

# Estate Planning for Blended Families

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# OUR EXPERIENCE

As a leading Saskatchewan law firm, our roots and values are evident in everything we do. We are grounded, pragmatic and hardworking.

With over a century of experience behind us, our lawyers seek to maintain a legacy of both shaping and remaining at the forefront of their respective areas of law.

Your presenters today have a breadth of experience in estate planning, family law, and litigation.



## TOPIC DESCRIPTION

Common issues that arise with blended families in the estate planning and litigation areas including:

- Changes to *The Wills Act* on revocation of a will after a spousal relationship;
- Cohabitation Agreements;
- *The Dependant's Relief Act*;
- Will Drafting considerations with blended families;
- Ethical Issues; and
- *The Family Property Act* considerations.

# Legislation

- *The Wills Act, 1996 and regulations*
- *The Intestate Succession Act, 2019 and regulations*
- *The Administration of Estates Act*
- *The Family Property Act*
- *The Dependant's Relief Act, 1996*
- *The Family Maintenance Act, 1997*
- *The Children's Law Act*

# Ethical Issues – The Retainer – Should you Act?

- Law Society of Saskatchewan – Code of Professional Conduct
  - Joint Retainer Rules apply:

Advise clients re: no confidentiality, and what happens if a conflict arises.

Have them sign a Joint Estate Planning Consent.

Practice tip: Include this as part of your initial estate planning questionnaire.

- Maybe you shouldn't act? A blended family situation is one where the potential for conflict is more obvious than others.

# Estate Planning Consent Form

*The Code of Professional Conduct* requires that before a lawyer acts in a matter or transaction for more than one client, the lawyer must advise each of the clients that:

1. the lawyer has been asked to act for both or all of them;
2. no information received in connection with the matter from one client can be treated as confidential so far as any of the others are concerned; and
3. if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

We consent to Robertson Stromberg LLP acting for both my spouse and I with our estate planning, including preparing documents such as wills, Power of Attorney, Health Care Directive, transfers of titles and other such documents which are deemed necessary.

Dated \_\_\_\_\_, 2023

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# Why have a Will, especially in the context of Blended Families?

- With no will the estate will be administered according to the statutes of Saskatchewan. The following concerns arise:
  - The scheme is dictated by statute which may seem in some cases arbitrary and inflexible. Raises issues of both certainty (follow the statute) and uncertainty in terms claims that can be made against the estate for family property and dependant's relief act claims (which can leave everything in a huge mess and delay administration and distribution of assets to those who ultimately entitled to share).
  - Status of spouses and entitlement – is this what the intestate would have wanted?
  - Entitlement of children and sharing with a spouse.

## Let's take a look at the distribution scheme provided for under *The Intestate Succession Act*

- The definition of spouse and descendant in the *Intestate Succession Act, 1996* (ISA):
  - “spouse” means:
    - (a) the legally married spouse of the intestate; or
    - (b) an individual who:
      - (i) cohabited with the intestate as spouses continuously for at least 2 years; and
      - (ii) at the time of the intestate's death was continuing to cohabit with the intestate or had ceased to cohabit with the intestate within the 24 months before the intestate's death.
- “descendant” means all lineal descendants of an individual, through all generations.



## Scenario 1: Intestate survived by a spouse only (legal spouse or common law spouse)

Result dictated by Section 4:

Subject to section 15, if an intestate died leaving a spouse but no descendants, the entirety of the estate shall be distributed to the spouse.

Issues:

1. Does Section 15 apply?
2. What if the spouse had an elderly mother or father that she was helping to support that lives in a care home?

## Section 15 Exception

A spouse of an intestate will not take any part in the estate if the estate and the spouse if:

- a) They had been living separate and apart for more than 2 years at time of intestate's death.
- b) Were opposing parties in a proceeding under the Divorce Act, Family Property Act, or The Family Maintenance Act at time of intestate's death.
- c) Are parties to an interspousal agreement or court order which appears to separate and finalize their affairs in recognition of the termination of their spousal relationship.

