

FAMILY LAW ACT ELECTION ON THE DEATH OF A SPOUSE

A surviving spouse has an important decision to make. On the death of a married spouse, the surviving spouse must elect to either:

- a) take the gifts in the deceased spouse's Will or, if applicable, the entitlement on an intestacy or partial intestacy; or,
- b) receive an equalization of net family property under the *Family Law Act* ("FLA") as if the spouses had separated.

The election is made within six months of death unless the court grants an extension.

The spousal election has important consequences for the spouse, the estate trustees, and others with an interest in the estate.

What is an election under section 6 of the FLA?

When a spouse dies, if the net family property of the deceased spouse exceeds the net family property of the surviving spouse, the surviving spouse is entitled to one-half of the difference between them.¹

The surviving spouse must elect to:

- A) receive an equalization payment,
- OR:
- B) receive and interest in the estate according to whichever of the following is applicable:
 - i. if the deceased spouse left a will, to take under the will;²

¹ *Family Law Act*, R.S.O. 1990, c. F.3 ["FLA"], s. 5(2).

² FLA, s. 6(1).

- ii. if the deceased spouse did not leave a will, to receive the entitlement on an intestacy;³ or
- iii. if the deceased died partially intestate, to take under the Will and on intestacy.⁴

It is important to distinguish between an *election* to receive an equalization of net family property and an *application* for an equalization of net family property. A surviving spouse who wishes to receive an equalization payment must file an election and must also bring an application for an equalization of net family property within the applicable limitation periods.⁵

Who can elect?

Only a surviving spouse can elect to receive an equalization of net family property. “Spouse” is defined in the FLA as either of two persons who are married to each other or have together entered into a marriage that is voidable or void, in good faith on the part of the surviving spouse.⁶ The guardian of property or attorney for property of a surviving spouse can elect on behalf of the surviving spouse.⁷

Who cannot make an election under the FLA?

- The personal representative of a surviving spouse after that spouse’s death. However, the personal representative can begin or continue an *application* for an equalization of net family property if the surviving spouse, before death, elected to receive an equalization payment;⁸
- The personal representative of the first-deceased spouse; and

³ *Succession Law Reform Act*, R.S.O. 1990, c. S.26 [“SLRA”], Part II; FLA, s. 6(2).

⁴ FLA, s. 6(3).

⁵ FLA, s. 7(1).

⁶ FLA, s. 1(1).

⁷ *Substitute Decisions Act, 1992*, s. 31(1); *Yamada v. Zolad*, [2007] W.D.F.L. 1661, 36 R.F.L. (6th) 159.

⁸ FLA, s. 7(2).

- A common law spouse;

When can the election and application be made?

The election for an equalization of net family property is made no later than six months from the date of death of the first spouse unless the court grants an extension of that time.⁹

If the surviving spouse elects to receive an equalization of net family property, then they must also bring an application for an equalization of net family property within six months of the date of death of the first spouse.¹⁰

If the spouses were separated but not divorced at the date of death of the first spouse, then there is an additional limitation period to consider: the application must be brought within six years after the day the spouses separated without reasonable prospect that they would resume cohabitation.¹¹ It is important to recognize that this limitation period could expire before the six-month deadline from the date of death of the spouse.

If the spouses were divorced at the date of death of the first spouse, then there is yet another additional limitation period to consider: the application must be brought within two years of the date of the divorce.¹² It is important to recognize that this limitation period could expire before the six-month deadline from the date of death of the spouse to file an election.

Extending the time to elect and apply for an equalization payment within 6 months from the date of death

If it will not be possible for the surviving spouse to make an informed decision within six months or another applicable limitation period, it may be necessary to

⁹ FLA, s. 6(10).

¹⁰ FLA, s. 7(3)(c).

¹¹ FLA s. 7(3)(b).

¹² FLA, s. 7(3)(a).

extend the time to elect and the time to apply for an equalization of net family property.

The court may extend the time to elect or apply if:

- (a) there are apparent grounds for relief;
- (b) relief is unavailable because of delay that has been incurred in good faith; and
- (c) no person will suffer substantial prejudice by reason of the delay.¹³

An extension of time should be considered in every case. Factors including the time for the estate registrar to issue Certificates of Appointment, inadvertent and intentional delays by the estate trustees in making enquiries, difficult-to-ascertain assets and liabilities, and inadvertent and intentional delays by the spouse, who is bereaved, mean that it is a safe assumption that it will not be possible to advise the spouse within six months of death.

