

Wills & Estates Update

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Law and Practice Update

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INTRODUCTION

What's new? It's all new!

Well, it's not *all* new in the area of wills and estates law but it sure seems that way.

The *Wills and Succession Act* of Alberta¹ (which is referred to in this paper as the "WSA" or the "Act"), save for section 117, came into force on February 1, 2012 and has made significant changes to the practice of law in this area.

In the first part of this paper I will summarize some of the provisions of the WSA that represent changes to the previous law in this area and will refer to the case law that has been reported to date.

In the 21 months that the Act has been in force there have been numerous excellent papers already written on the topic of the WSA and its effect on this area of the law and I direct you to the LESA website to review them. Other publications on this topic are referred to in my paper.

It is not my intention to repeat the efforts of those that have already written on this subject to date but a certain amount of overlap will be found due in part to the short period of time that the Act has been in effect and to the relatively few reported cases on it to date. For this I apologize in advance.

The second part will review several recent decisions in the area of costs in estate litigation.

PART ONE – THE WILLS AND SUCCESSION ACT

The WSA consolidates four statutes, namely, the *Dependants Relief Act*²; the *Intestate Succession Act*³, the *Survivorship Act*⁴, and the *Wills Act*⁵.

The Act also includes changes to the *Administration of Estates Act*⁶, and the *Family Law Act*⁷.

Transitional Chart

In order to determine how and when these changes to the Act take effect reference can be made to the transitional chart put out by Alberta Justice and Solicitor General on their website, a copy of which is attached to this paper⁸.

Proposed Amendments to the *Matrimonial Property Act*

Section 117 of the Act, which is intended to amend the *Matrimonial Property Act*⁹, did not come into force on proclamation. As currently drafted, this section would allow a surviving married spouse to make a claim against the estate of their deceased spouse under the *Matrimonial Property Act* for a

¹ SA 2010, c. W-12.2

² RSA 2000 c. D-10.5

³ RSA 2000 c. I-10

⁴ RSA 2000 c. S-28

⁵ RSA 2000 c. W-12

⁶ RSA 2000, c. A-2

⁷ SA 2003, c. F-4.5

⁸http://justice.alberta.ca/programs_services/wills/Publications/TransitionalChart.aspx/DispForm.aspx?ID=6

⁹ RSA 2000, c. M-8

division of the matrimonial property accumulated during the marriage. This claim is in addition to any property or other benefit received by the surviving spouse under a will or on an intestacy of the deceased spouse.

The proclamation of this section has been postponed pending further consideration by the Government.

INTERPRETATION AND APPLICATION

Section 2 of the Act confirms the paramountcy of the Dower Act¹⁰ over the provisions of Part 2 or 3 of the Act regarding a spouse's rights in respect of property after the death of another spouse. This was discussed by Mr. Justice Lee of the Alberta Court of Queen's Bench in the decision of *Nelson Estate*¹¹.

Under Section 4 of the Act every lawyer who acts on behalf of a party to a contested application has a duty to discuss alternative methods of resolving matters and to inform the party of the availability of collaborative processes, mediation facilities and other justice services that might assist the parties in resolving those matters. This requirement echoes a similar requirement placed upon litigants in the Rule 1.2 of the Alberta Rules of Court¹².

WSA Part 1 SURVIVORSHIP

The Act repeals the old *Survivorship Act*¹³ which provided that where two or more people died at the same time and it was unclear who died first, it was presumed that the older person died first.

Under Section 5 of the WSA, when two or more individuals die at the same time or in circumstances where it cannot be determined who survived the other, then, in the absence of the Court finding a contrary intention, all rights and interests of each of the individuals with respect to property must be determined as if that individual has predeceased the other.

Section 5(2) applies to property held as joint tenants by two or more individuals who all die at the same time or in circumstances where it cannot be determined who survived the other. Unless there is a contrary intention, the individuals are deemed to have held the property as tenants in common with each other.

One must be aware of these new provisions in drafting a will for a prospective testator in order to take into account their intentions for the distribution of their estate in the event such a circumstance might arise. This is particularly relevant in drafting a will for a couple that have children from a previous relationship.

Section 5 of the Act applies to deaths occurring on or after the date of proclamation.

The abolition of the provisions of the old *Survivorship Act* raises the question of whether the standard thirty day survivorship clause that appears in many wills should no longer be used. In her November 2011 LESA paper Helen R. Ward¹⁴ addresses the question of what advice we should give

¹⁰ RSA 2000, c. D-15

¹¹ 2013 ABQB 15

¹² Alta Reg 124/2010

¹³ Supra note 4

¹⁴ Helen R. Ward, *Other Changes to Wills & Estates Practice under the WSA Looking for Loopholes; Drafting for Change: Some Drafting Considerations Arising from the Wills and Succession Act*, prepared for the Legal Education Society of