

Until Death Do Us Part **By David J. Koski**

Not all that long ago, it was considered quite scandalous for two unmarried people of the opposite sex to live together. These days, what was once considered by many to be “living in sin” barely raises an eyebrow. The Canadian public has even grown more tolerant of same-sex relationships, although same-sex marriage remains controversial to some people. With so many people living in common law relationships (whether of the same-sex or opposite sex variety), it’s easy to question whether marriage still has any relevance. From a moral perspective, whether marriage has relevance is for individuals to decide. From a legal perspective, marriage continues to have definite relevance.

People mistakenly believe that since common law relationships enjoy some legal recognition, that it is equivalent to marriage. It is not. From an estate law perspective, there are important distinctions between common law relationships (described in legal terms as “adult interdependent relationships”) and marriage. Here are a few examples:

Perhaps most importantly, the *Matrimonial Property Act* applies only to married persons. In very general terms, the *Matrimonial Property Act* mandates the equal sharing of property acquired during a marriage. On death, if a surviving spouse discovers that he or she has been disinherited, they can apply to Court to receive what they would have received had they divorced their now-deceased spouse immediately prior to their death. Common law partners enjoy no such entitlements. Although common law partners who have been disinherited do have the right under the *Dependants Relief Act* to apply to Court for a share of their deceased partner’s estate, the principles used by the Court to determine entitlement to relief are different. There is no presumption that property acquired during the relationship is to be shared equally.

Another important distinction is the applicability of the *Dower Act* which applies only to married persons. The *Dower Act* applies where only one of the spouses is registered as owner of the family home (quaintly described in the legislation as a “homestead”). Among other things, the *Dower Act* provides that upon the death of the registered owner, the surviving spouse has the legal right to remain on the homestead for the rest of his or her life. Although most spouses own their homes jointly (in which case the *Dower Act* doesn’t apply), *Dower Act* issues arise more than one might think. It is not at all uncommon for parties to marry later in life, possibly for the second or third time, after each of the parties has accumulated some wealth. If that accumulated wealth includes a home that the newlywed partners share after the marriage, the non-titled spouse acquires a dower interest. There are no equivalent interests created for people in common law relationships.

A person’s will is automatically cancelled when he or she gets married on the presumption that the married person would want to make provision for his or her spouse. In contrast, a person’s will is not affected by a common law relationship except only if the parties have entered into a written adult interdependent partnership agreement. (Since the legislation was first enacted in 2002, I have yet to meet anyone who has actually

signed such an agreement.). There is no presumption that a person would want to make provision for his or her common law partner.

Without question, the legal distinctions between common law relationships and marriage have narrowed over the years. It would be a mistake, however, to assume that there is no distinction. There are important legal consequences to marriage both during life and, for purposes of estate law, after it. Everyone should have at least some appreciation of how those distinctions affect them.