

# DEATH AND YOUR FAMILY LAW CLIENT – A WILLS AND ESTATES REFRESHER

---

## Wills and Estates Matter to Family Lawyers

This paper is a wills and estates refresher for family lawyers. It summarizes the common family law statutes that govern on separation, and reviews other statutes that may impact family law matters, important when considering domestic agreements. For more information on family law and wills and estates, see the [Practice Area Fundamentals](#) in our Education Center.

Various statutes give spouses, common law partners, and sometimes other family members significant rights on death in addition or in priority to rights under *The Family Property Act* (FPA). Homestead rights restrict a party's ability to make a disposition of their home during their lifetime and upon death. *The Dependants Relief Act*, *The Wills Act* and *The Beneficiary Designation Act* must also be considered when planning for a separation agreement, a cohabitation or prenuptial agreement, or when contemplating rights and obligations in subsequent relationships. Rights of spouses and common law partners upon death contained in the FPA Part IV and elsewhere also impact relationship agreements. Because wills and estates matters intersect with family law, a good understanding of both is required in order to competently advise your family law clients.

## Who is a Common Law Partner?

Generally, common law partners are accorded the same rights as spouses. However, "common law partner" is defined differently in various statutes.

Under *The Family Law Act*, *The Intestate Succession Act* and *The Dependants Relief Act* common law partners are those who have cohabited in a conjugal relationship for 3 years, those who have cohabited for 1 year if they are together the parents of a child, or those who have registered their relationship under *The Vital Statistics Act* section 13.1. In order to register under that Act, the parties must be adults who live in Manitoba and who are not married or in a registered common law relationship with someone else.

Under *The Family Property Act* and *The Homesteads Act*, common law partners are defined as parties who have cohabited in a conjugal relationship for at least three years, or have registered their relationship under *The Vital Statistics Act*. Cohabiting for one year and having a child together is not sufficient to acquire rights under these statutes.

*The Pension Benefits Act* adds to the definition of a common law partner and provides for pension sharing where parties have cohabited for 1 year provided neither of them is married (*The Pension Benefits Act* s. 1). These parties do not meet the definition of common law partners under the FPA and have no rights under that statute to share in a pension.

*The Wills Act* contains two different definitions of a common law partner. For most of the provisions the definition is the same as under *The Family Property Act*, being parties who have cohabited in a conjugal relationship for at least three years, or those in a registered common law relationship.

Additionally, when considering gifts in a will to someone who has witnessed a will, or their spouse or common law partner, a common law partner is someone who is “cohabiting in a relationship of some permanence” (s. 12(1)). No specific duration is required. Gifts in a will to such a person are void unless validated by a court (ss. 12 – 14).

To review the indicia of cohabitation, see *Molodowich v. Penttinen*, 1980 CanLII 1537 (ON SC). For detailed information on a motion to the associate judge where the duration of a cohabitation relationship is in question, see the *Re-Revised Practice Direction Court of Queen’s Bench Of Manitoba Re: New Model For Scheduling And Case Flow Management Practice Before The Masters*, dated August 12, 2021 and KB Rule 70.25(1.1) – 70.25(1.3).

## **PROPERTY**

### **The Family Property Act**

*The Family Property Act* (FPA) provides for parties’ rights to an accounting and equalization of the value of property owned by each of them upon separation or upon death.

The FPA applies to assets acquired during the marriage or common law relationship, and those acquired prior to, but in specific contemplation thereof. Where the parties cohabited immediately prior to marriage, the FPA also applies to assets acquired during that pre-marital cohabitation period, irrespective of its length.

### **Part II and Part IV**

The FPA Part II deals with the accounting and equalization of assets upon separation. The provisions for an accounting and equalization on death are set out in Part IV.

The FPA does not apply to any asset to which it is made inapplicable in a spousal or common law relationship agreement, or where such an agreement varies the terms of the Act (s. 5). Part IV does not apply where the parties have divided their assets during their lifetimes in a spousal or common law relationship agreement (s. 27). These include a cohabitation agreement, marital agreement, a separation agreement, and a release or quit claim deed (s. 1).

You must be aware of the statutory provisions that ordinarily govern upon each of separation and death, in order to advise your client and appropriately draft an agreement that accords with their wishes and will not be undone by other legislation.

