

MARRIED WOMEN'S PROPERTY AND MAINTENANCE RIGHTS

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## The Present Law

### 1. Introduction

The law which at present governs family property is based on the principle of separation of property, that is to say, each spouse may acquire and deal with his or her property as if he or she were single. With few exceptions, notably the homestead, the fact that two people are married makes no difference to who owns what.

The marriage relationship gives rise to certain obligations, including that of support, which may affect directly or indirectly a spouse's liberty to deal freely with his or her property. But neither these obligations, nor the marriage relationship itself directly change the ownership of property.

The system of separate property was ushered in towards the close of the last century in England, by a series of married women's Acts, culminating in the Married Women's Property Act of 1882. This Act, with a few but important modifications in the last ten years, governs the English married women's property rights.

The law applicable in Alberta by the Judicature Act, RSA 1970, c. 193, c. 15 is until modification or change by the Legislature, all that law in force in England on July 15, 1870 and, in addition, two statutory enactments have been expressly held to apply, viz. the Divorce and Matrimonial Causes Act, 20 & 21 Victoria, c. 85 (of which sections 25 and 21 are relevant for the purposes of property rights) and the Married Women's Reversionary Interest Act, 21 & 21 Victoria, c. 57.

By the first of the above two Acts,

- (a) a wife is deemed to be feme sole with respect to any property she acquired or which may come to or devolve upon her while she is judicially separated from her husband: s. 25, and
  
- (b) a deserted wife may obtain an order from the court in respect of property or earnings to which she became entitled, thus protecting her from the claims of her husband or his creditors after the desertion. Such property vests in her as if she were feme sole (s. 21).

The second enactment enabled a married woman to dispose of by deed any future or reversionary interest in any personal estate to which she might be entitled by any instrument made after December 31, 1857, as if she were a feme sole. The Act did not apply where an interest in personal estate was settled on the wife at marriage. The Act is practically of no importance today as the husband has been deprived of his powers of control over his wife's property; it is however still on the statute book.

The first Canadian modification to the English law was made by the North West Territories Act, 49 Victoria, c. 25; by sections 36-40, the concept of separate property was extended to all earnings and profits of the married woman during the marriage, enabling her to dispose of such property as if she were a feme sole, both by inter vivos transaction and by a testamentary disposition. She

was also given the right to maintain an action in her own name for the recovery and protection of her separate property. Her husband's corresponding liability for wife's debts whether contracted before or during marriage, in connection with any employment or business in which she was engaged on her own behalf, was terminated.

This Act did not make a married woman a feme sole for all purposes; it did not confer on her a general capacity to contract--her capacity to contract depended on possession of separate property. Its effect was only to make her property "separate property". Full capacity to acquire, hold and dispose of property and enter into, sue and be liable on contracts and torts, was accorded to her in two stages. In 1890, the North-West Territories Ordinance (No. 20, c. 47, s. 2) enacted that

a married woman shall in respect of personal property be under no disabilities whatsoever heretofore existing by reason of her coverture or otherwise, but in respect of the same have all the rights and be subject to all the liabilities of a feme sole.

In 1906, the new Alberta Legislature passed the Transfer and Descent of Land Act, providing that a

married woman shall in respect of land acquired by her on January 1, 1887 have all the rights and be subject to all the liabilities of a feme sole. (S.A. 1906, c. 19, s. 10).

The first Married Women's Act was passed in 1922 giving the married woman full contractual capacity. It

enacted that

a married woman shall be capable of acquiring, holding and disposing or otherwise dealing with all classes of real and personal property, and of contracting, suing and being sued in any form of action or prosecution as if she were an unmarried woman.

Finally in 1936, the present Married Women's Act (RSA 1970, c. 227) was passed. It was based on the English Law Reform (Married Women and Tortfeasors) Act (25 & 26 Geo. 5, c. 30).

The effect of all these statutes was to place the married woman legally in the same position as an unmarried woman, by removing all the disabilities resulting from coverture. She was thus fully emancipated from her tutelage. She could in her own right acquire, hold and dispose of all types of property, enter into, sue and be liable on any type of contract, and sue or defend any type of action. She could even sue her husband in tort, but the husband still could not sue her--the common law unity of husband and wife has still been preserved in Alberta (England abolished it in 1962 by the Law Reform (Husband and Wife) Act, 10 & 11 Eliz. 2, c. 48).

2. The Effects of the System of Separation of Property in relation to Wife's Property and other Rights as a Result of Marriage:

I. Property Rights:

Under the principle of separation of property described above, marriage effects no change upon the

property of the spouses, and the wife acquires no new rights in the property of the husband. However this strict legal principle is subject to important qualifications. Some of them are the result of legislative changes and others due to judicial decisions.

A. Legislative Changes

1) The first important legislative change is the introduction of homestead laws in the Western Canadian provinces in 1917. At common law, the wife had an inchoate dower right in the property of the husband, and the husband a curtesy right. The homestead law abolished this common law right but replaced it with a present, vested right in the homestead and (in certain provinces including Alberta) certain personal property. The statutory right is vested by virtue of marriage in both the wife and the husband and while still married neither spouse can dispose of any property which was at any time their homestead without the consent of the other or an order of the court, and on the death of either, the surviving spouse has a life estate in one homestead. The main provisions of this Act (The Dower Act, RSA 1970, c. 114) are set out in the Appendix.

2)

i. The second important legislative change is the introduction of intestacy laws. The rights of a wife (and correspondingly of a husband) on intestacy flow by default. If the husband has not disposed of his property by means of a validly drawn up testamentary instrument, the wife is entitled to a certain share of

his estate in priority over all other relations of the husband, including his or their children; after that share has been apportioned to her (and by the Dower Act she has also a life estate in the homestead), she participates in the excess with the children, if any; if there are no legitimate children she takes the entire estate. In this province, she gets the first \$20,000 and one-half of the remaining estate if there is one surviving child or one-third if there are two or more surviving children; she takes the entire estate if there are no children. The principal disqualification from inheritance is separation and misconduct. The main provisions of the Intestate Succession Act are set out in the Appendix. (The husband is conferred identical rights, but in contrast, a husband who has been judicially separated from his wife shares no part of her estate: s. 11, Domestic Relations Act, RSA 1970, c. 113)

ii. The husband (and so also the wife) may dispose of the entire estate inter vivos or by a will. In the case of inter vivos dispositions (other than of homesteads) a wife has no right of attack except in those cases where dispositions are made to defeat her rights of maintenance; but where the husband has cut her out of his will, she may apply to the court for a maintenance order under the Family Relief Act, RSA 1970, c. 134. She may also apply for a maintenance order where the will does not make adequate provision for her maintenance, and even in the case of intestacy, where her share is inadequate for her maintenance (her additional entitlement in the last case will of course be at the expense of his or their children). If she had separated

from her husband and had misbehaved, it is not an absolute disqualification as in the case of the statutory right on intestacy, but is one of a number of circumstances to be considered by the court in determining what amount, if any, she should be allowed for her maintenance. It is now well settled that while a wife may contract out of her intestacy rights under the Succession laws, she cannot contract out of her maintenance rights under the family relief legislation. The main provisions of the Family Relief Act are set out in the appendix.

B. Judicial Inroads into the Strict Principle of Separation of Property:

A wife may obtain rights in the property owned by her husband in several ways. Her husband may make a gift of the property to her; this gift in the case of real property is usually evidenced by a change of title and in the case of other property by a change of use or possession. Or the husband may promise to confer on her an interest in the property (whether a co-ownership or lesser interest) in return for contributions she has made at the time of purchase or at a subsequent date, whether such contributions went directly to the acquisition of the property or by taking the financial load off his shoulders in other directions. Contributions subsequent to the acquisition may have taken the form of part or full payment of mortgage instalments falling due on the property from time to time, occasionally or regularly, or by making substantial improvements to the property leading to higher values on sale, such increases



not being the result of general appreciation of the property; or in any of several other ways. The contributions thus made may directly relate to the property under consideration, but where there is an express promise, amounting to contract, the contribution may be of a more general character, such as easing the financial burden or even the wife's exertion for the general benefit and welfare of the family.

In the realm of marital intercourse, however, it is seldom that one comes across express promises. Gifts and contracts present little difficulty in determining rights as between spouses, though when third parties have secured an interest by the operation of law, it may be necessary to safeguard their rights even at the expense of a spouse. Bankruptcy Act (Canada)\*, Fraudulent Preferences Act, Bills of Sale Act\*, are some of the legislation designed to protect third party rights.

1) Gifts

A gift is implied by courts when property is acquired by the husband in the sole name of or jointly with the wife, she having made little or no contribution towards its purchase. This is done by applying the presumption of advancement. A gift is not implied where it is the wife who acquired the property with her own funds and puts it in her husband's name or takes title jointly with him. In this latter case, the opposing presumption of resulting trust is applied so that the beneficial

\* The main provisions of these two Acts are set out in the Appendix.

interest in the entire property belongs to the wife. These two presumptions, like many others, are rebuttable and if the evidence is clear an opposite conclusion will be reached by the court.

However, although the presumptions may not pose insurmountable problems so far as the spouses are concerned, they may have important consequences for third parties relying on the paper title to the property. For instance, if land is held by the wife in her sole name, but the beneficial interest really and truly belongs to the husband, can a creditor of the wife seize the property in execution? Similarly, if the husband held the property in his sole name but as a bare trustee for his wife, is his interest attachable under s. 128 of the Land Titles Act, RSA 1970, c. 198? In other words, what is the position where the legal and equitable interest are in two different persons and the title shows only the registered owner?

In the case of personal property, again the same problems arise. The Bills of Sale Act to some extent safeguards third parties when there is a transfer of title by gift or by sale, by requiring that such transfer be registered unless there is a delivery and change of possession. Unlike those cases of personal property where an official register is maintained (e.g. chattel mortgages, conditional sales) registration of changes of ownership would be meaningless; even if registered there is no way a third party would investigate the title, and unless he investigates it is doubtful whether he is ever prejudiced when he discovers at the time of execution that the property in law belongs not to the execution

debtor but the spouse. The Act does not yield clear results in many cases involving transfers between husbands and wives and a strict application of the meaning of "change of possession" may injure the spouse of the execution debtor. As the leading English case, In Re Cole, a Bankrupt [1964] 1 Ch. 175 (CA) shows, the requirements of delivery and change of possession may tip the scales against the spouse. In that case, the husband had bought a house and furniture and told the wife when he took her to view the property that all the furniture was hers. Sixteen years later, he became bankrupt. In a contest between the wife and the husband's trustee-in-bankruptcy, the latter's claim prevailed. The court held that it was necessary to prove delivery. In cases of this nature, the spouse fails because of lack of clear evidence of gift; the formal requirements (of delivery and change of possession where there is no written instrument) are insisted upon to corroborate the statements of the claimant spouse.

Difficulties also arise when after a gift is made or the property is sold to the spouse, the husband disposes of the chattel to another person by mortgage or transfer inter vivos or by a will. The same rules are applied in these cases.

