



## **SPOUSES SEPARATED FOR 3+ YEARS MAY NO LONGER BE ENTITLED TO SHARE IN INTESTATE SUCCESSION STARTING IN 2025**

**By Suzana Popovic-Montag - October 2024**

Wills and estates practitioners in Ontario may want to mark their calendars – starting January 1, 2025, section 43.1 of the *Succession Law Reform Act* (the “**SLRA**”)<sup>1</sup> will finally take full effect. Section 43.1 first came into force on January 1, 2022, and applies to intestate succession, addressing when spouses who are living separate and apart are to be considered legally “separated” for the purposes of Part II of the *SLRA*, which addresses intestacy. This section is a dramatic shift from prior iterations of the legislation, and now provides that a surviving spouse who is separated from the deceased at the time of death cannot share in the deceased’s estate if that person dies intestate.

Much of section 43.1 has already been in full force since January 1, 2022. For example, a surviving spouse cannot share in a deceased spouse’s estate on intestacy if the spouses entered a valid separation agreement on or after January 1, 2022.<sup>2</sup> Similarly, a surviving married spouse is barred from sharing in their deceased spouse’s estate on intestacy if a court order or family arbitration award, which resolved the parties’ rights and obligations with respect to the breakdown of their marriage, was granted on or after January 1, 2022.<sup>3</sup> To satisfy section 43.1, the spouses also must have been living separate and apart at the time of death.<sup>4</sup>

However, there remains a portion of section 43.1 which will only recognize spouses as “separated” on or after January 1, 2025. While spouses may be recognized as “separated” under section 43.1 solely on the basis that they have lived separate and apart for a period of three years due to the breakdown of their marriage, this specific component of section 43.1 cannot be utilized as of yet.<sup>5</sup> For the three-year time period to apply, subsection 43.1(3) expressly mandates that “the spouses must ... have begun to live separate and apart on or after

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<sup>1</sup> RSO 1990, c S.26 (the “*SLRA*”), as amended by the *Accelerating Access to Justice Act, 2021*, SO 2021, c 4. To read s. 43.1, see the Appendix included at the end of this Tip.

<sup>2</sup> *SLRA*, *supra* note 1, ss. 43.1(2)(a)(ii), 43.1(3). See the *Family Law Act*, RSO 1990, c F.3, Part IV (the “*FLA*”).

<sup>3</sup> *SLRA*, *ibid.*, ss. 43.1(2)(a)(iii), (iv), 43.1(3). Part II of the *SLRA*, including s. 43.1, only applies to married spouses who are separated: see s. 1.1(1) “spouse”. This term is currently defined as “either of two persons who (a) are married to each other, or (b) have together entered into a marriage that is voidable or void, in good faith on the part of a person relying on this clause to assert any right”: see the *FLA*, *ibid.*, s. 1(1) “spouse”. The term “spouse” does not include common law spouses.

<sup>4</sup> *SLRA*, *ibid.*, s. 43.1(2)(b).

<sup>5</sup> *SLRA*, *ibid.*, s. 43.1(2)(a)(i).

[the] day” that the amendments to the *SLRA* came into force, being January 1, 2022.<sup>6</sup> Accordingly, if a person dies intestate prior to January 1, 2025 while living separate and apart from their spouse due to the breakdown of their marriage, the surviving spouse may still be entitled to a preferential share of the deceased’s intestate estate worth up to \$350,000,<sup>7</sup> even if they have been living separately for more than three years.<sup>8</sup> To illustrate this point, Justice MacPherson confirmed on a motion decided earlier this year that the amendments to the *SLRA*, including section 43.1, did not apply to a couple who had separated in 2020.<sup>9</sup>

While the legislature intended to alter the rights of separated spouses, it appears that there was reluctance to retroactively alter the legal affect of decisions made by married spouses prior to section 43.1 coming into effect. As a result, if a court order or family arbitration award was granted before section 43.1 came into force, the surviving spouse may not be considered “separated” from the deceased under section 43.1, even if they have been living separately for more than three years. The way that section 43.1 is drafted, court orders and family arbitration awards granted before section 43.1 came into force will not result in the spouses being recognized as “separated”; instead, it appears that spouses, other than those whose rights have been addressed by way of a separation agreement, arbitral award, or court order in 2022 or later, can only be recognized as “separated” once section 43.1 has been in force for three years, starting on January 1, 2025. What remains somewhat unclear is whether the spouses, as the current wording of the legislation appears to suggest, must have “begun to live separate and apart” on or after January 1, 2022, or whether spouses who separated prior to 2022 also enjoy the benefit of the new statutory provisions. If the legislature did not intend to retroactively alter the consequences of decisions made by married spouses prior to 43.1 coming into force, it may be that any separation that “began” before January 1, 2022 will not trigger the benefits of the statute.

