

2004 Bill 210

Fourth Session, 25th Legislature, 53 Elizabeth II

THE LEGISLATIVE ASSEMBLY OF ALBERTA

BILL 210

**MATRIMONIAL PROPERTY
(DIVISION OF PROPERTY ON DEATH)
AMENDMENT ACT, 2004**

MS GRAHAM

First Reading

Second Reading

Committee of the Whole

Third Reading

Royal Assent

BILL 210

2004

MATRIMONIAL PROPERTY (DIVISION OF PROPERTY ON DEATH) AMENDMENT ACT, 2004

(Assented to , 2004)

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

Amends RSA 2000 cM-8

1 The *Matrimonial Property Act* is amended by this Act.

2 Section 1(d) is repealed and the following is substituted:

- (d) “matrimonial property order” means a distribution by the
Court under section 7, an order under section 9 or an order
under Part 1.1;

**3 Sections 4 and 5(1) are amended by adding “under this Part”
after “matrimonial property order”.**

4 Sections 11 to 18 are repealed and the following is substituted:

**Part 1.1
Matrimonial Property on Death**

Application by spouse of deceased

11(1) Subject to this section, an application for a matrimonial property order may be made by the surviving spouse after the death of the other spouse if

- (a) the spouses were married at the time of death of the deceased spouse, or
- (b) a judgment of divorce was granted or a declaration of nullity of marriage was made with respect to the marriage not earlier than 2 years before the death of the deceased spouse.

(2) A matrimonial property order may not be made under this Part if, before the death of the deceased spouse, the spouses

- (a) divided their property pursuant to a matrimonial property order made under Part 1, or
- (b) lived separate and apart and divided their property pursuant to an agreement entered into under section 37.

(3) Notwithstanding subsection (2)(a), a matrimonial property order may be made under this Part if after the matrimonial property order was made under Part 1 the spouses resumed cohabitation for a period of more than 90 days with reconciliation as its primary purpose unless the spouses were divorced at the time of the deceased spouse's death.

(4) Notwithstanding subsection (2)(b), a matrimonial property order may be made under this Part if after the agreement was entered into under section 37 the spouses resumed cohabitation for a period of more than 90 days with reconciliation as its primary purpose unless

- (a) the spouses were divorced at the time of the deceased spouse's death, or
- (b) the agreement specifically provides that no matrimonial property order may be made under this Part in the event the spouses resume cohabitation.

(5) An application for a matrimonial property order made under Part 1 may be continued under this Part by the surviving spouse after the death of the deceased spouse.

Application of Part 1

11.1(1) Subject to subsection (2), sections 3 and 7 to 10 apply with necessary modifications in respect of a distribution of property under this Part.

(2) For the purposes of this Part, section 10(1)(d) is to be interpreted as if "one year before the date on which either spouse commenced the application for the matrimonial property order" read "one year before the death of the deceased spouse".

Form of application

11.2 An application for a matrimonial property order under this Part must be made by statement of claim.

Limitation period

11.3 An application for a matrimonial property order under this Part may not be commenced later than 6 months after the date of issue of the grant of probate or administration of the estate of the deceased spouse.

Continuation of action by estate

11.4(1) Notwithstanding the *Survival of Actions Act* but subject to subsections (2) and (3), the rights conferred on a person by this Act do not survive the death of the person for the benefit of the person's estate.

(2) Where a person dies after commencing an action under Part 1 or this Part,

- (a) the action may be continued under this Part by the estate of the deceased person, and
- (b) the rights conferred on that person under Part 1 or this Part before that person's death survive that person's death for the benefit of that person's estate.

(3) Where a person dies after the person's spouse has commenced an action under Part 1,

- (a) the personal representative of the deceased spouse may file a statement of defence and counterclaim in the action,
- (b) the personal representative of the deceased spouse may continue to defend the action, and
- (c) the surviving spouse may not discontinue the action after the death of the deceased spouse without the consent of the personal representative of the deceased spouse except with leave of the Court.

