

## Appendix A

**Clause by Clause Summary****Will Creating Testamentary Trusts**

*Note: This clause by clause summary of a Will creating Testamentary Trusts relates to the 14 templates in the 9th Edition of the **MOORES LEGAL** Will Precedent Document Templates. The clauses numbering refers to template W1. The provisions to which the summary refers will also appear in one form or another in most Wills creating a menu of testamentary trust options for the executors.*

**PART A- GENERAL PROVISIONS**

The substantive clauses of the Will are preceded by a clause identifying the Willmaker and the date of execution of the Will.

**1. Contemplation of Marriage or Divorce**

Templates: W1 2 3 4A 4B 5A 6 7 8A 8B 9A 9B 10.

This clause allows a Willmaker to override the presumption that the Will is to be invalidated by a subsequent marriage or clauses benefiting a spouse are to be invalidated by a divorce from that spouse.

**2. Revocation**

Templates: W1 2 3 4A 4B 5A 5B 6 7 8A 8B 9A 9B 10.

The purpose of the revocation clause is to revoke any previous Wills (and any codicils that might be in existence) so that this Will sets out the full directions of the Willmaker in respect of the Willmaker's estate.

Sometimes this revocation is qualified, eg the Will is only to apply to assets located with Australia.

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Importantly, the Will does not revoke a number of other estate planning documents, notably advisory or binding death benefit nominations to trustees of superannuation funds, enduring powers of attorney (which are "lifetime" documents only), the terms of trust applying to family, hybrid and other non-fixed trusts and land and other titles specifying ownership by joint tenancy (rather than tenancy in common).

### **3. Appointment of Executors and Trustees**

Templates - long form: W1 2 3 4A 4B 5A 5B 6.

Templates - short form: W7 8A 8B 9A 9B 10.

#### ***3.1-5 Appointment of Executors***

Nominates the first and (unless the executors are a trustee company) the back-up choices of executor(s). Where the Willmaker holds, or is likely to hold, existing executorships, eg in the capacity as a partner or director in a legal or accounting firm, a separate subclause may be included to deal with those clauses.

Possible choices of executors will be include primary beneficiaries of the estate, eg the surviving spouse, other relatives prepared to take on the role, lawyers and other professional advisors and professional trustee companies. In most Australian States and Territories, in order to prove the validity of the Will by obtaining probate, the executors must be:

- One or more individuals; and/or
- A professional trustee company empowered to be an executor by Statute under the Act of the relevant State or Territory.

The choice of the key decision-making role of the executors will be determined by factors such as the:

- Circumstances of particular beneficiaries;
- Likelihood of family disputes;
- Cost of professional fees charged; and
- Need for business and investment expertise (note-executors can always be given the power to obtain professional advice or advice from family members or friends).

Trustee companies and law firms may discount their fees for preparing a Will if they can derive fees in the future (usually calculated as percentage of estate capital and income) by acting in their professional capacity as the executor of the Willmaker's estate.

#### ***3.6-7 Executors' Advisors***

These subclauses nominate the people (if any) with whom the Willmaker would like the executors to consult, both as for professional advice (accounting, financial or legal) and as to family or domestic considerations.

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### **3.8-9 Appointment of Trustees**

With the exception of the beneficiary controlled testamentary trusts created under Part A, the executors usually also act as the trustee of the trusts created by the Will. Even in respect of the beneficiary controlled testamentary trusts, the executors may automatically be or become the trustee because of a crisis occurring, eg loss of capacity or bankruptcy on the part of the primary beneficiary. The Will may also authorise the executors to take over the trustee if the primary beneficiary is in the midst of a marriage or domestic relationship breakdown.

### **4. Parts of Will**

Templates: W1 2 3 4A 4B 5A 5B 6 7 8A 8B 9A 9B 10.

To make the Will easier to comprehend, an explanation of the various Parts of the Will is included.

### **5. Executors to Hold on Trust**

Templates: W1 2 3 4A 4B 5A 5B 6 7 8A 8B 9A 9B 10.

The proceeds of any superannuation death benefits, personally owned life insurance policies and compensation payments are generally excepted under the bankruptcy rules from having to be used to pay the debts of a bankrupt estate -see subsections 116(2) and (5). Reasonable benefit limits no longer apply for tax or bankruptcy purposes. One of the responsibilities is to settle the debts of the state and general instruction to that effect could override the bankruptcy exception. Instead this clause directs that the proceeds pass directly to beneficiaries or the trustees of testamentary trusts as per subsequent clauses.

*Note:* depending on the beneficial ownership of an insurance policy, insurance proceeds may not be available to fund testamentary trusts and may bypass the estate completely, eg:

- Are owned by the trustee of a superannuation fund (it may be possible to fund child pensions instead) or by the trustee of an absolute entitlement trust for a beneficiary other than the insured; or
- If the policies are "cross" owned (eg by a spouse or child) or by a business partner who then acquires equity from a family (discretionary) trust shareholder of the business.

In the latter case the bankruptcy applies where the spouse is the nominated beneficiary of death benefits, but not where another person(s) or entity is to be the recipient of the insurance policy death benefits.

Subject to the powers set out in Part B of the Will such as the power to distribute any geared assets complete with their existing gearing to beneficiaries, the executor's first duty is sort out the estate and to pay debts, taxes and other expenses. The executors then distribute the assets in accordance with the succeeding clauses.

