to pay or transfer the remainder of such share to such beneficiary, or to pay or transfer such share in trust on the same terms as herein provided for my Trustees to the parent, custodian, legal guardian or person standing in loco parentis to such beneficiary, or to such other person or institution for the benefit of such beneficiary, as my Trustees in their absolute discretion consider advisable. The payee's receipt shall be a sufficient discharge to my Trustees, who shall not be required to see to or account for the subsequent disposition thereof.

(k) Power to Deal As If I was Alive: In addition to the foregoing authorities, it is my intention that my Trustees shall have power and authority to deal as fully and effectively with the interest of my estate in any asset owned by me or

subsequently by my estate, or any trust thereof as I could have were I living, including the power and authority to sell any asset or assets privately or otherwise, to any beneficiary hereunder without requiring the approval of others of them.

(l) To Make Tax Elections: I FURTHER GIVE to my Trustees, in addition to all other powers contained in this, my Will, power to make all such elections, allocations, designations and distributions as they shall deem in their absolute discretion to be in the best interests of my Estate as a whole and specifically, any elections, allocations, designations and distributions as may be necessary under the *Income Tax Act* (Canada) and the provisions thereof in force from time to time. Where any specific funds, shares or residue are created under my said Will, my Trustees shall have the absolute power of determination as to the specific assets which shall form such fund, share or residue, as the case may be. I specifically exonerate my Trustees from any responsibility with respect to any such elections, allocations, designations and distributions which may result in liability to my Estate or to any beneficiary thereof if they act *bona fide* in the exercise of such power.

(m) To Purchase Estate Assets in Personal Capacity: I AUTHORIZE AND EMPOWER any or all of my Trustees to purchase in their personal capacities any of the assets of my estate at a price agreed upon by all *sui juris* beneficiaries, and if no agreement can be reached, at a price approved by the Court.

(n) To Gradually Liquidate My Liabilities: NOTWITHSTANDING any direction to my Trustees to pay all my just debts, I AUTHORIZE AND EMPOWER my Trustees to make arrangements for the gradual liquidation of any liabilities owing by me at the time of my death, including, without limiting the generality thereof, claims against my Estate arising before or after my death under the *Family Law Act*, R.S.O. 1990, c. F.3, and amendments thereto, and to compromise, settle, waive or pay any

claim at any time owing by my Estate, or which my Estate may have against others, for such consideration or no consideration, and upon such terms and conditions as my Trustees may deem advisable, and to refer to arbitration all such claims that my Trustees deem same advisable and I HEREBY specifically exonerate my Trustees in connection with any such settlements if they act *bona fide*.

(o) To Distribute in Kind: My Trustees may divide, distribute or allocate any asset of my estate in kind and at the valuation to be determined by my Trustees in their absolute discretion. In determining the valuation, my Trustees may consider future expectations for the asset as my Trustees in their absolute discretion consider appropriate, including any tax liability or credit. Any decision made by my Trustees in this regard shall be binding on all persons concerned.

(p) Trust Too Small: If, at any time, my Trustee holds any trust, which, in the sole and absolute discretion of my Trustee is of a small size such that it is inefficient or not in the best interest of the beneficiary or beneficiaries of that trust to continue to hold that trust, my Trustee may, at its unfettered discretion, terminate that trust and pay the amount of such trust then remaining to the beneficiaries or beneficiaries in accordance with their respective interests.

(q) Loans to beneficiaries: Except during the lifetime of my spouse, my Estate Trustees may lend money or other assets of my estate, or guarantee or continue any existing guarantees for loans, to any beneficiary of my Will, or any company owned or controlled by my estate or by any beneficiary or in which my estate or beneficiary may have an interest, for such length of time and upon such terms and at such rate of interest or without interest, and with such security or without security, all as my Estate Trustees in the exercise of an absolute discretion consider appropriate.

(r) To Act as Prudent Person: Until the final distribution of my estate and until the trusts set out in this Will have been fully performed, my Trustees have the power to perform, without court authorization, every act which a prudent person would perform for the purposes of the trusts under my Will.

(s) To Do Supplementary or Ancillary Acts: My Trustees may do all supplementary or ancillary acts or things and execute all instruments to enable them to carry out the intent and purpose of the powers here set out.

