WILLS & ESTATES ISSUES IN DOMESTIC CONTRACTS

by Mary Wahbi, J.D., TEP*

INTRODUCTION

The preparation of a domestic contract, whether at the start of a relationship or at the end of one, involves a number of areas where wills and estate planning issues arise. It is important for a prudent family law lawyer to recognize the interplay between these areas of law in providing the client with legal advice and in the preparation of the client's domestic contract. In addition to the usual matrimonial statutes, the family lawyer will need to have some familiarity with the relevant provisions of the *Succession Law Reform Act*,[1] ***("SLRA")***, the *Substitute Decisions Act, 1992*,[2] (***"SDA"***) and the *Trustee Act*[3] and would be well served by having a working relationship with an estates lawyer.

The purpose of this paper is to draw your attention to some of the wills and estate planning issues that arise when contemplating a domestic contract and to provide you with some practical advice on how to deal with them.

This paper will deal with the following:

1. A review of the legal consequences of cohabitation, marriage, separation divorce on estate planning documents and on disability and death;
2. A review of the provisions of the *Family Law Act*,[4] (the "***FLA***") applicable on death;
3. Estate planning considerations in marriage contracts and cohabitation agreements;
4. Estate planning considerations in separation agreements; and
5. A discussion of the Mutual Wills doctrine.

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* Ms. Wahbi practices in the areas of trust and estates law and corporate/commercial law and is a partner of the Toronto firm of Basman Smith LLP. Please note that this article is being re-printed with permission and was originally produced by Osgoode Professional Development CLE for "The 5th Annual Guide to Negotiating, Challenging and Drafting Domestic Contracts" presented on January 17, 2013. Mary Wahbi gratefully acknowledges the assistance of Karen Yolevski, Basman Smith LLP, in the preparation of this paper.

1 R.S.O. 1990, c. S.26.
2 S.O. 1992, c. 30.
3 R.S.O. 1990, c. T.23.
4 R.S.O. 1990, c. F.3.

1. LEGAL CONSEQUENCES OF COHABITATION, MARRIAGE, SEPARATION DIVORCE ON ESTATE PLANNING DOCUMENTS AND ON DEATH & DISABILITY

Caution is required when advising clients on their matrimonial matters as every domestic relationship can result in unintended consequences from an estate perspective. Some forms of relationships do, by statute, change the estate plan while others do not.

A. COHABITATION

Estate lawyers often have to correct our clients' misunderstanding of the law applicable to common law relationships, as no doubt is common for family law lawyers. Our clients are often under the wrong impression that after the requisite period of co-habitation (on which there is confusion as well), common law spouses have the same rights as married spouses.

(i) Validity of Existing Documents

Cohabitation for any period has absolutely no legal effect on the validity of existing Wills, beneficiary designations, Powers of Attorney for Property and Powers of Attorney for Personal Care. Therefore, if an individual has an estate plan involving a Will, beneficiary designations on life insurance, RRSPs or pensions, and Powers of Attorney in place prior to entering into a common law relationship, those documents remain valid and in effect until new documents or beneficiary designations are signed. It is important to ensure that clients attend to making new documents if they wish to benefit the common law spouse.

(a) **Will:** Section 17 of the *SLRA* provides:

17 (1) Subject to subsection (2), a will is not revoked by presumption of an intention to revoke it on the ground of a change in circumstances.

17 (2) Except when a contrary intention appears by the will, where, after the testator makes a will, his or her marriage is terminated by a judgment absolute of divorce or is declared a nullity,

(a) a devise or bequest of a beneficial interest in property to his or her former spouse;

(b) an appointment of his or her former spouse as executor or trustee; and

(c) the conferring of a general or special power of appointment on his or her former spouse,

are revoked and the will shall be construed as if the former spouse had predeceased the testator.

(b) **RRSP or pension plans:** section 51 of the *SLRA* provides:

51 (1) A participant may designate a person to receive a benefit payable under a plan on the participant's death,

(a) by an instrument signed by him or her or signed on his or her behalf by another person in his or her presence and by his or her direction; or

(b) by will,

and may revoke the designation by either of those methods.

(c) **Life insurance policies:** sections 190(1) and 190(2) of the *Insurance Act*[5] provide:

190 (1) An insured may in a contract or by a declaration designate the insured's personal representative or a beneficiary to receive insurance money.

190 (2) Subject to section 191, the insured may from time to time alter or revoke the designation by a declaration.

(d) **Powers of Attorney for Property or Personal Care:**

The provisions of the *SDA* dealing with termination of Powers of Attorney for Property[6] and Powers of Attorney for Personal Care[7] do not include cohabitation as a terminating event.

(ii) Rights on Death

If a common law spouse dies with a Will that does not provide for the surviving common law spouse, the rights of the survivor are limited to the statutory support claims under the *FLA* or the *SLRA*, and to any contractual or common law/equitable remedies such as resulting trust,[8] constructive trust, unjust enrichment, *quantum meruit*, and promissory/proprietary estoppels, or a combination of each, that may be available under their particular circumstances with regards to property. Unlike married spouses, there is no statutory right to equalization of net family property on one spouse's death. The definition of "spouse" in section 1(1) of the *FLA* which applies to Part I (Family Property) and Part II (Matrimonial Home) of the *FLA* is limited to married persons.

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5 R.S.O. 1990, c I.8.

6 SDA, s. 12(1).

7 SDA, s. 53(1).

8 See *Kerr v. Baranow* and *Vanasse v. Seguin*, 2011 SCC 10, in which the Supreme Court of Canada has expanded the rights of cohabiting spouses by rejecting the common intention resulting trust and introducing the concept of "joint family venture" which can be found where, among other factors, there exists: (i) the mutual effort of the parties and their working collaboratively towards common goals; (ii) economic integration of the couples' finances; (iii) actual intent or choice of the parties to not have their economic lives intertwined, whether such is expressed or inferred; and (iv) where the parties have given priority to the family or there is detrimental reliance on the relationship, by one or both of the parties, for the sake of the family [paras 89-100]. Furthermore, the court rejected that there are only two dichotomous choices of remedy available: 1) monetary award calculated on a value received basis or 2) a proprietary award where the claimant can show a benefit conferred contributed to the acquisition or improvement to a specific property in favour instead of a value survived approach.

If a common law spouse dies without a Will, the foregoing are still the only remedies available to the surviving common law spouse. The surviving spouse is not entitled to share in the estate of the deceased under the intestacy rules in the *SLRA*. Under section 1(1) of the *SLRA* (save for Part V-Support of Dependants), a spouse is defined as follows:

"spouse" means either of two persons who,

(a) are married to each other, or

(b) have together entered into a marriage that is voidable or void, in good faith on the part of the person asserting a right under this Act;

Therefore it is imperative that common law couples that wish to leave gifts to each other on death have wills that reflect this intent.

With regards to assets that require beneficiary designations, subject to the "claw-back" provisions of section 72(1) of the *SLRA* in dependant's relief applications, the common law spouse will have no rights to those assets.

(iii) Rights on Incapacity for Property Decisions

The *SDA* in section 1(1) defines a common law spouse as:

... a person,

(b) with whom the person is living in a conjugal relationship outside marriage, if the two persons,

(i) have cohabited for at least one year,

(ii) are together the parents of a child, or

(iii) have together entered into a cohabitation agreement under section 53 of the *Family Law Act*,

A common law spouse is recognized as having standing to apply to the Public Guardian and Trustee to replace that government office as the incapable common law spouse's statutory guardian of property.[9] It is not necessarily a position of priority and the common law spouse is also not statutorily recognized as having priority in a court application for Guardianship. If the incapable common law spouse has appointed someone else under a Power of Attorney for Property, the common law spouse would have to bring a court application to remove that person and show why such person ought to be removed. Note in any event that the married spouse is in no better statutory position than the common law spouse of an incapable person.

(iv) Rights on Incapacity for Personal Care Decisions

The *Health Care Consent Act, 1996*[10] in section 20(7) provides that two persons are spouses for the purpose of that section if:

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[9] SDA, s. 17(1).
[10] S.O. 1996, c.2, Sch. A.

