

BILL 53

COMMON-LAW PARTNERS PROPERTY AND RELATED AMENDMENTS ACT

A. Introduction

The Manitoba government has passed, but not yet proclaimed law which will give same-sex and opposite-sex common-law partners the same rights as married persons. Upon proclamation *The Common-Law Partners' Property and Related Amendments Act*, [the "Common-Law Partners' Act"], will have significant implications for estate planning and estate administration.

Some changes instituted by the Common-Law Partners' Act are retrospective. Persons that, on the date of proclamation, are living in "common-law" relationships will acquire certain rights and obligations that were previously afforded only to legally married persons. Common-law partners risk having their existing estate plans being legislatively revoked on the date that the law is proclaimed. Steps can be taken to address and/or avoid the effect of the legislation.

This paper will briefly outline the import of the pending changes and the steps available to persons desiring to address or avoid the impact of those changes.

B. Common-law Definition

The Common-Law Partners' Act will affect common-law partners. Common-law partners are persons that: (i) cohabit in a conjugal relationship for a period of at least three years; (ii) cohabit in a conjugal relationship for a period of at least one year and are together the parents of a child; or (iii) register as common-law partners under the Vital Statistics Act of Manitoba.

Whether or not persons qualify as common-law partners will be determined on a case by case basis. For some the proof will be easy because they will have registered, or dissolved registration, as common-law partners with Vital Statistics. For others the issue will not be as simple. Courts will be required to consider and define the phrase “cohabit in a conjugal relationship”. Whereas marriage, separation and divorce are usually easily identifiable events, the onset, duration and termination of a common-law relationship may be less easily ascertainable.

Courts have had occasion to consider the meaning of the phrase “cohabiting in a conjugal relationship”, used in other forms of legislation. In assessing whether parties were, or were not, cohabiting in a conjugal relationship courts have given consideration to the following characteristics: shared shelter; sexual and personal behaviour toward each other; shared responsibilities of child rearing; economic support; societal perception; commitment to the relationship; extent and nature of services performed for and between each other; and social behaviour between each other.

These elements may be present in varying degrees and are not all necessary for a common-law relationship to be found to exist. In order to come within the definition, neither opposite-sex couples nor same-sex couples are required to precisely fit the traditional marital model.

C. Retroactivity and Retrospectivity

Generally, laws are prospective, affecting rights and obligations after the date of proclamation. Sometimes, legislation is retroactive, changing past rights and obligations, ones that existed prior to the date of proclamation. Sometimes,

legislation is retrospective, changing future rights and obligations, but determined with reference to past circumstances.

The Act appears to be prospective and retrospective, but not retroactive.

Period(s) of cohabitation prior to proclamation are to be included in calculating eligibility as common-law partners. On the date of proclamation, therefore, persons that are cohabiting in a conjugal relationship, and have been so cohabiting for a period of at least three years prior to the date of proclamation, will immediately be subject to the rights and obligations of the Act.

The Act will not apply to any person that dies prior to the date of proclamation no matter how long that person may have been cohabiting in a conjugal relationship and no matter how recently prior to the date of proclamation he or she dies.

D. Implications for Various Manitoba Statutes

1) **The Wills Act**

Currently, the Wills Act applies only to married persons. The Act will make the Wills Act applicable to common-law partners.

Two areas of significant change will be:

- Upon becoming common-law partners, as defined, any prior will is revoked, unless,
 - the testator lacks capacity to make a new will on the day the Act is proclaimed
 - there is a declaration in the will that it is made in contemplation of the testator's common-law relationship
 - the testator's common-law partner is a beneficiary under this will

- the will is made in exercise of a power of appointment of real or personal property which would not, in default of the appointment, pass to the heir, executor, or administrator of the testator or to the persons entitled to the estate of the testator if the testator died intestate; or
- the will fulfills obligations of the testator to a former spouse or common-law partner under a separation agreement or court order.
- a devise, bequest, appointment as executor or trustee or appointment of a power under a will in favour of a common-law partner is revoked, absent an intention to the contrary in the will
 - if after making the will and before the death of the testator, the testator's common-law relationship with his or her common-law partner is terminated by:
 - where the common-law relationship was registered under *The Vital Statistics Act*, by registration of the dissolution of the common-law relationship under *The Vital Statistics Act*; or
 - where the common-law relationship was not registered under *The Vital Statistics Act*, by virtue of having lived separate and apart for a period of at least three years.

