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By Ian M. Hull & Suzana Popovic-Montag

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Common Estate Administration Problems and Solutions

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Introduction

This paper is designed to provide a brief outline and overview of Will drafting and planning problems that are often seen in an Estate litigation practice.

Solicitors drafting Wills are often met with unique circumstances and reference should be made to texts in this area to provide you with specific solutions to the problems.¹

Circumstances of Your Client

You will no doubt find your client is reluctant to face the issue of his/her own mortality and be even more reluctant to openly discuss some of the potential family dynamics or problems that may exist in their circumstances.

Often, by insisting that your client prepare a family tree and by reviewing other circumstances with a check list, you will be able to investigate some of the potential problems that may have an impact on the planning advice that you give.

¹Histrop, Lindsay, Estate Planning Precedents: A Solicitor's Manual (Carswell, 1989), Armstrong, E.P. Anne, Estate Administration A Solicitor's Reference Manual (Carswell, 1994), see also McGregor, Mary, Preparation of Wills and Powers of Attorney: First Interview to Final Report, (Aurora, Ontario: Canada Law Book Inc., 1994). The Law Society of Upper Canada Professional Standards Checklist for Wills and Estates, Appendix "D" Hull, Ian, Challenging The Validity of Wills, Carswell, 1996, pp. 100-103.

For example, if your client is currently in a second marriage, some consideration must be given to the existing circumstances of the spouse of the first marriage and, of course, enquiries should be made as to whether or not there were children in either relationship.

Careful attention must be given to a situation where your client is involved in common law relationships, with extra-marital partners, children born out of wedlock and any dependants.

By reviewing these types of issues with your client, you will be in a position to guide them through their will plan.

Probate Fees/ Probate Tax

Since approximately 1992, paying probate fees has become an important planning issue to review and consider with your client.

While probate fees have increased dramatically in recent years, too much attention can sometimes be paid to this issue to the detriment of your client.²

² See Barry Corbin "How Not to Avoid Probate Fees" 16 E.T.J. 169.

It has been suggested that since the increase in probate fees in 1992, there has been a substantial effort by the profession to take planning steps that will avoid probate fees.³

Solicitors must be careful when advising their clients as planning advice for one generation may bring with it bigger problems for the next generation.

Whether or not probate itself will be obtained, is something that should be reviewed with your client. This of course depends on the assets of the estate and whether or not third parties, such as financial institutions will be insisting that the asset will not be released until probate is obtained.

Inter Vivos Gifts

There are of course many techniques available to the practitioner to deal with the issue of probate fees, and one of the most popular planning techniques is to have your client dispose of her property *inter vivos*. Fees are of course payable on the assets as at the time of death and *inter vivos* transfers by way of gift or for consideration can be a useful planning tool.

³ IBID. at p. 171.

Careful consideration must be given to the potential income tax consequences, if any, of such dispositions well in advance of completion⁴.

Another fact to consider when proceeding with *inter vivos* gifts, is whether or not it can be proved on the date of death of your client that such gifts were, in fact, intended to be made. Often, later in life, your client will want to proceed to gift certain assets *inter vivos* and one must remember that if after the death of your client the gift is challenged, the recipient of the gift must meet the onus of providing convincing and unimpeachable evidence that the donor intended to make the gift.⁵ Another common planning technique is to encourage your client to put their cash assets into joint accounts with various family members.

There is obvious loss of control that comes with these planning techniques and this must be carefully reviewed with your client⁶.

LEGAL ISSUES

While it is not our intention to deal in any exhaustive way with the legal concepts referred to below, we have attempted to review some of the general legal concepts that should be considered.

⁴ Supra, Note 2, at p. 171-173.

⁵ See Re: Taerk, [1957] O.R. 482 (C.A.) and Dell' Aquila Estate v. Mellof, [1996] 6 W.W.R. 445 (Sask. Q.B.).

⁶ See Anthony P. McGlynn and K. Thomas Grozinger, "Joint Ownership of Property in the Context of Inter-Generational Transfers of Estates: Convenience and Conflict", 16 E.T.J. 105.

Assets in Jurisdictions Other than Ontario

In the circumstances, other than the use of an international will under the *Succession Law Reform Act*, the problems faced in this situation can be dealt with in several ways.

You may simply prepare the will in the usual way and rely on the reciprocal legislation of the foreign country to give the Ontario applicant the equivalent of confirmation by resealing of Appointment of Estate Trustee With or Without a Will (Rule 74.08) or a Certificate of Ancillary Appointment of Estate Trustee With a Will (Rule 74.09).

Section 52 of the *Estates Act*, R.S.O. 1990, c.E.21, allows the resealing of a grant of probate or letters of administration granted by a court in another province or territory of Canada, the United Kingdom or “any British possession”. The “foreign” grant is given the seal of the Ontario Court and then has the same force and effect as if it had been originally granted by the Ontario Court.

Difficulties and additional expense can be encountered when probate is sought in jurisdictions whose laws are not similar to ours when an ancillary grant is required.

Another option is to prepare the will so as to provide for two sets of executors, each of whom is to distribute the assets of the estate in each jurisdiction where they are

situate in accordance with the terms of the will. (For a form of this type of will see Canadian Forms of Wills, Sheard, Hull and Fitzpatrick 4th Edition, pp. 77).

You can also prepare an Ontario will for disposal of Ontario assets and have the testator prepare a complementary will dealing with the foreign assets or prepare a will in accordance with the laws in the foreign country where probate is sought.

The International Will

The *Succession Law Reform Act* includes the provisions of the International Convention providing a uniform law on the form of an international will that is applicable to the Province of Ontario.

Therefore, any country which has ratified the convention will recognize a will made pursuant the provisions of the *Succession Law Reform Act*. In such circumstances, the will will be valid as to its formalities “irrespective particularly to the place where it is made, of the location of the assets, and of the nationality, domicile or residence of the testator”.

If you wish to prepare an international will, you should ensure that the countries in which the assets with which you wish to deal are countries to which the convention applies and you should make those inquiries to the Department of External Affairs in Ottawa.

