



LAFRENIÈRE SANNA  
— ESTATE LAW —  
A B O U T I Q U E F I R M

Chantal M.J. Lafrenière  
B. Soc. Sc., JD, CEA

Natalie A. Sanna  
B.A. (Hon.), LL.B.

## Understanding Your Will

The language of legal documents is unfamiliar to most people and can be difficult to understand. To help make it easier to review your will, this brochure explains some of the terms and clauses in plain, easy-to-understand language. Your will may not include all of these clauses.

We have used the same titles and arranged them generally in the same order as they appear in your will.

The descriptions in this brochure refer to the default or standard versions of these clauses which we use in drafting wills. Some clauses may have been modified to suit your situation.

We have written this brochure for our clients who are residents of Ontario, Canada. Not all jurisdictions have the same rules. If you move out of Ontario, you should have your will reviewed by a lawyer in your new location to make sure that what you want will happen.

The contents of this brochure do not replace or modify your will in any way but are provided only as an explanation for you.

### Introductory Paragraphs

This section contains basic information about you and confirms that this is your will. If your will does not deal with everything you own, that is also specified here.

### In Contemplation of Marriage

If you sign a will and later marry, your marriage revokes or cancels your will unless the will was made 'in contemplation' of that specific marriage. If you have told us that you are in a relationship that could lead to marriage, the phrase 'in contemplation of my marriage to (Spouse's Name)' appears in the first paragraph of your will. As a

result, if you marry the person named, your will is not revoked. Even if you do not marry the person, your will remains valid. Of course, if you marry someone other than the person named, your will is revoked.

### Revocation

This clause confirms that by signing a new will, you are revoking or cancelling any other wills or codicils that you previously signed. It also confirms that any beneficiary designations you have made on any registered plans (such as an RRSP, RRIF, TFSA, RDSP) or life insurance policies will not be changed by your will unless your will specifically says so.

### Family Information

This section describes your 'status', for lack of a better word, as it is on the day that you sign your will – single, married, divorced, separated, common law, or widowed. If you have a spouse, his or her name will be included as well as the names and birthdates of your children or your spouse's or partner's children, if any.

### Definitions and Inheritances

#### Definition of "My Trustees"

In Ontario, an executor or executrix is also called an "estate trustee". Throughout the will, the term "my Trustees" is used to refer to the estate trustee, whether there is one or more than one. In this brochure, we use the terms executor and estate trustee interchangeably.

#### Definition of "Per Stirpes"

"Per stirpes" is latin for "by roots" or "by branch". It is best described using an example. John, a widower, had three children, Betty, Jim and Sue. Betty died leaving two children (John's grandchildren). Jim and Sue have no children.

If John's will says to divide his estate among his issue in equal shares per stirpes, without this clause, all of the living children, grandchildren, grandchildren, etc. of John would be entitled to a share of his estate.

However, by including this definition, if John's will says to divide his estate among his issue in equal shares per stirpes, Jim and Sue would each receive one-third of the estate and Betty's one-third would be divided between her two children (one-sixth of the total estate to each).

To take it even further, if Betty's daughter, Sally, was also not living at John's death but had left behind three children, Sally's three children would share Sally's one-sixth of the estate. So you can see, the estate is divided among the 'roots' or 'branches' of John's family with the result that each 'root' or 'branch' is treated equally.

'Remoter issue' refer to those issue who are further from you down the family tree. For example, your grandchildren are remoter issue from you than your children.

### ***Per Capita***

Another way to distribute is 'per capita'. In this method, each person named is treated equally but only receives their share if they are alive. For example, if Mary's will divides her estate 'equally per capita' among her three best friends, Sue, Asha, and Doris, they each receive 1/3 if all of them are alive. However, if Sue dies before Mary and Mary does not update her will before she dies, the remaining two friends, Asha and Doris, each inherit 1/2 of Mary's estate.

### ***Definition of "Household Goods and Personal Effects"***

This definition is fairly broad and covers most personal articles in and around your house. There are a few things to note in particular:

- 'articles of virtu' describes an article of particular importance or value;
- pets are included so they will be dealt with by your executor in the same way that your 'Household Goods and Personal Effects' are dealt with (see the paragraph with that title). Your will can include a special clause just dealing with pets if you wish but it is not necessary; and,
- household goods and personal effects in storage and at your cottage or recreational property are also included.

