Death and Property Rights in New Brunswick Recent Developments

INTRODUCTION

Proclamation of the *Marital Property Act*[1] as of January 1, 1981 has effected some significant changes in the law of New Brunswick regarding testamentary dispositions and inheritance rights. Subsequent proclamation of the *Child and Family Services and Family Relation's Act*[2] will produce further changes in those areas of the law.

The modest purpose of this practice note is to identify and describe those changes. While some observations will be made and questions raised concerning those matters, time and space do not permit the undertaking of the extensive analysis required to provide probable answers. It is hoped, however, that the observations which are made will assist the reader in finding appropriate answers.

MARITAL PROPERTY ACT

Division of Marital Property on Death

The *Marital Property Act* provides for a number of circumstances in which a spouse may make application for the division of marital property. The death of a spouse is included among them. The surviving spouse is entitled, upon application to the Court, to have the marital property divided in equal shares.[3]

It is to be noted that the Act does not effect a vesting of property in the surviving spouse.[4] Rather, it provides the survivor with the means of obtaining a share of the deceased spouse's estate. If, therefore, the survivor does not make an application, the Act does not govern the disposition of the deceased's estate.

If an application is made, the survivor's rights to a division of the marital property supersede any disposition of the estate effected by the deceased's will or the *Devolution of Estates Act.*[5] That is not say,

[1]S.N.B. 1980, c. M-1.1.

[2]S.N.B. 1980, c. C-2.1. It is anticipated that this Act will be brought into force in early April, 1981.

[3]*Supra*, footnote 1, at s. 4(1).

[4]*Ibid.*, at s. 47.

[5]Ibid., at s. 4(4). The intent of this provision is not without doubt because of the language which it employs. It would seem, however, that the intention is to displace the provisions of the will or the *Devolution of Estates Act*, R.S.N.B. 1973, c. D-9 only to the extent that they are inconsistent with an order made pursuant to Section 4(1).

however, that the obtaining of a division of the marital property disqualifies the spouse from sharing otherwise in the deceased's testate or intestate estate. The survivor may share in the estate which remains after the share of the marital property has been removed. Indeed, the surviving spouse may be a successful applicant under both the *Marital Property Act* and the *Testators Family Maintenance Act.*[6] Presumably, however, the results of the former application would influence the Court in its decision on the latter one.

While an application under the *Marital Property Act* does not disqualify the applicant from taking under the will, such disqualification may result from the terms of the will. Those terms may be such as to force the surviving spouse to elect between the benefits under the will and the share of the marital property. This is similar to the traditional rights of the testator to put the surviving spouse to an election as regards dower rights.[7] It is clearly a matter which should be given due consideration in the drafting of spouses' wills.

The division to which the surviving spouse is entitled is an equal share of the marital property, including the deceased spouse's interest in the marital home. The latter is, however, subject to the discretion of the Court which may make such other order as it considers fair and equitable in the circumstances. Those circumstances are the considerations set forth in Section 7.

While the terms of Section 4(1) appear to limit the Court's discretion to the disposition of the marital home, the introductory words of Section 7 seem clearly to extend that discretion to the division of the marital property generally. In the result, the surviving spouse may obtain from the estate such share of the marital property as the Court considers equitable.

An application under Section 4(1) may result in a division of assets of the estate which do not fall within the definition of marital property. Under Section 8 the discretion of the Court is extended beyond the scope of marital property. The executor or administrator cannot safely assume, therefore, that non-marital property may be freely dealt with pending an application under Section 4(1). Indeed, a restraining order issued under Section 11 may extend to any property that may be divided under the Act and is not restricted, therefore, to marital property.

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[6]R.S.N.B. 1973, c. T-4.

[7]Such an election is no longer relevant since the Act, by Section 49, has abolished both the common law right of dower and those rights created by the *Dower Act*, R.S.N.B. 1973, c. D-13. While Section 49(3) has preserved any dower right which "vested in possession" before January 1, 1981, it is not clear whether the intention is to extend such protection to all dower rights which crystallized by virtue of the husband's death prior to January 1st or only those rights which the widow had commenced to enjoy in possession before that time.

It is to be noted as well that the estate may include more than one property which satisfies the definition of "marital home". This is a consequence of the concept of "marital home" as set forth in Section 16, and is recognized to be so by Section 17. It is not clear whether Section 4(1) contemplates that the surviving spouse should acquire the deceased spouse's interest in each property which qualifies as a marital home under Section 16. It is clear, however, that the Court does have the discretion to deny any such claim in appropriate circumstances. Consequently, a claim of entitlement to more than one marital home may be denied.