As regards bank accounts, the rules of legal and beneficial ownership follow the same pattern as above, so far as the spouses are concerned. The money standing to the credit of a joint account is presumed to belong to both or the survivor of the two so far as the bank is concerned, but as between the spouses it belongs to them

in proportion to their contribution; if there is a contribution but it is not easily ascertainable how much it is, they will be deemed to hold in equal shares. This may be rebutted by evidence of gifts and in the case of a wife by the rebuttable presumption of advancement; and it has been held that the presumption of advancement is not rebutted merely by evidence of the agreement the joint account holders entered into with the bank. The Supreme Court of Canada, in Re Mailman [1941] S.C.R. 368, Niles v. Lake [1947] S.C.R.291, and Edwards v. Bradley [1957] S.C.R. 599 has held that the agreement having been drawn up by the bank (in standard form) for its protection, is no indication of any intention of the spouses. Similar rules apply where the account is in the name of the husband or wife, who is a mere nominee of the other spouse who contributed all or most of the money.

Problems as to who beneficially owns the balance of the joint account can arise on intestacy of the spouse and if the presumptions are rebutted and there is no present gift of the joint interest in the account, the agreement may not be valid as a testamentary disposition: See Edwards v. Bradley [1956] D.R. 225 (C.A.) reversed on another ground by the Supreme Court of Canada, [1957] S.C.R. 599; contra: Conway v. M.N.R. (1965) 65 D.T.C. 5169 per Thurlow J. at 5175.

Courts have however denied a creditor the right to garnishee a joint bank account although there is an Ontario Court of Appeal decision, Empire Fertilizers Ltd. v. Cioci [1934] 4 D.L.R. 804 to the contrary. The

leading case is Hirschhorn v. Evans (Barclays Bank, Garnishee) [1938] 3 All. E.R. 491, where the English Court of Appeal held that a creditor of either spouse cannot garnishee a joint bank account. There is an earlier Alberta District Court decision, Runk v. Jackson [1917] 1 W.W.R. 485 to the same effect. And in Davis, Nash and Davis v. Royal Bank of Canada (1938), 13 D.L.R. (2d) 411, the British Columbia Supreme Court refused to follow the Ontario case and preferred the English decision.

## 2) Contracts

Where a contract to transfer an interest in property can be inferred, there is somewhat less of a problem between spouses inter se, than when it affects the rights of third parties; the position of the latter is no different from the case of gifts. The same holds true where the contract is in writing unless it has been registered in a public register kept for that purpose. The English law in this respect is at variance with the Canadian. In the leading case, Ramsey v. Margrett [1894] 2 Q.B. 18 (applied in French v. Gething [1922] 1 K.B. 236) the English Court of Appeal held that where a husband sold the furniture and effects of the matrimonial home to his wife, giving her a receipt, the title was conclusive and there was no need to register despite the fact that there was no change of possession. Lord Esher M.R. said that as the goods remained in the matrimonial home, their possession was consistent with either that of the husband or the wife and possession must be attributable to the wife who had the legal title. Though this decision is legally unsatisfactory, and throws open the

doors for fraud which the system of registration was designed to prevent, it was clearly just in the circumstances of that case. The Canadian courts in cases decided under the Bills of Sales Acts have insisted on strict adherence to the letter of the law; a change of possession to meet the statutory requirements must be open and apparent to all. See McMillan and Jones and Brownstone and Jones [1923] 2 W.W.R. 641; Lipman and Traders Finance Co. Ltd. et. al. [1951] D.R. 838.

### 3) Inter-Spousal Dealings

The most serious problems however do not arise in connection with a gift or agreement to make a gift, or an express contract, at least so far as the rights of spouses between them are concerned. Lack of definite understanding, or more frequently lack of communication, is the normal situation in marital relations, and cases coming to the courts, invariably when the marriage is on the rocks, all have to deal with situations where the claimant spouse has made some tangible contribution to the acquisition or improvement of the property under dispute.

a. In the first situation, the spouse's claim is based on the direct financial contribution she has made to the acquisition of the property, e.g. by giving a part of the down payment to the husband to buy the property and the title is taken in his name alone. It was not her intention to benefit the husband, and the law presumes she had no such intention (the presumption of advancement, as discussed above, works in her favour,

not in favour of the husband). The probability then is that she expected her husband to reimburse her that amount of down payment, perhaps without interest, when he can afford to pay (the least) or that she expected to take an interest proportionate to her contribution or even equally, when it was time to split or sell (more probable), or that she thought that the property was being acquired for their joint use and benefit (when it can be so used) or future security, without the least thought to what should happen if their marriage broke up (most probable). Courts have to translate these unexpressed intentions of the wife, and perhaps similar though sometimes divergent intentions of the husband at the time of acquisition, into legal rights in property that they have thus acquired with joint contribution. In whatever language the judgements are handed down-- whether that of a constructive contract (as in Pettit v. Pettit)<sup>1</sup> whereby an intention to share the property is imputed to the spouses, as reasonable people, or that of a trust (as in the companion case of Gissing v. Gissing<sup>2</sup>, and in Canada, Trueman v. Trueman<sup>3</sup>) the basic idea is to interpose where possible an idea of sharing or partnership and thus to arrive at an equitable solution to the dilemma of non-communication of the precise intentions at the time of purchase. The two approaches often overlap; just as in the case of constructive contract an intention is imputed, to draw the inference of a trust there has to be sufficient evidence of conduct in that direction, and the process of analysing the conduct is often a tortuous one. The trust idea was expressly adopted by Johnson JA in Trueman v. True-

1 (1969) 2 All E.R., 385

2 (1970) 2 All E.R., 780

3 (1971) 2 W.W.R., 688

man in the Appellate Division and is especially useful in cases involving matrimonial property disputes.

b. The second situation is somewhat different, but it is still in the unexpressed realm of intentions of the spouses and the same ideas of sharing exist. Instead of a direct financial contribution, the wife may agree to help the husband by going out to work (or what is the same thing by helping him in his business where he owns one) and take a part of the load off his shoulders by contributing to the housekeeping expenses, or perhaps by pooling their earnings and setting aside the surplus for payment of the outgoings. This situation is encountered perhaps as frequently as the first, if not more, and presents even greater difficulty. There is no direct financial contribution as in the previous case, and if the decision to go out and work was not taken contemporaneously with acquisition of the property (which may point to a partnership idea), the probability of an interest proportionate or equal to the contribution may be ruled out; and as in the first case, the idea of gift is also improbable. Thus we are left with the third probability, i.e., that the spouses intended to share the property rights jointly in some equitable proportion. It is hard to take the approach of constructive contract or trust. In Minaker v. Minaker [1949] S.C.R. 397 the Supreme Court denied a wife's claim to a beneficial interest in property as it was based on indirect contribution. Twenty years later, Lord Reid in Gissing v. Gissing expressed his view that there should be no difference in principle between direct and indirect contributions and Johnson J.A. in Trueman v. Trueman accepted that view.



c. The third situation is where there is no financial contribution initially but the non-owning spouse instead of going out to work or helping in business, or perhaps in addition to doing that, has contributed in time and effort or even money, to make substantial improvements to the property and these improvements reflect the higher values realized or unrealized. Does the spouse expect payment for this extra effort over and above the normal call of duty? Such a thought probably never crossed her mind. Yet she did this for the benefit not of the husband, but their joint benefit and the benefit of the family. Should she be compensated for that and if so on what basis? Quantum meruit? If so how would a value be placed on the services? A share? If so, in what proportion?

When this situation is viewed in light of a matrimonial bliss supposed to prevail in many unions and in light of the principle that the husband is entitled to his wife's services in addition to consortium, and in light of the further common law right the wife has for maintenance and alimony, a very complicated legal position is encountered. It is virtually impossible for courts to decide without judicial law making, yet to deny the legitimate expectations of the wife is to perpetuate grave injustice.

The only authority on the facts of this situation is Trueman v. Trueman decided by the Alberta Appellate Division in 1971. In that case a farm wife was granted an equal share in the property owned by the husband

because she had contributed with time and labour in constructing improvements on the property and by paying sums which the husband would otherwise have had to pay. Johnson JA delivering the judgement of the court, relied on the judgement of Lord Reid (who was in the minority) in Pettit v. Pettit and expanded upon in Gissing v. Gissing in the following year. He stated that it was unnecessary "to consider if one spouse can acquire an interest in the property standing in the name of the other, other than by an agreement between them, where it is impossible to invoke the doctrine of trust in support of the claim. This would be in cases where the contribution was made after the property had already been paid for and when no improvements were involved." (18 D.L.R. (3d) at 113). He thought that Thompson v. Thompson [1961] S.C.R. 3 was not contrary to this principle. In that case the wife had made no financial contribution to the purchase of a lot by the husband who later built a house on it and used it as the matrimonial home. There was no intention between the parties either expressed or to be inferred from their conduct and dealings that this property was to be owned jointly. She had made no improvements. Her claim to a share in the proceeds of the sale was rejected. Judson J. giving the leading judgement observed that in the absence of some financial contribution, the mere fact of marriage and cohabitation and the fact that the property in question is the matrimonial home, does not confer a proprietary interest on the wife. So to hold would be introducing a community system which can only be done by legislation. The Trueman decision is perhaps in advance of the legal jurisprudence in Canada and may well not be conclusive.

In a later case, Marx v. Marx [1964] S.C.R. 653 a partnership concept was applied by the Supreme Court of Canada. That case concerned the claim of a wife to a share in the bakery business owned and operated by her husband, and she had been helping him in running it, and bears little analogy to matrimonial property jointly used and enjoyed. There is another Alberta case, Stanley v. Stanley (1960) 30 W.W.R. 686 where on evidence of a promise to confer an interest on the mistress who spent money on improvements in reliance thereof, the court granted her an interest. And in Barleben v. Barleben (1964) 46 W.W.R. 683 the properties were bought in joint names and in addition the mistress spent money on improvements; the Appellate Division held the mistress was entitled to one half interest in the properties. These two cases are not helpful in the normal case of a husband and wife where there is no ignorance of title at the time of making improvements claimed by the wife, and there is no promise to confer an interest.

d. The final situation arises where all the property owning is done by the husband who alone is in a position to acquire by dint of his outside earning, and the wife's activity by choice or necessity is confined to looking after the home and the children. Her effort in providing a happy home for the family, the savings she makes possible out of the housekeeping allowance provided to her by the husband, which she does not put away as a private cushion for the rainy day but perhaps "plows" back, thus enabling the husband to build an even greater saving--and if she puts by each month, a tight fisted husband would soon realize that the wife could manage

with a smaller allowance, so that the savings are reduced to the minimum--and by all these exertions enabling the continued success in business or employment of the husband, are all the intangibles which defy valuation. As has often been said, "a virtuous wife is worth her weight in rubies." Should such a wife have a share in the property which she has enabled the husband to amass? Or should she be relegated to a bare right of alimony or maintenance, subject to good conduct, when she has been legally cast aside for no fault of hers? Should a different test be applied in such a case--the test of "conduct"--than in the other three situations where in addition to a full-time or part-time outside job, the wife manages to run a home more or less as satisfactorily? As Ruth Deech points out, "it is possible to run the home and to be employed while the wife who chooses to stay at home can fill her time with the effort of running it."<sup>1</sup>

Clearly the full-time housewife has made no direct or indirect financial contribution to the acquisition of the property, and with an armful of children she has barely had time to make substantial improvements to the property acquired by the husband. Often there is no tangible property capable of improving--the savings are in stocks and shares and investments. Clearly also, as a dutiful wife, brought up in tradition, her values in life may be different from those in a more materialistic society--and she may have sacrificed a worthwhile career

1. "A Tide in the Affairs of Women", 122 New Law J., 742 at 744.

of her own independent of her husband's and given the best years of her life in providing a happy home for the family. She is in no position to demand a certain share of the property in advance, while the working wife has a greater bargaining position. Yet, with the changing social attitudes and the "enlightened" views of modern society, she begins to expect a legitimate share in the property which in a different way she makes it possible for the husband to acquire. If there is a definite economic necessity, she would not at any time hesitate to go out and work and thus relieve her husband to some extent. Can the courts help her when she comes before them for an equitable share in the property? As will be seen below, any attempts by the courts to grant her a share as a matter of right, would clearly be judicial law making to a far greater degree than in the foregoing situation.

