PPI

A REFERENCE GUIDE TO PROVINCIAL WILLS AND ESTATES LAW IN CANADA

Prepared by Borden Ladner Gervais LLP for PPI – *for Advisor use*

2021

GUIDE DE RÉFÉRENCE SUR LA LOI PROVINCIALE DES TESTAMENTS ET DES SUCCESSIONS AU CANADA

Préparé par Borden Ladner Gervais LLP pour PPI – *à l'usage des conseillers*

2021

A REFERENCE GUIDE TO PROVINCIAL WILLS AND ESTATES LAW IN CANADA

Table of Contents

GUIDE DE RÉFÉRENCE SUR LA LOI PROVINCIALE DES TESTAMENTS ET DES SUCCESSIONS AU CANADA

Table des matières

Information in this guide was last updated by Borden Ladner Gervais LLP, with the assistance of Stevenson Hood Thornton Beaubier LLP (Saskatchewan), and Stewart McKelvey (Atlantic provinces) during 2021 as indicated under each province's section. It is highly recommended that clients seek independent accounting, legal and taxation advice with regard to the use of life insurance in their business and estate planning.

Les informations contenues dans ce guide ont été mises à jour par Borden Ladner Gervais LLP, avec la collaboration de Stevenson Hood Thornton Beaubier LLP (Saskatchewan), et Stewart McKelvey (provinces de l'Atlantique) en 2021 tel qu'indiqué dans les sections de chaque province. Nous recommandons fortement aux clients d'obtenir des conseils comptables, juridiques et fiscaux indépendants relativement à l'utilisation de l'assurance vie dans le cadre de leur entreprise et de leur planification successorale.

BRITISH COLUMBIA

Prepared by Peter Glowacki, TEP of Borden Ladner Gervais LLP
(May, 2021)

1. Many people don't have a will, which means that their estate will be governed by the rules of intestacy.

(a) For a married person with children, what is the division of assets upon an intestacy?

Summary

When a married person with children dies without a will, pursuant to section 21 of the WESA, the division of assets is dependent on the relationship of the children to the deceased and surviving spouse.

If the deceased leaves behind a surviving spouse and children who are all children of both the deceased and surviving spouse, the surviving spouse will receive preferential treatment of $300,000, with the residue of the estate split evenly between the surviving spouse (50%) and children (50%).

If, all children are not children of both the deceased and surviving spouse, the surviving spouse will receive preferential treatment of $150,000, with the residue of the estate split evenly between the surviving spouse (50%) and children (50%).

If there is a spousal home (generally a home/strata/manufactured home in which the deceased person and his or her spouse were ordinarily resident), the provisions of Part 3, Division 2, sections 26 through 35 of the WESA must also be taken into consideration in dealing with the spousal home.

Spouse and descendants

21 (1) In this section:

> "household furnishings" means personal property usually associated with the enjoyment by the spouses of the spousal home;
>
> "net value of an intestate estate" means the value of an intestate estate after deducting from its fair market value, both inside and outside British Columbia,
>
> (a) the value of household furnishings distributed to a spouse under subsection (2), and
>
> (b) charges, debts, funeral and administration expenses, and fees under the Probate Fee Act, payable from the estate.

(2) If a person dies without a will leaving a spouse and surviving descendants, the following must be distributed from the intestate estate to the spouse:

(a) the household furnishings;

(b) a preferential share of the intestate estate in accordance with subsection (3) or (4).

(3) If all descendants referred to in subsection (2) are descendants of both the intestate and the spouse, the preferential share of the spouse is $300 000, or a greater amount if prescribed.

(4) If all descendants referred to in subsection (2) are not common to the intestate and the spouse, the preferential share of the spouse is $150 000, or a greater amount if prescribed.

(5) If the net value of an intestate estate is less than the spouse's preferential share under subsection (3) or (4), the intestate estate must be distributed to the spouse.

(6) If the net value of an intestate estate is the same as or greater than the spouse's preferential share under subsection (3) or (4),

(a) the spouse has a charge on the intestate estate for the amount of the spouse's preferential share under subsection (3) or (4), and

(b) the residue of the intestate estate, after satisfaction of the spouse's preferential share, must be distributed as follows:

(i) one half to the spouse;

(ii) one half to the intestate's descendants

(b) What is the division for an unmarried person with no children?

Section 23(2)(b) through (f) of the WESA detail the distribution of the estate for an unmarried person with no children (assuming no lineal descendants).

23(2) Subject to subsection (3) and section 24, if a person dies without leaving a surviving spouse, the intestate estate must be distributed

(a) to the intestate's descendants,

(b) if there is no surviving descendant, to the intestate's parents in equal shares or to the intestate's surviving parent,

(c) if there is no surviving descendant or parent, to the descendants of the intestate's parents or parent,

(d) if there is no surviving descendant, parent or descendant of a parent, but the intestate is survived by one or more grandparents or descendants of grandparents,

(i) an equal part to the surviving parents or parent of each of the intestate's parents, in equal shares of the part, but if a parent of the intestate has no surviving parents, that part to the descendants of those deceased grandparents, and

(ii) for the purpose of subparagraph (i), a part is determined by dividing the estate by the number of parents of the intestate

(A) who have a surviving parent, or

(B) who do not have a surviving parent but whose deceased parents have a surviving descendant,

(e) if there is no surviving descendant, parent, descendant of a parent, grandparent or descendant of a grandparent, but the intestate is survived by one or more great-grandparents or descendants of great-grandparents,

(i) an equal part to the surviving grandparents or grandparent of each of the intestate's parents, in equal shares of the part, but if a grandparent of the intestate has no surviving parents, that part to the descendants of those deceased great-grandparents, and

(ii) for the purpose of subparagraph (i), a part is determined by dividing the estate by the number of parents of the intestate

(A) who have a surviving grandparent, or

(B) who do not have a surviving grandparent but whose deceased grandparents have a surviving descendant, or

(f) if there is no person who is entitled under paragraphs (a) to (e), the whole intestate estate passes to the government and is subject to the *Escheat Act*.

(3) For the purposes of this section, persons of the 5th or greater degree of relationship to the intestate are conclusively deemed to have predeceased the intestate, and any part of the intestate estate to which those persons would otherwise be entitled must be distributed to other descendants entitled to the estate.

2. A will may be made but its existence may not be known to family members. Is there a will registry in BC?

Summary

British Columbia does have a wills registry.

Discussion

Non-mandatory Wills Notices may be registered with the BC Department of Vital Statistics giving notice of the date of execution of the will and where it is located. These can be searched through Vital Statistics.

3. Each province has rules for ensuring that wills are validly executed.

(a) What are the formalities for the proper execution of a will in BC?

Section 37(1) of the WESA details the formal requirements:

37(1) To be valid, a will must be

(a) in writing,

(b) signed at its end by the will-maker, or the signature at the end must be acknowledged by the will-maker as his or hers, in the presence of 2 or more witnesses present at the same time, and

(c) signed by 2 or more of the witnesses in the presence of the will-maker.

(b) How many witnesses are required?

Two

(c) Can a will be executed virtually and if so what are the rules?

Virtual execution is possible pursuant to sections 35.1 and 35.2 of the WESA.

Definitions

35.1 In this Part:

"communicate" means communicate using audiovisual communication technology, including assistive technology for persons who are hearing impaired or visually impaired, that enables persons to communicate with each other by hearing and seeing each other;

"electronic" means created, recorded, transmitted or stored in digital or other intangible form by electronic, magnetic or optical means or by any other similar means;

"electronic presence" or "electronically present" means the circumstances in which 2 or more persons in different locations communicate simultaneously to an extent that is

similar to communication that would occur if all the persons were physically present in the same location.

Electronic presence

35.2 (1) In this Part, except in section 38, a requirement that a person take an action in the presence of another person, or while other persons are present at the same time, is satisfied while the persons are in each other's electronic presence.

(2) For certainty, nothing in this section prevents some of the persons described in subsection (1) from being physically present and others from being electronically present when the action is taken.

(3) If a will-maker and witnesses are in each other's electronic presence when the will-maker makes a will, the will may be made by signing complete and identical copies of the will in counterpart.

(4) Copies of a will in counterpart are deemed to be identical even if there are non-substantive differences in the format of the copies.

(d) Is a holograph will permitted in BC and if so what are the rules?

Summary

Holograph wills are not specifically allowed for or defined in the *Wills, Estates and Succession Act* (British Columbia). However, they may be accepted in British Columbia upon a court application that the document be fully effective as the will of the deceased.

Discussion

A holograph document that was not executed in accordance with the formalities of the *Wills, Estates and Succession Act* (British Columbia) SBC 2009 c-13 (the "**WESA**") may be accepted in BC but would require an application to Court pursuant to section 58 of the WESA seeking to have the Court order that the document be fully effective as the will of the deceased.

4. According to provincial legislation, how is a person's will affected by the following changes in personal circumstances?

(a) If a person gets married;

Summary

If an individual has made a will and then married on or after March 31, 2014, the will is not revoked by the marriage. If the individual had a will and then married prior to March 31, 2014, the will was revoked by the marriage.

(b) If a person gets divorced; or

Summary

If a testator's marriage is terminated by a divorce, certain provisions of the current will are deemed to have been revoked unless the Court finds the testator had a contrary intention. Provisions deemed to have been revoked include any provision which: (a) makes a gift to a person who was or becomes the spouse of the will-maker; (b) appoints as executor or trustee a person who was or becomes the spouse of the will-maker; or (c) confers a general or special power of appointment on a person who was or becomes the spouse of the will-maker.

Discussion

Section 56 of the *Wills, Estates and Succession Act* (British Columbia) ("WESA"), which requires further reference to section 2(2) of the WESA and Part 5 of the FLA, addresses the situation. In short, any gift in favour of, appointment of the former spouse as executor/trustee or power of appointment granted to the spouse is revoked subject to a contrary intention in the will.

Revocation of gifts

56 (1) This section is subject to a contrary intention appearing in a will.

(2) If a will-maker

(a) makes a gift to a person who was or becomes the spouse of the will-maker,

(b) appoints as executor or trustee a person who was or becomes the spouse of the will-maker, or

(c) confers a general or special power of appointment on a person who was or becomes the spouse of the will-maker,

and after the will is made and before the will-maker's death the will-maker and his or her spouse cease to be spouses under section 2 (2) [when a person is a spouse under this Act], the gift, appointment or power of appointment is revoked and the gift must be distributed as if the spouse had died before the will-maker.

(3) Despite section 2 (2.1), the operation of subsection (2) of this section is not affected by a subsequent reconciliation of the will-maker and the spouse.

(4) For the purposes of subsection (2), the relevant time for determining whether a person

(a) was the spouse of a will-maker is at the time the will was made, or

(b) became the spouse of the will-maker is at any time after the will was made and before the spouses ceased to be spouses under section 2 (2).

When a person is a spouse under this Act

2 (2) Two persons cease being spouses of each other for the purposes of this Act if,

(a) in the case of a marriage, an event occurs that causes an interest in family property, as defined in Part 5 [Property Division] of the Family Law Act, to arise, or

(b) in the case of a marriage-like relationship, one or both persons terminate the relationship.

(c) If a person becomes separated from their spouse

Summary

If the conditions set out in section 56 of the WESA are met, the answer is the same as (b) above.

5. A person can designate a guardian of their children in their will.

(a) Is guardianship of children as provided in a will binding in BC?

The answer is the same as (b)

(b) Does BC give authority to the courts to vary the guardianship appointment in a will? And if so, are there any restrictions on how and when a court can change the guardian?

Summary

While a person can designate a guardian of their children in their will, prior to the appointment becoming effective, the Court must consider whether the appointment is in the best interest of the child.

Discussion

Section 53 of the *Family Law Act* (British Columbia) SBC 2011 c-25 (the "**FLA**") allows for the appointment of a guardian by a parent guardian, who must take into account the provisions of section 56 of the FLA in making such appointment. Further, section 37 of the FLA sets out the criteria for determining what is in the best interests of a child.

Appointment of guardian in case of death

53 (1) A child's guardian may appoint a person to be the child's guardian on the death of the appointing guardian

(a) in a will made in accordance with the *Wills Act*, or

(b) in the prescribed form,

(i) signed at its end by the guardian, or the signature at the end must be acknowledged by the guardian as his or hers, in the presence of 2 or more witnesses present at the same time, and

(ii) signed by 2 or more of the witnesses in the presence of the guardian.

(2) For the purposes of subsection (1) (b),

(a) a witness may not be a person appointed to be the child's guardian, and

(b) a reference to the signature of a guardian includes a signature made by another person in the guardian's presence and by the guardian's direction, and the signature may be either the guardian's name or the name of the person signing.

(3) If a child's guardian dies without having made an appointment under subsection (1) of this section or under section 55 (1) [appointment of standby guardian], and there is

(a) one surviving guardian who is also the child's parent, the surviving guardian has all parental responsibilities with respect to the child, unless an order provides otherwise, or

(b) more than one surviving guardian who are also the child's parent, each of the surviving guardians has the parental responsibilities that the deceased guardian had with respect to the child, unless an agreement or order provides otherwise.

Limits on appointments

56 In making an appointment under section 53 [appointment of guardian in case of death] or 55 [appointment of standby guardian], the appointing guardian

(a) must consider the best interests of the child only, and

(b) may not grant greater parental responsibilities than the appointing guardian has with respect to the child.

6. A person might exclude a spouse, child or stepchild from the will.

(a) What are the legislated rights in BC for a claim by a spouse or a child to the estate of a spouse or parent?

Summary

Part 4, Division 6 of the WESA and, in particular, section 60 allow a spouse and child (including an independent adult child) of the deceased to make an application to Court for adequate provision to be made to them from the estate of the deceased person. There is a legal and moral obligation aspect to the “adequate provision”.

Maintenance from estate

> 60 Despite any law or enactment to the contrary, if a will-maker dies leaving a will that does not, in the court's opinion, make adequate provision for the proper maintenance and support of the will-maker's spouse or children, the court may, in a proceeding by or on behalf of the spouse or children, order that the provision that it thinks adequate, just and equitable in the circumstances be made out of the will-maker's estate for the spouse or children.

(b) What are the dependants relief rules in BC? Can life insurance proceeds paid to a named beneficiary be "clawed back" to satisfy a dependant's claim?

See (a) above. No but they can be taken into account when varying the tems of a Will pursuant to s. 60 of the WESA.

(c) Do stepchildren of the deceased who are not legally adopted have any rights to challenge the will?

Not pursuant to s. 60 of the WESA

Summary

None unless there is already an obligation to pay child support.

(d) Can the validity of a will be challenged for reasons such as lack of capacity and undue influence?

Yes. Same general rules as other common law jurisdictions

7. Clients in second marriages often want to draft wills that provide for a legally binding distribution of assets upon first and second death (i.e. a mutual will). Are mutual wills allowed in BC?

Summary

Yes, although there is no specific statutory provision in this regard and such wills are generally combined with an agreement relative to the mutual wills. The survivor's will/estate would still be subject to the statutory rights of others (i.e. children and any future spouse).

8. The term common law marriage is used to describe a variety of relationships. Common law marriage does not require a marriage ceremony, marriage licence, or any other formal aspect of marriage.

(a) What is the definition of common law partner in BC?

Summary

In British Columbia, the *Family Law Act* governs the concept of who is considered a spouse, and the term "spouse" encompasses what most people think of when they think "common law partners". It provides that a person who has lived with another person in a marriage-like

relationship, and (a) has done so for a continuous period of at least two (2) years, or (b) has a child with the other person, is considered a spouse of that person.

Discussion

The FLA provides in subsection 3(1) that a person is a spouse if the person:

> has lived with another person in a marriage-like relationship, and
>
> (i) has done so for a continuous period of at least 2 years, or
>
> (ii) except in Parts 5 [Property Division] and 6 [Pension Division], has a child with the other person.

Subsection 3(3) of the FLA outlines when a relationship is said to begin:

> 3(3) A relationship between spouses begins on the earlier of the following:
>
> (a) the date on which they began to live together in a marriage-like relationship; or
>
> (b) the date of their marriage.

(b) What rights do common law partners have to property on death, including property that was owned by one partner prior to the relationship and property that was jointly acquired?

Summary

In British Columbia, the *Family Law Act* provides that couples who are not married, but are considered spouses under the FLA such that they live in a marriage-like relationship and have either done so for a continuous period of at least two (2) years, or those that have a child together, qualify as spouses under the FLA for the purposes of property division on the death of one of the partners. Furthermore, the *Wills, Estates and Succession Act* in British Columbia also views common law couples as spouses, if they have lived together for a continuous period of at least two (2) years for the purposes of dividing property where one of the partners dies without a will or in the power to vary the terms of a will if adequate provisions have not been made for them.

Discussion

Family Law Act (British Columbia)

Part 5 of the FLA deals with property division upon the death of a spouse. As discussed in question (a) above, a "spouse" encompasses both married persons and persons living in a marriage-like relationship who satisfy the requirements of living together for a continuous period of at least two (2) years, or those that have a child together.

According to subsection 81(1) in Part 5 of the FLA, spouses are both entitled to family property and responsible for family debt, regardless of their respective use or contribution, and therefore,

in a similar manner, common law partners are also entitled to family property and responsible for family debt, on the death of one of the partners.

Further, it has been held at common law that two people may be spouses even if they have never actually lived together in the same home. In the case of *Connor Estate*, 2017 BCSC 978, while they never lived together, they had a "loving and intimate relationship for over 20 years." The Court held that relationships come in many and various shapes, and based on the evidence in this case, found them to be spouses for the purpose of the FLA.

Wills, Estates and Succession Act (British Columbia)

Similar to the FLA, section 2 of the WESA in defines two persons as "spouses" of each other if they had lived with each other in a marriage-like relationship for at least two (2) years.

The recognition under the WESA legislation of common law partners as spouses is relevant to the determination of how the distribution of an estate is managed when there is no will in place, such that if there is no will, is a common law partner entitled to any property of the estate in the same way a married spouse would be in the absence of a will. Pursuant to section 20 of the WESA, if a person dies without a will leaving a spouse but no surviving descendant, the intestate estate (the estate of the deceased who died without a will) must be distributed to the spouse (which includes a common law partner).

However, if the deceased leaves behind children and a surviving spouse, the division of the assets is dependent on the relationship of the children to the deceased and the surviving spouse. For a fulsome discussion on how the estate is distributed in the case where an intestate estate is distributed where there are children, please refer to the discussion question number 1.

Another right of a common law partner who is a spouse pursuant to WESA is in the maintenance provided for a spouse (married or common law) from an estate where inadequate provision has been made for the spouse. Section 60 of the WESA provides that, if a will-maker dies leaving a will that does not, in the court's opinion, make adequate provision for the proper maintenance and support the of the will-maker's spouse or children, the court may, in a proceeding by or on behalf of the spouse or children, order that the provision that it thinks adequate, just and equitable in the circumstances be made out of the will-maker's estate for the spouse or children. This is an important right of a common law spouse in British Columbia to vary the terms of a will and be treated the same as a married spouse in the event that their spouse does not adequately provide for them in his or her will.

9. A client's will can include a life insurance beneficiary designation. If there is a beneficiary designation on the policy itself that differs from the will, which designation would apply and what legislation governs this?

Summary

In British Columbia, the Insurance Act, RSBC 2012 c-1 governs the designations made on a life insurance policy. In accordance with sections 59 and 61 of the Insurance Act, the latest made valid designation, whether this latest designation was made on the life insurance policy itself or on

the will, is the designation which will be followed with respect to the distribution of the life insurance policy.

10. A will is probated to provide the executor/estate trustee with authority to deal with the deceased's assets.

(a) Are there probate fees in BC and if so how are they determined?

Summary

Probate fees in British Columbia, found in Section 2(3) of the *Probate Fees Act,* are outlined below.

Discussion

Approximately 1.4% of the value of the estate assets, calculated in accordance with Section 2(3) of the *Probate Fees Act*.

2(3) If the value of the estate exceeds $25 000, whether disclosed to the court before or after the issue of the grant or before or after the resealing, as the case may be, the amount of fee payable is

(a) $6 for every $1,000 or part of $1,000 by which the value of the estate exceeds $25,000 but is not more than $50,000, plus

(b) $14 for every $1,000 or part of $1,000 by which the value of the estate exceeds $50,000.

"value of the estate" means the gross value, as deposed to in a Statement of Assets, Liabilities and Distribution exhibited to the affidavit leading to a grant or to a resealing, as the case may be, of

(a) the real and tangible personal property of the deceased situated in British Columbia, and

(b) if the deceased was ordinarily resident in British Columbia immediately before the date of death, the intangible personal property of the deceased, wherever situated,

that passes to the personal representative at the date of death.

(b) What assets pass outside the estate and are therefore not subject to probate?

Subject to beneficial interests and resulting trusts issues, jointly held assets and those assets with a named beneficiary (insurance, annuities and pensions not payable to the estate) pass outside of the estate.

(c) Can multiple wills be used to avoid probate?

Multiple wills can be used (with different executors in each Will) to reduce probate fees – generally on closely held, private company shares.

11. A person may use a power of attorney to delegate to another the ability to deal with property and financial matters on that person's behalf.

(a) What is the legislation that governs powers of attorney in BC?

Power Of Attorney Act [RSBC 1996] Chapter 370.

(b) What type of authority may be granted under a power of attorney and what are the limitations?

Section 13 of the Power of Attorney Act provides the broad parameters of the authority that can be granted.

13(1) An adult may, in an enduring power of attorney, authorize an attorney to

(a) make decisions on behalf of the adult, or

(b) do anything that the adult may lawfully do by an agent

(c) in relation to the adult's financial affairs.

13(2) An adult may grant general or specific powers to an attorney.

The actions of the attorney must be in the best interests of the adult donor.

(c) What are the formalities for executing a power of attorney in BC and can it be executed virtually?

Sections 16 and 17 set out the formalities for execution:

Adult must sign enduring power of attorney

16 (1) Subject to subsections (2) to (6), an enduring power of attorney must be in writing and signed and dated by

(a) the adult in the presence of 2 witnesses, and

(b) both witnesses in the presence of the adult.

(2) Subject to subsection (3), an enduring power of attorney may be signed on behalf of an adult if

(a) the adult is physically incapable of signing the enduring power of attorney,

(b) the adult is present and directs that the enduring power of attorney be signed, and

(c) the signature of the person signing the enduring power of attorney on behalf of the adult is witnessed in accordance with this section, as if that signature were the adult's signature.

(3) The following persons must not sign an enduring power of attorney on behalf of an adult:

(a) a witness to the signing of the enduring power of attorney;

(b) a person prohibited from acting as a witness under subsection (6).

(4) Only one witness is required if the witness is a lawyer or a member in good standing of the Society of Notaries Public of British Columbia.

(5) If an enduring power of attorney is to be effective for the purposes of the *Land Title Act*, the enduring power of attorney must be executed and witnessed in accordance with the *Land Title Act*.

(6) The following persons must not act as a witness to the signing of an enduring power of attorney:

(a) a person named in the enduring power of attorney as an attorney;

(b) a spouse, child or parent of a person named in the enduring power of attorney as an attorney;

(b.1) an employee or agent of a person named in the enduring power of attorney as an attorney, unless the person named as an attorney is

(i) a lawyer,

(ii) a member in good standing of the Society of Notaries Public of British Columbia,

(iii) the Public Guardian and Trustee, or

(iv) a financial institution authorized to carry on trust business under the *Financial Institutions Act*;

(c) a person who is not an adult;

(d) a person who does not understand the type of communication used by the adult, unless the person receives interpretive assistance to understand that type of communication.

Attorney must sign enduring power of attorney

17(1) Before a person may exercise the authority of an attorney granted in an enduring power of attorney, the person must sign the enduring power of attorney in the presence of 2 witnesses.

(2) The signing of an enduring power of attorney by an attorney is not required to be in the presence of the adult or any other attorney.

(3) Section 16 (4) and (6) applies to witnesses of an attorney's signature and, for this purpose, the reference in section 16 (6) to the adult is to be read as a reference to the attorney.

(4) A person named as an attorney in an enduring power of attorney who has not signed the enduring power of attorney is not required to give notice of any kind that the person is unwilling or unable to act as an attorney.

(5) If a person named as an attorney does not sign the enduring power of attorney, the authority of any other attorney is not affected, unless the enduring power of attorney states otherwise.

Virtual execution is currently and temporarily permitted pursuant to Ministerial Order No. M162, *Electronic Witnessing of Enduring Powers of Attorney and Representation Agreements (COVID-19) Order*. Witness must be a lawyer or notary.

12. A person may use a directive or other document under which health care and personal care decision-making can be delegated.

(a) What is the proper term for this type of document in BC and what is the legislation that governs it?

A Representation Agreement pursuant to the Representation Agreement Act, [RSBC 1996] Chapter 405.

(b) What are the formalities for executing this document in BC and can it be executed virtually?

Section 13 of the Representation Agreement Act sets out the details for execution:

Form, signing and witnessing of agreements

13 (1) A representation agreement must be in writing.

(1.1) For the purposes of this Act, a representation agreement is executed when the following requirements are met:

(a) the agreement is signed and witnessed in accordance with this section;

(b) all certificates required under this section and sections 5, 6 and 12 are completed.

(2) A representation agreement must be signed by the adult and

(a) if the representation agreement appoints more than one representative and the representatives must act jointly, each representative,

(b) if the representation agreement appoints only one representative, that representative, or

(c) if the representation agreement appoints more than one representative but each may act independently, at least one representative.

(2.1) Before a person may exercise the authority of a representative granted in a representation agreement, the person must sign the representation agreement.

(3) The persons referred to in subsection (2) need not be present together when they sign the representation agreement and any one or more of them may sign it in counterpart.

(3.01) Subject to subsection (3.02), the adult's signature must be witnessed by 2 witnesses each of whom must sign the representation agreement.

(3.02) Only one witness is required if that witness is a lawyer or a member in good standing of the Society of Notaries Public of British Columbia.

(3.03) The signature of a representative or alternate representative need not be witnessed.

(4) A representation agreement may be signed on behalf of the adult who wants to be represented if

(a) the adult is physically incapable of signing the agreement,

(b) the adult is present and directs that the agreement be signed,

(c) the person signing the agreement is an adult who is not named as a representative or alternate representative in the agreement and is not a witness to the agreement,

(c.1) the signature of the person signing the agreement is witnessed in accordance with subsection (3.01) or (3.02) as though that signature were the adult's signature, and

(d) in the case of a representation agreement made under section 7, the person signing the agreement and each witness complete a certificate in the prescribed form.

(5) The following persons must not act as a witness to the signing of a representation agreement:

(a) a person named in the representation agreement as a representative or alternate representative;

(b) a spouse, child or parent of a person named in the representation agreement as a representative or an alternative representative;

(b.1) an employee or agent of a person named in the representation agreement as a representative or alternative representative, unless the person named as a representative or an alternative representative is

(i) a lawyer,

(ii) a member in good standing of the Society of Notaries Public of British Columbia,

(iii) the Public Guardian and Trustee, or

(iv) a financial institution authorized to carry on trust business under the *Financial Institutions Act*;

(c) a person who is not an adult;

(d) a person who does not understand the type of communication used by the adult, unless the person receives interpretive assistance to understand that type of communication.

(6) A witness to a representation agreement made under section 7 must complete a certificate in the prescribed form.

Virtual execution is currently and temporarily permitted pursuant to Ministerial Order No. M162, *Electronic Witnessing of Enduring Powers of Attorney and Representation Agreements (COVID-19) Order*.

(c) In the absence of a written directive, to whom will medical professionals speak regarding treatment decisions for an individual who is incapable?

Next of kin.

For Will, Estate and Trust questions relating to British Columbia please contact:

Peter Glowacki, TEP
Borden Ladner Gervais LLP
1200 Waterfront Centre
200 Burrard Street
Vancouver, B.C. V7X 1T2
(604) 632-3507
pglowacki@blg.com

ALBERTA

Prepared by Kevin Major-Hansford of Borden Ladner Gervais LLP
(May, 2021)

1. Many people don't have a will, which means that their estate will be governed by the rules of intestacy.

(a) For a married person with children, what is the division of assets upon an intestacy?

Summary

When a married person with children dies without a will, pursuant to the *Wills and Succession Act* (Alberta), the division of assets is dependent on the relationship of the children to the surviving spouse. If the deceased leaves behind a surviving spouse and children who are also children of that surviving spouse, the entirety of the intestate estate goes to the surviving spouse. If, however, the children are not also children of the surviving spouse, the surviving spouse will receive $150,000 or 50% of the net value of the intestate estate, whichever is greater, and the residue of the estate will be distributed among the deceased's children. For the purposes of the above, a surviving spouse can also include an adult independent partner.

It should be noted that the rules are different for deaths prior to February 1, 2012, as they are governed by the provisions of the *Intestate Succession Act* (Alberta).

Discussion

Part 3 of the *Wills and Succession Act* (Alberta) ("WASA") deals with the distribution of intestate estates (defined at section 58(1)(a) of WASA as an estate, or any part of an estate, that is not disposed of by will) for deaths occurring after February 1, 2012. In the situation where a married person with children has died intestate, the distribution of the estate depends upon the relationship of the children to the surviving spouse.

If the person dies leaving a surviving spouse or adult interdependent partner and descendants who are also descendants of that surviving spouse or adult interdependent partner, section 61(1)(a) of WASA provides that the entirety of the intestate estate goes to the surviving spouse or adult interdependent partner.

However, if the person dies leaving a surviving spouse or adult interdependent partner, and descendants who are not also descendants of that surviving spouse or adult interdependent partner, section 61(1)(b) of WASA provides that the intestate estate will be distributed as follows:

- the surviving spouse or adult interdependent partner will receive either the prescribed amount (currently fixed at $150,000) or 50% of the net value of the intestate estate, whichever is greater; and

- the residue of the intestate estate shall be distributed among the person's descendants (*e.g.* in the case of a person who is survived by two children, the residue of the estate will be divided in two equal shares).

For deaths occurring before February 1, 2012, the provisions of the *Intestate Succession Act* (Alberta), RSA 2000 c I-10, continue to apply. In that case, the following rules apply:

> 3(1) When an intestate dies leaving a surviving spouse and issue or leaving a surviving adult interdependent partner and issue,
>
> (a) if the net value of the intestate's estate does not exceed $40 000, the estate goes to the spouse or adult interdependent partner, as the case may be, and
>
> (b) if the net value of the intestate's estate exceeds $40 000, the spouse or adult interdependent partner, as the case may be, is entitled to $40 000 and has a charge on the estate for that amount with interest from the date of death.
>
> (2) After payment to the surviving spouse or adult interdependent partner under subsection (1),
>
> (a) if the intestate dies leaving a surviving spouse and one child or leaving a surviving adult interdependent partner and one child, 1/2 of the residue of the intestate's estate goes to the spouse or adult interdependent partner, as the case may be;
>
> (b) if the intestate dies leaving a surviving spouse and more than one child or leaving a surviving adult interdependent partner and more than one child, 1/3 of the residue goes to the spouse or adult interdependent partner, as the case may be.

Source: *Wills and Succession Act* (Alberta), SA 2010 c W-12.2, ss. 1(1)(e), 61(1)(a), 61(1)(b), 70. *Preferential Shares (Intestate Estates) Regulation*, Alta Reg 217/2011, ss. 1, 3. *Intestate Succession Act* (Alberta), RSA 2000 c I-10, s. 3 (as in force between June 1, 2003 and July 31, 2011).

(b) What is the division for an unmarried person with no children?

Summary

When an unmarried person with no children dies without a will, pursuant to the *Wills and Succession Act* (Alberta), their estate is distributed to their nearest kin, in the following order: to their parents in equal shares, or to their surviving parent; if both of their parents are dead, then to their parents descendant (being the deceased's siblings, then nieces/nephews, and great nieces/nephews). If the deceased has no surviving parents or parents' descendants, then their estate would be left to their next of kin according to different degrees of blood relationships. For example, their estate would pass first to their grandparents. If their grandparents have died before them, their estate will be divided equally among their surviving aunts and uncles. If they do not have surviving aunts and uncles, their estate will be divided among their cousins. If they do not leave any traceable next of kin within four degrees of relationship, then the intestate estate goes to the provincial government under *Unclaimed Personal Property and Vested Property Act*.

Discussion

Part 3 of the *Wills and Succession Act* (Alberta) ("WASA") deals with the distribution of intestate estates (defined at section 58(1)(a) of WASA as an estate, or any part of an estate, that is not disposed of by will) for deaths occurring after February 1, 2012. In the situation where an unmarried person with no children has died intestate, the deceased's estate goes to their nearest kin.

If a person dies (the "Deceased") leaving no surviving spouse, adult interdependent partner or descendants, section 67(1) of WASA provides that the intestate estate will be distributed as follows:

- the intestate estate goes to the parents of the Deceased in equal shares if both survive, or to the survivor;

- if there is no surviving parent, the intestate estate is divided per stirpes amongst descendants of the Deceased's parents, or of either of them, stopping at grand nieces and nephews of the Deceased (being the 4th degree of relationship);

- if there is no surviving parent or descendant of a parent, but the Deceased is survived by one or more grandparents or descendants of grandparents:

    - 1/2 of the intestate estate goes to the surviving grandparents on one parent's side, in equal shares, or if there is no surviving grandparent on that side, per stirpes to the descendants of those grandparents, stopping at the Deceased's cousins (being the 4th degree of relationship); and

    - 1/2 of the intestate estate goes to the surviving grandparents on the other parent's side or per stirpes to their descendants in the same manner as provided above,

but if there is only a surviving grandparent or descendant of a grandparent on one parent's side, the entire intestate estate goes to the kindred on that side; and

- if there is no surviving parent, descendant of a parent, grandparent or descendant of a grandparent, but the Deceased is survived by one or more great-grandparents or descendants of great-grandparents,

    - 1/2 of the intestate estate goes to the surviving great-grandparents on one parent's side, in equal shares, or if there is no surviving great-grandparent on that side, to the descendants of those great-grandparents, stopping at the Deceased's great aunts and uncles (being the 4th degree of relationship); and

    - 1/2 of the intestate estate goes to the surviving great-grandparents on the other parent's side or to their descendants in the same manner as provided above,

but if there is only a surviving great-grandparent or descendant of a great-grandparent on one parent's side, the entire intestate estate goes to the kindred on that side.

As indicated above, according to section 67 of the WASA, inheritance under an intestacy goes only as far as the fourth degree of relationship with the deceased. Individuals at the fifth degree and beyond are deemed to have predeceased the Deceased, and are therefore excluded from inheriting.

According to section 69 of the WASA, if the deceased has no next of kin per section 67, the *Unclaimed Personal Property and Vested Property Act* applies to the intestate estate. However, in accordance with subsection 69(b), next of kin beyond fourth degree can still make a claim under the *Unclaimed Personal Property and Vested Property Act*.

Source: *Wills and Succession Act* (Alberta), SA 2010 c W-12.2, ss. 67(1) and 69.
Unclaimed Personal Property and Vested Property Act, SA 2007, c U-1.5.

2. A will may be made but its existence may not be known to family members. Is there a will registry in Alberta?

Summary

There is no wills registry in Alberta.

Discussion

While there is no wills registry in Alberta, Part 2, Division 3 of the *Wills and Successions Act* (Alberta) establishes a Registry for International Will, of which the Public Trustee has been designated registrar. International wills (made in accordance with the *Convention Providing a Uniform Law on the Form of an International Will*) may therefore be registered with the Office of the Public Guardian and Trustee.

Source: *Wills and Succession Act* (Alberta), SA 2010 c W-12.2 ss. 51, 52, 54, 55.

3. Each province has rules for ensuring that wills are validly executed.

(a) What are the formalities for the proper execution of a will in Alberta?

Summary

A will must be made in writing and contain a signature of the testator that makes it apparent on the face of the document that the person intended, by signing, to give effect to the writing in the document as the will. A will must be either:

- a Formal will - signed in the presence of 2 attesting witnesses;
- a Holograph will - handwritten in full by the testator ; or
- a Military will - made by a member of the Canadian Forces while on active service.

A testator may sign a will, other than a holograph will, by having another individual sign on the testator's behalf, at the testator's direction and in the testator's presence. A testator's signature does not give effect to any disposition or direction added to the will after the will is made. It is

worth noting that a will is not invalid because the testator's signature is not placed at the end of the will if it appears that the person signing intended by the signature to give effect to the will. However, the person making the will is presumed not to have intended to give effect to any writing that appears below the signature.

Discussion

According to section 14 of the *Wills and Succession Act* (Alberta) ("WASA"), to be valid, a will (a) must be made in writing and (b) must contain a signature of the testator that makes it apparent on the face of the document that the testator intended, by signing, to give effect to the writing in the document as the testator's will.

A Formal will is one where the testator makes or acknowledges his or her signature in the presence of 2 witnesses who are both present at the same time, and each of the witnesses signs the will in the presence of the testator. There are restrictions on who may and who may not be a witness. Section 20 of the WASA indicates that an individual must have capacity in order to be a witness to a signature of the testator. Although a will is not invalid if the witness is an executor of the will, a beneficiary under the will, or the spouse of the executor or beneficiary, in order to avoid unintended consequences, it is best if such individuals are not also witnesses. Further, an individual who signs a will on behalf of a testator is not eligible to witness the signature of the testator.

Section 19 of WASA sets out the formalities for the proper execution of a will in Alberta. A testator may sign a will, other than a will made under section 16 (holograph will), by having another individual sign on the testator's behalf, at the testator's direction and in the testator's presence. A will is not invalid because the testator's signature is not placed at the end of the will if it appears that the testator intended by the signature to give effect to the will. However, a testator is presumed not to have intended to give effect to any writing that appears below the testator's signature. Further, a testator's signature does not give effect to any disposition or direction added to the will after the will is made.

Source: *Wills and Succession Act* (Alberta), SA 2010 c W-12.2 ss. 14, 15, 19, and 20.

(b) How many witnesses are required?

Summary

A Formal will must be properly witnessed to be valid. All signatures in a formal will must be witnessed by at least two other people. Holograph and Military wills do not require witnesses.

Discussion

Pursuant to section 15 of the *Wills and Succession Act* (Alberta) ("WASA"), a formal will requires that (a) the testator makes or acknowledges his or her signature in the presence of two witnesses who are both present at the same time, and (b) each of the witnesses signs the will in the presence of the testator.

Additional requirements and restrictions for witnesses to the signature of the testator are found under section 20 of WASA, and include:

- An individual must have capacity in order to be a witness to a signature of the testator;
- An individual who signs a will on behalf of a testator is not eligible to witness the signature of the testator;
- An individual who witnesses a signature of a testator is not disqualified as a witness to prove the making of the will or its validity or invalidity only because the individual is:
    - an executor of the will;
    - a beneficiary under the will; or
    - the spouse or adult interdependent partner of an executor or a beneficiary.
- A will is not invalid only because:
    - A will is not invalid because the witness did not know at the time of witnessing the signature of the testator that the document being signed was a will,
    - A will is not invalid because a witness to the signature at the time of witnessing the signature, or afterwards became, incapable of proving the making of the will; and
    - A will with more than two individuals signing as witnesses is not invalid.

Source: *Wills and Succession Act* (Alberta), SA 2010 c W-12.2 ss. 15 and 20.

(c) Can a will be executed virtually and if so what are the rules?

Summary

In response to the COVID-19 global pandemic, Alberta introduced legislative changes to allow for virtual signing and witnessing of wills. Under the *Wills and Succession Act* (Alberta) the testator and witnesses are deemed to be in each other's presence when the following requirements are met:

- the persons (testator and two witnesses) are connected via video conference; and
- a lawyer, who is an active member as defined in the *Legal Profession Act*, is providing the testator with legal advice and services respecting the making, signing and witnessing of the will.

Where such requirements are met, the testator and witnesses may execute in counterpart identical copies of the will, which when taken together will constitute the will.

Discussion

According to section 19.1 of the *Wills and Succession Act* (Alberta) ("WASA"), during a period prescribed by the regulations (currently until August 15, 2022), persons are deemed to be in each other's presence while the persons are connected to each other by an electronic method of communication in which they are able to see, hear and communicate with each other in real time. The WASA requires that one of the witnesses is a lawyer who is an active member (as defined in the *Legal Professions Act*), and has provided the testator with legal advice and services with respect to the making, signing, and witnessing of the will.

Where a will is executed by an electronic or virtual method, in which the persons are deemed to be in each other's presence, the requirements of WASA may be fulfilled by the persons signing or initialling complete and identical copies of the will in counterpart, which together constitute the will. It is worth noting that copies of the will are identical even if there are minor, non-substantive differences in format or layout between the copies. According to section 2 of the *Remote Signing and Witnessing (Effective Period) Regulation*, persons will be deemed to be in each other's presence under section 19.1(1) of WASA up to and including August 15, 2022.

Source: *Wills and Succession Act* (Alberta), SA 2010 c W-12.2 s.19.1.
Remote Signing and Witnessing (Effective Period) Regulation 140/2020.
Legal Professions Act, RSA 2000 c L-8.

(d) Is a holograph will permitted in Alberta and if so what are the rules?

Summary

Pursuant to the *Wills and Succession Act* (Alberta), the province of Alberta allows for holograph wills, defined as a will made in writing that is wholly in the testator's own handwriting, and signed by him or her.

Discussion

The *Wills and Succession Act* (Alberta) ("WASA") specifically permits the creation of holograph wills. Section 16 of WASA defines a holograph will as a will made in writing that is wholly in the testator's own handwriting, and signed by him or her. No witnesses are required to be present or to sign the holograph will, and no further formalities are required.

Source: *Wills and Succession Act* (Alberta), SA 2010 c w-12.2, s. 16.

4. According to provincial legislation, how is a person's will affected by the following changes in personal circumstances?

(a) If a person gets married;

Summary

Provided that the marriage occurs on or after February 1, 2012, a will is not revoked as a result of the testator's marriage.

Discussion

In Alberta, a will is not revoked by the marriage of a testator (or by the testator's entering into an adult interdependent partner agreement, as defined in section 1(1)(b) of the *Adult Interdependent Relationships Act*), provided that the marriage or entering into of an adult interdependent partner agreement occurs on or after February 1, 2012.

Source: *Wills and Succession Act* (Alberta), SA 2010 c W-12.2 s. 23(2).
Adult Interdependent Relationships Act, SA 2002 c A-4.5 s. 1(1)(b).

(b) If a person gets divorced?;

Summary

If a testator's marriage is terminated by a divorce on or after February 1, 2012, certain provisions of the current will are deemed to have been revoked unless the Court finds the testator had a contrary intention. Provisions deemed to have been revoked include any provision which: (a) gives a beneficial interest in property to the testator's former spouse or former adult interdependent partner; (b) gives a general or special power of appointment to the testator's former spouse or former adult interdependent partner; or (c) appoints the testator's former spouse or former adult interdependent partner as an executor, trustee, or guardian of a child.

Discussion

If, after a will is made but before the testator's death, the testator's marriage is terminated by a divorce, found by a court to be void, or the testator ceases to be the adult interdependent partner of another person, section 25 of the *Wills and Succession Act* (Alberta) provides that any provisions under the will which:

- give a beneficial interest in property to the testator's former spouse or former adult interdependent partner;

- give a general or special power of appointment to the testator's former spouse or former adult interdependent partner; or

- appoint the testator's former spouse or former adult interdependent partner as an executor, trustee, or guardian of a child

are deemed to have been revoked, unless the Court, in interpreting the will, finds that the testator had a contrary intention. The will must then be interpreted as if the testator's former spouse or former adult interdependent partner had predeceased the testator.

This rule applies in respect of the will of a testator whose marriage (or adult interdependent relationship) terminates on or after February 1, 2012, regardless of when the will is made.

Source: *Wills and Succession Act* (Alberta), SA 2010 c W-12.2 s. 25.

(c) If a person becomes separated from their spouse

Summary

By law, separation is different than a divorce. A married person's will remains valid even after they have separated from their spouse.

Discussion

A married person's will remains valid even after they have separated from their spouse. It is only divorce, a declaration of nullity of marriage, or the termination of an adult interdependent relationship which causes certain gifts and appointments under a will to be deemed to be revoked. For further information, see No. 4(b), above.

Source: *Wills and Succession Act* (Alberta), SA 2010 c W-12.2 s. 25.

5. A person can designate a guardian of their children in their will.

(a) Is guardianship of children as provided in a will binding in Alberta?

Summary

A guardian who is a parent of a child may appoint another person to be a guardian of the child after the death of that guardian by a will, or a written document that is signed and dated by the guardian and an attesting witness. Such appointment does not take effect unless accepted by the nominated guardian either expressly or impliedly by the person's conduct. However, the Court must confirm such appointment in order for the guardianship to have full legal effect.