20(7) ...

(b) they are living in a conjugal relationship outside marriage and,

(i) have cohabited for at least one year,

(ii) are together the parents of a child, or

(iii) have together entered into a cohabitation agreement under section 53 of the *Family Law Act*,

Section 20(1) of this Act provides a specific list of persons who may give consent to treatment on behalf of an incapable person as follows:

20.(1) If a person is incapable with respect to a treatment, consent may be given or refused on his or her behalf by a person described in one of the following paragraphs:

1. The incapable person's guardian of the person, if the guardian has authority to give or refuse consent to the treatment.
2. The incapable person's attorney for personal care, if the power of attorney confers authority to give or refuse consent to the treatment.
3. The incapable person's representative appointed by the Board under section 33, if the representative has authority to give or refuse consent to the treatment.
4. **The incapable person's spouse or partner.** *(emphasis added)*
5. A child or parent of the incapable person, or a children's aid society or other person who is lawfully entitled to give or refuse consent to the treatment in the place of the parent. This paragraph does not include a parent who has only a right of access. If a children's aid society or other person is lawfully entitled to give or refuse consent to the treatment in the place of the parent, this paragraph does not include the parent.
6. A parent of the incapable person who has only a right of access.
7. A brother or sister of the incapable person.
8. Any other relative of the incapable person.

A common law spouse is recognized as having standing, as number four on the list, to give or refuse consent with respect to treatment on behalf of the incapable common law spouse.[11] In these circumstances, this is a position recognized by the statute as having priority ahead of the persons listed after the spouse. However, on a court application for guardianship of the person under the *SDA*, there is no statutory recognition of priority.[12] Note in any event that the married spouse is in no better statutory position than the common law spouse of an incapable person.

It is important to remember that in order for a common law spouse to have the right to make health care decisions on the incapable spouse's behalf, there cannot be a power of attorney for personal care which is still in effect giving this authority to someone else as a power of attorney for personal care outranks a spouse.

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[11] *Health Care Consent Act*, s. 20(1) s. 20(3).
[12] SDA, s. 22(1).

B. MARRIAGE

(i) Validity of Existing Documents

One of the most striking effects of marriage is that marriage revokes a Will made prior to the marriage unless the Will was executed in contemplation of marriage. However, marriage has no legal effect on beneficiary designations made in separate documents outside of the will such as beneficiary designations in RRSPs, RRIFs, life insurance policies, pensions and tax free savings accounts, and no legal effect on the validity of existing Powers of Attorney for Property or Personal Care.

Section 16 of the *SLRA* provides that:

> A will is revoked by the marriage of the testator except where,
>
> (a) there is a declaration in the will that it is made in contemplation of the marriage;
>
> (b) the spouse of the testator elects to take under the will by an instrument in writing signed by the spouse and filed within one year after the testator's death in the office of the Estate Registrar for Ontario; or
>
> (c) the will is made in exercise of a power of appointment of property which would not in default of the appointment pass to the heir, executor or administrator of the testator or to the persons entitled to the estate of the testator if he or she died intestate.

Sections 192(3) of the *Insurance Act*[13] provides:

> 92(3) Where a designation is contained in a will, if subsequently the will is revoked by operation of law or otherwise, the designation is thereby revoked.

It is imperative that clients are made aware of the need for a new Will when they marry or remarry and the need to review their entire estate plan, including beneficiary designations and Powers of Attorney.

(ii) Rights on Death

If a married spouse dies with a Will, the rights of the surviving spouse include the support claims under the *FLA*, the dependant's relief claims under the *SLRA*, and the right to elect to take under the will or to receive the equalization entitlement under section 5(2) of the *FLA*.[14]

If a married spouse dies without a Will, the rights of the surviving spouse include the support claims under the *FLA*, the dependant's relief claims under the *SLRA*, and the right to elect to take the entitlement under Part II of the *SLRA*,[15] or to receive the entitlement under section 5(2) of the *FLA*.[16]

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[13] R.S.O. 1990, c.I.8.

[14] FLA, s. 6(1).

[15] Sections 44 to 46 of the *SLRA* set out the entitlement of a surviving spouse. The starting point is the preferential share of the spouse which, pursuant to s. 45(5) is prescribed by regulation made by the Lieutenant Governor in Council. Currently, the preferential share is, pursuant to O. Reg. 54/95, $200,000. Pursuant to s. 44, where the deceased spouse is survived by a spouse only, the spouse is entitled to all of the intestate

(iii) Rights on Incapacity for Property Decisions

The married spouse has the same rights under the *SDA* as the common law spouse to be appointed statutory guardian in the place of the Public Guardian and Trustee.[17] It is not necessarily a position of priority and the married spouse is also not statutorily recognized as having priority in a court application for Guardianship. If the incapable spouse has appointed someone else under a Power of Attorney for Property, the spouse would have to bring a court application to remove that person and show why such person ought to be removed.

(iv) Rights on Incapacity for Personal Care Decisions

The married spouse has the same rights under the *SDA* as the common law spouse, after the incapable person's guardian of the person or failing that, the incapable person's attorney for personal care, to give or refuse consent with respect to treatment on behalf of the incapable spouse.[18] In these circumstances, this is a position recognized by the statute as having priority ahead of the persons listed after the spouse. However, on a court application for guardianship of the person, there is no statutory recognition of priority.[19] Furthermore, in order for the married spouse to have first right to make health care decisions on the incapable spouse's behalf, there cannot be a power of attorney for personal care which is still in effect giving this authority to someone else as a power of attorney for personal care outranks a spouse.

C. SEPARATION

(i) Validity of Existing Documents

Separation of a common law or married spouse has absolutely no legal effect on the validity of existing Wills, beneficiary designations, Powers of Attorney for Property or Powers of Attorney for Personal Care. **Clients should be warned that separating from their spouse, even for a lengthy period of time, does not affect their estate planning documents and it is imperative that they amend their estate planning documents as soon as possible once separation has occurred.** Otherwise, death or serious illness during the separation could result in devastating unintended consequences.

With regards to a will, section 17 of the *SLRA* provides:

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property of the deceased. Pursuant to s. 46(1), where the deceased leaves a spouse and one child, the spouse is entitled to the preferential share plus one-half of the residue. Pursuant to s. 46(2), where the deceased leaves a spouse and two or more children, the spouse is entitled to the preferential share plus one-third of the residue.

16 FLA, s. 6(2).
17 SDA, s. 17(1).
18 *Health Care Consent Act*, s. 20(3).
19 SDA, s. 22(1).

17(1) Subject to subsection (2), a will is not revoked by presumption of an intention to revoke it on the ground of a change in circumstances.

17(2) Except when a contrary intention appears by the will, where, after the testator makes a will, his or her marriage is terminated by a judgment absolute of divorce or is declared a nullity,

(a) a devise or bequest of a beneficial interest in property to his or her former spouse;

(b) an appointment of his or her former spouse as executor or trustee; and

(c) the conferring of a general or special power of appointment on his or her former spouse,

are revoked and the will shall be construed as if the former spouse had predeceased the testator.

The provisions of the *SDA* dealing with termination of Powers of Attorney for Property[20] and Powers of Attorney for Personal Care[21] do not include separation as a terminating event.

