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Preserving the Right to Elect for Equalization under the FLA

In Ontario, a married spouse can elect on the death of a husband or wife to either (a) inherit assets in accordance with the terms of the predeceasing spouse's Last Will and Testament or otherwise what he or she is entitled to on intestacy, or (b) to receive an equalization of net family properties under the *Family Law Act*, RSO 1990, c F.3 (the "**FLA**").

Subsection 6(10) of the FLA provides that an election shall be filed with the Estate Registrar within six months of the predeceasing spouse's death. If no election has been made six months after date of death, the surviving married spouse is normally *deemed* to have elected to take under the predeceasing spouse's will or to receive the amount to which the surviving spouse is entitled under the intestacy provisions of the *Succession Law Reform Act* (s. 6(11)).

Making the decision as to whether or not to elect for equalization under the FLA following the death of a married spouse within six months may at times be premature, as this may not provide sufficient opportunity to accurately calculate respective net family properties and/or to determine with certainty what the surviving married spouse will receive under a will or on intestacy. The FLA does speak to the ability of a surviving married spouse to move to preserve his or her ability to elect for equalization (ss. 2(8), 6(16)). Sometimes it may be reasonable to do so for several additional months or until proceedings affecting the interests of the surviving spouse in the predeceasing spouse's estate, such as a will challenge, have been decided.

However, in light of the language of the FLA, it is important that the option of electing for an equalization of net family properties is canvassed with clients well in advance of the six month anniversary of the date of death. Ideally, the order preserving a client's ability to elect for equalization under the FLA will be obtained prior to the six-month deadline. The order should refer to extensions to the following time periods:

- that within which the surviving spouse is entitled to file an election pursuant to subsection 6(10) of the FLA in the office of the Estate Registrar for Ontario;
- that after which the surviving spouse shall be deemed to have elected to take under the will or on intestacy pursuant to subsection 6(11) of the FLA; and
- that set out in subsection 7(3)(c) of the FLA with respect to the commencement of an application pursuant to subsection 5(2) of the FLA.

The remedy of an equalization of net family properties is not available to common-law spouses, who may be required to instead commence an application for dependant's support under Part V of the *Succession Law Reform Act* if the predeceasing spouse has not made adequate provision for the surviving spouse's support.

Lawyers assisting surviving married spouses should consider early on into the six months following date of death whether the period during which the client can elect for equalization may need to be extended to preserve the client's interests in a predeceasing spouse's estate. The failure to do so may result in the distribution of estate assets in a manner that is inconsistent with the surviving spouse's rights on equalization or the inability to obtain an equalization of net family properties altogether.