<u>Wills & Estates</u>
Winter Term 2014

Lecture Notes – No. 2

Advantages of a Will-substitute rather than a Will?

- Estate administration taxes arising on death may be avoided;
- The asset can be shielded from creditors as it passes 'outside the Estate' – but perhaps not if dependants are inadequately provided for (in which case it may be brought back into the Estate through a judicial order);
- no need for probate and legal fees associated with probate;
- fewer transactions costs;
- minimize opportunities for litigation by disappointed beneficiaries.

Advantages of a Will?

- Income and other taxes arising on death may be minimized through appropriate planning with greater certainty;
- Allows for highly creative plans that suit a person's needs;
- Allows for a comprehensive plan in one document;
- Covers issues beyond transmission of wealth.

One should note that the tax regime appears to be changing with respect to the rigor that the provincial government approaches the collection of Estate Administration Tax.

In the past, there was no real audit in respect of the value of personal property. The **Better Tomorrow for Ontario Act (Budget Measures), 2011** amended the legislation to enhance the compliance regime. Beginning this year, the Ontario Minister of Revenue is provided with significant audit and verification functions, as well as assessment, objection and appeal mechanisms, similar to those contained in Canada's Income Tax Act. As a result, it is anticipated that there will be much more pressure to verify the value of the assets disclosed in the application for a Certificate. This will likely result in a higher tax payable unless one has engaged in planning to minimize this tax.

The enhanced audit and verification functions will include (among other things) the right to assess and reassess an estate in respect of its tax liability within four years of the tax being payable, a requirement that the Estate Trustee provide all reasonable assistance and answer all questions in respect of an audit being conducted, provide any 'prescribed' information as is requested and a requirement that third parties give the Minister access to their premises and/or permit the Minister to examine their assets and records. The

Minister may also assess or reassess an estate in respect of its Estate Administration Tax liability outside the four-year limitation period if any person made a misrepresentation attributable to neglect, carelessness or wilful default, or committed fraud in supplying (or omitting to disclose) information regarding an estate to the Minister.

We will return to the tax point later in the course – and I will suggest that certain practices in respect of the use of multiple wills to avoid tax may be challenged by the government.

Please note that we are still awaiting the promulgation of Regulations under the Act.

Estate Administration Tax rate:

$5 for each $1,000, or part thereof, of the first $50,000 of the value of the Estate, and $15 for each $1,000, or part thereof, of the value of the estate exceeding $50,000.

(1) Joint Tenancies and Bank Accounts

The property interest in any bank account is not in the funds paid in directly by the depositor but rather is a *chose in action* in the form of a contractual debt owed by the bank to the account holders. Upon deposit, the bank takes title to the money and the account holder takes title to the *chose in action* that is the debt owed by the bank.

Joint tenancies, like a joint bank account, operate subject to the doctrine of survivorship; upon the death of the penultimate tenant, the surviving tenant takes absolutely. During the time that the joint tenancy is in effect, each joint tenant is said to hold *per my et per tout* ('by every part or parcel and by the whole'), holding nothing but holding everything as it were. That is, each joint tenant is equally seised of an interest in the entirety of the property but without distinct title. This means that the legal interests vest when title is transferred into the names of the joint tenants but the exact quality of the entitlement remains somewhat murky.

Pecore v Pecore
2007 SCC 17; cb., pp. 117, 135

A father placed his assets into a joint bank account with one of his three children (Paula). His other children were more financially secure than this child, and indeed one of the others was estranged from the father. The father acted, at least in part, based on the advice of a financial advisor who told him that probate fees would not be charged on jointly-held assets as they would operate outside the Will after his death. The father regarded the assets as his own during his lifetime, even representing himself as the 'real owner' to the Canada Revenue Agency in respect of tax liability (attempting to stave off liability for capital gains tax if the CRA chose to view the transaction as a present disposition of these capital assets to Paula). Paula had access to the account but only with notice to her father. At his death, a dispute arose between Paula and her quadriplegic ex-partner Michael, who was named as a residuary legatee in the father's Will. Were the assets part of the estate or were the assets owned in law and equity by Paula?

In **Madsen Estate v Saylor, 2007 SCC 18** the mother and father had mirror Wills providing for a gift over to the survivor, and if there was no surviving spouse then the remaining estate was to be divided equally between the two classes of children and grandchildren. The mother died first and her assets passed to the father. The father later opened a joint bank account and a joint investment account with one of his three daughters (Patricia). The father declared and paid the taxes on the income. He controlled the account during his lifetime which was only used for his benefit. Eventually the father died, Patricia claimed the assets as her own, and her siblings naturally disagreed and brought an action against her in her role as executor of the father's estate. Were the assets part of the estate or were the assets owned in law and equity by Patricia?