Revocation by Marriage

Section 16 of the *Succession Law Reform Act* provides that 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, unless the spouse of the testator elects to take under the will by an instrument in writing signed by the spouse or where 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 the persons entitled to the estate of the testator if he or she died intestate.

Thus, if a testator wishes to give instructions for a will and is about to be married or is a widower, it should be pointed out to him or her that if he or she is about to be married, the will must be stated to be made in contemplation of marriage to a specifically named person or if not contemplating marriage, it is carefully explained that the will will be revoked upon any subsequent marriage.

Careful attention must also be paid to s. 17 of the *Succession Law Reform Act* which provides that a will is not revoked by presumption of an intention to revoke it on the ground of a change in circumstances except on termination of marriage.

Constructive Trusts

It is clear that the registration of an asset in the testator's name alone is not sufficient to prevent the spouse or the common law spouse or any other person who

claims to have contributed to the ownership of an asset from making a claim to an asset such as the matrimonial home, the business operations of the testator or other similar assets.

If the spouse or common law spouse or any other person can prove participation in the payment of the house or other asset or show domestic services or participation in the business, the personal representatives of the testator may be held to be the constructive trustees of the property to the extent of the claimant's interest as determined by the court.

Accordingly, this issue must be reviewed with your client when you are taking instructions to ensure that she understands the consequences of such a claim which may be made against the estate and the significance of the form of registration of ownership of an asset.

a) Lapse

Black's Law Dictionary⁷ defines "lapse" as "a failure to vest a bequest or devise by reason of death of a devisee or legatee prior to the death of testator. The death of a legatee before the testator causes the legacy to lapse and to fall into the residue unless there is a statute which provides for its disposition as, for example, if the legatee is a child or relation of the testator, the legacy passes to the issue of the legatee".

⁷Black's Law Dictionary, 5th Edition, West Publishing Co.

Such a provision is contained in s. 31 of the *Succession Law Reform Act*, with which we deal later on in this paper.

It is sometimes necessary to explain this legal concept to your client when children or grandchildren are beneficiaries.

Lapse occurs when there is a failure of a gift by reason of the death of the beneficiary before the gift is vested.

The general principle with respect to lapse has been stated by Lord Parker of Waddington⁸ as follows:

The general law does not allow a legatee who predeceases the testator to take any benefit under his will. In that event, the gift is said to lapse, with the consequence that it falls into residue, or if it is itself a share of residue, goes to the testator's next-of-kin. It is not competent to a testator to exclude the application of this rule of law, but the consequences of a lapse can be avoided by the substitution of some other legatee to take the legacy if the event which occasions the lapse occurs. Such a substitutionary gift is often introduced by a direction that the legacy is not to lapse but is to go to the substituted legatee. In such a case the introductory words are of course quite inoperative unless followed by the substitution of another legatee, but if so followed, they are not construed as an attempt to exclude the rule of law as to lapse, but as indicating an intention to avoid the consequences which a lapse would otherwise entail by substituting another legatee.

⁸ Re Greenwood, [1912] 1 Ch. 392 at 396, per Parker J. (as he then was); Browne v. Hope (1872), L.R. 14 Eq. 343.

Section 31 of the *Succession Law Reform Act* referred to above provides an anti-lapse provision where, unless a contrary intention appears by the will, gifts to children, grandchildren, brothers or sisters do not lapse in such circumstances.

Section 31 provides as follows:

Except when a contrary intention appears by the will, where a devise or bequest is made to a child, grandchild, brother or sister of the testator who dies before the testator, either before or after the testator made his or her will, and leaves a spouse or issue surviving the testator, the devise or bequest does not lapse but takes effect as if it had been made directly to the persons among whom and in the shares in which the estate of that person would have been divisible,

- (a) If that person had died immediately after the death of the testator;
- (b) If that person had died intestate;
- (c) If that person had died without debts; and
- (d) If s. 45 had not been passed.

The provisions of s. 31 clearly operate to prevent lapse of bequests to certain classes of beneficiaries, and they operate in favour of those dead at the date of the will as well as those alive at the date of will but who die in the testator's lifetime.

b) Abatement

Black's Law Dictionary⁹ defines "abatement" as "a reduction, decrease, or diminution. The suspension or cessation, in whole or in part, of a continuing charge,

⁹ Black's Law Dictionary, 5th Edition, West Publishing Co.

such as rent. Furthermore, it is a proportional diminution or reduction of the pecuniary legacy, when the funds or assets out of which such legacies are payable are not sufficient to pay them in full”.

The rule with respect to abatement is that the general legacies abate rateably.

If the assets of an estate are insufficient to pay all of the legacies in full, the general legacies must, in the absence of a contrary direction by the testatrix, abate in equal proportions and the onus of proving that a legacy was intended by the testatrix to be paid in priority lies on the party seeking priority, and the proof must be clear and conclusive in the language of the will.¹⁰

c) Ademption

Black’s Law Dictionary¹¹ defines “ademption” as the “extinction or withdrawal of a legacy by a testator’s act, equivalent to revocation or indicating intention to revoke. Testator’s giving to a legatee that which he has provided in his will, or his disposing of that part of his estate so bequeathed in such manner as to make it impossible to carry out the will”.

d) Specific Devises and Bequests

When obtaining the information necessary for the preparation of a will, it is important to have your client provide an accurate description of any property that is to be specifically given to a beneficiary.

¹⁰ Williams on Wills, 7th Edition (Butterworths: 1995) at p. 282.

¹¹ Black’s Law Dictionary, 5th Edition, West Publishing Co.

While a complete legal description is not necessary, to simply say “my Florida property” can be problematic. You will find that most of your clients will know the basic legal description or municipal address of specific real property and if they do not have it readily available, they can obtain a tax bill or deed to ensure that it is described as accurately as possible.

