Alberta Succession Law Reform
Public Consultation Workbook

About this Workbook

This workbook is a consultation guide for stakeholders who wish to provide input to Alberta Justice on changes to provincial succession laws. Information and questions in this workbook are designed to help participants focus their thoughts and responses.

Individuals and organizations who wish to submit a written response to the questions are asked to forward comments to the Alberta Succession Law Reform Project Team.

- E-mail: **just.successionlaw@gov.ab.ca**
- Mail: Alberta Justice, Legislative Reform, 4th Floor, Bowker Building, 9833-109 Street, Edmonton, AB T5K 2E8.

This workbook is on the web at **www.justice.gov.ab.ca** Click on "Alberta Succession Law Reform." If you have questions about the workbook or wish a hard copy sent to you, contact:

- Alberta Justice at 780-427-3923 (dial 310-0000 to be connected toll free)
- E-mail us at **just.successionlaw@gov.ab.ca**

Please note:

- *The pronouns 'he' and 'she' are used in this workbook interchangeably to reference a person. When used in this way, the reader should assume 'he' or 'she' refers to either gender.*
- *The word 'partners' used in this workbook refers to two people involved in an Adult Interdependent Partnership (AIP). One example of an AIP is two people living together for three or more years. They are assumed to be interdependent. To learn more about adult interdependent partnerships, go to the Alberta Justice website, click on publications and search for Alberta's Adult Interdependent Relationships Act and you.*

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Message from the Minister

Thank you for taking the time to assist us in reviewing the Alberta Succession Statutes. As Alberta's Justice Minister, I am always encouraged by the feedback we receive from Albertans. We want to know how we can make the justice system, legislation and our programs and services even more accessible to you.

Alberta Justice is continually working to ensure that provincial legislation is up-to-date and meeting the needs of Albertans. The laws and principles dealing with what happens to an Albertan's property when they have passed away were developed decades and, in some cases, centuries ago. Through this review, we want to make sure that these legal principles come in line with Alberta society as it operates today. This means ensuring our succession statutes meet current concepts of family, finance, philanthropy, and gender roles as well as new technology.

Thank you again for assisting us with our review of this important legislation. We greatly appreciate your time and attention.

Alison Redford Q.C.
Minister of Justice and Attorney General
Government of Alberta

About the Alberta Succession Law Reform Project

Mandate

The Government of Alberta, through Alberta Justice, is conducting a review of existing provincial succession laws. Called the Alberta Succession Law Reform project, its mandate is to consolidate and update current legislation in this area.

There are several phases to the project. The current phase is reviewing that aspect of succession law that affects the transfer of property on death. Later phases will include the Wills Act and Administration of Estates. As part of the current review, Alberta Justice is consulting with professionals and the general public to get their input and opinions.

The options set out in this document are based on considerable research and analysis done by government and private agencies. Of particular note is the important work done by the Alberta Law Reform Institute.

Consultation Process

The public consultation on the transfer of property on death involves discussions with stakeholders on a number of specific issues. These issues include family support, possession of the family home, intestate succession, and the impact of marriage or an AIP on a will and matrimonial property.

Interested members of the public are being asked to provide their input through round table discussions, focus groups and written submissions. The consultation materials are available on-line and by hard copy for any Albertan to access. Succession law issues of a technical nature will be discussed with lawyers, academics, judges, and other succession law experts in a separate series of round tables and through in-depth interviews.

Section I: General Principles

Six general principles are proposed to guide succession law reform. The principles are intended to be reference points for what Albertans believe provincial succession laws should achieve.

i. **A person can do what he wants with his property and his decision will be respected. Interfering with testamentary freedom – a person's right to decide what to do with his property upon death – must be justified.**

   This principle refers to testamentary freedom, the freedom to do what you want with your property and other assets. This can be inside or outside the context of an estate.

   It assumes a person had the mental capacity to make an informed decision before he died. In cases where capacity is impaired, every effort should be made to help that person make their own decision.

   This principle is also based on the belief that your decision regarding your property and assets should not be changed unless there is a good reason to do so. However, freedom is not absolute in Alberta and Canada. There are limits but those limits must be reasonable and justified.

