The BROOKLYN BAR LAWYER REFERAL SERVICE

PREPARING FOR A FUTURE SMOOTH PROBATE

Drafting Wills That Minimize Post-Mortem Issues

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FOREWORD

An estate attorney not experienced in Probate matters has a lifetime of hard lessons awaiting his drafted Wills. Lost distributees, undisclosed property, missed drafting mistakes, and court clerks mindful of discrepancies await the Probate of a Will that, on the surface, looked perfectly fine upon execution. Such problems are due to any one of a number of shortcomings.

Many Wills contain too much boilerplate materials that are unnecessary for the client's future needs; there are many two page "Sweetheart Wills" which are admitted to Probate with little problem. On the reverse side, there are a near-unlimited number of Court proceedings based on multiple page Wills drafted by the most skilled attorneys that languish in the Surrogate's Court for years.

Wills should include the bare minimum requirements: Who receives the residuary, who is named as an Executor, the signature of the Testator, etc. Including language that states the Testator wishes to pay for his estate's expenses are unnecessary (it is a requirement unless someone else offers to pay for them), while adding the right for the Executor to sell property is redundant and merely adds more pages to the Will. The "Plain English" trend in legal writing should be observed with modern Wills even more so than other legal documents: **The Will should be drafted in a way that allows the client to understand what legal concepts are being conveyed**. To do otherwise may have the negative effects of not fulfilling the Testator's desires, and may open the Will up to the protracted legal intervention that the drafter was hoping so hard to avoid.

This CLE program is meant to cover the absolute minimal requirements necessary for a Will for (1) a married individual (2) with two surviving children (3) who has additional beneficiaries (4) while having little concern for estate taxes, (5) is a United States citizen with all property located in the United States, and (6) is not leaving retirement plans via a Trust created by that Will. It may NOT be appropriate for an estate having any of these prior issues, though materials have been provided later in the materials if these matters do arise.

Be mindful that Execution of the Will is often just as important as the actual contents of the document. In addition, make sure to provide your contact information for family members who may one day need to contact you regarding the client's condition, and ask the client if you may contact these extended family members to provide them with your contact information. By taking these steps you will better ensure that the client's desires are actualized upon their passing.

Have a policy on how you handle original Wills. Does the client hold onto the original? Does the attorney? Does a family member? Is it wise to hold onto the original Will of a client twenty years younger than you? What if you lose the original Will or it is damaged? Will your liability insurance coverage protect you as the bailee of someone's Will? There should be no set rule: The past-standard of an attorney becoming the holder of every client's Will has led to more than one attorney's Will Vault being lost to their death or retirement.

Keep copies of all executed legal documents, even if you plan on sending a Disengagement Letter upon the completion of your work. Paying clients do come back to you in this field of law, often more frequently the older they become. Make sure you are prepared for their arrival in your office.

Simple Suggestions for a Future Smooth Probate

1. **Ensure your Testator destroys her old Will once you have executed a new one.**
2. **Name and identify all distributees and legatees in the Will, and include their addresses.**
3. **If you come across a mistake in a Will you have already executed, re-execute the document with the client.**
4. **Keep Wills concise and to the point.**
5. **Discuss the financial impact of small bequests with the client, and propose alternative means to benefit these beneficiaries.**
6. **Suggest the use of an inter vivos trust when there are several foreign distributees and legatees involved with the estate.**
7. **Keep the number of named executors to a reasonable number.**
8. **Include an UTMA clause in the Will.**
9. **Include a Supplemental Needs Trust provision in the Will.**
10. **Discuss what bonding is with your client; know when it is not appropriate to waive bond.**
11. **Make sure to include plain-English reasons why a future guardian for minor children may be an unsuitable candidate.**
12. **Have a policy as to what client Wills to hold in your possession; any client who would realistically outlive your practice is often not a suitable candidate's Will to keep in your possession.**
13. **Make sure you execute all documents properly as required by law.**

What follows are problems (and simple solutions) that an attorney may face if they are familiar with drafting Wills, but have not done much Probate work.

1. Not destroying or revoking past Wills

It is hard to imagine any attorney not revoking any and all past Wills and codicils in the first paragraph of a new Will. It is more reasonable, however, to assume that an attorney is holding onto an old original Will that has since been revoked and must now be delivered to the court upon learning the Testator has passed. This can cause a great deal of delays and possible problems for the attorney administering to the Probate under a newer Will.

This problem tends to happen in one of three ways:

(1) A decedent is in possession of more than one original (differing) Will(s) and both must be included on the Petition
(2) A Testator deposits a Will at her domicile county's surrogate's court prior to her passing; when the practitioner delivers a Probate petition with a more recent Will the court finds the older Will in its possession
(3) An opposing party in a Will dispute "miraculously" finds an older Will executed by the Testator at a crucial time in the Will dispute process

While an old Will may eventually be revoked upon a newer Will being admitted to the Surrogate's Court, there is still the issue of actually having that newer Will admitted. Prior to that time, the petition and waivers must include the adversely-affected parties listed in the old Will. At best, this requires more parties to be placed on notice; at worst, it may lead to a Will dispute initiated by the adversely affected parties.

➔ **Ensure your Testator destroys her old Will once you have executed a new one**

2. Not naming all heirs under intestacy in the Will

Remember that the cornerstone of Probate is, almost paradoxically, the laws of Intestacy (dying without a Will). Any party that would have to be put on notice during an Administration proceeding under EPTL 4-1.1 must also be put on notice during the Probate of the same decedent if a Will did exist. A problem arises when the closest family members cannot be identified or found.

Many members of small families may not be in close contact with their nearest blood heir, and may not even have met them at all. This tends to happen more often to foreign-born clients (see more below), but is not exclusive to them. Using genealogists and private investigators in these circumstances may prove to be very expensive; it is perhaps better to have the Testator's assets

pass by operation of law, thereby avoiding the need to identify these people (not to mention subsequently serving them), is a proper practice.

A more frequent and avoidable issue is when an address of the nearest heirs is not known, or when a family member within the line of succession has predeceased. If a Testator has never been married, outlived his parents, and has two siblings who have children of their own, it is a good practice to state this in the Will, and to say where they are living at that time:

Example:

> *I have never been married and have no children alive or deceased, naturally or adopted. My Father, Bart Starr, predeceased me in 1997, and my mother, Martha Starr, predeceased me in 2001. I am survived by my two siblings: Joseph Starr, with a current residence located at 123 Barker Street, Green Bay, WI, and Jennifer Favre, with a current residence located at 76 Nichols Lane, Murrayville, TX. I have no other siblings alive or deceased. Joseph has two children, Lesley Starr and Miley Starr. Jennifer has one child, Mickey Farve.*

Placing this type of information in a Will has several benefits:

(1) Finding these distributees is much easier when the Testator passes away.
(2) The court clerks can better identify the distributees when comparing the Will to an heirship affidavit
(3) Ensuring the Petition has all relevant information regarding distributees
(4) Establishing proof of the Testator's knowledge of the "fruits of his bounty" (I.e. closest family members otherwise entitled to his estate under Intestacy)

➔ **Name and identify all distributees and legatees in the Will, and include their addresses**

3. Not having mistakes fixed after a Will has been executed

Very few (no?) Wills are entirely original content: Most clients tend to fit into a few categories that the estate practitioner has already encountered, and the attorney often uses an existing client's documents as a base for creating documents for the new client. The downside is that some information from the old client may sneak its way into the new client's document: Incorrect names, wrong birthdays or family members, and the like are more frequently an issue in these cases than incorrect distributive instructions.

