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Controversial Legislative Amendments on Ice

by Farha Salim

On February 1, 2012, the new *Wills and Succession Act* ("WSA") came into force, consolidating succession legislation in Alberta. The legislation – as originally unveiled - included significant amendments to portions of the *Matrimonial Property Act* ("MPA"): allowing a surviving spouse to make a claim for matrimonial property upon the death of a spouse, irrespective of whether or not there was a marital breakdown prior to death. However, amidst a firestorm of criticism, the matrimonial property amendments were not proclaimed into force on February 1, 2012. The Alberta Government has now confirmed that the matrimonial property amendments will not be proclaimed in force at this time, but that the proposed amendments will be reviewed further.

So, what does this mean for married Albertans? What rights does the surviving spouse have to matrimonial property on the death of a spouse?

Proposed changes

The controversial amendments would have allowed a surviving spouse to claim his or her share of matrimonial property in addition to his or her entitlement under a Will or on intestacy (where there is no Will). The proposed changes attempted to address the concern that a happily married surviving spouse has less right to an equitable distribution of matrimonial property on the death of his or her spouse, than he or she would have on a breakdown of the marriage.

Many were concerned that the proposed amendments would allow surviving spouses to "double dip," which could create surprising and unintended results for many Albertans. A surviving spouse could make a matrimonial property claim, accept any property that is awarded to him or her in the matrimonial property order, and also take his or her distribution under the Will or on intestacy. This could result in a surviving spouse's entitlement exhausting the assets of an estate, thereby excluding a testator's other intended beneficiaries, such as children from a prior relationship, common law partners, and charitable beneficiaries. It could also thwart a testator's estate plan in respect of a family business or family farm operation where the business operation was intended to be passed along to the next generation.

Others felt that allowing a surviving spouse to make a matrimonial property claim was inherently fair: a testator cannot give away what he or she does not own, and matrimonial property is property that is shared by the surviving and deceased spouses.

The current law

A surviving spouse can only make a claim for division of matrimonial property on death if such a claim could have been initiated prior to death: that is, if there was a breakdown of the marriage prior to death. Also, even where the circumstances allow the Court to make a matrimonial property order, the Court, in making the Order, is directed to take into consideration any benefit received by the surviving spouse as a result of the death of the deceased spouse. However, a surviving spouse is still able to advance a claim for a greater share of a deceased spouse's estate by claiming family maintenance and support under Part 5 of the *Wills and Succession Act* (previously known as dependants' relief in Alberta), and by making other common law claims in certain circumstances. Of course, where a testator leaves all of his or her estate to a surviving spouse in a Will, the matrimonial property provisions will be of little or no concern to a surviving spouse in any event.

It is expected that Alberta will enact legislation to deal with this issue at some future date. However, at this stage, it is not certain how the legislation will change or when any changes may come into force. Until then, it is recommended that all Albertans prepare a Will which gives effect to their wishes with the assistance of a lawyer who understands how their wishes may be impacted by current

legislation, and that any estate planning is undertaken with a view to revisiting that planning if and when legislative changes are brought into force.