You will find some clients will attach a disproportionate importance to bequests of specific personal items such as jewelry. We find that a memorandum prepared by the testator and maintained in the testator’s safety deposit box is an easy way to allow the testator to specifically set out where such items are to go and at the same time, have some flexibility if the items are no longer in the will maker’s possession or the will maker changes his or her mind. It can become costly and time consuming to have the testator change his or her will every time a personal household item is either lost, sold or destroyed.

If certain shares owned by the testator in a particular company are to be the subject of a specific direction in a will, they should be described in detail and some consideration should be given to the marketability of the shares and the impact on the company when such shares are transferred. For example, if there are shares held in a small company in the Caribbean and they have not been transferred for many years, it can be difficult to deal with that asset in accordance with the testator’s intentions.

e) Life Insurance

In view of the rising costs of probate fees, many solicitors are advising their clients to ensure that the proceeds of policies of life insurance are payable to a named beneficiary so that they do not flow through the estate.

f) Description of Beneficiaries

While counsel are usually conscious of the difficulties that arise when the will maker's property has not been properly described, many solicitors who draw wills forget to fully identify those who are to benefit under the will. Errors can be made in describing charitable institutions and their proper names should be obtained.

While describing charitable institutions can be resolved by directly contacting the charity itself, the solicitor has usually no means of checking the correct names of individual beneficiaries except through the will maker.

While the solicitor should obtain the full name of the beneficiary, an additional method of identifying such beneficiary is to describe them with reference to their relationship to the will maker or some other person.

g) **Selection and Powers of Trustees Including The Power To Encroach**

When a trust is created, the will maker must carefully consider the selection of a trustee and the powers needed to carry out the trust.

In practice, it is often the case that a will will provide for an infant to receive a substantial interest in the estate and a trust may well be the appropriate vehicle for this purpose. The duration of the trust is often a prolonged one and in such circumstances, it is sometimes advisable to appoint a trust company when the duration of the trust is lengthy.

With respect to discretionary powers of encroachment, the leading decision in this area is *Gisborne v. Gisborne*¹² which outlines the general principles with respect to the exercise of discretion.

When determining to what extent a Court will supervise the discretion of a trustee, consideration must be given as to whether or not the clause conferring such powers was intended to give the trustee uncontrolled or controlled discretion.

The approach in the past has been that the courts will not intervene unless the exercise of discretion was made with mala fides, improper purpose, a failure to consider all relevant matters, having exercised discretion based on irrelevant considerations or lack of prudence.¹³

¹² (1877), 2 A.C. 300.

¹³ For a full discussion of these issues see Maurice Cullity, "Judicial Control of Trustees' Discretions" (1975), 25 University of Toronto Law Journal 99 and for the recent case law in this area see Fox v. Fox Estate (1994) 5 E.T.R. (2d) 174 (Ont. Gen. Div.), (1996) 10 E.T.R. (2d) 229 (Ont. C.A.), Application for Leave to Appeal to the Supreme Court of Canada submitted September 13, 1996 and leave to appeal refused January, 1997. For a discussion of the personal liability of trustees and rights of indemnification see Maurice C. Cullity "Personal Liability of Trustees and Rights of Indemnification" 16 E.T.J. 115.

Reviewing Testamentary Capacity, Suspicious Circumstances and Undue Influence

When drawing a will, solicitors must be familiar with and understand the basic legal concepts relating to testamentary capacity, suspicious circumstances and undue influence. Furthermore, consideration at the time of drafting the will must be given as to the types of problems contemplated to be encountered as to each of these legal issues.

(i) Testamentary Capacity

There is no simple definition that one can rely on when determining whether or not the will maker has testamentary capacity. The onus is upon those propounding the will to prove capacity. The leading case for more than a century continues to be Banks v. Goodfellow.¹⁴

In that case, Cockburn C.J. set out a summary of the considerations to consider when determining whether or not a person has testamentary capacity and said:

It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties -- that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.

¹⁴ Banks v. Goodfellow (1870), L.R. 5 (Q.B.) 549.

Here, then, we have the measure of the degree of mental power which should be insisted on. If the human instincts and affections, or the moral sense, become perverted by mental disease; if insane suspicion, or aversion, take the place of natural affection; if reason and judgment are lost, and the mind becomes a prey to insane delusions calculated to interfere with and disturb its functions, and to lead to a testamentary disposition, due only to their baneful influence -- in such a case it is obvious that the condition of the testamentary power fails, and that a will made under such circumstances ought not to stand. But what if the mind, though possessing sufficient power, undisturbed by frenzy or delusion, to take into account all the considerations necessary to the proper making of a will, should be subject to some delusion, but such delusion neither exercises nor is calculated to exercise any influence on the particular disposition, and a rational and proper will is the result, ought we, in such case, to deny to the testator the capacity to dispose of his property by will?

Rand J. in *Leger v. Poirier*¹⁵ defines a "disposing mind and memory" as follows:

A disposing mind and memory is one able to comprehend, of its own initiative and volition, the essential elements of will-making, property, objects, just claims to consideration, revocation of existing dispositions, and the like; this has been recognized in many cases.

The cases seem to indicate that with regard to testamentary capacity, a solicitor must do more than just take instructions from a client. The solicitor must be satisfied that at a minimum, the will maker knew and understood the testamentary document disposing of his or her assets, the general value and nature of the assets being

¹⁵ *Leger v. Poirier*, [1944] S.C.R. 152 at 161-162, [1944] 3 D.L.R. 1.

disposed of and those persons who should be considered as objects of the testator's bounty.

The standard of review must involve investigation into whether or not the will maker appeared to be more than just lucid and able to answer simple leading questions.

The onus of proof with respect to the issues of execution and testamentary capacity is upon those putting the will forward.

(ii) Undue Influence

Again, the solicitor who draws the will must ensure that the testator is not being taken advantage of by someone and being unduly influenced or coerced to draw the will. For a comprehensive description and definition of the term undue influence see Wingrove v. Wingrove.¹⁶

Undue influence must be more than just simple legitimate persuasion or discussion as it must be "coercion". An interview with the client in private is essential.

