

1967 Bill 93

Fifth Session, 15th Legislature, 15 ~~Elizabeth II~~

THE LEGISLATIVE ASSEMBLY OF ALBERTA

BILL 93

An Act respecting the Surrogate Courts

THE ATTORNEY GENERAL

First Reading

Second Reading

Third Reading

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BILL 93

1967

An Act respecting the Surrogate Courts

(Assented to _____, 1967)

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Alberta, enacts as follows:

1. This Act may be cited as *The Surrogate Courts Act*.

2. In this Act,

- (a) "administration" means letters of administration of the property of deceased persons, whether with or without the will annexed and whether granted for general, special or limited purposes;
- (b) "clerk" means the clerk of the court in and for a judicial district and includes a deputy clerk;
- (c) "contentious business" means
 - (i) the proving of a will in solemn form, and
 - (ii) proceedings in which the right to obtain or retain a grant of probate or administration is in dispute;
- (d) "court" means a court constituted by this Act;
- (e) "grant" means a grant or a resealing of probate, administration or letters of guardianship issued by the district court before the commencement of this Act or by a surrogate court;
- (f) "judge" means a Chief Judge or judge of a surrogate court;
- (g) "non-contentious business" means any business pertaining to probate or administration of the property of deceased persons but does not include contentious business;
- (h) "Rules" means the surrogate court rules;
- (i) "testamentary matters and causes" includes all matters and causes relating to the grant or revocation of probate or of administration;
- (j) "trustee" means a trustee under a will;
- (k) "will" includes "testament" and any other testamentary instrument of which probate may be granted.

Explanatory Notes

1. This Bill will establish separate courts having jurisdiction over the administration of estates and guardianship of infants. This jurisdiction is presently exercised by the district courts. The new court is established mainly for purposes of administrative convenience and the judges and officers of district courts will act as the judges and officers of the surrogate courts.

2. Definitions.

3. There shall be in and for the Province two courts of record, one with the name "The Surrogate Court of Northern Alberta" and the other with the name "The Surrogate Court of Southern Alberta".

4. (1) The Chief Judge and the other judges of the District Court of the District of Northern Alberta shall be the Chief Judge and judges of The Surrogate Court of Northern Alberta.

(2) The territorial limits of The Surrogate Court of Northern Alberta shall be the same as those of the District Court of the District of Northern Alberta.

5. (1) The Chief Judge and the other judges of the District Court of the District of Southern Alberta shall be the Chief Judge and judges of The Surrogate Court of Southern Alberta.

(2) The territorial limits of The Surrogate Court of Southern Alberta shall be the same as those of the District Court of the District of Southern Alberta.

6. (1) No surrogate court judge shall enter upon the duties of his office until he has taken an oath in the following form before the Lieutenant Governor, the Chief Justice of Alberta, a judge of the Supreme Court or some other person appointed by the Lieutenant Governor to administer it:

I,....., solemnly and sincerely promise and swear that I will duly and faithfully and to the best of my skill and knowledge exercise the powers and trusts reposed in me as.....of The Surrogate Court of..... Alberta. So help me God.

(2) There shall be paid to each judge such salary as may be prescribed by the Lieutenant Governor in Council.

7. (1) If a judge

- (a) dies, or
- (b) retires or resigns his office, or
- (c) is transferred to another court, or
- (d) is absent through illness, or
- (e) for any other cause is unable to perform the duties of his office,

the remaining judges constitute the court.

(2) Where a judge has retired, resigned his office or has been appointed to another court, and a cause that has been fully heard by the judge stands for judgment, he may within six weeks after his retirement, resignation or appointment to another court give judgment therein as if he were still a judge of the court and any such judgment is of the same force and validity as if he were still a judge of the court.

3. Establishment of the surrogate courts.

4. Judges of The Surrogate Court of Northern Alberta.

5. Judges of The Surrogate Court of Southern Alberta.

6. Oath of office and salary.

7. Effect of changes in the membership of the courts.

(3) Where the judge before whom any matter or proceeding under this Act is tried

- (a) dies before disposing of it, or
- (b) having heard it has not disposed of it within six months thereafter, or
- (c) has retired or resigned or has been appointed to another court and the six week period referred to in subsection (2) has expired,

any party may, upon notice to all other parties, apply to the Chief Judge for an order that the matter or proceeding be reheard by such judge as he designates.

(4) An order made under subsection (3) shall name the place where the matter or proceeding is to be reheard and, in making the order, the Chief Judge may give such other directions as he considers fit.

(5) Upon the rehearing, the evidence, exhibits and papers used at the hearing shall be read and, after argument by counsel, the presiding judge shall deal with the action as on an original hearing.

8. (1) In and for each judicial district, the clerk and deputy clerk of the district court are the clerk and deputy clerk respectively of the surrogate court.