When this happens the drafting attorney must create a "Scrivener's Error Affidavit" explaining what was meant to be represented in the documents. Alternatively, the court can make a ruling as to what was meant to take place (though may not be willing to do so where the error creates a significant amount of ambiguity to affect a legatee or distributee under the Will). Neither circumstance is preferable.

➔ **If you come across a mistake in a Will you have already executed, contact the client and offer to re-execute the document at your expense.**

4. Making the Will too long

Most Wills are far larger and longer than they need to be. Several Wills may only have a few pages of individualized content, and then tens of pages of "universal" (a/k/a boilerplate) content placed in each practitioner's Wills, such as fiduciary powers and provisions. This leads to two major problems:

First, any Will is reviewed in its entirety by at least one clerk of the court upon submission of the Will. If you can imagine yourself feeling drained when you have to read one canned document during your week, imagine reading ten of them every day.

Second, and more importantly, a clerk will most likely (eventually) find any mistake or inconsistency between your individualized content and your standard content. These circumstances may warrant a bench ruling or a Will construction proceeding.

There are several default provisions relating to estates that more often than not make sense when a certain procedural aspect is not addressed in your Will. Practitioners tend to underemphasize the importance of the advice they provide during consultations, and overestimate the importance of their final deliverable product. Shorter Wills decrease the chances for inconsistencies and corrective proceedings, and make it easier for your client to understand the document.

➔ **Keep Wills concise and to the point.**

5. Making small general bequests

Some Testators want to leave a nominal gift to multiple individuals. This token bequest may serve as a final expression of appreciation to the recipient. However, leaving small bequests tends to cost as much in legal fees as the actual bequest does.

Example:

> *Bertha (the Testator) bequeaths $1,000 to her college friend Stephen. The presiding estate attorney must (a) find Stephen's whereabouts, (b) send Stephen Notice of Probate, (c) create a Release for Stephen's bequest, and (4) ensure return receipt of the Release. While none of these tasks are necessarily difficult, they can be time consuming; total legal fees for this one bequest equal $1,200.*

Small bequests are more easily accomplished utilizing Transfer on Death ["TOD"] or In Trust For {"ITF"] accounts: The Testator can choose how much money to keep in these accounts, may have multiple beneficiaries, may revoke the accounts by simply withdrawing all money, and

does not even have to inform the eventual recipient of the account until the owner's passing. In addition, the onus of transferring the funds is no longer placed on the attorney: The financial institution may ask the next of kin or Executor for the recipient's contact information, at which point only the beneficiary(ies) of the account is required.

➔ **Discuss the financial impact of small bequests with the client, and propose alternative means to benefit these beneficiaries**

6. Leaving money to hard-to-identify individuals / foreign individuals

The problems of leaving money to difficult-to-find parties cannot be overstated. If the party is a distributee you find yourself in a bad situation: Unlike personal jurisdiction requirements under CPLR 308, the Surrogate's Court requires distributees living in New York to be served in person. A Probate Citation cannot be left to a suitable party, such as a building's doorman, or "nailed and mailed" without the Court's permission. A Legatee who is placed on notice will require the mailing individual sign an affidavit (or, if it is the attorney, an attorney affirmation) that notice of Probate was sent return receipt and the mail has not been returned. You will also have to place their consulate on notice that their citizen is receiving funds from an estate.

Suppose your Testator has several foreign distributees, or left property in her Will to many people not currently living in the United States. If it is the former, they shall require waivers to be notarized (or citations to be delivered to them); any beneficiary shall need to sign a Release that is notarized as well. If the parties cannot make it to a US embassy or consulate to get these documents notarized, they need to get an "Apostille" which serves as a sort of international notarization under the 1961 Hague Convention.

Unfortunately, there is no one-fits-all approach for clients leaving money to many family members outside of the United States. An inter vivos trust is usually the best approach, as it minimizes formal notice requirements associated with Wills.

➔ **Suggest the use of an inter vivos trust when there are several foreign distributees and legatees involved with the estate.**

7. Naming too many successor Executors

All named executors in a Will must be placed on notice. If their addresses are not listed in the Will, finding them creates the same issues as listed above regarding finding a Testator's legatees and distributes. The additional problem here, though, is that a distributee is required to receive a Waiver or Citation whether or not there is a Will; absent being named as an executor in a Will, the person named as an executor would not have to be placed on notice (unless they also happen to be a distributee).

While naming successor executors is good practice, it remains important to (a) include their contact information in the Will, (b) name at least one individual who is likely to far-outlive the Testator (if one is available), and (c) attempt to limit the number of named successors so as to minimize notice requirements.

Remember that if your named executor(s) cannot serve, the next party in line under Intestacy has the right to petition to act as executor. If this outcome is also not desired, make sure to say such a person should not serve.

➔ **Keep the number of named executors to a reasonable number.**

8. **Neglecting to prepare for underage beneficiaries**

Forgetting to create a testamentary trust for underage beneficiaries can be a costly mistake. First, any bequest made directly to a minor allows the Court to hire a Guardian Ad Litem to represent the beneficiary, particularly if the minor is receiving more than $50,000. The GAL submits a bill to the court for his services, and the court determines what it believes is a reasonable fee via court order. This is only the first half of the problem: Upon attaining the age of majority the beneficiary may be legally entitled to all the funds that were bequeathed to him (and "buy the fraternity" or spend all funds in some frivolous manner).

Where nominal funds are involved the Will may include provisions allowing for the executor to deposit such funds in an Uniform Transfer to Minors Account ["UTMA"]. An adult custodian is named on the account who invests the funds as they deem fit as a fiduciary. When the minor attains age 21 he may withdraw the funds. This should allow the executor to avoid having a GAL named, thereby saving estate funds.

Of course, an UTMA does not protect a beneficiary from himself: He still receives the funds at a young age. Instead, the Testator may include a simple trust in the Will, often referred to as a "testamentary trust." This differs from inter-vivos trusts in that the latter are created during life, while testamentary trusts are only created upon the Will being admitted to Probate. The court grants Letters of Trusteeship so that the named trustee can open accounts for the beneficiary(ies).

Trusts allow a Testator to set a wide range of controlled distributions and investment options. A trustee may have the ability to pay for a beneficiary's healthcare, education or real estate purchases. Trust funds may be distributed at multiple periods or at the trustee's discretion, and may allow for cessation of payments in the instance of drug addiction, divorce, creditor issues or other problems of the beneficiary's making. And because there is written direction for the use of the money, a GAL is typically not required.

➔ **Include an UTMA clause in the Will.**

9. Neglecting to prepare for disabled beneficiaries

This is, perhaps, the most expensive omission in any Will: not preparing for the proper distribution of funds to legally disabled beneficiaries. Also known as a Supplemental Needs Trust (EPTL 7-1.12), these provisions allow a beneficiary receiving Medicaid or Supplemental Security Income to continue receiving their benefits while simultaneously having funds available to them in trust.

