

ALERT: IMPORTANT CHANGES TO ALBERTA WILLS AND ESTATE LAW

Alberta's new *Wills and Succession Act* ("WSA") came into force on February 1st, 2012, replacing the *Wills Act*, *Dependants Relief Act*, *Intestate Succession Act*, *Survivorship Act* and s. 47 of the *Trustee Act*, bringing significant changes to succession law and estate administration in Alberta. The WSA also contains major amendments to the *Matrimonial Property Act*, but these were not implemented on February 1st following concerns raised by the legal profession. However, these amendments are expected to come into force at some point in the future, in one form or another.

Individuals who have previously done a Will and those who have yet to prepare a Will should consider how their own estate plan is affected by the following changes:

The Effect of Marriage or an AIP Agreement on Revocation of Wills

Marriage, or the entrance into an adult interdependent partnership agreement, will no longer revoke a Will, unless a contrary intention is expressed in the Will.

Adult interdependent partners ("AIP"s) are those who have (a) cohabited for at least three years in a relationship of interdependence, or (b) cohabited in a relationship of some permanence if there is a child of the relationship, or (c) entered into an AIP agreement.

The Effect of Divorce or Separation of AIPs on Wills

The WSA drastically changes the impact of divorce on one's Will. Unless a contrary intention is stated in the Will, the WSA deems a former spouse or AIP to have predeceased the Will maker, for the purpose of gifts and appointments. The effect is that the former spouse or AIP will not act as Executor, Trustee or Guardian and will not receive any gift under the Will.

Note that a one-year separation is generally required to end an AIP relationship. The separation of married spouses for any period does not affect a Will; no change occurs until the divorce is finalized.

These provisions do not apply to beneficiary designations on RRSPs, RRIFs, other investments, pensions or life insurance that name a former spouse or AIP as beneficiary. These designations must still be changed to prevent the ex-spouse or former AIP from receiving the asset.

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Family Support/Dependants' Relief Claims

Two new classes of dependants (now referred to as “family members”) have been added to the WSA: (1) adult children of the deceased under the age of 22 years who are in school full time, and (2) minor grandchildren or great grandchildren of the deceased who depend on the deceased such that the deceased stood in place of their parent. This is an addition to the current classes of persons who can apply to vary the provision made for them under a Will or on intestacy (where there is no Will), which includes: (1) a spouse or AIP; (2) a minor child of the deceased; and (3) an adult child of the deceased who is unable to earn a livelihood as a result of a mental or physical disability. The provision for the family member can be varied, if the court considers it appropriate.

A spouse or AIP now has the right to stay in the deceased's home for three months (or longer with a court order) after the deceased dies, if he or she is not named on title to the property or on the lease. The estate must bear the costs during this 90 day period.

Matrimonial Property Claims

The proposed changes to matrimonial property rights will affect anyone who is not leaving their entire estate to their spouse. If implemented, a surviving spouse will be entitled to claim his or her share of the matrimonial property from the deceased's estate (presently allowed only if the spouses were separated before the death). The matrimonial property claim is in addition to any family support claim the spouse may have, and the calculation includes life insurance and other “non-estate” property which has passed to others (such as RRSPs, RRIFs, TFSAs, pensions, etc. with named beneficiaries). Under the proposed changes, a spouse would receive gifts under the Will in addition to his or her matrimonial property claim, unless the Will provides otherwise.

It is anticipated that the underlying principles reflected in these proposals will eventually be enacted, although the mechanics of the claim are not certain. The changes will affect all Wills upon coming into force.

Note: a matrimonial property claim may not be made by an AIP.

Advances to Beneficiaries

The WSA abolishes certain common law rules relating to payments and gifts to beneficiaries during the deceased's life. It remains very important to clearly state whether such advances are to be taken into account when dividing the estate. Amounts to be repaid must be properly documented.

Survivorship Presumptions

Where two people die at or around the same time and it is not possible to tell which person was the survivor, each of them will be presumed to have died before the other, unless the Will states a contrary intention. Each person's estate will pass to his or her alternate beneficiaries. Any property held by the deceased individuals as joint tenants will be deemed to be held as tenants in common, so a one-half interest will pass to each person's own estate.



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Distribution of Estates on Intestacy

Under the WSA, if a person dies without a Will leaving a spouse or AIP and all the children of the deceased are from that relationship, the spouse or AIP takes the entire estate. If the deceased has children from another relationship, the spouse or AIP gets a preferential share (the greater of \$150,000 and ½ of the estate residue) and the children receive the remainder of the estate.

If there is a spouse and AIP, they split the preferential share (if there are children) or they split the entire estate equally (if there are no children).

A spouse will be disinherited if separated from the deceased for at least two years, or where there is a court declaration of irreconcilability, or a court order or agreement intended to permanently finalize the marital affairs.

The priority of other family members to share in the estate has also changed where the deceased leaves no surviving spouse, AIP or children.

Expanded Court Powers

In some circumstances the court may now validate or rectify a Will which is unclear or does not meet formal Will requirements. Executors, beneficiaries and others claiming an interest in an estate should consult a lawyer if the Will has been improperly prepared or is unclear.

This is a general overview of the many changes under Alberta's new *Wills and Succession Act*. If you would like assistance regarding your own personal estate planning situation, please contact any of the following lawyers in our Private Client Services group:

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