   This approach is consistent with current estate planning, case law and dependent adult legislation in Alberta.

ii. **Testamentary freedom is subject to the settlement of a deceased person's and her estate's legal obligations.**

   The limits of testamentary freedom come into play with this principle too. Since a person's legal obligations do not die with her, paying off any debts that she may have left behind takes priority over any other wishes.

iii. **Where there is no will, it is presumed the deceased person wanted his family to have his property.**

   This speaks to the belief that a deceased person – in the absence of a will or other document – would want his family to have all his property and assets. This approach is standard practice in Commonwealth countries.

iv. **At a minimum, family members dependent on a person are entitled to adequate support from her estate after she dies.**

This principle advocates that a family member dependent on a person at the time of death should continue to be supported from the estate before any other beneficiaries. This principle exists in all provinces and Commonwealth countries. This consultation will help the Alberta government determine which family members should be considered 'dependents' and the amount of support they should receive.

v. **Succession laws must be consistent with the Canadian Charter of Rights and Freedoms and other prevailing social values and realities. It must also harmonize with other Alberta laws and statutes.**

There are several Canadian and provincial laws that govern family support and the division of property and assets when a person is alive. Examples include the *Trustee Act*, federal *Divorce Act*, the *Alberta Interdependent Relationships Act*, the *Alberta Guardianship and Trusteeship Act* and the *Alberta Family Law Act*.

This principle says the consolidation and updating of laws dealing with what happens to a deceased person's property and assets should be compatible with other laws, such as pension legislation and laws that deal with such matters when a person is alive. They should also be consistent with what Alberta society would consider fair and reasonable.

vi. **The laws and statutes should be user friendly, clear and practical.**

This principle simply states that, wherever possible, succession law should be easy to understand and to work with – whether you are a lawyer, advisor or lay person. It is recognized though that the law should not be oversimplified as this can lead to less clarity and more legal action.

Question to Consider

1. Do you agree with the six general principles to guide succession law reform? If not, what changes would you suggest?

Section II:
Issues and Options for Discussion

This section lists issues in five categories. It outlines proposed changes and options requiring public input. There are questions throughout that readers are asked to consider.

A. Family Support

Current succession law says family members dependent on a person when he dies should be supported from the estate he leaves behind. If he dies without leaving an 'appropriate' amount of support for dependent family members, family members can apply to the court to get the support from the estate they feel they need. All provinces and territories and virtually all Commonwealth countries have some kind of law that provides for family support after death.

There are three views of what is 'appropriate' support.

i. **Provide basic funding.** This covers necessities like clothing, food, shelter, school fees, etc. There is also consideration given to what a dependent needs to adjust to the loss of the deceased. Normally, this is roughly equivalent to what a person would receive in a divorce settlement.

ii. **Redistribute the estate based on a community standard.** The community standard is determined by what local citizens consider reasonable. This redistribution would be done regardless of the deceased person's wishes.

iii. **Provide basic funding but adjust for family history.** Family history would take into consideration the relationship between a dependent family member and the deceased, the situations of other beneficiaries, and how much of a contribution the surviving dependent made to the deceased person's personal, financial or general well-being. The wishes of the deceased would also be considered.

The word "estate" has special meaning in a discussion about family support. Property in an estate can only be transferred to another person by a will (or by intestacy law when there is no will). Some property can be transferred following death without a will. For example, insurance or pension benefits that are transferred by a beneficiary designation or jointly owned property. These assets are considered outside of the estate.

It is suggested that assets outside of the estate be considered when deciding family support. However, it is also recommended that these assets not be used to pay support.

Alberta and most Canadian provinces and territories have adopted the third approach. There are no plans to change this approach. However, it has been suggested that there be a limit on who can claim family support after death.

Which Family Members should be able to Claim Family Support?

It is generally accepted that to claim family support a person must be a family member and dependent or at least potentially dependent at the time of the person's death. Current Alberta law allows a spouse or partner, minor children and adult children who have a disability that prevents them from earning a living to claim family support. Alberta Justice is seeking input on whether this should change.

Disability refers to a permanent or very long term condition that has no immediate cure.

It has been suggested that family support claims be limited to people who are most likely to be dependent on the deceased. Studies suggest a dependent should be defined as a person who has a family connection to the deceased and who satisfies two or more of the following elements:

i. There was a legal obligation during life. This could include an obligation under a law, such as the Family Law Act or a court order.
ii. There is likely to be a real need. The person would struggle to make ends meet and her quality of life would decline without support.
iii. The dependency on the deceased existed at the time of death.
iv. The deceased person has a moral or social obligation to support the person. This may be for cultural reasons or because the deceased person made a commitment to support the surviving person throughout that person's life.

Guiding Principle

A person can do what he wants with his property and his decision will be respected. Interfering with testamentary freedom – a person's right to decide what to do with his property upon death – must be justified.

