

Making a Will Update

This update is to be used in conjunction with the Centre for Public Legal Education Alberta's Booklet *Making A Will*.

You should **not** rely on this booklet for legal advice. It provides general information on **Alberta law only**.



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Introduction

In February 2012, Alberta's *Wills Act* will be changed to the Alberta *Wills and Succession Act* ("WSA"). This new Act will do several things, including:

- changing many long-standing legalities around Wills;
 - merging many laws into this one Act (for example: the *Wills Act*, the *Intestate Succession Act*, the *Dependants' Relief Act*, s.47 of the *Trustee Act*, and the *Survivorship Act*); and
 - bringing some of Alberta's laws in line with what already exists in other provinces.
- The Legal Resource Centre's booklet, *Making a Will*, will be updated to reflect these changes, but, until that time, this insert provides a brief summary of some of changes related to creating a Will.

Anyone who is currently thinking about writing a Will needs to understand these changes and make decisions accordingly. People who already have Wills need to consider how these changes may affect their Wills and whether that means they need to write new Wills.

The principles that led to the changes

The Government of Alberta cites three principles that guided the changes in Wills law. They are:

- a person is free to transfer his/her property to others upon death and any interference with a person's wishes in this regard must be justified;
- if a person does not formally indicate how his/her property is to be distributed on death, it is presumed that the person wants it to go to family members (this is not entirely new, but it has been clarified and additional family structures have been included); and
- a person's freedom to transfer property on death is subject to satisfying the person's legal and family support obligations (this is not entirely new, but it has been clarified and additional obligations have been included).

Changes in the law about what happens when a person dies without a Will (“intestacy”)

The old law, called the *Intestate Succession Act*, set out a schedule of relatives who could inherit the estate. Here is a summary of the key points:

- If the value of the estate was less than \$40,000 and there was a spouse and children, then the spouse would inherit the whole estate.
- If the estate was worth more than \$40,000 and there was a spouse and children, then the spouse would get the first \$40,000 and split the rest with the children, in shares that depended on the number of children.
- If there was no spouse and no children, then the estate would go to other relatives in an order set out in the law.
- If there was no spouse and no blood relatives, then another Alberta statute, the *Unclaimed Personal Property and Vested Property Act*, set out who received the estate.

The new rules (which are included in the *WSA*) will be different.

- If the deceased has a surviving spouse or adult interdependent partner (AIP), *and* any surviving children who are also children of that surviving spouse/AIP, the whole of the estate goes to that surviving spouse/AIP, except in specific circumstances of separation and cases of dependent adult children.
- However, if the deceased has surviving children from a *different* person, the surviving spouse/AIP only receives a portion of the estate (the greater of either the amount stated in the law at the time of death or 50% of the estate), and the rest of the estate goes to the deceased’s descendants.
- If there is a surviving spouse *and* a surviving AIP, all or some of the estate will be divided between them (depending on whether there are also children and/or

grandchildren involved.)

- If there is no surviving spouse or AIP, but the deceased had children, the estate will be divided among the surviving children, and potentially also the grandchildren (if the parent, who is a child of the deceased, died before the deceased).
- If there is no spouse or AIP and no children, then the estate will go to other relatives in an order set out in the *WSA* which is a different order than under the old rules.
- If there is no spouse and no blood relatives, then the *Unclaimed Personal Property and Vested Property Act* still comes into play and its rules remain the same. According to this Act, if a person dies without a Will, after two years from the date of the grant of administration, the Administrator must give the provincial government any portion of the estate not claimed by a valid heir. The provincial government must keep this unclaimed personal property, or its equivalent value, for ten years. During the ten-year period, a valid heir could still come forward to claim the property. After the ten-year period has passed the property belongs to the government.

Changes in survivorship

Survivorship is the question of “who died first”.

Survivorship is important in situations when, for example, multiple family members die in the same accident. Under the old rules (which were in a law called the *Survivorship Act*), if the circumstances were such that it could not be figured out who died first, the law deemed that the oldest died first.

Under the *WSA*, every person’s Will, for the purposes of distributing the property, will be interpreted as if the other person/people died first. In addition, if the people in question owned property in joint tenancy, that property will now be treated as if it had been held in tenancy in common.

Changes in relation to marriage, divorce, and the start or end of adult interdependent relationships

Under the old rules, marriage (as well as the start of an adult interdependent relationship) generally revoked a previous Will. Divorce, on the other hand, did not. Neither did the end of an adult interdependent relationship. Under the new *WSA*, marriage does not revoke a Will. Neither does a divorce, or the start or end of an adult interdependent relationship.

