Are Mutual Wills a Viable Option

to Estate Planning for Blended Families?

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In the not-so-distant past, a 30- to 50- year relationship was considered long term. Today, a relationship of 10 to 20 years qualifies for this increasingly rare label. As the average term of relationships shortens, second and third relationships and "blended families"[1] are becoming increasingly commonplace.[2] As a result, an increasing incidence of challenges to wills/estates involve blended families.

Blended families create unique considerations for estate planning. When repartnered spouses enter a new relationship bringing with them children (minor or adult) and a measure of wealth from former relationships, there are additional demands placed on the wills of both spouses in the new relationship. Repartnered spouses face special challenges as they seek to balance competing interests: financially supporting their new spouse after their death, and also providing a share of the wealth from their estate for their biological children.

Further compounding the matter is the role that interpersonal dynamics play in blended family situations and estate planning, especially when these change upon the incapacity or death of one of the spouses. Even when harmony has prevailed during life, the event of death

[1] "Blended families" are defined as marriages or interdependent partnerships in which one or both spouses/partners have children from a previous marriage or relationship.

[2] For this paper, "spouse" refers to either a married or adult interdependent partner (formerly referred to as a common-law partner) in a relationship.

or incapacity can bring competing interests to the foreground—and to the court system. Disputes between a surviving spouse and his/her stepchildren regarding the interpretation of estate planning documents are well represented in court cases.

Legislative Considerations for Blended Families

The *Dependants Relief Act,* R.S.A. 2000, c. D—10.5, was enacted to remedy situations in which a deceased did not provide proper maintenance and support for their dependants in their will.[3] But the requirements of the Act make it challenging for a repartnered spouse to provide, in a will, financial support for a new spouse and an estate for the biological children from the prior relationship at the same time. While requiring the testator to provide "proper maintenance and support", the Act does not specifically define what that is. What a testator determined as adequate maintenance and support when they prepared their will may not be considered adequate at the time of the testator's death. Circumstances of dependency also can change over time: a decline in the health of a spouse or an increase of interdependence between spouses over the course of the relationship could also increase the need for maintenance and support.

A common way to provide proper maintenance to a spouse in a will is to provide them with all, or substantially all, of the estate. In the blended family, the risk to the testator is whether their surviving spouse will follow the deceased's expectation on the estate division

[3] *Dependants Relief Act,* R.S.A. 2000, c. D—10.5, section 3(1). The category of dependants includes a spouse (by marriage or adult interdependent relationship) and children (of any age, financially dependent upon their parent(s) due to age or disability).[3] The term "spouse" could include a former spouse, in the case where a former spouse had a legal entitlement to support that arose due to the breakdown of the relationship and that entitlement was not addressed by court order, judgement, or agreement between the parties.

upon that spouse's eventual death, or whether he/she will change their will to leave out the deceased's children.

The *Wills Act*, R.S.A. 2000, c. W—12, was enacted to provide similar rights to a new spouse as those granted to a spouse under intestacy legislation:[4] it provides for revoking of a will by operation of marriage or entry into an adult interdependent partner agreement.[5] The *Wills Act* may impact estate planning for the blended family in the case where the surviving spouse enters a subsequent relationship (i.e. third marriage). A testator's expectation that the surviving spouse will follow the expectation to benefit the testator's children could be defeated (intentionally or unintentionally) by a subsequent marriage or signed partner agreement by the surviving spouse.

The potential usefulness of mutual wills in the blended family situation lies in the greater certainty of intention they provide as to how assets are to be administered upon the death of the first and last spouses, which may protect the estate against unnecessary legal action. Mutual wills provide a mechanism to address the competing goals of supporting a surviving spouse after the testators' death, and providing an inheritance to the testator's children upon the death of the surviving spouse. Mutual wills also limit the application of the *Dependant's Relief Act*. By providing to the surviving spouse the majority of the estate from the testator, adequate spousal maintenance and support is achieved. The mutual will also limits the applicability of sections 17 and 17.1 of the *Wills Act* by providing additional rights (through certainty of intention) to the child beneficiaries.