It is generally accepted that spouses and partners and minor children are dependent under these criteria. Spouses and partners do not include ex-spouses or ex-partners. Minor children include all born and unborn children – adopted or otherwise – of the person at the time of death.

In Alberta, minor children are defined as being less than 18 years of age.

There is some debate whether adult children with a disability should be considered dependent. Alberta, Manitoba and Saskatchewan currently allow an adult child with a disability who is unable to live independently to apply for support. It doesn't matter if the child was not receiving support from the parent at the time the parent passed away.

There is even more debate about whether eligibility should include other family members like independent adult children, brothers and sisters, parents or grandchildren.

Research suggests cousins, uncles and aunts, and relatives by marriage should never be allowed to claim family support. This leaves a list of people who could be defined as dependents. A decision needs to be made on whether the following people should be defined as dependents and be able to claim family support.

- **Adult children who have a permanent disability and cannot work**: Most parents voluntarily provide some kind of support – financial, personal, or emotional – to help a child cope with a disability. When a parent dies, this support is lost.
- **Adult children who are unable to work**. Most parents voluntarily provide temporary support – financial, personal, or emotional – to help a child who was unable to work or go to school because of an illness, addiction or other treatable condition.

Current Alberta law allows adult children with disabilities to claim support from a deceased parent's estate. This is not the case for any other adult family member. There is no legal obligation – except for a direct court order made during a divorce – for a parent during her life to financially support an adult child or other adult family member.

- **Adult children who are going to school**. Most parents voluntarily assist their adult children with tuition, living expenses and other costs associated with attending a school, college or university.

  Under the federal *Divorce Act*, separated or divorced parents have a legal obligation to support dependent children over the age of 18 if they cannot become independent because of illness, disability or some other cause. The courts have interpreted "other cause" to include a child who is a student pursuing further education. Under the *Alberta Family Law Act*, there can be a claim for child support until the child is 23, provided he is going to school.
- **Adult children who are capable of earning a living**. In some situations, a parent may voluntarily provide total or partial support to an adult child even though the person is capable of working or going to school.
- **Minor stepchildren living in the home**: Because of the relationship with a new spouse or partner, the deceased was raising the stepchild and treated him as one of her own. The stepparent did have a legal obligation to support the child when she was alive.
- **Minor grandchildren or great-grandchildren living in the home**: The deceased was raising the child and treating him as one of the family. This usually occurs when the child's parents die or are otherwise unable to care for a child. The grandparent did not have a legal obligation to support the child when she was alive.
- **Minor children under the care of a guardian**. The deceased was raising the child and treating him as one of the family because of a guardianship order. The guardian did not have a legal obligation to support the child while she is alive.

There are many government income support, health, social service, education, employment and insurance programs that provide assistance to adults with disabilities, adults who need education and training, and adults with an illness, addiction or other condition. These programs do not cover all needs. They expect the individual will also try and help himself. His family and his community are also expected to pitch in.

Guiding Principle

Where there is no will, it is presumed the deseased person wanted his family to have his property.

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- **Parents and grandparents**. A person may voluntarily choose to provide a parent or grandparent with temporary or permanent financial, personal, or emotional support. Some other provinces allow parents or grandparents to claim family support.
- **Brothers and sisters**. A person may voluntarily choose to provide a brother or sister with temporary or permanent financial, personal, or emotional support. Some other provinces allow brothers and sisters to claim family support.
- **Honorary family members**. A person may consider an individual very close to her an honorary family member because of emotional, cultural, physical or other ties. As a result, she may voluntarily choose to support them.

Some people believe that a family member should only be able to claim support if he was actually getting support from the person at the time of death. Others believe family members should be able to claim appropriate support regardless of whether there was ongoing support before the death. Options being considered are:

i. A claim for family support would be available only to any family member who was getting support from the deceased at the time of death.

OR

ii. A claim for family support would be available to any family member regardless of whether or not the deceased was supporting the person at the time of death.

OR

iii. A combination – Family support would be automatically available to some close family members (such as a spouse or partner) whether or not they were being supported at the time of death. For other family members, it would only be available if the deceased was financially supporting the family member at the time of death.

Question to Consider

2. Which is the best option for allowing family support claims?

A person who is not a family member but had a close, family like association with the deceased because she was the primary caregiver can receive a share of the estate via a will, through a contract or by suing the estate for wages.