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### **6. Gift of Personal Chattels**

*(This clause is only included at this point if there are gifts of personal chattels to be distributed prior to the distribution of the balance of the estate).*

Templates: W1 2 3 4A 4B 5A 5B 6 7 8A 8B 9A 9B 10.

Details specific bequests of personal chattels such as jewellery and other family heirlooms. Often clauses dealing with jewellery and other personal possessions may express a wish, rather than a binding direction, to the executors. Unless the bequests to individuals are sufficiently large, beneficiary controlled testamentary trusts are not usually established for specific bequests.

Gifts (including gifts of money and other property to individuals and charities) may also appear in the Will at this point or alternatively following the "Alternative Provisions" clause or preceding the "Reserve Provisions" clause.

An additional subclause includes the option to make the clause subject to the direction to adjustment entitlements in Part B.

### **7. Existing Trusts and Corporate Trustees (powers passing to the executors)**

*(This clause would only be included if the Willmaker has a family trust or other non-fixed trust and wishes for the control of that trust to pass to the executors.)*

Templates: W1 2 3 4A 4B 5A 5B 6.

This clause is subordinate to the terms of the trust document.

Sets out the Willmaker's wishes for the executors to exercise any powers they may have in respect of the existing family trusts in such a way so as to give effect to the wishes of the Willmaker as set out in the Will. Use of this alternative normally means that the Willmaker anticipates that the control of the trust will pass to one person.

(Usually this clause by itself may not be sufficient to achieve a Willmaker's objectives. To deal with control issues, an agreement between the appointors on amendment to the terms of the discretionary or other non-fixed trust Deed is often also necessary).

### **8. Existing Trusts and Corporate Trustees (powers passing to specific persons).**

*(This clause [an alternative to the preceding clause] would only be included if the Willmaker has a family trust or other non-fixed trust and wishes for the control of that trust to pass to the specific persons.)*

Templates: W1 2 3 4A 4B 5A 5B 6.

This clause is subordinate to the terms of the trust document.

Sets out the Willmaker's wishes for the executors to exercise any powers they may have in respect of the existing family trusts for the benefit of specific persons.

(Usually this clause by itself is not sufficient to prevent a deadlock or a child gaining joint or sole control of the power to appoint the trustee company and thus effective control of

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the trust assets. To deal with these control issues, an amendment to the terms of the discretionary trust Deed is often also necessary).

Like the gifts clauses, the location of this and the preceding clause will vary depend on the objectives of the Willmaker.

### 9. Self Managed Superannuation Fund Trustee

Templates: W1 2 3 4A 4B 5A 5B 6.

This clause is subordinate to the terms of the trust Deed for the self managed superannuation fund.

The rules governing superannuation funds are very different to those governing family and other trusts and the control clauses may need to be quite different. The decision in ***Katz v Grossman*** in late 2005 highlighted the scope for a continuing trustee or director of an SMSF Fund to take personal advantage of their position as trustee in circumstances where:

- the continuing trustee is not bound by a binding death benefit nomination; or
- an adjustment clause in a deceased estate with sufficient assets to provide for adjustment.

This clause is only a small and, by itself, incomplete solution to the SMSF control problem. The shares in the trustee of the self managed superannuation fund are expressly dealt with in this clause.

### 10. Education Fund

Templates: W1 2 3 4A 4B 5A 5B 6.

This clause provides for the education of a particular person or persons, eg a child or grandchild.

### 11. Principal Residence

Templates; W1 2 4A 4B 5A 5B 6.

This clause sets out 3 options for the executor, in consultation with the principal beneficiary, in respect of any last principal residence that the Willmaker owns solely or as tenants in common (as opposed to as a non-surviving joint tenant). The default option is life tenancy clause below. For further information on this and the 2 succeeding clauses, see ***Life Interests (Fixed or Flexible) and Rights of Occupation*** in the ***Pocket Summaries*** folder.

### 12. Life Interest with Spouse/Domestic Partner as Life Tenant

Templates: W1 2 4A 4B 5A 5B 6.

Unlike a personal right of occupation, a fixed life interest is an asset for bankruptcy purposes. Thus the inclusion of this clause may improve the prospect of land tax exemption for a family home, but reduce the asset protection attributes of the Will. A

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trust for sale provision is included in case the Willmaker has land subject to the Victorian *Settled Land Act 1958*.

### 13. Right of Occupation of Home for Husband/Wife/Partner

Templates: W1 2 3 4A 4B 5A 5B 6.

This clause is used where a Willmaker has sole (or tenants in common) ownership of a family home. It was added to an earlier edition following Australian Taxation Office rulings, eg ID 2003/109 and ID 2004/882, regarding the operation of extension of the main residence exemption in section 118-195 of the *Income Tax Assessment Act 1997* (Cth) to rights of occupation, but (other than in the case of surviving spouses) not to life interests. Before including a clause of this type in a Will, regard should be had to the particular State or Territory land tax provisions that may exempt a principal residence passing under a Will. For example, amendments have been made to the Victorian land tax provisions that allow a right of occupation to secure an extension of the principal residence exemption in certain circumstances.

### 14. Distribution of Balance of Estate

Templates: W1 2 4A 4B 5A 5B 6.

*(This clause is only included if the balance of the estate is to pass to or for the primary benefit of surviving spouse or domestic partner. If testamentary trusts were not being established, this clause would simply create outright benefits - see templates W7, 8A, 8B, 9A and 9B. If there are concerns about a spouse or domestic partner's ability to handle and inheritance a flexible or fixed life interest or capital protected trust might be established for that particular beneficiary instead -see template W3.)*

#### 14.1-2 Spouse/Domestic Partner to be Primary Beneficiary (of Beneficiary Controlled Testamentary Trust)

Subject to any specific gifts the Willmaker might care to make, creates the option (by virtue of the executor's direction in Part B of a beneficiary controlled testamentary trust for all or the balance of the estate assets to the spouse, if the spouse survives the Willmaker.

