

Family Law and Estate Planning

TAX & ESTATE BULLETIN



Each province in Canada has legislation granting rights to partners in a marriage or spousal (common-law or same-sex) relationship when that relationship ends, whether because of relationship breakdown or the death of one of the partners. Those rights may include property rights or support rights, or both. This bulletin is intended to outline, in a general manner, the property and support rights that are in force across Canada (including Quebec, which is governed by Civil Law), and how they may affect the estate planning process.

To better understand the impact of these rules on your estate plan, it is important that you speak with a legal advisor familiar with the relevant rules for your province. When you are developing your estate plan, be sure to discuss all aspects of your marital and family situations with your advisor. It's also a good idea to review your will from time to time to make sure it reflects new developments in your personal circumstances and/or in family law. Changes in these areas can have a dramatic effect on your estate planning objectives, and can influence the extent to which the distribution of assets described in your will can be carried out.

What aspects of my estate plan can be affected?

From a "family" perspective, your estate plan should include provisions as appropriate for:

- Current and/or former spouses, common-law partners and same-sex partners
- Births, adoptions and step-children
- Family members who have disabilities
- Aging parents

- Deaths of individuals you have included in your will
- Any individuals you have been supporting, plan to support or, in some provinces, should be supporting
- Changes in marital status of other family members
- Changes in citizenship or in province/state/country of residence

Including these issues in your estate plan can save time, heartache and expense for your heirs who may have to become involved in court action to overturn or change aspects of your will or estate plan after your death. This is especially important if you have excluded a beneficiary (either intentionally or through oversight).

How matrimonial property rights can influence your will

Laws governing the division of property upon marriage breakdown were changed during the 1970s and 1980s because the existing rules were considered to be unfair. In many cases, the breakdown of the marriage would see the wife receive few, if any, of the business or investment assets that were acquired during the marriage because she rarely made a direct contribution to acquiring or maintaining the assets.

Provincial family law legislation now provides some form of property sharing between the partners in a spousal relationship when that relationship breaks down. Some provinces have also given certain property rights to a surviving spouse on the death of the other spouse. If your spouse survives you, those property rights can override the instructions in your will.

Matrimonial property rights from your beneficiaries' perspective must also be considered in your will. For example, if you intend to name your child as beneficiary of your estate, you should carefully consider how the applicable laws governing division of property between spouses deal with gifts or bequests received by one of the parties. This issue can be complicated by the fact that your child may change his or her place of residence from time to time. As an example, for the purpose of determining a spouse's property claim in Ontario, the *Family Law Act* excludes from each spouse's net worth calculation the value of gifts and inheritances (except the matrimonial home) received during marriage. You can put a clause in your will to similarly exclude income earned on the inheritance. If your will does not have a specific statement to this effect, then your beneficiary may not have all of the protection he or she needs. A lawyer can advise you of the rules in relation to inheritances for the various jurisdictions in which your beneficiaries are living and, where permitted, the wording in your will that is necessary to protect your beneficiaries.

What is a "spouse" and why is it important to understand the definition?

Many people are confused about the rights and obligations of parties to a relationship because the definition of spouse varies, depending on how and why you are using the term. For example, in 1993 the *Income Tax Act* was changed to allow identical treatment of a married spouse and a person who is, or has been, in an opposite-sex, conjugal relationship for at least 12 months.

(This time period is reduced if the couple has a child together.) Recently, new legislation grants same-sex couples the same rights for income tax purposes as opposite-sex parties in a common-law relationship.

The definition of spouse for income tax purposes is not exactly the same as the definition under provincial family law or succession (estate) law, although these laws generally are important for estate planning purposes relating to, for example, tax-deferred rollovers of RRSPs, RRIFs and capital property. You should be aware of some of the differences when it comes to determining the rights of the parties to a conjugal relationship as outlined in family law and succession law. Due to provincial differences in legislation and judicial decisions under the *Canadian Charter of Rights and Freedoms*, rights can vary dramatically from one province to another.

