

FAMILY LAW WORKSHOP - FAMILY MEMBERS AND SUCCESSION LAW

From our examination of several issues referred to us by the practising Bar, a substantial package of proposals has developed. The package, which will be discussed in greater detail below, consists of the following items:

Marital Property Act

- a) Time limit for applications after death -- We suggest an extension.
- b) Conflict with time limit in Testators Family Maintenance Act -- We suggest that the two Acts should be made consistent.
- c) How to deal with the marital home in an application made after the death of a spouse -- We propose a clarification.
- d) Duties of personal representatives after a division -- We suggest that a mechanism should be added to moderate the potentially distorting effects of a division of marital property.
- e) Power of personal representatives to effect a division -- We ask if the existing law is satisfactory.

Devolution of Estates Act

- a) Entitlement of surviving spouse -- We propose a new entitlement which will limit conflicts with the Marital Property Act.
  
- b) Disentitlement through adultery -- We suggest that a sufficiently final separation, rather than separation plus adultery, should be the test for the disentitlement of the surviving spouse.

Testators Family Maintenance Act

We suggest that this be expanded to include intestacies.

Survivorship Act

We propose a replacement for the "oldest dies first" rule.

Wills Act

- a) Revocation by marriage -- We suggest a new rule under which a will would not be revoked by marriage but would be given a qualified validity.
  
- b) Revocation by divorce -- We have considered, and reject, the idea that a will should be revoked or otherwise altered by divorce.

What we would like to know in relation to our proposed package of reforms is this. First, to what extent are the issues we are addressing problems in practice? Second, if they are problems, are we on the right track in the answers we are proposing? Third, are there other issues which we should be considering as part of this overall package?

#### DETAILS OF PROPOSALS

##### Marital Property Act

a) Time limit for applications after death. In about 50% of the reported cases under s.4 of the Act an application has been made for extension of the 60-day time limit under the Act. We feel that this suggests that the existing time limit is too short. We tentatively suggest extending it to four months.

##### **Questions:**

- (1) Should the time limit be extended?
- (2) If it is extended, would there be a need to confer on a judge the power to recover from beneficiaries property lawfully distributed in the administration of the estate? Extending the time limit increases the possibility that marital property may have left the estate before the application is made. Should the judge have the power, subject to the legitimate rights of third parties, to get the property back?

b) Conflict with time limit in the Testators Family Maintenance Act. At present the time limit for applications under the Marital Property Act is 60 days, whereas under the Testators Family Maintenance Act the time limit is six months. This raises the theoretical possibility that a surviving spouse could lose his/her right to apply for a division of marital property at a time when a dependant under the Testators Family Maintenance Act is still eligible to apply for support out of the estate. On the Testators Family Maintenance Act application by the dependant, nothing in either Act would prevent the judge from making an award that left the surviving spouse with less than he/she would have been entitled to under the Marital Property Act. On the Testators Family Maintenance Act application, therefore, any protection of the surviving spouse's position under the Marital Property Act would presumably depend upon whether the judge either (a) in exercising discretion under the Testators Family Maintenance Act, took into account the Marital Property Act and made an award that respected the surviving spouse's entitlement, or (b) allowed the surviving spouse to make a late application under the Marital Property Act.

We are not sure quite how much of a problem this represents. We do feel, though, that unless there is some good reason why the time limits for applications should be different under the two Acts it probably makes sense to make them

consistent. We therefore suggest that the time limit under the Testators Family Maintenance Act should be reduced to four months, thus matching the proposed new limit under the Marital Property Act. The four months should run from the time of death (as it now does under the Marital Property Act) rather than from the grant of probate (the present starting point under the Testators Family Maintenance Act).

**Comment:**

As a practical matter, we would suggest that a surviving spouse who is happy with his/her entitlement under a will or intestacy but who is faced with a challenge under the Testators Family Maintenance Act should automatically make an application under the Marital Property Act as a defensive measure. In some cases it might then be appropriate to ask the court to decide the Testators Family Maintenance Act issue first, since if that application was unsuccessful there might be no need to deal with the Marital Property Act.

