CHAPTER 19

Residue—If All Else Fails Clauses in the Will

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I. INTRODUCTION TO RESIDUE—IF ALL ELSE FAILS CLAUSES IN THE WILL [§19.1]

“Catch-all” or “fail-safe” clauses deal with any part of the residue of the estate that does not otherwise vest in any beneficiary. A number of our residuary clauses in this manual have a distribution among a class, be it children or another group. We have sometimes included a gift over if a member of that group predeceases the will-maker or the life
tenant. We have recommended considering the likelihood of a member of the class surviving and the need to include further alternatives. It is always prudent to specify what is to happen to the residue if a recipient dies before the gift vests. However, it may also be prudent to include an ultimate failure clause like the ones in this chapter even though the possibility of failure is remote.

Caution is advised if the will specifically deals with residential property and your client wishes to include someone who is not a Canadian citizen or permanent resident of Canada as a potential beneficiary. See the commentary at “Tax Consequences” in chapter 9 (Real Estate Clauses in the Will).

II. RESIDUE CATCH-ALL CLAUSES [§19.2]

A. PREAMBLE IF ESTATE NOT LEFT TO A SURVIVING SPOUSE OR COMMON–LAW PARTNER AND SOME OR ALL OF RESIDUARY GIFTS/TRUSTS FAIL TO VEST [§19.3]

Failure of Other Trusts

(a) if the trusts of paragraph [refer to your residuary clause and update the cross-reference in your document] of this Will, or any of those trusts, should at any date (the “Failure Date”) fail to vest, or not take effect for any reason, I direct my Trustee to divide the property that is subject to those trusts that have failed, or not taken effect, into [instructions; for example, see “Residuary Beneficiary Spouse or Common–law Partner Did Not Survive, Alternate Residue Failed to Vest, Gift Over to Named Beneficiaries (or Their Children)” in this chapter];

If the residue of the estate is held on trusts for a period of time before vesting (for example, pending children reaching a certain age), the will-maker should consider what should happen if none of the class, or their descendants if the clause provides for a gift over to descendants, lives to become fully vested as to the entire residue of the estate. In that situation, the trusts may be said to have failed and the will-maker may choose to designate a beneficiary or beneficiaries rather than have the residue remaining pass on by intestacy. You should have the will-maker consider the situation.
It may be unnecessary to define “Failure Date” if there is no need to refer to that date again; for example, if the only beneficiary named in this clause is “immortal” (for example, a charity).

B. PREAMBLE IF ESTATE LEFT FIRST TO SPOUSE OR COMMON-LAW PARTNER WHO DID NOT SURVIVE AND SOME OR ALL OF OTHER RESIDUARY GIFTS/TRUSTS FAILED TO VEST [§19.4]

Failure of Other Trusts

(a) if [spouse or common-law partner name] is not alive on the date that is 30 days after the date of my death and the trusts of paragraph [refer to your residuary clause and update the cross-reference in your document] of this Will, or any of those trusts, should at any date (the “Failure Date”) fail to vest, or not take effect for any reason, I direct my Trustee to divide the property that is subject to those trusts that have failed, or not taken effect, into [instructions; for example, see “Residuary Beneficiary Spouse or Common-law Partner Did Not Survive, Alternate Residue Failed to Vest, Gift Over to Named Beneficiaries (or Their Children)” in this chapter];

Where the residue of the estate has been left to the spouse or common-law partner, if he or she is alive for 30 days following the date of the will-maker’s death, and failing the spouse or common-law partner, the residue has been left to others or on certain trusts, you should seek the will-maker’s directions as to the disposition of the residue of the estate if none of the other beneficiaries survives both the will-maker and his or her spouse or common-law partner.

C. RESIDUARY BENEFICIARY SPOUSE OR COMMON-LAW PARTNER DID NOT SURVIVE, ALTERNATE RESIDUE FAILED TO VEST, GIFT OVER TO NAMED BENEFICIARIES (OR THEIR CHILDREN) [§19.5]