For instance, in most provinces currently, only married spouses have rights to a share of the estate of a deceased spouse who dies without a will (called "intestate"). The married spouse is entitled to an amount set by the province (called a "preferential share") and to a share of the balance of the estate as defined by the province (called a "distributive share"). The size of this distributive share depends on the number of surviving descendants (children, grandchildren, etc.) if any. In early 2000, British Columbia revised its succession laws to give all surviving partners the same rights in all aspects of intestacies, including the preferential share. This may become an issue in all provinces.

Another example of the differences in rights for married spouses is who is allowed possession of the matrimonial home. "Possessory rights" include the right to live in the home or to block a sale of, or loan on the property. Many provinces limit possessory rights to married spouses.

However, recently a Nova Scotia court ruled that the matrimonial property law in that province was unconstitutional, on the grounds that it discriminates against parties in a heterosexual common-law relationship.

Family law legislation has a bearing on issues such as the appointment of your spouse as executor, and the provision of assets to your spouse under your will. Whatever province you live in as a couple, and whether you are married or living common law, family law issues should be kept in mind when drafting your will. For clarity, you should consider having a marriage contract or cohabitation agreement. Talk to your legal advisor to make sure you understand the matrimonial property rules in your province.

CHANGES IN YOUR MARITAL STATUS CAN AFFECT YOUR WILL

Unless drawn up in anticipation of a marriage, your pre-marriage will is automatically revoked by the marriage (not applicable in Quebec). This rule was made to ensure that your new relationship is taken into consideration in your estate plan. There can be times however, when there is a domestic contract in place that benefits the new spouse satisfactorily, and the terms of the pre-marriage will are acceptable to everyone concerned. Under these circumstances, the provinces of Ontario, Nova Scotia and New Brunswick permit a surviving spouse to file an election within one year of death to use a will made prior to the marriage. If no election is made, then the will is revoked. This could mean that other beneficiaries may be treated differently from the way you intended in your will. If however, you were previously married, and are now in a common-law relationship, your will may not be automatically revoked. Under these circumstances, it's important that you draw a new will to reflect your new personal circumstances.

Provincial rules for family property

Each province refers to property included in marriage differently ("community property," "family property," "family patrimony," "marital property" or "net family property," to name a few). In this bulletin we will use the term "*family property*." The provinces vary as to what actually makes up family property, but in most provinces the definition of family property is similar. Generally, legislation is based on the idea that marriage (or, in some cases, a common-law relationship) creates an economic partnership, and when that partnership breaks down, each partner is entitled to a share of the family property. That share is usually 50 per cent, although most provinces permit changes to that percentage under certain circumstances.

If you are in a marital relationship at the time of your death and your spouse or partner is entitled to make a claim under family law, and does so, it can have a major impact on your estate plan. If part or all of the assets have to be sold to pay the claim, there may be no way to take advantage of a rollover to defer taxes. This could reduce the size of your estate that is remaining to distribute to your other beneficiaries.

Matrimonial property rules can generally be overridden if both parties sign a domestic contract that clearly defines the division of property. Don't rely on informal contracts, whether oral or written, because provincial laws have established minimum criteria to make domestic contracts legally enforceable, and informal agreements might not satisfy the provincial standards. To fully understand the family law issues that might affect you or an intended beneficiary, talk to your legal advisor.

HOW DOES IT WORK UNDER QUEBEC CIVIL CODE?

Regardless of which spouse is the registered owner of family assets, the principal and vacation homes of the family, furniture used by the family in the homes, motor vehicles used by the family, and retirement plan benefits accumulated during marriage form the family property that is divisible upon death. This is called the *family patrimony*. Shares held in private or public companies, bank accounts and term deposits do not form part of the family patrimony.

