

Estate and Tax Planning in Complex Family Situations

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Estate Planning for the Average Wealth Client

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ESTATE AND TAX PLANNING IN COMPLEX FAMILY SITUATIONS¹

INTRODUCTION

Estate and tax practitioners providing advice to individuals structuring business succession plans and the disposition of their estates are increasingly confronted with complex legal and moral obligations that need to be taken into account due to complex family situations.

This paper focuses on estate and tax planning issues that can arise in blended and non-traditional family circumstances, as well as some strategies available to practitioners to mitigate the risks of an individual's spouse, common-law partner, or dependent child or grandchild frustrating the individual's estate planning intentions.

DEMOGRAPHIC TRENDS AFFECTING ESTATE PLANS

Social statistics evidence that family and dependency, as we traditionally understood it, is markedly changing. For example, consider the following demographic information from the 2011 Canada Census:²

1. While married families are still the predominant family structure only 67% percent of families contained a married couple as compared to 92% in 1961;
2. Only 33% of same sex couples are married even though there is no longer any legislative obstacle for them doing so;
3. More than 42% of adults aged 20 to 29 live in their parental home;
4. Almost half a million blended families exist in Canada;
5. In 2011, only 31% of individuals between ages 20 to 29 were part of a couple compared to 52% in 1981.
6. Divorce rates in Canadian provinces overall are from 162 per 100,000 population to a high of 259.5 per 100,000 population in Alberta in 2011 meaning on average 4 in 10 marriages end in Divorce. ³
7. One out of every 10 children aged 14 and under lived in a step family in 2011 and one in eight families with children are step families.⁴

¹ This paper has been adopted from a paper co-authored and presented by the author at the 2013 Prairie Provinces Tax Conference of the Canadian Tax Foundation. Any errors in this paper are those of the author alone.

² Statistics Canada, Canadian Vital Statistics, Divorce Database and Demography Division.

³ The Vanier Institute of the Family – *Modern Families* – “By the Numbers” December, 2012. (Based on Statistics Canada 2011 Census)

8. In 2001 17.6% of seniors shared a home with their adult children and grandchildren.⁵

These societal realities underscore the challenges to those of us who are estate planning for individuals who are in, are providing for, or have family members in one or more of these situations. Legislative changes have expanded to the classes of individuals who have standing to share in property or apply for support. Given the diversity of domestic arrangements that currently exist we need to plan more carefully and be able to advise our client of legal obligations that exist and need to be addressed in order to reduce the risk of a successful challenge to the estate plan.

THE WILLS AND SUCCESSION ACT

Alberta's *Wills and Succession Act*⁶ ("WSA") is an omnibus piece of legislation that replaced and consolidated the *Wills Act*⁷, *Intestate Succession Act*⁸, *Survivorship Act*⁹, *The Dependants' Relief Act*¹⁰ as well as parts of other affected Alberta statutes.

Division 2 of Part 5 of the WSA allows for an application ("Application") to vary the disposition of the estate under a will.

Subsection 108(1) of WSA provides that Division 2 of Part 5 applies to all Alberta wills in respect of which the deceased died after February 1, 2012, *regardless* of when the will was executed.

Testamentary freedom to dispose of one's property according to one's wishes is limited under the WSA which sets forth the classes of individuals who can apply for variations of wills and the factors in determining what, if any, awards will occur in respect of such Applications.

Who Can Make an Application?

The WSA has expanded the class of individuals (each defined in the WSA as a "family member" of the deceased) who have standing to make an Application to vary a deceased's will in order to provide for "proper maintenance and support" of the family member the Application is in respect of. The definition of "family member" is in paragraph 72(b) of WSA and provides that any one of the following individuals is a family member in respect of the deceased:

⁴ Statistics Canada, based in 2011 Census Data, *Portrait of Families and Living Arrangements in Canada*, 2012.

⁵ The Vanier Institute of the Family – Seniors-“Just the Facts, October, 2011 – based on Statistics Canada 2011 Census.

⁶ *Wills and Succession Act*, SA 2010 c.W-12.2

⁷ *Wills Act*, RSA 2000 c.W12

⁸ *Intestate Succession Act*, RSA 2000 c.S-28

⁹ *Survivorship Act*, RSA 2000 c.S-28

¹⁰ *Dependants Relief Act*, RSA 2000 c. D-10.5