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REPORT
ON
"THE TESTATORS FAMILY MAINTENANCE ACT"

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Report #63

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CHAPTER 1

INTRODUCTION

The purpose of this Report is to assess whether statutory reform of *"The Testators Family Maintenance Act"* is called for and, if so, to propose recommendations for its reform. This Report is the third issued in a series on the topic of succession law, which may be broadly described as that field of law which deals with the acquisition of rights upon the death of another. The first two Reports issued in this series recommended substantive reform to two statutes, namely, *"The Dower Act"*[1] and *"The Devolution of Estates Act"*.[2] While these two statutes deal with proprietary rights at death, the subject of this Report - *"The Testators Family Maintenance Act"* - considers the separate yet related matter of support obligations at death. Generically, this legislation is known as dependants' relief legislation. *"The Testators Family Maintenance Act"*, like many others of its kind, authorizes the court to vary a will or to alter the effect of the statutory rules of intestacy in a given case, so as to make adequate provision for the proper maintenance and support of the deceased's dependants.

Proper maintenance and support includes two concepts. The first recognizes the public concern that the deceased meet his/her social responsibility to the state. That is, the deceased should provide proper maintenance to dependants so that the public is not required to shoulder the burden. The second concept recognizes the responsibility of the deceased to dependants which is of an individual or personal nature. Even where the possibility of public assistance does not arise, the deceased should not be permitted to leave dependants in circumstances such that their standard of living is far below that which they enjoyed during their lifetime.[3]

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[1]The Manitoba Law Reform Commission, *Report on An Examination of "The Dower Act"* (Report #60, 1984)

[2]The Manitoba Law Reform Commission, *Report on Intestate Succession* (Report #61, 1985).

[3]Institute of Law Research and Reform, *Family Relief* (Report No. 29, 1978) 7.

In our *Report on "The Dower Act"*, we identified three fundamental but conflicting interests in succession law. The first interest is that of freedom of testation or the right of an owner to dispose of property by will as (s)he sees fit. The second is the entitlement of the surviving spouse to an equal participation in the economic gains or property acquired by the parties during the subsistence of the marriage. The third is the interest of ensuring that certain dependants of the deceased receive proper maintenance and support. *"The Testators Family Maintenance Act"* is the governing statute for this third interest. In forming our recommendations for reform, we shall attempt to weigh and to consider each of the three interests identified in order to achieve a satisfactory reconciliation among them.

A. HISTORICAL OUTLINE

Freedom of testation is an incident of property ownership. It is regarded by some as a hallmark of English law.[4] In point of fact, English law recognized complete testamentary freedom for a relatively short period of time.[5] The first dependants' relief legislation which introduced flexible

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[4]As was stated in the oft-quoted judgment of *Banks* v. *Goodfellow* (1870), L.R. 5 Q.B. 549 at 564 per Cockburn C.J.:

> The English law leaves everything to the unfettered discretion of the testator, on the assumption that, though in some instances, caprice, or passion, or the power of new ties, or artful contrivance, or sinister influence, may lead to the neglect of claims that ought to be attended to, yet, the instincts, affections, and common sentiments of mankind may be safely trusted to secure, on the whole, a better disposition of the property of the dead, and one more accurately adjusted to the requirements of each particular case, than could be obtained through a distribution prescribed by the stereotyped and inflexible rules of a general law.

[5]In England, freedom of testation was formerly restricted in the case of realty by the rule of primogeniture and by the widow's right to dower. With respect to personalty, from at least the 12th century, a man's goods were divided upon his death into three equal parts, one of which went to his children, another to his widow, and the third according to his will. It might

(Footnote continued to page 3)

restraints on testamentary freedom was passed by the Dominion of New Zealand at the turn of this century.[6] This legislation gave the court the discretionary power to make an order out of the estate for the proper maintenance and support when testators failed to make adequate provision for their spouse or children.

This discretionary power was the means by which the legislature sought to solve a set of problems common to all legal systems, namely, the threat of disinheritance. Other legal systems have sought to solve the threat of disinheritance by a different means; some give family members a right to a fixed share or specified portion of the testator's estate. While the first dependants' relief legislation in New Zealand was characterized as a compromise solution between absolute freedom of testation and a fixed share regime, this is not the case in Manitoba. Instead, both the fixed share regime and the discretionary approach under dependants' relief legislation operate here.