On this last situation there is but little authority, but the judicial thinking does not seem to be in doubt. For instance, in respect of savings from housekeeping allowance granted by the husband, the Court of Appeal in the leading English case, Hoddinott v. Hoddinott [1949] 2 K.B. 406 decided that such savings belong to the husband exclusively. In that case the stake money for the pools was supplied by the wife from savings from housekeeping allowance. Winnings from the game were placed in a joint bank account and then used to buy furniture. The court denied the wife a share in the ownership of the furniture. The dissenting judgement of Denning L.J. in that case led the English Parliament to pass the Married Women's Property Act in

1964 whereby in the absence of agreement to the contrary such savings belong to the wife and the husband in equal shares. The shortcomings of that Act have been exposed by Professor Kahn-Freund in a learned article, "Recent Legislation on Matrimonial Property", 33 M.L.R. 601 at 604, and by others. The English decision is applicable in Canada. Similarly, there are several cases in England and in this country that have held that earnings from the business of taking in boarders and lodgers (a source of income for a section of women especially in the larger cities and university towns) belong to the husband: Montgomery v. Blows [1916] 1 K.B. 899; Rioux v. Rioux [1922] 53 O.L.R. 152 (C.A.) are examples.

The leading cases discussed in previous situations all involved substantial contributions from the claimant wife either direct or indirect, but there is no case which has held that the mere fact of marriage and cohabitation, however industrious the wife may be in the home, confers a proprietary interest in the absence of an express promise amounting to trust and reliance thereon: a promise without reliance would be ineffective for non-compliance of the writing requirement of the Statute of Frauds. See Thompson v. Thompson discussed above.

## II. Maintenance Rights:

In addition to the Property Rights outlined above, the wife has a very important right of maintenance during marriage, while she is separated from or deserted by her husband, and after termination of the marriage by divorce

or death. (Maintenance on husband's death has been discussed in the previous section.) The right to maintenance during marriage and to alimony on its termination, results from the status of marriage, and in nearly every case a valid marriage is a prerequisite to her entitlement. Cohabitation no matter how long, without a legally subsisting marriage, gives a woman no right to maintenance; such a woman may be discarded at any time with impunity<sup>1</sup> and a long lost wife, other relatives, and finally even the State, may emerge on the death of her husband intestate and wrestle away from her whatever had been "earmarked" for her use or even what she had worked and struggled for over a long period of time.

Legislation reinforcing or extending the husband's common law liability to maintain his wife is as follows:

1. During the Continuance of the Marriage Relationship:

- 1 One important exception in Alberta is that under the Workmen's Compensation Act; where a deceased workman has left no eligible widow but has left a common law wife who has borne him a child, she is entitled to a fixed monthly compensation. Another exception is provided by the doctrine of agency for necessaries supplied to a woman reputed to be living with a man as his wife. A few provinces have enacted legislation for the maintenance of the common law wife: See s. 15(e)(iii) Family Relations Act, 1972 (B.C.) and s. 6 of The Wives' and Children's Maintenance Act, R.S.M. 1970, c. W-170. (But not in the case of intestacy.)

- a. Domestic Relations Act: (R.S.A. 1970,  
c. 113)
  - i. Judgement for alimony,                    See Appendix  
    ss. 16-18, 21, 26
  - ii. Protection Order under  
      Part 3,                                    See Appendix  
      ss. 27, 29

- b. Maintenance Order Act: (R.S.A. 1970  
c. 222)
  - See Appendix  
(In addition, as a recognition of the  
duty to maintain, common law has recog-  
nized a wife's right to pledge the credit  
of her husband for necessaries.)

2. During a state of separation:

- a. Domestic Relations Act
  - i. Judgement for alimony without a decree  
    of separation                            See Appendix  
    ss. 16, 18, 21, 26
  - ii. Judgement for judicial separation and  
      alimony                                See Appendix  
      ss. 18, 22, 26  
      (See especially the court's powers re  
      settlement of property ss. 22)



D. Under a Separation Agreement:

in accordance with the terms thereof.

(The common law right of a wife who has been deserted by her husband without adequate means of support, to pledge her husband's credit for necessaries suitable to her station in life (the true agency of necessity), for what it is worth, has been left intact by legislation; however, where the wife later obtains a judgement for alimony or a judgement for judicial separation and alimony and such alimony has been regularly paid by the husband and there are no arrears, the right to pledge credit for necessaries is lost: s. 19, Domes-  
tic Relations Act, R.S.A. 1970, c. 113)

3. On termination of the marriage relationship:

The marriage relationship may be terminated by death, a decree of nullity or by a decree of divorce.

a. Termination by Death:

When death is the cause of termination of marriage, a widow is entitled to death benefits whether under the Family Relief

Act (where she has been deprived of benefits under her husband's will or where she has been inadequately provided for, or even in the case of intestacy) or under various social security legislation (e.g., Canada Pension Plan contributions) or under private arrangements (super-annuation benefits, life insurance provisions) or under other statutory (e.g. Workmen's Compensation Act, if she is a dependent widow, Fatal Accidents Act, etc.) or other entitlement (e.g., damages for wrongful death whether under statutes (such as Motor Vehicles Act or under Carriers' Acts) or due to negligence. Such entitlement normally enures to her benefit along with others dependent on the deceased, whether the spouses had lived together during their marriage or had been separated, (factually, or by agreement, or by a court decree) and, in the latter case, generally irrespective of her conduct after separation<sup>1</sup>. (The main provisions of the several Acts referred to herein including the Insurance Act provisions are set out in the Appendix.)

1 See the case of Davis v. Taylor decided by the House of Lords in 1972 where a wife living apart from her husband in adultery was denied damages under the Fatal Accidents Act (England)

b. Nullity of Marriage:

Domestic Relations Act, R.S.A. 1970,

c. 112

See Appendix

ss. 23, 26

[No Dower rights or rights of Succession or any other rights after this decree but on death of the ex-husband if the maintenance rights survive by the decree, they are a charge on the estate and paid out of it.]

c. Dissolution by Decree of Divorce:

Divorce Act, R.S.C. 1970, c. D-8

ss. 9(1)(f), 10-11

See Appendix

[No Dower rights or rights of Succession or any other rights except those conferred by the decree; if the rights are expressed to survive the ex-husband's death, they are to be satisfied out of his property.]

APPENDIX A

Married Women's Act, RSA 1970, c. 227

a) This Act removes all the disabilities in respect of property, contracts and torts, which a married woman previously suffered, and equates her position to that of an unmarried woman.

b) Section 6 provides that property belonging to a married woman in law or in equity whether married before or after March 25, 1936, and property acquired by her or devolving on her after that date shall belong to her in all respects as if she were an unmarried woman and may be disposed of accordingly.

But restraints attached to any property given to her or acquired by her are unaffected by section 6.

The Transfer and Descent of Land Act, RSA 1970, c. 368

1. Abolition of dower and tenancy by the curtesy

s. 4 No widow is entitled to dower in the land of her deceased husband except as provided in the Dower Act.

s. 5 No husband is entitled to any estate by the curtesy in the land of his deceased wife.

2. Transfer of land to and between husband and wife

s. 6 When land is transferred to a man and his wife, the transferees take according to the tenor of the transfer, and do not take by entirety unless it is so expressed in the transfer.

s. 7 A man may make a valid transfer of land to his wife, and a woman . . . to her husband, without in either case the intervention of a trustee.

Devolution of Real Property Act, RSA 1970, c. 109

- s. 12(1)            No sale, where an infant is interested in the estate of the deceased person, is valid without the written consent or approval of the Public Trustee or, in the absence of that consent or approval, without an order of the court.
- s. 12(2)            Where sale of real property is made with the consent or approval of the Public Trustee or the court, it is binding on the infant interested therein.

Dower Act, RSA 1970, c. 114

## 1. Definitions

- s. 2(b) "dower rights" means all rights given by this Act to the spouse of a married person in respect of the homestead and property of the married person, including
- i. the right to prevent disposition of the homestead by withholding consent;
  - ii. the right to sue the married person for damages if the married person disposes of the homestead without consent; (See s. 12)
  - iii. where the judgment against the married person for damages for wrongful disposition (as in (ii) above) is unsatisfied, and the property is registered in the name of some other person, the right to obtain payment from the Assurance Fund; (See s. 14)
  - iv. the right of the surviving spouse to a life estate in the homestead of the deceased person; and
  - v. the right of the surviving spouse to a life estate in the personal property of the deceased married person that is exempt from seizure under Execution. (See Exemptions Act).
- s. 2(c) "homestead" means a parcel of land
- i. on which the dwelling house occupied by the owner of the parcel as his residence is situated, and
  - ii. that consists of
    - a. not more than four adjoining lots in one block in a city, town or village as shown on a plan duly registered in the proper land titles office; or



- b. not more than one-quarter section of land other than land in a city, town or village.

## 2. Disposition Prohibited Without Consent

- s. 3(1) Unless the spouse of the married person consents in writing, or an order dispensing with consent as provided in s. 11 is obtained from a judge of the District Court or Supreme Court the married person cannot dispose of the homestead inter vivos at any time during the life of the spouse of the married person living at the date of the disposition.
- s. 3(2) This subsection makes a contravention of subsection (1) an offence punishable by fine of not more than \$1,000 or maximum two years imprisonment.