### ***Definition of "Digital Assets"***

This clause defines your digital assets as the files stored on any hardware device you may own but not the hardware device itself (which would usually be included under *Household Goods and Personal Effects*) as well as digital assets such as emails, digital photos, online accounts, etc.

### ***Definition of "Issue", "Children", "Child", and "Child of Mine"***

This clause names the children that you want included whenever one of these words is used in your will: "issue", "children", "child", and "child of mine". If you have step-children, they are not included unless they are named in this clause or elsewhere in your will to, for example, receive a specific gift.

### ***Definition of Relationships***

In estate law, there used to be a legal distinction between persons born in or outside of wedlock or marriage. But this is no longer true. As a result, if a will refers to 'issue' or 'children' but does not include a definition like this, the executor must search out all possible beneficiaries including those who might have been born outside marriage. With this clause included, your executor doesn't have to conduct a search which can be expensive (your estate pays the bill!) and time-consuming. The clause is carefully worded so that children of stable common law relationships are included.

### ***RRSP Contributions***

Under the *Income Tax Act*, your executor can contribute to your RRSP after your death. This clause is simply a reminder to your executor to consider if a contribution might benefit your estate.

### ***RESP***

When you set up an RESP, you are the 'subscriber'. You are entitled to receive a return of whatever contributions were made to the RESP. If you die, it could be argued that your executor is required to collect the contributions and return them to your estate.

This clause allows your executor or someone else that you have specified to become the subscriber of the RESP so that it can continue for the benefit of your children or whoever is named. Your executor may also be able to add to the RESP from your estate if your will allows this.

### ***Beneficiary Designation***

If appropriate, your will may contain a clause where one or more beneficiaries of a registered

plan (such as an RRSP, RRIF, TFSA, RDSP) or life insurance policy are named or 'designated'. The clause may also name contingent or alternate beneficiaries if the first named beneficiaries are not alive at the date of your death.

## **Estate Trustee & Executor Appointment**

This clause appoints one or more persons or a trust company to act as your executor. One or more named alternates will act only if the first named executors are unable or unwilling to act. This clause also confirms that your executor will act as the trustee of any trusts that are in your will. If you want someone else to look after any trusts in your will, there will be a separate clause to specify this.

## **Disclaimer**

This clause normally appears only in a secondary will (or a tertiary will if there is one). It allows the estate trustee of the secondary will to disclaim (or 'leave out') an asset from the secondary estate. The disclaimed asset would then become part of the primary estate and would be subject to probate if the primary will were submitted to the court. Disclaiming an asset may become necessary to avoid having all assets in the secondary estate subject to probate.

## **Compensation**

This clause begins by saying that if there is a gift in your will to someone who also happens to be your executor, the gift is not meant to be executor's compensation. In other words, the executor gets both the compensation and the gift. By the way, executor's compensation, if taken, is taxable income to the executor.

The clause also allows your executor to calculate compensation on all assets as of the first anniversary of your death whether or not such assets have actually been realized. Although the word 'realized' has a more complex meaning, for simplicity it can be understood to mean that we pretend all of the assets have been turned into cash or distributed to beneficiaries so that the executor can calculate his or her compensation. If this clause is not included, the executor may have to wait much longer to be paid some of the compensation.

An executor's compensation must be approved by the court or all of the beneficiaries of an estate. This clause allows your executor to 'pre-take' some of his or her compensation. 'Pre-take' does not mean being paid before doing the work. Rather it means being paid before the amount of compensation has been approved.

If a trust company, accountant, lawyer or other professional is named as your executor, there may be an additional clause referring to a compensation agreement which sets out how compensation is to be calculated.

If you have signed a prenup, cohabitation agreement or separation agreement, your will may mention that document so that your executor is aware of it and that it should be honored.

## **Funeral/Disposition Arrangements**

If you have any particular wishes regarding cremation, funeral, burial, or any pre-arrangements, these are mentioned here if you requested us to do so. There may also be a clause about organ donation. Although we may include these in your will, it is important to let your family know of your wishes. Often by the time the will is read, it is too late to be of much help.

## **Guardians of Children**

This clause appoints one or more temporary guardians of your minor (under 18) children and, if you have provided additional names, one or more alternate guardians who will act if the first guardians can't. Parents cannot name permanent guardians. Only a court can do that. So the clause goes on to state that you want the guardians to make an application to court within 90 days to ask for permanent guardianship. The costs of the court application can be paid from your estate. The clause also states that it is your wish that the guardian of your children's property not be required to post a bond.

