The Law Society of Manitoba

INCORPORATED 1877 | INCORPORÉ EN 1877

WILLS AND ESTATES

Chapter 2

Estate Planning

November 2022

TABLE OF CONTENTS

TABLE OF CONTENTS **1**

A. ESTATE PLANNING **3**

1. Estate Planning Generally **3**

a) Introduction 3

b) Role/Responsibility of Lawyer 3

c) The Importance of Flexibility 4

2. Various Estate Planning Considerations **5**

3. Estate Freezes **10**

4. Families with Special Needs Beneficiaries **11**

a) General Considerations 11

b) Legal Obligation to Provide Support 12

c) Planning Where Special Needs Beneficiary Does Not Receive Public Assistance 13

d) Planning for the Family Whose Special Needs Beneficiary Receives or Will Receive Public Assistance 14

e) Post Mortem Planning Regarding The Manitoba Assistance Act 17

f) Guardians 18

5. Small Business Corporations **19**

a) Creditor Proofing 19

b) Planning for Disability 19

c) Planning for Death - Business Held by Non-Related Persons 20

d) Business Held by Family and Non-Family Members 21

e) Business Wholly Owned by Family 21

f) The Family Farm Corporation 24

6. Other Considerations **25**

B. THE FAMILY PROPERTY ACT – IMPLICATIONS FOR ESTATE PLANNING AND ESTATE PRACTICE **27**

1. Basic Concepts **27**

a) Ownership of Assets 27

b) Categorization of Assets 28

c) Balancing the Interests 29
2. Effect on Estate Planning 30
a) Spousal or Other Trusts 30
b) Joint Ownership of Assets 31
c) Pensions and Insurance 32
d) Inter Vivos Gifts and Transfers 33
3. Other Considerations 34
4. Estate Considerations 35
a) Bringing an Application Under Part IV of The Family Property Act 35
b) Limitation Periods 35
c) Requirement to Serve Notice 36
d) Conditions Precedent to Distribution of Estate and Related Liability of Personal Representative 36
e) Settlements Under The Family Property Act are Subject to Consent 36
f) Responding to Requests for Information and Onus 36
g) Priority of Surviving Spouse or Common-law Partner's Entitlement 37
h) Multiple Equalization Claims 38
5. Interrelation with Other Legislation 38
C. APPENDIX: SPECIAL NEEDS CHECKLIST 40
D. PRECEDENTS 42
1. Form of Notice to be Served by Personal Representative on Surviving Spouse or Common-Law Partner 42
2. Consent to Distribution of Estate by Surviving Spouse/Common-Law Partner 43

A. ESTATE PLANNING

1. Estate Planning Generally

a) Introduction

> The term "estate planning" is not limited to the preparation of a will. Broadly speaking, estate planning concerns the total arrangement of a client's property affairs. An estate plan may include steps to be taken during the client's lifetime as well as upon death.

The estate planning team may include not only a lawyer, but also an accountant, an insurance broker, a financial planner, a banker and a trust officer. Having considered the client's personal and family circumstances, the team must determine the client's wishes. After consideration of the various steps which might be taken, the team and client must develop an arrangement which best addresses the client's needs and wishes.

Estate planning may involve a number of components, including *inter vivos* gifts, powers of attorney, wills, corporate reorganizations, trusts, shareholder agreements, purchase of insurance, beneficiary designations, and so on.

b) Role/Responsibility of Lawyer

In order to properly prepare an estate plan, the lawyer needs to know the facts of the client's circumstances (i.e., the family and other circumstances, and the assets of the client and of their spouse or common-law partner, if any), the client's wishes, and the applicable law.

Clients' needs and circumstances can be very diverse. For example, the needs of a young client with infant children who has yet to amass assets are very different from those of an older client who has accumulated wealth, owns a business and has children from a previous relationship.

With so many considerations being relevant, the lawyer should proceed in a systematic way to ensure that all of the various problem areas and possible solutions have been canvassed. For that purpose, a lawyer should develop checklists and keep detailed notes regarding the estate plan and the client's wishes. This is doubly important in cases where suspicious circumstances are present.

It is essential to ensure that capacity has been appropriately assessed. The test for testamentary capacity is a legal test that must be administered and evaluated by the lawyer who has been engaged to prepare and witness the will. It is important when performing this assessment that the lawyer documents the questions asked and the answers received, and that the test is conducted appropriately.

Although the test for capacity to execute a power of attorney is slightly different than the test for testamentary capacity, the same principles apply to the process for performing an assessment for capacity to execute powers of attorney.

The courts will be critical of a lawyer who fails to make thorough, systematic inquiries or fails to document the results on the file. See *Slobodianik v. Podlasiewicz*, 2003 MBCA 74 (CanLII) (also applied in *Young v. Paillé et al.*, 2012 MBQB 3 (CanLII) in reference to taking instructions for powers of attorney). In *Young* the court invalidated a power of attorney because the lawyer who took instructions failed to provide any evidence that he recalled the meeting or the questions he asked the client during their brief meeting. The onus is particularly heavy on a lawyer when taking instructions from an elderly client or a client whose faculties are impaired by disease (see *Slobodianik* and *Young*).

With respect to ensuring ownership of assets owned by a testator, in an Alberta case, *Meier v. Rose,* 2012 ABQB 82 (CanLII), a lawyer was found to be negligent where he failed to perform title searches to ascertain ownership of certain farmland dealt with in a will.

If a lawyer is negligent in advising a client in respect of an estate plan, or in assisting the client in implementing that plan, the lawyer will be liable to the client and may be liable to those the client intended to benefit. See *Earl v. Wilhelm,* 2000 SKCA 1 (CanLII) (leave to appeal to the Supreme Court of Canada refused) confirming that the law as set out in *White v. Jones* [1995] All E. R. 691 (HL) applies in Canada.

It is an open question as to whether, having undertaken an estate plan for a client, a lawyer is responsible to advise the client of subsequent developments in the law that affect that plan.

c) The Importance of Flexibility

The most important feature of a proper estate plan is flexibility, within the constraints of the law and the client's needs and wishes. A client's circumstances may change, laws may change, or the circumstances of intended beneficiaries may change. One simply cannot know or anticipate at the time of implementing the estate plan all changes which may arise at some point in the future.

However, it is important to recognize and anticipate all reasonable contingencies that may arise and to raise them with the client to obtain proper instructions. In the absence of thoughtful planning and adequate flexibility, your client, or the intended beneficiaries, may have to try to undo at considerable trouble and expense what was done at the outset with the best of intentions.

2. Various Estate Planning Considerations

The following is a non-exhaustive list of some of the considerations which may arise most frequently:

(a) In Manitoba, property rights for common-law partners are the same as those enjoyed by married spouses. In this regard, planning in Manitoba for common-law partners is quite different than it may be in other provinces. For the purposes of the discussion on estate planning that follows, wherever the term "spouse" is used, the term should be read to include common-law partners. A more complete discussion of this issue follows.

(b) A primary consideration for many clients is ensuring that adequate resources are available for the surviving family members on the death or disability of the income earner or earners. How does the client replace that earning power and can one ensure that cash needs at that time (such as taxes, etc.) can be met without depleting what assets may be available?

For modest income earners, insurance may be the only way to create a fund sufficient to meet those needs. Young clients who have not yet amassed capital may need insurance to provide a source of income if the income earner dies prematurely. Clients with estates consisting largely of non-liquid assets may require insurance to meet cash needs on death while at the same time avoiding the sale of assets which perhaps cannot or should not be sold. In developing the estate plan, consider the nature of the insurance which is held or should be held, and who should be the designated beneficiary.

(c) To the extent that the policy qualifies as "life insurance" under *The Insurance Act,* C.C.S.M. c. I40, where a beneficiary other than the estate has been designated, the proceeds of that policy are free from the claims of creditors of the estate. This aspect is significant where a client is concerned with personal bankruptcy or, where there may be significant personal guarantees outstanding, with failure of the business. Care must be taken to preserve assets for the benefit of the family against the claims of creditors of the estate.

(d) Another significant asset for many people is a registered retirement savings plan or registered retirement income fund. Consideration must be given to who is to be the designated beneficiary of that plan.

The Beneficiary Designation Act (Retirement, Savings and other Plans), C.C.S.M. c. B30 (the "*BDA*") allows designation of a beneficiary of a TFSA, RRSP or RRIF outside a will. Many clients, however, are not certain how beneficiaries may have been designated. It is a good idea to confirm the designation of beneficiaries of RRSPs and RRIFs held by the client in the will.

Beneficiary designations can have significant income tax implications, particularly where the designated beneficiaries of an RRSP/RRIF are not the same as the residuary beneficiaries under the will (although see the recent case of *Morrison Estate (Re)*, 2015 ABQB 769 (CanLII)). Unless there are good reasons to do otherwise, it is advisable to designate the surviving spouse as the beneficiary to take advantage of the rollover available and to prevent the entire RRSP/RRIF being taxed as income on the client's death. The income tax rollover is also available by way of a joint election between the spouse and executor.

Rollovers are also available where the designated beneficiary is a minor dependent child or grandchild, or for certain beneficiaries with disabilities, but where these beneficiaries are designated, the specific provisions and requirements of the *Income Tax Act,* R.S.C., 1985, c. 1 (5th Supp.) (Canada) should be reviewed.

For TFSAs spouses should name each other as successor holders to ensure the surviving spouse can easily add the deceased spouse's TFSA to theirs.

