

MANITOBA FAMILY LAW REFORM LEGISLATION AND SUCCESSION

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In the spring of 1977 the N.D.P. government of Manitoba enacted three statutes which comprised a family law reform package of legislation. Two of those statutes were *The Family Maintenance Act*¹ and *The Marital Property Act*.² The third statute³ made complementing amendments to, *inter alia*, *The Wills Act*, *The Dower Act*, and *The Devolution of Estates Act*. In the fall of 1977, *The Family Maintenance Act* and *The Marital Property Act* were suspended by the Progressive Conservative government.⁴ The statute which accomplished this made no mention of the third statute, so it remained on the books, but was never proclaimed into force, and thus remained in limbo. In 1978, the Progressive Conservative Government enacted its own similar three statute package of family law reform legislation, consisting of *The Marital Property Act*,⁵ *The Family Maintenance Act*,⁶ and *An Act to Amend Various Acts Relating to Marital Property*⁷ (hereinafter referred to as *Act to Amend*). Each of these statutes repealed its N.D.P. counterpart. *The Marital Property Act* and *The Family Maintenance Act*, as well as some parts of the *Act to Amend*, came into force on October 15, 1978;⁸ those parts of the *Act to Amend* dealing with *The Devolution of Estates Act* and *The Dower Act* came into force on July 20, 1978.⁹ I shall deal with the effect of this current package of legislation on our law of succession by dealing in turn with the relevant provisions of *The Marital Property Act*, *The Dower Act*, *The Devolution of Estates Act*, and *The Wills Act*, with will-drafting, and with *The Family Maintenance Act*.

The Marital Property Act

In *The Marital Property Act* enacted by the N.D.P. government, the "marital home" provisions¹⁰ virtually superseded the homestead life estate provisions of *The Dower Act*,¹¹ by providing that regardless of how the paper title to a "marital home" stood or

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1. S.M. 1977, c. 47.

2. S.M. 1977, c. 48.

3. S.M. 1977, c. 53.

4. S.M. 1977 (2nd), c. 4.

5. S.M. 1978, c. 24 (M45).

6. S.M. 1978, c. 25 (F20).

7. S.M. 1978, c. 27.

8. 107 *The Manitoba Gazette* (1978) No. 40.

9. S.M. 1978, c. 27, s. 13.

10. S.M. 1977, c. 48, essentially, ss. 1(c), (g), (l) and 3-7.

11. R.S.M. 1970, c. D100, as am. by S.M. 1971, c. 82; S.M. 1974, c. 59; S.M. 1976, c. 69; S.M. 1977, c. 53; S.M. 1978, c. 27; essentially ss. 2(c), (e) and 3-14, 22, 27, and 33.

was taken, a "marital home" was deemed to be owned by the spouses as joint tenants. This joint ownership of the "marital home" concept has been jettisoned by the Progressive Conservative government and the situation has been returned to virtually what it was prior to the spring of 1977. There are simply no provisions in the current *Marital Property Act* providing for joint ownership of the homestead; thus Sections 3 to 14 of *The Dower Act* and the homestead life estate are in full vigour.

By way of capsulization of the law regarding the homestead life estate, the right to such a life estate can come into existence automatically in certain situations to ensure that a surviving spouse has at least a life estate in the homestead. If the homestead was owned by a deceased spouse who has died (a) intestate, with assets in excess of \$50,000.00 and there are a surviving spouse plus at least one child, or (b) testate, but has not left the surviving spouse at least a life estate in the home, then the surviving spouse, through Section 14 of *The Dower Act*, can obtain a life estate in the home which will supersede for the life of the spouse the interest of any other person(s) in the house. The homestead life estate has no relevance where the spouses own the home as joint tenants, but it could have relevance where they own the home as tenants in common.¹²

The only provisions in *The Marital Property Act* relating to the "marital home" are Sections 1(e) and 6(2). The definition of a "marital home" is given in Section 1(e), while Section 6(2) provides that, subject to court order, "spouses each have an equal right to the use and enjoyment of their marital home. . . ." The definition of "marital home" under *The Marital Property Act* is narrower than that of a homestead under *The Dower Act*.¹³ This difference in the respective definitions and even Section 6(2) itself, may be of no significance, for it is likely that the non-owning spouse has as great a right to the use and enjoyment of the *homestead* by virtue of his or her inchoate interest under *The Dower Act*.

