

Centre of Excellence for Matrimonial Real Property

Hosted by the National Aboriginal Land Managers Association (NALMA), COEMRP is available to assist First Nations communities and their members in matters related to Matrimonial Real Property Rights and to First Nations' MRP law making



Other Reference Material

Role of Chief & Council

The COEMRP has prepared a brochure, "Role of Chief & Council," that outlines and defines their responsibilities under the Provisional Federal Rules as contained in the *Family Homes on Reserves and Matrimonial Interests or Rights Act*.

On-Reserve Matrimonial Real Property Rights

The COEMRP has prepared a booklet outlining the rights and protections available under the Provisional Federal Rules of the *Family Homes on Reserves and Matrimonial Interests or Rights Act*.

MRP Toolkit

The COEMRP has published a comprehensive Toolkit to guide First Nations professionals in MRP matters and the development of their own MRP law.

Training

The Centre also provides training courses across the country. First Nations are encouraged to take advantage of these offerings by contacting the Centre at:

**Centre of Excellence for Matrimonial Real Property
c/o National Aboriginal Land Managers Association
1024 Mississauga St, Curve Lake, Ontario K0L 1R0**

Website: www.coemrp.ca

Email: info@coemrp.ca

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UNDERSTANDING ESTATES MANAGEMENT ON RESERVE

**Under the Provisional Federal Rules as
contained in the *Family Homes on Reserves and
Matrimonial Interests or Rights Act***

Centre of Excellence for Matrimonial Real Property

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Where can I get help?

When a spouse dies, it is a time of tremendous stress for all involved. You may feel overwhelmed and even helpless. Your family and friends can often provide the quickest assistance, at least until you have an opportunity to sort things out. The Band Office or Health Centre may be able to direct you to sources of support within the community, such as counselling or grief support groups. The Band Office may be able to assist you with obtaining property records and put you in touch with the AANDC Estates Officer in your region.

In legal matters you should have a lawyer who represents you. Each province has a variety of services to put you in touch with a lawyer. You should discuss your situation and ask any questions before you make a decision to engage a lawyer. You need to feel comfortable with and have confidence in your lawyer.

The Centre of Excellence for Matrimonial Real Property and the Aboriginal Affairs and Northern Development Canada websites also provide information. The websites are:

- www.coemrp.ca
- www.aandc-aadnc.gc.ca

As discussed elsewhere in this booklet, if the PFRs apply, the provincial courts have the power to issue court orders related to protection and property matters. Under *FHRMIRA*, you have access to a court to protect yourself and your property interests. The court can issue instructions to the police to enforce its orders.

FHRMIRA gives you certain rights. It is important to understand these rights and to be diligent in pursuing them. If you do not understand them, talk to a lawyer. Carefully follow your lawyer's advice and keep proper records of important matters. It is important to be timely in responding to instructions or requests from authorities to keep the process moving. It may take time to sort everything out. Your lawyer may be able to help you understand how long the process might take in your specific situation.

What do I do if my spouse dies? (Cont.)

(B) Custom allotments

Many First Nations do not subscribe to the provisions of the *Indian Act* or other legislation in allotting land to members. They have their own ways of determining where families will live and follow their own customs and traditions for dealing with land on reserve.

The Provisional Federal Rules will not apply to the value of the lands that have been allotted according to custom (not recognized by federal government). However, they will apply to structures on custom allotments that are recognized by the First Nation or the courts.

It is important for you to understand the policies involving land allotment on your reserve.

Factor 3: Is there a Will?

The existence of a valid Will is another factor affecting succession of the matrimonial real property.

If the deceased left a valid Will, disposition of the property will follow the dictates of the Will, or the survivor may apply, under the PFRs, for a court order to determine entitlement.

Once the matrimonial share has been distributed, the remainder of the assets will be distributed to the remaining heirs or beneficiaries as per the Will, or where there is no Will, Section 48 of the *Indian Act*.

If the survivor is a member of the First Nation, there may be a transfer of property.

Both members and non-members may be entitled to compensation, and/or to a provision for exclusive occupation of the matrimonial home beyond the 180 days for a fixed period of time.

Introduction

This booklet on Understanding Estates Management on Reserve was produced by the Centre of Excellence for Matrimonial Real Property (COEMRP) under the auspices of the National Aboriginal Land Managers Association (NALMA) to help you understand your survivorship rights under the recent *Family Homes on Reserves and Matrimonial Interests or Rights Act (FHRMIRA)*.

FHRMIRA has two main components:

- First Nations can enact their own community-specific matrimonial real property laws which can be applied in provincial and territorial courts; and
- *FHRMIRA* contains a set of interim Provisional Federal Rules (PFRs) which provide MRP rights and protections to residents living on reserves until a First Nation develops and enacts its own laws under the *FHRMIRA* or other federal legislation.

