

Spousal Election: Rights Of A Surviving Spouse

It is a common misconception that we are at liberty to simply do with our property anything we wish upon death. 'Freedom of Testamentary' refers to the freedom to dispose of property upon death as one sees fit. While the relevant laws of Ontario provide significant "Freedom of Testamentary", and the Courts go to considerable lengths to honour the wishes of the deceased, there are restrictions on our ability to successfully direct how our assets and property will be distributed after death. In Ontario, one of these restrictions is the right of a surviving spouse to property as set out under the *Family Law Act*, R.S.O 1990, c.F.3 (the "FLA").

The Rights Of A Surviving Spouse Under An Estate

The passage of the FLA in 1986 brought into effect a new matrimonial property regime in Ontario that significantly changed the rules. Property rights became applicable even where a marital relationship ended with the death of one of the spouses. A surviving spouse now has the right to choose between accepting his/her entitlement under the will or claiming an 'equalization payment' representing an equal sharing of the "marriage spoils". This is referred to as the spousal election.

Section 6 of the FLA allows the surviving spouse to elect between the benefits provided by the will of the deceased (or under the intestacy if the deceased died without a will), or the right to a family property division that would have been available had the marriage ended in separation or divorce. In other words, the surviving spouse may elect not to accept what is provided either in the will or under the intestacy and to instead require an equalization of the assets of the respective spouses.

Pursuant to the FLA, a surviving spouse is entitled to an equalization of the property for each spouse. In essence, the surviving spouse is entitled to 50% of the difference between the respective Net Family Properties of each of the spouses. The calculation of the Net Family Property is done for each spouse. The calculation starts with the value of the property owned by each spouse just before the date of death, minus liabilities as at this same date, minus the net value of property owned on the date of marriage, minus the value of property owned on the date before the date of death that is an inheritance or gift from a third party received during the marriage. To the extent that there is a difference between the Net Family Properties of the spouses, that difference is equalized or shared, with 50% going to the spouse

with lower Net Family Property Value and 50% being deducted from the spouse with the higher Net Family. For example if the deceased spouse had Net Family Property valued at \$100,000.00 and the surviving spouse had Net Family Property valued at \$50,000.00, the difference would be equalized so that each spouse would have Net Family Property of \$75,000.00. In this example, the surviving spouse would have a claim against the estate for \$25,000.00. It is important to note that in the event the surviving spouse elects to take under the FLA, proceeds of any life insurance or RRSP/RRIF that have been paid to the surviving spouse will be deducted from the amount of any equalization payment calculated to be owing.

Where There Is A Will

Unless the will of the deceased specifically provides that the surviving spouse's entitlement, if any, under the will is in addition to his or her equalization entitlement, the surviving spouse will be put to an election, having to choose either the provisions of the will or the equalization entitlement (FLA, subsection 6(1)). If the FLA equalization entitlement is chosen, the will entitlement is forfeited, and the will is administered as if the surviving spouse had predeceased the deceased spouse. Either the entitlement under the will or an equalization payment can be claimed by the surviving spouse, but not both (FLA, subsection 6(1)).

Where There Is No Will Or There Is Partial Intestacy

Likewise, where there is no will (i.e. an intestacy), the surviving spouse is to pick either the entitlement according to Ontario's Succession Law Reform Act, R.S.O 1990, c.S.26 (the "SLRA") or the equalization claim (FLA, s. 6(2)). Lastly, on a partial intestacy, the choice is to be made between entitlement under the will and the provincial intestacy rules on the one hand, and the

equalization claim on the other hand, (FLA, s. 6(3)). Where there is no will, a surviving spouse must consider whether the intestacy provisions of the SLRA are more favourable or less favourable than a division of the property of the respective spouses. The SLRA provides that a surviving spouse, where there is no will, is entitled to the entire estate if the deceased had no issue. If the deceased had one or more children, the surviving spouse is entitled to a spousal preferential share (currently the first \$200,000.00 of the estate value), together with a percentage of the balance of the estate depending on the number of children the deceased had.

When To Make The Election

If the surviving spouse chooses to make the election under the FLA the election must be made within six months after the death of the deceased spouse in the prescribed form (i.e. Form 1, which

must be filed in the Office of the Estate Registrar for Ontario). If the election is not filed, the surviving spouse is deemed to have elected to take under the Will or under the intestacy, if applicable.

Conclusion

A prudent party should consider this issue in any estate where there is a surviving spouse. It is suggested that the surviving spouse should have legal advice before making the election to ensure that they fully understand their rights and the implications of the election available to them. It is advisable to gather as much information as possible about the assets of both spouses, including where appropriate, valuations and appraisals. Generally, when a complete picture of the estate is reviewed, the decision as to the election and the appropriate course of action can be quickly determined.



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