Discussion

Section 22 of the *Family Law Act* (Alberta) provides that a guardian who is a parent of a child may appoint a person to be a guardian of that child after the death of the guardian by a will. The appointment is not automatically effective or binding unless accepted by the appointee either expressly, or impliedly by the conduct of the appointee. Unless otherwise stated in the will, such appointment takes effect immediately on the death of the guardian parent. However, the Court must confirm such appointment in order for the guardianship to have full legal effect.

Source: *Family Law Act*, S.A. 2003, c. F-4.5, s. 22.

(b) Does Alberta give authority to the courts to vary the guardianship appointment in a will? And if so, are there any restrictions on how and when a court can change the guardian?

Summary

While a person can designate a guardian of their children in their will, prior to the appointment becoming effective, the Court must consider whether the appointment is in the best interest of the child. The Family Law Act gives the Court the power to terminate or vary a guardianship appointment. Absent special circumstances, however, guardianship appointments made under a

will are often confirmed by the Court as this represents a clear expression of the wishes of the child's parents.

Discussion

In Alberta, both parents of a child are, by default (subject to very limited exceptions), the guardians of the child. Generally speaking, both parents of the child are guardians if:

- They were married to each other at the time the child was born;
- They were married to each other, but divorced less than 300 days before the child was born;
- They lived together for a period of at least 12 months, during which time the child was born;
- They lived together for less than 12 months, were in an adult interdependent relationship, and the child was born during the relationship;
- They married or became adult interdependent partners after the birth of the child, but within one year of finding out about the pregnancy or the birth of the child; or
- They signed an agreement providing that both of them would be the guardians of the child.

Section 18 of the *Family Law Act* (Alberta) provides that in all proceedings with respect to guardianship of a child, the Court must take into consideration only the best interest of the child. Subsection 18(2) of the *Family Law Act* (Alberta) provides a listing of certain factors which the Court must consider, including the views of the child's current guardians, and their plans for that child's care and upbringing. On that basis, absent special circumstances, guardianship appointments made under a will are often confirmed by the Court, as this represents a clear expression of the wishes of the child's parents.

The Court has significant powers to terminate guardianships, or appoint a guardian under sections 23 and 25 of the *Family Law Act* (Alberta), which powers may be exercised on application by a guardian, a proposed guardian, or the child.

Source: *Family Law Act* (Alberta), SA 2003 c F-4.5, ss. 18, 20, 21, 23, 24.

6. A person might exclude a spouse, child or stepchild from the will.

(a) What are the legislated rights in Alberta for a claim by a spouse or a child to the estate of a spouse or parent?

Summary

If it is demonstrated that a testator failed to adequately provide for their family member(s), a family member can make an application for maintenance and support, effectively overriding the testator's will, within 6 months of the issuance of a grant of probate or administration. The Court will evaluate a maintenance and support claim based on the factors listed in section 93 of the *Wills and Succession Act* (Alberta).

Discussion

In Alberta, an individual's testamentary freedom to dispose of their property as they choose is subject to satisfying that individual's legal and moral obligations to support their family members. Section 72 of the *Wills and Succession Act* (Alberta) ("WASA") defines a family member as follows:

(a) a spouse of the deceased;

(b) the adult interdependent partner of the deceased;

(c) a child of the deceased who is under the age of 18 years at the time of the deceased's death, including a child who is in the womb at that time and is later born alive;

(d) a child of the deceased who is at least 18 years of age at the time of the deceased's death and unable to earn a livelihood by reason of mental or physical disability;

(e) a child of the deceased who, at the time of the deceased's death: is at least 18 but under 22 years of age; and is unable to withdraw from his or her parents' charge because he or she is a full-time student as determined in accordance with the *Family Law Act* and its regulations; and

(f) a grandchild or great-grandchild of the deceased: who is under 18 years of age; and in respect of whom the deceased stood in the place of a parent, at the time of the deceased's death;

A surviving spouse or adult interdependent partner (whose name is not on title to a shared home) has an automatic right to remain in the home shared with the deceased and to use the household goods contained therein for a period of 90 days following the death of the testator. During such temporary possession, the estate of the deceased is responsible for paying the costs and charges in respect of that property, including rent, mortgage payments, leases in respect of household goods, taxes assessed against the home, insurance costs, reasonable charges for utilities, and reasonable maintenance and repairs.

A family member can make an application for maintenance and support under Part 5 of WASA, and the Court may override a will if it is demonstrated that the testator failed to adequately provide for their family member. Applications for maintenance and support must be brought within 6 months of the issuance of a grant of probate or administration.

In evaluating a claim for maintenance and support, the Court shall consider a number of factors, including but not limited to the following items, listed at section 93 of WASA:

- the nature and duration of the relationship between the family member and the deceased,
- the age and health of the family member,
- the family member's capacity to contribute to his or her own support, including any entitlement to support from another person,

- any legal obligation of the deceased or the deceased's estate to support any family member,
- the deceased's reasons for making or not making dispositions of property to the family member, including any written statement signed by the deceased in regard to the matter,
- any relevant agreement or waiver made between the deceased and the family member,
- the size, nature and distribution of the deceased's estate, and any property or benefit that a family member or other person is entitled to receive by reason of the deceased's death,
- any property that the deceased, during life, placed in trust in favour of a person or transferred to a person, whether under an agreement or order or as a gift or otherwise,
- any property or benefit that an individual is entitled to receive under the Family Property Act, the Dower Act or Division 1 of this Part by reason of the deceased's death, and
- any other matter the Court considers relevant.

Source: *Wills and Succession Act* (Alberta), SA 2010 c W-12.2 ss. 72, 74, 75, 88, 89, 93.
Surrogate Rules, Alta Reg 130/1995.
Family Law Act.

(b) What are the dependants relief rules in Alberta? Can life insurance proceeds paid to a named beneficiary be "clawed back" to satisfy a dependant's claim?

Summary

Under the *Wills and Succession Act* (Alberta), relief claims may be brought by a "family member" against the deceased's estate when the deceased did not adequately provide for such persons in their will or otherwise. In making its decision, the court may accept any evidence that it considers relevant, including the nature and duration of the relationship between the family member and the deceased as well as any property that the deceased, during life, placed in trust in favour of a person or transferred to a person. The definition of "family members", includes spouses, adult interdependent partners, children, grandchildren and great-grandchildren.

Generally, life insurance paid to a named beneficiary does not form part of the deceased's estate, and is not subject to claims against the estate.

Discussion

Section 88 of the *Wills and Succession Act* (Alberta) ("WASA") provides the Court with authority to make orders for proper maintenance and support of "family members" of the Deceased. "Family members", includes spouses, adult interdependent partners, children, grandchildren and great-grandchildren, as described above in 6(a).

According to section 88 if a person dies with a will without making adequate provision in the person's will for the proper maintenance and support of a family member, or without a will and the share to which a family member is entitled is inadequate for the proper maintenance and

support of the family member, the Court may, on application, order that any provision the Court considers adequate be made out of the deceased's estate for the proper maintenance and support of the family members. Orders made under section 88 may be made in respect of one or more family members.

An application for an order for support may be made by a family member on his or her own behalf; or in the case of a family member who is under 18 years of age, on behalf of that family member by (i) the family member's parent or guardian, (ii) the Public Trustee, or (iii) any other person in accordance with applicable legislation; or in the case of a family member who is a represented adult or an incapacitated person, on behalf of that family member by (i) the family member's trustee, or (ii) any other person in accordance with applicable legislation.

Section 93 of the WASA outlines the factors a court shall consider when hearing an application for maintenance and support:

- the nature and duration of the relationship between the family member and the deceased,
- the age and health of the family member,
- the family member's capacity to contribute to his or her own support, including any entitlement to support from another person,
- any legal obligation of the deceased or the deceased's estate to support any family member,
- the deceased's reasons for making or not making dispositions of property to the family member, including any written statement signed by the deceased in regard to the matter,
- any relevant agreement or waiver made between the deceased and the family member,
- the size, nature and distribution of the deceased's estate, and any property or benefit that a family member or other person is entitled to receive by reason of the deceased's death,
- any property that the deceased, during life, placed in trust in favour of a person or transferred to a person, whether under an agreement or order or as a gift or otherwise,
- any property or benefit that an individual is entitled to receive under the *Family Property Act*, the *Dower Act* or Division 1 of this Part by reason of the deceased's death, and
- any other matter the Court considers relevant.

Further, Section 666 of the *Insurance Act* (Alberta) provides that where a beneficiary is designated, any insurance money payable to the beneficiary is not, from the time of the happening of the event (for example the death of the insured) on which the insurance money becomes payable, part of the estate of the insured and is not subject to the claims of the creditors of the insured. Section 666 has not been judicially considered in Alberta. Equivalent legislation exists in the majority of jurisdictions in Canada, and offer persuasive guidance to Alberta courts. Generally, absent intention to defeat, hinder, or defraud creditors, life insurance proceeds will not be clawed back to satisfy claims against the estate.

Source: *Wills and Succession Act* (Alberta), SA 2010 c W-12.2 ss. 72, 88, 90, 93.
Insurance Act (Alberta) RSA2000 c I-3, s.666.

(c) Do stepchildren of the deceased who are not legally adopted have any rights to challenge the will?

Summary

If an individual dies intestate, a stepchild who has not been formally adopted has no ability to make a claim against the estate, as stepchildren are not "descendants" for the purposes of *Wills and Succession Act* (Alberta).

Discussion

When an individual dies testate, section 28 of the *Wills and Succession Act* (Alberta) ("WASA") provides guidance on the interpretation of the terms "children", "descendants", or "issue". Unless, in interpreting the will, the Court finds the testator had a contrary intention, those terms must be interpreted as including:

> (a) any child for whom that individual is a parent within the meaning of Part 1 of the *Family Law Act*, and
>
> (b) any child who is in the womb at the time of the testator's death and is later born alive [emphasis added].

Sections 1(c) and (j) of the *Family Law Act* (Alberta) respectively, define a "child" as a "person who is under 18 years of age" and "parent" as "a person determined under Part 1 to be a parent of a child". Typically, a "parent" is the biological parent or adoptive parent of the child. An individual is not the parent of a step-child unless the individual has adopted that child.

Similarly, stepchildren (unless they have been legally adopted) would not constitute "family members" for the purposes of section 72 of WASA.

Source: *Wills and Succession Act* (Alberta), SA 2010 c W-12.2, ss. 28, 72.
Family Law Act (Alberta) SA 2003, c F-4.5 ss. 1(c), (j); 7(2).
Peters v Peters, 2015 ABCA 301.

(d) Can the validity of a will be challenged for reasons such as lack of capacity and undue influence?

Summary

The validity of the will may be challenged based on suspicious circumstances that relate to the execution of a will, circumstances calling into question the capacity of the testator, or circumstances tending to show that the free will of the testator was overborne by an act of coercion or fraud.

Discussion

The validity of the will may be challenged based on suspicious circumstances. Suspicious circumstances generally arise in three ways:

- Circumstances surrounding the preparation of the will;
- Circumstances tending to call into question the capacity of the testator, or
- Circumstances tending to show that the free will of the testator was overborne by acts of coercion or fraud.

These issues must all be proved on a balance of probabilities.

To be valid, a will must be made in writing and contain a signature of the testator that makes it apparent on the face of the document that the person intended, by signing, to give effect to the writing in the document as the will. The burden of proof for establishing due execution, testamentary capacity as well as knowledge and approval of the contents of the will rests with the propounder of the will.

Undue influence, which will set aside a will, must amount to force or coercion, destroying free agency. It cannot be the influence of affection or attachment. The burden of proof for establishing undue influence falls on the challenger of a will. Suspicious circumstances suggesting fraud or undue influence only rebut the presumption that the testator knew and approved the contents of the will and had testamentary capacity. Further, there must be proof that the act was obtained by this coercion, so that the motive is tantamount to force or fear.

The involvement of independent lawyers, by itself, may rebut a presumption of undue influence.

Source: *Vout v. Hay* , [1995] 2 S.C.R. 876, *Kozak Estate (Re)*, 2018 ABQB 185., *Dansereau Estate v. Vallee*, 1999 ABQB 557.

7. Clients in second marriages often want to draft wills that provide for a legally binding distribution of assets upon first and second death (i.e. a mutual will). Are mutual wills allowed in Alberta?

Summary

While there is no specific statutory provision with respect to mutual wills in Alberta, the concept of mutual wills has been enforced in Alberta and is governed by the common law.

Discussion

The concept of mutual wills in Alberta is governed by the common law. Parties may decide to make mutual wills, which involve an agreement between the parties that they will execute wills to dispose of property in a particular way, but that they will not revoke such wills without the other's consent. To be "mutual", the wills do not need to mirror each other, nor must the agreement cover all of the property owned by the parties.

There is no specific statutory provision in regard to such wills. They generally are combined with an agreement relative to mutual wills. These wills would still be subject to the statutory rights of others under the *Wills and Succession Act*, the *Matrimonial Property Act* and the *Dower Act*.

8. The term common law marriage is used to describe a variety of relationships. Common law marriage does not require a marriage ceremony, marriage licence, or any other formal aspect of marriage.

(a) What is the definition of common law partner in Alberta?

Summary

Although the term "common law" is often used in everyday language to describe un-married couples who live together, either with or without children, in Alberta, the term "common law" has been replaced with "Adult Interdependent Partner" and the concept of adult interdependent relationships are governed by the *Adult Interdependent Relationships Act*, (Alberta).

Discussion

Subsection 3(1) of the *Adult Interdependent Relationships Act*, (Alberta) (the "AIR Act") provides that a person is the adult interdependent partner ("AIP") of another person if:

a) The person has lived with the other person in a relationship of interdependence

i. for a continuous period of not less than 3 years, or

ii. of some permanence, if there is a child of the relationship by birth or adoption,

or

b) the person has entered into an adult interdependent partner agreement with the other person in accordance with section 7.

Therefore, in order for one person to be considered the AIP of another person, there is a minimum requisite time period for cohabitation, or the AIP relationship must be of some permanence in which there is a child of the relationship or there is an adult interdependent partner agreement which exists between 2 persons. Persons who are related to each other by blood or adoption many only become AIP's of each other by entering into an adult interdependent partner agreement which is laid out in section 7 of the AIR Act (subsection 3(2) of AIR Act). Furthermore, a relationship of interdependence may exist between 2 persons who are related to each other by blood or adoption except where one of the persons is a minor (subsection 4(1) of the AIR Act).

A relationship of interdependence means a relationship outside of marriage in which 2 persons

- share one another's lives,
- are emotionally committed to one another, and

- function as an economic and domestic unit.

Section 2 of the AIR Act sets out the factors which are used in considering whether 2 persons function as an economic unit and domestic unit for the purposes of the definition of a relationship of interdependence (defined above and in subsection 1(1)(f) of the AIR Act). The legislation sets out that all of the circumstances of the relationship must be taken into account, including any of the following matters as may be relevant:

- whether or not the persons have a conjugal relationship;
- the degree of exclusivity of the relationship;
- the conduct and habits of the persons in respect of household activities and living arrangements;
- the degree to which the persons hold themselves out to others as an economic and domestic unit;
- the degree to which the persons formalize their legal obligations, intentions and responsibilities toward one another;
- the extent to which direct and indirect contributions have been made by either person to the other or to their mutual well-being;
- the degree of financial dependence or interdependence and any arrangements for financial support between the persons;
- the care and support of children;
- the ownership, use and acquisition of property.

As a restriction, it is important to note that a person cannot at any one time have more than one AIP (subsection 5(1) of the AIR Act).

Source: *Adult Interdependent Relationships Act*, (Alberta) SA 2002, c. A-4.5.

(b) What rights do common law partners have to property on death, including property that was owned by one partner prior to the relationship and property that was jointly acquired?

Summary

In Alberta, the significance of the *Adult Interdependent Relationships Act*, (Alberta) and the definition of an AIP is that an AIP is now eligible to receive property where a person dies intestate (without a will) in the same way as a surviving spouse. Furthermore, under the terms of *Wills and Succession Act* (Alberta) an AIP is now considered a "dependent" for the purposes of this legislation, meaning that the AIP, like a dependent, can apply for relief from the terms of a will or intestacy where inadequate provisions have been made for them.

Discussion

Part 3 of *Wills and Succession Act* (Alberta) ("WASA") deals with the distribution of an intestate estate (which means an estate, or any part of an estate, that is not disposed of by the will). The rights and benefits of an AIP in the distribution of an intestate estate are the same as those of a surviving spouse, such that section 60 of WASA provides that if an individual dies leaving a surviving spouse or adult interdependent partner (AIP) but no descendants, the entirety of the intestate estate goes to the surviving spouse or AIP. Descendants are defined in subsection 1(1)(e) of WASA as "all lineal descendants of an individual through all generations."

If an individual dies without a will leaving a surviving spouse and one or more descendants, or leaving a surviving AIP and one or more descendants, then the full intestate estate goes to the surviving spouse or the surviving AIP, if all of the descendants are also descendants of the surviving spouse or AIP (subsection 61(1)(a) of WASA). However, if any of the descendants of the intestate individual are not descendants of the surviving spouse or the surviving AIP, then the surviving spouse or surviving AIP will receive the greater of either fifty (50%) percent of the net-value of the intestate estate or $150,000, the amount set by law under the regulations of WASA (subsection 61(1)(b) of WASA.)

Source: *Adult Interdependent Relationships Act*, (Alberta) SA 2002, c. A-4.5.
Wills and Succession Act (Alberta), SA 2010 c W-12.2.

9. A client's will can include a life insurance beneficiary designation. If there is a beneficiary designation on the policy itself that differs from the will, which designation would apply and what legislation governs this?

Summary

In Alberta, the *Insurance Act*, (Alberta) (the "Insurance Act") governs beneficiary designations made on a life insurance policy. In accordance with subsection 662(2) of the Insurance Act, the latest made valid designation, whether this latest designation was made on the life insurance policy itself or on the will, is the designation which will be followed with respect to the distribution of the life insurance policy.

Source: *Insurance Act*, RSA 2000, c. I-3.

10. A will is probated to provide the executor/estate trustee with authority to deal with the deceased's assets.

(a) Are there probate fees in Alberta and if so how are they determined?

Summary

Probate fees in Alberta, found in Part 5 Schedule 2 of the *Surrogate Rules,* are outlined below.

Discussion

In Alberta, probate fees are charged based on the net value of the estate as follows:

- Estates valued at $10,000 and under $35.00
- Estates valued at over $10,000 but not more than $25,000 $135.00
- Estates valued at over $25,000 but not more than $125,000 $275.00
- Estates valued at over $125,000 but not more than $250,000 $400.00
- Estates valued at over $250,000 $525.00

Probate fees, as well as other fees charged by the Clerk of the Court (Surrogate Matters) in respect of estates are found at Part 5 Schedule 2 of the *Surrogate Rules*.

Source: *Surrogate Rules*, Alta Reg 130/1995, Part 5 Schedule 2 "Court Fees".

(b) What assets pass outside the estate and are therefore not subject to probate?

Summary

Assets that pass outside of the estate include: jointly-held assets, assets with designated beneficiaries, such as pension plans, retirement plans, and life insurance policies. Assets with designated beneficiaries pass outside of the estate unless the estate is the named beneficiary, or if there is evidence supporting the assertion that such designation created a trust. As such, subject to any challenge, these assets will pass to the beneficiary without going through the estate and will avoid probate.

Discussion

The Following assets pass outside the estate and are therefore not subject to probate:

Joint Assets - There are two forms of joint ownership: tenancy in common and joint tenancy. In a tenancy in common, the property interest may form part of the estate. In joint tenancy, each owner has an undivided interest in the whole of the asset. When one of the joint owners dies, there is no interest in property to be disposed of by will or otherwise (and as such no need for probate), as the interest passes by right of survivorship to the surviving joint tenant(s). The deceased owner's interest simply is extinguished with the survivors continuing on until there is only one survivor.

Named Beneficiaries - There is no probate for life insurance or registered accounts – such as registered retirement savings plans (RRSPs) or tax-free savings accounts (TFSAs) – with named beneficiaries. These assets pass to beneficiaries outside the estate and do not go through probate.

Source: *Glass Estate (Re),* 2001 ABQB 248.
Richard vs. Canada Life Assurance Company, 2004 ABQB 805.

(c) Can multiple wills be used to avoid probate?

Summary

Having a system with low set probate fees (capped at $525 as of 2021), as opposed to a percentage of the value of the estate, means that there is less planning done to avoid probate, and in particular less use of multiple wills as a planning technique for this purpose. Practitioners in Alberta do use multiple wills primarily for privacy reasons and when clients have assets in other jurisdictions where probate will be required.

Source: *Wills and Succession Act* (Alberta), SA 2010 c W-12.2.
Surrogate Rules, Alta Reg 130/1995, Part 5 Schedule 2 "Court Fees".

11. A person may use a power of attorney to delegate to another the ability to deal with property and financial matters on that person's behalf.

(a) What is the legislation that governs powers of attorney in Alberta?

Summary

The *Powers of Attorney Act* RSA 2000, c P-20 governs enduring powers of attorney in Alberta.

(b) What type of authority may be granted under a power of attorney and what are the limitations?

Summary

Generally, an attorney has the authority to do anything on behalf of the donor that the donor may lawfully do by an attorney. Such authority may be limited by the terms contained in an enduring power of attorney, or by the *Powers of Attorney Act* (Alberta).

An enduring powers of attorney ("EPA") is a power of attorney which continues notwithstanding the subsequent mental incapacity of the donor. In order to be an EPA, the donor must be an adult at the time of execution, it must be in writing and signed by the donor and a witness, and it must contain a statement indicating it is intended to continue notwithstanding the donor's mental incapacity, or is only to take effect upon the mental incapacity of the donor.

An attorney under an enduring power of attorney has a duty to protect the donor's interests in matters regarding the donor's estate; including and subject to the *Trustee Act* (Alberta) exercising a power of investment. The attorney may exercise his or her authority for the benefit of the donor, the donor's spouse, adult interdependent partner and dependent children. The attorney is expected to account for their handling of the donor's property, and may be compelled to do so by court order.

Discussion

An Enduring Power of Attorney ("EPA") is a Power of Attorney, which continues notwithstanding the subsequent mental incapacity of the donor. EPAs include, powers of attorney that continue despite the maker or donor becoming mentally incapacitated and springing powers,

that is, powers of attorney that come into effect upon the occurrence of a subsequent event, usually the donor becoming mentally incapacitated.

Subject to *Powers of Attorney Act* (Alberta) and any terms contained in an enduring power of attorney, an attorney (a) has authority to do anything on behalf of the donor that the donor may lawfully do by an attorney, and (b) may exercise the attorney's authority for the maintenance, education, benefit and advancement of the donor's spouse, adult interdependent partner and dependent children, including the attorney if the attorney is the donor's spouse, adult interdependent partner or dependent child.

The attorney has, unless the enduring power of attorney provides otherwise, a duty to exercise the attorney's powers to protect the donor's interests during any period in which the attorney knows, or reasonably ought to know, that the donor is unable to make reasonable judgments in respect of matters relating to all or part of the donor's estate.

An attorney under an enduring power of attorney may apply to the court for advice and directions.

Source: *Powers of Attorney Act*, RSA 2000, c P-20, ss. 7, 7.1, 8, 9, 10.
Trustee Act RSA 2000 c T-8.

(c) What are the formalities for executing a power of attorney in Alberta and can it be executed virtually?

Summary

In order for an enduring power of attorney to be a valid enduring power of attorney, the following criteria must be met:

(a) it must be made by an adult person who, at the time of making, is mentally capable of understanding the nature and effect of an enduring power of attorney;

(b) it must be written, dated and signed as required by the Act; and

(c) it must state in the document either that it is to continue notwithstanding any future mental incapacity, or that it is to take effect on the mental incapacity or infirmity of the donor.

An Enduring Power of Attorney can be executed by an electronic method of communication, if the persons are deemed to be in each other's presence according to the provisions of the *Powers of Attorney Act*.

Discussion

According to section 2 of the *Powers of Attorney Act* (Alberta) a valid enduring power of attorney ("EPA") must meet the following requirements:

- the donor must be an adult at the time of execution;

- it must be in writing and signed by either

    (a) the donor before a witness who is not the attorney, adult interdependent partner or spouse of the attorney, or

    (b) if the donor is physically unable to sign an enduring power of attorney, by another person on behalf of the donor, at the donor's direction and in the presence of both the donor and a witness;

- it must be signed by the witness in the presence of the donor; and

- it must contain a statement indicating either

    (a) that it is to continue notwithstanding the donor's subsequent mental incapacity, or

    (b) infirmity or it is to take effect upon the mental incapacity or infirmity of the donor.

According to section 2.1(1) of the POAA, if an EPA is executed by an electronic method of communication, in which the persons are deemed to be in each other's presence, the requirements of POAA may be fulfilled by the persons signing or initialling complete, identical copies of the EPA in counterpart, which together constitute the EPA.

Persons are deemed to be in each other's presence while the persons are connected to each other by an electronic method of communication in which they are able to see, hear and communicate with each other in real time. This only applies, if a lawyer, who is an active member as defined in the *Legal Profession Act*, is providing the donor of an EPA with legal advice and services respecting the making, signing and witnessing of the EPA.

Source: *Powers of Attorney Act*, RSA 2000, c P-20, ss. 2(1) and 2.1.
Legal Profession Act, RSA 2000 c L-8.

12. A person may use a directive or other document under which health care and personal care decision-making can be delegated.

(a) What is the proper term for this type of document in Alberta and what is the legislation that governs it?

Summary

The *Personal Directives Act* allows a person to prepare a document called a personal directive, which names a person, called an agent, to make personal decisions for them when they are no longer mentally capable of making their own decisions.

Source: *Personal Directives Act*, RSA 2000, c. P-6, s. 3(1).

(b) What are the formalities for executing this document in Alberta and can it be executed virtually?

Summary

In order for a personal directive to be valid, it must be in writing, dated and signed at its end by the maker or, if the maker is physically unable to sign, by someone else on his or her behalf, and it must be witnessed in the presence of the maker. Further, any person who is at least 18 years of age and understands the nature and effect of a personal directive may make a personal directive.

There are limitations as to who may qualify as a witness to a personal directive. The maker's spouse or interdependent partner, the designated agent and his or her spouse, and the person, if any, who signed on behalf of the maker and that person's spouse or interdependent partner are excluded. A person may make more than one personal directive.

A personal directive can be executed by an electronic method of communication, if the persons are deemed to be in each other's presence according to the provisions of the *Personal Directives Act*.

Discussion

According to section 5(1) of the *Personal Directives Act* (Alberta), for a personal directive to be effective: the donor must be an adult at the time of execution; it must be in writing, dated and signed at the end by the donor before a witness who is not the agent, adult interdependent partner or spouse of an agent; and it must be signed by the witness referred to above in the presence of the maker.

A person may make more than one personal directive.

According to section 5.1(1) of the PDA, if a personal directive is executed by an electronic method of communication, in which the persons are deemed to be in each other's presence, the requirements of PDA may be fulfilled by the persons signing or initialling complete, identical copies of the personal directive in counterpart, which together constitute the personal directive.

Persons are deemed to be in each other's presence while the persons are connected to each other by an electronic method of communication in which they are able to see, hear and communicate with each other in real time. This only applies, if a lawyer, who is an active member as defined in the *Legal Profession Act*, providing the maker of a personal directive with legal advice and services respecting the making, signing and witnessing of the personal directive.

Source: *Personal Directives Act,* RSA 2000, c. P-6, ss. 3(1) 5, 5.1 and 6.

(c) In the absence of a written directive, to whom will medical professionals speak regarding treatment decisions for an individual who is incapable?

Summary

In the absence of a valid personal directive, or if an agent is not named pursuant to a personal directive, strictly speaking, only the court or someone appointed by the court may consent to or refuse medical treatment. A person may apply to make personal decisions under the *Adult Guardianship and Trusteeship Act.* The court proceedings to obtain such an order, and the subsequent reporting required, although less than for a Trustees under the same legislation, are often time consuming and expensive.

Discussion

Any interested person may apply to the Court of Queen's Bench for an order appointing a guardian in respect of an adult person. “Interested person” means:

- the Public Guardian,
- the Public Trustee, and
- any person who is 18 years of age or older and who is concerned for the welfare of a person in respect of whom the guardianship order is sought or has been obtained.

In determining whether it is in an adult's best interests to appoint a guardian, the court shall consider: the capacity assessment report respecting the adult and any other relevant information respecting the adult's capacity; the report of the review officer; the proposed guardianship plan; any personal directive made by the adult; any supported decision-making authorization made by the adult; any co-decision-making order that is in effect appointing a co-decision-maker for the adult; whether the adult's lack of capacity to make decisions about the personal matters that are to be referred to in the order is likely to expose the adult to harm; the personal matters with respect to which the adult needs or will likely need to make decisions; whether the appointment of a guardian would be likely to produce benefits for the adult that would outweigh any adverse consequences for the adult; and any other matter the court considers relevant.

Source: *Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2, ss. 1(u) and 26(7).

For Will, Estate and Trust questions relating to Alberta please contact:

Nancy L. Golding, Q.C.
Borden Ladner Gervais LLP
1900, 520 – 3rd Avenue S.W.
Calgary, AB, T2P 0R3
(403) 232-9485
ngolding@blg.com

- and -

Kevin Major-Hansford
Borden Ladner Gervais LLP
1900, 520 – 3rd Avenue S.W.
Calgary, AB, T2P 0R3
(403) 232-9635
kmajorhansford@blg.com

SASKATCHEWAN

Prepared by Beaty F. Beaubier, Q.C., TEP and Amanda S.A. Doucette, TEP of Stevenson Hood Thornton Beaubier LLP
(May, 2021)

1. Many people don't have a will, which means that their estate will be governed by the rules of intestacy.

(a) For a married person with children, what is the division of assets upon an intestacy?

Summary

Intestate succession legislation was amended in 2019 in Saskatchewan and applies to all deaths occurring after October 1, 2019.

The distribution now depends on whether the descendants were common descendants of the deceased and the deceased's spouse.

Discussion

The division of assets in this situation will depend on whether the descendants are common descendants of the deceased and his/her spouse:

(a) If all the descendants are common descendants, then the spouse is entitled to the entire estate.

(b) If some of the descendants are not common descendants of both the deceased and the deceased's spouse, then:

(i) If the net value of the estate is less than $200,000, the spouse still receives the entire estate;

(ii) If the net value of the estate is more than $200,000, the spouse will receive a preferential share of $200,000 first, and the remainder will be shared as follows:

1) If there is only 1 child, the remainder would be split evenly between the child and the spouse.

2) If there is more than 1 child, the spouse would receive 1/3 of the remainder, and the children would receive the remaining 2/3.

(iii) If one of the intestate's children dies before the intestate but leaves descendants alive at the date of the intestate's death, then the residue of the intestate's estate is divided as if the deceased child of the intestate had been alive at the particular time, and the deceased child's descendants then share the deceased child's inheritance on a *per stirpes* basis

Source: *The Intestate Succession Act, 2019*, S.S. 2019, c. I-13.1, s. 5, 6, 7.

(b) What is the division for an unmarried person with no children?

Summary

Spouse is defined in the legislation to include not only married spouses, but also spouses living common law continuously for a 2 year period. Therefore, if a person was not legally married, but was living common law at the time of death (but had no children), the spouse would still receive the entirety of the estate.

In the event the deceased had no spouse, and no children, the estate would be distributed *per stirpes* as between the surviving parents of the deceased. In light of this, if one or more parent pre-deceased the deceased, a portion of the estate could be divided between siblings of the deceased.

Source: *The Intestate Succession Act, 2019*, S.S. 2019, c. I-13.1, s. 2, 4, 8.

2. A will may be made but its existence may not be known to family members. Is there a will registry in Saskatchewan?

Summary

There is no will registry in Saskatchewan, except in the circumstances where a will has been filed with the Saskatchewan Court of Queen's Bench for safekeeping.

Discussion

There is no will registry in Saskatchewan in which it is required that a person record or deposit his or her will. However, a person can choose to deposit his or her will for safekeeping with a local registrar of the Court of Queen's Bench. There is a small fee for this. When the will is so deposited, it is placed in a sealed envelope and can only be removed by the testator in person or, if the testator has died, by the executor or by court order.

Sources: *The Administration of Estates Act*, S.S. 1998, c. A-4.1, s. 49; *The Queen's Bench Rules*, s. 16-8.

3. Each province has rules for ensuring that wills are validly executed.

(a) What are the formalities for the proper execution of a will in Saskatchewan?

Summary

A will must be in writing. There are two types of wills in Saskatchewan, and the formalities for execution are dependant on the type of will executed.

Discussion

There are two types of wills in Saskatchewan: (1) holograph wills; and (2) formal wills.

A holograph will must be wholly in the handwriting of the testator and signed and dated by him/her.

A formal will must be in writing and signed or acknowledged in the presence of witnesses who are also required to sign the document. Alternatively, if the testator is unable to sign the will, it must be signed at the direction of the testator.

Source: *The Wills Act, 1996,* c. W-14.1, s. 7.

(b) How many witnesses are required?

Summary

For a holograph will, no witnesses are required. For a formal will, two witnesses are required.

Discussion

For a formal will to be valid, two witnesses (both over the age of 18) need to be present and either witness the signature of the testator, or the testator must acknowledge his/her signature to the witnesses.

There are limitations as to who can be a witness to a will. Although it is acceptable for an executor and a creditor to be witnesses to a will, if a beneficiary (or the spouse of a beneficiary) acts as witness of a will wherein they are named as a beneficiary, the gift of that person is in jeopardy.

Source: *The Wills Act, 1996,* c. W-14.1, s. 7, 8, 13, 14, 15.

(c) Can a will be executed virtually and if so what are the rules?

Summary

A will can be executed virtually in Saskatchewan.

Discussion

It is acceptable for a formal will to be executed through "electronic means" (which requires both audio and visual communication) in Saskatchewan, so long as one of the witnesses is a lawyer, and such lawyer:

(a) Verifies the identity of the testator and confirms the contents of the will; and

(b) Complies with all Law Society requirements regarding the electronic signing of a will, including:

  (i) If the lawyer drafted the will, the lawyer must complete a line-by-line comparison of the document he/she is signing as compared to the document drafted;

  (ii) Consider whether red flags of fraud;

  (iii) Assess whether there is a risk of undue influence;

  (iv) Confirm the testator's understanding of the document;

(v) Amend the jurat to reflect signing by "electronic means";

(vi) Prepare a written record (in a prescribed form) confirming that these requirements have been met.

Sources: *The Wills Regulations,* R.S.S., c. L-10.2, Reg 2 and 3; Law Society of Saskatchewan, Practice Directive Number 3.

(d) Is a holograph will permitted in Saskatchewan and if so what are the rules?

Summary

Holograph wills are acceptable in Saskatchewan.

Discussion

Saskatchewan's legislation does provide for holograph wills. A holograph will is wholly in the handwriting of the testator and signed by him or her. No witnesses are required to be present or attest to the execution of a holograph will and no further formality is required.

Source: *The Wills Act*, 1996, S.S. 1996, c. W-14.1, s. 8.

4. According to provincial legislation, how is a person's will affected by the following changes in personal circumstances?

(a) If a person gets married;

Summary

Marriages entered into after March 15, 2020 will no longer result in revocation of a will. Likewise, cohabiting in a spousal relationship continuously for two years (in other words, living common law), after March 15, 2020 will no longer revoke a will.

Discussion

Prior to March 15, 2020, marriage (or a common law relationship) revoked a will unless the person completed a declaration in his or her will that indicated the will was being made in contemplation of that relationship.

After recent amendments to the legislation, marriages entered into after March 15, 2020 (and/or cohabitating in a spousal relationship continuously for two years) do not revoke a will.

Source: *The Wills Act, 1996*, S.S. 1996, c. W-14.1, s. 17.

(b) If a person gets divorced?

Summary

If a person has a will and then gets divorced, that person's will does not become invalid. However, any gift or appointment to the spouse is revoked by the divorce. The same is true if the person and

his/her spouse, who are not legally married, cease to cohabit as a common law couple for at least 24 months.

Discussion

If a married person has a will and then gets divorced, the entire will does not become invalid. Any gifts of a beneficial interest in property to the ex-spouse, the appointment of the ex-spouse as executor or trustee, and the provision of a general or special power of appointment on the ex-spouse would all be revoked upon the termination of the marriage by divorce (and the will is construed as if the spouse had predeceased the testator), unless the will provides otherwise. The rest of the will remains valid.

The same is true when the testator and his/her spouse, who are not legally married, have ceased to cohabit in a spousal relationship for at least 24 months.

Source: *The Wills Act, 1996*, S.S. 1996, c. W-14.1, s. 19.

(c) If a person becomes separated from their spouse

Summary

Separation from a married spouse does not revoke a will, nor does it revoke any gifts or appointments to the spouse within the will. If a common law couple separates for at least 24 months, the gifts and appointments to the former common law spouse in the will are revoked.

Discussion

A married person's will remains valid after separation. It is only upon divorce that certain gifts and appointments within the will are deemed to be revoked (see No. 4(b) above).

If a testator and his spouse, who are not legally married, cease to cohabit in a spousal relationship for at least 24 months, the gifts and appointments to the spouse would be revoked (see No. 4(b) above).

Source: *The Wills Act, 1996*, S.S. 1996, c. W-14.1, s. 18 & 19.

5. A person can designate a guardian of their children in their will.

(a) Is guardianship of children as provided in a will binding in Saskatchewan?

Summary

Guardianship of children (referred to as legal custodianship in Saskatchewan) as provided in a will is not necessarily binding in Saskatchewan.

Discussion

Where a person is appointed as legal custodian of a child or children by a parent who is authorized to do so, the appointment occurs immediately.

Having said that, regardless of any appointment by will or otherwise, the court has the power to grant custody of and/or access to a child to any person, provided that such grant would be in the best interests of the child.

Source: *The Children's Law Act*, 1997, S.S. 1997, c. C-8.2, s. 4, 5 & 8.

(b) Does Saskatchewan give authority to the courts to vary the guardianship appointment in a will? And if so, are there any restrictions on how and when a court can change the guardian?

Summary

A legal custodian for a child can be appointed by will, and the person who is so appointed may apply to the court for an order confirming his/her entitlement to custody of the child. The court, however, maintains its jurisdiction to award custody of a child to whomever it determines is most appropriate. In making such a decision, the court considers what is in the best interests of the child.

Discussion

In Saskatchewan, the parents of a child are, by default, joint legal custodians of the child unless:

(i) the court has made an order otherwise (in which case, the terms of the order govern; the order can authorize the parent to whom custody is granted to appoint a person to have custody of the child and/or guardianship of the child's property on that parent's death);

(ii) the parents have entered into an agreement that varies their status as joint legal custodians of a child (in which case, the terms of the agreement govern; the agreement can authorize one of the parents to appoint, in writing, one or more people to be legal custodian(s) of the child and guardian(s) of the child's property on the parent's death); or

(iii) the parents have never cohabited after the birth of the child (in which case the parent with whom the child has resided is the sole legal custodian of the child).

In a situation where the parents of a child are joint legal custodians of the child, if one parent dies, the surviving parent is the legal custodian of the child. Such surviving parent may appoint one or more people as legal custodian of the child upon the surviving parent's death. This appointment can be done by deed (if the parent is under the age at which he or she can make a valid will in Saskatchewan) or by will (if the parent is old enough).

In situations where the court has made an order as set out in subparagraph (i) above or the parents have entered into an agreement with one another as set out in subparagraph (ii) above, the parent who is authorized to appoint a person or persons to have custody of the child on that parent's death may make such appointment. In those cases, the appointment made by the parent authorized by order or agreement takes precedence over any right of the child's surviving parent.

Where a person is appointed as legal custodian of a child or children by a parent who is authorized to do so as set out above, the appointment occurs immediately. However, from a practical perspective, it may be prudent for the person who has been appointed as legal custodian to apply to the court for an order confirming his or her entitlement to custody of the child. The reason for this is that, in dealing with third parties, the legal custodian will be in a better position to prove guardianship than would otherwise be the case if there was no court order. Having said that, regardless of any appointment by will or otherwise, the court has the power to grant custody of and/or access to a child to any person, provided that such grant would be in the best interests of the child. In such a case, the person applying for custody of the child must be either a parent or another person who has, in the opinion of the court, a sufficient interest. In order to be a person having a "sufficient interest", the applicant must have both a significant relationship with the child and a demonstrated and settled ongoing commitment to the child. If the court determines that it is in the best interests of the child, it can grant custody of a child to a person or persons of sufficient interest, notwithstanding that the appointment of a legal custodian for a child was otherwise completed by a parent.

Source: *The Children's Law Act*, 1997, S.S. 1997, c. C-8.2, s. 3, 4, 5, 6 & 8; *G.E.S. v D.L.C.,* 2006 SKCA 79.

6. A person might exclude a spouse, child or stepchild from the will.

(a) What are the legislated rights in Saskatchewan for a claim by a spouse or a child to the estate of a spouse or parent?

Summary

The spouse (which includes a common law partner) of a deceased person can commence a claim for division of the couple's family property under Saskatchewan's family property legislation. A person who is considered a dependant under Saskatchewan's dependants' relief legislation can make a claim for reasonable maintenance from the estate of the deceased person.

Discussion

A spouse can make a claim to the estate of a deceased spouse through:

(a) family property legislation; or

(b) dependants' relief legislation.

A child may be able to make a claim to the estate of a deceased parent through the dependants' relief legislation.

Under the legislation that deals with the division of family property, a spouse (which includes a common law partner) can make an application for division of family property after the spouse dies. The surviving spouse has 6 months from the date that letters probate or letters of administration are issued to commence such a claim. The claim follows the same process and is subject to the same rules as if the couple were separating/divorcing. The starting position is that all family property is divided equally between the spouses, but this can be varied depending on

what was brought into the relationship, how the parties treated and used the property during the relationship, and whether they entered into any interspousal or prenuptial agreement in regard to the family property.

Under the dependants' relief legislation, the following people can make a claim against the estate of a deceased person:

(a) a married spouse;

(b) a child of the deceased who is under the age of 18 years;

(c) a child of the deceased who is over the age of 18 years but is unable to earn a livelihood due to mental or physical disability or, by reason of need or other circumstances, ought to receive a greater share of the deceased's estate than he or she would otherwise receive without such a court order being granted; or

(d) a person with whom the deceased person cohabited as spouses continuously for at least 2 years or, if they have a child together, in a relationship of some permanence.

In the dependants' relief claim, a request would be made for a court order that would provide reasonable maintenance for the dependant. Such a claim should be made within 6 months of the date that letters probate or letters of administration are granted, however, the court has a discretion to allow claims to be made at any point during which any portion of the estate remains undistributed. If the court is of the view that the deceased person did not adequately provide for the maintenance of the dependant for whom the application is made, the court can grant an order that requires maintenance for the dependant to be paid out of the deceased's estate. This, essentially, varies the distribution of the estate from that set out in the will. In determining what reasonable maintenance is, the court will look to the legal obligations and moral considerations that would be imposed on the deceased vis-à-vis the dependant, as well as the dependant's past, present or future capital or income, the dependant's conduct in relation to the deceased, the claims of any other dependants, and any other matter the court considers appropriate. From there, it will make a determination as to what reasonable maintenance for that dependant will be.

Sources: *The Family Property Act*, S.S. 1997, c. F-6.3, s. 30 & 31; *The Dependants' Relief Act, 1996*, S.S. 1996, c. D-25.01, s. 2, 3, 4, 6 & 8; *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807; *Ostrander v. Kimble Estate* (1996), 146 Sask. R. 64; *Thronberg v. Thronberg Estate*, 2003 SKQB 114; *Harding v. Warkentin*, 2016 SKQB 238.

(b) What are the dependants relief rules in Saskatchewan? Can life insurance proceeds paid to a named beneficiary be "clawed back" to satisfy a dependant's claim?

Summary

Insurance proceeds paid to a designated beneficiary fall outside of the estate of the deceased, and therefore cannot be clawed back to satisfy a dependant's relief claim.

Discussion

Where a beneficiary is designated on an insurance policy, from the time of the happening of the event upon which the insurance money becomes payable (i.e., death), the insurance monies are not part of the estate of the insured person.

On an application for maintenance by a dependant, the Court is only entitled to look to the estate of the deceased. Therefore, if insurance policies with a designated beneficiary fall outside of the estate, such funds cannot be clawed back by the Court.

Sources: *The Saskatchewan Insurance Act*, RSS 1978, c S-26, s. 153, s. 158; *The Dependants' Relief Act, 1996,* SS 1996, c. D-25.01, s. 3, 6, 11, 12.