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[4] *Intestate Succession Act* R.S.A. 2000 c. I—10

[5] *Wills Act*, R.S.A. 2000, c. W—12 sections 17 and 17.1

The Characteristics of Mutual Wills

Mutual wills are not defined by legislation. Instead, case law has developed various characteristics that, if present, can support a finding of mutual wills. Not all the characteristics are necessarily required to be present for a finding of mutual wills; however, the more characteristics that are present, the greater the likelihood that the wills will be found to be mutual wills. The courts have found mutual wills to be present when the following criteria are met:

- There is an agreement between the spouses:
    - To pool their property and income for their joint benefit during their lives, and to provide these pooled assets to the surviving spouse (or the last to die [LTD] spouse) upon the death of the first to die [FTD] spouse;[6]
    - To divide the remaining assets, upon the death of the LTD spouse, among a set of residual beneficiaries as per an agreed-upon scheme[7] (for example, 50% of the estate paid to the FTD spouse's children and 50% paid to the LTD spouse's children)[8];
    - To not revoke or change their will after the death or mental incapacity of the other.
- The intent of this agreement is set out in the body of the mutual wills; and/or;

[6] Widdifield on Executors and Trustees, 6th Ed. Referencing *Doherty v. Berry Estate* [1999] Carswell Alta 1047 and Thomas G. Feeney, *The Canadian Law of Wills*, 3rd Ed. (Toronto and Vancouver: Butterworths, 1987)

[7] Widdifield on Executors and Trustees, 6th Ed. Referencing *Doherty v. Berry Estate* [1999] Carswell Alta 1047 and Thomas G. Feeney, *The Canadian Law of Wills*, 3rd Ed. (Toronto and Vancouver: Butterworths, 1987)

[8] Widdifield on Executors and Trustees, 6th Ed. Referencing *Doherty v. Berry Estate* [1999] Carswell Alta 1047 and Thomas G. Feeney, *The Canadian Law of Wills*, 3rd Ed. (Toronto and Vancouver: Butterworths, 1987)

- The intent of this agreement is verified by a collateral agreement (such as a contract, or separate agreement) or by outside documents and sources.[9]
- The LTD spouse, upon taking the benefit of the assets through will or the benefit of jointly owned assets by the right of survivorship, has in effect a life estate in the assets, and cannot dissipate the assets during their lifetime as a means of thwarting the mutual will (for example, the LTD spouse making a preference towards his/her biological children at the expense of the FTD spouses' children) .[10]

Many couples, including those in blended family situations, have joint (or mirror) wills. The joint will can provide for a similar scheme of estate distribution in a blended family situation. What differentiates a mutual will from a joint (or mirror) will is the intention of the spouses to make the wills irrevocable upon the death or incapacity of the FTD spouse.

Applying the Mutual Will to the Blended Family

In the context of estate planning for blended families, there are two situations in which the mutual will can be a useful tool.

Scenario 1: Entering the second relationship

[9] Estates&Trusts Selected CED Titles Executors and Administrators (Western) Referencing *Heys Estate*, [1914] P. 192

[10] Widdifield on Executors and Trustees, 6th Ed. Referencing *Doherty v. Berry Estate* [1999] Carswell Alta 1047 and Thomas G. Feeney, *The Canadian Law of Wills*, 3rd Ed. (Toronto and Vancouver: Butterworths, 1987) and *Shewchuk v. Petreau* (1999), 27 ETR (2d)143.

In this scenario, both spouses are entering the new relationship with an asset base and children from their first relationships. The general scheme in this scenario is that upon the death of the FTD spouse, the LTD spouse receives the assets (from both inside and outside of the estate) to use and rely on during their lifetime. Upon the LTD spouse's death, the assets remaining are then distributed in accordance with an agreed-upon scheme. In many cases the scheme will include an equal distribution between the children of both spouses.

When one of the spouses in the blended family relationship has significantly more assets than the other, the scheme of estate division could favour the children of the well-to-do spouse.

The importance of pre-nuptial agreements or co-habitation agreements cannot be overstated when entering a blended family arrangement as the financial obligations imposed on a spouse when there is breakdown of the blended family, may drain the asset pool that a spouse intended to leave their children in their will[11].

Scenario 2: Exiting the first relationship

In this scenario, the spouses who are ending their first relationship have amassed assets together. They also have adult children and share a common interest to benefit their children, but recognize the possibility that either one or both of the spouses may repartner in the future.

[11]Assets brought into a relationship and subsequently co-mingled (for example, pooling funds into a joint bank account) or transferred into joint ownership (such as a house previously owned by one of the spouses) can lose exempt status and be divided upon the breakdown of the relationship. Spousal support obligations may also arise upon the breakdown of a relationship.

The spouses have a common interest in protecting a portion of their wealth from the future claim of new spouses.

Typically, each spouse would designate a fixed amount of their estate for the benefit of their children. Upon the death of the FTD spouse, an intervivos trust created in the will for the benefit of the children would be set up. Upon the death of the LTD spouse, the same fixed amount would be paid into the trust that was created in the will of the FTD spouse.[12] The benefit of this arrangement is that it allows the spouses to provide for their joint children together, while also enabling them to move forward and include a portion of their assets in their estate plan with a new spouse.

