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Estate Planning for Fractured Families: Cross Canada Complexities

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This paper is not intended as legal advice or as offering a legal opinion on any topic. Readers are cautioned that specific advice must be obtained from a lawyer who practices in the relevant jurisdiction who can provide advice on the specific circumstances in question.

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Introduction

This paper will highlight some of the significant estate statutory differences across Canada with respect to all manner of conjugal relationships, their formation, formalization, estrangement and dissolution. There is a surprising variation of rights and legal consequences arising from such relationships across Canada, and an awareness of these differences may be significant wherever the deceased, property of the deceased or family members have connections outside the province.

The laws applicable to an estate within Canada may vary according to the following factors:

- residence of the deceased
- domicile of the deceased
- the residence of a spouse or other dependent of the deceased
- characterization of property of the deceased (movable or immovable, real or personal)
- situs of immovables

This paper does not address the conflict of law rules, including the choice of law rules within Canada as they relate to estates in any detail. This is the topic of a larger paper or perhaps a book on its own. In a number of cases there are choice of law rules in the provincial statutes, and in most cases these are permissive rather than restrictive; and in addition the common law rules with respect to conflict of laws will apply where the provincial statute does not address the issue.

Generally, under the choice of law rules, the law of the situs will apply to immovable property, and the law of the domicile of the deceased will apply to movable property. However, it is not always clear how this may affect the distribution of an estate where provincial borders are crossed. The variation of rights and laws across Canada, which is the topic of this paper, should make a closer examination of the conflict of laws in estate matters a high priority.

One area that may cause confusion, with respect to the choice of law, is the determination of the situs of intangible personal property, as it has no physical properties. With the ongoing move to electronic records, the situs of financial instruments and accounts may be difficult to determine.[i]

If the client resides in one province, but is actually domiciled in another, the solicitor needs to consider the appropriate laws that will apply to the estate at the planning stage. This is also the case where immovable property is held outside the province of domicile as the law of the situs of the property not the province of domicile will apply. For example, in the case of *Corlet*[ii], the surviving spouse resided with her husband in Alberta at the time of death, but was not entitled to make a claim for dependant's relief under Alberta law. This result occurred because the deceased was not domiciled in Alberta at the time of death, and all property was movable property.

Clients are also increasingly concerned with protecting their children's inheritance from the real or potential claims of a spouse or partner. Where beneficiaries reside or are domiciled outside the province

of the client, it will be very relevant to the parents' planning to understand what rights arise from the conjugal relationship that child or other beneficiary may have.

During estate administration, recognizing cross provincial issues is also important. An intestate estate will have the laws of domicile apply to the succession of movable property, and the law of the *situs* applies to immovables. For example, see a case where mortgages were considered personality in Saskatchewan for the purposes of intestate succession and governed by the laws of intestacy under Saskatchewan law, but were considered immovable property for the purposes of probate fees and not subject to Saskatchewan probate fees because the land was in British Columbia.[iii]

Where the rights on intestacy of a common law spouse, or separated spouse vary across provincial lines, or other provincial differences exist, very different results could occur with respect to the distribution of property depending on its location and whether classified as movable or immovable.

In appropriate cases, it may be necessary to engage a lawyer who practices in that other province to assist with the estate plan or administration. This paper seeks to raise awareness of provincial differences and their impact, so that the lawyer may identify when that may be appropriate.

Caution is always necessary in considering the laws of an outside jurisdiction. While technology and services such as CanLII make finding law easy, as lawyers we are dangerous users of such information and should always consider ourselves voyeurs when looking at law elsewhere, rather than knowledgeable users. This even applies when looking at areas outside one's area of expertise within a province. Here is a case in point: In 2008, a colleague came into my office asking me to merely clarify a particular section of the *Powers of Attorney Act* of Ontario. This statue was replaced in 1996 by the *Substitute Decisions Act* and the former statute, which this lawyer/colleague was using to advise clients, had been replaced with only fragments remaining for certain transitional purposes.