(ii) Rights on Death

If a separated spouse dies with a Will, the rights of the surviving spouse include the support claims under the *FLA* and if that is not adequate, the dependant's relief claims under the *SLRA*. With regards to property, the surviving separated spouse is entitled to:

(a) If the equalization claim under s. 5 (1) of the *FLA* (the equalization triggered by separation) was commenced before the death of the other spouse, the surviving spouse can continue it against the estate of the deceased spouse;

(b) If the equalization claims under s. 5 (1) of the FLA was not commenced before the death of the other spouse, the surviving spouse is entitled to elect under s. 5 (2) to take either under the will of the deceased spouse or the equalization claim.[22]

Furthermore, in the latter case, the valuation date will be the date of separation and the limitation period will have shortened from six years after the date of separation to six months after the first spouse's death.[23]

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

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[20] SDA, s. 12(1).
[21] SDA, s. 53(1).
[22] FLA, s. 6(1) provides that when a spouse dies leaving a will, the surviving spouse shall elect to take under the will or to receive the entitlement under section 5.
[23] FLA, s. 7(3) provides that an application based on subsection 5(1) or (2) shall not be brought after the earliest of, (a) two years after the day the marriage is terminated by divorce or judgment of nullity; (b) six years after the day the spouses separate and there is no reasonable prospect that they will resume cohabitation; (c) six months after the first spouse's death.

estate against the surviving spouse. Furthermore, a s. 5(2) claim is also not available to a deceased spouse.[24]

(iii) Rights on Incapacity for Property Decisions

A separated spouse is still technically a spouse for the purposes of the application to be appointed statutory guardian in the place of the Public Guardian. However, such appointment requires the Public Guardian and Trustee to be satisfied that the applicant is suitable to manage the property of the incapable person. If the spouses are involved in litigation, that spouse would likely not be "suitable". For the same reasons, while a separated spouse is not excluded as an applicant for guardianship of property, the application is unlikely to be successful if the spouses are involved in litigation.

(iv) Rights on Incapacity for Personal Care Decisions

It is important to note that a separated spouse is not included in the definition of spouse under the *Health Care Consent Act, 1996* for the purposes of the list of persons who may give or refuse consent to treatment. Section 20(8) provides:

> 20(8) Two persons are not spouses for the purpose of this section if they are living separate and apart as a result of a breakdown of their relationship.

For the purposes of a court application for guardianship of the person, a separated spouse is not excluded under the *SDA* as a potential applicant.

D. DIVORCE

(i) Validity of Existing Documents

Divorce doe not revoke existing estate planning documents. They remain valid but the *SLRA* makes certain amendments to a Will under s. 17(2). The effects of divorce on a will are set out as follows:

> 17(2) Except when a contrary intention appears by the will, where, after the testator makes a will, his or her marriage is terminated by a judgment absolute of divorce or is declared a nullity,
>
> (a) a devise or bequest of a beneficial interest in property to his or her former spouse;
>
> (b) an appointment of his or her former spouse as executor or trustee; and
>
> (c) the conferring of a general or special power of appointment on his or her former spouse,
>
> are revoked and the will shall be construed as if the former spouse had predeceased the testator.

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[24] FLA, s. 5(2) provides that when a spouse dies, if the net family property of the deceased spouse exceeds the net family property of the surviving spouse, the surviving spouse is entitled to one-half the difference between them.

There are no similar provisions in the *SLRA* or the *Insurance Act* revoking beneficiary designations. Furthermore, it is not clear that a beneficiary designation made in a will is caught by s. 17(2). Reliance on section 17(2) rather than the preparation of a new will may result in unintended acceleration of gifts to alternate beneficiaries and adverse tax consequences since the rollover to the spouse will not be available. In addition, this provision is only applicable to assets governed by Ontario law. If the deceased owned land in another jurisdiction that did not have such a provision, then the divorce might not have the effect of cancelling the bequest of that land to the divorced spouse.

There is no provision in the *SDA* revoking the appointment of a former spouse as attorney for property or personal care.

Therefore, unless the divorced spouse executes estate planning documents including a new will, beneficiary designations, Insurance Trust, Power of Attorney for Property and Personal Care, the surviving divorced spouse may well benefit from insurance or RRSP designations as beneficiary, bequest of property made in jurisdictions other than Ontario, and may well continue to be appointed as the attorney for property and personal care.

It is therefore extremely important that the will as well as all other estate planning documents including beneficiary designations and Powers of Attorney be revisited in the light of the client's circumstances and properly planned and prepared.

(ii) Rights on Death

If a divorced spouse dies with a will, as indicated above, the surviving divorced spouse is eliminated as an executor and beneficiary under the will unless the will states otherwise. A divorced spouse whose support claim was not dealt with prior to the divorce may continue to have support claims under the *Divorce Act*[25] or as a dependant under the provisions of the *SLRA*. Section 15 of the *Divorce Act* includes a former spouse for the purposes of support claims and Section 57 of the *SLRA* includes in the definition of "spouse" either of two persons who were married to each other by a marriage that was terminated or declared a nullity.

With regards to property claims, the surviving divorced spouse is in the same position as a separated spouse, that is:

(a) If the equalization claim under s. 5(1) of the *FLA* (the election triggered on divorce) was commenced before the death of the other spouse, the surviving spouse can continue it against the estate of the deceased spouse;

(b) If the equalization claims under s. 5(1) of the FLA was not commenced before the death of the other spouse, the surviving spouse is entitled to elect under s. 5(2) to take either under the will of the deceased spouse or the equalization claim.

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[25] R.S.C. 1985, c. 3 (2nd Supplement).

Furthermore, in the latter case, the valuation date will be the date of divorce and the limitation period will have shortened from two years after the date of divorce to six months after the first spouse's death. [26]

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 divorced spouse. Furthermore, a s. 5(2) claim is also not available to a deceased divorced spouse.[27]

If a divorced spouse dies without a will, the surviving divorced spouse has no entitlements to share in the estate under the intestacy provisions of the *SLRA* and is limited support claims under the *Divorce Act*, dependant's relief under the *SLRA* and the equalization claims under the *FLA*.

(iii) Rights on Incapacity for Property Decisions

The divorced spouse is not included in the definition of spouse under the *SDA* and therefore has no standing to be appointed statutory guardian in the place of the Public Guardian and Trustee. The divorced spouse is not however excluded from being an applicant in the case of a court application for Guardianship, which can be made by any person.[28]

(iv) Rights on Incapacity for Personal Care Decisions

The divorced spouse is not included in the definition of spouse under the *SDA* and therefore has no standing to give or refuse consent with respect to treatment on behalf of the incapable divorced spouse. The divorced spouse is not however excluded from being an applicant in the case of a court application for Guardianship of the person, which can be made by any person.[29]

2. APPLICABLE PROVISIONS OF THE FAMILY LAW ACT ON DEATH

The *FLA* imposes a deferred community of property regime on married spouses which occurs on separation, divorce or death. The provisions relevant on death include:

(a) The definition of valuation date as being the date before the date of death;

(b) The surviving spouse's election rights for equalization of net family property;

(c) The credit mechanisms for assets flowing to the surviving spouse outside of the will as against the equalization claim; and

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[26] FLA, s. 7(3).
[27] FLA, s. 5(2) provides that when a spouse dies, if the net family property of the deceased spouse exceeds the net family property of the surviving spouse, the surviving spouse is entitled to one-half the difference between them.
[28] SDA, s. 22(1).
[29] SDA, s. 55(1).

(d) The right to possession of the matrimonial home for sixty (60) days after the date of death.

It is important to keep in mind that an equalization of net family property on death may have different results than one on separation or divorce. Since the valuation date in the case of equalization on death is the day before the date of death, some assets and liabilities which do not exist or come to fruition until the date of death may not be included in the valuation. For example, in the *Weatherdon-Oliver v. Oliver Estate*[30] case, the deceased had insurance proceeds, a lump sum superannuation payment, and Canada Pension Plan benefits. As none of these assets were payable until after the valuation date, they were not included as part of the deceased's assets. Debts such as funeral expenses which did not exist as at the valuation date could not be deducted. Furthermore, in an election on death there is a requirement that the surviving spouse making the election credit receipts of insurance proceeds, lump sum payments under a pension or similar plan, and property received by joint tenancy or otherwise as a result of the spouse's death against any equalization payments.

The provisions of the *FLA* include the surviving spouse's election right between the will and equalization or intestacy and equalization. This will involve a valuation process which is expensive and takes time. The statute also includes a complicated credit mechanism for assets acquired by the survivor as a result of the death of the deceased, in order to prevent a windfall. The survivor's election takes priority over gifts made in the will, the intestacy rights of others and over dependant's relief orders except in favour of a child and may accelerate gifts made in the will to others because the gifts made to the spouse are revoked. This may cause grief to other beneficiaries as well as adverse tax consequences to the estate. Furthermore, the statute includes a restriction against distribution in the estate within six months of the death of a spouse with personal liability against the estate trustee if that is breached.

