Important Estate Planning Changes for Couples effective January 1

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Effective January 1, 2022, important changes for estate planning come into effect. Anyone who has separated from their spouse, is living in a common law relationship, or who intends to marry in 2022 needs to be aware of these changes to the laws of Ontario.

Previously the Ontario law relating to wills and distribution of estates where there is no will, had four major elements:

1. Marriage revoked an existing will and left the individual without a valid will.
2. A separated but not divorced spouse remained entitled to share in an estate if he/she was named in a will or if there was no will (intestacy)
3. Divorce did not revoke an existing will, but created the situation where a divorced spouse named as an estate trustee or beneficiary was treated as having died before the maker of the will (the testator)
4. Common-law spouses (living together and not married) had no automatic rights to share in each other's estates

As of January 1, 2022, two of these situations change significantly. On January 1, 2022, the changes are:

1. Marriage occurring on or after January 1, 2022 does not revoke an existing will.
2. Spouses that have been separated but not divorced for at least 3 years before a death that occurs after December 31, 2021 or have a separation agreement, are treated the same as divorced spouses. This means that a separated spouse who is named as an estate trustee or a beneficiary in a will, does not continue to be entitled to the benefits under the will. If there is no will, there is no entitlement to share in the estate.

A positive outcome from these changes is that couples who have been living together and decide to marry or couples who have otherwise made satisfactory estate planning arrangements

do not have to change their wills as soon as they get married. There will be no need for wills done just before marriage to say that they are done “in contemplation of marriage.”

The change in the law is not retroactive, so anyone who married before January 1, 2022 is still caught under the previous rules and therefore does not have a will, unless they made a new one after marriage or before marriage and specifically in contemplation of marriage.

For anyone who is getting married in 2022, and already has a will, that will remains in effect. If it does not already have provisions for the person who is now the spouse, there are no provision for the new spouse.

For separated spouses, the change to exclude a separated spouse from a benefit under a will or from a share of the estate where there is no will, could remove some of the pressure to do a new will after a separation. If there is a reason why the separated spouse should continue to be the estate trustee or to receive benefits, the will must be specific about it. The changes do not affect beneficiary designations on life insurance and registered plans like RRSP and RRIF accounts. Those designations must still be changed if the separated spouse is to be excluded from receiving the benefits. The person who separated but did not divorce and then entered into a common-law relationship still has to review their estate planning documents. While the separated spouse will not share in the estate, the common-law spouse does not get any new rights. None of the changes have the effect of validating what often seems to be a commonly held belief that if a couple lives together for three years, they are as good as married.

The bottom line is that couples who are getting married, are separating, or who are in a long-term common-law relationship still need to get proper estate planning advice to be sure that they have made appropriate provisions for each other and other family members.

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