**Questions:**

Should four months be a sufficient period for application under the Testators Family Maintenance Act? Is there any reason why this period should not run from the date of death? Obviously the grant of

probate formalizes the status of the will and thus makes clear to the dependant whether support is needed beyond whatever the will provides. However, the same is true under the Marital Property Act. There, too, the surviving spouse's need to challenge a will may depend on whether the will is probated. Under that Act, however, the time allowed for application runs from the date of death.

c) How to deal with the marital home in an application made after the death of a spouse. It has been suggested that the wording of s.4(1) causes difficulties in cases in which the marital home is the predominant constituent of the marital property. LeBlanc v. LeBlanc Estate (1984) 57 N.B.R. (2d), 31 -- not the celebrated case that went to the Supreme Court -- has interpreted the Act in a way that gives full protection to the surviving spouse's right to the marital home, but which leaves outstanding various issues concerning the division of the remainder of the marital property. We suggest the following as a reasonable way of spelling out what the surviving spouse's entitlements should be. The surviving spouse should have the right to whichever of the following he/she prefers:

- a) an equal division of the marital property, with no special preference in relation to the marital home;
- b) an equal division of the marital property, the applicant's share to include the marital home;

c) a division of the marital property so that the marital home, and such other part of the marital property as is reasonably necessary for the enjoyment of the marital home, is vested in the applicant.

Options a) and b) respond to the case in which the marital home is not a disproportionately large part of the marital property. Between them they entitle the surviving spouse to take the marital home if he/she wishes -- option b) -- but leave the option of taking other assets if that seems preferable -- option a). Option c) is the one that deals with cases in which the marital home is the major asset. Option c) clarifies that the spouse is to get the home and whatever else is necessary, even when this goes beyond the ordinary half share of the marital property.

**Question:**

Is there any need to revise s.4(1)? Would the above formulation be clearer and more satisfactory than the existing s.4(1)? If so, at what stage should the applicant choose between the options? At first blush, an early choice would seem desirable. The problem, though, with an early choice is that in some cases it may be hard to know what the most favourable choice would be until the judge finally establishes what the marital property is and how it is to be divided.

d) Duties of personal representatives after a division.

Here the question that has been raised is whether the existing law governing the duties of the personal representatives after a division of marital property is (a) clear and (b) satisfactory. Under the existing law, it would seem that the estate of the deceased can be considered as composed of three elements: the marital property which is ordered to go to the surviving spouse, the remaining marital property, and the non-marital property. The practical question is, what are the personal representatives to do with the second and third component parts of the deceased's estate when the first part has been ordered to be the property of the surviving spouse?

This question becomes especially important in cases in which a testator has left a will dealing with the whole of his/her estate, and the application under the Marital Property Act has clearly undercut the testator's plans. Take, for example, a will which leaves "my \$100,000 business to my spouse; my \$100,000 marital home to charity." If the spouse applies under the Marital Property Act, will he/she get the marital home under the Act and the business under the will, leaving nothing for charity? Take, next, an estate which is wholly marital property and which is solely owned by the deceased. The will says "half to my spouse, half to my child." The spouse applies under the Act and is awarded half the marital property (= half the estate in this case). Is he/she now entitled to half of the balance under the will?



We are not aware of any New Brunswick cases that have dealt with these issues in depth. We take it that the position is that the personal representatives are bound by the terms of the will (or intestacy), except to the extent that the court orders otherwise. To the first of the hypothetical cases above, therefore, the answer does seem to be that if the court simply orders the house to go to the spouse, the spouse will end up with both the house and the business. In the second case, if the court simply orders half of the marital property to go to the spouse, it seems uncertain whether the spouse will then get half of the remainder under the will. If the will is interpreted by reference to the pre-division estate, he/she will get nothing more. If it is interpreted by reference to the post-division estate, he/she will get 50% of the remaining half.

