

Estate Planning and Dependant's Relief Claims

April 2022

Canadians generally enjoy testamentary freedom, meaning that a person may freely decide who will inherit their estate. However, provision must be made for persons who are financially dependent on the deceased. Failure to include such persons in the estate plan may lead to a successful claim against the estate and may disrupt sophisticated planning strategies.

This article explains the implications to an estate plan and the assets passing through the Will when a person makes a claim against an estate due to financial dependence on a deceased person.

What is an estate plan?

An estate plan is more than a Will. In most cases only some of a person's assets will pass through their Will. Assets may also pass by direct beneficiary designation or joint right of survivorship and may not pass through the estate of the deceased.¹ An estate plan must look to the ownership structure of all assets to determine the most appropriate strategy given the person's overall goals and objectives. An important part of estate planning includes a review of those persons who may be financially dependent on the deceased to ensure that those persons are adequately provided for, either through the Will or by other means.

Who is a "dependant"?

Most Canadian provinces and territories use the term "dependant" in describing a person who may make a claim against an estate due to financial dependence on a deceased person. Although the terminology varies by jurisdiction (in Quebec, for example, a dependant is referred to as a "creditor of support"), the concept is similar – a person has an obligation to provide for certain persons in their estate plan.

The determination of who may make a dependant's claim against an estate is determined by provincial or territorial legislation. The courts generally have wide latitude in determining the appropriate remedy where a dependant has not received adequate provision. Dependants include spouses/common-law partners and other family members. Creditors and other parties may also have a claim against an estate, but that is beyond the scope of this article.

Spousal/common-law partner claims

Depending on the applicable jurisdiction, a legally married spouse may have "more" rights against an estate than a

common-law partner. For example, in some jurisdictions a legally married spouse has automatic property rights that may include special rights to the matrimonial home. In such jurisdictions, a common-law partner may not enjoy these rights. For division of property purposes, the death of a spouse may be treated as if the spouses had separated and the surviving spouse may be able to make an election to either: (1) accept what would be received through the estate of the deceased; or (2) accept what the spouse would be entitled to pursuant to the relevant family law legislation. Although there is a limitation period within which the surviving spouse must make such election, the courts have discretion to extend such period in certain circumstances.

The automatic property rights referred to above should not be confused with the right to financial support. In some provinces and territories, even though a common-law partner may not have property rights they may bring a support claim against the estate of the deceased partner if adequate provision was not made for the surviving partner. As the laws of each province and territory are different, it is important to complete your estate plan in accordance with the relevant local requirements.

Example: Alex and Kim have been in a committed common-law relationship for 20 years. Alex has children from a prior marriage while Kim does not have children. Alex has died and left the entire estate to his children:

Scenario # 1: Ontario law applies

As Alex and Kim are not legally married, Kim does not have any property rights under the laws of Ontario. However, Kim may bring a dependant's relief claim against Alex's estate as his common-law partner if adequate provision has not been made. Under Ontario law, this adequate provision is not limited to the assets passing through the estate and may include other assets received by Kim as a result of Alex's death (for example, life insurance and RRSP proceeds received by way of direct beneficiary designation). If Kim did not receive adequate provision a dependant's relief claim may be forthcoming, disrupting Alex's plan of having assets pass to his children through his Will.

Scenario # 2: Nova Scotia law applies

In some provinces common-law partners are not permitted to bring a support claim against the estate of a deceased common-law partner. If the laws of Nova Scotia applied to the administration of Alex's estate and Kim's rights under matrimonial law, Kim would not be able to make a support claim against Alex's estate and Alex would be free to leave the residue of his estate to his children.²

Despite the general requirement to provide for dependants, spousal or common-law partner rights may be altered by contract, such as a prenuptial agreement or cohabitation agreement. These agreements are particularly prevalent in blended family situations. Depending on the jurisdiction, this may have a significant effect on the estate plan. In the above Scenario # 1 (Ontario), had Alex and Kim executed a cohabitation agreement confirming that they are both financially independent and that the survivor disclaims any right to make a support claim against the estate of the other, Alex's estate plan may have remained intact.

