



# **Powers of Appointment and Powers to Add and Remove Beneficiaries**

February 13, 2018

By: Richard Niedermayer, TEP  
Stewart McKelvey

# Agenda

- Where?
- Why?
- Who?
- How?
- Example scenarios
- When?
- Manner of exercise
- Why not?
- Powers of appointment
- Sample clauses

# Where?

- Wills/testamentary trusts
- Inter vivos trusts (alter ego/joint partner and family)
- Deeds of appointment

# Why?

- Flexibility
- Hindsight
- Changing circumstances
- Open versus closed classes
- Automatic versus discretionary distributions

# Who?

- Settlor
- Trustees
- Third party (appointor or protector)

# How?

- Terms of will/trust
- Court-ordered variation
- Rule in *Saunders v. Vautier*

# Example Scenarios

- Open versus closed classes in wills (i.e. “grandchildren then alive” versus “grandchildren who survive me”)
- Joining defined category by relationship (i.e. spouse of primary beneficiary, spouse of child, etc.)
- Addition to class by birth (new children/others)
- Removal from class by death or adoption out
- Removal by subsequent life event (i.e. divorce or separation depending on definition)

# Example Scenarios (Cont'd)

- Addition of present non-existent beneficiary by definition (i.e. a holdco controlled by other beneficiaries to be incorporated later - for future 21 year planning)
- Removal of corporate beneficiaries by wind-up
- Any other definition that no longer applies



# When?

- Create power at time of drafting will or trust
- Exercise during lifetime (inter vivos appointment)
- Exercise on death (testamentary appointment)
- Is power held personally or in fiduciary capacity?

# Manner of Exercise

- By will (obvious format) – note *Wills Act* definition of “will” says: “includes a codicil and an appointment by will or by **writing in the nature of a will in exercise of a power**, and also a disposition by will and testament or devise of the custody and tuition of any child, and any other testamentary disposition”
- See also other sections:
- S. 8. No appointment made by will in exercise of any power is valid unless the same is executed in the manner hereinbefore required, and **every will executed in the manner hereinbefore required is, so far as respects the execution and attestation thereof, a valid execution of a power of appointment by will, notwithstanding it has been expressly required that a will made in exercise of such power be executed with some additional or other form of execution or solemnity.**
- S. 12 re bequest to witness includes a power of appointment
- S. 17 re revocation by marriage exempts powers of appointment in certain cases
- S. 19A re effect of divorces includes the conferring of a power of appointment on the former spouse

# Manner of Exercise (Cont'd)

- By deed (traditional format or in format defined in instrument)
- If by deed, revocable or irrevocable?
- Court order under *Variation of Trusts Act* (arrangement – a variation, resettlement or revocation of a trust in relation to property or a variation, deletion or termination of, or an addition to the powers of a trustee in relation to the management or administration of the property subject to the trust)
- *Saunders v. Vautier* – written beneficiary agreement or court order

# Manner of Exercise (Cont'd)

- VTA requires consideration of:
  - Intention of the settlor
  - Position of trustee
  - Position of beneficiary
  - Position of anyone else appearing
- If power held in fiduciary capacity, same criteria?
- What if power held personally?
- What about letters of wishes?

# Why Not?

- Is addition or removal of beneficiaries in fact a “resettlement” of the trust?
- Is the substratum of the trust maintained or is there a “fundamental change”?
- CRA position – If power to add beneficiaries is in the trust terms, addition of a beneficiary is not a resettlement and no disposition for tax purposes BUT does create a disposition by existing beneficiaries of their interest in the trust to the new beneficiary
- CRA has conflicting views on the FMV of the trust interest disposed of (nominal, greater than nominal or pro rata by number of beneficiaries?)

## Why Not? (Cont'd)

- See CRA Document Nos. 2001-0111303, 2003-0181465, 9213470 and 2012-0451791E5
- CRA position – question of fact whether or not an amendment or variation will involve a resettlement
- What about addition of a corporate beneficiary by virtue of its incorporation and qualification in a pre-defined class?

