



Fleury, Comery LLP
Barristers & Solicitors

WHAT IS A “FAMILY LAW ACT ELECTION”?

Where a deceased spouse’s estate does not make satisfactory provision for the surviving spouse, that surviving spouse may consider an option provided by [section 6 of Ontario’s Family Law Act](#) (“FLA”), namely, an “election” not to accept what is provided either in the Will or, if no Will exists, by the law of intestacy.

Division of Net Family Property

The division of property of spouses on the breakdown of marriage is called a division of net family property (“NFP”). For more particulars, you may review our [client memo #27](#). Essentially, there is an attempt to equalize the property of each spouse by requiring a payment from the spouse with the larger NFP. The same considerations arise on the death of a spouse. If the surviving spouse elects for the division of NFP, then the law provides for a division of property in the same manner as if they had separated on the day before the deceased’s death.

Time Limit for Election

The Family Law Act election MUST be made within six (6) months of the deceased’s death. The surviving spouse should not attempt to rely on any indulgence or extension of time by the executor or a court order. It is, therefore, important to gather information to assist in deciding one way or other in regard to the election. If, as happens in the majority of cases, the election is not filed, the surviving spouse is deemed to have accepted what is provided in the Will or on an intestacy.

How to Make the Election

The surviving spouse who wishes to claim under the FLA must complete and file a [Form 1](#) in the Office of the Estate Registrar for Ontario. This form (current as of the time of writing) is available in PDF format on our website by clicking the hyperlink on this memo on the website. This is not the only thing to be done; in the absence of an agreement with the estate to delay distribution, the surviving spouse must also commence a court application for the division of NFP. Once an estate executor has received notice of that application, he or she must not distribute the estate.

Electing NOT to claim under the FLA

The form provides that surviving spouse can elect NOT to claim under the FLA. In circumstances where there might be an issue as to an election, the prudent estate trustee will want to receive this

election in writing. If the trustee wants to distribute the estate before the expiry of six months from the date of death, he or she should also obtain a written consent to the distribution from the surviving spouse.

Intestacy (There is no Will)

Where there is no Will, a surviving spouse must consider whether the intestacy provisions of Ontario’s [Succession Law Reform Act](#) (“SLRA”) are more favourable or less favourable than a division of NFP. The SLRA provides that a surviving spouse, where there is no Will, is entitled to the entire estate if the deceased had no issue. If the deceased had child(ren), the surviving spouse is entitled to a spousal preferential share (currently the first \$350,000.00 of the estate value), together with a percentage of the balance of the estate depending on the number of children the deceased had.

Life Insurance or Death Benefit

If the surviving spouse receives proceeds of life insurance or a pension death benefit, the amount of such benefit(s) must be included in his or her NFP if he or she elects to claim a division of NFP.

Independent Legal Advice

A prudent estate trustee should consider this issue in any estate where there is a surviving spouse. We suggest that the surviving spouse should have legal advice before making the election. Frequently, when a complete picture of the estate is reviewed with a lawyer, the decision as to the election can be resolved very quickly.

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