(2) A clerk of the surrogate court shall perform all the duties with respect to the surrogate court that a clerk of the Supreme Court is required to perform with respect to the Supreme Court under any Act or rule of court relating thereto so far as the Act or rule applies to the surrogate court.

(3) The clerk of the court shall

- (a) file and preserve all original wills of which probate or administration with the will annexed are granted and all other papers used in matters in the court in his judicial district, subject to the Rules,
- (b) upon payment of the fee prescribed by the Rules, issue official copies of the whole or any part of a will of which probate or administration with the will annexed is granted, or grants of probate or administration.

(4) The office of a clerk is a depository for the wills of living persons given to him for safekeeping and the clerk shall receive, keep and return them in accordance with and subject to the Rules.

(5) A clerk of a court shall not

- (a) for profit or reward draw or advise upon any will or any paper or document connected with the duties of his office, or
- (b) collect a fee for any service performed by him that is not expressly allowed by the Rules or any other Act, or

8. Functions and duties of the clerks of the surrogate courts.

- (c) become a surety to any bond given in connection with any grant.

9. The sherriffs in the respective judicial districts

- (a) subject to the Rules, shall serve and execute, both within and without the territorial limits for which they are appointed,
 - (i) all statements of claim, citations, notices, writs, summonses and orders, and
 - (ii) all the sentences, decrees, judgments, rules, warrants, commands and processes, of the surrogate court, and
- (b) shall make all returns of them together with the manner of the execution thereof, to the said court, and
- (c) shall perform all duties,

as they are required by law, order or regulation to do with relation to statements of claim and similar writs, summonses, orders, sentences, decrees, judgments, rules, warrants, commands and processes of and duties in the Supreme Court.

10. All statements of claim, citations, notices, writs, summonses, orders, decrees, judgments, rules, warrants and legal processes of every nature and kind that under any law, order or regulation can be issued out of or by the surrogate courts shall until otherwise provided be issued out of the offices of the clerks and acting clerks of the Supreme Court and out of the offices of the sheriffs of the judicial district according to the law, order or regulation governing them.

11. (1) The sittings of the court shall be held in each judicial district at the times specified by the Lieutenant Governor in Council or at such other time as a judge of the court may determine.

(2) Each surrogate court shall have and use as occasion requires in each judicial district the seal which may be authorized by the Lieutenant Governor in Council.

Jurisdiction

12. (1) A surrogate court has jurisdiction and authority in relation to testamentary matters and causes, the issuing or revoking of grants of probate and administration and all matters arising out of or connected with the issue or revocation of grants of probate and administration.

(2) With respect to all matters within its jurisdiction, a surrogate court and the judges and officers thereof respectively have and may exercise all the powers of the Supreme Court and of the judges and officers thereof.

9. Functions and duties of the sheriffs of the various judicial districts with respect to the surrogate courts.

10. Offices of the Supreme Court to be used as offices of the surrogate courts.

11. Sittings of courts.

12. Surrogate courts given jurisdiction in estate matters.

(3) Nothing in this Act affects the jurisdiction of the Supreme Court in matters within the jurisdiction given by subsection (1) to the surrogate courts.

13. (1) In all matters or applications touching or relating to the appointment, control or removal of guardians, the security to be given, the custody, control of or right of access to an infant and otherwise, the surrogate court has the same powers, jurisdiction and authority as are given by *The Judicature Act* to the Supreme Court or a judge thereof.

(2) Letters of guardianship granted by a surrogate court have the same force and effect as if issued by the Supreme Court or a judge thereof, and an official certificate of the grant may be obtained as in the case of letters of administration.

(3) This section shall not be construed as depriving the Supreme Court of jurisdiction in such cases.

(4) In matters of guardianship, a court has jurisdiction in respect of the person or property, or both, of an infant if the infant resides or has property within the territorial limits of the court.

14. (1) Where a person resident in the Province dies, the court within whose territorial limits the deceased has his place of residence at the time of his death has jurisdiction in respect of his property.

(2) Where a person is not a resident of the Province at the time of his death, the court has jurisdiction in respect of his property if the deceased had at the time of his death any property within the territorial limits of the court.

(3) Subject to the Rules, where a court has jurisdiction by reason of the fact that the deceased at the time of his death resided or the infant resides within its territorial limits, and application for a grant shall be made in the judicial district within which the deceased at the time of his death resided or the infant resides, as the case may be.

(4) Subject to the Rules, where a court has jurisdiction by reason of the fact that the deceased had at the time of his death, or that the infant has, property within the territorial limits of the court, an application for a grant may be made in any judicial district within which property was or is situated, as the case may be.

