



LAFRENIÈRE SANNA
— ESTATE LAW —
A B O U T I Q U E F I R M

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Marrying Again or Living Common Law

If as a result of divorce or death of your spouse, you marry again or if you begin living in a common law relationship, you should review your estate planning and consider updates to your Will, Powers of Attorney and beneficiary designations. Better yet, review and update these documents before marrying for a second time or beginning a common law relationship! This brochure outlines important considerations if you have married, or plan to marry, for a second (or subsequent) time or if you are living, or plan to live, in a common law relationship. The information provided here assumes that you have not signed a pre-nuptial, co-habitation agreement or marriage contract. In this brochure, we do not discuss possible claims for spousal support against an estate as provided for under either the Succession Law Reform Act or the Family Law Act or both.

Married Versus Common Law

Many believe that if a couple have a child together or if a couple live together for a certain period of time that as a common law couple they have the same rights as a married couple. For estate planning purposes, married and common law spouses are not treated the same. This brochure highlights some of the differences. For recommendations relevant to your situation, please consult a lawyer. Throughout this brochure, when we use the word 'spouse' we mean either a married or a common law spouse. If we use the phrase 'married spouse', we are not including a common law spouse.

Ensuring Children from Previous Marriage or Relationship Inherit

If you are marrying for the second or subsequent time, you may want your children from a previous relationship to receive something from your estate. You may also be concerned that your

spouse is taken care of in the event that you die first. To accomplish these goals, some advance estate planning is required. One of the simplest solutions may be to include a spousal trust in your Will. A spousal trust can allow your surviving spouse to have the use of your assets during his or her lifetime but upon your spouse's death, the remaining assets from your estate go to your children or other beneficiaries that you specify.

The Importance of a Will

If you die without a Will, your estate will be distributed according to Ontario's intestacy laws. Your estate consists of assets that you own solely at your death (not held jointly with anyone else) plus assets payable to your estate such as life insurance or RRSP's which do not have a named beneficiary.

Under Ontario's intestacy laws, if you have one child, your surviving married spouse receives \$200,000 (the 'preferential share') plus half of the remainder of your estate; the other half goes to your child. If you have two or more children, your surviving married spouse receives \$200,000 plus one-third of the remainder of your estate with the other two-thirds being divided equally among your children. Assets owned jointly with your surviving spouse are not included when calculating the preferential share. There is no preferential share for a common law spouse.

All Assets are Joint or a Beneficiary is Designated

If, like many couples, you arrange your affairs such that you and your spouse jointly own major assets such as a home, bank and investment accounts and that life insurance, RRSP's and RRIF's name each other as beneficiary, there may be nothing left to distribute under your Will. If your spouse outlives you, there will be nothing left to

distribute to your children or anyone else regardless of the provisions in your Will unless your Will changes a beneficiary designation.

Effect of Marriage on a Will

If you marry after signing a Will and if there is no mention in your Will that you were 'contemplating marriage' to your new spouse, your Will is effectively revoked by your marriage. The new spouse has the option to allow the Will to stand but this is rarely to the advantage of the new spouse. 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 that your Will remains valid.

Effect of Divorce on an Estate

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. A divorced spouse appointed as an Executor by a Will dated before the divorce is legally not allowed to act as Executor. If a Will was signed after the date of the divorce, any provision for an ex-spouse is valid including the appointment of the former spouse as an Executor.

Powers of Attorney

Divorce, re-marriage or living in a common law relationship generally have no effect on an existing Power of Attorney document in which you appointed a former spouse (married or common law) as your substitute decision-maker. If you do not wish a former spouse to act under an existing Power of Attorney, revoke the document in writing or sign new documents which appoint someone else and, at the same time, revoke the previous documents. You must also notify any institutions, financial planners, and other professionals that you have revoked or signed a new Power of Attorney document.

Joint Retainer

At Persona Law Group Professional Corporation, if we meet with you and a spouse, whether married or common law, to prepare Wills and Powers of Attorney, we are hired by the two of you as a couple. This is referred to as a 'joint retainer'. If one of you later approaches us to request changes to the documents, we will require your spouse's written consent or proof

of a signed separation agreement and/or divorce before we can proceed.

Beneficiary Designations

In Ontario, marriage or living common law generally has no effect on most insurance and RRSP/RRIF beneficiary designations. As a result, if you do not update such beneficiary designations, at death the insurance or RRSP/RRIF proceeds will be paid to the beneficiary that was previously named or, if none, to your estate. Please note that on death 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.

Planning to Marry or Live in a Common Law Relationship?

If you are planning to marry or begin living in a common law relationship, you should:

- review and/or sign a revised Will and Powers of Attorney and notify various institutions and professionals that you have done so;
- update named beneficiaries on insurance, RRSP's, RRIF's, pensions, etc.;
- review joint ownership of all assets;
- re-direct automatic deposits and withdrawals as appropriate;
- consider signing a pre-nuptial or co-habitation agreement before marriage or living together.

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