Mutual wills: Solving the lawyer's dilemma

by Debra Rolph

The dilemma

A solicitor prepares mutual wills on behalf of a couple. Later, one of them returns to the solicitor, asking that his or her will be changed without the knowledge of the other spouse. What should the solicitor do? Must the solicitor refuse to act? Or, under what circumstances is the solicitor entitled to act? Even if the solicitor refuses to act, is there still a duty to the "other" spouse to disclose that the solicitor was approached on this subject? Or would doing so be a breach of confidentiality to the spouse who raised the issue?

Rodney Hull, Q.C., addressed these issues in an article prepared in July, 1992, for the Errors & Omissions Bulletin published by the Law Society of Upper Canada and Lawyers' Professional Indemnity Company. It was his position that the preparation of spousal wills constitutes a joint retainer. He suggested that a lawyer should not subsequently prepare a will or codicil for either spouse without disclosure of this request to the other spouse.

In that situation, Hull suggested advising the clients at the outset that if one of them later chooses to change his or her will, and approaches the lawyer to do so, the lawyer will be obliged to inform the other spouse of this intention. If the parties agree, the lawyer may act, and if the parties do not agree, the lawyer should decline to act.

The controversy continued. The Law Society Advisory Services continued to receive queries from practitioners on this subject. The issue was eventually referred to Convocation. A Committee was struck and extensive consultations with the profession took place. Especially contentious was whether the "second" spouse must be informed, even where the solicitor declined a "new" retainer by the "first" spouse to change the terms of the first spouse's will.

The solution

In February, 2005, the following Commentary to rule 2.04(6) was adopted. The Commentary differs slightly from the advice given by Hull, who suggested that the solicitor should have the spouses agree, in advance, that if one spouse should subsequently approach the solicitor to revise the will, the second spouse must be told.

The Commentary sets out that in this circumstance, the "second" spouse or partner should NOT be told, BUT the solicitor cannot accept the "new" retainer UNLESS the "second" spouse or partner consents to the "new" retainer, or is dead, or unless the spousal or partnership relationship is at an end.

The full text of the Commentary is reproduced below:

2.04 (6) Before a lawyer accepts employment from more than one client in a matter or transaction, the lawyer shall advise the clients that:

(a) **Joint Retainer**

the lawyer has been asked to act for both or all of them,

(b) no information received in connection with the matter from one can be treated as confidential so far as any of the others are concerned, and

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

Commentary

Although this subrule does not require that, before accepting a joint retainer, a lawyer advise the client to obtain independent legal advice about the joint retainer, in some cases, especially those in which one of the clients is less sophisticated or more vulnerable than the other, the lawyer should recommend such advice to ensure that the client's consent to the joint retainer is informed, genuine, and uncoerced.

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

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

After advising the spouses or partners in the manner described above, the lawyer should obtain their consent to act in accordance with subrule (8).

[Amended – February, 2005]

Disregarding mutual wills

When considering this Commentary, it is well to remember that the estate of a spouse who made a mutual will, then made a subsequent will inconsistent with it, may be liable to the other spouse's heirs for breach of contract. *Hall V. Mclaughlin Estate*, 2006 Canlii 23932 (On S.C.), [2006] O.J. No. 2848 illustrates this fact.

Emily and John McLaughlin married in 1992. The bride was 80, the groom 78. They had children from former marriages, who, unfortunately, did not get along. Shortly after their wedding, the couple made identical mutual wills. The wills provided that if either spouse died first, the entire estate should go to the other; if both died together, the estate would be divided in half, with one half going to Emily's children, and the other half going to John's children.

Emily began exhibiting signs of Alzheimer's; by 1998, she was totally demented. John made two further wills after Emily lost testamentary capacity. They required that his family renounce any claims to Emily's estate before they were to take under his estate.

Emily died in January 2002. Her estate of $322,017.59 went to John. Before his death in December, he made it clear to several members of Emily's family that they would be taken care of. When John died, his estate was worth $706,291.39. All but $48,074 of that was distributed to his family pursuant to his last will. Emily's family received nothing. Emily's family brought an action against John's estate and family for a declaration that one half of John's estate was to be held in trust for them.

Madam Justice Helen M. Pierce of the Ontario Superior Court of Justice allowed the action. Justice Pierce found that there was clear and satisfactory evidence that Emily and John intended to enter and did enter into a binding agreement that the survivor of them would divide his or her estate into two equal shares to be divided among their surviving families. The wills reflected the best evidence of the formalized agreement between them. John recognized and felt bound, legally and morally, by the agreement.

There were two alternate explanations for his changing his will: 1) he expected to die first and he intended to protect Emily's estate for her children, or 2) he intended to make an *inter vivos* gift to Emily's children after their mother's death.

Unfortunately, John's efforts to identify and protect Emily's estate for her children failed because, at his death, Emily's estate was co-mingled with his. She no longer had an identifiable estate. His intention that his beneficiaries renounce any claims to her estate was therefore defeated.

Once Emily lost her testamentary capacity in 1997, she had performed her part of the bargain with John, as reflected in their 1992 wills. John was legally bound to the agreement they had earlier made, that the survivor would divide his or her estate equally between the two families.

Justice Pierce found that there was an agreement not to revoke the 1992 wills and make new ones. Even John's two subsequent wills referred to Emily's 1992 will, suggesting he felt bound to protect Emily's estate for her children. John was not prohibited from making a new will; he was, however unable to execute a new will that did not adhere to the agreed upon scheme.

The court imposed a constructive trust on one half of the net value of the John's estate for the benefit of Emily's children. Because all but $48,074 of the estate had been disbursed, there was an order for the tracing of the estate proceeds. An injunction was granted preventing John's family and estate from dissipating any assets attributable to the estate.

The judgment did not say whether the same lawyer prepared the 1992 wills, and John's subsequent wills as well. Nor was there any hint as to what advice or warnings John was given concerning the subsequent wills.

The new Commentary to rule 2.04(6), and the *Hall v. McLaughlin* case, gives solicitors both guidance and warning when approached to prepare mutual wills, or to make a subsequent will inconsistent with the mutual wills.

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