The potential for disruption to the administration of the estate, upheaval to other beneficiaries, delay, added costs, and adverse potential tax consequences of an election by a surviving spouse make it very important to properly address the arrangements on death when a domestic contract is contemplated, with a view to avoiding such a claim.

3. CONSIDERATIONS IN MARRIAGE CONTRACTS AND COHABITATION AGREEMENTS RELATING TO DEATH AND DISABILITY

Cohabitation agreements or marriage contracts are generally contemplated in order to opt out of the *FLA* regime either for property or support which the parties perceive to be inappropriate in their circumstances, either because it provides too much or not enough, and to provide for certainty with regards to their

[30] 2010 Carswell Ont. 6800, 2010 ONSC 5031.

rights and obligations. This occurs in situations of first marriages or cohabitation where one spouse brings significant assets into the relationship and wishes to protect them, and in subsequent relationships in which that is also a concern as well as concerns regarding obligations to a spouse or children of a prior relationship and dealing with a blended family.

Often such contracts will do a myriad of things including set out a scheme for the financial operations of the relationship, clarify ownership rights regarding property, preserve the matrimonial home with a date of marriage credit for its value on marriage, protect gifts and inheritances received before marriage including shares in business and interests in trusts, and provide agreement on property rights and support obligations in the event of separation, divorce or death and possibly incapacity.

(i) General Considerations:

1) Ensure that you have advises you client that notwithstanding any provision in the domestic contract releasing or waiving spousal support rights, such release/waiver is only one factor that a court considers when dealing with a dependants relief claim under the *SLRA* and such a release or waiver may not be foolproof.[31]

2) Advise the client that cohabitation does not affect their current estate planning documents and they need to be reviewed or prepared to reflect their new relationship and wishes on death or incapacity.

3) Advise the client that marriage revokes their Ontario Will but not necessarily wills in other jurisdictions and not their other estate planning documents and they need to be reviewed or prepared to reflect their new relationship and wishes on death or incapacity.

4) Advise the client that estate planning should be embarked upon in conjunction with the domestic contract and with the assistance of estate planning counsel.

5) Remind clients that estate planning includes not only their will but their beneficiary designations on insurance policies, RRSPs and RRIFs, pensions, TFSAs, Powers of Attorney for Property and for Personal Care.

(ii) Drafting Considerations:

1) Co-ordinate Domestic Contract and Estate Plan

Ensure that the current estate plan is reviewed when advising on the proposed domestic contract. The domestic contract should not conflict with the estate plan

[31] "Dependant" is defined in s. 57 of the *SLRA* as, among others, the spouse of the deceased ... to whom the deceased was providing support or was under a legal obligation to provide support immediately before his or her death and s. 63(4) provides that an order for the support of a dependant under s. 63 " ... may be made despite any agreement or waiver to the contrary."

and one or the other may have to be modified so that the overall scheme makes sense. If there is a conflict between the documents, the result on the death of one of the spouses may be undesirable tax and / or unhappy (= litigious) beneficiaries.

For example, suppose you are preparing a domestic contract in a second marriage and your client's assets consist of a home, a cottage, and a large RRSP portfolio and the domestic contract contemplates a buy-in by the other spouse of a half interest in the matrimonial home owned by the other spouse and that the property will then be held as joint tenants, or perhaps as tenants-in-common in the first five or ten years of the relationship and then transferred into joint tenancy on the fifth or tenth anniversary. If your client's current will leaves the cottage to one child and the residue (the bulk of which would have been the interest in the home) to the other child, a problem will occur with the estate plan because the domestic contract removes the matrimonial home from the deceased spouse's estate. The result on death will be a disappointed beneficiary whose share of the estate will be significantly smaller because the
scheme no longer has the effect contemplated by your client. The beneficiary designation on the RRSP will also have to be revisited to ensure that a former spouse is not named and to consider how to deal with it. By reviewing the estate plan in conjunction with the preparation of the domestic contract, a rethinking of the estate plan and domestic contract may be required to make sure the spouse is provided for and that the gifts to the children are equal on death in light of the assets that will be there. Consideration of other options for the domestic contract can also take place, such as holding the matrimonial home as tenants-in-common, requiring that the RRSPs name the spouse as beneficiary to take advantage of the tax rollover, and providing the surviving spouse with an option to buy the other half interest from the estate.

2) Ensure that the contract binds the estate:

A suggested provision is the following:

> "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."

3) Consider taking death out of the definition of Marriage Breakdown and dealing with it separately:

It is important not to lump in death with separation and divorce. Clients will generally want to be more generous to their spouse on death than on separation or divorce. For example, it would be appropriate to ensure the owner spouse receives a credit for the matrimonial home brought into the marriage in the event of separation or divorce, but that the matrimonial home be gifted to the survivor in the event of death during marriage and that the surviving spouse waive their election right on death. By segregating the event of death, you can be more specific and flexible about the arrangements on death. In drafting the death provision, consult with the estate planning lawyer for appropriate ideas and wording.

4) Consider dealing with personal property on death so as to eliminate grief between the surviving spouse and the children of the deceased spouse:

Personal effects and furnishings are a large source of aggravation and hostilities in the administration of an estate, especially when the beneficiaries are a second spouse and adult children of a first marriage. The contract will usually address the determination of ownership (usually by title, by whoever paid for it, by whoever received it as a gift or inheritance or failing that, as a default provision, held as joint tenants or tenants-in-common) but it may be appropriate to provide that subject to any specific bequests in a spouse's will, all personal property and household contents contained in the matrimonial home will become the property of the surviving spouse on death.

One example of a provision dealing with this in a domestic contract is:

> "Personal Articles" for the purposes of paragraph ____ of this Agreement shall mean all articles of personal, domestic, household or garden use or ornament including all boats, automobiles and accessories thereto owned by a party;
>
> In event of the death of one of the parties prior to a Relationship Breakdown, except for the specific bequests of any Personal Articles of the deceased party made in the will of that party, the Personal Articles of the deceased party contained in the Matrimonial Home(s) shall be the property of the surviving party.''

5) Ensure the contract specifies that only the contract governs the division of property on death

> "Bill and Trixie further agree that the provisions of this Agreement shall govern the division of any property, whenever and however acquired by either of them, in the event of a Relationship Breakdown, or in the event of the death of one party if no Relationship Breakdown has occurred at the time of such death."

6) Ensure the parties are free to provide more to each other in their estate planning documents, notwithstanding the releases in the domestic contract

It is important to ensure that estate litigation does not arise because of the wording of releases in the domestic contract. Depending on the wording and the timing of the documents, there may be an argument available to other beneficiaries that the surviving spouse waived all benefits and gifts to him or her made under the deceased's estate planning documents.

> "Either party may, by appropriate written instrument, convey or transfer during his or her lifetime and may devise or bequeath for distribution after his or her death, any property to the other or appoint the other Estate Trustee of his or her estate. Nothing in this Agreement will limit or restrict in any way the right to receive any such conveyance, transfer, devise, bequest, or appointment from the other."
>
> and
>
> "Nothing in this Agreement shall limit the right of Bill and Trixie to make provision in addition to the provisions in this Agreement from time to time for the other in his or her Last Will and Testament. In the event of the death of one of them, the survivor shall be

> deemed to have elected to take under the provisions contained in this Agreement and under any additional provision that the deceased party may include in his or her Last Will and Testament. Bill and Trixie hereby waive and release the right to make any application against the estate of the other under s. 6 of the Family Law Act, or otherwise, except in accordance with the terms of this Agreement or any Last Will and Testament of the deceased."

