

United We Stand: Planning by Spouses

The old-age axiom “the devil’s in the details” applies on several levels to the drafting of Wills. Whether a beneficiary receives a gift outright or in a trust, whether or not an adult beneficiary must wait to receive the entire trust capital at a specified event or upon attaining a specified age, whether or not an individual is a member of a class of beneficiaries, can depend on a single word, a phrase, punctuation or the interaction among these “details”, written in a Will. The drafting lawyer works her craft to reflect the intentions of the testator (the individual whose Will is being drafted) with respect to various “WHAT IFs”, in the context of certain plausible circumstances.

Unique Planning

Drafting Wills for spouses is unique because the spouses’ respective property rights, financial arrangements, and, obligations towards each other and towards common children, are intertwined. Spouses drink at the same well, so to speak, so contaminated water that ails one (succession plan) will also affect the other. The nature of estate planning by spouses is such that the drafting of each spouse’s Will will affect, for good and for bad, the other’s financial status and subsequent flow of assets to the next generation or other intended beneficiaries, and thus, affect the other spouse’s succession plan.

The Survivorship Clause

One plausible circumstance that applies to spouses and which requires unique planning, is the simultaneous or near simultaneous death of spouses. The inclusion of the Spousal Survivorship Clause in the Will is an important part of the overall estate planning, while both spouses are still alive. It is only a small part of the many aspects of coordinated drafting to be implemented between the two spouses’ Wills, but it is an important small part.

Generally, a survivorship clause appears as a preamble to the distributive provisions, and if precisely drafted, imposes a condition of survival of a beneficiary, typically with thirty, sixty, or ninety days

expiration. The survivorship clause in essence imposes a “wait and see” approach to the determination of who will receive what, from the estate of the deceased. In coordination with other provisions in the Will, the survivorship clause directs who shall receive specified property if the survivorship condition is met, and, who shall receive same property if the survival condition is not met. The survivorship clause is a succession strategy that is often used in reference to family members who live or travel together and whose deaths may occur within a very short time span, such as spouses. However, while a survivorship clause is most often used in reference to a spouse, the reference can also be to other beneficiaries, depending on circumstances and intentions of the testator.

There are three main reasons for having survivorship clauses in a Will. The first is to save time, legal fees, and accounting and other financial costs with respect to the administration of certain property, where the spouses (or parent and child, siblings) die within a relatively short time of each other. The survivorship clause prevents the work and expense from occurring twice within a short time span. The second is to ensure that succession intentions of the testator will be given effect to and will not be undermined by someone else’s Will. The third reason is to prevent probate tax from being charged twice, on exactly the same property. This is critical, particularly where the provincial probate tax is significant.

Mirror and Mutual Wills

Since succession planning by spouses involves the intertwining of respective property rights, financial arrangements, and, obligations towards each other and towards common family members, it is common for the trusts & estates lawyer to act for both, on a “Joint Retainer”. Accordingly, between spouses, the use of Mirror Wills and Mutual Wills is common. The use of Multiple Wills, a succession tool used in Ontario and to some extent in British Columbia to shelter private corporate shares and valuable personal effects such as jewellery and art, from probate, is not the subject of this discussion.

Commonly, spouses execute Mirror Wills (also referred to as Reciprocal Wills). In each spouse’s Will, the intended distribution, appointment of executors and the powers given to them, mirror the other spouse’s Will. The Wills are identical, in a “mirror” sort of way. The Mirror Will strategy is typically used by spouses who are parents of common children. This strategy is effective in an intact family context, where the intended ultimate succession is the same. But of course without an accompanying marriage contract, each spouse is free to change his or her Will at any time. Without an accompanying formal agreement neither spouse is bound by the Mirror Will.

Mutual Wills are those which are accompanied by a Contract entered into by the spouses to not change their Wills. The Contract cites the Wills, by date. Unlike a Mirror Will, a Mutual Will by virtue of the Contract which is signed by the spouses to reflect their agreement to not change their respective Wills, cannot be changed by either spouse without the consent of the other. This means that after the first death, the surviving spouse cannot change his or her Will. Such a change would constitute a breach of contract, a contract which is enforceable in court. There are many circumstances in which spouses may choose to execute Mutual Wills with an accompanying Contract to protect future generations’ interests in certain circumstances, only one of which is where the spouses do not have common children.

Considerations, Implications, Consequences

The execution of Mirror Wills does not negate an individual’s right to exercise testamentary freedom and to change his or her Will, at any time, as many times as he or she wishes, so long as the individual demonstrates the requisite cognitive capacity. However, the execution of Mutual Wills involving a binding agreement, a Contract, to not change the Will, restricts testamentary freedom. After the death of the first spouse to die, the surviving spouse is unable to change his or her Will. For this reason and other important reasons, Mutual Wills are not as common as Mirror Wills. They are, however, effective tools in estate planning for high net worth individuals in the context of a blended family, or, where only some of the children are involved in a family business and others are compensated by way of unequal distribution of the estate. Importantly, since Mutual Wills involve complex legal issues and require complicated drafting, independent legal advice for each spouse, is necessary.

The Road Travelled

There are many “details”, many turns and forks in the road, for spouses who embark on a comprehensive estate plan. These details, if not carefully considered, can lead you not towards the meadow, but rather, into a landmine. Spouses have available to them creative planning strategies which can maximize positive outcomes and minimize traps and glitches. Seek the advice of professionals to optimize the results in favour of your loved ones. Call your BMO Wealth Management professional to discuss your estate plan, together with your spouse.

This discussion is meant to be general in nature and does not constitute legal advice. It is critical that you seek and obtain the advice of a trusts and estates lawyer and a tax accountant, before implementing your estate plan.



For more information, speak with your BMO Wealth Management professional.



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