

## Don't Miss Family Law Issues When Drafting Wills!

We at LAWPRO have occasionally cautioned lawyers who specialize in one area of law about the dangers of dabbling in another, unfamiliar area. As a refreshing twist on that general advice, we're reminding lawyers that while dabbling can be dangerous, KNOWING the law in another area is never a bad idea. When it comes to the intersection between wills and family law, it is essential that wills and estates practitioners maintain a basic working familiarity with family law issues so that certain drafting pitfalls can be avoided.

From a family law perspective, the greatest potential risk for a will-drafting lawyer lies in overlooking a limitation – arising under the family law - on the testator's freedom to dispose of property. Those limitations tend to fall into two categories:

### **1. Matrimonial home**

Under Ontario family law, a spouse is not entitled to dispose of a matrimonial home without the consent of the other, regardless of who has formal title to the property. As a result, a lawyer drafting a will who is asked to make a bequest of a property should take steps to determine whether the house is a matrimonial home.

Both spouses need not be living in the home for the property to be a matrimonial home, especially if the spouses have recently separated. For that reason, asking the testator about who lives in the home will not satisfy the lawyer's duty.

A matrimonial home need not be a house in the traditional sense of the word — it could easily be a condominium, a cottage, a ski lodge, or even a time share property. Be careful not to make arrangements for the disposition of a home where the testator does not have full rights of disposition!

### **2. Support obligations**

The second potential limitation on a testamentary freedom comes in the form of support obligations. The testator may be required, by court order or under a domestic contract, to pay support to a dependent ex-spouse or child. Don't automatically assume that an elderly testator is free of such obligations without asking appropriate questions. For example, a testator may have a permanent obligation to support a disabled adult child. Ensure that if the terms of the court order or contract require it, sufficient provision is made in the will for the making of support payments after the testator's death.

### **3. Dependants' relief claims**

A testator's duty to support dependants need not be expressed in a court order or a domestic contract to be operative. If, at the time of his or her death, the testator was providing financial support to a dependant, and that dependant is not adequately provided for in the testator's will, the dependant may make a claim against the estate under a

dependants' relief provision (in Ontario, these are found in the *Succession Law Reform Act*). Crafting a will that is rendered invalid by these kinds of claims can lead to a claim against the will-drafting lawyer.

Most wills and estates lawyers are careful to ask testators if they have a spouse or children who have been left out of the will. However, a lawyer may not think to dig a little deeper and to ask the testator if there are individuals OTHER than biological children who may be dependants. For example, the testator may, at the time the will is drafted, be living with a partner who has a child still at home. While the testator may not consider that individual to be his or her child, the individual may well qualify as a dependant under the *Succession Law Reform Act*.

#### **4. Beneficiaries under insurance policies and other investments**

Though it's not exactly a family law issue, it is important for will-drafting lawyers to confirm the identity of beneficiaries under insurance policies and similar investments, especially where the proceeds of these policies are expected to fund bequests made under the will.

In some cases, estates have run into trouble where the drafting lawyer wrongly assumed or was told that the estate was the beneficiary of a policy, later to discover that the beneficiary is actually a named individual. In an additional wrinkle, the testator may believe that his or her current spouse is the beneficiary, when actually, the policy was not amended after the testator's marital status changed, and a former spouse is still the beneficiary.

Good wills practice requires that, where at all possible, the will-drafting lawyer review any insurance policies personally, keeping a copy on file.

#### **5. Marriage revokes a prior will... but divorce doesn't!**

One point that is generally known to lawyers but not necessarily to their clients is that a testator's marriage revokes any will created prior to the marriage, but divorce does not have the same effect, i.e., a will drafted after marriage remains in effect despite the testator's divorce. This rule is likely more relevant to family lawyers (who should advise their divorcing clients of the advisability of preparing a new will) than it is to wills and estates lawyers. But where a wills and estates lawyer happens to be aware of a client's divorce (for example, if a member of the same firm is representing the client in the family matter), it would be prudent (and good for business development!) to send the client a note advising of the operation of this rule.

#### **6. Multiple spouses**

Finally, there is the question of who, exactly, the testator means when he or she mentions a spouse. It is not uncommon for a person to refer to a long-term partner as "my husband" or "my wife" when in fact the parties are not legally married.

If a testator makes a bequest to “my wife, Serena Gonsalves” and it later turns out that Serena Gonsalves is the testator’s partner but not his wife, the error will often be easily overcome; however, consider the following scenario:

Testator was married in 1966 to Hannah Parker. The parties separated in 1988 after raising three children together. They were never legally divorced. Upon separation, testator and Hannah Parker sold their matrimonial home and each bought separate residences. However, the testator allowed Hannah Parker to continue using the cottage (which the testator inherited from his parents and to which he holds the title) for a holiday with the children every August.

In 1991, testator’s partner Serena Gonsalves moved in with him and they shared a condominium in the city. They spent most of every summer at the family cottage. They were never married.

In his will, testator leaves the condominium to “my wife, Serena Gonsalves”. He leaves the cottage to his children, with a gift over, should they predecease him, “to my wife”.

If the children predecease the testator, who gets the cottage, Hannah Parker or Serena Gonsalves?

As this example illustrates, it is essential, in wills drafting, to have a clear understanding of the testator’s family history, his or her relationships of dependence, and of the effect of any family law court orders or domestic contracts that may limit the testator’s freedom to dispose of assets under a will.

It is good practice, for wills and estates lawyers, not only to develop a questionnaire that addresses all of these issues, but also to document the testator’s answers to the questionnaire.

Finally, where there are court orders or domestic contracts that might affect the will, the will-drafting lawyer should ask to review these and should place a copy in the file. The lawyer should also ask to review any insurance policies on which the testator is relying in making bequests so that the lawyer can confirm his or her understanding of who the beneficiaries are under these policies.