(c) Do stepchildren of the deceased who are not legally adopted have any rights to challenge the will?

Summary

Unless it can be shown that the person writing his/her will intended for a step child to be included in the category of his/her children, a step child is not generally considered a child of a step parent.

Discussion

The Wills Act (Saskatchewan), *The Intestate Succession Act, 2019* (Saskatchewan), *The Dependants' Relief Act* (Saskatchewan) and *The Administration of Estates Act* (Saskatchewan) all refer, in some way, to a child or children. Typically, a child is considered to be someone who is a biological or legally adopted child of the parent. *The Intestate Succession Act, 2019* (Saskatchewan) refers to "issue" of a person. "Issue" is defined as "all lawful lineal descendants of the ancestor". Lineal descendants are typically considered to be relatives by blood who are in the direct line of descent. With respect to adopted children, *The Adoption Act* (Saskatchewan) provides that an adopted child becomes the legal child of the adoptive parents when the adoption order is granted. All of this brings us back to the idea of a child being someone who is a biological or legally adopted child. A step child is not, by default, considered a "child" of a step parent for the purposes of being able to make a claim against the estate of a step parent.

With that said, however, if it can be shown that there was an intention on the part of the step parent to include his or her step child in the distribution of an estate, the court can make a declaration in favour of so including the step child. The intention to include a step child can appear in the will or it can come from the surrounding circumstances. In one Saskatchewan case, the court found that the deceased person intended for his step niece to be regarded as his niece, as she was the only person who would fit this role at the time he made his will. As such, the court determined that the step niece was entitled to part of the estate of the deceased that was to go to his "nieces and nephews". Analogous reasoning can be used in the case of a child and step child.

Because of this, it is important that the will is clear as to who is considered a child and who is not. The easiest way to do this is to name the children that the testator intends to benefit in his or her will. That way, his or her intentions are clear.

Sources: *The Wills Act*, 1996, S.S. 1996, c. W-14.1; *The Intestate Succession Act*, *2019*, S.S. 2019, c. I-13.1; *The Administration of Estates Act*, S.S. 1998, c. A-4.1; *The Adoption Act,* 1998, S.S. 1998, c. A-5.2; *McCrea v. Barrett et al*., 2004 BCSC 208; *Peri v. McCutcheon*, 2011 BCSC 273; *CIBC Trust Corp. v. Peebles*, 1999 SKQB 137; *The Children's Law Act, 1997*, S.S. 1997, c. C-8.2, s. 40; MacKenzie, James, *Feeney's Canadian Law of Wills*, 4th ed., looseleaf (Toronto: LexisNexis, 2000) at §11.132-11.149.

(d) Can the validity of a will be challenged for reasons such as lack of capacity and undue influence?

Summary

Yes, a will can be challenged for reasons such as lack of capacity and undue influence.

Discussion

A person has the right to challenge the issuance of a grant of probate (or letters of administration) by filing a caveat with the Court in a prescribed form.

Sources: *The Queen's Bench Rules*, s. 16—38-to 16-43; *Craig v. Lamoureaux*, (1920) A.C. 349; *Arcand v. Wright*, 2019 SKQB 139; *Hood v. Hrycyna*, 2019 SKCA 30.

7. Clients in second marriages often want to draft wills that provide for a legally binding distribution of assets upon first and second death (i.e. a mutual will). Are mutual wills allowed in Saskatchewan?

Summary

Mutual wills are allowed, but if there is no written agreement in that regard, it may be difficult to prove the existence of an oral agreement between the parties to have mutual wills.

Discussion

The concept of mutual wills whereby two people complete wills and, at the same time, enter into an agreement with one another that they will not revoke their wills or will make their wills in a certain fashion is a concept of judge-made law. In these situations, what happens is this: the parties make wills on the understanding and agreement that their estates are to be distributed in a certain manner. If one of the parties dies without changing his or her will, and the second person thereafter changes his or her will so that the distribution of his or her estate is other than what was agreed to, the beneficiaries who have been "cut out" of the estate can make an application to the court, based on breach of the agreement, for a determination that the second person holds or held the estate property in a constructive trust for the beneficiaries who were to inherit under the mutual wills. Generally, a person always has the ability to revoke and/or change his or her will while he or she has capacity. In the case of mutual wills, the question becomes whether such change creates a breach of the agreement between the parties with the result that the survivor of the two is deemed to hold property in trust for the beneficiaries set out in the mutual wills.

The doctrine of legally binding mutual wills has not been written into the wills legislation in Saskatchewan. However, given that this concept has arisen as a result of judicial decisions rather

than legislation, it is nonetheless applicable in Saskatchewan. It is important to note that a party making an application to court on the basis that there were mutual wills made must prove that there was an agreement between the people making the wills that they either will not revoke their wills or will ensure that distribution under the wills occurs in a certain fashion. If such agreement is not put into writing, it can be difficult to try to prove an oral agreement years after the fact. The simple fact that two people made wills that mirror one another does not necessarily show that there was an agreement between the parties. As such, the simple act of making mirror wills does not, of itself, create a legally binding scheme for distribution of assets.

To remove any uncertainty, there are methods by which parties can set up their wills so that the scheme for distribution of assets is legally binding. One way to do this is for the couple to complete an interspousal agreement at the same time they complete their wills. The interspousal agreement would provide that they have agreed to the distribution of their estates on the first and last of them to die as set out in the concurrently-executed wills, and that they agree that neither of them will change such distribution if the person ends up being the survivor of the two. Essentially, it creates a binding agreement between the parties that they will maintain the scheme of distribution on both the first and last of them die. In order for an interspousal agreement to be binding in Saskatchewan, each of the parties must receive independent legal advice as to its contents (and the appropriate forms in that regard must be completed). Therefore, if a lawyer is drawing up mirror wills for the clients, that lawyer could also prepare the interspousal agreement but he or she would need to send each client to separate, independent lawyers so that they can receive the necessary independent legal advice.

The other method of ensuring the ultimate distribution of assets upon the first and last to die of the couple is through the use of a trust within the wills (to deal with property that is not otherwise owned in joint tenancy or that does not give rise to a significant tax liability if transferred to a trust). For example, let's say each person in the second marriage has children from a previous relationship. The couple's goal in their estate planning is that, on the first of them to die, they would each like to ensure that the other is provided for in that the survivor has the use of the deceased person's assets during his or her lifetime. However, the couple also wants to make sure that the husband's assets ultimately go to the husband's children from his previous relationship, and the wife's assets ultimately go to the wife's children from her previous relationship. In their wills, each of the husband and wife could put in place a trust on the first of them to die that provides that all of the assets of the deceased person would go into a trust for the benefit of the survivor. The survivor would be entitled to all income generated from those assets (and whatever other terms that would be appropriate in the circumstances can be inserted into the trust provisions). However, the surviving spouse will not have the ability to encroach on the capital of the trust. When the surviving spouse dies, the will that created the trust for the spouse would provide for the distribution of the capital of the trust (to the first deceased's spouse's children, in this case). This way, the assets are preserved and ultimately flow to the deceased person's biological children, but in the meantime and during the life of the surviving spouse, the surviving spouse has access to the assets and enjoys the benefits of the assets through the trust.

Sources: *Dufour v. Pereira* (1769), 2 Hargr. Jurid. Arg. 304, 21 All E.R. 332; *Pratt et al. v. Johnson et al.*, (1958), [1959] S.C.R. 102; Oosterhoff, Albert H., *Oosterhoff on Wills and Succession,* 7th ed. (Toronto: Carswell, 2011) at pages 148-162; MacKenzie, James,

Feeney's *Canadian Law of Wills*, 4th ed., looseleaf (Toronto: LexisNexis, 2000) at §1.44-1.60; *The Queen's Bench Act*, 1998, S.S. 1998, c. Q-1.01, s. 52 (incorporating common law and equitable principles); *The Family Property Act*, S.S. 1997, c. F-6.3.

8. The term common law marriage is used to describe a variety of relationships. Common law marriage does not require a marriage ceremony, marriage licence, or any other formal aspect of marriage.

(a) What is the definition of common law partner in Saskatchewan?

Summary

This depends on the specific legislation that is being applied but generally speaking, a couple who has cohabited in a spousal relationship continuously for 2 years is considered to be a common law couple in Saskatchewan.

Discussion

Generally speaking, a couple is considered to be in a common law relationship in Saskatchewan if they have cohabited with one another continuously as spouses for a period of at least two years. With that said, there are certain pieces of legislation in Saskatchewan that provide for variance in that general interpretation, and there is case law that provides a framework to determine when a couple is considered to be cohabiting in a spousal relationship.

The Family Property Act, 1997 (Saskatchewan) defines a common law spouse using the general definition set out above (cohabiting in a spousal relationship continuously for 2 years). However, under *The Family Maintenance Act* (Saskatchewan) and *The Dependants' Relief Act, 1996* (Saskatchewan), a couple could be considered to be in a common law relationship if they have cohabited together for at least two years or, if they are the parents of a child, they are in a relationship of some permanence. *The Intestate Succession Act, 2019* (Saskatchewan) includes, in its definition of "spouse", a person who cohabited with the intestate as spouses continuously for at least two years and, at the time of the intestate's death, was continuing to cohabit with him/her or had ceased to cohabit with him/her within the 24 months before the intestate's death. When we look at *The Wills Act, 1996* (Saskatchewan), the only time "spouse" is defined is in the context of the effect of a breakdown of a spousal relationship on a will. In that circumstance a "spouse" is defined to include a person purported or thought by the testator to be his or her spouse. In these particular provisions of *The Wills Act, 1996* (Saskatchewan), if a testator and his or her spouse (who are not legally married) have ceased to cohabit in a spousal relationship for at least 24 months after the time the testator made his/her will but before his/her death, the testator's will remains valid, but certain gifts and appointments within the will are deemed to be revoked in the same manner as if the couple's marriage had been terminated by divorce during that same time period (see No. 6 above).

Other pieces of legislation, for their own respective purposes, further define or illustrate situations in which persons have certain rights due to the nature of their relationships with others. For example, in *The Health Care Directives and Substitute Health Care Decision Makers Act, 2015* (Saskatchewan), the term "spouse" is not defined, but when it comes to nearest relatives (for the purposes of determining who will be able to make health care decisions for an incapacitated

person if he or she has not otherwise completed a proxy appointment through a Health Care Directive or Living Will), it states that the first person able to make such decisions will be a spouse or a "person with whom the person requiring treatment cohabits and has cohabited as a spouse in a relationship of some permanence". Similar wording is used in *The Adult Guardianship and Co-decision-making Act* (Saskatchewan) for determining who the "nearest relatives" are of an adult for whom an application for the appointment of a decision-maker is being made. For the purposes of *The Powers of Attorney Act, 2002* (Saskatchewan), a spouse is defined as someone who is cohabiting or has cohabited with the grantor as spouses continuously for at least two years or continuously for at least one year if they are parents of a child.

As demonstrated, there is some variance in Saskatchewan legislation as to when a couple will be considered to be in a common law relationship. When determining which definition applies, care needs to be taken to identify the correct piece of legislation that is being considered and the definition therein.

As indicated above, there is also case law that provides guidelines to assist with determining when two people have cohabited in a spousal relationship with one another. The courts have acknowledged that, in order to determine if a common law relationship exists, all of the circumstances surrounding the parties' lives together need to be examined. A number of factors or indicia of a common law spousal relationship have been laid out in the case law, including the following:

(a) shelter arrangements;

(b) sexual and personal behaviour;

(c) domestic services;

(d) social aspects;

(e) societal views of the couple;

(f) economic support; and

(g) the parties' conduct concerning any children they may have;

as well as economic interdependence, commitment to the relationship, common desire to make a home together, provisions made in the event of illness or death, documentation completed that verifies relationship status (for example, tax returns), and motivation for the relationship/future plans. These lists are non-exhaustive and no one factor is completely determinative of whether the couple is cohabiting in a spousal relationship.

Sources: *The Family Property Act*, S.S. 1997, c. F-6.3, s. 2(1); *The Family Maintenance Act, 1997*, S.S. 1997, c. F-6.2, s. 2; *The Dependants' Relief Act, 1996*, S.S. 1996, c. D-25.01, s. 2(1); *The Intestate Succession Act, 2019*, S.S. 2019, c. I-13.1, s. 2; *The Wills Act, 1996*, S.S. 1996, c. W-14.1, s. 19(3); *The Health Care Directives and Substitute Health Care Decision Makers Act, 2015*, S.S. 2015, c. H-0.002, s. 15; *The Adult Guardianship and Co-decision-making Act*, S.S. 2000, c. A-5.3, s. 5; *The Powers of Attorney Act, 2002*, S.S. 2002, c. P-

20.3, s. 2(1); *Molodowich v. Penttinen* (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.) at para. 16; *M. v. H.*, [1999] 2 S.C.R. 3 at para. 59; *Romanchuk v. Robin*, 2003 SKCA 50 at para. 9; *Tanouye v. Tanouye*, (1993) 117 Sask. R. 196 (Q.B.) at para. 36 (varied on other grounds in (1994) 128 Sask. R. 48; *Yakiwchuk v. Oaks*, 2003 SKQB 124 at para. 14.

(b) What rights do common law partners have to property on death, including property that was owned by one partner prior to the relationship and property that was jointly acquired?

Summary

Common law partners have the same property rights as married spouses. In general, property would be equally divided between spouses on an application for division of family property (which can be made by the surviving spouse following the death of the other spouse) unless there is an agreement or court order saying otherwise, or unless the property falls into one of the classes of exemptions set out in the family property legislation.

Discussion

As indicated in No. 8(a) above, a spouse (which includes a common law partner) of a deceased person can lay claim to the estate of the deceased spouse (or part thereof) through the Saskatchewan family property legislation and dependants' relief legislation. Setting aside dependants' relief claims for the purposes of this particular question, in the case of the death of one spouse in a relationship, the surviving spouse can, within 6 months from the date letters probate or letters of administration are granted, commence an action in the courts for division of family property. In a situation involving the death of one spouse, only the surviving spouse can commence an action for division of family property. The executor or administrator of the deceased spouse cannot commence such an action on behalf of the deceased person's estate. The executor or administrator can, however, defend any such action commenced by the surviving spouse.

If an action under the family property legislation is commenced, the rules and considerations governing the division of family property between spouses on a breakdown of the spousal relationship (i.e., separation or divorce) govern. In Saskatchewan, common law partners have the same rights and obligations regarding property as spouses who are married to one another. *The Family Property Act* (Saskatchewan) specifically recognizes the joint and mutual responsibilities of spouses (which includes common law partners) in their relationships with one another such that each spouse is entitled to an equal distribution of family property unless there is an exception, exemption, or other equitable consideration set out in the legislation that says otherwise.

When an application for division of family property is made, the starting point is that all family property (or its value) is to be divided equally between the spouses.

There are special rules for the distribution of a family home in Saskatchewan. A family home can be a house or part thereof, a trailer, a suite, a condominium, or any other living unit that is owned by one or both of the spouses (or a corporation that one or both of the spouses control) and that

is occupied or has been occupied or is intended to be occupied by them as their family home. A family home has a unique status under Saskatchewan's family property legislation. It is required to be divided equally between the spouses unless there are extraordinary circumstances that make it unfair and inequitable to do so or unless it would be unfair and inequitable to the spouse who has custody of the children. Circumstances such as one spouse bringing the family home into the relationship or being the only one to contribute to the expense of the family home are not typically extraordinary circumstances that would justify an unequal division of the family home. There is a very strong presumption of equal division of a family home. If there is more than one family home, the court can designate which home is the family home for the purposes of distribution. Its value will be distributed according to the provisions specific to a family home, with the value of the other home(s) distributable according to the general provisions for the distribution of family property.

Except for the family home (which has been discussed above), if the court believes it is unfair and inequitable to equally distribute the rest of the family property or its value, the court can order an unequal distribution or no distribution at all. In determining whether an unequal distribution is appropriate, the court must consider any relevant fact or circumstance including any written agreement between the spouses (or the spouses and a third party), the duration of the relationship and the separation, the date the property was acquired and who contributed to such acquisition, the contribution made by each spouse to the career potential of the other, the extent to which a spouse's finances and earning capacity has been affected by the relationship, any substantial gifts or transfers made by a spouse to a third party, any pre-2001 distributions of property between the spouses, any resulting tax liabilities, any dissipation of family property by a spouse, any benefit receivable by a spouse as a result of the death of a spouse, any maintenance payment for the support of a child, any interest of third parties in the family property, any liabilities of a spouse, and the value of family property outside Saskatchewan.

Certain property is, however, exempt from distribution. Generally speaking, the fair market value of any property acquired by one spouse prior to the commencement of the spousal relationship is exempt from distribution. Likewise, the value of any gift or inheritance acquired before the spousal relationship commenced is exempt from distribution (unless it can be shown that such gift/inheritance was intended to benefit both parties in the relationship). Note that it is the value of such property/gift/inheritance at the date of commencement of the spousal relationship that is exempt from distribution; any growth in such property/gift/inheritance during the course of the relationship is divisible equally between the spouses unless some other exemption/consideration applies. It is important to note that the date to use for exemptions in the case of a common law relationship is the two year anniversary date of the couple's cohabitation with one another (e.g. if the parties began cohabiting as spouses on June 1, 2012, then June 1, 2014 is the date to use for determining exemptions). When it comes to married spouses, the date for determining exemptions is the date of marriage.

In addition to property/gifts/inheritances owned/received prior to the commencement of the spousal relationship, the following are also exempt from an equal distribution between spouses:

(a) any tort damages in favour of a spouse (unless the damages are compensation for a loss to both spouses);

(b) money paid or payable under an insurance policy that is for property (unless the proceeds are compensation for a loss to both spouses);

(c) property acquired more than 2 years after cohabitation ceased (in the case of common law spouses);

(d) property acquired as a result of an exchange of property that is otherwise exempt (provided it can be traced); and

(a) any appreciation on or income received from any property listed in (a) – (d) above.

If an interspousal contract deals with the distribution or possession of any family property (including a family home and household goods), such property is exempt from the default distribution rules in the legislation, provided that the interspousal contract was not, at the time it was entered into, unconscionable or grossly unfair. If the contract was unconscionable or grossly unfair, the court can give it whatever weight it considers reasonable. As indicated in No. 12 above, in order for an interspousal contract to be binding, the appropriate independent legal advice needs to be received by each party to such agreement (and the appropriate forms in that regard need to be completed). The court may, however, take into consideration any agreement between spouses that does not meet all of the formalities of an interspousal contract and give it whatever weight it considers reasonable.

It is important to note that exempt property can lose its exempt status in certain cases, for example, if exempt funds are co-mingled with non-exempt funds or if property is put in joint names.

In the context of wills, it is very common to find a clause included in a will that indicates that it is the wish of the testator to only benefit the persons who are described as beneficiaries in the will and not provide any economic benefit to that beneficiary's spouse or common law partner in the event that there is a break down in the spousal relationship of that beneficiary and his/her departing partner demands some benefit in connection with the inheritance. Such a clause is a statement of intention only. In Saskatchewan, a judge can make a final determination as to whether the inheritance is shared between the beneficiary and the departing spouse, or not. If a beneficiary inherits property and that beneficiary's spousal relationship later ends, the manner in which the inherited property will be divided between the beneficiary and his/her spouse or common law partner will be dependent upon several factors including:

(a) the way the beneficiary dealt with the property (e.g. kept title to it in his/her own name versus putting it into joint names with the spouse or common law partner);

(b) any agreement between the beneficiary and his/her spouse or common law partner, including the existence and terms of a pre-nuptial or interspousal agreement;

(c) the intention of the testator in making a gift of the property; and

(d) the law of the particular province, territory or state governing the property distribution between the beneficiary and his/her spouse or common law partner.

With all of this said, the court has the ability to make any order it considers fair and equitable with respect to the division of any family property if it is satisfied that it would be unfair and inequitable to consider such property exempt from equal distribution. The presumption is that family property is shareable unless the person claiming otherwise proves it to the court's satisfaction. To effect a distribution of family property, the court has very broad discretion to make any order or declaration it sees fit in the circumstances.

Source: *The Family Property Act*, S.S. 1997, c. F-6.3, s. 2(1), 20, 21, 22, 23, 24, & 26.

9. A client's will can include a life insurance beneficiary designation. If there is a beneficiary designation on the policy itself that differs from the will, which designation would apply and what legislation governs this?

Summary

Whichever designation is most recent will be followed, provided that it meets the requirements of a "declaration" under *The Saskatchewan Insurance Act*.

Discussion

This depends on two things: (i) whether the contents of the will are such that they meet the requirements under Saskatchewan legislation and case law to be considered a "declaration" under *The Saskatchewan Insurance Act*, and, (ii) if such requirements are met, which declaration is most recent in time. In simplest terms, the declaration most recently made is the governing document.

Under *The Saskatchewan Insurance Act*, unless an irrevocable designation of a beneficiary has been completed, an insured can alter or revoke a beneficiary designation on a life insurance policy by completing a declaration to that effect. In order for such alteration or revocation (or appointment, for that matter) to be considered a declaration, it must be done in a written document that is signed by the insured. In order to satisfy the requirements of being a "declaration" that would designate, alter, or revoke the beneficiary of a policy, the document in question must either (i) be an endorsement on the policy, (ii) identify the contract of insurance, or (iii) describe the insurance or insurance fund. No particular form is required and no witnesses to the insured's signature is necessary. There must be a clear intention to designate, alter, or revoke the beneficiary designation in the document at issue, and the court has acknowledged that relatively informal documents can be effective declarations. Where there is any doubt as to which beneficiary designation is effective, the specific circumstances need to be examined.

Generally speaking, a general clause for the distribution of the residue of an estate will not be adequate to be considered a "declaration" for the purposes of *The Saskatchewan Insurance Act*. As such, it will not have the effect of designating, altering, or revoking a beneficiary designation. However, if the clause in the will adequately identifies the policy and is clear that its intention is to designate, alter, or revoke a beneficiary of such policy, it could be seen as a declaration which would have the effect of completing such designation/alteration/revocation. This is true even if the will appears to be an invalid (not revoked) will.

The courts can be persuaded to apply equitable remedies where there is strong evidence of the designator's intention. In a Saskatchewan case from 2013, the Saskatchewan Court of Appeal

rectified a beneficiary designation form that the deceased had failed to sign before his death on the basis that it was certain that the deceased intended to change the beneficiary of his life insurance policy prior to his death and his mistake of not signing the form was "self-evident and beyond reasonable dispute". In other words, the court rectified the form so as to make it a valid declaration under *The Saskatchewan Insurance Act*.

Sources: *The Saskatchewan Insurance Act*, R.S.S. 1978, c. S-26, s. 2(1), 133, 152, 153, and 154; *Sun Life Assurance Co. of Canada v. Taylor et al.*, 2008 SKQB 403; *Re Buckmeyer Estate*, 2008 SKQB 141; *Love v. Love*, 2013 SKCA 31.

10. A will is probated to provide the executor/estate trustee with authority to deal with the deceased's assets.

(a) Are there probate fees in Saskatchewan and if so how are they determined?

Summary

Generally speaking, probate fees in Saskatchewan are calculated at $7.00 on every $1,000.00 of estate value, with such estate value being rounded to the next highest thousand dollars. In other words, probate fees are equal to 0.7% of the value of the assets that flow through the estate.

Discussion

Generally, Saskatchewan probate fees are $7.00 on every $1,000.00 of sworn value of the estate (or part thereof). Real property located outside of Saskatchewan, property that is held in joint tenancy, and property in the form of insurance, pensions, and annuities for which there is a named beneficiary are not subject to probate fees. As an example, if the value of the assets that are subject to probate fees is $584,691.55, the probate fees would be $4,095.00 ($585,000.00 / $1,000.00 x $7.00).

If the value of the estate is less than $15,000.00 and if a person (other than a creditor) who is a Saskatchewan resident and is entitled to seek letters probate or letters of administration for the estate has requested the local registrar prepare the necessary papers to grant letters probate or letters of administration, there is a $30.00 basic fee and an additional fee of $6.00 on every $1,000.00 (or part thereof) of the estate's assets which are subject to such fees.

Further, it is possible for a judge, without granting letters probate or letters of administration, to order that personal property of a deceased be paid to a person named by a judge to be distributed as the judge directs provided that the deceased did not own real property in Saskatchewan that would pass through the estate and the value of the deceased's personal property is $25,000.00 in total or less. The court fees for an application in this regard are $30.00.

Finally, for an application where letters probate or a grant of administration have already been issued (and full court fees paid) but a second grant is required (for example, if an administrator dies without having fully dealt with the estate, necessitating an application for letters of administration *de bonis non*), the court fees associated with the application for such second grant will be equal to one-half of the usual court fees to a maximum of $200.00.

Sources: *The Administration of Estates Act*, S.S. 1998, c. A-4.1, s. 7, 9, 51(2) & 51(3);
The Administration of Estates Regulations, c. A-4.1 Reg 1, s. 3 & 8.

(b) What assets pass outside the estate and are therefore not subject to probate?

Summary

A number of assets owned by the deceased person do not require probate in Saskatchewan and transfer of these assets occurs through operation of law.

Discussion

The following assets owned by the deceased person are transferred through operation of law and are not subject to probate in Saskatchewan:

(a) real property held jointly by the deceased person and another person;

(b) insurance payable to a named beneficiary;

(c) Canada Pension Plan payments to a surviving spouse or child;

(d) pensions and annuities payable to a spouse, child or any other named beneficiary;

(e) joint deposit accounts;

(f) personal property outside Saskatchewan, if the deceased person was domiciled outside Saskatchewan on the date of death;

(g) real property outside Saskatchewan.

Source: *The Administration of Estates Regulations*, c. A-4.1 Reg 1, s. 8(3); *The Queen's Bench Rules*, Rule 16-14.

(c) Can multiple wills be used to avoid probate?

Summary

Although multiple wills are technically permitted in Saskatchewan, they cannot be used to avoid probate.

Discussion

In Saskatchewan, the use of multiple Wills does not ultimately result in any cost savings to the estate of the deceased person. This is because of the way the provincial estate administration legislation and the Rules of Court are set up.

As set out in 10(b) above, certain assets are automatically transferred by operation of law and do not form part of the deceased. Probate fees are payable based on the sworn value of the estate.

An application for a grant of probate in Saskatchewan is commenced by an affidavit. Attached to that affidavit are three documents – an Application for Grant of Probate; the original Last Will and Testament of the deceased; and a Statement of Property (which lists all of the property of the deceased at the time of death, save and except for the excluded assets that transfer automatically by operation of law as discussed above).

Sources: *The Administration of Estates Act*, S.S. 1998, c. A-4.1, s. 51(2); *The Administration of Estates Regulations*, c. A-4.1 Reg 1, s. 8; *The Queen's Bench Rules*, Part 16.

11. A person may use a power of attorney to delegate to another the ability to deal with property and financial matters on that person's behalf.

(a) What is the legislation that governs powers of attorney in Saskatchewan?

Summary

The relevant legislation in Saskatchewan is *The Powers of Attorney Act, 2002*.

Discussion

The Powers of Attorney Act, 2002 governs both personal and property powers of attorney in Saskatchewan.

Source: *The Powers of Attorney Act*, 2002, S.S. 2002, c. P-20.3.

(b) What type of authority may be granted under a power of attorney and what are the limitations?

Summary

It is possible to grant authority over personal and property interests (with the exception of health care decisions).

Discussion

A grantor of a power of attorney can grant authority over both personal and property interests. Health care decisions are not governed by a power of attorney, and instead are governed under separate legislation (discussed in question 12 below).

In certain circumstances, a person may not be able to act as an attorney. Specifically, an attorney will be prevented from acting if (at the time they have to take steps to act as attorney) he or she:

(a) is under the age of 18 years;

(b) is incapacitated such that he/she does not have the ability to make decisions;

(c) is an undischarged bankrupt;

(d) has been convicted of certain criminal offences (assault, sexual assault or other acts of violence, intimidation, criminal harassment, uttering threats, theft, fraud or breach of trust) in the previous 10 years; or

(e) provides personal care or health care services to you for remuneration if providing such personal or health care is the occupation or business of the attorney.

In any such case, he or she will be disqualified from acting as an attorney. With respect to an attorney who has a conviction for a criminal offence as set out above, it is still possible to appoint such person to act if he or she has been pardoned or has disclosed the conviction to the grantor, and the grantor indicates his/her consent on the face of the document.

Source: *The Powers of Attorney Act, 2002,* S.S. 2002, c. P-20.3, s. 4, 6, & 7.

(c) What are the formalities for executing a power of attorney in Saskatchewan and can it be executed virtually?

Summary

A power of attorney must be in writing, and requires the signature of a witness. It is possible for a power of attorney to be executed virtually.

Discussion

The power of attorney document must be in writing, and in order to be valid it must be signed by the grantor (or at the direction of the grantor), in front of either:

(a) a lawyer (and accompanied by a legal advice and witness certificate); or

(b) two adults with capacity (who are not appointed as attorneys under the document or family members of the grantor or attorneys), accompanied by witness certificates in the prescribed form.

The witness(es) must also sign in the presence of the grantor.

It is possible for a power of attorney to be executed virtually so long as:

(a) the witness is a lawyer, and the lawyer and the grantor are communicating via electronic means (i.e., both audio and visual communication);

(b) the lawyer takes the necessary steps to identify the client, and otherwise comply with the requirements of the Law Society of Saskatchewan, including a requirement to amend the jurat to reflect signing by "electronic means" and the completion of a prescribed form of record for the file.

Sources: *The Powers of Attorney Act, 2002,* S.S. 2002, c. P-20.3, s. 11.
The Powers of Attorney (Remote Witnessing) Amendment Regulations, 2020;
Law Society of Saskatchewan, Practice Directive Number 1.

12. A person may use a directive or other document under which health care and personal care decision-making can be delegated.

(a) What is the proper term for this type of document in Saskatchewan and what is the legislation that governs it?

Summary

This document is referred to as a directive, and is governed by the *Health Care Directives and Substitute Health Care Decision-Makers Act*.

Discussion

The legislation refers to the document as being a "directive". Within the document, the person may: (1) appoint a proxy or proxies to make decisions on his/her behalf; and/or (2) set out a list of wishes. The directive is intended to be utilized only when the person is unable to speak for him/herself. The proxy is required to act in accordance with the wishes of the person (if those wishes are known), and if the wishes are not known, the proxy is required to act in the best interests of the person.

Source: *Health Care Directives and Substitute Health Care Decision-Makers Act*, S.S. 1997, c. H-0.001, s. 2, 3, 4, 5, & 12.

(b) What are the formalities for executing this document in Saskatchewan and can it be executed virtually?

Summary

This document can be executed with less formality, and because a witness is not required, virtual execution of the document is not typically needed.

Discussion

The directive must be in writing, dated and signed by the person making the document. A witness is only required if the person making the document is unable to sign and then must acknowledge and direct the signature of a witness. In that case, the witness cannot be one of the proxies (or a spouse of a proxy) so named in the document.

Source: *Health Care Directives and Substitute Health Care Decision-Makers Act*, S.S. 1997, c. H-0.001, s. 6.

(c) In the absence of a written directive, to whom will medical professionals speak regarding treatment decisions for an individual who is incapable?

Summary

In the absence of a written directive, the medical professional is required to speak to the nearest relative regarding treatment decisions.

Discussion

The legislation sets out a list of persons who are considered to be the "nearest relative":

- the spouse or person with whom the person requiring treatment cohabits and has cohabited as a spouse in a relationship of some permanence;
- an adult son or daughter;
- a parent or legal custodian;
- an adult brother or sister;
- a grandparent;
- an adult grandchild;
- an adult uncle or aunt;
- an adult nephew or niece

These relationships include adoptive relationships. In the event that more than one person falls into a particular relationship category, the decision of the eldest within that category is preferred.

Source: *Health Care Directives and Substitute Health Care Decision-Makers Act*, S.S. 1997, c. H-0.001, s. 15.

For Will, Estate and Trust questions relating to Saskatchewan, please contact:

Beaty F. Beaubier, Q.C., TEP and Amanda S.A. Doucette, TEP
Stevenson Hood Thornton Beaubier LLP
500, 123 – 2nd Avenue South
Saskatoon, SK S7K 7E6
(306) 244-0123
bbeaubier@shtb-law.com
adoucette@shtb-law.com

MANITOBA

Prepared by Peter Glowacki, TEP of Borden Ladner Gervais LLP
(May, 2021)

1. Many people don't have a will, which means that their estate will be governed by the rules of intestacy.

(a) For a married person with children, what is the division of assets upon an intestacy?

Summary

Sections 2(2) and 2(3) of *The Intestate Succession Act* (Manitoba) specify the division of assets on intestacy in this situation. Depending on the relationship of the children to the deceased and surviving spouse or common law partner, the surviving spouse either receives the entire estate or ¾ of the estate (assuming the assets are well beyond the $50,000 preferential entitlement of the surviving spouse/partner).

If all issue of both intestate and surviving spouse or common law partner

2(2) If an intestate dies leaving a surviving spouse or common law partner and issue, and all of the issue are also issue of the surviving spouse or common law partner, the entire intestate estate goes to the surviving spouse or common law partner.

If issue of intestate but not surviving spouse or common law partner

2(3) If an intestate dies leaving a surviving spouse or common law partner and issue, and one or more of the issue are not also issue of the surviving spouse or common law partner, the share of the surviving spouse or common law partner is

(a) $50,000, or one-half of the intestate estate, whichever is greater; and

(b) one-half of any remainder of the intestate estate after allocation of the share provided by clause (a).

(c) If there is no spouse, the shares of issue are distributed in accordance with sections 4(2) and 5.

(b) What is the division for an unmarried person with no children?

Sections 4(3) through 4(6) of *The Intestate Succession Act* specify the division of assets on intestacy in this situation.

Neither spouse or common law partner nor issue

4(3) If there is no surviving issue, the estate goes to the parents of the intestate in equal shares or to the survivor of them.

No spouse or common law partner, issue or parents

4(4) If there is no surviving issue or parent, the estate goes to the issue of the parents of the intestate or either of them to be distributed per capita at each generation as provided in section 5.

No issue, parent, or issue of parent

4(5) If there is no surviving issue, parent or issue of a parent, but the intestate is survived by one or more grandparents or issue of grandparents,

(a) one-half of the estate goes to the paternal grandparents in equal shares or to the survivor of them, but if there is no surviving paternal grandparent, to the issue of the paternal grandparents or either or them to be distributed per capita at each generation as provided in section 5; and

(b) one-half of the estate goes to the maternal grandparents or their issue in the same manner as provided in clause (a);

but if there is only a surviving grandparent or issue of a grandparent on either the paternal or maternal side, the entire estate goes to the kindred on that side in the same manner as provided in clause (a).

No issue, parent or issue of parent, grandparent or issue of grandparent

4(6) If there is no surviving issue, parent, issue of a parent, grandparent or issue of a grandparent but the intestate is survived by one or more great-grandparents or issue of great-grandparents,

(a) one-half of the estate goes to the paternal great-grandparents or their issue in two equal shares, as follows:

(i) one share to the parents of the paternal grandfather in equal shares or to the survivor of them, but if there is no surviving parent of the paternal grandfather, to the issue of the parents of the paternal grandfather or either of them to be distributed per capita at each generation as provided in section 5, and

(ii) one share to the parents of the paternal grandmother or their issue in the same manner as provided in subclause (i),

but if there is only a surviving great-grandparent or issue of a great-grandparent on either the paternal grandfather's or paternal grandmother's side, one-half of the estate goes to the kindred on that side in the same manner as provided in subclause (i); and

(b) one-half of the estate to the maternal great-grandparents or their issue in the same manner as provided in clause (a);

but if there is only a surviving great-grandparent or issue of a great-grandparent on either the paternal or maternal side, the entire estate goes to the kindred on that side in the same manner as provided in clause (a).

2. A will may be made but its existence may not be known to family members. Is there a will registry in Manitoba?

Summary

There is no active wills registry or notice system in Manitoba.

3. Each province has rules for ensuring that wills are validly executed.

(a) What are the formalities for the proper execution of a will in Manitoba?

Formalities are set out in section 3 and 4 of *The Wills Act*.

Writing required

3 A will is valid only when it is in writing.

Signatures required

4 Subject to sections 5 and 6, a will is not valid unless,

(a) at its end it is signed by the testator or by some other person in the presence and by the direction of the testator;

(b) the testator makes or acknowledges the signature in the presence of two or more witnesses present at the same time; and

(c) two or more of the witnesses attest and subscribe the will in the presence of the testator.

(b) How many witnesses are required?

Two.

(c) Can a will be executed virtually and if so what are the rules?

Yes pursuant to the Order re Temporary Suspension of In-Person Commissioning and Witnessing Provisions, renewal (2) made by Order in Council 87/2021 under *The Emergency Measures Act*, with effect from March 31, 2021 to September 30, 2021.

Section 4 of *The Wills Act* is temporarily suspended and, instead, the action is valid if it is taken through a glass or plexiglass partition or by videoconferencing and each applicable step set out in the Schedule to the Order are followed.

(d) Is a holograph will permitted in Manitoba and if so what are the rules?

Summary

Holograph wills made in accordance with section 6 of *The Wills Act* (Manitoba) are valid.

Holograph will

6 A person may make a valid will wholly in the person's own handwriting and signed at its end by the person, without formality, and without the presence of, or attestation or signature by a witness.

4. According to provincial legislation, how is a person's will affected by the following changes in personal circumstances?

(a) If a person gets married;

Summary

A person's will is revoked by their later marriage except in the circumstances specified in section 17 of *The Wills Act*.

Revocation by marriage

17 A will is revoked by the marriage of the testator except where

(a) there is a declaration in the will that it is made in contemplation of the marriage; or

(b) (a.1) there is a declaration in the will that it is made in contemplation of the testator's common law relationship with the person the testator subsequently marries; or

(c) the will is made in exercise of a power of appointment of real or personal property which would not, in default of the appointment, pass to the heir, executor, or administrator of the testator or to the persons entitled to the estate of the testator if the testator died intestate; or

(d) the will fulfills obligations of the testator to a former spouse or common law partner under a separation agreement or court order.

(b) If a person gets divorced; or

Summary

Sections 18(2) and 18(4) of *The Wills Act* set out the effect of the testator's divorce or termination of common law relationship on his or her will. In short, any gift in favour of, appointment of the former spouse as executor/trustee or power of appointment granted to the spouse/partner is revoked subject to a contrary intention in the will.

Effect of divorce

18(2) Where in a will

(a) a devise or bequest of a beneficial interest in property is made to the spouse of the testator; or

(b) the spouse of the testator is appointed executor or trustee; or

(c) a general or special power of appointment is conferred upon a spouse of the testator;

and after the making of the will and before the death of the testator, the testator's marriage to that spouse is terminated by a decree absolute of divorce or is found to be void or declared a nullity by a court in a proceeding to which the testator is a party, then, unless a contrary intention appears in the will, the devise, bequest, appointment or power is revoked and the will shall be construed as if the spouse had predeceased the testator.

Effect of termination of common law relationship

18(4) Where in a will

(a) a devise or bequest of a beneficial interest in property is made to the common law partner of the testator;

(b) the common law partner of the testator is appointed executor or trustee; or

(c) a general or special power of appointment is conferred on a common law partner of the testator;

and after making the will and before the death of the testator, the testator's common law relationship with his or her common law partner is terminated

(d) where the common law relationship was registered under section 13.1 of The Vital Statistics Act, by registration of the dissolution of the common law relationship under section 13.2 of The Vital Statistics Act; or

(e) where the common law relationship was not registered under section 13.1 of The Vital Statistics Act, by virtue of having lived separate and apart for a period of at least three years;

then, unless a contrary intention appears in the will, the devise, bequest, appointment or power is revoked and the will shall be construed as if the common law partner predeceased the testator.

(c) If a person becomes separated from their spouse

Summary

If a married person separates but there is no divorce, then there is no effect on his or her will. If a person in a common law relationship separates for at least 3 years or dissolves their relationship, then the provisions of sections 18(4)(d) and (e) of *The Wills Act* (see No. 4(b) above) would apply.

5. A person can designate a guardian of their children in their will.

(a) Is guardianship of children as provided in a will binding in Manitoba?

No.

(b) Does Manitoba give authority to the courts to vary the guardianship appointment in a will? And if so, are there any restrictions on how and when a court can change the guardian?

Summary

The designation/appointment of a guardian in a will is not binding. It is subject to a Court application for guardianship and the court will make the determination in the best interests of the child.

6. A person might exclude a spouse, child or stepchild from the will.

(a) What are the legislated rights in Manitoba for a claim by a spouse or a child to the estate of a spouse or parent?

Summary

Pursuant to Part IV of *The Family Property Act* (Manitoba) ("**FPA**"), a surviving spouse or common law partner may bring an application for an accounting and equalization of the estate assets.

In addition, a dependant, which may include but is not limited to a spouse, common law partner or child, may bring an application pursuant to section 2 of *The Dependents Relief Act* (Manitoba) ("**DRA**"), to have the Court order that reasonable provision be made out of the estate of the deceased for the maintenance and support of the dependant.

A "dependant" is defined in section 1 of the DRA and the dependant has to be in financial need in order for the Court to order that reasonable provision be made for them. The amount is determined in accordance with section 8 of the DRA.

> Reasonable provision for dependant
>
> 2(1) If it appears to the court that a dependant is in financial need, the court, on application by or on behalf of the dependant, may order that reasonable

provision be made out of the estate of the deceased for the maintenance and support of the dependant.

Act applies if deceased testate or intestate

2(2) An order may be made under subsection (1) whether the deceased died testate or intestate and notwithstanding the provisions of the deceased's will or The Intestate Succession Act.

Support determined at date of hearing

2(3) The reasonableness of provision for maintenance and support shall be determined as of the date of the hearing of the application.

(b) What are the dependants relief rules in Manitoba? Can life insurance proceeds paid to a named beneficiary be "clawed back" to satisfy a dependant's claim?

The Dependants Relief Act, C.C.S.M. c. D37, sets out the rules for dependant's relief. No, insurance cannot be clawed back.

(c) Do stepchildren of the deceased who are not legally adopted have any rights to challenge the will?

Summary

Pursuant to the definitions in the DRA, such a child could be considered the child of the deceased and, if a dependent, entitled to make an application to the Court seeking to have adequate provision be made for them from the estate of the deceased.

"child" includes

(a) a child conceived before and born alive after the parent's death, and

(b) a child to whom the deceased stood in loco parentis at the time of the deceased's death, except under an arrangement where the child is placed for valuable consideration in a foster home by a person having lawful custody;

"dependant" means …

(c) a child of the deceased who was under the age of 18 years at the time of the deceased's death,

(i) 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

(ii) who was substantially dependant on the deceased at the time of the deceased's death.

(d) Can the validity of a will be challenged for reasons such as lack of capacity and undue influence?

Yes. Same general rules as other common law jurisdictions.

7. Clients in second marriages often want to draft wills that provide for a legally binding distribution of assets upon first and second death (i.e. a mutual will). Are mutual wills allowed in Manitoba?

Summary

Yes, although there is no specific statutory provision in this regard and such wills are generally combined with an agreement relative to the mutual wills. The survivor's will/estate would still be subject to the statutory rights of others (i.e. children and any future spouse or common law partner).

8. The term common law marriage is used to describe a variety of relationships. Common law marriage does not require a marriage ceremony, marriage licence, or any other formal aspect of marriage.

(a) What is the definition of common law partner in Manitoba?

Summary

Two people can be considered common law partners in Manitoba if they register as such under the *Vital Statistics Act,* or, being in a conjugal relationship, cohabit for a period of at least three years (or one year if the parties are the parents of a child).

Discussion

Section 1 of *The Wills Act*, CCSM c. w-150 (the "**Wills Act**") defines a common law partner of a testator as: (a) a person who, with the testator, registers a common law relationship under section 13.1 of *The Vital Statistics Act*, or (b) a person who, not being married to the testator is cohabiting or has cohabited with him or her in a conjugal relationship for (i) a period of at least three years, or (ii) for a period of at least one year and they are together the parents of a child.

Additionally, the concept of a "common law partner" is also discussed in the *Family Property Act*, CCSM c. F-25 (the "**FPA**"). Similar to the *Wills Act*, subsection 1(1) of the FPA provides that a person is a common law partner if, with another person: (a) they registered a common law relationship under section 13.1 of *The Vital Statistics Act*, or (b) not being married to the person, cohabited with him or her in a conjugal relationship for a period of at least three years.

(b) What rights do common law partners have to property on death, including property that was owned by one partner prior to the relationship and property that was jointly acquired?

Summary

Essentially, the rights of common law partners and spouses are the same with respect to property on death.