Implications of Amendments to The Wills Act for Estate Planning

Persons in common-law relationships need to be aware of the effect of the changes to the Wills Act to their estate plan. When a person becomes a common-law partner, as that term is defined under the Wills Act, their will has the potential that it will be "common-law partners" as defined by the Wills Act on the date of proclamation of the Act. Common-law partners need to be cognizant of the effect of the Act to existing wills. The Act will automatically revoke wills, either

on the date of its proclamation or on the date that persons become common-law partners under the Act. When entering a common-law partner a person will have to consider oprolWills Upon proclamation of the Act many common-law partners will have their wills revoked. ion will be should be aware that on the date of proclamation of the Act an existing will may be revoked, and that an existing will and that the termination of a common-law partnership will affect an intended gift to the common-law partner.

Where a common-law partnership was registered under *The Vital Statistics Act* it will be necessary to dissolve the registration to terminate the partnership, which dissolution can be registered after one year of separation. Although dissolution does not require concurrence or signature from both partners, notice of dissolution is to be served upon the other party prior to becoming acknowledged by the director of Vital Statistics.

The Vital Statistics Act provides for a dispute process related to registrations and dissolutions.

Implications of Amendments to *The Wills Act* for Estate Administration

Estate administration will become more complicated as the determination of the validity of a will of a common-law partner will become more difficult. Searches at Manitoba Vital Statistics will be necessary upon the death of an individual as will greater inquiry into the personal background of the deceased. Presently the determination of marital status at the time of death is rather straightforward. A person is either married, divorced, widowed or single. All four are usually readily and easily ascertainable. Whether a person will be in or out of a common-law relationship on the date of death will be more difficult to ascertain.

Determination of the existence of a common-law relationship of the deceased will require more inquiry. The inquiry will be more difficult for executors such as Trust Companies that may not be familiar with the testator's personal relationships.

2) The Marital Property Act

Currently, the Marital Property Act applies only to married persons. The Act will amend the Marital Property Act, including changing its name to the Family Property Act, and will be applicable to common-law partners.

Interestingly the definition of common-law partner under the Family Property Act does not include persons that cohabit in a conjugal relationship for a period of at least one year and that are together the parents of a child

For estate planning purposes surviving common-law partners will be entitled to make Part IV applications against the estate for an accounting and equalisation of common-law property. The common-law partnership must subsist at the time the Act is proclaimed, or be renewed thereafter.

A common-law partner must apply within 6 months of the date of death or issuance of Grant of Probate for an accounting and equalisation, or in the event of dissolution of the registration with Vital Statistics within 60 days..

Implications of the Amendments of the M.P.A. for Estate Planning

An eligible common-law partner that is left out of the will of his or her partner may apply for an accounting and equalisation. Many common-law partners have devised an estate strategy on the expectation that their partner has no legal claim to an accounting and equalisation. That strategy is undermined by the Act.

Note that rights under the Family Property Act can be waived or released.

Implications of the Amendments to *The Marital Property Act* for Estate Administration

First, and most easily, a practitioner will have to search for any registered common-law relationships under the Vital Statistics mechanism. That search should extend to registered dissolutions of such relationships. Certificates would be ordered. In terms of registered common-law relationships all of this should be easy. Like legal marriage, registered common-law status lends itself to ready determination of status.

The situation is more interesting, as discussed earlier in this paper for *de facto* common-law relationships. Six month notice will have to be provided to common-law partners just as it is now required for spouses. That notice has to go out within thirty days of the grant of probate as provided for by the new subsection 31(1) of the Act. It now provides:

Personal representative to serve notice

31(1) Except where there is only one surviving spouse or common-law partner and he or she has made or is continuing an application for an accounting and equalization of assets under this Part, the personal representative of a deceased spouse or common-law partner shall within one month after the grant of letters of probate or letters of administration serve the surviving spouse or common-law partner, in accordance with the rules of court, with a notice in the form prescribed by regulation.

Notice to both spouse and partner

31(2) If the deceased spouse or common-law partner has a surviving spouse and a surviving common-law partner, or two or more surviving common-law partners, the personal representative of the deceased spouse or common-law partner shall serve both or all of them with the notice as provided in this section.