Question to Consider

3. Who should be considered dependent and eligible for family support after a person's death in Alberta? *(Check as many as apply)*

Dependent and always able to claim without any other conditions:

- ❑ Spouse or partner
- ❑ Minor children
- ❑ Adult children who have a permanent disability and cannot work
- ❑ Adult children who are unable to work
- ❑ Adult children who are going to school
- ❑ Adult children who are capable of earning a living
- ❑ Minor stepchildren living in the home of the deceased
- ❑ Minor grandchildren or great-grandchildren living in the home of the deceased
- ❑ Minor children under the care of a guardian
- ❑ Parents and grandparents
- ❑ Brothers and sisters
- ❑ Honorary family members
- ❑ Other (please specify)

Dependent ONLY if the deceased was supporting the person at time of death:

- ❑ Adult children who have a permanent disability and cannot work
- ❑ Adult children who are unable to work
- ❑ Adult children who are going to school
- ❑ Adult children who are capable of earning a living
- ❑ Minor stepchildren living in the home of the deceased
- ❑ Minor grandchildren or great-grandchildren living in the home of the deceased
- ❑ Minor children under the care of a guardian
- ❑ Parents and grandparents
- ❑ Brothers and sisters
- ❑ Honorary family members
- ❑ Other (please specify)

Guiding Principle

At a minimum, family members dependent on a person are entitled to adequate support from her estate after she dies.

Determining How Much Support is Appropriate

Determining who is eligible to share a deceased person's property and assets is only one side of the equation. The other half deals with determining how much is appropriate support.

As noted in the previous section, it is suggested that a person be dependent to claim family support. Further, it is recommended that basic funding - adjusted for family history and circumstances - be deemed an appropriate amount of support.

It is suggested the following considerations be taken into account when determining what appropriate family support is. These may be by parties who are negotiating a claim for support or by a judge who is making a support order.

Regarding the net value of the deceased's assets

- The size and nature of the deceased person's estate after paying all debts and expenses.
- Assets outside of the estate such as insurance policies, pensions, RRSPs or property that is jointly owned.
- Who received which property.
- Claims a dependent or other person has made on the estate or other assets.
- Any legal obligation that a deceased person has to support another person.

Currently, family support can only be paid from the estate of the deceased. Property that passed to another person outside the will (e.g. a pension plan) can be taken into account but cannot be used.

Regarding the dependent's basic needs

- The age and health of a dependent.
- Any assets given to a dependent by the person before he died.
- Any other assets a dependent is entitled to receive.
- The ability of a dependent to support herself.
- The responsibilities a surviving spouse or partner has regarding minor or adult dependent children.
- The resources and time needed for a dependent to become financially independent.
- If the deceased is a stepparent, the ability of the stepchild's biological parents to look after the child financially.

Regarding family history

- What does the will say?
- The nature and duration of a dependant's relationship with the deceased.
- Any strong moral obligation the deceased may have had to support a dependent.
- Why the deceased person chose to give or not give support to a dependent.

Question to Consider

4. Is the list of factors to be considered when determining how much support is appropriate sufficient? If not, what changes should be made?

Guiding Principle

The laws and statutes should be user friendly, clear and practical.

B. Possession of the Family Home

The family home is often the most valued possession a couple owns together. It offers security and emotional support and stability, particularly during difficult times like the death of a loved one. There has been debate about whether Alberta should create a law that gives a surviving spouse or partner special rights or considerations when it comes to the family home.

When couples jointly own their homes – as most do – the home is automatically transferred to the surviving partner or spouse. When they do not, a surviving spouse or partner may be left without a place to live when her spouse or partner dies. It is proposed a law be made that deals with this special circumstance. Options being considered for such a law include:

i. The right to stay in the home for a short period of time after the death of the spouse or partner regardless of who actually owns the home. This would be an automatic right for a short period (say three months) and up to 12 months if court ordered. This would give the spouse or partner certainty regarding where to live while she struggles to adjust to the loss. This is similar to the rights provided under the Family Law Act and Matrimonial Property Act to people who end their marriage or interdependent relationship.

OR

ii. The right to:
    - Stay in the home until the surviving spouse or partner dies, regardless of who actually owns the home.
    - Buy out the shares of any other owners.

    This right could only be granted by a judge after being convinced that the spouse or partner's need outweighed the needs of all the others. It would not apply to lease property. Another owner or beneficiary affected by the court order would be entitled to put a claim on the title. Their share in the property would be recovered when the widow or widower dies or the home is sold.

A family home is defined as the family residence owned or leased by one or both spouses or partners. That includes a single family home, part of a house, a condominium, townhouse, apartment, mobile home, trailer and even a home quarter on a farm. It also includes a home owned or leased with a third party who is not the spouse or partner.