Property of surviving spouse and deceased spouse

11.5(1) For the purposes of this Part, property of the surviving spouse includes

- (a) property that, at the time of the death of the deceased spouse, was held jointly by the deceased spouse and the surviving spouse with a right of survivorship,
- (b) a benefit payable to the surviving spouse on the death of the deceased spouse under a plan as defined in section 47 of the *Trustee Act*, and
- (c) proceeds payable to the surviving spouse on the death of the deceased spouse under a policy of life insurance that was
 - (i) owned by either spouse, or

- (ii) taken out on the lives of a group of persons of which the deceased spouse was a member.

(2) For the purposes of this Part, property of the deceased spouse includes

- (a) proceeds payable to the estate of the deceased spouse on the death of the deceased spouse under a policy of life insurance that was

- (i) owned by either spouse, or

- (ii) taken out on the lives of a group of persons of which the deceased spouse was a member,

and

- (b) any other proceeds payable to the estate of the deceased spouse on the death of the deceased spouse.

(3) The Court shall distribute the property referred to in subsections (1) and (2) in accordance with section 7(4).

Deemed property of deceased spouse

11.6(1) For the purposes of this Part, all property that was owned by the deceased spouse immediately before the deceased spouse's death that passed on death to a person other than the surviving spouse is deemed to be the property of the deceased spouse to the extent that the deceased spouse did not receive adequate consideration for the property, including but not limited to the following:

- (a) a gift made in contemplation of, and intended only to take effect on, the death of the deceased spouse;
- (b) subject to subsection (2), property that, at the time of the death of the deceased spouse, was held jointly by the deceased spouse and a person other than the surviving spouse with a right of survivorship;
- (c) a benefit payable to a person other than the surviving spouse on the death of the deceased spouse under a plan as defined in section 47 of the *Trustee Act*;
- (d) proceeds payable to a person other than the surviving spouse on the death of the deceased spouse under a policy of life insurance that was
 - (i) owned by the deceased spouse, or

- (ii) taken out on the lives of a group of persons of which the deceased spouse was a member;
 - (e) property that was disposed of by the deceased spouse, in trust or otherwise, to the extent that the deceased spouse retained during the deceased spouse's lifetime, either alone or in conjunction with another person, a power to revoke the disposition or a power to consume or dispose of the principal of the property for the deceased spouse's own benefit.
- (2) If a deceased spouse dies holding property jointly with a person other than the surviving spouse with a right of survivorship, the property is deemed to be property of the deceased spouse
- (a) in the case of funds in a bank account, to the extent that the funds were the property of the deceased spouse immediately before the funds were deposited, and
 - (b) in the case of any other property, to the extent of the ratio of the contribution of the deceased spouse to the contribution of both persons, multiplied by the fair market value of the property.
- (3) The property referred to in subsection (1) does not form part of the estate of the deceased spouse and is not subject to attachment by any creditor of the deceased spouse.
- (4) In this section, "contribution" means money, goods or services for the purchase, maintenance or repair of property.

Exempt property

11.7 For the purposes of this Part, in addition to the property referred to in section 7(2), the following property is exempt from distribution:

- (a) property referred to in section 11.6(1) that is used to satisfy an existing debt or liability of the deceased spouse;
- (b) property referred to in section 11.6(1) that is used to provide
 - (i) money or other property that the recipient of the property will likely require, or
 - (ii) compensation for loss that the recipient of the property will likely suffer,

in respect of a business undertaking by reason of the death of the deceased spouse.

Payment of deficiency by recipients of property

11.8(1) If the property of the estate of the deceased spouse is not sufficient to satisfy a matrimonial property order made under this Part, those persons, if any, who have received property referred to in section 11.6(1) shall pay the deficiency in proportion to and to the extent of the value of their respective interests in that property less

- (a) the value of any consideration provided by those persons respectively to or on behalf of the deceased spouse, and
- (b) the value of any property exemption under section 7(2) or 11.7.

(2) The defence of change of circumstances is not available to a person who has received property referred to in section 11.6(1).

Suspensory order

11.9(1) Section 11.6(1) does not prevent any person from paying or transferring any funds or property, or any portion of any funds or property, to any person otherwise entitled to them unless there has been personally served on the person a certified copy of an order made under section 12 enjoining the person from making the payment or transfer.

