



Separation and Divorce – Estate Planning Concerns

If you separate from your spouse with no prospect of reconciliation or if you divorce your spouse, you should promptly review your estate planning and consider revisions to your Will and Powers of Attorney. You should also update beneficiary designations and other documents. This brochure outlines some issues of particular concern to those who are separated or divorced. All of the information provided here assumes that the couple does not have a pre-nuptial agreement or marriage contract. To determine the effect of such a document on your estate planning, review the document with a lawyer experienced in wills and estates. It is not within the scope of this brochure to review the right to spousal support from an estate which may be claimed under the Succession Law Reform Act or the Family Law Act or both.

Powers of Attorney

Generally, neither separation nor divorce affect Power of Attorney documents which appoint an ex-spouse as your substitute decision-maker. If you do not wish an ex-spouse to have authority to act under an existing Power of Attorney, you must revoke such documents in writing (or sign new ones) and notify others, such as your Bank, accountant, etc, that you have done so.

Previous Joint Retainer

At Neff Law Office Professional Corporation, if we meet with a couple to prepare their Wills and Powers of Attorney, we are retained by the couple. This is referred to as a 'joint retainer'. If one spouse subsequently approaches us requesting changes to such documents, we are required to obtain the written consent of the other spouse before proceeding. However, if the couple has divorced or there is a signed separation agreement in place, we may be able to act for one of the spouses. If neither a written consent nor

a signed separation agreement is available and the couple are not divorced, we will provide a referral to another law office.

Handwritten Changes

Generally, handwritten changes on your existing Will or Powers of Attorney will have no effect unless done in accordance with the law.

Signed Separation Agreement

If you provide us with a signed separation agreement that specifies that the two of you are separate as to property and that you have no claims against each other's estates, we may be able to meet with you to review your estate planning needs. We will require a copy of the signed separation agreement for our review.

Separated Ex-spouse is Not Automatically 'Cut Out'

If you or your spouse die while separated from each other but no separation agreement or pre-nuptial agreement was ever signed, generally the deceased spouse's estate is distributed as though you were not separated. There may be some exceptions regarding pensions and certain insurance but, for the most part, the surviving spouse will either inherit under the Will of the deceased spouse (which often leaves the entire estate to the spouse) or, if there is no Will, as set out in the intestacy laws of Ontario. Whether there is a Will or not, any property or assets owned jointly belong to the survivor when one joint owner dies.

If there is no Will, the intestacy laws of Ontario provide that a surviving married spouse receives all of the estate if the deceased had no children. If the deceased had one child, the surviving spouse receives \$200,000 (the 'preferential share') plus one-half of the

remainder of the estate; the other one-half of the remainder goes to the child. If the deceased had two or more children, the surviving spouse receives \$200,000 plus one-third of the remainder of the estate with the other two-thirds being divided equally among the children. The value of jointly-held assets is not included when calculating the preferential share as the surviving spouse owns such assets by right of survivorship. There is no preferential share for a common law spouse.

Effect of Divorce

Generally a divorced ex-spouse does not inherit via the Will of a deceased ex-spouse nor under intestacy laws. Any mention of a surviving spouse in a Will which was signed before the date of the divorce is treated as though the surviving ex-spouse had died first. This has the effect of cutting out the surviving ex-spouse. In addition, the ex-spouse's appointment as an executor or trustee under the Will is also revoked. However, if a Will was signed after the date of the divorce, any provision for an ex-spouse is valid.

Divorce & Jointly-Held Property

Unless property is owned as tenants-in-common, jointly-held property owned by a divorced couple belongs, by right of survivorship, to the last of the two spouses to die even if they have divorced. Therefore, it is important to ensure that the title of any jointly-held property is changed to reflect your intentions and to avoid unintended distribution of assets to an ex-spouse. One of the joint owners can divide the ownership of the real estate between the two spouses without obtaining the consent of the other if a certain document is registered. This may be necessary if you and your ex-spouse cannot agree on a division of property and if you wish to ensure that your share of the jointly-held property becomes part of your estate rather than automatically belonging to your ex-spouse if you die. This process is referred to as 'severing a joint tenancy'.

Beneficiary Designations

Separation or divorce generally have no effect on most insurance and RRSP/RRIF beneficiary designations where you have named an ex-spouse. As a result, if you do not update such beneficiary designations, at death the insurance or RRSP/RRIF proceeds will be paid to a surviving ex-spouse. In addition, RRSP/RRIF proceeds are fully paid out with no holdback for income taxes. Income taxes owing are payable by the estate of the deceased and, depending upon the income in the year of death, may be almost

half the value of the RRSP/RRIF unless a spousal rollover is available to allow the deferral of taxes.

Effect of Marriage on a Will

If you marry subsequent to signing a Will and if there is no mention in the Will that you were 'contemplating marriage' to your new spouse, the Will is effectively revoked by the marriage. The new spouse has the option to allow the Will to stand but this is rarely to the advantage of the new spouse. As a result, if you intend to marry or re-marry, you should review and possibly re-sign your Will with a special 'in contemplation' clause to ensure the Will remains valid.

Separating or Divorcing?

If you are in the midst of, or considering, separation or divorce, you should promptly:

- update your Will and Powers of Attorney and notify financial institutions that you have done so;
- update beneficiary designations on insurance, RRSP's, RRIF's, etc.;
- consider severing joint ownership of assets which are jointly-held with your ex-spouse such as real estate;
- establish sole ownership of assets as much as possible for bank accounts, investments accounts, etc.;
- re-direct automatic deposits and withdrawals where appropriate;
- meet with a lawyer knowledgeable in family law issues to obtain advice as to your rights and obligations.

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Version:20080104

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