(e) Even where a beneficiary has been designated under an RRSP/RRIF, the proceeds will not necessarily be free from the claims of creditors. Unless the RRSP/RRIF qualifies as a life insurance policy under *The Insurance Act*, proceeds are not sheltered by statute. The decision of the Manitoba Court of Appeal in *Clark Estate v. Clark*, 1997 CanLII 22786 (MB CA) appears to stand for the proposition that RRSPs/RRIFs are available to creditors of the deceased.

In certain circumstances, therefore, the RRSP/RRIF may have to be transferred to a different kind of plan in order to ensure proceeds are protected. Not every RRSP/RRIF issued through an insurance company qualifies as a life insurance policy. When in doubt, perhaps some written assurance can be obtained from the insurer. For a contrary position review *Amherst Cranes Rentals Ltd. v. Perring,* 2002 CarswellOnt 2362, [2002] O.J. No. 2792, [2002] O.T.C. 497 (Ont. S.C.J.); aff'd 2004 CanLII 18104 (ON CA).

(f) What are the needs of the spouse? Is the client also concerned with preservation of assets for the next generation? In the case of remarriage and children from the previous relationship, the testator may not be confident that their spouse will ensure that assets left to the spouse will be left by the spouse to the testator's children. Are these ends best satisfied by providing all or some of the estate to the spouse outright, or through a spousal trust?

If a spousal trust is intended or the testator otherwise intends not to leave the bulk of their estate outright to the spouse, consider the spouse's rights under Part IV of *The Family Property Act,* C.C.S.M. c. F25 and whether an accounting and equalization may defeat the testator's intentions. In such a case, a spousal agreement may be advisable.

The spouse may also be entitled to relief under *The Dependants Relief Act*, C.C.S.M. c. D37. (See *Kawiuk v. Wagenko Estate*, 1999 CanLII 32281 (MB QB), *Davids v. Balbon Estate,* 2002 MBCA 83 (CanLII), 2001 MBQB 189 and *Dickinson v. Woodiwiss,* 2008 MBQB 136 (CanLII).)

(g) Where there is a second spouse and children from a previous relationship, caution should be exercised with respect to use of beneficiary designations in the estate plan. For example, although it is tax effective to designate a spouse as beneficiary of an RRSP/RRIF, if the spouse elects not to have the rollover apply, they may receive the RRSP/RRIF tax-free while the estate will bear the tax. If the children of the testator are the residuary beneficiaries, they will end up bearing this tax burden.

In the case of a RRIF, it is possible to designate the spouse as "successor annuitant" under the *Income Tax Act* (Canada), resulting in an automatic rollover without any ability of the spouse to take the RRIF tax-free. However, care must be taken when a successor annuitant designation is made, as the successor annuitant designation will generally take priority over a subsequent beneficiary designation.

(h) In the case of a younger client with infant children, an obvious concern is whether or not the plan contemplates adequate capital and income to maintain the spouse while the children are small, and to provide for the needs of both the spouse and the children through later years given costs of education, housing and other general maintenance requirements, compounded by inflation and other unforeseen factors.

(i) In considering the needs of adult children, some regard may be had to preserving the assets for the child as against the claims of the creditors of that child, and in particular the claims of a former spouse, possibly through the use of trusts. In certain circumstances the client might prefer to bypass the children in favour of grandchildren. Perhaps gifts have already been given, and a hotchpot provision accounting for all gifts in any distribution of the estate would ensure fairness to all concerned.

(j) Consider what is required where the client is involved in a business. Is your client a key person in the business? Are there sufficient insurance and other safeguards in place so that the business will continue? Are there partners or co-shareholders involved? Who is to succeed to the client's interest in the business? Is there a buy/sell or other agreement in place that covers death?

(k) Determine which assets in the client's estate will attract capital gains tax on death. If there are significant investments, recreation property not qualifying as a principal residence, or other assets on which gains may be realized, perhaps the will might

specify that these be transferred to the spouse or to a qualifying spousal trust to defer realization of gains to the survivor's death.

If a spousal trust is established, only a "qualifying spousal trust" as defined in the *Income Tax Act* (Canada) will result in a tax deferral. Generally speaking, to be a qualifying spousal trust, the spouse must receive all of the income of the trust each year, and no one other than the spouse can receive or use the income or capital of the trust (although there is no requirement to provide a power to encroach on capital). Certain trustee powers may result in a so-called "tainted" spousal trust and care must be taken when drafting these trusts.

(l) If the client's estate includes shares that are subject to a mandatory buy-sell arrangement, note that the shares may not vest indefeasibly in the spouse or qualifying spousal trust so as to qualify for the spousal rollover.

(m) Instead of deferring the gain, consider eliminating or reducing tax by realizing a gain (during the testator's lifetime or on death) and offsetting it against available losses, or against unused capital gains exemptions. The lifetime capital gains exemption may be available to offset gains on transfer of qualifying farm property ($1,000,000 for 2022) or qualifying small business corporation shares ($913,630 for 2022). The possibility exists that this exemption may be eliminated in the future (although there is no current indication that such a change will occur) and some people have taken steps to trigger gains and take advantage of the exemption while it exists. The inclusion rate for capital gains as of the date of preparation of these materials is 50%. This rate may also change in the future.

(n) Joint accounts are often misunderstood, and transfers in and out of joint ownership can create unintended consequences and conflicts. When advising clients regarding transfer of property into joint names, consider *Pecore v. Pecore,* 2007 SCC 17 (CanLII), [2007] 1 SCR 795. The Supreme Court of Canada in that case did away with the presumption of advancement where a parent transfers assets to an adult child and the adult child doesn't pay any consideration for the property transferred.

> The law now is clear that where a gratuitous transfer occurs during the transferor's life to an adult child, whether dependent or not, there is a presumption of resulting trust. This means that the adult child holds the property in trust for the benefit of the parent and their estate. The adult child can rebut that presumption by evidence of actual intention of a gift at the time of the transfer, determined on a balance or probabilities. The onus to prove a gift is on the adult child claiming a gift.

The solicitor may be in a position to recommend a client document the intention to make a gift at the time the gift is made if called upon for advice at the time. However, often solicitors are not aware of the transfer until a later date, after the transfer has been completed by the client on their own. Any documentation that supports intention of a gift is strongest if it is signed contemporaneously with the transfer.

See also *Sawdon Estate v. Watch Tower Bible and Tract Society of Canada*, 2014 ONCA 101, 93 E.T.R. (3d) 247 an interesting case where 2 of 5 children were found to be holding their father's bank accounts in trust, as surviving joint legal owners, for the benefit of all 5 children, there having been an *inter vivos* gift of the beneficial right of survivorship to all 5 children at the time the parent named the 2 children as joint legal owners. Upon being named as legal joint owners the 2 children held that beneficial right of survivorship in trust for all 5 children, and not for the estate.

(o) In 2009 the Federal government created the ability under the *Income Tax Act* (Canada) to make annual deposits into a tax-free savings account. Contributions are not tax-deductible. This tax saving opportunity is open to Canadian residents age 18 or older. Investment income earned in a TFSA is tax-free. Withdrawals from a TFSA are tax-free. Unused TFSA contribution room is carried forward and accumulates in future years. The full amount of withdrawals can be put back into the TFSA in future years. Neither income earned within a TFSA nor withdrawals affect eligibility for federal income benefits such as Old Age Security, the Guaranteed Income Supplement, and the Canada Child Tax Benefit.

TFSAs can be transferred to a spouse or common-law partner upon death. It is more seamless if this is done by naming a spouse as a successor holder. The surviving spouse takes over the account. A surviving spouse as a beneficiary, rather than a successor holder, has a limited time after death to transfer the assets in the deceased spouse's TFSA to their own, being the end of the next calendar year after the year of death.

Lawyers should discuss TFSAs with their clients during estate planning consultations because they allow for significant tax savings over a period of many years.

(p) Formerly, testamentary trusts were widely used for tax planning purposes because a testamentary trust is treated as a separate taxpayer and income of the testamentary trust was entitled to access its own set of marginal tax rates, the same as an individual. That is no longer the case.

Starting with taxation years after 2015, testamentary trusts, with some exceptions, are taxed at the highest applicable combined federal/provincial marginal tax rate without access to marginal tax rates. Additionally, effective December 31, 2015, other than for graduated rate estates, all testamentary trusts are required to have a calendar year end. There is no grandfathering of existing testamentary trusts.

However, to recognize the fact that estates require a reasonable period of time for administration, graduated rates continue to be available for an individual's estate that is a testamentary trust for a period of 36 months after the individual's death provided that the appropriate election is made in the estate's first tax return. In addition, where a testamentary trust is established for a beneficiary who is eligible to claim the disability tax credit, graduated rates will continue to apply, although this is possible for only one trust of which the individual is a beneficiary. Notwithstanding this change, there are a number of non-tax reasons why testamentary trusts may still be used.

(q) Consider the requirements where the client has assets in other jurisdictions and the consequences on death (particularly tax consequences) in respect of those assets. US tax legislation imposes an estate tax where property is owned in the United States, although exemptions may be available. Where a client holds US *situs* property (i.e., US real estate or shares of a US corporation, even where those shares are held in a Canadian portfolio) consider what the tax consequences under the current legislation may be without planning, and whether steps are possible to mitigate those consequences. This will require assistance from a US tax professional. Other problems and solutions will exist in respect of assets held in other foreign jurisdictions. Consideration should also be given to having a separate will and foreign executors to deal with such assets.

(r) *The Budget Implementation and Tax Statutes Amendment Act, 2020* which received Royal Assent on March 6, 2020, eliminates probate fees.

3. Estate Freezes

An "estate freeze" is a method for crystallizing capital gains liability at current value and transferring future growth to children or a family trust.

