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Estate Planning for Separated Spouses Requires Careful Consideration

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The intersection between estates law and family law has long been a complex and intricate landscape to navigate.

The amendments to the Ontario *Succession Law Reform Act* (“**SLRA**”), implemented in 2022, added a new layer of complexity.

With these statutory amendments, both estates and family lawyers need to carefully consider the implications of separation and divorce in estate matters and advise their clients on how such changes in the law can and will impact their estate plan. If separating spouses fail to be vigilant in structuring their affairs during a divorce, they will face unintended consequences.

For example, previously, under sections 15 and 16 of the *SLRA*, a marriage revoked a prior will, unless the will stated that it was expressly made in contemplation of the marriage. These sections were repealed with the 2022 amendments. Thus, a marriage no longer automatically revokes a prior will.

Another example relates to when a testator spouse becomes separated *or* divorced after their will is made. With the 2022 amendments, under section 17, the will is treated as if the surviving spouse died before the deceased spouse such that all gifts to the surviving spouse are voided if they were separated (in accordance with the definition outlined in section 17 of the *SLRA*) or divorced, at the time of the testator’s death. Note that the surviving spouse may still be a creditor of the estate because of liability for child support or spousal support, whether by prior separation agreement, existing court order or new order.

A further example is when a testator has appointed their spouse as their estate trustee. With the 2022 amendments, under section 17, the law presumes that a separated or divorced spouse shall not be appointed as the deceased spouse's estate trustee. There are exceptions however to this presumption, if a "contrary intention" appears in the testator’s will. Then, a divorced or separated spouse may be appointed as the estate trustee in accordance with the deceased spouse’s will.

Finally, if spouses were separated at the time of one’s death, and the deceased spouse did not have a will (which is not advisable), then with the 2022 amendments, under section 43.1, the surviving spouse will not have the right to entitlement of the deceased spouse’s property. Separation agreements may also impact beneficiary designations, even where the will or designations in the source document were not changed.

[1] The collaboration of the authors is result of their roles as Mentor and Mentee in the TLA Family & Estates Mentorship program.

When lawyers are assisting clients who are separated, but not yet divorced, several steps are advisable. Firstly, it is essential for lawyers to address whether the *SLRA* or other legal instruments, such as separation agreements, will impact bequests and appointments in existing testamentary instruments, such as wills, insurance policies and RRSPs. Secondly, lawyers should confirm their client's intentions regarding bequests, estate trustee appointments (including alternate trustees), and beneficiary designations. Thirdly, lawyers should review with their clients whether new or revised testamentary instruments are necessary to prevent unintended appointments or beneficiary designations.

The intersection between estates law and family law became more complex with the amendments to the *Succession Law Reform Act* implemented in 2022. Separating spouses must continue to be acutely aware of how their separation may affect their estate planning. Careful estate planning and professional advice from both an estates lawyer and family lawyer are essential to ensure their intentions are realized and to avoid unintended consequences in the distribution of their assets. Estates and family lawyers should work collaboratively to guide their clients through this intricate legal landscape.