The terms applying to this and other beneficiary controlled testamentary trusts, if they proceed, are set out in Part C in the clause headed "Terms of Beneficiary Controlled Testamentary Trusts". In the event of the surviving spouse losing intellectual capacity or becoming bankrupt, the beneficiary controlled testamentary trust automatically becomes a crisis protective trust by virtue of the subclause headed "Appointment and Removal of Trustee" and the executors become trustee instead of the surviving spouse. Should the option to sue the beneficiary controlled testamentary trust proceed, tax returns will need to be lodged for the trust and a family trust election may need to be made - see **Family Trust Elections** in the **Structuring and Trusts** folder.

Note: see also the **Beneficiary Controlled Testamentary Trust and Life Interests (Fixed or Flexible) and Rights of Occupation** in the **Pocket Summaries** folder.

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### **14.3 Alternative Provisions**

Provides for the remaining clauses in this part to operate in lieu of this clause if the spouse or domestic partner does not survive the Willmaker.

**Alternative Clause for spouse or domestic partner - Flexible Life Interest (Template W3)** - This template includes a direction for the executor to meet an income beneficiary's CGT liability out of estate capital.

**Alternative Clause for spouse or domestic partner - Fixed Life Interest (Template W10)** - This template includes a direction for the executor to meet an income beneficiary's CGT liability out of estate capital.

### **15. Guardianship of Children**

Templates: W1 2 3 4A 4B 5A 5B 6 7 8A 8B 9A 9B 10.

Expresses a Willmaker's preference as to who is to care for the Willmaker's young children. Normally the executors would be given the power to pay for or assist with a guardian's additional expenses, eg the additional cost of a larger capacity car, an interest-free loan to extend a house.

### **16 Gift of Benefit of Loans**

Templates: W1 2 3 4A 4B 5A 5B 6.

This clause deals with any business or investment loans owned to the Willmaker, eg by family companies or by the trustees of family trusts, that are to pass to particular beneficiaries. This clause includes an option to make the clause subject to the direction to adjustment entitlements.

### **17. Gifts**

Templates: W1 2 3 4A 4B 5A 5B 6 7 8A 8B 9A 9B 10.

Details specific bequests of money and other property to individuals and charities, as well as personal chattels such as jewellery and other family heirlooms. Often clauses dealing with jewellery and other personal possessions may express a wish, rather than a binding direction, to the executors. Unless the bequests to individuals are sufficiently large, beneficiary controlled testamentary trusts are not usually established for specific bequests.

#### **17.3 No Double Gifting**

In the event that spouses or domestic partners have executed Wills with provisions that wholly or substantially mirror each other, a "no double gifting" may be needed to ensure that a bequest is not duplicated by virtue of the two Willmakers dying together or within the 30 day survivorship period.

### **18. Division and Distribution of Balance of Estate**

*(If beneficiary controlled testamentary trusts were not being established, this clause would simply create outright benefits. If there are concerns about a beneficiary's ability*

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*to handle an inheritance a capital protected or non-fixed or other protective trust might be established for that particular beneficiary instead.)*

Templates: W1 2 3 4A 4B 5A 5B.

This clause divides the estate into the necessary parts, sections and portions that are to apply, depending on which primary beneficiaries survive the Willmaker.

### **18.2-3 My Daughter / Son / Nephew / Niece / Name of Person(s) to be Primary Beneficiary**

Subject to Part B, creates the default option (subject to the executor's discretion in Part B) of a beneficiary controlled testamentary trust for the surviving child or other beneficiary that is to inherit. If the intended primary beneficiary is still young, a requirement to attain 18 years (or such older age as might be specified in the Will, ie 21, 25 or 30 years) would be included.

The terms applying to this and other beneficiary controlled testamentary trusts, if they proceed, are set out in Part C in the clause headed "Terms of Beneficiary Controlled Testamentary Trusts". In the event of the child losing intellectual capacity or becoming bankrupt, the beneficiary controlled testamentary trust automatically becomes a crisis protective trust by virtue of the subclause headed "Appointment and Removal of Trustee" and the executors become trustee instead of the child. Should the option to use the beneficiary controlled testamentary trust proceed, tax returns will need to be lodged for the trust and a family trust election may need to be made - see **Family Trust Elections** in the **Structuring and Trusts** folder.

*Note:* see also **Beneficiary Controlled Testamentary Trust, Protective Trusts - 2 Options** and **Capital Protected Testamentary Trusts in the Pocket Summaries** folder.

### **18.4-6 My Children / Nephews and Nieces / Name of Persons to be Primary Beneficiaries**

Subject to Part B, creates the default option (subject to the executor's discretion in Part B) of a separate beneficiary controlled testamentary trust for each of two or more surviving children or other beneficiaries that are to inherit. By creating separate trusts, 2 or more children do not have to share control of a single testamentary trust, thereby reducing the potential for tension and conflict between them.

### **18.7-8 Distributions in Lie - Descendants to be Primary Beneficiaries**

Where the children or other primary beneficiaries fail to both survive the Willmaker and attain the required age, provision is usually made to give their children, ie usually the grandchildren of the Willmaker, the option of beneficiary controlled testamentary trusts in lieu of their parents.