Estate freezes involve a number of considerations. These include whether the freeze is accomplished by way of an exchange of common shares in a corporation for preferred shares with fixed value, and a subsequent subscription for new common shares by the freezor's children or a family trust, or by way of a transfer of common shares to a new corporation owned by the children or a family trust for preferred shares with fixed value in the new corporation, under the provisions of section 85 of the *Income Tax Act*. The use of section 85 results in a deferral of capital gains tax.

When providing advice with respect to an estate freeze, be sensitive to the position of your client after the plan is implemented. Is the client prepared to lose control of the business or do they want to continue to be active in it? Is transferring growth assets to infant children a solution or a time bomb waiting to go off when they reach adulthood? What happens in the

event of marriage breakdown of a child or of the client? What if the transferee predeceases the client? What are the consequences if the children move to another jurisdiction, particularly the United States?

If the estate freeze is to a trust or corporation, greater flexibility exists to allow the client to be one of the trustees, or to have control of the corporation as the holder of voting preferred shares of the corporation. The trust deed/shareholders agreement should address these other contingencies. Unless you practice tax law a tax accountant should always be part of the professional team completing corporate reorganisations.

4. Families with Special Needs Beneficiaries

a) General Considerations

On occasion, you may be asked to advise a client who has a family member with special needs. A person with special needs includes anyone who, by reason of mental or physical disability or other circumstances, is financially not able to provide for themselves, or who is incapable of managing their own affairs or who would do so in a fiscally irresponsible way or a way that may put them at risk.

This could include, for example, an adult child who has a drug, alcohol, gambling, or other addiction. Although these materials will focus for ease of reference on a "child", similar situations arise in the context of surviving spouses.

There are many possible variations of such circumstances. The child may be a minor, living at home, or in an institution. Possibly the child is in a group home, or in a foster home under someone else's care. An adult child with special needs may be living on their own. Parents will usually want to take whatever steps may be available to maintain that child within the community and to avoid institutionalizing them. Considerable financial and emotional supports are needed to achieve that, and a parent's concern is often to continue that support and to provide stability for that child after the parent's death. Where it is not possible to maintain the child outside an institution, the client will want the child to receive benefits which will supplement the care being provided.

Primarily estate planning in the context of a special needs beneficiary is directed at ensuring, wherever possible, that adequate financial resources are made available for that child to allow them to maintain the greatest quality of life within their capabilities and the resources available.

b) Legal Obligation to Provide Support

In advising any testator who has a child with special needs, one should address what legal obligation there may be for the testator to support such a child.

Clearly a legal obligation exists where the child is a minor. The child must be in financial need: *Lam (Guardian of) v. Le Estate,* 2002 MBQB 17 (CanLII). The obligation likely ceases to exist when the child becomes an adult.

However, *The Dependants Relief Act* (the "*DRA*") includes as a dependant in paragraph 1(d) either a minor child, or a child who "by reason of illness, disability or other cause was, at the time of the deceased's death, unable to withdraw from the charge of the deceased or to provide himself or herself with the necessaries of life," or a child who is otherwise substantially dependent upon the deceased at the time of the death. If it can be shown that a special needs child, whether a minor or an adult, otherwise qualifies as a dependant and is in financial need, reasonable provision for that dependant may be ordered to be paid from the estate if such provision has not been made otherwise. *See Zenyk v. Zenyk Estate*, 2007 MBCA 57 (CanLI).

Among the factors to be considered by the court, as specified in *section 8* of the *DRA*, are the financial resources and assets of that dependant (currently and in the foreseeable future), and the measures available for that dependant to become financially independent. One aspect would be public assistance available to that child. The dependant's needs would then have to be weighed against the interests of the other potential beneficiaries.

Therefore, to the extent that a special needs beneficiary's needs are not otherwise being met and resources are available, a court may impose the obligation on an estate to provide maintenance and support for such a child. Even where the child is not currently dependent, there exists the possibility that social policy may change in the future such that the child's needs might not be met by the state. A discretionary trust for the benefit of the child is advisable.

The Public Trustee's office monitors, to some extent at least, what provisions are made for dependant children and would consider making application under the *DRA* in appropriate circumstances. See *Hoeppner (Litigation Guardian of) v. Misiewicz Estate*, 1995 CanLII 16502 (MB KB).

Besides children and spouses, the *DRA* allows for applications for relief by a variety of different family members so long as they can show the court that they were substantially dependent and in financial need at the time of the supporting family member's death. The categories of family members that may apply under the *Act* are a grandchild, a parent or grandparent or a brother or sister of the deceased.

A useful question to ask clients when taking instructions for a will is whether they are financially supporting anyone in the family. If the answer is "yes", the effect of the *DRA* must be considered and explained so that appropriate accommodation can be made for that beneficiary in the will if necessary.

c) Planning Where Special Needs Beneficiary Does Not Receive Public Assistance

Any plan to make provision for long term support where it is required, and to maximize the financial resources available, involves a number of considerations. In addition to investment and income tax considerations, one would want to have regard to all of the various circumstances and desires of the parties involved, including the child's special needs, existing lifestyle, goals for the child's lifestyle after the client's death, and possible appointment of an individual to look after the child after the client's death. A checklist as to some of the circumstances to be considered is found in the precedents.

As for estate planning considerations, consider the following:

- Are there competing interests of others to the client's estate (i.e., under *The Family Property Act*, needs of spouse or common-law partner or other potential beneficiaries)?
- What is the size of the client's estate?
- Will there be a sufficient fund available after the death of the client to continue the lifestyle of the disabled child (i.e., after tax income)? A considerable sum may be required to provide a fund sufficient for the total care of a disabled person throughout their lifetime.
- In what form shall the fund be?
- Where will the funds come from: residue? life insurance? sale of particular assets?
- Who is to have control of the fund?
  - the executor?
  - a trustee?
- What *situs* is the trust to have? (The test for residency of a trust is central management and control. See *Fundy Settlement v. Canada*, 2012 SCC 14 (CanLII), [2012] 1 SCR 520).
- How is income to be disbursed?
- How to account for inflation?
- Is there to be a power to encroach on capital? Under what circumstances?

- Is there to be a remainder interest after the death of the beneficiary? If so, in favour of whom?
- Are certain assets (i.e., realty) to be maintained for use by the disabled child (i.e., a life interest)?
- Guardianship of the person of the beneficiary (see above).

As well, the usual investment and taxation considerations apply. For instance, in 2010, the Federal government provided for registered disability savings plans (RDSPs). An RDSP is a savings plan that is intended to help parents and others save for the long-term financial security of a person who is eligible for the disability tax credit. Lawyers should discuss RDSPs with clients who have disabled beneficiaries. Note that a rollover is available from an RRSP or RRIF to an RDSP.

It may be possible to establish a "qualified disability trust" (defined in s. 122(3) of the *Income Tax Act* (Canada)) for the beneficiary, which would qualify for graduated tax rates.

The Manitoba Assistance Act regulations allow for contributions to a trust for an eligible person to a maximum of $200,000. This is sometimes referred to as a disability expense trust or an EIA trust. The contribution amount, up to $200,000, and the growth and interest on the contribution are exempt from the calculation of financial resources of an applicant or recipient of assistance under *The Manitoba Assistance Act*. Note that the disbursements from this type of trust are limited, and are delineated in the Assistant Regulation (see s. 8.1(9) of the Assistance Regulation). The combined value of an RDSP and the amount in such a trust is $200,000 (see s. 8.2 of the Assistance Regulation).

A form of precedent for establishing a trust giving a life interest to a special needs child with a gift over to other siblings is included in Chapter 1 of these materials.

d) Planning for the Family Whose Special Needs Beneficiary Receives or Will Receive Public Assistance

The planning for persons receiving social assistance may be complex. On the one hand, a testator would not want to make provision for a special needs beneficiary which would decrease the benefits provided to that beneficiary by public assistance. On the other hand, to exclude that beneficiary is to exclude the person probably most in need of whatever resources are available to supplement that beneficiary's lifestyle. The key is to provide for support which will accommodate both concerns.

The Manitoba Assistance Act, C.C.S.M. c. A150 and related regulations provide for provision by the province of money for basic necessities (*s. 2*) where, *inter alia,* by reason of age or disability, a person is unable to earn sufficient income or is incapable of providing for themselves (*s. 5*). In determining what is required to provide for the basic necessities, the director will have regard to the financial resources of an applicant or recipient, which by definition include:

i) all real and personal property of that person;

ii) income from any source, gifts and gratuities (including specifically the value of goods or services regularly supplied to that person without charge); and

iii) the value, if any, attributable to free shelter or board provided to that person.

A person is not eligible for social assistance until they are an adult. The financial resources to be considered are the resources of that individual, except where the person is attending undergraduate or vocational training, in which case the financial resources of the parents are also considered.

It must be remembered that social assistance is simply for basic necessities. Regulation 404/88R, as amended, prescribes the measure of allowance for food, clothing, shelter and board for persons of differing circumstances. The resources of the estate of a family of limited means can best be utilized by providing those extras above and beyond the basic necessities for the special needs individual. Examples might include spending money, television, computers and other electronic goods, recreation, tickets to special events/entertainment, and vacations. Such expenses could not usually be met by the individual from the allowance made available.

In order to avoid reducing the social allowance otherwise available, the estate plan must ensure that any interest created does not vest in the special needs beneficiary.

Take care that wherever possible the individual does not become entitled to any assets from parents or other sources (i.e., insurance proceeds or entitlements from another relative's estate or a trust agreement).

