

# Family Law Impact on Estate Planning

## Halifax Estate Planning Council

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... and I'm sure  
I can trust you  
not to fight over  
my money  
when I'm  
gone.



# overview

- marital status and its relevance in estate planning
- *Matrimonial Property Act*
- *Testators' Family Maintenance Act*
- 2008 revisions to *Wills Act*
- *Hayward v. Hayward*, 2011 NSCA 118

# marital status

- marital status affects legal rights of surviving spouse on death
- e.g.,
  - the right to division of property from the estate
  - the right to support from the estate
  - the right to act as executor or administrator
  - the right to property division if the spouse died intestate
- becomes important when deceased spouse has made no provision or inadequate provision for spouse in his or her will or died intestate

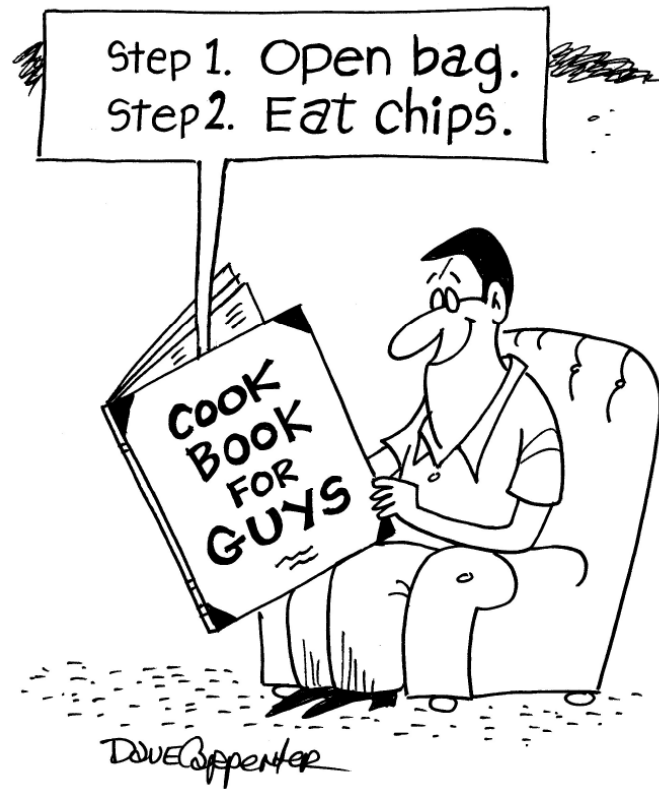


## marital status, cont'd

- single
- common law
- registered domestic partners
- married
- divorced



single



# common law or “shacking up”

- not equivalent to marriage or registered domestic partnership
- *Matrimonial Property Act, Intestate Succession Act, Testators’ Family Maintenance Act, Probate Act* do not apply to common law spouses
- may be unclear when relationship begins or ends
- no formal process for resolution of claims on breakdown
- claims against estate often based in equity due to lack of statutory rights as a spouse
- consider a cohabitation agreement to resolve potential claims

# registered domestic partnerships

- since 2002, common-law couples can register as domestic partners under *Vital Statistics Act*
- two people who are cohabiting in a conjugal relationship may make a domestic partner declaration if:
  - unmarried and not in another registered domestic partnership
  - over 19
  - ordinarily resident in the province
- gives rights of a married couple under *Matrimonial Property Act*, *Intestate Succession Act*, *Testator's Family Maintenance Act*, etc.
- not clear how often used since same-sex marriage





# marriage

- originates with a religious or civil ceremony
- same-sex marriage allowed since September 2004
- absent the death of one of the spouses, marriage can only be ended by formal judicial proceeding such as annulment or divorce
- until divorce is finalized, statutory rights continue



# statutes affecting estate planning

1. *Matrimonial Property Act*
2. *Testators' Family Maintenance Act*
3. *Wills Act*



## *Matrimonial Property Act*

- provides for division of a family's property when the relationship ends, whether by separation or death
- s. 12 allows surviving spouse to apply for equal division of matrimonial assets on death