So it is with caution that this paper is submitted; the laws of thirteen jurisdictions are not fully explored or analyzed here. The purpose is to demonstrate the diversity of rules that may apply across Canada on death. To assist the reader, where practical, the primary statutory reference is given. The laws of the jurisdictions are only summarized with respect to selected topics relating to spousal relationships, including their formation, breakdown and termination, as they effect wills, estates and powers of attorney for property. Exceptions and qualifications almost invariably apply to the general comments or classifications given and specific legal advice from the other jurisdiction ultimately must be obtained. If there are inaccuracies, the author would gladly receive the information.

Recognizing the Common Law Spouse – A Diverse Landscape

Nowhere is the ground more uneven across Canada than where the rights of the common law spouse develop. Barren still in some provinces, the landscape recognizes full rights in some jurisdictions and none in others, with still a third category with some, but less than full rights of a married spouse. TABLE ONE illustrates the diverse cross-Canada terrain of rights bestowed on those who qualify for "legal" common law status. Rights vary, as do the requirements to attain common law status where it is recognized. TABLE ONE shows what rights are available to common law spouses, and the different time

periods for the relationship to qualify (usually cohabitation but slightly different in Alberta as discussed below) and the period of separation after which rights cease.

TABLE ONE: STATUTORY* RIGHTS ACROSS CANADA ON DEATH OF COMMON LAW PARTNER

Jurisdiction	**Dependants' Relief**	**Intestate Succession**	**Property Claim**	**Cohabitation Period – IN (years)****	**Separation period OUT (years)*****
Alberta	Yes, if AIP	Yes, if AIP	n/a	3/3/na	1/1/na
British Columbia					
• Old Laws	Yes	Yes	n/a	2/2/na	0/0/na
• Law Reforms	Yes	Yes	n/a	2/2/na	0/0/na
Manitoba	Yes	Yes	Yes	3(1)/3(1)/3	3/3/3
New Brunswick	Yes	No	No	3(0)/na/na	1/na/na
Newfoundland/Lab.	No	No	No	na	na
Nova Scotia	No	No	No	na	na
Northwest Territories	Yes	Yes	Yes	2(0)/2(0)/2(0)	1/na/na
Nunavut	Yes	Yes	Yes	2(0)/2(0)/2(0)	1/na/na
Ontario	Yes	No	No	3(0)/na/na	0/na/na
Prince Edward Island	Yes	Yes	n/a	3(0)/3(0)/na	0/0/na
Quebec	No*	No	No	na	na
Saskatchewan	Yes	Yes	Yes	2(0)/2/2	na/2/na
Yukon	Yes	Yes	No	1/1/na	1/1/na

NOTES:

*This chart summarizes rights recognized in the statutes; rights may be extended by the Supreme Court of Canada pending the decision on appeal from Quebec in *Droit de la famille — 102866*, 2010 QCCA 1978 (CanLII), also known informally as the "*Eric v. Lola*" case.

**Cohabitation - number of years corresponds to the three rights listed in the table, from left to right, respectively. The bracketed number refers to the number of years of cohabitation required if there is a child of the relationship. "na" indicates there are no rights. A "0" indicates that there is no minimum length of time required for a right to arise if there is a child of the relationship.

*** Separation - number of years corresponds to the three rights listed in the table, from left to right, respectively. "na" means either that there are no rights, or that separation *per se* does not terminate rights. "0" means any separation results in a denial of rights.

The development of rights for common law spouses continues to be battled out in the courts where historically decisions have forced the legislatures into (sometimes begrudging) reform. Coming from Quebec, the case of *Attorney General of Quebec, et al. v. A, et al.*,[iv] known better as *Eric v. Lola*, will test the rights of the common law partner once again. Heard in the Supreme Court of Canada on January 28, 2012, with no decision rendered at the time of writing (June 2012), the court will review the Quebec Court of Appeal and lower court decisions which gave a common law partner rights to support on breakdown of the relationship despite the absence of such rights under the Quebec Civil Code. The effect of the decision could be quite broad, if it is found that common law relationships must be accorded the same rights as married. If the decision is confined to support, this may affect the right to dependant's relief on death, as the right to support generally carries over in Canadian jurisdictions to a

right to dependants' relief on death. The Court may opine on other rights of the common law spouse, such as division of property, as well.