## **Sharing Under The Family Property Act**

Parts I and II of the FPA set out how the Act as a whole applies to assets and liabilities. The provisions in Part II that set out the assets and debts that are included or exempt from sharing also apply in Part IV (s. 26), although there are some significant differences.

The value of all assets and debts which are held at the valuation date that were acquired during the period of the cohabitation/marriage relationship is shareable, with some important exceptions (ss. 3-10).

### **Exceptions to Sharing**

The values of assets that are acquired prior to the date of cohabitation or marriage (or while married but living separate and apart) are not shareable, unless acquired in specific contemplation of the marriage or cohabitation. Any appreciation in value of such assets and/or income from such assets during the relationship is shareable (s. 4).

Liabilities are subtracted from the accounting, except those that relate to assets which are exempt from sharing (s. 11) and funeral and testamentary expenses (s. 36).

The values of assets that are acquired by way of damage award for personal injury, inheritance, gift or trust benefit that were not intended to benefit both parties, are not shareable. Any appreciation in value and/or income from such assets, is similarly not shareable (ss. 7 and 8).

### **Loss of Exemptions**

Where funds that are exempt from sharing are used to acquire a “family asset”, the value of that asset is shareable and the exemption is lost (s. 6(5)). “Family asset” has a wide definition, and specifically includes a family home. A family home is defined as a “property in which a spouse or common law partner has an interest and that is or has been occupied by the spouses or common law partners as their family residence”. It also includes a property owned by a corporation in which a spouse or common law partner owns shares that entitle them to reside in the property.

Additional complexities can occur when such property was held with or by a previous partner. If a party purchases the interest of their previous partner in contemplation of their new relationship, that property may be fully shareable with the new partner (FPA s. 4(1)(b) and s. 4(2.2)(b)).

Where non-shareable funds are used to purchase a commercial asset, the exemption from sharing continues.

Where non-shareable funds are used to purchase property which is jointly held, the joint tenancy prevails. On death of the first joint owner, such property will pass to the survivor by right of survivorship, and will not be included in the estate of the deceased.

## Adding Assets Back to the Accounting

Assets that are no longer in possession of a spouse or common law partner on the valuation date might be added back into the accounting, on an application to the court. These include assets that have been dissipated, excessively gifted, or transferred for inadequate consideration. Dissipation is defined as “the jeopardizing of the financial security of a household by the gross and irresponsible squandering of an asset”. Whether a gift is “excessive” may require a consideration of the motivation for the gift, the size of the gift in relation to the entire estate and the historical pattern of gifting.

Claims to **include** such items in the inventory of the assets of the spouse or common law partner must be made within 2 years of the dissipation or the transfer or its discovery (ss. 6(7)-(9) and (7.1)-(9.1)). It is therefore important to try and ensure that a spouse or common law partner is aware of such transactions, for example when there is a corporate reorganization, or large gifts are made as part of estate planning, so that the limitation period begins to run.

## Part IV Exclusions from the Accounting

Various additional items of property may also be **excluded** from the accounting of the estate of the deceased under Part IV. Life insurance paid to the survivor, and assets such as TFSA, RRSP, RIF or pensions designated to the survivor upon death, and joint assets which the survivor receives by right of survivorship are not included.

These assets which are received directly by the survivor do not fall into the estate of the deceased, and are exempt from the accounting. The survivor can retain those items and **also** receive a Part IV equalization of the assets that are in the estate (s. 37).

Life insurance proceeds payable to someone other than the survivor, for business purposes, in compliance with a court order under the *Divorce Act*, *The Family Law Act* or a support agreement, or otherwise payable to someone other than the survivor are not included as an asset of either the estate or the survivor (s. 35).

## Part IV Potential Additions

Under Part IV, *only if* the parties are cohabiting at the date of death, the value of certain other assets may also be added to the deceased’s estate for the purposes of the accounting. These include the deceased’s interest in items held jointly with someone other than the survivor, gifts mortis causa to someone other than the survivor, TFSA or RRSP accounts designated to someone other than the survivor, life insurance payable to the estate, and the *cash surrender value* of life insurance paid to someone other than the survivor (s. 35).

## Valuation Date

If the parties were cohabiting at the date of death, that is the valuation date for the accounting of assets and liabilities. If the parties were not then cohabiting, the valuation date is the date of separation (s. 34).