# Why Not? (Cont'd)

- If contributor retains power to add or remove beneficiaries in personal capacity, consider subsection 75(2) (particularly 75(2)(a)(ii))
- Not an issue with alter ego/joint partner trusts (75(2) applies)
- Big problem with family trusts!
- Not applicable to testamentary trusts
- Big problem if applies (income inclusion, no rollout to anyone other than contributor)
- Can also be caught by 75(2)(a)(i) if power may be exercised in favour of settlor (draft to exclude application)

# Powers of Appointment

- Not to be confused with the power to appoint a person to a role or position (successor or replacement executor/trustee, estate management agent, investment advisor etc.)
- “...A power to transfer property out of the trust and into the hands of an object of the power, for his or her benefit; or, to apply property in some other way, for the benefit of an object.” – Waters’ Law of Trusts in Canada (4<sup>th</sup> ed.) p. 1199



# Powers of Appointment (Cont'd)

- Can include power to:
  - pay or apply capital for the “advancement or benefit” of an object of the power
  - for trustees or others to designate the particular trusts on which property will be held
  - create new trusts for the beneficiaries
  - select which beneficiaries will receive property and how much (in a discretionary trust)
- See generally Waters at pp. 1199-1200

# Powers of Appointment (Cont'd)

- Consider who holds the power – trustees or others
- If trustees, is it a pure power or a trust power?
- Court can compel performance of a trust power, but not a pure power
- Trustee who holds trust power cannot release it and must exercise it as a fiduciary
- When donee of power is the trustee but want power to be exercised personally careful drafting required
- Can include power to add or remove beneficiaries

# Sample Clauses

At each child's death, pay or transfer the residue of the trust property as that child may by his or her will appoint or, failing appointment, then divide the residue of the trust property equally among those of that child's children alive at that time or, if there are none, then divide the residue of the trust property equally among those of my other children then alive, to be added to each child's share of the rest of my estate and administered and distributed as if it had been an original part of that share.

# Sample Clauses (Cont'd)

Fourteen days prior to the 21st anniversary of my death or such other earlier or later date as my trustees in their discretion determine, distribute the residue of the trust property to the Primary Beneficiary or, if the Primary Beneficiary is not alive at that time, then as the Primary Beneficiary may by will appoint or, failing appointment, in accordance with the laws applicable in the case of an intestacy of that Primary Beneficiary.

# Sample Clauses (Cont'd)

*The ● Trust.* I note that I am a Trustee of The ● Trust settled by trust agreement dated as of ● (the “● Trust”). The assets held in the ● Trust do not form part of my estate. I appoint my trustees as successor Trustees of the ● Trust. I direct that the income and capital of the Trust Property be distributed both before and on the Division Date in the same manner and on the same trusts, terms and conditions as the provisions made for the rest of my estate in this will. For this purpose, the terms “Trustee”, “Trust Property” and “Division Date” are defined in the ● Trust.

# Sample Clauses (Cont'd)

## 4. *Restrictions on Powers of Trustees.*

(a) *The Settlor.* Notwithstanding any other provision of this trust agreement:

(i) The Settlor shall not and can never be either a Trustee or a Beneficiary of the Trust;

(ii) Any other person who contributes property to the Trust (an “Other Contributor”) shall not and can never be either a Trustee or a Beneficiary of the Trust; and,

(iii) No Trustee or Beneficiary may become at any time an Other Contributor.

(b) *Property Transferred by Corporate Beneficiary.* Notwithstanding any other provision of this trust agreement, any property (or any property substituted therefor) transferred to the Trust by way of dividend or otherwise from any body corporate that is a beneficiary of the Trust shall not directly or indirectly revert to or vest in that same corporate Beneficiary.

## Sample Clauses (Cont'd)

If on the Division Date the Principal Trustee is deceased, divide the Trust Property as the Principal Trustee may by the Principal Trustee's will appoint, provided that if the Principal Trustee does not have a will or if the Principal Trustee's will does not specifically provide for the allocation and payment of the Trust Property, it shall be distributed in the same manner as if it had formed part of the residue of the Principal Trustee's estate.

