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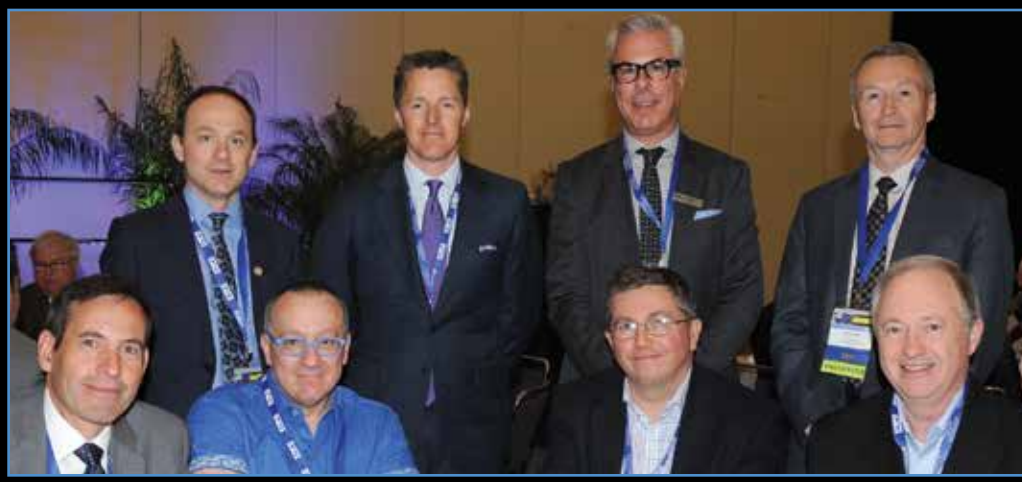

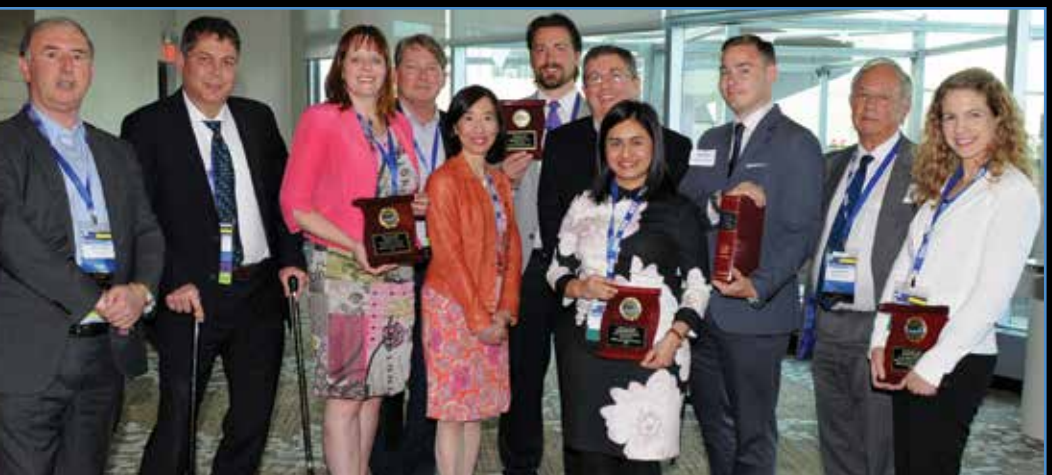

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All enquiries, comments and correspondence may be directed to:

STEP Canada
45 Sheppard Avenue East,
Suite 510
Toronto, ON, M2N 5W9
www.step.ca

Tel 416-491-4949
Fax 416-491-9499
E-mail news@step.ca

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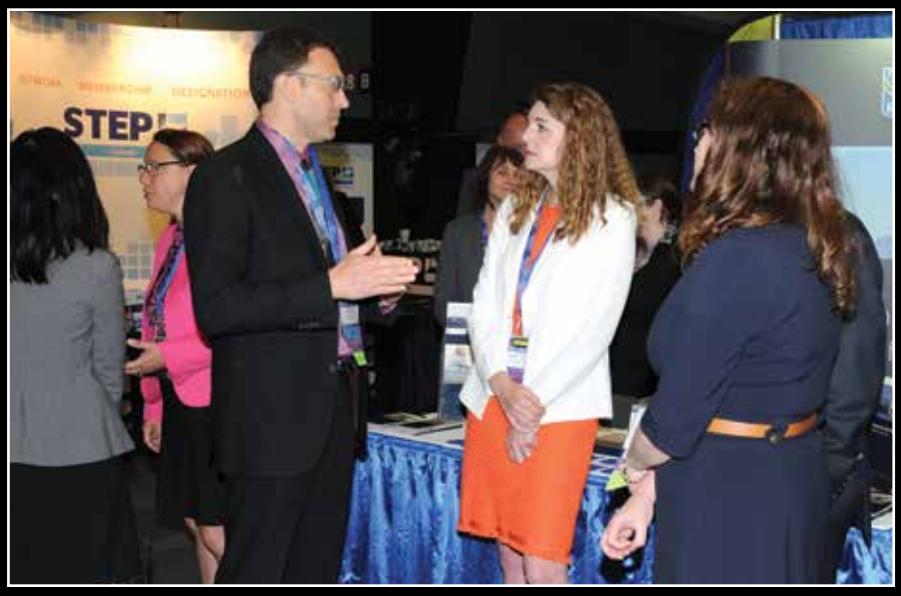