## Equal Division

Unlike in separation (Part II) where the court has the rarely exercised ability to order unequal division (s. 14), upon death (Part IV) the court may not order the division of property in a way that is other than equal (s. 40).

## Part IV Application

Only the survivor can apply under FPA Part IV for an accounting and division of property (s. 28(1)). Where there are both a spouse and a common law partner, both must be served with notice of this right (FPA s. 31). The limitation period to apply is 6 months from the grant of probate or letters of administration, with possible extensions (s. 29). If there is no such grant, the limitation period does not begin to run.

The estate administrator cannot seek an accounting and division of property, which otherwise might see the survivor making an equalization payment into the estate. However, FPA applications under Part II that were made by either party prior to death can be continued (s. 28(2)).

## Survivor's Choice

The survivor is not obligated to seek a division of property under Part IV, and may elect to take under the will (s. 43). Any gifts to the survivor under the will are deducted from any amount payable pursuant to a Part IV accounting (s. 39). This may require the preparation of draft accountings so that a comparison may be made between the bequests in the will and a Part IV calculation, and a decision made.

If the survivor is the executor and wishes to make a claim against the estate, they are in a conflict, as they are both responsible to distribute the estate in accordance with the will and are seeking an order that is different than the will. They may be removed or suspended as the executor until their claim has been resolved (see [Stern v. Stern](#), 2010 MBQB 68).

## Part IV Equalization Payment

An equalization payment under Part IV is a debt of the estate. It is payable after payment of the liabilities of the estate and **has priority** over bequests in the will, an *Intestate Succession Act* claim, an obligation to pay support that binds the estate and a *Dependents Relief Act* claim (s. 41).

It is not uncommon for a family law agreement to provide that the survivor will accept whatever is in the will, won't challenge the will in any fashion, and won't seek a Part IV accounting. Sometimes those promises are conditional on other terms, such as insurance for the survivor's benefit, or the maintenance of a will leaving certain properties, percentages or amounts to the survivor.

## NOTES ON PARTICULAR PROPERTY

### Pensions

A pension can be the most significant asset of a party. It is crucial to know whether a pension is governed by provincial or federal pension legislation or by a specific superannuation act. Inquiries may be made of the employer or pension administrator in order to obtain specific information.

Generally speaking, survivors who were married or in a common law relationship with a party who had pension rights are entitled to share in the pension, unless those rights were effectively waived. Absent an effective waiver by the spouse, a designation of such shareable pension benefits to anyone else will be ineffective.

See:

- Office of the Superintendent Pension Commission - Overview of Manitoba Pension Laws  
<https://www.gov.mb.ca/pension/faq/overview/print,breakdownrelations.html>
- Relationship Breakdown  
<https://www.gov.mb.ca/pension/faq/specific/relationship.html>
- Government of Canada Division of Pension Benefits Package (Public Service Superannuation Act members)  
<https://www.canada.ca/en/public-services-procurement/services/pay-pension/public-service-pension-plan/information-packages-kits/division-pension-benefits-package.html>
- Divorce or Separation - Public Service Pension Plan  
<https://www.canada.ca/en/treasury-board-secretariat/services/pension-plan/active-members/divorce-separation-pension.html>
- Other information may be available that is specific to a particular pension plan, for example, Teachers' Retirement Allowances Fund (TRAF) marriage/Common Law Breakdown  
<https://www.traf.mb.ca/retired-members/life-events/marriage-common-law-breakdown/>

Pensions can be very complex and are described in more detail in [chapter 4](#) of Family Law under Practice Area Fundamentals in the Education Center.

## Canada Pension Plan (CPP)

CPP credits are shareable. A waiver of sharing CPP credits is ineffective in Manitoba. Applications for division of CPP credits may be made after divorce or separation, or within 3 years of death. See *Divorced or Separated: Splitting CPP Credits*

<https://www.canada.ca/en/services/benefits/publicpensions/cpp/cpp-split-credits.html>

## The Home

A family home can be the most financially and emotionally valuable asset held by family law clients. Most parties hold title to their family home jointly.

As joint tenants, each party holds an undivided interest with the right of survivorship; upon the death of the first joint owner, their interest in the property will pass to the survivor.

As the deceased party's share of the jointly held property does not fall into their estate, that value is not included when calculating the portion of the estate to which the survivor is entitled in an FPA Part IV accounting (s. 37). The survivor will retain the entire property in addition to their Part IV entitlement.