Prior to the enactment of Manitoba's *"Testators Family Maintenance Act"*, the Legislature in 1918 adopted *"The Dower Act"*. This Act permitted both husbands and wives alike to elect a fixed share of one-third of their deceased spouse's estate when the will failed to make the minimum provision as set out in the Act; however, no protection against disinheritance was provided for children and other dependants under *"The Dower Act"*. When the Manitoba Legislature enacted *"The Testators Family Maintenance Act"* in 1946,[7], it retained *"The Dower Act"* unlike Alberta and Saskatchewan, the only other

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(Footnote continued from page 2)
be said that <u>*total*</u> freedom of testation reigned in England and Wales, from 1883 with the enactment of the *Dower Act* until the first dependants' relief legislation, namely, the *Inheritance (Family Provision) Act*, which came into operation in 1938.

[6]*The Family Protection Act*, N.Z. Stat. 1900, 64 Vict, No. 20.

[7]The Manitoba legislation was patterned on the *Uniform Dependants' Relief Act*. The principle of dependants' relief legislation was adopted in 1920 in British Columbia and the two other western provinces passed maintenance legislation in the following years: Alberta (1947) and Saskatchewan (1940). Ontario entered the fold in 1929.

provinces which originally adopted the fixed share principle.[8] By retaining the fixed share for the surviving spouse after giving the courts the power to make adequate provision for the maintenance of dependants, it would appear that the legislature considered that the law should take cognizance of another social interest, namely the surviving spouse's entitlement to an equitable share of the deceased's estate.[9] This is the second interest in succession law which we identified in our *Report on An Examination of "The Dower Act"*.

Every common law province has now enacted some form of dependants' relief legislation which embodies a discretionary approach. While in broad outline the various dependants' relief Acts are similar, they differ markedly as to the basis on which the jurisdiction is to be exercised, as to the nature of the power to be employed and the terms on which an order may be made. Accordingly, care must be taken in applying decisions from other jurisdictions.[10]

B. RELATIONSHIP OF *"THE TESTATORS FAMILY MAINTENANCE ACT"* AND THE PROPOSED DEFERRED SHARING REGIME

In Report #60, *An Examination of "The Dower Act"*, the Commission considered in depth the property rights which should be accorded the surviving

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[8]The fixed share legislation for Alberta and Saskatchewan was, respectively, *"The Married Women's Relief Act", S.A. 1910, 2nd Sess., c. 18, ss. 2 and 8;* and *"The Devolution of Estates Act"*, S.S. 1910-11, c. 13, s. 11(a) and (g). These Acts, however, were only available for the benefit of the widow. Both schemes simply allowed the widow the right to seek a greater share in the testator's estate if, by her husband's will, she received less than she would have had he died intestate. It would seem that the retention of a fixed share regime was no longer thought justified in these provinces as it was perceived that the widow was afforded adequate protection under the new dependants' relief legislation. *See* G. Bale, "Limitation on Testamentary Dispositions in Canada" (1964), 42 Can. Bar Rev. 367 at 372.

[9]*See* G. Bale, *id.*, at 389, where the author points out:

> . . . since The Testators Family Maintenance Act explicity refers to the fixed share provided for under The Dower Act, it is probably legitimate to conclude that the law of Manitoba is intended to recognize another social interest - that of the wife or husband to a fair share in the estate of the spouse."

[10]A warning against this tendency was given by Kellock J. in *Meyer* v. *Capital Trust Corpn. Ltd., Brethour* v. *Clarey*, [1948] 3 D.L.R. 225 at 227 (S.C.C.)

spouse in the estate of the deceased spouse. Under the present law, there is a lack of symmetry between the principles governing a pre-death distribution of property and those governing a post-death distribution of property. At issue with respect to the fixed share under s. 15 of *"The Dower Act"* was whether such a scheme was the fairest and most appropriate means of adjusting the economic position of the spouses where the marriage is terminated by death. A key issue examined was whether any functional reason existed as to why a distribution at death should be so widely different from that during the spouses' joint lives. The general conclusion we reached was that the passage of time since *"The Dower Act"*'s inception in 1918, coupled with recent developments in the law of marital property, have brought to light a number of technical and conceptual deficiencies in the dower legislation.