By way of illustration: Medicaid pays for a disabled individual's health care needs and assistance for activities of daily living. It is a "needs based" program, meaning that a Medicaid recipient cannot have more than $14,850 of assets and $825 of monthly income. If a Testator leaves this type of beneficiary too much money outright (instead of leaving the executor the ability to create a testamentary supplemental needs trust) one thing will happen and another can happen:

(1) WILL HAPPEN: The beneficiary shall be over his allowing resource level and be removed from Medicaid
(2) MIGHT HAPPEN: If the beneficiary is either over the age of 55 or has substantial nursing home expenses, the bequest will have a Medicaid lien places against it

All too often, almost always unintentionally, bequests in Wills either get a beneficiary removed from receiving Medicaid benefits, or require additional attorney fees in the form of an attorney petitioning the courts to have the bequest used to fund a court-ordered SNT. This can be avoided by merely inserting a simple provision into a simple Will.

➔ **Include a Supplemental Needs Trust provision in the Will.**

10. Bonding issues

Much like revoking all past Wills and codicils, it is very rare to see a Will that does not waive bond for any serving fiduciary. This knee-jerk response, while understandable, should first be understood prior to automatically inserting it into a Will.

A bond is insurance on the fiduciary: If an executor or administrator is bonded and then absconds with estate funds the bonding company will pay the beneficiaries' bequests themselves, and then pursue the fiduciary for the absconded funds. Because the beneficiaries' payments are ensured, courts tend to favor estate bonding, and may often require it during administration proceedings where several parties are beneficiaries.

However, and to be fair, procuring bonding is not always an easy process: A proposed fiduciary must have a credit check, a lien search, a criminal background search, must report his income and assets annually, and must pay for the initial premiums himself (though he can be reimbursed upon the bond being filed with the court). These are all rather intrusive requirements, and when a fiduciary has a weakness on any of these matters the most favorable bonding companies may

reject the request. The problem is that if a bond cannot be procured then full Letters Will not be issued.

Be mindful to waive bond for trusted fiduciaries, such as a spouse or responsible children. For more-remote family members, work with the client to determine whether requiring bond will disincentivize their acting a fiduciary.

➔ **Discuss what bonding is with your client; know when it is not appropriate to waive bond.**

11. Not warning the court as to improper Guardians of minor children

Parents of minor children will often request an attorney draft their Wills for the primary purpose of naming a guardian for their children if they pass away unexpectedly. While it is the court's mandate to ask what is in the best interest of the child, it is helpful to provide the court with information it may not immediately become aware of regarding certain choices of guardian.

A child's other parent or grandparent may have criminal proceedings against them in another jurisdiction, or may be woefully behind on child support payments. Certain parties may be physically abusive or may have substance abuse issues. The court may not immediately know this without you providing such information in the Will.

Statements such as: "*My children's father is two years behind on child support payments",* or "*My children's mother has been sent to rehab for alcohol abuse on four separate occasions*" puts the court on notice that a detailed investigation may be required before guardianship is granted.

➔ **Make sure to include plain-English reasons why a future guardian for minor children may be an unsuitable candidate.**

12. Holding onto all of your clients' Wills

Many attorneys have made it a habit to hold onto all of their clients' original Wills upon execution. Their stated purpose may have been that they didn't want the Will lost in case the client passed away and it couldn't be found, but in reality it was more likely because the attorney wanted the first shot as procuring the Testator's Probate work upon their passing. While this viewpoint may seem cynical, it has regularly played itself out for several generations.

An attorney may retire, switch firms, switch occupations or have property damage that causes his Wills collection to be lost or ruined. If the attorney passes away his fiduciary must attempt to return the Wills to the client or his legal representative.

A better practice is to only hold onto Wills for clients who live far from their choice of Executor, aging clients who do not have close family members as Executor, Wills where there are uneven distributions to certain Legatees, or where the attorney is the named Executor. Clients who are young, have trusting spouses and children named as Executors, or basically anyone who does not need their Will in your possession are not suitable bailors of Wills to you.

➔ **Have a policy as to what client Wills to hold in your possession; any client who would realistically outlive your practice is often not a suitable candidate's Will to keep in your possession.**

13. Improper (Bad) execution

Having proper content within a Will is only half the battle; the other reason clients come to you instead of using online resources or blank Wills sold in stationary stores is to ensure their Wills are valid documents. This means the Will should be a validly-executed document.

Remember that a valid Will must be

(1) signed by the Testator (or in the presence of the Testator by a representative)
(2) at the end of the Will
(3) and must be published by the testator
(4) The actual acknowledgement must be made
(5) in front of two (2) disinterested witnesses
(6) who must attest to the Testator's mental capacity and execution of the document

It is also good policy to have a self-proving affidavit signed at the time of execution, or else the witnesses will have to provide the attestation when the Will is delivered to the court for submission to the Surrogate. This is not a good practice, as the witness may be hard to find, not remember the signing, etc.

Remember that any distributee to an estate has the right to hold 1404 examinations of your witnesses, so it is good to always follow the same execution habits. Some attorneys have lengthy scripts they read during execution, others read the self-proving affidavit to the witnesses; some attorneys will have their clients initial every page of the Will; the list can go on.

Here are some tips that should be generally followed to make execution ceremonies conform to execution requirements:

- Have the Will stapled PRIOR to the execution of the document, and do NOT unstaple the document.
- Have the Testator bring valid identification which you shall show to the witnesses.
- Look at your witness identification at least once in our life, as you shall.
- Have the Testator (1) state his name, (2) sign in front of the witnesses (if possible) and (3) state the words *"I publish this to be my Will."*

- You may ask them whether they know the document is his Will, and who is nearest family members are.
- Have the witnesses NEATLY print their names (as well as sign their names), and include their current residential address or some other address they can be found at in case of a future Will dispute.
- Ask if anyone at the execution ceremony has any questions.
- Make a photocopy of the document if possible.

➔ **Make sure you execute all documents properly as required by law.**

(Place this Letter on my Firm Letterhead)

PRIVILEGED and CONFIDENTIAL
ATTORNEY/CLIENT WORK PRODUCT

(Date)

(Client Name)
(Client Address)
(Client Address)

Re: Your Last Will and Testament(s)

Dear (Client Name),

Please allow me to introduce myself. My name is Daniel Timins. I am a Trusts and Estates attorney practicing law in New York.

I was recently asked to handle _____ estate planning matters. I want to remind you that **I am currently in possession of _____ ORIGINAL Last Will and Testament**. This is obviously an important legal document, and I want to assure you that it is currently in safe keeping.

Please be mindful that at this time _____ is my client, and as such I cannot share his / her confidential legal information. If you have any thoughts or questions about your _____ legal affairs I highly encourage you to reach out to him / her.

If anything happens to _____ I ask you to contact me immediately so I may be of assistant. In addition, if you would merely like to chat about your own personal legal matters, please feel free to contact me.

Yours Truly,

Daniel Timins, Esq.

LAST WILL AND TESTAMENT OF
LAURA JAMESON

I, **LAURA JAMESON**, a domiciliary of New York born on July 2nd, 1949, revoke any prior Wills and Codicils and declare this to be my Last Will and Testament.

ARTICLE I

Family Information

I am married to**NICOLAS JAMESON**, born March 22nd, 1947, and any reference to my 'husband" shall be to him. I two children, **MARCUS JAMESON,** born January 25th, 1974 and currently residing at 45 Rue de Flor, Avignon, France, FHM432, and **MICHELLE JAMESON-ROTHBERG**, born May 22nd, 1976 and currently residing at 20 Pendleton River Road, Scarsdale, New York 10583. I have no other children alive or deceased, naturally or adopted. **MARCUS** has two children, **RICHARD JAMESON** and **KERRIE JAMESON,** and **MICHELLE** has one child, **RUTH ROTHBERG**.