The issue of the operation of the presumption of advancement was of course central to both *Pecore* and *Saylor*; and the question was really one that asked whether the presumption ought to operate in present social circumstances - *does it aid in determining what the transferor probably intended?* Rothstein J, for the majority in *Pecore v Pecore*, held it is not helpful where the child in not a minor:

> … given that a principal justification for the presumption of advancement is parental obligation to support their dependent children, it seems to me that the presumption should not apply in respect of independent adult children… [moreover] parental support obligations under provincial and federal statutes normally end when the child is no longer considered by law to be a minor… Indeed, not only do child support obligations end when a child is no longer dependent, but often the reverse is true: an obligation may be imposed on independent adult children to support their parents in accordance with need and ability to pay… [further] it is common nowadays for ageing parents to transfer their assets into joint accounts with their adult children in order to have that child assist them in managing their financial affairs. There should therefore be a rebuttable presumption that the adult child is holding the property in trust for the ageing parent to facilitate the free and efficient management of that parent's affairs.

(2) Life Insurance

Life insurance forms a part of most people's estate plan; indeed, for people of modest means, it may be the primary device to provide for family members after death. The issues surrounding insurance become complex at times. The deceased may have a former spouse, current spouse, children to whom he or she owes obligations from one or both or other relationships (with or without disabilities), etc. The contract of insurance itself is a complex arrangement, it may be a policy for a term of years or have a fixed premium for the life of the insured. The policy may be just on the life of the deceased, or the deceased and another (a 'multiple life' policy covering the deceased and his or her spouse for example).

One aspect of insurance that is important is in respect of the designation of the beneficiaries. Insurance statutes commonly allow for an irrevocable designation which prevents creditors accessing the funds when the deceased dies; that is, the proceeds form no part of the estate. One must check the terms of the *Insurance Act*, RSO 1990, c.I.8 carefully. Thus, for example, the deceased cannot be the single beneficiary of the

policy but can be one of the designated beneficiaries; see the Insurance Act, s.171; *Tennant v Tennant* (2003), 62 OR (3d) 185 (CA).

Richardson Estate v. Mew
2009 ONCA 403; cb., p. 145

Here a man died leaving an ex-wife (and their children) and a second wife (and their children). He died in a long-term care facility as he developed Alzheimer's Disease and required institutional care in his final years. The second wife managed his affairs using a Power of Attorney provided for that purpose. A question arose in respect of a life insurance policy payable to the first wife. It had been taken out originally when the deceased was married to his first wife and then made subject of a condition in the separation agreement between them that the first wife remain as beneficiary for a year (the end of his child care obligations). He told his second wife that he would designate her as the beneficiary at the end of the commitment under the separation agreement but never did so. Some few years later, the deceased became incapable of managing his affairs due to Alzheimer's Disease. The costs of his care exhausted his retirement savings and the second wife assumed the costs of his care including paying the premiums due on the life insurance policy. It wasn't entirely clear in the report of the judgement whether it was established as a matter of fact that the second wife did actually pay premiums with her own money and the suggestion was that if she did, the sum was relatively modest. In any case, the action was brought in unjust enrichment claiming a constructive trust over the policy.

The Court of Appeal held that while the first wife may have been enriched, there was no corresponding deprivation and a juristic reason that allowed her to retain – the contract of insurance. That is, the plaintiff might have a theoretical claim against the Estate for the premiums that she paid; 'theoretical' because she inherited the Estate. As against the designated beneficiary (the first wife), there was no claim in unjust enrichment as the contract of insurance constituted a good juristic reason for her to retain the insurance proceeds. The separation agreement may have contained a standard clause release or renouncing all claims against the other's estate, but it is well recognized that the quality of title to insurance proceeds is unaffected where the policy continues to designate the former spouse as beneficiary upon death.

As an aside, there is an interesting point that arises and that was addressed, in *obiter dicta*, by Gillese JA as to the ability of the plaintiff to change the designation in view of her fiduciary obligation to her incapable husband:

> 49 As a fiduciary, Ms. Ferguson was obliged to act only for the benefit of Mr. Richardson, putting her own interests aside: see *Ermineskin Indian Band & Nation v. Canada*, 2009 SCC 9 (S.C.C.), at para. 125. In *Egli (Committee of) v. Egli* (2004), 28 B.C.L.R. (4th) 375 (B.C. S.C.), aff'd (2005), 262 D.L.R. (4th) 208 (B.C. C.A.), Garson J. described the prohibition against using a power for the attorney's profit, benefit or advantage at para. 82 in the following way:
>
> It is the attorney's duty to use the power only for the benefit of the donor and not for the attorney's own profit, benefit or advantage. The attorney can only

use the power for his or her own benefit when it is done with the full knowledge and consent of the donor. I am not aware of any authority that detracts from this principle in circumstances where the benefit is conferred on family members. [Citations omitted.]

50 I do not understand Ms. Ferguson to suggest that she was entitled to change the beneficiary designation, cancel the Policy or cease paying the premiums during the time that Mr. Richardson was still capable of managing his property. To the extent that she makes such an argument, I would reject it. Given that there is no evidence that Mr. Richardson instructed her to do any of those things, if she had so acted, she would have been in breach of her duty to carry out the donor's instructions. Furthermore, changing the beneficiary designation to herself would have contravened the prohibition against using the Power for her own benefit, as Mr. Richardson had not expressly consented to such a change.