The use of mutual wills in Scenario 2 assumes that the separating spouses require the use of their assets during their lifetime. If the spouses can live without use or access to the amount they would pay into the intervivos trust, a family trust arrangement might be a viable alternative.

It is important to understand that in Scenario 2, the mutual will forms part of the Separation Agreement or Divorce and Property Agreement between the parting spouses. For this reason, all the documents pertaining to the separation and divorce must dovetail together.

<u>Two [Alberta] Cases of Mutual Wills</u>

Two important cases in Alberta that address the court's acceptance of mutual wills are *Doherty v. Berry Estate* [1999] Carswell Alta 1047, and *Powell v. Glover* [2008] Carswell Alta

[12] The spouses could consider using a percentage of their respective estates to fund the intervivos trust; however that might create an imbalance in the case where one parent is a saver and the other a spender.

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Doherty v. Berry Estate involved a second marriage situation with the husband having five children from his previous marriage and the wife having two from her previous marriage. Each spouse had a will that made provision for all children from both first marriages. The husband's will gave half of his estate to his wife and assigned the other half to be divided equally among all seven children. The wife's will left everything to the husband; in the event that he predeceased her, then her estate was to be divided equally among the seven children. The husband developed cancer, which resulted in him changing his will to name his wife as the beneficiary of the residue of his estate "for her own use absolutely."[13] Shortly after, the husband predeceased his wife. His children contested the administration of the revised will on the basis that the original wills were mutual wills.

The evidence presented at trial included the viva voce testimony of the drafting lawyer, Minsos. During examination, Minsos acknowledged that "his understanding of the legal effect of the mutual wills was to some extent erroneous," but said that he did explain the concept to the wife. However, the testimony of the wife was contrary to the evidence given by Minsos. She advised the Court that Minsos did not explain the concept of mutual wills to her or her husband. The court accepted the testimony of the wife over that of the lawyer.

In his review of the characteristics indicative of mutual wills,[14,15] Justice Hembroff determined that the wills prepared by the husband and wife lacked both the intention required of mutual wills and also the collateral agreement or evidence to support the intention.

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[13] *Doherty v. Berry Estate* [1999] Carswell Alta 1047 at paragraph 11

[14] Thomas G. Feeney, *The Canadian Law of Wills*, 3rd Ed. (Toronto and Vancouver: Butterworths, 1987)

The use of a collateral agreement or contract that confirms the intention of the spouses not to change their will upon the death or incapacity of the FTD spouse provides contractual rights to the children of the FTD spouse to uphold the terms of the mutual wills.

The case of *Powell v. Glover* involved a third marriage situation, with the husband having three children from his first marriage and two from his second marriage, and the wife having two children from her first marriage. Both wills contained the same clause dealing with the residue of the estate upon the death of the last surviving spouse.[16] Upon the death of the husband, however, the wife took the position that she was free to rescind the gift of the residue to the husband's children, as stipulated in the will, and claimed that she was not bound by a mutual agreement not to do so.

However, when the husband's children challenged the wife's stance, Justice Kent reviewed the wording of the wills and determined the wording was sufficient to consider the wills were mutual wills. The key points of Justice Kent's decision are summarized below: There

can be sufficient wording in the wills themselves, without collateral documentation of the intention of mutual wills, to find that wills are mutual wills.

- It would be a fraud if the LTD spouse could amend their will in the face of an equitable obligation to honour a mutual will, even if jointly owned assets passed to

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[15] D. W. M. Waters, *Law of Trusts in Canada,* 2nd Ed. (Toronto: Carswell, 1984).

[16] *Powell v. Glover* [2008] Carswell Alta 1161 at paragraph 2 …" in consideration of our agreement that each of us has an equitable interest in the estate of the other; and that accordingly, our respective Wills shall not hereafter be revoked or altered either during our joint lives or by the survivor of us after the death of one of us. Now relying on such an agreement, I give, devise and bequeath all my property of every nature and kind and wheresoever situate, including any property over which I may have a general power of appointment, to my said trustee upon the following trusts...."

the LTD spouse by right of survivorship and not through the administration of the will.[17]

- The elements of a (constructive) trust had been met, and the judge imposed a constructive trust upon the LTD spouse on the assets received following the death of the FTD spouse, for the benefit of the residual beneficiaries.[18]
- The trust allows the LTD to use and dispose of property so long as the intention of such use and disposition is not to defeat the trust[19].
- The LTD spouse is also required to account to the contingent beneficiaries of the mutual wills the particulars of the marital assets at the time of death of the FTD spouse.[20]

I interpret the decision to mean that where the intention on the face of the wills is that they are mutual, the court was willing to invoke the doctrine of constructive trust in order to give effect to the rights of the residual beneficiaries (children of the FTD spouse) in the case where a collateral agreement was lacking to give the residual beneficiaries rights by way of contract.