## 3. Duration of the Homestead

- s. 4(1) Once a homestead always a homestead  
notwithstanding acquisition of another homestead or change of residence of the married person (but see s. 11(1)(d) and (2)).
- s. 4(2) Land ceases to be a homestead when
  - i. a transfer of that land by the married person is registered in the L.T.O., or
  - ii. pursuant to s. 8 a release of dower rights is registered in the L.T.O., or
  - iii. a judgement for damages against the married person for improper transfer of the land is obtained (pursuant to ss. 12-18) and is registered in the L.T.O.

4. Consents

ss. 5-7 Formalities

5. Releases

a. Voluntary Release

s. 8 Release formalities--where release executed in Form D (no consideration received?)

s. 9 Despite Release, the spouse may file a Caveat against the homestead at any time before its transfer by the married person and thereupon the Registrar of L.T.O. shall cancel the release and the spouse is entitled to dower rights once again--but subject to rights acquired by third parties in good faith and for valuable consideration before filing a Caveat.

b. Release for Consideration

s. 10 By Written Agreement, for valuable consideration; the consideration to be expressed in the Agreement (may be a general release or may be part of a Separation Agreement)

formalities laid down

no Caveat possible as in the case of s. 8 releases.

6. Dispensing with Consent

s. 11(1) A married person wishing to dispose of the homestead who cannot obtain his spouse's consent may apply to a judge for an order dispensing with the spouse's consent in the following cases:

a. where the married person and his spouse are living apart, or

b. where the spouse has not since the marriage lived within the Province, or

- c. where the whereabouts of the spouse is unknown, or
- d. where the married person has two or more homesteads, or
- e. where the spouse has executed an Agreement pursuant to s. 10, or
- f. where the spouse is mentally incompetent or of unsound mind.

s. 11(4) The Judge may before dispensing with consent consider the following matters:

in the case of subsection (1)(a) [living apart] the circumstances of separation and the financial resources of the parties and their mode of life;

in the case of subsection (1)(d) [two or more homesteads], the homestead the spouse of the married person would prefer the married person to retain;

in the case of subsection (1)(e) [Agreement], whether the consideration has been paid and whether the other provisions of the Agreement have been performed.

s. 11(5) The Judge may dispense with the consent if it appears fair and resonable under the circumstances.

s. 11(6) The Judge may impose terms on the married person, including payment into Court . . . if he thinks proper.

## 7. Remedy of the Spouse

### a. Damages

s. 12(1) For disposing of the homestead without consent of the spouse, the married person is liable to his spouse in an action for damages.

- s. 12(2) the amount of damages--one half of the consideration received by the married person for the transfer, if the consideration is fair market value; if not fair market value, one half of the fair market value ought to have been received.
- s. 12(3) Personal Representatives are liable to the extent of the assets in their charge.
- s. 12(4) Limitation period laid down (six years from discovery of disposition, two years from date of death).

b. Indemnity

- s. 14 After judgment is obtained under s. 12 and if it is unpaid and if the assets of the married person liable to seizure are insufficient to satisfy the judgement the spouse may apply to a judge of the Supreme Court for an order directing payment of the unsatisfied judgement out of the Assurance Fund created under the L.T. Act.

8. Life Estate to Survivor

- s. 19 Surviving spouse is entitled to a life estate in the homestead, notwithstanding any disposition by a will or devolution of the married person's estate in intestacy. (Can the homestead be allotted to her as part of he entitlement on intestacy?)
- s. 20 Life Estate limited to only one homestead and where the married person has two or more homesteads, the surviving spouse is required to make an election in writing; until an election is registered in the L.T.O., the Personal Representative of the deceased married person cannot dispose of any homestead. The Personal Representative may apply to the Judge for an order to designate the homestead where the surviving spouse neglects or refuses to make an election.
- s. 24 Life Estate also in the Personal Property of the deceased (Personal Property as defined by s. 2(b)(v)).

9. Disqualifications

s. 23       Where at the time of the death of a married person the spouse of the married person is living apart from the married person under circumstances that would disentitle a wife to alimony, no life estate vests in the spouse and the spouse takes no benefit under this Act. (This section corresponds to s. 18 of the Intestate Succession Act.)

(Personal Representatives of the deceased may obtain order dispensing with such spouse's consent).

10. General

s. 25       Mines and Minerals

--included in the dower right where they are part of the homestead. . . but not if they are registered under a separate certificate of title (?)

subsection 2: Nothing in this section gives the spouse of a married person a dower interest in mines and minerals contained in any certificate of title registered in the name of the married person other than the certificate of title to the homestead.

(This section envisages a splitting of title for mines and minerals and the surface land; as separate titles can be obtained, a wife's dower rights in the mines and minerals could be defeated in certain situations.)

subsection 3: No damages awardable out of Assurance fund for disposition of mines and minerals, whether they were disposed of by the married person by themselves or together with the homestead. . .

11. Non-Application of the Act

s. 26 Where a married person is

joint tenant, tenant in common or part-owner of any other interest in the land together with some person other than the spouse

this Act DOES NOT APPLY to that land and it is not a homestead within the meaning of this Act, and the spouse has NO DOWER rights in it.

Where a married person and his spouse are joint tenants or tenants in common in land, the execution of disposition by them constitutes a consent by each of them to the release of their Dower rights and no acknowledgment under this Act is required from either of them.

## THE EXEMPTIONS ACT

### CHAPTER 129

- Short title**     **1.** This Act may be cited as *The Exemptions Act*.  
[R.S.A. 1955, c. 104, s. 1]
- Property exempt from seizure**     **2.** The following real and personal property of an execution debtor is exempt from seizure under any writ of execution:
- (a) the necessary and ordinary clothing of the execution debtor and his family;
  - (b) furniture and household furnishings and household appliances to the value of \$2,000;
  - (c) cattle, sheep, pigs, domestic fowl, grain, flour, vegetables, meat, dairy or agricultural produce, whether or not prepared for use, or such of them as will be sufficient either themselves or when converted into cash to provide
    - (i) food and other necessaries of life required by the execution debtor and his family for the next 12 months,
    - (ii) payment of any sums necessarily borrowed or debts necessarily incurred by the execution debtor
      - (A) in growing and harvesting his current crop, or
      - (B) during the preceding period of six months, for the purpose of feeding and preparing his livestock for market,
    - (iii) payment of current taxes and one year's arrears of taxes or in case taxes have been consolidated, one year's instalment of the consolidated arrears, and
    - (iv) the necessary cash outlays for the ordinary farming operations of the execution debtor during the next 12 months and the repair and replacement of necessary agricultural implements and machinery during the same period;
  - (d) horses or animals and farm machinery, dairy utensils and farm equipment reasonably necessary for the proper and efficient conduct of the execution debtor's agricultural operations for the next 12 months;
  - (e) one tractor, if it is required by the execution debtor for agricultural purposes or in his trade or calling;

## EXEMPTIONS

either

- (i) one automobile valued at a sum not exceeding \$2,000, or
- (ii) one motor truck,  
required by the execution debtor for agricultural purposes or in his trade or calling;
- (g) seed grain sufficient to seed the execution debtor's land under cultivation;
- (h) the books of a professional man required in his profession;
- (i) the necessary tools and necessary implements and equipment to the value of \$5,000 used by the execution debtor in the practice of his trade or profession;
- (j) the homestead of an execution debtor actually occupied by him, provided it is not more than 160 acres, but if it is more, the surplus may be sold subject to any lien or encumbrance thereon;
- (k) the house actually occupied by the execution debtor and buildings used in connection therewith, and the lot or lots on which the house and buildings are situated according to the registered plan thereof, if the value of the house, building and the lot or lots does not exceed \$8,000, but if the value does exceed \$8,000, the house, building and lot or lots may be offered for sale and if the amount bid at the sale after deducting all costs and expenses exceeds \$8,000 the property shall be sold and the amount received from the sale to the extent of the exemption shall be paid at once to the execution debtor and shall until then be exempt from seizure under any legal process, but no such sale shall be carried out or possession given to any person thereunder until the execution debtor has received \$8,000;
- (l) the mobile home actually occupied by the execution debtor if the value of the mobile home does not exceed \$3,000, but if the value does exceed \$3,000, the mobile home may be offered for sale and if the amount bid at the sale after deducting all costs and expenses exceeds \$3,000 the mobile home shall be sold and the amount received from the sale to the extent of the exemption shall be paid at once to the execution debtor and shall until then be exempt from seizure under any legal process, but no such sale shall be carried out or possession given to any person until the execution debtor has received \$3,000.

[R.S.A. 1955, c. 104, s. 2; 1964, c. 26, s. 2; 1969, c. 31, s. 2]



## EXEMPTIONS

Exemption  
from  
seizure  
under  
distress

3. The following goods and chattels are not liable to seizure under distress by a landlord for rent:

- (a) the beds, bedding and bedsteads, including carriages and cradles, in ordinary use by the debtor and his family;
- (b) the necessary and ordinary wearing apparel of the debtor and his family;
- (c) one cooking stove with pipes and furnishings, one other heating stove with pipes, two towels, one wash-basin, one kitchen table, one tea kettle, one teapot, one saucepan, one refrigerator, one freezer, one washer, one dryer and one frying-pan;
- (d) for each member of the debtor's family, one chair, one cup and saucer, one plate, one knife, one fork and one spoon;
- (e) all necessary fuel, meat, fish, flour and vegetables for the ordinary consumption of the debtor and his family for 30 days;
- (f) the tools or agricultural implements used by the debtor in the practice of his trade or occupation to the value of \$1,000;
- (g) one axe and one saw.

[R.S.A. 1955, c. 104, s. 3; 1969, c. 31, s. 3]

Mortgaged  
chattels  
exempt from  
seizure

4. (1) Notwithstanding anything to the contrary contained in any Act or in any agreement, a person who executes a chattel mortgage of any of the chattels mentioned in section 2 has, in case of seizure under the mortgage, the right to claim as exempt from seizure and from sale any such chattels covered by the mortgage and that cannot be seized or sold without depriving the mortgagor of the number or part of the number of the kind of such chattels that by virtue of section 2 he may hold free from seizure under execution.

(2) This section does not apply to

- (a) a crop lien under *The Harvesting Liens Act*, or
- (b) a mortgage or bill of sale for the purchase price of seed grain or necessaries given under section 30 of *The Bills of Sale Act*.