The Application under Section 4(1)

An application under Section 4(1) is to be made within sixty days after the death of the deceased spouse. This time limit may be extended by the Court for cause. Should the applicant die before a decision is rendered the application may be continued by the applicant's estate. This may be of particular significance to the beneficiaries of the surviving spouse's estate in circumstances where they might not stand to benefit from the deceased spouse's estate. If, for example, the deceased husband's will makes the surviving wife's benefits contingent upon her surviving him by a specified period, it would appear advisable that an application be made under Section 4(1) for the benefit of her beneficiaries should she fail to qualify to take under the will. Presumably, such an application can be withdrawn if subsequent developments should so dictate.

The fact that an application can be continued after the applicant's death is indicative of the premise and philosophy which underlie the *Marital Property Act.* The spouse's entitlement to a share of the marital property arises out of the partnership of the marriage and not because of any state or relationship of dependence. This is in sharp contrast with the premise, if not the application, of the *Testators Family Maintenance Act.* The following table indicates important differences between the two Acts.

Section 4(1) of the **Marital Property Act**	**Testators Family Maintenance Act**
1. An application may be made whether the spouse dies testate, intestate, or both.	1. An application may be made only if the spouse dies testate, in whole or in part.[12]
2. An application may be continued by the applicant's estate.[8]	2. An application dies with the applicant.[13]
3. The applicant must be granted a share of the deceased's estate.[9]	3. An application may be refused.[14]
4. The applicant must assume a fair and equitable share of the marital debts.[10]	4. The applicant does not assume any debts of the estate.
5. The application takes precedence over one made under the *Testators Family Maintenance Act.*[11]	5. The authority of the Court is subject to the rights of the surviving spouse to a division of marital property.
6. The Act does not provide a specific right of appeal from an order.	6. The Act does provide a specific right of appeal from an order.[15]

Domestic Contracts

Section 40 of the *Marital Property Act* provides that "where there is a conflict between a provision of this Act and a domestic contract the domestic contract prevails". By Section 34 the ownership in or division of property upon death may be provided for by an agreement entered into by a man and a woman before their marriage or during their marriage while cohabitating. In this way the right to a division of property under Section 4(1) may be barred. By contrast, the right to apply under the *Testators Family Maintenance Act* may not be so barred. An attempt to do so is unenforceable as an attempt to oust the authority of the Court.[16]

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[8]*Supra,* footnote 1 at s. 5(3).

[9]While Section 7, *Marital Property Act* authorizes the Court to make an unequal division of the marital property there is no indication that it may deny the applicant any share whatever.

[10]*Supra,* footnote 1, at s. 9.

[11]*Ibid.*, at s. 4(6).

[12]*Supra*, footnote 6, at s. 2(1), s. 2(4).

[13]*Re McMaster* (1957), 21 W.W.R. 603 (Alta. S.C.).

[14]*Supra,* footnote 6, at s. 2(1), s. 2(3).

[15]*Ibid.*, at s. 18.

[16]*Re Edwards* (1962), 31 D.L.R. (2d) 308 (Alta. C.A.).

The *Marital Property Act* does not purport to clothe a domestic contract with testamentary character. Presumably, therefore, it is to be treated like any other contract by which a party undertakes to dispose of property in a certain manner on death. An inter vivos disposition which would render the covenantor unable to fulfil his undertaking may give rise to an action for breach of contract.[17] Where there is no inter vivos breach but the covenantor's will fails to dispose of the estate in satisfaction of the domestic contract the surviving spouse may take action against the estate.[18]

Section 41 authorizes the Court to disregard any provision of a domestic contract if it was made before January 1, 1981 and was not made in contemplation of the legislation. As well, a spouse may challenge a domestic contract which was entered into without the benefit of independent legal advice. The apparent purpose of those provisions is to enable the surviving spouse to get around the domestic contract so as to be entitled to make application for a division of marital property under the Act.

Where the deceased spouse has failed to comply with the terms of a domestic contract the survivor may be entitled to treat the contract as inoperative and to apply under the Act for a division. This could be of considerable advantage to the surviving spouse.

An interesting question arises as to the relationship between a testamentary disposition made pursuant to a domestic contract and the operation of the *Testators Family Maintenance Act.* Section 16 of that Act provides as follows:

> 16. Where a testator, in his lifetime bona fide and for valuable consideration, has entered into a contract to devise and bequeath any property real or personal and has by his will devised or bequeathed such property in accordance with the provisions of the contract such property shall not be liable to the provisions of an order made under this Act except to the extent that the value of the property in the opinion of the judge exceeds the consideration received by the testator therefor.