The Definition of Common Law to Attain Rights

TABLE ONE shows the period of marriage like cohabitation required to qualify for rights under the common law regime. The statutes use language like "living together", "cohabiting", and "in a conjugal relationship", or "family relationship where one is substantially dependent on the other" (N.S.), or "relationship of inter-dependence" (Alta.), or "as spouses" (Sask.), or similar combinations. There are also lesser requirements where there is a natural, and sometimes adopted, child. Where there is a child, some laws provide that the period of cohabitation required is shortened, or no cohabitation is required, along with a requirement that there be a relationship "of some permanence". In other cases, no cohabitation is required. British Columbia is a notable exception (under both the current and new laws), where having a child is not a shortcut to common law status.

The cohabitation period requirement may be for different periods even within the same jurisdiction for different rights. TABLE ONE reflects the different periods with the order of the columns, first dependant's relief, then intestacy and then property division.

Voluntary Opting Into Common Law Recognition

Several provinces also permit couples to enter into an agreement to be treated as common law spouses for the purposes of rights recognition. The option provides certainty with respect to the nature of the relationship, and prevents litigation over the "living together" status. It may also grant common law status where the other statutory requirements are not met.

In Quebec, this is a civil union, where couples can agree to be accorded the same rights as married couples. Short of marriage or a civil union in Quebec, there are no rights given to common law partners, called "de facto" spouses, subject to the pending Supreme Court of Canada decision. In the tables in this paper, when referring to common law rights in Quebec, this is a reference to common law or "*de facto"* relationships which are not civil unions.

In Nova Scotia, unmarried couples can register under the *Vital Statistics Act*, RSNS 1989, c 494; in Manitoba couples who do not qualify as common law can register under *The Vital Statistics Act*, CCSM c V60, to be treated as common law couples for the purposes of property division, intestate succession, and dependants' relief. Where these rights to "opt in" exist they typically can be terminated in a similar fashion.

In Alberta, "common law" spouses do not exist. Instead, the *Adult Interdependent Relationships Act*, SA 2002, c A-4.5, recognizes rights for two people living together in a relationship of interdependence. In the tables summarizing rights in this paper, when referring to Alberta, common law is assumed to mean an adult interdependent relationship, or AIP. It also allows two people living together in a relationship of interdependence to enter into an adult interdependent partner agreement. The Alberta regime does not require that the relationship be "conjugal" anywhere, rather it must be interdependent. It is possible for

a brother and sister, or mother and daughter, or other related persons to opt into the Adult Interdependent Partner (AIP) regime by entering into a partner agreement. They then attain the same rights as other couples who qualify as AIPs.

Terminology for the Common Law Regimes Across Canada

The terminology for a common law partner who qualifies for rights varies by province also. Most provinces define "spouse" for the specific purpose to include common law spouse, and then provide a separate definition of "common law". As noted, in Alberta, where there was an aversion to using the terms "cohabit" or "conjugal" or "common law" in a statute, the term "Adult Interdependent Partner" is used and is always referred to separately in addition to the term spouse. In Prince Edward Island, the *Interpretation Act* was modified to expand the meaning of "spouse" for all statutes to include the definition of "spouse" from the *Family Law Act* where rights to inter vivos support are granted. This patchwork method has an interesting anomaly where the rights of a married spouse to dependant's relief on death cease on divorce (with an exception for a dependant former spouse), but the rights of a common law spouse continue regardless of the period of separation.

Conclusion on Common Law Status and Summary

The diversity of common law rights across Canada, both inter vivos (which is not specifically discussed here) and on death, is striking. The laws of the Atlantic Provinces and Quebec are particularly severe where rights of a common law spouse are sparse or non-existent. The only provinces to deny rights across the board, including dependant's relief, are Quebec (excluding civil unions which are equal to married), Nova Scotia, and Newfoundland/Labrador. Prince Edward Island has only recently modified its definition of spouses to include common law spouses for couples cohabiting for 3 years or who have a child together; these couples now have rights for dependants' relief and for intestate succession. Ontario and New Brunswick provide the only rights to dependants' relief for common law couples. The remaining provinces generally provide the same rights to common law couples as married spouses if the relationship qualifies.

