THE USE OF TRUST IN WILLS

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I. INTRODUCTION

In drafting wills, the primary objective is to give effect to the testamentary intentions of one's client. Coupled with this, of course, are the concerns with respect to the testator's legal obligations to dependents and the potential income tax repercussions. Addressing these matters may require use of the ever-flexible legal tool known as the trust. In the following, some of the various applications of the testamentary trust will be discussed.

II. THE TRUST DEFINED

Initially, however, it is useful to briefly review the nature of trusts and the requirements for the valid creation thereof. One of the best known definitions of trust is found in Underhill's raw of Trusts and Trustees:

"""A trust is an equitable obligation", binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property), for the benefit of persons (who are called the beneficiaries or cestuis que trust), of whom he may himself be one, and anyone of whom may enforce the obligation."

From this definition we note that the trust is a creature of the English judicial system and, more particularly, the court of Chancery with its jurisdiction in equity. The foremost characteristic of the trust is that it creates a fiduciary relationship between the Trustee and the beneficiary. The obligation on the Trustee has been described by Waters as follows:

"...the trustee may indeed have two hats, that of trustee and of beneficiary, but he is bound to wear only the hat of trustee when he carries out any duty of the trustee. His management must be scrupulously objective; he must act only in the best interests of all the beneficiaries, and he can be held to account if his conduct falls short of that standard."

A breach of trust occurs when "any act or neglect on the part of the trustee is not authorized or excused by the terms of the trust instrument or by law." In Saskatchewan, the general legislation governing trustees is The Trustee Act, R.S.C. 1948, c. T-23. Section 8 of that Act recognizes the importance of the trust document in delineating the powers and obligations of the trustee. It reads as follows:

"8.- (1) The power conferred by this Act relating to trustee investment are in addition to the powers conferred by the instrument, if any, creating the trust.

(2) Nothing in this Act relating to trustee investments authorizes a trustee to do anything that he is in express terms forbidden to do or to omit to do anything that he is in express terms directed to do by the instrument creating the trust."

Trusts may be classified in various ways. They may be private, when the objects or beneficiaries of the trust are specific and ascertainable persons; or they may be public or charitable, when the objective is for the benefit of the public, such as in the advancement of education. Trusts may also be categorized as being express, implied, resulting or constructive. The latter three are often not clearly distinguished in law. For our purposes, suffice is to say that the settlor's intentions are presumed or imposed by the courts in these instances.


3 Underhill, supra, note 1
The **express trust** is one in which the settlor (the person creating the trust) advises of his intentions either orally or in the writing of a trust deed or will. It is the **drafting** of the express **testamentary** trust with which we are concerned today.

### III. **THE THREE CERTAINTIES**

From the words of Lord Langdale in 1840, in the case of **Knight v. Knight** (1840), 3 Beav. 148, 49 E.R. 58, the three certainties have developed as essential elements for the valid declaration of a trust. They are as follows:

- **A. Certainty** of intention;
- **B. Certainty** of subject-matter (property); and
- **C. Certainty** of objects (beneficiaries).

While termed "certainties", at least the latter two of these elements have caused the courts considerable consternation in determining what may be deemed as sufficiently clear and **unambiguous**. Furthermore, same authors have suggested in connection with the first certainty, that the courts have been "over-confident of what the settlor's intention was...4 The moral for practitioners is that the **testamentary trust** contained in our clients' wills must be drafted carefully and clearly.

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4 see, for example, Williams, "The Three certainties" (1940), 4 Mod. L. Rev. 20
A. **CERTAINTY OF INTENTION**

The words used to establish a trust must demonstrate the intention of the settlor/testator to make a gift by way of trust. It must be clear that he is not intending an absolute gift, but that the transferee is to receive the property for objects which the testator describes. Generally the phrases "in trust" or "as trustee for" will reveal this intention. However, Canadian courts have indicated that neither the presence nor absence of such phrases is conclusive. [see for example Re Rispin, [1912] 2 D.L.R. 644; affirmed 46 S.C.R. 649 and Re Garden Estate [1931] 2 W.W.R. 849, 4 D.L.R. 791 (C.A.).]

Much litigation has arisen surrounding the question of whether a testator intended to create a trust or merely to impose his wishes or desires in the form of a moral obligation upon the recipient of the gift. Prior to the latter half of the 19th century the courts went to great lengths to find the intention to create a trust in such words as "expectation", "fervent wish", "desire", "firm belief", or "purpose" when used in conjunction with the testator's desire for a certain occurrence or outcome. His trend shifted in the late 1900s and the courts became more inclined to find that an absolute gift had been given. Furthermore the courts emphasized that one cannot derogate from an absolute gift by grafting a trust onto it.