OR

iii. The same right as in 'ii' but only if there is no will. This is current law in Australia and similar to proposed legislation in British Columbia. It is based on an assumption that this is what the deceased person would have intended.

OR

iv. The right to have first right to purchase the family home or any share not owned by the surviving spouse or partner. This would take priority over any other right given to others under a will, trust or intestate law.

These rights would be combined with any other rights to family support or matrimonial property. However, it would be subject to the surviving spouse or partner's ability to pay the home's expenses, including taxes and mortgages and upkeep.

If put in place, this new law would impact both partners and spouses, and would apply to more kinds of homes than dower property rights.

"Dower" rights in Alberta apply to married people but only in limited circumstances. For a widow or widower, dower rights include entitlement - for life – to a family house or home quarter owned by the deceased spouse.

Question to Consider

5. Should there be a law giving a surviving spouse or partner special rights or considerations when it comes to the family home? If yes, which of the four options should become Alberta law?

Guiding Principle

Succession laws must be consistent with the Canadian Charter of Rights and Freedoms and other prevailing social values and realities. It must also harmonize with other Alberta laws and statutes.

C. Intestate Succession

Intestate means a person dies without leaving a will or any other way of determining how that person wanted his property and assets distributed. When this happens, the law in Alberta and Commonwealth countries sets out rules which give the property and assets to the person's surviving family. It is assumed most people would want this and it is consistent with community standards.

The alternative is to determine what the person wanted done after he dies. This often creates disputes among family members and others and the court has to get involved. This is too costly and complicated for most families.

There are no plans to change the current standard. However, there are a number of options that spring from this standard that need to be defined.

Entitlement of Separated Spouses or Partners

When there is no will, current Alberta law dictates that all property and assets go to the spouse or partner. And, if the deceased person also left behind children, they also get a share. While this appears straightforward, there could be complicating factors. One complication is that the person may have been separated from his spouse or partner but still legally married or in a legal Adult Interdependent Relationship when he died. It has been suggested that in such cases the deceased person's property and assets should still go first to the separated spouse or partner but there should be a limit on that eligibility.

The options being considered are:

i. The separated spouse or partner inherits only if the couple were separated for less than one year.

OR

ii. The separated spouse or partner inherits regardless of the length of the separation.

Unless there has been abuse or adultery, current Alberta law requires a couple to be separated for one year before a divorce can be finalized.

Question to Consider

6. When there is no will, when should a separated spouse or partner no longer be eligible to inherit a deceased spouse or partner's property and assets?

Further:

i. Should the disinheritance of a separated spouse or partner be absolute?

OR

ii. Should the separated spouse or partner be given the opportunity to prove that the deceased intended her to inherit?

Question to Consider

7. Should the disinheritance of a separated spouse or partner be absolute?

Splitting of Assets between Surviving Spouse or Partner and Children

What to do with property and assets when there is a spouse or partner and children is a point of debate. Some people support a deceased person's surviving spouse or partner getting it all, particularly if the deceased person's children all came from the relationship with that spouse and partner. This argument is based on the belief that a surviving spouse or partner knows what is in the minor or adult children's best interests.

Other people believe the property and assets should be split between the spouse or partner and the children. It becomes complicated when the deceased person has children from another relationship. When that is the case, research suggests there should be a share guaranteed to all the children.

There is no doubt that if there are children from another relationship, the spouse or partner should inherit a preferred share with the remaining assets split between the spouse or partner and all the deceased person's children.

If the children are the children of the only surviving spouse or partner, two options are being considered:

i. The spouse or partner inherits 100% of the deceased person's assets.

OR

ii. The spouse or partner inherits a preferred share, with the remaining assets split between the spouse or partner and all the offspring.

Guiding Principle

Where there is no will, it is presumed the deceased person wanted his family to have his property.

Question to Consider

8. Should the surviving partner or spouse inherit 100% of the assets if her children are also the children of the deceased spouse or partner? OR Should she receive only a preferred share with the balance split between her and her children?

Alberta Justice is looking for direction on what the spouse's preferred share should be and how any left over assets should be split. In the case of the spouse or partner's preferred share, Alberta Justice is considering these options:

i. The spouse or partner inherits a cash value set by law. For example, $100,000.

OR

ii. The spouse or partner inherits a guaranteed percentage of the total estate. For example, 50%.

OR

iii. The spouse or partner inherits a combination of i. & ii. For example, $100,000 or 50%, whatever is more.

Question to Consider

9. Should the preferred share to the spouse or partner be a cash value, a guaranteed percentage or a combination of both?