Your will may also include a clause which lets your executor make payments from your estate to the guardians of your minor children to assist in raising your children. Payments might include mortgage financing, a nanny or housekeeper, or travel costs. If the guardian and your executor are the same person, this can be a conflict of interest.

## **Debts, Taxes and Distribution**

### ***Debts and Taxes***

Your executor must pay all of your debts, funeral expenses, and taxes out of the assets of your estate before giving anything to your beneficiaries. The clause goes on to say that beneficiaries receive their gifts after any taxes or duties have been paid. However, it excludes any taxes that are owing as a result of a beneficiary being a resident of another country. If there are such taxes, the beneficiary must pay them.

## ***Distributive Clauses***

Next you will find clauses specifically tailored for your unique situation dealing with any or all of the following: Pets, Household Goods and Personal Effects, Real Property, Joint Accounts, and Cash Legacies.

## ***Hotchpot***

The term 'hotchpot' means the combining of assets into a common lot to ensure equality of division among a group of beneficiaries. Including this clause means that all gifts to your beneficiaries are taken into account when your estate is distributed.

So, for example, if you helped one of your children to buy a house by making a down payment for them or if you gave your cottage to one of your children and you want these gifts taken into account when dividing your estate equally among your children (or other beneficiaries), this clause can be helpful. It is very important that if you do not want a gift to be included in hotchpot, you must ensure your intentions are clear and are in writing, preferably in your will.

For example, if you wanted an extra amount given to a child that you lived with for a period of time, or if you added a child on your bank account as a joint owner and wanted him or her to receive all of the balance in that bank account at your death over and above his or her share of your estate, this should be in writing, again preferably in your will.

Even without the hotchpot clause, the law now is that any jointly held assets between a parent and an adult child are to be considered part of the parent's estate unless there is clear evidence otherwise.

## ***Residue, Alternate Residue, Failure of Gifts, and Trusts***

The 'residue' is the balance of your estate after your expenses, claims, and debts have been paid and any cash gifts set out in your will have been paid. Your will has a clause setting out how the residue of your estate is to be distributed. Your will may also have clauses entitled *Alternate Residue* and *Failure of Gifts* and there may also be one or more trusts for the benefit of one or more of your beneficiaries. All of these clauses are specifically drafted to meet your estate planning goals as you have described them to us.

## ***Administrative Provisions***

### ***Failure of Charitable Legacies***

This clause is included if you are leaving something to a charity named in your will. It is also known as a 'cy-pres' clause. If a charity does not exist at the date of your death, this clause allows your executor to give the gift to a charity with a similar purpose.

### ***Charitable Receipt***

This clause lets your executor pay the gift to the treasurer or other officer of the charity in exchange for a receipt. It also goes on to say that the executor is not responsible for overseeing what the charity does with the gift.

### ***Excluded Income***

Following marriage breakdown, the assets of the couple (known as 'net family property') are divided according to the Ontario *Family Law Act*. When a couple's 'net family property' is calculated, the *Family Law Act* defines property to exclude anything acquired by inheritance after the date of marriage as long as the asset isn't put into the couple's joint names.

However, any income earned on the inheritance, say it was invested and earned interest (or income), is only excluded if the will contains a statement like this. So, if a beneficiary's marriage breaks down and if he or she always kept the inheritance in his or her own name, the inheritance and the income it has earned belong to him or her and is not part of net family property.

### ***Minor and Incapable Beneficiaries***

This clause applies to any minor (under 18) who benefits under your will unless you have included a specific trust for that minor elsewhere in your will. Without this clause, a minor's inheritance must be paid into Court and held until the minor is 18. It is usually very difficult to access any of the money before the minor turns 18. To do so, someone would need to make an application to court and explain why the money is needed.

This clause lets your executor hold the minor's inheritance but make payments to the minor's parent or guardian for the child's care, education, and so on.

### ***Thirty-day Survivorship***

This clause states that any beneficiary named in your will must live longer than you by at least 30 days before he or she is entitled to receive the inheritance. However, money could be accessed sooner if probate were not required to access it.

The reason for including this clause is to avoid 'double probate' if you and a beneficiary, such as your spouse, die within a few days of each other as the result of a common accident.