MUTUAL WILL CHALLENGE UPHELD

JOAN E. JUNG TEP
Partner, Minden Gross LLP; Member, STEP Toronto

Spouses often have reciprocal or mirror image wills. In such cases, testamentary freedom permits each spouse to revoke his or her will and write a new will independently of the other spouse. In the case of mutual wills, however, neither spouse has this freedom without the consent of the other spouse. Mutual wills are founded in contract; there is an agreement between the spouses concerning the testamentary disposition of property. The recent case of *Rammage v. Estate of Roussel* 2016 ONSC 1857, illustrates the applicable principles.

Ruth and Alf had been in a long-term relationship before their marriage. Each had two children from a previous marriage. Before marrying in 1997, they had lived together for approximately 12 years, beginning in 1985. Within the first year of cohabiting, Ruth and Alf entered into a cohabitation agreement. Among other things, the cohabitation agreement effectively provided that each person's property would remain separate; it also provided for mutual releases. The cohabitation agreement, which was to continue in force notwithstanding the marriage, also provided that there were no restrictions on making testamentary gifts.

At the time of the marriage, all four children were independent and not living with Ruth and Alf. In the court's words, after the first few years of marriage, Ruth assumed the role of "a traditional homemaker," and Alf was "the main breadwinner." He worked until the year before his death.

In 1998, after the first year of their marriage, Ruth and Alf signed wills in which each gave all of his or her estate to the other; the wills also provided for an equal division of assets among the four children on the death of the survivor.

Alf died in 2009, and Ruth inherited Alf's estate. After Alf's death, the relationship between Ruth and Alf's children deteriorated. In 2010, Ruth signed a new will in which she left her estate to her two daughters and made no provision for Alf's children. Following Ruth's death in 2013, Alf's children brought an action on the basis that the 1998 wills were mutual wills.

In summary judgment, the Ontario Superior Court held in favour of Alf's

two children. The court noted that if wills are not specifically noted in their terms as being mutual, there must be "clear and convincing evidence" of a binding legal contract between the two spouses that the wills cannot be changed without the consent of the other. Specific reference was made to section 13 of the *Evidence Act*, which applies to will challenges and requires that an interested person must corroborate his or her own personal evidence with other material evidence.

In this case, the lawyer who prepared the 1998 wills recalled no discussion that the parties could not change the wills independently of each other. Apparently, he asked no questions about mutuality. There was no indication whether the same lawyer or another one prepared Ruth's 2010 will.

One of the plaintiffs deposed that during his final illness, Alf had verbally confirmed to her his intention that Ruth be taken care of after his death but that following Ruth's death, he and Ruth had arranged that all four children would share equally. The same plaintiff also deposed that before Alf's death, Ruth had verbally confirmed the equal sharing concept.

The court reviewed the relationship of Ruth, Alf, and the four children. The 1986 cohabitation agreement was discounted because it was entered into almost 9 years before marriage and almost 12 years before the 1998 wills. The court considered it "not unreasonable to conclude" that in the 12 years between the cohabitation agreement and the 1998 wills, the parties' views of long-term financial commitments may have changed significantly. The evidence showed that Ruth and Alf had a close personal relationship with all four children without differentiation on the basis of their biological relationship. Presents on family occasions and holidays reflected this, as did the fact that all four were invited to select items of meaning from Alf's mother's belongings before she moved into a nursing home. The court considered that Alf's obituary was indicative of a "unified family," referring to "four children" without distinction. The court found that the facts disclosed a "blended family history." In view of these findings, the court concluded that the plaintiffs satisfied the onus of proving a verbal contract between Ruth and Alf. As a result, it declared that the 1998 wills were mutual wills and the trustees of Ruth's estate held the estate assets in trust to be divided equally among the four children.

It is interesting that the necessary corroborative evidence determined by the court was arguably similar to the typical hallmarks of a relatively long marriage during which a couple makes some estate-planning decisions. Additionally, the case demonstrates that it is prudent for advisers to raise the question of whether reciprocal or mirror image wills are intended to be mutual wills. Moreover, in recognition of the fact that relationships may change after the death of a biological parent in blended families, documenting contractual understandings during the joint lifetimes of the spouses may be judicious.

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