Discussion

Part IV of the *Family Property Act*, CCSM c. F-25 (the "**FPA**") deals with the accounting and equalization (i.e. distribution) of assets on the death of a spouse or common law partner. As discussed above, a "common law partner" is defined similarly in both the FPA and the *Wills Act* (Manitoba). The rights and benefits of a common law partner in the distribution assets are essentially the same as those of a surviving spouse. Section 25.1 of the FPA provides that the provisions of Part IV of the FPA relating to an accounting and equalization of assets on the death of a common law partner apply in respect of common law partners described in subsection 2.1(1) immediately before the death of one of them, but only where the death occurs on or after the day this section comes into force.

Notwithstanding the above, according to subsection 27(1) of the FPA, Part IV does not apply in respect of spouses or common law partners who, before one of them dies, divide their assets under a spousal agreement or common law relationship agreement or this Act. Further, subsection 27(3) of the FPA provides that where spouses or common law partners enter into a spousal agreement or common law relationship agreement before Part IV comes into force and one of them dies after Part IV comes into force, the surviving spouse or common law partner has, subject to the FPA, the right to an accounting and equalization of assets, unless the surviving spouse or common law partner specifically waived or released his or her rights.

Pursuant to Subsection 28(1) of the FPA, a surviving spouse or common law partner may make an application for an accounting and equalization of assets. Nevertheless, according to section 37 of the FPA, certain assets are exempt from the accounting process provided for by Part IV of this Act:

(a) an asset owned jointly with the deceased spouse or common law partner where the surviving spouse or common law partner has a right of survivorship;

(b) life insurance payable on the death of the other spouse or common law partner;

(c) a TFSA (tax-free savings account) as defined in the Income Tax Act (Canada), retirement savings plan, retirement income fund or annuity, funds in a PRPP account as defined in The Pooled Registered Pension Plans (Manitoba) Act or a pension, retirement, welfare or profit-sharing fund, trust, scheme, contract or arrangement for the benefit of employees or former employees payable to the surviving spouse or common law partner on the death of the other spouse or common law partner.

9. A client's will can include a life insurance beneficiary designation. If there is a beneficiary designation on the policy itself that differs from the will, which designation would apply and what legislation governs this?

Summary

In Manitoba, the *Insurance Act* (Manitoba) governs the designations made on a life insurance policy. In accordance with subsection 169(2) of the *Insurance Act*, the ***latest*** made valid designation, whether this latest designation was made on the life insurance policy itself or on the will, is the designation which will be followed with respect to the distribution of the life insurance policy.

It is also possible, under section 168 of the *Insurance Act* (Manitoba), to irrevocably designate a beneficiary by way of a will or an insurance policy. An irrevocable beneficiary has guaranteed rights to the assets of the insurance policy, the effect being that the designation may not be revoked without the beneficiary's consent, and therefore a later designation made in either a will or via the insurance policy would not be of any effect.

10. A will is probated to provide the executor/estate trustee with authority to deal with the deceased's assets.

(a) Are there probate fees in Manitoba and if so how are they determined?

Summary

Probate fees in Manitoba, found in the Schedule to *The Law Fees and Probate Charge Act* (Manitoba), are outlined below.

Discussion

The probate charge in Manitoba is approximately $7 for every $1,000 of estate assets as specified in the Schedule to *The Law Fees and Probate Charge Act* (Manitoba).

> Calculation of Charge on Application For Probate or Administration
>
> For the purposes of section 1.1, the charge payable by the estate of a deceased person on an application for probate or administration is the amount determined as follows:
>
> 7. For an application made on or after July 1, 2005:
>
> (a) where the value of the property devolving is $10,000 or less $70.
>
> (b) where the value of the property devolving is more than $10,000, $70, plus $7 for every additional $1,000 of value or fraction thereof.

(b) What assets pass outside the estate and are therefore not subject to probate?

Subject to beneficial interests and resulting trusts issues, jointly held assets and those assets with a named beneficiary (insurance, annuities and pensions not payable to the estate) pass outside of the estate.

(c) Can multiple wills be used to avoid probate?

No.

11. A person may use a power of attorney to delegate to another the ability to deal with property and financial matters on that person's behalf.

(a) What is the legislation that governs powers of attorney in Manitoba?

The Powers of Attorney Act, C.C.S.M. c. P97.

(b) What type of authority may be granted under a power of attorney and what are the limitations?

The donor may generally authorize an attorney to make decisions in relation to the donor's financial affairs with such limits as may specified in the enduring power of attorney. The actions of the attorney must be in the best interests of the adult donor.

(c) What are the formalities for executing a power of attorney in Manitoba and can it be executed virtually?

Witnessing formalities for an enduring power of attorney are set out in section 11.

Witnesses

11(1) Subject to subsection (2), a witness to the execution of an enduring power of attorney must be:

(a) an individual registered, or qualified to be registered, under section 3 of *The Marriage Act* to solemnize marriages;

(b) a judge of a superior court of the province;

(c) a justice of the peace or provincial judge;

(d) a duly qualified medical practitioner;

(e) a notary public appointed for the province;

(f) a lawyer entitled to practice in the province;

(g) a member of the Royal Canadian Mounted Police; or

(h) a police officer with a police service established or continued under *The Police Services Act*.

Who may not act as a witness

11(2) The attorney appointed under the enduring power of attorney and his or her spouse or common law partner may not act as a witness to the donor's signature.

Virtual execution is permitted pursuant to the Order re Temporary Suspension of In-Person Commissioning and Witnessing Provisions, renewal (2) made by Order in Council 87/2021 under *The Emergency Measures Act*, with effect from March 31, 2021 to September 30, 2021. Clauses 10(1)(b) and (c) and (2)(a) and (b) of *The Powers of Attorney Act* are temporarily suspended and, instead, the action is valid if it is taken through a glass or plexiglass partition or by videoconferencing and each applicable step set out in the Schedule to the Order are followed.

12. A person may use a directive or other document under which health care and personal care decision-making can be delegated.

(a) What is the proper term for this type of document in Manitoba and what is the legislation that governs it?

A health care directive pursuant to *The Health Care Directives Act* C.C.S.M. c. H27.

(b) What are the formalities for executing this document in Manitoba and can it be executed virtually?

Execution formalities are set out in section 8.

Directive must be in writing

8(1) A directive must be in writing and dated.

Execution

8(2) A directive must be signed

(a) by the maker; or

(b) by some other person at the direction and in the presence of the maker, in which case

(i) the person signing shall not be a proxy appointed in the directive or a proxy's spouse,

(ii) the maker shall acknowledge the signature in the presence of a witness, who shall not be a proxy appointed in the directive or a proxy's spouse, and

(iii) the witness shall sign the directive as witness in the maker's presence.

Virtual execution is permitted pursuant to the Order re Temporary Suspension of In-Person Commissioning and Witnessing Provisions, renewal (2) made by Order in Council 87/2021 under *The Emergency Measures Act*, with effect from March 31, 2021 to September 30, 2021. Subsection 8(2) of *The Health Care Directives Act* is temporarily suspended and, instead, the action is valid if it is taken through a glass or plexiglass partition or by videoconferencing and each applicable step set out in the Schedule to the Order are followed.

(c) In the absence of a written directive, to whom will medical professionals speak regarding treatment decisions for an individual who is incapable?

Next of kin.

For Will, Estate and Trust questions relating to Manitoba please contact:

Peter Glowacki, TEP
Borden Ladner Gervais LLP
1200 Waterfront Centre
200 Burrard Street
Vancouver, B.C. V7X 1T2
(604) 632-3507
pglowacki@blg.com

ONTARIO

Prepared by Michael Rosen, TEP of Borden Ladner Gervais LLP
(August, 2021)

1. Many people don't have a will, which means that their estate will be governed by the rules of intestacy.

(a) For a married person with children, what is the division of assets upon an intestacy?

Summary

1. The spouse is entitled to a "preferential share" of the estate, which is either:

   (a) For estates of persons who die before March 1, 2021: $200,000

   (b) For estates of persons who die on or after March 1, 2021: $350,000

2. If the estate is worth more than the "preferential share," the spouse and children divide the remaining amount of the estate:

   (a) For estates with a spouse and one child, the remaining estate is divided as follows:

      (i) ½ goes to the spouse;

      (ii) ½ goes to the child.

   (b) For estates with a spouse and two or more children, the remaining estate is divided as follows:

      (i) 1/3 goes to the spouse; and,

      (ii) 2/3 are divided by the children equally.

Discussion

If a person is survived by a spouse and by issue, Ontario's *Succession Law Reform Act* (the "SLRA") provides that a spouse is entitled to the "preferential share." The preferential share is set by regulation. For the estates of persons who die before March 1, 2021, the share is $200,000, and for estates of persons who die on or after March 1, 2021, it is $350,000 (SLRA ss. 45(1)-(3) and Ontario Regulation 54/95).

If the estate is worth more than the "preferential share," the spouse and children divide the remaining amount of the estate. If the deceased had one child, the remaining amount of the estate is divided equally by the spouse and the child (SLRA s. 46(1)). If the deceased had two or more children, the spouse receives one third, and the children divide the remaining two thirds (SLRA s. 46(2)). If a deceased person's child had predeceased him or her, but the child was survived by the child's own issue (e.g., the deceased's grandchild), the child's share is divided among his or her issue (SLRA s. 46(3) and 47).

Note that the spouse's rights are subject to their right to elect to receive a share of the deceased's property in accordance with the rules set out in the *Family Law Act* (Ontario) (see below).

(b) What is the division for an unmarried person with no children?

Summary

If survived by grandchildren or further issue, the deceased person's issue of the nearest kin receive the estate. If a deceased person has no issue, the deceased person's nearest surviving relatives receive the estate.

Discussion

If a person is survived by issue, such as his or her grandchildren, then the deceased person's issue are entitled to the estate (SLRA s. 47(1)). If any issue of the same nearest kin had predeceased the person, but was survived by their own issue, then the predeceased person's issue receive that person's share instead (SLRA s. 47(2)).

If a person is not survived by issue, then the person's nearest surviving relatives receive the estate. The nearest kin follows the following list:

1. Parents (SLRA s. 47(3))
2. Brothers and sisters (SLRA s. 47(4))
3. Nephews and nieces (SLRA s. 47(5))
4. Further of kin (SLRA s. 47(6))

Finally, if there is no surviving next of kin of a deceased person, the property becomes the property of the Crown (SLRA s. 47(7)).

2. A will may be made but its existence may not be known to family members. Is there a will registry in Ontario?

Summary

There is no will registry in Ontario.

Discussion

While there is no will registry in Ontario, the Rules of Civil Procedure (Ontario) provide that a person may deposit a will with a Court Registrar, who is then to provide notice of the deposit to the Estate Registrar for Ontario (see Rule 74.02). Some local lawyers' associations may have voluntary will registries.

3. Each province has rules for ensuring that wills are validly executed.

(a) What are the formalities for the proper execution of a will in Ontario?

Summary

A will must be in writing. It must be properly witnessed by two or more witnesses in the presence of the testator (unless it is a holograph will).

Discussion

A will must be in writing (SLRA s. 3). A will must be signed by the testator (the person who is executing the will), or by some other person if the person is in the presence of the testator and signs at his or her direction (SLRA s. 4(2)(a)). The will must be signed by the testator in the presence of two or more attesting witnesses who are both present at the same time (SLRA s. 4(2)(b)). The two or more attesting witnesses must subscribe the will in the presence of the testator (SLRA s. 4(2)(c)).

(b) How many witnesses are required?

Two witnesses are required (SLRA s. 4(2)), except if it is a holograph will (SLRA s. 6).

(c) Can a will be executed virtually and if so what are the rules?

Summary

Wills cannot be executed virtually, but they may be witnessed virtually.

Discussion

Wills cannot be executed virtually, and electronic wills are not allowed. However, the witnesses to a will may satisfy any requirement to be present by using audio-visual communication technology. If the will is witnessed virtually, the following rules must be followed:

1. The normal rules regarding witnesses and subscribing the will must be followed.

2. The testator and witnesses must be able to see, hear and communicate with one another in real time by means of audio-visual communication technology.

3. At least one person who acts a witness must be a licensee within the meaning of the *Law Society Act* (SLRA s. 4(3)(a)), which means either a lawyer or paralegal, provided that their license has not been revoked).

4. The making or acknowledgement of the signature and the subscribing of the will must be done contemporaneously (SLRA s. 4(3)(b)). If the same copy of the will is being signed by the witnesses, both witnesses must be present with the testator at the same time (virtually or not).

5. The required signatures may be done by having each person signing a complete, identical copy in counterpart (SLRA s. 4(4)). If there are minor, non-substantive differences in format or layout, the copies may still be considered identical (SLRA s. 4(5)).

Electronic wills are not allowed (SLRA s. 21.1(2) and *Electronic Commerce Act*).

(d) Is a holograph will permitted in Ontario and if so what are the rules?

Summary

Holograph wills are acceptable in Ontario.

Discussion

The *Succession Law Reform Act* (Ontario) (the "SLRA") provides that a testator may make a valid holograph will where it is wholly hand written by him or her and is signed and dated by him or her. It need not follow any other formality or be in the presence of a witness (see SLRA s. 6).

4. According to provincial legislation, how is a person's will affected by the following changes in personal circumstances?

(a) If a person gets married;

Summary

As of the date this document was prepared, a marriage revoked a will, subject to certain exceptions. Starting January 1, 2022, a marriage will no longer revoke a will.

Discussion

Currently, Ontario's *Succession Law Reform Act* (the "SLRA") provides that a will is revoked by the marriage of the testator except where:

(i) there is a declaration in the will that it is made in contemplation of the marriage,

(ii) the spouse files an election with the Estate Registrar for Ontario within a year of the testator's death, or

(iii) the will was made in the exercise of a power of appointment dealing with property that would not form part of the property of the deceased if he or she died intestate (SLRA s. 16).

As of January 1, 2022, the rule is revoked and a marriage will not revoke a will.

(b) If a person gets divorced; or

Summary

Unless otherwise indicated in the will, any gift or appointment to the spouse is revoked by the divorce.

Discussion

The *Succession Law Reform Act* (Ontario)(the "SLRA") provides that except where a contrary intention appears in the will, the will is to be construed as though the former spouse predeceased the testator where the testator's marriage is terminated by divorce or is declared a nullity and (i) any devise or bequest of a beneficial interest to the former spouse is revoked, (ii) any appointment of the former spouse as executor or trustee is revoked, and (iii) the conferring of any power of appointment upon the former spouse is revoked (see SLRA s. 17(2)).

Please note that the SLRA does not make any changes to beneficiary designations on registered plans or insurance policies in the event of a divorce and that the *Substitute Decisions Act* (Ontario), which deals with Continuing Powers of Attorney for Property and Powers of Attorney for Personal Care, does not provide for the automatic revocation of a former spouse appointed as Attorney.

(c) If a person becomes separated from their spouse

Summary

As of the date this document was prepared, separation does not revoke a will. As of January 1, 2022, a gift to a separate spouse is revoked and the separated spouse is considered to have predeceased the testator.

Discussion

Currently, when this document was prepared, Ontario's *Succession Law Reform Act* (the "SLRA") provides that a will is not revoked by presumption of an intention to revoke it on the ground of a change in circumstances (see SLRA s. 17(1)).

As of January 1, 2022, if a spouse was separated from the deceased on the deceased's death, a gift of property or the appointment of the spouse as estate trustee is revoked and the will is construed as if the separated spouse predeceased the deceased person (SLRA s. 17(3)).

A person is considered to be separated from another person if at the time of death they were both:

(A) living separate and apart, and

(B) any of the following four events occurred on or after January 1, 2022 (SLRA ss. 17(4) and (5)):

1. The spouses lived separate and apart as a result of the breakdown of their marriage for a period of three years immediately before death.

2. They entered into an agreement that is a valid separation under Part IV of the Family Law Act.

3. A court made an order with respect to their rights and obligations in the settlement of their affairs from the breakdown of their marriage.

4. A family arbitration award was made under the Arbitration Act, 1991 with respect to their rights and obligations in the settlement of their affairs arising from the breakdown of their marriage.

5. A person can designate a guardian of their children in their will.

(a) Is guardianship of children as provided in a will binding in Ontario?

Summary

A parent may appoint a person with temporary decision-making responsibility (formerly, custody) or guardian for 90 days, or longer, if the person makes a court application to be appointed.

Discussion

A person (called an "appointor") entitled to decision-making responsibility (prior to March 1, 2021, the term used was a "custodian") may appoint one or more persons to have decision-making responsibility for a child after the death of the appointor, according to section 61 of Ontario's *Children's Law Reform Act* (the "CLRA"). Similarly, a guardian of the property of a child may also appoint a guardian of property for the child in their will (CLRA s. 61(2)).

The appointment is only effective if the appointor is the only person entitled to decision-making responsibility, or guardian of property, or if both parents die at the same time (CLRA s. 61(4)). Both parents must make the same appointment for it to be effective.

The appointed person must consent to the appointment for it to be effective (CLRA s. 61(6)).

The appointment expires on the later of 90 days after the appointment becomes effective. However, if the appointee applies for decision-making responsibility or guardianship of property of the child within the 90 days, the appointment continues to be effective until the application is disposed of.

(b) Does Ontario give authority to the courts to vary the guardianship appointment in a will? And if so, are there any restrictions on how and when a court can change the guardian?

Summary

A custodian or guardian can be appointed under a will for 90 days, after which point a Court Order is required. The Court has full discretion to make the appropriate Order and is not required to follow the designation in the will.

Discussion

The *Children's Law Reform Act* (Ontario) (the "CLRA") provides that a person entitled to decision-making responsibility (prior to March 1, 2021, the term used was a "custodian") of a child may use a will to appoint another person to have decision-making responsibility of the child after such person's death (see CLRA s. 61(1)). Similarly, the CLRA provides that a guardian of the

property of a child may use a will to appoint a guardian of the property of the child after such person's death (see CLRA s. 61(2)). Both of these appointments are effective only for 90 days unless the appointed person has applied to the Court for decision-making responsibility or guardianship of the property of the child, in which case the appointment is effective until the application is disposed of (see CLRA s. 61(7)).

When considering granting an order for custody, the Court will consider the best interests of the child, including the child's needs and circumstances, preferences and so on (see CLRA s. 24). The Court will also consider the views of a deceased guardian of the property as provided in his or her will, but those views are not determinative.

When considering granting and order for guardianship of property, the Court will consider: (i) the ability of the applicant to manage the property of the child; (ii) the merits of the plan proposed by the applicant for the care and management of the property of the child; and (iii) the views and preferences of the child where they are ascertainable (see CLRA s. 49). The Court will also consider the views of a deceased guardian of the property as provided in his or her will, but those views are not determinative.

6. A person might exclude a spouse, child or stepchild from the will.

(a) What are the legislated rights in Ontario for a claim by a spouse or a child to the estate of a spouse or parent?

Summary

A deceased individual's spouse may elect to receive one-half of the net family property rather than the amount provided for in the deceased's will or the applicable intestacy rules. Any person who is a dependant of a deceased individual may make a dependants relief claim.

Discussion

The *Family Law Act* (Ontario)(the "FLA") provides that a spouse may elect to receive an equalization of the net family property, rather than receiving under the deceased's will or under the applicable intestacy rules (see FLA s. 6). The electing spouse receives one-half of the difference between his or her net family property and the deceased's net family property.

The *Succession Law Reform Act* (Ontario)(the "SLRA") provides that where a deceased (whether testate or intestate) has not made adequate provision for the proper support of his or her dependents, a court may make an order for the provision of such support as it considers adequate (see SLRA s. 58(1)). A "dependant" means any of the following to whom the deceased was providing support or was under a legal obligation to provide support immediately before his or her death: the deceased's spouse, common law spouse, former spouse, parents, children, grandchildren, persons whom the deceased has demonstrated a settled intention to treat as his or her children (in certain circumstances further discussed in question 11), and siblings (see SLRA s. 57). The Court will consider all of the circumstances of the application in determining the amount of support, as further enumerated in SLRA s. 62.

For clarity, except where such person is found to be entitled to receive dependent's support under the SLRA, a child of the deceased is not entitled to receive any assets from the estate other than as set out in the will or, where there is no will, as provided under the SLRA in an intestacy.

(b) What are the dependants relief rules in Ontario? Can life insurance proceeds paid to a named beneficiary be "clawed back" to satisfy a dependant's claim?

Summary

A person who is a "dependant" of a deceased person, and who did not receive adequate support under the deceased person's will or under their intestate estate, may bring an application to court for support. Life insurance proceeds can be "clawed back" to satisfy a dependant's claim.

Discussion

The *Succession Law Reform Act* (Ontario)(the "SLRA") provides that where a deceased (whether testate or intestate) has not made adequate provision for the proper support of his or her dependents, a court may make an order for the provision of such support as it considers adequate (see SLRA s. 58(1)).

A "dependant" means:

A. One of the following family members of the deceased:

   (a) Married spouse;

   (b) Divorced spouse;

   (c) Common law spouse;

   (d) Parent;

   (e) Child (or grandchild, or any child that the deceased had a settled intention to treat as a child of his or her family);

   (f) Brother or sister.

B. And to whom the deceased was providing support or was under a legal obligation to provide support immediately before his or her death.

An application for dependant support must be made within six months after probate is granted, although the court may allow an application after six months if there is a portion of the estate that remains undistributed at the time of the application (SLRA s. 61).

If a court determines that a person is a dependant of the deceased, and that adequate support was not made, the court will determine the amount and duration of support the applicant is entitled. The court will consider all of the circumstances of the applicant in determining the amount of support, as further enumerated in SLRA s. 62.

Certain transactions effected by the deceased before his or her death, whoever it benefited, are included as testamentary dispositions as of the date of death of the deceased and are deemed part of the estate for the purposes of determining the value of the estate for dependant support. The legislation specifically names the amount payable under a policy of life insurance (SLRA s. 72).

(c) Do stepchildren of the deceased who are not legally adopted have any rights to challenge the will?

Summary

Interested beneficiaries with a financial interest in an estate may challenge a will. However, only natural and adopted children are entitled to receive from an intestate estate.

Discussion

Any person who appears to have a financial interest in an estate can bring a request for formal proof of a testamentary instrument, or file a notice of objection to issuing a certificate of appointment (i.e., probate), under Rule 75 of Ontario's *Rules of Civil Procedure*. This could apply if a stepchild benefitted under a prior will of a deceased person, and the stepchild wished to challenge the last will propounded by someone. The law regarding a will challenge is complicated and legal advice should be obtained by interested parties.

The *Succession Law Reform Act* (Ontario)(the "SLRA") only includes natural and adopted children as children for the purposes of intestacy provisions. However, dependant relief rules include a person whom the deceased has demonstrated a settled intention to treat as a child of his or her family (except where the person was a foster child) (see SLRA s. 57). If a person did not have an obligation to provide support immediately before his or her death to a stepchild that was not adopted (for example, if the stepchild is an independent adult), then there is no legal obligation for the deceased to benefit the stepchild.

(d) Can the validity of a will be challenged for reasons such as lack of capacity and undue influence?

Summary

Yes, the validity of a will may be challenged on the basis that the testator (the person who executed the will) lacked capacity or was unduly influenced.

Discussion

A person must be of "sound mind, memory and understanding" to have testamentary capacity. Included in this obligation is that a testator must understand the nature and effect of a will, must have some knowledge about his or her assets, and must know who might be expected to benefit under his or her will.

The presence of "undue influence," if proven, can be sufficient grounds to invalidate a will. Undue influence has been described as influence of such a degree that the execution of the will pretends

to express the testator's mind, but which "really does not express his mind, but something else which he did not mean" (*Vout v. Hay*, 2 S.C.R. 876).

7. Clients in second marriages often want to draft wills that provide for a legally binding distribution of assets upon first and second death (i.e. a mutual will). Are mutual wills allowed in Ontario?

Summary

Mutual wills are allowed.

Discussion

In Ontario, a will may be revoked as long as the testator has capacity. However, the testator may agree not to revoke his or her will without the consent of the other spouse. There must be clear and satisfactory evidence that there is an agreement not to revoke the wills and not just a loose understanding or a sense of moral obligation. While each party may revoke his or her will, it would be a breach of contract and the Courts may impose damages or a remedial trust. Mutual wills are, however, uncommon in Ontario. In order to ensure clear and satisfactory evidence is present, a written agreement is often entered into by the parties and, in order to ensure enforceability, the same requirements for independent legal advice and disclosure as a marriage contract or cohabitation agreement are often considered.

8. The term common law marriage is used to describe a variety of relationships. Common law marriage does not require a marriage ceremony, marriage licence, or any other formal aspect of marriage.

(a) What is the definition of common law partner in Ontario?

Summary

Spouses must cohabitate for at least three years in order to establish a common law relationship under the *Family Law Act* ("FLA") requiring support, unless the couple has a child together.

Discussion

The definition of "spouse" in section 29 of the FLA includes common law relationships for spousal support purposes. The expanded definition requires either (a) continuous cohabitation for a minimum of three years, or (b) if the couple has a child together, cohabitation "in a relationship of some permanence". In the latter case, a common law relationship has been found to exist after as little as 6 months cohabitation. In some cases, the fact that parties maintain separate residences does not prevent a finding of cohabitation: the court will look at all the circumstances and consider the reasons for maintaining a separate residence, such as to facilitate access with one's children. Cohabitation must also be conjugal, and objective evidence that both parties mutually understood their relationship to be spousal in nature is required to establish a common law relationship under the FLA.

(b) What rights do common law partners have to property on death, including property that was owned by one partner prior to the relationship and property that was jointly acquired?

Summary

Common law spouses are not "spouses" within the meaning of the *Family Law Act*'s property division scheme. As a result, the relief available to these spouses upon death or separation is limited to the equitable remedies of unjust enrichment, constructive trust and proprietary estoppel in the discretion of the Courts.

Discussion

The seminal Supreme Court of Canada decisions in *Kerr v Baranow* and *Vanasse v Seguin* significantly loosened the barriers to common law couples who make unjust enrichment claims upon separation or the death of their spouse. To prove unjust enrichment, a claimant must prove that their spouse was enriched, that he or she suffered a correspondent deprivation, and that no "juristic reason" exists for the enrichment. In a domestic context, unjust enrichment arises when parties are engaged in a "joint family venture", whereby the accumulation of wealth during the relationship can be attributed to some extent to the parties' collective efforts notwithstanding the fact that legal ownership is not shared. The remedy for unjust enrichment will generally be a monetary award reflective of the claimant's proportionate contribution to the value of the asset in dispute.

The remedial constructive trust is a remedy available for cases of unjust enrichment where a monetary award is insufficient or inappropriate. In these cases, the claimant must show a direct and substantial link between their contributions and the acquisition, improvement or maintenance of the property in dispute. The trust operates to *deem* the claimant a part-owner of the property.

Increasingly, common law claimants are also depending on the doctrine of proprietary estoppel to establish an interest in property owned by their spouse. To obtain this remedy, a claimant must prove that the title-holding spouse (1) induced, encouraged or allowed the claimant to believe that he or she would enjoy some right over the property, (2) that in reliance on this belief, the claimant acted to his or her detriment, and (3) that the title-holding spouse unconscionably denied the claimant the right or benefit which he or she expected to receive.

The foregoing remedies apply where only one spouse legally owns the disputed property. Whether property was acquired prior to or during the relationship is irrelevant except to the extent that an unjust enrichment claim is limited to the property's increase in value during the relationship. Jointly owned property is subject to the right of survivorship and the presumption of resulting trust.

Note also that where common law spouses qualify as dependants under the *Succession Law Reform Act* (see question 8 above), they may be entitled to claim dependant support relief against the deceased's estate.

9. A client's will can include a life insurance beneficiary designation. If there is a beneficiary designation on the policy itself that differs from the will, which designation would apply and what legislation governs this?

Summary

If there is more than one conflicting beneficiary designation at the time of death, the designation signed most recently will generally prevail.

Discussion

Section 192(1) of the *Insurance Act* (Ontario) provides that a beneficiary designation in respect of a life insurance policy may be made by will. It should be noted that a beneficiary designation made in a will must be specific (i.e. a general bequest of the assets of the deceased will not qualify as a beneficiary designation).

Section 192(2) of the *Insurance Act*, which provides that "a designation in a will is of no effect against a designation made later", ensures that the most recent beneficiary designation will generally be enforced in Ontario, regardless of whether it is made by will or with the life insurance company.

The general rule does not apply where the prior beneficiary designation is irrevocable pursuant to section 191(1) of the *Insurance Act*, in which case the irrevocable beneficiary designation may not be changed.

Please also note that where a dependant has filed for support relief under the SLRA (see no. 8 above), distribution of the insurance proceeds may also be subject to the claw back provision in subsection 72(1)(f) of the SLRA.

10. A will is probated to provide the executor/estate trustee with authority to deal with the deceased's assets.

(a) Are there probate fees in Ontario and if so how are they determined?

Summary

The Estate Administration Tax (commonly known as probate fees) is currently 0% for the first $50,000 and 1.5% on the value of all assets over $50,000 (the value is rounded up to the nearest $1,000 prior to determining the tax).

Discussion

The *Estate Administration Tax Act* (Ontario)(the "EATA") provides that the amount of estate administration tax ("EAT") payable is $0 for each $1,000 or part thereof of the first $50,000 of the value of the estate and $15 for each $1,000 or part thereof by which the value of the estate exceeds $50,000 (see EATA s. 2(6)). If the value of the estate is less than $50,000, there is no EAT payable (see EATA s. 2(2)).

The value of the estate includes all of the property that belonged to the deceased at the time of his or her death. However, a testator may use multiple wills, and pay the EAT only on the assets governed by the will submitted probate EAT (see EATA s. 1(1) and s. 32 of the *Estates Act* (Ontario)).

(b) What assets pass outside the estate and are therefore not subject to probate?

Summary

Assets that are held jointly with the right of survivorship, and registered accounts and life insurance policies with valid beneficiary designations, may pass outside the estate to a designated beneficiary.

Discussion

Assets held in joint tenancy with a right of survivorship pass by operation of the death of the joint tenant to the surviving joint tenant, and therefore do not form part of the estate for the purposes of probate or paying estate administration tax ("EAT").

Registered accounts, such as RRSPs, RRIFs, or TFSAs,that have a valid beneficiary designation pass by operation of the death of the account holder to the named beneficiary or beneficiaries. Under Ontario's Succession Law Reform Act ("SLRA"), a person administering a registered plan is discharged on paying the benefit to the person designated under the latest designation. Similarly, insurance policies with death benefits may also be paid to a beneficiary under the *Insurance Act*.

Further, under conflict of laws rules real property is subject to the laws where it is situated; accordingly, real property outside of Ontario is not included in determining the value of the estate.

Note that in a recent decision in Ontario, *Calmusky v. Calmusky*, 2020 ONSC 1506, a court ruled that despite the fact that there was a valid beneficiary designation for a registered account, the proceeds of the account were to be paid to the estate of the deceased. The court held that the presumption of resulting trust applied to the proceeds of registered accounts. The case is the first of its kind in Ontario, and some practitioners have raised questions about the decision. At this time, it remains to be seen if the government will introduce any legislative changes as a result of the decision*.

**Subsequent to this update, there has been an opposing decision in the same Ontario court (Mak Estate v Mak, 2020 ONSC 4415) dealing with the resulting trust issue. Unfortunately, this decision does not resolve the uncertainty since both decisions are from the same court and it will be necessary to wait and see if there is an appeal or legislative change.*

(c) Can multiple wills be used to avoid probate?

Summary

Multiple wills can be used to avoid probate on certain assets.

Discussion

The use of multiple wills is allowed as a probate reduction strategy. Under this strategy, one will, often called the "Primary Will" or "Probate Will" is used for assets that a Certificate of Appointment of Estate Trustee With a Will (i.e., a probate certificate) is needed to deal with, and a "Secondary Will" or "Non-Probate Will" is used for assets that do not require a probate certificate. EAT is only paid on the Primary Will.

11. A person may use a power of attorney to delegate to another the ability to deal with property and financial matters on that person's behalf.

(a) What is the legislation that governs powers of attorney in Ontario?

Powers of attorney for property are primarily governed by Part I of the *Substitute Decisions Act*.

(b) What type of authority may be granted under a power of attorney and what are the limitations?

Summary

A continuing power of attorney for property may allow an attorney to do anything that the grantor can do if capable, except make testamentary dispositions and any other restrictions contained in the document itself.

Discussion

A continuing power of attorney for property is a power of attorney that can be used while the grantor is incapable of managing property, according to Ontario's *Substitute Decisions Act* (the "SDA"). A continuing power of attorney may authorize the person named as attorney to do anything on the grantor's behalf that the grantor could do if capable, except make a will.

There are three major limitations to the attorney's authority. First, any restrictions specified by the grantor in the power of attorney itself apply. Second, an attorney cannot make a will or make testamentary dispositions. What may be considered a "testamentary disposition" for this purpose is a legal question that depends on the context. For example, in some cases, the transfer of the grantor's account from sole ownership to joint ownership has been found by an Ontario court to be a testamentary disposition that was not allowed. Finally, an attorney is a fiduciary and must exercise their powers honestly and in good faith, in the interests of the grantor.

(c) What are the formalities for executing a power of attorney in Ontario and can it be executed virtually?

A power of attorney for property must be executed in the presence of two witnesses, each of whom must sign the power of attorney as a witness, according to Ontario's *Substitute Decisions Act* (the "SDA").

The following persons cannot be a witness (SDA s. 10):

1. The attorney or the attorney's spouse or partner.

2. The grantor's spouse or partner.

3. A child of the grantor or a person whom the grantor has demonstrated a settled intention to treat as his or her child.

4. A person whose property is under guardianship or who has a guardian of the person.

5. A person who is less than 18 years old.

A power of attorney cannot be executed virtually, but the requirement for witnesses can be satisfied by using audio-visual communication technology (SDA s. 3.1(2)). The grantor and witnesses must be able to see, hear and communicate with each other in real time. The parties may sign complete, identical counterpart versions of the power of attorney, which together constitute the power of attorney (SDA s. 3.1(3)).

12. A person may use a directive or other document under which health care and personal care decision-making can be delegated.

(a) What is the proper term for this type of document in Ontario and what is the legislation that governs it?

The document is called a "power of attorney for personal care." A power of attorney for personal care is governed by Part II of the *Substitute Decisions Act* (the "SDA").

(b) What are the formalities for executing this document in Ontario and can it be executed virtually?

A power of attorney for personal care must be executed in the presence of two witnesses, each of whom must sign the power of attorney as a witness, according to Ontario's *Substitute Decisions Act* (the "SDA").

The following persons cannot be a witness (SDA ss. 48 and 10):

1. The attorney or the attorney's spouse or partner.

2. The grantor's spouse or partner.

3. A child of the grantor or a person whom the grantor has demonstrated a settled intention to treat as his or her child.

4. A person whose property is under guardianship or who has a guardian of the person.

5. A person who is less than 18 years old.

A power of attorney cannot be executed virtually, but the requirement for witnesses can be satisfied by using audio-visual communication technology (SDA s. 3.1(2)). The grantor and witnesses must be able to see, hear and communicate with each other in real time. The parties may sign complete, identical counterpart versions of the power of attorney, which together constitute the power of attorney (SDA s. 3.1(3)).

(c) In the absence of a written directive, to whom will medical professionals speak regarding treatment decisions for an individual who is incapable?

Summary

If a person is not capable with respect to a treatment, then consent may be given or refused on behalf of the person by a list of persons.

Discussion

If a person is not capable with respect to a treatment, then consent may be given on behalf of the person, according to Ontario's *Health Care Consent Act* (the "HCCA"). The following persons are entitled to give consent (HCCA s. 20):

1. The incapable person's guardian of the person, if the guardian has authority to give or refuse consent to the treatment.

2. The incapable person's attorney for personal care, if the power of attorney confers authority to give or refuse consent to the treatment.

3. The incapable person's representative appointed by the Board under section 33, if the representative has authority to give or refuse consent to the treatment.

4. The incapable person's spouse or partner, or if they have cohabited for at least one year, but not if they are separated.

5. A child or parent of the incapable person, or a children's aid society or other person who is lawfully entitled to give or refuse consent to the treatment in the place of the parent. This paragraph does not include a parent who has only a right of access. If a children's aid society or other person is lawfully entitled to give or refuse consent to the treatment in the place of the parent, this paragraph does not include the parent.

6. A parent of the incapable person who has only a right of access.

7. A brother or sister of the incapable person.

8. Any other relative of the incapable person.

The listed individuals must be themselves capable of giving consent with respect to the treatment, must be at least 16, must not be prohibited by a court order from having access to the incapable person, must be available, and must be willing to assume responsibility of giving or refusing consent (HCCA s. 20(2)).

A person listed in the above may only give consent if there is no other person ranking higher in priority on the list. If none of the persons listed in the above list are available, Ontario's Public Guardian and Trustee (the "PGT") may give or refuse consent. Similarly, if two people disagree and rank of the same priority, the PGT may decide in their place.

This document has been prepared for general information only. You should consult a lawyer about your unique circumstances before acting on this information.

For Will, Estate and Trust questions relating to Ontario please contact:

Michael Rosen, TEP
Borden Ladner Gervais LLP
Bay Adelaide Centre, East Tower
22 Adelaide St. W
Toronto, ON M5H 4E3
(416) 367-6402
mrosen@blg.com

QUÉBEC (Français)

Préparé par Noah Weinstein et Mathieu Lacasse de Borden Ladner Gervais LLP
(Mai, 2021)

1. Plusieurs personnes n'ont pas de testament, ce qui signifie que leur succession sera régie par les règles provinciales en matière de succession légale.

(a) Pour une personne mariée avec des enfants, quel est le partage des biens en cas de succession ab intestat ?

Synthèse

Lorsqu'une personne décède sans testament, la succession du défunt est dévolue au conjoint marié ou uni civilement et/ou aux parents conformément aux règles du Livre 3, Titre 3 du *Code civil du Québec*.

Selon l'article 666 du *Code civil du Québec*, si une personne mariée décède en laissant un conjoint marié ou uni civilement, et des descendants (y compris les enfants), la succession du défunt sera partagée entre le conjoint marié survivant (ou conjoint uni civilement), qui a droit à un tiers de la succession, et les descendants, qui ont droit aux deux tiers restants. Il est à noter que ces proportions demeurent les mêmes, peu importe que les descendants soient issus ou non du mariage ou de l'union civile entre le défunt et le conjoint survivant.

En droit québécois, un conjoint de fait n'est pas considéré comme un héritier à la succession légale.

Discussion

La répartition d'une succession ab intestat (sans testament), que l'on appelle aussi « succession légale », est déterminée conformément au Livre 3, Titre 3 du *Code civil du Québec*, et l'article 653 prévoit que :

> **653.** À moins de dispositions testamentaires autres, la succession est dévolue au conjoint survivant qui était lié au défunt par mariage ou union civile et aux parents du défunt, dans l'ordre et suivant les règles du présent titre. À défaut d'héritier, elle échoit à l'État.

L'article 655 du *Code Civil du Québec* prévoit que la « parenté » est déterminée en fonction des liens du sang ou de l'adoption.

En vertu de l'article 666 du *Code civil du Québec* :

> **666.** Si le défunt laisse un conjoint et des descendants, la succession leur est dévolue.
>
> Le conjoint recueille un tiers de la succession et les descendants les deux autres tiers.

Il est important de noter qu'une union de fait n'est pas la même chose qu'une union civile. L'union civile est un acte solennel par lequel deux personnes de même sexe ou de sexe opposé s'engagent publiquement devant un célébrant désigné (par exemple, un célébrant civil, comme un notaire public) à faire vie commune et à respecter les droits et obligations liés à cet état. Contrairement au mariage, l'union civile n'est valide que dans la province de Québec. Au Québec, l'union civile est régie par les articles 521.1 et suivants du *Code civil du Québec*. Une union de fait ne donne pas le droit à un individu d'hériter par succession légale.

Dans le cas où un individu décède en laissant un conjoint marié (ou uni civilement) et des enfants, le conjoint hériterait d'un tiers de la succession, et les enfants (qu'ils soient ou non issus du mariage ou de l'union civile, puisque le fait que les enfants reçoivent le statut de « descendants » est déterminé par rapport au défunt conformément aux articles 655 et 658 du *Code civil du Québec*) hériteraient des deux tiers restants de la succession.

Source : *Code civil du Québec*, L.Q. 1991, c. 64, art. 653, 655, 658, 666

(b) Quel est le partage pour une personne célibataire sans enfant ?

Synthèse

Les biens d'une personne célibataire sans enfant seraient séparés de manière égale entre ses parents et ses frères et sœurs.

Discussion

Le *Code civil du Québec* prévoit différentes situations pour les personnes qui ne sont pas mariées (ou en union civile). L'article 667 du *Code civil du Québec* stipule qu'en l'absence de conjoint, toute la succession est dévolue aux descendants (y compris les enfants ou petits-enfants).

L'article 670 du *Code civil du Québec*, définit les père et mère du défunt comme des ascendants privilégiés et les frères et sœurs du défunt et leurs descendants au premier degré comme des collatéraux privilégiés.

L'article 674 du *Code civil du Québec* décrit la situation où la personne décédée n'a ni descendant ni conjoint. Dans ce cas, sa succession est partagée à parts égales entre les ascendants privilégiés et les collatéraux privilégiés. En outre, en l'absence d'ascendants privilégiés, les collatéraux privilégiés héritent de la totalité de la succession, et vice versa.

Source : *Code civil du Québec*, RLRQ c CCQ-1991, art. 667, 670, 674

2. Il se peut qu'un testament ait été rédigé, mais que son existence ne soit pas connue des membres de la famille. Existe-t-il un registre des testaments au Québec ?

Synthèse

Il existe deux registres testamentaires distincts au Québec :

- Le Registre des dispositions testamentaires et des mandats de la Chambre des notaires du Québec, qui enregistre tous les testaments préparés ou enregistrés par les notaires du Québec,

y compris la date à laquelle le testament a été fait ainsi que le nom et l'adresse du notaire en possession du document ; et

- Le Registre des testaments et mandats du Barreau du Québec.

Toutefois, comme le *Code civil* prévoit, en plus des testaments notariés, la possibilité d'avoir un testament fait devant témoins (qui ne doit pas nécessairement être préparé par un avocat) et la possibilité d'avoir un testament olographe (qui est généralement conservé par le testateur), il n'est pas obligatoire que tous les testaments soient inscrits dans un registre.

Discussion

Lorsqu'une personne décède au Québec, le liquidateur est tenu, en vertu de l'article 803 du *Code civil du Québec*, de faire une recherche pour déterminer si le défunt a fait un testament. Le liquidateur doit fouiller les papiers et les effets personnels du défunt (y compris les coffres du défunt, le cas échéant). De plus, le liquidateur doit faire une demande de recherche testamentaire à partir de chacun des registres (c'est-à-dire le Registre des testaments et mandats du Barreau du Québec et le Registre des dispositions testamentaires et des mandats de la Chambre des notaires du Québec). Pour faire la demande, le liquidateur doit produire soit l'acte de décès, soit le certificat de décès délivré par le Directeur de l'état civil.

Au Québec, les testaments notariés doivent être inscrits au Registre des dispositions testamentaires et des mandats de la Chambre des notaires du Québec. De même, les testaments faits avec un avocat sont automatiquement inscrits au Registre des testaments et mandats du Barreau du Québec.

Toutefois, comme le *Code civil* prévoit, en plus des testaments notariés, la possibilité d'avoir un testament fait devant témoins (qui ne doit pas nécessairement être préparé par un avocat) et la possibilité d'avoir un testament olographe (qui est généralement conservé par le testateur), il n'est pas obligatoire que tous les testaments soient inscrits dans un registre.

Source : *Code civil du Québec*, L.Q. 1991, c. 64, art. 712, 718, 803
Loi sur le notariat, RLRQ, c. N-3, art. 95
Règlement sur les registres de la Chambre des notaires du Québec, R.R.Q., 1981, c. N-3, r. 13, art. 1, 5
Loi sur le barreau, RLRQ, c. B-1, art. 15(3)e)
Règlement sur les registres des dispositions testamentaires et des mandats donnés en prévision de l'inaptitude, R.R.Q., 1981, c. B-1, r. 18, art. 5, 8
Jacques BEAULNE, *Droit des successions*, 5e éd., Montréal, Wilson & Lafleur, 2016, p. 377
Michel BEAUCHAMP, « Commentaire sur l'article 613 C.c.Q. », dans *Commentaires sur le Code civil du Québec (DCQ)*, 2018 EYB2018DCQ85

3. Chaque province a des règles pour s'assurer que les testaments sont valablement exécutés.

(a) Quelles sont les formalités à remplir pour la bonne exécution d'un testament au Québec ?

