

# Death of a Spouse or Common-law Partner

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The death of your spouse or common-law partner<sup>1</sup> is a very difficult and emotional time. You may be overwhelmed with grief over losing your partner, as well as trying to understand what your rights and obligations are as the surviving spouse. On top of all of that, your spouse likely named you as the executor of their estate and you may not be familiar with the responsibilities and tasks involved in administering an estate.

With the assumption both spouses are Canadian residents (and not U.S. citizens), this publication will help guide you in the steps to be taken when your spouse dies, whether or not you have been named as executor, and considerations for updating your own estate plan.

## The estate: Acting as executor

Very often, spouses will name each other as the executor of their estate. If your spouse named you as the executor of their estate, one of your first steps should be to retain a lawyer well-versed in estate administration to help you understand what actions you need to take. Typical steps required in the administration of an estate are covered in our BMO publication, *Executor's Task List*. Not every task may be relevant for your situation.

The administration of the first spouse's estate is typically far less complicated than the estate of the surviving spouse, simply because many spouses own their assets jointly or will name each other as beneficiary on their registered plans and/or insurance policies. If that is your situation, you will likely be able to deal with those assets without a grant of probate<sup>2</sup>.

## Assets falling outside your spouse's estate

### Jointly held assets

Many spouses hold certain (capital) assets jointly with right of survivorship ("JTWROS")<sup>3</sup>. Assets held JTWROS is a form of property ownership where each owner has one and the same interest in the property such that upon the first owner's passing, the interest of the deceased owner does not pass through their estate, but will transfer to the surviving owner outright by virtue of the right of survivorship. Assets typically owned JTWROS by spouses include the marital home or non-registered accounts, including investment accounts. A grant of probate should not be required to transmit the deceased owner's interest to the surviving joint owner.

If you are the surviving owner, you should ensure you are aware where all the bank accounts were held and locate title deeds to any real estate property you held jointly with your spouse. You can contact the relevant financial institutions to confirm what documents they will require to have your spouse's name removed from any jointly held bank and/or investment accounts; an original death certificate will likely be needed by each financial institution. Your lawyer can assist you with contacting the local land registry office to have your spouse's name taken off title to jointly owned real estate.

For Canadian income tax purposes, when an individual dies they are deemed to dispose of their capital assets and to have received proceeds equal to fair market value ("FMV") immediately prior to death, which may result in a capital gain and an income tax liability on the deceased's terminal (final) return. However, where assets are transferred or bequeathed to a surviving spouse<sup>4</sup>, the assets are deemed to have transferred at their cost amount, thereby providing for a tax-deferred "rollover" of the assets to the surviving spouse. As a result, no tax is payable until either the spouse or the spousal trust disposes of the assets or when the surviving spouse dies. Given assets held JTWROS transfer automatically to the surviving spouse, this automatic tax deferral can apply<sup>5</sup>.

### Registered plans

Common registered plans include registered retirement savings plans ("RRSP"), registered retirement income funds ("RRIF"), various pension plans, and Tax-Free Savings Accounts ("TFSA"). These plans are unique compared to other investment vehicles, in that the owner may be able to designate a beneficiary to directly receive the plan assets on death<sup>6</sup>. The beneficiary designation allows the plan assets to fall outside the owner's estate on death, thereby bypassing the probate process.

With respect to RRSPs/RRIFs specifically, from an income tax perspective, upon death the FMV of the registered plan assets is included as income on the deceased annuitant’s final tax return. However, similar tax deferrals (as described above) may be achieved on the first spouse’s death when a surviving spouse is named as the beneficiary of the plan and the underlying assets are directly transferred to the surviving spouse’s RRSP/RRIF<sup>7</sup> or to purchase an eligible annuity for the surviving spouse. Available to RRIFs only, a surviving spouse may be named as a successor annuitant on RRIFs, in which case the RRIF continues to exist after death in the name of the surviving spouse as the annuitant.

Typically, spouses will designate each other as the beneficiary of their registered plans. The following table outlines what steps you should take if your spouse designated you as the beneficiary of their registered plans and the resulting tax consequences.