Relationships, especially second ones in which the spouses have children from prior relationships, will evolve and change over time. As the children of the parent become older and more self-sufficient they become less dependent on their parents. As the spousal relationship continues and the parties age, they become more dependent on each other. The natural progression will be to focus less on the gifts to the children and more on the needs of the aging spouse. It is important that the domestic contract be flexible enough, at least in the death scenario, and possibly during the parties' lifetime as well, to allow for the parties to provide more than the minimum set out in the domestic contracts. Sunset provisions can allow for this during the parties' lifetime, while the foregoing suggested provisions can allow it in the death scenario.

7) Review obligations to former spouses, child(ren) and others and ensure that the provisions contemplated in the domestic contract will not conflict

It is important to review the client's documentation, whether agreements or court orders, to ensure a complete understanding of their obligations to former spouses and children. The client's verbal recollections will often be inaccurate. In addition to any support obligations, the client may have already committed certain assets as security for prior obligations and made previous contractual commitments which limit his or her ability to use those assets in the domestic contract. A search under the *Personal Property Security Act*[32] for registrations against your client would also be prudent. It is important not make any commitments in the marriage contract or cohabitation agreement that would conflict with prior obligations. The estate plan which contemplates provisions for the prior obligation would also have to be revisited to take into account the new domestic contract.

4. CONSIDERATIONS IN SEPARATION AGREEMENTS

Unlike the situation of cohabitation and marriage, once advised by the family lawyer that there is no impact on their estate planning documents by their separation, most clients will quickly attend to new estate planning documents, even if they are simple quick and dirty stop-gap documents, to ensure that the estranged spouse is removed as executor, beneficiary, and attorney for property and personal care.

Separation agreements will not generally deal with death except to ensure of three things:

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[32] R.S.O. 1990, c. P.10.

1) That obligations bind the estate of each party and enure to the benefit of each party (see previous suggested phrasing);
2) That the obligations are secured in the event of death (usually with insurance on the payor's life); and
3) That other than the obligations agreed to in the Separation Agreement, there are mutual releases of all claims against each party and his or her estate.

(i) General Considerations:

Advise the client that separation does not affect their current estate planning documents and they need to be reviewed or prepared to reflect their new circumstances and wishes on death or incapacity.

Three recent cases emphasize this point.

In *King v. King*[33] while Mr. King and his former wife executed a separation agreement that contained a general release regarding his pension, it was held that this general pension release was not sufficient to constitute a waiver of his former wife's entitlement to his OMERS pension. The Court held that the waiver in the separation agreement did not mirror the requisite OMERS form and did not comply with the strict requirements of the *Pension Benefits Act* and refused to make the declaration that the former wife waived her entitlement.

In *Makarchuk v. Makarchuk*[34] the issue was whether the wife had released her right to be the executor of her husband's will and her right to take under the will as a beneficiary as a result of a release contained in the separation agreement. The separation agreement, signed five months after the parties had done their wills together and one month after their separation, provided the following release:

> Except as provided in this agreement, and subject to any additional gifts from one of the parties to the other in any will validly made after the date of this agreement, the husband and wife each release all rights which he or she has or may acquire under the laws of any jurisdiction in the estate of the other. ...

At trial the court held that the release did not address the will made only five months previous to the separation. The judge noted that the husband could have revoked the gift that he had made under the will, but he chose not to. Furthermore, since the release addressed only "rights acquired under the law", the judge reasoned that this was not a reference to rights acquired under the will. The court found, and the Court of Appeal affirmed, that the release in the separation agreement did not "trump" the will.

Carrigan v. Quinn[35] acts as an important warning that beneficiary designations on pensions must be changed on separation to avoid unintended results. The facts of the case are that Ronald Carrigan was married to Melodee Carrigan in 1973 and

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[33] 2011 CarswellOnt 774 (Ont. S.C.J.).
[34] CarswellOnt 8451 (Ont. S.C.J.), affirmed 2012 CarswellOnt 791 (Ont C.A.).
[35] 2012 CarwellOnt13522, 2012 ONCA 736 (Ont C.A.).

they had two daughters. Although they separated in 1996, they didn't enter into a separation agreement, were never divorced and Mrs. Carrigan was named as estate trustee and sole beneficiary of the residue of Mr. Carrigan's estate after two small bequests to his daughters in his 1986 will, which he never changed. Mr. Carrigan cohabited in a conjugal relationship with Ms. Quinn starting in 2000, and lived with her in a condominium owned by him and Mrs. Carrigan jointly. When Mr. Carrigan died suddenly at the age of 57 in 2008, he was still married to Mrs. Carrigan and was cohabiting with Ms. Quinn. The issue at trial was who receives the pension death benefit when the member of a pension plan entitled to a deferred pension dies and is survived by both a common law spouse with whom he resided at the time of death and a legally married spouse from whom he was separated but whom he designated as a beneficiary of his pension plan. The outcome turns on the interpretation of s. 48 of the *Pension Benefits Act*.[36] The trial judge dismissed

[36] R.S.O. 1990, c. P.8.
The relevant sections are:
s. 1 definition of spouse
"spouse" means, except where otherwise indicated in this Act, either of two persons who,
(a) are married to each other, or
(b) are not married to each other and are living together in a conjugal relationship,
(i) continuously for a period of not less than three years, or
(ii) in a relationship of some permanence, if they are the natural or adoptive parents of a child, both as defined in the Family Law Act;
48. (1) If a member who is entitled under the pension plan to a deferred pension described in section 37 dies before payment of the first instalment is due, or if a former member or retired member dies before payment of the first instalment of his or her deferred pension or pension is due, the person who is his or her spouse on the date of death is entitled,
(a) to receive a lump sum payment equal to the commuted value of the deferred pension;
(b) to require the administrator to pay an amount equal to the commuted value of the deferred pension into a registered retirement savings arrangement; or
(c) to receive an immediate or deferred pension, the commuted value of which is at least equal to the commuted value of the deferred pension.
Same – s. 48(2)
(2) If a member of a pension plan continues in employment after the normal retirement date under the pension plan and dies before payment of pension benefits referred to in section 37 begins, the person who is the spouse of the member on the date of death is entitled,
(a) to receive a lump sum payment equal to the commuted value of the pension benefits;
(b) to require the administrator to pay an amount equal to the commuted value of the pension benefits into a registered retirement savings arrangement; or
(c) to receive an immediate or deferred pension, the commuted value of which is at least equal to the commuted value of the pension benefits.
Application of subss. (1, 2) – s. 48(3)
(3) Subsections (1) and (2) do not apply where the member, former member or retired member and his or her spouse are living separate and apart on the date of death.
Direction – s. 48(4)
(4) A spouse may exercise his or her entitlement under subsection (1) or (2) by delivering a direction to the administrator within the prescribed period and, if the spouse does not do so, the spouse is deemed to have elected to receive an immediate pension.
Calculation of benefit – s. 48(5)
(5) For the purposes of this section, the deferred pension or pension benefits to which a member is entitled if the member dies while employed shall be calculated as if the member's employment were terminated immediately before the member's death.

the action of Mrs. Carrigan for a declaration that she was entitled to the pre-retirement death benefit and found that the common law spouse was entitled. The trial judge found that at the time of Mr. Carrigan's death the statutory definition of "spouse" applied to both Mrs. Carrigan because she was legally married to Mr. Carrigan and Ms. Quinn because she was living with him in a conjugal relationship for more than three years prior to his death. The trial judge then noted that s. 48(1) refers to "the spouse" and concluded that there could only be one spouse entitled to a member's death benefit and resolved the conundrum by focusing on s. 48(3) which she indicated required that a spouse be living with the member in order to be entitled. The trial judge also read s. 48(6) to apply only when there is "no eligible spouse" and that therefore the designation of beneficiaries made was irrelevant. She therefore held that Ms. Quinn was entitled. The Court of Appeal allowed the appeal in a two-one decision written by Justice Juriansz (Justice Epstein concurred and Justice LaForme dissented). The court found on favour of Mrs. Carrigan and her daughters as the designated beneficiaries. The court held that assuming that both Mrs. Carrigan and Ms. Quinn met the statutory definition of "spouse", section 48(3) does not create a requirement for cohabitation. Instead, it creates a condition which, if satisfied, renders section 48(1) inapplicable. Section 48(3) would apply in these circumstances as Mrs. Carrigan was "living separate and apart" from Mr. Carrigan at the date of death. Once section 48(3) was triggered, section 48(1) which entitles a "spouse" to the death benefit, did not apply. The court then went on to find that as there was not spousal entitlement, Mr. Carrigan's designated beneficiaries were entitled under section 48(6). Furthermore, he indicated that "I see no particular policy rationale for interpreting the *PBA* to provide unequivocally that in all circumstances where there is a legally married spouse and a common law spouse, the common law spouse is entitled to the member death benefit. Given the diversity of possible relationships, it is more desirable to interpret the statue to allow pension members the freedom to order their affairs in a way that suits their particular circumstances."[37] In his dissent, LaForme J.A. held that section 1 allows for two spouses concurrently and that the