### ***Perpetuity Clause***

This clause reflects a rule which has developed in the law to stop someone from putting conditions in their will which have the effect of controlling the distribution of the estate long after death. The rule sets a time limit for when future gifts must 'vest' in a beneficiary (become legally entitled to the gift).

If it can be determined that the gift will not vest within the perpetuity period, the gift may be considered 'void' or cancelled. To avoid this, the clause says that the gift automatically vests before the end of the perpetuity period. It is only included if your will contains a trust and if the trust does not have this already included in its terms.

### ***Anti-Accumulations Clause***

If a trust receives interest, dividends, or other amounts, these are income to the trust. Income cannot accumulate or be kept inside a trust for longer than 21 years. Tax rules set limits on how long income can be accumulated in a trust.

Therefore, any trust must name a beneficiary who is to receive the income or interest after 21 years. This clause is included if a trust in your will might exist for more than 21 years and if the trust does not have this already included in its terms.

### ***Trustees' Abilities, Powers, and Discretions***

Your will gives your executor or trustee a lot of power. Think of it as giving your executor all the tools he or she needs to do the job properly. No one can predict what assets you may have at your death or what other special circumstances your executor or trustee may face. So it is best to make sure that he or she is well-equipped to do whatever is necessary to administer your estate and any trusts.

Without the broad powers set out in your will, your executor would have to rely on the limited powers provided by law. These powers are also given to the trustee of any trust in your will unless your will specifically modifies those powers.

### ***Settlement Period***

Under new tax laws in effect as of January 1, 2016, the income earned by the assets of an estate will be subject to the top tax rate unless the executor elects to have the income taxed at graduated rates and assuming the estate

otherwise qualifies. It is then a 'graduated rate estate' under the *Income Tax Act*. If the election is filed, graduated rates apply to the estate's income for a maximum of 36 months from the date of death. This settlement period clause allows the executor the discretion to delay winding up the estate in order to take advantage of potentially lower graduated tax rates.

### ***Power To Sell***

This clause gives your executor the power to sell all of the assets of your estate except for any assets specifically mentioned which are to be given to, or held for, a beneficiary.

### ***Retention***

This clause allows your executor to hold on to one or more of your assets in their original form if he or she thinks it would benefit your estate to do so. Otherwise, your executor is expected to sell all of your assets within a year of your death except for any assets specifically mentioned as gifts or which are to be held for a trust or for a beneficiary.

### ***Investment***

When making investments, an executor is required to act as a 'prudent investor' would. As this is a relatively new legal concept, judges haven't had time to determine exactly what it means.

The clause in your will broadens the investment powers of your executor or trustee and directs that he or she act reasonably and in good faith and establish a standard and criteria when investing. It also allows an executor or trustee to delegate his or her investment powers to a corporate executor.

### ***Hire and Pay Professionals and Others***

This clause allows your executor to hire professionals, such as an accountant, financial planner, or lawyer, to help him or her in the administration of your estate. It sets out that the fees of these professionals are to be paid from your estate.

### ***Power to Delegate Investment Management to Others***

This clause allows your executor or trustee to hire investment managers or advisors to help with investing your estate or trust assets. It also allows your executor to delegate his or her discretion to manage such assets as your executor feels is appropriate and to pay the fees of investment counsel out of your estate.

### ***Borrowing and Lending***

This clause lets your executor borrow money on behalf of your estate to, for example, pay an outstanding tax debt. This can be especially important if the main asset is a house or an investment portfolio. If the asset can't be sold quickly enough and turned into cash to pay the tax debt, penalties and interest can build up very quickly.

### ***Settling Claims***

This clause gives your executor the authority to deal with a claim against your estate or a claim your estate may have against someone else. It goes on to say that your executor may refer a claim to arbitration and relieves your executor from claims against him or her for agreeing to a settlement.

### ***Making Agreements***

This clause enables your executor to enter into agreements with others concerning your estate without having to get the consent of the beneficiaries.

### ***Power to Deal with Hardware Devices and Digital Assets***

This clause gives broad power to your executor to access and control your hardware devices and digital assets (as previously defined in your will). It also gives your executor the power to deal with any passwords associated with your hardware devices and digital assets. It authorizes any website to release your account information, including usernames and passwords, to your executor. It also advises your executor that you may have prepared a memorandum with instructions for dealing with your digital assets.

### ***Real Estate***

This clause gives broad power to your executor to deal with any real property that you may own at your death without having the consent of the beneficiaries.