Inquiries must be made with the will maker as to the degree of persuasion that may be being placed on him or her by a family member or other person.

¹⁶ Wingrove v. Wingrove (1885), 11 P.D. 81 at 82-83.

The onus of proof with respect to undue influence is on the person who alleges it.¹⁷

(iii) Suspicious Circumstances

The leading case in this area is Vout v. Hay¹⁸.

In Vout v. Hay, the Supreme Court of Canada heard an appeal from the Ontario Court of Appeal with respect to the issue of the validity of a will of an 81 year old man, set aside the Order of the Court of Appeal and restored the Judgment of the trial judge. The executrix and main beneficiary named in the will was a 29 year old woman, who was a friend of the testator for the last few years of his life. The surviving members of the testator's family, who took greatly reduced gifts from those under former wills, challenged the validity of the will.

The will had been prepared by a legal secretary in the office of the 29 year old woman's mother's lawyer and the evidence was that the secretary had received the instructions from the 29 year old woman and a will was prepared pursuant to those instructions.

With respect to the evidence of undue influence, the secretary's evidence was that she read the will to the testator in front of the 29 year old woman and at some

¹⁷ Riach v. Ferris, [1934] S.C.R. 725, [1935] 1 D.L.R. 118; Maw v. Dickey (1974), 6 O.R. (2d) 146, 52 D.L.R. (3d) 178 (Surr.Ct.); Vout v. Hay, [1995] 2 S.C.R. 876, 82 O.A.C. 161, 7 E.T.R. (2d) 209.

¹⁸ Vout v. Hay, Ibid.

point the testator hesitated and then looked quizzically at the woman when the portion relating to the gift to the woman was read. She stated “Yes, that is what we discussed. That’s what you decided.” and he nodded to continue.

The will was found by the trial judge to be a valid will and the Ontario Court of Appeal reversed the decision and restored the decision of the trial judge.

At the Supreme Court of Canada, the issue of suspicious circumstances was dealt with in detail by Mr. Justice Sopinka and an analysis of the legal concept is set out in the decision.¹⁹

In the decision, the Supreme Court of Canada made it clear that where suspicious circumstances are raised, the civil standard of proof on a balance of probability applies. Furthermore, the evidence must be scrutinized in accordance with the gravity of the suspicion. The suspicious circumstances may be raised by circumstances surrounding the preparation of the will, circumstances tending to call into question the capacity of the testator or circumstances tending to show that the free will of the testator was overridden by acts of coercion or fraud.

The issue of suspicious circumstances can arise in relation to the issue of testamentary capacity or undue influence.

¹⁹ S.C.R. 885-891.

Execution of the Will

With respect to the execution of the will or codicil, it must be carried out in accordance with the specific and strict requirements set out in Part I of the Succession Law Reform Act²⁰ (“SLRA”).

Sections 5 and 6 of the SLRA set out provisions relating to wills of members of the Armed Forces on active service and details the specific requirements with respect to holograph wills.

Furthermore, if the position of the signatures themselves is in question, a review of s. 7 SLRA will assist counsel in obtaining probate of a will that on the face of it looks like it may be problematic.

It is a good practice to have the Affidavits of Execution signed at the time that the will is executed as it can be difficult to locate one of the witnesses when it comes time for an Application for Certificate of Appointment of Estate Trustee With a Will.

The onus of proof of due execution lies on those propounding the will.

²⁰ R.S.O. 1990, c.S.26.

It has been the practice of many counsel to initial the bottom right hand margin of all of the pages of the will or codicil except the signature page.

When the will is signed, it should be placed in a fire proof safe location so that it will be easily accessible when the time to obtain probate arrives.

SPECIAL CLAUSES

1. Forfeiting The Right to Contest the Will

Some clients may insist that a clause be set out in the will providing that a beneficiary forfeits his or her rights if they take proceedings to contest the validity of the will.

These clauses are frequently referred to as “in TERROREM” clauses. The enforceability of the clause itself is always a problem; however, it is not in most circumstances illegal or invalid,²¹ which confirms that such clauses are only illegal when they attempt to oust the jurisdiction of the court to determine questions of construction and other such issues.

The following clause probably goes far enough to meet the wishes of most will makers who insist on a clause of this kind:

²¹ see Re Raven, [1915] Ch. 673 and Re Wynn, [1952] Ch. 271.

“I declare that if any beneficiary of this my Will shall, within _____ years after my death without the consent in writing of my Trustees, which Trustees in their discretion may give or withhold, institute any action or proceeding in which the validity of this my Will or any Codicil thereto is sought to be impeached, then, in every such case, such beneficiaries shall absolutely forfeit and loose all interest in any right to any gift to him hereunder or any Codicil hereto and every gift so forfeited shall fall into my residuary estate unless it is a gift of a share of my residuary estate, in which case it shall devolve as though such beneficiary had died at the time such action or proceeding was instituted.”²²

2. Powers of Encroachment

With respect to discretionary powers of encroachment, the leading decision in this area is Gisborne v. Gisborne²³ which outlines the general principles with respect to the exercise of discretion.

When determining to what extent a Court will supervise the discretion of a trustee, consideration must be given as to whether or not the clause conferring such powers was intended to give the trustee uncontrolled or controlled discretion.

The approach in the past has been that the courts will not intervene unless the exercise of discretion was made with mala fides, improper purpose, a failure to

²² Sheard, Hull, Fitzpatrick, Canadian Forms of Wills 4th Edition, Carswell 1982 at p. 119.

²³ Gisborne v. Gisborne, (1877), 2 A.C. 300.

consider all relevant matters, having exercised discretion based on irrelevant considerations or lack of prudence.²⁴

CLAIMS AGAINST THE ASSETS OF THE ESTATE

1. Family Law Act (“FLA”)

Ontario has established and developed a deferred community of property regime in this Act which has a tremendous impact upon surviving spouses and the estates of the deceased spouse. Generally speaking, community of property legislation provides that a spouse should share certain assets equally on divorce or voluntary separation and upon the death of a spouse.