15. A surrogate court as regards all causes of action within its jurisdiction

(a) shall grant in a proceeding before the court such relief, redress or remedy or combination of remedies either absolute or conditional, and

(b) shall in each such proceeding give such and the like

13. Surrogate courts given jurisdiction in guardianship of infants.

14. Manner of determining which court has jurisdiction.

15. Duty of courts to grant relief.

effect to each ground of defence or counterclaim legal or equitable, in as full and ample a manner as might and ought to be done in a like case by the Supreme Court.

16. A grant made by a court having jurisdiction is effective throughout the Province.

Practice

17. (1) Except as otherwise provided by this Act or the Rules, the practice, procedure and rules of the Supreme Court, including the course of proceedings and practice in chambers, so far as they are applicable and consistent with this Act and the Rules, apply to proceedings in a surrogate court.

(2) The rules of law concerning evidence observed in the Supreme Court apply to and shall be observed in the surrogate courts in the trial of questions of fact.

(3) The court may

- (a) require the attendance of parties and witnesses and order the production of documents and other papers or writings before it or as it directs and for the purpose may issue any order, writ or subpoena or warrant,
- (b) examine or cause to be examined parties and witnesses orally upon oath or affirmation, as the case requires, or in lieu thereof or in addition thereto, by interrogatories, or receive their evidence by affidavit, and
- (c) summon a person named as an executor of a will to prove or to refuse to prove the will and to bring in inventories and do every other thing necessary or expedient concerning it.

18. (1) Whether an action or proceeding regarding the estate of a deceased person is pending before it or not, the court may, on summary application, order a person to produce and bring before or deposit with the clerk, or otherwise as the court directs,

- (a) any paper or writing being or purporting to be testamentary, or
- (b) any document or evidence of title relating to the securities, contracts or assets of the deceased, or
- (c) any personal property of the deceased,

that is shown to its satisfaction to be in the possession or under the control of that person.

(2) Where it is not shown that the paper, writing, document, evidence of title or personal property is in the possession or under the control of the person but it is shown that there are reasonable grounds for believing that he has

16. Grants have Province-wide effect.

17. Practice and procedure of the courts.

18. Production of documents may be ordered.

knowledge thereof, the court may direct him to attend for the purpose of being examined in court or before the clerk or such other person as the court directs, or upon interrogatories, and if so ordered, to produce and bring in the paper, writing, document, evidence of title or personal property.

(3) On default of compliance with an order made under subsection (1) or (2), the person to whom the order is directed is subject to the like process as he would have been subject to if he were a party to an action in the court and made such a default, and the costs of the proceedings shall be in the discretion of the court.

19. The powers of the Supreme Court to issue commissions and make orders for the examination of witnesses in actions pending therein, and the provisions of law for enforcing examination and production applicable thereto and to the witnesses examined, extend and are applicable to the surrogate courts and to the examination of witnesses under the commissions and orders of those courts.

20. (1) A surrogate court has the like powers as those possessed by the Supreme Court of enforcing its judgments and orders in any part of Alberta, and may issue the like process as may be issued out of the Supreme Court and the same have the like force and effect as process issued out of the Supreme Court.

(2) A surrogate court may punish any person by fine or imprisonment or both for wilful contempt of or resistance to its process, Rules or orders but the fine shall not in any case be more than \$500 nor shall the imprisonment be for a term of more than six months.

Removal of Cases to Supreme Court

21. (1) A judge of the Supreme Court or of the surrogate court may order that any business in a surrogate court be removed to the Supreme Court for determination if

- (a) he considers it of such a nature and of such importance as to render it proper that it should be determined by the Supreme Court, and
- (b) the amount in issue or value of the property in issue exceeds \$3,500 in value.

(2) The judge making the order may impose such terms as to payment of or security for costs or otherwise as he considers just.

(3) The Supreme Court may determine and otherwise deal with the cause or proceeding in the same manner as any cause or proceeding originally commenced before it.

(4) The final order or judgment of the Supreme Court shall be transmitted together with all papers to the clerk of

19. Evidence on commission may be authorized.

20. Enforcement of judgments and orders of the courts.

21. Removal of cases to the Supreme Court.

the surrogate court in the judicial district from which the cause or proceeding was removed and upon being entered also becomes the judgment or order of the surrogate court.

Appeals to the Appellate Division

22. (1) Any party or person taking part in proceedings may appeal to the Appellate Division of the Supreme Court from any order, determination or judgment of a surrogate court or a judge thereof in any matter of cause if the value of the property affected by the order, determination or judgment exceeds \$500.

(2) Where an appeal is taken, the surrogate court judge shall upon application of the appellant order all proceedings in the matter to be stayed upon such terms as he sees fit.

(3) Subject to this section, the rules of the Supreme Court pertaining to appeals to the Appellate Division apply to appeals under this section.