Challenging the Mutual Will: The Evidence Required

As these cases illustrate, challenges to mutual wills can arise from a variety of parties or interests:

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[17] *Powell v. Glover* (2008) Carswell Alta. 1161 at paragraphs [17] and [18] citing Dufour v. Pereira (1769) 21 E.R. 332

[18] *Powell v. Glover* (2008) Carswell Alta. 1161 at paragraph [18].

[19] *Powell v. Glover* (2008) Carswell Alta. 1161 at paragraph [20].

[20] *Powell v. Glover* (2008) Carswell Alta. 1161 at paragraph [26].

1) child beneficiaries seeking to enforce the provisions of a mutual will;
2) child beneficiaries seeking a declaration that joint wills are in fact mutual wills;
3) a LTD spouse declaring that there was no intention by the spouses for their wills to be considered mutual in nature.

The remedies available to parties wishing to challenge the will are provided by the *Administration of Estates Act* [21]and the *Surrogate Court Rules*.[22] Applicants have the onus of leading evidence to prove their case. About the forms of evidence presented, Justice Hembroff in *Doherty v. Berry Estate* provided his opinion that he would not accept hearsay evidence.[23] The wording of his comments indicates to me that they would be obiter in nature.

Against the backdrop of Justice Hembroff's comments, the *Wills and Estates Succession Act*, which is set to be pronounced January 1, 2012, will change the rules governing evidence in estate matters. The bulletin provided by the Alberta government states that:

• A new rule that allows the admission of extrinsic evidence. In interpreting a will, the court may admit corroborated outside evidence including evidence to help prove the testator's intention (s. 26). The Alberta Evidence Act requires corroboration (s. 3(3)).

• In sections relating to wills interpretation, the Act uses the term "Unless the Court, in interpreting a will finds that the testator had a contrary intention" as opposed to "unless a contrary intention appears in the will." This is to complement the new rule allowing outside evidence.

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[21] *Administration of Estates Act* R.S.A. 2000, c. A--2

[22] *Surrogate Rules*, Alta. Reg. 130/1995 (Judicature Act)

[23] *Doherty v. Berry Estate* [1999] Carswell Alta 1047 at paragraph 33

This broadening of the use of outside evidence may make it easier in certain circumstances to prove the intention (or lack of intention) to create mutual wills. It could also result in an increase of litigation to address the issue of intention.

Practice Considerations

The obligation to advise clients on the applicability of mutual wills cannot be overlooked in a blended family situation. As evident from the *Doherty v. Berry Estate* case, the lawyer's instructions and credibility can be front and center in an estate litigation matter. The lawyer's goal in estate planning is twofold: to prepare the documents that will give effect to the clients' goals and objectives, and to minimize legal challenges to the documents when they come into effect. When clients instruct the lawyer on the use of mutual wills, documenting is crucial. The documenting starts with the lawyer detailing their file notes and communications with clients on the use of mutual wills; it continues with the lawyer including the explicit intention in the mutual wills and in the corroborating agreement that both spouses sign in the presence of independent legal counsel.

In my own experience with clients who decide against the use of mutual wills, the reasons run the gamut from higher cost (in particular, the cost of independent legal advice) to the expectation of vulnerability to a wish to convey trust in their new spouse to do the right thing. How does a lawyer address the client whose interests might be best served by mutual wills but does not want them? Again, as seen in the *Doherty v. Berry Estate* case, beneficiaries may later raise the challenge that a joint will was mutual even when, in fact, the intention to create mutual wills did not exist.

I suggest that the estate-planning lawyer is in the best position to convey the client's decision of *not* having mutual wills by:

- including a clause in the wills saying that there is no intention for the wills to be interpreted as mutual wills;
- reporting to the client that their wills are not mutual, and what the implications of not having mutual wills could be;
- having the client sign a waiver acknowledging that the pros and cons of having mutual wills were explained to them and they have declined the option;
- keeping good notes about the estate-planning file and in particular about all discussions concerning mutual wills.

Mutual wills create an estate planning opportunity for spouses to meet two separate but intertwined sets of objectives: providing financial support from their estate for the spouse of their blended family relationship, and providing an inheritance for the children of a previous relationship. The intent to make the wills irreversible upon mental incapacity or death of either spouse is the cornerstone of mutual wills. The more documents that set out the intention to create mutual wills, the greater the likelihood that such intent will be found and upheld by the courts. Proper groundwork is critical in preparing the mutual wills, and careful drafting will assist in ensuring that the testator's goals are met while also helping to limit unwanted and costly challenges to the administration of the estate.