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WIDDIFIELD ON EXECUTORS AND TRUSTEES, 6TH EDITION

Release No. 5, June 2025

This seminal work of Canadian legal literature is reviewed and updated by a team of authors drawn from the front ranks of the profession from across Canada. In keeping with the original, the sixth edition of Widdifield on Executors and Trustees offers a comprehensive exposition of the law relating to the exercise of the duties and prerogatives of executors and trustees in Canadian estates and trusts law.

What's New in This Update:

This release contains amendments and updates to the commentary in Chapter 2 (Assets); Chapter 4 (Expenses and Legal Costs); Chapter 5 (Bequests and Beneficiaries); Chapter 15 (Resignation, Removal and Appointment of Trustees); Chapter 17 (Dependants' Relief Claims and Spousal Property on Death); and Words and Phrases.

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Highlights of This Release, Include:

Joint Tenancy — Gift — Severance — Right of Survivorship — A son sought an order to sell a family farm and an order that the sale proceeds be divided on an unequal basis that would see him receive well over 50 per cent of the monies realized on the sale. The land in question in the litigation was originally owned by his parents. In 2008, the parents had added the son as a joint tenant to the title without consideration. The parents maintain that they did this due to an undocumented understanding with the son that:

a) The son would continue to assist them with their active farming operation on the Farmland on a full-time basis;

b) They would continue with their farming operation on the Farmland "*until they were no longer able*"; and

c) They would continue to live in their house on the Farmland "*until they passed away*"

The relationship between the parents and the son broke down and the parents served the son with a notice of intention to sever the joint tenancy of the farmland. The son took no action in opposition to the notice. The court held that the son had no exercisable rights in connection to the farmland prior to the deaths of the parents. In coming to this conclusion, the court stated that the law recognized that a gift of a right of survivorship after death can exist independently and in the absence of a beneficial right of ownership during the donor's lifetime. Further, although the gift of the right of survivorship took effect immediately, and such a gift could not be revoked, there was nothing at law precluding the parents from severing the joint tenancy at a later date, which had the effect of terminating the son's right of survivorship to the interest the parents held in the farmland. The notice of severance had clearly stated that the new title would show each parent as holding an undivided one-third interest in the farmland and the son also having an undivided one-third interest. Although the son has lost his right of survivorship with respect to the parents' two-thirds share of the farmland, the parents could not revoke the gift of survivorship with respect to the son's one-third share. The terms of the resulting trust in this case would cause the parents' two-thirds share of whatever equity remains in the farmland to fall to their estates, while the son's one-third share of whatever equity remains in the farmland would pass to him after the death of the parents, in accordance with the intention of the parents at the time the 2008 transfer was completed. The court stressed at para. 79: "To be clear, the Parents are free to enjoy the Farmland as they see fit during their lifetimes, which can include developing it, registering a mortgage against it or otherwise encumbering it without regard to the equity that may remain after their deaths." The court went on to add that if its conclusion that the son has no exercisable rights in connection to the farmland prior to the deaths of the parents was incorrect, it would still deny his application for partition and sale of the farmland. The court cited *Siwak v. Siwak*, 2019 MBCA 60, 2019 CarswellMan 435 (Man. C.A.), which stated that although s. 19(1) of *The Law of Property Act*, C.C.S.M., c. L90 (the "LPA"), gave a joint tenant or tenants in common a prima facie right to apply for an order of partition and sale, there are circumstances where a judge can exercise discretion to refuse such a request. These were outlined at para. 95, in that judgment. The court found that the facts in the case before it brought it within the principles found in Siwak. The son had not come before the court with clean hands, given the uncontradicted evidence that he had drained the accounts of the farming operation, sold farm assets and

confiscated farm equipment belonging to the parents without offering any kind of accounting or compensation: *Berry v. Berry et al.*, 2025 MBKB 32, 2025 CarswellMan 74 (Man. K.B.).

Marriage-like relationship — Meaning of "Lived with" and "Cohabitation" — Spouses not Sharing Same Residence — In this case, the court noted that the concept of living with another person is by necessity " 'susceptible to some factual fluidity to take account of the complexities of modern life including employment and education needs and geography': *Jones v. Davidson*, 2022 BCCA 31 at para. 17". Cohabitation was not synonymous with co-residence. Two people can cohabit even if they do not live under the same roof: *Jones v. Davidson*, 2022 BCCA 31, 2022 CarswellBC 213 (B.C. C.A.), at para. 17, citing *Hodge v. Canada (Minister of Human Resources Development)*, 2004 SCC 65, 2004 CarswellNat 3695, 2004 CarswellNat 3696 (S.C.C.), at para. 42. The words "lived with" therefore encompass relationships where the couple do not share the same residence. Maintaining separate residences does not preclude a finding of a marriage-like relationship: see e.g. *Matossian Estate v. Clark Estate*, 2024 BCSC 2214, 2024 CarswellBC 3613 (B.C. S.C.): *Hill v. Dhanda*, 2025 BCSC 333, 2025 CarswellBC 491 (B.C. S.C.).

Spousal Support — Whether Obligation Survives Death of Payor — On the eve of a 2003 support-and-property trial, the parties agreed to spousal support of $9,000 per month "until further order", reviewable at the option of either party on the payor's retirement. The spousal support agreement was incorporated into a corollary relief order dated January 8, 2003 which stated:

> ... [t]he Defendant will pay spousal support to the Plaintiff of $9,000.00 per month, payable on the 1st day of the month following the granting of the Divorce Judgment and payable on the 1st day of each month thereafter, until further Order of the Court.
>
> ... on the Defendant's retirement from Deloitte & Touche LLP, the quantum of spousal support payable by the Defendant to the Plaintiff may be reviewed at the option of either party.

The payor twice applied, unsuccessfully, for a review. He died in 2023. His second wife took the position here that spousal support was no longer payable. The payor's first spouse maintained that the spousal support obligation survived the payor's death. The court found that with the spousal-support order neither expressly addressing the impact of the payor's death nor doing so indirectly (e.g. via directing support for "the life of the recipient" or making the support obligation binding on the payor's estate), the spousal support obligation ended with the payor's death. In applying the principles found in the jurisprudence on this matter, the court stated at paras. 72 et seq.:

> 72 Is the 2003 divorce judgment sufficient to require spousal support (or some equivalent) on or after the payor's death?
>
> 73 I restate the judgment's key provision:
>
> > ... the [payor] will pay spousal support to the [first spouse] of $9,000.00 per month ... until further Order of the Court.
>
> 74 The judgment does not:
>
> - set the order's duration as recipient's lifetime or any other "fixed duration" yardstick possibly exceeding the payor's lifetime i.e. other than "until further order";
> - refer expressly to the payor's death or its impact, let alone provide that support will survive;
> - state that the support obligation binds or charges or will bind or charge the payor's estate;

- provide for security of any form for spousal support payable after the payor's death;
- provide a replacement for spousal support on or after the payor's death e.g. life insurance on the payor's life in favour of the recipient
- direct or reflect a relinquishment of the recipient's claims against the payor other than enforcement of spousal support against the payor or his or her estate; or
- otherwise state or signal that support (or equivalent) will continue or be payable in any respect after the payor's death.

75 There is no underlying settlement agreement here, let alone one providing for any of these elements lacking in the judgment or otherwise reflecting an estate-binding intention e.g. an inurement clause[.]

76 The reference to "until further Order of the Court" does not qualify as a "clear, specific, and unequivocal" direction that the ordered support would continue after the payor's death.

McCulloch v. McCulloch, 2025 ABKB 148, 2025 CarswellAlta 554 (Alta. K.B.).

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