

Mutual Wills

Hull on Estates Podcast #60

Posted on May 22nd, 2007

Sean Graham: Hello and welcome to Hull on Estates. You're listening to Episode #60 of our podcast on Tuesday May 22nd, 2007.

Welcome to Hull on Estates, a series of podcasts for the Canadian legal community dealing with issues and insights surrounding estate planning in Canada. Hosted by the lawyers of Hull & Hull, the podcast will touch on some key considerations when planning estates and Wills. Now, here are today's hosts.

Sean Graham: Hi Paul, how are you?

Paul Trudelle: Good Sean, how are you today?

Sean Graham: Pretty good, thanks.

Paul Trudelle: Today I guess we can say the feeling is mutual, because we thought we would talk about Mutual Wills.

Sean Graham: And that will be the last pun, (Laughter) at least from me. Yeah, and it's an interesting topic, for sure. And I guess one way to start off would be a very common phenomenon of Mirror Wills.

Paul Trudelle: The Mirror Wills, I guess, is the norm where there's a husband/wife or spouses together. Normally the spouses will make what we call Mirror Wills, where the Wills are essentially identical, and often identical. One spouse will give his or her estate to the other spouse, to the surviving spouse. Failing that, the estate will pass to his or her children. And we see that normally. Often that would involve a gift of a life interest to the surviving spouse, rather than an outright gift. And that would be the norm, and that would be your Mirror Will.

Sean Graham: Yeah, and I've found that in my practice at least, you run into that situation with, generally with first marriages. And the couple have children. Often with younger marriages, when the assets are not, not as substantial as they'll be later in life, often it's an outright gift to the spouse. And then as the couple builds up assets and moves into sort of middle age, often then you'll have the spousal trust with income and encroachments on capital, to be paid to the surviving spouse. And then the children, on the death of the surviving spouse, take the remaining capital.

Paul Trudelle: That's right. Now with respect to Mirror Wills, the doctrine of testamentary freedom remains. And for the most part, either spouse is able to revise their estate plan, or make other dispositions of their estate at any time, either before or after the death of their spouse. So if they receive all of the assets from their spouse after his or her

death, they can then distribute those according to their own estate plan at any time later in the day.

Sean Graham: And Mutual Wills is often deceptively similar to Mirror Wills, with the important difference that it involves a binding agreement between the two testators not to change their Wills.

Paul Trudelle: That's right. And it's that notion of the binding agreement that makes the Mirror Wills, Mutual Wills and the doctrines that we're going to, and the rules and principles, that we're going to discuss that follow from the fact that there are Mutual Wills with this key agreement followed from that.

Sean Graham: And so, just to go back to first principles. Essentially, Mutual Wills are bolstered or reflect a contract. And just from first year law school, for a contract to be binding, you need an offer, acceptance and consideration. So the offer is, I will put my Will in this form if you do the same. The acceptance would be, I agree to do that. And then the consideration is actually following through and signing those Mutual Wills. That gives you a binding contract not to change those Wills, provided there's sufficient evidence to prove that the intent was to have that binding contract.

Paul Trudelle: And that's one of the bigger issues with respect to proving a Mutual Will is the evidence of that key agreement not to change the Wills at a later time. Perhaps we can spend a moment or two talking about examples of where we would see a Mutual Will.

Sean Graham: Well one that I've run into from time to time is second marriages, where both couples enter into the second marriage, often bringing children from a first marriage or from a prior relationship. And they want to be clear, each wants to benefit the second husband or wife, but they're not necessarily so keen on watching their estate go to the children after the fact. And often, that's out of the desire to help their own children from the first marriage. They want to make sure that once their spouse is taken care of and his or her life ends, that the remainder of the money does not go to that spouse's children, but rather reverts to ones' own children. And that's a common scenario where Mutual Wills can be effective.

Paul Trudelle: Right. And that scenario would be, in effect, I'll agree to give you my estate if I predecease, on the condition that when you die, it's going to go to, part of that will go back to my children. The intent isn't to give all of the estate over to the second spouse so that she can deal with it freely and dispose of it upon her death. In a sense, it's a life interest, in that she's able to use those assets freely during her lifetime. The agreement is that she'll benefit the predeceased spouse's children.

Another scenario that we see is where there's a husband and wife. They want to benefit each other. They agree that they'll give each other their estate, should they predecease, on the condition that, when that second spouse dies, the property will go to their mutual children. So the scenario is that I'll give you my estate on the understanding that when

you die, it's going to go to our children and it's not going to go to a second spouse, children that you may have in a later relationship.

Sean Graham: Yeah, and that's also fairly common where, say both spouses bring in two children into the relationship. And the second marriage lasts for, you know, decades. Then by the time that has elapsed, often the step-children are, you know, fairly close, sometimes closer than the first children. And there's no real reason to have that stark division and make sure that everything remaining on the second spouse's death comes back to the first spouse's children.

Paul Trudelle: That's right. So in order to give effect to that type of an agreement or that arrangement, the parties should turn their minds to whether to enter into an agreement that the Wills won't be revoked at a later date after the first spouse dies. And I think that agreement should be manifest, perhaps both in the Will and in a separate agreement which attaches the Wills, saying that we've entered into these Wills and we're agreeing that it's not to be changed after the death of the first. So in effect, the testamentary freedom that the parties would otherwise have is reined in by mutual agreement.

Sean Graham: And do you find, Paul that one good form of evidence of the intention to have Mutual Wills, a binding contract, might be a pre-nuptial or a domestic contract? Would that help, or are there other forms of evidence that you would prefer?