51 After Mr. Richardson became incapable, as has been noted, Ms. Ferguson owed him an even higher duty of loyalty when exercising the Power. As a fiduciary in a role rising to that of a trustee, she was bound to use the Power only for Mr. Richardson's benefit and any exercise of the Power had to be done with honesty, integrity and in good faith. There is nothing in the record to suggest that a change in the beneficiary designation, cancellation of the Policy or a cessation of the premium payments would have been for Mr. Richardson's benefit.

(3) Pensions and Beneficiary Designations

The Succession Law Reform Act provides a scheme in Part III respecting pension funds and plans. They are not available to creditors of the deceased normally (unless designated to the Estate), except may be brought back into the Estate for the purposes of family provision.

Amherst Crane Rentals Ltd. v. Perring
(2004), 11 E.T.R. (3d) 112 (Ont CA); cb. p127

Per Feldman JA:

2 **The facts of the case are quite typical. The appellant is a creditor of the deceased. The respondent is the widow of the deceased and the designated beneficiary of two RRSP funds. She received the proceeds of the two funds from the two plan administrators. Because the estate of the deceased was unable to pay all of its debts and declared bankruptcy, the creditor sought to obtain payment of the outstanding debt owed by the estate from the beneficiary out of the proceeds of the RRSPs.**

…

33 I agree with Cameron J. that **there is neither a legal principle nor statutory authority that requires that the creditors have any claim on the proceeds of an RRSP that devolve directly to a designated**

beneficiary. I also agree that the equities do not necessarily favour the claims of creditors over those of beneficiaries of RRSP. The beneficiaries are often spouses, and therefore, not volunteers in the traditional sense, but partners in life, who have provided support to their spouses with the expectation that they will be supported after the death of their spouses. Finally, there are several potential procedural difficulties if creditors are permitted to pursue beneficiaries directly for the proceeds of the RRSPs in their hands.

34 I am also satisfied that in order to give full effect to s. 53 as an exemption from the rule that an RRSP designation is a testamentary disposition, and following Kerslake, it would be anomalous to hold that RRSP proceeds that have devolved to the designated beneficiary remain subject to the claims of the creditors of the deceased.

35 I therefore conclude that the effect of s. 53 is to except RRSP proceeds in the hands of a designated beneficiary from the claims of creditors of a deceased RRSP owner's estate.

Carrigan v. Carrigan Estate
2012 ONCA 736 [Leave denied, 2013 CanLII 15563 (SCC)]

Section 48 of the Pension Benefits Act, R.S.O. 1990, c.P.8, provides for spousal entitlement to a pension if the member dies before becoming entitled but also provides that a spouse living separate and apart from the member does not receive the entitlement. The issue here was whether a ‘spouse’ only referred to a married spouse; the majority held that that was in fact the meaning within the scheme of the statute. Since the married spouse had a priority claim but that the claim was inoperable as the married couple had separated, the designated beneficiaries (the married but separated spouse and the deceased’s children) were entitled over the cohabitational spouse. Lesson: if a married but separated person has a new spouse, he or she should review pension and other will-substitute designated beneficiaries to ensure the asset will pass as they presently intend.

Per Juriansz J.A.:

A. Introduction

1 This appeal concerns a pure question of law: who receives the pension death benefit when the member of a pension plan entitled to a deferred pension dies and is survived by both a common law spouse with whom he resided at the time of death and a legally married spouse from whom he was separated but whom he designated a beneficiary of his pension plan? The outcome turns on a proper interpretation of s. 48 of the Pension Benefits Act...

...

17 This appeal is entirely an exercise in statutory interpretation that begins with the statutory definition of "spouse". The definition opens by stating that a "spouse" is "either of two persons" who are married to each

other, or who are not married to each other but satisfy other criteria. The two persons referred to are the pension member and the person with whom the member is in a spousal relationship. The word "either" in the definition should not be misread to refer to a legally married spouse on the one hand and a common law spouse on the other. The PBA definition of spouse is unlike the definition of spouse in s. 29 of Part III of the Family Law Act, R.S.O. 1990, C. F.3, which includes a common law spouse "in addition" to a spouse as defined in s. 1(1) of the Family Law Act.
...

24 Section 48(1) gives statutory priority to the member's spouse. When s. 48(1) is engaged, it applies even if the member has designated a beneficiary as envisaged by s. 48(6) or dies intestate as envisaged by s. 48(7). Given the assumption that both Mrs. Carrigan and Ms. Quinn are spouses, we encounter difficulty in applying s. 48(1): while the statutory priority is in favour of "the spouse of the member", here the member has two spouses.
...

28 In fact, it is apparent that the word "spouse" in s. 48(3) must always refer to the legally married spouse. Under the PBA it makes no sense to conceive of a common law spouse living separate and apart from the member. While a person may be a common law spouse in other contexts, only a legally married spouse can live separate and apart from the member and still be a "spouse" under the PBA. That is because paragraph (b) of the statutory definition applies to two persons not legally married who "are living in a conjugal relationship". The circumstance contemplated by s. 48(3) — that the member and his or her spouse are living separate and apart on the date of the death — can only be satisfied by the legally married spouse.
...