### ***Not Required to Maintain Even Hand***

If all or part of an estate is held and not immediately distributed, for example, because a beneficiary is a minor or an incapable person or there is a Henson trust for a person receiving ODSP, the estate trustee is required to give equal consideration to both the trust beneficiary and the remainder persons (those who would receive the remainder of the trust if the trust beneficiary dies before receiving all of the funds). This clause allows the estate trustee to consider only the needs of the trust beneficiary when administering the estate or

trust rather than worrying about how much will be left for the remainder persons.

### ***Securities***

This clause gives your executor the same rights that you would have had, if alive, to deal with shares of a corporation which you own at your death.

### ***Actions and Rights***

This clause sets out that your executor can start or join any action (lawsuit) concerning any investment or asset that is part of your estate.

### ***Distribution of Assets in Existing Form***

This clause allows your executor to give an asset to a beneficiary in the form the asset was in at your death. Without this clause, the executor would have to convert all assets to cash or get the consent of the beneficiaries. Your executor can also sell assets to your beneficiaries and apply the beneficiaries' interest in your estate to the purchase price.

### ***Elections, Designations, Determinations***

There are times when it may benefit your estate if your executor makes elections, designations or determinations for income tax reporting purposes. This clause gives your executor the power to do this when appropriate.

### ***Transactions with Trustees***

This clause is included to allow your executor to buy assets from your estate. Without this clause, your executor would have to seek the court's approval before buying assets from your estate.

### ***Business Interests***

This clause gives your executor the power to carry on or sell any business or partnership that you are involved in at your death. If you have advised us that you currently have a business or partnership, this clause will be expanded to include additional powers related to your business or partnership.

### ***Power to Appoint Another***

This clause is included if your will contains one or more trusts. It allows your executor or trustee to appoint someone else if needed because he or she intends to resign or can no longer act. It also allows your executor or trustee to appoint a trust company as an additional executor or trustee.

### ***Power to Add a Subsequent Interest to an Existing Trust***

This clause sets out that if there is a trust for a beneficiary and if that beneficiary could receive

something more from your estate at a later date, that is also to be added to the trust.

### ***Power to Purchase Annuity***

If your will includes a trust for a beneficiary, there may come a time when there isn't a lot left in the trust and it no longer makes sense to keep the trust running due to the cost of administering the trust. If that happens, this clause allows your executor to use the rest of the trust funds to buy an annuity for the beneficiary.

### ***Annuity for Dependent Child or Grandchild***

This clause allows your executor to buy an annuity for your dependent child or grandchild. The annuity can be paid directly to the child or grandchild or to a trust for the child or grandchild.

### ***Division of Assets***

This clause allows your executor to decide what assets will form part of various shares and to set a value for assets. However, your executor must have a reasonable basis for setting values such as an appraisal.

### ***Income and Capital Receipts***

This clause allows your executor to decide whether certain investments, stock dividends, and stockholders' subscription rights should be considered capital or income.

### ***Power to Combine Trusts***

In the event that in your will or in both the wills of you and your spouse there are largely identical trusts benefitting the same beneficiary, this clause allows your executor to combine the trusts. This might be done to make administering the trusts easier and less costly.

### ***Power re Spousal Trust***

If your will contains a trust for your spouse, to ensure the best possible tax benefit certain conditions must be met so that the trust continues to qualify as a spousal trust under the *Income Tax Act*. This clause serves as a reminder to your executor and trustee to comply and disallows anything that is contrary to that goal.

### ***Ancillary Powers***

To help ensure all of the powers contained in your will are truly useful, this clause allows your executor to do all things incidental to such powers.

## **Maintain Testamentary Trust Status**

A trust established as the result of a death, called a 'testamentary trust', receives favourable tax treatment. There are certain conditions that must be met if a trust is to be considered testamentary. This clause sets out that nothing in your will allows your executor or trustee to act in a way that results in the trust losing its testamentary status.

## **Miscellaneous**

### ***Interpretation***

This clause confirms that the headings in your will do not affect the meanings of the clauses but are only provided for convenience. It also sets out that if your will specifies that some part of your estate is to be divided, the part is to be paid to the beneficiary unless there are contrary instructions in your will, for example, if a part is to be held in trust.

### ***Governing Laws***

This clause confirms that the will is to be governed by the laws of Ontario.

We hope you have found the above explanations to be helpful. If you have any questions, feel free to contact us at (613) 836-9915, or bring them with you to your signing appointment.

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