

Testamentary Freedom - with Limits. Your rights and obligations to family members in estate planning.

“As for you, nephew, if you were in my will,
I’d disinherit you!”

- Ebenezer Scrooge

Scrooge really did have the freedom to disinherit his nephew. But if he was around today and if he disinherited a wife or dependent children, his grumpy wings would be unceremoniously clipped by our courts.

In Alberta, we are mostly free to leave our estates to whomever we please, as long as we adequately provide for our spouse or common law partner (Adult Interdependent Partner) and dependent children (and sometimes grandchildren or great grand children if we are raising them). From a policy perspective, it makes sense: morally and legally we should support our partners and dependent children. The roots of the current legislation date back to when women couldn’t own property. It all passed through the men in the family. Victorian novelists Jane Austen and Charles Dickens had a heyday with the resulting inequities, and their satire still resonates today. Fortunately our laws have changed over time to keep up (or catch up) with changing social norms. The most recent Alberta update came in 2012 with the passing of the Wills and Succession Act, SA 2010, c. W-12.2 (WSA). WSA codifies our estate planning obligations to our partners and dependent children and grandchildren.

Let’s look at the definition of each one of these family members in turn, and what it means to ‘adequately provide’ for them.

Who is a Spouse or Adult Interdependent Partner?

In Canada, the definition of a spouse/partner has changed over time. Policy makers first put legislation in place to protect married women from disinheritance in the early 1900’s. Each province dealt with it a bit differently, but all required that wives receive at least some portion of their husband’s estate. Defining who was a spouse was straight forward: if you were legally married and living together at the time of death, your spouse had a claim to at least part of your estate.

Societal norms and the family unit have changed substantially over time. We now recognize separation, divorce, remarriage, common law partners and same sex spouses. Inheritance laws have evolved to keep up with these changes. In Alberta, a spouse is now someone you are married to. An Adult Interdependent Partner is someone with whom you have lived in a relationship of interdependence for at least 3 years, or shorter if you have children together and are acting like the relationship has some permanence. It sounds straight forward, but reality and family are never so simple. What if you are engaged and plan to marry in the next few months but your fiancé dies? What if you are just recently separated? Common law for 2 years and 9 months?

The law doesn’t know how serious we are when we begin to live together, get engaged, or separate. So without clear direction (such as marriage, a will, cohabitation agreement, declaration of irreconcilability or separation agreement) the law correlates time with intention. The magic moment of commitment is 3 years in Alberta. In BC it is 2 years, and each province has defined it slightly differently. The law deems we are likewise serious about breaking up when we have been apart for 1 year (or 2 years if we don’t have a will). Once again, each province is different. Arbitrary time limits leave loop holes but provide at least a default bench mark for defining your rights and obligation to partners.

Who is a Child?

When we plan our estate, we must provide for our children who are minors (under 18) or up to age 22 if they are in full time school and still fully dependent on us. Our children are our biological and legally adopted children. Unadopted step children are not legally our children. However, if we are grandparents raising grandchildren or great grandchildren, we must provide for the grandchild or great grandchild as though he or she were our child.

If the child is over 18 but unable to earn a livelihood due to mental or physical disability, our obligation to them is life-long. From a policy perspective this all makes sense: the primary responsibility to support our minor or adult disabled children rests with parents. It would be contrary to social norms to allow us to disinherit our dependent children and leave our estate to some other third party.

In BC, the law goes one large step further: children are defined as biological or legally adopted children (not grandchildren) regardless of age. So adult, financially independent children may have a claim to their parents' BC estates if the parent did not justly and adequately provide for them.

This brings us to the next question: what is adequate provision?

How much is enough?

In Alberta, we have to adequately provide for our spouse, interdependent partner and dependent children (and dependent grandchildren and great grandchildren). Where spouses or partners leave everything to each other and then to their three children, there are no issues. However, where spouses or partners have children from previous relationships, and where the spouses/partners want to preserve their separate estates for their respective children, how do they do that while still meeting the moral and legal duty to provide for each other? There is no hard and fast formula, but it is clear that it is not a financial needs test. Rather, it is relative to the individual family's situation and circumstances. The court will consider several factors: any legal obligations to the dependant (for example, married spouses would have matrimonial property rights), the lifestyle that the family had together, its length, the

family member's age, health and ability to contribute, evidence of intent of the parties (is there a marriage or cohabitation agreement?), and the size of the deceased's property. Then the court will in essence rewrite the will to the extent necessary to preserve that relative lifestyle, in keeping with 'contemporary community standards.'