TABLE TWO: SUMMARY OF RIGHTS OF COMMON LAW SPOUSE ACROSS CANADA

No Rights	**Dependants' Relief Only**	**Dependants' Relief and Rights on Intestacy**	**Full Rights: Dependants' Relief, Intestacy and Division of Property**
Quebec *de facto* spouse, Nova Scotia, Newfoundland/Labrador	Ontario, New Brunswick	British Columbia*, Alberta, PEI and the Yukon*	Saskatchewan, Manitoba, Northwest Territories, Nunavut

*There is no division of property on death in B.C., Alberta, P.E.I. or the Yukon regardless of marital status.

The fact that common law rights are recognized in Canada is fairly well known by most individuals. As is often the case, a little knowledge may be a dangerous thing if it makes common law couples complacent about putting their affairs in order. What is generally not known, or very well understood, is how restricted these rights are, and how different they are from one jurisdiction to another. In Ontario,

where the only rights on death are to dependant's relief, it is a very common mistaken belief that a common law relationship entitles the surviving partner to rights to the estate where there is no Will. People are often shocked to learn that in the absence of a Will, the surviving partner receives nothing unless litigation is commenced by way of a dependants' relief application.

Common law couples are recognized for income tax purposes across Canada after 12 months co-habitation. It may be that this income tax rule lulls common law couples into a false sense of security about their rights. This is unfortunate, as the only way common law couples can truly ensure that they are provided for in a manner that is intended when one of them dies is to do a proper estate plan with Wills and powers of attorney. The statutory regime for common law rights is too unpredictable to leave to chance.

While property rights and estate law are clearly a matter of provincial jurisdiction, one has to ask whether there is some fundamental right that is violated when a common law couple whose rights are recognized fully, say in Saskatchewan, move to a non-recognizing province, like Nova Scotia. Is this territory for some form of Charter challenge?

Comment on Rights on Death in B.C. – No Dependants' Relief or Similar Remedy on Intestacy

There is an anomaly in British Columbia. Rights to dependants' relief on death do not exist, *per se*. Instead, the court has jurisdiction under the *Wills Variation Act* to provide for a surviving dependant who has not been provided for appropriately under the Will. The courts in British Columbia have used their power under this statue to interfere with the succession of property to a much greater extent than other jurisdictions in Canada have under dependants' relief legislation. This power extends even to impose a "moral obligation" on testators with respect to family members, including a spouse and children.[v] The anomaly exists because this power is available *only if there is a Will.* Thus a married spouse, or a common law spouse, will only be entitled to the distribution provided under the rules for an intestacy in British Columbia, and no further relief is available either under dependants' relief, or under division of property (as there is no regime for division of property on death in British Columbia).

More than One Spouse

Once common law partners attain rights, complications can arise as there is a possibility of rights available to more than one spouse, including a married spouse, and one or more common law partners. The competing rights of spouses could lead to multiple claims and litigation, and the fact that common law rights vary geographically across Canada could make for some interesting legal gymnastics. Where rights are wholly statutory, such as on an intestacy, the statutes of some provinces anticipate the multiple spousal claims and provide rules.

In Saskatchewan, common law spouses have rights on intestacy, but these rights are available only if the deceased did not have a legally married spouse, unless that spouse was living with another partner. Effectively this appears to preclude multiple spousal claims.

In the new British Columbia legislation, Bill 4, s. 22 of the proposed *Wills, Estates and Succession Act*, provides that competing spouses will share the spousal share "in the portions to which they agree" or the court will decide. So while resort to litigation may still be required, it appears clear that there is only one spousal share that must be divided among the possible claimants.

In Alberta if there is both a spouse and Adult Interdependent Partner, they share the estate 50/50 if there are no descendants, or the spousal share 50/50 if there are descendants.

There can be a similar problem where the same spouse has rights on intestacy in a different jurisdiction, and the preferential share is different. Generally, the courts will limit the preferential share to the highest amount of any of the relevant jurisdictions.