In addition, under the *WSA*, a divorce, or the end of an adult interdependent relationship, that occurs *after* the *WSA* comes into force (February 2012) will revoke a gift to the ex-spouse/interdependent partner, unless the court can find an intention that the gift was not meant to be revoked. In other words, the whole will will not be revoked, but certain gifts may be revoked.

Wills by minors

There is no longer an automatic right for a minor who has children to make a Will. However, there is now the ability for any minor to make a will if that minor has the permission of the Court.

Changes to the situation where a beneficiary cannot take the gift left by the Will

Under the old rules, if a beneficiary could not take a gift (for example, if the beneficiary died before the deceased), the gift went to the named alternate beneficiary (and then the next, if the second could not take the gift either). If none of the named alternate beneficiaries could take the gift, that gift went into residue of the Will.

This has now changed somewhat. Now, the gift will go first to an alternate beneficiary (or second, third, etc, if required). If none of the named beneficiaries can take the gift, then the gift goes to descendants (not including the spouse/partner) of the intended beneficiary if the beneficiary is a descendant; then to residual beneficiaries.

Changes to family maintenance and support

In most cases, you are free to deal with your property as you wish. However, the law has always placed some limits on that freedom. Under the old rules (in the form of the old *Dependents' Relief Act*, certain dependent individuals could bring a claim against the estate if they were not adequately provided for under the Will.

Under the new rules in the *WSA*, this is still true, but additional obligations (reflecting changing family structures) have been included. Under the *WSA*, dependants include:

- children, including adopted children, and a widow or widower
- minor and disabled adult children, and adult children under 22 who are going to school (if the deceased was supporting the child at the time of the death); and
- a minor grandchild or great-grandchild, if the deceased was acting like a parent to that grandchild/great-grandchild at the time of death.

New court powers

The new *WSA* grants powers allowing a Court to correct or validate Wills and documents purporting to be Wills. In addition, courts can now waive certain requirements, if the Court decides that it is correct to do so. Part of making such decisions includes a new ability for the court to hear extra, outside evidence about the intent of the Testator. Such outside evidence could, amongst other things, result in courts:

- waiving the requirement of a signature;
- adding words if there is clear evidence of intent; and/or
- allowing a beneficiary who witnessed the Will to receive the gift left to him/her in Will (which is normally not allowed).

It is important to note that courts are under no obligation to either hear outside evidence or waive requirements. In addition, courts will not lightly engage in such actions. As a result, it is best to continue ensuring that formalities are met.

Conclusion

The new *WSA* brings in other, smaller changes as well, including getting rid of some of old common law rules. These affect matters such as gifts to children who already received a large financial gift and gifts to debtors.

Given all of the above changes, whether you are writing Will for the first time or re-writing a Will, you may benefit from consulting an experienced lawyer.

Matrimonial property on death

Note: The laws on this issue were also set to change on February 1st, 2012. They have now been delayed. It is unknown when they will pass.

Under Alberta's *Matrimonial Property Act*, when a married couple divorces, the default starting position is that each partner is entitled to 50% of the property acquired by that couple during the marriage.

Under the current rules, no similar division occurred for couples in which one of the spouses died. Therefore, if a Will stated that the spouse got, for example \$1,000, that is all that the spouse is entitled to, no matter how long they were married (assuming the spouse was not a "dependant" of the deceased). But for that same couple, if there had been a divorce instead of death, the spouse would have been entitled to 50% of the property acquired by that couple during the marriage.

In the future, the *WSA* will change. As a default starting position, all spouses will be entitled to 50% of the property acquired by that couple during the marriage, whether that marriage is ended by divorce or by death. This has been the law in some other parts of Canada for some time.

For most married couples, this is not an issue, as most married couples leave all of their property to each other when they die. A right to claim such "matrimonial property" only comes into play when the surviving spouse ends up worse off than s/he would have been had there been a divorce. For other married couples, however, particularly those who have had multiple marriages this will be a major change. For example: in a second marriage, spouses may decide to only leave a certain amount to one another (say \$10,000), and leave the rest to their respective children from their first marriages. Assuming for the moment, however, that during that second marriage, the couple acquired property worth \$100,000, the surviving spouse will be entitled to at least 50% of that \$100,000 (so \$50,000, which can end up in other beneficiaries receiving less). In addition, the spouse might also be entitled to the \$10,000 gift.

Again, these laws have been delayed and will *not* come into force on February 1st, 2012.