(2) Personal service of an order made under section 12 on a person holding any funds or property referred to in subsection (1) is a defence to any action or proceeding brought against the person with respect to the funds or property during the period the order is in force.

Suspension of administration of deceased's estate

12 The Court may make an order suspending in whole or in part the administration of the estate of the deceased spouse until an application for a matrimonial property order has been determined.

Consent to distribution of estate

13(1) Until the expiration of 6 months from the date of issue of the grant of probate or administration of the estate of the deceased spouse, the personal representative shall not distribute any portion of the estate to a beneficiary without the consent of the surviving spouse except with leave of the Court.

- (2) If
- (a) the personal representative of the deceased spouse distributes a portion of the estate contrary to subsection (1), and
 - (b) the Court makes a matrimonial property order with respect to property in the estate of the deceased spouse,

the personal representative is personally liable to the surviving spouse for any loss to the surviving spouse as a result of the distribution.

Distribution in accordance with Court order

14(1) If an application for a matrimonial property order is made or continued under this Part by the surviving spouse, the personal representative of the deceased spouse shall hold the estate subject to any matrimonial property order that may be made, and the personal representative shall not proceed with the distribution of the estate other than in accordance with the matrimonial property order.

(2) If the personal representative of the deceased spouse distributes a portion of the estate contrary to subsection (1), the personal representative is personally liable to the surviving spouse for any loss to the surviving spouse as a result of the distribution.

(3) An agreement in settlement of an action commenced or continued under this Part is not valid unless approved by the Court where a beneficiary of the estate

- (a) is a minor whose interest in the estate is affected by a distribution of the property under the agreement, or
- (b) does not consent in writing to a distribution of the property under the agreement.

Property deemed never part of estate of deceased spouse

15(1) Money paid to a surviving spouse or property transferred to a surviving spouse under a matrimonial property order is deemed never to have been a part of the estate of the deceased spouse with respect to a claim against the estate by

- (a) a beneficiary under a will,
- (b) a beneficiary under the *Intestate Succession Act*, or
- (c) a dependant under the *Dependants Relief Act*.

(2) Where the Court orders the estate of a deceased spouse to pay money to the surviving spouse, the amount fixed by the order is a debt of the deceased spouse and ranks in priority of payment equally with other unsecured debts of the deceased spouse.

(3) Where the Court orders the estate of a deceased spouse to pay money to the surviving spouse and charges property with payment of all or part of the payment to be made, the amount fixed by the order is a secured debt of the deceased spouse.

Proportionate burden of matrimonial property order

16(1) In the absence of a specific direction in the will of the deceased spouse as to the manner in which satisfaction of a matrimonial property order affects the interests of the beneficiaries under the will, the burden of a matrimonial property order falls ratably on all the beneficiaries of the estate of the deceased spouse in proportion to their respective interests after payment of all funeral and testamentary expenses and all debts and liabilities of the estate.

(2) An order declaring that the surviving spouse has an interest in property that was the subject of a specific bequest or devise under the terms of the will of the deceased spouse does not prevent the beneficiary of that property from receiving the value of what that beneficiary would otherwise have received if no matrimonial property order had been made under this Part, less the proportionate burden of the matrimonial property order.

Rights of surviving spouse under will or on intestacy

17(1) Any right that the surviving spouse has to ownership or division of property under this Act is in addition to the rights that the surviving spouse has by reason of the will of the deceased spouse or on the intestacy of the deceased spouse.

(2) The Court shall not, in making a distribution of property pursuant to an application for a matrimonial property order made or continued under this Part, consider

- (a) the amount payable to the surviving spouse on intestacy, or
- (b) any gifts made to the surviving spouse under the terms of the will of the deceased spouse.

Effect on Dependants Relief Act

18(1) Nothing in this Act affects the right of a surviving spouse to make an application under the *Dependants Relief Act*.

(2) An application by a surviving spouse under the *Dependants Relief Act* may be joined with an application under this Part.