Consider the stock question, posed earlier, that practitioners might ask of executors:

“The law of Manitoba affords rights to common-law partners if they have lived together. That extends to same sex and opposite sex partners. Did the deceased, to your knowledge, ever live with another person?”

If the executor is the brother of the deceased, the question should be easy. Again, what if the executor is a trust company? In that case, the executor will have no idea. The question cannot be answered without enquiry. Should the trust company make these enquiries?

Assume they do not. A common law partner will eventually step forward, after an estate has been distributed to other beneficiaries, and turn out their pockets in poverty while pointing an accusing finger at the corporate executor. “If you had asked the neighbors, they would have told you that I was in a common-law relationship with the deceased for 5 years, ending two years prior to the deceased’s death. We were a couple in every way. You never made the enquiries. The estate is now scattered. My only recourse is against the trust company.”

In that scenario will the trust company be liable to the defeated common-law? Does the obligation to give notice carry with it the obligation to make enquiries to determine if there is a common-law out there? Until a court advises otherwise, and absent further research on the point, we believe the answer has to be “yes” – a trust company might be wise to make those enquiries and be liable for failure to do so. This extends to other estranged executors as well. For example, a member of the extended family, like a niece or nephew, who lives in another city, may not know the

domestic history of the deceased with any certainty. They may be in the same position as the trust company in the discussion outlined above.

C. THE INTESTATE SUCCESSION ACT (I.S.A.)

i. The Current *Intestate Succession Act*

The current Act contains three definitions in section 1, “estate”, “issue” and “successors”. The Act doesn’t define marriage but extends rights only to married spouses and blood relations.

ii. The Changes to *The Intestate Succession Act*

The following definitions are added in the definitions section:

“common-law partner” of an intestate means

- (a) a person who, with the intestate, registered a common-law relationship under the section 13.1 of *The Vital Statistics Act*, or
- (b) subject to subsection 11(2), a person who, not being married to the intestate, cohabited with him or her in a conjugal relationship, commencing either before or after the coming into force of this definition,
 - I. for a period of at least three years, or
 - II. for a period of at least one year and they are together the parents of a child.

“common-law relationship” means the relationship between two persons who are common-law partners of each other;

A series of provisions are added under section 3 to give rights to separated common-law spouses and establishes priorities between married and unmarried partners as follows:

Rights of separated common-law partner

3(2) If, at the time of the intestate's death, the intestate and his or her common-law partner were living separate and apart from one another, and one or more of the following conditions is satisfied:

- (a) where the common-law relationship was registered under section 13.1 of *The Vital Statistics Act*, the dissolution of the common-law relationship was registered under section 13.2 of *The Vital Statistics Act* before the death of the intestate;
- (b) where the common-law relationship was not registered under section 13.1 of *The Vital Statistics Act*, three years have passed from the day on which the common-law partners began living separate and apart;
- (c) during the period of separation, one or both of the common-law partners made an application for an accounting or equalization of assets under *The Family Property Act* and the application was pending or had been dealt with by way of final order at the time of the intestate's death;
- (d) before the intestate's death, the intestate and his or her common-law partner divided their property in a manner that was intended by them, or appears to have been intended by them, to separate and finalize their affairs in recognition of the breakdown of their common-law relationship;

the surviving common-law partner shall be treated as if he or she had predeceased the intestate.

Priorities between spouse and common-law partner

3(3) If, at the time of the intestate's death, the intestate had both a spouse and one or more common-law partner's, the entitlement of the spouse or common-law partner whose relationship with the intestate was the most recent at the time of the intestate's death has priority over the spouse or common-law partner whose relationship with the intestate was earlier. Section 2 shall be applied as if the intestate

only had the spouse or common-law partner who was the most recent, provided that

- (a) the claim of the most recent spouse or common-law partner under this Act shall not have priority over the claim under Part IV of *The Family Property Act* of an earlier spouse or common-law partner; and
- (b) the entitlement set out in subsection 2(3) shall be reduced by the amount due under *The Family Property Act* to the spouse or common-law partner who was earlier.

Exclusion

3(4) A spouse or common-law partner who is excluded from the distribution of the intestate's estate under subsection (1) or (2) shall not be considered for the purpose of subsection (3).

