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Cohabitation Agreements in Estate Planning

By Andrea J. Hadley



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Given the significant increase in blended families in recent years, it is becoming more and more important to have a will. However, what most people don't realize is that, in many cases, a will alone is not enough. In the case of many families, particularly those with children of dissolved relationships, a full estate plan is required.

What is the difference between a will and an estate plan? A will is a single document which dictates how you wish to have your assets transferred upon your death. An estate plan, on the other hand, can consist of multiple documents, which together manage distribution of your estate. These documents can include cohabitation or prenuptial agreements, shareholder agreements, powers of attorney, health care directives and any other document which provides direction regarding your assets on your death.

For a person who is in a common-law relationship (as defined in The *Family Property Act* of Manitoba), a will leaving all assets to children may be worthless unless it is accompanied by a cohabitation agreement in which the common-law partner has given up all rights to those assets. The heirs would find out upon death that the common-law partner is entitled to an accounting and division of assets or that the common-law partner may have a homestead right to remain in the home before it can be sold or transferred. Of course the surviving partner has the option of accepting the will as written and allowing the children to have the deceased's assets. However, it should not be assumed that this will occur, no matter how trustworthy a person may be. A situation may arise where the parties to the common-law relationship are in a common accident where one person is killed and the partner survives but is incapacitated. In this instance, it is not the partner who is making the decision to forego the division of assets but the partner's representative who may not be aware of a verbal agreement or simple understanding between the parties.

If this person truly intended that assets should flow to his/her children upon death, the estate plan would require a cohabitation agreement. This agreement would contain a provision in which the common-law partner relinquishes all rights to an accounting of assets upon death. The agreement should be referenced in both parties' wills and the documents should complement each other in order to be effective.

In many cases the parties do wish to provide for the other upon their death but also to provide for their children. In this scenario, an effective estate plan would contain a cohabitation agreement which outlines how assets are to be handled upon the death of either party, which may or may not differ from how those assets are handled upon a separation of the parties.

A cohabitation agreement can contain any provision required by the parties and is unique to each situation. It should be prepared by a lawyer in the province in which you reside as the drafter of the agreement will have to be aware of both family and estate law in that province. The agreement should be executed only after both parties have received independent legal advice regarding its contents and certificates regarding the independent legal advice must form part of the document. Any document which is designed to be used only after your death must be as thorough as possible as there is nothing outside of the agreement to provide any evidence of your intentions at that time. Because each agreement is unique, the lawyer preparing your wills must be aware of its existence and should have an opportunity to review the document prior to finalizing the wills. It is also recommended that a copy of the agreement be stored with the wills for ease of reference to the executor and beneficiaries.

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