Alberta Justice is also looking for input on how to split – between the spouse or partner and the children – what is left over after the spouse or partner receives her preferred share. Alberta Justice is considering these options:

i. Provide equal shares. For example, if there are four children and a spouse/partner, each person would get 20%.

OR

ii. Provide a guaranteed percentage to the spouse or partner with the remainder to be split equally amongst the children. For example, 50% to the spouse/partner with the remaining 50% split amongst the children.

Current Alberta law says that if there is no spouse or children, then the deceased person's assets go to the parents. If the parents are dead the assets go to any brothers and sisters. If they are dead the assets go to nieces or nephews. There are no plans to change this approach except to allow grandnieces and grandnephews to inherit if all the more closely related family members are dead.

Question to Consider

10. Should the split of what is left over after the spouse or partner receives her share be equal shares between the spouse or partner and her children? OR Should the spouse or partner get a guaranteed percentage with the remainder split equally amongst the children?

Advancement of an Inheritance

Often a person will provide a child, spouse or partner money to allow her to attend school, start a business or buy a house. It is assumed that any substantial support is intended as an advance from the person's estate unless a will or some other document proves it was a gift. When there is nothing to say otherwise, the law assumes that the support was an advance and should be deducted from her inheritance.

This is called "presumption of advancement." The rule was developed because the law assumes a deceased person who leaves no will probably wants to treat his children equally. Under this rule, there is an opportunity for the person who received the support to show that the payment was really intended to be a gift. If that can be proven then there is no deduction from her inheritance.

Guiding Principle

The laws and statutes should be user friendly, clear and practical.

Alberta Justice is considering several options regarding who should be included in this "presumption of advancement" rule:

i: Advances made to minor children only.

OR

ii: Advances made to any child, regardless of age.

OR

iii: Advances made to any child or the deceased person's spouse or partner.

OR

iv: Advances made to any person who qualifies for a share of the deceased person's property or assets.

Question to Consider

11. Who should be included in the "presumption of advancement" inheritance rule?

D. Wills: Impact of Creating or Ending a Marriage or AIP

Current Alberta law says that when two people marry or enter into an Adult Interpersonal Partner (AIP) agreement, it automatically invalidates any will the people may have had while single unless the will specifically mentions the intended union. This is mainly based on the belief that if a will isn't changed after marriage or an AIP, it is because the spouse or partner forgot to do so.

Some people believe the rules about invalidating a will should be comparable for both on marriage and divorce. Currently, a will doesn't change automatically when people divorce or end their AIP agreement. For example, an ex-husband or partner is still entitled to a share of his ex-wife or ex-partner's estate if her will says he should receive something from the estate. The law does not assume the deceased wanted the share to go to someone else just because a marriage or AIP was officially ended.

This is also the case for insurance, pension or other assets with beneficiaries. Unless the beneficiary is changed, a former spouse or partner named as a beneficiary still receives the benefit.

Alberta Justice is considering three options regarding divorce/AIPs and succession law:

i. Leave the law the way it is, so that marriage or creating an AIP automatically invalidates a will but a divorce or ending an AIP does not affect the will.

OR

ii. Change the law, so that marriage, creating an AIP, divorce or ending an AIP has no effect on a will.

OR

iii. Change the law, so that marriage or creating an AIP invalidates a will and divorce or ending an AIP causes any gifts to an ex-spouse or partner to be void (unless the will indicates otherwise).

In Alberta, two people who live or intend to live in an interdependent relationship may enter into an Adult Interdependent Partner (AIP) agreement. This agreement gives the partners all the legal benefits and obligations of adult interdependent partners. People do not have to sign an agreement to be considered part of an AIP.

Question to Consider

12. Which option should be adopted concerning the impact of creating or ending a marriage or AIP?

Guiding Principle

Succession laws must be consistent with the Canadian Charter of Rights and Freedoms and other prevailing social values and realities. It must also harmonize with other Alberta laws and statutes.

E. Matrimonial Property

Alberta law regarding the division of matrimonial property is restricted to married people who are divorcing. The law is based on the idea that, regardless of who owns property, a couple shares and contributes equally to each other's property while they are married, unless they have an agreement that says otherwise. Matrimonial property rules do not apply to Adult Interdependent Partnerships.

When a marriage ends, is it assumed that each spouse should get 50% of the property's value. Each spouse may claim more or less if there are good reasons, like a very short marriage or other extraordinary circumstances. However, the right to claim matrimonial property only exists if a marriage breakdown occurs before one of the spouses dies.