Parties may also hold title as tenants in common, which does not include a right of survivorship. Each party may leave their interest as they may wish, subject to homesteads rights which continue to exist. It is possible to sever joint tenancy to become tenancy in common.

For more information, see *"Joint Tenancy, the Right of Survivorship, and Your Family Law Client"* under Family Law in the Education Center.

## The Principal Residence

There can be only one principal residence at a time per family unit. If two properties, such as a house and a cottage are owned, only one is the principal residence. When the principal residence is sold, it must be reported on the owner's income tax return. Should each party retain one property, the first to sell may designate that property as the principal residence, thus preventing the other party from doing so for the same period of time.

It is prudent for a separation, spousal, cohabitation or prenuptial agreement to deal with the principal residence exemption to avoid this possibility. See *Disposing of Your Principal Residence* and *Income Tax Folio S1-F3-C2, Principal Residence* for a discussion of the principal residence exemption, which can eliminate or reduce a capital gain on the disposition.

## The Homesteads Act

Homestead rights give a property owner's spouse or common law partner a life estate in their homestead. This means that following the death of the owner, the survivor has the right to live in the property which they occupied as their home for the rest of the survivor's life (s. 21). Joint owners and tenants in common also have homestead rights. Where the home has been left to someone other than the surviving partner, the devise is subject to the life estate (s. 22).

The deceased owner's estate is responsible for the capital expenses of the home. These costs can be significant. The duration of the life estate can be very long, depending on the age and health of the survivor.

The homestead rights of the first spouse or common law partner to acquire them continue until they are released or terminated. Where those rights have not been dealt with, a subsequent partner will not acquire homestead rights (ss. 2.1 and 2.2).

Where parties have more than one home and there has not been an election of the homestead, the survivor may choose either a prior or the current home at the time of death as their homestead (s. 8.1).

**Homestead rights are not affected by simply separating.** Homestead rights are terminated by divorce, by the registration of a dissolution of a registered common law relationship under *The Vital Statistics Act*, or by court order under s. 10(1.1) where common law partners in a non-registered relationship have lived separate and apart for three years.

Where homestead rights have not been terminated or released, it may be necessary to seek a court order dispensing with consent for a disposition of the property in appropriate circumstances (s. 10).

Homestead rights are in addition to, and have priority over, rights under the FPA (FPA s. 44) and *The Intestate Succession Act* (ISA s. 10).

It is not uncommon for parties to a cohabitation, prenuptial or separation agreement to waive and release their homestead rights (s. 28). In cohabitation and prenuptial agreements these rights are sometimes replaced with similar but more restricted terms, such as a limited duration for occupancy of the home.

## THE WILLS ACT

### Children in Wills

Generally speaking, a child is one naturally born or adopted (*The Adoption Act* s. 31). To include others such as foster children or step children in a will, they should be named, or the term "children" or "issue" should be defined.

Guardianship clauses in a will are not binding, but are an indication of the parent's views. The court retains jurisdiction and must make an order in the best interests of the child.

## Effect of Separation and Divorce

Separation has no effect on a will or the right of a separated spouse or common law partner to take under the will (*The Wills Act* s. 18(2)(4)).

Divorce does not revoke a will. However, where a divorce has become final, a dissolution of a registered common law relationship has been registered or parties to a non-registered relationship have been separated for 3 years, the surviving former spouse or common law partner is treated as if they had predeceased.

## Effect of Marriage

A will is made invalid upon marriage, unless it is made in specific contemplation of marriage or a common law relationship with a person they subsequently marry. The will should provide that it is being made in specific contemplation of marriage with the specifically named person. Note that **marriage** is required to revoke a will; entering into a common law relationship alone is not sufficient (*The Wills Act* s. 17).

Given the difference in capacity to marry and to make a will, a marriage can have a disastrous effect on prior estate planning. Where the person has the sufficient (lower) capacity to marry, but does not have the sufficient (higher) capacity to make a will, the marriage can result in an intestacy, voiding the estate planning that was previously in place.

Marriage does not invalidate a will that fulfills obligations of the testator to a former spouse or common law partner under a separation agreement or court order (*The Wills Act* s. 17).