Where resources are to be made available, the solution is to create a discretionary trust which can supplement the social assistance otherwise available. As noted below, if the trust is properly constructed, only amounts actually paid from the trust to or for the person's benefit will be included in calculating their resources. Thus, the purchase of goods or the provision of programs which might augment that individual's quality of life could be provided without impairing the individual's ability to qualify for assistance.

The key in creating a discretionary trust in these circumstances is to avoid giving the special needs beneficiary a vested interest in the trust, or in other words a right to monies which they might enforce. Any such vested interest or right will be considered a financial resource under *The Manitoba Assistance Act*.

The use of a discretionary trust in these circumstances was recognized in *Quinn v. Director of Social Services*, 1981 CanLII 3526 (MB CA) in which the Manitoba Court of Appeal held that where a trust fund provided for payment out of income and/or capital entirely in the trustee's discretion, the applicant did not have a vested interest qualifying as a financial resource within the terms of the legislation.

The Manitoba Court of Appeal in *Thomas v. Director, Employment and Income Assistance Programs*, 2013 MBCA 91 (CanLII), confirmed *Quinn* and determined that the rights of the recipient of social assistance under a trust established in a will were not a financial resource adversely affecting eligibility to receive social assistance.

Compare the case of *Re Smith and Attorney-General of Ontario et al.,* 1973 CanLII 730 (ON CA) in which the Ontario Court of Appeal held that the wording of the particular trust entitled the beneficiary to require the trustee to make payments for his benefit, and the beneficiary was therefore ineligible for social assistance. Another Ontario example is *Ontario (Minister of Community and Social Services) v. Henson* (1987), 28 ETR 121 (Ont Div Ct), aff'd (1989), 36 ETR 192 (Ont CA) where the trustee was expressly given absolute and unfettered discretion in making payments so that the beneficiary could not compel provision for herself. The beneficial interest in the trust therefore did not reduce the public assistance to which the beneficiary was entitled. This discretionary trust is widely referred to as a "Henson Trust".

The *DRA,* as it was originally introduced, contained a provision which caused a great deal of concern to people who had set up discretionary trusts for disabled children and other people who were otherwise on social assistance. The original bill included a provision that the Minister responsible for Social Allowances might make an application against an estate, with the result that the obligation to support the special needs individual would pass from Social Allowances to the estate, and Social Allowances might be reimbursed for any payments which had been made since the date of death. The complaint was raised that with such a provision the deceased would have a greater obligation to support the individual after death than during their lifetime. Fortunately, the provision was deleted before the legislation was passed.

Where the Public Trustee or some other individual is committee or substitute decision maker for the dependent child, however, application under the *DRA* might still be made if deemed appropriate.

If a discretionary trust is appropriate, some of the following may also be relevant issues:

- Choice of trustee - The discretionary trust places significant responsibility on the trustee. That person must therefore be familiar with the testator's/settlor's wishes and be sensitive to the beneficiary's needs and interests. Avoid, if possible, those with a potential conflict of interest, such as residual beneficiaries of the discretionary trust;

- Even handed duty – The trust should include a clause relieving the trustee of this duty, assuming that the intention is that the entire fund be used for the individual's needs, if required, over the term of the trust;
- Multiple beneficiary trust – Consider authorizing the trustee to make discretionary payments of income and/or capital to a number or class of beneficiaries, of which the special needs child is only one. In such a case, that child clearly cannot force payments on their behalf. On the other hand, consider also the greater responsibility on the trustee to appreciate the individual needs and balance the different interests;
- Build in flexibility to meet changes in legislation (notably *The Manitoba Assistance Act*), the beneficiary's circumstances, possible future improvements in the beneficiary's capabilities, developments in service trends, reassessment of the care and service arrangements, etc.
- In view of the very difficult decisions which may have to be taken by any trustee who may have been designated in respect of a fund set up for a special needs beneficiary, consideration should be given to including in the will or trust deed a clause which provides guidelines to the trustee on the level of care to be provided to the beneficiary and the concerns which should be paramount to a trustee. A sample of a general interpretation clause is found in the precedents to Chapter 1.

Chapter 1 of these materials also contains precedent clauses for:

- a discretionary trust of a life interest in the residue of an estate; and
- a trust provision for a special needs child who is an infant at the time of the drawing of the will, which provides for a non-discretionary trust until the child is age 18, and a discretionary trust thereafter when the child becomes eligible for social assistance; and
- provision for the special needs beneficiary to remain in the parents' home after both have died, either by way of a life tenancy in the home or by creating a tenancy at will. In considering making provision for accommodation for the individual, consider that the value of free accommodation and board may be a factor in reducing the allowance otherwise available, by virtue of the definition of "financial resources" under *The Manitoba Assistance Act*. For that reason, tenancy at will may be preferable. Be sure to consider tax consequences of this option, including potential loss of the principal residence exemption.

e) Post Mortem Planning Regarding *The Manitoba Assistance Act*

Please note that if care is not taken at the time of the execution of the will, only limited steps can be taken following the death of a testator to rectify the situation. Where, for example, a special needs beneficiary is the life tenant under a standard form trust,

with income payable to them and the residue to be divided among siblings on their death, the concern would be that the Director of Assistance would reduce or eliminate benefits payable to this individual because of the income from the estate which would now be payable. Historically, two options were considered to prevent such a reduction:

i) the individual could renounce their interest as life tenant and waive any benefits payable under the estate, trusting in their siblings to provide extra amenities from time to time thereafter; or

ii) the executors might try to maximize the estate by bringing an application for a variation of trust in order to change the life interest to a discretionary trust.

Section 8.3 of the Assistance Regulation, MR 404/88 precludes any such steps being taken. Specifically, it states that if the director determines that an applicant or recipient has (within 5 years before or any time after the date of application for assistance) given away, assigned or transferred any property for inadequate consideration to reduce their financial resources in order to qualify for income or general assistance, the director may deem the property so assigned or transferred, and the amount which might have been received as income thereon, to have been received by the applicant/recipient. A variation cannot proceed without the consent of all people capable of consenting, and like the renunciation, would then be an act of conveyance of property otherwise available to the beneficiary. Such steps would therefore defeat the purpose of the exercise.

As referenced above the Assistance Regulation makes some post-mortem estate planning possible. A person with a physical or mental disability who receives an inheritance (or from any other source, other than any form of income or income replacement) can place up to $200,000.00 of the inheritance into an *inter vivos* discretionary trust and preserve their eligibility for ongoing income assistance (see s. 8. 1 of the Assistance Regulation).

f) Guardians

A final consideration with respect to special needs beneficiaries is the appointment of a substitute decision maker for that individual to make decisions with respect to their ongoing care and/or financial matters after the parents have died. *The Vulnerable Persons Living with a Mental Disability Act*, C.C.S.M. c. V90 provides for the appointment of substitute decision makers, both as to personal care and as to property for persons that meet the definition of vulnerable person under that Act.

This step can, and sometimes should, be taken while the parents are alive to ensure seamless decision-making upon their death. The Vulnerable Persons' Commissioner has the authority to appoint substitute decision makers if required. Where a person does not meet the definition of vulnerable person then other paths to being appointed a legal guardian would be necessary, such as a guardianship application under *The Infants' Estates Act* or *The Mental Health Act*, as may be applicable.

5. Small Business Corporations

When a significant portion of a client's personal estate consists of an interest in a business, the client must plan carefully, not only for the inevitable, but also for the unexpected.

a) Creditor Proofing

The client's premature death is not the only occurrence to consider. If an economic slowdown were to cause the business to fail, are family assets exposed? As noted above, are the client's RRSPs/RRIFs sheltered from creditors? How are the family assets held? What is the nature of the business interest and how is it held? Are there significant personal guarantees outstanding? What exposure does the client have?

Perhaps steps should be taken to shelter assets by transfers to a spouse, holding corporation or trust. It is important to be aware of the impact of legislation, including family property legislation and bankruptcy and insolvency legislation, particularly where transfers of property are occurring.

b) Planning for Disability

A somewhat different question is what happens if the client becomes disabled. Very often the value of a small business and its output depends significantly upon the efforts of one or two individuals. If one of those people is disabled, not only are future profits from the business (the income source for your client and the estate) threatened, but the value of the business itself and your client's interest in it may be substantially reduced.

What safeguards are in place to protect the business in this event? Have the principals considered disability insurance, on the one hand to allow the business to buy the talent to replace the principal, and also to provide an income stream to the disabled principal and their family? Is a successor being groomed who would be in a position to step in if need be? It may be advisable to have a unanimous shareholder agreement or a partnership agreement in place to deal with matters related to disability of a principal and disability insurance.

c) Planning for Death - Business Held by Non-Related Persons

In developing an estate plan one must consider, in addition to consequences to the client's family, the effect on the client's business associates:

- Similar considerations of creditor proofing and insurance apply when planning for the unexpected death of a client.
- As with disability, in the absence of proper planning the unexpected death of the business owner may well result not only in the loss of income, but in a significant loss of capital value of the main family asset.
- Generally, there is only a limited market for an interest in a small business, the potential purchasers usually being co-shareholders or employees. The problem is exacerbated where the client's interest is a minority one. There may also be a limited ability of the co-shareholders to fund any purchase unless there are life insurance proceeds to fund such a purchase. This option may be further limited depending on the insurability of the business principals.
- In the absence of any planning to the contrary, the client's interest will often pass to their spouse and children. Where these other members of the family have not previously been involved in the business, and there are other business associates involved, disputes may result, particularly where the personalities of the surviving family members differ from that of the client, and where the surviving family members lack the knowledge or the decision-making skills required for involvement in the business.
- The surviving family might press for distribution of corporate earnings for non-business reasons where from a business point of view it would be best to hold monies in reserve to get the business through this difficult time.