ARTICLE II

Payment of Estate Expenses

I direct that all my debts which shall be determined to be proper antemortem claims against my estate and my funeral expenses be paid as soon as practicable after I pass away by my Executor hereinafter named. In his or her sole discretion, my Executor may pay any portion of the costs of ancillary administration and similar proceedings in other jurisdictions.

ARTICLE III

Specific Bequests

I leave my gold engagement ring with a 1.02 carat princess cut diamond to my daughter, **MICHELLE JAMESON-ROTHBERG.** If she predeceases me then I leave the property to my Executor to hold onto until my granddaughter RUTH ROTHBERG attains the age of TWENTY ONE (21), as which time the right shall be delivered to her.

If you are drafting a new Will ALWAYS revoke past Wills and Codicils to avoid future Will Construction Proceedings. These take place when multiple Wills need to be incorporated because past Wills were not explicitly revoked.

It is wise to include that the Testator is a New York domiciliary if that is the case and the Will is executed in New York. Including a birth date is optional.

It is a good practice to list all family members who would receive under Intestacy, as they require notice whether or not they receive under the Will. This shall give the clerk accepting the Probate Petition more comfort in knowing all necessary parties to the Probate have been identified. It is imperative that the drafting attorney identify all key Distributees when drafting the Will: a Testator always has two sides of a family (mother's and father's relatives), and the two may not know each other well or know the whereabouts of the other side of the family.

Statutory requirements state that adopted children have equal rights to naturally born children. If no children exist, make sure you include the fact that the Testator does not have and never had any adopted children.

This is a "fluff" article. A person cannot obviate her requirements to pay for estate expenses. However, clients tend to appreciate knowing they are responsible for their own post-mortem expenses to avoid being perceived as a "burden" upon their passing.

Specific details of specific bequest items can be helpful in the case where a person absconded with the Decedent's property. That being said, even the best description does not stop some individuals from stealing personal possession. All too often the "first person on the scene" ends up in possession of this property, at which point it disappears (I.e. it is taken and hidden).

Remind the client that specific bequests that cannot be found at the time of death **adeem**, meaning that there is no financial set-off for this gift which is not found and therefore never delivered. This is particularly troubling when the property bequeathed is substantial, such as a piece of real estate. Making contingency bequests in the case of adeemed property may ease this potentially lost bequest.

ARTICLE IV

General Bequests

A. **Bequests to Minors.** I leave Three Hundred Thousand Dollars ($300,000) to be split evenly by the then-living grandchildren by right of representation pursuant to the provisions of ARTICLE VI, Descendants' Separate Trust, described hereunder.

B. **Bequests to Charity.** I leave the sum of Twenty Thousand Dollars ($20,000) to my church, **Saint John the Baptist's Church of the Holy Redeemer**, located at 145 Vine Street, Brooklyn, New York. If the church is no longer in existence at the time of my passing this bequest shall lapse into my residuary estate.

ARTICLE V

Residuary

I dispose of the rest, residue and remainder of my estate as follows:

A. **If My Husband Survives.** If my Husband survives me, I give my Residuary Estate, real and personal, to my Husband.

B. **Husband's Disclaimer of Outright Bequest.** If my Husband disclaims all or part of this gift, the disclaimed property shall be paid to the Trustee of the Descendants' Separate Trust under this Will to be disposed of under the terms of that trust in the amounts noted hereunder in Section C, provided that my Husband shall have no power to direct the beneficial enjoyment of the fractional share of the Descendants' Separate Trust originally consisting of disclaimed property.

C. **If My Wife Does Not Survive.** If my Wife does not survive me, I leave the remainder of my residuary estate equally to my children outright by right of representation.

ARTICLE VI

Descendants' Separate Trusts

Property that is to be bequeathed to my grandchildren in an Descendants' Separate Trust shall be held under this Article, and all references to the "Descendants' Separate Trusts" shall be to the trusts held under this Article.

Adding a beneficiary's estate's right to a bequest (terms such as "by right of representation" or "per stirpes") will allow non-family member's family to receive the bequest. Under the SCPA's "Anti-Lapse" provisions the children of anyone more distant that a sibling will not receive a bequest without these terms included.

Remember the importance of explaining the differences between Specific, General and Residuary Bequests (Demonstrative Bequests are rare, though if they apply make sure to explain them as well). You will also want to explain the concept of **abatement**, I.e. how bequests are filled in the following order: Specific, General, Demonstrative, Residuary. If there is no remaining property to fulfill a later type of bequest there is no set-off.

Example: All Specific Bequests are fulfilled, some General Bequests are fulfilled pro-rata due to lack of Probate assets. All remaining bequests shall not be fulfilled.

A Residuary Clause is an essential part of the Will. Residuary bequests are the final bequests to be filled, and may dictate the majority of the property to be transferred.

Reference the part of the Will that shall dictate how a bequest is to be handled if it is not being given outright. If no instruction is given (Ex: " pursuant to Article VII" or "In Trust as outlined herein") the assumption is that it is being given outright.

Some clients do not want a bequest going to a recipient's children: They want the bequest to only go to that individual or someone else of her choosing. This is commonly referred to as "Survivorship" and may apply to all bequests of a sort, in which case you may want to add a "Survivorship Clause. Make sure to ask your client if a Specific or General Bequest is meant to go to a specific person.

Lastly, where certain Distributees are excluded, you may want to include a "soft" reason as to why the Testator wished to not include them in her testamentary desires.

Here we have created a "Testamentary Trust." These trusts are created upon the acceptance of the Will into Probate and are secured by issuance of "Letters of Trusteeship." Until that time, no Trust exists.

A. **Purpose of Trust**. It is my intention that any funds held In Trust shall be used for a beneficiary's healthcare and higher education expenses prior to him or her attaining the age of Thirty (30).. However, I leave complete discretion to the Trustee as to how to administer to Trust income and principle.

B. **Administration of Trust Assets.** The Trustee shall divide all assets distributed to the Trustee by the Executor into separate Trust accounts for the then-living beneficiaries under this Article.

1. Any beneficiary not alive at the time of this Will shall have his or her share transferred to the surviving beneficiaries' Separate Trust.

2. The Trustee shall have the right to invest Trust assets as he or she deems appropriate, and accumulate any income not otherwise distributed or utilized during any year.

C. **Trustees of Trusts.**

1. All Descendants' Separate Trusts shall be administered by **MICHELLE JAMESON-ROTHBERG** as Trustee. If she is unable or unwilling to serve I appoint **MARCUS JAMESON** to serve as Trustee.

2. Any Trustee may appoint a Co-Trustee and his or her Successor Trustee, provided said Co-Trustee or Successor Trustee is not related to the serving Trustee in any way.

3. No named Trustee shall be required to post bond to act as Trustee.

D. **During The Beneficiary's Life.**

1. Prior to beneficiary attaining the age of Thirty (30) the Trustee shall have full discretion as to how to administer to the funds held in trust.

2. The beneficiary may withdraw all income and principal of the Trust at any time after the Beneficiary has attained the age of Thirty (30).