## Section 15 Exception Continued ...

- This disentitlement will not apply if a spouse has reconciled with the intestate and the reconciliation was subsisting at the time of the intestate's death.
- If the spouse of an intestate has left the intestate and is cohabiting with another individual in a spousal relationship at the time of the intestate's death, the spouse takes not part in the estate. The result would be that the estate would be dealt with as if the estate died without a spouse.

## **Scenario 2: Intestate dies leaving a spouse and one or more “common” descendants**

Result dictated by section 5:

Subject to section 15, if an intestate died leaving a spouse and one or more descendants, the entirety of the estate shall be distributed to the spouse if all of the intestate's descendants are also descendants of the spouse.

## Scenario 3: Intestate dies leaving a spouse and one or more descendants that are not descendants of the spouse [blended family scenario]

Spouse's Preferential Share (Section 6) – Current prescribed amount in the regulations is \$200,000

- If the net value of the estate is \$200,000 or less the spouse will receive the entire amount.
- If the net value of the estate is greater than \$200,000:
  - The greater of \$200,000 or  $\frac{1}{2}$  of the net value of the estate would go to the spouse; and
    - If the intestate died leaving a spouse and one child,  $\frac{1}{2}$  of the residue would go to the spouse.
    - If the intestate died leaving a spouse and children,  $\frac{1}{3}$  of the residue of the estate shall be distributed to the spouse.

Intestate's descendants: If an intestate died leaving descendants, the estate shall be distributed, subject to the rights of the spouse, if any, *per stirpes* among the descendants.

## In the previous scenario:

- While the spouse in the blended family benefits, the children of the surviving spouse would not share in the estate (if the estate is under \$200,000) – maybe that's ok?
- Estate may still subject to claims under *The Dependant's Relief Act*

# The Wills Act, 1996 – Provisions to be aware of in estate planning for Blended Families

Effect of Marriage or 24 Months of Cohabitation on Your Will - Changes to *The Wills Act, 1996* enacted effective March 16, 2020.

- Marriage or Cohabitation no longer revokes a Will.
- This amendment is not retroactive (Vance decision).

## *Re Vance, 2021 SKQB 320*

- In March 2004, the deceased had a child. In October 2004, the deceased made a will giving all of his assets to Ms. Bailey (the aunt of the deceased). In 2010, the deceased had another child. In 2012, the deceased and the second child's mother began cohabiting in a spousal relationship. In January 2020, the deceased and his common law spouse were no longer living together. On June 6, 2021, the deceased passed away.
- On March 16, 2020, section 16(a) and 17 of *The Wills Act* were repealed which had previously indicated that a spousal relationship (either marriage or cohabiting in a spousal relationship for over two years) revoked a will.
- The question was whether the October 2004 will was revoked because of the deceased's cohabitation between 2012 and 2020. At the time of death, *The Wills Act* did not contain the provision regarding the revocation of a will because of a spousal relationship.



## *Vance*, continued

- The Court ultimately found that the will was revoked in 2014 (when the parties had cohabitated for over two years).
- The fact that sections 16 and 17 were repealed did not revive the will. The change to the legislation was not retroactive.
- **Takeaway:** If parties became “spouses” before March 16, 2020, any wills predating that date may be revoked (unless the will was made in contemplation of the spousal relationship).
- Real life example

## What effect does a divorce or cessation of a common law relationship for at least 24 months have on a testator's existing Will?

See section 19:

Unless a contrary intention appears in the will the following are revoked and the will is to be construed as if the spouse had predeceased the testator:

- a devise or bequest in property to the spouse
  - the appointment of the spouse as executor or trustee
  - A general or special power of appointment conferred on the spouse
- 
- Note: In this section “spouse” includes the person purported or thought by the testator to be his or her spouse...

## Mutual Wills – an estate planning tool

Wills are great planning tools and are extremely flexible. One of its inherent features is that it is REVOCABLE and can be changed at any time up until death (as long as there is capacity).