Where various non-family members own the business, the most important ingredient of an estate plan may therefore be the partnership agreement or the buy-sell/shareholder agreement. A partnership agreement will prevent the business from being dissolved upon the death of any one individual, as well as provide for how the estate of a deceased principal may be compensated for the deceased's partnership interest and/or contributions to the partnership. Similarly, a shareholder agreement may provide for an option to the co-shareholders, which creates a potential market for the deceased's shares, or a buy-sell arrangement, which is of course a guaranteed market for what may otherwise be of limited marketability.

From the point of view of the family, the capital value of that interest is recovered, whether from a buy-sell funded by insurance or payable over time out of earnings. From the point of view of the co-shareholders, the agreement prevents any interference by family members in the operations. In preparing any such agreement,

one must also review the tax consequences for all parties of the agreed plan. Will your client's estate have the necessary resources to pay the tax on any gains realized?

d) Business Held by Family and Non-Family Members

The situation becomes somewhat more difficult where there are non-family business associates as well as one or two children or other family members who are being groomed to carry on in the client's footsteps. Unless the intended heir has had a sufficient period of time to develop experience in the business and a relationship with the associates, in the event of the unexpected death of the client, there will probably be a very difficult transition period while the survivors in the business sort out their working relationship and various control and operational issues inevitably arise during this period.

Even where proper planning is undertaken, bringing a family member into an existing business owned with others can be a very delicate task. Co-shareholders or employees may resent the opportunities made available to the "heir apparent", and they may disagree with the compensation arrangements or transfer of control to that individual.

As advisor, you should discuss these potential difficulties with your client. Those potential problems notwithstanding, a planned transition over an extended period of time is much more likely to succeed than where the unexpected happens without planning, and the survivor or survivors are parachuted into the position of control of a significant interest in the business with others.

e) Business Wholly Owned by Family

Even where a business is entirely owned by the client, an easy transition in the event of death is not guaranteed. The risk of difficulty is minimized with careful consideration as to how that interest is to be transferred and the business is to be operated in the event of certain contingencies.

Where proper planning and consideration of the consequences of the client's death is not undertaken, and infighting results, the only way to resolve such infighting may be to sell the business to an arm's length purchaser, thereby causing the family to lose it after all the deceased's efforts to build it.

Take the example of a highly profitable manufacturing enterprise (OPCO) that a father leaves to his two children, B and S, equally, his wife having predeceased him. Only the sister S is active in the business; brother B is busy with his own career. Both B and S have an equal number of voting common shares in OPCO. OPCO owns certain land and buildings, which house its operation, as well as a significant amount of machinery and equipment. The father gives no guidance in his will as to how OPCO is to be continued.

There may be conflict in the viewpoints of these two shareholders. B might be concerned with the maximization of dividends paid by the business. His involvement

in the business may be limited to influencing OPCO to a conservative approach towards business expenses, particularly expansion costs, benefits and bonuses for senior management. S, on the other hand, may be concerned about retaining monies for the purposes of the business, and may want to ensure that senior management is adequately compensated for efforts in operating this business.

Of course, ultimately both B and S will want to ensure that the business is successful, but their views on how this will be accomplished, their definition of "success", and their short-term and long-term goals with respect to the business may be very different. It may also be that S, who is putting the bulk of the effort into the business, may be resentful that B, who puts no effort in, is entitled to the same equity in the business as she is and the same voting control as a shareholder.

Such differences between the co-shareholders can only adversely affect the business. If the differences cannot otherwise be resolved, the only choice other than selling the business may be to sever the interests. B might sell his shares to S, but she may not have the resources to pay him. The shares might be repurchased by the corporation, but cash requirements of the business may be such that this would involve a prolonged buy out requiring negotiation on payment and security terms.

Other possible solutions might be the redemption of B's shares by OPCO, perhaps after B rolls the shares into a holding company, or some kind of "butterfly" transaction where a pro rata share of assets are rolled out to a holding company and after a series of steps are taken, B and S would end up with their separate interests. In each instance, the problem is solved only after considerable time, money and effort have been expended on some difficult tax questions, in addition to the personal and emotional impact on the relationship between B and S.

Proper planning by the client may have avoided these problems for B and S. Some ideas include:

- Leave all of the shares of the business to S, and give other assets of equal value (such as life insurance) to B. If the client chooses to give the shares to S during his lifetime, the client may want to incorporate in the will a clause to ensure that the value of the gifted shares is taken into account in making the division of the estate.
- Instead of giving the shares to S, the client might sell the shares to S during his lifetime, perhaps allowing for payment over time. This way the client could provide a cash flow for himself and, from the payments made, equalize the inheritance to B if there were no other means available. A variation on that would be for the client to effect an estate freeze of his interest, have the common shares issued to the child active in the business, and to make arrangements for the redemption of the client's new preferred shares on the client's death or over time. Proceeds of the preferred shares could be used to equalize payment to B.

- A further option is to issue shares of different classes to both B and S. For example, the client could either through his will or in his lifetime arrange for S to acquire the voting equity shares, while B might acquire other shares with a fixed annual cumulative dividend without any other dividend entitlement. These shares might be frozen in value and redeemable over time. Perhaps the shares could carry the right to vote only where the dividend or redemption payments are not made when due. In such a circumstance, S may have a right of first refusal on B's shares.

- A fourth consideration is a variation on the estate freeze option. The estate freeze serves to limit the value of the client's interest in the event of his death, thereby minimizing the gain which might be realized at that time, and passing the growth in the operation after the freeze onto successive generations.

  What if at the time of the estate plan it is not yet certain as to what the involvement of the children might be in the business? In those circumstances, your client would want maximum flexibility as to the ultimate disposition of their business interests. Alternatively, the client might have concerns that either child's interest be preserved and protected from creditors, spousal claims or business failures.

  To accomplish this, the client might effect an estate freeze and have the new common shares issued to a discretionary trust with the ultimate distribution of those shares to be delayed until the appropriate time. The brother and sister could obtain dividends from the trust (bearing in mind the tax on split income rules, or "TOSI" rules, in the *Income Tax Act* (Canada)). During his lifetime, the client might be one of several trustees, and/or maintain control of the corporation through voting preferred shares. The client would have to consider control of the corporation and the identity of the trustees after his death.

- The *Income Tax Act* (Canada) provisions and the policies of Canada Revenue Agency in respect of these types of transactions are constantly changing and, accordingly, it is imperative that knowledgeable tax advisors be consulted in connection with any business succession planning or estate planning involving private corporation shares, particularly given significant recent changes concerning the taxation of private corporations.

- A surviving spouse or common-law partner may be a complicating factor, particularly if the surviving spouse or partner is not the parent of the client's children. One then must balance the possible need for maximizing income for the surviving spouse or partner against maximizing growth in the hands of the children.

Again, the client will want to consider whether or not other assets of the estate are sufficient to provide for the spouse or partner, whether some interest (whether by preferred shares or otherwise) be maintained for the client in the business with an obligation that interest be realized in the event of death so as to provide for the spouse, or by issuing to the spouse a different class of shares or having the spouse as one beneficiary of a discretionary trust to ensure that ample means are provided. Family property law requirements must also be considered.

- A point worth considering in making arrangements relative to the succession of the business and the estate in general is that while the client will strive to be fair in terms of his arrangements, fair does not necessarily mean equal, which could provide more options to a client in making provisions for their children.

f) The Family Farm Corporation

The same considerations of treating all parties fairly, providing an orderly transition to the appropriate party, and minimizing the tax cost must be balanced in planning the succession of the family farming business.

There are a number of personal, tax and corporate considerations to be addressed before implementing any plan. It should be noted that there are unique problems to consider in advising farmers who are involved in estate planning. These include the following:

- equipment leases that may be cancelled on death because the heirs are not able, or have chosen not, to run the farm operation as an ongoing entity, resulting in an immediate debt to the manufacturer payable forthwith; and
- whether the farm defers income in the following year which can snowball as the farm continues to make a profit and be fully taxable on the death of the farmer.

Further, in the past, some individuals may have transferred the farming business to their children by forming a family farm corporation. Some of them may now be reconsidering this move if the only market for those assets is for the land. If the land was held in the hands of the individuals rather than the corporation, with the individuals claiming the capital gains exemptions available to them, a significant tax saving would result. Clients may now be asking you how to undo the estate plan so that the land can be sold with the minimum tax payable and a careful evaluation of any such reverse-planning must be undertaken.

> It is important to be aware of tax exemptions and rollovers that might be available with respect to succession planning and family farm businesses.

6. Other Considerations

Where there is a substantial estate or the considerations of a small business, the estate plan may become very complex. It may be necessary to appoint a number of different trustees for a number of different purposes, or to consider trusts for children, or to contemplate some particular type of reorganization for the trustees to effect at some time in the future. Careful drafting will be required to ensure that the documents achieve the intended result and allow sufficient power, authority and flexibility to the executors and trustees to properly implement the plans as well as adjust for changes that may arise in the future whether they are tax, business and/or personally related.

> One should also be sensitive to other problems such as potential conflicts of interest between surviving parties.

A client is often tempted to appoint a business associate as one of the executors, or the child most likely to succeed them in the business. Clearly any person who has a pre-existing right to acquire an interest in the estate, or who would otherwise be the likely purchaser of a significant portion of the estate has a conflict in any role as executor of the estate. It is particularly problematic to include such a person as an executor where the executors have been given flexible discretionary authority in the ongoing administration of trusts for other family members. It may be more appropriate to have such a person act in an advisory role to the executors with independent individuals acting in the role of executors, who would consider input from these advisors but not be in a conflict in the actual decision-making.

