THE NEW *WILLS AND SUCCESSION ACT,* SA 2010, cW-12.2
A SUMMARY OF CHANGES
Revised December 9, 2011

BACKGROUND

A new ***Wills and Succession Act*** **(WSA)**[1] was passed by the Alberta Legislature in Fall 2010. A year has been set aside to allow for preparation and education before the Act becomes law. Once in force, it will have significant impact on wills and succession practice in Alberta. The WSA is expected to come into force on February 1, 2012.

A second phase of succession law reform is in the works and will deal with estate administration.

Practitioners may be interested in reviewing the ***Wills and Succession Act,*** **SA 2010, cW-12.2** at http://www.qp.alberta.ca/Laws_Online.cfm. Note that the WSA was amended in 2011 to make some housekeeping changes. Readers should be sure to consult the most recent version of the legislation.

Background can be found in a number of places including:

- Hansard speeches on Bill 21 from the Fall 2010 sitting of the Alberta Legislature, via http://www.assembly.ab.ca. [2]
- In various papers produced by Alberta Justice available by emailing Just.Successionlaw@gov.ab.ca.
- In materials available from Legal Education Society of Alberta www.LESA.org

Comments or questions on the ***Wills and Succession Act*** can be directed to JUST.SuccessionLaw@gov.ab.ca or the Justice website http://justice.alberta.ca/Pages/home.aspx.

[1] *Wills and Succession Act,* SA 2010, cW-12.2.
[2] Also Hansard relating to *Wills and Succession Amendment Act* Spring 2011, Bill 14 and *Justice and Court Statutes Amendment Act* Fall 2011 Bill 22

PRINCIPLES GUIDING REFORM OF THE WSA

These fundamental principles were used to guide succession law reform:

- A person is free to transfer his or 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 they want his or her property distributed upon death, it is presumed that the person wants it to go to family members.

- A person's freedom to transfer property on death is subject to satisfying the person's legal and family support obligations.

MAJOR CHANGES TO THE LAW

The new law consolidates the ***Wills Act, Intestate Succession Act, Survivorship Act, Dependants Relief Act*** and section 47 of the ***Trustee Act***.[3] There are also major amendments to the ***Matrimonial Property Act*** and some companion amendments to the ***Administration of Estates Act*** and ***Family Law Act.***[4]

Key changes to the law made by the WSA include but are not limited to:

- Where two or more people die in circumstances where the order of death cannot be determined, for the purpose of property distribution, each is deemed to have died before the other.
- There are new powers allowing a Court to correct or validate of wills and documents purporting to be wills. These provisions will apply when a death occurs after the WSA comes into force.
- Marriage will no longer revoke any will.
- A divorce occurring after the WSA comes into force may revoke a gift to the ex spouse. A similar rule applies to adult interdependent partners.

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[3] *Wills Act,* RSA 2000, c. W-12. *Intestate Succession Act,* RSA 2000, c I-10. *Dependants Relief Act,* RSA 2000, c. D-10.5. *Survivorship Act,* RSA 2000, c S-28. *Trustee Act,* RSA 2000, c T-8, s 47, *Matrimonial Property Act,* RSA 2000, c M-8. Unless otherwise stated, all references in this paper to these statutes are to these citations.

[4] *Administration of Estates Act*, SA 2000 c A-2, *Family Law Act,* SA 2003 c F-4.5, both before and after the amendments made by Bill 22 (2010 *Family Law Statutes Amendment Act 2010 SA 2010 c 16*).

- On death, a surviving spouse may claim his or her share of the matrimonial property from the estate. This applies to deaths of married people occurring after the WSA comes into force.

THE DETAILS: CHANGES MADE BY THE WSA[5]

All proposed changes received support from an extensive public and technical consultation process. The changes are described here, in the order they appear in the statute.

GENERAL DEFINITIONS AND DISPUTE RESOLUTION (Sections 1- 4)

- There are new definitions (s.1(1)) including
    - "Beneficiary" are those receiving a beneficial disposition (i.e. a gift) from an estate.
    - "Descendant(s)" replaces the term "issue", in referring to lineal descendants of a person.