The Marital Property Act enables a division of assets, generally speaking, when an owning spouse is dissipating assets and when the marriage comes to an end by separation, or by a decree of nullity or a

12. For cases on what constitutes a homestead, bearing in mind the change in legislative definition in 1964, see *Ironsides v. Green*, [1927] 2 W.W.R. 59 (Man. K.B.); *In re Ripstein Estate* (1929), 38 Man. R. 184, [1929] 2 D.L.R. 935, [1929] 1 W.W.R. 788 (C.A.); *In re Ostapowicz Estate* (1938), 46 Man. R. 65, [1938] 2 D.L.R. 466, [1938] 1 W.W.R. 609 (C.A.); *In re Tarnapolski Estate* (1944), 52 Man. R. 238, [1944] 4 D.L.R. 139, [1944] 3 W.W.R. 203 (K.B.); *In re Barrie Estate* (1945), 53 Man. R. 80, [1945] 2 W.W.R. 384 (K.B.); *Randall v. National Trust Co.* (1954), 11 W.W.R. (N.S.) 385 (Man. Q.B.); *Packer v. Packer* (1959), 24 D.L.R. (2d) 411, 31 W.W.R. 22 (Man. Q.B.); *Re Brown and Thorsteinson* (1960), 31 W.W.R. 119 (Man. Q.B.); *Seroy v. Seroy and Komar* (1964), 48 D.L.R. (2d) 78, 50 W.W.R. 65 (Man. C.A.); *In re Empey Estate* (1979), Unreported (Man. Surr. Ct.).

13. R.S.M. 1970, c. D100.

decree absolute of divorce.¹⁴ Neither the repealed N.D.P. *Act* nor the Progressive Conservative *Act*, provides for a division of assets when the marriage ends as a result of the death of one spouse, which seems to be incongruous. The only significance that the death of a spouse has is that, if a spouse dies after the spouses have separated and before a decree of nullity or a decree absolute of divorce is obtained, the surviving spouse has, by Section 18(1), six months from the date of death in which to take action in respect to the division of their assets.

The Dower Act

The Dower Act provides for two quite distinct rights: (1) the homestead life estate under Section 14, and (2) the surviving spouse's entitlement under Section 15 to a part of the deceased spouse's estate when the deceased spouse has died testate and has not left enough of his or her estate to the surviving spouse. The effect of the family law reform legislation of the Progressive Conservative government in regard to the homestead life estate has been covered earlier. Formerly, Section 15 provided the surviving spouse an entitlement to one-third of the estate of the testator. By virtue of the *Act to Amend*, it is now a one-half entitlement and the surviving spouse has to account for what he or she has received under *The Marital Property Act*. Section 15(1) of *The Dower Act* now reads (with the changed and added portions being italicized):

Notwithstanding anything contained in The Wills Act, the widow of every testator who by his will has not left her property or otherwise provided for her to the value of at least *one-half* of the value of his net real and personal property, is entitled to receive from his executor such share of his net real and personal property as, together with all moneys paid or payable under or by virtue of any insurance policies on the life of the testator to her or for her benefit and for her own use, and together with any property owned at the time of the testator's death by her for her own use or then held in trust for her, and which is property (or the proceeds or investments of property) which the testator had during his life after marriage conveyed to her or for her benefit as a gift or by way of advancement *and together with any benefit that the widow had received from the testator during his life under The Marital Property Act, or had become entitled to receive from the testator by virtue of a division of assets made during his life under The Marital Property Act*, shall equal in value *one-half* of the testator's net estate, and in addition, is entitled to the life estate in her husband's homestead under the provisions of this Act hereinbefore set out.

Section 16 of *The Dower Act* sets out a number of provisions that a spouse can make for the other spouse which eliminate any entitlement that spouse would otherwise have had under Section 15. The *Act to Amend* increased the figures which govern in Section 16(1) (a) to (f) from \$6,000 to \$15,000 and from \$100,000 to

14. S.M. 1978, c. 24, ss. 12-16. The Act provides actually not for a division of assets, but rather for an accounting between the spouses of their assets.

\$150,000, and in Section 16(1)(g) from \$50,000 to \$150,000 and from \$3,000 to \$10,000. Also, Section 16(2), which provided for a difference in the operation of Section 16(1) depending upon whether the spouses were married before or after July 1, 1964, was repealed.