Matrimonial property consists of all property owned by one or both spouses except:

- Property acquired before marriage (value at time of marriage).
- Value of a gift or inheritance, received by one spouse from another person at the time is received.
- Damages or insurance benefits awarded to one spouse.
- Property the spouses agree is not matrimonial property.

The Alberta Law Reform Institute recommends that a surviving spouse in Alberta be allowed to claim a share of matrimonial property following the death of a spouse. Many other provinces have this law and Alberta Justice is seeking advice on whether to follow suit.

For most married couples, this is not an issue. Most married couples leave their property to each other when they die. A right to claim matrimonial property would only come into play when an appropriate share of matrimonial property is not willed or gifted to the surviving spouse.

Currently, property and assets outside of the estate such as joint property held with someone else, insurance or pension proceeds or RRSPs can not be used to provide family support. However, joint property held with someone other than the spouse and some income plans can be used to pay for a matrimonial property claim.

It is suggested that a matrimonial property after death law follow the same basic approach for determining and dividing matrimonial property as exists in divorce cases. There would be some differences such as giving credit for life insurance payments and the way matrimonial property is valued at the time of death. Significant factors would include:

- To the extent needed to ensure the spouse has a fair share, the matrimonial property claim would, for the most part, take precedence over the gifts or transfers to any other beneficiaries, including jointly owned property or property passing by beneficiary designation (such as an RRSP) to third parties.
- Spouses could have a written agreement that matrimonial property sharing does not apply to them.
- Matrimonial property claims would be in addition to rights to claim family support. There are no plans to change that part of the law that guarantees a surviving spouse's right to make a claim for family support. The law provides that assets in an estate should pay for basic necessities as well as what is fair considering the surviving family's circumstances.
- It would be available only to a living husband or wife. This is based on the principle that matrimonial property sharing is personal to the spouses. It is unique to the marriage relationship and cannot be passed on to another person (or the person's estate) after death.

Right to Matrimonial Property After Death

Case Study

In the following example, please keep in mind that not all property owned by the spouses is matrimonial property. Also the deceased spouse may have left property to third parties.

Bob and Judi have been married for 27 years. Their matrimonial property consists of a house they own jointly; a joint bank account; shares Bob owns in the business he built while married; shares Judi owns in her business and Bob's RRSP. Bob inherited a cottage 17 years ago. It has increased in value $200,000 since then.

Guiding Principle

The laws and statutes should be user friendly, clear and practical.

The $200,000 increase in value is matrimonial property, but the cottage itself is not. Bob also inherited some jewellery, which was worth $40,000. It has not increased in value. The jewellery is not matrimonial property.

Bob dies. On his death Bob left his shares to Judi, the RRSPs to his children and the cottage to his brother. The house and the bank account automatically go to Judi because they were held jointly.

For a matrimonial property claim, the value of the matrimonial property needs to be calculated. (Note the value of the jewellery and the original value of the cottage are not included in this calculation because they are not matrimonial property. Note also that some of Judi's property ***is*** *included.)*

Bob and Judi's Matrimonial Property	
House	*$200,000*
Bank account	*10,000*
Bob's shares in his business	*60,000*
Judi's shares in her business	*10,000*
Bob's RRSP	*20,000*
Increase in cottage value	*200,000*
Total	***$500,000***

Assuming the value of the matrimonial property would be split 50/50 – Judi would be entitled to $250,000 worth of matrimonial property. She has $220,000 worth of the matrimonial property (house, bank account and the shares in her own business.) She would be able to claim the remaining $30,000 owed to her from the other matrimonial property that was not left to her.

Question to Consider

13. Should Alberta adopt a law that allows a surviving spouse to make a claim for matrimonial property on the death of a spouse?

Choosing between Matrimonial Property and Inheritance

Some people believe that both matrimonial property rights and the deceased spouse's wishes should be equally respected. Others believe it should be one or the other but not both. Some jurisdictions allow a surviving spouse to claim a share of matrimonial property but once he does, he cannot inherit any other property left to him by his dead spouse. Other jurisdictions allow for both a matrimonial property claim and inheritance. Alberta Justice is seeking the public's input on which approach to take in Alberta. Here is how it could work.

In the case study on pages 23 and 24, Judi's matrimonial property entitlement is $250,000 but she only has $220,000. The difference ($30,000) would come from the other matrimonial property. But Bob also had $40,000 in jewellery that is not matrimonial property. Bob has left that jewellery to Judi in his will.

There are a couple of options to deal with such situations:

i. Allow a share of matrimonial property but once taken, not any inheritance provided.