- "Property" is defined in terms similar to that of the ***Civil Enforcement Act*** and the ***Adult Guardianship and Trusteeship Act*****.** There are virtually no distinctions between real and personal property, corporeal and incorporeal property. (s. 1(1)(i))

- "Child" is defined to include *all* children of a person, regardless of whether the parents were married, and will include children who are conceived and actually in the womb at the time of the death of the person, even though they are born after the death. (s.1 (3)). The parent-child relationship, for purposes of succession is as set out in Part 1 of the ***Family Law Act***. Children conceived *after* the death of the biological parent are not included in the definition: for the purposes of the *WSA*, posthumously conceived children are not considered children.

- The ***Dower Act***[6] is unchanged and the rights under the ***Dower Act*** prevail over the will or rights on intestacy.

- Lawyers dealing must consider appropriate dispute resolution in contested estate matters. (s. 4)

[5] A longer, detailed version of this paper is available by contacting Just.Successionlaw@gov.ab.ca
[6] RSA 2000, c D-15

PART 1 – SURVIVORSHIP (Sections 5 and 6)

The Act changes the rule that if two or more people die at about the same time, for property distribution purposes, the youngest is deemed to have survived. The new rule is: if two or more people die at or around the same time, and the order of death cannot be determined, the property is distributed as if each person died before the other. (s. 5(1)). This change is consistent with the ***Insurance Act***.[7] Also, if the deceased owned property jointly with each other, the property is deemed to be held as a tenancy in common. (s. 5(2))

PART 2 - WILLS

The law is refocused on ensuring testamentary intent is met. It will generally apply to wills made after the WSA comes into force, with some important exceptions. See sections 8, 23(2) and 25(3).

Part 2 makes the following key changes to wills law:

- Definition of "disposition" is added, the term will include legacy, devise, etc. (s. 7(1) (a)). There is no distinction in the WSA between legacy, devise, bequest or similar terms.

- Five sections of the ***Wills Act*** dealing with the legal effect of a will were removed and replaced with three basic sections:

    - Unless the will provides otherwise, a disposition of property by will is a disposition of ALL the interest in a property that a person has capacity to give. (s.9 (2)). This obliterates the remnants of an old common law rule that had the opposite effect.

    - The "Ademption by Conversion" rule is maintained. That is, where a testator leaves a specific gift and then disposes of the gift, the beneficiary may take whatever identifiable interest remains at the death. There is no tracing of funds (s. 10). Note that s. 67 of the ***Adult Guardianship and Trusteeship Act*** [8] makes an exception to this rule.

[7] *Insurance Act,* RSA 2000, c I-3, ss. 599, 690.
[8] SA c. A-4.2 2008

- A disposition by will continues to include property over which there is a power of appointment. (s.11)

- The law allowing a power of appointment to be created or exercised by will is continued. (s.12)

- The law that minors may make wills if they are married or on military service is continued. The law that minors may make wills if they have children is not (s. 13). However, new is that minors may make wills under court supervision (s. 36)

- The formalities for making a valid will are modernized:
  - *All* forms of wills must adhere to the two basic requirements: they must be in writing and include a signature. (s. 14) Under the ***Interpretation Act***[9], "writing" includes electronic formats.
  - There continues to be three forms of wills:
    - Formal - the witnessed will (s. 15)
    - Holograph – in handwriting of the testator (s. 16)
    - Military – made in the field by a person on active service or someone at his direction (s. 17).
  - The requirements for a valid signature are modernized:
    - It must be apparent on the face of the will that the testator intended the signature to give effect to the will (s. 14(b));
    - The signature need not be at the end of the will, but there is a presumption that words below a signature were not intended to be given effect, and;
    - There is an absolute rule that words added any time after the signature, are not part of the will. (s. 19)
  - There are new powers for the court to dispense with certain formalities (i.e. the requirements of s. 15, 16 and 17) for making wills and changing wills. See ss. 37 and 38. This power does NOT allow the court to dispense with the requirement for the will to be in

[9] *Interpretation Act,* RSA 2000, c I-8, s 28(1) (j).

writing or, with one small exception, the requirement for signature. (The signature exception is in s. 39(2).) More on this below.