Pursuant to Part I of the Family Law Act²⁵ (“FLA”), the surviving spouse may make a claim against the assets of the deceased spouse’s estate.

A spouse, former spouse or a deceased spouse’s personal representative may apply for equalization of the net family property.²⁶ The application may be made

²⁴ For a full discussion of these issues see Maurice Cullity “Judicial Control of Trustees’ Discretions” (1975), 25 University of Toronto Law Journal 99 and for the recent case law in this area see Fox v. Fox Estate (1994) 5 E.T.R. (2d) 174 (Ont. Gen. Div.), (1996) 10 E.T.R. (2d) 229 (Ont. C.A.), Application for Leave to Appeal to the Supreme Court of Canada submitted September 13, 1996.

²⁵ R.S.O. 1990, c.F.3.

²⁶ Ibid. c.F.3, s. 7(1).

when a spouse dies²⁷ and may not be brought more than six months after the date of death of a party to the marriage.²⁸

Generally speaking, the equalization entitlement for the surviving spouse is based on the spouse whose net family property is the lesser of the two and thereby entitled to an Order to equalize the net family properties by providing for payment of one-half the difference between them.

Typically, when your clients are a married couple, the property of one spouse generally passes on death to the other spouse. However, if your client wishes to do something different to that provision, you must outline to your client the impact of the community of property regime in Ontario as set out in the FLA.

2. Dependants Relief

A solicitor who draws a will for a client should review with him or her the limits on testamentary power and in particular the types of claims that may be made pursuant to the various statutory provisions relating to support of dependants.

In this regard, a careful review of the will maker's current family circumstances must be undertaken to ensure that any such potential claims have been considered at the time of making the will. Such claimants include:

²⁷ Ibid, s. 5(1).

²⁸ Ibid, s. 7(3)(c). Note that the limitation period may be extended in certain circumstances, see s. 2(8).

- the deceased's wife or husband, same-sex partner or common law spouse or husband;
- a brother or sister of the deceased;
- a former wife or husband of the deceased;
- a child or grandchild of the deceased;
- a person treated by the deceased as a child of the family in relation to any marriage of the deceased.

to whom the deceased was or was obliged to provide support for that person.

Part V of the SLRA contains the specific limits on testamentary power that should be reviewed with your client. Essentially, where a deceased has not made adequate provision for the support of his or her dependants, the court may order that such provision be made out of the estate of the deceased.²⁹

The expansive and broad language in s. 58 of the SLRA is important to consider and your client must know that the courts have a wide discretion to order payment out of the estate to dependants.

Consideration must be undertaken with your client to review who could be a dependant of the will maker as set out above.

²⁹ R.S.O. 1990, c.S.26, s. 58(1).

A review of s. 62(1) of the SLRA is useful to determine quantum. This section sets out the considerations that the court will review when determining the amount and duration, if any, of support.

Section 62 provides as follows:

- “62(1) In determining the amount and duration, if any, of support, the court shall consider all the circumstances of the application, including,
- a) the dependent’s current assets and means;
 - b) the assets and means that the dependant is likely to have in the future;
 - c) the dependent’s capacity to contribute to his or her own support;
 - d) the dependent’s age and physical and mental health;
 - e) the dependent’s needs, in determining which the court shall have regard to the dependent’s accustomed standard of living;
 - f) the measures available for the dependant to become able to provide for his or her own support and the length of time and cost involved to enable the dependant to take those measures;
 - g) the proximity and duration of the dependent’s relationship with the deceased;
 - h) the contributions made by the dependant to the deceased’s welfare, including indirect and non-financial contributions’
 - i) the contributions made by the dependant to the acquisition, maintenance and improvement of the deceased’s property or business;
 - j) a contribution by the dependant to the realization of the deceased’s career potential;

-
- k) whether the dependant has a legal obligation to provide support for another person;
 - l) the circumstances of a deceased at the time of death;
 - m) any agreement between the deceased and the dependant;
 - n) any previous distribution or division of property made by the deceased in favour of the dependant by gift or agreement or under court order;
 - o) the claims that any person may have as a dependant;
 - p) if the dependant is a child,
 - (i) the child's aptitude for and reasonable prospects of obtaining an education, and
 - (ii) the child's need for a stable environment;
 - q) if the dependant is a child of the age of sixteen years or more, whether the child has withdrawn from parental control;
 - r) if the dependant is a spouse,
 - (i) a course of conduct by the spouse during the deceased's lifetime that is so unconscionable as to constitute an obvious and gross repudiation of the relationship,
 - (ii) the length of time the spouse cohabited;
 - (iii) the effect on the spouse's earning capacity of the responsibilities assumed during cohabitation;
 - (iv) whether the spouse has undertaken the care of a child who is of the age of eighteen years or over and unable by reason of illness, disability or other cause to withdraw from the charge of his or her parents,
 - (v) whether the spouse has undertaken to assist in the continuation of a program of education for a child eighteen years of age or over who is unable for that reason

- to withdraw from the charge of his or her parents,
- (vi) any housekeeping, childcare, or other domestic service performed by the spouse for the family, as if the spouse had devoted the time spent in performing that service in remunerative employment and had contributed the earnings to the family's support,
 - (vii) the effect on the spouse's earnings and career development of the responsibility of caring for a child,
 - (viii) the desirability of the spouse remaining at home to care for a child; and
- s) any other legal right of the dependant to support, other than out of public money.

(2) In addition to the evidence presented by the parties, the court may direct other evidence to be given as the court considers necessary or proper.

(3) The court may accept such evidence as it considers proper of the deceased's reasons, so far as ascertainable, for making the dispositions in his or her will, or for not making adequate provision for a dependant, as the case may be, including any statement in writing signed by the deceased.

(4) In estimating the weight to be given to a statement referred to in (3), the court shall have regard to all the circumstances from which an inference can reasonably be drawn as to the accuracy of the statement.

