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The Potential Impact of Separation on Wills and Estates

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Practitioners in Ontario have been advising clients about how divorce can impact the distribution of estates for decades. Now, in light of the amendments to the *Succession Law Reform Act* (the "*SLRA*") that came into force on January 1, 2022,[1] estate planners must also be aware of how separation can impact wills and estates. This article explores how appointments and bequests in wills may be affected by separation, in addition to how separation may impact other testamentary instruments.

Estate Trustee Appointments

The law presumes that a separated spouse cannot be appointed to act as the deceased's estate trustee as long as certain conditions pertaining to the separation are satisfied.[2] The first requirement is that the spouses must have been married;[3] the presumptive revocation of an appointment under the *SLRA* does not extend to separated common law partners. Second, an appointment will be revoked post-separation as long as one of the following conditions is met:

- the spouses were living separate and apart for three years prior to the spouse's death;
- the spouses had a valid separation agreement; or
- the spouses obtained either a court order or an arbitration award with respect to their rights and obligations in the settlement of their affairs arising from the breakdown of the marriage.[4]

Third, the spouses must have been living separate and apart at the time of death.[5]

There are also exceptions to the presumptive revocation of an appointment. For example, if a "contrary intention" appears in the deceased's will, the surviving spouse may be appointed as estate trustee, despite the separation.[6]

A spouse may also be appointed as estate trustee post-separation, but not in his or her personal capacity. This notion was explored by the New Brunswick Court of Queen's Bench in *Williams v. Breau*.[7] The deceased in this case appointed his children to act as the executors of his estate; however, because the deceased passed away when one of the sons was still a minor, the deceased's ex-wife applied to administer the estate. Justice Walsh confirmed that the ex-wife could be appointed to this role, notwithstanding a separation agreement in which they agreed to discharge the right to act

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[1] *Succession Law Reform Act*, R.S.O. 1990, c. S-26 [*SLRA*], as amended by the *Accelerating Access to Justice Act, 2021*, S.O. 2021, c. 4, Sched. 9.
[2] *SLRA*, *supra* note 1, ss. 17(3), (4).
[3] *Ibid.*, s. 1(1) "spouse". See also the *Family Law Act*, R.S.O. 1990, c. F.3, s. 1(1) "spouse". Spouses also may have entered a marriage that is voidable or void, in good faith.
[4] *Ibid.*, ss. 17(4)(a)(i), (ii), (iii), (iv).
[5] *Ibid.*, s. 17(4)(b).
[6] *Ibid.*, s. 17(3).
[7] *Williams v. Breau et al.*, 2020 NBQB 85.

as executor or administrator of each others' estates, but only because the agreement failed to address "what would happen if one or both children were not of the age of majority at the time of death of one parent and there was either no Will or a failed appointment of an executor/executrix under a Will."[8] Under these circumstances, the ex-wife could apply to act in her capacity as the son's guardian, but not in her personal capacity – the court found that the waiver in the separation agreement "was not to apply if a child was a minor at the time of a parent's death."[9]

Bequests

The conditions under which an appointment as estate trustee is presumptively revoked by the *SLRA* also apply to testamentary bequests.[10] However, a bequest to a spouse may also be revoked post-separation, even if the conditions articulated in the *SLRA* are not met, through the execution of a new will or a codicil revising an existing will. Another "document or writing", such as a separation agreement, could also revoke a testamentary bequest to a spouse post-separation as long as that instrument is validated by the Court of Superior Justice under section 21.1 of the *SLRA*.[11] The court may order a document or writing as valid and fully effective as the revocation of a will as long as it is satisfied that the document sets out an intention to revoke.