If your First Nation is signatory to either the **First Nation Land Management Act** or to a **Self-Government Agreement**, then *FHRMIRA* may not apply to you. If your First Nation has enacted its own MRP Law pursuant to *FHRMIRA*, the Provisional Federal Rules no longer apply.

Find out from the Band Office which rules apply to your circumstance. If the First Nation has enacted its own MRP Law pursuant to *FHRMIRA*, obtain a copy to determine what survivorship and occupancy rights may be available to you.

This booklet is provided strictly for informational, not legal, purposes. In all legal matters, refer to the *Indian Act*, and the *Family Homes on Reserves and Matrimonial Interests or Rights Act*, or any similar legislation your First Nation may have developed and seek the advice of a lawyer to understand your rights as a survivor.

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Terminology & Acronyms

FHRMIRA	Abbreviated form of the <i>Family Homes on Reserves and Matrimonial Interests or Rights Act</i> .
Common-law partners	Persons who have been living together in a conjugal relationship for at least one year (as defined in the <i>Indian Act</i>)
CP	Certificate of Possession, document giving evidence of a member's right to lawful possession of reserve lands pursuant to the <i>Indian Act</i> .
Estates	All of the assets you own when you die, including land, bank accounts, personal property, after all of your debts are paid (funeral, hydro, etc.).
Exclusive Occupation Order	An order providing for the sole occupancy of the home to one of the spouses for a set period of time. It does not involve a change in ownership.
Family home	The family matrimonial home (the structure only, not the land) situated on a reserve where the family normally lives. It will also be referred to as the "home".
Intestate	A person who has died without having made a Will.
MRP	Matrimonial Real Property, the immovable property used by a couple and their family, the most common example being a family home and the land it is situated on.
Personal property	Refers to movable assets, such as cars, furniture, boats, money in the bank, or household goods.
PFRs	Provisional Federal Rules are interim rules defined in sections 12-52 and 54-55 of <i>FHRMIRA</i> , which took effect on December 16, 2014 for those First Nations without their own MRP law.
Real property	Refers to immovable property, the most common example being a house and the land it is situated on.
Spouse	An individual who is one of the married partners or common-law partners living in a conjugal relationship or family unit.
Succession	Entitlement to the deceased's property by kinship.

What do I do if my spouse dies? (Cont.)

Factor 2: Type of right or interest

One of the factors affecting succession (transfer of deceased's property in sequence) of the matrimonial real property is the type of right or interest that the spouses had in the property.

(A) Lawful possession (CP or lease)

The possession could be

- as joint tenants
- as tenants in common
- with sole possession by the surviving spouse
- with sole possession by the deceased

Joint Tenants (both were in lawful possession, wholly and indivisibly)
If you and the deceased held the property as joint tenants, you now assume full possession of the real property (land and house).

Tenants in Common (both were in lawful possession of a divisible percentage of the property)
You retain your original interest in the property; the remaining portion becomes part of the assets of the deceased and will be disposed of according to a valid Will if any, or by the Intestacy section (48) of the *Indian Act*.

Sole lawful possession by the surviving spouse
No transfer of the property, however, there may be a settlement payment to anyone specified in a Will.

Sole lawful possession by the deceased
You may be entitled to all or part of the property, or to a settlement payment. The terms or percentage will be determined by the Will if any, or by the Intestacy section (48) of the *Indian Act*.

In any of the cases above where the result is a transfer of the property, the executor or administrator is responsible for submitting the appropriate documents to AANDC.

What do I do if my spouse dies? (Cont'd)

Regardless of any of the factors listed below, under the Provisional Federal Rules, surviving spouses have an automatic right to remain in the home for 180 days.

If you are living on a First Nation reserve and the PFRs apply, you have rights upon the death of your spouse. Those rights may vary depending on these factors:

- Whether or not you are a member of that First Nation.
- The type of right or interest, if any, in the matrimonial real property.
- Whether or not there is a valid Will.

The three factors are explained below.

Factor 1: Are you a member of the First Nation?

Whether or not you are a member of the First Nation, you are entitled to share in the value of the interest or right that was held by your spouse in or to the family home, as well as certain other matrimonial rights or interests, despite any directives in the Will.

If you are a member of the First Nation, on whose reserve the matrimonial real property is located, you may also be entitled to share in the value of the right or interest in land that was held by your spouse, even if the CP is in your spouse's name alone.

If you are **not** a member of the First Nation, there can be no transfer of real property to you. However, you may be entitled to compensation. The value of such compensation will be determined by a number of factors. You should obtain the advice of a lawyer.

In either case, you may be entitled to exclusive occupation beyond the 180 days, particularly if there are children or other dependents. Your lawyer will be able to assist you in determining and applying for any occupation of the matrimonial home.

