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52nd Annual Refresher: Family Law

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Death and Divorce: Common Considerations

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DEATH AND DIVORCE: COMMON CONSIDERATIONS

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INTRODUCTION

When we draft domestic agreements, we tend to focus on what would occur in the event of a separation or divorce. We don't focus on what would occur in the event of one party's death. The reference to death is often limited to a number of standard clauses as set forth below, but rarely is the impact of these standard clauses discussed.

- The parties mutually appoint each other as the child(ren)'s guardian in the event of death;
- The parties verify their understanding that the agreement represents the disposition of support matters between them in all circumstances, including death specifically;
- The parties arrange for life insurance to secure support;
- The parties mutually release their respective rights, title and interest in and to the estate of the other;
- The agreement specifically provides that the parties have been advised of their rights under provincial wills and estates legislation; and
- The parties include an inurement clause making their agreement binding on their respective estates.

These standard provisions have at times given rise to litigation after the death of one party, often depending on how the parties have structured their post-divorce affairs. In what follows, we address several considerations in drafting domestic agreements that deal with the possibility of one party's death, specifically:

(a) Prenuptial and Cohabitation Agreements

1. The application of prenuptial agreements on one party's death when the parties are still in a relationship;
2. Cohabitation Agreements and the use and possession of the family home;
3. The effectiveness of spousal or partner support waivers in prenuptial or cohabitation agreements;
4. Beneficiary Designations;

- (b) Separation Agreements
- 5. Contractual releases relating to pension plans or other registered plans such as RRSPs and TFSAs;
- 6. Clauses binding the estate, and the effect of death on child and spousal support provisions; and
- 7. Clauses requiring the maintenance of life insurance to secure child or spousal support.

APPLICATION OF A PRENUPTIAL AGREEMENT UPON ONE PARTY'S DEATH

As an initial and seemingly obvious consideration, it is important to canvas with your client whether they want the terms of the Cohabitation Agreement or the Prenuptial Agreement to apply only upon separation and/or divorce or whether they also want it to apply to the death of one of the parties while they are still together or whether they wish to make different provisions for what happens upon death if the parties are still together.

If they chose to have all of the terms apply on death as well as separation or divorce, then one should draft the Agreement so as to eliminate any possible claim that a prenuptial or cohabitation agreement applies **only** on separation and not on death.

If the client wants to have separate provisions for what happens on separation/divorce and what happens upon death if the parties are together, then the wording of your Agreement needs to be very clear and specific.

In some cases the client may wish to have the terms of the Agreement apply to both separation/divorce and death, but wants the Agreement to provide the ability to put more generous provisions in their will in the event of their death while the parties are still together.

The result in *Starosielski v Starosielski Estate*, [1998] AJ No. 892, provides a helpful roadmap here: the parties entered into a prenuptial agreement and upon the husband's death, the wife sought to argue (among other things) that it was her understanding that the agreement dealt only with divorce and separation and not death.

The court held that the agreement clearly applied on death, noting the following provisions:

1. The preamble referenced division of property on death of one of the parties;
2. There was a waiver under the Family Relief Act and the Intestate Succession Act;