[R.S.A. 1955, c. 104, s. 4]

Seizure of  
article when  
judgment  
obtained

5. Nothing in this Act exempts from seizure an article the price of which forms the subject matter of the judgment upon which the execution is issued, except articles intended for the food, clothing and bedding of the execution debtor and his family. [R.S.A. 1955, c. 104, s. 5]

Rights of  
family of  
deceased  
debtor

6. In case of the death of an execution debtor, or of a mortgagor referred to in section 4, his property exempt

## EXEMPTIONS

from seizure under execution or under the mortgage, as the case may be, is exempt from seizure under execution or under the mortgage as long as the property

- (a) is in the use and enjoyment of
    - (i) the widow and infant children, or
    - (ii) the widow or infant children, of the deceased, and
  - (b) is necessary for the maintenance and support of his widow and infant children or any of them.
- [R.S.A. 1955, c. 104, s. 6]

Selection of  
chattels for  
exemption

### 7. When

- (a) an execution debtor or mortgagor holds or his estate contains a greater quantity of chattels of a kind exempted from seizure by virtue of sections 2 and 3 than are exempt, or
- (b) the estate of a deceased execution debtor or mortgagor contains a greater quantity of chattels so exempt than are necessary for the maintenance and support of his widow and infant children or any of them,

the execution debtor or mortgagor, or his widow or family or in the case of infants, their guardian, as the case may be, may select from chattels of the same kind the chattels that are hereby exempt from seizure. [R.S.A. 1955, c. 104, s. 7]

Seizure of  
exempt  
goods

8. (1) A person authorized to execute a seizure shall not seize any goods that appear to him to be exempt from seizure under this Act, but no liability attaches to such a person where in good faith he seizes goods which are later shown to be so exempt.

(2) A creditor, on notice of motion to the debtor, may apply to a judge for an order declaring any specified goods of the debtor to be not exempt from seizure under this Act. [1966, c. 95, s. 3]

Exception to  
exemption

### 9. Section 2 does not apply

- (a) where the execution debtor has absconded or is about to abscond from the Province, leaving no wife or husband or infant children within the Province, or
- (b) to an execution issued upon a judgment or order
  - (i) for the payment of alimony or for the payment of maintenance by a husband to his wife or his former wife, as the case may be, or
  - (ii) for the payment of maintenance for any child of the execution debtor.

[R.S.A. 1955, c. 104, s. 8]

## EXEMPTIONS

Absconding  
tenant

10. Section 3 does not apply where the tenant debtor has absconded or is about to abscond from the Province, leaving no wife or husband or infant children within the Province.  
[1966, c. 95, s. 3]

Exemption  
from seizure  
on hospital  
judgment

11. The personal property set out in section 2, clause (c), subclauses (ii), (iii) and (iv) is not exempt from seizure under an execution issued upon a judgment for a debt owing to a hospital for hospital services, but the amount recoverable upon any such execution by the seizure of such property shall not exceed in any calendar year the sum of \$200.  
[R.S.A. 1955, c. 104, s. 9]

Dispute re  
exemptions

12. If a claim is made for exemptions and a dispute arises thereunder, the sheriff upon his own motion shall refer the matter to a judge of the district court for summary determination, upon such notice as the judge may direct.  
[R.S.A. 1955, c. 104, s. 10]

Intestate Succession Act, RSA 1970, c. 190Widow's Rights:1. Where Intestate Leaves Lawful Issue

- s. 3            a. When the net value of the Estate does not exceed \$20,000--all of it goes to the Widow
- b. When the net value of the Estate exceeds \$20,000, the widow is
- i. entitled to \$20,000 and legal interest on that sum as from the date of intestate's death,
- ii. plus
- one-half of the balance if there is only one surviving child
- or
- one-third of the balance if there is more than one surviving child

2. Where Intestate Leave No Lawful Issue

- s. 5            the entire estate goes to the widow

3. Where Intestate During his Life-time has Advanced a Child by Portion

- s. 12            that portion shall be brought into the hotchpot, and if the advancement is equal to or greater than that child's entitlement under this Act, it shall take no share in the estate; if less than the child's entitlement, it shall take so much share in the estate as would bring about equality among the children. (Does this section apply where there is only one child?)

4. Partial Intestacy

- s. 13            Where a person dies partially intestate, the undisposed of estate will devolve as if he had died intestate and had left no other estate.

5. Qualifications

- s. 14            Subject to the Dower Act,
- a. a widow is not entitled to dower in the land of her deceased husband dying intestate;
  - b. (husband's curtesy rights on wife's intestacy abolished)

6. Disqualifications

- s. 18(1)        If a wife has left her husband and is living in adultery at the time of his death, she shall take no part of her husband's estate.
- s. 18(2)        [similar disqualification for surviving husband]

Wills Act, RSA 1970, c. 393

- s. 16            A will is revoked (inter alia) by the marriage of the testator, subject to s. 17.
- s. 17            A will is revoked by the marriage of the testator except where
- (a)    there is a declaration in the will that it is made in contemplation of the marriage, or
  - (b)    the will is made in exercise of a power of appointment of real or personal property that would not in default of the appointment pass to the heir, executor or administrator of the testator or to the persons entitled to the estate of the testator if he died intestate.

The Family Relief Act, RSA 1970, c. 134

- s. 2 (b) "child" includes an illegitimate child of the deceased parent (if the deceased be the father, he must have either acknowledged paternity or have been declared by the court to be the father)
- (c) "deceased" means a Testator or a Person dying Intestate
- (d) "depend nt" means
- i. the spouse of the deceased;
  - ii. a child of the deceased who is under 18 at the time of the deceased's death;
  - iii. a child over 21 but due to physical or mental disability unable to earn a livelihood).
- s. 4 (1) Where a deceased testator has not made adequate provision for the proper maintenance and support of his dependants or any of them, or where a person dies intestate and the intestate's dependants' share under the Intestate Succession Act is inadequate for their proper maintenance, an application may be made to a Judge of the Supreme Court for an order of maintenance and support; the Judge may make such an order as he deems adequate, notwithstanding the Intestate Succession Act and notwithstanding the provisions of the will.
- (2) The Judge may consider a number of matters relevant to the application, including in the case of a deceased testator, the deceased's reasons for not making adequate provisions for a dependant, before making an order under the Act.
- (5) The Judge may refuse to make an order in favour of any dependant whose character or conduct is such as in the opinion of the Judge disentitles the dependant to the benefit of an order under this Act.

- s. 5           The Judge shall take into consideration the benefits to which a spouse is entitled under the provisions of the Dower Act when determining the provision that ought to be made for the spouse out of the Estate.
- s. 6           The Judge has a wide discretion in making a provision and types of provision, including absolute transfer or transfer in trust or for life.
- s. 10           The support provision ordered under this Act may be spread ratably upon the whole Estate or such part as is within the jurisdiction of the Judge under this Act (s. 13 excludes devises and bequests made bona-fide for valuable consideration pursuant to an inter vivos contract.)
- s. 18           The Personal Representatives of the deceased shall not distribute the Estate of the deceased until the expiration of six months from the grant of Probate or Letters of Administration without the consent of all the dependants of the deceased, or unless authorized by an order of the Judge.



**Notice to the Public Trustee and Others**

Notice to  
Public  
Trustee

7. (1) Where an application is made for a grant, the applicant shall send a copy of the application to

- (a) the Public Trustee, where an infant, a person who was an infant at the date of death, a missing person or a convict is interested in the estate to which the application pertains or where the Public Trustee is the committee of the estate of a person who is interested in the estate to which the application pertains, and
- (b) the committee of the estate of a person who is interested in the estate to which the application pertains, where the committee is a person other than the Public Trustee.

(2) An application to which this section applies shall not be proceeded with until the Public Trustee or the committee, as the case may be, is represented on the application or has expressed his intention of not being represented.

(3) In this section, "missing person" and "convict" have the meanings given them in *The Public Trustee Act*.

[1969, c. 2, s. 7]

Notice to  
dependants

8. (1) Where an application is made for a grant of probate or administration, the applicant shall send a copy of the application and a notice pertaining to the rights of dependants under *The Family Relief Act* to

- (a) the spouse of the deceased, if the spouse is not the sole beneficiary under the will of the deceased or under *The Intestate Succession Act* and if the spouse resided in Canada at the date of death of the deceased, and
- (b) each child of the deceased who is <sup>18</sup>21 years of age or over at the time of the deceased's death and unable by reason of physical disability to earn a livelihood and who resided in Canada at the date of death of the deceased.

(2) Where an application is made for a grant of probate or administration, the applicant shall send a copy of the application to

- (a) the Public Trustee, where the deceased is survived by a child who was under the age of 21<sup>18</sup> at the time of the deceased's death, and
- (b) the committee of the estate of a child of the deceased who was 21<sup>18</sup> years of age or over at the time of the deceased's death and is unable by reason of mental disability to earn a livelihood.

(3) Where the deceased is survived by a child who was ~~21~~ 21 years of age or over at the time of the deceased's death, is unable by reason of mental disability to earn a livelihood but for whose estate there is no committee, the judge may, having regard to the value of the estate, the circumstances of the child and the likelihood of success of an application made on the child's behalf under *The Family Relief Act*,

(a) direct that a grant for probate or administration in the deceased's estate not be issued until a committee has been appointed of the child's estate, and

(b) direct that the applicant or some other person apply to have a committee of the child's estate appointed under *The Mentally Incapacitated Persons Act*.

(4) A grant of probate or administration shall not be issued unless the judge is satisfied that the requirements of this section have been complied with except that the judge may waive the requirement to send a copy of the application or a notice to any person where it is shown to his satisfaction that the person could not be found after reasonable enquiry.

[1969, c. 2, s. 8]

Bankruptcy Act, RSC 1970, c. B-3

"claim provable"

s. 2 includes any claim or liability provable in proceedings under this Act by a preferred, secured or unsecured creditor.

"creditor" means a person having a claim, preferred, secured, or unsecured provable as a claim under this Act.

s. 3 (3) Persons related to each other within the meaning of s. 4 shall be deemed not to deal with each other at arm's length while so related.

s. 4 (2) For the purposes of this Act, persons are related to each other and are "related persons" if they are a) individuals connected by blood relationship, marriage or adoption

s. 47 Property of the Bankrupt:

[The property of a bankrupt divisible among his creditors shall not comprise

- a. property held by the bankrupt in trust for any other person;
- b. any property that as against the bankrupt is exempt from execution or seizure under the relevant provincial law within which the bankrupt resides and within which the property is situated.

but it shall comprise

- c. all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge; and
- d. such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.]

s. 48 Bankruptcy of Persons receiving a salary, wage or other remuneration from an employer --the trustee if directed by the creditors shall apply to the court for an order directing that part of the salary, wages etc. to be paid over to the trustee, and the court may in making the order determine the same having regard to the family responsibilities and personal situation of the bankrupt. (See also ss. 142 and 143 re discharge of bankrupt)

Settlements and Preferences:

- s. 69 (1) Any settlement of property, if the settlor becomes bankrupt within one year after the date of settlement, is void against the trustee;
- (2) Any settlement of property, if the settlor becomes bankrupt within five years after the date of settlement, is void against the trustee, if the trustee can prove that the settlor was, at the time of making the settlement, unable to pay all his debts without the aid of the property comprised in the settlement, or that the interest of the settlor did not pass on the execution thereof.
- (3) This section does not extend to any settlement made
- a. before and in consideration of marriage,
  - b.
  - c. on or for the wife or children of the property that has accrued to the settlor after marriage in right of his wife or of his children.

s. 70 Any covenant or contract made by a settlor in consideration of his or her marriage to

settle property acquired after marriage or to pay money, and wherein the settlor had not at the date of marriage any estate or interest, whether vested or contingent, and not being money or property in right of the settlor's spouse, if the settlor becomes bankrupt and the covenant or contract has not been executed, is void against the trustee, but the persons entitled under the covenant or contract are "deferred creditors". (See also s. 147 re Fraudulent Preferences).

