Family Law Issues and Their Impact on Estates

David M. Smith

Direct Dial: (416) 369-7858
Fax: (416) 369-1517
E-mail: dsmith@hullandhull.com

HULL & HULL LLP
Barrister and Solicitors

TORONTO
141 Adelaide Street West, Suite 1700
Toronto, Ontario M5H 3L5
TEL: (416) 369-1140
FAX: (416) 369-1517

OAKVILLE
228 Lakeshore Road East
Oakville, Ontario L6J 5A2
TEL: (905) 844-2383
FAX: (905) 844-3699

www.hullandhull.com
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SPOUSAL ISSUES FOR THE ESTATES PRACTITIONER

Estates and Trusts Practitioners face special considerations when drafting wills for spouses. This paper considers two of these issues:

(i) The ramifications of the joint retainer between spouses; and

(ii) Wills made in contemplation of marriage.

In addition, when administering estates of spouses, special care needs to be given to determine spousal entitlements when the testator was legally separated from his or her spouse at the time of death. This often involves a consideration of the effect of any Separation Agreement between the parties. This paper considers how a Separation Agreement may impact upon testamentary dispositions and how the Courts have dealt with this issue.

- **JOINT RETAINERS FOR MUTUAL OR MIRROR WILLS**

A lawyer practicing in the area of estates and trusts often represents both: (i) a husband and a wife, (ii) "common law" spouses, or (iii) same sex partners[1] (collectively "spouses"). The solicitor who acts for spouses pursuant to a joint retainer may well face the dilemma created when the parties subsequently take divergent positions respecting the subject matter of that retainer.

[1] Then definition of "partner" in the Ontario *Substitute Decisions Act, 1992 S.O. 1992 c.30* is as follows: "partner" means, (a) a person of the same sex 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*, or (b) either of two persons who have lived together for at least one year and have a close personal relationship that is of primary importance in both persons' lives

For the estates and trust practitioner, the most common joint retainer occurs in the making of mirror or mutual wills for spouses. Such wills, of course, typically provide for each spouse's assets to pass to the other and, in all other respects, are identical.

As of February, 2005, the Law Society of Upper Canada has brought some clarity and guidance to the profession respecting these issues by implementing amended Commentary ("the Commentary") to the applicable *Rule of Professional Conduct*[2] as detailed below:

> **A lawyer who receives instructions from spouses or partners as defined in the *Substitute Decisions Act*, 1992 S.O. 1992 c.30 to prepare one or more wills for them based on their shared understanding of what is to be in each will should treat the matter as a joint retainer and comply with subrule (6). Further, at the outset of this joint retainer, the lawyer should advise the spouses or partners that if subsequently only one of them were to communicate new instructions, for example, instructions to change or revoke a will:**
>
> **(a) the subsequent communication would be treated as a request for a new retainer and not as part of the joint retainer;**
>
> **(b) in accordance with Rule 2.03, the lawyer would be obliged to hold the subsequent communication in strict confidence and not disclose it to the other spouse or partner; but**
>
> **(c) the lawyer would have a duty to decline the new retainer unless**
>
> > **(i) the spouses or partners had annulled their marriage, divorced, permanently ended their conjugal relationship, or permanently ended their close personal relationship, as the case may be;**
> >
> > **(ii) the other spouse or partner had died; or**

[2] Rule 2.04(6)

(iii) the other spouse or partner was informed of the subsequent communication and agreed to the lawyer acting on the new instructions

In some respects, the solicitor can plan in advance for the possibility contemplated by the revised Commentary and can avoid some of the problems to which this conflict may give rise.

The following is a list of some of the considerations that the solicitor may look to when meeting with spouses to draw up mirror wills and these suggestions should be recorded in the notes that are taken and should, ideally, be referred to in the reporting letter:

(i) The option of asking the couple to seek their own counsel when drawing wills is of course available; however, this is neither a realistic nor a practical solution.