# what are matrimonial assets?

- “matrimonial assets” = matrimonial home and all other property acquired by either or both spouses before or during marriage, except:
  - gifts, inheritances, trusts or settlements except to extent they are used for the benefit of the family
  - awards of damages or settlements
  - money payable to one spouse under an insurance policy
  - personal effects
  - business assets
  - property exempted under marriage contract or separation agreement
  - property acquired after separation

## equal or unequal?

- presumption is for equal division, but Court may make unequal division under s. 13, where equal division would be unfair or unconscionable in circumstances

## *Matrimonial Property Act, cont'd*

- right of surviving spouse under *MPA* is in addition to rights arising on intestacy or by will
- limitation period is six months from grant of probate/administration
- action can't be commenced by the surviving spouse's estate, but can be continued by estate if surviving spouse brought action before death

# contracting out

- couples can enter into an agreement
  - before (marriage contract/pre-nuptial agreement) or
  - at the end (separation agreement)
- marriage contract must be in writing, signed and witnessed
- contracts must be of “utmost good faith”
- financial disclosure and independent legal advice are key



## *Testators' Family Maintenance Act*

- at common law, a testator has the right to dispose of his or her property in any way he or she chooses (subject to some policy considerations)
- but where a testator dies without having made adequate provision in his or her will for proper maintenance and support of a dependant, Court has power to order adequate provision out of the estate



# who is a dependant?

1. testator's widow or widower—not common law spouse
2. testator's child
  - includes a child
    - lawfully adopted by the testator
    - of the testator but not born at the date of death ("*en ventre sa mère*")
    - of which the testator is the natural parent
  - adoption terminates rights of adopted child to natural parents' estate under *TFMA: Re Marshall Estate*, 2006 NSSC 38

## list of statutory factors

- character or conduct of the dependant
- whether the dependant is likely to become possessed any other provision for maintenance and support
- relations of the dependant and the testator at the time of death
- financial circumstances of the dependant
- claims of other dependants on the estate
- any provision made for the dependant during testator's life
- any services rendered by the dependant to the testator
- any provision made by the dependant for the testator during testator's life

# evidence on *TFMA* application

- judge may receive any evidence he or she considers relevant of the testator's reasons, as far as ascertainable, for making the dispositions made by his will, or for not making provision for a dependant
- including any statement in writing signed by the testator

# effect of marriage on a will

s. 17 of *Wills Act* states that a will is revoked by subsequent marriage unless one of two main exceptions exists:

1. the will states that it is made in contemplation of that marriage
2. the testator's spouse files an election to take under the will within a year of death

# amendments to *Wills Act*

- amendments to *Wills Act* proclaimed August 19, 2008
- new provisions:
  - s. 6(2) – holograph wills
  - s. 8A – substantial compliance
  - s. 19A – effect of divorce on a will

# holograph wills

- s. 6(1) sets out formalities of execution
  - in writing
  - signed at the end by the testator
  - in the presence of two or more witnesses
  - who were present at the same time who sign in the presence of the testator

## holograph wills, cont'd

- s. 6(2) now permits holograph wills:

Notwithstanding subsection (1), a will is valid if it is wholly in the testator's own handwriting and it is signed by the testator.



"In case I die in this mess, I leave all to the wife.  
Cecil Geo Harris."



# substantial compliance

s. 8A Where a court of competent jurisdiction is satisfied that a writing embodies

- (a) the testamentary intentions of the deceased; or
- (b) the intention of the deceased to revoke, alter or revive a will of the deceased or the testamentary intentions of the deceased embodied in a document other than a will,

the court may, notwithstanding that the writing was not executed in compliance with the formal requirements imposed by this Act, order that the writing is valid and fully effective as if it had been executed in compliance with the formal requirements imposed by this Act.

# effect of divorce on a will

- s. 19A now provides that divorce subsequent to making will revokes:
  - gift to the former spouse
  - appointment of former spouse as executor
  - power of appointment conferred on former spouse
- the will is construed as if former spouse predeceased the testator
- except where a contrary intention appears by the will, separation agreement or marriage contract,

- do the new provisions apply to wills made before August 18, 2008?