- The rule that voids a gift to a witness or his spouse or AIP[10] is expanded to include interpreters and individuals signing on behalf of a testator. (s. 21) There are new powers for the court to validate these gifts, provided the disappointed beneficiary can show he or she exercised no improper or undue influence over the testator. (s. 40)

- The law that a will is revoked on marriage or signing an adult interdependent partnership agreement is repealed. Marriage will *not* revoke wills after the *WSA* comes into force. (s. 23(2)) This is intended to apply regardless of when the will was made.

- A gift in a will to a spouse or adult interdependent partner is revoked if the marriage or partnership ends (s. 25). The "ex" is treated as predeceased for the purposes of the gift. This applies to divorces and adult interdependent relationships that terminate after the Act comes into force, regardless of when the will was made. (That is, a will made before the Act comes into force is impacted if the divorce occurs AFTER the *WSA* comes into force.)

- There is a new rule that allows extrinsic evidence to be admitted to interpret the will. In interpreting a will, the court may admit corroborated, outside evidence including evidence to help prove the testator's intention. (s. 26) The ***Alberta Evidence Act***[11] requires corroboration. (s. 3(3)) This will have a significant effect on the Court's and lawyers' ability to determine testamentary intent.

- In sections relating to wills interpretation, the Act uses the term "unless the Court, in interpreting a will finds that the testator had a contrary intention" as opposed to "unless a contrary intention appears in the will". This is to complement the new rule allowing outside evidence. (See, for example, sections 25(1), 27, 28.)

[10] In this paper, "partner" or "AIP" refers to an Adult Interdependent Partner under the *Adult Interdependent Relationships Act*, RSA 2000 c A- 4.5.
[11] *Alberta Evidence Act*, RSA 2000, c A-18, s 11

- There are updated rules for interpreting words commonly used in wills, including the definition of "child" to include all children of a testator. (ss. 28-31)

- There are new rules covering cases where a gift in a will cannot take because a beneficiary has predeceased, disclaimed and or is disqualified. (ss. 31 and 32) There is a hierarchy providing the disposition will go:
    - First to an alternate beneficiary of the gift;
    - Then to descendants (not including the spouse/partner) of the intended beneficiary if the beneficiary is a descendant;
    - Then to residual beneficiaries, and;
    - Lastly, as if the testator died intestate.

- In addition to the new Court powers to correct errors in formalities, rules for Rectification has been codified and expanded. (s. 39):
    - If there is clear evidence of intent, words and markings can be *added* to a will by the Court. This is in addition to the Court's common law power to *exclude* words or markings, which is now codified.
    - Omitted signatures can be inserted in a will in very clear cases of pure mistake or inadvertence.

- Application of the new Wills provisions: Generally the provisions apply only to wills made after the WSA comes into force, EXCEPT:

    - Remedial provisions in the new Act will apply to wills made before or after the Act comes into force. (s. 8) including:
        1. Admission of extrinsic evidence (s. 26)
        2. The court's power to dispense with the formalities for making a will (ss. 37 and 38)
        3. The expanded rules for rectification (s. 39), and
        4. The court's power to validate gifts to witnesses, etc. (s. 40)

- No will existing before or after the WSA is revoked by marriages occurring after the WSA comes into force (unless the Will is interpreted otherwise). (ss. 8(1) and ss. 23(2)(a) and (b))
- Gifts to spouses or Adult Interdependent Partners (AIPs) in wills existing at the time the WSA comes into force are revoked if there is a divorce or the AIP ends after the WSA comes into force (unless the will is interpreted otherwise). (ss. 8(1) and s. 25(3))

PART 3 - INTESTACY – DISTRIBUTION OF INTESTATE ESTATES

There is no change to the fundamental principle that if a person dies without leaving a will, the estate goes to the family. Within that principle, there are some changes, however.