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Designated beneficiary – s. 48(6)
(6) A member, former member or retired member described in subsection (1) may designate a beneficiary and the beneficiary is entitled to be paid an amount equal to the commuted value of the deferred pension mentioned in subsection (1) or (2),
(a) if the member, former member or retired member does not have a spouse on the date of death; or
(b) if the member, former member or retired member is living separate and apart from his or her spouse on the date of death.
Estate entitlement – s. 48(7)
(7) The personal representative of a member, former member or retired member described in subsection (1) is entitled to receive payment of the commuted value mentioned in subsection (1) or (2) as the property of the member, former member or retired member if he or she has not designated a beneficiary under subsection (6) and,
(a) does not have a spouse on the date of death; or
(b) is living separate and apart from his or her spouse on the date of death.

[37] *Supra* note 35 at para. 39.

Act clearly favours whichever spouse (whether married or common-law) was living with the pension holder on the date of death. Furthermore, he indicated that awarding Ms. Quinn the death benefit is consistent with the purpose of section 48, which is to provide a priority scheme for death benefits prioritizing spouses who are not living separate and apart at the time of the member's death. He would have dismissed the appeal.

I agree with one commentary[38] which makes two points:

1) Juriansz J.A. nor LaForme J.A. directly address whether the benefits could be split, which is a shame because there is no explicit prohibition against dividing benefits between contending parties in the *PBA*. The *PBA* also does not prioritize married spouses over common law spouses (or vice versa). Therefore, dividing the benefits evenly between Mrs. Carrigan and her daughters and Ms. Quinn is a more equitable remedy.

2) Moreover, the equity rationale that LaForme advances is compelling. The law recognizes common law spouses to protect their interests in the absence of formal agreements recognizing the significance of the relationship. As a spouse, Ms. Quinn's interest matters. While the debate over how section 48(3) should apply is technically sound, it is hard to see why Mrs. Carrigan's separation from Mr. Carrigan should exclude Ms. Quinn's claim to the benefits as a spouse. It makes much more sense to read section 48(3) and section 48(1) in tandem as preventing a spouse who is separated from the member from accessing benefits.

3) Don't get caught in the section 7(2) *FLA* trap. This section imposes a fixed and strict limitation period on equalization applications which may disentitle your client from an equalization payment. You ought to advise the client that unless an application is commenced between separation and the death of a spouse (if he or she is the spouse with the lesser net family property), the claim for equalization will be lost if he or she dies[39] and the claim for equalization will only be the one available on death, not separation, if his or her spouse dies.[40] This will protect you against delay by a client and the subsequent death of one of the spouses. You may wish to confirm this advice in writing as the subsequent dispute, if any, will be with the estate and not your client.

Section 7(2) of the *FLA* provides:

> 7(2) Entitlement under subsections 5(1), (2) and (3) is personal as between the spouses but,
>
> (a) an application based on subsection 5(1) or (3) and commenced before a spouse's death may be continued by or against the deceased spouse's estate; and

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38 Online: www.thecourt.ca/2012/11/21/carrigan-v-carrigan-estate.
39 *Bugoy v. Donkin*, [1985] 2 S.C.R. 85.
40 *Panangaden v. Panangaden Estate* (1991), 42 E.T.R. 87, 4 O.R. (3d) 332 (Gen. Div.).

(b) an application based on subsection 5(2) may be made by or against a deceased spouse's estate.

3) Suggest that any replacement Power of Attorney for Property contain the express authority for the attorney to initiate or maintain proceedings under the *FLA* and to act as litigation guardian in such proceedings so as to avoid any potential delays or issues of authority in the event of incapacity while separated.

4) Advise clients of their right to sever joint tenancies, even on matrimonial homes, without the consent of the other spouse. A joint tenant has the right to sever unilaterally a joint tenancy by transferring his or her interest in the property to himself or herself (or a third party). The Ontario Court of Appeal confirmed that the spouse's consent is not required where the jointly held property is a matrimonial home.[41]

The Ontario Court of Appeal in *Hansen Estate v. Hansen*[42] recently dealt with the issue of what constitutes a "course of dealing" sufficient to sever a joint tenancy. There are three ways to sever a joint tenancy:

1) Unilaterally acting on one's own share, such as transferring or encumbering it;

2) A mutual agreement between the co-owners to sever the joint tenancy; or

3) Any course of dealing sufficient to intimate that the interest of all were mutually treated as constituting a tenancy in common.

In *Hansen Estate v. Hansen*, the parties were in the process of separating but were still married when the husband died on June 10, 2010. On his death, they still owned the matrimonial home as joint tenants. Both had children from prior marriages. Earlier, in March and April of 2010, the husband had made a new Will excluding the wife, the wife had moved out of the matrimonial home and had leased her own apartment, the husband remained and paid all the expenses, the parties closed their joint bank accounts and opened their own sole accounts and the parties had exchanged correspondence through their solicitors commencing the separation process.

The application judge found that the joint tenancy had not been severed in that there was no agreement or "course of dealing" sufficient to sever the joint tenancy and the parties had sufficient time to sever the joint tenancy but chose not to and he dismissed the application. The Court of Appeal reviewed the matter and indicated:

> "A proper application of the course of dealing test for severing a joint tenancy requires the court to discern whether the parties intended to mutually treat their interests in the property as constituting a tenancy in common. It is not essential that the party requesting a severance establish that the co-owners' conduct fall in to a formulation

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41 *Re Horne v. Horne Estate*, (1987) 60 O.R. (2d) 1 (C.A.).
42 2012 ONCA 112, [2012] 109 OR (3rd) 241.

> found to have the effect of severing a joint tenancy in other cases. The court's inquiry cannot be limited o matching fact patterns to those in prior cases. Rather, the court must look to the co-owners' entire course of conduct – in other words, the totality of the evidence – in order to determine if they intended that their interest were mutually treated as constituting a tenancy in common. This evidence may manifest itself in different ways. Each case is idiosyncratic and will turn on its own facts."[43]

In this case, the court found a course of dealing sufficient to sever the joint tenancy. Given that each case will turn on its own facts, it is important to draw your client's attention to this issue and consider whether the joint tenancy should be severed in the client's circumstances. The downside of course of doing so should be considered in that if the other spouse dies first, that spouse's half interest flows through their estate.

5) Remind clients that estate planning includes not only their will but their beneficiary designations on insurance policies, RRSPs and RRIFs, pensions, TFSAs, Powers of Attorney for Property and for Personal Care and should be done in conjunction with the separation agreement and with the assistance of estate planning counsel.

(ii) Drafting Considerations:

1) Co-ordinate Separation Agreement and Estate Plan

Ensure that the current estate plan is reviewed when advising on the separation agreement. The separation agreement should not conflict with the estate plan and one or the other may have to be modified so that the overall scheme makes sense. If there is a conflict between the documents, the result on the death of one of the ex-spouses may be undesirable tax and / or unhappy (=litigious) beneficiaries.

For example, when considering providing life insurance as security for your client's spousal support obligations, the client may have several policies on his or her life to choose from including a whole life policy with level premiums, a term policy and a group policy. A review of the policies, the length of any term policy to ensure it will be in force throughout the time the obligation endures, whether there are any loans against a policy or whether it is assigned as security, and the client's estate plan, are all important in assessing the appropriate policy to use as security.