Relief from failing to elect or apply for an equalization payment within six months from the date of death

If the surviving spouse has not filed an election to receive an equalization payment within six months of the date of death, they will be deemed to have elected to take under the will.

However, the court has the power to relieve from the effects of a deemed election.¹⁴ The court can extend the time to apply for an equalization payment more than six months after the date of death.¹⁵

¹³ FLA, s. 2(8).

¹⁴ FLA, s. 6(11).

¹⁵ See *Slaven v. Williams et al.*, 2011 ONSC 3929 (CanLII) for an example of a successful application for an extension; see *Webster v. Webster Estate*, (2006), 25 E.T.R. (3d) 141 (Ont. S.C.J.) and *Van Den Oetelaar, Re*, 2004 CanLII 14559 (ON SC) for examples of the court's refusal to grant an extension.

Revoking an actual election already filed

There is no general right to revoke an actual election (i.e. a filed election, as opposed to a deemed election). However, there is support in the case law that the filed election may be revoked in certain limited circumstances.¹⁶

The court retains a residual discretion to revoke an election where the interests of justice require it and where the balance of the interests of affected parties clearly warrants it. The court will have regard to the following questions:

- a) Was the election filed as a result of a material mistake of fact or law made in good faith?
- b) Was there any responsibility or culpability on the part of affected parties in relation to the election?
- c) Was the notice of intent to seek revocation of the election given in a timely way and, in particular, how long after the six month filing period was such notice given?
- d) Has the estate been distributed or would interested parties otherwise be adversely affected by a revocation of the election?
- e) Does the election result in an injustice to the surviving spouse in all of the circumstances?¹⁷

Preserving the surviving spouse's rights on an interim basis

If there is a prospect that the continuing administration of the estate will prejudice the surviving spouse's rights, then the surviving spouse may move for an order suspending the administration of the estate for a specified time and extent.¹⁸

¹⁶ *Iasenza v. Iasenza Estate*, 2007 CanLII 23351 (ON SC).

¹⁷ *Ibid.*

¹⁸ FLA, s. 6(20).

Evaluating the benefits of electing to take under the will, on intestacy, or on partial intestacy

Advising a surviving spouse on an election, especially within the six month limitation period, can be challenging because it involves estimating the surviving spouse's entitlement under the will and/or on an intestacy before the administration of the estate may be complete and at a time when the actual value of the interest in the estate may be uncertain. These uncertainties include, just to name a few:

- Questions about the validity or interpretation of the will;
- Potential or actual claims by dependants for support out of the estate;
- Other potential or actual claims by or against the estate;
- Questions about whether assets held in joint tenancy by the deceased with another person are assets of the estate or pass to the other person by right of survivorship;
- Future claims for estate trustee compensation; and
- Unascertained assets and/or liabilities of the estate, including income tax liabilities that may not be finally determined until the issuance of a clearance certificate by the Canada Revenue Agency.

A spouse who elects to take under the will, on intestacy, or on partial intestacy is also entitled to receive any other property that he or she is entitled to as a result of the death of the deceased spouse.¹⁹ For example, the surviving spouse is entitled to receive the proceeds of life insurance policies, RRSP proceeds and

¹⁹ FLA, s. 6(20).

property held in joint tenancy with the deceased that passes to the surviving spouse by right of survivorship.

If and only if the will provides for it, the surviving spouse may take the gifts in the will and also receive an equalization payment.²⁰

Evaluating the benefits of electing to receive an equalization payment

The equalization payment between a surviving spouse and the deceased spouse is calculated in the same manner as for separated spouses under the *Family Law Act*. Generally, an equalization payment is one-half of the difference between the *net family properties* of the spouses. The spouse with the higher net family property pays the equalization payment to the spouse with the lower net family property.²¹

A spouse's *net family property* is the value of all of that spouse's property on the valuation date after deducting the spouse's liabilities on the valuation date and the value of property that the spouse owned on the date of marriage, other than a matrimonial home, and after excluding the value of excluded property, which includes certain property received during the marriage including a gift from a third party other than a matrimonial home, an inheritance, and life insurance proceeds.²²

The valuation date, for the purposes of an election, is the earliest of: the date before the date of death of the first spouse; the date the spouses separated; or the date the spouses divorced or the marriage was declared a nullity.²³

There are special considerations in calculating the net family property of a deceased spouse that would not apply if the spouse were alive:

²⁰ FLA, s. 6(5).

²¹ FLA, s. 5(1).

²² FLA, s. 4(1) and (2).

²³ FLA, s. 4(1).

