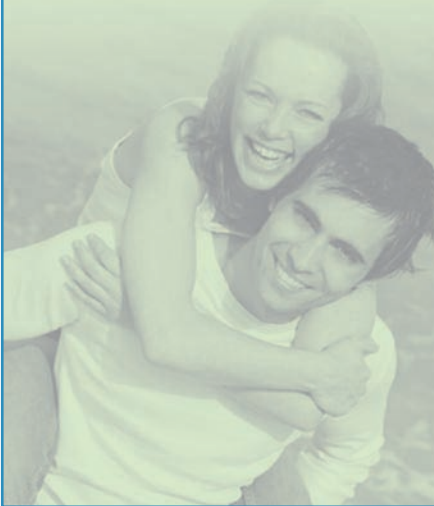




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WILLS, ESTATES AND TRUSTS

Estate Contracts: A Look at Mutual Wills

Mutual wills are two wills, one executed by each of two individuals who have agreed to a specific estate plan. Most often each party leaves their estate (or a life interest in their estate) to the other party and their instructions are identical or very similar as to how their respective estates are to be disposed of upon the death of the party who is last to die. In other words, regardless of which of the two parties dies first, the distribution of the remaining assets of the survivor's estate is agreed upon by the parties in advance. Once one of the parties dies, the estate plan becomes irrevocable with few exceptions.

Case law indicates that courts will apply the "mutual wills doctrine" where there is independent evidence of an agreement not merely to make identical wills but to dispose of the property in a particular way. It must amount to a contract at law. Wills that are executed simultaneously and have identical provisions will not be presumed to be mutual wills. Here, one should note that spouses often execute what are commonly referred to as "mirror wills" in that they are identical or virtually identical, expecting that the surviving spouse will not alter the terms. But unless there is evidence of a specific agreement between the spouses not to alter their estate plans, the surviving spouse is free to change his or her will at any time.

Evidence that an agreement exists may include prohibition against revocation of the plan contained in the wills or another document. As neither of the parties to the mutual wills are usually available to testify, hearsay evidence and other conduct may be relied upon as proof of the agreement.



Are you ready?



Boundary Dispute

Zorz v. Attard, 2008 CanLII 2760 (ON S.C.) was the case of two neighbours whose houses were built about 80 years ago on Baby Point Rd. near Jane and Annette Streets in the City of Toronto. The fence separating the houses was constructed 15 inches west of the actual boundary, making it appear that the Zorz land was 15 inches wider than what was shown on the deed. The original deed to the Zorz house included a right-of-way over the 15-inch strip of the Attard property.

In 2006, Attard renovated her home and constructed an addition. In the process, she removed the old fence and replaced it with a new one on the true, registered property line. As a result, the Zorz family could no longer access their garage, and sued Attard in November, 2006.

When the case was heard, Justice Macdonald decided that the Zorz family had acquired adverse possession to the 15-inch strip of land east of the original fence line (as did the previous owners) due to their contin-

uous, uninterrupted, open and “notorious” occupation of it for more than 11 years from their purchase in 1990 to the government’s conversion of both properties to Land Titles in 2001. As Attard’s actions were declared to constitute trespass, nuisance, invasion of privacy and interference with the Zorz’s right to use and enjoy their home, the Zorz’s were awarded \$7500 in damages plus \$7500 in costs. Attard was also

ordered to replace the fence at the same location as the original fence she removed.

Thus, it is best, when purchasing, to check property boundaries on a survey. Moreover, fences should be relocated with agreement from the neighbouring owner or a court order, as taking matters into your own hands can be costly and deteriorate relations between you and your neighbour.



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