Survivorship: Rules for Simultaneous Death and Survivorship Clauses in Wills and Provincial Law

Married or common law couples are typically execute "mirror Wills" making each other the primary beneficiaries, and also frequently hold property jointly with a right of survivorship. When it is not known who died first, provincial rules provide order of death rules as shown in TABLE THREE.

TABLE THREE: SURVIVORSHIP RULES ACROSS CANADA

Jurisdiction	Common Accident*	Joint Property
Alberta	Survive each other (change)	Tenants in common
British Columbia - old	Order of birth	Order of birth
British Columbia - new	5 day survival rule (change)	Tenants in common (change)
Manitoba	Survive each other, with 15 day survival rule intestacy only	Tenants in common
New Brunswick	Survive each other with 10 day survival rule	Deemed equal shares
Newfoundland/Lab.	Order of birth	
Nova Scotia	Order of birth	
Northwest Territories	Order of birth	
Nunavut	Order of birth	
Ontario	Survive each other	Tenants in common
Prince Edward Island	Order of birth	
Quebec	Survive each other	
Saskatchewan	Survive each other with 5 day survivor rule	Tenants in common
Yukon	Survive each other	Deemed equal shares

Different rules may apply for purposes of life insurance. These rules may also apply for joint ownership where not noted, and for beneficiary designations for registered plans.

* "Survive each other" in the chart refers to the situation where the deceased is deemed to have survived any beneficiary. In some statutes this is worded as others predeceasing the decedent.

Generally, one of two rules is used to determine which person died first in the case of simultaneous death, or where the order of death is unknown. The order of death is sometimes the order of birth, with

the older person deemed to have died first. However, as provinces update their laws, this rule is usually replaced with a provision that deems each deceased person to have survived all others, along with a companion rule that deems jointly held property to be held as tenants in common. Other provinces provide automatic deemed survivorship for a number of days.

It is easy to see how this could produce very different results for the distribution of an estate where there is real property in another province, and different survivorship rules exist. A person who is a spouse under the common law regime in one province, may not be in another. In addition, the property may ultimately pass under the estate of the younger spouse in one jurisdiction, but under the estate of both spouses in another.

Importance of Survivorship Clauses in Wills Where there is a Former Spouse

Where there is a common accident or other event whereby persons die in close proximity to each other time-wise, the survivorship rules do not apply if it is known who died first. The succession of property in such a case, either under a Will or on an intestacy, can be arbitrary and produce inappropriate results, particularly where couples are no longer together or are divorced.

As a matter of general principal, there should not be a significantly different succession contingent on which of two persons in a spousal relationship die first. Where there is a Will, it is common drafting practice to provide for a 30-day survivorship requirement in leaving property to a spouse. The practice has two benefits: it prevents the delays and costs associated with the same assets passing through two estates, and it ensures the appropriate persons benefit where there are multiple deaths within close proximity in time. In the latter benefit, appropriate distribution is of greatest concern where families may be fractured and there are conflicting interests, such as where beneficiaries may be from different families, or where there is a divorce.

Take the example of a divorced mother who dies first in a car crash along with her infant daughter. Assume the mother would want her estate to go to her own family if no issue. However, if the mother dies intestate, or without a 30-day survivorship clause in her Will, the mother's estate passes ultimately to her surviving former husband on the infant daughter's intestacy. This result could be avoided if there were a Will with a 30-day clause. On an intestacy, this result would be avoided in Manitoba because of a 15-day survivor rule for intestacy. The result would also be avoided in British Columbia (under law reform), Saskatchewan and New Brunswick, whether intestate or with a Will, as these provinces have general survivorship rules for 5, 5, and 10 days respectively.

Effect of Change of Relationship Status on Wills and Power of Attorney

The various jurisdictions across Canada do not treat a change in spousal relationship status in a uniform manner – see TABLES FOUR AND FIVE. This can create problems when parties move within Canada as Wills or spousal appointments in powers of attorney may be revoked - or possibly revived.