To illustrate, let us consider an example of poor drafting wherein the will
may provide:

"$60,000.00 to my sister, catherine, $20,000.00 of that sum to be held in trust [or "I direct to be held"] for her children equally and absolutely on catherine's death."

Is the testator's intention that catherine take $40,000.00 absolutely and hold the remaining $20,000.00 in trust during her lifetime with the remainder to be passed to her children? If so, it would have been better to avoid the risk of having the trust held void by clearly indicating an absolute gift of $40,000.00 to catherine and a separate trust fund of $20,000.00 for which catherine was appointed as trustee for her children.

B. CERTAINTY OF SUBJECT-MATTER (PROPERTY)

The second certainty requires that both the property which is to be the subject matter of the trust and the shares in such property which the beneficiaries are each to take be clearly identified. This will generally involve a clear description of the property or the provision of a formula or method for identifying the property. The use of the formula more frequently occurs when determining the quantum of each beneficiary's respective interest; however it can be used in describing the whole trust property as was the case in Crawford v. Mound Grove Cemetery Association, 218 Ill. 399, 75 N.E. 998 at 1002 (1905), (S. ct. Ill.). There the testator left all his property to trustees requiring them to hold "a sufficient sum of money to produce $50.00 per annum" for the benefit of a hospital. While the Court recognized that it might be difficult to determine this sum due to varying interest rates from year to year, the
size of the annuity was clear and the capital required could be "approximately and easily ascertained".

C. CERTAINTY OF OBJECTS (BENEFICIARIES)

A trust may be designed to benefit persons or group of persons or it may be designed in favour of a purpose or objective which the settlor desires be fulfilled.

When considering a trust for the benefit of persons - be they human or incorporated - the question is whether the persons are ascertainable. Here we must determine, in circumstances where the intended beneficiaries are referred to by a class description rather than by name, whether any particular person is a member of that class. Secondly, one must discover if all the members of that particular class are known. In addressing these questions the Courts have noted that the difficulty in finding members of a class is irrelevant.

A number of class descriptions have been considered by the Courts. Terms such as "children", "grandchildren", "cousins", "sibbling's", "nephews" and "nieces" and other such relational terms have satisfied the test of certainty. However, who exactly are one's "family", "friends" or "relatives" is not certain.

When the size of the class increases as, for example, in the commercial
context, one must be very careful in drafting the objects clause of the trust to ensure the ascertainability of those persons who fall within a class description. To demonstrate the problems which can arise in this area the following cases should be examined:


Where a testator seeks by the terms of the trust he creates to have certain purposes fulfilled, the trust may be viewed as valid if the purpose can be classified as charitable. Otherwise, so-called "purpose trusts" may be void. As noted by Waters:

"'This is an age-old concession in recognition and encouragement of acts of giving which are concerned to improve the welfare of society or sizeable groups within it. A further concession to charity is that the objects of the charitable trust, that is, the purpose or purposes, need not be set out with the same degree of certainty as is demanded of the objects clause of a trust for persons. It is true the Court cannot execute a purpose trust where the purpose is unascertained; but, provided the purpose whatever its range of possible activities comes within the scope of charitable activities as the law defines that term, the trust will be said to have certainty of objects. Certainty is "charitable"; the Court will order a scheme to be drawn up setting out a specific proposal for the expenditure of the trust funds if such an ambiguity within the scope of charity is found." (at page 118)

When considering the instructions of a client where a purpose trust is contemplated one must be careful to ascertain whether the purposes could be viewed in law as charitable.
IV. TRUSTS FOR CHILDREN

section 2(1)(b) of The Children's law Act S.S. 1990 c. C-8.1 defines a child as a person who is under 18 years of age and has never married. In other words, a child is someone who is under the age of legal competence and is therefore is not legally capable of owning property. Thus a child who is a beneficiary under the terms of a will will not be entitled to receive his or her inheritance absolutely. Either the Public Trustee or the guardian of the property of a child, constituted or appointed pursuant to section 30 of The Children's law Act, will manage the property for the child. This scheme is set forth in sections 30(1), 32 and 34 of The Children's law Act, supra, and section 15 of The Public Trustee Act S.S. 1984 c. P-43.1, as amended, which are attached hereto as Appendix "A".