# Sample Clauses (Cont'd)

*Power of Appointment.* Notwithstanding clauses 8(a), (b) and (c), at any time prior to or on the Division Date, the Principal Trustee shall have the power:

- (i) to appoint, by deed, to or for the benefit of the Beneficiaries, or such one or more of them and to the exclusion of such one or more of them and in such proportions as the Principal Trustee in the Principal Trustee's discretion may determine, all or so much of the income, if any, derived from the Trust Property as the Principal Trustee in the Principal Trustee's discretion may determine;
  - (ii) to appoint, by deed, to or for the benefit of the Beneficiaries, or such one or more of them and to the exclusion of such one or more of them and in such proportions as the Principal Trustee in the Principal Trustee's discretion may determine, all of so much of the capital of the Trust Property as the Principal Trustee in the Principal Trustee's discretion may determine;
  - (iii) to delegate, by deed, these powers of appointment to another person or persons, with or without restriction; and
  - (iv) to rescind or vary any exercise or delegation of these powers of appointment;
- provided, however, that the Principal Trustee, when exercising authority pursuant to this clause, may not make any such appointment in the Principal Trustee's own favour.

These powers of appointment may be exercised or delegated at any time and from time to time and may, subject to clause 8(d)(iv), be exercised or delegated so as to be effective with respect to either or both of a current fiscal period or one or more future fiscal periods of the Trust. The Principal Trustee or any person or persons delegated by the Principal Trustee to exercise these powers of appointment may cancel any exercise of authority of the Trustees pursuant to clauses 8(a), 8(b) or 8(c) hereof at any time within 30 days of the date of such exercise of authority.



# Sample Clauses (Cont'd)

*Not Fiduciary Capacity.* The powers of appointment authorized in this clause 8 are held by the Principal Trustee and any person or persons delegated by the Principal Trustee in the Principal Trustee's or the delegate's personal capacity and not as a Trustee and as such the Principal Trustee or the delegate is not acting in a fiduciary capacity to the Beneficiaries in respect of the exercise or non-exercise of these powers.

# Offshore trusts – on the limit

*Beneficiaries:* means:

- (1) the descendants of the Settlers;
- (2) any person or class of persons added as a Beneficiary or Beneficiaries pursuant to clause 9;

*Excluded Person:* means:

- (1) the Original Trustee or the Trustee from time to time;
- (2) the Protector;
- (3) any person declared an Excluded Person pursuant to clause 9; and
- (4) any person who is or who becomes a resident of Canada for purposes of the Income Tax Act (Canada);

# Offshore trusts (Cont'd)

## 4 Power of appointment

- 4.1 The Trustees (being at least two in number or a corporate trustee) shall have power with the prior or simultaneous written consent of the Protector to appoint that the whole or any part of the Trust Fund and its income shall be held on such trusts and subject to such powers and provisions in favour or for the benefit of all or any one or more of the Beneficiaries in such shares and in such manner generally as the Trustees think fit.
- 4.2 The following rules apply to any appointment under the power in sub-clause 4.1:
- 4.2.1 it must be made by deed revocable (during the Trust Period) or irrevocable;
  - 4.2.2 it must be made during the Trust Period;
  - 4.2.3 it may be made in respect of income or capital or both;
  - 4.2.4 it may create interests of any kind, absolute or limited, vested or contingent, conditional or unconditional;
  - 4.2.5 it may create discretionary trusts and powers (including new powers of appointment) to be executed or exercised by any person;
  - 4.2.6 it may in any other way delegate the exercise of the discretion conferred by the power;
  - 4.2.7 it may create trusts and powers for the accumulation of income during any period permitted by law;
  - 4.2.8 it may include administrative and dispositive provisions;
  - 4.2.9 it may appoint and provide for the future appointment of separate trustees of different parts of the Trust Fund anywhere in the world; and
  - 4.2.10 it may appoint that the whole or any part of the capital or income of the Trust Fund shall be transferred to the trustees (to be held on the trusts) of any other trust or settlement (whether governed by the proper law of this Settlement or of any other jurisdiction) anywhere in the world which shall be for the benefit of all or any one or more of the Beneficiaries even though it may benefit one or more other persons other than an Excluded Person.
- 4.3 No exercise of the above power of appointment shall prejudice the validity of any prior payment or application of capital or income or other act or thing previously done.