- Assets of the deceased spouse's estate that only arise upon death are not included in the deceased spouse's net family property. For example, a pre-retirement death benefit, life insurance proceeds, and Canada Pension Plan death benefits payable to the estate of the deceased spouse are not included in the deceased spouse's net family property.²⁴
- Similarly, liabilities that only arise upon death cannot be deducted from the deceased spouse's net family property. Funeral expenses and estate administration expenses, for example, are not deducted from the deceased spouse's net family property.²⁵
- Certain liabilities that crystallize on death may be deducted from the deceased spouse's net family property if the liability existed on the valuation date, there was a likelihood that the liability would be payable in the foreseeable future, and the amount can be quantified. For example, income tax payable on capital gains resulting from a deemed disposition of the deceased's assets on death and on the redemption of the deceased's RRSP may be liabilities that are deductible from the deceased spouse's net family property.²⁶

A surviving spouse who elects to receive an equalization payment is not allowed to "double dip" by receiving the equalization payment and also any assets that pass to the surviving spouse outside of the estate, such as life insurance proceeds. To prevent double dipping, the *Family Law Act* credits the value of certain assets passing to the surviving spouse outside of the estate against the

²⁴ *Laframboise v. Laframboise*, 2012 ONSC 4508 (CanLII), *Weatherdon-Oliver v. Oliver (Estate)*, 2010 ONSC 3881 (CanLII) at paras. 22-30.

²⁵ *Weatherdon-Oliver v. Oliver (Estate)*, 2010 ONSC 3881 (CanLII) at para 32 and *Szufflita v. Szufflita Estate*, 2000 CanLII 22556 (ON SC) at paras. 16-24.

²⁶ *Bobyk v. Bobyk Estate*, 1993 CarswellOnt 336 (Ont. S.C.J.); *Ambrose v. Ambrose Estate*, 2005 CarswellOnt 4527, at paras. 9 to 14.

equalization payment. Specifically, there will be credits against the equalization payment if the surviving spouse.²⁷

- is a beneficiary of a life insurance policy owned by the deceased spouse or a group policy of which the deceased spouse was a member;
- is the beneficiary of a lump sum death benefit under a pension or similar plan; and/or
- receives property by right of survivorship as a result of the death of the deceased spouse.

The amount of the credit is the amount of the payment or value of the asset received, less any associated contingent tax liability.²⁸ If the credit is greater than the equalization payment, the estate may recover the excess from the surviving spouse.²⁹

If the spouse elects to receive an equalization payment, the gifts in the will are revoked and the will is interpreted as if the surviving spouse had died before the deceased spouse.³⁰ However, if and only if the will or a written designation provides for it, the surviving spouse may receive both the equalization payment and the payment that would otherwise be credited against it.³¹

Similarly, when a surviving spouse elects to receive an equalization payment, the spouse shall be deemed to have disclaimed the entitlement to inherit upon intestacy.³²

Advising a surviving spouse on an election, especially within the six month limitation period, can be challenging because it involves calculating the net family

²⁷ FLA, 6(6).

²⁸ FLA, s. 6(7).

²⁹ FLA, s. 6(7), paragraph 2.

³⁰ FLA, s. 6(8).

³¹ FLA, s. 6(7) paragraph 3.

³² FLA, s. 6(9).

property of both spouses at a time when the necessary information may be uncertain or unavailable. For example, calculating net family property in an election context can be complicated by:

- The need for a valuation of either spouse's interest in a private business or pension;
- The need for a valuation of either spouse's contingent or future interest in a trust, including a fully discretionary trust;
- A dispute over the exclusion from a spouse's net family property of a gift received during the marriage from a third party;
- A challenge to the validity of a domestic contract between the spouses that deals with property division upon death or generally;³³
- The potential for an unequal division of net family property in consideration of the factors in s. 5(6) of the FLA (e.g. a spouse's reckless depletion of assets or a disproportionate share in relation to a period of cohabitation less than five years);
- Difficulty ascertaining the property that either spouse owned on the date of marriage to calculate the deduction from net family property; and
- Other factors that may arise as a result of the law and circumstances.

Advising the surviving spouse

The choice between electing to receive an equalization of net family property and taking under the Will may not be clear-cut. There may still be some uncertainty in

³³ See especially *Kaptyn v. Kaptyn Estate*, 2008 CarswellOnt 6441 for a discussion of the kind of financial disclosure that will be ordered when a surviving spouse must successfully overcome the threshold issue of setting aside a domestic contract before they can elect to receive an equalization of net family property.

evaluating the equalization payment and/or the surviving spouse's interest under the will that cannot be resolved before the spouse must elect.