The lack of a child's legal capacity to hold property makes the use of the trust nearly essential in cases where the intended beneficiary is a young child. Here consideration must be given to the question of whether the executor will be the trustee of the property for the child or whether a separate trustee will be appointed. On this point, consideration must be given to Section 33 of The Children's law Act which provides as follows:

"33(1) Where a person appoints a trustee of property that the person has devised, bequeathed or given to a child, the trustee is entitled to receive and hold that property for the child in accordance with the settlor's instructions, subject to subsection (2)."

(2) Where a trustee other than an executor is appointed to hold property devised or bequeathed to a child in a will, the public
trustee may apply to the court for an order requiring the trustee to furnish security, and on an application, section 34 applies, with any necessary modification."

A second consideration is what power the trustee has to encroach upon the capital of the trust. In the care of infants such a power is desirable in order to ensure their "health, maintenance and education".

Many testators are of the view that 18 years is still too young an age for an individual to receive an inheritance, particularly if it is a substantial one. They may also wish their executors to retain investment powers due to their specific money management skills. In such circumstances, the trust provisions must be carefully drafted so as to address the rule in saunders v. Vautier (1841), 4 Bea. 115, 49 E.R. 282 per lord Iangdale M.R.; affirmed Cr. and Ph. 240, 41 E.R. 482, per: lord Cottenham L.C.

"The operation of the rule in saunders and Vautier as is briefly described by Waters as follows:

""The narrow statement of the rule, is this:

Where there is an absolute vested gift made payable at a future event, with the direction to accumulate the income in the mean time and pay it with the principal, the Court will not enforce the trust for accumulation, in which no person has any interest but the legatee. For instance, T leaves a legacy of $10,000.00 to his grandchild, A, with the direction that the trustees may pay for maintenance out of the income, accumulate the remainder, and pay capital and accumulations to A when he became 25 years of age. The result of the rule just given is that the donee, if he is of age and mentally capacitated, may call for the capital and any accumulated income, regardless of the settlor's directions to accumulate until the occurrence of an event which has not yet taken place. In the example involving T and his grandchild, if T dies when A is 16 years old, A will came of age at 18 and then be
able to stop the accumulations of surplus income by calling upon the trustees to transfer to him at 18 years of age both capital and the accumulations to date." (at page 813)

If the testator truly desires that the beneficiary not obtain the capital of the trust at age 18, a Saunders and vautier termination of the trust must be avoided. !The most effective method for doing so is to create a gift-over effective upon the death of the beneficiary, if such occurs prior to him reaching the designated age. In the example quoted from Waters above, one could simply provide that if A did not reach the age of 25 years then the capital and accumulations would be given to B. !This ensures that at the time of the testator's death A has not acquired the whole beneficial interest as B has a contingent interest. An example of this type of revision is found in Appendix "B".

V. SPousAL TRUST

Depending upon the nature of testator's assets, the investment skills of the testator's spouse and the nature of the relationship between the testator and spouse, a spousal trust may be considered. "The Income Tax Act s.c. 1970-71-72, c. 63, as amended, deems the deceased to have disposed of all his capital property for proceeds determined in accordance with the provisions in subsections 70(5), (5) (i) and (5) (ii). !The result may involve capital gains or capital losses which must be considered in computing the deceased's terminal return. One exception to the deemed disposition rule is the transfer to a spousal trust in strict compliance with the provisions of section 70(6), the first portion of which reads as
follows:

"70(6) Where any property of a taxpayer who was resident in Canada immediately before his death that is a property to which paragraphs (5) (a) and (c), or paragraphs 5(b) and (d), as the case may be, would otherwise apply has, on or after his death and as a consequence thereof been transferred or distributed to:

(a) his spouse who was resident in Canada immediately before the taxpayer's death, or

(b) a trust, created by the taxpayer's will, that was resident in Canada immediately after the time the property vested indefeasibly in the trust and under which

(i) his spouse is entitled to receive all of the income of the trust that arises before the spouse's death; and

(ii) no person except the spouse may, before the spouse's death, receive or otherwise obtain the use of any of the income or capital of the trust,

if it can be shown, within the period ending 36 months after the death of the taxpayer or, where written application therefor has been made to the Minister by the taxpayer's legal representative within that period, within such longer period as the Minister considers reasonable in the circumstances, that the property has become vested, indefeasibly in the spouse or trust, as the case may be, the following rules apply:

(c) paragraphs (5) (a) to (d) are not applicable to the property;

(d) subject to paragraph (d.1), the taxpayer shall be deemed to have disposed of the property immediately before the taxpayer's death and to have received proceeds of disposition therefor equal to:

(i) where the property was depreciable property of the taxpayer of a prescribed class, that proportion of the undepreciated capital cost to him immediately before his death of all of the depreciable property of the taxpayer of that class that the fair market value at that time of the property is of the fair market value at that time of all of the depreciable property of that class, and

(ii) in any other case, the adjusted cost base to the taxpayer of the property immediately before his death,
and the spouse or trust, as the case may be, shall be deemed to have acquired the property for an amount equal to those proceeds; "..." [emphasis added]

A spousal trust may also be considered to have been created by the taxpayer's will pursuant to section 70(6.1) where beneficiaries of the trust disclaim any interests that would otherwise disqualify the trust, or where the spousal trust is created by an order obtained under The Dependant's Relief Act R.S.S. 1978 c. 0-25, as amended.

If the spousal trust set forth in the will does not meet the qualifications set forth in section 70(6) it is referred to as a "tainted spousal trust". One cause of the spousal trust being tainted is a direction in the will to pay out of the trust various debts, obligations and death duties, other than those to which subsection (108) (iv) of the Income Tax Act applies.

When considering the use of a spousal trust reference should be made to both the Income Tax Act and Interpretation Bulletins IT-305 R3 dated June 29, 1987, IT-449 R dated September 25, 1987 and IT-207 R dated March 26, 1979.

IV. TRUST FOR THE MENTALLY DISABLED

In recent years there have been significant advancements in obstetrical and neonatal care. Thus, infants who are severely neurologically compromised at, or prior to delivery are now surviving, unlike their counterparts of years past. Developments in rehabilitation medicine and surgical
techniques now permit such disabled infants to live longer and fuller lives.

Along with the progress in medical technology has been the increased availability of accommodation, education and vocational programs and facilities for those with special needs. Thus, mentally handicapped adults now have many more opportunities available to them.

The question then arises as to who pays for these opportunities. The government through social assistance plans? The parents of the disabled person? While the parents are alive they can seek, on behalf of their child, the support of government and organized charities when they cannot afford the required programs, equipment or facilities themselves. Yet what happens upon their death? For many parents of mentally disabled children, this aspect of estate planning is particularly troublesome.

Most people do not have sufficient assets in their estates to provide enough capital to ensure that reasonable care will be provided for the remainder of the lifetime of the handicapped child, particularly if the disability is severe. They recognize that reliance upon social assistance programs is necessary for primary maintenance of the child. Parents then seek to provide the additional funds to provide the child with "bonuses", such as a piece of special equipment to aid in communication or mobility, the cost of which is not covered by social assistance, or "luxuries" such as a stereo or television to make life more comfortable. The problem
arises, however, in ensuring that funding provided by the parents' estates for these non-essential items is not applied to defray the costs of ordinary maintenance and care of the child.

Social assistance legislation and regulations vary from province to province. The wording and effect of the applicable provisions must be carefully considered as often there are limits on the financial resources which may be available to the disabled child if social assistance is to be maintained. Furthermore, as such provisions may be amended from time to time, the parents and any trustee appointed to act upon their death should keep abreast of the changes.

In light of these limitations, a carefully designed discretionary trust set forth in the parents' Wills is often the best method of providing for the individual needs of the child. Other, less satisfactory, alternatives are to leave a bequest directly to the mentally disabled child; to leave nothing to this child, but have an informal arrangement with the beneficiaries of the estate (who are often siblings of the disabled person) to use a portion of their inheritance to assist the disabled child; or to establish a non-discretionary trust.

The first of these options is often not feasible as the child may not have sufficient mental capacity to handle financial matters. Thus, a guardian or committee would also have to be appointed. As well, social assistance would in many instances be reduced or eliminated due to the availability of
the funds from the estate.

To leave nothing to the disabled child is likewise not a viable option. Provincial dependents' relief legislation would govern and, in the absence of an application by someone else on behalf of the child, the Public Trustee or Public Guardian would seek to have the distribution of the estate altered by Court Order. The result could again jeopardize continued social assistance.

The third option, a non-discretionary trust, bears with it a similar risk with respect to the continuation of government assistance.

