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## Family Law Considerations for the Wills and Estates Practitioner

**Edmonton, Alberta**

**Calgary, Alberta**

### **Chair**

**Fulvio M. Durante**

Dunphy Best Blocksom LLP  
Calgary, Alberta

### **Faculty**

**Rhoda Dobler QC**

Widdowson Kachur Ostwald Menzies LLP  
Calgary, Alberta

**Laura H. Bruyer**

Gordon Zwaenepoel  
Edmonton, Alberta

**Shelly K. Chamaschuk**

Reynolds Mirth Richards & Farmer LLP  
Edmonton, Alberta

**Catherine E. Gerrits**

Dunphy Best Blocksom LLP  
Calgary, Alberta

**Sherrilynn J. Kelly**

Parlee McLaws LLP  
Calgary, Alberta

**Michael Klaray**

Duncan Craig LLP  
Edmonton, Alberta

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# **Cracking the Code: Family Law Legislation and Estate Planning**

*Family Law Considerations for the Wills and Estates Practitioner*

Prepared by:

**Shelly K. Chamaschuk**

**Reynolds Mirth Richards & Farmer LLP**

**Edmonton, Alberta**

**Heidi Besuijen**

**Reynolds Mirth Richards & Farmer LLP**

**Edmonton, Alberta**

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## **INTRODUCTION**

Family law focusses on issues relating to family relationships and the rights, duties, powers, and liabilities that arise in connection with those relationships. Wills and estates law focusses on the disposition of property, in life or at death, as well as the management of affairs for those who are unable to do so by reason of incapacity or other physical or mental limitations.

At the confluence of these two streams of law, practitioners are called to address the legal obligations arising from familial relationships as they guide clients in arranging their affairs for the future. Legislation has intervened over the common law to impose obligations on testators (i.e. providing for claims for family maintenance and support) or to give rise to new relationships outside traditional arrangements from which further legal rights and obligations can spring (i.e. adult interdependent relationships).

This paper aims to assist estate practitioners in giving better, more strategic advice to clients which accounts for and assimilates family law. The topic of support, both child and spousal, is not broached herein as that topic will be covered in depth by another presenter at this seminar.

## **CONSTITUTIONAL CONSIDERATIONS**

While the division of powers under *The Constitution Act, 1867*, 30 & 31 Vict, c 3 might bring to mind hours spent in law school blinking through agricultural reference cases, the jurisdiction ground covered by sections 91 and 92 do come up in practice from time to time. Family lawyers must be concerned more frequently with the division of powers than estates practitioners. For this reason, a brief discussion is helpful because it serves as background to the discussion of family and brings these issues to the attention of those giving advice on estate planning.

Section 91(26) reserves to the federal government jurisdiction over “Marriage and Divorce” whereas section 92(12) affords the provinces jurisdiction over “the Solemnization of Marriage in the Province”. Furthermore, section 92(13) assigns “Property and Civil Rights in the Province” to the provinces. The result of these various divisions is that some matters in family law are dealt with under federal legislation (i.e. child support where spouses are seeking to divorce) and others provincial legislation (i.e. child support where spouses are merely separated or where adult interdependent partners are splitting). In contrast, the disposition of personal property which occurs in estate planning is firmly within the provincial sphere of power. Estate practitioners ought to be aware that the division of powers, therefore, can impact the advice to clients where the operation of federal legislation such as the *Divorce Act*, RSC 1985, c 3 (2nd Supp) may intercede in a client’s arrangements.

## RELATIONSHIPS

As noted, family law governs the legal aspects of family relationships. It should not be a surprise that there is a legal response to the question: “Who is my family?” The answer can have significant implications for a client’s estate planning. So, the first step is to identify the relationships which can give rise to legal obligations which must be considered in estate planning.

### Spouse

The definition of spouse is relatively straightforward where that relationship is the result of a legal marriage. The *Interpretation Act*, RSA 2000, c I-8 defines a spouse at section 28(1)(zz.1): “spouse” means the spouse of a married person. This definition has its limits as “married person” is not also defined. Under the *Divorce Act*, RSC 1985, c 3 (2nd Supp) at section 2(1) spouse is “either of two persons who are married to each other”.

A person ceases to be a spouse when divorce proceedings are undertaken resulting in a divorce judgment and divorce certificate, or a declaration of nullity of marriage is obtained.

For estate purposes, a spouse may be deemed predeceased but this issue is explored further below.

### Adult Interdependent Partner

The “adult interdependent partner” is a creation unique to Alberta, which addresses what many people think of as a common law partner or spouse. The *Adult Interdependent Relationships Act*, SA 2002, c A-4.5 governs when such relationships arise, how they are terminated, and other matters arising from their recognition. This is true even for estate purposes as in the *Wills and Succession Act*, SA 2010, c W-12.2, where the definition for an Adult Interdependent Partner is referred to the *Adult Interdependent Relationships Act*.

The *Adult Interdependent Relationships Act* defines its namesake at section 3:

#### **Adult interdependent partner**

3(1) Subject to subsection (2), a person is the adult interdependent partner of another person if

- (a) The person has lived with the other person in a relationship of interdependence
  - (i) for a continuous period of not less than 3 years, or
  - (ii) of some permanence, if there is a child of the relationship by birth or adoption