30 Consequently, even if one assumes the definition of "spouse" encompasses both Mrs. Carrigan and Ms. Quinn, only Ms. Carrigan could be the "spouse" referred to in s. 48(3). Since the circumstance contemplated by s. 48(3) exists, s. 48(1) is rendered inapplicable. Since s. 48(1) is inapplicable, the difficulty in applying the spousal priority falls away. When s. 48(1) does not apply, there is no provision that the "spouse" of the member is entitled to the death benefit. As there is no spousal entitlement, the member's designated beneficiary is entitled to the death benefit under s. 48(6) of the PBA.

31 Section 48(6) provides that the designated beneficiary is entitled to the death benefit if either of two circumstances exists. Either, the member does not have a spouse on the date of death; or, the member is living separate and apart from his or her spouse on that day. The structure of s. 48(6) indicates that the existence of either circumstance triggers the application of the subsection. The same reasoning employed in regard to s. 48(3) applies to the second circumstance in s. 48(6). Mr. and Mrs. Carrigan were living separate and apart on the date of his death. The second circumstance in s. 48(6) exists and the application of the section is triggered.

> Therefore, s. 48(6) is triggered and the designated beneficiaries are entitled to Mr. Carrigan's death benefit.
>
> 32 The result is that neither Mrs. Carrigan nor Ms. Quinn is entitled to the pension benefit as a spouse. Rather Mrs. Carrigan and her two daughters are entitled to Mr. Carrigan's death benefit as his designated beneficiaries.

Per Epstein J.A. (concurring):

> 99 Based on this analysis, I agree with Juriansz J.A. that s. 48 must be interpreted to mean that if, at the time of death, the pension benefit holder had a legally married spouse from whom he or she was living separate and apart, a designation that had been made under s. 48(6) would apply regardless of the fact that he was living with a person who fell within one of the two definitions of spouse.
>
> 100 At the time of his death, Mr. Carrigan was in that position. He was married to Mrs. Carrigan and he was living separate and apart from her. This engages s. 48(3), which in turn eliminates the application of the spousal priority set out in s. 48(1) and allows for the application of s. 48(6). The result is that Mrs. Carrigan and the Carrigans' two daughters, as designated beneficiaries under s. 48(6) of the *PBA*, are entitled to the pension benefit.

(4) Contracts: A Promise to Make a Will and Leave the Plaintiff a Gift

A common enough situation arises: a person promises to leave another a gift in his or her Will in exchange for something (personal care, marriage, some favour, etc). Conceptually there is merely a straight-forward case. If the contract is broken, the plaintiff can sue the Estate in damages. The difficulty, of course, is that Estate may not be able to pay either at all or completely given that there may be other creditors. In the past, cases arose where there was insufficient protection for spouses or dependants (*Synge*, below), on equitable doctrines (part performance, estoppel), or the principle of restitution (*Degleman*, below).

Synge v Synge
[1894] 1 QB 466; cb, p.139

The most familiar of all estate litigation: 2nd wife v children of first marriage. The husband induced the 2nd wife to marry him by promising her that she would inherit the house and land as a life tenant after he died. She married him in reliance. He then conveyed the property to his daughters from his first marriage. The second wife sued and was successful in damages. Kay LJ held that the claim might have been made against the daughter but the plaintiff sought only damages from the husband:

> **Sir R. Synge had all his lifetime to perform this contract; but, in order to perform it, he must in his lifetime make a disposition in favour of Lady Synge. If he died without having done so, he would have broken his contract. The breach would be omitting in his lifetime to make such a disposition. True, it would only take effect at his death; but the breach must take place in his lifetime, and as by the conveyance to his daughters he put it absolutely out of his power to perform this contract. Lady Synge, according to well-known decisions… had a right to treat that conveyance as an absolute breach of contract, and to sue at once for damages; and as this Court has both legal and equitable jurisdiction, we are of opinion that such relief should be granted.**
>
> We have not before us the materials for assessing such damages. The amount must depend on the value of the possible life estate which Lady Synge would be entitled to if she survived her husband. Their comparative ages would, of course, be a chief factor in such a calculation. There must be an inquiry as to the proper amount of damages.

Part Performance

Certain types of agreements must be in writing to be enforceable under the *Statute of Frauds*, RSO 1990, c. S.19.