TABLE FOUR: EFFECT OF CHANGE IN SPOUSAL STATUS ON WILLS

Marriage does not revoke a Will	Marriage revokes a Will	Common law status revokes a Will	Final Divorce Decree revokes spousal gifts and executor appointments	Divorce has no effect on spousal gifts and executor appointments
• BC[1]: new law • Alberta[2] • Quebec[3]	• All others including territories • BC[4]: old law	• Saskatchewan[5]	• BC[6,7]: old and new law • Alberta[8] • Ontario[9] • Manitoba[10] • Saskatchewan[11] • Quebec[12] • PEI[13] • Nova Scotia[14]	• New Brunswick • Nfld/Labrador • NWT • Nunavut • Yukon

TABLE FIVE: EFFECT OF ESTRANGEMENT AND DIVORCE ON POWERS OF ATTORNEY FOR PROPERTY

Separation or Relationship Breakdown Terminates Appointment of Spouse	No Effect of Final Divorce Decree on PoA	Final Divorce Decree revokes appointment of Spouse
• BC: For married, ends if s. 56 of *Family Relations Act* applies, including separation agreement or other marriage breakup proceedings. For common law, when stop cohabiting with intention of ending the relationship.[15] • Saskatchewan: For married or common law - if ceased to cohabit as spouses as result of intention to end spousal relationship.[16]	• Alberta[17] • Manitoba[18] • Ontario[19] • Quebec[20] • New Brunswick[21] • Nova Scotia[22] • PEI[23] • Nfld/ Labrador[24] • Yukon[25], NWT[26], Nunavut[27]	• BC[28] • Saskatchewan[29]

[1] S.55 of Bill 4 – 2009 *Wills, Estates and Succession Act* (not yet in force).
[2] S.23 of the *Wills and Succession Act*, SA 2010, c W-12.2 for marriages after February 1, 2012.
[3] Chapter V – Civil Code of Quebec, LRQ, c C-1991.
[4] S.14(1) of the *Wills Act*, RSBC 1996, c 489. Proposal for the same rule in Manitoba was rejected
[5] S.17 of the *Wills Act*, 1996, SS 1996, c W-14.1.
[6] S.2(2), s.56 of Bill 4 – 2009 *Wills, Estates and Succession Act* (not yet in force); includes breakdown of a common law relationship.
[7] S.16 of the *Wills Act*, RSBC 1996, c 489.
[8] S.25 of the *Wills and Succession Act*, SA 2010, c W-12.2; includes ceasing to be an AIP.
[9] S.17(2) of the *Succession Law Reform Act*, RSO 1990, c S.26.
[10] S.18(2) of *The Wills Act*, CCSM, c W150; includes termination of common law relationship.
[11] S.19 of the *Wills Act*, 1996, SS 1996, c W-14.1; includes termination of common law relationship.
[12] S.764 of the Civil Code of Quebec, LRQ, c C-1991; includes termination of civil union.
[13] S.69 of the *Probate Act*, RSPEI 1988, c P-21.
[14] S.19A of the *Wills Act*, RSNS 1989, c 505.
[15] S.29(2) of the *Power of Attorney Act*, RSBC 1996, c 370.
[16] S.19(1)(h) of the *Powers of Attorney Act*, 2002, SS 2002, c P-20.3; including ceasing to cohabit with an intention to end relationship.
[17] S.13 of the *Powers of Attorney Act*, RSA 2000, c P-20.
[18] S.13 of the *Powers of Attorney Act*, CCSM, c P97.
[19] S.12, s. 53 of the *Substitute Decisions Act*, *1992,* SO 1992, c 30.
[20] Division V, s. 2175 - Civil Code of Quebec, LRQ, c C-1991.
[21] S.58 of the *Property Act*, RSNB, c P-19.
[22] *Powers of Attorney Act*, RSNS 1989, c 352.
[23] *Powers of Attorney Act,* RSPEI 1988, c P-16.
[24] *Enduring Powers of Attorney Act*, RSNL 1990, c E-11.
[25] S. 14 of the *Enduring Powers of Attorney Act*, RSY 2002, c 73.
[26] S.16 of the *Powers of Attorney Act*, SNWT 2001, c 15.
[27] S.16 of the *Powers of Attorney Act*, SNu 2005, c 9.
[28] S.29(2) of the Power of Attorney Act, RSBC 1996, c 370.
[29] S.19(1)(h) Powers of Attorney Act, 2002, SS 2002, c P-20.3: including ceasing to cohabit with an intention to end the spousal relationship.