Where a testator devises or bequeaths property to his spouse pursuant to a domestic contract how is the value of the consideration received by the testator to be measured? If the value so determined is less than the value of the property left to the surviving spouse then the excess could become subject to an order made on an application by the testator's children. On the other hand, if the surviving spouse takes by way of division under the *Marital Property Act* such division is not subject to reduction by an order under the *Testators Family Maintenance Act.*[19]

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[17]*Synge & Synge*, [1894] 1 Q.B. 466 (C.A.).

[18]*Re Davidson* (1947), 20 M.P.R. 53 (N.B. C.A.).

[19]*Supra*, footnote 1, at s. 4(6).

Where a will contains provisions which are intended to carry out the terms of a marriage contract or separation agreement, care must be taken to ensure that that intention is clearly reflected in the will. Otherwise, the surviving spouse may enjoy a double benefit by being entitled to take under the will and to sue the estate pursuant to the contract.

CHILD AND FAMILY SERVICES AND FAMILY RELATIONS ACT

Adopted Children

Section 33 of the *Adoption Act*[20] makes provision for inheritance by and from adopted children on an intestacy. The effects of those provisions may be summarized as follows:

> (a) An adopted child inherits from the adopting parents as though he were their natural born child.
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> (b) An adopted child inherits from the issue of the adopting parents as though he were the natural born child of those adopting parents.
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> (c) An adopted child does not inherit from the ascendants or collateral relations of the adopting parents.
>
> (d) An adopted child inherits from the natural parents and kindred as though the adoption had not taken place.
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> (e) The adopting parents and their kindred inherit from the adopting child any property which he acquired by his own efforts or by gift or inheritance from the adopting parents or their kindred.
>
> (f) The adopted child's natural parents and kindred inherit from him any property which he received by gift or inheritance from the natural parents or kindred.

In the case of an adopted child who was born illegitimate only the mother and maternal kindred fall within the scope of natural kindred for inheritance purposes.

By Section 85(1)(*a*) of the *Child and Family Services and Family Relations Act* (the "new Act"), the adopted child becomes the child of the adopting parents for all purposes including inheritance from the kindred of the adopting parents. This has the effect of bringing the adopting parents' ascendants and collateral relations within the scope of those from whom the adopted child may inherit. Although no specific reference is made to the rights of the adopting parents and their kindred to inherit from the adopted child, the effect of that provision would appear to be that those persons may inherit from the adopted

[20]R.S.N.B. 1973, c. A-3.

child as though he had been born to the adopting parents. On that basis the distinction which Section 33 of the *Adoption Act* draws between the sources of the adopted child's property will be eliminated thus making all of the child's estate inheritable by the adopting parents and their kindred.

By Section 82(2)(*c*) of the new Act the right of the adopted child to inherit from his natural parents and kindred is terminated unless the adoption order specifically preserves such right in accordance with the express wishes of the natural parent. It is possible, therefore, for the adopted child's dual rights of inheritance to be preserved. There is no provision, however, for preservation of the right of the adopted child's natural parents and kindred to inherit from him.

Section 34 of the *Adoption Act* provides that the word "child" or its equivalent in any instrument shall include an adopted child unless the contrary intention plainly appears by the terms of the instrument. There is no such provision in the new Act. Is this likely to have any effect on the interpretation of wills?

The answer probably lies in the construction and application of Section 85(1)(*a*) of the new Act which provides, in effect, that an adoption order gives the adopted child, for all purposes, the same status as if he had been born to the adopting parents. It is to be presumed that the interpretation of wills is one of those purposes. While this ought not to be construed as interfering with the testator's right to exclude adopted children from the benefits provided by his will, the Courts will probably require stronger evidence of such an intention than in the past. The very clear intention of the Legislature to establish the position of the adopted child fully and firmly within the adopting family is not likely to be easily avoided.[21]

Illegitimate Children

Section 34 of the *Devolution of Estates Act* provides for inheritance by illegitimates and their issue. They may inherit from the illegitimate's mother and his maternal ascendants and collateral relations as though he were legitimate.

The illegitimate may also inherit from his own spouse and issue because the fact of his illegitimacy is irrelevant for that purpose. Similarly, the illegitimate's surviving spouse and issue may inherit from him as though he were legitimate.

If, however, the illegitimate is not survived by a spouse or issue then the normal rules of intestate succession do not apply. In such a case

[21] *Re Barthelmes*, [1973] 1 O.R. 752, (1971), 32 D.L.R. (3d) 325 (Ont. H.C.). See also Sheard, Terrance, "Adopted Children", (1973) 21 *Chitty's L.J.* 150.

inheritance is governed by Section 35 which restricts such rights to the illegitimate's mother and to the mother's other children and grandchildren.

