Blended Families – Do you need a Mutual Will Clause

Becoming ever-increasingly prevalent in modern times is the familial situation where one or both spouses have a child or children with a third party before the commencement of a relationship. This situation is known as a ‘Blended Family’.

Whenever a blended family situation occurs, the Testators should be advised whether to establish a Mutual Will Clause in their will or enter into a Mutual Will Agreement with their spouse.

The purpose of a Mutual Will Clause or Agreement is to:

1. Ensure the child/children of one or both spouses benefit under their parent’s will regardless of which spouse passes away first;
2. Protect the testamentary wishes of the Testator upon their death; and
3. Reduce the likelihood of success regarding a Part IV claim being made by any child or potential beneficiary.

What is a Mutual Will Clause or Agreement?

A Mutual Will Clause is a decree stipulated in a will where the surviving spouse, upon the death of the Testator, will have the benefit of the Testator’s assets and will not dissolve or dilute such assets for the remainder of their life. In turn, upon the death of the Testator’s spouse, the Testator’s assets will vest as per the Testator’s bequests.

In addition, the clause legally binds and restricts the spouse from entering a new or altering the pre-existing will without the consent of the Testator or, in the event of the Testator’s death, a nominated Trustee (usually an Alternate Executor). The other spouse has the same or similar clause in their will, hence the term ‘Mutual Will clause’.

A Mutual Will Agreement is effectively the same as a Mutual Will Clause, but instead of being evidenced in wills, the terms are adduced to a formal deed, which will be kept alongside the original wills.

Example

A marries B and has two children together, C and D. Z marries Y and has one child together, X. The marriages between A and B and Z and Y end, and each divorce. Shortly after, A and Z commence a relationship and eventually marry. A and Z wish to create wills in which they leave all assets to the surviving spouse, with the residue to be split between C, D, and X as tenants in common in equal shares upon the death of the surviving spouse.

Because A and Z are a blended family, they are advised of the potential consequences of drafting the wills as instructed, including the surviving spouse altering their will upon the death of the other spouse and the potential of a Part IV [1] (#_ftn1) claim being made by each of their children. A and Z are advised to either include a Mutual Will clause in each of their wills or enter into a Mutual Wills Agreement to ensure the assets vest as instructed and inhibit the success of a claim.

Recent Case Law

The Supreme Court case of Re Miglic [2] (#_ftn2) highlights the importance of entering into a formal Mutual Will Agreement rather than relying on such an agreement orally.

The case centered on the blended family relationship between Kurt Miglic and Marilyn Miglic, who married after the ending of their prior relationships; Kurt had two daughters from his previous relationship (Plaintiffs), whereas Marilyn had no children of her own, however, had two nieces and one nephew (second Defendants). The first Defendant, an Administrator for the Estate of Marilyn, did not

actively participate in the proceeding. The Plaintiffs claimed both Kurt and Marilyn orally entered into a Mutual Will Agreement in which their wills could not be updated without the consent of the other.

The Plaintiffs argued that in 1993, Kurt and Marilyn executed comparable wills, and each left their entire estate to each other absolutely upon their deaths. The contrasting difference in each will was the resulting residue clause; Kurt's residue if Marilyn predeceased him went to the Plaintiffs, whereas Marilyn's residue bequeathed the sum of $20,000.00 to the second Defendants as tenants in common in equal shares with the remainder to be given to the Plaintiffs.

After being diagnosed with Dementia in the late 1990s and having memory issues, Kurt passed away in 2007.

In 2001, 2005, 2011, 2014, and 2018, before passing away in 2020, Marilyn altered her will, further bequeathing a greater share of the estate to the second Defendants, thereby diluting the share to be vested in the Plaintiffs. Marilyn's 2018 will left one-fifth of her property in Toorak (formally a joint asset with Kurt) to each of the second Defendants with the remaining two-fifths of the property and the residue of her estate to the Plaintiffs. The property sold for $11,500,000.00, resulting in a $6,900,000.00 loss of beneficial interest to the Plaintiffs when considering the testamentary differences between Marilyn's 1993 and her 2018 will.

After hearing the evidence and submissions of both parties, Justice Gorton determined there was "[sufficient evidence based on the balance of probabilities to conclude both Kurt and Marilyn agreed in a way not to change their wills without the consent of the other"] [3]. (#_ftn3) His Honour declared Marilyn's estate is to be held in trust by the first Defendant to give effect to her will made in 1993 [4]. (#_ftn4)

Conclusion

Although the Plaintiffs was successful in Maglic, the decision connotes the importance of effective will drafting in capturing a client's testamentary intentions, especially when a Mutual Will clause or Agreement may be appropriate. Adducing such intentions into a will or agreement will most likely reduce the requirement and expense of Supreme Court litigation yet protect your testamentary dispositions.

If you require advice on preparing your will or wish to discuss whether a Mutual Will Clause or Agreement suits you, please do not hesitate to contact us at 5303 0281 or at admin@ballaratlawyers.com.au .

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[1] (#_ftnref1) Administration and Probate Act 1958 (Vic)

[2] (#_ftnref2) [2024] VSC 20

[3] (#_ftnref3) Ibid at 117.

[4] (#_ftnref4) Ibid at 137.

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