Marriage revokes a Will in all Canadian jurisdictions except Alberta, Quebec, and under law reform in British Columbia. In Saskatchewan, being in a common law relationship is sufficient to revoke a Will – which may result in an unpleasant surprise for families upon death of an estranged spouse whose Will is invalid.

The provinces and territories are almost evenly split with the effect of a final decree of divorce on a Will. In some jurisdictions, a divorce revokes spousal gifts in a Will, as well as any spousal executor appointment. In others, divorce has no effect on the Will and testators should take note of this or else they risk accidentally leaving their estate to an ex-spouse. What happens when the deceased has moved from one jurisdiction to another after the divorce?

A divorce is less likely to have an effect on powers of attorney. British Columbia and Saskatchewan stand alone to terminate the authority of a married or common law attorney for property if there is a divorce, or the relationship ends and cohabitation ceases.

Once again, one can see how this variable treatment regarding the status of Wills and powers of attorney can create cross "border" problems. If there is a ski chalet in Whistler, and the deceased was separated at the time of death, does the Ontario Will (i.e. assume the deceased is domiciled and resident in Ontario and the Will made in Ontario) govern the succession of the British Columbia property, or is the deceased deemed intestate with respect to the ski chalet?

When there is No Will: Effect of Estrangement on Intestacy

If the laws across Canada dealing with rights of spouses after an intestate's death were not already confusing enough, the provinces and territories also differ with their treatment of married and common law spouses who have separated. The effect of separation, and breakdown of a spousal relationship on the rights of the spousal partner, either married or common law is shown in TABLE SIX.

Married Spouse
In a few jurisdictions, such as Ontario, Quebec, and Newfoundland/Labrador, separation of "legally married" spouses has no effect on rights on intestacy. In the Northwest Territories and Nunavut, separation alone is not a bar to taking a share on intestacy; other conditions must also be met. Some jurisdictions, like British Columbia, Alberta, and Yukon, allow a period of separation for married couples, before the surviving spouse no longer takes a share in an intestacy.

Common Law Spouse
Many jurisdictions, such as British Columbia, Ontario, New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland/Labrador, and Yukon do not have this grace period for common law spouses, and if these common law spouses are living separate and apart at the time of the intestate's death, the surviving spouse no longer has rights on the intestacy. Only Alberta, Saskatchewan, and Manitoba allow for a period of separation before rights are extinguished. Like their married counterparts, common law couples in the Northwest Territories and Nunavut do not lose rights on separation alone.