(ii) When the couple come to see the solicitor, he should advise them that their wills can be changed by either of them at a later date and that, if this is not their intention, they should consider whether to create a contract with one another not to change their wills without the consent of the other. In giving such advice, the solicitor should explain the difference between such a contract and the making of mutual wills. Clearly, either of these options create the potential for problems which, one could argue, should be avoided altogether.

(iii) The solicitor should advise both clients verbally, and in writing, that he or she is acting jointly for both of them, that the information between them is not confidential and if a conflict

arises in the future, the solicitor is obliged to advise the other spouse.

It is prudent to remind the clients that in the event of one of the spouses dying, it may be that the surviving spouse will want to change his or her will and review some of the scenarios with respect to the possibility of a second marriage. While these issues are sometimes difficult to raise, many clients do not consider the possibility that the surviving spouse may want to revise their affairs in the event of the other spouse's death.

Not infrequently, one of the spouses, after having the estate plan included in a will or trust, will consult the solicitor and request a change which the spouse insists that the solicitor not disclose to the other spouse.

It is also not unusual for a child to give the "family solicitor" instructions to prepare a will for his parent giving a greater benefit to that child than other siblings or children of a prior marriage.

In such circumstances, the solicitor must recognize the problem and conflicts that exist and consider how he or she will deal with the problems they create when they eventually arise.

While elaborate retainers or engagement letters are not usually warranted, where potential conflicts exist, it would seem that a satisfactory answer would be to include in a reporting letter paragraphs along the following lines:

> "You have jointly requested me to prepare your wills in the form enclosed after a full consideration of your respective assets and wishes.

> At the time of taking instructions for these wills, I advised each of you together that as between both of you, any confidences which you have reposed in me relating to either or both of your wishes are held by me on the understanding that if any conflict of interest is disclosed to me respecting either of your interests I am bound to disclose that conflict to the other of you.
>
> In other words, there are no secrets between the three of us affecting either of you respecting these wills and the dispositions in connection with your estate and I am bound to discuss with each of you any subsequent changes either of you may wish to make."

In summary, the decision of Convocation to approve and implement the recommendations of the Professional Regulation Committee has clarified the direction for the estates bar such that:

1. A retainer to make mirror wills is a joint retainer;

2. The joint retainer ends when the wills are executed;

3. Notwithstanding the termination of the joint retainer, the solicitor has a continuing obligation not to act against a former client. This obligation includes a prohibition against making a change to a mirror will without first obtaining the consent of both of the parties to the original retainer, save and except for the exceptions referenced in the Commentary; and

4. If the solicitor does not act when contacted by one spouse, he or she is precluded from advising the other spouse that he or she was contacted as such contact would breach solicitor and client privilege.

- **Wills Made In Contemplation of Marriage**

Occasionally, a client will seek to make a will benefiting the person whom he or she intends to marry. While this scenario does not play out on a frequent basis in the practice of most lawyers, it does represent an interesting interplay between family law and estate practitioners. And when a client seeks to make such a will, it is commonly understood that appropriate consideration must be given to section 16 of the *Succession Law Reform Act* ("the Act") which provides as follows:

> "A will is revoked by the marriage of the testator **except where there is a declaration in the will that it is made in contemplation of the marriage** (emphasis added)"

In short, this section of the Act speaks to the power of a "contemplation declaration" to nullify an event (i.e. marriage) which would otherwise revoke a will. Put another way, the contemplation declaration serves the express purpose of preserving a will in the face of marriage.

The drafting issue seems simple enough: to avoid revocation by an impending marriage, the testator must include a clear and unambiguous declaration in his will that it is made in contemplation of that marriage. The language employed must clearly evidence the testator's contemplation of marriage to a particular person (who is undoubtedly a beneficiary under the will).[i]

Perhaps because the issue is so seemingly (although, as argued below, deceptively) straightforward, there are relatively few reported cases in respect of the issue. The

cases that are reported primarily deal with whether or not a marriage had the effect of revoking a will where the existence or intent of contemplation declaration is ambiguous.

