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Acting For Husbands & Wives

Do you act for husbands and wives buying a house together, giving a mortgage together, or preparing family wills? Of course you do. Who doesn't?

If you do, just remember the joint retainer rules. Even though the clients are married to each other and doing little more than buying a house or doing mutual wills leaving everything to the other with a gift over to their children, rule 2.04(6) of the Rules of Professional Conduct considers that the lawyer has a joint retainer i.e. two clients which means that the lawyer must advise the clients that:

- the lawyer has been asked to act for both of them;
- no information received in connection with the matter from one can be treated as confidential so far as the other is concerned; and

- if a conflict develops that cannot be resolved, the lawyer cannot continue to act and may have to withdraw.

Subrule 2.04(8) requires that, after so advising the clients, the lawyer obtain both clients' consent.

The rule also includes special commentary when acting for spouses making wills about advice to clients should they want to retain the lawyer to change their wills in the future and the duty of disclosure and the possible inability to act. Check out the rule on the Law Society website. And make sure you have the signed document of consent in your file. The Law Society auditors will be looking for it.

While many lawyers might consider the rule odd, especially in the context of a simple residential purchase or will, it is a rule that requires understanding and compliance.

Using Joint Tenancies to Avoid Probate

We all have done it. Put title in joint tenancy so that if one spouse dies, the property goes to the survivor without the need for probate.

We may do it with ailing parents. Mom died, Dad is getting older and living in the house so you have him transfer an interest to a child or children for natural love and affection so title is Dad and child or children as joint tenants. Presumably, you make sure that if there are several children, you avoid the exclusive gift problem and all the children are on side as to who actually gets the house or the sale proceeds when Dad dies.

Can you do it if Mom has Alzheimers or is in a nursing home and is incapacitated, Dad owns the house having used a power of attorney to get title out of Mom's name and now wants to estate plan so that when he dies, the house

goes to the kids without probate. When Dad dies, do the surviving joint tenant children take? Not so fast.

Section 26 (1) of the *Family Law Act* says that "If a spouse dies owning an interest in a matrimonial home as a joint tenant with a third person and not with the other spouse, the joint tenancy shall be deemed to have been severed immediately before the time of death." That means the children get their interest but Dad's interest passes by his will so that Mom's family law rights can be protected. The children do not take by right of survivorship. Probate might be required. And you may need to ensure that you have powers of attorney for Mom in place as well. Nothing is easy. Watch out for it as an obstacle to a simple solution.