2) Co-ordinate with Obligations to Former Spouse and Children

See previous discussion under marriage contracts and cohabitation agreements.

3) Ensure that the contract binds the estate:

The same suggested provision can be used:

> "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."

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[43] *Hansen* at para. 7.

4) Will and Estate Release:

In addition to the standard release wording, it is prudent to include provisions to cover will and estate issues as follows:

1. Except as otherwise provided in this Agreement, Bill and Trixie each renounce any entitlement either may have in the other's will made before the date of this Agreement or to share in the estate of the other upon the other dying intestate.
2. Except as otherwise provided in this Agreement, Bill and Trixie release each other from all claims either may have against the other now or in the future under the terms of any statute or the common law, including claims for:
   a) a share in the other's estate,
   b) a payment as a dependant from the other's estate under the *Succession Law Reform Act*,
   c) an entitlement under the *Family Law Act*,
   d) an appointment as an attorney or guardian of the other's personal care or property under the *Substitute Decisions Act*, and
   e) participation in decisions about the other's medical care or treatment under the *Health Care Consent Act*.
3. Except as otherwise provided in this Agreement, on the death of either party, the surviving party will not:
   (a) share in any testate or intestate benefit from the estate, or
   (b) act as personal representative of the deceased; and,
   (c) the estate of the deceased party will be distributed as if the surviving party had died first.

5) Deal with taxability and deductibility of spousal support after death

While spousal support is taxable to the recipient and deductible to the payor spouse, once the payor spouse dies, if the obligation continues against the payor's estate, it will no longer be deductible to the estate. The *Income Tax Act* defines "support amount" as an amount paid to the recipient by a spouse, common-law partner or former spouse of the recipient.[44] The estate is not the spouse or former spouse of the recipient. The separation agreement could provide for a reduction in the spousal support based on the tax benefit of the support becoming non-taxable after death.

6) Proper Consideration and planning for the use of life insurance as security for the payment of support

This has been covered by other speakers in the program.

The following summary however may be of some assistance:

(a) obtain a copy of the insurance documents and review and understand them

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[44] *Income Tax Act* (Canada), R.S.C. 1985, c. C.1 (5th Supplement), s. 56.1(4).

(b) ensure the policy is adequate (for example, on a term policy is the term long enough to cover the payor's obligations? If not, is it renewable without a Medical? Does the benefit decline?

(c) get written verification from the insurance company that the policy remains in good standing and that its terms are unchanged

(d) avoid follow-up problems by ensuring that the beneficiary designation contemplated is executed and filed with the insurance company at the time the separation agreement is signed

(e) make it clear whether the life insurance policy is intended to be received in lieu of continued support, only as security if the estate does not make the support payments, or in addition to continuing or reduced support

(f) consider ownership and beneficiary issues of the insurance policy

(g) consider whether proceeds to secure child support payments are to be paid to a trustee and the appropriate terms of the trust. Do not simply provide that the payor will designate "Bill in trust for the children" as the beneficiary of the policy. If this is done it will be a bare trust with no directions as to the investment or use of the funds. The trustee will be left with either paying the funds into court or seeking the consent of the Children's Lawyer when wanting to access the funds for the children. Furthermore, the children will be entitled to the funds outright at the age of eighteen pursuant to the rule in *Saunders v. Vautier*, which may be inappropriate.

(h) advise the client who will be the trustee of any insurance proceeds of his/her fiduciary obligations and duties under the *Trustee Act* and in common law.

5. FACTORS TO KEEP IN MIND WHEN THERE ARE ADULT CHILDREN

Adult children from a prior relationship will quite likely be named as the executors of their parent's will and as the attorneys for property and personal care. In most second relationships involving adult children from a former relationship,
it is quite unlikely that the adult children and the surviving spouse will maintain a relationship after the death of the parent spouse. It is the relationship between the deceased and the spouse that required the adult children and spouse to get along and that is no longer in existence. It is rare for adult children of a prior relationship to form strong loving bonds with the new spouse.

(i) Arrangements on Death:

Domestic contracts that provide for arrangements on death or incapacity requiring interaction, co-operation and goodwill between the surviving spouse and adult children of a prior relationship should be avoided except in rare circumstances. For example, a domestic contract may contemplate a life estate to the surviving spouse in the matrimonial home with provision for payment of capital

expenses by the estate and day-to-day expenses by the survivor, along with the ability to sell the property and replace it with another, or possibly even an option to the survivor to buy the property. The goals would be to ensure there will be a home for the surviving spouse and also that there will be an inheritance for the children.

Questions such as who pay for what, what constitutes capital expenses and day-to-day expenses, when, how and for how much can the property be sold, what can be bought in replacement, the protocol for the valuation process of the buy-out option and so on, will likely be a source of disagreement between the surviving spouse and the adult children.

If at all possible in such circumstances, it is best to carve out specific outright gifts to the spouse and the children. If there aren't sufficient assets to do that, consideration should be given to increasing the estate with life insurance. Furthermore, it may be possible to carve up the estate into assets that flow outside of the will, such as RRSPs, life insurance, pensions, TFSA's and name one camp (the surviving spouse or the children) as the beneficiary(ies) of these assets and eliminate this camp entirely from the will as executor(s) or beneficiary(ies) to avoid potential conflicts in the administration of the estate. This can also be achieved by segregating assets into two pools and using two limited wills.

If it is not possible to devise such a plan because the estate just isn't large enough, it will be incumbent on the family law lawyer and estate planning lawyer together to come up with another workable plan. Some suggestions are the following, in the example of a life interest in a matrimonial home being left to the surviving spouse:

1) Consider naming as executors one of the adult children to represent the children, the surviving spouse and a neutral professional or friend and providing that decisions are to be made by majority, of which the professional must be one.
2) Consider whether the spouse's role as executor can be narrowed if appropriate so that he or she is only to be involved in certain decisions, excluding perhaps the day-to-day administration of the estate, discretion in any children's or issues' trusts, etc., or if his or her role ceases upon certain events (completion of buy-out of matrimonial home).
3) Ensure that personal and household effects are dealt with specifically or a "drop-dead" mechanism is included ("any item over which there is disagreement shall be sold and the proceeds shall fall into and form part of the residue of my estate").
4) Ensure that detailed definitions are included to clarify the expenses that fall into capital and day-to-day maintenance costs.
5) Provide detailed mechanisms for any valuations that may be required including who is to choose the valuator, how many valuators will be used, the required qualifications of the valuators, how much time is given to choose a

valuator and what happens on default, how the valuations will be averaged, the time allowed for the valuator's decision and default mechanism, how notices are to be given.

6) Provide detailed mechanism for any other actions contemplated, such as a buy-out option, requirement to sell the property, requirement to replace the property.

7) If part of the plan is for the spouse to be the beneficiary of an RRSP or RRIF, consider who is to bear the burden of the income tax? Is the spouse to roll those proceeds into his or her own RRSP or RRIF, deferring the tax and transferring the liability to the spouse, or is he or she free to accept the funds, passing the tax burden on to the estate? If it is desired that the surviving spouse have a limited life interest in these funds with the balance to go to the adult children, the domestic contract could provide that while the surviving spouse will be designated the beneficiary, the funds will be rolled into his or her own RRSP/RRIF, will have limited rights of withdrawal annually (a maximum amount of dollars or percentage), will designate the adult children as his or her beneficiary provided that the adult children bear the ultimate burden of the income tax payable on the death of the surviving spouse.

8) Provide for a dispute resolution mechanism (arbitration, the neutral executor, etc.) and the parameters of any arbitration (timing for selection, default mechanism, how costs are to be paid, timeline for arbitrator's decision, binding effect).

(ii) Arrangements on Incapacity:

The domestic contract can include provisions to ensure that the spouse is protected in the event of the other spouse's mental incapacity, by requiring the execution of a Power of Attorney for Property and for Personal Care which contain certain provisions.

