

## **Changes to Matrimonial Property Law Under the *Wills and Succession Act***

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*Wills & Succession Act for Legal Support Staff*

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The new *Wills and Succession Act* (WSA) makes significant amendments to matrimonial property laws in Alberta, which will affect the distribution and administration of estates. This paper will discuss the changes which have been made, and look at some examples of matrimonial property claims which are likely to be made under the new provisions.

### A Cautionary Note

Please note, while the WSA has been passed, proclamation is not expected until February 1, 2012. There are various regulations under the WSA and the MPA which have not been finalized, including amendments to the Surrogate Court Rules and the Surrogate Court forms. Those amendments and forms include documents which will be used under the amended *Matrimonial Property Act*. There are a number of agencies whose input is required on any change to the Rules of Court or to the Court forms. At the time of writing of this paper, that process has not been completed.

Included with this paper are the most recent drafts of some of the Surrogate Court forms, however, those have not yet been finalized. Please note that the attached forms are **DRAFT**. The final regulations and forms will be available from the Queen's printer website and will be posted on the Alberta Justice website once they have been finalized. All law firms who have a subscription to the Rules of Court will receive the updates to the Surrogate Rules and forms once those have been prepared by the Queen's printer.

### A Brief Summary of the Law to Date

The *Matrimonial Property Act of Alberta* (MPA) has, for many years, governed the division and distribution of property in the event of separation or divorce. It is important to note that the MPA only applies to married spouses – the Supreme Court of Canada has ruled that the MPA does not apply to common law relationships or adult interdependent partners.

The general principle of the MPA is that property which has been acquired during the course of the marriage should be shared equally on separation or divorce, no matter whose name the property is registered in.<sup>1</sup> This is based on the presumption that each of the parties has contributed equally to the marriage and to the property acquired, either by way of paid employment or through such things as care of children or other home care responsibilities.

Under the existing Act, either spouse may apply for an order dividing the matrimonial property in the event of marriage breakdown. Those circumstances include divorce, a declaration of irreconcilability, one year separation, or separation and evidence that one party is dissipating assets.<sup>2</sup> The Court has the authority to divide all the property owned

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<sup>1</sup>*Matrimonial Property Act*. s. 7(4)

<sup>2</sup>See section 5, and the parties must be resident in Alberta (s. 3)

by the parties, however there are four major categories of property which are exempt from the distribution, which are briefly described as follows:

- a) a gift from a third party to one of the spouses - this is most often an inheritance;
- b) property acquired prior to the date of the marriage;
- c) an award for damages which has been received by one or the other spouses, and
- d) personal injury insurance proceeds which have been received by one or the other spouses during the course of the marriage.

While there is a general presumption that matrimonial property is divided equally, s. 7(3) of the MPA identifies certain property which, while still subject to division, may be divided on a “just and equitable” basis depending on the circumstances. This property includes:

- the increase in value of exempt property during the marriage,
- property acquired with income received from exempt property,
- property acquired after a divorce but before a division on matrimonial property, and
- property which one spouse has gifted to the other.

Under the existing MPA, if the husband and wife were still living together when one of them died, there was no ability to claim a division of matrimonial property, as there had not been a breakdown of the marriage with section 5 of the Act.

If the surviving spouse did not receive all of the estate in the will, he or she did have the right to make a claim under the *Dependants Relief Act*. That Act gives the Court the authority to set aside a larger share of the estate for the surviving spouse (or other dependant) if the Court is satisfied that the spouse has not been adequately provided for. The surviving spouse could also make a claim that property owned by the deceased spouse had been held under a constructive trust. However, both the *DRA* and constructive trust are equitable remedies, and they involve an application to the Court for the exercise of discretion. Given that they were discretionary remedies, there was no security for the surviving spouse, and no guarantee of an equal division of the matrimonial property.

In dealing with those applications, the Courts developed what amounts to a *Matrimonial Property Act* analysis, to consider whether the will of the deceased spouse was consistent with his or her legal obligations. That approach was established through a

series of cases including *Tataryn v. Tataryn Estate*<sup>3</sup> and *Siegel v. Siegel Estate*<sup>4</sup> in which the courts followed a process of applying an *MPA* analysis to a defendant relief claim by a surviving spouse or adult interdependent partner. Presumably greater certainty as to the property entitlement of surviving spouses is one of the goals of the WSA.

### **What's Changing**

Under the new legislation if one spouse dies the surviving spouse will have the right to commence an action for matrimonial property division against the estate of the deceased spouse. This is an entirely new provision for Alberta, although it has been the law in all provinces except Alberta, B.C. and P.E.I. for a number of years.

There is also an entirely new provision which provides a right to temporary possession of the family home for a surviving spouse if the spouse who has died was the sole owner of the home in which the family has been residing. That is set out in s. 75 of the WSA, and will be discussed in more detail below.

The changes to the legislation are reflected in a number of changes which are being made to the Surrogate Court Rules and Surrogate Court Forms. Samples of some of the forms relating to estate *MPA* claims are attached.

#### **1. ESTATE MATRIMONIAL PROPERTY ACT CLAIMS**

The amendments to the *Matrimonial Property Act* are contained in the *Wills and Succession Act* - section 117. A copy of that section is attached to this paper.

The key sections are s. 5(1) and 5.1, which are:

- 5(1) A matrimonial property order may only be made  
.....  
(f) if one of the spouses is deceased and  
the surviving spouse makes an  
application under section 5.1.

#### **Application by spouse of deceased**

5.1(1) An application for a matrimonial property order may be made or continued by a surviving spouse after the death of the other spouse.

- (2) Notwithstanding section 1.1(1)(a) and the *Survival of Actions Act*, no application for a matrimonial property order may be made by the estate of a deceased person.

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<sup>3</sup>[1994] 2 S.C.R. 807

<sup>4</sup>[1996] 3 W.W.R. 247, 10 E.T.R. (2d) 178, 35 Alta. L.R. (3d) 321, 177 A.R. 282