If this is the correct legal approach, we suggest that the answer to our question as to whether the existing law is (a) clear and (b) satisfactory is that, in the first example, the law is unsatisfactory, and in the second example the law is at least unclear, and is open to debate as to whether it is satisfactory. In practice, of course, it may well be rare for an application under the Marital Property Act to produce so striking an effect as in the examples above. Nonetheless, with every will there must be to some extent a distortion of the

testamentary intent, for the will is drafted in relation to the testator's estate as it exists before an application under the Marital Property Act is made, whereas it is executed in relation to the estate as it exists after the application is disposed of. How great a distortion this may produce will vary from case to case, but in all cases there will be a distortion.

In relation to intestacies, too, there may be similar difficulties. Here the difficulties result from the surviving spouse's share under the Devolution of Estates Act being so similar to, and yet so different from, the share under the Marital Property Act. Notably, under the Devolution of Estates Act the spouse has no special claim to the marital home (this is apparently part of the "residue" to be shared with the children), but gets 100% of the "personal chattels" (as opposed to the 50% of the "marital property" under the Marital Property Act). If the proposal below to reformulate the surviving spouse's share under the Devolution of Estates Act is accepted, this particular difficulty will diminish, but certainly as the Act now stands, the personal representatives may find it difficult to reconcile their obligations under the two Acts, and the spouse who applies under the Marital Property Act seems likely to end up with a share far different from anything envisaged by either of the two Acts.

We feel that the answer to this is to give the court that makes the division of marital property the power to deal with any further issues arising as to the distribution of the part of the estate that is not ordered to go to the surviving spouse. This power should apply both to the marital property which is not ordered to go to the surviving spouse and to non-marital property. The power of the court should be to make such order in relation to the distribution of the balance of the testator's estate as it considers just and reasonable having regard to (a) the distribution that will occur if no such order is made and (b) the distribution which would have occurred if no application under the Marital Property Act had been made. So far as concerns the distribution of that part of the marital property that is not to go to the surviving spouse, this is perhaps an extension and clarification of the court's existing power and duty to divide the marital property having regard to the testator's express intentions. The proposed inclusion of non-marital property, however, will take the court into areas where at present it only rarely treads.

The effect of this amendment would be to strengthen the provisions of the Act requiring the court to reconcile, as best it can, the testator's intentions with the surviving spouse's rights. The surviving spouse's rights will remain paramount, but once the entitlement under the Marital Property Act is taken care of, full power can be given to the court to

make such adjustments as seem necessary to ensure that the combined effect of the statutory division in favour of the surviving spouse and the testamentary distribution of the balance of the estate approximate as closely as possible to the apparent intentions of the testator.

**Comment:**

We have not found the issues described above easy to deal with in conceptual terms. To our surprise, moreover, when we included a discussion of them in our 1988 paper, we received little response. Are we wrong in thinking there is a weakness in the Act here? Or perhaps our analysis is correct but our solution is already part of the Act. Can it be argued that ss.4 and 7 are already broad enough to give the court full access to the marital property to achieve the above result, and that ss.8 and 7 are broad enough to enable the court to bring in the non-marital property when recourse to it is necessary?

e) Power of personal representatives to effect a division. Here the question is whether something should be added to the Act to enable personal representatives to give effect to the surviving spouse's claim on the marital property. This might simplify estate administration by avoiding the need for applications to the court.

The existing law is presumably that the personal representatives' duty is to follow the terms of the will or intestacy unless and until an application to the court is made, but that the beneficiaries of an estate may vary the terms of the estate if they all agree and all have the legal capacity to consent to the variation. If a beneficiary lacks consent, the court may be asked to give it on his/her behalf. Thus a division of marital property can be effected out of court if all beneficiaries agree.