   In this option, Judi would have to choose between accepting the jewellery or the difference she is owed on her matrimonial property entitlement.

OR

ii. Allow a share of matrimonial property AND any inheritance provided.

   In this option, Judi would not have to make a choice. She would receive both the jewellery and what she is owed on her matrimonial property entitlement.

Question to Consider

14. If the right to claim matrimonial property is created, should the surviving spouse be able to receive only matrimonial property and not any inheritance provided? OR should she receive both matrimonial property AND any inheritance provided?

Guiding Principle

Succession laws must be consistent with the Canadian Charter of Rights and Freedoms and other prevailing social values and realities. It must also harmonize with other Alberta laws and statutes.

Section III:
Summary of Questions to Consider

1. Do you agree with the six general principles to guide succession law reform? If not, what changes would you suggest?
2. Which is the best option for allowing family support claims?
   i. Family members who were getting support from a person at the time of death. If so, which family members?
   ii. Family members, regardless of whether or not the deceased was supporting the person at the time of death. If so, which family members?
   iii. A combination – Family support would be automatically available to some close family members (such as a spouse or partner) whether or not they were being supported at the time of death. For other family members, it would only be available if the deceased was financially supporting the family member at the time of death.
3. Who should be considered dependent and eligible for family support after a person's death in Alberta? *(Check as many as apply)*

Dependent and always able to claim without any other conditions:

- ❑ Spouse or partner
- ❑ Minor children
- ❑ Adult children who have a permanent disability and cannot work
- ❑ Adult children who are unable to work
- ❑ Adult children who are going to school
- ❑ Adult children who are capable of earning a living
- ❑ Minor stepchildren living in the home of the deceased
- ❑ Minor grandchildren or great-grandchildren living in the home of the deceased
- ❑ Minor children under the care of a guardian
- ❑ Parents and grandparents
- ❑ Brothers and sisters
- ❑ Honorary family members
- ❑ Other (please specify)

Dependent ONLY if the deceased was supporting the person at time of death:

- ❑ Adult children who have a permanent disability and cannot work
- ❑ Adult children who are unable to work
- ❑ Adult children who are going to school
- ❑ Adult children who are capable of earning a living
- ❑ Minor stepchildren living in the home of the deceased
- ❑ Minor grandchildren or great-grandchildren living in the home of the deceased
- ❑ Minor children under the care of a guardian
- ❑ Parents and grandparents
- ❑ Brothers and sisters
- ❑ Honorary family members
- ❑ Other (please specify)

4. Is the list of factors to be considered when determining how much support is appropriate sufficient? If not, what changes should be made?
5. Should there be a law giving a surviving spouse or partner special rights or considerations when it comes to the family home? If yes, which of the following options should become Alberta law:
    i. The right to stay in the home for a short period of time after the death of the spouse or partner regardless of who actually owns the home.
    ii. The right to:
        - Stay in the home until the surviving spouse or partner dies, regardless of who actually owns the home.
        - Buy out the shares of any other owners.
    iii. The same right as in 'ii' but only if there is no will.
    iv. The right to have first right to purchase the family home or any share not owned by the surviving spouse or partner.
6. When there is no will, when should a separated spouse or partner no longer be eligible to inherit a deceased spouse or partner's property and assets?
7. Should the disinheritance of a separated spouse or partner be absolute?
8. Should the surviving partner or spouse inherit 100% of the assets if the children are also the children of the deceased spouse or partner? OR Should she receive only a preferred share with the balance split between her and her children?
9. Should the preferred share to the spouse or partner be a cash value, a guaranteed percentage or a combination of both?
10. Should the split of what is left over after the spouse or partner receives her share be equal shares between the spouse or partner and her children? OR Should the spouse or partner get a guaranteed percentage with the remainder split equally amongst the children?
11. Who should be included in the "presumption of advancement" inheritance rule?

12. Which option should be adopted concerning the impact of creating or ending a marriage or AIP? Should it be:
    i. Leave the law the way it is.
    ii. Change the law, so that marriage, creating an AIP, divorce or ending an AIP has no effect on a will.
    iii. Change the law, so that marriage or creating an AIP invalidates a will and divorce or ending an AIP causes any gifts to an ex-spouse or ex-partner to be void (unless the will indicates otherwise).
13. Should Alberta adopt a law that allows a surviving spouse to make a claim for matrimonial property on the death of a spouse?
14. If the right to claim matrimonial property is created, should the surviving spouse be able to receive only matrimonial property and not any inheritance provided? OR should she receive both matrimonial property AND any inheritance provided?