Even if the interest under the will and the equalization payment can be accurately ascertained, the election may involve a choice between qualitatively different outcomes. An election to receive an equalization payment typically results in a lump sum payment to the surviving spouse. However, the gifts in the will may take other forms. For example, the will might include gifts of fee simple or life interests in real property (e.g. a matrimonial home or a cottage), a life interest in the income of a testamentary trust, or shares of a business.

If the estate is insolvent or bankrupt, this factor takes on great importance in advising the spouse on the election. A surviving spouse's equalization payment has priority over gifts in the deceased spouse's will (except gifts made in accordance with a contract made in good faith for valuable consideration), any other person's right to a share of the deceased spouse's estate on intestacy, and any dependant's support awards except an award in favour of the deceased spouse's child.³⁴

There is support in the case law for the proposition that a surviving spouse's equalization payment has priority over the claims of unsecured creditors of the estate.³⁵ However, if the estate is bankrupt, the equalization payment ranks equally in priority with other unsecured creditors.³⁶

Regardless of whether a surviving spouse elects to receive an equalization payment or to take under the will, on intestacy, or on partial intestacy, they may also make a claim for dependant's support under Part V of the *Succession Law Reform Act*.³⁷

³⁴ FLA, s. 6(12) and (13).

³⁵ *Estate of Joseph Paul Grieco, deceased*, 2013 ONSC 2465 (CanLII) at paras 8 to 10.

³⁶ *Thibodeau v. Thibodeau*, 2011 ONCA 110 (CanLII).

³⁷ See *De Winter v. De Winter Estate*, 2001 CarswellOnt 3156 at paras. 39 and 40.

A surviving spouse who elects to receive an equalization of net family property is a person with a financial interest in the estate who has standing to apply for the removal of the estate trustee.³⁸

How to elect

A surviving spouse may elect to receive an equalization payment or to take under the will, on intestacy, or on partial intestacy by filing the proper election form (Form 1, prescribed by the regulations to the *Family Law Act*) in the office of the Estate Registrar for Ontario within six months of the date of death.³⁹

If the surviving spouse does not file an election within six months from the date of death, the spouse is automatically deemed to elect to take under a will, on intestacy, or on partial intestacy, unless the court orders otherwise.⁴⁰

The surviving spouse must also bring an application for an equalization of net family property within six months from the date of death.

Application for an equalization of net family property

If the surviving spouse elects to receive an equalization of net family property, then they must bring an application for an equalization of net family property within the applicable limitation period (six months from the date of death unless an earlier limitation period applies) unless the court orders otherwise.

The surviving spouse must begin an application for equalization and serve notice on the estate trustee to engage the protections in section 6(15) of the *Family Law Act* that restrict distributions from the estate. Neither filing an election, giving

³⁸ See *Collie v. Eryomin*, 2013 CarswellOnt 7083 (Ont. S.C.J.).

³⁹ FLA s.6(10), Form 1, R.R.O. 1990, Reg. 368, available online at <http://www.canlii.org/en/on/laws/regu/rro-1990-reg-368/latest/rro-1990-reg-368.html> [accessed January 6, 2015].

⁴⁰ FLA, s. 6(11).

notice of an intention to file an election, nor giving notice of an intention to commence an application are sufficient notice for the purpose of section 6(15).⁴¹

The application may be brought by the surviving spouse personally, by the surviving spouse's personal representative after death if the surviving spouse filed the election while alive, or by the personal representative of the deceased spouse.⁴²

In Toronto, an application for an equalization of net family property from the estate of a deceased spouse is brought on the Estates List of the Superior Court of Justice.⁴³

If an application is made for an equalization payment, then the surviving spouse and the personal representative of the deceased spouse must each deliver a sworn financial statement in Form 13.1 and a Net Family Property Statement disclosing:

- (a) the party's property and debts and other liabilities,
 - (i) as of the date of the marriage,
 - (ii) as of the valuation date, and
 - (iii) as of the date of the statement;
- (b) the deductions that the party claims under the definition of "net family property";
- (c) the exclusions that the party claims under subsection 4(2) of the FLA; and

⁴¹ *Paola v. Paola Estate*, 1997 CarswellOnt 520 at paras. 40 to 42.

⁴² FLA, s. 7 (1).

⁴³ *Consolidated Practice Direction Concerning the Estates List of the Toronto Region*, April 11, 2014, para. 78.

