WHAT YOUR ESTATE LITIGATOR WISHES YOU HAD INCLUDED IN YOUR FAMILY LAW AGREEMENT

HORNE COUPAR LLP

L A W Y E R S + NOTARIES

Suite 300 – 612 View Street
Victoria, British Columbia
clare@hc-law.com

CLARE M. SPARKS

A FEW KEY POINTS TO BEGIN

- Your client cannot be both a spouse with a claim under *Wills, Estates and Succession Act (WESA)* and a spouse with triggered property rights under the *Family Law Act (FLA)*
- So, when does a family law agreement come into play in an estate litigation file?
  1. One spouse passes away and does not adequately provide for the surviving spouse, the surviving spouse may bring a claim under *WESA* to vary the will. When a court considers if "adequate provision" has been made, it will consider what the surviving spouse may have received had the spouses separated just prior to the death of the deceased spouse; this is where we, in the estates litigation world, encounter cohabitation agreements.
  2. When separated spouses fail to make important changes to their estate planning (like changing beneficiary designations, this is where we encounter separation agreements.
  3. When there is a dispute among living family members or representatives about whether a spousal relationship existed, and whether a separation/reconciliation took place between spouses before death.

A FEW KEY POINTS TO BEGIN

- On an application to vary a will, the assessment of "adequate, just and equitable" is a search for "contemporary justice" : *Tataryn v. Tataryn Estate*, 1994 CanLII 51 (SCC), [1994] 2 SCR 807.

- Wills are "ambulatory" – they can be changed by the will-maker at any time, as long as that person has testamentary capacity and rights of beneficiaries to not crystalize until the death of the testator.

- Wills are protected by privilege – it is extremely unlikely that your client would know if their spouse decided to change their will after meeting the requirements under a clause in your agreement:
  - The wording you use in the family law agreement is intended to create a contractual obligation on the estate of the other spouse, which your client could pursue against an estate or which an estate could pursue against a living spouse.

1. A CLAUSE CONFIRMING WHEN THE AGREEMENT OPERATES

- Does your cohabitation agreement operate only in the event of a separation, or also during the parties' relationship? Is your client clear on this?
- Does your agreement make a clear distinction between the clauses that operate only on separation, and those that operate both during and after the relationship?

  Steernberg v. Steernberg, 2006 BCSC 1672

- Similarly: when does the agreement cease to operate?
  - For a separation agreement, does the wording clearly address what happens if the parties reconcile?
  - Strongly consider having it remain in effect unless varied or revoked in the same manner it was executed.

2. A CLAUSE THAT BINDS THE PERSONAL REPRESENTATIVE AND HEIRS

- Now that you have an operating agreement, who must follow it?
- A clause that confirms the agreement is binding on the parties':
  - executors/administrators (administering the will or estate after a party has died)
  - personal representatives (a Power of Attorney, Representative under a Representation Agreement, a Committee, a Litigation Guardian etc. where a third party has authority to act on behalf of a party, possibly due to loss of that party's capacity)
  - heirs, beneficiaries (persons entitled to receive a share of an estate) and assigns (people to whom the heirs may transfer the property to which they are entitled)
- Include an express waiver to claim against the Estate under *WESA* except to enforce the terms of the agreement: see *Lobe v. Lobe Estate,* (1996), 13 E.T.R. (2d) 126 (B.C.S.C.).
- An agreement may reduce or nullify the legal obligation of a testator, leaving only the moral obligation in a variation claim.

3. A CLAUSE CONFIRMING WHAT SEPARATION LOOKS LIKE (AND WHAT WILL NOT AUTOMATICALLY QUALIFY)

- "An agreement to be clear"
- Consider how your client's lives will change over time
  - Does physical separation mean separated?
    - Illness
    - Assisted living
  - Capacity to separate is the least stringent test of all the tests for capacity (*Wolfman-Stotland v. Stotland,* 2011 BCCA 175)
- *Robledano v. Jacinto*, 2018 BCSC 152
  - WESA s. 2(2)(b) – "in the case of a marriage-like relationship, one or both persons terminate the relationship."
  - FLA s. 3(4)(b) – "the court may consider, as evidence of separation,

    (i) communication, by one spouse to the other spouse, of an intention to separate permanently, and

    (ii)an action, taken by a spouse, that demonstrates the spouse's intention to separate permanently."
- *Knelsen Estate*, 2020 BCSC 134
- *Razafsha v. Heidary,* 2022 BCSC 1357

4. A CLAUSE REQUIRING THE AGREEMENT BE REVIEWED

- For cohabitation agreements, a requirement to review every 3-5 years, and one confirming that, in the absence of a *request* for a review, the parties have deemed the review adequate.
- Wills variations are a "search for contemporary justice", and that contemporary standard should be regularly reviewed.
- Changing health circumstances can be recorded.
- Estate planning happening for other family members (e.g. your client's parents).
- This provides an opportunity to plan for the treatment of specific assets.