Any lawyer purporting to assist in a client's estate plan must take care in developing and implementing the plan. In order to best combine the tax considerations and the family considerations, keep the plan as flexible as possible. Moving the assets into a corporation or a trust may provide certain immediate advantages, but should leave open as much as possible the choice of ultimate transferee, subject to the client's wishes. Such a move may have control and long-term tax considerations that must be taken into account as well. You must also ensure that the trustees have adequate powers to be able to deal with the various contingencies which might arise in the future.

If the plan can be kept flexible, the outcome is more readily adaptable to changing circumstances as they occur but, obviously, those in control of the exercise of any discretionary powers in connection with such flexibility must be trusted. Unfortunately, such flexibility and discretion can be the subject of abuse. However, without flexibility, one might be faced with complicated and expensive re-organizations of corporations to redistribute or to sever the interests of the various parties.

In the absence of careful planning, the trustees may be forced to bring a court application for variation of a trust, or for advice and directions where the trustees are not clear on the testator's intentions as to what should occur in the circumstances which have developed or where they do not have the powers to take appropriate steps.

Thoughtful planning now can avoid expensive litigation later, and save the responsible lawyer from potential liability to the client's estate and to intended beneficiaries for failing to anticipate the course of events and its consequences. If a client is not willing to accept recommendations or make appropriate arrangements, you should prepare detailed file notes and document your recommendations to the client as well as the client's refusal to implement the recommendations should the issue arise in the future.

B. THE FAMILY PROPERTY ACT – IMPLICATIONS FOR ESTATE PLANNING AND ESTATE PRACTICE

The provisions of *The Family Property Act* (formerly *The Marital Property Act*) extend to common-law partners. A couple qualifies as a common-law partnership if they either:

(a) register their relationship under *The Vital Statistics Act*, C.C.S.M. c. V60; or

(b) cohabit together for three years in a conjugal relationship.

Part IV of *The Family Property Act* (the "*Act*") equates death with marital breakdown, and allows for a sharing, or more specifically, an accounting and equalization, of the collective family assets of a surviving spouse or common-law partner and the deceased spouse, at the option of the survivor. As a consequence, in order to advise their clients properly, wills and estates practitioners require an in-depth understanding of how the family property regime works generally, as well as an appreciation for the special rules which will operate on death under Part IV of that legislation.

It should be noted that the *Act* applies on the death of a spouse or common-law partner which occurs after August 15, 1993. Thereafter, the rules apply to all wills, including those made prior to that date, and all estate planning clients other than those who have entered into a spousal agreement.

The legislation has little impact where one spouse or common-law partner leaves everything outright to the other by the will, or, by reason of joint ownership or by way of insurance products designating a beneficiary, and all assets are, therefore, being transferred on death directly to the surviving spouse or common-law partner.

There are clients who, by reason of a second marriage, considerable wealth, or other circumstances special to them, may have made what they consider to be adequate provision for the other spouse without leaving all or the bulk of their estate to that person. The lawyer must scrutinize those situations carefully and determine how the Part IV of the *Act* impacts on the distribution of those clients' assets on death, what parts of each estate plan may have to be revised, and/or whether a spousal agreement should be considered to preserve the existing plan. See *Bogoch v. Bogoch Estate,* 2000 CanLII 20756 (MB QB) as to the importance of a properly drafted pre-nuptial or ante-nuptial agreement.

1. Basic Concepts

a) Ownership of Assets

Under T*he Family Property Act* there are several considerations to be taken into account. One of the first considerations is to calculate the net value of the assets belonging to the client and their spouse or common-law partner which would form part of the accounting on death.

Generally speaking, those are the family and commercial assets acquired by each of them during the marriage or the common-law relationship, or acquired in specific contemplation of the marriage or the cohabitation. Assets acquired while cohabiting immediately prior to the marriage are included. The increase in value of all assets acquired prior to the relationship is also included. (See *FPA s. 4(2)(a) and (b)* and *4(3)* and also *FPA s. 7* which deals with exceptions). Debts as of the date of separation are subtracted (see *FPA s. 11*). In addition, one may have to include, in the calculation of the client's assets, the value of assets of third parties to whom the deceased has transferred or was intending to transfer shareable assets prior to or on death.

The definition of family asset in the *Act* may include assets held, for example, by a trust or corporation. Other third party assets are subject to being clawed back under the provisions of *section 6* respecting dissipation of assets, excessive gifts, and transfers for inadequate consideration. Every lawyer who implements an estate freeze should be aware of the case of *Hamm v. Hamm (Estate of)*, 2014 MBQB 14 (CanLII), which held that an estate freeze in favour of the deceased's sons was an excessive gift.

Finally, one must have regard to the special rules applicable on death which appear in section 35 of Part IV. It is important for determining family property rights on death of a client that the client and the client's advisors keep detailed records of the value of assets transferred by a client *inter vivos,* particulars of transferees and consideration given, and whether or not the spouse or common-law partner had knowledge or constructive knowledge of the transfer.

b) Categorization of Assets

Upon the death of the client one would have to determine which assets of the deceased and the surviving spouse or common-law partner are to be included in the accounting, and the extent to which the value of each of those assets is to be included in the accounting.

- Were the assets acquired during the marriage (including cohabitation immediately prior to marriage) or the common-law relationship, or in specific contemplation thereof?
    - If not, to what extent did the value of the asset increase between the date cohabitation commenced and the date of death?
- Were the assets acquired by gift or inheritance?
    - If so, did any transactions take place which would effectively change that asset (excluded for purposes of the *Act)* to a family asset (included under the *Act*)?

- Are there assets which have been transferred to third parties which should be included by virtue of section 6 of the *Act*?

In addition to categorizing assets using the general rules of property sharing, estate planners have to also consider those special rules applicable on death set out in Part IV of the *Act.*

- If the assets are pension assets payable to someone other than the spouse or common-law partner by reason of the client's death, are they brought back into the accounting by reason of *section 35* of the *Act*?
- Is an asset jointly held with a third party a family asset which should be brought back into the accounting by virtue of section 35?
- If an insurance product, are proceeds payable under that contract excluded by virtue of being business insurance, or by virtue of being insurance maintained pursuant to a maintenance agreement or court order under section 35(2)?
- If not excluded, was the policy owned by the deceased, in which case it is only the cash surrender value which is included by virtue of section 35(1)(d).
- Are there assets being transferred to the surviving spouse or common-law partner by reason of the deceased's death, including insurance, RRSPs/RRIFs or joint assets, to be specifically excluded from the calculation by virtue of *section 37* of Part IV?

Finally, one must consider also what debts are to be included or excluded from the calculation. The exclusions are few. *Section 36* excludes funeral and testamentary expenses of the deceased spouse or common-law partner and *section 11* excludes liabilities related to non-shareable assets.

c) Balancing the Interests

A final consideration is how the respective net values of the assets of each spouse or common-law partner compare and whether an equalization payment would be required.

If the surviving spouse or common-law partner has net assets of a greater or equal value as the client at the time of death, no contribution is required.

A deceased's estate may not claim an equalization from the surviving spouse or common-law partner. The Part IV provisions preclude the personal representatives of the deceased spouse or common-law partner from making an application for an accounting and equalization (*s. 28(1)*). However, a personal representative can

continue an application for an accounting and equalization that was started prior to death.

If a surviving spouse or common-law partner makes an application and it becomes apparent that the value of the assets will create a requirement for that surviving spouse or common-law partner to make an equalization payment, the surviving spouse or common-law partner need only withdraw the application. No equalization payment is required.

2. Effect on Estate Planning

Wills and estates practitioners must master the rules as set out in the *Act*, and determine how best to work within the rules, or to circumvent them, as the case may be, in order to best meet their clients' needs and wishes. The estate planning client must either plan to share on death sufficient value to ensure no equalization is required, or, based on full disclosure of assets held today and commitments as to what will be shared on death, arrange for the execution of a spousal agreement. For the purposes of this discussion, we will assume that a spousal agreement is not possible.

a) Spousal or Other Trusts

The testamentary spousal trust, a once common estate planning technique for clients of wealth, has become less attractive by reason of the existence of family property legislation. For purposes of an accounting and equalization under the *Act,* assets held by the deceased's estate in trust are potentially shareable. No matter how large the spousal trust fund or how much an income it would have produced, the surviving spouse may be entitled to an equalization payment having regard to those assets.

Where a testamentary spousal trust is created, the *Act* contemplates that the value of the spouse's life interest in that trust is deducted from any equalization otherwise payable. How does one value the interest where there is a power to encroach on capital? If a value can be determined, where the testamentary trust is part only of the estate residue, the equalization due to the spouse will reduce the remaining residue first.

Where, however, the spousal trust is as to the entire residue, then payment of the equalization will reduce the trust fund. This in turn reduces the value of the life interest to the spouse, and increases the equalization payable. Given the circular calculation which results, where an equalization is payable and the spousal trust is as to the entire residue, a surviving spouse may be entitled to claim a lump sum equalization in lieu of the trust, effectively rendering the trust unenforceable.

Whether the value of the assets held in trust would be included in the net value of the assets of either the deceased or the surviving spouse would depend upon the terms of the trust and whether or not the assets were subject to the *Act.* Certainly, the definition of "family asset" in the *Act* specifically contemplates that an asset held by a

trust might be considered an asset of the respective spouse, as would an asset over which a spouse has a power of appointment.