**Question:**

Is the existing law as stated above? Is it adequate to allow the personal representatives to deal with Marital Property Act claims without the need to go to court? Should the law be amended, either to clarify the existing right, or to give the personal representatives greater authority? (E.g. they might be given power to vary the terms of the estate notwithstanding the absence of consent, leaving it up to the unsatisfied beneficiary to challenge the revised distribution as unreasonable.)

Devolution of Estates Act

a) Entitlement of surviving spouse

At present, the Devolution of Estates Act and the Marital Property Act give the surviving spouse rights which are

similar in concept but different in detail. The former Act gives the spouse a special claim on "personal chattels" while the latter talks of "marital property," but the drafters of the two definitions clearly had much the same property in mind. Both express the idea that the ordinary property of everyday life should go to the surviving spouse. There are, however, major differences. Notably, the Devolution of Estates Act gives no preferential right to the marital home or to cash, while it gives a right to one hundred percent of (as opposed to an equal division of) the "personal chattels."

It is hard to see why these two statutory entitlements, so similar yet so different, should co-exist, especially given that the existing provisions of the Devolution of Estates Act seem to have been a kind of first step in the direction in which the Marital Property Act subsequently followed. In other jurisdictions in which the spouse is given a legacy and then a share of residue, the legacy is generally expressed in terms of dollars. New Brunswick, instead, gives the "personal chattels" as the legacy. Under the law elsewhere the argument for retaining two separate entitlements might be stronger: a case can no doubt be made for giving the surviving spouse a choice between entitlements. (On the other side, of course, a case can likewise be made for saying that the legislature need only confer one entitlement and should not prevaricate.) We see little justification, however, for a law which takes one general concept as expressing the surviving

spouse's entitlement, and then expresses it in two different ways.

We therefore suggest an amendment to the surviving spouse's entitlement under the Devolution of Estates Act. We propose that the property to which the spouse is entitled on intestacy should be the whole of the "marital property." Non-marital property should be divided between the spouse and any children in the proportions now established under the Devolution of Estates Act. This appears a natural extension of the policy of the Devolution of Estates Act in the new context created by the Marital Property Act. It reflects the view that a reasonable person would probably want his/her spouse to have the property that represents their joint lives together. Children for whom adequate provision was not made by the new legislation would be free to proceed under the Testators Family Maintenance Act (which, as noted below, we suggest should be extended to intestacies), but even on such an application, the spouse should be guaranteed the half share of marital property given by the Marital Property Act.

An incidental effect of giving the surviving spouse all of the marital property would be to make Marital Property Act applications in cases of intestacy largely redundant. The spouse's entitlement under the Devolution of Estates Act would always include everything which he/she could get under the Marital Property Act, so that only in response to an

application by another dependant under the Testators Family Maintenance Act might the spouse need to apply under the Marital Property Act in order to safeguard the one-half share of marital property.

(b) Disentitlement through adultery

Section 37 of the Devolution of Estates Act says that a spouse loses his/her right to intestate succession if the spouses are separate and the survivor is living in adultery at the time of death. This provision seems out of keeping with the times. We suggest a provision based on separation combined either with formal procedures under the Marital Property Act or with passage of time. We propose that the surviving spouse should lose the right to intestate succession if, at the time of the deceased's death:

- a) the court had divided the marital property and there had been no reconciliation; or
- b) the spouses had entered into a separation agreement, with independent legal advice, and there had been no reconciliation; or
- c) the spouses had lived separate and apart for four years.



Items a) and b) both reflect the idea that once a separation is final, spouses should not expect to inherit from each other in cases of intestacy. If they want to preserve inheritance rights, they should do so by making a will, and items a) and b) both depend upon the spouses having gone through a legal process in which their legal advisors should be in a position to ensure that the spouses understand their options in terms of succession law. Item c) has a rather different effect. It reflects the idea that passage of time may lead to a separation being final, but in the context of the revision suggested above to the surviving spouse's intestate entitlement, it serves mainly to remove an irritant to estate administration. The source of the irritant is that any entitlement of a separated spouse to "marital property" is a right that becomes less substantial as the period of separation grows: things that were once marital property are disposed of and other things replace them. The entitlement thus becomes, over the course of time, more of a theoretical nuisance than a substantial benefit to the spouse. Item c) terminates the theoretical nuisance by stipulating a time after which the right to intestate succession is cut off.

