

HYPOTHETICAL SITUATIONS



MATRIMONIAL REAL PROPERTY

SITUATION #1

Life can certainly get complicated at times. Family breakdowns. Death. Domestic violence. When these things happen, emotions run high, lives are affected, and all communities need sensible ways to deal with such situations.

Here is an example of the sort of situation that occurs.

The Problem

A non-member father living on a reserve for 15 years is dealing with the death of his member wife and caring for their young children. In his time of grief, he is also looking for a new place to live because he has been told by the First Nation that he cannot stay in the family home since his late wife held the right of possession of the home.

Although he has care of the children who are members and have always lived on the reserve, this father is worried that he may have no choice but to leave the family home and probably live off the reserve.

Clearly, this is a stressful situation for both the family and friends and relatives in the community.

The Solution

For a First Nation where no MRP law has been enacted, all the provisions of the Act came into effect December 16, 2014; the father has a minimum of 180 days to stay in the home while he searches for a new home and develops a plan. He is also able to apply for exclusive occupation of the family home for a fixed period, which would allow him time to keep his children in their school and maintain a close connection to their community.

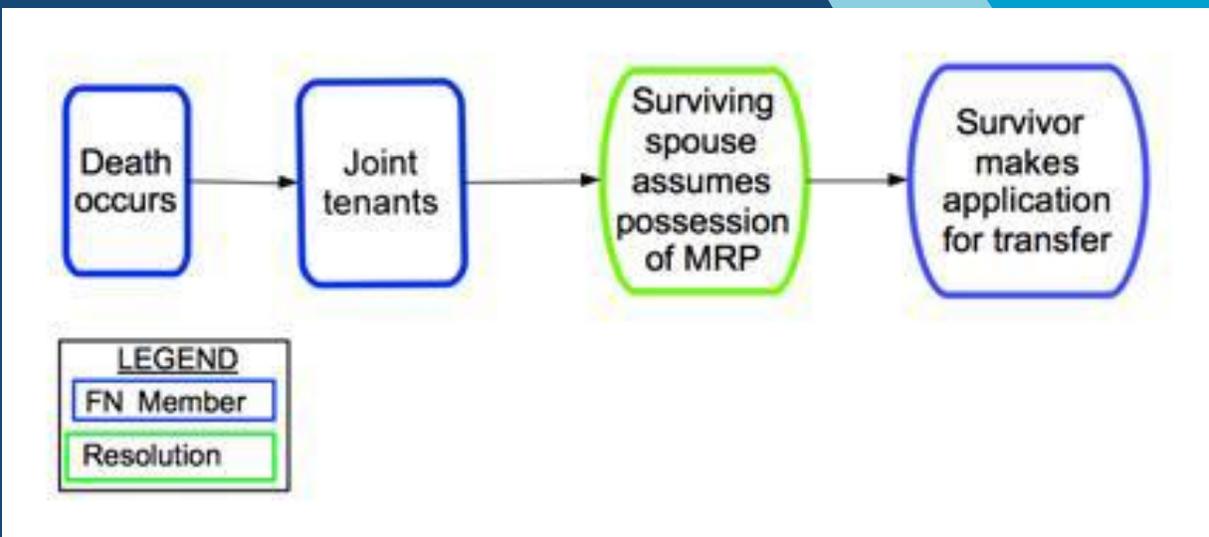


SITUATION #2 – JOINT TENANT FN MEMBER SURVIVORSHIP

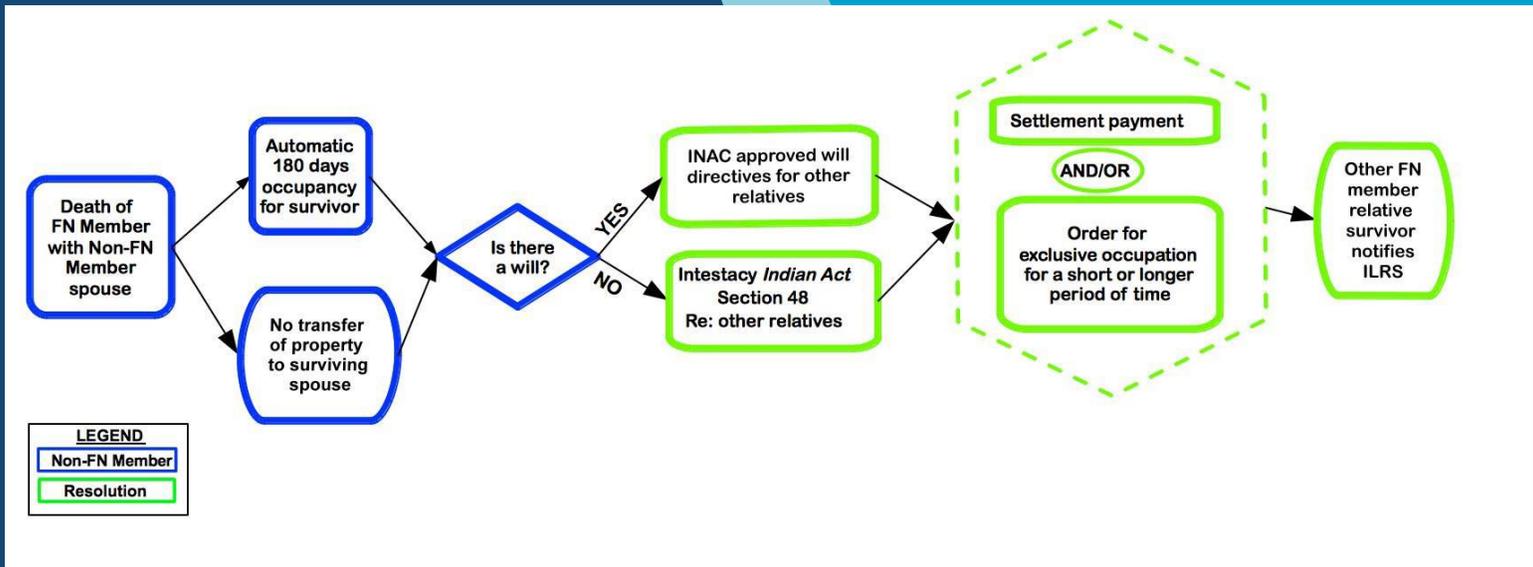
This example is basic: two First Nation members have been married 20 years. They are joint tenants in a property and both are named on the Certificate of Possession (CP).

When one spouse dies, and because they are joint tenants (meaning they both owned the property wholly and indivisibly) the surviving spouse assumes possession of the matrimonial real property, land and house. A new CP will have to be issued to reflect the surviving spouse as sole owner. It is the survivor's responsibility to complete and submit an Application for Transfer, attaching a certified true copy of the Death Certificate or Funeral Director's Statement of Death for registration in the ILRS, either to the First Nation or directly to INAC.

Similar situation: Had the surviving spouse not been named on the CP, but was named in a will as sole heir, the outcome would be the same.



SITUATION #3 – FN MEMBER SURVIVORSHIP



Practical application using the Provisional Federal Rules in the case of the **Death of a First Nation member where the surviving spouse is also an FN member.**