The doctrine of part performance is an equitable doctrine that was used to deal with claims based, inter alia, on ineffective transactions. In *Steadman v. Steadman*, [1976] A.C. 536, 558 Lord Simon said:

> [This doctrine] was evoked when, almost from the moment of passing of the Statute of Frauds, it was appreciated that it was being used for a variant of unconscionable dealing, which the statute itself was designed to remedy. A party to an oral contract for the disposition of an interest in land could, despite performance of the reciprocal terms by the other party, by virtue of the statute disclaim liability for his own performance on the ground that the contract had not been in writing. Common Law was helpless. But Equity, with its purpose of vindicating good faith and with its remedies of injunction and specific performance, could deal with the situation. The Statute of Frauds did not make such contracts void but merely unenforceable; and, if the statute was to be relied on as a defence, it had to be specifically pleaded. **Where, therefore, a party to a contract unenforceable under the Statute of Frauds stood by while the other party acted to his detriment in performance of his own contractual obligations, the first party would be precluded by the Court of Chancery from claiming exoneration, on the ground that the contract was unenforceable, from performance of his reciprocal obligations; and the court would, if required, decree specific performance of the contract. Equity would not, as it was put, allow the Statute of Frauds "to be used as an engine of fraud." This became known as the doctrine of part performance — the "part" performance being that of the party who had, to the knowledge of the other party, acted to his own detriment in carrying out irremediably his own**

> **obligations (or some significant part of them) under the otherwise unenforceable contract.**

[Approved in *Hill v. Nova Scotia (Attorney General)* [1997] 1 S.C.R. 69. For a recent case applying the doctrine see *Frisgo Development Inc. v. Brower*, 2009 ABQB 463].

Quantum Meruit, Proprietary Estoppel, and Unjust Enrichment

In most cases in which the claim is brought against the Estate based on the acts of the deceased, the approach today would be through the action for unjust enrichment.

In ***Degleman v Guaranty Trust Co. of Canada*, [1954] S.C.R. 725; cb, p.144**, a disappointed nephew was promised a testamentary gift by an aged aunt in exchange for his services. The aunt didn't leave the gift and the nephew sued on the promise. The Supreme Court of Canada held that the claim for the services rendered was valid notwithstanding that the oral promise was not enforceable given its obvious non-compliance with formalities. Cartwright J for the majority held:

> In my opinion when the Statute of Frauds was pleaded the express contract was thereby rendered unenforceable, but, the deceased having received the benefits of the full performance of the contract by the respondent, the law imposed upon her, and so on her estate, the obligation to pay the fair value of the services rendered to her.

Rand J held for the concurring minority:

> There remains the question of recovery for the services rendered on the basis of a *quantum meruit.* On the findings of both courts below the services were not given gratuitously but on the footing of a contractual relation: they were to be paid for. The statute in such a case does not touch the principle of restitution against what would otherwise be an unjust enrichment of the defendant at the expense of the plaintiff. This is exemplified in the simple case of part or full payment in money as the price under an oral contract; it would be inequitable to allow the promissor to keep both the land and the money and the other party to the bargain is entitled to recover what he has paid. Similarly is it in the case of services given.

Given that there was no contract between the aunt and the nephew, what is the ultimate rationale for liability in *Degleman*? It can't be the contract alleged to have existed; both the majority and the concurring minority rejected a contractual basis for relief. Rather than contract, then, it was the principle of unjust enrichment (the retention of a benefit without valid reason) that best rationalized liability in the Court's view.

The law of unjust enrichment in Canada has moved on substantially since *Degleman v Guaranty Trust Co. of Canada*. There is no doubt that there exists an independent action for unjust enrichment in Canada that is not parasitic on an established common law, equitable, or statutory cause of action. That such established law is brought into unjust enrichment as 'juristic reasons' to disallow an otherwise unjust retention of a benefit is not to limit the action for unjust enrichment to those categories. Pragmatically, this ensures that well settled doctrine remains valid but allows for more coherent

development. Thus, rather than talking of an 'action for *quantum meruit*' in respect of the services at issue in *Degleman*, we now more usefully speak of remedies properly arising as a response to a valid contract (on which damages may be calculated on a *quantum meruit* basis) or remedies arising on a successful action in unjust enrichment (which might be remedied with a money award to the same ends). We no longer have to rely on *quantum meruit* as an indistinct concept that describes the variety of factors that might support the remedy outside conventional contract, whether in law or equity or otherwise. Rather, we ventilate the inquiry through the law of unjust enrichment which provides for a more structured approach. Thus, at the very least, we can now say with confidence:

> A remedy based upon unjust enrichment may be ordered where there is
>
> (a) a benefit to or enrichment of one party, and
> (b) a corresponding detriment to or deprivation suffered by the other party, and
> (c) the absence of any juristic reason for the benefit or enrichment to be retained.
>
> The 'juristic reason' involves consideration of (i) traditional categories that would allow the benefit to be retained and (ii) fact-specific reasons and new categories of general application that would allow the benefit to be retained tested on both the reasonable expectations of the parties and public policy considerations.

Mutual Wills

Mutual Wills can take the form of 'mirror Wills' (there are two documents that are the same) or a joint Will (one document made by two people). **The doctrine arises where there is a contract between two people (spouses usually) to leave their property to specific beneficiaries in specific ways** (e.g. to the surviving spouse for life with a power to encroach on the capital, remainder to children or their issue in equal shares).

If the requirements are satisfied, the estate of the surviving spouse will be obligated to give effect to the Will even as against a later inconsistent Will (made say after death of the first spouse and in favour of a new partner) through the imposition of a constructive trust.

Thus,

1. The valid mutual Will leads to a constructive trust over the property at issue in favour of the named legatees unless the parties have consented to the change.

