

# Major Changes to Wills Law in 2012

## The *Wills and Succession Act* and Amendments to the *Matrimonial Property Act*

The *Wills and Succession Act* was passed by the Alberta Legislature in the fall of 2010 and is expected to be proclaimed in force in February 2012. The legislation will have a significant impact on all wills and estate planning in the province of Alberta. The *Matrimonial Property Act* has also been amended to allow a surviving spouse to make a claim for division of matrimonial property on death and will be proclaimed in force at the same time as the *Wills and Succession Act*.

Many of the changes have been made to cure historical obstacles in estate law that have developed over hundreds of years of British and Canadian statutory and case law. The *Wills and Succession Act* is a modernization of wills law to better reflect today's society. Note however, that the legislation could have a significant effect on your estate plan and we recommend that you have your will reviewed.

### The *Wills and Succession Act* – An Overview

The *Wills and Succession Act* will repeal and replace a number of statutes that deal with inheritance laws and combine them into one Act. The guiding principles of the new legislation are:

- A. A person is free to transfer his or her property to others upon death and any interference with a person's wishes in this regard must be justified.
- B. A person's freedom to transfer property on death is subject to satisfying the person's legal and family support obligations.
- C. If a person does not formally indicate how his or her property is to be distributed upon death, it is presumed the person wants it to go to family members.

### Terminology used in this Article

"Adult Interdependent Partner" is the Alberta term for a common-law spouse as defined in the *Adult Interdependent Relationships Act*. A person is an adult interdependent partner if he or she has lived with the other person in a relationship of interdependence:

- for a continuous period of not less than 3 years, or
- of some permanence, if there is a child of the relationship by birth or adoption, or
- if the person has entered into an adult interdependent partner agreement with the other person.

Adult interdependent partners have almost all of the rights of legal spouses, but do not have rights under the *Matrimonial Property Act* or dower rights.

"Spouse" means a person who is legally married to another person.

## Summary

The following is a summary of the major changes to the law once the new legislation is declared in force:

- **Matrimonial Property**
  - A surviving spouse will be entitled to make a claim against the estate of the deceased spouse under the *Matrimonial Property Act* for a division of the matrimonial property accumulated during their marriage. Previously, only divorcing or separated spouses could make such a claim against the estate.
  - A surviving spouse will be entitled to receive all property given to him or her under the will of the deceased in addition to his or her claim under the *Matrimonial Property Act*. This is a critical point to be reviewed under your current will.
  - If you have not left your entire estate to your spouse, and if it is your intention that a portion of your estate pass to your children, particularly an interest in a family business or family farm, it is critical that you review your estate plan.
  
- **Temporary possession of matrimonial home**
  - A surviving spouse or adult interdependent partner will have the temporary right to possession of the family home for 90 days after the date of death, even though the home might be owned by another person or it was a rented premises. For example, this includes a residence owned in joint tenancy with the deceased and another person.
  
- **Dependants Relief claims**; now called “family support” claims
  - Under the old legislation (*Dependants Relief Act*), a spouse, adult interdependent partner, minor child and disabled adult child were entitled to make a claim for a greater share of the estate if the deceased did not adequately provide for the dependant in the will. This law remains relatively unchanged but there are two new categories of dependants added:
    - Adult children under the age of 22 years who are in full-time attendance at school, if the deceased was supporting the child at the time of death.
    - A minor grandchild or great grandchild of the deceased will now be able to apply for support from their grandparent’s or great grandparent’s estate if the deceased was standing in the place of the child’s parent when the grandparent or great grandparent died.
  
- **Intestacy**
  - For persons dying without a will, the entire estate will now pass to the surviving spouse or adult interdependent partner if the children of the deceased are all children of that relationship.
  - If there are children of the deceased from another relationship, however, the surviving spouse or adult interdependent partner will be entitled to a preferential portion of the estate, (one half or \$150,000, whichever is greater) with the remainder being divided amongst the children.
  
- **Wills**
  - Divorce after February 2012 will revoke that portion of the will leaving a share of the estate to the ex-spouse unless there is a contrary intention in the will.

- Similarly, a former adult interdependent partner will not be entitled to gifts under a will unless there is a contrary intention in the will.
  - Marriage will no longer revoke a will.
  - The court will have the power to validate a will even though the formal requirements for signing a will have not been complied with. There must be clear and convincing evidence to demonstrate the intent of the deceased.
  - The court will have the power to allow a minor to make a will.
  - Under the previous legislation, a gift to a beneficiary in a will was void, if the beneficiary or their spouse or adult interdependent partner witnessed the will. Under the new legislation, that beneficiary can apply to the court to validate the gift if it can be demonstrated that the witness did not unduly influence the testator.
- **Advances**
    - Gifts to children, grandchildren, spouses or adult interdependent partners might be deducted from a beneficiary's share of the estate. For example:
      - If a parent makes a gift to a child to help him or her buy a house, the amount of that gift might be deducted from that child's share of the estate if the parent intended it to be an advance on the child's inheritance.
      - it might be argued that farm land owned in joint tenancy with a child should be deducted from that child's share of the estate.
      - shares of the family business transferred to the business child might be deducted from that child's share of the estate.
    - A clear statement of the parent's intention should be included in the will to avoid litigation in the estate over the issue.
- **Survivorship**
    - The old law provided that if two people die in a common accident and it is uncertain who died first, the youngest was deemed to survive. The new law will provide that the beneficiary will be deemed to predecease the other, so that the property will pass to surviving beneficiaries. Also, a joint tenancy will be severed in the event of simultaneous death of the joint owners, in which case the property will be divided between the estates of the two owners.

If you have any questions about the effect of this new legislation on your estate plan, please call one of the lawyers in our [Estates and Trusts Practice Group](#)