Synthèse

Au Québec, il existe trois formes de testaments qui peuvent être rédigés : le testament notarié, le testament olographe et le testament devant témoins. Chacune d'elles a ses propres formalités pour sa bonne exécution et, selon l'article 713 du *Code civil du Québec*, le non-respect des formalités entraînerait la nullité du testament.

Discussion

Pour le testament notarié, l'article 716 du *Code civil du Québec* précise que le testament notarié est signé par un notaire, en minute, en présence d'un témoin ou, dans certains cas, de deux témoins. La date et le lieu de la rédaction du testament doivent également être inscrits sur le testament.

Pour ce qui est du testament olographe, l'article 726 du *Code civil du Québec* précise que le testament olographe doit être entièrement écrit par le testateur et signé par lui, sans l'utilisation de moyens techniques. Il n'y a pas d'autres exigences formelles.

Pour le testament fait en présence de témoins, l'article 727 du *Code civil du Québec* établit que le testament devant témoins est écrit par le testateur ou par un tiers.

Si le testament est écrit par le testateur, ce dernier doit alors déclarer en présence de deux témoins majeurs que le document qu'il présente est son testament. Il ne doit pas nécessairement en divulguer le contenu. Il le signe à la fin ou, s'il l'a déjà signé, reconnaît sa signature.

Il peut également le faire signer par une tierce personne en sa présence et selon ses instructions.

Si le testament est rédigé par une tierce personne ou par des moyens techniques, le testateur et les témoins doivent parapher ou signer chaque page de l'acte qui ne porte pas leur signature.

Source : *Code Civil du Québec*, RLRQ c CCQ-1991, art. 712, 713, 716, 726, 727,
JUSTICE QUÉBEC, Formes reconnues de testaments, en ligne,
https://www.justice.gouv.qc.ca/votre-argent-et-vos-biens/le-testament/formes-reconnues-de-testament/

(b) Combien de témoins sont nécessaires ?

Synthèse

Pour un testament notarié, un témoin est requis, pour un testament olographe, aucun témoin n'est requis, et pour un testament fait en présence de témoins, deux témoins sont requis.

Discussion

Pour un testament notarié, un seul témoin est requis. Plus précisément, en vertu de l'article 717 du *Code civil du Québec*, le testament notarié est lu par le notaire au testateur seul ou, au choix du testateur, en présence d'un témoin. Une fois la lecture faite, le testateur déclare en présence du témoin que l'acte lu contient l'expression de ses dernières volontés. Le testament est ensuite signé par le testateur, le témoin et le notaire, en présence les uns des autres.

Le testament olographe n'a pas besoin de témoin.

Pour un testament fait en présence de témoins, deux témoins sont nécessaires. Plus précisément, en vertu de l'article 727 du *Code civil du Québec*, le testateur doit déclarer en présence de deux témoins majeurs que le document qu'il présente est son testament, les témoins doivent signer le testament avec le testateur. Si le testament est rédigé par une tierce personne ou par des moyens techniques, le testateur et les témoins paraphent ou signent chaque page de l'acte qui ne porte pas leur signature. Les témoins du testament notarié et du testament fait devant deux témoins doivent être majeurs et ne doivent pas bénéficier du testament.

Source : *Code Civil du Québec*, RLRQ c CCQ-1991, art. 717, 726, 727, JUSTICE QUÉBEC, Formes reconnues de testaments, on line, https://www.justice.gouv.qc.ca/votre-argent-et-vos-biens/le-testament/formes-reconnues-de-testament/

(c) Un testament peut-il être exécuté virtuellement et si oui, quelles sont les règles ?

À l'heure actuelle, les seules règles en vigueur au Québec concernant la capacité de signer virtuellement un testament ont trait aux circonstances sans précédent entourant la pandémie de Covid-19 et aux règles de distanciation physique en vigueur au Québec.

Source: *Code civil du Québec*

(d) Le testament olographe est-il autorisé au Québec et si oui, quelles sont les règles ?

Synthèse

En vertu de l'article 712 du *Code civil du Québec*, le Québec autorise les testaments olographes, qui sont définis à l'article 726 comme étant un testament entièrement écrit par le testateur et signé par lui, autrement que par un moyen technique.

Discussion

Le *Code civil du Québec* reconnaît trois formes de testaments :

- Le testament notarié (c'est-à-dire un testament qui est reçu en minute par un notaire, assisté d'un témoin ou, en certains cas, de deux témoins, avec la mention de la date et du lieu où il est reçu) ;

- Le testament devant témoins (c'est-à-dire un testament écrit par le testateur ou par un tiers, avec ou sans l'utilisation de moyens techniques, signé par le testateur en présence de deux témoins majeurs) ; et

- Le testament olographe.

Le testament olographe doit être écrit entièrement de la main du testateur et ne peut être rédigé à l'aide de moyens techniques tels qu'une machine à écrire, un ordinateur ou un formulaire. Le testament olographe doit être signé par le testateur. Aucune autre formalité n'est requise.

Après le décès du testateur, contrairement aux testaments notariés, les testaments olographes doivent être homologués conformément au *Code de procédure civile*.

Source : *Code civil du Québec*, L.Q. 1991, c. 64, art. 712, 716-731
Code de procédure civile, RLRQ, c. C-25.01

4. Selon la législation provinciale, comment le testament d'une personne est-il affecté par les changements suivants dans sa situation personnelle ?

(a) Si une personne se marie;

Synthèse

Au Québec, le mariage ne révoque pas un testament fait antérieurement.

Discussion

Les articles 763 à 771 du *Code civil du Québec* traitent de la révocation d'un testament. Le mariage n'entraîne pas la révocation d'un testament.

Source : *Code civil du Québec*, L.Q. 1991, c. 64, art. 763-771
Jacques BEAULNE, *Droit des successions*, 5e éd., Montréal, Wilson & Lafleur, 2016, p. 156

(b) Si une personne divorce; ou

Synthèse

L'article 764 du *Code civil du Québec* prévoit que si le testateur se divorce, si l'union civile est dissoute, ou si le mariage ou l'union civile est déclaré nul par un tribunal du vivant des conjoints, le legs fait à l'ex-conjoint marié (ou uni civilement) est révoqué, à moins que le testateur n'ait manifesté une intention contraire au moyen de dispositions testamentaires. De plus, la révocation du legs entraîne également la révocation de la désignation de l'ex-conjoint comme liquidateur de la succession du défunt. Le testament demeure valide.

Cet article s'applique même lorsque le testateur a fait son testament avant l'entrée en vigueur du *Code civil du Québec*, le 1er janvier 1994.

Discussion

En vertu de l'article 764 du *Code civil du Québec*, si le mariage d'un testateur se termine par un divorce ou est déclaré nul par un tribunal du vivant des époux, ou dans le cas d'une union civile, si l'union civile est dissoute ou est déclarée nulle par un tribunal du vivant des époux, les legs faits à

l'ex-conjoint sont révoqués, à moins que le testateur ne manifeste une intention contraire par le biais d'une disposition testamentaire.

Une « disposition testamentaire » comprend les dons faits par testament, une disposition d'un contrat de mariage portant sur la disposition des biens au décès, ou un don à cause de mort (c.-à-d. un don qui est conditionnel au décès du donateur et où le dessaisissement des biens du donateur n'a lieu qu'au décès du donateur).

De plus, l'article 768 du *Code civil du Québec* prévoit qu'une disposition testamentaire postérieure entraîne une révocation tacite de la révocation d'une disposition antérieure dans la mesure où elles sont incompatibles, ce qui constitue une considération importante dans la rédaction des dispositions testamentaires postérieures.

Cette disposition s'applique aux successions ouvertes à compter de l'entrée en vigueur du *Code civil du Québec*, le 1er janvier 1994, que le testament ait été fait ou non avant cette date.

Source : *Code civil du Québec*, L.Q. 1991, c. 64, art. 764, 1806, 1808
Deschênes c. Lechasseur, 2018 QCCS 1407, par. 11-29
Sioris c. Lamarre, REJB 1998-06447 (QCCS) ; conf. par EYB 2000-17091 (QCCA)
Germain BRIÈRE, *La révocation du testament ou d'un legs. Les successions*, Collection Traité de droit civil, Centre de recherche en droit privé & comparé du Québec, 1994 EYB1994SUC26

(c) Si une personne se sépare de son conjoint

Synthèse

Selon la loi, la séparation diffère du divorce. Lorsqu'une personne se sépare de son conjoint, son testament n'en est pas touché – ni le testament, ni les legs au conjoint séparé ne sont révoqués.

Discussion

Le testament d'une personne mariée demeure valide même si elle s'est séparée de son conjoint. Seulement le divorce, la dissolution d'une union civile ou la déclaration de nullité du mariage ou de l'union civile par un tribunal entraînent la révocation des legs en faveur de l'ex-conjoint marié ou uni civilement. Pour plus d'informations, voir la question 5 ci-dessus.

Source : *Code civil du Québec*, L.Q. 1991, c. 64, art. 764
Germain BRIÈRE, *La détermination des droits des différents ordres de successibles. Les successions*, Collection Traité de droit civil, Centre de recherche en droit privé & comparé du Québec, 1994 EYB1994SUC16

5. Une personne peut désigner un gardien pour ses enfants dans son testament.

(a) La tutelle des enfants prévue dans un testament a-t-elle force obligatoire au Québec ?

Synthèse

Au Québec, la notion de " tutelle des enfants " est désignée sous le nom de " tutelle ", qui est établie dans l'intérêt du mineur, elle vise à assurer la protection de la personne du mineur, l'administration de son patrimoine et, en général, d'assurer l'exercice de ses droits civils. La tutelle aux mineurs est régie par les articles 177 à 191 du *Code civil du Québec*.

Plus précisément, les parents sont habituellement les " tuteurs " de leurs enfants mineurs, mais si les deux parents meurent, deviennent incapables ou perdent leur autorité parentale, un tuteur datif est nommé.

La désignation d'un tuteur peut être constestée, ou le tuteur désigné par les parents peut refuser la tutelle.

Discussion

En vertu de la loi, si le tuteur désigné ne refuse pas sa fonction dans les 30 jours suivant la prise de connaissance de sa nomination, le tuteur est présumé l'avoir acceptée. Dans les cas où le tuteur n'est plus en mesure d'exercer ses fonctions, par exemple s'il décède, s'il démissionne ou si la tutelle est contestée, le tribunal peut désigner le tuteur. Cela dit, le *Code civil du Québec* prévoit ce qui suit :

> **202.** À moins que la désignation ne soit contestée, le tuteur nommé par le père ou la mère entre en fonction au moment de son acceptation de la charge.
>
> La personne est présumée avoir accepté la tutelle si elle n'a pas refusé la charge dans les 30 jours, à compter du moment où elle a eu connaissance de sa nomination.
>
> **204.** Lorsque la personne désignée par le parent refuse la tutelle, elle doit en aviser, sans délai, son remplaçant si le parent en a désigné un.
>
> Elle peut, néanmoins, revenir sur son refus avant qu'un remplaçant n'accepte la charge ou que l'ouverture d'une tutelle ne soit demandée au tribunal.

En vertu de l'article 250 du *Code civil du Québec*, le tribunal peut, à la demande du tuteur lui-même, relever le tuteur de sa charge « pour un motif sérieux ». De même, l'article 251 autorise le conseil de tutelle (c'est-à-dire une personne ou un groupe de personnes chargées de la supervision et de la surveillance du tuteur conformément aux articles 222 à 239 du Code civil du Québec) ou toute personne intéressée, y compris le curateur public, à demander le remplacement d'un tuteur qui ne peut exercer sa charge ou ne respecte pas ses obligations.

En vertu de l'article 205 du Code civil du Québec, le tribunal peut également intervenir « lorsqu'il y a lieu de nommer un tuteur ou de le remplacer, de nommer un tuteur ad hoc ou un tuteur aux biens, ou encore en cas de contestation du choix d'un tuteur nommé par les père et mère ».

Conformément à l'article 33 du *Code civil du Québec*,

> **33.** Les décisions concernant l'enfant doivent être prises dans son intérêt et dans le respect de ses droits.
>
> Sont pris en considération, outre les besoins moraux, intellectuels, affectifs et physiques de l'enfant, son âge, sa santé, son caractère, son milieu familial et les autres aspects de sa situation.

Sur cette base, lors de l'examen des demandes de tutelle d'enfants mineurs, le tribunal est tenu de tenir compte de l'intérêt et des droits de l'enfant.

Source : *Code civil du Québec*, RLRQ c CCQ-1991, art. 33, 177, 200-207, 222, 250-251
CURATEUR PUBLIC DU QUÉBEC, Désignation d'un tuteur datif par les parents, en ligne, https://www.curateur.gouv.qc.ca/cura/en/mineur/tutelle-biens/acteurs/designation-tuteur.html

(b) Le Québec donne-t-il aux tribunaux le pouvoir de modifier la désignation du gardien dans un testament ? Et si oui, y a-t-il des restrictions sur la façon et le moment où un tribunal peut changer le gardien ?

Synthèse

Le *Code civil du Québec* prévoit que le père ou la mère peut nommer un tuteur datif à son enfant mineur afin de veiller au bien-être et aux biens de l'enfant en cas de décès ou d'incapacité des deux parents (ou de perte de l'autorité parentale), y compris par testament.

Le tuteur entre en fonction au moment de son acceptation de la charge, et s'il n'a pas refusé la charge dans les 30 jours suivant la connaissance de sa nomination, il est présumé avoir accepté.

Le tribunal peut, à la demande du tuteur, relever le tuteur de ses fonctions pour un motif sérieux. Le tribunal peut également, à la demande du conseil de tutelle ou de toute personne intéressée, destituer un tuteur qui ne peut exercer sa charge ou ne respecte pas ses obligations. Lorsque la nomination est contestée, le tribunal peut nommer un tuteur remplaçant. Dans tous les cas, les décisions concernant l'enfant doivent tenir compte de l'intérêt et des droits de l'enfant.

Discussion

Par défaut, la tutelle légale d'un enfant mineur est automatiquement accordée à ses parents. Cependant, le *Code civil du Québec* permet aux parents de nommer un « tuteur datif », qui s'occupera de l'enfant et de ses biens si les deux parents décèdent, deviennent incapables ou perdent autrement leur autorité parentale. Plus précisément, le *Code civil du Québec* prévoit que :

200. Le père ou la mère peut nommer un tuteur à son enfant mineur, par testament, par un mandat de protection ou par une déclaration en ce sens transmise au curateur public.

201. Le droit de nommer le tuteur n'appartient qu'au dernier mourant des père et mère ou, selon le cas, au dernier des deux apte à assumer l'exercice de la tutelle, s'il a conservé au jour de son décès la tutelle légale.

Lorsque les père et mère décèdent en même temps ou perdent leur aptitude à assumer la tutelle au cours du même événement, en ayant chacun désigné comme tuteur une personne différente qui accepte la charge, le tribunal décide laquelle l'exercera.

En plus des éléments mentionnés ci-dessus à la question 5(a) et à moins que la nomination du tuteur ne soit contestée, la personne ainsi nommée entrera en fonction dès qu'elle l'acceptera. Si le tuteur n'a pas refusé la nomination dans les 30 jours suivant la connaissance de sa nomination, il est présumé, en vertu de l'article 202 du *Code civil du Québec*, avoir accepté la nomination. En d'autres termes, aucune demande judiciaire n'est nécessaire pour formaliser la nomination du tuteur. Toutefois, en vertu de l'article 203 du *Code civil du Québec*, lorsque le tuteur nommé par le père ou la mère de l'enfant accepte ou refuse la charge de tuteur, le tuteur est tenu d'aviser le liquidateur (c'est-à-dire la personne responsable de l'administration de la succession du défunt) et le curateur public.

Source : *Code civil du Québec*, L.Q. 1991, c. 64, art. 200-207

6. Une personne peut exclure un conjoint, un enfant ou un bel-enfant du testament.

(a) Quels sont les droits prévus par la loi au Québec pour une réclamation par un conjoint ou un enfant à la succession d'un conjoint ou d'un parent ?

Synthèse

La liberté testamentaire est assujettie à certaines restrictions en vertu du droit civil québécois. Certaines obligations subsistent après le décès du testateur, y compris l'obligation de subvenir aux besoins du conjoint marié ou uni civilement, ou des parents en ligne directe au premier degré (parents et enfants). En vertu de l'article 684 du *Code civil du Québec*, un créancier alimentaire peut réclamer les aliments dus à la succession. Toutefois, le montant maximal qui peut être accordé à un créancier alimentaire ne peut excéder la moitié de ce que cette personne aurait eu droit de recevoir en cas de succession légale.

De même, les conjoints mariés et les conjoints unis civilement ne peuvent, par testament ou contrat de mariage, déroger aux règles relatives au partage du patrimoine familial lors de la dissolution du mariage ou de l'union civile résultant du décès de l'un des époux.

Discussion

La liberté testamentaire est très large au Québec. Toutefois, la loi impose certaines restrictions à cette liberté afin d'assurer le soutien financier des membres de la famille du testateur à son décès et de protéger le patrimoine familial.

L'article 585 du *Code civil du Québec* le prévoit :

> **585.** Les époux et conjoints unis civilement de même que les parents en ligne directe au premier degré se doivent des aliments.

Cette obligation survit dans le cas du décès de la personne tenue de subvenir aux besoins de la famille. Ainsi, une personne ayant droit à une telle pension alimentaire (ex. conjoint marié ou uni civilement, ex-conjoint, parents et enfants) peut réclamer cette pension de la succession avant le partage et la distribution de la succession, dans les six mois suivant la date du décès, conformément à l'article 684 du *Code civil du Québec*. L'article 688 du *Code civil du Québec* prévoit toutefois que le montant maximal qui peut être accordé à un créancier alimentaire ne peut excéder la moitié de ce que cette personne aurait eu droit de recevoir à la suite d'une succession légale.

De même, le *Code civil du Québec* contient des règles concernant le partage du patrimoine familial (défini à l'article 415 comme incluant « les résidences de la famille ou les droits qui en confèrent l'usage, les meubles qui les garnissent ou les ornent et qui servent à l'usage du ménage, les véhicules automobiles utilisés pour les déplacements de la famille et les droits accumulés durant le mariage au titre d'un régime de retraite »). Les époux ont le droit de partager les biens du patrimoine familial, sans égard à celui des deux qui en détient la propriété. Selon l'article 391 du *Code civil du Québec*, ces règles sont d'ordre public, et un testateur ne peut priver son conjoint de son droit à la part du patrimoine familial par testament ou par contrat de mariage. Ainsi, lorsqu'un mariage ou une union civile prend fin en raison du décès de l'un des conjoints, le conjoint survivant a droit au partage du patrimoine familial (qui sera partagé également entre le conjoint survivant et les héritiers conformément à l'article 416 du *Code civil du Québec*).

Source : *Code civil du Québec*, L.Q. 1991, c. 64, art. 391, 414-416, 585, 684-695
Jacques BEAULNE, *Droit des successions*, 5e éd., Montréal, Wilson & Lafleur, 2016, p. 377

(b) Quelles sont les règles d'exonération des personnes à charge au Québec ? Le produit d'une assurance-vie versé à un bénéficiaire désigné peut-il être "récupéré" pour satisfaire la demande d'une personne à charge ?

Synthèse

Au Québec, la liberté testamentaire est soumise à certaines restrictions, dont les règles relatives à l'aide aux personnes à charge. En vertu de l'article 684 du *Code civil du Québec*, un créancier alimentaire peut réclamer la pension alimentaire due sur la succession.

En ce qui concerne les produits d'assurance-vie, définis comme des "Libéralités" en vertu du *Code civil du Québec*, des règles sont en place pour empêcher le défunt de priver son conjoint et ses enfants du droit à la survie de l'obligation alimentaire en faisant des dons entre vifs qui réduisent l'actif de la succession.

Discussion

Le droit successoral québécois permet à tout créancier d'aliments de réclamer une contribution financière d'une succession. L'article 684 stipule ce qui suit :

> **684.** Tout créancier d'aliments peut, dans les six mois qui suivent le décès, réclamer de la succession une contribution financière à titre d'aliments.
>
> Ce droit existe encore que le créancier soit héritier ou légataire particulier ou que le droit aux aliments n'ait pas été exercé avant la date du décès, mais il n'existe pas au profit de celui qui est indigne de succéder au défunt.

L'article 585 du *Code civil du Québec* stipule que les conjoints mariés ou unis civilement, et les parents en ligne directe au premier degré, se doivent mutuellement des aliments.

Par ailleurs, le *Code civil du Québec* contient des règles relatives au partage du patrimoine familial (défini à l'article 415 comme comprenant "les résidences de la famille ou les droits qui en confèrent l'usage, les biens meubles dont elles sont meublées ou décorées et qui servent à l'usage du ménage, les véhicules automobiles utilisés pour les déplacements de la famille et les avantages acquis pendant le mariage en vertu d'un régime de retraite"). Les conjoints ont le droit de partager ce patrimoine familial, peu importe lequel des conjoints est le propriétaire légal du bien. Selon l'article 391 du *Code civil du Québec*, ces règles sont d'ordre public et un testateur ne peut priver son conjoint de son droit à la participation au patrimoine familial par testament ou par son contrat de mariage. Ainsi, lorsqu'un mariage ou une union civile prend fin en raison du décès de l'un des conjoints, le conjoint survivant a droit au partage du patrimoine familial (qui sera divisé en parts égales entre le conjoint survivant et les héritiers conformément à l'article 416 du *Code civil du Québec*).

En ce qui concerne le cas particulier des polices d'assurance, les articles 687 et 691 du *Code civil du Québec* visent à empêcher le défunt de réduire l'actif de sa succession en désignant, dans les trois ans précédant son décès, un titulaire subrogé ou un bénéficiaire de la police d'assurance. Bien qu'il n'y ait pas de "récupération", ces dispositions empêchent la dépréciation de la valeur de la succession du défunt.

> **687.** Lorsque la contribution est réclamée par le conjoint ou un descendant, la valeur des libéralités faites par le défunt par acte entre vifs dans les trois ans précédant le décès et celles ayant pour terme le décès sont considérées comme faisant partie de la succession pour fixer la contribution
>
> **691.** Sont assimilés à des libéralités les avantages découlant d'un régime de retraite visé à l'article 415 ou d'un contrat d'assurance de personne, lorsque ces avantages auraient fait partie de la succession ou auraient été versés au créancier n'eût été la désignation d'un titulaire subrogé ou d'un bénéficiaire, par le défunt, dans les trois ans précédant le décès. Malgré toute disposition contraire, les droits que confèrent les avantages découlant de ces régimes ou contrats sont cessibles et saisissables pour le paiement d'une créance alimentaire payable en vertu du présent chapitre.

Source : *Code civil du Québec*, RLRQ c CCQ-1991, art. 585, 684-695.
Michel BEAUCHAMP, Commentaires sur le *Code civil du Québec* (DCQ), 2018, EYB2018DCQ163.

(c) Les beaux-enfants du défunt qui ne sont pas légalement adoptés ont-ils le droit de contester le testament ?

Synthèse

Les beaux-enfants qui n'ont pas été légalement adoptés ne font pas partie de la « parenté » de leur beau-parent décédé et, par conséquent, en l'absence d'une disposition testamentaire (p. ex. dans un testament), les beaux-enfants n'ont pas droit à la succession de leur beau-parent décédé.

Discussion

En vertu de l'article 653 du *Code civil du Québec*, à moins de dispositions testamentaires autres, la succession est dévolue au conjoint survivant qui était lié au défunt par mariage ou union civile et aux parents du défunt. En droit civil québécois, une personne est un parent d'une autre personne si elle est liée par le sang ou l'adoption (voir l'article 655 du *Code civil du Québec*).

Ainsi, les beaux-enfants qui n'ont pas été légalement adoptés n'ont pas droit à une part de la succession de leur beau-parent décédé, à moins que le beau-parent décédé n'en ait disposé autrement par testament ou autre disposition testamentaire.

Source : *Code civil du Québec*, L.Q. 1991, c. 64, art. 653, 655
Jacques BEAULNE, *Droit des successions*, 5e éd., Montréal, Wilson & Lafleur, 2016, p. 230

(d) La validité d'un testament peut-elle être contestée pour des raisons telles que le manque de capacité et l'influence indue ?

Synthèse

Les trois types de testaments au Québec, le testament notarié, le testament olographe et le testament devant témoins, peuvent être contestés avec différents niveaux de difficulté.

Discussion

Le testament étant un acte juridique, il est soumis aux mêmes vices du consentement que tout autre contrat au Québec. Les deux vices de consentement les plus courants en matière testamentaire sont l'incapacité et l'influence indue.

Au Québec, l'article 703 du *Code civil du Québec* présume que toute personne a la capacité requise pour faire un testament. De plus, l'article 707 du *Code civil du Québec* ajoute ce qui suit :

> **707.** La capacité du testateur se considère au temps de son testament.

Par conséquent, la charge de la preuve incombe au requérant qui doit établir que le testateur était incapable ou sous influence indue au moment où le testament a été fait. La contestation de la

validité d'un testament pour cause d'incapacité ou d'influence indue est une circonstance exceptionnelle.

Un élément unique à noter concernant les testaments notariés, est que les testaments notariés sont les plus difficiles à contester, puisque ces testaments sont qualifiés d'actes authentiques, conformément à l'article 2814(6) du *Code civil du Québec*. De plus, le notaire est tenu de vérifier l'identité et le consentement du testateur.

À cet égard, l'article 2819 stipule ce qui suit :

> **2819.** L'acte notarié, pour être authentique, doit être signé par toutes les parties; il fait alors preuve, à l'égard de tous, de l'acte juridique qu'il renferme et des déclarations des parties qui s'y rapportent directement.

Source : *Code civil du Québec*, RLRQ c CCQ-1991, ss. 703, 707, 2814-2821
Marilyn PICCINI ROY, Les testaments, Personnes et successions, Collection de droit 2020-2021, École du Barreau du Québec, vol. 3, 2020, EYB2020CDD76
JUSTICE QUÉBEC, Le testament notarié, en ligne, https://www.justice.gouv.qc.ca/en/your-money-and-your-possessions/wills/forms-of-will/notarial-will

7. Les clients en deuxième mariage souhaitent souvent rédiger un testament qui prévoit une répartition des biens ayant force obligatoire au premier et au deuxième décès (c'est-à-dire un testament mutuel). Les testaments mutuels sont-ils autorisés au Québec ?

Synthèse

Le concept de testament conjoint n'est pas reconnu au Québec.

Discussion

Un testament conjoint implique un accord explicite entre les parties qu'elles signeront chacune un testament pour disposer de biens d'une manière particulière, et qu'elles ne révoqueront pas leur testament respectif sans le consentement de l'autre. En vertu de l'article 704 du *Code civil du Québec* :

> **704.** Le testament est un acte juridique unilatéral, révocable, établi dans l'une des formes prévues par la loi, par lequel le testateur dispose, par libéralité, de tout ou partie de ses biens, pour n'avoir effet qu'à son décès.
>
> Il ne peut être fait conjointement par deux ou plusieurs personnes. [*Soulignement ajouté*]

La notion de testament conjoint n'est pas reconnue en droit civil québécois.

Source : *Code civil du Québec*, L.Q. 1991, c. 64, art. 704

8. L'expression "mariage de fait" est utilisée pour décrire une variété de relations. Le mariage de fait ne nécessite pas de cérémonie de mariage, de licence de mariage ou tout autre aspect formel du mariage.

(a) Quelle est la définition de conjoint de fait au Québec ?

Synthèse

Pour qu'un couple soit considéré comme étant en union de fait, il faut que les deux personnes fassent vie commune et se présentent publiquement comme un couple. En règle générale, un couple sera présumé comme faisant « vie commune » si les partenaires vivent dans une relation conjugale depuis au moins un an ou s'ils ont un enfant né de leur union.

Discussion

Selon l'article 61.1 de la *Loi d'interprétation* :

61.1. Sont des conjoints les personnes liées par un mariage ou une union civile.

Sont assimilés à des conjoints, à moins que le contexte ne s'y oppose, les conjoints de fait.

Sont des conjoints de fait deux personnes, de sexe différent ou de même sexe, qui font vie commune et se présentent publiquement comme un couple, sans égard, sauf disposition contraire, à la durée de leur vie commune. Si, en l'absence de critère légal de reconnaissance de l'union de fait, une controverse survient relativement à l'existence de la communauté de vie, celle-ci est présumée dès lors que les personnes cohabitent depuis au moins un an ou dès le moment où elles deviennent parents d'un même enfant.

Source : *Loi d'interprétation*, RLRQ, c. 64, art. 704
Jacques BEAULNE, *Droit des successions*, 5e éd., Montréal, Wilson & Lafleur, 2016, p. 141

(b) Quels sont les droits des conjoints de fait sur les biens au décès, y compris les biens qui appartenaient à l'un des conjoints avant l'union et ceux qui ont été acquis conjointement ?

Synthèse

À moins que le conjoint de fait décédé n'ait pris des dispositions concernant l'héritage du conjoint de fait survivant, en vertu du *Code civil du Québec*, les conjoints de fait n'ont pas le droit d'hériter par succession légale. De plus, contrairement aux conjoints mariés ou unis civilement, les conjoints de fait n'ont pas droit à la pension alimentaire du défunt (obligation qui se poursuit après le décès).

Au Québec, il n'y a pas de droit de survie automatique pour les biens dont les conjoints sont copropriétaires. Pour les conjoints de fait qui sont copropriétaires de biens (p. ex. la maison familiale), les options pour traiter les biens dépendront de la situation familiale du couple (c.-à-d. s'ils ont eu ou non un enfant issu de la relation).

Les conjoints de fait peuvent toutefois avoir droit à une certaine protection en vertu d'autres lois du Québec, comme le Régime de rentes du Québec (qui prévoit l'inclusion d'un conjoint de fait à titre de « conjoint survivant », en vertu de l'article 91 de la *Loi sur le Régime de rentes du Québec*), ou en vertu d'une désignation dans une police d'assurance-vie.

Discussion

À moins que l'héritage du conjoint de fait survivant n'ait été prévu dans le testament du défunt ou dans une entente de vie commune, le conjoint de fait n'est pas un héritier légal et n'aurait ni le droit de réclamer des droits à la succession (voir l'article 653 du *Code civil du Québec*), ni le droit à une pension alimentaire (voir l'article 585 du *Code civil du Québec*).

Au Québec, il n'y a pas de droit de survie automatique pour les biens dont les conjoints sont copropriétaires. Pour les conjoints de fait qui sont copropriétaires de biens (p. ex. la maison familiale), les options pour traiter les biens dépendront de la situation familiale du couple. Si un enfant est né de l'union de fait, le conjoint survivant pourrait demander au tribunal d'utiliser temporairement et exclusivement la part de la résidence qui appartenait au défunt, en se fondant sur l'article 33 du *Code civil du Québec* qui exige que les décisions concernant les enfants soient prises en tenant compte de leurs droits et intérêts. Par contre, si le couple n'avait pas d'enfant, cette option ne serait pas disponible, et le conjoint survivant pourrait devoir racheter à la succession la part de la résidence familiale qui appartenait au conjoint décédé, ou vendre et partager la propriété avec la succession.

Source : *Code civil du Québec*, L.Q. 1991, c. 64, art. 33, 585, 653, 1030
Loi sur le régime de rentes du Québec, RLRQ, c. R-9, art. 91, 105, 168
Murielle DRAPEAU, *Le statut légal des conjoints de fait au Québec*, Brossard, Publications CCH, 2013, pp. 82, 84

9. Le testament d'un client peut inclure une désignation de bénéficiaire d'une assurance-vie. S'il existe une désignation de bénéficiaire sur la police elle-même qui diffère du testament, quelle désignation s'applique et quelle législation régit cette question ?

Synthèse

À moins que le testateur n'ait fait une désignation irrévocable sur sa police d'assurance-vie, le testateur peut modifier ou révoquer une désignation de bénéficiaire d'assurance-vie par testament. En cas de conflit entre une désignation dans le testament et une désignation révocable faite dans une police d'assurance-vie, c'est la dernière de ces désignations qui prévaut.

Discussion

L'article 2446 du *Code civil du Québec* prévoit que :

> **2446.** La désignation de bénéficiaires ou de titulaires subrogés se fait dans la police ou dans un autre écrit revêtu, ou non, de la forme testamentaire.

De plus, en vertu de l'article 2450 du *Code civil du Québec* :

> **2450.** La désignation ou la révocation contenue dans un testament nul pour vice de forme n'est pas nulle pour autant; mais elle l'est si le testament est révoqué.
>
> Cependant, la désignation ou la révocation contenue dans un testament ne vaut pas à l'encontre d'une autre désignation ou révocation postérieure à la signature du testament. Elle ne vaut pas, non plus, à l'encontre d'une désignation antérieure à la signature du testament, à moins que le testament ne mentionne la police d'assurance en cause ou que l'intention du testateur à cet égard ne soit évidente.

Sources : *Code civil du Québec*, L.Q. 1991, c. 64, art. 2446, 2450
Serge LESSARD, « Pièges et stratégies lors de la désignation des bénéficiaires de polices d'assurance dans le testament », *Cours de perfectionnement du notariat (2014)*, 2014 EYB2014CPN116
Régime de sécurité sociale, Syndicat des débardeurs, section locale 375 c. Berthelet, REJB 2000-17454 (C.S.)

10. Un testament est homologué pour donner à l'exécuteur testamentaire ou au fiduciaire de la succession le pouvoir de gérer les biens du défunt.

(a) Y a-t-il des frais d'homologation au Québec et si oui, comment sont-ils déterminés ?

Synthèse

Les testaments, autres que les testaments notariés, doivent être soumis à la Cour supérieure du Québec pour homologation. Bien qu'il n'y ait pas de frais d'homologation dans la province de Québec, des frais de dépôt de 209,00 $ (pour les demandeurs qui sont des personnes physiques ou morales) seront facturés au demandeur. Le demandeur peut également être tenu de payer des frais juridiques pour préparer la demande d'homologation.

Discussion

L'article 772 du *Code civil du Québec* prévoit que :

> **772.** Le testament olographe ou devant témoins est vérifié, à la demande de tout intéressé, en la manière prescrite au Code de procédure civile (chapitre C-25.01).
>
> Les héritiers et successibles connus doivent être appelés à la vérification du testament, sauf dispense du tribunal.

Source : *Code civil du Québec*, L.Q. 1991, c. 64, art. 772
Code de procédure civile, RLRQ, c. C-25.01, art. 570
Tarif judiciaire en matière civile, R.R.Q., 1981, c. T-16, r. 10, art. 15(8)

(b) Quels sont les biens qui passent en dehors de la succession et qui ne sont donc pas soumis à l'homologation ?

Synthèse

Le type d'actif n'est pas pertinent pour déterminer si la succession est soumise ou non à l'homologation au Québec.

Discussion

Au Québec, différents types de testaments sont soumis à l'homologation, et non pas divers types de biens. En effet, les testaments, autres que les testaments notariés, c'est-à-dire le testament olographe et le testament devant témoins, doivent être homologués par la Cour supérieure du Québec.

Le testament notarié n'est pas soumis à la probation puisqu'il s'agit d'un acte authentique.

Source : *Code Civil du Québec*, RLRQ c CCQ-1991, art. 777
Marilyn PICCINI ROY, Les dispositions testamentaires et les legs, Personnes et successions, Collection de droit 2020-2021, École du Barreau du Québec, vol. 3, 2020, EYB2020CDD77
Michel BEAUCHAMP, La vérification des testaments et les lettres de vérification, Précis de procédure civile du Québec, Volume 2 (Art. 302-320, 345-777 C.p.c.), 6e édition, 2020

(c) Les testaments multiples peuvent-ils être utilisés pour éviter l'homologation ?

Synthèse

Les testaments multiples ne peuvent pas être utilisés pour éviter l'homologation au Québec.

Discussion

Pour éviter l'homologation au Québec, un seul testament notarié est nécessaire, comme il est mentionné aux points (a) et (b) ci-dessus.

11. Une personne peut utiliser une procuration pour déléguer à une autre personne la capacité de s'occuper des biens et des questions financières en son nom.

(a) Quelle est la législation qui régit les procurations au Québec ?

Synthèse

Le *Code civil du Québec*¸ régit la possibilité de déléguer à une autre personne la capacité de s'occuper des biens et des questions financières en son nom. Au Québec, une telle relation s'appelle un mandat.

Le *Code civil du Québec*, crée une deuxième relation, appelée mandat de protection qui est donné par une personne majeure en prévision de son incapacité à prendre soin d'elle-même ou à administrer ses biens. Les mandats de protection sont décrits plus en détail à la question 12.

(b) Quel type de pouvoir peut être accordé en vertu d'une procuration et quelles en sont les limites ?

Synthèse

En général, les pouvoirs qui peuvent être accordés en vertu d'une procuration sont décrits aux articles 2130 et 2131 du *Code civil du Québec*. En général, les pouvoirs du mandataire s'étendent non seulement à ce qui est spécifié dans le mandat, mais aussi à tout ce qui y est accessoire.

Un mandat peut être spécial, c'est-à-dire donné dans un but unique et précis. Dans ce cas, il doit être formellement exprimé.

En outre, la portée du mandat est limitée par l'incapacité du mandant, auquel cas un mandat de protection peut entrer en vigueur.

Discussion

Les articles 2130 et 2131 du *Code civil du Québec* définissent le mandat et son objet comme suit :

> **2130.** Le mandat est le contrat par lequel une personne, le mandant, donne le pouvoir de la représenter dans l'accomplissement d'un acte juridique avec un tiers, à une autre personne, le mandataire qui, par le fait de son acceptation, s'oblige à l'exercer.
>
> Ce pouvoir et, le cas échéant, l'écrit qui le constate, s'appellent aussi procuration.
>
> **2131.** Le mandat peut aussi avoir pour objet les actes destinés à assurer, en prévision de l'inaptitude du mandant à prendre soin de lui-même ou à administrer ses biens, la protection de sa personne, l'administration, en tout ou en partie, de son patrimoine et, en général, son bien-être moral et matériel.

2136 du *Code civil du Québec* décrit comment les pouvoirs du mandataire pourraient s'étendre au-delà de ce qui est expressément écrit dans le mandat :

> **2136.** Les pouvoirs du mandataire s'étendent non seulement à ce qui est exprimé dans le mandat, mais encore à tout ce qui peut s'en déduire. Le mandataire peut faire tous les actes qui découlent de ces pouvoirs et qui sont nécessaires à l'exécution du mandat.

Sources : *Code civil du Québec*, RLRQ c CCQ-1991, art. 2130, 2131, 2135, 2136 et 2166
https://www.justice.gouv.qc.ca/en/your-money-and-your-possessions/power-of-attorney-and-protective-supervision/power-of-attorney-mandate/the-contract

(c) Quelles sont les formalités de signature d'une procuration au Québec et peut-elle être signée virtuellement ?

Synthèse

Le mandat étant un contrat, il est soumis aux mêmes formalités que tout autre contrat au Québec. Par conséquent, il peut être donné oralement, par écrit ou virtuellement.

Discussion

L'article 1385 du *Code civil du Québec* décrit comment un contrat est formé au Québec :

> **1385.** Le contrat se forme par le seul échange de consentement entre des personnes capables de contracter, à moins que la loi n'exige, en outre, le respect d'une forme particulière comme condition nécessaire à sa formation, ou que les parties n'assujettissent la formation du contrat à une forme solennelle.

Il est aussi de son essence qu'il ait une cause et un objet.

En outre, l'article 1387 explique quand le contrat est formé :

> **1387.** Le contrat est formé au moment où l'offrant reçoit l'acceptation et au lieu où cette acceptation est reçue, quel qu'ait été le moyen utilisé pour la communiquer et lors même que les parties ont convenu de réserver leur accord sur certains éléments secondaires.

Sources : *Code Civil du Québec*, RLRQ c CCQ-1991, art. 1385, 1387

12. Une personne peut utiliser une directive ou un autre document en vertu duquel la prise de décision en matière de soins de santé et de soins personnels peut être déléguée.

(a) Quel est le terme approprié pour ce type de document au Québec et quelle est la législation qui le régit ?

Synthèse

Au Québec, le terme approprié pour ce type de document est un mandat de protection. Ils sont régis par le *Code civil du Québec*.

Discussion

Un mandat de protection est un moyen pour une personne d'exprimer ses souhaits à l'avance. Le mandat de protection, est un document écrit dans lequel un individu majeur et capable, appelé le mandant, désigne une ou plusieurs personnes, appelées mandataires, pour prendre soin de sa personne et/ou administrer ses biens, en cas d'incapacité à le faire, de manière temporaire ou permanente.

Dans le mandat de protection, le mandant peut inscrire ses souhaits concernant tous les soins médicaux, y compris les soins de fin de vie, qui peuvent ou non être proposés. Le mandant a toute latitude pour rédiger ses souhaits. De même, les clauses relatives à l'administration de ses biens peuvent être rédigées de manière très générale ou très détaillée, et contenir une liste d'actes d'administration précis.

Les règles particulières qui régissent les mandats de protection au Québec sont décrites aux articles 2166 et suivants du *Code civil du Québec*.

> **2166.** Le mandat de protection est celui donné par une personne majeure en prévision de son inaptitude à prendre soin d'elle-même ou à administrer ses biens; il est fait par acte notarié en minute ou devant témoins.
>
> Son exécution est subordonnée à la survenance de l'inaptitude et à l'homologation par le tribunal, sur demande du mandataire désigné dans l'acte.

Sources : *Code Civil du Québec*, RLRQ c CCQ-1991, art. 2166
BARREAU DU QUÉBEC, COLLÈGE DES MÉDECINS DU QUÉBEC, Les médecins et le consentement aux soins, Document de référence 09/2018

(b) Quelles sont les formalités d'exécution de ce document au Québec et peut-il être exécuté virtuellement ?

Synthèse

Le mandat de protection peut être établi devant témoins ou par acte notarié. Il est alors inscrit sur le registre des mandats de protection. Cela dit, l'exécution du mandat de protection est subordonnée à la survenance de deux événements (1) l'incapacité et (2) l'homologation par le tribunal à la demande du mandataire désigné dans l'acte.

Discussion

Actuellement, les seules règles au Québec concernant la capacité de signer virtuellement des mandats de protection concernent les circonstances sans précédent entourant la pandémie de Covid-19 et les règles de distanciation physique en place au Québec.

(c) En l'absence d'une directive écrite, à qui les professionnels de la santé s'adresseront-ils pour prendre les décisions relatives au traitement d'une personne incapable ?

Synthèse

Lorsque les soins sont requis pour un majeur inapte, le pouvoir de consentir est confié au mandataire désigné en vertu du mandat de protection. À défaut d'une telle représentation, le consentement est donné par le conjoint, qu'il soit marié, uni civilement ou uni de fait, ou, à défaut de conjoint ou si le conjoint est inapte à consentir, par un proche parent ou une personne qui manifeste un intérêt particulier pour le majeur.

Discussion

L'article 15 du *Code civil du Québec* décrit la situation particulière où une personne incapable n'a pas donné son consentement préalable à la représentation.

> **15.** Lorsque l'inaptitude d'un majeur à consentir aux soins requis par son état de santé est constatée et en l'absence de directives médicales anticipées, le consentement est donné par le mandataire, le tuteur ou le curateur. Si le majeur n'est pas ainsi représenté, le consentement est donné par le conjoint, qu'il soit marié, en union civile ou en union de

fait, ou, à défaut de conjoint ou en cas d'empêchement de celui-ci, par un proche parent ou par une personne qui démontre pour le majeur un intérêt particulier.

De plus, le conjoint ou le proche parent doit agir conformément à l'article 12 du *Code civil du Québec.*

> **12.** Celui qui consent à des soins pour autrui ou qui les refuse est tenu d'agir dans le seul intérêt de cette personne en respectant, dans la mesure du possible, les volontés que cette dernière a pu manifester.
>
> S'il exprime un consentement, il doit s'assurer que les soins seront bénéfiques, malgré la gravité et la permanence de certains de leurs effets, qu'ils sont opportuns dans les circonstances et que les risques présentés ne sont pas hors de proportion avec le bienfait qu'on en espère.

Sources : *Code Civil du Québec*, RLRQ c CCQ-1991, ss. 2166
Hélène GUAY Les droits de la personnalité, Personnes et successions, Collection de droit 2020-2021, École du Barreau du Québec, vol. 3, 2020,EYB2020CDD107

Pour toute question relative au testament, à la succession et à la fiducie au Québec, veuillez communiquer avec :

André J. Barette, TEP
Borden Ladner Gervais LLP
900 - 1000 rue De La Gauchetière Ouest
Montréal, QC H3B 5H4
(514) 954-3128
abarette@blg.com

QUEBEC (English)

Prepared by Noah Weinstein and Mathieu Lacasse of Borden Ladner Gervais LLP
(April, 2021)

1. Many people don't have a will, which means that their estate will be governed by the rules of intestacy.

(a) For a married person with children, what is the division of assets upon an intestacy?