Other dependant claims

Children and other relatives that are financially dependent upon the deceased may make a claim against the estate if adequate provision has not been made. Minor children or adult children with a disability are generally considered dependants, although other relatives may qualify as dependants depending on the jurisdiction. As a result, it is important to prepare an estate plan in accordance with local requirements. Alberta is one of the provinces that defines a dependant child or grandchild as one who is under a certain age, while other provinces such as Newfoundland and Labrador do not specify an age limit such that a child of any age may potentially be considered a dependant.³ Some jurisdictions include other family members, such as parents and siblings, as potential dependants.

In determining whether a person was financially dependent on the deceased, the courts will review many factors, including the age of the person, relationship to the deceased, financial stability of the person, their ability to support themselves and other factors as are relevant in the circumstances. The courts generally have wide discretion in determining an appropriate award.

Dependant's relief claim limitation

There may be limitation periods within which a dependant must make a claim. For example, in Ontario a legally married spouse has six months from the death of the first spouse to elect to accept the entitlement under the *Family Law Act*⁴ as opposed to the entitlement under the Will or intestacy. Other dependants in Ontario, such as dependant children, must make a claim within six months of a Certificate of Appointment of Estate Trustee (also known as "probate") being granted.⁵ In some instances, such as where the executor may be a friend or relative that is not familiar with the affairs of the deceased, it may be prudent to obtain a probate certificate even if it is not required by a third party so that the limitation period may start to run. In Quebec, on the other hand, the six-month limitation period for all creditors of support commences as of the date of death.⁶

Conclusion

Although Canadians have testamentary freedom, potential claims by dependants against the estate must be considered in establishing an estate plan. Executing certain documents, such as marriage contracts, may ensure that an estate plan remains intact after a spouse passes away. As each province and territory has unique legislation, it is important to obtain legal advice from a lawyer specializing in this complicated area of law.

For more information, please speak with your BMO financial professional.



¹ Usually in Quebec, the designation of a beneficiary in a registered plan must be done in a Will or by a marriage contract. Joint tenancy with right of survivorship is not recognized in Quebec. In Quebec, ownership of property by more than one person can only be achieved by way of co-tenancy, also known as tenancy in common.

² Even though Kim may not make a common-law partner support claim against Alex's estate under Nova Scotia law, there may be other factors involved that may permit her to make other claims against the estate. For example, she may have other contractual or equitable rights (such as a constructive trust claim) that she may bring against Alex's estate.

³ *Wills and Succession Act*, SA 2010, c. W-12.2, ss. 72(b) and *Family Relief Act*, RSNL 1990 c. F-3, ss. 2(c).

⁴ *Family Law Act*, R.S.O. 1990, c. F.3, ss. 6(1) and (2).

⁵ *Succession Law Reform Act*, R.S.O. 1990, c. S.26, s. 61.

⁶ Article 684, *Civil Code of Quebec*.

BMO Private Wealth provides this publication for informational purposes only and it is not and should not be construed as professional advice to any individual. The information contained in this publication is based on material believed to be reliable at the time of publication, but BMO Private Wealth cannot guarantee the information is accurate or complete. Individuals should contact their BMO representative for professional advice regarding their personal circumstances and/or financial position. The comments included in this publication are not intended to be a definitive analysis of tax applicability or trust and estates law. The comments are general in nature and professional advice regarding an individual's particular tax position should be obtained in respect of any person's specific circumstances.

BMO Private Wealth is a brand name for a business group consisting of Bank of Montreal and certain of its affiliates in providing private wealth management products and services. Not all products and services are offered by all legal entities within BMO Private Wealth. Banking services are offered through Bank of Montreal. Investment management, wealth planning, tax planning, and philanthropy planning services are offered through BMO Nesbitt Burns Inc. and BMO Private Investment Counsel Inc. If you are already a client of BMO Nesbitt Burns Inc., please contact your Investment Advisor for more information. Estate, trust, and custodial services are offered through BMO Trust Company. BMO Private Wealth legal entities do not offer tax advice. BMO Trust Company and BMO Bank of Montreal are Members of CDIC.

© Registered trademark of Bank of Montreal, used under license.

All rights are reserved. No part of this publication may be reproduced in any form, or referred to in any other publication, without the express written permission of BMO Private Wealth.