We suggest, however, that the loss of the automatic right to inherit should not entail a loss of statutory rights to make application either as a spouse under the Marital Property Act or as a dependent under the revised Testators Family Maintenance Act. These Acts establish a minimum level

of protection which should remain. In practical terms, no doubt, the protection that either statute gives will become less substantial as the length of the separation grows. In the case of the Marital Property Act, moreover, an application after death would not be available once the marital property had already been divided inter vivos. Nonetheless, there might be some exceptional cases in which the protection of these Acts would be of value.

**Comment:**

One response to this proposal when circulated in 1988 was that separation plus adultery should be retained as a ground for the loss of inheritance rights, even in the context of the revised proposal above. Adultery, it was suggested, would still be viewed by so many as unacceptable that it was reasonable for the law to assume that a deceased would wish an adulterous spouse to be disinherited, and that the law should therefore effect that result.

We tend to the view that in this area of human relationships the law should not presume too much. For some people, infidelity may be absolutely unacceptable; for others it may not. In present circumstances (and noting, for example, the policy of the Divorce Act and the Marital Property Act in favour of reconciliation), we think it better that there

should not be a rule of law automatically disinheriting the separated spouse who commits adultery. Those who wish to disinherit for adultery should do so by will. The case against disinheritance by rule of law becomes even stronger in the context of the other elements of our proposal. Our proposal would establish a formal separation as an event that led to a loss of inheritance rights. An additional rule on adultery, therefore, would only affect those who, despite the adultery, had not proceeded with a formal separation. For those people above all it seems inappropriate that the law should presume an intention to disinherit.

Testators Family Maintenance Act

As will be apparent from the above, our suggestion is that the Testators Family Maintenance Act should be expanded (and probably renamed) so that it encompasses not only testacies and partial intestacies, but also total intestacies. There is no reason to suppose that the shares prescribed by the Devolution of Estates Act, either as it exists now or as it is proposed to be amended, are reasonable in all cases, and in exceptional circumstances (e.g. an exceptionally needy child) it should be possible to adjust the statutory shares, just as it would be if a will left property in the way the Devolution of Estates Act does.

Survivorship Act

In accordance with all recent Law Reform Commission Reports that we have seen, we suggest that the present 'oldest dies first' rule of the Survivorship Act should be replaced. Its replacement should be the rule generally recommended elsewhere: that the property of each deceased should be distributed as though he/she had outlived the other. We further suggest that the principle of equal sharing in the Marital Property Act should be extended to the Survivorship Act in cases where the two co-deceased are husband and wife. Although the general rule in the Marital Property Act is that the right to apply only exists while the applicant is alive, we feel that an exception should be made where the two spouses die together, with the result that neither is able to consider his/her options. We further suggest that there should be an extension to the concept of 'dying together,' so that people who die within ten days of each other should be considered to die at the same time. The aim of this is to ensure that one person should genuinely outlive the other in order to inherit. Under the existing law it is enough for one to outlive the other by merely a matter of minutes for the one to be considered the survivor, and thus for the heirs of the one to inherit the sum of both estates, to the exclusion of the heirs of the other. The one rider we would add to the 10-day rule is

that if, by will, gift or whatever, the survivor takes steps during the ten days to dispose of the property, the disposition should stand.

**Question:**

Is our proposal to bring in the Marital Property Act here realistic and/or desirable? The kind of case that seems to call for it is that of the childless couple who die intestate. Why should there not be an equalization of marital property for the benefit of their respective next-of-kin? On the other hand, the Marital Property Act is in general only concerned with the rights of the living, and in some cases, especially where the deceased have left wills, the case for allowing the beneficiaries of one estate to equalize the marital property, this being necessarily at the expense of the beneficiaries of the other estate, is less clear. Perhaps the marital property should be shared where there is an intestacy, but not where there is a will.