2. To be enforced:

    a. there is a clear agreement not to revoke the Will in respect of the dispositive provisions either on the face of the Will(s), or as may be inferred from the provisions of the Will(s) or a separate instrument; and

    b. the first party to die did not himself or herself revoke the Will.

3. The survivor may revoke the Will, and the new Will is valid in respect of property not subject to the provisions of the mutual Will, but a constructive trust will be ordered in respect of those assets to give effect to the mutual Will.

LSUC Rules of Professional Conduct

R.2.04

(6) Except as provided in subrule (8.2), where a lawyer accepts employment from more than one client in a matter or transaction, the lawyer shall advise the clients that

(a) 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).

University of Manitoba v. Sanderson Estate
(1985), 155 D.L.R. (4th) 40 (BCCA); cb, p. 151

Here a husband and wife made mutual Wills (including the requisite agreement not to revoke their mutual Wills) that left the residue of their estates to the University of Manitoba. After the wife died, her assets passed to the husband via survivorship. The husband made a new and inconsistent Will. At trial, the Estate successfully argued that by purchasing assets subject to the doctrine of survivorship after the making of the mutual Wills, there was effective revocation of the Wills. On appeal, the University succeeded in obtaining a constructive trust. There was also discussion in the case of a recurring argument in the cases – whether the survivor must be unjustly enriched in some way through the new arrangement (which has of yet to be accepted).

Per Rowles JA:

> In my respectful view, the trial judge was in error when he concluded that there was a revocation of the Agreement by conduct of the parties inconsistent with that Agreement. **While it is true that mutual conduct inconsistent with a contract may be taken to show that the contract is no longer enforceable, that conduct must be quite clear.** Here the evidence would have to show that, by the purchase of assets in their joint names, the Sandersons intended to supercede the operation of their mutual wills.
>
> **From the evidence in this case it is not at all clear what effect, if any, the Sandersons intended their subsequent purchase of jointly held assets to have in relation to their Agreement. The creation of a right of survivorship in their assets is not necessarily inconsistent with the operation of the mutual wills, and it has no bearing on the Agreement, which was simply not to revoke the wills.**
>
> I am also of the view that the trial judge was in error in finding that the agreement not to revoke, which was contained in both the Agreement and the mutual wills, could be revoked by conduct or implication.
>
> The Agreement contained a provision allowing it to be revoked by written consent of both parties. In my opinion, anything less; such as conduct of the parties which might be construed as inconsistent with the continuance of the Agreement, could not be taken to revoke the contract in light of the clear mechanism for revocation contained within it.

Quite apart from whether the Agreement could be revoked by conduct inconsistent with it, the mutual wills could not be so revoked. There are only a limited number of ways to revoke a will and the inconsistent conduct said to have occurred in this case is not one of them.

The mutual wills clearly contain the parties' agreement not to revoke within them. Short of clear evidence that they were revoked prior to Mrs. Sanderson's death, I must conclude that the agreement not to revoke the mutual wills was still in force at the time of Mrs. Sanderson's death in 1985.

…

The appellant argues that there are two conditions which must be met before the court will impose a trust as a consequence of joint or mutual wills: (1) a mutual agreement not to revoke the joint or mutual wills, and (2) the first to die must have died without revoking or changing his or her will in breach of the agreement.

The question is whether there is a third condition, that is, a benefit flowing to the survivor from the will of the first to die. The appellant argues that a benefit is not required for equity to hold the survivor to his promise.
…

With respect, I do not agree that either the probate of the will of the first to die, or a benefit flowing to the survivor from the will of the other, is a necessary condition for relief to be granted to the University on trust principles.

This is a case in which there was an express agreement made that the mutual wills would not be revoked or altered during the joint lives of the parties to the agreement and that after the death of the first, the will of the survivor would not be altered or revoked. There was an exchange of promises and Mrs. Sanderson did not revoke her will, although she had the legal right to do so, before her death.

The guiding principles to be applied in this case are to be found in *Dufour v. Pereira*, *supra*, in which the enforcement of an agreement in a joint will was held to be within equity's jurisdiction to prevent fraud. Equity considers it a fraud upon the deceased, who has acted upon and relied upon the mutually binding nature of the agreement, for the survivor to change the will and break the agreement. As the deceased cannot intervene to enforce the obligation, equity will enforce the survivor's obligation, despite the survivor's subsequent intentions.

It is also my respectful view that the remedy of constructive trust founded on the principle of unjust enrichment is not analogous to the principles enunciated in *Dufour v. Pereira*, *supra*, and that the trial judge erred when he concluded that an unjust enrichment was required. A constructive trust arising from an unjust enrichment is imposed on property gained at the expense of another for no juristic

> **reason, whereas the obligation created by an agreement not to revoke mutual wills binds not only that portion of the survivor's estate which may have come from the estate of the first to die, but also his or her own property.**
> …
>
> In my opinion, the requisite conditions for the imposition of a trust on the property of Mr. Sanderson have been met in this case and the University is entitled to succeed on the appeal.

An example:
Powell v. Glover
2008 ABQB 532

Here the operate clause read:

> Whereas my wife and I have, each with the other covenant and agreed to execute Wills of an even date 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,...