Product	Tax treatment	Estate consequence (not Quebec)
RRSP RRIF LIRA LIF LRIF	<ul style="list-style-type: none"> <li>The FMV of assets in the registered plan are deemed to have been received immediately before the owner’s death and included in income on their terminal tax return. The estate bears the resulting tax burden, whether the plan proceeds form part of the estate or not.</li> <li>If a surviving spouse is the beneficiary (or successor annuitant), a rollover may be utilized and tax may be deferred until the surviving spouse withdraws the funds or dies.</li> <li>If the rollover is not available/utilized, the FMV of the account at date of death is taxable as income in the deceased’s terminal tax return. The deceased’s estate pays the tax liability.</li> </ul>	<ul style="list-style-type: none"> <li>Probate not required for transmission if beneficiary designated.</li> <li>Beneficiary to provide issuing financial institution with required proof of death, including death certificate<sup>8</sup>.</li> </ul>

Product	Tax treatment	Estate consequence (not Quebec)
TFSA	<ul style="list-style-type: none"> <li>FMV at death is not taxable on death to the account holder.</li> <li>Can transfer to spouse’s TFSA account without impacting the surviving spouse’s contribution room.</li> </ul>	<ul style="list-style-type: none"> <li>Account passes outside of the estate eliminating the need for probate.</li> <li>Beneficiary to provide issuing financial institution with required proof of death, including death certificate<sup>8</sup>.</li> </ul>
Pension plans	<ul style="list-style-type: none"> <li>No immediate tax consequence on death of the spouse while receiving pension income from a defined benefit plan. Depending on plan attributes, surviving spouse typically receives a survivor benefit pension income.</li> <li>If your spouse died before retirement, you may be entitled to a lump sum benefit from their pension plan as a named beneficiary. This will be taxable to you as the recipient but a rollover may be achieved if the benefit can be transferred to your own pension plan, RRSP or RRIF.</li> </ul>	<ul style="list-style-type: none"> <li>Under some pension plans, the surviving spouse has an automatic entitlement to the pension benefits.</li> <li>Review your spouse’s pension plan documentation, and speak to their pension administrator to determine what rights you have.</li> </ul>

If your spouse named their estate as the beneficiary of his/her registered plans, probate will be required for transmission of the plan proceeds into the estate. The funds will be de-registered and paid into the estate account upon the executor providing the relevant financial institution with the required documentation. Where applicable, the FMV of the account is taxable as income to the account holder at death and will be included in their terminal return. Subject to any other instructions in the Will, the deceased’s estate pays the tax liability. No further contributions can be made to a deceased individual’s RRSP after the date of death. However, your deceased spouse’s executor can make contributions to your RRSP in the year of death or during the first 60 days after the end of that year. Contributions made to your RRSP can be claimed on your deceased spouse’s return, up to his/her RRSP deduction limit for the year of death.

Note, even if you were not designated as the beneficiary on the plan documentation, but are a beneficiary of your spouse's estate and entitled to some or all of their RRSP/RRIF proceeds, there may still be an opportunity to transfer the RRSP/RRIF proceeds into your RRSP/RRIF<sup>7</sup> and achieve the tax-deferred rollover where you and the executor file an appropriate joint tax election. The guidance and advice of a good tax advisor is necessary to ensure the tax reporting obligations are appropriately executed to achieve the intended results in your circumstances.

### Insurance policies

If you were the direct beneficiary of your spouse's insurance policy or policies<sup>9</sup>, then you can reach out to the issuing institution and advise them of your spouse's death. You can provide them directly with the documents required to release the proceeds, which typically include an original death certificate. Probate should not be required in order to release the insurance proceeds unless the active beneficiary designation was contained in your spouse's Will. Proceeds from exempt policies are not taxable to the policy holder or the beneficiary of the policy.

Insurance policies on the life of your deceased spouse may have been owned by a private corporation owned by you and/or your deceased spouse. In these circumstances, the beneficiary of the policy is typically the corporate policy owner and although the proceeds from the death benefit are received by the corporation tax-free, there may be income tax consequences when the proceeds are paid out to the estate or ultimate individual shareholders<sup>10</sup>. A detailed review of any shareholders' agreements governing the administration of any death benefits under a life insurance policy should be reviewed to understand who the ultimate beneficiaries are, or the intended use of the funds that may be part of a broader post-mortem tax planning arrangement. Be sure to consult with your external tax advisor to understand these mechanics and accounting for corporate owned insurance policies.

### Assets held in an inter vivos trust

Your spouse may have settled assets into a trust, such as a family trust, prior to their death, or may have been acting as a trustee for a trust. The assets in these trusts will not form part of their estate. However, their Wills might provide instructions regarding any power your spouse may have maintained in these trusts. In most situations, these family trusts will continue even after the death of your spouse. You should review any such trust deeds with your lawyer.

