

**Wills, Trusts & Estates**

# Complex estate claims of the second marriage

By **Susannah Roth**

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(November 3, 2021, 2:38 PM EDT) -- We all know that divorce rates are high, and common law relationships are increasingly, well, common. You may not know that a very high percentage of divorced individuals will eventually remarry, and more than one in four Canadians who are in a spousal relationship are in their second or subsequent one.

Second and subsequent spousal relationships are not only often more complex personally, but they can create significant additional legal complexity in planning one's estate. Unfortunately, planning to deal with these special issues is often overlooked or not done in a timely manner, which can lead to legal claims against the estate after death. This article summarizes some of the claims that can be made.

If the spouses were married and not living separate and apart on the death of one of them, the surviving spouse can elect to make a claim to equalize net family property pursuant to s. 5 of the *Family Law Act*, rather than receive the gifts under their deceased spouse's will or their share of the estate on an intestacy.

A surviving married spouse who is occupying a matrimonial home in which they have no ownership interest prior to death is also entitled to continue such occupation for 60 days following the death of a spouse. If a married spouse owns a matrimonial home jointly with another person who is not their spouse, the joint tenancy is deemed to be severed immediately before death, thereby preventing the surviving joint tenant from inheriting the deceased's interest in the property automatically. Instead, the deceased's interest forms part of their estate. In this context, a matrimonial home can be a principal residence or a cottage, or both.

Both married and common law spouses can make a dependant's support claim under section V of the *Succession Law Reform Act*. If the court determines that the deceased spouse has not made adequate provision for the proper support of a dependant surviving spouse, the court may order whatever provision it considers adequate for the surviving spouse be made out of the estate of the deceased spouse.

This provision can include financial support, either as a lump sum payment or ongoing payments, occupation of the matrimonial home (or homes) for a period of time or for life, and ownership of specific assets, including a matrimonial home. Until the final disposition of the claim, no distributions to beneficiaries can be made, unless the claimant consents prior to the proposed distribution. The claimant can also obtain an order suspending the administration of the estate for such period as the court decides is appropriate, effectively freezing the estate assets.

Further, certain assets that otherwise would not be part of the estate can be clawed back to satisfy dependant's support claims pursuant to s. 72 of the *Succession Law Reform Act*. These include life insurance and registered retirement plans with beneficiary designations, "in trust" bank accounts, jointly held financial assets and property held in trust if the deceased transferred the property to the trust and retained certain control over it.

Married and common law spouses can also make claims for unjust enrichment. Where a spouse has contributed to the acquisition, maintenance or preservation of an asset owned by the other spouse, the principle of unjust enrichment can be invoked to compensate the non-owner spouse for their

efforts. The successful claimant spouse can receive a monetary award, or possibly an ownership interest in the asset through a constructive trust imposed for their benefit.

Any of these claims can result in the surviving spouse receiving more than planned for by the deceased spouse, or to receive assets that were intended for other beneficiaries. It can also result in a loss of capital succession to others if the surviving spouse receives assets outright, rather than being restricted to a trust under the will for their benefit with capital succession to other persons such as children of a prior marriage. As well, a tax deferral might be lost for assets that were to be rolled over to a qualifying spouse trust for the surviving spouse's lifetime.

Of course, these claims are designed to ensure that a surviving spouse is not left without proper support and that they receive a fair share of the matrimonial assets on the death of a spouse. Often spouses must resort to making a claim in order to ensure they can properly care for themselves for the remainder of their lives.

But without an understanding of how their estate might be vulnerable to such claims after death, spouses may not plan their estate well enough to ensure that such matters are sufficiently addressed.

In addition, spouses entering into a second or subsequent marriage often benefit from a domestic contract, which can help to realize expectations and avoid unforeseen claims both on a relationship breakdown and on death.

Experienced professional advice can be key to ensuring that an estate plan survives the test of potential spousal claims.

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