It was held that the surviving spouse could do as she wished with the property inherited from her deceased husband except to convey it to defeat the trust for children established in the Will. Her Estate will be obligated through the mutual Will.

Proving The Obligation

Fry v Densham-Smith
[2010] EWCA Civ 1410 (Eng. C.A.)

An agreement not to revoke the mutually agreed upon disposition of assets may be found even where the wills were drafted by a solicitor and no notes were produced in support of the agreement having been made.

Per Mummery L.J.:

> 32. Direct evidence is not available on the two critical points in Martin's claim: the existence of a mutual wills agreement between Denny and Laura and the execution of a will by Laura pursuant to it. No will, or copy will, or instructions for a will relied on as the mutual will made by Laura during Denny's lifetime has been produced. There is no indication in Denny's professionally drafted will or in the solicitor's attendance note that it is a mutual will.

> 33. The deficiency of direct evidence and the piecemeal nature of the evidence relied on by the judge for his conclusion do not, in my view, defeat Martin's claim or undermine the judgment. It is, of course, unfortunate that Denny's personal and financial papers were unavailable as direct evidence. However, evidence can be evaluated by a court and facts can be perceived and proved by the process of drawing reasonable and probable inferences from other facts, such as primary facts specifically found, undisputed events and uncontroversial circumstances surrounding them. All of those matters may be safe points of departure for the judicial process of drawing inferences that can lead to an evidentially satisfactory conclusion.
>
> 34. This very experienced judge was able to evaluate and assemble items of evidence into a convincing picture and explanation of the situation of the two families and the options about inheritance and wills available to Denny and Laura on their marriage in 1985. The probabilities are that they would both make wills providing not only for each other on the death of the first to die but also for each son. Ideally, Denny and Laura should have both gone to solicitors with instructions that led to the drafting and execution of wills recording a mutual wills agreement. Instead, an untidy situation has arisen, which has unfortunately aggravated existing ill-feeling within a family and has cost a great deal of money to sort out.
>
> 35. The judge cannot be accused of adopting an uncritical approach to Martin's counterclaims. Following a detailed examination of the evidence he was not persuaded to find for Martin on his counterclaims based on a secret trust and a tripartite agreement. His critical powers did not desert him when he came to consider the mutual wills claim based on a bilateral agreement. He paid careful attention to the evaluation of the available evidence in respect of Martin's counterclaim.
>
> 36. I think that the judge both made, and satisfactorily explained how he made, reasonable and proper inferences from the facts, events and circumstances summarised earlier in this judgment about what was probably agreed to be done and probably done by Denny and Laura about the disposition of their estates to each other and to their respective sons.

Charles v Fraser
[2010] EWHC Civ 2124 (Eng. Ch.)

The Agreement May Be Proven by Solicitor's Notes.

Here the mutual agreement was between two sisters. Per Jonathan Gaunt QC, Dep. J.:

> 15. Neither Will contains any record that the Wills had been made pursuant to an agreement between the sisters but it is apparent from the provisions of the Wills that the terms must have been carefully discussed and agreed. The Wills did not contain any express statement as to whether any agreement had been made as to whether they could or could not be revoked nor did they contain any statement designed to negative the creation of any constructive or implied trust. What can perhaps fairly be said about them is

that, since the provisions in clause 5 could only come into play on the death of the survivor, there was not a lot of point to them if the survivor was to be in a position to revoke her Will following the death of the other sister. The care with which the shares were devised and agreed is some indication that each sister at least expected the property of the survivor to pass in the manner provided for and was content to leave her property to her sister on that basis.

...

64. In my judgment, a Court has to approach oral evidence of the kind that was given by and on behalf of the Claimants in this case warily and with appropriate scepticism. First, I bear in mind the inherent improbability of a testator being prepared to give up the possibility of changing his or her will in the future, whatever the change of circumstances. Secondly, I take into account that a number of the witnesses who gave evidence that the sisters said they had made an agreement and that the wills could not be changed had a financial interest in the outcome of the case. I do not mean by that that I think for a moment that anybody was being dishonest. My impression of all the ladies who gave evidence before me was that they gave their evidence honestly and scrupulously and, having taken the oath, would have been shocked at any suggestion that they might do otherwise. Nevertheless, one is aware from experience of the ability of the human mind to "*remember*" what a person wishes to remember.

65. Thirdly, one is only too well aware of how easy it is, when witness statements are being drafted by solicitors, for the recollections of the witnesses to be subtly improved in the direction the party calling them wishes to go. There are some kinds of case, of which perhaps this is an example, where it would make it easier for the Court to assess the evidence if it were given in chief viva voce instead of by carefully drafted witness statements.