In the rare event of both a first choice primary beneficiary and reserve primary beneficiaries all failing to both survive the Willmaker and attain the required age, further provision is usually made to give their children, ie usually the great grandchildren of the Willmaker, the option of beneficiary controlled testamentary trusts in lieu of their parents.

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The likelihood of this further proviso being needed increases when high age barriers, eg 40 years, are set before beneficiaries are allowed to assume control of their inheritance.

### ***18.9 Meaning of "Children"***

This definition is included to emphasise that the extended definition of children, eg including step children, in the "Terms of Beneficiary Controlled Testamentary Trust" clause in Part C does not apply in relation to the division of the estate.

***Additional or Alternative Clause - Capital Protected Trust (Non-fixed) - one child (Template W2)*** - see ***Capital Protected Testamentary Trusts*** in the ***Pocket Summaries*** folder. This template includes a direction for the executor to meet an income beneficiary's CGT liability out of estate capital.

***Additional or Alternative Clause - Capital Protected Trust (Non-fixed) (Template W2)*** - see ***Capital Protected Testamentary Trusts*** in the ***Pocket Summaries*** folder. This template includes a direction for the executor to meet an income beneficiary's CGT liability out of estate capital.

***Additional or Alternative Clauses - Special Disability + All Needs Protective Trust (Templates 4A and, 4B)*** with the introduction of the very restrictive special disability trusts (see ***Protective Trusts - Special Disability and All Needs*** in the ***Structuring and Trusts*** folder), these clauses were extensively re-written and expanded in both the 7th and 8th editions. The executor is given the option to divide the vulnerable beneficiary's inheritance between a special disability trust established in the Will, an all needs protective trust established in the Will and an existing special disability trust established by Deed or by another Will that is already operative.

***Additional or Alternative Clauses - All Needs Protective Trust (Templates 5A and 5B)*** - these clauses are intended for vulnerable beneficiaries (with or without children) who are not likely to qualify as having a severe disability for the purposes of the Federal special disability trusts provisions.

***Alternative Clause - Staggered Time Release Beneficiary Controlled Testamentary Trusts (Template W6)*** - see ***Beneficiary Controlled Testamentary Trust*** in the ***Pocket Summaries*** folder.

***Alternative Clause - No Beneficiary Controlled Testamentary Trusts - (Template 7, 8A, 8B, 9A, 9B and 10).***

***Additional or Alternative Clause - Protective Trust (Non-fixed), but no Beneficiary Controlled Testamentary Trusts (Templates 8A and 8B)*** - see ***Protective Trusts - Special Disability and All Needs*** in the ***Structuring and Trusts*** folder - this template is for vulnerable beneficiaries (with or without children) who are not likely to qualify as having a severe disability for the purposes of the Federal special disability trusts provisions.

***Changes:*** All existing alternatives have been modified to some extent and new alternate templates (W4B, W5B, W8B and W9B) have been included. These "B" templates separate the role of executor from the role of ongoing trustee - this template is likely to

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be used by law firms in those Australian States and Territories where a company (other than a professional trustee company) cannot apply for a grant of probate but can administer an ongoing trust created by the Will.

### **19. Reserve Distribution Provisions (short or long form)**

*(If beneficiary controlled testamentary trusts are not being established, this clause simply creates outright benefits.)*

*Templates: W1 2 3 4A 4B 5A 5B 6 - short form option (only option included for templates W7 8A 8B 9A 9B 10).*

*Templates: W1 2 3 4A 4B 5A 5B 6 - additional longer form option.*

Where the Willmaker's children are young or the descendants of the Willmaker are few in number, it is desirable to include a clause providing for the situation where there are no surviving and sufficiently long lived descendants of the Willmakers. For example, this clause might divide the estate into 2 and create the option of testamentary trusts for respective relatives of both the Willmaker and the Willmaker's spouse. Alternatively charitable bequests may feature at this point.

The terms of this clause can be "long form", ie along the lines of the preceding clause with further reserve provisions or can be "short form", ie relatively simple in that if the person or people that are nominated to receive fail to survive a distribution is made to there estate.

### **20. Earlier Vesting in Certain Circumstances**

Templates: W1 2 3 4A 4B 5A 5B 6 7 8A 8B 9A 9B 10.

In States and Territories other than South Australia, deceased estates and testamentary trusts with any non-charitable beneficiaries are subject to a finite "perpetuity" period, eg 80 years from the date of death, at the end of which time the assets of the estate or trust must cease to be held on trust. This clause waives the requirement for a beneficiary to reach a specified age such as 40 years if the time is reached when the estate or trust must come to an end.

### **21. Organ Donation and Other Purposes**

Templates: W1 2 3 4A 4B 5A 5B 6 7 8A 8B 9A 9B 10.

Purely optional clause setting out the Willmaker's instructions as to organ transplant and medical research - often Willmakers prefer to carry such instructions in their wallets.

### **22 Disposal of My Body**

Templates: W1 2 3 4A 4B 5A 5B 6 7 8A 8B 9A 9B 10.

A third optional clause, dealing with burial or cremation preferences.

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### ***Additional Clause - Disposal of My Child's Body (Templates 4A, 4B, 5A, 5B, 8A, 8B, 9A, 9B)***

Parents of an intellectually disabled child might also wish to include a statement of wishes in relation to the child's body.

## **PART B - EXECUTORS' INSTRUCTIONS AND DISCRETIONARY POWERS**

### **23. Priorities of Executors**

Templates: W1 2 3 4A 4B 5A 5B 6.