In *Owers v. Hayes*[ii], the court held that a holograph codicil in the form of a letter to the testator's daughter that stated "Just in case I do marry Norm & anything ever happens to me - I would like him to live rent free..." amounted to a valid declaration in contemplation of the subsequent marriage.

In *Re Ratzlaff Estate*[iii], the Saskatchewan Court of Appeal found that a dispositive clause was sufficient to satisfy the requirement of a declaration. In that case, the testator stated "if at the time of my death I am legally married, then . . . I specifically bequeath to my wife the sum of $10,000 for each year or portion thereof we have cohabited together as man and wife".

In such cases, the Court is primarily concerned, not with the intention of the testator, but, rather, the ascertainment of whether the requirements of the Act are met by the language employed.

But what about a situation in which the validity of a will is, in a departure from the usual grounds, challenged by disgruntled family members on the basis that a testator made such will in contemplation of a marriage which does not, in fact, occur prior to the death of the testator? Such a challenge will be predicated on the basis that the will is conditional; conditional, that is, upon the marriage actually taking place.[iv] But is there authority for such a contention?

Where a will contains a declaration that it is made in contemplation of marriage, it appears that the marriage itself need not necessarily occur as a precondition to the validity of the will. Recall that the contemplation declaration is required by statute to protect a will that would otherwise be revoked by marriage. In other words, if there is no

marriage which revokes the will, the mere inclusion of a contemplation declaration would not appear to, in and of itself, be sufficient to invalidate the will.

It is a question of interpretation as to whether a reference to the marriage is "a condition upon which the gift depends or merely a statement of the testator's reason for making the gift." To answer the question, the Court will seek to ascertain the testator's intention in including a contemplation declaration in the will. Extrinsic evidence of surrounding circumstances is not only admissible but likely key to a determination of the issue. Accordingly, factors such as: the setting of a date; the buying of a ring; consultations regarding a prenuptial agreement; the revoking of an existing will and the time between the making of the will and the marriage may all be relevant criteria for the court to consider.[v] As in most cases, the notes of the solicitor who drew the will and the sworn evidence of the solicitor will be relevant to a determination of testamentary intent. Evidence from the intended marriage partner by way of examination and evidence from friends of the testator will also be of assistance.

It is worth repeating that a contemplation declaration is specifically derived from statute and, as such, a strong argument may be made that such declaration exists to prevent against revocation by marriage and for no other purpose. In this regard, contrast section 16 of the Act with section 8(1)(b), the minor's will provision, which specifically requires the marriage to take place in order for the will to be valid.

When drawing a will for a testator in contemplation of marriage, the drafting solicitor does not know whether the contemplated marriage will ever in fact occur. Many "common law" couples may live for many years together, always intending to marry but never getting around to actually formalizing their union. Alternatively, the person whom the testator intends to marry may in fact still be legally married to another at the death of the testator. Can it be said that a testator has formed a meaningful intention to marry someone in such circumstances and does a contemplation declaration made in such

circumstances carry greater significance than what appears to be ascribed to such a declaration by statute? Finally, does the drafting solicitor have an obligation to advise the testator that the inclusion of a contemplation declaration in a will may potentially expose the estate to an argument (whether vexatious or not) that the will is conditional and therefore invalid in the absence of a marriage? As these examples illustrate, there may be more to a contemplation declaration then the simple avoidance of revocation by marriage.

- **The Effect of Separation Agreements on the Testamentary Disposition of Property by Intestacy, Will, Jointly Held Assets or Beneficiary Designations.**

Separation Agreements may have a profound impact upon the disposition of an estate. However, the apparent intention of a party to a Separation Agreement may not always be realized on his or her death.