Throughout the Act, wherever the term "spouse(s)" occurs, the phrase "or common law partner(s)" is added. The amendments are intended to make the Wills Act as applicable for common law couples as they are for married couples.

iii. Retroactivity/Retroactivity Regarding *The Intestate Succession Act*

The amended *Intestate Succession Act* will clearly be *retrospective*. Cohabitation prior to proclamation will result in immediately effective rights when Bill 53 becomes law.

In terms of *retroactivity*, there is a subsection added to section 11 of the Act that specifically addresses the retrospective application as follows:

Application re common-law partners

11(2) The provisions of this Act that govern the distribution of an estate to the common-law partner of an intestate apply to the estates of intestates who die on or after the date on which this subsection comes into force.

The Act makes it very clear that the amended distribution rules will only apply to cases where the date of proclamation predates the date of death.

iv. Implications of the Amendments to *The Intestate Succession Act* for Estate Planning

Some citizens in Manitoba may have consciously chosen not to prepare a Will, having received advice as to the terms of *The Intestate Succession Act*. When the law changes, that may pose problems.

Imagine this scenario: A widowed spouse with grown children starts a relationship with a sexual partner and for convenience sake they begin living together. As the law stands now, if they continue to live together for three years and if she then dies with no will, the Act will divide her property among her children. That is the current understanding of the function of the Act. When the amendments come into effect, that changes drastically. The boyfriend will get half the estate and the remainder will be split among the children.

Based on the above, there is a collection of individuals in the province who may now wish to make a Will. This means that the pending changes will have to be brought home to them through some form of public education process. It is our understanding that the government plans to engage in a program of public education prior to proclamation. The extent of that public education process, or the content, is not, to my knowledge, a matter of public record at this stage. There may be some indication out there, but we are unaware of it.

v. Implications of the Amendments to the I. S. A. for Estate Administration

Paralleling the discussion earlier in this paper dealing with *The Marital Property Act* and the impact of amendments for estate administration, practitioners will have to search for registered common-law relationships, and potentially make inquiries to try to ascertain whether any non-registered common-law relationships exist. If the estate is distributed to children, for example, on the mistaken understanding that there was no common-law relationship taking place at the date of death, the disinherited common-law may later have some cause of action against the lazy administrator who failed to make such enquiries.

The changes to this *Act* may bring forward a good deal of estate litigation. The *Act* anticipates the claims of both married and common-law or multiple common-law partners. Coupled with the fact that there may be hundreds if not thousands of Wills revoked as a result of *The Wills Act* amendments, this might create a likely arena for contest. In the event of someone having both a married and common-law spouse, it gives all the rights of succession (subject to a Part IV Family Property Act accounting) to the most recent spouse. Where the estate is of a significant size, and there is animosity between the rival parties (as there often is in these circumstances) it makes for the perfect conditions for litigation for the assets of the estate.

D. THE DEPENDANT'S RELIEF ACT ("D.R.A.")

i. The Current D.R.A.

The *Act* already applies to spouses and common-law relationships based on the test of need.

ii. Changes to the D.R.A.

The substantive amendments to *The Dependents Relief Act* focus on the definition of common-law, adding the concept of a common-law by registration:

“common-law partner” is defined as

- (a) A person who, with the deceased, registered a common-law relationship under the section 13.1 of *The Vital Statistics Act*, the dissolution of which had not been registered under section 13.2 of *The Vital Statistics Act* before the death of the deceased, or
- (b) A person, who not being married to the deceased, cohabited with him or her in a conjugal relationship
 - I. For a period of at least three years, or
 - II. For a period of at least one year and they are together the parents of a child

The only significant change is the ability to register and dissolve a common-law relationship under the Vital Statistic Act.

iii. Retroactivity/Retrospectivity/ regarding the D.R.A.

The majority of other statutes that change to reference three years of cohabitation both before and after coming into force of the Bill. *The Dependant’s Relief Act* does not include that amendment. This is likely a moot point as the definition of a common-law as a three year, conjugal cohabitee (one year with child) has been part of *The Dependant’s Relief Act* since the summer of 2001.

iv. Implications of the Amendments to the D. R. A. for Estate Planning

There will be a larger pool of individuals that qualify under the Act to make an application for relief. The estate planner will need to be more wary of this fact when taking instructions. The planner will need to enquire in a bid to determining whether a common-law currently qualifies as a dependant or may do so in the future. The general form of that enquiry is discussed elsewhere in this paper.