It is fluid and should be reviewed periodically to ensure it is appropriate for the life circumstances of the testator at different points in their life. Changes can be made to accommodate these change in life circumstances.

BUT what if spouses want to make sure their surviving spouse does not make some crazy change to their Will after death – like removing the adult children as beneficiaries in favour of, for example, hmmmmm a new spouse???

## What are mutual wills?

“The term “mutual” wills refers to wills that dispose of property belonging to two persons (usually husband and wife), who may have agreed to pool their property and to provide, by their wills, for its disposition according to an agreed scheme. By one typical arrangement, a reciprocal benefit (usually a life interest) is conferred on the survivor, and, after the death of the survivor, the mutual property is distributed to the other persons as the parties have agreed.

...

Persons who make mutual wills may agree not to alter or revoke them without the other's consent, and it is out of this agreement not to revoke that a constructive trust may arise. Such an agreement, however, cannot deprive an individual testator of the right to revoke his or her will.”<sup>1</sup>

<sup>1</sup>James Mackenzie, *Feeney's Canadian law of Wills, 4<sup>th</sup> ed.*, looseleaf at para 1.45-1.46

# Prerequisites for a Mutual Will

- There must be an agreement between the individuals who made the Wills.
- The agreement must satisfy the requirements for a binding contract (knowledge, and acceptance, consideration/ signed under seal); burden of proof is not any greater than on a balance of probabilities.
- Must include an agreement not to revoke the Wills.<sup>2</sup>

See *ibid* at paras 1.50-1.51; See also Johnson, Re (1957) 21 W.W.R. 289 (Sask.CA), aff'd [1959] S.C.R. 102 The dissenting opinion of Culliton J. in the Court of Appeal decision which laid out the requirements for a mutual will has been quoted with approval in several decisions.

## Example Scenario

Albert and Becky had lived together as spouses for just over two years. While spouses, they had one child together named Clarke. Albert and Becky separated and one year later Albert passed away. Albert died intestate and had an estate worth \$1,000,000.00.

Albert had three children from a previous relationship – Dan, Ellie, and Frank.

Becky has two children from a previous relationship – Gord and Hailey.

How would the estate be divided in accordance with *The Intestate Succession Act, 2019*?

## Analysis:

A “spouse” is defined as an individual who cohabitated with the deceased for at least two years and has not been separated from the deceased for a period of more than two years before the death. By this definition, Becky would be considered a spouse, and so is going to have entitlement to the estate.

A “descendant” is defined as lineal descendants of the deceased. This means that Clarke, Dan, Ellie, and Frank will be considered descendants, but Gord and Hailey will not.

## Analysis continued:

In this situation, Becky as a spouse is automatically entitled to  $1/2$  (**\$500,000.00**) of the estate. Becky is then entitled to an additional  $1/3$  of the residue of estate (**\$166,666.66**), and the other  $2/3$  will be divided equally between Albert's descendants (Clarke, Dan, Ellie, and Frank) meaning they would each receive **\$83,333.33**.



## Entitlement would be:

Person	Relationship	Entitlement
Becky	Former Common-Law Spouse	\$666,666.66
Clarke	Child of Albert and Becky	\$83,333.33
Dan	Child of only Albert	\$83,333.33
Ellie	Child of only Albert	\$83,333.33
Frank	Child of only Albert	\$83,333.33
Gord	Child of only Becky	\$0.00
Hailey	Child of only Becky	\$0.00

Shortly after the estate of Albert is divided, Becky passes away and dies intestate. Becky's estate would be divided evenly among Clarke, Gord, and Hailey. **The distribution of Albert's initial \$1,000,000.00 would be as follows:**

Person	Relationship	Entitlement
Clarke	Child of Albert and Becky	\$305,555.55
Dan	Child of only Albert	\$83,333.33
Ellie	Child of only Albert	\$83,333.33
Frank	Child of only Albert	\$83,333.33
Gord	Child of only Becky	\$222,222.22
Hailey	Child of only Becky	\$222,222.22