- s. 71 (1) Any payment of money, not being payment of premiums on a policy of life insurance in favour of the husband, wife, child or children of the settlor, or any transfer of property made by the settlor in pursuance of a covenant or contract mentioned in section 70, is void against the trustee unless the person to whom the payment or transfer was made proves that
- a. the payment or transfer was made more than six months before the date of the bankruptcy,
  - b. at the date of the payment or transfer the settlor was able to pay all his debts without the aid of the money so paid or the property so transferred, or
  - c. the payment or transfer was made in pursuance of a covenant or contract to pay or transfer money or property expected to come to the settlor from or on the death of a particular person named in the covenant or contract and was made within three months after the money or property came into the possession or under the control of the settlor.
- (2) Where any payment or transfer mentioned in subsection (1) is declared void, the persons to whom it was made are entitled to claim for dividend under or in respect of

the covenant or contract in like manner as if it had not been executed at the date of the bankruptcy. R.S., c. 14, s. 62.

Claims Provable

- s. 95 (1) All debts and liabilities, present or future, to which the bankrupt is subject at the date of the bankruptcy or to which he may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy shall be deemed to be claims provable in proceedings under this Act.
- (2) The court shall, on the application of the trustee, determine whether any contingent claim or any unliquidated claim is a provable claim, and, if a provable claim, it shall value such claim, and such claim shall after, but not before, such valuation be deemed a proved claim to the amount of its valuation.
- (3) A creditor may prove for a debt not payable at the date of the bankruptcy and may receive dividends equally with the other creditors, deducting only thereout a rebate of interest at the rate of five per cent per annum computed from the declaration of a dividend to the time when the debt would have become payable according to the terms on which it was contracted.
- (4) Where a proposal is made before bankruptcy the claims provable shall be determined as of the date of the filing of the proposal.
- (5) The Claims of creditors under a proposal are, in the event of the debtor subsequently becoming bankrupt, provable in the bankruptcy for the full amount of the claims less any dividends paid thereon pursuant to the proposal.

- (6) Where interest on any debt or sum certain is provable under this Act but the rate of interest has not been agreed upon, the creditor may prove for interest at a rate not exceeding five per cent per annum to the date of the bankruptcy from the time the debt or sum was payable, if evidenced by a written instrument, or, if not so evidenced, from the time notice has been given the debtor or the interest claimed. R.S., c. 14, s. 83.

[Scheme of Distribution]

- s. 108 (2) A spouse or former spouse of a bankrupt is not entitled to claim a dividend in respect of wages, salary, commission, etc. or services rendered in connection with the trade or business of the bankrupt until all claims of other creditors have been satisfied.
- s. 109 A father, son, daughter, mother, brother, sister, uncle, or aunt by blood or marriage of a bankrupt is not entitled to have his claim preferred as provided by s. 107 in respect of wages, salary, etc. rendered to the bankrupt.
- s. 116 Proceeds of liability insurance policy--provincial statute governs in respect of application of moneys to claims as a result of injury, etc. covered by the policy.
- s. 147 In either of the following cases, that is to say:
- a. in the case of a settlement made before and in consideration of marriage where the settlor is not at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement; or

- b. in the case of any covenant or contract made in consideration of marriage for the future settlement on or for the settlor's wife or children of any property wherein he had not at the date of his marriage any estate or interest, not being property of or in right of his wife;

if the settlor becomes bankrupt, and it appears to the court that such settlement, covenant or contract was made in order to defeat or delay his creditors, or was unjustifiable having regard to the state of the settlor's affairs at the time when it was made, the court may refuse or suspend an order of discharge or grant an order subject to conditions in like manner as in cases where the bankrupt has been guilty of fraud. R.S., c. 14, s. 134.

- s. 148 (1) An order of discharge does not release the bankrupt from
  - b. any debt or liability for alimony;
  - c. any debt or liability under a maintenance or affiliation order or under an agreement for maintenance and support of a spouse or child living apart from the bankrupt;
- (2) An order of discharge releases the bankrupt from all other claims provable in bankruptcy. R.S., c. 14, s. 135.



Bill of Sale Act, R.S.A. 1970, c. 29

- s. 2 (a) "bill of sale" means
- a document in writing in conformity with this Act evidencing a sale or a mortgage, but does not include
- documents of title, etc. used in the ordinary course of business as proof of the possession or control of goods
- (e) "change of possession" means
- such change of possession as is open and reasonably sufficient to afford public notice thereof;
- s. 3 (1) Every sale or mortgage not accompanied by an immediate delivery and an actual and continued change of possession of the chattels sold or mortgaged is absolutely void as against
- a. creditors, and
- b. subsequent purchasers or mortgagees claiming from or under the grantor in good faith, for valuable consideration and without notice, whose conveyances or mortgages have been duly registered or are valid without registration,
- unless the sale or mortgage is evidenced by a bill of sale duly registered.
- (2) The sale or mortgage and the bill of sale, if any, evidencing the sale or mortgage take effect, as against creditors and such subsequent purchasers or mortgages, only from the registration of the bill of sale.

Domestic Relations Act, RSA 1970, c. 113s. 12 Property of Wife after Judicial Separation

in the event of her dying intestate during the continuance of the separation devolves as the property would have done if her husband had been then dead.

s. 13 Liability of Husband after Judicial Separation

s. 13(1) Husband NOT liable in respect of any engagement or contract his wife has entered or enters into, or for a wrongful act or omission by her, or for any costs she incurs in any action, after a judgement of judicial separation and during the continuance of the separation.

s. 13(2) However, if alimony has been decreed or ordered to be paid and is not paid by the husband he is liable for necessaries supplied to her use.

s. 14 Damages from adulterer

Court may order any damages recovered from an adulterer to be settled for the benefit of the children (if any) or as a provision for the maintenance of the wife.

(Action for damages may be brought by the husband in proceedings restricted to that object only.)

(but see s. 15 for possibilities of success in such an action)

Part 3--Alimony and Maintenance

ss. 16-18 Lay down provisions governing the award of alimony to a wife on or after judicial separation or in proceedings restricted to alimony only.

- s. 20           Where alimony applied for the Court may either before or after judgement, grant an injunction for such time and on such terms as are just to prevent any apprehended disposition by the husband of his real or personal property.
- s. 21           Provides for registration of order or judgement for alimony against land.
- s. 22           Provides that the court may order settlement of wife's property for the benefit of the innocent party and of the children or either or any of them, where a decree of judicial separation or divorce is granted for adultery of wife.
- s. 23           Provides for maintenance on a decree of divorce or declaration of nullity (both secured and periodical, i.e., monthly or weekly sums); in the case of decree of divorce presumably not in the case of declaration of nullity) adultery of wife is not a bar to maintenance.
- s. 24           Court may order that any ante- or post-nuptial settlement be applied or varied for the benefit of children of the marriage or of the parties to the marriage or of both--where a decree absolute of divorce or declaration of nullity is given.
- s. 25           Where husband obtains judgement for Restitution of Conjugal rights, court may order (a) settlement of wife's property for his benefit and for the benefit of the children, or for the benefit of either or any of them; or (b) that the wife pay part of her earnings periodically to the husband for his own benefit or to another person for the benefit of the children or of husband or either or any of them.
- s. 26           Provides for variation of order for alimony or mainenance.

Part 4--Protection Orders

This part provides for periodical payments where the wife has been deserted or the children have been deserted by the husband. (ss. 27-28)

- s. 29            Provides that adultery which has not been condoned is an absolute bar to an order under this Part; and that on proof of subsequent adultery of the wife the order may be rescinded by the magistrate (but the order in respect of children only is unaffected (s. 27(5), (6))).

Domestic Relations Act, RSA 1970, c. 113

Children

See sections 14, 22, 24, 25, 27

## Exemption

483. (1) Where the debt due to an employee is for wages or salary the following portion thereof is exempt from attachment by garnishee for each month in respect of which the wages or salary is payable:

- (a) if the debtor is a married person, the sum of \$200, or
- (b) if the debtor is a married person with dependent children
  - (i) in his or her custody, or
  - (ii) under his or her control, or
  - (iii) in respect of whom he or she is paying maintenance,
 \$200 plus \$40 for each child, or
- (c) if the debtor is a widow, widower, unmarried mother or divorced person with dependent children
  - (i) in his or her custody, or
  - (ii) under his or her control, or
  - (iii) in respect of whom he or she is paying maintenance,
 \$100 plus \$40 for each child, or
- (d) if the debtor is an unmarried person \$100.

(2) The amount of exemption applicable is increased or decreased proportionately where the period in respect of which the wages or salary is payable is greater or less than one month.

(3) If the debtor is employed during part only of a month, he is entitled to the full exemption for the month.

(4) If the amount of the exemption applicable or any portion thereof is paid into court, the clerk shall pay it out to the defendant or judgment debtor.

(5) This Rule does not apply

- (a) where the debt sued for, or in respect of which judgment was recovered, was contracted for board and lodging or either of them, or
- (b) where the debtor has absconded or is about to abscond from Alberta, leaving no wife or husband or infant children within Alberta, or

## RULES OF COURT

- (c) to any garnishee summons issued upon any judgment or order for the payment of alimony or for the payment of maintenance by a husband to his wife or his former wife, as the case may be, or for the payment of maintenance for any child of the debtor.

(6) A copy of this Rule shall be attached to or endorsed on each garnishee summons purporting to attach wages or salary.

Court may  
reduce  
exemption of  
husband and  
wife

484. Where both husband and wife are in receipt of wages or salary the court may, upon application, reduce the exemption to which one or both of them would be otherwise entitled under Rule 483.

### Process Against Absconding Debtors

Writ of  
attachment

485. After the commencement of any action wherein the claim is for recovery of a debt of \$200 or upwards,

- (a) upon affidavit, made by the plaintiff or one of several plaintiffs, if more than one, or by his or their agent swearing positively to the facts establishing the debt and that he has reason to believe, specifying the grounds of his belief, that the defendant
- (i) is about to abscond or has absconded from Alberta, leaving personal property liable to seizure under execution, or
  - (ii) has attempted to remove any of his personal property out of Alberta or to sell or dispose thereof with intent to defraud his creditors generally or the plaintiff in particular, or
  - (iii) keeps concealed to avoid service of process, and that the deponent verily believes that without the benefit of the attachment the plaintiff will lose his debt or sustain damage, and
- (b) upon the further affidavit of one other person swearing that he is well acquainted with the defendant and that he has good reason to believe specifying the grounds of his belief, that the defendant
- (i) is about to abscond, or
  - (ii) has absconded, or
  - (iii) has attempted to remove any of his property out of Alberta, or
  - (iv) has attempted to sell or dispose of his property, or
  - (v) keeps his property concealed with intent to defraud his creditors,

the court may, on application to it *ex parte*, direct the clerk to issue a writ of attachment in Form M in the schedule, which writ shall be executed by the sheriff according to its tenor.