Summary

When a person dies without a will, the deceased's succession devolves to the married spouse or civil union spouse and/or relatives in accordance with the rules in Book 3, Title Three of the *Civil Code of Quebec*.

According to section 666 *Civil Code of Quebec*, if a married person dies leaving a married spouse or civil union spouse, and descendants (including but not limited to children), then the deceased's succession will be shared among the surviving married spouse (or civil union spouse), who is entitled to one-third of the succession, and the descendants, who are entitled to the remaining two-thirds. It should be noted that these proportions remain the same whether or not the descendants are children of the deceased's marriage or civil union with the surviving married (or civil union) spouse.

In Quebec law, a common law or *de facto* spouse is not considered an heir on intestacy.

Discussion

The distribution of an intestate estate is determined in accordance with Book Three, Title Three of the *Civil Code of Quebec*, and section 653 provides that:

> **653.** Unless otherwise provided by testamentary provisions, a succession devolves to the surviving married or civil union spouse and relatives of the deceased, in the order and according to the rules provided in this Title. Where there is no heir, it falls to the State.

Section *655 Civil Code of Quebec* provides that a person's status as a "relative" is determined based on ties of blood or adoption.

Pursuant to section 666 of the *Civil Code of Quebec*:

> **666.** If the deceased leaves a spouse and descendants, the succession devolves to them.
>
> The spouse takes one-third of the succession and the descendants, the other two-thirds.

It is important to note that a common law relationship (sometimes referred to in Quebec as a *de facto* union) is not the same as a civil union. A civil union is a solemn act by which two people of the same or opposite sex make a public commitment before a designated officiant (*e.g.* a civil officiant such as a notary public) to live together, and to respect the rights and obligations of a

civil union. Unlike marriage, a civil union is valid only within the province of Quebec. In Quebec civil unions are governed by sections 521.1 and following of the *Civil Code of Quebec.* A *de facto* union does not entitle an individual to inherit on intestacy.

In the case where an individual has died leaving a married (or civil union) spouse and children, then the spouse would inherit one third of the succession, and the children (whether or not they are children of the marriage or civil union, as the children's status of "descendants" is determined in relation to the deceased in accordance with sections 655 and 658 of the *Civil Code of Quebec*) would inherit the remaining two-thirds of the succession.

Source: *Civil Code of Quebec*, RLRQ c CCQ-1991, ss. 653, 655, 658, 666

(b) What is the division for an unmarried person with no children?

Summary

The assets of an unmarried person with no children would be separated equally between their parents and their siblings.

Discussion

The *Civil Code of Quebec* outlines various different situations for people who are not married (or in a civil union). Section 667 of the *Civil Code of Quebec* states that where there is no spouse, the entire succession deolves to the descendants (including children or grandchildren).

The 670 of the *Civil Code of Quebec,* defines the father and mother of the deceased as privileged ascendants and the brothers and sisters of the deceased and their descendants in the first degree as privileged collaterals.

674 of the *Civil Code of Quebec* outlines the situation where the deceased person dies with no descendants or spouse. In that case, their succession is partitioned equally between the privileged ascendants and the privileged collaterals. Furthermore, where there are no privileged ascendants, the privileged collaterals inherit the entire succession, and vice versa.

Source: *Civil Code of Quebec*, RLRQ c CCQ-1991, ss. 667, 670, 674

2. A will may be made but its existence may not be known to family members. Is there a will registry in Quebec?

Summary

There are two separate will registries in Quebec:

- The *Registre des dispositions testamentaires et des mandats* of the Chambre des notaires du Québec, which records all of the wills prepared or registered by Quebec notaries, including the date on which the will was made and the name and address of the notary in possession of the document; and

- The Register of wills and mandates of the Barreau du Québec.

However, as the *Civil Code* contemplates wills made before two witnesses (which need not necessarily be prepared by a lawyer) and holograph wills (which are typically kept by the testator) in addition to notarial wills, it is not a mandatory requirement that all wills be recorded in a registry.

Discussion

When a person dies in Quebec, the liquidator is required by section 803 of the *Civil Code of Quebec* to make a search to ascertain whether the deceased made a will. The liquidator must search the personal papers and effects of the deceased (including the deceased's safety deposit boxes, if any). In addition, the liquidator must make a request for a will search from each of the Registers of wills and mandates of the Barreau du Québec and the *Registre des dispositions testamentaires et des mandats* of the Chambre des notaires du Québec. In order to request a search, the liquidator must produce either the Act of Death or the Death Certificate issued by the Directeur de l'état civil.

In Quebec, notarial wills must be recorded in the *Registre des dispositions testamentaires et des mandats* of the Chambre des notaires du Québec. Similarly, wills made with a lawyer are automatically registered in the Registers of wills and mandates of the Barreau du Québec.

However, as the *Civil Code* contemplates wills made before two witnesses (which need not necessarily be prepared by a lawyer) and holograph wills (which are typically kept by the testator) in addition to notarial wills, it is not a mandatory requirement that all wills be recorded in a registry.

Source: *Civil Code of Quebec*, RLRQ c CCQ-1991, ss. 712, 718, 803
Notaries Act, CQLR c N-3, s. 95.
Règlement sur les registres de la Chambre des notaires du Québec, RLQR c N-3, r 13, ss. 1, 5
Act respecting the Barreau du Québec, CQLR c B-1, s. 15(3)e)
Règlement sur les registres des dispositions testamentaires et des mandats donnés en prévision de l'inaptitude, RLRQ c B-1, r 18, ss. 5, 8
Jacques BEAULNE, *Droit des successions*, 5e éd., Montréal, Wilson & Lafleur, 2016, p. 377.
Michel BEAUCHAMP, « Commentaire sur l'article 613 C.c.Q. », dans *Commentaires sur le Code civil du Québec (DCQ)*, 2018 EYB2018DCQ85.

3. Each province has rules for ensuring that wills are validly executed.

(a) What are the formalities for the proper execution of a will in Quebec?

Summary

In Quebec, there are three forms of wills that may be made: the notarial will, the holograph will and the will made in the presence of witnesses. Each of these has its own formalities for their

proper execution, and, according to section 713 of the *Civil Code of Quebec*, failure to observe the formalities would result in the nullity of the will.

Discussion

For a notarial will, section 716 of the *Civil Code of Quebec* states that, a notarial will is executed by a notary, en minute, in the presence of a witness or, in certain cases, two witnesses. The date and place of the making of the will must also be noted on the will.

For a holograph will, section 726 of the *Civil Code of Quebec* says that a holograph will shall be written entirely by the testator and signed by him, without the use of technical means. There are no other formal requirements.

For a will made in the presence of witnesses, section 727 of the *Civil Code of Quebec* establishes that a will made in the presence of witnesses is written by the testator or by a third person.

If the will is written by the testator, the testator then must declare in the presence of two witnesses of full age that the document he is presenting is his will. He need not divulge its contents. He signs it at the end or, if he has already signed it, acknowledges his signature; he may also cause a third person to sign it for him in his presence and according to his instructions.

If the will is written by a third person or by technical means, the testator and the witnesses must initial or sign each page of the act, which does not bear their signature.

Source: *Civil Code of Quebec*, RLRQ c CCQ-1991, ss. 712, 713, 716, 726, 727 JUSTICE QUEBEC, *Formes reconnues de testaments,* on line, https://www.justice.gouv.qc.ca/votre-argent-et-vos-biens/le-testament/formes-reconnues-de-testament/

(b) How many witnesses are required?

Summary

For a notarial will one witness is required, for a holograph will no witnesses are required, and for a will made in the presence of witnesses, two witnesses are required.

Discussion

For a notarial will, one witness is required. More specifically, pursuant to section 717 of the *Civil Code of Quebec*, a notarial will is read by the notary to the testator alone or, if the testator chooses, in the presence of a witness. Once the reading is done, the testator shall declare in the presence of the witness that the act read contains the expression of his last wishes. The will is then signed by the testator, the witness and the notary, in each other's presence.

The holograph will does not have a witness requirement.

For a will made in the presence of witnesses, two witnesses are required. More specifically, pursuant to section 727 of the *Civil Code of Quebec*, the testator must declare in the presence of two witnesses of full age that the document he is presenting is his will, the witnesses must sign the

will with the testator. If the will is written by a third person or by technical means, the testator and the witnesses initial or sign each page of the act which does not bear their signature.

The witnesses to both the notarial will and the will made in the presence of two witnesses must be an adult of full age and must not benefit under the will.

Source: *Civil Code of Quebec*, RLRQ c CCQ-1991, ss. 717, 726, 727 JUSTICE QUEBEC, *Formes reconnues de testaments,* on line, https://www.justice.gouv.qc.ca/votre-argent-et-vos-biens/le-testament/formes-reconnues-de-testament/

(c) Can a will be executed virtually and if so what are the rules?

Currently, the only rules in Quebec regarding the ability to virtually sign wills pertain to the unprecedented circumstances surrounding the Covid-19 pandemic and the physical distancing rules in place in Quebec.

Source: *Civil Code of Quebec*

(d) Is a holograph will permitted in Quebec and if so what are the rules?

Summary

Pursuant to section 712 of the *Civil Code of Quebec*, the province of Quebec allows for holograph wills, which are defined at section 726 as a will that is written entirely by the testator without the use of technical means, and signed by the testator.

Discussion

The *Civil Code of Quebec* recognizes three types of wills:

- the notarial will (*i.e.*, a will that is executed by a notary *en minute*, in the presence of a witness or witnesses, with the date and place of making of the will noted on the will);

- the will made in the presence of witnesses (*i.e.* a will that is made in writing, either by the testator or a third party, with or without the use of technical means, signed by the testator and two witnesses of the full age of majority); and

- the holograph will.

A holograph will must be written entirely in the testator's own handwriting and cannot be drawn up using any technical means, such as typewriters, computers or forms. The holograph will must be signed by the testator. No other formalities are required.

After the death of the testator, unlike notarial wills, holograph wills are required to be probated in accordance with the *Code of Civil Procedure*.

Source: *Civil Code of Quebec*, RLRQ c CCQ-1991, ss. 712, 716-731
Code of Civil Procedure, CQLR c C-25.01

4. According to provincial legislation, how is a person's will affected by the following changes in personal circumstances?

(a) If a person gets married;

Summary

Marriage does not revoke a will in Quebec.

Discussion

Sections 763-771 of the *Civil Code of Quebec* deal with revocation of a will. Marriage does not result in the revocation of a will.

Source: *Civil Code of Quebec*, RLRQ c CCQ-1991, ss. 763-771
Jacques BEAULNE, *Droit des successions*, 5e éd., Montréal, Wilson & Lafleur, 2016, p. 156.

(b) If a person gets divorced; or

Summary

Section 764 of the *Civil Code of Quebec* provides that if a testator's marriage is terminated by a divorce, or their civil union is dissolved, or the marriage or civil union is declared null by a court during the lifetime of the spouses, a legacy made to the former married spouse (or civil union spouse) is revoked, unless the testator manifested a contrary intention by means of testamentary provisions. Further, the revocation of a legacy also entails the revocation of the former spouse's appointment as the liquidator of the deceased's succession. The will remains valid.

This section applies even where the testator made their will prior to the coming into force of the *Civil Code of Quebec* on January 1, 1994.

Discussion

Pursuant to section 764 of the *Civil Code of Quebec*, if a testator's marriage terminates by a divorce or is declared null by a court during the spouses' lifetimes, or in the case of a civil union, if the civil union is dissolved, or the civil union is declared null by a court during the lifetime of the spouses, then any legacies made to the former spouse are revoked, unless the testator manifests a contrary intention by way of a testamentary provision.

A "testamentary provision" includes gifts made by a will, a provision of a marriage contract dealing with the disposition of property on death, or a gift *mortis causa* (*i.e.*, a gift which is conditional upon the death of the donor, and where the divesting of the donor's property takes place only upon the death of the donor).

Furthermore, section 768 of the *Civil Code of Quebec* provides that a subsequent testamentary provision, entails a tacit revocation of a revocation of a previous provision to the extent that they are inconsistent, which is an important consideration in drafting subsequent testamentary provisions.

This provision applies to successions opened on or after the coming into force of the *Civil Code of Quebec* on January 1, 1994, whether or not the will was made before that date.

Source: *Civil Code of Quebec*, RLRQ c CCQ-1991, ss. 764, 1806, 1808
Deschênes c. Lechasseur, 2018 QCCS 1407, paras. 11-29
Sirois c. Lamarre, [1998] RJC 1573 (QCCS); affirmed, EYB 2000-17091 (QCCA)
Germain BRIÈRE, *La révocation du testament ou d'un legs. Les successions*, Collection Traité de droit civil, Centre de recherche en droit privé & comparé du Québec, 1994 EYB1994SUC26.

(c) If a person becomes separated from their spouse

Summary

By law, separation differs from divorce. Where a person is separated from their spouse, their will is not impacted – it is neither revoked, nor are the legacies to the separated spouse revoked.

Discussion

A married person's will remains valid even if they have separated from their spouse. It is only a divorce, a dissolution of a civil union or a declaration of nullity of the marriage or civil union by a court that causes legacies in favour of the former married or civil union spouse to be revoked. For further information, see question 4(b), above.

Source: *Civil Code of Quebec*, RLRQ c CCQ-1991, s. 764
Germain BRIÈRE, *La détermination des droits des différents ordres de successibles. Les successions*, Collection Traité de droit civil, Centre de recherche en droit privé & comparé du Québec, 1994 EYB1994SUC16.

5. A person can designate a guardian of their children in their will.

(a) Is guardianship of children as provided in a will binding in Quebec?

Summary

In Quebec, the concept of "guardianship of children" is refered to as tutorship, which is established in the interest of the minor, it is intended to ensure the protection of the minor's person, the administration of his patrimony and, generally, to secure the exercise of his civil rights. Tutorship to minors is governed by sections 177 to 191 of the *Civil Code of Quebec.*

More specifically, parents are usually the "tutors" of their minor children, but if both parents die, become incapable or lose their parental authority, a dative tutor is named.

The designation of a tutor could be contested, or the tutor appointed by the parents could refuse the tutorship.

Discussion

By default, if the named tutor does not refuse office within 30 days of learning of their appointment, the tutor is presumed to have accepted it. In cases where the tutor is no longer able to perform their duties, for instance if the tutor dies, resigns, or if the tutorship is contested, the court could designate the tutor. That being said, the *Civil Code of Quebec* provides that:

> **202.** Unless the designation is contested, the tutor appointed by the father or mother assumes office upon accepting it.
>
> If the person does not refuse the office within 30 days after learning of his appointment, he is presumed to have accepted.
>
> **204**. Where the person appointed by either parent refuses the tutorship, he shall without delay give notice of his refusal to the replacement, if any, designated by the parent.
>
> The person may, however, retract his refusal before the replacement accepts the office or an application to institute tutorship is made to the court.

Additionally, the appointment is not binding, pursuant to section 250 of the *Civil Code of Quebec*, the court may, on application by the tutor themselves, relieve the tutor of his or her duties "for a serious reason". Similarly, section 251 entitles the tutorship council (*i.e.* a person or group of persons charged with the supervision and oversight of the tutor in accordance with sections 222-239 of the *Civil Code of Quebec*) or any interested person, including the Public Curator, to apply for the replacement of a tutor who is unable to perform or neglects his or her duties.

Pursuant to section 205 of the *Civil Code of Quebec*, the court may also intervene to appoint a tutor "where it is expedient to appoint a tutor or a replacement, to appoint a tutor ad hoc or a tutor to property or where the designation of a tutor appointed by the father and mother is contested."

In accordance with section 33 of the *Civil Code of Quebec*,

> **33.** Every decision concerning a child shall be taken in light of the child's interests and the respect of his rights.
>
> Consideration is given, in addition to the moral, intellectual, emotional and physical needs of the child, to the child's age, health, personality and family environment, and to the other aspects of his situation.

On that basis, when considering applications regarding tutorship of minor children, the court is required to take into account the child's interests and rights.

Source: *Civil Code of Quebec*, RLRQ c CCQ-1991, ss. 33, 177, 200-207, 222, 250-251
CURATEUR PUBLIC DU QUÉBEC, *Designation of a dative tutor by the parents,* on line, https://www.curateur.gouv.qc.ca/cura/en/mineur/tutelle-biens/acteurs/designation-tuteur.html

(b) Does Quebec give authority to the courts to vary the guardianship appointment in a will? And if so, are there any restrictions on how and when a court can change the guardian?

Summary

The *Civil Code of Quebec* provides that a father or mother may appoint a dative tutor to his or her minor child to look after their child's wellbeing and property in the event of the death or incapacity of both parents (or their loss of parental authority), including by will.

The tutor assumes their office upon accepting it, and if they have not declined the role within 30 days of learning of their appointment, then they are presumed to have accepted.

The court may, on application by the tutor, relieve the tutor of his or her duties for a serious reason. The court may also, on the application by the tutorship council or any interested person, remove a tutor who is unable to carry out or neglects his or her duties. Where the appointment is contested, the court may appoint a tutor or replacement tutor. In all cases, decisions concerning the child must take into account the child's interests and rights.

Discussion

By default, legal tutorship of a minor child is automatically granted to his or her parents. However, the *Civil Code of Quebec* allows parents to appoint a "dative tutor", who will care for the child and his or her property if both parents die, become incapable, or otherwise lose their parental authority. Specifically, the *Civil Code of Quebec* provides that:

> **200.** A father or mother may appoint a tutor to his or her minor child by will, by a protection mandate or by filing a declaration to that effect with the Public Curator.
>
> **201.** The right to appoint a tutor belongs exclusively to the last surviving parent or to the last parent who is able to exercise tutorship, as the case may be, if that parent has retained legal tutorship to the day of his death.
>
> Where both parents die simultaneously or lose the ability to exercise tutorship during the same event, each having designated a different person as tutor, and both persons accept the office, the court decides which person will exercise it.

In addition to the elements mentioned above in question 5(a), unless the appointment as tutor is contested, the person so appointed will assume their office upon accepting it. If the tutor has not declined the role within 30 days of learning of their appointment, then they are presumed, pursuant to section 202 of the *Civil Code of Quebec*, to have accepted the appointment. In other words, no court application is necessary to formalize the appointment of the tutor. However, pursuant to section 203 of the *Civil Code of Quebec*, when the tutor appointed by the father or mother of the child accepts or refuses the office of tutor, the tutor is required to give notice to the liquidator (i.e. the person responsible for administering the deceased's estate, referred to as a "succession") and the Public Curator.

Source: *Civil Code of Quebec*, RLRQ c CCQ-1991, ss. 200-207

6. A person might exclude a spouse, child or stepchild from the will.

(a) What are the legislated rights in Quebec for a claim by a spouse or a child to the estate of a spouse or parent?

Summary

Testamentary freedom is subject to certain restrictions under Quebec civil law. Certain obligations survive the death of the testator, including any obligations to provide support for their married or civil union spouses, or their relatives in the direct line in the first degree (*i.e.* parents and children). Pursuant to section 684 of the *Civil Code of Quebec*, a support creditor may claim the support owed from the succession. However, the maximum amount that may be granted to a support creditor cannot exceed one half of what that person would have been entitled to receive on intestacy.

Similarly, married and civil union spouses may not, by a will or marriage contract, derogate from the rules relating to the partition of family patrimony on the dissolution of the marriage or civil union resulting from the death of one of the spouses.

Discussion

Testamentary freedom is very broad in Quebec. However, the law imposes certain restrictions to that freedom in order to ensure the financial support of the testator's family members on the testator's death and to protect the family patrimony.

Section 585 of the *Civil Code of Quebec* provides that:

> **585.** Married or civil union spouses, and relatives in the direct line in the first degree, owe each other support.

This obligation survives the death of the person required to provide support. Thus, a person entitled to such support (*e.g.* married or civil union spouses, former spouses, parents and children) can claim it from the succession before the partition and distribution of the succession, within six months after the date of death, in accordance with section 684 of the *Civil Code of Quebec*. Section 688 of the *Civil Code of Quebec* provides, however, that the maximum amount that may be granted to a support creditor cannot exceed one half of what that person would have been entitled to receive on intestacy.

Similarly, the *Civil Code of Quebec* contains rules regarding the partition of family patrimony (defined at section 415 to include "the residences of the family or the rights which confer use of them, the movable property with which they are furnished or decorated and which serves for the use of the household, the motor vehicles used for family travel and the benefits accrued during the marriage under a retirement plan"). The spouses are entitled to share in that family patrimony regardless of whether or not the spouses are legal owners of the property. Per section 391 of the *Civil Code of Quebec*, these rules are of public order, and a testator may not deprive their spouse of their entitlement to share in the family patrimony by will or by their marriage contract. Thus, when a marriage or civil union ends by reason of the death of one of the spouses, the surviving

spouse is entitled to the partition of the family patrimony (which will be equally divided between the surviving spouse and the heirs in accordance with section 416 of the *Civil Code of Quebec*.

> Source: *Civil Code of Quebec*, RLRQ c CCQ-1991, ss. 391, 414-416, 585, 684-695.
> Jacques BEAULNE, *Droit des successions*, 5e éd., Montréal, Wilson & Lafleur, 2016, p. 377.

(b) What are the dependants relief rules in Quebec? Can life insurance proceeds paid to a named beneficiary be "clawed back" to satisfy a dependant's claim?

Summary

In Quebec, testamentary freedom is subject to certain restrictions, including the dependant relief rules. Pursuant to section 684 of the *Civil Code of Quebec*, a support creditor may claim the support owed from the succession.

When it comes to life insurance proceeds, defined as "liberalities" under the *Civil Code of Quebec* has rules in place to prevent the deceased from depriving his or her spouse and children of the right to survival of the support obligation by making inter vivos gifts that reduce the assets of the estate.

Discussion

Quebec estate law allows every creditor of support to claim a financial contribution from a succession. Section 684 states:

> **684.** Every creditor of support may within six months after the death claim a financial contribution from the succession as support.
>
> The right exists even where the creditor is an heir or a legatee by particular title or where the right to support was not exercised before the date of the death, but does not exist in favour of a person unworthy of inheriting from the deceased.

Section 585 of the *Civil Code of Quebec*, outlines that married or civil union spouses, and relatives in the direct line in the first degree, owe each other support.

Furthermore, the *Civil Code of Quebec* contains rules regarding the partition of family patrimony (defined at section 415 to include "the residences of the family or the rights which confer use of them, the movable property with which they are furnished or decorated and which serves for the use of the household, the motor vehicles used for family travel and the benefits accrued during the marriage under a retirement plan"). The spouses are entitled to share in that family patrimony regardless of which spouse is the legal owner of the property. Per section 391 of the Civil Code of Quebec, these rules are of public order, and a testator may not deprive their spouse of their entitlement to share in the family patrimony by will or by their marriage contract. Thus, when a marriage or civil union ends by reason of the death of one of the spouses, the surviving spouse is entitled to the partition of the family patrimony (which will be equally divided between the surviving spouse and the heirs in accordance with section 416 of the *Civil Code of Quebec*).

When it comes to the specific case of insurance policies, sections 687 and 691 of the *Civil Code of Quebec*, intend to prevent the deceased from reducing the assets of their estate by designating, within three years preceding their death, a subrogated holder or a beneficiary of the insurance policy. Though there is not a "claw back" these provisions do prevent the depreciation of the value of the estate of the deceased.

> **687**. Where the contribution is claimed by the spouse or a descendant, the value of the liberalities made by the deceased by act inter vivos during the three years preceding the death and those having the death as a term are considered to be part of the succession for the fixing of the contribution.
>
> **691.** Benefits under a retirement plan contemplated in article 415 or under a contract of insurance of persons, where these benefits would have been part of the succession or would have been paid to the creditor had it not been for the designation of a subrogated holder or a beneficiary, by the deceased, during the three years preceding the death, are considered to be liberalities. Notwithstanding any provision to the contrary, rights conferred by benefits under any such plan or contract may be transferred or seized for the payment of support due under this chapter.

Source: *Civil Code of Quebec*, RLRQ c CCQ-1991, ss. 585, 684-695.
Michel BEAUCHAMP, *Commentaires sur le Code civil du Québec* (DCQ), 2018, EYB2018DCQ163.

(c) Do stepchildren of the deceased who are not legally adopted have any rights to challenge the will?

Summary

Step children who have not been legally adopted are not "relatives" of their deceased step parent, and thus, absent a testamentary provision (*e.g.* in a will), step children have no entitlement to the succession of their deceased step parent.

Discussion

Pursuant to section 653 of the *Civil Code of Quebec*, unless otherwise provided by way of testamentary provisions, a succession devolves to the surviving married or civil union spouse and relatives of the deceased. At Quebec civil law, a person is a relative of another person if they are related by blood or adoption (see section 655 of the *Civil Code of Quebec*).

Thus, step children who have not been legally adopted have no entitlement to share in the succession of their deceased step parent, unless the deceased step parent has provided otherwise by will or other testamentary provision.

Source: *Civil Code of Quebec*, RLRQ c CCQ-1991, ss. 653, 655.
Jacques BEAULNE, *Droit des successions*, 5e éd., Montréal, Wilson & Lafleur, 2016, p. 230.

(d) Can the validity of a will be challenged for reasons such as lack of capacity and undue influence?

Summary

The three types of wills in Quebec, the notarial will, the holograph will and the will made in the presence of witnesses could be challenged with varying levels of difficulty.

Discussion

Since a will is a juridical act, it is subject to the same defects of consent as any other contract in Quebec. The two most common defects of consent in testamentary matters are incapacity and undue influence.

In Quebec, section 703 of the *Civil Code of Quebec,* presumes that every person has the required capacity to make a will. Furthermore, 707 of the *Civil Code of Quebec* adds:

> **707**. The capacity of the testator is considered relatively to the time he has made his will.

Consequently, the burden of proof is on the petitioner to establish that the testator was incapable or under undue influence at the time that the will was made and challenging the validity of a will due to incapacity or undue influence are exceptional circumstances.

One unique element to note regarding notarial wills, is that notarial wills would be the most difficult to challenge, since those wills are qualified as an authentic acts, pursuant to section 2814(6) of the *Civil Code of Quebec*. Furthermore, the notary is obliged to check the testator's identity and consent.

To that point, article 2819 says:

> **2819**. To be authentic, a notarial act shall be signed by all the parties; it then makes proof against all persons of the juridical act which it sets forth and of those declarations of the parties which directly relate to the act.

Source: *Civil Code of Quebec*, RLRQ c CCQ-1991, ss. 703, 707, 2814-2821
Marilyn PICCINI ROY, Les testaments, *Personnes et successions*, Collection de droit 2020-2021, École du Barreau du Québec, vol. 3, 2020, EYB2020CDD76
JUSTICE QUEBEC, *Notarial Will,* on line, https://www.justice.gouv.qc.ca/en/your-money-and-your-possessions/wills/forms-of-will/notarial-will

7. Clients in second marriages often want to draft wills that provide for a legally binding distribution of assets upon first and second death (i.e. a mutual will). Are mutual wills allowed in Quebec?

Summary

The concept of mutual wills is not recognized in Quebec.

Discussion

A mutual will involves an explicit agreement between the parties that they will each execute wills to dispose of property in a particular way, and that they will not revoke their respective wills without the other's consent. Pursuant to section 704 of the *Civil Code of Quebec*:

> **704.** A will is a unilateral and revocable juridical act drawn up in one of the forms provided for by law, by which the testator disposes by liberality of all or part of his property, to take effect only after his death.
>
> In no case may a will be made jointly by two or more persons. [*emphasis added*]

The concept of mutual wills is not recognized in Quebec civil law.

Source: *Civil Code of Quebec*, RLRQ c CCQ-1991, s. 704.

8. The term common law marriage is used to describe a variety of relationships. Common law marriage does not require a marriage ceremony, marriage licence, or any other formal aspect of marriage.

(a) What is the definition of common law partner in Quebec?

Summary

In Quebec, common law partners are referred to as *de facto* spouses. In order for a couple to be considered *de facto* spouses, they are required to live together and represent themselves publicly as a couple. Generally speaking, a couple will be presumed to be "living together" if they have been living together in a conjugal relationship for at least one year, or if they have a child together.

Discussion

According to section 61.1 of the *Interpretation Act*:

61.1. The word "spouse" means a married or civil union spouse.

> The word "spouse" includes a *de facto* spouse unless the context indicates otherwise. Two persons of opposite sex or the same sex who live together and represent themselves publicly as a couple are *de facto* spouses regardless, except where otherwise provided, of how long they have been living together. If, in the absence of a legal criterion for the recognition of a *de facto* union, a controversy arises as to whether persons are living together, that fact is presumed when they have been cohabiting for at least one year or from the time they together become the parents of a child.

Source: *Interpretation Act*, CQLR c I-16, s. 61.1
Jacques BEAULNE, *Droit des successions*, 5e éd., Montréal, Wilson & Lafleur, 2016, p. 141

(b) What rights do common law partners have to property on death, including property that was owned by one partner prior to the relationship and property that was jointly acquired?

Summary

Unless the deceased *de facto* spouse has made provision for the surviving *de facto* spouse, under the *Civil Code of Quebec*, *de facto* spouses are not entitled to inherit on intestacy. Further, unlike married or civil union spouses, *de facto* spouses are not entitled to support from the deceased (which obligation continues after death).

In Quebec, there is no automatic right of survivorship for property that is co-owned by the spouses. For *de facto* couples who co-own property (*e.g.* the family home), the options to deal with the property will depend on the family situation of the couple (*i.e.* whether or not they had a child of the relationship).

De facto spouses may, however, be entitled to some protection under other Quebec legislation, such as the *Quebec Pension Plan* (which does contemplate the inclusion of a *de facto* spouse as a "surviving spouse", pursuant to section 91 of the *Act respecting the Quebec Pension Plan*), or pursuant to a designation in a life insurance policy.

Discussion

Unless the surviving *de facto spouse* was provided for in the will of the deceased, the *de facto spouse* is not a legal heir, and would not be entitled to claim rights to an intestate succession (see article 653 *Civil Code of Quebec*) or be entitled to support (see article 585 of the *Civil Code of Quebec*) from the deceased's succession.

In Quebec, there is no automatic right of survivorship for property that is co-owned by the spouses. For *de facto* couples who co-own property (*e.g.* the family home), the options to deal with the property will depend on the family situation of the couple. If the couple have a child together, the surviving *de facto* spouse could apply to the court for temporary exclusive use of the deceased's share of the residence that they co-owned, relying on section 33 of the *Civil Code of Quebec* which requires that decisions regarding children be made with their rights and interests in mind. On the other hand, if the *de facto* couple had no children, this option would not be available, and the *de facto* may have to purchase the succession's interest in the family home, or sell and partition the property.

Source: *Civil Code of Quebec*, RLRQ c CCQ-1991, ss. 33, 585, 653, 1030
Act respecting the Quebec Pension Plan, CQLR c. R-9, ss. 91,105, 168
Murielle DRAPEAU, *Le statut légal des conjoints de fait au Québec*, Brossard, Publications CCH, 2013, pp. 82, 84.

9. A client's will can include a life insurance beneficiary designation. If there is a beneficiary designation on the policy itself that differs from the will, which designation would apply and what legislation governs this?

Summary

Unless the testator has made an irrevocable beneficiary designation on their life insurance policy, the testator may change or revoke a life insurance beneficiary designation by will. In the event of a conflict between designations in the will and a revocable designation made in a life insurance policy, the later of them will govern.

Discussion

Section 2446 of the *Civil Code of Quebec* provides that:

> **2446.** The designation of beneficiaries or of subrogated policyholders is made in the policy or in another writing which may or may not be in the form of a will.

Further, pursuant to section 2450 of the *Civil Code of Quebec*:

> **2450.** A designation or revocation contained in a will that is null by reason of a defect of form is not null for that sole reason; such a designation or revocation is null, however, if the will is revoked.
>
> A designation or revocation made in a will does not avail against another designation or revocation subsequent to the signing of the will. Nor does it avail against a designation prior to the signing of the will unless the will refers to the insurance policy in question or unless the intention of the testator in that respect is manifest.

Sources: *Civil Code of Quebec*, RLRQ c CCQ-1991, ss.2446, 2450
Serge LESSARD, « Pièges et stratégies lors de la désignation des bénéficiaires de polices d'assurance dans le testament », *Cours de perfectionnement du notariat (2014)*, 2014 EYB2014CPN116.
Régime de sécurité sociale, Syndicat des débardeurs, section locale 375 c. Berthelet, REJB 2000-17454 (C.S.)

10. A will is probated to provide the executor/estate trustee with authority to deal with the deceased's assets.

(a) Are there probate fees in Quebec and if so how are they determined?

Summary

Wills, other than notarial wills, must be submitted to the Quebec Superior Court for probate. Although there are no probate fees in the province of Quebec, a filing fee of $209.00 (for applicants who are natural persons or legal persons) will be charged to the applicant. The applicant may also be required to incur legal fees to prepare the application for probate.

Discussion

Section 772 of the *Civil Code of Quebec* provides that:

> **772.** A holograph will or a will made in the presence of witnesses is probated, on the application of any interested person, in the manner prescribed in the *Code of Civil Procedure* (chapter C-25.01).
>
> The known heirs and successors shall be summoned to the probate of the will unless an exemption is granted by the court.

Source: *Civil Code of Quebec*, RLRQ c CCQ-1991, s. 772
Code of Civil Procedure, CQLR c C-25.01, s. 570
Tariff of judicial fees in civil matters, CQLR c T-16, r 10, s. 15(8)

(b) What assets pass outside the estate and are therefore not subject to probate?

Summary

The type of asset is irrelevant for determining whether or not the estate is subject to probate in Quebec.

Discussion

In Quebec, different types of wills are subject to probate, and not different kinds of assets. In fact, wills, other than notarial wills, meaning the holograph will and the will made in the presence of witnesses, must be probated by the Quebec Superior Court.

Notarial wills are not subject to probate since they are authentic acts.

Source: *Civil Code of Quebec*, RLRQ c CCQ-1991, s. 772
Marilyn PICCINI ROY, Les dispositios testamentaires et les legs, *Personnes et successions*, Collection de droit 2020-2021, École du Barreau du Québec, vol. 3, 2020, EYB2020CDD77
Michel BEAUCHAMP, La vérification des testaments et les lettres de verification, *Précis de procédure civile du Québec, Volume 2 (Art. 302-320, 345-777 C.p.c.)*, 6e édition, 2020

(c) Can multiple wills be used to avoid probate?

Summary

Multiple wills can not be used to avoid probate in Quebec.

Discussion

In order to avoid probate in Quebec, one notarial will is needed, as mentioned in (a) and (b) above.

11. A person may use a power of attorney to delegate to another the ability to deal with property and financial matters on that person's behalf.

(a) What is the legislation that governs powers of attorney in Quebec?

Summary

The *Civil Code of Quebec*, governs the ability to delegate to another the ability to deal with property and financial matters on that person's behalf. In Quebec, such a relationship is called a Mandate.

The *Civil Code of Quebec,* creates a second relationship, called a protection mandate which is given by a person of full age in anticipation of his incapacity to take care of himself or to administer his property. Protection mandates are outlined in more detail in Question 12.

(b) What type of authority may be granted under a power of attorney and what are the limitations?

Summary

Generally, the authority that may be granted under a power of attorney are outlined in sections 2130 and 2131 of the *Civil Code of Quebec*. Generally, the powers of the mandatary extend not only to what is specified in the mandate, but also to everything that is incidental to it.

A mandate may be special, in other words given for a single, specific purpose. In this case, it must be formally expressed.

Furthermore, the scope of the mandate is limited by the incapacity of the mandator, in which case a protection mandate may enter into effect.

Discussion

Sections 2130 and 2131 of the *Civil Code of Quebec* define the mandate and its object as follows:

> **2130**. Mandate is a contract by which a person, the mandator, confers upon another person, the mandatary, the power to represent him in the performance of a juridical act with a third person, and the mandatary, by his acceptance, binds himself to exercise the power.
>
> That power and, where applicable, the writing evidencing it are also called power of attorney.
>
> **2131.** The object of the mandate may also be the performance of acts intended to ensure the personal protection of the mandator, the administration, in whole or in part, of his patrimony and, generally, his moral and material well-being, should he become incapable of taking care of himself or administering his property.

2136 of the *Civil Code of Quebec* outlines how the powers of the mandatary could extend past what is expressly written in the mandate:

> **2136**. The powers of a mandatary extend not only to what is expressed in the mandate, but also to anything that may be inferred therefrom. The mandatary may carry out all acts which are incidental to such powers and which are necessary for the performance of the mandate.

Sources: *Civil Code of Quebec*, RLRQ c CCQ-1991, ss. 2130, 2131, 2135, 2136 and 2166
https://www.justice.gouv.qc.ca/en/your-money-and-your-possessions/power-of-attorney-and-protective-supervision/power-of-attorney-mandate/the-contract

(c) What are the formalities for executing a power of attorney in Quebec and can it be executed virtually?

Summary

Since a mandate is a contract, it is subject to the same formalities as any other contract in Quebec. Consequently, it could be given orally, in writing or virtually.

Discussion

1385 of the *Civil Code of Quebec* outlines how a contract is formed in Quebec:

> **1385**. A contract is formed by the sole exchange of consents between persons having capacity to contract, unless, in addition, the law requires a particular form to be respected as a necessary condition of its formation, or unless the parties subject the formation of the contract to a solemn form.

It is also of the essence of a contract that it have a cause and an object.

Furthermore, 1387 explains when the contract is formed.

> **1387**. A contract is formed when and where acceptance is received by the offeror, regardless of the method of communication used, and even though the parties have agreed to reserve agreement as to certain secondary elements.

Sources: *Civil Code of Quebec*, RLRQ c CCQ-1991, ss. 1385, 1387

12. A person may use a directive or other document under which health care and personal care decision-making can be delegated.

(a) What is the proper term for this type of document in Quebec and what is the legislation that governs it?

Summary

In Quebec, the proper term for this type of document is a protection mandate, which are governed by the *Civil Code of Quebec*.

Discussion

A protection mandate is a way for a person to express their wishes in advance. The protection mandate, is a written document in which an individual of full age who is capable, called the mandator, designates one or more persons, called mandataries, to take care of his person and/or administer his property, in the event of his incapacity to do so, either temporarily or permanently.

In the protection mandate, the mandator can enter his wishes concerning all medical care, including end-of-life care that may or may not be proposed. The mandator is given full latitude in drafting his or her wishes. Similarly, the clauses relating to the administration of his or her property can be drafted in very general terms or in great detail, and contain a list of specific acts of administration.

The special rules governing protection mandates in Quebec, are outlined in section 2166 and following of the *Civil Code of Quebec*:

> **2166**. A protection mandate is a mandate given by a person of full age in anticipation of his incapacity to take care of himself or to administer his property; it is made by a notarial act en minute or in the presence of witnesses.
>
> The performance of the mandate is conditional upon the occurrence of the incapacity and homologation by the court upon application by the mandatary designated in the act.

Sources: *Civil Code of Quebec*, RLRQ c CCQ-1991, ss. 2166
BARREAU DU QUÉBEC, COLLÈGE DES MÉDECINS DU QUÉBEC, *Les médecins et le consentement aux soins*, Document de référence 09/2018

(b) What are the formalities for executing this document in Quebec and can it be executed virtually?

Summary

The protection mandate can be established before witnesses or by notarial act. It is then entered in the register of protection mandates. That being said, the performance of the protection mandate is conditional upon the occurrence of two events (1) the incapacity and (2) homologation by the court upon application by the mandatary designated in the act.

Discussion

Currently, the only rules in Quebec regarding the ability to virtually sign protection mandates pertain to the unprecedented circumstances surrounding the Covid-19 pandemic and the physical distancing rules in place in Quebec.

(c) In the absence of a written directive, to whom will medical professionals speak regarding treatment decisions for an individual who is incapable?

Summary

When the care is required for an incapable adult, the power to consent is given to the mandatary appointed under the protection mandate. In the absence of such representation, consent is given by the spouse, whether married, in a civil union or in a de facto union, or, if there is no spouse or if the spouse is unable to give consent, by a close relative or a person who shows a special interest in the person of full age.

Discussion

Section 15 of the *Civil Code of Quebec,* outlines the specific situation when an incapable individual did not give consent in advance to the representation.

> **15.** Where it is ascertained that a person of full age is incapable of giving consent to care required by his or her state of health and in the absence of advance medical directives, consent is given by his or her mandatary, tutor or curator. If the person of full age is not so represented, consent is given by his or her married, civil union or de facto spouse or, if the person has no spouse or his or her spouse is prevented from giving consent, it is given by a close relative or a person who shows a special interest in the person of full age.

Furthermore, the spouse or close relative must act in accordance with section 12 of the *Civil Code of Quebec.*

> **12**. A person who gives his consent to or refuses care for another person is bound to act in the sole interest of that person, complying, as far as possible, with any wishes the latter may have expressed.
>
> If he gives his consent, he shall ensure that the care is beneficial notwithstanding the gravity and permanence of certain of its effects, that it is advisable in the circumstances and that the risks incurred are not disproportionate to the anticipated benefit.

Sources: *Civil Code of Quebec*, RLRQ c CCQ-1991, ss. 2166
Hélène GUAY Les droits de la personnalité, *Personnes et successions*, Collection de droit 2020-2021, École du Barreau du Québec, vol. 3, 2020, EYB2020CDD107

For Will, Estate and Trust questions relating to Quebec please contact:

Noah Weinstein
Borden Ladner Gervais LLP
900, 1000 De La Gauchetière Street West
Montréal, QC H3B 5H4
(514) 954-2563
nweinstein@blg.com

NEW BRUNSWICK

Prepared by Christopher Marr, of Stewart McKelvey, Saint John
(July, 2021)

1. Many people don't have a will, which means that their estate will be governed by the rules of intestacy.

(a) For a married person with children, what is the division of assets upon an intestacy?

Summary

On intestacy, a surviving spouse is entitled to all interest of the deceased spouse in any marital property. If there is one child, then the surviving spouse and child are each entitled to half of the remainder of the estate. If there is more than one child, then the surviving spouse is entitled to one third of the remainder of the estate, and each child is entitled to an equal share of the remaining two thirds of the remainder of the estate.

The above is subject to claims by spouses for support from the remainder of the estate as a dependant of the deceased spouse.

Discussion

If a person dies without a will in New Brunswick (or where a will does not fully dispose of the testator's property), the property of the deceased, or the portion not dealt with by the will, is divided according to the formula set out in the *Devolution of Estates Act*, RSNB 1973, c D-9, (the "DEA"). Only married people (not common law partners) are considered to be spouses under the DEA, where the survivors are referred to as "widows".

In the case of a married person with children, the division under the DEA is as follows:

First, the spouse is entitled to all interest of the intestate in their marital property, as that term is defined in s. 1 of the *Marital Property Act*, RSNB 2012, c 107, (the "MPA"). Second, (a) if the intestate leaves a spouse and one child, then each takes half of the remainder of estate (s. 22(2)). If the intestate leaves a spouse and more than one child, the spouse is entitles to one-third of the remaining estate, and each child is entitled to an equal share, *per stirpes*, of the other two-thirds of the remaining estate (s. 22(2.1)).

A surviving spouse may receive more of the remaining estate if they make a successful claim for support from the estate under the *Provision for Dependants Act*, RSNB 2012, c. 111, (the "PDA"). Further details on this are set out below.

(b) What is the division for an unmarried person with no children?

First, to the intestate person's parent or parents; second, if both parents are predeceased, to the person's brothers and sisters (with representation of deceased sibling by his or her children per stirpes); thereafter, proceeding to remoter ancestors or collateral next-of-kin.

2. A will may be made but its existence may not be known to family members. Is there a will registry in New Brunswick?

No.

3. Each province has rules for ensuring that wills are validly executed.

(a) What are the formalities for the proper execution of a will in New Brunswick and how many witnesses are required?

The Will must be signed by the testator (or by some other person at the testator's request and in his presence) at the end, and attested by two witnesses, all three being present in the same place at the same time. *Wills Act*, RSNB 1973, c. W-9 (the "*Wills Act*").

(b) Can a will be executed virtually and if so what are the rules?

Summary

Wills may be signed in a situation where the testator and witnesses meet virtually, rather than in the same location, in New Brunswick, until December 31, 2022, subject to certain conditions being met.