Clients will want to reassess trusts established for persons other than spouses. Trusts for third parties of estate assets created by the client's will may be defeated wholly or partly by a surviving spouse's claim under the *Act*, which has priority (*s. 41*). The value of trusts established for third parties on death outside a will with pension proceeds may form part of the value of the deceased's net assets by virtue of section 35. A trust of insurance proceeds is of less consequence, since only the cash surrender value of the policy will form part of the accounting (s. 35(1)(d)). Because the *Act* addresses most testamentary dispositions a client might make for the benefit of third parties, a client now may prefer to bestow a benefit intended for third parties in their lifetime rather than deferring the transfer until death. This is discussed further below.

b) Joint Ownership of Assets

Under section 37 of Part IV of the *Act*, assets held by the survivor as joint owner with the deceased spouse or common-law partner are specifically excluded from the accounting.

If a client intends that assets held jointly with the surviving spouse or common-law partner are to be the primary or only assets to be received by the surviving spouse or common-law partner from the client's estate, the client now has to consider varying that ownership in the client's lifetime so as to create a credit for the value of those assets on the ultimate accounting and equalization on that client's death.

For example, a client may want to maintain sole ownership of the property, or have the property transferred back into the client's name (which would require the spouse or common-law partner's consent), and then transfer that property to the surviving spouse or common-law partner by will. Being part of the client's estate, the property will be subject to the claims of creditors but the full value of it will be included as an asset of the deceased's estate for purposes of an accounting under the *Act*, and be credited as a bequest made to the surviving spouse or common-law partner under the will. Alternatively, the client might consider transferring the property outright to the surviving spouse or common-law partner during the client's lifetime.

Although an asset held jointly by the surviving spouse or common-law partner with the deceased is not part of the accounting, an asset which is a family asset owned by the surviving spouse or common-law partner at the time of the deceased's death will form part of the equation. As part of the value of the net assets of the surviving spouse or common-law partner, the value of the property transferred will reduce the surviving spouse or common-law partner's claim against the deceased's estate.

A third option to consider is severing the interest, which would put half of the value of the assets in each respective spouse or common-law partner's asset accounting. The undivided one-half interest held by the client could be transferred to the surviving spouse or common-law partner by will. Unfortunately, varying ownership of a jointly

owned asset such as land requires the consent of the other spouse or common-law partner, which may not be forthcoming, failing which an application would need to be made to sever the joint tenancy.

A client cannot evade the surviving spouse or common-law partner's entitlement on death by transferring ownership of an asset to the client and a third party jointly. Section 35(1)(b) of the *Act* expressly brings back into the accounting the value of property held by the deceased and another party jointly, where the deceased spouse or common-law partner did not receive adequate consideration in respect of that asset. The extent to which the value of that asset is brought into the equation in the case of real property or bank accounts is discussed at section 35(3). Essentially, the value of that asset is included to the extent that the deceased has contributed to that asset.

c) Pensions and Insurance

A client may have to decide whether or not they are more concerned about creditor-proofing during their lifetime, or about the potential claim of a surviving spouse or common-law partner to an accounting and equalization.

For many clients, pensions and insurance proceeds comprise a large part of the assets being left to a surviving spouse. Often these are seen as the primary source of funds to provide adequate means to the surviving spouse for the balance of the survivor's lifetime. Under the provisions of Part IV, specifically section 37, life insurance or pension payable to the surviving spouse is specifically excluded from the calculation of the net value of the surviving spouse's assets for purposes of the equalization with the deceased's estate.

In order to create a credit for those assets passing to the surviving spouse on the death of the deceased, it would be necessary to have those amounts payable into the estate of the deceased and have the assets transferred through the will. Therefore, although a client might want to designate a spouse as beneficiary of certain insurance policies, or certain RRSPs/RRIFs or other pensions, in order to take advantage of protection from creditors afforded under provincial legislation, concerns as to creditors will have to be weighed against the desire to put back into the Part IV equation proceeds payable from these contracts to the surviving spouse on death.

An insurance trust can be used, however, to maintain creditor-proofing and probate avoidance, while paying insurance proceeds through trustees to the spouse. If that level of complication is acceptable to the client, the insurance trust may operate in such circumstances to keep the proceeds as an entry on the inventory of the surviving spouse or common-law partner.

As noted above, Part IV (s. 35(1)) brings back into the equation as assets of the deceased RRSPs or other pension benefits for which a beneficiary other than the surviving spouse is designated, as well as the cash surrender value of a life insurance policy on the deceased payable to a person other than the surviving spouse. Since it

is only the cash surrender value of a policy that is brought back into the accounting, clients who have left considerable shares of a family business or other assets to children of a first marriage may want to consider instead providing insurance funding payable to the children sufficient to allow them to buy out the value of the business or other assets from the estate. Only the cash surrender value of the policy would form part of the accounting for purposes of the equalization. Not only would the children get the business or other assets as intended, but cash proceeds would be available to the estate to make whatever equalization payment might be required.

For example, Mr. X. owns a business worth $1,000,000 which he wishes to leave to his children by way of will. He has provided for an equal amount of insurance payable to his surviving spouse on his death. Unless a change were made, under the rules Mrs. X, assuming that she has no other assets, would be entitled on Mr. X's death to the insurance plus one half of the value of the shares, for a total of $1,500,000.00.

If, however, Mr. X rearranges his affairs so that the insurance is payable to the children, then the net value of the deceased's assets would be the value of the shares plus the cash value of the insurance payable to the children (say $10,000.00). The children would have enough money from the insurance to buy the shares from the estate, and the surviving spouse would be entitled to an equalization payment equal to one-half of the net asset value or $505,000.00.

d) *Inter Vivos* Gifts and Transfers

Because of the special rules contemplated on death provided for in sections 35 and 37 of Part IV, *inter vivos* estate planning is of great significance. For example, a client probably will not want to defer transfer of ownership until death by holding assets jointly with children of a former marriage, since the value of those assets may be brought back into an accounting of family assets on the client's death (s. 35(1)(b)).

In respect of *inter vivos* dispositions, section 6 brings back into the equation assets which may have been transferred or otherwise disposed of in circumstances amounting to dissipation of assets, excessive gifts, or transfers for inadequate consideration made with the intention of defeating a spouse or common-law partner's claim.

> In each case, the *Act* contemplates that the value of those assets will be brought into an accounting under the *Act* provided that the spouse, common-law partner, or surviving spouse applies to do so within two years of the dissipation, gift or transfer having taken place or within two years of having become aware of it.

Serious issues relating to the effects of past corporate reorganizations and estate planning on an accounting and equalization have arisen in recent cases and these issues for the most part remain unresolved (see *Dillon v. Dillon,* 2015 MBQB 138 (CanLII) and *Faurschou v. Faurschou*, 2016 MBQB 12 (CanLII), upheld on appeal 2018 MBCA 44 (CanLII)).

Conversely, if under a structured estate plan a client disposes of assets today and the spouse is aware of that, the client should be able to say with some certainty that after a period of two years those assets will no longer be brought into an accounting under the *Act* in the event of relationship breakdown or the client's death. Therefore, *inter vivos* gifts to children or others, or transfers to trusts for the benefit of others or to corporations held by others will be the means of providing some certainty to the client with complex estate considerations. In implementing any such plan, however, careful consideration should be given to the general provisions of the *Act* and in particular the definitions to be sure that one has successfully removed that asset from the operation of the *Act.*

3. Other Considerations

There is very little flexibility in planning around the accounting and equalization provisions of the *Act* which operate on death. While there is clearly considerable merit in the provisions which preclude a client evading or avoiding the rights of a surviving spouse or common-law partner, the legislation also eliminates or severely restricts the ability of a client to balance the needs of the surviving spouse or common-law partner as against legitimate concerns of the client for others, such as dependent or disabled children, or other special cases.

Where there are those special circumstances, it does not matter that the surviving spouse was only married to the deceased briefly, or has considerable independent means which, by reason of having been received by way of inheritance or gift, are excluded from the accounting and equalization. Although *section 14* gives the court some discretion to vary the equal division of family assets on marriage or relationship breakdown, there is no discretion available on death by virtue of *section 40* of the *Act.*

As will practitioners, we also have to give some thought to that 15 day or 30 day survival period we incorporate in bequests to the spouse or common-law partner under our clients' wills. To address those common accident situations, we have imposed some limited survival period on the survivor's entitlement by will. Under the *Act,* however, there is the possibility that this survival period might result in the will not providing the appropriate entitlement to a surviving spouse or common-law partner, even if they survive for only 29 days.

The one practical barrier to that survivor's claim against the estate is section 28, which precludes an application being instituted under the *Act* after a spouse or common-law partner has died. If, however, a spouse or common-law partner does manage to bring an application in their lifetime, that action may be continued by that person's personal representative (s. 28(2)) and an equalization required, even though the survivor will not have the benefit of it.

4. Estate Considerations

a) Bringing an Application Under Part IV of *The Family Property Act*

> *Section 28* of Part IV of the *Act* provides that once a spouse or common-law partner has died, the personal representative of that person cannot commence an application under the *Act* for an accounting and equalization. However, if an application has been made by a spouse or common-law partner during their lifetime, the personal representative may continue that action.

As a practical matter this means that personal representatives will most likely be responding to an application by a surviving spouse or common-law partner for an accounting and equalization. As noted earlier, if in the process of that application it were to become apparent that the surviving spouse or common-law partner might have to make an equalization payment, although the deceased's estate is theoretically entitled, as soon as the application is withdrawn by the surviving spouse or common-law partner, the deceased's estate has no recourse.

b) Limitation Periods

> A surviving spouse or common-law partner has six months from the grant of letters probate or the grant of letters of administration to bring an application unless the court extends the time for reasons outlined in *section 29(2)*. In conjunction with that, the surviving spouse or common-law partner may obtain an order of the court suspending the transfer of assets of the deceased (including assets transferable to third parties outside of the estate) under *section 30*.

