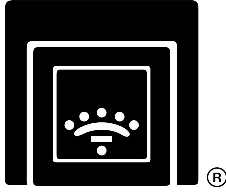

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Family Law Considerations for the Wills and Estates Practitioner

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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Child and Spousal Support Obligations in the Estate Planning Context

Family Law Considerations for the Wills and Estates Practitioner

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Prepared by:
Rhoda Dobler QC
Widdowson Kachur Ostwald Menzies LLP
Calgary, Alberta

Jessica MacDonald
Widdowson Kachur Ostwald Menzies LLP
Calgary, Alberta

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CHILD AND SPOUSAL SUPPORT OBLIGATIONS IN THE ESTATE PLANNING CONTEXT

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INTRODUCTION

Sadly, the rate of divorce in Canadian families remains high, as does the instance of relationship breakdown where parties have chosen not to formally marry. The reality confronting those relationships is similar as are their issues, but the law treats them differently. This distinction is obviously important to family lawyers, but the trickle down effect on other practice areas is also significant, particularly in the area of Wills and Estate law. All our clients have or had families, and many of our clients are in family units that are not necessarily their original families. There are second, third, fourth, etc. families, blended families, step parents and step siblings, polyamorous relationships……the variations appear endless, and are far too many too be covered here. One of the most common occurrences is the situation where a client is in a relationship which is no longer their initial relationship and dealing with estate planning or estate administration issues. They will likely have a Separation Agreement and, in the event they were previously married, they will also have a Divorce Judgment from their earlier relationship. It is imperative to know what those documents say, as they may well have obligations that still bind them, or be seeking to understand those obligations in the context of planning for new obligations in their estate planning. I will focus strictly on the support obligations that need to be considered, both child support and spousal support.

CHILD SUPPORT BASICS

We first need to understand the law behind child support, and any differences in legislation that apply to couples leaving a marriage versus leaving an Adult Interdependent Partnership. The *Divorce Act* R.S.C. 1985 c.3 (2nd Supp.) (and amendments thereto) governs child support obligations for those leaving a marriage. The *Family Law Act* S.A. 2003 c. F-4.5 (and amendments thereto) governs child support obligations when the parties were not married or have children without a previous relationship of permanence.

Under the *Divorce Act*, support obligations for a child are driven first by the definition of a child of the marriage in that legislation at section 2(1) which provides: child of the marriage means a child of two spouses or former spouses who, at the material time,

(a) is under the age of majority and who has not withdrawn from their charge, or

(b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life.

Age of majority, in respect of a child, means the age of majority as determined by the laws of the province where the child ordinarily resides, or, if the child ordinarily resides outside of Canada,

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eighteen years of age. Please also note that section 2(2) also states that a child of two spouses or former spouses includes (a) any child for whom they both stand in the place of parents; and (b) any child of whom one is the parent and for whom the other stands in the place of a parent.

Adult interdependent partners (AIP's) or former partners are defined in the *Adult Interdependent Relationships Act* S.A. 2002, c. A 4.5 (the "AIRA"). Section 3(1) sets out that 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, or
>
> (b) the person has entered into an adult interdependent partner agreement with the other person under section 7.

Under the *Family Law Act,* the definition of a "child" is at section 46(b): "child" means

> (i) a person who is under the age of 18 years, or
>
> (ii) a person 18 years of age or older who is under his or her parents' charge and is unable by reason of
>
> > (a) illness,
> >
> > (b) disability,
> >
> > (c) being a full-time student as determined in accordance
> >
> > with the prescribed guidelines, or
> >
> > (d) other cause

to withdraw from his or her parents' charge or to obtain the necessaries of life.

Until a very recent amendment, even if a "child" could not withdraw from their parents' charge for the reasons above, the *Family Law Act* previously capped a "child" as being 18 or older but no older than age 22, making for a big difference in child support treatment for married versus non-married parents. The amendment at least made the inclusion of "who is a child" under both statutes more similar, but beware that many agreements prior to 2018 for AIP's may have included the more restricted wording capping child support at 22.

Section 49 of the *Family Law Act* details additional terms not mirrored in the wording of the *Divorce Act.* Section 49(2) states sets out that a child support obligation does not extend to a child who:

> (a) is a spouse or an adult interdependent partner; or

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