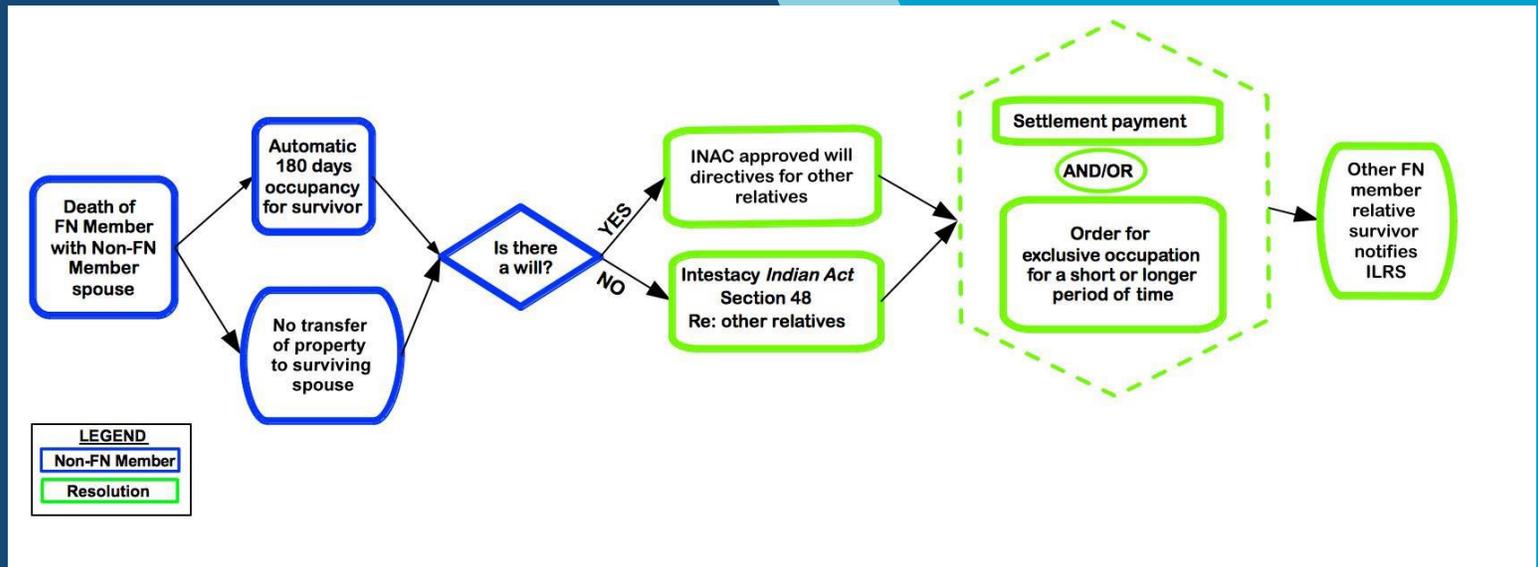
After the death of an FN member, the surviving FN spouse has an automatic 180 days of occupancy of the matrimonial home. What happens beyond the 180 days depends on **several factors**:

- 1) If the CP lists the couple as **joint tenants** this means they both owned the property wholly and indivisibly. Upon notification of the death, INAC could begin the process of transferring the matrimonial real property to the surviving spouse. Because it is held as joint tenants, it does not form part of the deceased's estate.
- 2) If the CP lists the couple as **tenants in common**, they both owned a divisible percentage of the property. The deceased's portion would form part of his or her estate and would be disposed of in accordance with the will or intestacy provisions of the Indian Act.
- 3) If only the deceased was listed on the CP, the survivor has the automatic 180 days and the opportunity to apply for exclusive occupation for a further period of time. In addition, the survivor must choose between inheriting under the will or the intestacy provisions OR making an application under section 34 of FHRMIRA

Once all is settled, any change in the title of the property must be recorded in the Indian Land Registry System (ILRS)

SITUATION #4 – NON-FN MEMBER SURVIVORSHIP

Practical application using the Provisional Federal Rules in the case of the **Death of a First Nation member where the surviving spouse NOT an FN member**. In this example, the couple had been married for 20 years and had no children.



After the death of the husband, a First Nation member, the surviving non-FN wife had an automatic 180 days of occupancy of the matrimonial home. What happens beyond the 180 days depends on **several factors**:

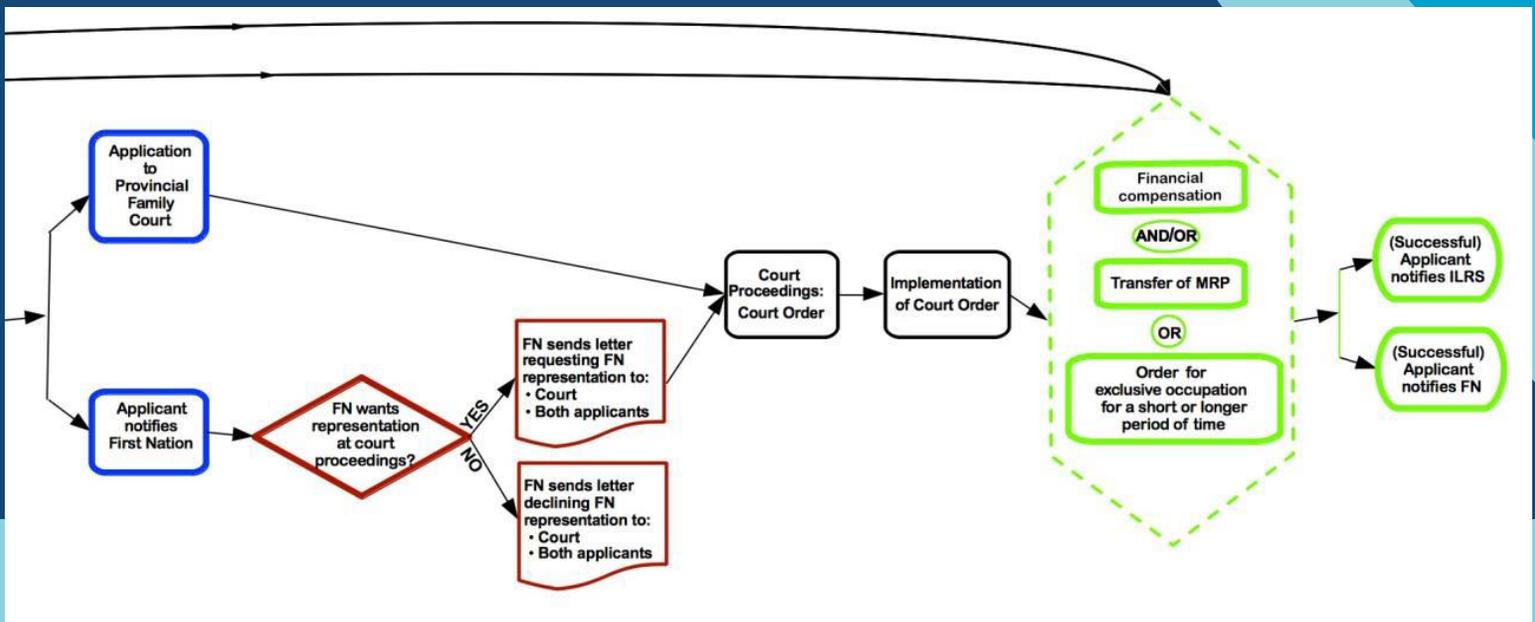
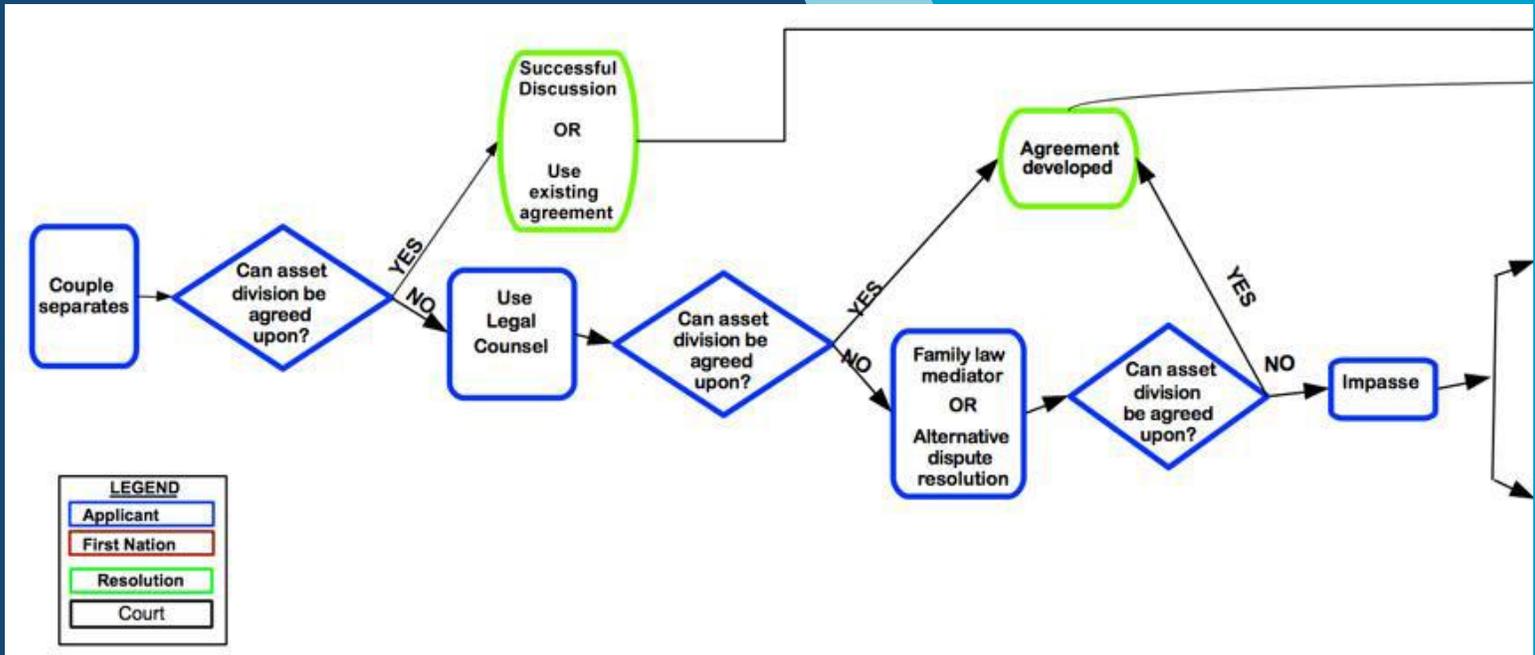
There was a will in which he bequeathed the house and land to his oldest child as there can be no transfer of property to a non-FN surviving spouse. The will was approved and the heir agreed that the survivor would remain in the home until she could no longer do so. Had they been unable to come to an agreement, the survivor could have made an application to the courts for exclusive occupation under s. 21 of FHRMIRA. She could also have made an application for half the value of the family home which would have become a debt against the estate. No transfer of the CP would be approved until the matrimonial real property interest had been resolved.