TABLE SIX

EFFECT OF ESTRANGEMENT ON INTESTACY

Province	Effect	Statute
BC - before reform	Married: no rights if apart for not less than one year and no reconciliation during that time. Common law: no rights if separated - definition of spouse must be living together immediately before death for 2 years.	ss. 1 and 98 of the *Estate Administration Act* , [RSBC 1996] C 122.
BC - Law Reform	Married: not a "spouse" if apart at least 2 years or rights to division of property triggered Common law: definition says "had lived" - cease to be spouse if one terminates the relationship.	s.2 definition of spouse in Bill 4 2009 - *Wills, Estates and Succession Act* (not yet in force)
Alberta	Married: no rights if living separate and apart for more than 2 years. Common law: no rights if cease to be Adult Interdependent Partner - occurs after more than one year apart and one or both intend relationship not continue.	s. 63, 65 of the *Wills and Succession Act* , SA 2010, c W-12.2; *Adult Interdependent Relationships Act* , SA 2002, c A-4.5, s. 10
Saskatchewan	Married and Common Law: lose rights if cohabiting with another partner at the time of death. Common law - lose rights if separated for 2 years.	s.2, s.9, s.20 of the *Intestate Succession Act* , ss 1996, c I-13.1
Manitoba	Married: no rights if living separate and apart, and either: a) application for divorce or an accounting; or b) before death, division of property and finalized affairs in recognition of marriage breakdown.	s. 3(1) of *The Intestate Succession Act* , CCSM c I85
	Common law: no rights if living separate and apart, and either a) the dissolution was registered under *The Vital Statistics Act* before the death; b) 3 years separation ; c) application for an accounting or equalization; or d) divided their property to separate and finalize their affairs.	s. 3(2) of *The Intestate Succession Act* , CCSM c I85
Ontario	Married: no effect. Common law: no rights on intestacy.	s.1, s.45 of the *Succession Law Reform Act* , RSO 1990, c S.26.
Quebec	Married and Civil Union: separation has no effect - will inherit from their spouse's estate under the normal rules. *De facto* - no rights on intestacy.	s.619, s.776 of the *Civil Code of Quebec* , LRQ, c C-1991
New Brunswick	Married: no effect. Common law - no rights on intestacy.	*Devolution of Estates Act* , RSNB 1973, c D-9
Nova Scotia	Married: no rights if the spouse has left the intestate and was living in adultery at the time of death. Common law - no rights on intestacy.	s.17 of the *Intestate Succession Act* , RSNS 1989, c 236.
PEI	Married: no rights if spouse has left intestate and was living with another in a conjugal relationship at time of death. Common law: no rights if separated - must have cohabited continuously in a conjugal relationship for three years, or with a child.	s.99 of the *Probate Act* , RSPEI 1988, c P-21.
Nfld/Labrador	Married - no effect. Common law - no rights on intestacy.	*Intestate Succession Act* , RSNL 1990, c. I-21
Yukon	Married: No share if separated for not less than one year immediately before intestate's death. Common law: must have cohabited with spouse for at least one year before intestate's death.	s.94 of the *Estate Administration Act* , RSY 2002, c 77
NWT & Nunavut	Married and Common Law: No rights if a) divorce proceedings commenced (married only); b) spouses were separated and application for entitlement or domestic contract for division of property was made; c) immediately before death, surviving spouse in a conjugal relationship with another; or d) immediately before death, the spouses were separated and the intestate entered into a new spousal relationship.	s.13 of the *Intestate Succession Act* , RSNWT 1988, c I-10; s.13 of the *Intestate Succession Act* , RSNWT (Nu) 1988, c I-10

NOTES:

This chart assumes that rights of a legally married spouse cease on divorce. There may be rights of a divorced spouse in some circumstances.

Common law rights may also arise where there is a natural or adopted child. In some jurisdictions these rights extend to intestacy and in others they do not. This chart does not take that status for common law recognition into account.

Adultery
A few jurisdictions have "adultery" provisions, where the surviving spouse loses their rights if they are cohabiting with another person in a conjugal relationship at the time of the intestate's death. These provisions can be found in Saskatchewan, Nova Scotia, Prince Edward Island, the Northwest Territories and Nunavut.

Conclusion

Mobility of individuals and multiple relationships during lifetime are a fact of modern life. In addition, clients often have property that is located, or deemed to be located in jurisdictions outside that of their domicile or residence. As lawyers, we are trained to keep to our jurisdiction of practice. That is the nature of our licensing and most lawyers do not and indeed cannot, practice outside their home province (although the law societies have entered into agreements regarding cross-Canada mobility). Nevertheless we cannot turn a blind eye to the effect of laws of other jurisdictions within Canada; and hopefully this paper has demonstrated, this is particularly the case for estate planning for fractured families.

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[i] See *Re Bloom Estate* (2004), 27 B.C.L.R. (4th) 176 (S.C.).
[ii] *Re Corlet Estate,* [1942] 2 W.W.R. 93 (Alta. S. C.).
[iii] *Hogg v. Provincial Tax Commission*, [1941] 4 D.L.R. 501 (Sask. C.A.).
[iv] *Droit de la famille — 102866*, 2010 QCCA 1978 (CanLII); *A v. B. and Attorney General of Quebec, and Attorney General of Canada, and Fédération des Associations de Familles Monoparentales et Recomposées du Québec*, 2010 QCCA 1978 (CanLII).
[v] *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807.