Discussion

In New Brunswick, until December 31, 2022, the requirements that a will be signed by the testator in the presence of at least two witnesses, who must also sign the will in the presence of the testator, may be satisfied by using electronic means of communication. The requirement that a person signing in the name and on behalf of the testator must be in the presence of the testator, may also be satisfied by using electronic means of communication. Wills signed in counterparts by using electronic means of communication will be deemed to be one and the same will. In order to sign a will using electronic means of communication, at least one of the witnesses must be a lawyer who is a practicing member of the Law Society of New Brunswick. All of the above is pursuant to section 4.1 of the *Wills Act*.

Pursuant to section 4.1(1) of the Wills Act, an electronic means of communication is acceptable if all persons relying on the means of communication are able to see, hear and communicate with one another in real time, to the same extent as if the persons were communicating in person in the same location.

(c) Is a holograph will permitted in New Brunswick and if so what are the rules?

Summary

Holograph wills are permitted in New Brunswick. A holograph will is a will made wholly in the handwriting of and signed by the testator.

Discussion

The requirements for a valid holograph will are set out in s. 6 of the *Wills Act*, which states: "A testator may make a valid will wholly by his own handwriting and signature, without formality, and without the presence, attestation or signature of a witness."

4. According to provincial legislation, how is a person's will affected by the following changes in personal circumstances?

(a) If a person gets married;

Summary

If a person's will was made before that person marries, that person will be deemed to die intestate if they die while married, or while any issue of the marriage, born subsequent to the making of the will, are still alive. This does not apply to a will made in contemplation of marriage. Further, a person who was a beneficiary under a will made prior to marriage may apply to the Court for an order giving effect to the gift to be made to that person in the will.

Discussion

Pursuant to s. 15.1(2) of the Wills Act, a person who has made a will and subsequently marries, will be deemed to die intestate if they die while married, or while any issue of the marriage, born subsequent to the making of the will, are still alive. This does not apply to a will made in contemplation of marriage (s. 16).

Pursuant to s. 15.1(3) of the Wills Act, a person who was a beneficiary under a will made prior to marriage may apply to the Court, within four months of the death of the testator, for an order giving effect to the gift to be made to that person in the will. This order can be made so long as it can be made without undue detriment to a person who take on intestacy (s. 15.1(4)).

(b) If a person gets divorced; or

Summary

Divorce has no specified impact on a will under the laws of New Brunswick.

Discussion

The Wills Act is silent on divorce, and it is therefore considered that divorce does not revoke, amend or otherwise impact a will in New Brunswick.

(c) If a person becomes separated from their spouse

Summary

Separation has no impact on a will in New Brunswick.

Discussion

The Wills Act is silent on separation, and it is therefore considered that separation does not revoke, amend or otherwise impact a will in New Brunswick.

5. A person can designate a guardian of their children in their will.

(a) Is guardianship of children as provided in a will binding in New Brunswick and does the province give authority to the courts to vary the guardianship appointment in a will? If so, are there any restrictions on how and when a court can change the guardian?

Summary

A guardianship appointment in a will is binding in New Brunswick, however, the appointment may be displaced by a court order with respect to custody.

Discussion

In New Brunswick, a person having the care and custody of a child may appoint a guardian for that child by will pursuant to s. 4(1) of the *Guardianship of Children Act*, RSNB 2011, c. 167, (the "GCA"). Pursuant to s. 6 of the GCA, a court order with respect to the custody of a child displaces any guardianship appointment made by a parent pursuant to the GCA, including an appointment by will.

6. A person might exclude a spouse, child or stepchild from the will.

(a) What are the legislated rights in New Brunswick for a claim by a spouse or a child to the estate of a spouse or parent?

Summary

A dependant of a deceased person may apply to the Court for discretionary relief where everything the dependant is entitled to either by the will of the deceased, or by intestacy, does not provide adequately for the dependant. Further, a spouse may apply to the Court for a division of marital property and possession of the marital home and goods.

Discussion

Pursuant to s. 2(1) of the PDA, a dependant may apply to the Court for relief from the estate if what they are entitled to under will of the deceased, or on intestacy, does not adequately provide for the dependant.

The definition of dependant in s. 1 of the PDA includes the spouse or a child of the deceased, as well as anyone else who is considered a dependant under the *Family Law Act*, SNB 2020, c 23, (the "FLA"). The definition of dependant under the FLA includes a common law partner who was dependent on the deceased, by virtue of s. 14(2). Additionally, only the natural, adopted or unborn children of the deceased are considered dependants under the PDA (s. 1).

An application for relief under the PDA must be made within four months of the date of the death of the deceased (s. 16(1)). Notwithstanding this, a judge may, if they consider it just, allow an application to be made at any time as to any portion of the estate remaining undistributed at the time of application (s. 16(2)).

Pursuant to s. 8 of the PDA, the Court can require the relief to be held in trust.

The spouse of the deceased (who must have been married to the deceased, not a common law partner), may apply to the Court under s. 4(1) of the MPA for a division of marital property, as marital property is defined under s. 1. The spouse may also apply under s. 4(1) for possession of the marital home and marital goods. Marital goods means furniture, equipment, appliances and effects owned by one spouse or both spouses and ordinarily used or enjoyed by both spouses or by one or more of their children within or about a marital home while the spouses are or were cohabiting.

An application for division or possession of marital property under the MPA must be made within four months of the date of the death of the deceased (s. 4(1)). A court may extend the limitation period by any length of time it considers just if a person is unable to make an application within the four month limitation period due to lack of knowledge of the occurrence or date of death, or circumstances reasonably beyond the person's control (s. 4(4)).

Pursuant to s. 10 of the MPA, a court may order that property, or title to any property be held in trust for a surviving spouse.

(b) What are the dependants relief rules in New Brunswick? Can life insurance proceeds paid to a named beneficiary be "clawed back" to satisfy a dependant's claim?

No.

(c) Do stepchildren of the deceased who are not legally adopted have any rights to challenge the will?

Summary

In New Brunswick, children who are not the natural children of, or who were not legally adopted by a deceased, are not entitled to a share of the estate of the deceased unless named in the will.

Discussion

In s. 1 the DEA, in the context of an intestacy, a "child" is defined as "an offspring of the first generation." In the dependant relief context, a "child" of a deceased may apply for relief. An unadopted child is not so entitled because they do not fall within the definition of 'child' at s. 1 of the PDA which states that a child "includes a lawfully adopted child, and an unborn child."

(d) Can the validity of a will be challenged for reasons such as lack of capacity and undue influence?

Summary

There is no wills variation law in New Brunswick. However, a will, or a provision in it, may be challenged in Court under statutory and common law principles, such as: (1) invalid execution; (2) lack of testator capacity; (3) undue influence; (4) fraud; and (5) public policy concerns. Further, a dependant may challenge the will pursuant to dependant's relief legislation, and a spouse may make claims to marital property.

Discussion

In New Brunswick, the validity of a will may be challenged under the following statutory provisions or common law principles: (1) the will was not validly executed per s. 7(1) of the Wills Act; (2) the testator lacked capacity; (3) the testator was subject to undue influence in making the will; and (4) fraud. Further, a specific provision of a will may also be challenged in Court on the basis of public policy concerns.

It should be noted that s. 7(2) of the Wills Act allows for some variation in the execution requirements, and that s. 35.1 of the Wills Act is a substantial compliance provision, which allows the Court to declare a will valid, despite an irregularity or lack of formality.

The disposition of property described in a will may be adjusted *ex post facto* pursuant to dependant's relief and marital property legislation (see discussion above). On this basis, a dependant spouse, or common law partner or child (with respect to dependant's relief only), could make a claim that has the effect of changing a will.

7. Clients in second marriages often want to draft wills that provide for a legally binding distribution of assets upon first and second death (i.e. a mutual will). Are mutual wills allowed in New Brunswick?

Summary

Mutual wills are permitted in New Brunswick as an ordinary contract. They are not specifically provided for in statutory law.

Discussion

It is possible for testators to enter into a valid agreement not to revoke their wills. This is governed by common law contract principles only, and is not dealt with under the Wills Act or other legislation.

8. The term common law marriage is used to describe a variety of relationships. Common law marriage does not require a marriage ceremony, marriage licence, or any other formal aspect of marriage.

(a) What is the definition of common law partner in New Brunswick?

Summary

In New Brunswick, a "common law partner" means an individual who has cohabited with another individual in a marriage-like relationship for at least three years, or in a situation of some permanence if they have a child together.

Discussion

The requirement to be a common law partner in New Brunswick is to have lived together in a conjugal relationship for three years, or to have lived together in a situation of some permanence if they have a child together (s. 14 of FLA). These time periods and requirements may be different in other legislation for the specific application of that legislation (such as under the *Pension Benefits Act*, SNB 1987, c P-5.1).

(b) What rights do common law partners have to property on death, including property that was owned by one partner prior to the relationship and property that was jointly acquired?

Summary

Except for jointly owned property, and property left to the common law partner under a will, common law partners have no rights to the property of their deceased partner in New Brunswick, without the intervention of a Court order. The intervening court orders may be made under dependants' relief legislation, or on an application for the recognition of a constructive trust.

Discussion

A surviving common law partner, like any other person, will be the owner of joint property on the death of the other owner, pursuant to the right of survivorship. With respect to all other property, a surviving common law partner has a claim to property left to them in a will, but has no claim to the property of the deceased common law partner pursuant to the DEA.

A surviving common law partner who was a dependant of the deceased, may make a claim to the Court for relief under the PDA, as explained above. Otherwise, a surviving common law partner may advance a claim on application to the Court based on the equitable doctrine of constructive trust, to have property of the deceased set aside in a trust for the benefit of the common law partner.

9. A client's will can include a life insurance beneficiary designation. If there is a beneficiary designation on the policy itself that differs from the will, which designation would apply and what legislation governs this?

Summary

In New Brunswick, the last made valid designation, whether made by contract or by written designation without or outside of a will, dictates how the proceeds of the insurance policy are distributed.

Discussion

Pursuant to s. 153 of the *Insurance Act*, RSNB 1973, c I-12 (the "Insurance Act"), a valid designation with respect to the proceeds of an insurance policy may be made in a will, which will have no affect against a designation made after the making of the will. A designation may be made in a contract or by a declaration in writing, in or outside of a will (s. 151(1) of the *Insurance Act*).

10. A will is probated to provide the executor/estate trustee with authority to deal with the deceased's assets.

(a) Are there probate fees in New Brunswick and if so how are they determined?

Summary

Probate tax amounts and rates in New Brunswick are set out in Schedule A to the *Probate Court Act*. The tax amounts and rates are currently: for an estate not exceeding $5,000, the tax is $25.00; for an estate exceeding $5,000 but not exceeding $10,000, the tax is $50.00; for an estate exceeding $10,000 but not exceeding $15,000, the tax is $75.00; for an estate exceeding $15,000 but not exceeding $20,000, the tax is $100.00; for an estate exceeding $20,000, the tax is the sum of $5.00 per $1000 or part thereof of the estate being administered.

(b) What assets pass outside the estate and are therefore not subject to probate?

Assets with valid beneficiary designations of surviving persons, such as life insurance or registered pension or retirement plans or tax free savings accounts – these are subject to probate only if the estate is named as the beneficiary or if there is no valid beneficiary designation.

Jointly held assets with right of survivorship (subject only to the equitable presumption of resulting trust).

(c) Can multiple wills be used to avoid probate?

Although the relevant legislation in New Brunswick is silent on the matter, there has been at least one successful probate involving a multiple will in New Brunswick.

11. A person may use a power of attorney to delegate to another the ability to deal with property and financial matters on that person's behalf.

(a) What is the legislation that governs powers of attorney in New Brunswick?

Summary

The *Enduring Powers of Attorney Act*, SNB 2019, c 30 (the "EPA"), is the primary legislation governing powers of attorney in New Brunswick, however, certain provisions are made for powers of attorney in the *Property Act*, RSNB 1973, c P-19 (the "Property Act").

Discussion

Sections 56, 57 and 58 of the Property Act deal with powers of attorney. Specifically, section 56 sets out certain terms with respect to irrevocable powers of attorney and section 57 deals with time limited irrevocable powers of attorney. Section 58 validates any action taken by the donee of a power of attorney that was revoked by the donor, where the action was taken in good faith, without the donee or any involved third party having any knowledge of the termination.

All other legislative provisions with respect to powers of attorney in New Brunswick are set out in the EPA.

(b) What type of authority may be granted under a power of attorney and what are the limitations?

Summary

In New Brunswick, an attorney under an enduring power of attorney may exercise authority over all matters of property, financial affairs and personal care of the donor, subject to specific limitations and any specifications on authority set out in the instrument.

The EPA also sets out limitations on an attorney's authority, including limitations on delegation of authority, altering beneficiary designations, making testamentary dispositions, taking illegal actions, and on compensation for acting as attorney.

Discussion

In an enduring power of attorney, a grantor may give an attorney authority with respect to all matters or only specified matters with respect to property, financial affairs and personal care (s. 7(1) of the EPA). Unless the enduring power of attorney specifies otherwise, an attorney for property has the authority to renew a beneficiary designation for the benefit of the beneficiary previously selected by the donor, and may designate the estate of the donor in a beneficiary designation if the donor has not made a previous designation (s. 7(3) of the EPA).

Unless an enduring power of attorney gives specific authority, an attorney may not delegate their authority to another person or make a gift on behalf of the grantor (s.7(4) of the EPA). An attorney does not have authority to make, alter or revoke a will on behalf of the grantor or do anything that is prohibited by law or omit to do anything that is required by law (s.7(5) of the EPA). Unless an enduring power of attorney provides otherwise, a person shall not be

compensated for acting as an attorney, but is entitled to be reimbursed for reasonable expenses incurred in acting as an attorney (s. 15 of the EPA).

(c) What are the formalities for executing a power of attorney in New Brunswick and can it be executed virtually?

Summary

In New Brunswick, an enduring power of attorney must be in writing and signed by the donor. If it is appointing an attorney for property, it must be signed and dated in the presence of a New Brunswick lawyer, who must include a specified written confirmation. If an enduring power of attorney is appointing an attorney for personal care only, it may either be signed and dated in the presence of a New Brunswick lawyer, who must give the written confirmation, or two adult witnesses.

In New Brunswick, enduring powers of attorney may be signed in a situation where the donor and witnessing lawyer meet virtually, rather than in the same location, in New Brunswick, until December 31, 2022, subject to certain conditions being met. A practicing member of the Law Society of New Brunswick must be the witness in these circumstances, regardless of the type of attorney appointed.

Discussion

Pursuant to section 4(1) of the EPA, an enduring power of attorney must be in writing and it must be signed and dated by the donor, or if the donor is unable to sign it, it must be signed by another person at the direction of and in the donor's presence (s. 4(2) of the EPA).

If an enduring power of attorney is appointing an attorney for property, it must be signed and dated in the presence of a lawyer, and it must include or be accompanied by a written confirmation by the lawyer confirming that they are a practising member of the Law Society of New Brunswick, that they were present when the enduring power of attorney was signed, that they reviewed the provisions of the enduring power of attorney with the grantor and that they are of the opinion that the grantor had the capacity to make the enduring power of attorney (s. 4(1)(c) of the EPA).

If an enduring power of attorney is appointing an attorney for personal care only, it can be signed and dated in the presence of two adult witnesses who are not the spouse, common law partner or child of the donor, who also must sign the power of attorney, as an alternative to a lawyer signing and providing their confirmation (s. 4(1)(d) of the EPA).

In New Brunswick, until December 31, 2022, the requirements that an enduring power of attorney be signed by the donor in the presence of a lawyer, who must also sign the enduring power of attorney in the presence of the donor, may be satisfied by using electronic means of communication. All confirmations that the lawyer must make may also be satisfied by using electronic means of communication. Enduring powers of attorney signed in counterparts by using electronic means of communication will be deemed to be one and the same enduring power of attorney. An enduring power of attorney signed using electronic means of communication

must be witnessed by a lawyer who is a practising member of the Law Society of New Brunswick, regardless of the type of attorney appointed. All of the above is pursuant to section 4.1 of the EPA.

Pursuant to section 4.1(1) of the EPA, an electronic means of communication is acceptable if all persons relying on the means of communication are able to see, hear and communicate with one another in real time, to the same extent as if the persons were communicating in person in the same location.

12. A person may use a directive or other document under which health care and personal care decision-making can be delegated.

(a) What is the proper term for this type of document in New Brunswick and what is the legislation that governs it?

Summary

An enduring power of attorney must be used to delegate personal and health care decision making in New Brunswick. A person may use a health care directive to provide instructions regarding health care decisions to be made for them, in the event they lack capacity.

Discussion

In New Brunswick, personal and health care decision making may only be delegated by making an enduring power of attorney that appoints an attorney for personal care, under the EPA. It is considered an enduring power of attorney, subject to all provisions of the EPA, other than those that apply only to attorneys for property and financial affairs.

Pursuant to section 19(1) of the EPA, a person may make a health care directive to give instructions regarding health care decisions in the event they lack capacity to make them. Note that this document does not appoint a person to carry out these instructions, nor does it delegate decision making authority.

(b) What are the formalities for executing this document in New Brunswick and can it be executed virtually?

Summary

The formalities of executing an enduring power of attorney are set out above. Other than a health care directive being in writing, there are no formalities of execution.

Discussion

See above discussion on formalities of executing an enduring power of attorney.

Pursuant to section 19(2) of the EPA, a health care directive must be in writing but does not need to be in any particular form.

(c) In the absence of a written directive, to whom will medical professionals speak regarding treatment decisions for an individual who is incapable?

Summary

Where there is no written health care directive, physicians in New Brunswick will speak to an appointed attorney for personal care or a court appointed committee for the person, if either exist. In other circumstances, physicians may rely on known unwritten directions given to them by the incapable individual. Where there is a total lack of direction, physicians are likely to rely on hospital policies and procedures, as well as their own professional guidelines, which are likely to lead them to discussing decisions with the next of kin of the incapable individual.

Discussion

Pursuant to section 20(1) of the EPA, when a health care decision is to be made on behalf of someone who lacks capacity, assuming that there is no health care directive, a health care provider shall make a reasonable effort to determine whether or not the person has appointed an attorney for personal care and to seek direction from the attorney for personal care. If a decision is not made by an attorney for personal care, and the health care provider is aware of instructions given by the person when they had capacity, the health care provider shall act in accordance with those instructions (s. 20(1)(c) of the EPA). These requirements are subject to certain limitations and protections for the health care provider set out in sections 20(2), 20(3) and 20(4) of the EPA.

If a committee of the person has been appointed for the individual who lacks capacity under the *Infirm Persons Act,* RSNB 1973, c I-8, a health care provider would speak to the person or people appointed as committee.

Though not law, in the absence of any directives, enduring powers of attorney, committee appointments or knowledge of the instructions of the individual, a health care provider is likely to speak with the next of kin of the individual who lacks capacity. Next of kin in this circumstance is not legally defined, but would have its typical meaning of a spouse, adult children, parents, or other closest capable relationship such as a sibling. Hospitals are likely to have policies and protocols on this point, and all physicians in New Brunswick may turn to the *Code of Ethics* of the New Brunswick College of Physician and Surgeons, wherein Part 30 directs physicians to be considerate of the patient's family and significant others and cooperate with them in the patient's interest.

For Will, Estate and Trust questions relating to New Brunswick please contact:

Christopher Marr
Stewart McKelvey
Suite 1000, Brunswick House
44 Chipman Hill
Saint John, N.B. E2L 2A9
(506) 632-2789
cmarr@stewartmckelvey.com

PRINCE EDWARD ISLAND

Prepared by Geoffrey Connolly, QC, FEC, P.Eng, of Stewart McKelvey, Charlottetown
(July 2021)

1. Many people don't have a will, which means that their estate will be governed by the rules of intestacy.

(a) For a married person with children, what is the division of assets upon an intestacy?

Summary

If the intestate leaves a surviving spouse and one child, the estate is divided equally between them. If the intestate dies leaving a surviving spouse and more than one child, one-third of the estate goes to the surviving spouse and the remaining two-thirds is divided among issue *per stirpes*.

Discussion

In Prince Edward Island, where a person dies without a will (or where a will does not fully dispose of the testator's property), the deceased's property is divided according to the formula set out in s. 87 of the *PEI Probate Act*.

In the case of a married person with children, the division under the *PEI Probate Act* is as follows: If the intestate leaves a spouse and one child, then each takes half of the estate (s. 87(1)). If the intestate leaves a spouse and more than one child, then one-third goes to the spouse, and the remaining two-thirds is divided among the issue *per stirpes* (per familial branch) (s. 87(2)). For the purposes of the provisions within Part IV – Distribution of Estates of Intestates in the *PEI Probate Act*, "issue" includes all lawful descendants of the ancestor.

Note that common law partners are deemed to be "spouses" and are treated equally to married partners.

(b) What is the division for an unmarried person with no children?

First, to the intestate person's parent or parents; second, if both parents are predeceased, to the person's brothers and sisters (with representation of deceased sibling by his or her children per stirpes); thereafter, proceeding to remoter ancestors or collateral next-of-kin.

2. A will may be made but its existence may not be known to family members. Is there a will registry in Prince Edward Island?

No.

3. Each province has rules for ensuring that wills are validly executed.

(a) What are the formalities for the proper execution of a will in Prince Edward Island and how many witnesses are required?

The Will must be signed by the testator (or by some other person at the testator's request and in his presence) at the end, and attested by two witnesses, all three being present in the same place at the same time. [*PEI Probate Act*]

(b) Can a will be executed virtually and if so what are the rules?

No, a will cannot be executed virtually in Prince Edward Island.

Discussion

Per Section 60 of the *Probate Act*, R.S.P.E.I. 1988, c P-21 (the "*PEI Probate Act*"), in order to be duly executed, a will must be signed by the testator and in the presence of two witnesses who are present at the same time. Section 2 of the *Electronic Commerce Act*, R.S.P.E.I. 1988, c E-4.1 specifically excludes wills from the provisions of the Act. As such, they cannot be executed virtually.

(c) Is a holograph will permitted in Prince Edward Island and if so what are the rules?

Summary

In Prince Edward Island, holograph wills are only permitted in limited circumstances. Holograph wills are permitted for members of the Armed Forces of Canada or by mariners or seamen when at sea or in the course of voyage.

A holograph will may also be permitted with application to the court that the holograph will "substantially complied" with but was not executed in accordance with the formal requirements under s. 70 of the *PEI Probate Act*.

Discussion

As set out in section 62 of the *PEI Probate Act,* members of the Armed Forces of Canada who are placed on active service or called out for training, service, or duty, or a mariner or seamen may make a holograph will "by writing signed by him without any further formality or any requirement as to the presence of or attestation or signature by any witnesses."

4. According to provincial legislation, how is a person's will affected by the following changes in personal circumstances?

(a) If a person gets married;

Summary

In Prince Edward Island, if a person gets married, the will is revoked. However, revocation is subject to the exceptions enumerated in Section 68(2) of the *PEI Probate Act*.

Discussion

Pursuant to Section 68 of the *PEI Probate Act*, a will is revoked by marriage of the testator after the will is made, except when the will is:

(a) made in contemplation of a marriage of the testator which marriage actually takes place within one month after the making of the will;

(b) made in exercise of a power of appointment, when the real or personal estate thereby appointed would not, in default of the appointment, pass to their heir, executor, or administrator, or the person entitled as their next of kin, under Part IV

If the testator becomes common law on an existing will, there is no effect on the will, but there may be a change to the entitlement to proceeds of the estate if the common law spouse had cohabitated with the deceased for at least three years immediately before the other person's death. Pursuant to Section 2 of the *Dependants of a Deceased Person Relief Act*, R.S.P.E.I. 1988, c. D-7 (the "*Dependants of a Deceased Person Relief Act*") where a deceased has not made adequate provision for the proper maintenance of a common law spouse the court may, on application by the common law spouse, vary the provision to one it considers adequate.

(b) If a person gets divorced; or

Summary

Divorce does not revoke a will, but any bequest, appointment, or conferral of power to the former spouse is revoked.

Discussion

Pursuant to Section 69 of the *PEI Probate Act*, if the testator gets divorced, the divorce revokes the appointment of the spouse or conferral of power and any bequest or devise made to the spouse:

> Where in a will
>
> (a) a devise or bequest of a beneficial interest in property is made to a spouse;
>
> (b) a spouse is appointed executor or trustee; or
>
> (c) a general or special power of appointment is conferred upon a spouse,
>
> and after the making of the will and before the death of the testator, the marriage of the testator is terminated by divorce or his marriage is found to be void or declared a nullity by a court in a proceeding to which he is a party, then, unless a contrary intention appears in the will, the devise, bequest, appointment or power is revoked and the will shall be construed as if the spouse has predeceased the testator.

(c) If a person becomes separated from their spouse

Summary

Separation has no impact on a will.

Discussion

In Prince Edward Island, if a person is separated from their spouse but not divorced, there is no impact on that person's will. Separation does not revoke a bequest, appointment or conferral of power made to a spouse.

The Prince Edward Island Supreme Court upheld the principle from *Re Winter Estate*, [1955] 1 D.L.R. 134 that, in order for a spouse to surrender their rights on intestacy, "clear, direct, and cogent words are required" (see *Turner Estate (Re)*, [2013] P.E.I.J. No. 40). In *Re Winter Estate*, although under a separation agreement the wife had released the husband from all claims present, past or future for maintenance, alimony, or separation allowance and acknowledged that she had no further claims against the husband nor the estate of the husband, the court held that the release was only a release against the estate for future claims for maintenance, alimony or separation allowance and was not a bar to her claim against the deceased's estate on his intestacy.

5. A person can designate a guardian of their children in their will.

(a) Is guardianship of children as provided in a will binding in Prince Edward Island and does the province give authority to the courts to vary the guardianship appointment in a will? If so, are there any restrictions on how and when a court can change the guardian?

Summary

A guardianship appointment in a will is not binding. Consent of the named guardian is required, and the appointment may be varied by the Court.

Discussion

Per the *Probate Act*, R.S.PE.I. 1988, c P-21 (the "*PEI Probate Act*"), a person may appoint a guardian for their child through a will if they are over eighteen or if they are under eighteen and a member of the Armed Forces of Canada or a seamen or mariner (s. 59 & s.62(2)). A guardianship appointment made in a will does not become effective until a judge confirms it. If the person named guardian does not wish to be guardian, the judge will not order them to do so.

6. A person might exclude a spouse, child or stepchild from the will.

(a) What are the legislated rights in Prince Edward Island for a claim by a spouse or a child to the estate of a spouse or parent?

Summary

A dependant (spouse or child) of the deceased may apply to the Court for discretionary relief where the will does not make adequate provision for the proper maintenance and support.

Discussion

In Prince Edward Island, dependant relief rules are governed by the *Dependants of a Deceased Person Relief Act*.

In order for a beneficiary to qualify to bring claim, they must be a dependant and the testator must not have made adequate provision. Section 1(d) of the *Dependants of a Deceased Person Relief Act* defines a dependant as a spouse, minor child, adult disabled child, or a family member or divorced spouse who was dependant on the testator for maintenance and support for at least 3 years prior to death.

Pursuant to Section 2 of the *Dependants of a Deceased Person Relief Act*, a dependant may apply for relief:

> 2. "Where a deceased has not made adequate provision for the proper maintenance and support of his dependants or any of them, a court, on application by or on behalf of the dependants or any of them, may order that such provision as it considers adequate be made out of the estate of the deceased for the proper maintenance and support of the dependants or any of them."

The limitation period to bring such claims is six months from the date of the issue of grant of probate (s.13).

Note that s. 6 of the *Dependants of a Deceased Person Relief Act* states that a court, in any order making provision for maintenance and support of a dependant, may impose such conditions and restrictions as it considers fit.

Per *MacDonald Estate*, 2014 PESC 7, moral entitlement can be relevant to dependant claims in PEI.

(b) What are the dependants relief rules in Prince Edward Island Can life insurance proceeds paid to a named beneficiary be "clawed back" to satisfy a dependant's claim?

No.

(c) Do stepchildren of the deceased who are not legally adopted have any rights to challenge the will?

Summary

The *PEI Probate Act* is silent with respect to the entitlement of children to the estate of the deceased step parent where the children are not legally adopted. However, unadopted children do not meet the definition of 'issue' entitled to the estate in intestacy. In the dependant relief context, while 'child' is not defined by the *Dependants of a Deceased Person Relief Act*, case law from other jurisdictions suggests that unadopted children do not meet the definition of 'child.'

Discussion

In the intestacy context, 'issue' of the intestate is entitled to a portion of the distributive share. An unadopted child is not entitled to a portion because they do not fall within the definition of 'issue' at s. 86(b) of the *PEI Probate Act*: "all lawful lineal descendants of the ancestor."

In the dependant relief context, a dependant who may apply for relief includes 'minor child' or 'adult disabled child.' However, 'child' is not a defined term in the *Dependants of a Deceased Person Relief Act*. The Canadian Encyclopedic Digest (CED Wills XXII.3.(b)), citing case law from BC, indicates that, in the context of dependant relief, "child" is limited to natural and adopted children and does not include persons treated as if they are the testator's child but were never formally adopted.

(d) Can the validity of a will be challenged for reasons such as lack of capacity and undue influence?

Summary

Yes. In Prince Edward Island, s. 39 & 40 of the *PEI Probate Act* and Rule 65 of the *Rules of Civil Procedure* govern challenges to the validity of wills.

Discussion

Pursuant to s. 39 and 40 of the *PEI Probate Act* and Rule 65 of *Rules*, to launch a challenge to the validity of a will, the originating document is a caveat followed by a petition. To put the interpretation of a will before the court, an Advice and Direction application must be made (see either s. 52 of the *Trustee Act* R.S.P.E.I 1974 Cap T-9, s. 12 of the *PEI Probate Action*, or motion for direction per Rule 65.30).

7. Clients in second marriages often want to draft wills that provide for a legally binding distribution of assets upon first and second death (i.e. a mutual will). Are mutual wills allowed in Prince Edward Island?

Summary

The *PEI Probate Act* is silent with regard to mutual wills and their use does appear to have yet been tested by the courts in PEI.

Discussion

While the PEI courts have not yet tested the subject, in Nova Scotia, mutual wills are permitted and the courts have found that, in order to be effective, the testators must agree not to revoke the will after the death of one of them (*Re Hand Estate*, 2010 NSSC 297).

8. The term common law marriage is used to describe a variety of relationships. Common law marriage does not require a marriage ceremony, marriage licence, or any other formal aspect of marriage.

(a) What is the definition of common law partner in Prince Edward Island?

Summary

In Prince Edward Island, a "common law partner" means an individual who has cohabitated with another individual in a conjugal relationship for a continuous period of at least three years or an individual who has cohabitated with another individual in a conjugal relationship and together those individuals are the natural or adoptive parents of a child.

Discussion

S. 1(iii) of the *Interpretation Act* R.S.P.E.I. 1988, c I-8 (the "*Interpretation Act*") indicates that 'spouse' means a spouse as defined in clause 29(b) of *the Family Law Act* R.S.P.E.I. 1988, Cap. F-2.1 (the "*Family Law Act*"). The definition of 'spouse' in s. 29(b) of the *Family Law Act* includes an individual who:

> (iii) is not married to the other person but is cohabitating with him or her in a conjugal relationship and has done so continuously for a period of at least three years, or
>
> (iv) is not married to the other person but is cohabitating with him or her in a conjugal relationship and together they are the natural or adoptive parents of a child

(b) What rights do common law partners have to property on death, including property that was owned by one partner prior to the relationship and property that was jointly acquired?

Summary

Common law partners have no property rights under the *Family Law Act* and are not treated the same as married spouses to bring community property claims against the estate.

Discussion

For succession law purposes, common law partners are considered a spouse under the *PEI Probate Act* and a dependent under the *Dependants of a Deceased Person Relief Act*, but the *Family Law Act* governs who can bring community property claims against the estate (see Section 10). 'Family home' is defined in Section 10 of the *Family Law Act* as "every property in which a

married person has an interest." Therefore, common law partners are not afforded the same rights as married spouses to bring community property claims against the estate.

Jointly owned property becomes the property of the surviving common law partner by right of survivorship. Otherwise, the surviving common law partner would have to advance a claim based on the equitable doctrine of constructive trust.

9. A client's will can include a life insurance beneficiary designation. If there is a beneficiary designation on the policy itself that differs from the will, which designation would apply and what legislation governs this?

Summary

In Prince Edward Island, the latest made valid designation, whether this last designation is in a will or on the policy, will dictate how the proceeds of the insurance policy are distributed (*Insurance Act*, R.S.P.E.I. 1988, c. I-4).

Discussion

Beneficiary designations for life insurance proceeds are governed by the *Insurance Act*, R.S.P.E.I. 1988, c. I-4 (the "*Insurance Act*"). Section 140 of the *Insurance Act* states that a designation in a will is of no effect against a designation made later than the making of the will. Furthermore, if a designation is contained in a will and the will is subsequently revoked by operation of the law or otherwise, the designation is thereby revoked.

10. A will is probated to provide the executor/estate trustee with authority to deal with the deceased's assets.

(a) Are there probate fees in Prince Edward Island and if so how are they determined?

Summary

Probate fees in PEI are set pursuant to Section 119.1 of the *PEI Probate Act*. In general, probate fees are $4 for every $1,000 of assets in an estate.

Discussion

Pursuant to s. 119.1(4), if the probate value of an estate is $10,000 or less, the fee is $50; if the probate value is $10,001 to $25,000, the fee is $100; if the probate value is $25,001 to $50,000, the fee is $200; if the probate value is $50,001 to $100,000, the fee is $400; if the probate value exceeds $100,000, the fee is $400 plus $4 for each $1,000 or fraction thereof in excess of $100,000.

Probate fees apply to gross assets of the estate, but not including life insurance money passing on the death to a named beneficiary under a life insurance policy (s.119.1(1)).

(b) What assets pass outside the estate and are therefore not subject to probate?

Assets with valid beneficiary designations of surviving persons, such as life insurance or registered pension or retirement plans or tax free savings accounts – these are subject to probate only if the estate is named as the beneficiary or if there is no valid beneficiary designation.

Jointly held assets with right of survivorship (subject only to the equitable presumption of resulting trust).

(c) Can multiple wills be used to avoid probate?

Summary

The *PEI Probate Act* is silent with regard to multiple wills and their use does appear to have yet been tested by the courts in PEI.

11. A person may use a power of attorney to delegate to another the ability to deal with property and financial matters on that person's behalf.

(a) What is the legislation that governs powers of attorney in Prince Edward Island?

Summary

The *Powers of Attorney Act*, R.S.P.E.I. 1988, c P-16 (the "PAA") is the primary legislation governing powers of attorney in Prince Edward Island. However, certain provisions are made for the registration of powers of attorney in the *Registry Act*, R.S.P.E.I. 1988, c. R-10 (the "Registry Act").

Discussion

Section 45 of the *Registry Act* indicates that all powers and letters of attorney must be registered in the registry office "separate and apart from any document purporting to be executed under such power or letter of attorney." Furthermore, a document executed by an attorney is not registrable until the power or letter of attorney has been registered in the registry office.

(b) What type of authority may be granted under a power of attorney and what are the limitations?

Summary

In Prince Edward Island, a donee of the power may do anything that the donor can do lawfully, subject to any conditions and restrictions that may be contained in the power of attorney.

Discussion

Section 2 of the *Powers of Attorney Act* provides as follows:

> 2. A general power of attorney…is sufficient authority for the donee of the power or, where there is more than one donee, for the donees acting jointly or acting

jointly and severally, as the case may be, to do on behalf of the donor anything that the donor can lawfully do by an attorney, subject to such conditions and restrictions, if any, as are contained therein.

Even where a power of attorney is terminated or revoked or becomes invalid, any subsequent exercise of the power by the attorney is valid and binding as between the donor or the estate of the donor and any person, including the attorney, who acted in good faith and without knowledge of the termination, revocation or invalidity (s. 3(1)).

An enduring power of attorney may be revoked by the donor at any time while they have legal capacity (s. 7).

(c) What are the formalities for executing a power of attorney in Prince Edward Island and can it be executed virtually?

Summary

A power of attorney cannot be executed virtually. A power of attorney in Prince Edward Island may be in a Form 1 outlined in the PAA, signed by one witness and the donor. If the power of attorney is meant to be an enduring power of attorney, then there must be a statement in the document to that effect. Anyone can witness an enduring power of attorney, except the attorney or the attorney's spouse.

Discussion

Section 2 of the *Electronic Commerce Act*, R.S.P.E.I. 1988, c E-4.1 specifically excludes powers of attorney from the provisions of the Act. As such, they cannot be executed virtually.

Form 1 in the Schedule to the PAA may be used to designate a power of attorney in Prince Edward Island.

Per section 5 of the PAA, any provision for an enduring power of attorney is valid and effectual if it expressly states that it may be exercised during any subsequent legal incapacity of the donor, subject to such conditions and restrictions as are contained in the power of attorney or in the Act. Per section 6 of the PAA, if the power of attorney contains such a provision, then the witness to the power of attorney must be someone other than the attorney or the attorney's spouse.

The PAA does not require a certificate of independent legal advice.

As already indicated in the response to question 1, section 45 of the *Registry Act* indicates that all powers and letters of attorney must be registered in the registry office "separate and apart from any document purporting to be executed under such power or letter of attorney." Documents executed by an attorney are not registrable until the power or letter of attorney has been registered in the registry office.

12. A person may use a directive or other document under which health care and personal care decision-making can be delegated.

(a) What is the proper term for this type of document in Prince Edward Island and what is the legislation that governs it?

Summary

In Prince Edward Island, this type of document is called a "Health Care Directive." Health Care Directives are governed primarily by the *Consent to Treatment and Health Care Directives Act*, R.S.P.E.I. 1998, c C-17.2.

Discussion

Section 2 of *the Consent to Treatment and Health Care Directives Act* indicates that the Act is also subject to the *Mental Health Act,* R.S.P.E.I. 1988, Cap. M-6.1 and the *Public Health Act,* R.S.P.E.I 1988 Cap.P-30. Where there are any conflicts between the *Consent to Treatment and Health Care Directives Act* and those Acts, the other Acts prevail.

(b) What are the formalities for executing this document in Prince Edward Island and can it be executed virtually?

Summary

A Health Care Directive must be in writing and dated. It must also be signed by the maker of the Directive or by another person if the maker is not signing for him or herself. If the Directive is being signed by someone other than the maker, certain conditions apply, as set out in Section 21(2) of the *Consent to Treatment and Health Care Directives Act*. One of these conditions is that a witness must be present and must also sign the directive.

A Health Care Directive can be executed virtually if signed by the maker themselves. However, a Directive cannot be executed virtually if signed by someone other than the maker, as the conditions set by subsection 21(2)(b) indicate that a witness other than the proxy or the spouse of the proxy must sign the directive in the presence of the maker.

Discussion

Section 21 of the *Consent to Treatment and Health Care Directives Act* indicates that, in order to be properly executed, a Directive must be in writing and dated. It must be signed either by the maker of the Directive or by some other person in the presence and by the direction of the maker. If the Directive is being signed by someone other than the maker, that person shall not be the proxy or the spouse of the proxy, the maker must acknowledge the signature in the presence of a witness, who shall not be the proxy or the spouse of the proxy, and the witness must sign the directive in the presence of the maker.

A Health Care Directive is not an excluded document listed in Section 2 of the *Electronic Commerce Act*. As such, a Health Care Directive signed by the maker themselves can be executed virtually. However, a Directive cannot be executed virtually if signed by someone other than the

maker, as a witness must sign the Directive in the presence of the maker in such a case. While Section 9 of the *Electronic Commerce Act* indicates that electronic signatures can be acceptable for legal documents other than wills and powers of attorney, the Act is silent with regard to the validity of virtual witnessing of legal documents. Section 18 of the *Electronic Commerce Act* indicates that "electronic agent" means a computer program or any electronic means used to initiate an action or to respond to electronic documents or actions in whole or in part without review by an individual at the time of the response or action. Therefore, witnesses do not appear to be captured under the definition of "electronic agent."

In order for the appointment of a proxy to be valid, the proxy, or another person at the direction of the proxy, must agree to the appointment in writing prior to the maker's incapacity (s. 21(4)).

Regardless of these formalities, Section 30(2) of the *Consent to Treatment and Health Care Directives Act* indicates that, even if a Directive has not been validly executed in accordance with the Act, has been revoked, or was made by a person who was not competent to execute it, the Directive is still deemed to be valid for the purposes of the Act if the person who acted upon it had no reason to believe that the directive was not in fact executed in accordance with the Act, was revoked, or was made by a person who was not competent to execute it.

(c) In the absence of a written directive, to whom will medical professionals speak regarding treatment decisions for an individual who is incapable?

Summary

If there is a no written directive for an individual who is incapable, medical professionals must first ask if the individual has a guardian with the authority to give or refuse consent to treatment when determining with whom to speak. If not, they must next look to a spouse of the individual. If there is no spouse or if the spouse cannot make a decision for the individual, medical professionals must look next to the son, daughter, or parent of the individual, then to the brother or sister, then to a trusted friend, then to any other relative, in that descending order of priority, until someone is able to make a decision for the individual.

Discussion

Pursuant to Section 11(1) of the Act, if there is no written directive, medical professionals can speak to the following people regarding treatment decisions for an individual who is incapable, in the following descending order of priority:

a. The guardian if having the authority to give or refuse consent to treatment;

b. The spouse;

c. The son or daughter, or the parent, or a person who has assumed parental authority and who is lawfully entitled to give or refuse consent to treatment on the patient's behalf;

d. The brother or sister;

e. A person whom the health practitioner considers to be the patient's trusted friend with close knowledge of the wishes;

f. Any other relative,

of the patient.

Pursuant to Section 11(2) of the *Consent to Treatment and Health Care Directives Act*, a health practitioner must make reasonable inquiry as to the existence of the persons listed above and shall determine who is entitled to make a decision. A person from this list in subsection one may only make a decision if the person described in the earlier clause is not willing to assume the responsibility for making a decision or if they are themselves incapable with respect to the treatment (s. 11(5)).

Only a person who is at least sixteen years old, are themselves capable with respect to the treatment, and who has knowledge of the incapable patient's circumstances and has been in recent contact with the patient may make a decision (s. 11(3)).

No person may make a decision on an incapable patient's behalf with respect to any of the following (s. 12):

a. subject to any express authority given in a directive, a procedure the primary purpose of which is research except where the research is likely to be beneficial to the well-being of the patient;

b. sterilization that is not medically necessary for the protection of the patient's health;

c. an abortion except where the continuation of the pregnancy would be likely immediately to endanger her life or health;

d. the use of electric shock as aversive conditioning;

e. the provision of conversion therapy;

f. not proclaimed;

g. any other treatment prescribed in the regulations.

For Will, Estate and Trust questions relating to Prince Edward Island please contact:

Geoffrey Connolly, Q.C., FEC, P.Eng
Stewart McKelvey
65 Grafton Street
Charlottetown, P.E. C1A 1K8
(902) 629-4515
gconnolly@stewartmckelvey.com

NOVA SCOTIA

Prepared by Timothy C. Matthews, Q.C., TEP, of Stewart McKelvey, Halifax
(July, 2021)

1. Many people don't have a will, which means that their estate will be governed by the rules of intestacy.

(a) For a married person with children, what is the division of assets upon an intestacy?

Summary

On intestacy, the surviving spouse is entitled to a $50,000 preferential share. The spouse may elect to take the matrimonial home in lieu of the $50,000 preferential share. After the preferential share, the distributive share is divided among the spouse and children. If there is only one child, the spouse and the child share the residue of the estate equally. If there is more than one child, the spouse is entitled to one third of the estate, and the remainder is divided among the children per *stirpes*.

Discussion

In Nova Scotia, where a person dies without a will (or where a will does not fully dispose of the testator's property), the deceased's property is divided according to the formula set out in the *Intestate Succession Act*, RSNS 1989, c 236 (the "*NS ISA*").

Note that common law spouses are not considered to be spouses under the NS ISA, unless they have registered as Registered Domestic Partners under Part 2 of the *Vital Statistics Act* of Nova Scotia.

In the case of a married person with children, the division under the *NS ISA* is as follows: First, the spouse of an intestate is entitled to a preferential share of the estate (s. 4(1) and 4(2)). The size of the preferential share is $50,000. The spouse may elect instead to take the matrimonial home in lieu of the $50,000 preferential share (s. 4(4)).

Second, after the preferential share, the distributive share is divided among the spouse and child(ren) of the intestate per s. 4(5). If the intestate leaves a spouse and one child, then each takes half of the remaining estate (s. 4(5)(a)). If the intestate leaves a spouse and more than one child, one-third of the remaining estate goes to the spouse, and the remaining two-thirds is divided among the children *per stirpes* (per familial branch) (s. 4(5)(b)).