- "All to the spouse rule" - If a person dies intestate, leaving a both a spouse or AIP and children of the relationship with that spouse or partner, everything goes to the spouse or partner, instead of being shared between the spouse and children. (s. 61(1)). From a policy perspective, this leaves the spouse or partner to distribute the estate according to the deceased's intent and their presumably shared family values.

- If the intestate dies leaving children of more than one relationship, a preferential share will be given to the spouse or partner, with the remainder to the children. (s. 61(2))

    - The amount of the share is the greater of 50% of the net value of the intestate estate or $150,000. The rest goes to the intestate's children.
    - If there is both a spouse and an adult interdependent partner, they will split the preferential share and the children will get the rest.

- There are new rules for inheritance and disinheritance where spouses are separated. (s. 63) Spouses are disinherited if living two years separate and apart, the parties have a declaration of irreconcilability, or a court order or agreement that is intended to permanently finalize their marital

affairs. Note that there is no provision for disinheritance of an adult interdependent partner: this is because after one year separation the partnership is terminated by operation of s. 10 of the ***Adult Interdependent Relationships Act***. Former AIPs, of course, do not inherit.

- There is a change from consanguineous to a new parentelic system if a person dies with no descendants or parents to inherit the estate. (s. 67). Instead of going to the closest blood relative, no matter how distant, the estate is distributed as follows:

    - See the chart at the end of this paper.
    - The estate will be split between the relatives on the maternal and paternal sides of the family according to rules set out in s. 67.
    - Inheritance goes only to the fourth degree of relationship with the deceased. This has two important impacts:
        - Grandnieces and grandnephews can inherit by representation.
        - Those beyond the fourth degree can make a claim under the ***Unclaimed Personal Property and Vested Property Act.*** (s. 69(b))

- Advancement rules are replaced – see the discussion under Part 6, below.

PART 4 – BENEFICIARY DESIGNATIONS

- There is no change here; the law is simply moved from section 47 of the ***Trustee Act***. These are the rules allowing property such as pensions or RRSPs to be disposed on death by a written designation, rather than by will.

PART 5 – FAMILY MAINTENANCE AND SUPPORT

The law allowing family members to claim support from the estate of the deceased is largely carried forward, with some additions:

- The old Dependants Relief terminology has changed. The terminology is shifted from "dependants" to "family members". (s. 72(b))

- An adult interdependent partner or spouse of a deceased has an automatic right to stay in their shared home for 3 months after the death. (Part 5 Division 1)

    - This applies where the spouse or partner is not on title or on the lease.
    - This binds beneficiaries, landlords, personal representatives, and joint owners.

- An adult child under age 22, who is in school full-time, can apply for support from a dead parent's estate. (s. 72(b) (v)) This mirrors the child support provisions found in ***Family Law Act***.

- A minor grandchild or great grandchild who depends on a deceased grandparent or great grandparent can also apply for continued support. (ss. 72(b)(vi) and 73))

- There are new disclosure requirements that allow a family member and personal representative to request financial information from each other. (s. 95) These are similar to the family law rules; no court order is required.

- There are some changes to service and some updates of court powers, fines and the duties of the Public Trustee. (ss. 91, 96-99, 104-105, and 107(3))

- The most important point is there is *no change* to the rule as set out in ***Tataryn*** **(SCC) and** ***Stang*** **(ABQB)**. The factors that the court must consider in hearing an application are set out under the Act. (s. 93)

PART 6 – ADVANCEMENT, ABOLITION OF OLD COMMON LAW AND COMING INTO FORCE

- There is a new procedure where there is an allegation that the deceased advanced a share of the estate to his child or spouse. That is, if it is alleged that property transferred during life is to be

repaid from the recipient's share of the estate, an application may be made to determine the issue. (s. 109)

- A personal representative or interested person can make an application for the court to determine the nature of an ***inter vivos*** transfer.
- The court makes the determination including whether the transaction is to be deducted from a prospective beneficiary's inheritance.
- This change is not intended to interfere with ***Pecore*** **(SCC) or** ***Madsen*** **(SCC)** dealing with the presumption of a resulting trust and the presumption of advancement.