It should be noted that while the FLA does not allow for claims to be made by common law spouses, Part V of the SLRA includes the common law spouse in the definition of dependant.

STEPS TO TAKE WHILE THE WILL MAKER IS ALIVE

1. Contracts Not to Contest the Will

In circumstances where those who would be considered to be the likely beneficiaries of an estate know that the will maker has favoured one beneficiary over the other and then changed his or her mind and subsequently changed his or her will, a contract not to contest the will may be considered.

This is of course a unique situation where the solicitor may be approached by the children in a family where it is well known that the father had from time to time favoured one child over the other to the exclusion of the others. It can be useful to try to anticipate such a dispute and to avoid the legal costs of a will challenge by entering into Minutes of Settlement between the beneficiaries that provides for the executor of the father's estate to divide the assets of the estate equally to all of the parties, notwithstanding the terms of the will. It may be useful to add in a provision that deals with any inter vivos gift or gifts to any of the signatories to the agreement within six months of the date of the agreement that those gifts also be redistributed equally amongst the children or brought into hotchpot.

2. Advising Beneficiaries

In circumstances where the will maker clearly wishes to favour one child over the other as a result of that child's dutiful and time consuming work to assist the testator in his or her later years, or for any other reason, it can be helpful, although usually not practical to have the will maker advise the child who is not favoured of his or her decision at the time the will is made.



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Digital Legacies: For Now and Forever

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DIGITAL LEGACIES: FOR NOW AND FOREVER

Digital media has become an important platform for all our communications, whether professional in nature, with, for instance, colleagues and clients, or mainly social, with family and friends. From a business perspective, we have developed webpages, created email accounts, joined professional on-line organizations, and bolstered our internet presence. And the influx of social media cannot be ignored – clearly, it is everywhere. Young and old, we blog, we “tweet”, we sell and purchase almost anything and everything online, and we spend hours checking out Facebook, Flickr and YouTube.

Not surprisingly, therefore, one’s online presence is something that we as estate practitioners are increasingly finding that we need to consider when dealing with clients, both from an advance estate planning and subsequent estate administration perspective.

Digital Assets

For the most part, the three main components of a digital presence are websites, Facebook/LinkedIn accounts and email addresses. Websites tend to be created for business or for recreational reasons, and some can have both economic and sentimental value to the creator. Facebook and LinkedIn accounts can be used for social and professional purposes, to interact, to market and to connect with friends and colleagues. And email addresses, such as Hotmail and Gmail accounts, carry high importance for their owners, given that much communication is done through these mediums. Almost all of our clients have at least one of these. The question that arises then is what is the legal status of these “assets” on death? And how does an executor

deal with the unique legal, practical and administrative issues that arise as a result of one's digital presence and the digital footprint they leave behind? As practitioners, these are questions that we are facing more and more frequently, and the answers to them involve both practical and legal considerations.

The Basics

Almost all forms of digital media require acceptance of terms of use (which are rarely, if ever, read and even less likely to be understood) and a user-generated name and password. Internet banking, PayPal and iTunes accounts, social media platforms, and email accounts all contain confidential personal information and require access to their content in this fashion. Practically speaking, a list of all such media and the associated passwords is a simple first step to managing one's digital identity.

The next issue then is what is to happen to these assets on death? Some are easy to answer, in that their utility "expires" on death: emails and social media accounts no longer need to be accessed. But what about the content of things like webpages and Facebook accounts? Who owns, for instance, the pictures and the text, and what restrictions are faced by personal representatives when trying to access this content after death?

The Law

From a legal perspective, the primary focus is on the areas of copyright, contract and estate law. Copyright, for instance, prevails over the content that has been created on webpages and YouTube videos and protects it on death. Contract law controls the medium that is used to launch the various applications – that is, the licence agreements and terms that are readily accepted with service providers in order to set up the

accounts. And then there is estate law, and the whole question of who has the authority to deal with the digital assets on death, and to what end.

Planning For and Managing a Digital Presence

When we meet with clients who are looking to create estate plans and prepare wills and powers of attorney, exploring their digital presence is becoming as important as determining "who is to get what" in terms of personal property at the end of the day. As practitioners, we are now canvassing the nature and extent of our client's "digital footprint", collecting passwords, discussing where they will be stored, and what will be done with (or who will become beneficiaries of) various digital assets once clients become incapable or die.

We are considering with clients whether they would prefer their attorneys or executors to preserve their internet profiles (by managing and controlling them indefinitely in the future) or perhaps eliminate them altogether. And this, of course, will depend on the particular asset and, in many cases, the rules and regulations of the service provider.

A further consideration, however, is that of jurisdiction and possible conflict of laws issues. Even if we empower attorneys and executors with authority to act in our clients' stead or pursuant to our clients' wishes, we may not be able to control whether that authority is recognized and accepted abroad. In other words, even if an executor were to obtain probate in Canada, there is no guarantee that an internet service provider based in a foreign jurisdiction would recognize the executor's authority to act or direct as he or she sees fit. This remains a struggle for practitioners, one that we cannot easily overcome.

Conclusion

There is no doubt that we have embarked upon a new and exciting adjunct to our traditional estate planning. Digital assets, and the unique complexities that arise in converting them into digital legacies, will undoubtedly continue to evolve with the proliferation of the internet. The sooner we recognize this, and incorporate it into our daily practice, the better.