There are three comments that can be made of these changes. First, the Progressive Conservative legislation is essentially the same as the repealed N.D.P. legislation. Second, it is wrong in principle to make a spouse account for a "benefit" received under *The Marital Property Act*. Actually this "benefit" is not a benefit at all, but rather a payment of money or a transfer of property to equalize what in law, by virtue of *The Marital Property Act*, is recognized to be the proprietary right of that spouse. Therefore, such a payment or transfer is not the same as a provision of insurance proceeds or a transfer of property by *inter vivos* gift. The surviving spouse does not have to account for his or her own property, and thus should not have to account for property, the acquisition of which, has been enabled by *The Marital Property Act*.¹⁵

Third, it may be arguable that in the situation where a surviving spouse obtains a division of assets under *The Marital Property Act* pursuant to Section 18(1), due to the words "during his life" in the added wording of Section 15(1) of *The Dower Act*, no accounting is required of the surviving spouse under that Section for the "benefit" received under *The Marital Property Act*. On the other hand, the words "during his life" may be in reference to when the right to the "benefit" occurred rather than when it was enforced.

The Devolution of Estates Act

The Devolution of Estates Act deals with intestate succession. The *Act to Amend* increased the surviving spouse's primary entitlement under Section 6(1) of *The Devolution of Estates Act*, in the situation where issue survive, to \$50,000 from \$10,000. The surviving spouse's share of the surplus of the deceased spouse's estate over \$50,000.00 was changed to one-half, regardless of whether there is a child or children, or issue of the same, surviving. Formerly, the surviving spouse was entitled to one-half of the surplus if there was one child or issue of that child surviving, but only to one-third, if there were two or more children or issue of them surviving.¹⁶

15. At the very least one might have expected that along with s. 15(1) being amended by the addition of the wording relating to *The Manitoba Property Act*, s. 2(h), which defines "net estate," would have been similarly amended.

16. It may be of passing interest to note that Ontario revised its intestate succession law in 1977 (*The Succession Law Reform Act, 1977*, S.O. 1977, c. 40, ss. 46 & 47) to provide a surviving spouse with a \$75,000.00 primary entitlement where there are issue also surviving; regarding a surplus, the Ontario legislation entitles the surviving spouse to one-half of it where there is one child or issue of that child surviving, but only to one-third if there are two or more children or issue of them surviving.

The *Act to Amend*, in its revision of the wording of Sections 6(1) and (2), contemplates a Section 6(5). *The Devolution of Estates Act* has never had a Section 6(5) and thus such a provision would have to be enacted. While the N.D.P. counterpart to the Progressive Conservative *Act to Amend* did contain a Section 6(5), the Progressive Conservative *Act to Amend* does not. I expect that the Progressive Conservative government intended to enact a slightly different provision along the following lines: "In subsections (1) and (2), the amount of \$50,000.00 includes any money and the value of any property received by the widow pursuant to *The Marital Property Act*." However, for the same reason that I object to the amendment of Section 15(1) of *The Dower Act* which requires a surviving spouse to account for property received under *The Marital Property Act*, I think that the addition of a Section 6(5) to *The Devolution of Estates Act* would be wrong. A surviving spouse is not required to account for any other of his or her property.

The Wills Act

Prior to the enactment of the *Act to Amend*, the only change in the circumstances of a testator or testatrix that had any revocatory effect on a will was a subsequent marriage, by virtue of Sections 16(a) and 17 of *The Wills Act*.¹⁷ The *Act to Amend* has added another change in circumstances that has revocatory effect, namely a subsequent divorce. The *Act to Amend* added Section 36.1 to *The Wills Act*:

Where a testator makes a gift to his or her spouse by will and the marriage between the testator and the spouse is subsequently dissolved or annulled but without any revocation of the will or gift, then, unless there is a declaration in the will that it was made in contemplation of the dissolution or annulment the spouse is for the purposes of the gift deemed to have predeceased the testator.

There are a number of comments to be made about this new legislation. Differing from Section 17, Section 36.1 operates only with respect to provisions for a spouse and not with respect to the entire will. It will also be noted that the Section operates to deem a predeceasing of the ex-spouse unless there is a "declaration in the will that it was made in contemplation of the dissolution or annulment. . . ." The requirement of a "declaration" is the same as that in Section 17 and thus there is the same uncertainty as to what is required. The comparable provision in England is Section 177(1) of the *Law of Property Act*,¹⁸ which requires that a will be "expressed" to be in contemplation of a subsequent marriage. It has been suggested that legislation such as that in Manitoba, using the word

17. R.S.M. 1970, c. W150, as am. by S.M. 1974, c. 59, s. 65; S.M. 1975, c. 6; S.M. 1977, c. 53, s. 7; S.M. 1978, c. 27, s. 9.