The objective of most Willmakers is to divide their "wealth" in accordance with their estate planning objectives, rather than just their estate. This clause formally states that objective and gives the executors the power under this Part to apportion the Willmaker's estate in such a way that the executors think appropriate in order to achieve those objectives.

### **24. Direction to Adjust Entitlements**

*(This clause is usually only needed where the Willmaker has two or more children.)*

Templates: W1 2 3 4A 4B 5A 5B 6 - superannuation, unallocated reserves, family trusts and estate assets.

Templates: W7 8A 8B 9A 9B superannuation death benefits and estate assets only.

Most commonly, the issue that causes an adjustment to be made is the death benefits to be paid from the Willmaker's superannuation fund or funds, but other "non-estate" assets may also need to be considered, eg unallocated net assets in family trusts.

This clause requires the executors to divide the Willmaker's estate so that the right overall division of the estate and non-estate assets is, as far as is possible, achieved. The absence of this equalisation or adjustment clause from a Will may mean that a Willmaker's wishes to divide overall "wealth" equally or in set proportions may not eventuate.

Usually the executors are given the power to determine the method of adjustment within the Willmaker's guidelines. Some flexibility for the executors as to how the adjustment is achieved is often necessary, particularly when the adjustment needed might include a reserve that a child may not be able to access without significant penalty until retirement some or many years in the future.

#### ***24.2 Amounts to be adjusted***

The Willmaker's children or (less commonly) other beneficiaries may be entitled to claim, may have received, or may receive after the Willmaker's death, unequal distributions from or by virtue of:

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- **Superannuation and pension death benefit payments** (particularly where one of the children is a dependant and another who is not a dependant);
- Balances in the **reserves** of self managed superannuation funds – a particularly important issue when the Willmaker has been in receipt of a complying lifetime or term pension;
- **Life insurance** policy ownership; eg death benefits paid to a particular child nominated as policy owner or beneficiary;
- **Family trust allocations** (it may be appropriate to provide that the discretionary trust become a restricted, fixed or discretionary trust for a beneficiary unlikely to have children or grandchildren);
- Lifetime or testamentary **gifts**;
- **Debts forgiven**, eg by a succeeding clause of the will;
- **Wages or capital contribution foregone** (in the farming and small business context, there is often a need to adjust for a child's wages foregone or contribution in building up a capital asset)
- Capital entitlements to **concessionally taxed trusts**, eg a parent establishes a child support (maintenance) trust for the children of one relationship and then has a child by a subsequent relationship.

### ***24.3-4 Operation of this Clause***

These subclauses summarise the operation of this clause.

### ***24.5-6 Deeming Net Assets of Trusts***

These subclauses deal with unpaid allocations in family, hybrid and other non-fixed trusts and include references to associated beneficiaries, eg children of a primary beneficiary.

#### ***24.7.1 Deeming Net Value of Superannuation Death Benefits Trusts***

This is a deeming provision to cover the possibility of only some of the primary beneficiaries being specified beneficiaries of superannuation death benefits trusts, eg because not all were death benefits dependants of the Willmaker or the Willmaker's late spouse or domestic partner.

#### ***24.8 Deeming Superannuation Unallocated Reserves***

This clause will now usually only be needed for Willmakers who commenced lifetime pensions in self managed superannuation funds prior to 2006. Nevertheless this subclause may need to feature in those people's Wills for some decades to come.

### ***24.9 Application of this Clause***

In certain circumstances, eg with family trusts, it is important to ensure that no double gifting occurs from a pair of Willmakers.

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### **25. Executor’s Discretionary Powers – Terms of Trust (short form)**

Templates: W1 2 3 4A 4B 5A 5B

This clause comes with two alternatives, a general short form power and a more precise long form power.

### **26. Executor’s Discretionary Powers – Terms of Trust (long form)**

Templates: W1 2 3 4A 4B 5B 6 7 8A 8B 9A 9B 10

It is difficult to predict just what type of trust might best suit a primary beneficiary. Rather than second guessing the beneficiary and the circumstances and tax and other laws applicable to the beneficiary at some future time, this clause gives the executors the discretion to vary the terms of trust.

Given that the rule against delegation of testamentary power still applies in certain States, eg New South Wales, but not Victoria and Queensland, and that it is good practice to give the executors clear guidelines in any event, the menu of options in this clause are within clearly defined boundaries. The menu limits the boundaries of the discretion of the executors, rather than leaving open the executors’ discretion to function outside clearly defined boundaries. For example the executors in choosing the trust can exclude, but not add beneficiaries. Essentially the powers enable the executors to narrow down the terms of trust or to segregate trust assets. A default clause applies creating a beneficiary controlled testamentary trust in the event that the executors are not able or fails to exercise the discretion conferred on the executors by the Willmaker.

#### ***26.2 Right of Occupation (of residence)***

This subclause is prefaced with the word “option”. In private rulings (see for example ID 2003/109), the Australian Taxation Office has made a clear distinction as to when an extension of the main residence exemption in section 118-95 of ITAA 1997 applies for a right of occupation as opposed to informal use or a life interest. In the light of that provision and the view of the Australian Taxation Office, a specific right of occupation clause is usually included as one of the discretionary powers available to the executors in administering the estate.

#### ***26.3 Parallel Testamentary Trusts***

This subclause allows the executors to choose, in respect of one or more of the primary beneficiaries, more than one identical or different testamentary trust from the menu of options that the Willmaker has set out in this and the succeeding clause. For example one beneficiary controlled testamentary trust might be used to hold passive investment assets and the other to hold trading or business assets.

