

## Sex, Death and Taxes

“The state has no business in the bedroom of the nation.” – Pierre Trudeau

Pierre Trudeau made his famous remarks about the state having not having any business in the bedroom of the nation in the context of decriminalizing homosexual acts. It would be wrong, however, to interpret those remarks too broadly. The state continues to have business in the bedrooms of the nation. And so too do estate lawyers.

More and more people are choosing to live in common law relationships. Not so long ago, it was considered quite scandalous for a man and woman to live together unless they were married or siblings. Even more scandalous was for two men or two women to live together. Canadian society has evolved to the point where both common law relationships and same-sex relationships are generally accepted. The law has followed suit. Legal privileges once afforded only to married couples—such as generous tax deferrals and the right to share in a deceased partner’s estate—were first extended to common law couples and eventually to same-sex couples.

There is a lot of myth around the term “common law relationship”. People have wildly differing views on what it means to be in a common law relationship and when such a relationship begins. Generally speaking, for tax purposes, you are in a common law relationship if you have cohabited with your partner in a conjugal relationship for a continuous period of at least one year. For most purposes other than tax, you are in a common law relationship if you have lived with your partner in a relationship of interdependence for a continuous period of three years.

This begs the question—what is a conjugal relationship? What is a relationship of interdependence? Sex in the relationship is obviously an important factor, but it is not the only factor. Consider the following comments from the Supreme Court of Canada:

*[The generally accepted characteristics of a conjugal relationship] include shared shelter, sexual and personal behaviour, services, social activities, economic support and children, as well as the social perception of the couple. However, it was recognized that these elements may be present in varying degrees and not all are necessary for the relationship to be found conjugal.*

*Certainly, an opposite-sex couple may, after many years together, be considered to be in a conjugal relationship although they have neither children nor sexual relations. Obviously the weight to be accorded the various elements or factors to be considered whether an opposite sex couple is in a conjugal relationship will vary widely*

*and almost infinitely. . . . Courts have wisely determined that the approach to determining whether a relationship is conjugal must be flexible. This must be so, for the relationships of all couples will vary widely.*

The state has an interest in whether a relationship is conjugal (and, therefore, in the bedrooms of the nation) because an individual's tax status is determined by it. Estate lawyers have an interest because an individual's right to share in the deceased partner's estate turns on whether the parties were in a relationship of interdependence. Depending on the circumstances, a surviving common law partner can receive between one-third and the whole of their deceased partner's estate. The issue of entitlement can get messy where the deceased had children from a different relationship, and even more so if the deceased died without a will. If the surviving family members don't get along with the surviving common law partner, they may refuse to believe that a relationship even existed. And then the fight is on—potentially getting into the sordid details of who slept with whom, and who slept with whom else how often. Pretty ugly stuff indeed.

A well crafted will can go along way to avoiding potential disputes of this sort. If you're in a common law relationship—and even if you're not—it's something to think about.