If bringing in the Marital Property Act is a good idea, would it be better to do it by application to the court in the normal way, or simply to deem the marital property to have been owned jointly and require it to be split equally?

Wills Act

a) Revocation by marriage

It has been suggested that something should be done about the rule that a will is revoked by marriage. We are inclined to agree. The rule seems to be one of those legal 'things that go bump in the night,' having significant legal effects at a time when ordinary people might well not expect it. We do not feel, however, that the existing rule should be replaced by its opposite, a rule that marriage does not revoke a will. This would in many cases cut out the new spouse, and though he/she would no doubt have rights under the Testators Family Maintenance Act or the Marital Property Act, this does not seem a sufficient response.

What we suggest instead is that the marriage should have the effect of suspending the will, and thereby rendering the deceased intestate, as long as there is anyone alive who, by marriage or descent, will inherit from the testator on intestacy but will not take under the will. Once that period is over, the will would revive. While the will is suspended, moreover, beneficiaries under the will, if they are not beneficiaries under the intestacy, should be able to apply to the court to be allowed to receive their bequests if this can be done without undue detriment to the rights of the

beneficiaries under the statutory intestacy. It is these unrelated beneficiaries -- friends, charities and so forth -- who seem to us to be the the main victims of the existing rule. The new proposal that we are making aims to balance the interests of these people, whom the testator has specifically chosen to benefit, with the interests of the new family members.

**Question:**

Can a better way be found of reconciling the various interests involved? If the general approach -- suspending the will but giving the beneficiaries under it some possibility of protection -- is acceptable, how long should the suspension last and which beneficiaries should have the protection? Our present suggestion reflects the idea that the purpose of the suspension is to protect the new dependants that the testator gains through the marriage or during it. The suspension therefore ends once there is nobody in this category. Pre-existing dependants (e.g. parents, children by an earlier marriage) are people that the testator could have dealt with in the will if he/she had so chosen. The termination of the suspension puts these people back into the position that the testator assigned to them by the will.

On the question of which beneficiaries should have the right to apply to the court, the main question is whether people who benefit both under the will and under the intestacy (e.g. children by an earlier marriage), but who have different entitlements under the two, should be within the class of beneficiaries able to assert their testamentary claims. Our suggestion is that they should be limited to their claims on intestacy for as long as the will is suspended. Admittedly, this may in some cases appear contrary to the testator's wishes. For example, a widow might leave "75% to son A, 25% to son B" and then remarry. When the widow dies, sons A and B would each receive equal shares on distribution under the Devolution of Estates Act, which may seem anomalous given the 75/25 division in the will. However, there is no assurance that the 75/25 distribution made under the will before re-marriage is the same as the widow would have made in the new context established by the marriage. Besides, if the gifts were of specific items of property of uncertain financial or sentimental value, any attempt to reflect the testator's apparent proportional desires (e.g. by adjusting the shares of the two sons inter se) seems likely to cause severe difficulties.



b) Revocation by divorce

It has been suggested to us that a will should be revoked by divorce. We think not. We have also considered, and are not convinced by, the recommendations made elsewhere that the effect of divorce should be to deem the divorcee dead, or to revoke all gifts to the divorcee, but leave the balance of the will intact. Our conclusion is that it should be up to the testator, and not the law, to say what happens to his/her will on divorce. Divorce is, after all, a process which will involve contact with lawyers. As part of this contact the lawyer should advise of the need to revise a will to prevent the former spouse from receiving things that the testator would not wish him/her to. We do not think that it is necessary to create a new statutory rule based on what we think many testators might expect if the testator will in fact be in a position to state his/her wishes for himself/herself as part of the divorce process.

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