



SPOUSAL RIGHTS AFTER DEATH

When a surviving spouse's inheritance is less than expected, he or she has some legal rights. Spousal rights are complex and are governed by provincial law. This article reviews the survivor's rights in Ontario. Future articles will review other provinces.

WHO IS MY SPOUSE?

Typically, spouses are either married or common-law. Under the Family Law Act ("FLA"), if two people are living common-law, they will be considered spouses if they have lived with each other for at least three years; or have lived in a permanent relationship and have a child together. The Supreme Court of Canada case *Molodowich v. Penttinen* considers what qualifies as "living together". The following amongst other factors should be considered:

- Did the parties live under the same roof?
- What were the sleeping arrangements?
- Did they maintain an attitude of fidelity to each other?
- Did they participate together or separately in neighborhood and community activities?
- What was the attitude and conduct of the community towards each of them and as a couple?

A married spouse, but not a common law spouse has a right to inherit upon intestacy and is entitled to financial support from their partner's estate. In the absence of a marriage contract, if the deceased's will does not provide adequately for the surviving spouse, the surviving spouse is entitled to receive the greater of:

- What would have been received upon divorce or separation (an equalization payment);
- Their entitlement on intestacy; or
- The gift set out in the will

(i) Equalization Payment:

Under the FLA a disappointed spouse may renounce his or her entitlement under their spouse's Will and seek an equalization awards in the same manner as they would in a separation or divorce. In addition, the surviving spouse has a 60-day period following the death of their spouse to live in the matrimonial home on a rent-free basis.

The following should also be considered:

The definition of property, over which a spouse may claim, is very broad and includes an interest in a corporation and a vested pension plan.

There are some notable exclusions from property including inheritances, life insurance proceeds, court settlements and property pre-excluded in a domestic contract.

The valuation date is the day before the spouse's death and not the date of death. This makes the valuation of registered products problematic

The surviving spouse must make an election for equalization within six months of the spouse's death. Once an election is made there is no guarantee a revocation can be made. So, a spouse often must decide to elect before all financial details are known.

(ii) Intestacy:

If a married spouse dies intestate (without a will), the Succession Law Reform Act ("SLRA") creates a minimum inheritance for the surviving spouse. Under the SLRA, a surviving spouse is entitled to the entire estate, if the deceased left no children. If the deceased left a child, his or her spouse is entitled to a preferential share of the estate (\$200,000) plus one half of the remaining estate. The child would inherit the other half. If the deceased left more than one child, the spouse would be entitled to the preferential share of the estate (\$200,00) and 1/3rd of the remaining estate. The deceased's children would share the other 2/3rds.

Remember, the SLRA does not recognize common-law couples.

(iii) Dependency Claim:

A dependency claim is available if the surviving spouse was dependent on the deceased and was not adequately provided for in the will. It applies to both a marriage and common-law relationship. The spouse needs to prove dependency to be entitled to support. Dependency claims tend to be long and costly both "financially and emotionally". The applications for dependency must be filed within six months after probate has been granted.

(iv) Unjust Enrichment:

Although an equalization payment is only available to a married spouse, unjust enrichment may be another means for a common-law spouse to advance a claim. Unjust enrichment is an equitable principal that states one person should not receive a financial gain at another's expense.



THINGS TO DISCUSS WITH YOUR CLIENTS:

Consider A Domestic Agreement – Domestic contracts are a viable way to determine property and spousal support entitlement.

Importance of a Will – It is imperative to have an up-to-date will. A will is by not bullet proof, however it allows a person to determine their beneficiaries and lets the family know their wishes.

Communicate – Perhaps most importantly, couples should communicate their estate plans to avoid unpleasant estate litigation and family disputes.

Visit us at ci.com/en/tax-retirement-and-estate-planning
For more information, speak to your CI sales team.



IMPORTANT DISCLAIMERS

This communication is published by CI Global Asset Management ("CI GAM"). Any commentaries and information contained in this communication are provided as a general source of information and should not be considered personal investment advice. Facts and data provided by CI GAM and other sources are believed to be reliable as at the date of publication. Certain statements contained in this communication are based in whole or in part on information provided by third parties and CI GAM has taken reasonable steps to ensure their accuracy.

Market conditions may change which may impact the information contained in this document. Information in this communication is not intended to provide legal, accounting, investment or tax advice, and should not be relied upon in that regard. Professional advisors should be consulted prior to acting on the basis of the information contained in this communication.

You may not modify, copy, reproduce, publish, upload, post, transmit, distribute, or commercially exploit in any way any content included in this communication. You may download this communication for your activities as a financial advisor provided you keep intact all copyright and other proprietary notices. Unauthorized downloading, re-transmission, storage in any medium, copying, redistribution, or republication for any purpose is strictly prohibited without the written permission of CI GAM.

CI Global Asset Management is a registered business name of CI Investments Inc.

©CI Investments Inc. 2021. All rights reserved.

Published: January 14, 2021

21-01-0019_E (01/21)