It is important to note that the terms of the Act cannot be excluded by contract so accommodation for it must be made in every case.

The deathbed scenario posed earlier is interesting here. If you are a registered common-law, then your rights under the DRA can be extinguished if the relationship is extinguished. The deathbed partner can sign a statement of dissolution. After service of the statement on the other registered common-law they have thirty days before the director of Vital Statistics can issue a certificate of dissolution. The director has to be satisfied about the one year separation, and once satisfied must register the dissolution and may issue the certificate. Rights under the DRA extinguish immediately upon the certificate issuing. Again, it is not hard to imagine circumstances where parties may fight bitterly over the registration of the dissolution. This means that the administrative and appeal procedures under *The Vital Statistics Act* may have to bear the load of heavy testing. They are not broadly worded, and some problems may be encountered. An analysis of those provisions is beyond the current scope of this paper.

v. Implications of the Amendments to the D. R. A. for Estate Administration

The Act does not require that notice be provided to the dependant of their right to make a claim. The estate representative should be canvassed for someone with a claim and be made aware that it could arise. The dependant can make a claim within six months of the decease. On application by a dependant the court can order that the administration of the estate be suspended.

A Vital Statistics search for registrations of common-law partners will be required.

E. THE HOMESTEAD ACT (The "H.A.")

i. **The Current Homesteads Act**

The current Act applies only to married spouses.

ii. **Changes to The Homesteads Act**

The Homestead Act will now provide a definition of "common-law partner" in section 1 as follows:

- (a) another person who, with the person, registers a common-law relationship under the section 13.1 of *The Vital Statistics Act*, or
- (b) subject to subsection 3.1, another person who, not being married to the person, cohabited with him or her in a conjugal relationship for a period of at least three years commencing either before or after the coming into force of this definition";

The term "common-law partner" is added in the Act wherever a right is provided to a spouse. The common-law partner therefore has the right to a life estate in the family home subject to a first come first served basis. Section 2.1 and 2.2 outline the priority of relationships:

Only one spouse or common-law partner with rights

2.1 Only one spouse or common-law partner at a time may have rights in a homestead under this Act.

Homestead rights of second spouse or partner

2.2A second or subsequent spouse or common-law partner of the owner does not acquire homestead rights in a property previously

occupied by the owner and his or her previous spouse or common-law partner until the following conditions are satisfied:

- (a) if the previous spouse or common-law partner acquired a homestead right in the property, that right has been released or terminated in accordance with this Act;
- (b) if the previous spouse or common-law partner has an ownership interest in the property, that interest has been transferred to the owner or another person;
- (c) if the previous spouse or common-law partner has a claim under *The Family Property Act* for an accounting and equalization of assets, that claim has been satisfied.

The mechanism for termination of the homestead rights under the *Act* are not automatic. An application to terminate the homestead rights may be made by an owner where the common-law partners have lived apart for 3 years and they have not registered their relationship under *The Vital Statistics Act* if it “appears fair and reasonable under the circumstances to do so.”

iii. Retroactivity/Retrospectivity/ regarding *The Homesteads Act*

The provisions of the *Act* are not retroactive. The *Act* is not intended to apply to partners who are not living together at the date of proclamation:

Parties living separate and apart

3.1 The provisions of this Act do not apply to common-law partners who cohabited in a conjugal relationship for at least three years before the date on which this section came into force of this section but who were living separate and apart on that date, unless

- (a) the parties resume cohabitation after this section comes into force and register their relationship under section 13.1 of the *Vital Statistics Act*, or

- (b) the parties resume cohabitation after this section comes into force and continue to cohabit for a period of at least 90 days after that.

The *Act* does appear to be retrospective however. The provisions of this *Act* are available immediately to persons who have lived in the eligible circumstances up to the present time. That is, the *Act* has retrospective effect to qualifying parties and will on its proclamation date give rise to hundreds if not thousands of *The Homestead Act* life estates.

iv. Implications of the Amendments to *The Homesteads Act* for Estate Planning

If common-law partners do not want the *Act* to apply on the proclamation date their options appear to be encapsulated in the following hard choice: Have the partner enter into a properly structured agreement or other instrument to release or defeat the homestead rights, on the one hand, or if they refuse, end the relationship and move out prior to proclamation date, on the other.