E. **After The Beneficiary's Life.** Upon the passing of the Beneficiary, any funds held in his or her Descendants' Separate Trust shall be transferred to the surviving beneficiary's Descendants' Separate Trust.

ARTICLE VII

Spendthrift Provision

A. **No Assignment.** No interest in any distribution shall be subject to a beneficiary's liabilities or creditor claims, assignment or anticipation.

While the terms of the Trust will allow the Court and Executor to determine the Trust being dictated by the Testator, it is advisable to include a plain-English section describing the Testator's intention for creating the Trust.

Certain defaults under the SCPA will guide Trustee actions: It is not essential to list all fiduciary powers a Trustee shall have. However, these defaults may constrain some potential Trustee powers, so it is important, at a minimum, to provide some direction to the Trustee.

Make sure to name Trustees who are reliable individuals who would not be enticed to act pursuant to their own interests. More importantly, make sure to allow the Trustee to name Co-Trustees and Successor Trustees so that doing so in the future will avoid the need to petition the Court if the then-serving Trustee is no longer available.

Give the Trustee instructions. If funds are only to be used for certain types of expenses then list those expenses. However, you should include a date or age where the Trust shall be dissolved in order to allow the beneficiaries access to what was held aside for them, and avoid issues relating to the rule against perpetuities.

Also include what shall happen to funds if a beneficiary passes away while funds are still held in Trust. Do remaining funds go to the beneficiary's estate? Other siblings? Discuss this with your client.

A "Spendthrift" article is somewhat fluff: the default in New York often confounds a person's efforts to assign his or her interests in an estate pre-mortem. However, a creditor to a beneficiary may attempt to place a lien on the beneficiary, particularly if he or she is named as an Executor (what is to stop them from writing a check to himself?).

B. **Protection from Creditors.** If the Executor shall determine that a beneficiary would not benefit as greatly from any outright distribution of trust income or principal because of the availability of the distribution to the beneficiary's creditors, the Executor shall instead expend those amounts for the benefit of the beneficiary. This direction is intended to enable the Executor to give the beneficiary the maximum possible benefit and enjoyment income and principal to which the beneficiary is entitled.

ARTICLE VIII
Executor Appointments

A. **Appointment of Executor.** I appoint my husband to serve as my Executor of my estate. If he is unable or unwilling to serve, I name my friend, **JANET JOHNSON,** currently residing at 523 Houston Street, Apt. 4, New York, NY 10003 to serve as my Executor. If she too is unavailable, I appoint my then-serviving children to act as Joint Executors on all matters.

B. **Co-Executors.** A Co-Executor may be appointed by a then serving Executor (the "appointing Executor") at any time when only one Executor is serving. The sole exception to this shall be when an Executor with an interest in my estate is serving while having creditor issues, in which case the Executor may name a disinterested party to serve as a Co-Executor, even if two Executors are already serving. A Co-Executor so appointed hereunder shall serve only while the appointing Executor serves. Any appointment of a Co-Executor hereunder shall be made by an acknowledged instrument delivered to any and all other Executors who may then be serving and filed in the court or other judicial office in which this Will has been admitted to original probate or, if this Will has not yet been admitted to original probate, where it has been first offered.

C. **Successor Executors.** If only one Executor is serving hereunder and if no successor Executor has been named or identified herein or has been otherwise named pursuant to the provisions hereof, such Executor may appoint a successor Executor to serve when the appointing Executor fails or ceases to serve as Executor. Any appointment of a successor Executor shall be made by an acknowledged instrument delivered to any and all other Executors who may then be serving and filed in the court or other judicial office in which this Will has been admitted to original probate or, if this Will has not yet been admitted to original probate, where it has been first offered for original probate.

Bear in mind a beneficiary's largest creditors: A soon-to-be former spouse (with the IRS not far behind). While a bequest is not considered part of marital property unless it is commingled for years with the other spouse's funds, requests to modify child support may be another matter. If a beneficiary's non-preferred creditors (such as credit card companies) may be an issue consider using non-public means of conveying property, such as a Transfer on Death account, or leaving funds to a Testamentary Trust where the beneficiary is NOT the Trustee.

A Will is incomplete if no executor is named. The most trustworthy beneficiary is often named as the Testator's first choice of Executor, provided he or she does not have substantial creditor issues. It is equally important to name a Successor Executor: If the first person does not wish to serve he may "waive" his right to serve; if he is deceased his Death Certificate may be provided to the Probate clerk so that the Successor may be named in his stead.

Remember that the Executor enters into a fiduciary relationship with the Estate: With associated liabilities also comes the right to be paid a commission under SCPA 2307. These commissions are:

- **5%** for the **first $100,000** probated **($0 to $100,000)**
- **4%** for the **next $200,000** probated **($100,001 to $300,000)**
- **3%** for the **next $700,000** probated **($300,001 to $1,000,000)**
- **2 ½%** for the **next $4,000,000** probated **($1,000,001 to $5,000,000)**
- **2%** for **all additional assets** probated **($5,000,001 and Above)**

If the Testator wishes to have the Executor serve for lesser funds that is acceptable, though it may disincentivize him from serving if he is not a substantial beneficiary of the estate. Being an Executor can be hard work and opens one up to potential liability, so it is important to discuss the concept of commissions with the Testator.

Much like with Trustees, allow the Executor to name a Co-Executor or Successor Executor: Many Probates last much longer than initially anticipated, sometimes for over a decade. If no successor is named and no mechanism for replacing an Executor is in place then the attorney will need to petition the court for a Successor to be named, sometimes requiring service of all beneficiaries.

A Will that does not address Successor matters is ripe for a dispute: Beneficiaries and attorneys alike want to be in the "driver's seat" of the Probate proceeding. Such expenses could have been somewhat mitigated by solely adding a few sentences to the Will.

ARTICLE IX

Fiduciary Provisions

1. **Accountings and Other Proceedings.** My Executor shall not be required to render to any court annual or other periodic accounts, or any inventory, appraisal, or other returns or reports, unless explicitly required and instructed by the Court. My Executor shall take such action for the settlement or approval of accounts at such times and before such courts or without court proceedings as my Executor shall determine. My Executor shall pay the costs and expenses of any such action or proceeding, including (but not limited to) the compensation and expenses of attorneys and guardians, out of the property of my estate. I direct that in any proceeding relating to my estate, service upon any person under a legal disability need not be made when another person not under a disability is a party to the proceeding and has the same interest as the person under the disability. The person under the disability shall nevertheless be bound by the results of the proceeding.

B. **Distributions to Minor Beneficiaries.** My Executor may, but is not required to, distribute any of my estate to a beneficiary under twenty-one (21) years of age by distribution to any appropriate person (who may be an Executor) chosen by my Executor as custodian under any appropriate Uniform Transfers (or Gifts) to Minors Act, to be held for the maximum period of time allowed by law. My Executor may also sell any asset that cannot be held under this custodianship and invest the sales proceeds in assets that can be so held.

C. **Waiver of Bond.** No Executor or Trustee shall be required to give bond or other security in any jurisdiction and, if despite this exoneration, a bond is nevertheless required, no sureties shall be required.