Failure of Other Trusts

(a) if [spouse or common-law partner name] is not alive on the date that is 30 days after the date of my death and the trusts of paragraph [refer to your residuary clause and update the cross-reference in your document] of this Will, or any of those trusts, should at any date (the “Failure Date”) fail to vest, or not take effect for any reason, I direct my Trustee to divide the property that is subject to those trusts that have failed, or not taken effect, in equal shares [between/among]
those of [beneficiary names] who are alive on the Failure Date, except if [either/any] of them has died before the Failure Date and one or more of [his/her/his or her] children are alive on the Failure Date, that deceased [beneficiary type] will be considered alive for the purposes of the division and the share created for that deceased [beneficiary type] will be divided equally among those of his or her children who are alive on the Failure Date;

It is not uncommon for the will-maker to provide for the residue to pass to the spouse or common-law partner but, failing the spouse or common-law partner, to the children. Then if neither the spouse or common-law partner nor any child (or more remote descendant) survives to be fully vested as to the entirety of the residue of the estate, the residue is to be divided among the will-maker’s siblings or some other class of named or defined individuals. The provision commencing with the word “except” after the words “Failure Date” can be deleted if no representation for a deceased member of that class is desired.

D. RESIDUARY BENEFICIARY SPOUSE OR COMMON–LAW PARTNER DID NOT SURVIVE, ALTERNATE RESIDUE FAILED TO VEST, DIVIDE BETWEEN TWO SETS OF NAMED BENEFICIARIES (ONE WITH A GIFT OVER TO CHILDREN) [§19.6]

Failure of Other Trusts

(a) if [name] is not alive on the date that is 30 days after the date of my death and the trusts of paragraph [refer to your residuary clause and update the cross-reference in your document] of this Will, or any of those trusts, should at any date (the “Failure Date”) fail to vest, or not take effect for any reason, I direct my Trustee to divide the property that is subject to those trusts that have failed, or not taken effect, into [number] equal shares, and:

(i) divide [number] [share(s)] in equal portions [between/among] those of [name], [name] and [name] who are alive on the Failure Date, except if [either/any] of them has died before the Failure Date and one or more of his or her children are alive on the Failure Date, that deceased person will be considered alive for the purposes of the division and the portion created for that deceased person will
be divided equally among those children of that deceased person;

(ii) give [number] [share(s)] to [name], if [he/she] is alive on the Failure Date, and if [he/she] is not alive on the Failure Date, divide that share equally among those of [his/her] children who are alive on the Failure Date;

Some couples will want the residue divided, either 50:50 or in some other proportion, between their respective more remote family members (siblings, cousins, etc.). For example, if the children predecease the parents, they might wish one half divided among the husband’s siblings and one half divided among the wife’s siblings.

E. RESIDUARY BENEFICIARY SPOUSE OR COMMON–LAW PARTNER DID NOT SURVIVE, ALTERNATE RESIDUE FAILED, GIFT OVER TO NAMED BENEFICIARIES (OR THEIR CHILDREN) AND CHARITY (WHEN FAILURE IS EITHER ON THE DATE OF WILL MAKER’S DEATH OR FOLLOWING DISCRETIONARY TESTAMENTARY TRUSTS) [$19.7]

Failure of Other Trusts

(a) if [spouse or common-law partner name] is not alive on the date that is 30 days after the date of my death and the trusts of paragraph [refer to your residuary clause and update the cross reference in your document] of this Will, or any of those trusts, should at any date (the “Failure Date”) fail to vest, or not take effect for any reason, I direct my Trustee to divide the property that is subject to those trusts that have failed, or not taken effect, into [number] equal shares, and:

(i) divide [number] [share(s)] in equal portions [between/among] those of [name], [name] and [name] who are alive on the Failure Date, except if [either/any] of them has died before the Failure Date and one or more of his or her children are alive on the Failure Date, that deceased person will be considered alive for the purposes of the division and the portion created for that deceased person will be divided equally among those children of that deceased person;

(ii) with respect to the remaining share or shares (the “Failure Share”):

(A) if my Trustee decides that on the Failure Date my estate is a “graduated rate estate” within the meaning of
section 248(1) of the *Income Tax Act* of Canada, give the Failure Share to [full charity name] (“[charity name]”), charitable registration number [number], of [address] [, provided that if on the Failure Date [charity name] no longer exists or has ceased to be a charity, give the Failure Share to [full charity name 2] (“[charity name 2]”), charitable registration number [number], of [address], provided that if on the Failure Date [charity name 2] no longer exists or has ceased to be a charity, give the Failure Share to any charity or charities (and if more than one charity, in whatever proportions my Trustee decides) as my Trustee decides; or

