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Family Law Considerations for the Wills and Estates Practitioner

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Estate Litigation and Family Law Issues

Family Law Considerations for the Wills and Estates Practitioner

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ESTATE LITIGATION AND FAMILY LAW ISSUES

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Estate litigation almost always intersects with multiple areas of law, but perhaps most frequently with family law. Typically, we rely on the three main legislative documents for estate litigation: The **Wills and Succession Act**¹, the **Estate Administration Act**² and the **Surrogate Rules**³. On occasion the common law directs that we must independently consider family law principles, legislation and case law.

As estate practitioners we are charged with the responsibility of managing our clients when their sky is falling. Our job is to consider our client's big questions during times of familial tragedy and guide them through the process.

This paper considers three often posed questions: (1) Where am I going to live? (2) How am I going to afford to live the way I have become accustomed? (3) How do I separate what is "mine" from what was "ours"?

BIG QUESTION #1: WHERE AM I GOING TO LIVE?

An immediate concern for family members of a deceased person is where are they going to live. A common example is in the case of adult interdependent partners ("AIP" or "partner"), where the deceased was the only person on title to the family home. Understandably, the surviving family members may be distraught and confused over the thought of having to immediately vacate their home.

In the case of surviving spouses, the **Dower Act** will apply.⁴ Section 18 states that any disposition of a homestead through a will or intestacy is subject to a life estate to the surviving spouse. Section 23 gives the surviving spouse a life estate in the deceased's personal property. section 75(2) of the WSA contemplates that the *Dower Act* will apply over and above the temporary possession provisions.

Where Do I Live?

Section 75 of the WSA provides that a surviving spouse or AIP is entitled to temporary possession of the family home that they were *ordinarily occupying* with the deceased for a period of 90 days.

A family home is defined in section 72(a) of the Act as follows:

¹ *Wills and Succession Act*, SA 2010, c W-12.2 [the "WSA" or the "Act"].

² *Estate Administration Act*, SA 2014, c E-12.5.

³ *Surrogate Rules*, Alta Reg 130/1995.

⁴ *Dower Act*, RSA 2000, c D-15.

- “family home” means
 - a house or part of a house that is a self-contained dwelling unit,
 - a part of business premises used as living accommodation,
 - a mobile home,
 - a residential unit as defined in the *Condominium Property Act*, or
 - a suite

that, at the time of a deceased’s death, was ordinarily occupied by the deceased and the deceased’s spouse or adult interdependent partner as their home and was owned, whether wholly or in part, or leased by the deceased but not by the deceased’s surviving spouse or partner.

The surviving spouse or partner is also entitled to the use and enjoyment of all *ordinarily used* household goods during the period of temporary possession.⁵ This does not include mementos. Household goods have been defined as:

- “household goods” means personal property that,
 - at the time of a deceased’s death, was owned by the deceased or both the deceased and the deceased’s spouse or adult interdependent partner, and
 - at the time of a deceased’s death, was needed or being ordinarily used for transportation, household, educational, recreational or health purposes by the deceased’s spouse or adult interdependent partner or by any child described in clause (b)(iii) or (iv) who is residing in the family home.⁶

The temporary possession provisions state that the surviving family member enjoys the right to temporary possession as against:

- the deceased’s estate or any person inheriting from the estate, other than a child described in section 72(b)(iv) (an adult child who is unable to earn a livelihood by reason of mental or physical disability) and who was ordinarily occupying the family home at the time of the deceased’s death;
- any person who is an owner of the family home by right of survivorship on the deceased’ death;

⁵ WSA, *supra* note 1 at s 76.

⁶ *Ibid.* at s 72(c).