## *Hayward v. Hayward*, 2011 NSCA 118

- analysis of whether s. 19A is retrospective
- separate but concurring reasons from Justices Oland, Fichaud, and Beveridge
- concluded s. 19A has retrospective application
- departure from previous case law, which held amendments *not* retrospective



# what is retrospectivity?

“... A retrospective statute ... changes the law only for the future, but it looks to the past and attaches new prejudicial consequences to a completed transaction. ... A retrospective statute operates as of a past time in the sense that it opens up a closed transaction and changes its consequences, although the change is effective only for the future.”

Driedger, *Construction of Statutes*, 2nd ed. (Butterworths, 1983)





# presumptions

1. presumption against retrospectivity
2. presumption against interference with vested rights

## retrospectivity, cont'd

- revisions to *Wills Act* contain no transitional provision indicating whether they're to act retrospectively or not

## *Re Thibault*, 2009 NSSC 4

- testator executed will in 1999 naming wife as executor and sole beneficiary
- testator and wife divorced in 2003
- testator died on September 8, 2008, 20 days after s. 19A in force
- Court concluded s. 19A not retrospective
- ex-wife takes



## *MacDonald v. MacDonald Estate*, 2009 NSSC 323

- involved handwritten document, “last will of Jean Pringle MacDonald”, dated March 25, 2006
- unsigned at foot and not properly witnessed
- applicant argued s. 6(2), s. 8A applied retrospectively to allow document to be admitted to probate
- Court followed *Re Thibault* – no retrospectivity, document not probated
- respondent described retrospective application as “nightmare for executors [and] for the Court of Probate” – Chief Justice Kennedy said there was “some validity” to that

## *Hayward v. Hayward*, 2011 NSCA 118

- in 1995, testator made a will naming wife as executor and beneficiary (son as alternate)
- they divorced in 2004 (Corollary Relief Judgment incorporated separation agreement)
- testator died on October 15, 2008
- son granted administration of estate
- mother applied to have son removed and herself appointed executor/declared beneficiary
- trial judge found in her favour—amendments operate prospectively

## issues on appeal

1. Is s. 19A retrospective?
2. Is the separation agreement an “other writing” under s. 8A ?

# retrospective or prospective?

“I am of the view that, when construed, in their ordinary literal sense, the words of s. 19A of the *Wills Act* are clear and unambiguous, and demonstrate a legislative intention that the provision operate retrospectively.”

Oland, J.A. at para. 46

# the separation agreement

## RELEASE OF RIGHTS TO ESTATE

17.01 The Husband and Wife each hereby release all rights which he or she might have under the laws of any jurisdiction to any share in the estate of the other or to the administration of the estate of the other, except as otherwise provided in this Agreement.





# the separation agreement, cont'd

## RELEASE OF RIGHTS TO MAINTENANCE AND PROPERTY

18.01 Except as provided in this Agreement, the husband and wife release each other from all rights and claims which they may have against each other for maintenance or support, or for property division or ownership under the laws of any jurisdiction and, in particular, under the *Maintenance and Custody Act*, the *Matrimonial Property Act*, the *Intestate Succession Act*, the *Testators' Family Maintenance Act*, the *Pension Benefits Act* and the *Divorce Act, 1985* or any successor legislation.



## is the separation agreement a s. 8A writing?

- Oland, J.A. – trial judge failed to consider whether separation agreement was a s. 8A writing
- Beveridge, J.A. – no reason why documents written before August 19, 2008 are not to be given full force and effect under s. 8A
- Fichaud, J.A. – “In June 2004, George and Nancy Hayward signed a document to eliminate any disposition from Mr. Hayward’s testamentary estate to Ms. Hayward, despite that such a disposition had been directed by Mr. Hayward’s 1995 Will. In my view, this ‘writing’ expressed an intent to alter the effect of Mr. Hayward’s Will under s. 8A(b).”

# implications of *Hayward*

- accelerated effect of amendments
- usual troubles with retrospective legislation – testator who wanted to provide for ex-spouse may have received advice prior to August 19, 2008 that is now no longer valid
- opens up range of pre-August 19, 2008 documents that could qualify as holograph wills, codicils, revocations or other writings that embody testamentary intentions – huge level of uncertainty
- s. 8A writing needs judge to decide – not a paper filing process
- greater onus on executors to submit to probate any document that could meet test for holograph document or other writing – how do lawyers give advice and how do executors know they're being complete?





Questions?





# Contact Information

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