5. A CLAUSE (OR SEVERAL) THAT ADDRESS BENEFICIARY DESIGNATIONS

- Confirm the "bargains" made by the parties;
- Require a return of diverted funds;
- Consider tax: tax-free spousal rollover is (likely) no longer available once one parties has died;
- *Roberts (Martindale Estate)* 1998 CanLII 4561 (B.C.C.A.) provides foundation for remedial constructive trust:
  - In that case, a husband and wife negotiated a separation agreement before their divorce which included terms that any claims against the other's property or estate were settled, that all interest in the estate of the other was relinquished, and that the wife kept all of her property free from any right of the husband during her lifetime or after her death.
  - The wife mistakenly believed she had done what was necessary to remove the husband as beneficiary on a policy of life insurance and on her death the husband applied for and was paid the proceeds of the life insurance. The estate sued and succeeded at trial, on the ground of resulting trust. On appeal, the court was clear that a trust does not arise simply because a testator is "mistaken about the legal effect of what they have or have not done," para. 14. However, the court allowed the trust to stand stating at para. 27:
  - For the appellant, Mr. Martindale, to claim from the insurer the proceeds was a breach of the separation agreement and such a breach is sufficient, in my opinion, to call in aid the doctrine of the remedial constructive trust. To put it another way, it is not the mistaken belief of Mrs. Martindale which gives rise to the remedy; it is the bargain which Mr. Martindale made.
- *Wilson v. Wysoski,* 2014 BCSC 675 (designation is a juristic reason to retain a benefit);
- *Morton v Christian,* 2014 BCSC 1303 (consent order, general waiver of all claims not sufficient for designation);
- Consider including deadlines to effect transfers in the agreement, closing agenda and reference it again in your closing letter.

6. A CLAUSE REQUIRING PARTIES TO HARMONIZE THEIR ESTATE PLANNING WITH THEIR COHABITATION AGREEMENT

- Agreements should not bind the hands of estate planners when it comes to what language the estate planner will include to give effect to the intentions:
  - Estate planners can advise on tax optimization, practical challenges of dealing with probate and administration of an estate
- Penalty clauses are sometimes included in cohabitation agreements in particular, requiring spouses to give instructions to their estate planners to include *verbatim* language in a will.
- This can create enormous challenges for the estate planners, when that language is inappropriate to include or will be ineffective.
- Call your local, friendly estate planning colleagues if you have questions!

6. A CLAUSE REQUIRING PARTIES TO HARMONIZE THEIR ESTATE PLANNING WITH THEIR COHABITATION AGREEMENT CONT'D

Example Clauses:

Within 90 days of the execution of this Agreement, the parties agree that they will each consult an estate planning professional with a view to giving effect to the provisions set out in paragraphs X and Y of this Agreement [with respect to the Family Residence].

If the will and/or the estate planning decisions of the deceased spouse are insufficient to effect the testamentary benefit required by paragraphs X and Y of this Agreement and executors of the deceased spouse refuse to comply with the terms as set out in paragraphs X and Y of this Agreement, the parties agree that provisions set out in this Agreement shall be enforceable in court and that the terms of paragraphs X and Y shall form the basis of a consent court order regarding [transfer of title of the Family Residence and compensation for the surviving spouse's interest in the Family Residence]. If necessary, the Court Order will also deal with reimbursement for payment of the costs set out in paragraph X(a)(i).

When the Agreement is signed, each party will execute a will, or a codicil to an existing will, to give effect to the provisions with respect [to the Family Residence [if occupancy rights or life estate]] set out in this clause.

If the will of the Deceased Spouse does not contain the testamentary benefit required by this clause or if the Decease Spouse's estate planning decisions are insufficient to effect an equivalent benefit for the Surviving Spouse, the estate of the Deceased Spouse will be liable to the Surviving Spouse [in debt in the amount equal to the present value that the Surviving Spouse's lifetime right to occupy the Family Residence would have had at the date of the death of the Deceased Spouse] and for reasonable expenses incurred by the Surviving Spouse to enforce this claim in debt.

FINAL THOUGHTS

- Wills are just one part of estate planning, and new spousal relationships can have an enormous impact on estate entitlement for children of a "first family"
  - Consider candid discussions with your clients about irrevocable beneficiary designations where life insurance policies are meant to secure child support obligations (or spousal support obligations)
  - Cannot always rely on being able to bring a claim against an estate to satisfy a responsibility, if main wealth is passing outside of an estate by joint tenancy or beneficiary designation
  - With blended families, agreements need to be paired with effective estate planning to accomplish client's goals

- A cohabitation agreement is not necessarily the last word on a wills variation claim
  - Responsibilities are judged based on circumstances at time of a will-maker's death
  - This is different from the way a fair cohabitation or separation agreement will be judged under our family law legislation
  - The emphasis on certainty is not nearly as articulated in the estates case law as in the family case law on agreements

FINAL THOUGHTS

- In *Steernberg*, the court noted that the analysis in *Hartshorne* was of "limited assistance" in the wills variation context
  - The agreement in that case was focused on only one legal obligation after separation (division of property under the *family Relations Act*)
  - Other legal obligations were found under the law of unjust enrichment and the *Divorce Act*
  - While the (then) *Wills Variation Act* and the *FRA* both consider fairness, they do so in different contexts: in one circumstance, two (or more) living persons who need to maintain a standard of living, and in the other, only one surviving spouse
  - *Tataryn* confirmed that a moral obligation is distinct from, and goes beyond, legal obligations
    - While an agreement may satisfy the legal obligations of a party, it may not satisfy the moral obligation and a will may still be varied
    - Can this risk truly be mitigated on the part of the family law agreement drafters? Likely not.

FINAL THOUGHTS

- You cannot always close off every door – just flag what you can, and take careful notes in case an executor comes knocking at some point!