Executors that may not need a will probated to facilitate the administration of the estate should consider the protection provided by the *Act* by the limitation period to a future claim by a surviving spouse.

c) Requirement to Serve Notice

A primary obligation of the personal representative of a deceased spouse or common-law partner is the service on the surviving spouse or common-law partner in prescribed form within one month of probate or letters of administration of notice of the survivor's possible entitlement under the *Act* and the need to seek independent advice (*s. 31*). A sample notice can be found in the precedents.

d) Conditions Precedent to Distribution of Estate and Related Liability of Personal Representative

A personal representative must be cautioned not to distribute the estate until one of three conditions precedent has been met. Under *section 32* these are:

(a) that the surviving spouse or common-law partner has consented to the distribution,

(b) that the time for making of an application has expired without the application being made (i.e., six months from the grant or as extended), or

(c) that the application has been made by the surviving spouse or common-law partner and has been disposed of.

> If a personal representative distributes the estate before one of those conditions is met, the representative will be personally liable to the surviving spouse or common-law partner for any loss suffered as a result of the inability of the estate to meet the equalization payment because of the distribution of estate assets.

e) Settlements Under *The Family Property Act* are Subject to Consent

Where an application has been made under Part IV and the parties have satisfied themselves as to the appropriate division of assets to be made in settlement of that application, the settlement agreement is not valid unless all other beneficiaries of the estate consent in writing, or, if there are minor beneficiaries, a court order is obtained approving the settlement (*s. 32(3)*).

f) Responding to Requests for Information and Onus

Section 33 states that a surviving spouse or common-law partner to a Part IV application may request a sworn statement as to the deceased's assets and liabilities whether or not they make or continue an application. A response by the personal representative is due within 14 days. Obtaining that information assists the surviving

spouse or common-law partner in determining whether or not to commence the application.

A personal representative can only ask for this disclosure from the surviving spouse or common-law partner where they continue an application for an accounting and equalization of assets.

> It is incumbent on clients and their advisors to maintain detailed records of assets disposed of during a client's lifetime, including to whom, at what value, and the consideration given. Otherwise, it may be very difficult for that client's personal representative to respond to requests under section 33 for such information. That difficulty is specifically addressed under the *Act* in relation to joint bank accounts or real property held with third parties. The value of such assets is included to the extent that the deceased contributed to the value of that asset.

Sections 35(3) and *35(4)* recognize the representative's potential problem by putting the onus on the surviving spouse or common-law partner to establish the extent of the deceased's interest. The problem remains for a personal representative to respond to allegations that other assets should be included under section 35 by virtue of inadequate consideration having been given, or under section 6 relating to steps taken by the deceased during their lifetime amounting to dissipation of assets, excessive gifts, or transfers for inadequate consideration with the intention of defeating the claim of the spouse or common-law partner.

g) Priority of Surviving Spouse or Common-law Partner's Entitlement

> The rights of a surviving spouse or common-law partner under the *Act* are considered a debt of the estate with a special priority. Under the *Act*, the debt to the surviving spouse or common-law partner will have priority not only over bequests, but also over maintenance obligations binding on the estate and over any orders under the *DRA* (*s. 41(1)*).

Section 41(1) says that the equalization payment is made after other liabilities of the estate but prior to any bequests. The debt due to the surviving spouse or common-law partner is allocated proportionally among other beneficiaries of the estate under *section 41(2)*, unless the will specifies some other allocation. Pursuant to *section 41(3)*, if an estate has been depleted, the spouse or common-law partner may then look to

the third parties who have become entitled to assets outside of the estate, the value of which have been included in the accounting by virtue of *section 35(1)*.

You will note that the provisions contemplate that a court might vary the terms of a testamentary trust in order to satisfy the equalization, and that it might be satisfied either by way of a lump sum, by a commitment to provide instalment payments, by the transfer of assets, or by a combination of these.

When in doubt, a personal representative may refer any question or dispute arising under the *Act* to the court by virtue of *section 42*.

h) Multiple Equalization Claims

There is the possibility of multiple claims under the *Act.* This could occur where the deceased is married and separated from a spouse at the time of death and also has a common-law partner. Both the spouse and the common-law partner should be provided with notice under the *Act.* The executor would then be charged with the nightmarish job of valuing the deceased's assets as to their value during the marriage (for the benefit of the spouse) and then as to any increase of that value during the subsequent common-law relationship (for the benefit of the common-law partner).

5. Interrelation with Other Legislation

In advising clients, keep in mind how the provisions of Part IV of the *Act* interrelate with other statutes which are applicable on death.

The right of a surviving spouse or common-law partner to an accounting and equalization is of course in addition to the life interest in the homestead which is provided for in *The Homesteads Act,* C.C.S.M. c. H80.

Where there is an intestacy or partial intestacy, the surviving spouse or common-law partner may have an entitlement under *The Intestate Succession Act*, C.C.S.M. c. I85. If so, that entitlement is deducted from the equalization payment otherwise to be made under *The Family Property Act.* In the case of a partial intestacy, any bequests under the will or gifts *mortis causa* by the deceased to the surviving spouse or common-law partner are also deducted.

An application for an accounting and equalization under *The Family Property Act* may be worthwhile for a surviving spouse or common-law partner where there are considerable assets which have been transferred by the deceased in life or which are being transferred to third parties by reason of the deceased's death.

Under *The Intestate Succession Act*, the surviving spouse or common-law partner's entitlement is of course only as to those assets which actually form part of the deceased's estate. Since the accounting under *The Family Property Act* may bring back in under sections 6 and 35 all or part of the value of assets transferred to third parties, the surviving spouse or common-law partner may be entitled to an additional amount under that *Act.* Balanced against that will be the consideration that under the *Act* the net assets of the surviving spouse or

common-law partner are also part of the calculation. If these are considerable, they may outweigh any benefit in making this second application.

With respect to the *DRA*, an equalization payment under the *Act* does not preclude a surviving spouse or common-law partner from making a further application under the *DRA* provided that financial need, as contemplated by that legislation, can be demonstrated.

The entitlement of the surviving spouse or common-law partner under the *Act* does have priority over the claim of a former spouse or common-law partner or any other person's claim under the *DRA.* When advising a former spouse or common-law partner, therefore, consideration should be given to requiring that the liability to the former spouse or common-law partner be funded by an annuity or some other form of insurance. That insurance will not be added back into the accounting, as it is excluded by section 35(2) of the *Act.*

C. APPENDIX: SPECIAL NEEDS CHECKLIST*

1. Description of disability

2. What is/are person's special need(s) as a result?

3. What are the person's capabilities?

4. Description of existing lifestyle:

   a) in general:

   b) specifically:
      - accommodation
        - with whom?
        - where (i.e., type)?
        - costs/conditions
      - day-to-day functioning
      - education/training
      - medical or other types of treatment
      - is supervision required (i.e., seizures)?
      - what extra benefits, if any, are provided now for person?
      - advocacy
      - consultation (i.e., any ongoing advisors to family?)

   c) what are the ongoing resources (time and money) to maintain this lifestyle?

   d) is the beneficiary's quality of life enhanced by the addition of resources?

5. Desires regarding lifestyle after death of parent(s):

   a) in general:

   b) specifically:
      - accommodation
        - with whom?
        - where (i.e., type)?
      - day-to-day functioning
      - education/training
      - medical or other types of treatment
      - advocacy
      - consultation

---

* Adapted from M. Braunstein "Estate Planning for Beneficiaries with Special Needs" a Continuing Legal Education program of the Law Society of Manitoba, 1985.

c) what are the alternative means and cost of replacing the parent's input? over what potential time period? (consider inflation)

d) what are the potential change(s) in condition of the beneficiary?

6. If person over 18:

a) is there a need for a guardian (i.e., of person) or a committee (i.e., of person's estate)
- if so, role?
- who?
- alternates and successors
- are above named sensitive to the need(s)?

b) who is to take care of finances?
- alternates and successors
- are above named sensitive to the need(s)?

c) should special needs person have input regarding:
- lifestyle and decision making?
- finances and any control/management over same?
- should level of input vary based on changes in level of disability?

d) are there to be advisors?
- siblings?
- family?
- others

7. Financing of the person's future needs:

- structure? a trust?
- how to be funded?

8. Social assistance and discretionary trust if relevant.

9. Additions or reductions in person's needs

- to be accounted for? how?
- to be determined by whom?

10. Is there to be residuary gift after death of person?

D. PRECEDENTS

1. Form of Notice to be Served by Personal Representative on Surviving Spouse or Common-Law Partner

NOTICE

TO: JOHN SMITH

IN THE MATTER OF THE ESTATE OF ALICE SMITH

TAKE NOTICE that as the surviving spouse or common-law partner of ALICE SMITH, you could have rights under *The Family Property Act* to an accounting and equalization of assets. If you wish to make an application under that *Act,* you must do so within six months from April 20, 20__, the day on which letters probate were granted. That is, you must make application before October 20, 20__, unless you apply to the Court for and are granted an extension of time. You should consult a lawyer with respect to your rights since *The Family Property Act* could, in some circumstances, entitle you to a greater share of the estate of your spouse or common-law partner than you are otherwise entitled to, whether or not your spouse or common-law partner left a will.

DATED: May 15, 20__

RON JONES
Personal Representative

2. Consent to Distribution of Estate by Surviving Spouse/Common-Law Partner

CONSENT

IN THE MATTER OF THE ESTATE OF ALICE SMITH

I, JOHN SMITH, hereby consent to the distribution of the Estate by Ron Jones.

DATED: August 12, 20__

_____

JOHN SMITH