You and/or your spouse may have settled assets into a joint partner trust during your lifetimes. This is a special trust that would have likely been set up in order to avoid probate on the death of the second spouse and effect other incapacity planning intentions. If you are a beneficiary of one of these trusts, the death of your spouse has no impact on the trust as it will continue in existence until your death. You should review any such trust deeds with your lawyer.

### Your own estate plan

You likely had your spouse appointed as executor of your estate or attorney under powers of attorney. They were also very likely named as a beneficiary of your estate. When you are ready, you should review your estate planning documents with a lawyer and update them as necessary.

The death of your spouse is also a good time to review your own beneficiary designations. If your spouse was named as beneficiary of your registered accounts and/or insurance policies, you should update these designations to your new intended beneficiaries.

### Possible claims against your spouse's estate

While you may be grieving the loss of your spouse, it is important that you are also aware of claims you might have against your spouse's estate. Ensure you speak to a lawyer before you sign off on any distributions from your spouse's estate if you are unclear about what rights you may have. In particular, you should speak to the lawyer if any of the following apply to you:

- Your spouse died without a valid Will.
- Your spouse did not leave you anything from their estate.
- Your spouse made significant distributions to other individuals from their estate.
- Your spouse executed a new Will without telling you.
- You and your spouse were in the process of negotiating a separation or divorce.
- You had a domestic contract with your spouse and the terms of the Will or beneficiary designations to registered plans/insurance policies do not reflect the obligations that were agreed upon in the contract.
- You had a separation agreement with your spouse and the terms of the Will or beneficiary designations to registered plans/insurance policies do not reflect the obligations that were agreed upon in the agreement.

## Seek advice

The loss of your spouse is a difficult time. If you are overwhelmed with the responsibilities of administering your spouse's estate, talk to your BMO financial professional about how BMO Trust might be able to assist you in your duties.

**For more information, speak with your BMO financial professional.**



<sup>1</sup> For ease of reference, spouse and common-law partner will be referred to as "spouse" in this article. Note, the income tax treatment of transfers/bequests between spouses and common-law partners are identical. For income tax purposes, individuals are in a common-law partnership where they cohabit at any such time in a conjugal relationship and have so cohabited throughout the 12-month period before that time.

<sup>2</sup> Probate is a process that confirms an executor or administrator's authority to administer and distribute assets of an estate. Where required, provincial courts impose a tax (or fee) based on estate assets and grant this authority by issuing a probate certificate.

<sup>3</sup> Joint tenancy with right of survivorship is not recognized in Quebec. In Quebec, ownership of property by more than one person can only be achieved by way of co-tenancy, also known as tenancy in common.

<sup>4</sup> While not relevant to the concept of jointly owned property, it is worthwhile mentioning that the same rollover can be achieved when assets are transferred to a qualifying testamentary spousal trust, which is a trust that is established for the benefit of a surviving spouse and created in the deceased spouse's Will. Among other conditions, in order to qualify as a spousal trust, the deceased must have been resident of Canada immediately prior to death. Assets are transferred to the trust created by the Will where the surviving spouse is entitled to receive all of the income from the trust that arises during the surviving spouse's lifetime and no person (other than the surviving spouse) may obtain the use of any of the income or capital of the trust during the surviving spouse's lifetime.

<sup>5</sup> Note, the Income Tax Act ("ITA") permits the ability to elect out of the tax-deferred rollover on a property-by-property basis which can be a useful tool to effect any tax planning opportunities available at death on the terminal return; for example, realizing capital gains to utilize available lifetime capital gains exemptions on qualifying private company shares or to apply any capital loss carryforward amounts that may otherwise expire. Note, even if the assets do not fall outside of the estate and are administered through the deceased spouse's estate, the income tax deferral can still be achieved when assets are transferred to the surviving spouse pursuant to the terms of the deceased spouse's Will.

<sup>6</sup> For residents of Quebec, beneficiary designations for your registered plans need to be made in a Will or marriage contract for most plans. With some rare exceptions, designations made in the contract with the issuing financial institution are not recognized in the province of Quebec.

<sup>7</sup> By December 31 of the year following the year of death.

<sup>8</sup> Note that if the beneficiary designation was contained within the Will, as is possible to do in some provinces, the issuing financial institution might require proof of probate in order to release the funds.

<sup>9</sup> Beneficiary designations made on life insurance policies are valid in Quebec and will pass to the beneficiary outside of the Will and estate administration process.

<sup>10</sup> The proceeds received under the life insurance policy less the policy's adjusted cost base is credited to the private corporation's notional capital dividend account ("CDA") balance. To the extent there is a positive CDA balance, a tax-free dividend can be paid out to Canadian resident shareholders.

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