18. 15 & 16 Geo. 5, c. 20 (U.K.).

“declaration,” requires something more than simply an expression of the required contemplation.¹⁹ The use of the word “it” is somewhat equivocal; “it” could be a reference to either the will or to the provision. If it is the will which must be declared to have been made in contemplation of the subsequent dissolution or annulment then the recent English decision in *Re Coleman*²⁰ ought to be noted.

Other difficulties that come to mind with Section 36.1 can be raised by the following questions. What is the effect of Section 36.1 on a bequest to a spouse in trust in a half-secret trust situation: is the spouse barred from being a trustee beneficiary, as well as a beneficial beneficiary; if yes, is the entire bequest in jeopardy or is the result simply that a new trustee-beneficiary must be designated? What is the effect, if any, of Section 36.1 on a fully-secret trust bequest to someone for the benefit of a spouse; that is to say the spouse is the unarticulated beneficiary? What is the effect, if any, of Section 36.1 in connection with a substitutional gift? Suppose that among other testamentary provisions a testatrix provides for a bequest “to my husband Miln, but if he should die before me or within 30 days following my death to my nephew Patrick” and the testatrix leaves the residue of her estate to her niece Ainslie; does or should the bequest go to Patrick or to Ainslie? What is the effect of Section 36.1 on devises of life estates per autre vie? Does Section 36.1 apply to testamentary provisions for a spouse by name only without any description of him or her as a spouse; that is, a bequest “to Mary Jane” without any descriptive adjectives such as “my spouse,” “my wife,” or even “my dear,” indicating that the bequest is for the beneficiary as a spouse? There may well be other difficulties that will eventually surface.²¹

Will Drafting

The Marital Property Act of the N.D.P. government created instant community of property with respect to what it defined as family assets and deferred community of property with respect to what it defined as commercial assets. Insofar as family assets were concerned, the establishment of a community of property situation, as opposed to a separate property situation, added another restriction, so to speak, to a spouse’s testamentary freedom or power which perhaps would have had to have been taken into account in the drafting of wills. However, this potential will-drafting consideration

19. See *Re Pluto* (1969), 6 D.L.R. (3d) 541, 69 W.W.R. 765 (B.C.S.C.).

20. [1975] 1 All E.R. 675 (Ch. D.).

21. Again it may be of passing interest to note that the recently enacted Ontario provision, *The Succession Law Reform Act, 1977*, S.O. 1977, c. 40, s. 17(2), copes better (but not completely) with these questions than does our s. 36.1.

evaporated with the suspension and repeal of the N.D.P. *Act*, for *The Marital Property Act* of the Progressive Conservative government does not provide for a regime of community of property, instant or deferred, with respect to any assets. Separate property (with a right to an accounting of the assets of the marriage in certain circumstances) continues to be the order of the day as between spouses. The only will-drafting ramification seen at this juncture, is the use of conditions proscribing re-marriage with a gift over in the event of a re-marriage, to deal with a serious concern that a second spouse may become entitled to assets, via Section 7(5) or Section 6(5) (if it is applicable) of *The Marital Property Act*.²²

The Family Maintenance Act

At first impression, the only questions respecting succession in regard to *The Family Maintenance Act*, are whether orders under the *Act* are enforceable against estates; whether original applications can be made against estates under the *Act*; and whether applications can be made to vary an existing order either by a personal representative wishing to cancel or to decrease the order, or by a surviving spouse wishing to increase the order, assuming in both cases that orders are enforceable against estates. *The Family Maintenance Act* does not deal with these questions, and neither did its predecessor, *The Wives' and Children's Maintenance Act*.²³ The situation is therefore unchanged. In *Ex p. Buckholz*,²⁴ the Court answered the second and third questions in the negative. *The Testators Family Maintenance Act*²⁵ must also be remembered when considering maintenance for surviving lawful spouses and children.

22. For a brief discussion of the law regarding such conditional provisions, see T. G. Feeney, *The Canadian Law of Wills: Construction* (1978) 248-51.

23. R.S.M. 1970, c. W170.

24. (1968) 1 D.L.R. (3d) 455, 66 W.W.R. 282 (B.C.C.A.).

25. R.S.M. 1970, c. T50, as am. by S.M. 1976, c. 69, s. 44.