## Wills for a Couple

Spouses or common law partners may make **mirror wills**, which contain basically the same terms, reversing the testator and the beneficiary. In most cases, mirror wills can be revoked or changed at any time by either spouse.

Spouses or common law partners may agree, in a cohabitation or prenuptial agreement or otherwise, to maintain wills that contain certain terms or bequests. These may take the form of a mirror will, but not necessarily. Wills made by binding agreement are **mutual wills**. Mutual wills cannot be revoked, except by agreement of both parties. They are contracts to leave property in a certain way.

Mutual wills may be useful in a circumstance such as a second marriage or blended family, or where parties ultimately want their estates to go in a certain way (such as to all of the children of both parties) and do not want the survivor to be able to change their will after the passing of the first party. As an exception to privity of contract, the beneficiaries of a mutual will can apply to enforce the agreement for mutual wills under constructive trust

principles. Both parties should have independent legal advice if mutual wills are contemplated.

Many couples who are including estate planning in cohabitation or prenuptial agreements are not expecting separation or divorce. You must draw to their attention that they may be assuming risks. These include the possibility that one of the parties may wish to change their will in the future, including in the event of separation or if one party predeceases the other and the circumstances of the survivor change by reason of repartnering, health, changing family relationships or otherwise.

## **NAMING BENEFICIARIES**

### **The Beneficiary Designations Act and The Insurance Act**

*The Beneficiary Designations Act* (“BDA”) allows a person to designate or revoke a beneficiary by will or by an instrument (BDA s. 2-5 and *The Insurance Act* ss. 148 and 168-169). A designation or a revocation of an instrument in a will may be general (“all my RRSPs”) or specific (“RRSP account no. 123 at ABC Bank”) (BDA ss. 3 and 4).

A later designation revokes an earlier one, to the extent of a discrepancy (BDA ss. 5 and 11). The revocation of a will revokes a designation contained in it, although the invalidity of a will does not revoke a designation in it (BDA ss. 6-8).

A designation by an instrument may be made irrevocable (BDA s. 12 and *The Insurance Act* s. 168). This is fairly common in a family law situation where insurance is provided for the benefit or support of a current or former spouse or common law partner and/or children after death.

**Separation and divorce do not affect designations** (BDA s. 13). A general release in a separation agreement also is not sufficient to revoke an insurance designation. It is important that family law clients are aware of the necessity to change such designations if they wish to do so following a separation.

Where the designation is in the will and the designation is a “devise or bequest of beneficial interest in property” by a will, divorce may result in the surviving divorced party being treated as having predeceased (*The Wills Act* ss. 18(2) and 18(4)).

It is important to remind clients to change beneficiary designations on insurance policies, RRSPs, RIFs, TFSAs etc. with their providers and not rely on a later will to do so. An insurer may pay out based on their last instructions and not know about a change made in a will. If a will with a designating clause has been signed, the insurer should be advised right away, so they are aware that there might have been a change.

When parties are contemplating an agreement to designate taxable assets such as an RRSP to a beneficiary, you must advise your clients of tax implications. Where such an asset is

designated to a beneficiary, the beneficiary is entitled to the asset, but the estate is responsible for paying the tax. This may not be the intention of the testator and may be a significant burden on the estate, affecting the estate's ability to pay the other bequests. There may be an argument that the tax amount might be claimed from the recipient under the principles of unjust enrichment (see *Morrison Estate*, 2015 ABQB 769).

A rollover of such an asset may be possible for a surviving spouse or common law partner, such that the estate would not have taxes to pay in relation to the rolled over asset. A rollover also removes the asset from the estate so that it would be unavailable for creditors, provided the estate is solvent. In the case of a rollover, the recipient will be required to pay the necessary tax when they withdraw the funds.

The survivor is not obligated to elect a rollover and may choose not to do so. For example, a spouse who is designated as the beneficiary of an RRSP and who does not get along with beneficiaries under the will might refuse a rollover, receiving the designated amount in its entirety, and leaving a reduced estate for the beneficiaries, after payment of the tax burden. This is an important consideration when planning a cohabitation and/or prenuptial agreement.

It is also important to recognize that if a party has a spouse or common law partner at death, a locked in RRSP/RIF which was originally sourced from a pension must go to the survivor, absent an effective waiver. It is crucial to know the source of such assets in order to plan effectively.