Paul Trudelle: Well I think the court struggles to find evidence of that agreement. And if there is that evidence set out in a pre-nuptial agreement. That would be very helpful. A specific agreement relating to the Wills would be very helpful. Short of a written agreement between the parties, the evidence of the solicitor with respect to the intention of the parties would be helpful. In proving the existence of that important agreement not to change Wills would be helpful. I think it's important for the solicitor to raise the question of the intention of the parties when drafting a Will, and specifically discuss with the parties whether these are to be Mirror Wills with either party being able to change it after the death of the first, or whether they're in fact to be Mutual Wills. And if that issue is raised and discussed, then the lawyer can put into effect the documents necessary to evidence such an agreement.

Sean Graham: And I think that one very helpful document later on is going to be a reporting letter after the fact, stating that all of that has been done and confirming the reasons and so forth. Because that, as always, in any case, is going to protect the solicitor after the fact if the Mutual Will contract is drawn into question. And the inevitable complaint that the lawyer didn't adequately document the intention of the parties can be laid to rest quickly, with any luck.

Paul Trudelle: I think that's very important in order to defend a lawyer against a claim from a disappointed beneficiary who later says that, you know, Dad wanted to give assets to Mom and to make sure that they come to me when she passes away. And I think that that sort of documentation must be provided, or in the records of the solicitor. And the

solicitor should turn his or her mind to making sure that the actual intentions of the parties is reflected in the Wills and in extra agreements as well.

Sean Graham: Paul, have you run into any situations where you find that the Mutual Will agreement has some drawbacks?

Paul Trudelle: I think there, well there are drawbacks in that it limits the testamentary freedoms of the parties. If I enter into a Mutual Will saying that my assets are going to go to my spouse and then to our children if she passes away, I'm limited as to what I can do with my assets after that. And I must, I can't rescile from that agreement. That limits what I can do with respect to, you know, subsequent arrangements. I can't then give my estate to anyone else. I can't benefit other parties that may, that I may want to benefit at a later time.

Sean Graham: And the other concept that I find a bit of a drawback is actually after the first death. It is very difficult for the parties to comprehend the scope of possible circumstances that might make the binding agreement infeasible to the surviving spouse. One example would be extraordinary medical expenses. Finding out that one of the children has a disability and requires more help. Once that agreement is put in place, it seems to me that you really do lose a lot of flexibility after the death of the first testator. And that might not have been the intent, had the person known. And there's no way to know. But had the person known certain circumstances that would arise.

Paul Trudelle: Right. And I think that that becomes a real concern for parties who may be bound by a Mutual Will. If an estate goes to a surviving spouse with the agreement that it's going to pass on to, you know, children A and B of the relationship, can the spouse go out and spend that money? If there's a cottage involved, can she sell the cottage if she needs the money? - probably so, if she needs the money. Can she sell the cottage if she doesn't need the money but she just doesn't want the burden of a cottage anymore? Can she gift the property away during her lifetime? There's a number of issues that arise and that should be addressed when the Will is prepared and the Mutual Will agreement is entered into.

Sean Graham: The court may be somewhat flexible in those types of extreme circumstances where things arise that the two testators could not possibly have predicted or known about. And sometimes the courts will allow for a qualified departure from the Mutual Will contract in those types of cases.

Paul Trudelle: Now perhaps we can address what does a beneficiary of an estate do if he feels that there is a Mutual Will and that the surviving spouse has breached that in some way by disposing of property or by making a disposition in their own Will that is contrary to that Mutual Will?

Sean Graham: My first instinct would be to apply to the court for advice, interpretation and directions as to whether there was a contract, and would present all the evidence that

can be found. Or get an order that the beneficiary be entitled to go out and find that evidence and compel lawyers to produce it and so forth, that would be my starting point.

Paul Trudelle: Right. And I think the claim would be that the beneficiary who received the property under the new Will holds that in trust and must honour the prior Mutual Will.

Sean Graham: Again it, as with many estate litigation cases, when you're retrospectively trying to find out what the intention was of somebody who is no longer there to tell you, you can run into some serious evidentiary roadblocks. And it is virtually inevitable if the matter is contested that you're going to end up in a trial I think, because you're going to have two different versions as to what the facts were. And the only way the court is generally going to deal with that is to put the people on the witness stand and decide which is more likely to be telling the truth and which is more likely to be shading the truth or outright lying.

Paul Trudelle: That's right. And the court there in that sort of a trial is struggling to find whether there was that agreement or not. If there was clear, written documentation, then that would obviously help and probably avoid the trial. The matters that do go to trial are cases where there is no such written agreement and it's just the intention of the parties, discussions that they had with their solicitor or with children, other parties, as to what the agreement was.

Sean Graham: Well I hope that's helpful. And I think that these cases are going to continue to come forward as there are a lot of second marriage situations that that continues to take place. And I imagine that these arrangements are going to be litigated increasingly in the future. And I guess we'll see.

Paul Trudelle: Thank you very much, Sean.

Sean Graham: Thanks Paul.

This has been Hull on Estates with the lawyers of Hull & Hull. The podcast you have been listening to has been provided as an information service. It is a summary of current legal issues in estates and estate planning. It is not legal advice and you are reminded to always talk with a legal professional regarding your specific circumstances.

To listen to other podcasts, or to leave a question or comment, please visit our website at www.hullandhull.com.

Our theme music is Upper Structure by DJ AKid and is courtesy of the Podsafe Music Network.

/mem