14. Investment in Corporation: If, at any time, my Trustees hold in my Estate any investment in or in connection with any company or corporation, I AUTHORIZE my Trustees to join in or take any action, or to exercise any rights, powers and privileges which, at any time may exist or arise in connection with it to the same extent and as fully as I could if I were alive and the sole owner of the investment. I also authorize my Trustees to retain as an investment of my Estate for such length of time as in their discretion they deem advisable, any assets or other interest whatsoever acquired by my Trustees through the exercise of the powers hereinbefore given to my Trustees.

15. Continue to Carry on Business: Without in any way restricting the general power and discretion given to my Trustees and to the extent my Trustees are lawfully entitled to do so, I HEREBY AUTHORIZE Trustees to continue and carry on any business which I may own or control or which I may be interested in at the time of my death, either alone or in partnership with any person or persons, for such length of time as in their uncontrolled discretion they consider to be in the best interests of my Estate, and I GIVE to my Trustees power to do all things necessary or advisable for the carrying on of any such business and, in particular, but without limiting the generality of the foregoing, my Trustees shall have the following powers, namely:-

(a) to change the objects of such business or corporation;

(b) to continue to employ therein, or withdraw therefrom any capital which may be employed therein at my death, or advance, with or without taking security, any additional capital which they may deem desirable for effectually carrying on such business;

(c) to arrange and agree to the continuation of employment or to hiring of any person or persons therein (including any one or more of my Trustees) at such salary or remuneration as they shall think proper, and to such extension or curtailment of business thereof or the adoption of a new line of business;

(d) to form or join in forming a limited company for the purpose of taking over or purchasing the whole or any part or parts of such business or may sell the business at such price and such terms and conditions as they may determine. In consideration for any such transaction, my Trustees may accept all or any of the following: cash, bonds, notes, preference or common shares of any company, whether or not such company is the company taking over or purchasing, as they may think fit, and any bonds, notes, preference or common shares so received will be an authorized investment under this, my Will.

16. Trustee Compensation: I DIRECT that my Trustees shall be entitled to the usual compensation and I FURTHER DIRECT that such usual compensation shall be in addition to every gift and benefit given by me by this, my Will, or by any Codicil thereto to my Trustees.

17. Alternative Dispute Resolution: Any difference of opinion that may arise during the administration of my estate should be resolved as early as possible and with a minimum of formality through the mediation process. I have every confidence this wish will be honoured.

18. Governing Law: My Will shall be governed by and construed in accordance with the laws of **Canada [or a Province or Territory – depending on your lawyer's advice).**

IN WITNESS WHEREOF I have signed my name to this my Will written on this and **insert number of preceding pages]** preceding pages of paper, the day and year first above written.

Signed in the presence of	)	
______________________________	)	
(Signature of Witness above)	)	[Testator signs here – usual signature]
______________________________	)	______________________________
Address of Witness	)	**[INSERT FULL LEGAL NAME OF TESTATOR]**
______________________________	)	
(Signature of Witness above)	)	
______________________________	)	
Address of Witness	)	

SAMPLE WILL 5

SIMPLE WILL ALL TO SPOUSE WHO IS A MEMBER OF THE SAME FIRST NATION WITH GIFT OVER TO ADULT CHILDREN

LAST WILL OF [**INSERT FULL LEGAL NAME OF TESTATOR]**

This is the last will of me, **[INSERT FULL LEGAL NAME OF TESTATOR]** of **[INSERT ADDRESS OF TESTATOR]**, being ordinarily resident on **[INSERT NAME OF FIRST NATION OR TREATY LANDS]** First Nation, in the Province of [INSERT PROVINCE OR TERRITORY], Canada , made this () day of (), 202().

Revocation

1. (a) Revocation of Prior Wills and Codicils: I REVOKE all wills and codicils previously made by me.

(b) No Change to Designations Made Before This Will: This Will does not alter any designations of a beneficiary I may have made prior to the date of this Will, and other than by will, under any policy of life insurance, pension, registered plan, annuity, or other plan or policy under which I am competent to designate a beneficiary other than by will.

NOTE: If the Testator has an insurance policy, pension, RRSP or RRIF for example, this paragraph makes it clear that the Testator does not intend to revoke any beneficiary designation made before the date of this Will. The designation can, however, be changed with the Holder (Insurance company or Bank for example) AFTER the date of the Will.

Executors and Trustees

2. (a) Appointment of Executor and Trustee: I appoint my spouse (or common-law partner – delete one), **[INSERT FULL LEGAL NAME OF SPOUSE]** (hereinafter called my "Spouse") of **[insert address of spouse]** to be the Executor of my Estate and Trustee of my Will.