Your partner is not entitled to use your estate to stockpile his or her estate for his or her eventual heirs. But nor should your partner have to take a substantive step down in lifestyle. Where dependent children are involved, your moral and legal duty to adequately provide for them will be quite strong, and the courts will intervene without hesitation to overrule your will if you have not adequately provided for them.

What happens if I don't 'adequately provide' for my partner and dependent children?

Let's turn to one of Charles Dickens' lawyer characters in *Dombey and Sons* to answer that: "Why waste a good estate on the beneficiaries?" In other words, failure to adequately provide will mean you have opened up the door to possible costly litigation, which will reduce the size of the estate, and increase the family dysfunction.

What can we do to meet our obligations and keep our testamentary freedom?

1. Have the conversation

You have likely given considerable thought to how you want to plan your estate, and have wrestled with balancing the needs and hopes of various family members, along with your wishes. Open up the discussion. Beneficiaries who receive 'less' from the estate than they expected often feel hurt, unloved, or forgotten. By talking with them and explaining your thought process now, they will know you have thought of them and love them. And you might be able to manage their expectations. Consider including your legal and financial advisors as mediators or facilitators. They are uniquely qualified to understand the issues and are able to remove themselves from the emotional aspects. Thus they can guide the discussion in a constructive manner towards greater mutual understanding.

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2. Document your intentions

Don't leave it to a judge to 'deem' what you intended about your relationships, or to intervene to vary your estate plan because you failed to update it as your life and lifestyle changed. When you have a major life change, such as beginning to live with someone, getting engaged or married, having a child (or raising a grandchild), separating, or receiving an inheritance, meet with your estate planning lawyer and financial advisor and update your estate plan, including putting marriage or cohabitation agreements in place. Make sure you plan for incapacity too, with a power of attorney and a personal directive.

When you are entering a relationship where you each have your own separate families and assets, plan how it will work both during your lives together, and after one of you dies. What do you each need to maintain the same lifestyle? It might be handled by way of setting aside certain property in a trust for the lifetime of a spouse or partner, or designating the spouse/partner as beneficiary of certain assets. Each scenario is different, and might need further updating with the passage of time.

Besides being an ever charming romance killer and a sure fire way to test the strength of your relationship, putting your intentions to paper now will put your mind at ease and will very likely reduce family tension after you pass away. The grieving process is longer and more painful when loved ones are left to reflect on and extrapolate meaning from conversations and conduct. It often isolates and polarizes the family into divisive camps, each selecting and customizing their memories to suit their narrative. Sometimes it is difficult to get motivated to do things for ourselves. But most of us are motivated by caring for our loved ones, and it is really for them that we do the planning.

"Often, to be free means the ability to deal with the realities of one's own situation so as not to be overcome by them."

- Howard Therman

What if we are a partner or dependent child who has been left out of a partner or parent's estate, or have received less than we need to carry on?

We have 6 months from when the Personal Representative receives the Grant of Probate to bring a claim against the estate. It may be even shorter if we are a recently separated. So don't delay. See your lawyer to discuss possible remedies and to preserve your potential claim against the estate. Often, the family can work together to find a solution through discussion or mediation. If not, our court system is well set up to consider the claims and, where necessary, vary the will or estate plan to make sure partners and dependent children are adequately provided for.

If we are the Personal Representative of an estate, where we know that provision for a partner or dependent child might be an issue, seek guidance from your lawyer, and don't make any distributions on the estate until the matter has either been resolved or 6 months has passed from the grant of probate and we know a claim won't be forthcoming.

At Duncan Craig we have a dedicated team of lawyers who focus on Estate Solutions. We are able to offer services on all aspects of estate planning, including facilitating family meetings and mediations to discuss the family plans. We also offer full estate administration and litigation services, including assisting personal representatives and beneficiaries on potential claims, rights and obligations. Visit www.dcllp.com to contact the Estate Solutions team.

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