In the absence of a Separation Agreement, the disposition of an estate to a spouse is governed by applicable statute and common law as follows:

- **Rights of a married spouse on an intestacy**

A surviving husband or wife, on an intestacy, receives the entire estate of his spouse if there are no children. If there are children, the surviving husband or wife still receives the first $200,000.00 of the estate and either ½ of the remainder if there is one child or 1/3 of the remainder if there are two or more children of the marriage.

The entitlement of a married spouse on an intestacy is statutory: *Succession Law Reform Act, Part II.*

- **Rights of an unmarried spouse on an intestacy**

A surviving unmarried spouse, on an intestacy, receives no entitlement. A spouse is defined for the purposes of Part II of the *Succession Law Reform Act* as either a man or a woman who is married.

Although there are some cases in other provinces which suggest that this statutory provision offends the equality provisions of the *Charter,* the only available statutory remedy for an unmarried spouse on an intestacy in Ontario is to bring an application for support under the provisions of Part V of the *Succession Law Reform Act.*

- **Rights of a married spouse under the *Family Law Act* where the deceased leaves a will or dies intestate**

If a will is made, or if there is an intestacy, a husband or wife receives the benefit provided under the deceased spouse's will or the intestacy provisions of the *Succession Law Reform Act*, respectively, or is entitled to elect to instead receive his or her benefit under the *Family Law Act.*

Such election will be made if the husband or wife will receive a more favourable benefit by receiving one half of the difference between the net family properties of the deceased spouse and the survivor respectively.

Note that the right to elect is restricted to married spouses.

- **Rights of a married or unmarried spouse under the *Succession Law Reform Act* where the deceased dies testate or intestate**

If an election under the *Family Law Act* will not benefit the surviving spouse, the option remains for the surviving spouse to claim against the estate under the provisions of Part V of the *Succession Law Reform Act.* The position asserted by the surviving spouse on such a claim is that the deceased spouse, by the provisions of his or her will or on a distribution on an intestacy, did not satisfactorily provide for the needs of his or her spouse.

As noted above, an unmarried spouse as defined in Part V of the *Succession Law Reform Act,* may similarly assert a claim for support against the estate. A spouse is defined for the purposes of Part V of the *Succession Law Reform Act* to include persons who have "cohabited for a period of not less than three years or in a relationship of some permanence if they are the natural or adoptive parents of a child."

- **Rights of a married or unmarried spouse as a joint tenant**

It is a common characteristic of spousal relationships for the two to jointly own property. The predominant characteristic of jointly held property is that each joint owner has a right to ownership on the death of the other joint holder, also known as a right of survivorship. This right is severable, with each joint owner having an entitlement to one-half of the property.

- **Rights of a married or unmarried spouse as a designated beneficiary of the other's assets**

Many assets can be passed by beneficiary designation including RRSPs, RRIFs, insurance policies and pension plans.

The designation of the beneficiary is typically made as part of the contract between the plan holder and the recipient.

Pension Benefits, in particular, provide that if the member of the pension dies before he or she has started to collect on the pension, his or her spouse is entitled to a lump sum payment as the designated beneficiary unless they are living separate and apart at the date of death.

- **IMPACT OF SEPARATION AGREEMENTS ON RIGHTS OF A SURVIVING SPOUSE**

- **A Separation Agreement or a Marriage Contract between married spouses may contract out of the rights afforded to married spouses by Statute**

If married spouses separate within the meaning of the *Family Law Act*, their relationship is typically governed by the provisions of a Separation Agreement.

A Separation Agreement is a contract and is governed by the common law as it relates to contracts.

As a general proposition, the intention of a Separation Agreement is generally assumed to be to ensure that the parties, as between themselves, contract to

ensure that neither benefits from the other's property after the termination of the relationship.

- **Inter-relationship between a Domestic Agreement and the deceased spouse's will & estate**

A contract may be set aside for a number of reasons including lack of financial disclosure and duress.

If the obligations contained in a Marriage Contract are incorporated into a will, the obligations will continue notwithstanding the fact that the contract has itself been found to be invalid.