NOTE: The "two spouses" problem. If the Testator is married, but no longer cohabiting with that person and is at death in a common-law relationship with a new partner, this can create significant issues for the estate. Under the *Family Homes on Reserves and Matrimonial Interests or Rights Act,* S.C. 2013, c.20, a spouse to whom the Testator is still married (but not cohabiting with) may make a claim under *Section 34* for an amount equal to one half of the value of an "interest or right" in or to the Family Home and potentially any other interest or right in other Reserve Lands). This could have significant consequences for the common-law partner. *Section 38* of that Act directs that where there are two spouses, the executor must pay the survivor who was the common-law partner first before paying the survivor who was the spouse, but nothing prevents a married spouse from contesting that right and bringing a court application to contest the distribution under the estate – especially if the Testator had minor children with the married spouse. It is strongly recommended that a Testator finalize a divorce from a married spouse during his or her lifetime.

If my said Spouse dies before me, or at any time is unable or unwilling to act or to continue to act as Executor of my Will and Trustee of my Estate before all the

trusts in my Will have been fully performed, I appoint my son, **[INSERT FULL LEGAL NAME OF SON]** currently of **[insert current address of son]**, my daughter, **[INSERT FULL LEGAL NAME OF DAUGHTER1]** currently of **[insert current address of daughter1]** and my daughter, **[INSERT FULL LEGAL NAME OF DAUGHTER2]** currently of **[insert current address of daughter2]** to be the Executors of my Will and Trustees of my Estate in place of my said Spouse. The expression "my Trustees" used throughout my Will includes, where the context permits, the executor or executors and trustee or trustees for the time being of my Will, whether original, additional, or substituted.

NOTE: It is very important to actually name a child and properly identify that child, rather than just say "my son" or "my daughter". This makes it clear whom you are talking about. Inserting the current address of the Trustee just makes it easier to find them.

(b) Conflict Resolution: If any difference of opinion exists at any time among my Trustees in relation to the commission or omission of any act in the execution of the trusts in my Will, the opinion of my Trustees having the majority of votes prevails, notwithstanding that one or more of my Trustees may be personally interested or concerned in the matter in dispute or question.

NOTE: It is best to keep the number of Executors and Trustees to a minimum. You do not have to appoint your children. You can appoint anyone whom you trust and you know will be able to administer your estate in accordance with your wishes set out in your Will. If you have someone you trust, then appoint that person alone. If you feel more comfortable having more than one Executor and Trustee, then don't appoint them together if they can never

agree on anything or do not get along. Be pragmatic when considering the relationships between your children. It is better to choose the most responsible and reasonable child to act alone with another child as an alternate if the original child cannot act (they have died or are unable to act due to illness or incapacity). If you wish to appoint more than one Executor and Trustee, it is better to have an odd number and then provide that in the event of disagreement, majority rules. If you have a business, you can consider appointing a separate Estate Trustee to manage and distribute your business assets, if you feel your family members do not possess the necessary skills.

Residue to Spouse

3. My Trustees shall pay and transfer the residue of my estate to my Spouse, **[INSERT FULL LEGAL NAME OF SPOUSE]** if she is living on the thirtieth day following my death.

NOTE: Two Spouses: Again, it is strongly advised that all matters be settled in writing or by Court Order with any spouse the Testator is no longer living with prior to death. Otherwise the common-law partner will have to deal with a potential claim from the Spouse, which can subject the Spouse to unnecessary stress, both financially and emotionally.

NOTE: The Spouse takes the estate subject to the payment of all the Testator's funeral, testamentary and other debts.

Alternate Bequest of Residue

4. If my Spouse **[INSERT FULL LEGAL NAME OF SPOUSE]** dies before me or is not living on the thirtieth (30th) day following my death, then on the death of the survivor of my Spouse and me (the "Division Date"), I GIVE, DEVISE, BEQUEATH AND APPOINT my Estate to my Trustees upon the following trusts, namely:-