#### ***26.4 More Restricted Testamentary Trusts***

This subclause allows the executors to choose to establish one or more of the testamentary trusts with a more restricted class of beneficiaries, eg in the light of the circumstances of the primary beneficiary or in consequence of changes to taxation and other laws that took place after the Will was executed.

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### **26.5 Split Fixed Testamentary Trusts**

This subclause creates a further option for the executors as to the choice of the type of testamentary trust or trusts for a primary beneficiary.

### **26.6 Non-fixed Testamentary Trusts**

This subclause creates a further option for the executors as to the choice of the type of testamentary trust or trusts for a primary beneficiary.

### **26.7 Income Reserved Non-fixed Testamentary Trusts**

This subclause creates a further option for the executors as to the choice of the type of testamentary trust or trusts for a primary beneficiary.

## **27. Executor's Discretionary Powers Not To use Testamentary Trusts**

Templates: W1 2 3 4A 4B 5A 5B 6.

The distribution clauses in Part A are usually subject to the executors, with the consent of the relevant primary beneficiary, having the discretion to bypass a beneficiary controlled testamentary trust:

- In circumstances where it is not appropriate for the testamentary trust to be established, eg because a particular primary beneficiary has no use for the trust or because new laws have made the trust undesirable, or
- To only distribute a portion of the primary beneficiary's "inheritance" to the trust, eg because of land tax considerations, New South Wales land might not be distributed to a discretionary testamentary trust.

### **27.2 Power to Avoid or Dispense with Trust**

Instead the executors are given the power, subject to the primary beneficiary's consent, to distribute direct to a beneficiary (usually in practice the primary beneficiary).

### **27.3 Distribution to Other Trust**

In the event of testamentary trusts being duplicated, eg by both wife and husband, the executors, again subject to the consent of the primary beneficiary, also have the power to distribute to a similarly constituted testamentary trust established by another Will.

## **28. Existing Loans and Other Entitlements**

*(This clause is only included if there are loans owed to the Willmaker personally)*

Templates: W1 2 3 4A 4B 5A 5 B 6.

The Willmaker may choose to change, or allow the executors to change, the treatment of any existing loans owed to the Willmaker, eg by commencing to charge interest or requiring repayment immediately or within a stipulated time period.

There can be adverse tax consequences when debts generating a deduction for interest (or capable of generating an income tax deduction if interest were to be charge) are

## **EPSS Clause by Clause Summary – Will Creating Testamentary Trusts**

forgiven. Those adverse tax rules do not apply when debts owed to the Willmaker personally (as opposed to a company or trust) are forgiven under a Will.

It is important to distinguish between actual loans and unpaid trust allocations incorrectly recorded as loans, as forgiveness of the latter may amount to a disclaimer and create present entitlement taxation problems for the trustee. In such circumstances, it would be preferable to make a carefully worded bequest of the trust allocations.

Where a company has retained profits, there may be considerable income tax advantages in declaring a dividend to a now deceased estate shareholder with little other income in that financial year. (The anti-streaming rules in Division 204 of ITAA 1997 may require similar dividends to be declared to any other shareholders holding shares with similar rights to income and capital).

Wills usually have a default position to apply if the executors do not exercise the power granted under this clause. Typical defaults are forgiveness for individuals and repayment for companies (the latter because the taxation problems caused when the net worth of company is increased without a corresponding liability and profits have to be paid out by way of dividend).

### **29. Business Succession Agreements**

*(This clause would only be included if the Willmaker has control, or shares in the control, of a business).*

Templates: W1 2 3 4A 4B 5A 5 B 6.

Depending on the business structure and the existence of business agreements, eg between partners, shareholders or unitholders, it may be appropriate to set out directions or wishes as to the future control and conduct of businesses. If applicable, the executors should be alerted to, and directed to uphold, any mandatory or optional “buy-sell” (equity) or other agreements relating to the business. Where assets are integral to that business, eg premises, business names, goodwill, designs, patents, trademarks, options, etc it may be crucial to ensure that the ownership of these assets passes into, or remains, in appropriate hands. Frequently, action will need to be taken to ensure that the future control of non-estate assets will need to dovetail with the terms of the Will.

### **30. Superannuation Death Benefits and Dependants (surviving domestic partner and no other “tax” dependants)**

*(This clause is only included if the Willmaker may have a surviving spouse or domestic partner, but no other dependants for income tax purposes, ie no children under 18 or no person who may be financially dependant at the time of the Willmaker's death).*

Templates: W 1 2 3 4A 4B 5A 5B 6.

This clause provides for all or part of any superannuation death benefits received by the estate to be held or distributed on terms that satisfy the Death Benefit Eligible Termination Payment (“ETP”) requirements for tax exemption on the payment from the trustee of the superannuation fund.

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### **31. Superannuation Death Benefits and Dependants (more than one surviving death benefits (tax) dependants, including a surviving domestic partner)**

(This clause is only included if the Willmaker may have, in addition to a surviving spouse or domestic partner, one or more dependants for income tax purposes, eg:

- Children under 18;
- Any person who is financially dependant at the time of the Willmaker's death; or
- Any person who is interdependent with the deceased, eg an adult child caring for the deceased).