D. **Disabled Beneficiaries.** In the case of a disabled beneficiary who is receiving or who may in the future receive government benefits, any portion of the Residuary Estate or any trust income or principal shall not vest in such recipient, but instead, the Executor or Trustee may distribute the portion of the Residuary Estate or the income or principal to a third party Supplemental Needs Trust (SNT), pursuant to New York's Estates Powers and Trusts Laws (EPTL) Section 7-1.12, in which the disabled beneficiary is the primary beneficiary. If a third party SNT does not exist, I empower my Executor to create such a trust for the disabled beneficiary, designating the heirs of the beneficiary as the successor beneficiaries.

There are several ways and times that a Will or Probate may be contested, and many chores the Executor must do during these times. At a minimum, an Executor must always:

1. File a Probate Petition and Oath & Designation
   a. (Don't forget the original Will and Death Certificate)
2. Get Waivers or serve Citations on Distributees
3. Collect Assets
4. Pay Creditors
5. Handle estate matters (taxes, sale of property, etc.)
6. Deliver an Inventory of Assets to the Court
7. Distribute bequests to beneficiaries (preferably with Releases)

However, beneficiaries may request that the Court require Accountings from prior to the Will being filed, as well as during the Executor's term. A Testator shall often want the estate to pay for the Executor's expenses on these matters. If it is found that the Executor did abused his powers the Court has the right to surcharge the Executor, so the Testator should have some comfort knowing that the other beneficiaries have recourse for malicious actions taken by the Executor. As such, it may be best to incorporate language that indemnifies the Executor to a greater extent in cases where beneficiaries may be wrongfully disgruntled.

Lastly, the Court, by default, requires the Executor to get **bonded**. A bond is insurance: It can be issued by a surety company to ensure funds are still available to the beneficiaries if the Executor absconds with Probate assets. The idea is that the bonding company will pay the beneficiaries, then pursue the absconder for the difference.

The Court maintains the right to require bonding when it deems it appropriate. That being said, many people find bonding burdensome, intrusive and (in some cases) offensive. Bonding requires the proposed Executor to have a credit check, report his assets and income, and a background check. It requires many rounds of paperwork, and after many weeks of waiting the surety may not want to issue the bond for any one of a number of reasons (lack of income, under-employment, bad credit). And when the Executor is also one of the beneficiaries there is often a feeling that the Executor is having to pay for money they view as theirs.

Many Executors will not serve if a Bond is required. Bonding adds a good deal of time to the Probate process. Many corporate fiduciaries will not want to serve if a Bond is required. Therefore, most Wills explicitly waive Bond, particularly when there is a low-probability of the beneficiaries fighting with one another.

SIGNATURE OF TESTATOR

IN WITNESS WHEREOF, I have hereunto subscribed my name on April 29, 2014.

_____

LAURA JAMESON

ATTESTATION OF WITNESSES

Signed, sealed, published and declared by LAURA JAMESON, the Testatrix above named, as and for her Last Will and Testament, in our presence, and we, in her presence, and in the presence of each other, have hereunto subscribed our names as witnesses on April 29, 2014.

_____	_____
(Signature)	(Signature)
_____	_____
(Printed Name)	(Printed Name)
_____	_____
(Street Address)	(Street Address)
_____	_____
(City, State, Zip Code)	(City, State, Zip Code)

SELF-PROVING AFFIDAVIT

STATE OF NEW YORK)
) ss:
COUNTY OF KINGS)

In the County of Kings, State of New York, on April 29, 2014, then and there personally appeared the within named _____ and _____, who being severally duly sworn depose and say that they witnessed the execution of the within Last Will and Testament of the within named Testatrix, LAURA JAMESON; that she subscribed said Last Will and Testament and declared the same to be her Last Will and Testament in their presence; that they thereafter subscribed the same as witnesses in the presence of LAURA JAMESON and

When possible, have the client sign the Will himself / herself concurrently with witnesses signing the Will. This is not required: The Testator may sign and attest to his or her signature to the witnesses within thirty (30) days thereafter. The former is far more preferable. A person may also sign for the Testator in the Testator presence, but again this is not a preferred practice and should be avoided except in the most extreme circumstances.

No contents of the Will are effective after the signature in the Will: Any gifts, memos, attachments and the like are merely supporting evidence of the Testator's intent. Place all relevant information into the Will prior to the signature.

A Will MUST be witnessed by a minimum of two (2) disinterested parties, I.e. non-beneficiaries. The drafting attorney or Executor may be a witness provided that (1) they are not beneficiaries, and (2) they do not notarize their own signature in the Self-Proving Affidavit. But again, this is not a good practice.

Including witness addresses is a formality: It is solely to help find witnesses in the case of a Will Dispute. Most attorneys will have staff or suitemates sign as witnesses, and sometimes tell them to include the office's address. Again, a home address is preferable in case that individual is no longer working with the Attorney at the time of a Will Dispute.

There are many rituals attorneys use to prove (1) the Testator's mental capacity, and (2) that the Testator knows he is signing a Will. These two requirements must be made clearly to the witnesses. These rituals include:

1. Showing the witnesses the Testators identification
2. Asking the Testator to name his closest family members
3. Asking the Testator to publish the Will ("This is my Will")
4. Reading from a prepared script
5. Reading the Self-Proving Affidavit to the witnesses

These rituals vary from attorney to attorney, and seem boundless. The most important aspect of these rituals is that they are done <u>consistently</u>, I.e. done every time every time.

In New York the Self-Proving Affidavit is made for the WITNESSES, NOT THE TESTATOR! It is the WITNESSES who are swearing under oath, not the Testator.

Include the date throughout the Signature Page, preferably at (1) the signature of the Testator, (2) the Witness Affirmation, (3) the Self-Proving Affidavit, and (4) the Notarization of the Affidavit (the most important part).

in the presence of each other and at her request; that, at the time of the execution of said Last Will and Testament, LAURA JAMESON appeared to them of full age and of sound mind, memory and understanding, not under any restraint or in any respect incompetent to make a Last Will and Testament, could read, write and converse in the English language and was suffering from no defect of sight, hearing or speech, or from any other physical or mental impairment which would affect her capacity to make a valid Last Will and Testament; that said Last Will and Testament was executed as a single, original instrument and was not executed in counterparts; that they make this affidavit at the request of LAURA JAMESON. This Will was written by the offices of RACHEL LOCKWOOD, ESQ., an attorney licensed to practice law in the State of New York, and executed in her office in the same state.

_____ _____

Signature of witness 1 Signature of witness 2

_____ _____

Print name Print name

NOTARIZATION

STATE OF NEW YORK)
) ss:
COUNTY OF KINGS)

Subscribed and sworn to before me by _____ and _____ on April 29, 2014.

_____
Notary Public

Each attorney's affidavit differs. It is best to include more depth in the Affidavit, and to review it with witnesses at least once prior to them ever signing any Wills for the practitioner.

Let the Court know when an attorney drafted the Will: Stating that the Will was drafted by an attorney has several benefits. First, the Will is given greater deference by the Court when it was drafted by an attorney. Second, it allows the drafting attorney to be identified for depositions if a Will Dispute is ever initiated. Lastly, there is a presumption of proper execution if the attorney supervised the ceremony.

DO NOT forget to notarize the Self-Proving Affidavit! If the Affidavit is not notarized at the time of witnessing the witnesses will have to sign an Affidavit when the Will is admitted to Probate. By that point several decades may have passed, leaving room for opposing counsel to criticism the veracity of the witnesses' statements and memories during a Will dispute (this is presuming the witnesses can even be found to be deposed). This crucial step is often forgotten but attorneys not familiar with Will drafting, and can lead to uncomfortable questioning during a Will dispute.