Who is this booklet for?

If you are living on reserve in a marriage or common-law partnership, and at least one of you is a member of the First Nation, and

- you are concerned with what happens to your property on the First Nation if you or your spouse dies;
- you are concerned about the administration of your estate or that of your spouse;
- you are concerned about your rights and those of your spouse if one of you dies;
- you are uncertain of the role of the Courts and the Chief & Council on the death of you or your spouse

then this booklet was created for you.

While it cannot answer all of your questions, it may prove to be useful to you. Settling an estate on-reserve can be complicated. We recommend that you seek the guidance of a lawyer to assist you in understanding your rights and responsibilities.

NOTE

- If your First Nation is signatory to either the *First Nation Land Management Act* or to a *Self-Government Agreement*, then *FHRMIRA* may NOT apply to you.
- If your First Nation has enacted its own MRP law under *FHRMIRA*, the Provisional Federal Rules no longer apply.

A General Overview of Estates

When does the Indian Act apply to an estate?

The *Indian Act's* rules on Estates do not apply to everyone. For the *Indian Act's* Estate rules to apply, the deceased individual must be a First Nation member who is registered in the Indian Registry pursuant to the *Indian Act*. The deceased individual must be residing in their home, which is located on reserve, at the time of their death.

The rules also apply to people who live on-reserve, but are away for a period of time to go to school, for seasonal employment, or who had to leave to go into a care facility off-reserve.

For First Nations individuals with Indian status who live **off-reserve** and do not have an interest in reserve land, **their estates** are subject to the estate laws of the province where they are residing and their assets are located.

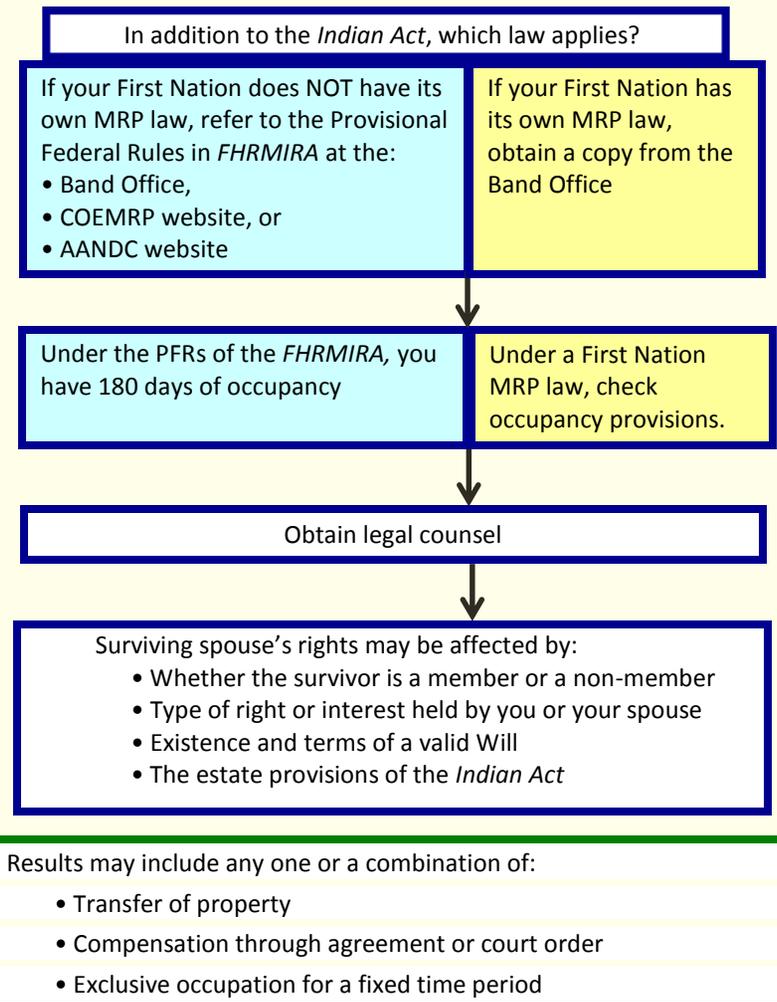
Similarly for people who live on-reserve but **do not have Indian status**, **their estates** are also subject to the estate laws of the province where they are residing and their assets are located.

For individuals with Indian Status who live off-reserve but who have an interest in land on reserve, please contact the Regional AANDC office to determine if there will be any follow-up necessary. In most cases, any transfer of property must be approved by the Minister.



What do I do if my spouse dies?

When a spouse dies, it is a time of tremendous stress. You may feel overwhelmed and even helpless. The chart below and the following pages may help you to organize your thoughts and help you understand your options for the future.