Upon your death, the net value of all assets (market value less costs to acquire, improve or maintain) is roughly divided in half. Your surviving spouse is entitled to one-half of the family patrimony, even if your will says otherwise (e.g. totally excludes your spouse or bequeaths the entire value of the family patrimony to that spouse). The claim of your surviving spouse has priority over any of your other beneficiaries or heirs and this could reduce the amount of their inheritances.

Division of inherited assets – what you should know

If you are planning your will, or if you are the beneficiary under the will of someone else, it's important that you understand how matrimonial property laws treat inheritances. Provincial variations in the laws can include:

- Whether or not timing, (whether an inheritance is received either before or after the beginning of the conjugal relationship) is a deciding factor in sharing the inheritance
- Whether or not the inheritance includes the matrimonial home

- The extent to which other assets acquired with the proceeds of the inheritance must be shared
- Whether or not the matrimonial property rules divide or exclude the assets or only the value of those assets
- Whether or not the increase in value of the inheritance from the time of receipt until the end of the relationship must be divided

Don't forget support of dependants

Since 1900, there has been dependant's relief legislation in place that permits your dependants to ask for support from your estate. Provinces vary on the definition of dependant, so talk to your lawyer to make sure you are clear about this point. Ontario's *Succession Law Reform Act*, for example, sets out a clear definition of a dependant, including a married spouse, common-law or same-sex partner who lived with you in a conjugal relationship for at least three years (or for less than that time if you and your partner together are the natural or adoptive parents of a child).

Dependant's relief legislation is intended to prevent a person from having to claim public assistance as a result of your death if you were, or should have been, supporting him or her at the time of death. Because of this, some provinces have legislation that makes certain assets available to satisfy a dependant's relief claim, even if those assets would not otherwise form part of your estate. In Ontario, for example, a life insurance policy on which there is a designated beneficiary does not usually form part of your estate and is so protected from creditors. However, if there is a claim for dependant's relief, the province's *Succession Law Reform Act* expressly includes insurance proceeds of an individual insurance policy owned by you or a group insurance policy of which you were a member as part of your estate. RRSP and RRIF accounts owned by you may also be included for dependant's relief claims, even if you have named a beneficiary on the plans.

CASE: KAWIUK VS. WAGENKO ESTATE

In a case decided in Manitoba in 1999, Mrs. Kawiuk had lived with John Wagenko for approximately 11 years in a common-law relationship, until Mr. Wagenko's death. It was agreed when she moved in with Mr. Wagenko that she would sell her own house and give the proceeds from the sale of her home to her two sons, as had been requested by her late husband.

At the time of Mr. Wagenko's death Mrs. Kawiuk had her own source of income, but was dependent on Mr. Wagenko for shelter. Unfortunately, Mr. Wagenko did not make any provision for her in his will. The court decided that the estate, given its nature and size, could provide reasonable support for Mrs. Kawiak, and so awarded her a lump-sum amount equal to the approximate value of the house she had previously sold.

What can I do to make sure my will is followed when I die?

Although your will outlines how you want your assets distributed at death, it cannot override your partner's legal property or support rights that arise at your death. A domestic contract can outline how your assets are to be divided if the relationship between you and your spouse or partner ends. In some provinces however, a dependant's relief claim cannot be overridden by a contract. A domestic contract is especially important for common-law and same-sex relationships, as it clearly defines the rules and can reduce challenges from relatives who may not approve of the relationship. You should discuss this issue with your lawyer to clarify the rules in your province.

Getting advice

Talk to your advisor about how to make sure your estate plan includes all of the legal and personal considerations that affect you and your family. For more information on tax and estate issues, ask for copies of the Tax & Estate Bulletins entitled *Death & Taxes*, *Structuring an Effective Will* and *Incapacity – Planning Ahead Helps*.

Have a tax or estate planning question?
Call us at **1.800.874.6275** or
E-mail infoservice@aimfunds.ca

The information contained in this bulletin is meant to be for education purposes only, and is not intended to offer legal advice. Talk to a lawyer familiar with family and estate law in your province for further clarification and advice.

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