## *The Family Property Act*

- Adding to the complexity is that a surviving spouse can bring a family property claim.
- Under Section 30 of *The Family Property Act*, a surviving spouse can bring or continue a family property claim against the personal representative of the deceased spouse. Such a claim must be brought within six months after the date of the issue of a grant of probate or administration.
- Section 30 also indicates that the Court shall not consider any amount payable under *The Intestate Succession Act* and is not impacted by the intestacy.
- Thus, a surviving spouse can take in sequence: (1) an equalization payment under the FPA; (2) the greater of \$200,000 or  $\frac{1}{2}$  of the estate; and (3) 50% of the residue of the estate.
- Section 33 also provides that no personal representative will distribute an estate until 6 months from the grant of probate or administration without consent of the surviving spouse or a court order.

## Importance of Cohabitation/Prenuptial Agreements

- It should go without saying that, in advising parties with estate issues and blended families, you should be alive to whether a cohabitation or prenuptial agreement would be beneficial.
- Section 38 indicates that such agreements, if created with the formalities of the Act, are binding.
- When I have been involved in such agreements, they have led to further discussions regarding joint tenancy and whether parties intended for certain lands to have rights of survivorship.

## *The Dependants' Relief Act, 1996 ("DRA")*


- Another major consideration with blended families are the potential claims of dependants.
- Dependants under the DRA can include (1) the wife or husband of the deceased; (2) a child of the deceased under 18; (3) a child of the deceased over 18 at the time of the deceased's death and who alleges that they are unable to earn a livelihood because of mental or physical disability or that by reason of need or other circumstances, he or she ought to receive a greater share of the deceased's estate than he or she is entitled to without an order; (4) a person who has resided with the deceased for over 2 years or was in a relationship of some permanence, if they were the parents of a child.

## DRA (Continued)

- Questions that a lawyer should contemplate when drafting a will include:
  - Are there dependant children?
  - Does the will provide appropriately for those dependant children?
  - Is the new spouse a dependant?
  - Does the will provide appropriately for the new dependant spouse?
  - What advice should be given to the testator regarding risks related to the provisions of the will if there are dependants that are not provided for?
- DRA claims can also be an issue where there is an intestacy. The dependants can claim against the estate, which would be dealt with in priority to the intestate's claim on the estate.

## DRA (Continued)

- The DRA indicates that in determining what reasonable provisions are for a dependant, a court should consider:
  - The past, present or future capital or income from any source of the dependant
  - The conduct of the dependant in relation to the deceased
  - The claims of other dependants
  - Any other matter that the court considers appropriate
  - The reasons that the testator gave for not making provision for the dependant
  - The character or conduct of the dependant that might disentitle the dependant to the benefit of an order.
- In addition, the Court can consider (based on case law):
  - The legal and moral obligations of the deceased;
  - Any waiver of entitlement that the dependant may have signed;
  - The fact that a DRA claim is not intended to provide an estate for the dependant.



Main  
Takeaways/  
Practise tips:

- Consider potential for conflict issues and whether it is a good idea to act for both parties in a blended family situation. If you do get the joint representation consent form signed.
- Proper will planning can address potential undesirable results on intestate succession rules
- Be ready to advise of the effect of marriage, cohabitation and divorce on existing planning documents
  - The Wills Act Amendments on revocation
  - Section 17 of the Wills Act
  - Benefits of having a Cohabitation Agreement/Prenuptial Agreement, especially in the blended family scenario!
- Do a thorough intake - make sure you ask “What if” questions. Use a checklist or intake form to go over with your clients to help them turn their mind to different scenarios and highlight legal obligations they may have.
- In blended family situations ask clear questions on how they want to treat all children – his, mine and ours. Who do they wish to specifically include or exclude and why? Flag legal duty to provide for dependants and potential chaos if they do not.