(b) What is the division for an unmarried person with no children?

First, to the intestate person's parent or parents; second, if both parents are predeceased, to the person's brothers and sisters (with representation of deceased sibling by his or her children per stirpes); thereafter, proceeding to remoter ancestors or collateral next-of-kin.

2. A will may be made but its existence may not be known to family members. Is there a will registry in Nova Scotia?

No.

3. Each province has rules for ensuring that wills are validly executed.

(a) What are the formalities for the proper execution of a will in Nova Scotia and how many witnesses are required?

The Will must be signed by the testator (or by some other person at the testator's request and in his presence) at the end, and attested by two witnesses, all three being present in the same place at the same time. *Wills Act*, RSNS 1989, c 505 (the "*NS Wills Act*")

(b) Can a will be executed virtually and if so what are the rules?

No.

(c) Is a holograph will permitted in Nova Scotia and if so what are the rules?

Summary

Holograph wills are permitted in Nova Scotia, and are valid where signed by the testator and written wholly in the testator's handwriting.

Discussion

The two requirements for a valid holograph will are set out at s. 6(2) of the *NS Wills Act*, under the heading *Formalities of execution*: "Notwithstanding subsection (1) [regarding formal validity], a will is valid if it is wholly in the testator's own handwriting and it is signed by the testator."

4. According to provincial legislation, how is a person's will affected by the following changes in personal circumstances?

(a) If a person gets married;

Summary

Upon marriage, an existing will is revoked, except if (1) it is executed in contemplation of the marriage; or (2) the spouse elects in writing to take under the will within one year of the testator's death; or (3) the will is made in exercise of a power of appointment.

Discussion

Pursuant to the *NS Wills Act*, a will is revoked by marriage, subject to three exceptions (s. 17). First, a will is not revoked by marriage if it is declared that it is being executed in specific contemplation of the same (s, 17(a)). Second, a will is not revoked by marriage if the surviving spouse elects, in writing, to take under the will within one year after the testator's death (s. 17(b)). Third, an appointment of real or personal property pursuant to a power of appointment remains effective (s. 17(c)).

(b) If a person gets divorced; or

Summary

Divorce does not revoke a will, but any bequest, appointment or conferral of power to the former spouse is revoked.

Discussion

Divorce does not revoke a will in Nova Scotia. However, pursuant to the *NS Wills Act*, any bequest, appointment or conferral of power to the former spouse is revoked on divorce (s. 19A). The former spouses may, however, contract out of such revocation; s. 19A provides an exception for situations where "a contrary intention appears by the will or a separation agreement or marriage contract" from the revocation.

(c) If a person becomes separated from their spouse

Summary

Separation has no impact on a will.

Discussion

In Nova Scotia, if a person is separated from their spouse but not divorced, there is no impact on that person's will. Separation does not revoke a bequest, appointment or conferral of power made to a spouse.

5. A person can designate a guardian of their children in their will.

(a) Is guardianship of children as provided in a will binding in Nova Scotia and does the province give authority to the courts to vary the guardianship appointment in a will? If so, are there any restrictions on how and when a court can change the guardian?

Summary

A guardianship appointment in a will is not binding. Consent of the named guardian is required, and the appointment may be varied by the Court.

Discussion

In Nova Scotia, a person having the care and custody of a child may appoint a guardian for that child by will or other instrument in writing (executed before two witnesses) pursuant to s. 19(1) of the *Guardianship Act*, SNS 2002, c 8 (the "*Guardianship Act*"). Section 19(5) provides that an appointment "is not effective without the consent of the person appointed."

A guardianship appointment may also be varied by the court. Section 19(6) of the Guardianship Act states: "[a]n appointment under this Section does not restrict or diminish the jurisdiction of the Supreme Court with respect to the appointment or removal of guardians of the person of the

child" (s. 19(6)). However, there are no reported Nova Scotia cases where the court has exercised its authority pursuant to s. 19(6).

6. A person might exclude a spouse, child or stepchild from the will.

(a) What are the legislated rights in Nova Scotia for a claim by a spouse or a child to the estate of a spouse or parent?

Summary

A dependant (spouse or child) of a deceased may apply to the Court for discretionary relief where the deceased's will does not make adequate provision for proper maintenance and support, regardless of the closeness of relationship between the dependant and the testator.

Discussion

In Nova Scotia, dependant relief is governed by the *Testators' Family Maintenance Act*, RSNS 1989, c 465 (the "*NS TFMA*"), and the *Matrimonial Property Act*, RSNS 1989, c. 275 (the "*NS MPA*"). Pursuant to s. 3(1) of the *NS TFMA*, a dependant may apply to the court for relief from the estate not otherwise granted in the will:

> 3(1) Where a testator dies without having made adequate provision in his will for the proper maintenance and support of a dependant, a judge, on application by or on behalf of the dependant, has power, in his discretion and taking into consideration all relevant circumstances of the case, to order that whatever provision the judge deems adequate be made out of the estate of the testator for the proper maintenance and support of the dependant.

The definition of dependant includes the widow(er) and child(ren) of the testator. Common law spouses are not considered dependants for the purposes of the Act and may not make a claim for relief unless they have registered as Registered Domestic Partners pursuant to the *Vital Statistics Act*, RSNS 1989, c 494. Additionally, only the natural or adopted children, or those *en ventre sa mere* are considered dependants (s. 2(b)); a child to which the testator was *in loco parentis* is not a dependant.

In Nova Scotia, testators have a moral obligation to provide for dependants regardless of the closeness of the relationship between the testator and the dependant (see *Corkum v. Corkum*, (1976), 18 N.S.R. (2nd) 50 (S.C.A.D.), *Jones v. Jones' Estate* (1993), 125 N.S.R. (2nd) 263 (S.C.), *Walker et. al. v. Walker Estate* (1998), 168 (2nd) 231 (S.C.), and *Nova Scotia (attorney General) v. Lawen*, 2021 NSCA 39.

An application for relief must be made within six months of the date of the grant of probate, subject to the discretion of the court to extend the deadline (see *Smith v. Hunter* (1993), 126 N.S.R. (2nd) 254 (S.C.).

Note that a judge has the jurisdiction to impose conditions and restrictions under s. 6(1) of the *NS TFMA* and can provide for support to be paid by way of a trust under subsection 6(2).

(b) What are the dependants relief rules in Nova Scotia? Can life insurance proceeds paid to a named beneficiary be "clawed back" to satisfy a dependant's claim?

No.

(c) Do stepchildren of the deceased who are not legally adopted have any rights to challenge the will?

Summary

Children who were not legally adopted by a deceased are not entitled to a share of the estate of the deceased unless named in the will.

Discussion

In Nova Scotia, an unadopted child is not entitled to the estate of a deceased step parent unless named in the will.

In the intestacy context, 'issue' of the intestate is entitled to a portion of the distributive share. An unadopted child is not entitled to a portion because they do not fall within the definition of 'issue' at s. 2(a) of the *NS ISA*: "all lawful lineal descendants of the ancestor."

In the dependant relief context, a 'child' of the intestate may apply for relief. An unadopted child is not so entitled because they do not fall within the definition of 'child' at s. 2(a) of the NS TFMA:

> 2(a) "child" includes a child
>
> (i) Lawfully adopted by the testator,
>
> (ii) Of the testator not born at the date of the death of the testator,
>
> (iii) Of which the testator is the natural parent.

(d) Can the validity of a will be challenged for reasons such as lack of capacity and undue influence?

Summary

Yes. Under the *Probate Act* and the *NS Wills Act*, a person with an interest in the estate may challenge a will on four bases: (1) the will was not validly executed; (2) lack of testator capacity; (3) undue influence; and (4) fraud. A dependant may challenge the will pursuant to dependant's relief legislation.

Discussion

In Nova Scotia, a person with an interest in the estate may challenge a will pursuant to Probate Act, NSN 2000, c 31 (the "*Probate Act*"). Section 31(1) of the *Probate Act* then requires the propounder of the will to prove the same in solemn form:

> 31(1) A court may hear a will proved in solemn form and determine the validity of the will where an application asking the court to do so is made by a person interested in the estate of the testator either before or after a grant is made with respect to the will but not after the expiration of six months from the grant.

A person with an interest in the estate may challenge the will on four bases: the will was not validly executed per *NS Wills Act* s. 6; capacity (*viz.* the testator did not have adequate mental capacity to approve the will); undue influence (*viz.* a will made not by the testator's volition); and fraud (*viz.* a bequest induced by deception).

Finally, the disposition of property described in a will may be adjusted *ex post facto* pursuant to dependant's relief legislation (See discussion above). On this basis, a dependant widow(er) or child(ren) could make a claim that has the effect of changing a will.

7. Clients in second marriages often want to draft wills that provide for a legally binding distribution of assets upon first and second death (i.e. a mutual will). Are mutual wills allowed in Nova Scotia?

Summary

Mutual wills are permitted in Nova Scotia.

Discussion

For a mutual will to be effective, the testators must agree not to revoke the will after the death of one of them (*Re Hand Estate*, 2010 NSSC 297). Although not commonplace, it is possible for these testators to enter into a valid agreement not to revoke their wills.

8. The term common law marriage is used to describe a variety of relationships. Common law marriage does not require a marriage ceremony, marriage licence, or any other formal aspect of marriage.

(a) What is the definition of common law partner in Nova Scotia?

Summary

In Nova Scotia, a "common law partner" means an individual who has cohabited with another individual in a marriage-like but not marital relationship, regardless of the gender of the two persons.

Discussion

The requisite time period for cohabitation differs based on the relevant legislation and purpose. The typical requirement is to have lived together in a conjugal relationship for two years, or have lived together and have a child together (e.g. *Maintenance and Custody Act*, RSNS 1989, c 160). However, under other pieces of legislation, the time period may be different. For example, under the *Insurance Act*, RSNS 1989, c 231, common law partners are only required to have lived together in a conjugal relationship for at least one year.

However, couples who are not legally married can register a declaration that they are living in a "domestic partnership" under the *Vital Statistics Act* (RSNS 1989, c 494), giving the couple many if not all of the same rights as a legally married couple has in the province ("RDP"). In order to register as an RDP under the Act, the couple must be cohabiting, or intend to cohabit, in a conjugal relationship.

(b) What rights do common law partners have to property on death, including property that was owned by one partner prior to the relationship and property that was jointly acquired?

Summary

Except for jointly owned property, common law partners have no rights to property in Nova Scotia. However, RDPs have substantial proprietary rights, including the ability to claim for division of assets, take a portion of the estate as provided in a Will, inherit property and make claims in Court for relief as a dependant.

Discussion

On the death of one partner, RDPs will inherit on intestacy as a legally married spouse would (*Intestate Succession Act*, RSNS 1989, c 236). Further, RDPs can make a claim under the *Testators Family Maintenance Act* if they feel the deceased partner did not adequately provide for them in a Will. They can also choose to take the portion of the estate of the deceased partner as provided in a Will, or make a claim under the *Matrimonial Property Act* (RSNS 1989, c 275) for a division of assets. None of these rights are afforded to non-registered common law partners in Nova Scotia (common law spouses are not recognized under these statutes). Jointly owned property becomes the property of the surviving common law partner by right of survivorship. Otherwise, the surviving common law partner would have to advance a claim based on the equitable doctrine of constructive trust.

9. A client's will can include a life insurance beneficiary designation. If there is a beneficiary designation on the policy itself that differs from the will, which designation would apply and what legislation governs this?

Summary

In Nova Scotia, the latest made valid designation, whether this last designation is in a Will or on the policy, will dictate how the proceeds of the insurance policy are distributed (*Insurance Act*, RSNS 1989, c 231).

10. A will is probated to provide the executor/estate trustee with authority to deal with the deceased's assets.

(a) Are there probate fees in Nova Scotia and if so how are they determined?

Summary

Probate fees in Nova Scotia are set pursuant to the *Probate Act*. As of April 1, 2015, the fee schedule is: for an estate not exceeding $10,000, the tax is $85.60; for an estate exceeding $10,000,

the tax is $215.20; for an estate exceeding $25,000, the tax is $358.15; for an estate exceeding $100,000, the tax is $1,002.65; and, for an estate exceeding $100,000, each additional $1,000 incurs a tax of $16.95.

(b) What assets pass outside the estate and are therefore not subject to probate?

Assets with valid beneficiary designations of surviving persons, such as life insurance or registered pension or retirement plans or tax free savings accounts – these are subject to probate only if the estate is named as the beneficiary or if there is no valid beneficiary designation.

Jointly held assets with right of survivorship (subject only to the equitable presumption of resulting trust).

(c) Can multiple wills be used to avoid probate?

No.

11. A person may use a power of attorney to delegate to another the ability to deal with property and financial matters on that person's behalf.

(a) What is the legislation that governs powers of attorney in Nova Scotia?

Powers of Attorney Act, RSNS 1989, c 352 governs enduring powers of attorney.

(b) What type of authority may be granted under a power of attorney and what are the limitations?

The Act is silent on the extent of powers that may be authorized under a power of attorney, so it is necessary to refer to the common law and equity. Generally, such a power may not delegate any legal decision that is personal and discretionary to the donor, for example, the power to make a will or to designate a beneficiary under a life insurance policy or a registered plan, or the exercise of a fiduciary power, such as the office of executor, trustee, or corporate director. In general, unless the document explicitly permits, the attorney may not delegate his or her discretionary powers.

(c) What are the formalities for executing a power of attorney in Nova Scotia and can it be executed virtually?

The power of attorney must be in writing, signed by the donor, and witnessed by at least one person who is not the attorney or the spouse of the attorney. If the power is intended to be exercised after and during the donor's incapacity, the document must explicitly state that it may be exercised during incapacity in order to be an enduring power of attorney.

A power of attorney cannot be validly executed virtually.

12. A person may use a directive or other document under which health care and personal care decision-making can be delegated.

(a) What is the proper term for this type of document in Nova Scotia and what is the legislation that governs it?

A personal directive may be executed to authorize a delegate to make health care and personal decisions for the maker of the directive during incapacity. This instrument is authorized and governed by the *Personal Directives Act*, SNS 2008, c 8.

(b) What are the formalities for executing this document in Nova Scotia and can it be executed virtually?

The personal directive must be in writing, be dated, be signed by the maker (or if the maker is unable to sign, by another person on his or her behalf who is not the delegate or the delegate's spouse, at his or her direction and in his or her presence), and witnessed by at least one person who is not the delegate or the delegate's spouse or the person who signs on the maker's behalf or that person's spouse.

(c) In the absence of a written directive, to whom will medical professionals speak regarding treatment decisions for an individual who is incapable?

With regard to a person who lacks capacity to make a health care decision or a decision to accept an offer of placement in a continuing care home or to accept home care services, the nearest relative who (a) has capacity, (b) is willing to make the decision, and (c) excepting a spouse, has been in personal contact with the person over the preceding twelve-month period or has been granted a court order to shorten or waive the twelve-month period; (d) is willing to assume the responsibility for making the decision; and (e) knows of no person of a higher rank in priority who is able and willing to make the decision; and (f) makes a statement in writing certifying the relationship to the person and the facts and beliefs set out above, may act as a statutory decision maker.

"Nearest relative" means the first-named of the following (in order of priority):

(i) spouse,

(ii) child,

(iii) parent,

(iv) person standing in loco parentis,

(v) sibling,

(vi) grandparent,

(vii) grandchild,

(viii) aunt or uncle,

(ix) niece or nephew,

(x) other relative,

who, except in the case of a minor spouse, is of the age of majority.

If there is no such person able and willing to act, the Public Trustee is the statutory decision-maker.

This document has been prepared for general information only. You should consult a lawyer about your unique circumstances before acting on this information.

For Will, Estate and Trust questions relating to Nova Scotia please contact:

Timothy C. Matthews, Q.C., TEP
Stewart McKelvey
600-1741 Lower Water Street
Halifax, N.S. B3J 0J2
(902) 420-3325
tmatthews@stewartmckelvey.com

NEWFOUNDLAND AND LABRADOR

Prepared by Paul Coxworthy of Stewart McKelvey, St. John's
(July, 2021)

1. Many people don't have a will, which means that their estate will be governed by the rules of intestacy.

(a) For a married person with children, what is the division of assets upon an intestacy?

Summary

Upon intestacy, the surviving spouse is not entitled to a preferential share in Newfoundland. If there is one child, the assets are divided equally between the spouse and the child. If there is more than one child, one-third goes to the spouse and the remainder is divided equally among the children *per stirpes*.

Discussion

In Newfoundland, where a person dies without a will (or where a will does not fully dispose of the testator's property), the deceased's property is divided according to the formula set out in the *Intestate Succession Act*, RSNL 1990, C I-21 (the "*NL ISA*").

Note that common law spouses are not considered spouses under the *NL ISA*.

In the case of a married person with children, the division under the *NL ISA* is as follows: The spouse of an intestate is not entitled to a preferential share of the estate. The distributive share is divided among the spouse and child(ren) of the intestate per s. 4. If the intestate leaves a spouse and one child, then each takes half of the estate (s. 4(1)). If the intestate leaves a spouse and more than one child, then one-third goes to the spouse, and the remaining two-thirds is divided among the children *per stirpes* (per familial branch) (s. 4(2)).

(b) What is the division for an unmarried person with no children?

First, to the intestate person's parent or parents; second, if both parents are predeceased, to the person's brothers and sisters (with representation of deceased sibling by his or her children per stirpes); thereafter, proceeding to remoter ancestors or collateral next-of-kin.

2. A will may be made but its existence may not be known to family members. Is there a will registry in Newfoundland and Labrador?

No.

3. Each province has rules for ensuring that wills are validly executed.

(a) What are the formalities for the proper execution of a will in Newfoundland and Labrador and how many witnesses are required?

The Will must be signed by the testator (or by some other person at the testator's request and in his presence) at the end, and attested by two witnesses, all three being present in the same place at the same time. *Wills Act*, RSNL 1990, c W-10 (the "*NL Wills Act*")

(b) Can a will be executed virtually and if so what are the rules?

Summary

In Newfoundland and Labrador, wills may be duly executed in a situation where the testator/testatrix and one or two lawyers as witnesses are in attendance virtually, rather than all in the physical presence of each other, until "the date the public emergency health emergency ends", subject to certain conditions being met.

The "public health emergency" was declared, in respect of the Covid-19 pandemic, pursuant to the *Public Health and Promotion Act*, SNL 2018, c. P-37.3. A further declaration is required every 14 days to extend the public health emergency. The most recent declaration has extended the public health emergency for 14 days from July 26, 2021. At the present time, it is anticipated there will be further extensions; however it will be necessary to monitor the status of any extensions to determine whether virtual execution of wills (and documents) continues to be permissible.

Discussion

Pursuant to the *Temporary Alternative Witnessing of Documents Act*, SNL 2020, c. T-4.001, during the "public health emergency", the requirement under the *Wills Act*, RSNL 1990, c. W-10 that a will must be "signed by the testator in the presence of at least 2 witnesses" includes attendance through the use of audio-visual technology, where the testator is in a different location from one or both witnesses, provided that

(a) if both witnesses are in a different location than the testator, then both witnesses must be lawyers in good standing with the Law Society of Newfoundland and Labrador; if one of the witnesses is in the same location as the testator (ie is in the physical presence of the testator), then that "same situate" witness need not be a lawyer;

(b) the lawyer witness(es) take all reasonable steps to verify the identity of the testator (and if applicable, the identity of the"same situate" witness) and confirm the contents of the will (ie the document actually before the testator);

(c) the will includes a statement that it was witnessed through the use of audio-visual technology in accordance with the *Temporary Alternative Witnessing of Documents Act*; and

(d) the lawyer witness(es) comply with the requirements established by the Law Society of Newfoundland and Labrador related to witnessing documents through the use of audio-visual technology.

Rule XVIII of the Law Society of Newfoundland and Labrador – Witnessing, Commissioning and Notarizing Documents via Audio-Visual Communication – defines "audio-visual communication" as technology which allows a person signing a document and a person witnessing the signing of the document to see hear and communicate with each other at all times. Rule XVIII also contains and incorporates by reference extensive insurance, client (testator) identification and verification, will document verification, record keeping and other risk mitigation requirements (which are not able to be accurately summarized).

(c) Is a holograph will permitted in Newfoundland and if so what are the rules?

Summary

Holograph wills are permitted in Newfoundland, and are valid where signed by the testator and written wholly in the testator's handwriting.

Discussion

The two requirements for a valid holograph will are set out at s. 2(1) of the *Wills Act*:

> A will is invalid unless it is made in writing, and it is either in the handwriting of the testator, and signed by him or her, or, where not so written and signed, is signed by the testator in the presence of at least 2 witnesses […]. [*emphasis added*]

4. According to provincial legislation, how is a person's will affected by the following changes in personal circumstances?

(a) If a person gets married;

Summary

The will is revoked, except if it is executed in contemplation of the marriage. Specific bequests in a will are not revoked if the property would not otherwise pass to the entitled person.

Discussion

Pursuant to the *NL Wills Act*, a will is revoked by marriage, subject to two exceptions (s. 9). First, a will is not revoked by marriage if it is declared that it is being executed in specific contemplation of the same (s. 9(b)). Second, an appointment of real or personal property pursuant to a power of appointment remains effective (s.9(b)).

(b) If a person gets divorced; or

Summary

The *NL Wills Act* is silent with respect to the effects of divorce on a will.

(c) If a person becomes separated from their spouse

Summary

Separation has no impact on a will.

Discussion

In Newfoundland, if a person is separated from their spouse but not divorced, there is no impact on that person's will. Separation does not revoke a bequest, appointment or conferral of power made to a spouse.

With respect to the effectiveness of separation agreements in Newfoundland, any such agreement must specifically address a bequest, appointment or conferral of power being revoked (*Billing v Rideout (Estate) et al.*, 1993 CanLII 8384 (NL SCTD) [*Billing*]). In *Billing*, for example, where a separation agreement contemplated a release of rights on intestacy, the court did not revoke a testamentary (rather than intestate) bequest to a separated spouse.

5. A person can designate a guardian of their children in their will.

(a) Is guardianship of children as provided in a will binding in Newfoundland and Labrador and does the province give authority to the courts to vary the guardianship appointment in a will? If so, are there any restrictions on how and when a court can change the guardian?

Summary

A guardianship appointment in a will is not binding. Consent of the guardian is required, and the appointment may be varied by the Court.

Discussion

In Newfoundland, a person with the custody of a child may appoint a guardian for that child by will pursuant to s. 68(1) of the *Children's Law Act*, RSNL 1990, c C-13 (the "*Children's Law Act*"). Section 68(2) provides that a guardian of the property of a child may appoint a guardian of a child's property by will. Such appointments are not, however, binding. Section 68(6) of the Act provides that an appointment "is not effective without the consent of the person appointed."

A guardianship appointment may also be varied by the court. Section 68(8) specifically identifies that an appointment does not limit applications made pursuant to ss. 28 and 54. Those sections deal with the court's authority to make orders for custody and access to a child, and the application of child abduction conventions in NL, respectively.

6. A person might exclude a spouse, child or stepchild from the will.

(a) What are the legislated rights in Newfoundland and Labrador for a claim by a spouse or a child to the estate of a spouse or parent?

Summary

Dependants may apply to the Court for discretionary relief where the will does not make adequate provision for proper maintenance and support.

Discussion

In Newfoundland, dependant relief is governed by the *Family Relief Act*, RSNL 1990, c F-3 (the "*NL FRA*"). Pursuant to s. 3(1) of the *NL FRA*, a dependant may apply to the court for relief from the estate not otherwise granted in the will:

> 3(1) Where a person:
>
> (a) dies testate without having made in his or her will adequate provision for the proper maintenance and support of his or her dependants or 1 of them; or
>
> (b) dies intestate and the share under the *Intestate Succession Act* of the intestate's dependants or 1 of them in the estate is inadequate for their or his or her proper maintenance and support,
>
> a judge, on application by or on behalf of those dependants, or 1 of them, may in his or her discretion and taking into consideration all relevant circumstances of the case, notwithstanding the provisions of the will or the *Intestate Succession Act*, order that adequate provision shall be made out of the estate of the deceased for the proper maintenance and support of the dependants or 1 of them.

The definition of dependant includes the widow(er) and child(ren) of the deceased. For greater specificity, the testator and dependant widow(er) must have been married; Common law spouses do not have the status of dependent under the legislation, and may not make a claim under the NL FRA. Additionally, only the natural or adopted children, or those *en ventre sa mere* are considered dependants (s. 2(a)); a child to which the testator was in loco parentis is not a dependant.

Section 5 of the NL FRA instructs the court to consider an application broadly, and to consider a list of factors, including: conduct of the dependant; other entitlements of the dependant; the dependant's relationship with the deceased; the financial circumstances of the dependant; other arrangements made for the dependant; claims of other dependants; services render by the dependant for the deceased; and entitlements under other legislation/regimes.

An application must be brought within six months from the date of issue of the grant of probate.

(b) What are the dependants relief rules in Newfoundland and Labrador? Can life insurance proceeds paid to a named beneficiary be "clawed back" to satisfy a dependant's claim?

No.

(c) Do stepchildren of the deceased who are not legally adopted have any rights to challenge the will?

Summary

Children who are not legally adopted are not entitled to a share of the estate unless named in the will.

Discussion

In Newfoundland, an unadopted child is not entitled to a share of the estate of the deceased step parent unless named in the will.

In the intestacy context, any 'issue' of the intestate are entitled to a portion of the distributive share. An unadopted child is not entitled to a portion because they do not fall within the definition of 'issue' at s. 2(b) of the *NL ISA*: "all lawful lineal descendants of a person through all generations."

In the dependant relief context, a 'child' of the intestate may apply for relief. An unadopted child is not so entitled because they do not fall within the definition of 'child' at s. 2(a) of the *NL FRA*:

> 2(a) "child" includes
>
> (i) a child lawfully adopted by the deceased; and
>
> (ii) a child of the deceased which is in the mother's womb at the date of the deceased's death.

(d) Can the validity of a will be challenged for reasons such as lack of capacity and undue influence?

Summary

The eligibility of individuals seeking to challenge a will has not been codified in Newfoundland. Under the *NL Wills Act*, the will may be challenged on four bases: (1) invalid execution; (2) lack of testator capacity; (3) undue influence; and (4) fraud.

Discussion

In Newfoundland, the eligibility of a person interested in an estate to challenge a will has not been codified. Rather, a person with an interest in the estate may challenge a will by application to the court. The propounder of the will must then prove the same in solemn form.

A person with an interest in the estate may challenge the will on four bases: the will was not validly executed per *NL Wills Act* s. 2(1); capacity (*viz.* the testator did not have adequate mental capacity to approve the will); undue influence (*viz.* a will made not by the testator's volition); and fraud (*viz.* a bequest induced by deception).

Finally, the disposition of property described in a will may be adjusted after the fact pursuant to dependant's relief legislation (see discussion above). On this basis, a dependant widow(er) or child(ren) could make a claim against the estate for financial relief. This has the effect of changing a will.

7. Clients in second marriages often want to draft wills that provide for a legally binding distribution of assets upon first and second death (i.e. a mutual will). Are mutual wills allowed in Newfoundland and Labrador?

Summary

Mutual wills are permitted in Newfoundland.

8. The term common law marriage is used to describe a variety of relationships. Common law marriage does not require a marriage ceremony, marriage licence, or any other formal aspect of marriage.

(a) What is the definition of common law partner in Newfoundland and Labrador?

Summary

For the purposes of most statutes in Newfoundland, a "common law partner" means an individual who has cohabited with another for at least two years in a "marriage-like" or conjugal relationship, or at least one year where the partners are the biological or adoptive parents of a child (e.g., s. 35 and 36 of the *Family Law Act*, RSNL 1990, c F-2).

(b) What rights do common law partners have to property on death, including property that was owned by one partner prior to the relationship and property that was jointly acquired?

Summary

Common law partners have no rights under intestacy legislation in the province.

Discussion

Pursuant to the *Intestate Succession Act*, RSNL 1990, c I-21, if a common law partner dies with a Will, the surviving partner only has a right to the portion of the estate gifted to him or her in the Will: no claim can be made for a division of family property (*Family Law Act*) or under dependant's relief legislation. Jointly owned property becomes the property of the surviving common law partner by right of survivorship. Otherwise, the surviving common law partner would have to advance a claim based on the equitable doctrine of constructive trust.

9. A client's will can include a life insurance beneficiary designation. If there is a beneficiary designation on the policy itself that differs from the will, which designation would apply and what legislation governs this?

Summary

In Newfoundland, the latest made valid designation, whether this last designation is in a Will or on the policy, will dictate how the proceeds of the policy are distributed (*Life Insurance Act,* RSNL 1990, c L-14).

10. A will is probated to provide the executor/estate trustee with authority to deal with the deceased's assets.

(a) Are there probate fees in Newfoundland and Labrador and if so how are they determined?

Summary

In Newfoundland, the charge for a grant of letters of probate or administration is calculated according to the formula: $60 plus $0.60 for each $100 above $1,000.

(b) What assets pass outside the estate and are therefore not subject to probate?

Assets with valid beneficiary designations of surviving persons, such as life insurance or registered pension or retirement plans or tax free savings accounts – these are subject to probate only if the estate is named as the beneficiary or if there is no valid beneficiary designation.

Jointly held assets with right of survivorship (subject only to the equitable presumption of resulting trust).

(c) Can multiple wills be used to avoid probate?

There is no statutory provision or reported court decision expressly addressing this question. The answer is likely "No", if the intention is to avoid probate in respect of one of the wills, or to avoid probate fees in relation to a portion of the estate situate in NL. There is no legal impediment to multiple wills where each will deals with estate assets situate in different jurisdictions (although our Rules of Court might require disclosure of a non-NL asset will if it is referred to in the NL asset will).

11. A person may use a power of attorney to delegate to another the ability to deal with property and financial matters on that person's behalf.

(a) What is the legislation that governs powers of attorney in Newfoundland and Labrador?

Summary

The *Enduring Powers of Attorney Act*, RSNL 1990, c. E-11 (the "NLEPA"), is the primary legislation governing those powers of attorney in Newfoundland and Labrador that authorize the

management of the estate of a donor and that are intended to be exercised in the event of the donor's subsequent legal incapacity or that is intended to continue notwithstanding the donor's subsequent legal incapacity. As the *Enduring Powers of Attorney Act* deems an enduring attorney to be a trustee, the *Trustee Act*, RSNL 1990, c- T-10 will also be of application in certain situations.

Enduring powers of attorney and non-enduring powers of attorney are subject to provisions of the *Conveyancing Act*, RSNL 1990, c. C-34 and the *Registration of Deeds Act*, SNL 2009, c. R-10.01 with respect to the conveyancing of real property by a power of attorney and the registration of deeds by a power of attorney.

Other than provisions of the *Conveyancing Act* and *Registration of Deeds Act* noted above, and the potential application of the *Trustee Act* in certain situations, there is no legislation that governs non-enduring powers of attorney in Newfoundland and Labrador.

Discussion

An attorney appointed under an enduring power of attorney must exercise his or her powers in "the manner that protects the best interests of the donor" (section 6(1) of the NLEPA). The NLEPA applies to all enduring powers of attorney notwithstanding an agreement or a statement in the enduring power of attorney to the contrary (section 4 of the NLEPA).

The intent and effect of sections 32-35 of the *Conveyancing Act* may be summarized as providing assurances to persons dealing with the attorney, whether acting under an enduring or non-enduring power of attorney, with respect to conveyances of real property. Section 13 of the *Registration of Deeds Act* provides that registration of an instrument, in the circumstance where the instrument has been executed under a power of attorney, is not valid unless the power of attorney is registered before the registration of the instrument or within 6 months after the registration.

The potential scope of the application of the *Trustee Act* to an enduring power of attorney cannot be accurately summarized. The only provision of that *Act* specific to powers of attorney is section 28, which provides that a trustee acting or paying money in good faith under a power of attorney shall not be liable for that act or payment because of the fact that at the time of the payment or act the person who gave the power of attorney was dead or had done some act to avoid the power, where this fact was not known to the trustee at the time of his or her so acting or paying.

(b) What type of authority may be granted under a power of attorney and what are the limitations?

Summary

As noted above, the NLEPA provides in respect of enduring powers of attorney that

- it must authorize, and is limited to, the management of the estate of a donor (section 2(2);
- the attorney must exercise his or her powers in "the manner that protects the best interests of the donor" (section 6(1));

- NLEPA applies to all enduring powers of attorney notwithstanding an agreement or a statement in the enduring power of attorney to the contrary (section 4).

In addition, section 3(3) provides that an attorney shall not appoint another person to perform the attorney's functions or to exercise his or her powers as an attorney.

There is no specific legislation governing the type of authority that may granted under a non-enduring power of attorney or any limitations on that authority in the Newfoundland and Labrador.

Discussion

Other than as summarized above, the NLEPA does not expressly set out any other limitations on an enduring attorney's authority, and in particular does not expressly address (as applicable legislation may in other Canadian jurisdictions) whether an attorney may alter the donor's beneficiary designations, alter or make testamentary dispositions with respect to the donor's estate, or otherwise authorize estate planning measures. As a result, there is some uncertainty as to whether an enduring power of attorney instrument which purports to authorize such acts would be found to be compliance with the NLEPA.

Section 10(1) of the NLEPA provides that a person with an interest in the estate of the donor, or another person permitted by the court, may, where the donor is legally incapacitated, apply to the court for an order requiring the attorney to submit his or her accounts for a transaction involving the estate of the donor.

Compensation of an enduring power of attorney, as a trustee, would be governed by the *Trustee Act*. Section 52 of the *Trustee Act* provides that a trustee, shall be allowed, over and above actual and necessary expenses,

- the remuneration that may appear to the court or a judge of the court to be adequate to their services;
- the total remuneration shall not exceed 1/20 of the realized value of the assets;
- where the assets have not been realized the court or judge may either order further realization or allow remuneration in respect of the unrealized part to a sum less than 1/20 of the value of the assets; and
- in the case of continuing trusts the court or a judge may allow a person entitled to remuneration under subsection (1), (2) or (3) an annual care and management fee not exceeding 1/250 of the average market value of the assets under administration.

(c) What are the formalities for executing a power of attorney in Newfoundland and Labrador and can it be executed virtually?

Summary

With respect to non-virtual execution of powers of attorney, whether enduring or non-enduring, in Newfoundland and Labrador, the power of attorney must be in writing and signed and dated by the donor, in the presence of one (1) subscribing witness. There are no formal requirements with respect to who the subscribing witness may be (other than, in respect of an enduring power of attorney, where section 3(1) of the NLEPA stipulates that it must not be witnessed by a person who is the person named in the enduring power of attorney as the attorney or the spouse or cohabiting partner of that person; as a matter of practice, the same exclusions would be applied to witnessing of a non-enduring power of attorney). However, if the power of attorney (enduring or non-enduring) may be required to be registered for the purposes of conveying or dealing with real property, the power of attorney will have to be witnessed by a notary public or commissioner of oaths, or other category of persons prescribed by section 15 (for documents executed in the Province) or section 16 (for documents executed outside the Province) of the *Registry of Deeds Act* as persons who may prove the execution of an instrument for registration; if the witness is not of the prescribed categories, then an affidavit will need to be taken from that witness to prove the execution of an instrument for registration.

With respect to the virtual execution of powers of attorney, whether enduring or non-enduring, in Newfoundland and Labrador the requirements are essential the same as for a will, as summarized and discussed above, excepting that only one witness is required and that one witness must be a lawyer in good standing with the Law Society of Newfoundland and Labrador.

12. A person may use a directive or other document under which health care and personal care decision-making can be delegated.

(a) What is the proper term for this type of document in Newfoundland and Labrador and what is the legislation that governs it?

Summary

In Newfoundland and Labrador, the proper term for a document in which a maker sets out that maker's instructions or the maker's general principles regarding his or her health care treatment or in which a maker appoints a substitute decision maker for health care decisions or both is an "advance health care directive", governed by the *Advance Health Care Directives Act*, SNL 1995, c. A-4.1.

Discussion

Section 2(b) of the *Advance Health Care Directives Act* defines a "health care decision" as meaning a consent, refusal to consent, or withdrawal of consent of any care, treatment, service, medication, or procedure to maintain, diagnose, treat, or provide for an individual's physical or mental health or personal care and includes

- life-prolonging treatment,
- psychiatric treatment for a person other than a person admitted to a psychiatric unit as an involuntary patient under applicable legislation,
- the administration of nutrition and hydration, and
- admission to treatment facilities and removal from those institutions.

The term "health care treatment" is not defined under the Act but presumably would be given meaning in accordance with the definition above of "health care decision".

(b) What are the formalities for executing this document in Newfoundland and Labrador and can it be executed virtually?

Summary

Pursuant to section 6(1) of the *Advance Health Care Directives Act*, an advance health care directive must be in writing, witnessed by at least 2 "independent persons" and signed by the maker.

The requirements for virtual execution of an advance health care directive are essentially the same as for a will, as discussed above.

Discussion

Pursuant to section 6(2) of the *Advance Health Care Directives Act*, where the maker is unable to sign the advance health care directive it may be signed by some other person in the presence of the maker and by the direction of the maker, in which case:

(a) the person signing shall not be the substitute decision maker or the spouse of the substitute decision maker;

(b) the maker shall acknowledge the signature in the presence of at least 2 independent witnesses, neither of whom shall be the substitute decision maker or the spouse of the substitute decision maker; and

(c) the witnesses shall attest and subscribe the advance health care directive in the presence of the maker.

The term "independent persons", in relation to who may be a witness to an advance health care directive, is undefined. It can be reasonably inferred from the other provisions of the Act referred to above that the substitute decision maker or spouse of the substitute decision maker should be excluded as witnesses; good practice may be to exclude as witnesses all persons who might be called upon to act as a substitute decision maker (and their spouses) in the absence of a written directive or in substitution to the appointed substitute decision maker (see discussion under question 3 below).

(c) In the absence of a written directive, to whom will medical professionals speak regarding treatment decisions for an individual who is incapable?

Summary

Section 10(1) of the *Advance Health Care Directives Act*, provides that in the absence of an advance health care directive appointing a substitute decision maker, or if the substitute decision maker refuses or is unable to so act, the first named person or a member of the category of persons in the following list may, if he or she is at least 19 years of age, act as a substitute decision maker:

- the incompetent person's spouse;
- the incompetent person's children;
- the incompetent person's parents;
- the incompetent person's siblings;
- the incompetent person's grandchildren;
- the incompetent person's grandparents;
- the incompetent person's uncles and aunts;
- the incompetent person's nephews or nieces;
- another relative of the incompetent person; and
- the incompetent person's health care professional who is responsible for the proposed health care.

Discussion

Pursuant to section 10(3) of the *Advance Health Care Directives Act*, notwithstanding section 10(1) (above) a person can indicate by his or her advance health care directive that he or she does not wish an individual to act as his or her substitute decision maker.

Pursuant to section 10(4) of the *Advance Health Care Directives Act*, notwithstanding section 10(1) (above) a person may not act as a substitute decision maker unless he or she has had personal involvement with the incompetent person at some time during the preceding 12 months (excepting a health care professional).

Where, pursuant to section 10 of the *Advance Health Care Directives Act*, several persons rank in the first priority rank to act as a substitute decision maker, then pursuant to section 11(1) of the *Act* the decision of the majority of them shall govern; if there is no majority decision among that priority rank, then the decision falls to the persons in the next priority rank of decision maker.

Where, pursuant to section 10 of the *Advance Health Care Directives Act*, several persons rank in the first priority rank to act as a substitute decision maker, then pursuant to section 11(2) of the *Act* they are required to designate one person among their number to communicate their health care decisions to a health care professional, and the health care professional may rely on that communication without making inquiry of the others. If they fail to designate such a person, then the decision falls to the persons in the next priority rank of decision maker.

This document has been prepared for general information only. You should consult a lawyer about your unique circumstances before acting on this information.

For Will, Estate and Trust questions relating to Newfoundland and Labrador please contact:

Paul Coxworthy
Stewart McKelvey
Suite 1100, Cabot Place
100 New Gower St.
St. John's, N.L. A1C 6K3
(709) 570-8830
pcoxworthy@stewartmckelvey.com

A COMPARISON BY PROVINCE

The provincial legislation with respect to the ability to execute virtually witnessed wills and power of attorney's (POA's) and whether marriage, divorce or separation revoke a will vary between the provinces. The following charts compare the rules in each province.

Virtually witnessed wills and POA's

	Virtually witnessed wills	Holograph wills	Virtual POA's
BC	Yes	No	Yes
Alberta	Yes	Yes	Yes
Saskatchewan	Yes	Yes	Yes
Manitoba	Yes	Yes	Yes
Ontario	Yes	Yes	Yes
Quebec	Yes	Yes	Yes
New Brunswick	Yes	Yes	Yes
PEI	No	Yes	No
Nova Scotia	No	Yes	No
Newfoundland and Labrador	Yes	Yes	No

Revocation of will on marriage, divorce, separation

	Marriage revoke a will?	Divorce revoke a will?	Separation revoke a will?
BC	No	Gifts, appointments revoked	Gifts, appointments revoked
Alberta	No	Gifts, appointments revoked	No
Saskatchewan	No	Gifts, appointments revoked	No
Manitoba	Yes	Gifts, appointments revoked	No
Ontario	January 1, 2022 – No	Gifts, appointments revoked	January 1, 2022 – Gifts, appointments revoked
Quebec	No	Legacy, appointments revoked	No
New Brunswick	Deemed to die intestate	No	No
PEI	Yes	Gifts, appointments revoked	No
Nova Scotia	Yes	Gifts, appointments revoked	No
Newfoundland and Labrador	Yes	No	No

The above tables have been prepared by PPI.

UNE COMPARAISON PAR PROVINCE

La législation provinciale concernant la capacité d'exécuter un testament et une procuration virtuels et la révocation d'un testament en cas de mariage, divorce ou séparation varie d'une province à l'autre. Les tableaux suivants comparent les règles de chaque province.

Testament et procuration virtuels

	Testament virtuel	Testament holographe	Procuration virtuelle
C-B	Oui	Non	Oui
Alberta	Oui	Oui	Oui
Saskatchewan	Oui	Oui	Oui
Manitoba	Oui	Oui	Oui
Ontario	Oui	Oui	Oui
Québec	Oui	Oui	Oui
Nouveau-Brunswick	Oui	Oui	Oui
Î.-P.-É.	Non	Oui	Non
Nouvelle-Écosse	Non	Oui	Non
Terre-Neuve-et-Labrador	Oui	Oui	Non

Révocation du testament en cas de mariage, divorce ou séparation

	Mariage révoque le testament ?	Divorce révoque le testament ?	Séparation révoque le testament ?
C-B	Non	Dons et nominations révoqués	Dons et nominations révoqués
Alberta	Non	Dons et nominations révoqués	Non
Saskatchewan	Non	Dons et nominations révoqués	Non
Manitoba	Oui	Dons et nominations révoqués	Non
Ontario	1er janvier 2022 – Non	Dons et nominations révoqués	1er janvier 2022 – Dons et nominations révoqués
Québec	Non	Dons et nominations révoqués	Non
Nouveau-Brunswick	Réputé décédé sans testament	Non	Non
Î.-P.-É.	Oui	Dons et nominations révoqués	Non
Nouvelle-Écosse	Oui	Dons et nominations révoqués	Non
Terre-Neuve-et-Labrador	Oui	Non	Non

Les tableaux ci-dessus ont été préparés par PPI.

Borden Ladner Gervais

Contributing authors: | Auteurs collaborateurs :

BRITISH COLUMBIA
Peter Glowacki, TEP
Borden Ladner Gervais LLP

ALBERTA
Nancy L. Golding, Q.C. and **Kevin Major-Hansford**
Borden Ladner Gervais LLP

SASKATCHEWAN
Beaty F. Beaubier, Q.C., TEP and **Amanda S.A. Doucette, TEP**
Stevenson Hood Thornton Beaubier LLP

MANITOBA
Peter Glowacki, TEP
Borden Ladner Gervais LLP

ONTARIO
Michael Rosen, TEP
Borden Ladner Gervais LLP

QUEBEC (English) | QUÉBEC (Français)
Noah Weinstein and/et **Mathieu Lacasse**
Borden Ladner Gervais LLP

NEW BRUNSWICK
Christopher Marr
Stewart McKelvey

PRINCE EDWARD ISLAND
Geoffrey Connolly, Q.C., FEC, P.Eng
Stewart McKelvey

NOVA SCOTIA
Timothy C. Matthews, Q.C., TEP
Stewart McKelvey

NEWFOUNDLAND AND LABRADOR
Paul Coxworthy
Stewart McKelvey