(a) Letter of Wishes - Personal and Household Articles: I wish to advise my Trustees that I have prepared a letter of wishes (the "Letter of Wishes"), that I have left among my personal papers, regarding the division and disposition of articles of personal and household use and ornament owned by me on the date of my death (collectively, the "Personal and Household Articles"). I wish to advise further that it is my strong wish and desire that my Trustees, together with those of my children who are living on the date of my death, give effect to the terms of the Letter of Wishes, although I recognize that there is no legal obligation upon them to do so, regarding the division and disposition of the Personal and Household Articles listed on the Letter of Wishes. If I do not leave the Letter of Wishes or in the event the Letter of Wishes I have left does not deal with the division and disposition of all of the Personal and Household Articles, I direct that the Personal and Household Articles that have not been divided and disposed of pursuant to the Letter of Wishes shall be divided among those of my children who are living on the date of my death, in any manner as they may agree upon, or if they do not agree, then in any manner as a majority of my Trustees in an absolute discretion consider equitable.

NOTE: Who gets what of the Testator's personal items is one of the most contested parts of administering an estate. Testators sometimes tell beneficiaries (usually family) one thing and then do another (or forget) when preparing a written Memorandum. Personal Articles often have more sentimental value than monetary value. Family treasures which are passed through generations are important and the Testator should talk to their children when deciding what to do with these items. Even better, if you are an elder and you are not using something – give it away when you are alive. Don't set your family up for a fight or disappointment. Don't wait until you are gone. And talk to your children. Grief heightens emotions to the point where beneficiaries can be unreasonable and bonds can be broken forever over an item that the Testator would never have imagined would cause a dispute. It is also more meaningful to make a gift in person, while you are alive rather than have it pass in a Will. Lawyers see families stop speaking to each other over some personal items all of the time.

The first sample is legally binding on the Estate Trustees. So the list must be in existence before the Will is made; the Will must refer to it as an existing document and the document must be described sufficiently that the Trustee can identify it. This can be inconvenient, particularly because Testator's often change their minds and if you change the Memorandum you must amend your Will.

The second sample is a non-binding expression of wishes, but if it is typed by the Testator or is in the Testator's handwriting – it can have significant moral suasion on the beneficiaries. The benefit of the second sample is that the it can be changed as many times and whenever the Testator wants without having to make changes to the Will.

However, if the Testator makes gifts of the special items before death, a Statement of Wishes or Memorandum may not even be needed.

(b) Gift of Remaining Personal Articles: My Trustees shall divide the remaining articles of personal, domestic or household or garden use or ornament that I shall own at my death and all regalia, art, jewelry, boats, hunting equipment,

automobiles and accessories thereto (collectively called "the Personal Articles") as equally as possible among those of my children who are living on the 30th day following my death, in any manner that my children may agree upon, or if they do not agree, then in any manner that my Trustees in their absolution discretion consider equitable.

Power of Sale and Retention

5. (a) Power to Sell or Retain: I authorize my Trustees to use their unfettered discretion in the realization of my estate.

(b) To Pay debts: My Trustees shall pay my just debts, funeral and testamentary expenses.

(c) Residue: If my Spouse is not living on the 30th day following my death or upon the Division Date, as the case may be, my Trustee shall divide the residue of my estate equally among my three children, namely my son, **[INSERT FULL LEGAL NAME OF CHILD1],** my daughter, **[INSERT FULL LEGAL NAME OF CHILD2]** and my daughter, **[INSERT FULL LEGAL NAME OF CHILD3]** or to the survivor or survivors of them.

Payments to Persons Under 21 Years or Disabled Beneficiaries

6. SUBJECT AS IS SPECIFICALLY PROVIDED HEREIN, if any person entitled under the provisions of this Will to receive any share of income or capital of the my estate while such person is under the age of twenty-one (21) years or while under any other disability as defined by the Ontario *Disability Support Program Act 1997*, c.25 Sch B, or any succeeding legislation **[replace with appropriate Act if beneficiary is receiving disability support from a Province or Territory]** as the case may be, the Trustees shall keep such share of income or capital invested until, for a beneficiary

that is under the age of twenty-one (21) years, such Beneficiary attains the age of twenty-one (21) years, or for a beneficiary under a disability, until such beneficiary ceases to be disabled as defined by the Ontario *Disability Support Program Act 1997*, c.25, Sch B, or any succeeding legislation as the case may be; provided that the Trustees may in the exercise of an absolute discretion pay such income or any part thereof together with the whole or any part of the capital thereof to a parent, or to a person entitled to the custody of such person, or to the guardian of the property of such person or to any other person standing in *loco parentis* to such Beneficiary, whose receipt shall be a good acquittance to the Trustees or the Trustees may apply the same as they, in the exercise of an absolute discretion, think fit to or for the benefit of such Beneficiary or further they may pay any part of such income or capital directly to such Beneficiary notwithstanding that he or she is under the age of twenty-one (21) years if in their discretion they consider it advisable so to do and the *de facto* payment of such income or capital to such Beneficiary shall be a complete release to the Trustees and in addition, the Trustees shall have the power to accumulate and add to the capital of such Beneficiary's share any income not so paid out.