HULL & HULL LLP
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Estate Planning Questionnaire

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ESTATE PLANNING QUESTIONNAIRE

REFERRING LAWYER: _____ **DATE:** _____

D&L has current Will: Yes No
D&L prepared current Will: Yes No

INFORMATION FOR WILL PREPARATION

1. CORRESPONDENCE TO:

(a) Name: _____

(b) Mailing Address: _____

(c) Phone: Business: _____ Home: _____

Mobile: _____ Fax: _____

(d) E-Mail Address: _____ Send drafts by E-Mail: Yes No

(e) Client Identification Obtained: Yes No Details: _____

(f) Name: _____

(g) Mailing Address: _____

(h) Phone: Business: _____ Home: _____

Mobile: _____ Fax: _____

(i) E-Mail Address: _____ Send drafts by E-Mail: Yes No

(j) Client Identification Obtained: Yes No Details: _____

(k) Copies To: Name: _____

(l) Mailing Address: _____

(m) Phone: Business: _____ Home: _____

Mobile: _____ Fax: _____

(n) E-Mail Address: _____ Send drafts by E-Mail: Yes No

2. GENERAL PERSONAL

	<u>Partner No. 1</u>	<u>Partner No. 2</u>
(a) Names:	_____	_____
(b) Birthplace:	_____	_____
(c) Birth date:	_____	_____
(d) Citizenship:	_____	_____
(e) Registered Indian as defined in the <i>Indian Act</i>	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>
(f) Occupation:	_____	_____
(g) Employer:	_____	_____
(h) Disabilities/Illnesses:	_____	_____
(Medications):	_____	_____
(Physical/Mental):	_____	_____
(i) Continuing in Ontario:	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>

3. MARRIAGES

(a) Marital Status: Single Married Cohabiting Engaged
 Divorced Separated Widowed

(b) **Current Marriage/Common-Law Status:**

(i) When/Where: _____

(ii) Domestic Contract: Yes (Copy required) No

(iii) Separated: Yes Date of Separation: _____

 Separation Agreement
 (or Court Order): Yes (Copy required) No

(c) **Previous Marriage (Partner No. 1):**

(i) To Whom: _____

(ii) When/Where: _____

(iii) Domestic Contract: Yes (Copy required) No

(iv) How Terminated: _____

(v) If divorced, Where: _____

(vi) Financial Rights or Obligations: _____

(d) Previous Marriage (Partner No. 2):

- (i) To Whom: _____
- (ii) When/Where: _____
- (iii) Domestic Contract: Yes (Copy required) No
- (iv) How Terminated: _____
- (v) If divorced, Where: _____
- (vi) Financial Rights or Obligations: _____

4. CHILDREN:

(a) Children of Present Union:

Name	Age	Marital Status	Children (No./Ages)	Dependent	Health	Mun. of Residence

(b) Partner No. 1's Children:

Name	Age	Marital Status	Children (No./Ages)	Dependent	Health	Mun. of Residence

(c) Partner No. 2's Children:

Name	Age	Marital Status	Children (No./Ages)	Dependent	Health	Mun. of Residence

5. OTHER DEPENDANTS:

<u>Partner No. 1</u> Name/Age	<u>Partner No. 2</u> Name/Age

6. RELATIVES OF PARTNER NO. 1:

Name	Relationship	Age	Health	Address	Children (No./Ages)

7. RELATIVES OF PARTNER NO. 2:

Name	Relationship	Age	Health	Address	Children (No./Ages)

8. CURRENT ESTATE PLANNING:

	<u>Partner No. 1</u>	<u>Partner No. 2</u>
(a) Date of Current Will:	_____	_____
(b) Existing PoA (Property):	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>
(c) Existing PAPC:	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>
(d) Existing Living Will:	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>

- | | <u>Partner No. 1</u> | <u>Partner No. 2</u> |
|---|--|--|
| (e) Inter vivos Trusts: | Yes <input type="checkbox"/> (Copy required)
No <input type="checkbox"/> | Yes <input type="checkbox"/> (Copy required)
No <input type="checkbox"/> |
| (f) Acting or appointed executor of another estate/trust: | Yes <input type="checkbox"/> (Details required)
No <input type="checkbox"/> | Yes <input type="checkbox"/> (Details required)
No <input type="checkbox"/> |
| (g) Are there any agreements binding on the Estate: | Yes <input type="checkbox"/> (Details required)
No <input type="checkbox"/> | Yes <input type="checkbox"/> (Details required)
No <input type="checkbox"/> |
| (h) Details of financial planner, investment advisor, accountant and/or life insurance agent: | | |

ASSETS

1. REAL ESTATE:

(a) Properties Owned

	Address	Registered Owner(s) and How Title is Held	Original Cost Base	Gross Market Value	Mortgage Balance	Annual Rent
Primary Residence:						
Other Personal Use Real Estate:						
Investment Real Estate:						

- Have you granted any option to anyone to buy your real estate?:
Yes (Details required) No
- Do you have any options to buy any other real estate?:
Yes (Details required) No

(b) Mortgages Owned

Mortgagee(s)	Amount of Principal Due	Maturity Date

2. NOTES AND ACCOUNTS RECEIVABLE:

Debtor	Individual / Corporation	Present Value
	<input type="checkbox"/> <input type="checkbox"/>	\$
	<input type="checkbox"/> <input type="checkbox"/>	\$
	<input type="checkbox"/> <input type="checkbox"/>	\$

3. CASH:

	Institution	Owner(s)	Value
Bank Account:			\$
Bank Account:			\$
Bank Account:			\$
Bank Account:			\$
Brokerage Account:			\$
Tax Free Savings Account:			\$
Other Cash Assets:			\$

Should joint owner of a bank account inherit the balance on client's death? Yes No

Are Safety Deposit Boxes held at any of the above Institutions? Yes No

Is there a beneficiary designated for the TFSA? Yes (Name of beneficiary _____)
No

4. LIFE INSURANCE AND ANNUITIES:

(a) **Life Insurance**

Policy	Registered Owner	Life Insured	Beneficiaries	Death Benefit
				\$
				\$
				\$

(b) **Retirement Funds**

Type	Issued By	Registered Owner(s)	Beneficiaries	Death Benefit
Registered Pension Plans:				\$
				\$
Registered Retirement Income Funds:				\$
				\$
Registered Retirement Savings Plans:				\$
				\$
Other Annuity Contracts:				\$
				\$

Are any RRSPs locked in? Yes No

(c) **Other Savings Plans**

Type	Issued By	Registered Owner(s)	Beneficiaries	Death Benefit
Registered Education Savings Plans:				\$