## **INTESTACY**

*The Intestate Succession Act* governs where there is no will. If the deceased had a spouse or common law partner and no issue, or if all the issue are of both the deceased and the spouse or common law partner, the survivor is entitled to the entire intestate estate (ss. 2(1) and 2(2)).

In the event there are issue who are not the issue of both the deceased and their surviving spouse or common law partner, the survivor is entitled to the greater of half the intestate estate or \$50,000 plus half of the remainder of the intestate estate (s. 2(3)).

In the case of a partial intestacy, any amount the survivor receives by will from the deceased is subtracted from their ISA entitlement (s. 2(4)). An amount received by direct designation by an instrument is not subtracted (see *Grassing v. Riley*, 2020 MBQB 34 which can be found at <https://welpartners.com/blog/2021/01/missing-case-grassing-v-riley-2020-mbqb-34/>).

Parties may be living separate and apart at death. Generally speaking, parties who are living apart due to health or medical needs, but do not intend to end their relationship are not considered to be living "separate and apart" as their relationship is continuing.

A separated spouse or common law partner will be treated as if they had predeceased (see ss. 3(1) and 3(2)) if:

- their divorce is final,
- a dissolution of a registered relationship has been registered, or parties to a non-registered relationship have lived separate and apart for three years,
- an application has been made for a divorce or an accounting or equalization under the FPA, or
- the parties have *divided their property in a way that appears to have been intended by them to finalize their property rights*. This might be clear in a comprehensive agreement, or it may be difficult to determine the parties' intention, necessitating the assistance of the court.

A party may have more than one spouse or common law partner. If the property rights of a separated spouse or common law partner have not been dealt with, the **most recent** spouse or common law partner **has priority under the ISA, but does not have priority over the separated spouse or common law partner's FPA Part IV rights**. You must calculate the most recent partner's ISA entitlement, which will be reduced by the amount to which the separated party is entitled under FPA Part IV (s. 3(3)).

It is not uncommon for parties to a cohabitation, prenuptial, or separation agreement to waive their rights under *The Intestate Succession Act* in the agreement. It is good practice to try and ensure that your client has a will, to limit the likelihood of an intestacy.

Although the FPA Part II, FPA Part IV and the ISA all deal with the division of property between spouses and common law partners, the differences in the legislation can lead to wildly different results. For example, see the Comparative Accountings in the Appendix, which illustrate the results of an accounting in the event of a separation, death, or intestacy between the same fictitious parties.

## SUPPORT AND DEATH

### Court Orders and Agreements

Court orders, separation agreements or prenuptial agreements may direct that support bind an estate, raising a number of issues. The estate will not be able to be finalized until the support ends, which could be far in the future. The estate may have insufficient assets to make all the payments that will ultimately be required.

There may also be important tax ramifications. Periodic spousal support payable by a person pursuant to a written agreement or court order is tax deductible by the payor and must be included in income by the payee. If the estate is paying the support, there is no tax deduction or inclusion.

Possibilities include maintaining life insurance payable either to the estate to fund the support, or to the recipient to satisfy the support obligation. It can be wise to grant the recipient the right to information about the currency of the policy directly from the insurance company, to name the recipient as the owner of the policy, and/or to make the designation irrevocable. These guard against the possibility that, unbeknownst to the recipient, the insured does not maintain the policy as agreed.

Terms and conditions may be included in a support order to secure payment (*Divorce Act* ss. 15.1, 15.2 and *The Child Support Guidelines* s. 12). *The Family Law Act* specifically provides for a spouse or child to be designated as the beneficiary of a life insurance policy, including irrevocably.

In [Ladoski-Kolbuck v Kolbuck](#), 2025 MBCA 100 the Court of Appeal held that:

*There is jurisdiction under either section 74(12) of the FLA or section 15.1(4) of the Act to order a spouse to obtain a new life insurance policy to secure their support obligation when combined with an order providing that the duty and liability to pay support continues after the spouse's death and will be binding on their estate.*

....

*Section 74(8) of the FLA empowers the court to make an order binding the payor's estate. This is significant as, in the absence of such an order, the ongoing payment of support is not binding on the estate since the obligation is personal and ends on the payor's death (thus, there would be no ongoing obligation to secure).*

The Court also noted that in making such an order, there should be evidence of the payor's insurability, the appropriate amount and duration of insurance to secure the support, and its cost.