The new Act repeals Sections 34 and 35 of the *Devolution of Estates Act.* Section 96(4) of the new Act provides as follows:

> Any distinction between the status of children born in wedlock and born out of wedlock is abolished and the relationship of parent and child and kindred relationships flowing therefrom shall be determined in accordance with this section.

Consequently, inheritance by, from or through a person born outside marriage will be governed by Sections 22 of 32 of the *Devolution of Estates Act.* To ensure the full application of those provisions the definition of "issue" under the *Interpretation Act*[22] has been amended to include all lineal descendants of the ancestor, not just the "lawful" lineal descendants as has been the case.

If the person born outside marriage is subsequently adopted then the provisions of the Act respecting the inheritance rights of adopted children apply.[23]

Since both the child's natural parents and their kindred are brought fully within the scope of the *Devolution of Estates Act,* the provisions respecting determination of parentage are most important. It would appear that doubt as to maternity can only be resolved by means of an application for a declaratory order under Section 100(1) of the new Act. Presumably such an application may be made even though the child or the putative mother, or both, are dead.

As regards paternity it appears that a person such as an administrator of an estate is entitled to rely upon any presumption which arises under Section 103(1). A person wishing to challenge the applicability of such a presumption must apparently make application under Section 103(1). A person wishing to challenge the applicability of such a presumption must apparently make application under Section 100(1) for a declaratory order. Similarly, it seems to be open to the administrator to make an application under Section 100(1) to seek confirmation of the applicability of such presumption. An application to have a presumption of paternity confirmed or displaced may be made even if the child or putative father, or both, are dead.[24]

Where, however, the circumstances do not give rise to a presumption of paternity under Section 103(1) an application may be

[22]R.S.N.B. 1973, c. I-13.

[23]*Supra*, footnote 2, at s. 96(2).

[24]This appears to be the necessary implication of Section 100(5).

made under Section 100(1). An order may be made in such circumstances only if both the man and the child were living at the time the application was made.[25] If, therefore, there is no presumption of paternity, the timing of an application for a declaratory order is crucial. It must be brought inter vivos the parties. It is to be anticipated that this requirement will have the effect of preventing the successful pursuit of some legitimate inheritance claims.

The elimination of the concept of illegitimacy is extended to the interpretation of wills and other instruments by Section 97(1) which provides as follows:

> 97(1) For the purposes of construing any instrument, Act or regulation, unless the contrary intention appears, a reference to a person or group or class of persons described in terms of relationship by blood or marriage to another person shall be construed to refer to or include a person who comes within the relationship of parent and child as determined under section 96.

While application of the provision is made subject to the contrary intention of, for example, a testator, it is improbable that such an intention will arise readily by implication. The very strong statement of public policy which is inherent in Section 96 is unlikely to give way to a contrary intention which is not clearly expressed.[26]

Section 97(1) is not intended to have retroactive effect. By Section 97(2)(*b*) it is made applicable to instruments made on or after the coming into force of Part VI. An interesting and important question arises as to whether a will made prior to the effective date of Part VI but republished after that date will be subject to the new provisions. It is arguable that republication does not constitute the "making" of an instrument in the sense of 97(2)(*b*) and ought not, therefore, to bring a will into the new system. It is also arguable that the doctrine of republication is to be used only to give effect to a testator's intention, not to defeat it.[27]

Recognizing that such arguments may not succeed it is recommended that a codicil to a will which predated Part VI should contain a provision excluding children born outside marriage if that is the testator's intention. One such provision which has been suggested for use under the *Succession Law Reform Act* of Ontario would be equally useful in New Brunswick. It provides as follows:

> Any reference in my will or this or any codicil to a person in terms of relationship to another person determined by blood or marriage shall not include a person born outside marriage nor a person who comes within the

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[25] *Supra*, footnote 2, at s. 100(5).

[26] *Supra*, footnote 21.

[27] *In Re Heath*, [1949] 1 All E.R. 199 (Ch.D.).

> description traced through another person who was born outside marriage, provided that any person who has been legally adopted shall be regarded as having been born in lawful wedlock to his or her adopting parent and any person who is born outside marriage and whose natural parents subsequently marry shall be regarded as having been born in lawful wedlock.[28]

The concluding portion of that provision would preserve for purposes of the will the effect of the *Legitimation Act*[29] as a result of the subsequent marriage of the child's natural parents. That Act is repealed by the new Act since it no longer serves any need.[30]

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[28]This precedent is contained in a lecture by David Fuller on the *Succession Law Reform Act*, S.O. 1977, c. 40, published by the Department of Continuing Education, The Law Society of Upper Canada, Osgoode Hall, Toronto.

[29]R.S.N.B. 1973, c. L-4.

[30]*Supra*, footnote, 2 at s. 156.

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