Unless the provisions in a Marriage Contract for the surviving spouse are clear and straightforward, there is a risk that the provisions in the will may amplify the benefit flowing to the surviving spouse.

A Marriage Contract can not appoint executors, deal with custodial issues regarding children, or dispose of property which is not covered by the Contract.

- **Unless carefully worded, a Separation Agreement between married spouses will not contract the parties out of the benefits conferred by their wills**

As a general proposition, spouses that have entered into a Separation Agreement do not typically intend their spouse to thereafter benefit from their estate. However, unless the Separation Agreement is very carefully worded, the

wills made by the parties to the Separation Agreement, even if those wills predate the Separation Agreement and appear on their face to be contrary to the intention of the Separation Agreement, will be found to prevail.

This is because the Court is loathe to override the testamentary dispositions contained in a will unless the words used in the Separation Agreement are **direct and cogent** that such is the intention of the parties to the Separation Agreement.

A Separation Agreement is not a testamentary disposition. Rather, it is a contract whereby, insofar as the death of the parties is concerned, the parties contract out of their entitlements to receive statutory rights and testamentary dispositions **if the Agreement uses direct and cogent language to effect such a result.**

A Separation Agreement will rarely expressly address the situation in which the parties to the Agreement have not changed their wills to exclude each other. However, it is not uncommon for just such a situation to arise. Although the intentions of the parties to the Separation Agreement is, typically, to exclude the other from any interest in their property and for such exclusion to be binding on their respective estates, the Court will **not** construe the intentions of the parties in their Separation Agreement to have contracted out of entitlements received as a beneficiary of the other's estate.

So, for example, where a Manitoba Separation Agreement stated as follows:

> "the payments and other provisions herein contained constitute a full and final settlement of all the Wife's rights against the Husband but expressly including such rights as the Wife now has or might hereafter have under and by virtue of the Dower Act, the Devolution

> of Estates Act, the Testator's Family Maintenance Act, the Wives' and Children's Maintenance Act, the Matrimonial Causes Act, and any other statute hereafter enacted to the same or similar effect..."

the Court found that the parties had not contracted out of the benefits conferred upon them by the other's will, which predated the Separation Agreement. Specifically, the Court reasoned that "the Wife had no right to claim to be named as beneficiary of her former husband's estate, but she did not by the agreement waive her right to claim if her husband chose not to alter his Will so as to eliminate her as a beneficiary." (*Goldfield v. Koslovsky [1976] 2 W.W.R. 553*).

Put another way, the Court will construe the fact that a married spouse did not change his or her will to be "an affirmation of the intention to benefit his spouse." Accordingly, what is typically an inadvertent omission will be interpreted by the court as an act committed with the intent to benefit.

Put still another way, there is effectively a presumption that the will has not been revoked by the terms of the Separation Agreement. Such presumption is rebuttable but only if there are direct and cogent words in the Separation Agreement which specifically contemplate the situation in which the parties fail to change wills which predate the Separation Agreement and leave their respective estates to the other.

- **Unless carefully worded, a Separation Agreement between married spouses will not contract the parties out of the benefits conferred by statute on an intestacy**

The Court will protect the rights afforded to a spouse on an intestacy by scrutinizing the Separation Agreement with just the same degree of exactitude as in cases where the spouse dies testate.

In *Cairns v. Cairns (1990) 72 O.R.(2d) 217 (Ont. H.C.)*, a Separation Agreement included "a full and final release to any future claim by either party to a further division of property or payment for net equalization pursuant to the Family Law Act or any relevant statute."

The Court held that "the words of the release are not clear enough, nor sufficiently direct and cogent to bar [the wife] from her preferential share on an intestacy under the *Succession Law Reform Act."*

Simply put, the Court inferred that the deceased's decision to not make a will after the Separation Agreement was executed was a deliberate act designed to ensure that the surviving spouse receive her entitlements on an intestacy.

While the result must be respected, it is certainly questionable as to whether such was in fact the deceased's intent.

