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JOINT RETAINER CONSIDERATIONS WHEN ACTING FOR SPOUSES IN A SECOND MARRIAGE

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Blended families, and second (or third, or fourth) marriages have become increasingly common. These types of relationships often have a unique dynamic which may be different than a "traditional" family. As lawyers acting for individuals who are members of a blended family, it is crucial to be aware of the issues that can arise, and to keep in mind any special planning considerations relevant in the circumstances.

Joint Retainers

It is not uncommon for both spouses in a subsequent relationship to seek estate planning advice from a single solicitor, in the form of a joint retainer.

Pursuant to the Law Society of Ontario's *Rules of Professional Conduct*, before a lawyer acts in a matter for more than one client, the lawyer shall advise each of the clients of the following:

(a) that the lawyer has been asked to act for both of them;

(b) that no information received with respect to the matter from one client can be treated as confidential in relation to the other client; and

(c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both of them and may have to withdraw completely.[1]

The commentary to this Rule also provides some specific comments in relation to a lawyer preparing Wills for spouses, stating that such a retainer should be treated as a joint retainer. The commentary also provides some guidance regarding what the lawyer should do in the event that one of the spouses subsequently contacts the lawyer with further instructions, such as to change or revoke a Will.

Additionally, the commentary suggests that a lawyer should recommend that clients obtain independent legal advice prior to accepting a joint retainer to ensure that the clients' consent to the joint retainer is "informed, genuine and uncoerced".

Pitfalls in Communicating with and Advising Subsequent Spouses

Acting jointly for two spouses may create the risk that one or both of the spouses will not be fully candid with the solicitor in communicating their testamentary wishes. A spouse may be hesitant to make a Will that leaves all, or the bulk of their estate, to their spouse, without ensuring some manner of provision for their children. However, it can be difficult to communicate such feelings while the other spouse is in the room. This may lead to an outcome where one (or both) spouses feel that the Will they sign does not truly reflect their wishes.

Unfortunately, due to the fact of a joint retainer, even a one-on-one meeting between one of the spouses and the solicitor does not solve this problem, as the lawyer must share with both clients all information received from either of them.

Lawyers also have an obligation to be honest and candid in advising clients.[2] This can raise unique difficulties in the context of a joint retainer for subsequent spouses. For instance, spouses may wish to execute reciprocal Wills which provide that upon the death of the first spouse, the surviving spouse shall receive a benefit from the deceased spouse's estate, and following the death of the second spouse, his or her estate (including any assets received from the deceased spouse's estate) will be distributed to other specified persons (often the children of both spouses).

If the spouses' intention is not for such Wills to be mutual Wills (discussed further below), the lawyer's duty of candour will likely involve advising the spouses of the possibility that the children of the first spouse to die could be disinherited by the surviving spouse if the surviving spouse subsequently changes their Will.

Depending on the relative ages of the spouses, the lawyer may also need to advise of the possibility that the older spouse will die much earlier than the younger spouse, and that the younger spouse may require the bulk of both spouses' estates for his or her own maintenance, thus leaving little for any

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children. Similarly, if the younger spouse is of a comparable age to the children of the older spouse, these children may not receive a benefit from their parent's estate until much later than their parent may have envisioned, or perhaps never.

Mutual Wills vs. Mirror Wills

Although mutual and mirror Wills are similar in some ways, they have one very significant difference - mutual Wills involve an agreement between the two individuals signing Wills that they will not execute a subsequent Will without the consent of the other person. Where individuals have executed separate Wills which are subject to an agreement regarding the terms of the respective Wills and their ability to revoke the Wills, this will generally attract the application of the doctrine of mutual Wills.[3]

On the other hand, if spouses execute reciprocal Wills, without any further agreement, the Wills would typically be considered to be mirror Wills, rather than mutual Wills, and the spouses would be free to later change their respective Wills without notice to the other spouse. However, as can be seen in the decision of *Rammage v Estate of Roussel,*[4] which is discussed below, a finding of mirror Wills may not necessarily occur in all circumstances where no express agreement appears to have been made.

One significant difficulty which may arise in relation to mutual Wills is how to determine whether such an arrangement existed between the parties. Case law indicates that the Court will require "clear and satisfactory" evidence of an agreement.[5] There must be more than "just some loose understanding or sense of moral obligation".[6] Unless there is some clear indication in the Wills themselves, or by some other written agreement, that the Wills were intended to be mutual, the Court may need to rely on evidence from beneficiaries, possibly including disappointed beneficiaries. In this context, such evidence (on both sides) may be self-serving.

Rammage v Estate of Roussel

In *Rammage v Estate of Roussel,* the Court considered, on a motion for summary judgment, whether spouses had made mutual Wills. The facts involved a second marriage for both spouses, Ruth and Alf, each of whom had two children from prior relationships. Ruth and Alf had executed reciprocal Wills which gave all of their respective estates to each other, and provided for an equal division amongst their four children upon the death of the surviving spouse. Following Alf's death, Ruth proceeded to sign a new Will leaving her entire estate to her two daughters, with Alf's children receiving nothing.

As Ruth had died prior to the hearing in this case, the Court appeared to have relied mainly on evidence from Ruth and Alf's respective children. Ultimately, despite the fact that there was no direct written or oral confirmation that the Wills were to be mutual, the Court held that Ruth and Alf had intended there to be an agreement to this effect.

Significantly from the perspective of a drafting solicitor, the lawyer who prepared the Wills in question in this matter had also given evidence. He stated that he did not discuss the matter of mutual Wills with Ruth and Alf, and they gave him no impression about their intentions beyond the specific terms of the Wills. The lawyer could recall no expressed intention or discussion to the effect that Ruth and Alf could not subsequently change their Wills independently of each other.

Given that Ruth and Alf's lawyer did not discuss with them the concept of mutual Wills, it is possible that they did not even turn their minds to the idea of whether either of them would later be able to change or revoke his or her Will. Although we have the Court's finding of mutual Wills, in reality we will never be able to know whether Ruth and Alf truly did intend that their Wills be mutual, or simply mirror Wills.

A lawyer acting jointly for subsequent spouses should discuss with his or her clients the distinction between mutual and mirror Wills, and the intentions of the spouses in this regard, to ensure that each spouse understands how the distribution of the respective estates could play out, including what benefit his or her children may or may not ultimately receive.

Conclusion

Although joint retainers for spouses in the context of a blended family are not uncommon, as lawyers acting for individuals in subsequent marriages, we should keep in mind that such circumstances can raise unique challenges, some of which have been touched on above, and take steps as necessary to ensure we are acting in our clients' interests.

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[1] *Rules of Professional Conduct,* Rule 3.4-5
[2] *Ibid,* Rule 3.2-2
[3] *Edell v Sitzer,* [2001] O.J. No. 2909 at para 57
[4] 2016 ONSC 1857
[5] *Ibid* at para 58
Hall v McLaughlin Estate, [2006] O.J. No. 2848 at para 11, 96
[6] *Ibid* at para 58

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