



Common Law Spouses and Intestacy – The Misconceptions

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Many common law spouses believe that because they have been living together, they are considered married in the eyes of the law and consequently, if one common law spouse dies intestate (without a Will), the surviving one common law spouse is entitled to receive part of or the entire Estate. This is not the case.

The Succession Law Reform Act (the “SLRA”) states that if one dies without a will, married spouses are entitled to a preferential share of the estate equal to \$200,000 plus 1/2 of the balance to share with the deceased child or 1/3 of the balance to share with the deceased's children. However, common law relationships of heterosexual or same sex partners, lack the same recognition as married spouses under the SLRA leaving the surviving common law spouse with no statutory right to an inheritance from their spouse's Estate. That means if a common law spouse dies without a will, the surviving common law spouse has no entitlement to any part of the Estate.

For example consider Jack and Jill who have decided never to marry but have been living together for 15 years and have three children aged 12, 9 and 7. Unfortunately, Jack dies in a car accident leaving an estate valued at \$300,000. Jack has no Will.

Because Jack and Jill were never married, Jill has no legal right to an inheritance or to property through an equalization payment and Jack's estate will be divided equally among his three children where each would inherit \$100,000 (held in trust until they have reached the age of majority). As a common law spouse, Jill can only hope to succeed in an action where she would sue the Estate seeking support as a dependent.

The above example may seem unfair but the Supreme Court of Canada in *Walsh v. Bona*, held that such distinction does not offend the Canadian Charter of Rights and Freedoms because the differentiation was based on the individuals' choice of whether or not to marry.

Common law spouses who want their spouse to have a right to an inheritance in their Estate must have a valid Will. If you or someone you know is in a common law relationship and does not have a Will, to avoid a situation such as this, it is time to consider getting one.

If you have questions regarding this issue or any other issue pertaining to Wills and Estates Planning, please contact Sebastien Desmarais at (613) 288-3220 or sdesmarais@tslawyers.ca.