(4) The notice of an appeal under this section shall be given within 30 days but the 30-day period may be extended by a judge of the Appellate Division either before or after it has expired.

(5) Upon receiving a certificate from the registrar of the Appellate Division that a notice of appeal has been filed, the clerk of the surrogate court shall forthwith, at the expense of the appellant transmit to the registrar all documents, instruments, affidavits and papers in his possession and relating to the estate concerned together with the order, determination or judgment appealed from

(6) The registrar of the Appellate Division shall, upon the issue of the judgment in the appeal, return the documents, instruments, affidavits, papers and orders, determination or judgment to the surrogate court from which they were transmitted together with a certified copy of the judgment of the Appellate Division and the reason for judgment, if any were given.

23. The Lieutenant Governor in Council may

- (a) make rules for regulating the procedure and practice of the courts, and in relation to proceedings under this Act,
- (b) make rules prescribing and regulating the proceedings under any statute that confers jurisdiction upon the courts or the judges,
- (c) makes rules for regulating the duties of the officers of the courts,
- (d) prescribe forms and schedules,
- (e) prescribe the fees payable to the Crown and the clerks and other officers of the courts and the fees and expenses payable to witnesses in respect of proceedings in the courts,

22. Appeals to the Appellate Division of the Supreme Court.

23. Rules of court.

- (f) prescribe a tariff of fees to be allowed to barristers and solicitors for services performed in connection with estates or deceased persons and guardianship, and make rules for taxation and allowances of their costs, and
- (g) generally, make rules for carrying into full effect the provisions of this or any other Act relating to proceedings in the courts.

Transitional

24. (1) A district court judge may take the oath of office as a surrogate court judge before the commencement of this Act.

(2) Where at the commencement of this Act, any application, proceeding or other matter is before the district court or a judge thereof in respect of anything which would have been within the jurisdiction of a surrogate court or a surrogate court judge if this Act had been in force at the time the application was made or the proceeding or other matter commenced,

- (a) the application, proceeding or other matter shall be continued before the surrogate court and shall be dealt with and determined by the surrogate court or judge thereof, and
- (b) the district court judge dealing with the application, proceeding or other matter shall continue to deal with it in his capacity as a surrogate court judge, and
- (c) subject to subsection (2) of section 25, all papers required to be filed in or in connection with the application, proceeding or other matter shall be styled in the surrogate court and shall be filed with the surrogate court clerk.

(3) At the commencement of this Act, the records and files of the district courts in respect of all probate, administration and guardianship matters, whether concluded or not, become the records and files of the surrogate courts.

25. (1) Where any application for a grant is made to the surrogate court, an affidavit made in connection with the application but styled in the district court shall be accepted by the court as though it were styled in the surrogate court if the affidavit was sworn before the commencement of this Act.

(2) Where any application, proceeding or other matter before the district court or a judge thereof is continued before a surrogate court or a surrogate judge pursuant to subsection (2) of section 24, an affidavit styled in the district court

24. Transfer of pending proceedings from the district court to the surrogate courts.

25. Effect of transfer on pending proceedings.

- (a) shall be accepted for filing after the commencement of this Act if it was sworn before the commencement of this Act, or
 - (b) may be accepted for filing where it was sworn after the commencement of this Act if the clerk is satisfied that it is impossible or that it would cause undue delay or hardship to have a proper affidavit styled in the surrogate court prepared and sworn.
- (3) A surrogate court judge may, upon an application of any person interested in an application, proceeding or matter before the court or a judge, give directions as to the filing of documents or matters of procedure in cases for which no provision is made by section 24 or this section and for the purpose of removing or minimizing any procedural difficulty arising upon the commencement of this Act.

26. (1) A reference in any Act or any regulation, order, rule, by-law or resolution made under any Act to a district court, in so far as the reference extends to that court in the exercise of jurisdiction which by this Act is given to the surrogate courts shall be deemed to be a reference to the corresponding surrogate court unless the context or the circumstances otherwise require.

(2) A reference in any Act or any regulation, order, rule, by-law or resolution to a grant of a district court shall be deemed to include a reference to a grant of a surrogate court.

(3) Until such time as Rules are made under section 23, the Consolidated Rules of the Supreme Court apply, *mutatis mutandis*, to the surrogate courts and matters within their jurisdiction.

27. *The District Court Act* is amended

- (a) as to section 25, clause (b) by striking out the words "will or",
- (b) as to section 34, subsection (1)
 - (i) by adding the word "and" at the end of clause (a) and by striking out the word "and" at the end of clause (b),
 - (ii) by striking out clause (c),
- (c) by striking out sections 43 and 44.

28. This Act comes into force on a date to be fixed by Proclamation.

26. References to the district courts in probate and guardianships are to be deemed to be references to the surrogate courts.

27. Jurisdiction of the district courts in probate and guardianship is removed.