- Three very outdated evidentiary presumptions and two doctrines related to wills and intestacy are abolished. (ss. 110 and 111)

PART 7 – CONSEQUENTIAL AMENDMENTS

MATRIMONIAL PROPERTY ACT **AMENDMENTS**

The key change is that death will be a trigger to a matrimonial property claim. Key aspects of the ***Matrimonial Property Act*** (MPA) amendments are:

- On the death of their spouse, if he or she does not already own their share of the couple's matrimonial property, a surviving spouse may claim the value of their share of matrimonial property from the estate of the spouse. They do not have to be divorced or separated in order to make this claim. (ss. 5(1) (f) and 6(5) of the MPA)

- The valuation of the matrimonial property claim will take into account life insurance and non estate property of both spouses. (ss. 7 and 7.1 of the MPA)

- The matrimonial property claim is paid from estate assets only. (s. 9(4) of the MPA)

- Only living spouses may commence a claim for matrimonial property. (s. 5.1 of the MPA)

- The matrimonial property claim will not directly affect the surviving spouse's right to inherit from their deceased spouse.

- This will apply where the death of the deceased spouse occurs after the coming into force of the sections. (s. 5.1(3) of the MPA)

Note the *Matrimonial Property Act* only applies to spouses, not adult interdependent partners.

ADMINISTRATION OF ESTATES ACT AMENDMENTS

- There are changes to the rules for who gets notice of an application for a grant, to fit with new Family Maintenance provisions (Part 5) of the Act. (s. 7 of the AEA)

- The personal representative's power to grant options is moved from the ***Wills Act*** *to* s. 54.1 of the AEA.

- "Survivorship of executor" provisions are moved from the ***Survivorship Act*** to s. 20.1 of the AEA.

RELATED ***FAMILY LAW ACT*** AMENDMENTS

The ***Family Law Act*** is also amended:

- The status of illegitimacy is abolished. (Section 7(6) ***Family Law Act.***) Also, s. 36 of the ***Wills Act*** was amended to remove references to illegitimacy.
- There are new provisions allowing for the variation of ***Family Law Act*** support orders or agreements, after death of the payor. (This will be Section 80.1 in the ***Family Law Act.***