A far larger collection of Powers of Attorney will have to be executed in compliance with sections 23(2), (3) and 24 of *The Homestead Act*. Formerly, this was necessary only for married persons. Now, anyone in a common-law relationship or who is or might in future be living with another person will need to ensure that their power of attorney is executed in accordance with the requirements of *The Homestead Act*. That means the Power of Attorney must expressly confer the power to deal with homesteads, must name an attorney or alternate other than the spouse, and must attach or embed the prescribed wording of a Spouse's Acknowledgement for Power of Attorney (Form 9 to *The Homestead Act*).

The Homesteads Act currently provides:

Authority of spouse's attorney

23(1) A consent to a disposition, a consent to a change of homestead or a release may be executed by a attorney on behalf of an owner's spouse if the power of attorney expressly authorizes the attorney to execute a consent or release under this Act.

Owner cannot be attorney

23(2) Despite subsection (1), an owner shall not execute a consent, a release, a consent to terminate a release or discharge of homestead notice as attorney for his or her spouse.

Owner cannot be attorney

24 An owner shall not execute a disposition referred to in clause 4(d) (spouse as a party to a disposition) as attorney for his or her spouse.

Disposition prohibited without consent

4 No owner shall, during his or her lifetime, make a disposition of his or her homestead unless

(d) the owner's spouse has an estate or interest in the homestead in addition to rights under this Act and, for the purpose of making a disposition of the spouse's estate or interest, is a party to the disposition made by the owner and executes the disposition for that purpose;...

The above provisions came into effect for married persons on the 15th of August in 1993 when *The Dower Act*, R.S.M. 1988, c. D100, was repealed and *The Homesteads Act* came into force. The prohibition against spouses acting for each other was not new. The former *Dower Act* did contain equivalent prohibition against a married spouse releasing homestead rights on behalf of their spouse while acting as their

attorney under a power of attorney. *The Dower Act* did not provide for the Acknowledgment. Thousands of powers of attorney executed by married couples in the days and years prior to August 15th, 1993, became non-compliant. Those powers of attorney failed to contain the Acknowledgment. They were expressly grandfathered at the time by section 30(5)(c) of *The Homesteads Act* that read:

Documents under former act

30(5) Any...

(c) power of attorney giving authority to deal with rights in a homestead;...
...made, executed or registered in accordance with the former Act before this Act comes into force is deemed to be effective of the purposes of the Act.

They expressly continued to be effective after August 15, 1993 notwithstanding the absence of the Acknowledgement, by virtue of the grandfathering provision in 30(5)

Turning to 2002, thousands of powers of attorney will have been executed by common-laws since 1993. These will be non-compliant when Bill 53 is proclaimed in force. Many of them will appoint a common-law to exercise powers under the power of attorney. Many of them will lack an express power to deal with homestead rights. Most, if not all, will not contain the Acknowledgment. Is there an express grand fathering clause to preserve them? Our review of Bill 53 has not disclosed any grand fathering clause. This leads us hesitantly to the conclusion that thousands of non-compliant powers of attorney executed by common-laws will indeed have to be re-done when the new laws are in place.

Perhaps one could argue that the Powers of Attorney, while non-compliant, ought to be given continuing legal effect notwithstanding the change to the law by virtue of general principles that deal with the retroactive revocation of instruments like Powers

of Attorney. In making that argument, one would have to say that although a grandfather clause was put in place in 1993, that grandfather clause was actually out of an abundance of caution. It was unnecessary. The natural operation of law would have allowed older Powers of Attorney to continue in force and effect. If that is, indeed, a tenable position to take, then the argument could go on as follows. Section 46(1)(c) of *The Interpretation Act* provides that “the repeal of an Act or regulation, whether or not it is also replaced, does not...affect a right, privilege, obligation, or liability acquired, accrued, accruing, or incurred under the repealed Act or regulation...”. If that provision is to save earlier Powers of Attorney (without a grandfather clause) then the issue becomes this. Is the right to transfer the marital home under an earlier, non-compliant Power of Attorney a right afforded by statute or a right afforded in the common-law? If the power of an individual to make a transfer of a home has its origin in the common-law of agency, then the provision in *The Interpretation Act* does not appear to apply. If the right to make a transfer of property pursuant to Power of Attorney finds its origin in *The Power of Attorney Act* itself, then the provision from *The Interpretation Act* quoted above may be effective in saving the earlier Powers of Attorney from the effects of their non-compliance. A brief discussion of this can be found in *Huston v. Ash* 1984 CarswellMan 83, 17 E.T.R. 188, 9 D.L.R. (4th) 387 (*sum nom.* Purpur v. Ash) 28 Man. R. (2d) 288 (Q.B.) where, at paragraph 13, it dealt with retrospectivity of amendments.

