

## II. DEBT CLAUSES [§8.2]

### A. SIMPLE, STRAIGHTFORWARD ESTATE [§8.3]

#### Debts to Be Paid from My Estate

- (a) to pay out of my estate:
  - (i) my debts, including income taxes payable up to and including the date of my death;
  - (ii) my funeral and other expenses related to this Will and my death; and
  - (iii) all estate, gift, inheritance, succession, and other death taxes or duties payable in respect of all property passing on my death, and my Trustee may prepay or delay payment of any taxes or duties;

This simple clause is used only when your client has both simple, straightforward assets that are not likely to change to anything more complicated, and a simple, straightforward will. Specifically, this clause is appropriate where your client does not own any assets that will pass outside the will on death and the will consists solely of outright distributions (preferably, all to one person or entity).

### B. STANDARD DIRECTION TO PAY DEBTS, ETC. [§8.4]

#### Debts to Be Paid from My Estate

- (a) to pay out of my estate:
  - (i) my debts, including income taxes payable up to and including the date of my death *[and any financial charges with respect to any property that, pursuant to this will, is to be transferred free and clear to a beneficiary or beneficiaries]*;
  - (ii) my funeral and other expenses related to this Will and my death; *[and]*
  - (iii) all estate, gift, inheritance, succession, and other death taxes or duties payable in respect of all property passing on my death, including:
    - A. insurance proceeds on my life payable as a consequence of my death (but excluding the proceeds of insurance upon my life owned by any

corporation or owned by any partnership of which I am a partner);

- B. any registered retirement savings plan, registered retirement income fund, annuity, pension, or superannuation benefits payable to any person as a result of my death;
- C. any gift made by me in my lifetime; and
- D. any benefit arising by survivorship,

and my Trustee may pay these taxes whether they are imposed by the law of this jurisdiction or any other, and my Trustee may prepay or delay payment of any taxes or duties;

*[paragraphs (iv) and (v) are optional]*

- (iv) any tax payable under the *Property Transfer Tax Act* of British Columbia as a result of any transfer from my estate to *[name of recipient]* of any real property at *[address]* pursuant to the provisions of clause *[number]* of this Will; *[and]*
  - (v) any tax deferred under the *Land Tax Deferment Act* of British Columbia charging real property owned by me at my death;
- (b) *[if my Trustee decides the residue of my estate is not sufficient to pay the debts, expenses, taxes and duties referred to in paragraph (a) above out of my estate, my Trustee [insert instructions];]*

This is our standard debts clause. We include this clause (or a variation of it) in most of our wills. The clause includes all of the elements of the typical debt clauses.

See s. 50(3) of the WESA, which provides that, unless the will signifies a contrary or other intention (s. 50(1)), the property charged by the mortgage or other charge is primarily liable for the payment of the debt. If the will-maker is making a specific gift of real property, the will-maker may have intended that the beneficiary of the real property receive it clear of financial encumbrances such as a mortgage or deferred property taxes. If that is so, your will-maker may want to include provisions such as paragraphs (iv) and (v). Note that if the mortgage is insured, you may want to check with the insurer as to whether the insurance proceeds would be payable to the mortgagee or the estate. See the commentary at “Estate’s Assets Charged with Payment” in chapter 11 of the *British Columbia Probate and Estate Administration Practice Manual*, 2nd ed. (CLEBC, 2007–).

See also, for example, the clauses in chapter 9 (Real Estate Clauses in the Will), some of which transfer real property subject to encumbrances and some of which transfer real property free and clear. You should also be aware of the provisions of s. 47 of the WESA. See the commentary at “Introduction to Debt Clauses” in this chapter.

Because certain types of estate taxes and duties have been imposed in other jurisdictions, the list of items in paragraph (iii) more specifically identifies the types of duties or taxes that we might anticipate in the future. It contemplates, for example, taxes on insurance or pension proceeds, succession duties, and gift taxes. We have included these examples only in case your client is unable to react and update their will if a government subsequently imposes these sorts of taxes. If succession duty or estate tax legislation is enacted, you or your client will have to reconsider this clause and possibly update the will.

A source of contention in many estates is the issue of who should pay the tax arising on gifts that pass outside the will. Typical precedent clauses do not specifically address this issue, leaving the door open for legal battles (often at the expense of the estate). This clause specifically directs the estate to pay taxes on, for example, RRSPs and RRIFs passing outside the will to a named beneficiary, which is consistent with the provisions of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.).

If your client does not wish the general estate to bear the tax or duty in a particular situation, you may have to exonerate the general estate from the incidence of the tax or duty and impose that burden on the particular bequest or trust. For example, if your client has created separate trusts, it is our experience that they will wish those trusts or their respective beneficiaries to bear income taxes payable with respect to those trusts, including tax on capital gains either realized or deemed to be realized (for example, 21-year deemed realization).

### **C. DIRECTION TO PAY DEBTS, ETC., WITH POSSIBLE LIMITATION ON FOREIGN TAXES TO BE PAID [§8.5]**

#### **Debts to Be Paid from My Estate**

- (a) to pay out of my estate:
  - (i) my debts, including income taxes payable up to and including the date of my death *[and any financial charges with respect to any property which, pursuant to this will, is to be transferred free and clear to a beneficiary or beneficiaries]*;
  - (ii) my funeral and other expenses related to this Will and my death; and
  - (iii) all estate, gift, inheritance, succession, and other death taxes or duties payable in respect of all property passing