

Osgoode Hall Law School Professional Development CLE

The 5th Annual Guide to Negotiating, Challenging, and Drafting
Domestic Contracts

Wills and Estates Issues in Domestic Contracts

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INTRODUCTION

- domestic contracts, whether at the start or the end of a relationship, will intersect with estate planning issues
- Family lawyer needs to have some familiarity with the relevant provisions of the *Succession Law Reform Act*, the *Substitute Decisions Act* and the *Trustee Act*
- develop a working relationship with an estate & trusts lawyer
- Presentation will:
 - Quickly review legal consequences of cohabitation, marriage, separation & divorce on estate planning documents
 - Review the provisions of the FLA applicable on death
 - Outline estate planning considerations in marriage / cohabitation contracts
 - Outline estate planning considerations in separation agreements
 - Discuss Mutual Wills doctrine

Effect of Living Common Law on Estate Planning Documents – Schedule 1

- a common law relationship does not revoke a Will
- a common law relationship does not revoke the beneficiary named on an RRSP/RRIF; pension; TFSA or life insurance
- a common law relationship does not revoke a Power of Attorney or Power of Attorney for Personal Care
- a common law relationship does not confer equalization rights under the FLA
- a common law relationship will confer personal care decision rights if there is no Power of Attorney for Personal Care in place and will confer standing to apply as a statutory guardian to replace the Public Guardian and Trustee

Effect of Marriage on Estate Planning Documents – Schedule 2

- marriage will revoke a Will
- marriage does not revoke the beneficiary named on an RRSP/RRIF; pension; TFSA or life insurance
- marriage does not revoke a Power of Attorney or Power of Attorney for Personal Care
- marriage does confer equalization rights under the *FLA*
- marriage will confer personal care decision rights if there is no Power of Attorney for Personal Care in place
- NOTE: a Will made in another jurisdiction dealing with real property may not be affected by this!

Effect of Separation on Estate Planning Documents – Schedule 3

- separation does not revoke a Will
- separation does not revoke the beneficiary named on an RRSP/RRIF; pension; TFSA or life insurance
- separation does not revoke a Power of Attorney or Power of Attorney for Personal Care
- if no document exists, under the *Health Care Consent Act*, a spouse cannot make health care decisions for the other spouse once separated

Effect of Divorce on Estate Planning Documents – Schedule 4

- divorce does not revoke a Will but S.17(2) of the *SLRA* provides that a gift to former spouse made in a will is void and the appointment of the spouse as executor is revoked - NOTE: it is dangerous to rely on this because it may not apply to Wills that aren't governed by Ontario law
- divorce does not revoke the beneficiary named on an RRSP/RRIF; TFSA or life insurance
- divorce does not revoke a Power of Attorney or Power of Attorney for Personal Care
- if no document exists, under the *Health Care Consent Act* a spouse cannot make health care decisions for the other spouse once separated [*HCCA*, S.20(8)]

Rights Death With or Without a Will – Schedule 5 & 6

COMMON LAW SPOUSE

- no automatic right to a share of the estate under the will or under intestacy laws
- no equalization under the *FLA*
- must look to equitable remedies of unjust enrichment and/or dependant's relief under the *SLRA* which includes claw back provisions for life insurance proceeds and RRSP/RRIF

MARRIED SPOUSE

- the right to elect between the provisions under the will or the equalization payment under the *FLA* when the deceased dies with a will or to elect between the intestacy entitlement (\$200,000 preferential share & portion of the residue depending on the number of children; all if no children; ½ if one child; 1/3 if two or more children)
- no rights to insurance proceeds or RRSP/RRIF except under the claw back provisions in a dependent's relief claim under the *SLRA*

Rights on Death With or Without a Will – Schedule 5 & 6

SEPARATED SPOUSE

- gifts to spouse under the will are not void; right to share on intestacy unaffected
- if the separated spouse started an equalization claim before the death of the other spouse, it can be continued against the estate;
- if did not start an equalization claim, the separated spouse can elect to take under the will or intestacy rights or for his/her equalization payment
- valuation date will be the date of separation; no rights to insurance proceeds or RRSP/RRIF except under the claw back provisions in a dependent's relief claim under the *SLRA*
- limitation period will be the shorter of six years after the date of separation or six months after the first spouse's death
- **THE s. 7(2) TRAP:** In the case of the estate of the **deceased spouse**, if no equalization claim was commenced under s.5(1) of *FLA* before death, it is no longer available to the estate against the surviving spouse and a s.5(2) claim is also not available to the estate against the surviving spouse

Rights Death With or Without a Will – Schedule 5 & 6

DIVORCED SPOUSE

- Gifts to the divorced spouse under the Will are revoked and the appointment as executor is revoked; no right to share in intestacy
- If divorced spouse started an equalization claim before the death of the other spouse, it can be continued against the estate
- if not, the divorced spouse can pursue his/her equalization claim against the estate;
- can pursue support claims under the *Divorce Act*
- no rights to insurance proceeds or RRSP/RRIF except under the claw back provisions in a dependent's relief claim under the SLRA;
- the valuation date in any event will be the date of separation
- the limitation period will be the shorter of six years after the date of separation, two years after the divorce or six months after the first spouse's death
- The **S.7(2) TRAP** exists for the deceased spouse in this scenario as well