Type	Issued By	Registered Owner(s)	Beneficiaries	Death Benefit
				\$
Registered Disability Savings Plans:				\$
				\$

5. INVESTMENTS – HELD IN BROKERAGE ACCOUNTS

Brokerage Firm	Registered Owner(s)	Cost Base of Account	Market Value of Account
			\$
			\$
			\$

6. INVESTMENTS – HELD OUTSIDE OF BROKERAGE ACCOUNTS

(a) Bonds

	Registered Owner	Original Cost	Est. Market Value
			\$
			\$
			\$

(b) Stocks

	Registered Owner	Original Cost	Est. Market Value
			\$
			\$
			\$

7. BUSINESS INTERESTS

(a) Sole Proprietorships

	Estimated Value
	\$

(b) Corporations

	Number and Class of Shares	Percentage of Voting Control	Shareholder's Agreement
			Yes <input type="checkbox"/> (Copy required) No <input type="checkbox"/>
			Yes <input type="checkbox"/> (Copy required) No <input type="checkbox"/>

(c) Partnerships

	Number of Partners	Percentage of Interest	Partnership Agreement
			Yes <input type="checkbox"/> (Copy required) No <input type="checkbox"/>

(d) Unit Trusts

	Number of Units	Percentage of Interest	Subscription Agreement
			Yes <input type="checkbox"/> (Copy required) No <input type="checkbox"/>

8. INTERESTS IN OTHER ESTATES / TRUSTS

Name	Age of Life Tenant	Present Value
		\$
		\$

9. PERSONAL PROPERTY

	Owner	Present Value
Household furniture and personal effects:		\$
Books, paintings, articles of special value:		\$
Automobiles:		\$
Jewellery and furs:		\$
Hobby and Recreational Equipment:		\$
Collections		\$

10. **REWARD POINTS PLANS** (e.g. Airmiles, Aeroplan)

Plan Issuer	Owner	Estimated Value (miles, points, \$)

11. **MEMBERSHIPS**

Description	Owner	Estimated Value \$

12. **DIGITAL ASSETS**

Should Executors Have Access

Facebook:	Yes <input type="checkbox"/>	No <input type="checkbox"/>	Yes <input type="checkbox"/>	No <input type="checkbox"/>
LinkedIn:	Yes <input type="checkbox"/>	No <input type="checkbox"/>	Yes <input type="checkbox"/>	No <input type="checkbox"/>
MySpace:	Yes <input type="checkbox"/>	No <input type="checkbox"/>	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Twitter:	Yes <input type="checkbox"/>	No <input type="checkbox"/>	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Email Accounts:	Yes <input type="checkbox"/>	No <input type="checkbox"/>	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Other:	Yes <input type="checkbox"/>	No <input type="checkbox"/>	Yes <input type="checkbox"/>	No <input type="checkbox"/>

13. **GENETIC ASSETS**

Type of Genetic Material (e.g. Cord blood)	Name and Location of Storage Facility	Special Instructions

14. **GIFTS MADE TO OTHERS**

Date of Gift	Form of Gift	To Whom Made	Value

15. FOREIGN ASSETS

Are any of your assets located outside Ontario? Yes No

Details:

LIABILITES

1. NOTES, LOANS AND AMOUNTS DUE:

(a) Mortgages

Mortgagee	Mortgage Insurance	Interest Rate	Due Date	Balance Outstanding
	Yes <input type="checkbox"/> No <input type="checkbox"/>			\$
	Yes <input type="checkbox"/> No <input type="checkbox"/>			\$

(b) Other Loans

Lender	How Secured	Interest Rate	Due Date	Balance Outstanding
				\$
				\$

(c) Leases

Type of Lease (e.g. car lease)	Lessor	Monthly Payments	End Date
		\$	
		\$	

2. LOANS ON LIFE INSURANCE POLICIES:

	\$
	\$

3. HOUSEHOLD ACCOUNTS PAYABLE:

	\$
	\$

4. INCOME AND INCOME TAX:

Cash or Accrual Basis?: _____

Does Partner File?: Yes No

	Income	Investment	Total Income Tax	Income Arrears	Tax Arrears
(a) Current Year					
Partner No. 1:	\$	\$	\$	\$	\$
Partner No. 2:	\$	\$	\$	\$	\$
(b) Previous Year					
Partner No. 1:	\$	\$	\$	\$	\$
Partner No. 2:	\$	\$	\$	\$	\$

5. CONTINGENT LIABILITIES:

	\$
	\$
	\$

6. DETAILS OF ANY FURTHER INDEBTEDNESS:

	\$
	\$
	\$

WILL INSTRUCTIONS

1. Executors (+ relationship):

Alternate:

Decisions of Executors:

Majority decision binding?: Yes No

Right to veto?: Yes _____ No

2. RRSPs, etc.:

3. Insurance:

4. Household goods:

To surviving spouse?: Yes No

To children?: Yes (in equal shares? Yes No
No

To other?:

How is distribution to be effected:

- In trustees sole discretion: Yes
- As beneficiaries agree: Yes
- By way of non-binding memorandum: Yes

5. Residence:

6. Cash Legacies:

7. Business Interests :

8. Residue:

Outright distribution to partner?: Yes No

Trust for partner?: Yes No

Trusts for children?: Yes (Ages for dist.: _____)

Trusts for grandchildren?: Yes (Ages for dist.: _____)

Other instructions re trusts:

9. Common Disaster:

10. Guardianship of Children:

11. Special Instructions:

POWER OF ATTORNEY INSTRUCTIONS

Continuing Power of Attorney for Property

12. Attorney(s) (+ relationship): _____

Decisions of Attorneys:

Joint - By majority?: Yes No
Joint and several

13. Alternate: _____

Power of Attorney for Personal Care

1. Attorney(s) (+ relationship): _____

Decisions of attorneys:

Joint - By majority?: Yes No
Joint and several

2. Alternate: _____

3. Special Instructions
Regarding Care: _____

Living Will

Special Instructions: _____