Maintenance Order Act, RSA 1970, c. 222

## 1. Wife's Rights

Definitions

- s. 2 (a) ["child" includes a child of a child, and the child of a husband or wife by a former marriage, but does not include illegitimate child.]
- (b) "father" includes grandfather.
- (c) "mother" includes grandmother

Maintenance

- s. 3 (1) The husband, wife, [father, mother and children] of every old, blind, lame, mentally deficient or impotent person, or of any other destitute person who is not able to work, shall provide maintenance, including adequate food, clothing, medical aid and lodging, for such person.
- (2) [child's maintenance . . . . See under Children's Rights]
- (3) This section does not impose liability on a person to provide maintenance for another if he is unable to do so out of out of his own property or by means of his labour, nor does it impose a liability in favour of a person who is able to maintain himself.
- s. 4 (1) Subject to the other provisions of this Act, a husband is primarily liable for the maintenance of his wife, and a wife for the maintenance of her husband.
- (2) [children's maintenance . . . . See under Children's Rights]

Workmen's Compensation Act, RSA 1970, c. 397

This Act provides for monthly compensation to injured workmen who have contributed to the fund; and if the injured workman has "abandoned" his wife or children, s. 33 provides that the compensation in whole or in part may be paid to or for the benefit of the spouse or children, where they are a public charge or depending on private charity or where an order for their maintenance has been made.

In case of death of the injured workman a monthly fixed compensation of \$110 goes to the dependent widow and \$50 to each and every dependant child under 16 and in some cases over 16 but under 18 (s. 34). In a case where the child is an invalid and unable to maintain itself, there is no age limit. If there is no dependant (? eligible) widow, the compensation may be paid to the common law wife (? common law "widow") who has lived with him at least for two years prior to the workman's death and has borne his child or children (s. 36).

- s. 40                   Remarriage of widow terminates the monthly payment of compensation, but she is entitled to a lumpsum settlement of \$1320 within one month after the date of her re-marriage.
- s. 41                   is designed to avoid double pension: Where a dependent subsequently becomes a dependent of another person who is under the Act, only one pension is payable.
- s. 2.6                   "common law wife" includes any woman who although not legally married to him lives and cohabits with a man as his wife and is known as such in the community in which they have lived.
- s. 2.7                   "dependent" includes a partially dependent person . . .
- s. 2.1a                  "member of a family" includes illegitimate children or illegitimate child of a child (legitimate or illegitimate) and both



parents and grandparents (whether the workman is legitimate or not) brothers and sisters, half blood or whole blood, step-parents, etc. . . . and those to whom he stands or who stand towards him in loco parentis (but common law wife is not one of them).

Fatal Accidents Act, c. 138

- s. 3           The spouse, parent (including stepparent, grandparent), child (including illegitimate, stepchild and grandchild), brother or sister may recover damages for wrongful death of the deceased caused by any person.
- s. 4           The damages to be awarded by the court may be such as it thinks proportioned to the injury resulting from the death. (See also s. 7)
- The action may be brought by the Personal Representative of the deceased but if the Personal Representative does not sue within one year the action may be brought by any other person in s. 3.
- s. 5           Only one action lies for and in respect of the same subject matter of complaint.
- s. 7           In assessing damages in an action under this Act no account shall be taken of any insurance money paid or payable on the death of the deceased.

Alberta Insurance Act, 1962, Part 6

(Appended to Insurance Act, RSA 1970, c. 187)

[Contracts effected before 30th June 1962]

s. 244 (1) Beneficiaries for Value

are beneficiaries who have furnished valuable consideration other than marriage, and who are expressly stated to be or described as Beneficiaries for Value in the Policy or any other Declaration by the Insured.

(2) Preferred Beneficiaries

subject to s. 253, are the husband, wife, children, adopted children, grandchildren, children of grandchildren, father, mother, and adopting parents of the Insured.

s. 247 (1) Subject to the rights of Beneficiaries for Value and to the provisions of this Act (see below) relating to Preferred Beneficiaries

the Insured may designate any beneficiary or change beneficiaries by the contract or by a declaration, or surrender the contract of Insurance or deal with it in any manner as is agreed upon between him and the Insurer.

(4) A declaration, whether in a will or other instrument in writing, has subject to subsection (1) effect from the time of its execution, but a declaration does not affect the interests or rights of a Beneficiary for Value or Assignee for Value, unless the declaration has been filed with the Insurer prior to the time when the Beneficiary for Value or Assignee for Value acquired such interests.

(Priority among Beneficiaries for Value or Assignees for Value determined by the time a written notification is given to the Insurer: s. 245)

- s. 250 (1) Where the Insured pursuant to s. 247(1) designates as beneficiary or beneficiaries a member or members of the class of Preferred Beneficiaries (s. 244(2)) a trust is created in favour of the designated beneficiary (or beneficiaries) . . . and the Insurance Money . . . is not, except as otherwise provided in this Act (ss. ) subject to the control of the Insured, or of his creditors, and does not form part of the estate of the Insured.
- (2) The contract may provide or the Insured may at any time direct by a Declaration that a Preferred Beneficiary is entitled only to the income from the Insurance Money for life or for a period of time subject to any limitation or contingency stated in the instrument.
- (3) This section is subject to
- (a) any vested rights of Beneficiaries for Value and Assignees for Value,
  - (b) the provisions hereinafter contained relating to Preferred Beneficiaries,
  - (c) any contingency or limitation stated in the instrument by which the Insured designates a Preferred Beneficiary.
- (4) Notwithstanding subsection (3)
- the Insured cannot reserve the right to revoke or abridge the interest of a Preferred Beneficiary except to another person in the class of Preferred Beneficiaries.
- s. 251 Notwithstanding the designation of a Preferred Beneficiary, the Insured may exercise the powers conferred by s. 247(1) [to change, transfer, limit, terminate etc. . . of benefits] to anyone or more of the class of Preferred Beneficiaries to the exclusion of any or all of the others of that class.

- s. 252 "wife" or "husband" or "children"
- "wife" unless named, or otherwise definitely indicated, means the wife living at the maturity of the contract;
- "husband" unless named, or otherwise definitely indicated, means the wife living at the maturity of the contract;
- "children" unless named, or otherwise definitely indicated, means all children (? legitimate) living at the maturity of the contract, as well as the issue of any predeceased child living at the maturity of the contract; such issue taking by representation.
- s. 253 Adopted children included--also adopting parents--as from the date of adoption--in the class of Preferred Beneficiaries--but they are entitled to benefits in respect of insurance contracts whenever effected.
- s. 254 (1) Where a Preferred Beneficiary dies, the Insured may direct that his/her appointed share shall go to himself or to his estate or to any beneficiary not in the class; unless (subsection (2)) he has previously designated another member of the class to succeed to that share.
- (4) Where a Preferred Beneficiary is a child and the child dies before maturity of the contract;
- the children of the deceased shall be substituted, such children taking by representation. If the child has no surviving issue, the share is payable to the surviving designated beneficiaries in equal shares; if none of the above is available, then it goes to the deceased Insured's wife or husband or children (or children's children) living at the maturity of the

contract in equal shares; the children's children taking their share only by representation. If there is none of the above group, the share goes to the Estate of the Insured or his Estate.

s. 255      Effect of Divorce:

Where the wife or husband of the Insured, who is designated as a Preferred Beneficiary, is subsequently divorced, all the interest of such beneficiary under the contract lapses unless that beneficiary is a Beneficiary for value or an Assignee for Value.

The Insurer may deal with the Insurance money according to the contract, unless he receives a notification of the divorce. . . . but the Insured or his Estate may proceed to recover the moneys paid by the Insurer, from the recipient.

s. 256      Husband or Wife Living Apart:

A wife living apart from her husband (or husband apart from wife) and had been designated as a beneficiary, and the separation is in such circumstances disentitling the wife to alimony (or husband to a decree of restitution of conjugal rights) and there is no other member of the class of Preferred Beneficiaries whom the Insured may designate as beneficiary, the Insured may apply to the court to declare that the beneficiary is disentitled to claim the benefit of the provisions of this Act relating to Preferred Beneficiaries, and the Insured may then deal with the Policy as provided by s. 247.

Surrender of Contract:

s. 257 (1)      Insured may Surrender the contract to the Insurer and accept in lieu any paid up or extended insurance, notwithstanding the designation of a Preferred Beneficiary.

- s. 257 (2) Insured may borrow from the Insurer on the Security of the contract such sums as are necessary and are applied to keep the contract in force notwithstanding the designation of a Preferred Beneficiary. The sums so borrowed and interest are a first charge on the contract and the Insurance money.
- s. 258 Disposition of Surplus or Profit:
- Notwithstanding the designation of a Preferred Beneficiary, any person who effects a Participating Contract, other than a contract of group life insurance, may during his lifetime receive for his own benefit the surplus or profits declared on the contract or may direct the insurer to apply them in payment or reduction of premiums . . . or hold them to his credit . . . [in the case of group life insurance, the surplus or dividends or bonus shall be applied in accordance with the contract].
- s. 259 Surrender of Contract:
- Where all the designated Preferred Beneficiaries are of full age, they and the Insured may surrender the contract or may assign or dispose of it either absolutely or by way of Security to the Insurer, the Insured or any other person; but notwithstanding anything herein contained the Insured may exercise the borrowing powers conferred by s. 257(2) without the concurrence of any beneficiary.
- s. 261(1) Where the insurance money is payable in instalments and the contract, or an instrument in writing signed by the Insured and delivered to the Insurer, expressly provides that the beneficiary is not to have the right to commute the instalments or to alienate or assign his interest therein,

- (a) the Insurer shall not commute the instalments or pay them to any person other than the beneficiary, and
  - (b) the instalments are not, in the hands of the Insurer, subject to legal process except in an action to recover for the necessaries supplied to the beneficiary for his or her children.
- (2) Insured may revoke the above restriction on commutation, or the court may do so in special circumstances upon the application of the Insurer or of the Beneficiary, or the Personal Representatives of the deceased after the death of the Insured.



Insurance Act (Part 6)

- B. Contracts of Insurance effected since July 1, 1962  
[s. 229]

Designation of Beneficiaries:

- s. 247 (1) The Insured may by the contract or by declaration designate his Personal Representative or a Beneficiary to receive Insurance money.
- (2) Subject to s. 248 the Insured may alter or revoke the designation by a declaration.

Irrevocable Designation:

- s. 248 (1) An Insured may in a contract or declaration (other than in a will) filed with the Insurer, during his lifetime, designate a beneficiary irrevocably.

and in that case the Insured, while that beneficiary is living,

- i. may not alter or revoke the designation without the consent of the beneficiary,  
and
- ii. the Insurance money is not subject to the control of the Insured or of his creditors and does not form part of his Estate.