66. Fourthly, if the two sisters told many of their friends and relations about their agreement and if, as Mr. Last said Ethel told him they had, they told their Solicitor, it is remarkable that he did not include any recital of it in the wills he drafted for them or make any other record of it. Mr. Bell suggested to me that this might have been because the law had moved on since 1991 and the need for there to be an agreement not to revoke may not have then been fully appreciated. I do not accept that. It is true that there have been several reported cases about mutual wills since 1991 but the law has not, so far as I can see, changed in any material respect, although its requirements have been emphasised. **I think it was the plain duty of any solicitor, then as now, faced with two sisters wishing to make reciprocal wills, to ascertain their intentions as to revocation, to advise as to the effect of making mutual wills and to ensure that any agreement the testatrices wished to make was clearly and accurately recorded.** The fact that Mr. Collins does not appear to have done this in 1991 is a powerful point in Miss Da Costa's favour. It cannot, however, be conclusive because it is perfectly possible that Mr. Collins did not have the requirements of the law clearly in mind, did not do a very good job or did make some record which has been lost (no notes from the original file survive).

Re Wright Estate
2012 BCSC 119

Here the agreement was proven on the strength of the solicitor's notes.

Here there was a marriage between H and W. Both had previous marriages and there was a contract made between them respecting estate planning. The Agreement provided that H would make a codicil to his will to give W a life interest in all of his real property and designate her as the beneficiary of his RRIFs. In exchange, W agreed to make a will which provided for an irrevocable gift of the remainder of her estate to H's estate (to benefit his adult children, who were named as his residuary beneficiaries) after a gift of $30,000 was paid to each of her two adult children. H and W died. The executors of W's estate denied the validity of the wills and of the obligation. The agreement was proven and enforced conventionally. Importantly, the obligation was principally proved by the solicitor's notes made at the time of the will's drafting and execution. Per Greyell J.:

> [10] There is an issue to which I must refer before I discuss the background to this matter. The defendants argued that this matter was not properly heard on a summary trial application and should proceed to trial. During the course of argument, Mr. Fominoff, counsel for the defendants, challenged the content of Mr. Scott's affidavit. He challenged the notes Mr. Scott made of the discussions he deposed he had with Donald and Vickie at the time he met with them and when Vickie's will and Donald's codicil were executed. Mr. Scott's evidence is important to these proceedings. He was the architect of the Agreement alleged by the plaintiff. In my view, his evidence is critical to the outcome.

And last, a case to scare the pants off any articling student or lawyer doing things in a hurry...

Re Murphy Estate
2012 ONSC 974

H and W married. They had children from previous relationships. They made wills featuring residuary legacies treating all the children equally by the survivor. H died; W made an inconsistent will favouring her children. After W's death it was discovered that she had a RRIF; it was uncertain whether the RRIF predated the marriage and the mutual wills. There was a settlement of the mutual wills dispute that emerged between the children. The settlement was premised on the RRIF being an estate asset. However, after the settlement was agreed, it was discovered that W designated her children as beneficiaries under the RRIF and that it was not an estate asset.

Per M.J. Donohue J.:

> [24] Clearly, none of the parties had made a clear inquiry as to what the exact assets and liabilities of the estate would be. Simply by relying on the

pro forma statement by counsel as to what the assets appeared to be is not enough to change a non estate asset into an estate asset.

[25] The late Mildred Murphy excluded the RRIF from her estate by naming the two beneficiaries. She might have named her friend Freda Little (noted in one of the wills) and ultimately this RRIF would not be an estate asset.

[26] The late Mrs. Murphy showed a clear intention since at least 2001 that she was preferring to leave her estate largely to Michael and Stephen Fines so this result in not inconsistent with her intention.

[27] Counsel for the applicant argued that, without the RRIF, the deed of arrangement would not make sense. This is because all that is now potentially available in the estate for distribution is the debt owed by Michael Fines of $21,592.72 which, divided five ways, works out to less than the $5,000.00 bequest left to Ms. Scime and her brother in the March 15, 2000 will. This argument, however, ignores the tax liability that reduced the estate's value and the legal accounts that have had to be paid from the estate to both the applicant and the respondents throughout this litigation.

[28] Counsel for the applicant relied on case law setting out the basis for unilateral mistake. It was argued that Michael Fines made a mistake in including the RRIF on the *pro forma* statement and should have to now include it in the shared estate. Counsel referred to the *Law on Contracts in Canada*, 5th ed., Fridman, p 252-256:

> It is not necessary for the party seeking to avoid the contract on the ground of mistake to prove that the other party caused or induced the mistake (although if such causation is established it might lead to rescission for fraud, or for innocent misrepresentation). As long as the unmistaken party knows of the mistake, without having caused it, that party cannot resist a suit for rectification on the grounds of mistake. The same will apply if the other party had good reason to know of the mistake and to know what was intended. The converse of the proposition as to knowledge of the other party's mistake is that if the unmistaken party is ignorant of the other's mistake the contract will be valid and neither rescission nor rectification will be possible.
>
> ...

[29] I find the above law confirms that even if the applicant made a bad bargain by signing the deed of arrangement she is bound by it.

[30] Counsel argued on the basis that Mr. Fines made a mistake in this contract. On the facts above, however, I find that all the parties were mistaken in the value of the estate net of liabilities.

[31] On the evidence provided and a plain reading of the deed of arrangement, I do not find the TD Waterhouse RRIF to be as asset of the estate and is not required to be paid back to the estate.