Templates: W1 2 3 4A 4B 5A 5B 6

This clause provides for all or part of any superannuation death benefits received by the estate to be held or distributed on terms that satisfy the Death Benefit Eligible Termination Payment ("ETP") requirements for tax exemption on the payment from the trustee of the superannuation fund. The terms of any superannuation death benefits distribution or testamentary trust may be set out in the Will or a trust can be established after death into which the death benefits can be directly paid.

Usually that part of the payments from trustees of superannuation funds paid to the executors that comprise:

- Non-concessional contributions; or
- Payments where there are no surviving dependants for tax purposes;

are to form part of the balance of the estate.

If the Willmaker has a surviving spouse and also leaves dependants under 18, this clause provides the executors with the option of placing all or part of any death benefits paid to the estate in a special superannuation death benefits testamentary trust. To prevent unnecessary tax being payable, beneficiaries of a superannuation death benefits testamentary trusts are usually to confined to "death benefits" for death benefit eligible termination payment purposes, thereby preserving the income tax exemption. A superannuation death benefits testamentary trust is essentially an alternative to the beneficiaries of the trust receiving a pension from the superannuation fund.

A pension from a superannuation fund is also concessional tax (qualifying for a 15% income tax offset as well) in the hands of the beneficiaries under 18. However it does mean that capital is converted into income and the executors do not have day to day control of the money and cannot access the capital without bringing the pension arrangements to an end.

#### ***31.2-4 Options for Executors***

As with beneficiary controlled testamentary trusts, the executors are given options as to how the trust is to be structured. Again, as with beneficiary controlled testamentary trusts, unwanted superannuation death benefit trusts can be avoided.

## **EPSS Clause by Clause Summary – Will Creating Testamentary Trusts**

### ***31.5 Wish Regarding Death Benefit Not Paid to Estate***

Given that death benefits from a superannuation fund may never reach the estate, this clause allows the Willmaker to express non-enforceable wishes as to the payment of the death benefits.

### ***31.6 Default Superannuation Death Benefits Trust***

This default clause applies if the executors do not choose to exercise the powers made available under this clause in the 6<sup>th</sup> edition.

Note: see also Superannuation Death Benefits Trusts in the Pocket Summaries folder.

## **PART C – ADMINISTRATIVE PROVISIONS**

### **32. Interpretation**

Templates: W1 2 3 4A 4B 5A 5B 6.

Sets out the general interpretive provisions which apply to the Will.

### **33. Terms of Beneficiary Controlled Testamentary Trusts**

Templates: W1 2 3 4A 4B 5A 5B 6

Sets out the terms applying to each beneficiary controlled testamentary trust established by Clauses 9, 12 and 13. Rather than unnecessarily duplicating the terms of trust and greatly adding to the length of the Will, a common set of terms is used for each beneficiary controlled testamentary trust established by the Will. The terms are in essence those of a family discretionary trust established by Deed, but subject to important modifications, eg they are drafted with the rule of equity against delegation of testamentary power outside guidelines set out by the Willmaker and they do not have a living settlor.

Note: many of the provisions in this clause also apply to the other types of testamentary trusts that might be established by the Will.

#### ***33.1 Name of Trust***

The primary beneficiary has the power to name the trust for which the primary beneficiary is primary beneficiary, default trustee and default appointor.

#### ***33.2-3 Beneficiaries***

This important subclause defines the class of beneficiaries (including a power to permanently or temporarily exclude a beneficiary, eg to ensure means tested pension eligibility). Any deficiencies in this definition may create ongoing difficulties for the

## **EPSS Clause by Clause Summary – Will Creating Testamentary Trusts**

primary beneficiaries of the estate or expose them to unnecessary taxation or other expenses.

### ***33.4 Right of Occupation with Respect to Real Property***

This subclause is included because of potential CGT, land tax and bankruptcy advantages.

### ***Allocation of Net Income or Unreserved Capital***

This important subclause sets out how distributions of net income, capital and other benefits to beneficiaries are to occur, noting that “excepted income” (Division 6AA of ITAA 1936) income tax concessions apply to beneficiaries under 18 years. The subclause is in two parts, dealing first with times when the primary beneficiary has control of the trust and second with times when the executors, remaining executor or reserve executor has assumed control because of a crisis as defined by the succeeding subclause.

Note: In Practice Statement PS LA 2003/12, the ATO advised that it would not depart from its “long standing practice long-standing administrative practice of treating the trustee of a testamentary trust in the same way that a legal personal representative is treated for the purposes of Division 128 of the ITAA 1997, in particular subsection 128-15(3)”. It is important to note that subsection 128-15(3) does not apply to all assets passing to a beneficiary – notable exceptions include certain assets (not including real estate located in Australia) passing to a tax advantaged beneficiary (CGT event K3) and after acquired assets – see TD 93/35.

### ***33.5 Appointment and Removal of Appointor***

This subclause, again important to the operation of a beneficiary controlled testamentary trust, sets out how the appointor is to be appointed and removed.

### ***33.6 Appointment and Removal of Trustee***

This subclause, also important to the operation of a beneficiary controlled testamentary trust, sets out how the trustee is to be appointed and removed. It defines two types of crisis where the trustee is automatically removed and replaced by the executors, remaining executor or reserve executor, ie bankruptcy and loss of decision making capacity, and one where the executors, remaining executor or reserve executor has the power to remove the trustee, ie the breakdown of a domestic relationship of the primary beneficiary.

Note: see also Crisis Protective Trust in the Pocket Summaries folder

### ***33.7 Consent of Primary Beneficiary to Major Decisions***

This subclause gives the primary beneficiary a power of veto at times when the primary beneficiary, as detailed above, is not the trustee of the beneficiary controlled testamentary trust.