(d) all property that the party disposed of during the two years immediately preceding the making of the statement, or during the marriage, whichever period is shorter.⁴⁴

The surviving spouse as estate trustee

A surviving spouse who elects to receive an equalization of net family property is in a conflict of interest and must renounce as the estate trustee of the deceased spouse's estate if so named in the will.⁴⁵

A surviving spouse should typically renounce as estate trustee of the deceased spouse's estate when there is a realistic possibility that the surviving spouse may elect to receive an equalization of net family property. Once the surviving spouse takes a step to administer the estate of the deceased spouse, renunciation is impossible and a court order will be necessary to remove the surviving spouse as estate trustee.

Advising the estate trustee

It is important to advise the estate trustee about the *Family Law Act* regime for spousal elections and, specifically, the particular obligations imposed on the estate trustee. An estate trustee may be personally liable for taking inappropriate steps or failing to take necessary steps in the administration of an estate where the deceased person was married and a surviving spouse has the right to elect.

Where the deceased was survived by a spouse, the estate trustee of the deceased spouse's estate must not make any distribution of the estate within six months of the deceased spouse's death without the written consent of the surviving spouse or a court order.⁴⁶

Similarly, if the estate trustee has been given notice of an application for an equalization of net family property, the estate trustee must not make any

⁴⁴ FLA, s. 8; *Family Law Rules*, O. Reg. 114/99, rule 13.

⁴⁵ *Reid Martin v. Martin*, 1998 CarswellOnt 5945 (Ont. S.C.J.).

⁴⁶ FLA, s. 6(14).

distribution out of the estate without the written consent of the applicant or a court order.⁴⁷

However, the estate trustee may make reasonable advances for the support of the deceased's dependants without needing to seek consent or a court order.⁴⁸ As a matter of practice, consent or a court order would be desirable protection for the estate trustee. The deceased's dependants include a spouse, parent, child, or sibling of the deceased, to whom the deceased was providing support or was under a legal obligation to provide support immediately before death.⁴⁹

What happens if the surviving spouse obtains an order extending the time to make an application for an equalization payment after six months from the date of death, but the estate trustee has already made distributions from the estate beginning more than six months after death? In that case, the amount of the distributions from the estate made before the date of the order will be deducted from the deceased spouse's net family property.⁵⁰

An estate trustee is personally liable for making a distribution within six months of death or before the expiry of an extension of time if the remaining assets of the estate are not sufficient to satisfy an order for an equalization payment.⁵¹

If the surviving spouse elects to receive an equalization of net family property, then the will is interpreted as if the surviving spouse had predeceased the deceased spouse.⁵² The obvious result of this provision is that the surviving spouse does not receive the gifts they otherwise would have received under the will. However, there is also a more unexpected result. If there are any gifts in the

⁴⁷ FLA, s. 6(15).

⁴⁸ FLA, s. 6(17).

⁴⁹ FLA, s. 6(18); SLRA s. 57.

⁵⁰ FLA, s. 6(16).

⁵¹ FLA, s. 6(19).

⁵² FLA, s. 6(8).

will that are conditional on the surviving spouse predeceasing the first deceased spouse, then those gifts will vest.⁵³

If an application is made for an equalization payment, then the personal representative of the deceased spouse must serve and file a sworn financial statement in Form 13.1 and a Net Family Property Statement, as discussed above.

An estate trustee should inform a surviving spouse to get independent legal advice. Beyond this, it is not clear whether the estate trustee and/or solicitor to the estate trustee are obliged to advise the surviving spouse of the existence of the right to make an election under the FLA.⁵⁴ Advising the surviving spouse of their rights may limit the surviving spouse's justification for delay if there is an application for an extension of the deadline to file the election. However, it is an open question about whether an estate trustee has a positive obligation to the beneficiaries of the estate *not* to advise the surviving spouse of the right to make an election, which might compromise the beneficiary's interests. Estate trustees should be cautious in this area.

Family Law Act elections are often technically challenging and highly contentious. All parties involved in them should be represented by knowledgeable and experienced counsel.

This paper is intended for the purposes of providing information and guidance only. This paper is not intended to be relied upon as the giving of legal advice and does not purport to be exhaustive.

Whaley Estate Litigation

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⁵³ See *Ambrose v. Ambrose Estate*, 2005 CarswellOnt 4527 at paras. 22 to 27.

⁵⁴ *Webster v. Webster Estate*, (2006), 25 E.T.R. (3d) 141 (Ont. S.C.J.).