# Offshore trusts (Cont'd)

## 9 Addition and exclusion of Beneficiaries

9.1 At any time during the Trust Period the Trustees may with the prior or simultaneous written consent of the Protector by revocable (during the Trust Period) or irrevocable deed:

9.1.1 add as Beneficiaries such one or more persons or class of persons (not being an Excluded Person) as the Trustees shall in their absolute discretion determine subject to such terms conditions or restrictions and for such period as may be specified in such deed and such deed shall specify the date (not being earlier than the date of the deed but during the Trust Period) from which such person shall be so added; or

9.1.2 declare that a person or member of a class named or specified (whether or not ascertained) in such deed who are, would or might but for this clause be or become a Beneficiary or Beneficiaries or be otherwise capable of benefiting under this Settlement as the case may be:

9.1.2.1 shall be wholly or partially excluded from future benefit under this Settlement; or

9.1.2.2 shall be an Excluded Person;

and any such declaration shall take effect in such circumstances or subject to such terms and conditions and from the date specified in such deed provided that this power shall not be capable of being exercised so as to derogate from any interest to which any Beneficiary has become indefeasibly entitled whether in possession or in reversion or otherwise.

9.2 Any person not being a minor who is, would or might be able to benefit under this Settlement may declare in writing during the Trust Period that he shall be:

9.2.1 wholly or partially excluded from future benefit under this Settlement; or

9.2.2 an Excluded Person;

and any such declaration may be revocable (during the Trust Period) or irrevocable and shall have effect from the date that it is received by the Trustees.

# Offshore trusts (Cont'd)

## 13 Settlor's and Protector's powers

13.1 The exercise by the Settlor of his powers shall be in a personal capacity. If and to the extent the Settlor releases any of the powers conferred upon him by the terms of this Settlement, this Settlement shall be read and construed as if references to the requirement for the Settlor's consent or agreement and to the exercise by the Settlor of any power were omitted from this Settlement.

13.2 If at any time there is no Protector or if and to the extent the Protector releases any of the powers conferred upon him by the terms of this Settlement, this Settlement shall be read and construed as if references to the requirement for the Protector's consent or agreement and to the exercise by the Protector of any power were omitted from this Settlement.

13.3 The Protector shall not exercise his powers (including giving or withholding his consent in writing) in favour of himself, his creditors, his estate or the creditors of his estate, except insofar as the Protector is also a Beneficiary and exercises his powers under this Settlement (which, subject to sub-clause 13.4, for the avoidance of doubt are fiduciary) in an appropriate manner.

13.4 If at any time the Settlor is the Protector the powers of the Protector shall be personal and the Protector shall have no fiduciary duties.

13.5 Any written consents of the Protector required under the terms of this Settlement may be given either specifically in relation to any particular matter or by a general written consent referring to one or more matters and may either revocably or irrevocably consent prospectively to any exercise of any power.

13.6 Notwithstanding any other provisions in this Settlement, the Trustees shall not be liable for acting with the consent or on the directions of a person who had been, but has ceased to be, a Protector unless the Trustees have received notice that the person has ceased to be a Protector.

# Offshore trusts (Cont'd)

## 14 Release of powers and discretions

The Trustees, Settlor, Protector and any other person on whom powers are conferred under this Settlement shall have power, exercisable at any time or times before the expiration of the Trust Period, by deed revocable (during the Trust Period) or irrevocable, to release or restrict in whole or in part any power, right or discretion vested in them.

## 15 Exclusion of Excluded Persons

Notwithstanding anything else contained or implied in this Settlement or in law, no Excluded Person shall be capable of taking any direct or indirect benefit of any kind by virtue or in consequence of this Settlement and in particular but without prejudice to the generality of this clause:

15.1 the Trust Fund and its income shall be held and enjoyed to the entire exclusion of any direct or indirect benefit to any Excluded Person by contract or otherwise;

15.2 no part of the capital or income of the Trust Fund shall be paid to or held by any Excluded Person (except in a fiduciary or parental capacity) or lent to or applied for the direct or indirect benefit of any Excluded Person; and

15.3 no power or discretion conferred on the Trustees or any of them or on the Settlor or Protector by law or by this Settlement shall be capable of being exercised or operating in any manner so as to confer any benefit whether directly or indirectly on any Excluded Person in any manner or circumstances whatsoever.

Questions ???

Thank You!!!



**Richard Niedermayer, TEP**  
Stewart McKelvey

Purdy's Wharf Tower 1  
900 - 1959 Upper Water Street  
Halifax, NS B3J 2X2

Ph: 902-420-3339

Email: [RNiedermayer@stewartmckelvey.com](mailto:RNiedermayer@stewartmckelvey.com)