(B) if my Trustee decides that on the Failure Date my estate is not a “graduated rate estate” within the meaning of section 248(1) of the *Income Tax Act* of Canada:

(1) if the Failure Date is the date of my death, give the Failure Share to [full charity name] (“[charity name]”), charitable registration number [number], of [address] [, provided that if on the Failure Date [charity name] no longer exists or has ceased to be a charity, give the Failure Share to [full charity name 2] (“[charity name 2]”), charitable registration number [number], of [address], provided that if on the Failure Date [charity name 2] no longer exists or has ceased to be a charity, give the Failure Share to any charity or charities (and if more than one charity, in whatever proportions my Trustee decides) as my Trustee decides; or

(2) if the Failure Date is after the date of my death, give the Failure Share to any charity or charities or charitable purposes my Trustee decides and if more than one charity, in whatever proportions my Trustee decides, having regard to the charities and charitable purposes [spouse or common-law partner name]
Some clients will want the residue divided among family members and charities. See the commentary at “Gift to Charity (No Interest)” in chapter 13 (Cash Gifts and Funds Clauses in the Will) with respect to charitable donations generally. We have used the term “charity” and have assumed that the definition of charity has been included from chapter 2 (Definitions Clauses in the Will). The client should be advised to seek tax advice if the client wants a charitable tax receipt to reduce taxes that would otherwise be payable.

In addition to other requirements, the Canada Revenue Agency will not consider a gift to qualify as a donation unless there has been a voluntary transfer of property from a donor to a qualified recipient. In wills containing trusts, it can sometimes be difficult to accurately determine who qualifies as the “donor” of the gift. The CRA distinguishes between whether the deceased will-maker is the donor, or the trustees of the trust (established pursuant to the terms of the will) are the donor. From the CRA’s perspective, the critical element has been whether the will-maker has directed the trustees to make a gift or whether the trustees’ discretion over the amount or the recipient is such that the CRA considers the trustees to have voluntarily made the gift. The donation tax credit may be available to be used by either the will-maker or the trustees, depending on who has made the gift.

See the commentary at “Gift to Charity (No Interest)” in chapter 13 (Cash Gifts and Funds Clauses in the Will). Different rules, with less flexibility, apply when the estate does not qualify as a “graduated rate estate”.

Where the trustees are considered to have made the gift, the trustees may be able to claim the donation tax credit on the trust’s T3 Return to offset income of the trust. Where the will contains trust provisions and the donation tax credit could be useful to offset income taxes payable in the trust’s future T3 Returns, the gift must be structured so that the trustees of the testamentary trust are making the “gift” voluntarily rather than at the direction of the will-maker.

If structured effectively, the trustees may be issued the charitable donation tax receipt at the Failure Date and can use the charitable tax credit resulting from the donation to offset income realized by the trust at that time. Where the trustee is obligated to donate to a specific charity or to otherwise make a distribution of capital or income to a charity, any payments made as a result of these obligations may not be seen as a gift at law and no charitable donation tax receipt will be available. Instead, the CRA has recently taken the position that such payments are simply distributions made pursuant to the trust terms rather than gifts. The better practice may be to include a clause like “Charitable Donations” in chapter 20 (Powers of Trustees Clauses in the Will) in the will, empowering—but not requiring—the trustee to make charitable gifts. Careful consideration should be given to the drafting of these
provisions, particularly for clients for whom it is important that a charitable tax receipt be received by the trust. Tax advice regarding the availability of tax credits to offset tax liability is recommended. This issue is complicated and the application of the recent Income Tax Act amendments is unclear. Practitioners are advised to seek tax advice and to obtain current information regarding the application of the recent Income Tax Act amendments.

You will note we sometimes include as a second named charity in paragraph (A) one of the umbrella charitable organizations such as the Vancouver Foundation or another community foundation, a United Way organization, or one of the other public foundations such as Aqueduct Foundation that has donor-advised funds for any charitable purpose. By naming the umbrella organization as a “back-up”, we reduce the risk that the trustee will have to select the alternate recipient.

For additional information, see CRA Interpretation Bulletin IT-226R (Archived) “Gift to a Charity of a Residual Interest in Real Property or an Equitable Interest in a Trust” dated November 29, 1991, and chapter 14 (Planned Charitable Giving) in British Columbia Estate Planning and Wealth Preservation (CLEBC, 2002–).