5 This Act comes into force on Proclamation.

Explanatory Notes

1 Amends chapter M-8 of the Revised Statutes of Alberta 2000.

2 Section 1(d) presently reads:

1 In this Act,

(d) “matrimonial property order” means a distribution by the Court under section 7 and an order under section 9;

3 Sections 4 and 5(1) presently read:

4 An application for a matrimonial property order shall be made by statement of claim.

5(1) A matrimonial property order may only be made

(a) if

(i) a judgment of divorce has been granted, or

(ii) a declaration of nullity of marriage has been made with respect to the marriage,

(b) if one of the spouses has been granted a judgment of judicial separation,

- (c) *if the Court is satisfied that the spouses have been living separate and apart*
 - (i) *for a continuous period of at least one year immediately prior to the commencement of an application, or*
 - (ii) *for a period of less than one year immediately prior to the commencement of an application if, in the opinion of the Court, there is no possibility of the reconciliation of the spouses,*
- (d) *if the Court is satisfied that the spouses are living separate and apart at the time the application is commenced and the defendant spouse*
 - (i) *has transferred or intends to transfer substantial property to a third party who is not a bona fide purchaser for value, or*
 - (ii) *has made or intends to make a substantial gift of property to a third party,*

with the intention of defeating a claim to property a spouse may have under this Part, or
- (e) *if the Court is satisfied that the spouses are living separate and apart and one spouse is dissipating property to the detriment of the other spouse.*

4 Sections 11 to 18 presently read:

11(1) Subject to this section, an application for a matrimonial property order may be made or continued by the surviving spouse after the death of the other spouse.

(2) A matrimonial property order may be made on the application of a surviving spouse only if an application for a matrimonial property order could have been commenced immediately before the death of the other spouse.

(3) When a matrimonial property order is made in favour of a surviving spouse, the Court, in addition to the matters in section 8, shall take into consideration any benefit received by the surviving spouse as a result of the death of the deceased spouse.

(4) An application by a surviving spouse for a matrimonial property order may not be commenced more than 6 months after the date of issue of a grant of probate or administration of the estate of the deceased spouse.

12 The Court may make an order suspending in whole or in part the administration of the estate of the deceased spouse until an application for a matrimonial property order has been determined.

13(1) Until the expiration of 6 months from the date of issue of the grant of probate or administration of the estate of a deceased spouse, the executor, administrator or trustee shall not distribute any portion of the estate to a beneficiary without the consent of the living spouse or an order of the Court.

(2) If

- (a) an executor, administrator or trustee distributes a portion of the estate contrary to subsection (1), and*
- (b) the Court makes a matrimonial property order with respect to property in the estate of the deceased spouse,*

the executor, administrator or trustee is personally liable to the living spouse for any loss to that spouse as a result of the distribution.

14(1) If an application for a matrimonial property order is made or continued by a spouse, the executor, administrator or trustee of the deceased spouse shall hold the estate subject to any matrimonial property order that may be made, and the executor, administrator or trustee shall not proceed with the distribution of the estate other than in accordance with the matrimonial property order.

(2) If an executor, administrator or trustee distributes a portion of the estate contrary to subsection (1), the executor, administrator or trustee is personally liable to the living spouse for any loss to that spouse as a result of the distribution.

15 Money paid to a living spouse or property transferred to a living spouse under a matrimonial property order is deemed never to have been part of the estate of the deceased spouse with respect to a claim against the estate

- (a) by a beneficiary under a will,*
- (b) by a beneficiary under the Intestate Succession Act, or*
- (c) by a dependant under the Dependents Relief Act.*

16 Where a person dies after commencing an action under this Part,

- (a) the action may be continued by the estate of the deceased person, and*
- (b) the rights conferred on that person under this Part prior to that person's death survive that person's death for the benefit of that person's estate.*

17(1) If a question respecting property arises between spouses in any other matrimonial cause, the Court may decide the question as if it had been raised in proceedings under this Part.

(2) If in an application under this Part it appears to the Court that it is necessary or desirable to have other matters determined first or at the same time, the Court may direct that the application be adjourned until those matters are determined or brought before the Court.

18(1) Nothing in this Act affects the right of a surviving spouse to make an application under the Dependants Relief Act.

(2) An application by a surviving spouse under the Dependants Relief Act may be joined with an application under this Part.

5 Coming into force.