A will usually names an executor and that person is appointed by the Minister. Once appointed, that executor is entirely responsible for the administration of the estate and is accountable to the heirs.

The transfer of the Certificate of Possession must be recorded in the Indian Land Registry System (ILRS), under the *Indian Act*. A new CP will then be issued to the heir. The executor of the will is responsible for forwarding the application to transfer to INAC so that these changes can be approved and recorded in the ILRS. In the case of the deceased being in a First Nation under FNLMA, or a self-governing band, or the Kanasatake Mohawk Interim land base, the copy of the order is delivered directly to the First Nation.

SITUATION #5 - SEPARATION

Practical application using the Provisional Federal Rules in the case of the **Separation of two married or common-law First Nation members**. They have been married for 20 years and have two children. The matrimonial real property consists of house valued at \$100,000, and a camp property valued at \$25,000. The chart (in two parts) shows the logic and steps to follow.



Upon separation of these two married people, division of assets was difficult and complicated. Before looking to apply the Matrimonial Real Property law, whether the

Provisional Federal Law or a law enacted specifically within the First Nation, there were several steps taken to achieve an agreement.

The simplest case would be where the couple could agree on how to divide the assets either through discussion or by using an existing agreement (such as a domestic agreement). In this case, the choices would include any mix of the items listed in the second last box in the chart on the next page.

In this case, where an agreement could not be reached at the outset, the two spouses chose to seek legal counsel, (or it could have been a family law mediator, or through alternative dispute resolution). If through any of these measures, an agreement had been reached, and a formal agreement developed, choices would include any mix of the items listed in the second last box in the chart on the next page.

However none of these methods proved successful, and an impasse was reached; the applicants then progressed to

The wife made an application to the Provincial Family Court for exclusive occupation for her and the two children. Concurrently she was required to notify the First Nation of this action. The FN must at this point decide whether or not it wants representation at the court proceedings. If the FN wishes to make representation at the court proceedings, it would be required to send a notification stating its intention to the Court.

The Family law court proceedings resulted in a binding Court Order spelling out the terms of the division of assets. Depending on the terms, any mix of the following directives would apply:

- financial compensation, calculated taking into account the \$125,000 real property, car, furniture, child and spousal support (lump sum and/or monthly support), and/or
- transfer of the Matrimonial Real Property to one of the spouses, and/or
- exclusive occupation for the wife and mother.

If an Order to transfer the property is made, the change in lawful possession of the property must be recorded in the Indian Land Registry System (ILRS) under the *Indian Act*. The responsibility lies with the successful applicant to whom the property is being transferred, to send a copy of the Order to the Minister of INAC so that these changes can be recorded in the ILRS. In the case of the applicant being in a First Nation under FNLMA, or a self-governing band, or the Kanasatake Mohawk Interim land base, the copy of the order is delivered directly to the First Nation.

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