(a) In the case of a Power of attorney for property:

1) Consider naming as attorneys one of the adult children to represent the children, the spouse and a neutral professional or friend and providing that decisions are to be made by majority of which the professional must be one.

2) Consider whether the spouse's role as attorney can be narrowed if appropriate so that he or she is only to be involved in certain decisions regarding assets that affect him or her (matrimonial home, an earmarked investment account to cover expenses of that home and possibly living expenses of the spouse). This may also be achieved with a separate Power of Attorney covering these assets only and the Power of Attorney given to the children to exclude these assets.

3) Consider including provisions in the document directing the attorney on the use of funds for obligations under the domestic contract, and providing any

additional benefits to the spouse which the client may want to include in the case of incapacity while still cohabiting.

4) Consider dealing with personal and household effects in the document. They can be gifted to the appropriate beneficiaries and the spouse if they are not needed by the donor, or the document can specify that they are to be retained in the home(s) and made available to the spouse for his or her use, without further need to account for them, insure them, etc.

5) If the spouse will be the attorney for personal care making personal care decisions (which include decisions relating to health care, nutrition, shelter, clothing, education, training, recreation, social services, hygiene and safety), ensure that the attorneys for property are directed to provide funding to implement such decisions.

6) Consider whether under the circumstances it is appropriate to include a dispute resolution mechanism.

(b) In the case of a Power of Attorney for Personal Care:

1) Consider whether it is appropriate to name the spouse alone or together with one or more of the adult children and consider if the latter is the case, whether majority decision ought to prevail and whether the spouse ought to be part of the majority.

2) Consider whether the client ought to provide detailed personal care directions in the document in order to avoid arguments about what "wishes" were if they are only communicated verbally.

3) Consider whether under the circumstances it is appropriate to include a dispute resolution mechanism.

6. TESTAMENTARY FREEDOM AND MUTUAL WILLS

Traditional wills for couples in a first marriage are usually wills that leave everything on the first death to the other spouse and a gift-over on the second death to their children, either outright or in trusts, and possibly a global disaster provision to other family members or charities. In such circumstances, the parties are often quite satisfied to rely on the moral duty of the surviving spouse to provide for their joint children. These wills are often referred to as mirror or reciprocal wills and are very different from mutual wills, discussed below, or joint wills which are rarely used and are made in one document signed by two persons.

Changes in our society's demographics have resulted in an increase in second marriages and blended family arrangements. The estate planning for these couples is more complicated and often involves providing for each other but ensuring that children of the first marriage are benefitted as well. These changed circumstances have given rise to an increased desire by clients to enter into arrangements with their spouse to provide for a scheme of distribution of their estates on the first and on the second death, and a desire that the scheme will be legally binding on the

second death. While a moral obligation may be sufficient in a first marriage situation since it usually involves joint children, more and more of our clients in second marriages or blended family situations are looking to ensure that the children of their first marriage are guaranteed inclusion in the distribution on the second death.

The best the law can provide in cases where the estate is not large enough to carve out assets during one's lifetime or where a spousal trust is not desirable in the will, is to invoke the doctrine of mutual wills. To ensure that the doctrine is invoked, the parties will need to enter into a contract as well as prepare their wills.

The doctrine of mutual wills applies where two or more persons make wills containing similar or agreed upon provisions pursuant to an agreement that the wills should be made and not revoked. The effect of the doctrine is that when one party dies leaving a will in accordance with the agreement, the other party is bound by the agreement and a trust arises in favour of third party beneficiaries of the agreement.

This doctrine is set out in *Hall v. McLaughlin*,[45] quoting from Snell's Equity, 13th Ed.:

> "Where two persons make an arrangement as to the disposal of their property and execute mutual wills in pursuance thereof, the one who predeceases the other without having departed from the arrangement has performed his part of the bargain and dies with the implied promise of the survivor that it shall hold good. Usually the parties give each other a life interest with remainders over to the same person but they may give each other an absolute interest with a substitutional gift in the event of the other's prior death. The principle applies even where they agree to make wills leaving their property to third parties and no part to each other. The arrangement will not be presumed from the simultaneous execution of virtually identical wills but must be proved by independent evidence of an agreement not merely to make identical wills but to dispose of the property in particular way. It must amount to a contract at law.
>
> Once one of the parties dies, the arrangement becomes irrevocable, at least if the survivor accepts the benefits conferred on him by the other's will. Until the first death, either may withdraw from the arrangement; and any material alteration by one part of his will without the agreement of the other party will prevent it from being binding"

The elements of the doctrine are as follows:

1. Two or more parties to the agreement;
2. Wills made by the parties in agreed terms;
3. A binding agreement that the parties will leave their estates essentially in the agreed terms (it is not necessary to agree not to revoke the wills, which is clearly in conflict with general principles of testamentary freedom, but the point of the agreement must be to leave an estate essentially in the agreed terms);

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[45] 2006 CanLII 23932, 2006 CarswellOnt 4284, 25 E.T.R. (3d) 198 (Ont. S.C.J.).

4. The death of one party without having substantially altered his or her will; and
5. A breach by the surviving party such that his or her estate passes other than as agreed.

Wills drawn up pursuant to contractual provisions in a domestic contract will meet the requirements of "mutual wills". The parties need to appreciate that a will is, by its nature, ambulatory or revocable. Therefore, even though they enter into this agreement, they each are free to revoke their will and make a new will. Further, if either one of them subsequently marries or remarries, their will is, except for some minor exceptions, automatically revoked. Notwithstanding this however, a constructive trust will attach to the property of the deceased and be binding on the persons who are entitled to his or her estate under the new will made by the breaching party or on his or her intestacy.

There was previously a line of thought that a survivor might be able to repudiate the mutual wills contract by disclaiming any benefit under the will of the first to die, or alternatively, that if the survivor had not received any benefit under the will of the first to die, he or she would not be bound to the agreement. That has now been held not to be the case. The doctrine is based in fraud. It is not the consideration received by the survivor that is determinative, but the promises that were made and the reliance on the promises by the first to die that binds the survivor to the agreement.[46]

There is a question whether, during the lifetime of both parties they are free to revoke their wills or change them on notice to the other party. The theory is that the notice permits the other party to change his or her will too so no detrimental reliance would exist at that point. It is not clear whether that is the case and therefore the domestic contract should ensure that the agreement addresses this one way or the other.

If you are acting for clients in the preparation of a domestic contract so as to invoke the doctrine of mutual wills, the following should be included in the contract:

1) A series of recitals giving the background to the decision;
2) Spell out in detail the scheme of distribution proposed;
3) The contract should comply with the formalities of a domestic contract under the ***FLA***;
4) Complete financial disclosure by each party and independent legal advice for each;
5) The estate lawyer should include a reference to the agreement in the wills since the agreement may get lost;

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[46] *University of Manitoba v. Sanderson Estate* (1998), 155 D.LR. (4th) 40, 7 W.W. R. 83, 47 B.C.L.R. (3d) 25 (B.C.C.A.).

6) The agreement should set out whether either party can change a will while they are both alive and if so, on what kind of notice to the other;

7) The agreement should consider whether notice to the other spouse is valid if the other spouse is incompetent, if the scheme of distribution included *inter vivos* gifts that cannot be reversed, etc.;

8) The agreement should address whether assets acquired after the first death will be included or excluded, otherwise, they will be included regardless of the source;[47] and

9) The agreement should specify what constitutes a breach – making a new will? Changes to specific dispositive provisions? A transfer of property intended to pass to residual beneficiaries? Revocation by operation of law?

CONCLUSION

The issues raised in this paper are not exhaustive of all of the wills and estate issues that arise in the preparation of domestic contracts. It is a sampling only. Hopefully, it highlights the importance of family law lawyers and estate/trust lawyers working more closely together in these personal domestic matters.

[47] *Brynelsen Estate (Official Administrator of) v. Verdeck* (2002), 165 B.C.A.C. 279, reversed *Brynelsen Estate v. Verdeck*, 2002 BCCA 187.