- **Even if carefully drafted, a Separation Agreement is but one factor for the Court to consider in determining whether to award support to a surviving spouse under Part V of the SLRA.**

Even if a Separation Agreement purports to preclude a surviving spouse from making an application for support under Part V of the *Succession Law Reform Act,* the Court may permit an application for support to proceed if the surviving spouse can show a material change of circumstances such as to justify a claim.

The argument would be that it would be unconscionable for the Separation Agreement to bind the entitlements of the surviving spouse.

Section 62(1)(m) of the *Succession Law Reform Act* states that the Court shall consider "any agreement between the deceased and the dependant" in determining the amount and duration, if any, of support.

- **Unless carefully worded, a Separation Agreement between spouses will not sever a joint tenancy**

A Separation Agreement should reference the property in respect of which the parties wish to sever a joint tenancy. All too often, the surviving spouse will find that he or she has taken sole title to a jointly held property by right of survivorship, notwithstanding the existence of a Separation Agreement which appears to evidence an intention for the parties not to benefit from the other's property.

If the Court finds any ambiguity whatsoever in the Separation Agreement, the joint tenancy will be found to prevail.

Although the availability of the doctrine of resulting trust can potentially be of some assistance, the Court may well be hesitant to apply the doctrine in a case where a spouse stands to take the property in question by right of survivorship.

Such was the case in *Berry v. Berry,* a recent unreported decision of the British Columbia Supreme Court. In this case, the Court refused to sever the joint tenancy or declare a resulting trust over one-half of the property for the benefit of the deceased spouse's estate, notwithstanding that the spouses had separated prior to his death.

- **Unless carefully worded, a Separation Agreement between spouses will not contract the parties out of the benefits conferred by beneficiary designations**

Many assets can be passed by beneficiary designation including RRSPs, RRIFs, Insurance policies and Pension Plans.

A Separation Agreement may purport to release the parties from all claims including any claims to a share in company pension plans, RRSPs, RHOSPs, etc.

The statutory provisions relating to the designation of beneficiaries of interests in funds and plans are found in Part III of the *Succession Law Reform Act*

Section 51(1) of the SLRA states:

> **A participant may designate a person to receive a benefit payable under a plan on the participant's death,**
>
> > **(a) by an <u>instrument</u> [emphasis added] 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[emphasis added].**

Section 51(2) states:

A designation in a will is effective only if it relates expressly to, a plan, either generally or specifically

A Separation Agreement can be an "instrument" as that term is referenced in s. 51(1) of the Act although the term itself is not described in the statute. The Court of Appeal in *Burgess v. Burgess Estate [2000] O.J. No. 4846 (Ont. C.A.)* confirmed this fact by reference to dictionary definitions of "instrument."

In *Burgess v. Burgess Estate*, the deceased had designated his first wife as beneficiary of the whole his deferred pension sharing plan (DPSP), which he held with his employer, during the course of his marriage. He subsequently entered into a Separation Agreement in which he reduced her entitlement to one half of the DPSP. He subsequently remarried and made a new will leaving his entire estate to his second wife and the children of his first marriage.

On an application before Madam Justice Haley, the first wife sought a declaration that she was entitled to the whole of the DPSP. The first wife essentially made the same argument which was accepted by the courts in the line of cases in which wills that were inconsistent with Separation Agreements were found to prevail: in her submission, she did not, by the Separation Agreement, "waive the right to claim if the deceased spouse chose not to alter his or her beneficiary designation so as to eliminate her as a beneficiary."

Madam Justice Haley accepted the reasoning: the contract between the employer and its employee was separate from the marriage. Not being a party to the Separation Agreement, the employer, with whom the deceased filed his beneficiary designation, could not be said to have been bound by the Agreement. If the deceased truly intended to eliminate or reduce the entitlement of his spouse, he would have changed the beneficiary designation at the source.

Accordingly, Justice Haley found that the Separation Agreement had no effect on the beneficiary designation.