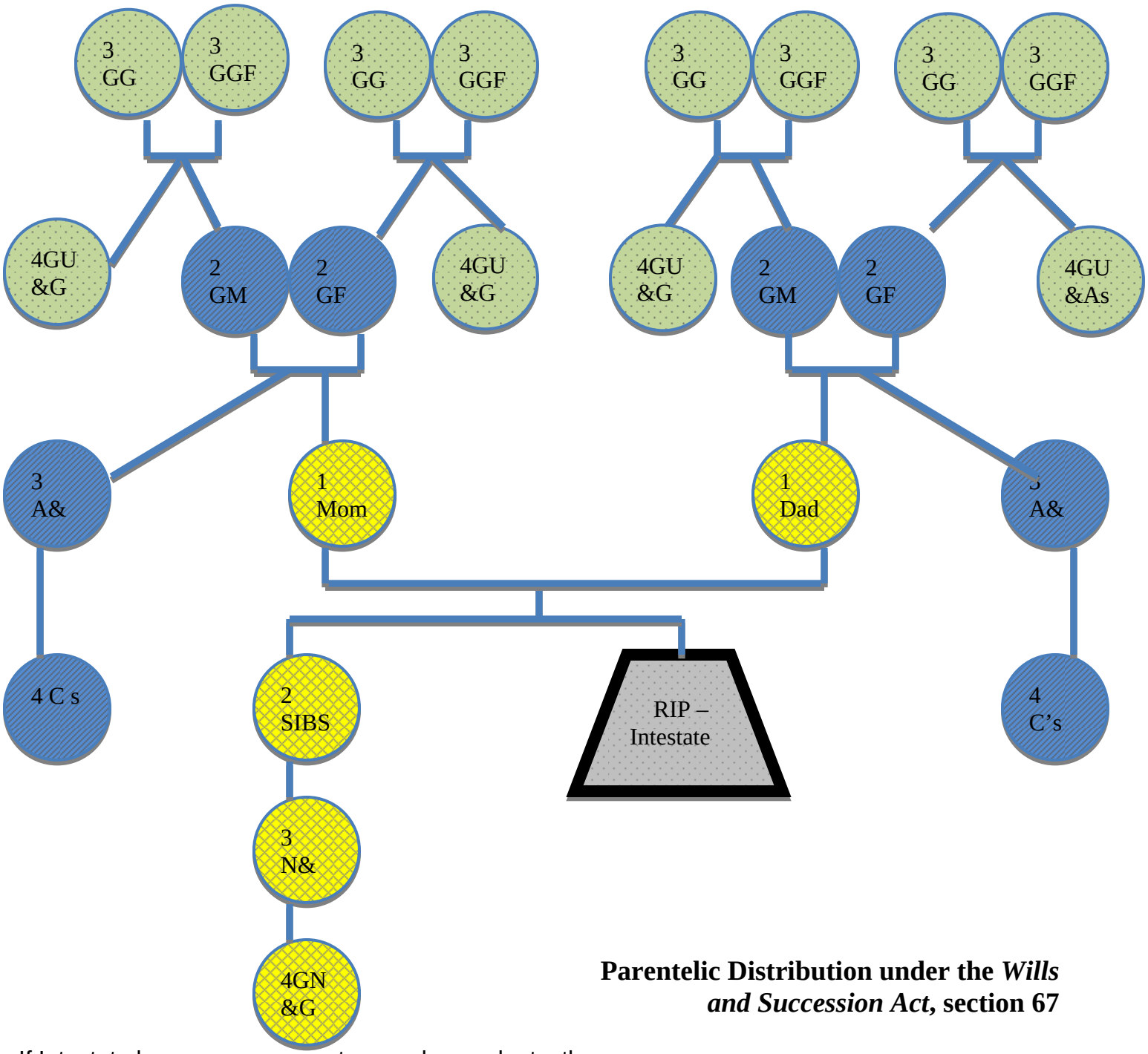
- There is a tweak regarding the means for appointing testamentary guardians. The guardian can be appointed by will or by "a written, witnessed and dated document" rather than by deed. (See amended s. 22 of the ***Family Law Act***.)

NEW COURT PROCEDURES

To accommodate the WSA, changes have been made to some court processes and forms. To see the content of those changes, see the Surrogate Rules of Court on the Alberta Queen's Printer website or contact the email address below.

FOR FURTHER INFORMATION

- www.justice.alberta.ca/wills
- Just.SuccessionLaw@gov.ab.ca



Parentelic Distribution under the *Wills and Succession Act*, section 67

If Intestate has no spouse, partner or descendants, then

- No inheritance beyond 4 degrees of relationship on any line
- Step One: estate goes to either or both parents. If both are dead, then to siblings and their descendants *per stirpes*. Stop at Grand nieces and nephews. (Yellow line)
- Step Two: if none in that line, 50% of estate to each of maternal and paternal side, to either or both grandparents on that side. If none, then *per stirpes* to their descendants. But only to cousins, then stop. (Follow the Blue line)
- Step Three: if no relatives on one of maternal or paternal side, then 100% to the other side.
- Step Four: If no one in the Grandparents line on either side, repeat the process for Great -grandparents. (Follow the Green line)
- Step Five: If no one in the Great-grandparent line, then estate goes to *Unclaimed Personal and Vested Property Act.*