SAMPLE ARTICLES

Appointment of Guardian (1)

I appoint as guardian of any minor child of mine, the child's other parent, if living or, if that parent fails to qualify or ceases to act, I appoint my mother, _____, as guardian. If all previously named individuals fail to qualify, I appoint my sister, _____, provided she is living in the United States at that time. If all previously named individuals fail to qualify, I appoint my mother-in-law, _____, as guardian. No bond or other security shall be required of any person named as Guardian.

Appointment of Guardian (2)

I hereby appoint _____ to serve as Guardian of my children if I am unable to do so myself. If he / she is unavailable, I appoint _____ to serve as Guardian of my children. No bond or other security shall be required of any person named as Guardian.

_____ is the father of my child children. He is not a suitable candidate to serve as a Guardian of my children because ____(late on child support / has had a "Founded" Report by Child Protective Services / etc.)_____.

In Terrorem / No Contest Clause

To the extent permitted by law, if any beneficiary hereunder shall contest the probate or validity of this will or any provision thereof, or shall institute or join in (except as a party defendant) any proceeding to contest the validity of this will or to prevent any provision thereof from being carried out in accordance with its terms (regardless of whether or not such proceedings are instituted in good faith and with probable cause), then that beneficiary shall be treated as if he/she had predeceased me not survived by issue and all benefits provided for such beneficiary are revoked and such benefits shall pass to the residuary beneficiaries of this will

Many young couples enter the estate planning process solely for the sake of naming their choice of preferred guardian for their children. Then tend to not realize that the larger issue is how any money left for that child is to be controlled for that child's benefit, since minors cannot control property in New York.

Agreeing to guardians is not always easy for a couple, though they have typically discussed the topic prior to visiting the drafting attorney. Most questions revolve around which person is best suited to the task, who lives locally, and thus will allow the child to maintain some stability with friends and community. It is not uncommon to have siblings named over grandparents. Naming friends as a choice of guardian should often be avoided, since they don't often have a good right for guardianship.

Keep in mind the Court always asks **what is in the best interest of the child.** The 13 Step Test is subjective in nature, and all factors will be taken into account. However, the Family Court does not always communicate well with the Surrogate's Court (both have authority to name the child's ultimate Guardian). Past acts by a less-than-perfect parent may need to be brought to the Court's attention. If the remaining parent is not an ideal candidate to serve as guardian it is important to tell the court why this is the case.

An In Terrorum Clause in a Will has the effect of informing a beneficiary that any formal legal contest to invalidate the Will shall lead to the beneficiary receiving less or none of his bequest stated in the Will if the legal proceeding fails to invalidate the Will. Such clauses are most appropriate where uneven distributions are made to beneficiaries or the Testator is aware that the beneficiaries may be hostile toward one another.

In Terrorum clauses are not always appropriate: In practice they are not heavily used. When the situation does call for such a clause it is important to incentivize the potential disputing beneficiary to accept the Will by leaving them enough funds to make acquiescence probable:

other than such beneficiary or such beneficiary's issue) in the proportions that the share of each such residuary beneficiary bears to the aggregate of the effective shares of the residuary. If all of the residuary beneficiaries join in such contest or proceedings, then such benefits shall pass to those persons (other than the persons joining in such contest) who are living at my death and who would have been my distributees had I died intestate a resident of the State of New York and had the person or person contesting my will died immediately before me. Each benefit conferred herein is made on the condition precedent that the beneficiary shall accept and agree to all of the provisions of this will and the provisions of this Article are an essential part of each and every benefit. "Contest" is to be interpreted in the broadest possible manner. Contest includes any direct or indirect attempt to challenge this will, including, but not limited to, abetting, commencing, conducting, and inciting any action, caveat, claim, demand dispute, proceeding, or suite to resist, oppose, upset, or object to this my Last Will and Testament, asserting, filing or raising an objection this my Will based upon any allegation, including, but not limited, forgery, lack of capacity, duress, fraud, undue influence, or failure of due execution; and impairing, invalidating, modifying, setting aside, or preventing the carrying out of any part of this Will. It also includes challenging the validity of any determination by the Executor or Trustee of a beneficiary's matching amount for any year or year. It also includes, but is not limited to, agreeing with or procuring any other person to any of the foregoing acts.y that my sister's children have been able to.

Disabled Issue

Notwithstanding any provisions of Articles Four and Five of this Will, if and so often as any share of my Residuary Estate or any trust principal and/or income would be distributable to any one of my issue of any age who is under a physical or mental disability for which he/she receives government benefits, such distribution shall not vest in such issue but instead shall be placed in an existing third party Supplemental Needs Trust for such issue or in the alternative, I authorize my Executor or my Trustee to create a third party supplemental needs trust pursuant to New York State Estates, Powers and Trusts Law § 7-1.12. and to choose a Trustee or Trustees for such Trust and place the disabled person's gift in such Trust.

Inserting a No Contest Clause in a Will and leaving nothing to a beneficiary is pointless, since the disputer has nothing to lose by challenging the Will.

It is also important to remember the impact an In Terrorum Clause has on SCPA 1404 Examinations. First, the initial depositions of the Will's witnesses and drafting attorney is not considered a "dispute" since it goes to the heart of whether or not the document is even a valid to be purported to be a Will. In addition, where the Clause is included in the Will, the Executor named in the document may also be deposed. If the aggrieved party decides to pursue Discovery after the initial round of questioning the In Terrorum Clause is activated, and in theory the party goes in for "all or nothing" (I.e. invalidate the document purported to be the valid Will at the risk of losing his bequest).

New York permits disabled beneficiaries to have Third Party Supplemental Needs Trusts created by a Will, and to have bequests name inter vivos 3rd Party SNTs as beneficiaries as well.

It is IMPERATIVE that an attorney ask a client whether they wish to leave funds to a disabled family member: If funds are left directly to the beneficiary the bequest endangers the beneficiary's Medicaid / Supplemental Security Income benefits.

Including an Article for disabled individuals is good standard practice for most Wills, and may need to be expanded upon at times when the disability is both apparent and lasting.

Retirement Accounts (Sub Section - Included in Testamentary Trusts):

1. Should this Trust be designated as beneficiary of any IRA, 401(k), or any other tax-deferred or "Roth" retirement accounts (Retirement Accounts), then the Trustees shall remove the "required minimum distribution" of all Retirement Accounts and place it into the Trust. The amount of the "required minimum distribution" and the mechanism by which it is determined and removed shall be determined by the Trustees based on current federal and state tax law and IRS rules and regulations in effect at the time of the determination.

2. This Paragraph F shall in no way prevent the Trustees from removing any or all of the principal of any Retirement Account in which the Trust is named beneficiary if the Trustees determine such sum is needed to accomplish the purpose of the Trust.

3. When the beneficiary reaches the age of thirty-five (35) years, the Trustees shall, if permitted by federal and state law and IRS rules and regulations governing distribution of Retirement Accounts, transfer the Retirement Accounts from the Trust as beneficiary to the child directly as beneficiary. If federal or state law, or IRS rules and regulations governing distribution of Retirement Accounts do not allow this beneficiary transfer without creating a taxable event, then the Trust shall remain open for the purpose of receiving distributions from these Retirement Accounts, and the child shall become the sole Trustee of the Trust. If the child's designation as Trustee shall result in a taxable event, then the persons who serve as Trustees immediately prior to the child's thirty-fifth (35^{th}) birthday shall continue as Trustees and may name a new Trustee or new Trustees at any time to serve in his/her/their stead.