As such, January 1, 2025 may be a noteworthy date for wills and estates practitioners. In the New Year, it may no longer be necessary for spouses to have entered into a separation agreement, or to have obtained a court order or a family arbitration award regarding the breakdown of their marriage, in order to be recognized as legally separated under Part II of the *SLRA* so long as the deceased spouse passes away on or after January 1, 2025, and the other conditions articulated in section 43.1 are satisfied.<sup>10</sup>

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<sup>6</sup> *Ibid.*, s. 43.1(3). Not recognizing spouses as separated until a specific amount of time after the pertinent legislative provision comes into force appears to be unique to Ontario. In other Canadian jurisdictions where separated spouses cannot inherit on intestacy, there is no similar requirement included in the legislation. See, for example, (BC) *Wills, Estates and Succession Act*, SBC 2009, c 13, ss. 2, 20-22; (AB) *Wills and Succession Act*, SA 2010, c W-12.2, s. 63; (SK) *The Intestate Succession Act, 2019*, SS 2019, c I-13.2, s. 15; (MB) *The Intestate Succession Act*, CCSM c 185, ss. 3(1), (2); and (YK) *Estate Administration Act*, RSY 2002, c. 77, s. 94.

<sup>7</sup> See O Reg 54/95, s. 1(b).

<sup>8</sup> This is consistent with how the law governing intestate succession operated before the *SLRA*, *supra* note 1, was amended effective January 1, 2022. See Carmen S. Thériault, *Widdifield on Executors and Trustees*, 6th ed (Toronto, Ontario: Thomson Reuters, 2002) (loose-leaf) at § 5:74.

<sup>9</sup> See *McDowell v. McDowell*, 2024 ONSC 2301 at para 24. In this case, neither spouse had died; the court was examining whether the wife would be legally disadvantaged if a motion brought by the husband to sever their divorce from corollary relief was granted.

<sup>10</sup> *Ibid.*, ss. 43.1(2)(a)(i), 43.1(3).

## **APPENDIX**

### ***Succession Law Reform Act, RSO 1990, c S.26, s. 43.1***

#### **Non-application of intestacy rules to separated spouses**

**43.1** (1) Any provision in this Part that provides for the entitlement of a person's spouse to any of the person's property does not apply with respect to the spouse if the spouses are separated at the time of the person's death, as determined under subsection (2). 2021, c. 4, Sched. 9, s. 6.

#### **Same**

(2) A spouse is considered to be separated from the deceased person at the time of the person's death for the purposes of subsection (1), if,

- (a) before the person's death,
  - (i) they lived separate and apart as a result of the breakdown of their marriage for a period of three years, if the period immediately preceded the death,
  - (ii) they entered into an agreement that is a valid separation agreement under Part IV of the *Family Law Act*,
  - (iii) a court made an order with respect to their rights and obligations in the settlement of their affairs arising from the breakdown of their marriage, or
  - (iv) a family arbitration award was made under the *Arbitration Act, 1991* with respect to their rights and obligations in the settlement of their affairs arising from the breakdown of their marriage; and
- (b) at the time of the person's death, they were living separate and apart as a result of the breakdown of their marriage. 2021, c. 4, Sched. 9, s. 6.

#### **Transition**

(3) This section applies in respect of a separation only if an event referred to in clause (2) (a) occurs on or after the day section 6 of Schedule 9 to the *Accelerating Access to Justice Act, 2021* came into force, except that in the case of subclause (2) (a) (i), the spouses must also have begun to live separate and apart on or after that day. 2021, c. 4, Sched. 9, s. 6.