Leaving aside the specific provisions of *The Interpretation Act*, and turning to more general principles at law, one could also argue as follows in a bid to save the non-compliant Powers of Attorney. These principles were discussed in *National Trust Company v. Larson* 1989 CarswellSask 294, [1989] 6 W.W.R. 605, 61 D.L.R. (4th) 270, 6 R.P.R. (2d) 171, 77 Sask. R. 58 (C.A.). At paragraph 12 of the ECarswell report, the following appears:

“Third, there has evolved at common law a body of principle by which the courts, when construing new statutes dealing with substantive rather than purely procedural matters, lean against ascribing to the

legislature an intention either to legislate retrospectively or to legislate prospectively in derogation of vested rights. Such statutes are often attended by injustice to the person whose rights are being interfered with, and so the courts are naturally reluctant to ascribe intentions of that sort to the legislature. Thus in doubtful instances, when the legislative intention is not altogether clear, such statutes are taken to operate prospectively and are generally construed so as not to interfere with acquired rights: *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 S.C.R. 271, 66 D.L.R. (3d) 449, [1976] C.T.C. 1, 75 D.T.C. 5451, 7 N.R. 401 [Fed.]; *Martin v. Perrie*, [1986] 1 S.C.R. 41, 36 C.C.L.T. 36, 24 D.L.R. (4th) 1, 12 O.A.C. 369, 64 N.R. 195.”

The issue then becomes whether the right to transfer a home under a Power of Attorney is a substantive right or a procedural matter. At first blush, it seems to be procedural, but research into the meaning of the words “substantive” and “purely procedural” is beyond the current scope of this paper.

As another question, what if the donor no longer has the capacity to validly make a new Power of Attorney in those circumstances? Absent a grand fathering clause some people will be left with no recourse other than a court application to allow the sale. The attorneys will have a remedy, but they will have the legal bills involved in implementing that remedy. Some practitioners are of the view that a double transfer strategy is available to avoid the necessity for a court application. If so, the impact of this will be ameliorated.

Leaving powers of attorney aside and turning to Last Wills and Testaments, what impact will the amended *Homesteads Act* have on persons’ estate planning? The Wills of a number of people will be affected after proclamation by the creation of the life estate in their homes. If their will leaves their house to anyone other than the common-law, then it may need to be rewritten to remove that devise. If their will

requires the sale of the home to fund bequests or the payment of debts, then it may have to be re-written.

To mirror an issue raised earlier in this memo, should lawyers be actively seeking out their former clients and warning them of the changes? Should they be advising them to redo their wills or redo their powers of attorney? Over the months prior to proclamation, should the lawyers be inserting homestead language in all powers of attorney? Would failure amount to liability on the part of the lawyer?

v. Implications of the Amendments to *The Homesteads Act* for Estate Administration

The Act does not prohibit the owner's estate from disposing of the homestead without the spouse or common-law partner's consent. Section 4 states:

4 No owner shall, *during his or her lifetime* make a disposition of his or her homestead ...(without the spouse or common-law partner's consent)

The onus might be on the surviving partner to claim the right. If the administrator unknowingly sells the property without determining that there ever was a common-law partner out there to claim the life estate, is the latecomer without remedy?

A search for common-law relationship registration at Vital Statistics should be part of the general practice for administrators.

F. THE HEALTH CARE DIRECTIVES ACT (The “HCDA”)

Bill 53 will not amend the provisions of the HCDA.

At section 9(2), the HCDA provides that where a divorce occurs and the spouse is appointed as the “proxy” under the Act, the appointment is revoked by the divorce. Since Bill 53 does not amend the HCDA, there is no parallel provision for common-laws.

Section 8(2)(b) of the HCDA allows a person to sign the directive at the instruction of the maker, except the spouse of the maker is not allowed to be so designated. There is again, no provision excluding the common-law partner from being designated.

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