Bequest Not to Form Part of Beneficiary's Net Family Property:

7. Any benefit, whether as to income or capital, or income from capital to which any person shall become entitled in accordance with the provisions of this Will or any Codicil thereto, shall not fall into any community of property as amended from time to time, any benefit, whether as to income or capital, or income from capital to which any person shall become entitled in accordance with the provisions of this my Will or any Codicil thereto, shall not fall into any community of property which may exist between any such person and his or her spouse and shall not form part of her or his net

family property for any purpose or purposes of the the *Family Homes on Reserves and Matrimonial Interests or Rights Act*, S.C. 2013. C. 20 as amended from time to time or **[insert reference to applicable Family Law Act *off reserve* for the Province or Territory in which the beneficiary lives]** , but shall be paid by my Trustees to such person on the condition that the same shall remain the separate property of such person, free from the control of her or his spouse. The separate Release or Receipt of such person shall be a discharge to my Trustees in respect of any such payment.

NOTE: This clause makes it clear that the Testator's intention is that a gift made to a child under this Will is to that child alone and not to the child and his or her spouse. Most Provinces and Territories exclude inheritances from "family property" that is divided when a couple separates, but these types of clauses can be helpful when a child is trying to prove a particular gift was made only to the child. Not the child and her spouse.

8. Alternative Dispute Resolution: Any difference of opinion that may arise during the administration of my estate should be resolved as early as possible and with a minimum of formality through the mediation process. I have every confidence this wish will be honoured.

9. Governing Law: My Will shall be governed by and construed in accordance with the laws of **Canada and [insert name of the Province or Territory in which your First Nation is located].**

[SIGNATURE PAGE NEXT PAGE]

IN WITNESS WHEREOF I have signed my name to this my Will written on this and **insert number of preceding pages]** preceding pages of paper, the day and year first above written.

Signed in the presence of)
)
)
)
)
)
_____)
)
(Signature of Witness above)) [Testator signs here – usual signature]
)
)
)
_____) _____
)
Address of Witness) **[INSERT FULL LEGAL NAME OF TESTATOR]**
)
)
)
)
_____)
)
(Signature of Witness above))
)
)
)
)
_____)
)
Address of Witness)
)
)
)
)

ENDNOTES WITH REFERENCES

[i] Powers of Attorney for Property

Yukon:

https://yukon.ca/en/legal-and-social-supports/wills-and-estates/give-someone-ability-make-decisions-you

North West Territories:

https://www.justice.gov.nt.ca/en/power-of-attorney/

Nunavut:

file:///C:/Users/Owner/Downloads/ConsolidatedPowerAttorney%20(1).pdf

British Columbia:

https://www2.gov.bc.ca/assets/gov/people/seniors/financial-legal-matters/pdf/powersofattorney_bc_web_final.pdf

https://www.canada.ca/content/dam/esdc-edsc/documents/corporate/seniors/forum/brochure_attorney.pdf

Alberta:

https://www.alberta.ca/enduring-power-of-attorney.aspx

Saskatchewan:

https://www.saskatchewan.ca/residents/justice-crime-and-the-law/power-of-attorney-guardianship-and-trusts/powers-of-attorney-for-adults

Manitoba:

https://www.gov.mb.ca/publictrustee/services/powers_of_attorney.html

Ontario:

https://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/livingwillqa.pdf

Quebec:

https://www.curateur.gouv.qc.ca/cura/en/outils/publications/mon_mandat.html

New Brunswick:

https://www2.gnb.ca/content/gnb/en/news/news_release.2019.11.0602.html

Nova Scotia:

https://novascotia.ca/just/pda/_docs/PersonalDirective_Booklet.pdf

Prince Edward Island:

https://www.princeedwardisland.ca/sites/default/files/legislation/P-16-Powers%20Of%20Attorney%20Act.pdf

Newfoundland and Labrador:

https://court.nl.ca/supreme/general/seniors_and_law.pdf