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Estate Planning & Administration Attorneys

Dickinson Wright LLP
Steven J. Gray, Toronto
416-777-4032 • sgray@dickinsonwright.com

Kathleen A. Strachan, Toronto
416-777-2394 • kstrachan@dickinsonwright.com

Dickinson Wright PLLC
Kevin M. Bernys, Troy
248-433-7234 • kbernys@dickinsonwright.com

Deborah L. Grace, Troy
248-433-7217 • dgrace@dickinsonwright.com

Henry M. Grix, Troy
248-433-7548 • hgrix@dickinsonwright.com

Thomas D. Hammerschmidt, Jr., Ann Arbor
734-623-1602 • thammerschmidt@dickinsonwright.com

Judith Fertel Layne, Troy
248-433-7563 • jlayne@dickinsonwright.com

Ralph Levy, Jr., Nashville
615-620-1733 • rlevy@dickinsonwright.com

Leslee M. Lewis, Grand Rapids
616-336-1042 • llewis@dickinsonwright.com

Douglas L. Mann, Troy
248-433-7244 • dmann@dickinsonwright.com

Ward Randol, Jr., Troy
248-433-7233 • wrandol@dickinsonwright.com

Joan Cripe Skrzyniarz, Troy
248-433-7521 • jcripe@dickinsonwright.com

James P. Spica, Detroit
313-223-3090 • jspica@dickinsonwright.com

Cynthia J. Black Svenson, Troy
248-433-7530 • csvenson@dickinsonwright.com

SEPARATION, DIVORCE, AND ESTATE PLANNING

by Kathleen A. Strachan

Introduction

Estate planning becomes critically important when a couple is going through a separation or a divorce. It is imperative that both parties take immediate steps to change their Wills and Powers of Attorney, in addition to beneficiary designations on their life insurance policies, pensions, and registered plans. For if one party dies after a separation, and the deceased party has failed to amend his or her estate plan before their death in accordance with their new separated status – they are likely to roll over in their grave at what may occur as a result of their oversight.

Makarchuk v. Makarchuk[1]

Mr. and Mrs. Makarchuk were separated, but not divorced. Six months before they separated, Mr. Makarchuk made a Will appointing his wife as his executor and the sole beneficiary of his estate. Subsequent to their separation, Mr. and Mrs. Makarchuk entered into a separation agreement that provided "subject to any additional gifts from one of the [spouses] to the other in any Will validly made after the date of this agreement" the spouses both released any rights they may acquire "under the laws of any jurisdiction in the estate of the other…"

When Mr. Makarchuk died a dispute arose as to whether Mrs. Makarchuk was entitled to receive the estate pursuant to her husband's Will, and act as his executor. Their son argued that Mrs. Makarchuk had no entitlement to the estate as the separation agreement acted as a waiver to any rights that she might have. Mrs. Makarchuk argued that there were only three ways that the provisions in her husband's Will could fail: (1) through her husband making a new Will; (2) through her husband marrying someone else; or (3) in compliance with the provisions of s. 15 of the Succession Law Reform Act, which sets out the formal requirements when revoking a Will.

Ultimately, the Court found in favour of Mrs. Makarchuk. The Court determined that the language in the separation agreement that referred to the release of "rights acquired under law" did not apply to those rights acquired under her husband's Will. Accordingly, the Court found that the language in the separation agreement did not trump Mrs. Makarchuk's rights under the Will and she was entitled to take as the Will provided.

Robinson v. Morrell Estate[2]

Ingrid Ostrom and Ezra Morrell divorced in 2007 after a six year marriage. They signed a separation agreement in which they both agreed to renounce and waive any claim that they had on each other's estates. When they divorced, the agreement became part of the divorce settlement. However, in 2008 Ezra Morrell died in an

automobile accident at the age of thirty-one without making a new Will. His existing Will left the residue of his estate to his former wife.

Ingrid Ostrom decided that she would claim the residue under Ezra's Will, however, Ezra's mother; Anne Robinson challenged her right to do so. In a chambers application, the judge ruled that the separation agreement did not revoke the Will and that Ingrid was entitled to inherit the residue of the estate. Ms. Robinson appealed that decision to the Nova Scotia Court of Appeal. The issue before Mr. Justice Oland of the Nova Scotia Court of Appeal was whether Ms. Ostrom was bound by contract law to renounce a gift under her former husband's Will.

The Court took an exhaustive look at the case law, including some English and American cases. The Court stated that "until the death of the testator, a person has nothing more than an expectancy and one cannot disclaim or renounce an interest in something to which he or she has no legal interest." The Court said that when there is only an expectation, there is nothing on which a renunciation can "bite".

Once Mr. Morrell died, Ingrid Ostrom had a choice. The Court noted she chose not to renounce or refuse to take the residue of the estate. Ms. Robinson argued that Ms. Ostrom should not get to choose: she was contractually obligated under the separation agreement to renounce any claim to her former husband's estate. She further claimed that the agreement was a valid contract because it was supported by valuable consideration. However, the Court ruled "…the appellant has failed to produce any legal authority that a contractual promise to renounce, given for consideration before the death of a former spouse, binds a person to renounce a testamentary gift after his death."

Mr. Justice Oland identified a further problem with Ms. Robinson's challenge. He noted that she was relying on contract law to make her case that Ms. Ostrom could not step away from her renunciation under the separation agreement. However, Mr. Justice Oland stated that "The parties to the contract were Ezra Morrell, and Ingrid Ostrom, and its clause two states that its terms are binding on their heirs, administrators, executors, successors and assigns. The appellant was not a party to the separation agreement, nor is she one of the persons named under clause two. Even if it had been determined that Ingrid Ostrom was contractually bound to refuse the testamentary gift, there does not appear to be any privity of contract between the appellant and Ingrid Ostrom which would allow the appellant to enforce clause two of the separation agreement."

Mr. Justice Oland dismissed Ms. Robinson's claim and also ordered that she pay costs of two thousand dollars to the estate.

When this case was decided in 2009, it was every divorced person's worst nightmare. The law has since been amended.[3]

Conclusion

In general, Canadian law provides that a Will is invalidated by marriage, but not by divorce.

Under Ontario law, marriage invalidates a prior Will unless that Will was made in contemplation of marriage. Divorce, on the other hand, does not revoke a prior Will; however, a couple of provisions in the Will are affected. For example, an ex-spouse cannot be the beneficiary of any of your assets. Nor can they act as your executor or personal representative. In contrast, the Alberta's Wills and Succession Act provides that entering into a marriage or an adult interdependent relationship does not revoke a prior Will, but, any gift to an ex-spouse or former adult interdependent partner left in the Will is deemed void, "… unless the Court, in interpreting the [W]ill, finds that the testator had a contrary intention…"[4]

As evidenced above, there is an obvious intersection between estates, trusts, and family law issues. Separating and divorcing parties should seek the advice of an experienced estate planner as soon as possible in order to avoid the possibility of having an ex-spouse make decisions regarding their personal and financial well-being, or worse, leaving all or part of their estate to their ex-spouse in a prior Will.

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[1] 2011 ONSC 4633 (CanLII)

[2] [2009] N.S.J. No. 597 (N.S.C.A.)

[3] The Wills Act, R. S., c.505, s.1., provides that a divorce revokes a bequest to a testator's former spouse.

[4] Alberta Wills and Succession Act, Statutes of Alberta, 2010 chapter W-12.2 s. 25(1).