On the flip side, it appears that section 21.1 could also be used to save a bequest to the deceased's spouse post-separation if there is evidence that the deceased still wanted their spouse to be the recipient of a testamentary bequest, notwithstanding the separation. For example, the British Columbia Supreme Court used its dispensing power to save a will executed by the deceased pre-separation in *Jacobson Estate*.[12] There was an abundance of evidence in this case confirming that the deceased still wanted to give a bequest to her former partner after their separation, and that the deceased was unaware that the gift had been revoked. As noted by Justice Tucker, the purpose of the dispensing power "is to ensure that discernable testamentary intentions are not thwarted 'for no good reason' by a failure to comply with statutory requirements."[13] Accordingly, a document, including a revoked will, can be given effect as a will under the dispensing power as long as the formal statutory requirements have not been met.[14] While it seems reasonable to surmise that such a case would be decided similarly in Ontario, it merits noting that the outcome could be different – section 21.1 of the *SLRA* is worded differently than British Columbia's dispensing power and may not have as broad an application.[15]

Separation may also impact the distribution of an estate if the residual bequest in a will fails, for example because no alternate beneficiary is named. Under those circumstances, if the residue of the estate is distributed on intestacy, the surviving spouse will not be permitted to share in it if the spouse and the deceased were separated at the time of death and the separation satisfies the conditions in the *SLRA* already noted above.[16]

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[8] *Ibid.* at para. 26.
[9] *Ibid.*
[10] *SLRA*, *supra* note 1, ss. 17(3), (4).
[11] *Ibid.*, s. 21.1(1).
[12] *Jacobson Estate (Re)*, 2020 BCSC 1280.
[13] *Ibid.* at para. 43.
[14] *Ibid.* at para. 39.
[15] *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13, s. 58.
[16] *SLRA*, *supra* note 1, s. 43.1.

Beneficiary Designations

Separation, and more specifically the terms of a separation agreement, may also revoke beneficiary designations. Case law determined by the Ontario Court of Appeal confirms that a separation agreement may revoke a beneficiary designation if the asset disposed of through the designation is expressly included in the separation agreement.[17]

However, more recent case law indicates that a separation agreement may also revoke a beneficiary designation, even if neither the asset nor the designation is expressly mentioned in the agreement. In *Ray-Ellis v. Goodtrack*,[18] for example, the court found that a general release intended to resolve the spouses' matrimonial litigation revoked a beneficiary designation which named the deceased's ex-wife as his beneficiary. While the ex-wife argued that the release could not revoke the designation, as it did not reference the asset disposed of through the designation or the beneficiary designation itself, Justice Gilmore disagreed, noting that it was not necessary for the release, which was broad and general, to provide a specific list of property included. The release was intended to include all property, as the parties had turned their minds to the separation of every aspect of their lives.[19]

The effect of a separation agreement that does not expressly revoke a beneficiary designation ought to be determined on a case-by-case basis. If a separation agreement is not final and does not refer to the relinquishment of all claims, for example, it may not effectively revoke a beneficiary designation post-separation.[20]

Estate Planning for Separation

When assisting clients who are separated, but not yet divorced, a number of steps are advisable. First, it is worthwhile to address whether the application of the *SLRA* or other legal instruments, like a separation agreement, will impact bequests and appointments in existing testamentary instruments. Second, counsel ought to confirm whether the client still wants to leave a bequest to their separated spouse, or appoint the spouse to act as estate trustee. Depending on the answer, the client may want to execute new testamentary instruments. Third, if the client wishes to appoint their minor children to act as estate trustee, it is advisable to include an alternate appointment in case the client passes away when the children are still under the age of majority, to ensure that the ex-spouse is not appointed as estate trustee in their capacity as the children's guardian. Fourth, it may also be prudent to execute new beneficiary designations, depending on whether the client has entered a separation agreement with their former spouse and the terms of that agreement.

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[17] See *Burgess v. Burgess Estate*, 2000 CanLII 16989 (Ont. C.A.).
[18] *Ray-Ellis v. Goodtrack et al.*, 2021 ONSC 3102.
[19] For other caselaw with a similar outcome, see *Schiller-Arsenault v. Proudman*, 2015 BCSC 1924 and *Martindale Estate v. Martindale*, 1998 CanLII 4561 (B.C.C.A.).
[20] See *Knowles v. LeBlanc*, 2021 BCSC 482.