The Rights of Surviving Spouse under *FHRMIRA* (Cont'd)

In relation to the MRP, the surviving spouse or common-law partner will have to choose between receiving an amount or right under *FHRMIRA* or an amount or right under the Will or the *Indian Act*.

To claim rights and interests under the PFRs, a survivor must make an application to the court within 10 months of the death of their spouse or common-law partner. Once the family home and matrimonial rights or interests have been distributed, the remainder of the estate will be distributed to the remaining heirs or beneficiaries as per the Will or Section 48 of the *Indian Act*.

If a survivor chooses instead to inherit pursuant to the deceased's Will or estate, the *Indian Act* process must withhold distribution of assets until the 10 month period expires unless the survivor indicates in writing that he or she elects to inherit under the Will and not under *FHRMIRA*.

The options above are specific to the matrimonial home or other matrimonial rights or interests. It does not preclude the survivor from inheriting other assets from the deceased such as personal items.



A Review of the Minister's Role in Estates Management

According to Section 42 of the *Indian Act*, all jurisdiction and authority in relation to the estates of deceased Indians, who die ordinarily resident on reserve, is vested exclusively in the Minister of Aboriginal Affairs and Northern Development Canada (AANDC).

The Minister's role is to approve Wills; to confirm the appointments of executors or administrators named in the Will; to settle the estates of First Nation members who have no Will or where no one wishes to act as administrator or executor of the estate. AANDC has an oversight role to ensure the proper management of the estates of on-reserve members of a First Nation.

In order for a Will to be approved, it must meet certain requirements set out in the *Indian Act* and its regulations. The Will must be in writing (typed or handwritten), must be signed by the deceased, must express the deceased's wishes, and must be intended to take effect on death. Although not required, the Will should also be dated.

The Minister may void all or part of a Will if:

- It was made under duress or influence;
- The person making it lacked testamentary capacity (the inability to understand what a Will is, or what it says at the time it is signed);
- The terms of the Will create undue hardship for dependents;
- The Will provides for the disposition of reserve land contrary to the interest of the Band or the *Indian Act*;
- It is vague or uncertain;
- The terms of the Will are against the public interest.

If the entire Will is voided, or if an individual dies without a Will, AANDC applies the provisions as contained in Section 48 of the *Indian Act*.

The Administration of Estates

Notifying AANDC of a death (usually by providing an original death certificate) starts the estate administration process. AANDC can be notified by family members, the Indian Registration System, the Band Administrator or a Band Council Employee.

An estate administrator is the person named in your Will, or appointed by AANDC, to take control of your assets, pay your final bills, and distribute your assets to your beneficiaries. Once appointed, the estate administrator must generally carry out the duties set out by the *Indian Act*, the estate regulations, or the Minister. They must also consider the rights of a survivor pursuant to either *FHRMIRA* or similar legislation the First Nation of the deceased may have adopted.

An interest in land on reserve cannot be transferred to heirs who are not band members of that First Nation. Where a right to possession or occupation of land on a reserve passes to a non-band member either through a Will or through intestacy, Section 50 of the *Indian Act* applies.

Section 50 provides that:

- The right of the land that has been gifted to a non-member shall be sold by the “superintendent” (Departmental employee) to the highest bidder among those entitled to reside on that reserve and the proceeds shall go to the devisee or descendant
- Unsold interest in lands revert to the band
- No sale is final until approved by the Minister

The Rights of the Surviving Spouse under *FHRMIRA*

Prior to the enactment of *FHRMIRA*, it was possible that a surviving spouse or common-law partner would not inherit or be entitled to an equal division of the matrimonial interests or rights on reserves. The PFRs came into force on December 16th, 2014 and provide new rights for survivors.

Under the PFRs, a surviving spouse or common-law partner (whether or not they are a member of the First Nation) who does not hold an interest or right in or to the family home has an automatic right to occupy the family home for 180 days after the death of their spouse or common-law partner. That right can be extended beyond 180 days with a court order.

A survivor also has the right to apply to the court for exclusive occupation of the matrimonial home beyond the 180-day period. Various considerations will be taken into account by the court to determine whether to grant exclusive occupation and the period of such occupation.

FHRMIRA requires that an applicant for exclusive occupation order beyond the 180 days send a copy of the application to the First Nation. The Chief and Council may then request an opportunity to present its views to the court regarding the social, legal, and cultural context that pertains to the application.

PFRs do not lead to non-Indians or non-members acquiring a permanent interest in reserve land. Exclusive occupation is temporary and for a fixed period of time.

With respect to settling the estate, a surviving spouse or common-law partner has two options:

- They may choose to apply to court for an amount equal to half the value of the deceased spouse's or common-law partner's interest or right in the family home and of other matrimonial interests or rights; or
- They may choose to inherit from the deceased's Will or under the estates provisions of the *Indian Act* in respect of the family home and other matrimonial interests.