FLA Provisions on Death – Schedule 7

- "valuation date" is the date before death
- equalization available to survivor only
- 6 months to make election
- no distribution permitted in the estate within 6 months of death
- personal representative personally liable if breach and insufficient assets for equalization
- court can suspend administration

Effect of Election under S.5 *FLA*

- election between Will and equalization, or intestacy and equalization
- gifts under will are revoked, will interpreted as if surviving spouse predeceased
- credit against entitlement of assets received as a result of death of spouse
- not all assets and liabilities count; may have different results than an equalization on separation or divorce
- adverse consequences including delayed administration, unhappy beneficiaries and increased costs and income taxes

Marriage Contracts & Cohabitation Agreements – General Considerations

- 1) Advise that release or waiver of spousal support rights is only one factor to be considered by a court when dealing with a spouse's dependant's relief claim under the SLRA
- 2) Advise that cohabitation has no effect on estate planning documents (Will, beneficiary designations, Power of Attorney for Property or Personal Care)
- 3) Advise that marriage revokes Will but has no effect on any other estate planning documents; may not apply to wills governing real property in other jurisdictions
- 4) Advise that estate planning should be done in conjunction with the domestic contract and with the assistance of estate planning counsel
- 5) Remind clients that estate planning includes beneficiary designation on insurance, RRSPs, RRIFs, TFSAs, POA and POAPC in addition to their Will

Marriage Contracts & Cohabitation Agreements – Drafting Considerations

- 1) Co-ordinate domestic contract and estate plan to avoid undesirable tax and /or unhappy (=litigious) beneficiaries
- 2) Ensure the contract binds the estate:
“This Agreement and any written Agreement written to modify, amend, vary, supplement, waive or terminate or rescind it shall enure to the benefit of and shall be binding upon the heirs, assigns, administrators and executors of the parties hereto.”

Marriage Contracts & Cohabitation Agreements – Drafting, cont'd

- 3) Don't lump death in with separation
- 4) Consider dealing with personal property on death
- 5) Ensure contract specifies that only it governs division of property on death
- 6) Ensure parties can give more on death
- 7) Ensure no conflict with obligations to former spouse/children or other third parties

Separation Agreements – General Considerations

- 1) Advise separation has no effect on estate planning documents (Will, beneficiary designations, Power of Attorney for Property or Personal Care)
King v. King; Makarchuk v. Makarchuk; Carrigan v. Quinn
- 2) Don't get caught in S.7(2) *FLA* trap – make sure you commence your s.5(1) application
- 3) Suggest that replacement Power of Attorney for Property contain express authority for attorney to initiate or maintain proceedings under *FLA*
- 4) Advise client of right and pro/con of severing joint tenancy
Hansen Estate v. Hansen
- 5) Advise that estate planning should be done in conjunction with the separation agreement and with the assistance of estate planning counsel

Separation Agreements – Drafting Considerations

- 1) Co-ordinate separation agreement and estate plan
- 2) Co-ordinate with obligations to former spouse and children
- 3) Ensure contract binds the estate
- 4) Include wills and estate releases; proper pension releases,
King v. King
- 5) Deal with taxability and deductibility of spousal support on death
- 6) Consider proper use of life insurance as security for the payment of support for spouse and children: Samples attached Schedule 8

Mutual Wills

- Changes in demographics resulting in more second marriages and blended families have led to interest in “mutual wills”
- Desire to enter into arrangements with their spouse to provide for a scheme of distribution of their estates on the first and second death and to ensure it is binding on the survivor
- Doctrine of Mutual Wills:
 - 1) Two or more people make wills containing agreed to terms which may or may not benefit each other but benefit third parties
 - 2) They have an agreement that they will not revoke the wills (or will have terms in the wills as agreed to)
 - 3) One party dies having abided by the agreement
 - 4) The second party dies having breached the agreement

Mutual Wills

- Notwithstanding the breach by the second to die, a constructive trust will attach to the property of the second to die in favour of the third party beneficiaries of the agreement
- Excerpts of sample clause included as Schedule 9

Domestic Contract for Mutual Wills

- 1) Ensure you provide a series of recitals giving the background of the parties and the background to the decision to make an estate plan that binds the parties on their deaths
- 2) Spell out in detail the scheme of distribution proposed
- 3) Ensure the usual compliance under the FLA for domestic contracts
- 4) Address whether either party can change a will while they are both alive and how that can be done
- 5) Address whether either party can change a will while the other is incompetent

Domestic Contract for Mutual Wills cont'd

- 6) Address any contemplated inter vivos gifts or restrictions on them during both lifetimes or after the first death
- 7) Address whether assets acquired after the first death are included or excluded, otherwise, they will be included regardless of the source
- 8) Set out what constitutes a breach – making a new Will? Changing certain dispositive provisions only? Revocation by operation of law (marriage)?

CONCLUSION

Call us –your friendly estate & trusts lawyers.
We'd love to work with you!



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