There have been a number of cases in which courts have found remedies where a deceased has failed to maintain insurance in contravention of an agreement, or where the court has refused to interfere where a deceased has neglected to change a designation although permitted to do so. (For one example, see [Moore v. Sweet](#), 2018 SCC 52 (CanLII).)

Arrears of support owing at time of payor's death are a debt of the estate. While ongoing periodic support ceases at the recipient's death, lump sum support unpaid at the time of the recipient's death remains payable to recipient's estate (see [The Estate of Denise Joanne Pynenburg et al. v. Donald Rocan Salkeld](#), 2020 MBQB 150 (CanLII)).

## **The Dependants Relief Act**

Under *The Dependants Relief Act* ("DRA"), a dependant in financial need may seek a court order that reasonable provision be made for them from the deceased's estate, irrespective of whether the deceased died intestate or testate, and despite the terms of a will (DRA s. 2(1)).

A dependant includes a spouse or common law partner, or a former spouse or common law partner entitled to support under an order or agreement and a child as defined under the *Divorce Act* and FLA. Financial need is required, although there is no requirement that the dependant was actually being supported by the deceased.

Parents, grandparents, grandchildren and siblings who were substantially dependent on the deceased are also included (s. 1).

The limitation period to apply under the DRA is typically 6 months after the grant of probate or letters of administration, which can be extended by the court in limited circumstances (see also *Zenyk v. Kowalyk et al.*, 2007 MBCA 57). Where there is no grant, the limitation does not begin to run (DRA s. 6).

Both *The Homesteads Act* and Part IV of the FPA have priority over the DRA. As a matter of public policy, a waiver of rights under the DRA is not binding.

## Releases

In addition to releases of specific rights discussed above, typically separation agreements and many cohabitation and prenuptial agreements contain releases of rights to act as each other's Power of Attorney and/or to make healthcare decisions, as well as to waive any entitlement to act as the executor/administrator of each other's estate (see *Williams v. Breau et al.*, 2020 NBQB 85 (CanLII) which also deals with conflict of interest by a potential administrator).

## Conclusion

It can be difficult to plan the terms of a family law agreement. Such agreements generally deal with rights and obligations on both separation and death, which provisions may vary widely.

Terms of a separation agreement that include rights and obligations upon death should consider the needs of the parties and the children; terms in a cohabitation or prenuptial agreement may also need to address first, blended and second families.

Various pieces of family and wills legislation affect parties in life and upon death, and impose rights and responsibilities on each other. When drafting any agreement, family lawyers must understand and take into consideration these various statutes in order to provide competent and comprehensive advice. When in doubt, advice from counsel who practice in the area of wills and estates is a necessity.

## Appendix: Comparative Accountings: FPA Part II (Separation), Part IV (Death) & ISA

Assets of Husband	Separation	Death of Husband	Intestacy Death of Husband
*House (pre-acquired) \$350,000 Increase in value \$250,000	*250,000	*250,000	*350,000
Car	7,500	7,500	7,500
Bank account	12,500	12,500	12,500
Cottage, joint \$220,000	^	+	+
Life insurance payable to Wife \$100,000 on death, csv \$2500	2,500	++	++
Term life insurance payable to Estate \$150,000, no csv	nil	150,000	150,000
Canada Savings bonds, inherited	nil	nil	20,000
Investment account, joint with son of prior relationship \$15,000	7,500	?	+
Credit card debt	(10,000)	(10,000)	(10,000)
TOTAL Husband's assets	270,000	410,000	530,000
Wife's own assets	100,000	100,000	100,000@
Payment to Wife	85,000#	155,000#	397,500
Additionally received by Wife:			
^ half sale proceeds	110,000		
+ cottage, joint, by survivorship		220,000	220,000
++ life insurance by designation		100,000	100,000
Total retained by Wife	295,000	575,000	817,500

- 
- \* pre-acquired asset (FPA s. 4), homestead rights are in addition (FPA s. 44, ISA s. 10)
  - ^ to be dealt with under LPA (FPA s. 10, LPA s. 19), sold and half value assigned to each in this example
  - + does not fall into estate, passes by right of survivorship
  - ++ does not fall into estate, passes by designation
  - ? might be added to estate (FPA s. 35)
  - # equalization payment under FPA (s. 13)
  - @ irrelevant to calculation of ISA payment to wife