This decision was reversed on appeal. The Court of Appeal determined that the Separation Agreement was an instrument that revoked the beneficiary designation on file with the holder of the Plan. The subsequent will, not "relating expressly to, a plan, either generally or specifically" did not effect the beneficiary designation of the Plan contained in the Separation Agreement.

In *Klassen Estate v. Klassen (1998) 22 E.T.R. (2d) Man. Q.B.)*, the Court considered a situation in which a second wife was named as beneficiary under several instruments notwithstanding the fact that: (i) she was divorced from her deceased husband, (ii) she had entered into a Separation Agreement; and (iii) he had made a new will leaving all his property to the children of his first marriage. The Court in this case considered parol evidence of the deceased's intention which was clearly to exclude the benefit to his second wife. Although the Court could not find a legal basis to set aside the beneficiary designation, it found that the second wife, as designated beneficiary, held such assets on a resulting trust for the benefit of the estate.

On appeal, the Manitoba Court of Appeal reversed the finding of the Trial Judge:

> Even if the deceased's intentions concerning the four policies in question may have changed, it did not find expression in a way that can or should be recognized in law. That could have been done by way of a provision in the will which he made on June 17, 1993. It could have been accomplished by a codicil to that will. It could have been done by way of the other forms of declarations permitted under the statutes. Further, he could have communicated his wishes directly to the respondent, and if she had assented to carry out those wishes, she would have been bound in equity to do so as a constructive trustee. None of these courses was followed.

> During the appeal hearing, my colleague, Kroft J.A., made this observation: If the estate is able to successfully claim the proceeds of these policies by producing evidence of a change of intent (even though not acted upon by the deceased or communicated to the named beneficiary), then every legacy in every will is subject to similar attack based upon hearsay evidence of a change of mind subsequent to the execution of the will which is not evidenced by a validly executed codicil or a new will. It cannot be.

Notwithstanding that it was reversed on appeal, *Klassen* provides a creative option to litigation counsel to seek to find a way out of the dilemma posed by a defective Separation Agreement. However, this case has, to the best of the writer's knowledge, not been applied in Ontario.

SUMMARY

Spouses, by Separation Agreements, typically intend to contract out of their entitlements provided by statute. Rarely is there any question that a Separation Agreement intends to preclude the rights afforded to a surviving spouse under the provisions of either the *Family Law Act* or Part V of the *Succession Law Reform Act.*

If spouses, when they separate, wish to disentitle their surviving spouse from any interest in their estate, consideration must also be given to the status of their wills. **Counsel of caution suggests that a new will (or a first will!) should always be made after a Separation Agreement.**

The Court will find in favour of a surviving spouse on an intestacy or in accordance with the provisions of a will predating the Separation Agreement unless there is **direct and cogent wording** used by which the surviving spouse

has clearly contracted out of his or her entitlement to receive a benefit either on an intestacy or under a will.

The use of direct and cogent wording would appear to be a requirement in any Separation Agreement that also seeks to sever a joint tenancy or revoke a beneficiary designation.

Ultimately, when acting for an executor or surviving spouse, an application for the opinion, advice and direction of the Court may be required to determine the issue.

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[i] See *The Canadian Law of Wills,* Feeney Chapter 5.10
[ii] (1983) 16 E.T.R. 61 (Ont. H.C.J.).
[iii] (2002), 44 E.T.R. (2d) 286 (Sask. C.A.).
[iv] It is perhaps worth noting that the appropriate procedure would not be an application for directions on a will challenge but, rather, an application for the opinion, advice and direction of the court under Rule 14.03 of the *Rules of Civil Procedure.* However, it is unlikely that the issue would come before the Court as an inherent ambiguity in the Will but rather, at the behest of a disappointed beneficiary.
[v] See generally Jordan Atin's article "Revocation of Wills by Marriage" in the *Estates Trusts and Pensions Journal [(1998, 18 ETPJ 13].*