- (2) Designation as Irrevocable Beneficiary by a Will operates as revocable designation

- s. 249 Designation in Will:

stands or falls with the Will itself.

- s. 251 (1) Where a beneficiary predeceases the person whose life is insured and there is no disposition of the share of the deceased beneficiary by the Insured, the share is payable

- (a) to the surviving beneficiary; or
- (b) if more than one surviving beneficiary, to the surviving beneficiaries in equal shares; or
- (c) if there is no surviving beneficiary, to the Insured or his Personal Representative.

- s. 253 (1) Insurance money not part of the Estate of the Insured and is not subject to the claims of the creditors of the Insured.
- (2) Where a designation is in favour of a spouse, child or grandchild, or parent of the Insured, the insurance money and the rights and interests of the Insured therein, and in the contract are exempt from execution or seizure.

Dealings with Contract:

- s. 254 Insured may assign or deal with or surrender [etc.] the Insurance contract in any manner agreed upon with the Insurer or as provided in the contract,
- a. if a beneficiary is not designated irrevocably, or
  - b. if designated irrevocably but, being over 21, consents.

Entitlement to Dividends:

- s. 255 (similar to old s. 258)
- Notwithstanding, designation of beneficiary irrevocably, the Insured is entitled while living to the dividends or bonuses declared on a contract, unless the contract provides otherwise.

These dividends may be used to pay up premiums to keep the contract in force.

- s. 257 (1) An assignee of a contract of Insurance who gives notice to the Insurer has priority against
- a) all other assignees except the ones giving earlier notice
  - b) all beneficiaries except irrevocable beneficiaries designated prior to the notice of assignment.
- (2) Where the contract is assigned as Security, the rights of a beneficiary are affected only to the extent necessary to give effect to the rights and interests of the assignee.
- (3) Where the contract is assigned unconditionally, the assignee has the same rights as the Insured, and shall be deemed to be the Insured.

s. 274 Commutation of Instalments:

(similar to old s. 261)

Divorce Act, RSC 1970, c. D-81. Wife's Rightss. 9 Additional Duties of the Court

(1)(f) Where a decree is sought under s. 4 (divorce on grounds of permanent breakdown of marriage), the Court had a duty to refuse the decree if the granting of the decree would be unduly harsh or unjust to either spouse or would prejudicially affect the making of such reasonable arrangements for the maintenance of either spouse as are necessary in the circumstances.

s. 11(1) Upon granting a decree nisi of divorce, the Court may, if it thinks fit and just to do so having regard to the conduct of the parties, and the condition, means and other circumstances of each of them, make one or more of the following orders, namely:

- a) an order requiring the husband to secure or to pay such lump sum or periodic sums as the court thinks reasonable for the maintenance of both or either
  - i. the wife, and
  - ii. the children of the marriage;
- b) an order requiring the wife to secure or to pay such lump sum or periodic sums as the court thinks reasonable for the maintenance of both or either
  - i. the wife, and
  - ii. the children of the marriage;
- c) an order providing for the custody, care and upbringing of the children of the marriage. .

APPENDIX B

Intestate Succession Act, RSA 1970, c. 190

Children's Rights:

- s. 3(3) When an Intestate dies leaving a widow and children and the net value of the estate exceeds \$20,000, the child's share is as follows:
- a. If there is a widow and only one child:
- that child gets one-half of the excess over \$20,000 (after paying legal interest on the widow's preferential share of \$20,000), the remainder going to the widow.
- b. If there is a widow and more than one child:
- the children together get two-thirds of the excess over \$20,000 (after paying legal interest on the widow's preferential share of \$20,000), the remainder going to the widow.
- s. 4: Each child shares equally with every other, per stirpes
- s. 12 Where Intestate during his Life-time has Advanced a Child by Portion:
- that portion shall be brought into the hotch-pot, and if the advancement is equal to or greater than that child's entitlement under this Act, it shall take no share in the estate; if less than the child's entitlement, it shall take so much share in the estate as would bring about equality among the children.

The Family Relief Act, RSA 1970, c. 134

## Children

See sections 2(b), (d), 4, 6, 10, 18.

- s. 14 (2) An application may be made on behalf of an infant dependant by a parent, guardian appointed by the court, or by the Public Trustee. (in the case of mentally incompetent persons, by the committee of the Estate of the dependant)
- s. 15 The Public Trustee, or other person representing a dependant infant child under 19, or mentally incompetent or physically disabled child, is not under any obligation to make an application where
- a. it appears that the child was living with or supported by both or either of the parents at the date of the deceased's death, and
  - b. he is satisfied that the child is receiving adequate maintenance and support.

Maintenance Order Act, RSA 1970, c. 222

## 2. Children's Rights

Definition

- s. 2 (a) "child" includes a child of a child, and the child of a husband or wife by a former marriage, but does not include an illegitimate child.

Maintenance

- s. 3 (1) The [husband, wife], father, mother [and children] of every old, blind, lame, mentally deficient or impotent person, or of any other destitute person who is not able to work, shall provide maintenance including adequate food, clothing, medical aid and lodging, for such person.
- (2) The father of, and mother of, a child under 16 years of age shall provide maintenance, including adequate food, clothing, medical aid and lodging for such child.
- (3) This section does not impose a liability on a person to provide maintenance for another if he is unable to do so out of his own property or by means of his labour, nor does it impose a liability in favour of a person who is able to maintain himself.

Liability for maintenance

- s. 4 (1) [husband and wife . . . . See Wife's Rights]
- (2) Subject to the other provisions of this Act,
- (a) the liability of the mother hereunder does not arise unless the father is unable and she is able to maintain the person in respect of whom the order is sought;



- (b) the liability of the grandfather under this Act does not arise unless both the father and mother are unable and he is able to provide such maintenance; and
  - (c) the liability of the grandmother does not arise unless the father, mother and grandfather are all unable and she is able to provide such maintenance.
- (3) [Liability of the grandchild . . .]

The Maintenance and Recovery Act, RSA 1970, c. 223

Illegitimate Children's Rights

s. 7 (a) "Agreement" means an agreement entered into pursuant to s. 10, or Part 4 of the Child Welfare Act, 1966 or Part B of c. 39 RSA 1955, whether or not varried by an order.

(e) "Mother" means a single woman, widow, or a married woman who has delivered a child or who is pregnant (or whose pregnancy is terminated without the birth of the child) and the pregnancy or birth was out of wedlock.

s. 10 Agreement with Putative Father

(1) A putative father may enter into an agreement

(a) with the Director or

(b) with the Director and the mother

whereby he undertakes to pay the whole or any part of all or any of the expenses referred to in s. 21, if the amounts to be paid are acceptable to the Director and if he admits by the agreement that he caused or possibly caused the pregnancy of the mother.

(2) A mother may enter into an agreement with the Director whereby she undertakes to pay the whole or any part of the expenses referred to in s. 21, if the amounts to be paid are acceptable to the Director.

s. 13 A complaint (against the putative father) may be made

(a) by the mother, or

- (b) by the next friend or guardian of a child born out of wedlock, or
- (c) by the Director

s. 14 Limitation Period

generally two years of birth of the child or termination of the pregnancy.

ss. 15-16 summons etc. against putative father

s. 18 order declaring paternity--more than one person may be declared father

s. 20 Order for Payment of Maintenance

- (1) Where an order is made under s. 18 the judge may, by order, require
  - (a) the person or persons declared to be the father, and
  - (b) the mother, if the judge determines that she should contribute toward the expenses,

to pay the whole or any part of all or any of the expenses referred to in s. 21 in such proportion as the judge considers just.

- (2) Where no order made under s. 18 and no agreement pursuant to s. 10 exists, or an order or agreement exists but does not provide for the payment in full of all or any of the expenses referred to in s. 21 a complaint may be lodged against the mother and the judge may make an order against her.

s. 21 Determining Amount of Maintenance

- (1) An order or agreement may provide for the payment of the following expenses:

- (a) the reasonable expenses for the maintenance and care, medical and otherwise, of the mother
  - i. maximum three months preceding the birth of child or termination of pregnancy,
  - ii. at the birth of the child or termination of pregnancy, and
  - iii. during such period after birth of child or termination of pregnancy as is considered necessary as a consequence of the birth of the child or the termination of the pregnancy.
- (b) a monthly sum of money towards the maintenance and education of the child attains the age of 16 years or 18 years if attending school or mentally or physically incapable of earning his own living; etc. . . .

s. 22 [application to vary the order or agreement]

s. 23 (1) Order of maintenance, or the agreement, terminates

- (a) on the death or adoption of the child, or
- (b) on the marriage of the mother when the child is retained in her custody and under her care and control, or
- (c) in the case of a married woman living apart from her husband, on the resumption of cohabitation with her husband when the child is retained in her custody and under her care and control.

(2) But an application may be made notwithstanding (b) or (c) above to reinstate or to reinstate and vary the order or agreement pursuant to subsection (1).

s. 27 Liability of Estate

- (1) An order made against a declared father or an agreement entered into by a putative father binds his estate after his death.

- s. 31 Minority of the mother or putative or declared father is no bar to bringing an action against her or him; but the judge in his discretion may appoint the Public Trustee or other person to safeguard his or her interests before the court.

s. 32 Other remedies

Nothing in this Part takes away or abridges any right of action or remedy which without this Part might have been maintained against the father of a child born out of wedlock.

Divorce Act, RSC 1970, c. D-82. Children's RightsDefinition of Child

- s. 2 (a) "Child" of a husband and wife includes any child to whom the husband and wife stand in loco parentis or either of them is a parent and the other stands in loco parentis.
- (b) "Children of the marriage" means each child of the husband and wife (as defined in (a)) who at the material time is
- i. under 16 years of age, or
  - ii. 16 years or over and under their charge, but unable, by reason of illness, disability, or other cause, to withdraw himself from their charge or to provide himself with necessaries of life.

s. 9 Additional Duties of the Court

- (1)(e) Where a decree is sought under s. 4 [divorce on grounds of permanent breakdown of marriage] the court has a duty to refuse the decree if there are children of the marriage and the granting of the would prejudicially affect the making of reasonable arrangements for their maintenance.

## Corollary Relief:

- s. 11 (1) Upon granting a decree nisi of divorce, the court may, if it thinks fit and just to do so having regard to the conduct of the parties, and the condition, means and other circumstances of each of them, make one or more of the following orders, namely:
- (a) an order requiring the husband to secure or to pay such lump sum or periodic sums as the court thinks reasonable for the maintenance of both or either
    - i. [the wife] and
    - ii. the children of the marriage;

- (b) an order requiring the wife to secure or to pay such lump sum or periodic sums as the court thinks reasonable for the maintenance of both or either.
- i. [the wife], and
  - ii. the children of the marriage;
- (c) an order providing for the custody, care and upbringing of children of the marriage.