Thus, a discretionary trust is recommended. Some of the considerations in the establishment of such a trust are as follows:

(a) The trust funds never vest in the mentally disabled child, and he or she has no absolute right to the funds;

(b) The income and capital of the trust is available for emergencies, special adaptive equipment and small luxuries not funded through social assistance, in the discretion of the Trustee;

(c) Upon the death of the handicapped adult, any funds remaining in the trust could be distributed to other beneficiaries, such as relatives or charitable organizations; however the Trustee should be given specific authority not to necessarily maintain any portion of the trust for such residual beneficiaries;

(d) Any applicable laws concerning accumulations (retention of earnings from trust investments) must be addressed in the trust provisions; and

(e) The trustee should be given considerable flexibility, but must also be responsible to monitor any changes in the social assistance regime.
In addition to these general features we must emphasize that the applicable legislation must be considered when establishing a discretionary trust. If a child is in Saskatchewan, one will look to the Saskatchewan Assistance Plan Regulations. However, if the mentally disabled child is located in another jurisdiction, that province's social assistance legislation and regulations should be consulted. A very useful discussion of the discretionary trust and other alternatives in planning for disabled beneficiaries is found in the C.C.H. Canadian Estate Planning & Administration Reports. Paragraph 17,030 located at page 10,029 contains a helpful precedent for setting up a discretionary trust by will.

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APPENDIX "A"

"The Children's Act:"

"30(1) Unless otherwise ordered by the court and subject to the provisions of this Act, the parents of a child are joint guardians of the property of the child with equal rights, powers and duties.

32 Unless the court orders otherwise, the guardian of the property of a child appointed or constituted pursuant to section 30:

(a) after furnishing the security ordered by the court pursuant to section 34, shall have:

(i) the care and management of the property of the child;

(ii) the right to receive any moneys due and payable to the child and give a release for them; and

(b) may appear in court and prosecute or defend any action or proceeding in which the property of the child is or may be affected.

34(1) Unless otherwise ordered, the guardian of the property of a child, including the child's parents, shall furnish security:

(a) in the form of a bond of a guarantee company;

(b) in the name of the child;

(c) in the amount; and

(d) on the terms;

that the court may approve.

(2) Where the court is of the opinion that a bond:

(a) is not required; or

(b) is not an appropriate form of security;

it may make any order it considers appropriate with respect to security.

(3) 'The security required to be furnished pursuant to this section is to be filed with the registrar.
(4) "The requirement of this section to file security does not apply to the public trustee."

The Public Trustee Act:

(15) (1) Where the public trustee has received no notice that an infant has a guardian, he shall be entitled to receive money to which an infant is entitled:

(a) as a beneficiary under a life insurance policy;

(b) as a death benefit pursuant to 'The Automobile Accident Insurance Act;

(c) as a beneficiary on an intestacy or under a will where the executor is not empowered to act as trustee of the infant's share and no other trustee is appointed in the will to receive the money;

and the public trustee may give a release for the money which shall be as binding and effectual as if the infant had executed it and been of the full age of 18 years at the time.

(2) Subject to subsection (3), the public trustee may, in his discretion, receive money to which an infant is entitled, from any source not mentioned in subsection (1).

(3) "The public trustee shall not receive money payable to an infant where the money:

(a) is wages or salary earned by an infant; or

(b) is not vested absolutely in the infant and payable upon the infant's attaining the age of majority.

(4) Where:

(a) an infant's share in an estate consists of cash or liquid securities; and

(b) the executor or administrator of the estate or a trustee appointed in the will to hold the cash or liquid securities desires to be discharged;

the public trustee, in the discretion of the public trustee, may accept the infant's share on behalf of the infant for administration during the infant's minority and release the executor, administrator or trustee in so far as the share of the infant is concerned.

(5) "The public trustee's release pursuant to subsection (4) is as binding
and effectual as if the infant had:

(a) executed it; and

(b) been of the full age of 18 years at the time."
"To hold [the trust property] in trust and keep it invested for the benefit of my daughter, Alexandra Bean on the following terms:

(a) I authorize my trustee to make such payments from the trust fund herein established as she sees fit for the health, maintenance, education and welfare of my said daughter;

(b) Upon my daughter attaining the age of 21 years and providing she attains such age, I DIRECT my trustee to transfer and deliver the balance then remaining in the said trust fund to my daughter;

(c) If my daughter fails to attain the age of 21 years then upon her death the balance remaining in the said trust fund shall be transferred to my brother, Claudius Bean, for his own use and benefit absolutely."