4. The Trustees of this Trust, in consultation with any professional financial advisor if the Trustees so choose, shall make all investment decisions for all Retirement Accounts in which this Trust is designated beneficiary.

5. The Trustees shall have the power to change and amend the Trust without court permission to reflect any changes in federal or state tax law and IRS rules and regulations governing distributions of Retirement Accounts. Such change shall be accomplished by a duly signed and acknowledged instrument in writing and filed with the Court in which this Will is admitted to probate.

6. For purposes of Trustees' commissions, all Retirement Accounts in which this Trust is named beneficiary shall be considered part of the Trust.

Retirement Plans CAN (though not always should) be left via a Testamentary Trust. It is important that the Practitioner speak with a trusted Trusts and Estates attorney before attempting to accomplish this task. There are five requirements that must be met in order to effectuate this transfer while maintaining favorable Required Minimum Distribution rules:

(1) The trust must be valid under state law,
(2) The trust must have identifiable beneficiaries; "classes," such as "my children," are okay, but the beneficiaries with the longest and shortest life expectancies must be identifiable at the time of the transfer,
(3) The trust must be irrevocable before or as of the participant's death,
(4) A copy of the Trust must be sent to the plan administrator or trustee by 10/31 of the year following participant's death, or the plan admininistrator or trustee must receive a list of all trust beneficiaries (including contingent and remainder beneficiaries) by September 30 of year following participant's death, and
(5) All primary trust beneficiaries must be individuals

This sample is a SUB SECTION of a Testamentary Trust Article. It is only effective if the retirement plan's **Beneficiary Designation Form** is properly titled. An example could be as follows:

The Trust for My Grandchildren created under Article Six in my will dated August 16, 2012.

Keep in mind that any funds left to pass via Probate will add to court filing fees. This may not be as much of a concern as ensuring funds are distributed correctly, and may be the best course of action where minors are to receive the benefits of the retirement plan. If the practitioner needs assistance he should call a financial advisor for more detail as to how to name the account.

Date: _____

Dear _____

I am sending this letter to inform you that in the past I worked with Daniel Timins, Esq. ("Dan"), to design my Estate Plan. This included drafting legal documents, such as a **Power of Attorney**, **Health Care Proxy** and a **Last Will and Testament**, so I could better ensure my financial and health care needs are addressed if something happens to me.

If something adverse does happen to me regarding my health I ask you to contact Dan: He can provide guidance as how to best handle my legal affairs. If you are a named Agent in any of my documents he can assist you in performing tasks that I need you to do to help me. In addition, Dan usually has copies of my legal documents at his office or in storage.

Please make sure to keep Dan's information in a safe and memorable location, such as a place where you keep your own legal files, or store his contact information electronically with a reference as to him being my Estate Planning Attorney:

Daniel A. Timins, Esq., CFP®
450 7th Avenue, Suite 1500
New York, New York 10123
(212) 683-3560
dan@timinslaw.com

Thank you,

_____

EXECUTION CEREMONY for LWT

Hello everyone. My name is **Daniel Timins** I am the attorney who will be presiding over this Will Execution Ceremony. Our future "Testators," meaning the people who shall be establishing their Last Wills and Testaments (**and other documents names**), are **___(Client #1 Name)___** and **___(Client #2 Name)___.** The people serving as witnesses to this ceremony are **___(Witness #1 Name)___** and **___(Witness #1 Name)___.**

Please pay attention to what I am about to say, because it is ***very important*** for helping you achieve your estate planning goals. I am asking that no one leave this room until the completion of this ceremony in approximately 15 minutes. Is that okay with everyone?

There are several technical requirements that must be followed in order to make your Will valid. These requirements shall be met in the next few minutes during this ***Will Execution Ceremony*** and execution of other documents. In the hopes of avoiding future controversies regarding your estate, I always run our execution ceremonies the same way by reading verbatim from this script, so please excuse what may seem like rigid formalities that accompany this ceremony.

In order to execute a valid Will the Testator must have ***Testamentary Capacity,*** meaning he or she has a general idea of the property they own, knows or is aware of their family and friends, knows who they are leaving that property to, and understands the basic nature and function of a Will. By law, the Testator only needs a general understanding of these assets, people, gifts and concepts, and is NOT required to understand every section of the Will or know the exact nature of all of his or her assets. There is also a *"6 Step Test"* that must be met to make your Last Will and Testament valid. Your Will must be ***signed by you***, the Testator ***at the end of the Will***. You have to ***"publish"*** your Will, meaning that you declare this document to be your Will, not some other legal document. You must ***sign*** your Will or acknowledge your signature in front of ***two disinterested witnesses***, meaning people who are not beneficiaries to your Will, who shall then ***attest*** to the Will, meaning they acknowledge your mental capacity to execute this Will.

The best way to revoke this Will is to either execute a new Will in the future that invalidates this Will, or to completely destroy this Will, preferably in front of a disinterested witness. Crossing out sections, adding new sections in handwriting, or only partially destroying this document may NOT be effective in revoking this Will. One final message to our Testators: Please do NOT tamper with the staples of your documents under ANY circumstances. Doing so may lead to the protracted legal intervention we have been working so hard to avoid.

I have two quick messages to relay to our witnesses: You are not here to question the contents of these legal documents or question the intentions of the Testator: (1) Your purpose in this ceremony is to either agree or disagree that the Testator has the mental capacity to understand what these documents represent, and that he or she understands the general contents of this Will. (2) You shall be signing the Will in TWO PLACES. First, you will sign after the

Attestation Clause, which states that as of this time you agree with the events that took place here today. Second, you will sign after the ***Self-Proving Affidavit,*** which says that if you are unable to come to court during a future Will dispute, you are swearing under oath that the Testator had both the mental capacity to understand the contents of this Will and that this ceremony was properly executed. Keep in mind that the Self-Proving Affidavit is the equivalent of sworn testimony in court, so it is imperative that you believe what you are signing.

(Client's Name), we have discussed the consequences of dying intestate, meaning without a valid Will, and dying with a properly executed Will which shall be admitted to probate. We have also discussed the significance of your other legal documents. We have discussed your options, reviewed this document in depth, and have discussed your questions, thoughts, concerns and wishes.

(Client's Name), have you reviewed your documents in their entirety?

Has anyone coerced you or unduly influenced you to execute these documents?

Please name your closest family members.

(Client's Name), do you hereby declare this document to be your Last Will and Testament (and *other documents*)?

(Client's Name), please say "I publish this to be my Will."

(Witness's Names), do you attest to the fact that this ceremony was properly executed, and do you believe that (Client's Name) had the mental capacity to execute this Will (and *other documents*)?

Congratulations! You have successfully executed your Last Will and Testament **(and *other documents*)**. This means that our execution ceremony is now completed. Thank you witnesses, I appreciate your time and your help; you may now leave the room.

I will keep this original copy of your Will in my firm's safe for safe keeping. You can ask me for this original copy at any time. I am going to step out of the room for a moment and make photocopies for you to keep.