## **EPSS Clause by Clause Summary – Will Creating Testamentary Trusts**

### ***33.8 & 10 Powers to Pass to Specified Beneficiaries***

This default subclause provides that on the death of the primary beneficiary (and in the absence of other documentation executed by the trustee and the primary beneficiary during the primary beneficiary's lifetime) the powers of the primary beneficiary pass to the primary beneficiary's children (if any).

### ***33.11 Exercise of Trustee's Discretion***

This subclause sets out how the trustee's discretion is to be exercised in the event that there are two or more specified beneficiaries.

### ***33.12 General Power to Hold on Separate Trust***

Under trust law, trusts can be split into two or more equal or unequal parts – this subclause gives express authority for this to happen. Exercise of this power, like the exercise of many powers under the terms of trust and of the Will in general, often takes place many years after the Willmaker dies and should only happen after careful consideration of taxation and other consequences.

### ***33.13-14 Separate Trustees and Appointors for Parts of the Trust Fund***

These subclauses follow on from the preceding subclause and allow for the appointment of separate trustees and appointors.

### ***33.15 Specific Power to Allocate for the Future***

This subclause allows for allocations of income and capital by the trustee to happen not just in the year of income in which the trustee is currently administering the trust, but in respect of future years as well.

### ***33.16 Additional Powers for Trustees of Beneficiary Controlled Testamentary Trusts***

This subclause gives trustees of BCTTs 3 specific additional powers not held by executors, ie powers relating to guarantees, borrowing and commencing to conduct a business.

### ***33.16 Amending the Terms of Trust***

Being a testamentary trust, this power of amendment is more restrictive than for many trust established by Deed, but importantly does allow for specific powers to be adopted as part of the terms of the trust.

### ***33.17 Ending of Trust***

This subclause details the procedure that the trustee must follow to bring the trust to an end.

## **34. General Powers of Executors and Trustees**

Templates: W1 2 3 4A 4B 5A 5B 6 7 8A 8B 9A 9B 10

## **EPSS Clause by Clause Summary – Will Creating Testamentary Trusts**

Provides both the executors and trustees with (usually) wide general administrative powers to implement the Willmaker's intentions. These powers are usually much wider than the default powers given to executors and trustees by virtue of the prudent person rule applying in all Australian States and territories.

### **35. Geared Assets**

Templates: W1 2 3 4A 4B 5A 5B 6 7 8A 8B 9A 9B 10

The traditional approach to Wills is to require the calling in of debts before distributions are made. Where estate assets are geared, it may be desirable to preserve that gearing in the hands of a primary beneficiary. Income from other estate sources can then be distributed to those testamentary trust beneficiaries whose marginal income tax rates are lower than the rates that the primary beneficiary would pay.

The consent of a lender may be needed before such a clause can apply in practice.

### **36. Protective Primary Beneficiary Testamentary Trusts**

Templates: W1 2 3 4A 4B 5A 5B 6.

Specific powers are given to the executors in respect of a prospective primary beneficiary, ie one who has not yet passed the age barrier (ie of at least 18 years) set by the Willmaker. The executors have the power to also distribute income and benefits to any dependants of the prospective primary beneficiary. Alternatively, the executors can also choose to make the prospective primary beneficiary the sole income beneficiary.

### **37. Other Specific Powers of Executors and Trustees**

Templates: W1 2 3 4A 4B 5A 5B 6 7 8A 8B 9A 9B 10

Sets out a range of specific administrative powers for the executors and trustees – revenue authorities, beneficiaries, lenders and other people dealing with the trust often want to see specific authorisation of particular aspects of estate or trust administration. Power is usually given to the executors of trustees to add to these specific powers from time to time.

### **38. Entitlement to Charge**

Templates: W1 2 3 4A 4B 5A 5B6 7 8A 8B 9A 9B 10.

Allows those executors and trustees that are professional trustee companies or professional advisors to charge for their services. Includes a field code to include a provision to any other person, eg a beneficiary, to be nominated as being able to charge for their services as well.

### **39. Calculation of Executor's Commission**

Templates: W1 2 3 4A 4B 5A 5B6 7 8A 8B 9A 9B 10.

Sets out the method of calculating the executor's commission (if permitted under the Will).

## **EPSS Clause by Clause Summary – Will Creating Testamentary Trusts**

### **40. Payment of Taxes or Duties**

Templates: W1 2 3 4A 4B 5A 5B6 7 8A 8B 9A 9B 10.

With the prospect of notional taxes such as death duties being imposed at some stage in the future, this clause allows for payment of those taxes even if they are imposed because of the existence of a related entity such as a trust or superannuation fund.

## **PART D – DEFINITIONS**

Templates: W1 2 3 4A 4B 5A 5 B 6 – more extensive set of definitions of terms used throughout the Will, including key definitions pertaining to the operation of beneficiary controlled testamentary trusts. Some of the definitions will only be needed in certain circumstances, eg if an adjustment clause is to cover a family trust.

Templates: W7 8A 8B 9A 9B – less extensive set of definitions.

## **PART E – TERMS OF SPECIAL DISABILITY TRUST**

This Part is included in Templates W4A, 4B, 8A and 8B only. This part closely follows the model trust Deed provided to practitioners and the general public by the Federal Department of Families, Housing, Community Services and Indigenous Affairs (FAHCSIA) and includes modifications to reflect that the trust is being established by Will, rather than by Deed, as well as a completed Schedule D.