Pace Law School Continuing Legal Education
Bridge the Gap: December 6-7, 2014

A SIMPLE, EFFECTIVE WILL

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FOREWORD

It is sometimes mind-numbing to see the absurd depth that attorneys will sink to when drafting legal documents: Details, definition sections, contingency upon contingency upon contingency. Yet, in the end, the artful litigator will still find a sufficient number of loopholes and arguments in any document, no matter how solid the drafter intended it to be. The statement "simple is better" when it comes to legal documents may be true, and perhaps equally so when it comes to the central estate planning document: A Last Will and Testament.

There are many two page "Sweetheart Wills" drafted by laymen 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. And, of course, the inverse is equally true for both parties.

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 single individual (2) with no surviving children (3) who has some beneficiaries who are minors (4) who has 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 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 have 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 them now 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.

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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.

LAST WILL AND TESTAMENT OF
LAURA JAMESON

I, **LAURA JAMESON**, a domiciliary of New York born on July 2nd, 1939, revoke any prior Wills and Codicils and declare this to be my Last Will and Testament.

ARTICLE I

Family Information

My former husband, **NICOLAS JAMESON**, predeceased me on March 14, 2009. I have no children, alive or pre-deceased, naturally or adopted. My closest living relatives are my brother, **BRUCE HALL**, born on January 25, 1943; he has two children, **TREVOR HALL** born on October 4, 1968 and **MARGARET MILGRAM**, born on March 18, 1973. I had one sister, **MARIA HALL-MICKINS**, who predeceased me on July 15, 2011; she is survived by her son **PAUL MICKINS**, born on March 7, 1963, and her daughter **JESSICA RUBINO**, born on April 22, 1966. I have no other siblings, nieces or nephews, alive or deceased.

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.

Specific Bequests

I leave my gold engagement ring with a 1.02 carat princess cut diamond to my niece, **JESSICA RUBINO.** I leave what was formerly my husband's 1956 Rolex Air King watch to my nephew, **PAUL MICKINS.** If one of them shall predecease me then that person's specific bequest shall go to the survivor. If both predecease me I leave both items to the any living Heirs of **JESSICA RUBINO** by right of representation.

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.

General Bequests

Bequests to Minors. I leave Two Hundred Thousand Dollars ($200,000) to be split evenly by the then-living children of **JESSICA RUBINO** by right of representation pursuant to the provisions of ARTICLE VI, Heirs' Separate Trust, described hereunder.

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.

Residuary

Remainder of Estate. I dispose of the rest, residue and remainder of my estate, real and personal ("my Residuary Estate") as follows:

One half (1/2) to my brother, **BRUCE HALL**, provided he survives me.

One half (1/2) to be divided equally by **PAUL MICKINS** and **JESSICA RUBINO** by right of representation. If **JESSICA RUBINO** predeceases me, then the share going to her descendants shall be distributed according to pursuant to the provisions of ARTICLE VI, Heirs' Separate Trust described hereunder.

Survivorship of Brother Required. If **BRUCE HALL** predeceases me I leave his share of my residuary estate to **PAUL MICKINS** and **JESSICA RUBINO** by right of representation. While I do love my brother's children, they are both financially secure and, due to their living in California, have been unable to attend to my needs in the way that my sister's children have been able to.

Heirs' Separate Trusts

Property that is to be bequeath to the living children of **JESSICA RUBINO** in an Heirs' Separate Trust shall be held under this Article, and all references to the "Heirs' 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.

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

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 given year.

C. **Trustees of Trusts.**

1. All Heirs' Separate Trusts shall be administered by **JESSICA RUBINO** as Trustee. If she is unable or unwilling to serve I appoint **PAUL MICKINS** 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).

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

ARTICLE III

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?).

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 IV

Executor Appointments

A. **Appointment of Executor.** I appoint **JESSICA RUBINO** to serve as my Executor of my estate. If he/she is unable or unwilling to serve, I name **PAUL MICKINS** to serve as my Executor.

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 for original probate.

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 V

Fiduciary Provisions

A. **Accountings and Other Proceedings.**

1. 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.

2. 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. The same rule shall apply to non-judicial settlements, releases, exonerations and indemnities.

B. **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.

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:

File a Probate Petition and Oath & Designation
(Don't forget the original Will and Death Certificate)

Get Waivers or serve Citations on Distributees
Collect Assets
Pay Creditors
Handle estate matters (taxes, sale of property, etc.)
Deliver an Inventory of Assets to the Court
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 December 6, 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 December 6, 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 WESTCHESTER)

In the County of Westchester, State of New York, on December 6, 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 WESTCHESTER)

Subscribed and sworn to before me by _____ and _____ on December 6, 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)

ARTICLE VI 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.

ARTICLE VII _____ 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

ARTICLE VIII

ARTICLE IX

ARTICLE X

ARTICLE XI

ARTICLE XII 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.

ARTICLE XIII

ARTICLE XIV 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.

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.