We recommended the repeal of the fixed share under s. 15 of *"The Dower Act"* and the adoption of a deferred sharing regime operative on death. Under such a scheme, the surviving spouse would ordinarily be entitled to one-half of the property that the spouses had acquired during the marriage. The proposed deferred sharing regime was based generally upon the principles set out in *"The Marital Property Act"*. Our recommendations would simplify and consolidate marital property legislation and succession legislation by setting up similar schemes for the sharing of marital property. A deferred sharing regime would also achieve a fairer and far more equitable allocation of property than the present fixed share by taking into account the separate property accumulations of the survivor, the source of the property and the length of the marriage. At the time of writing this Report, the *Report on An Examination of "The Dower Act"* had been tabled in the Legislature but had not yet been the subject matter of legislation or debate.

We wish to emphasize that it is our intention that *"The Testators Family Maintenance Act"* should co-exist with a deferred sharing regime and serve to supplement that regime whenever necessary. Even where there has been an allocation of property on death there may still be instances where the division is inadequate to provide proper maintenance and support for the surviving spouse. This would be particularly so in the case of modest estates. The comments of Williams C.J.K.B., in *In Re Blackmore Estate* in 1948 respecting the relationship between *"The Testators Family Maintenance*

Act" and a regime for the determination of proprietary rights are just as apposite today:

> . . . [I]t is only necessary to say that the two Acts were passed for entirely different reasons. "*The Dower Act*", first passed in 1918, was passed to assure to the widow a life estate in the homestead, if any, and one-third [now one-half] of the estate. "*The Testators Family Maintenance Act*", first passed in 1946, was to provide, in a proper case, that dependants, including the widow, should receive proper maintenance and support.
>
> A widow taking under "*The Dower Act*" might get far less than proper maintenance and support . . . . In such circumstances the widow may resort to "*The Testators Family Maintenance Act*" and, if entitled, obtain relief even if the whole estate is required for that purpose.[11]

Simply put, "*The Testators Family Maintenance Act*" should operate as a supplement to, but not a substitute for, a deferred sharing regime on death.

C. STRUCTURE OF THE REPORT

The structure of this Report is as follows. Chapter 2 sets forth an overview of the present law and an examination of its deficiencies. A discussion of the law elsewhere and proposals for change recommended in other jurisdictions follows in Chapter 3. In Chapter 4 we set out what we think the fundamental basis of the legislation should be and our specific recommendations for reform. Chapter 5 contains a summary of the recommendations for reform.

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[11][1948] 1 W.W.R. 1001 at 1010 (Man. K.B.).

CHAPTER 2

THE PRESENT LAW

In this Chapter, we describe in detail the operation of *"The Testators Family Maintenance Act"* and consider its deficiencies. We look at how the Act has been judicially interpreted and the problems which arise when the courts, through the exercise of a broad discretionary power, place a heavy emphasis on a deceased's "moral duty" to provide for dependants.

A. GENERAL OVERVIEW

Under *"The Testators Family Maintenance Act"* the court may, in its discretion, award a part of the deceased's estate to a dependant. The Act does not confer any right to share in an estate; it simply confers a right to make an application to the court. The foundation of the jurisdiction to make an award under the Act is the failure of the deceased to make "adequate provision for the proper maintenance and support" of a dependant. The onus is on the applicant to satisfy the court that the disposition of the deceased's estate was inadequate for his/her proper maintenance.

The heart of the statute lies in the broad grant of power to the courts to award a dependant, found to be inadequately provided for, "such provision as the judge deems adequate". The proposition is frequently asserted that the Act was not intended to authorize the court to write a new will for a testator. This, however, is somewhat of an artificial proposition because the court unmistakably does revise a will so as to transform it into what is characterized as a wiser and more "morally just" testamentary disposition. It is indeed a basic truth that, in *"Testators Family Maintenance Act"* proceedings, the court is overriding or varying the provisions of a will. Until the claims of the dependants have been disposed of, all interests in the estate are only provisionally created by the will or determined by the law of intestate succession.[1]

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[1] In the words of Herdman J. in *Welsh* v. *Mulcock* [1924] N.Z.L.R. 673 at 682, this means "that under the Act a man's will is no more than a tentative disposition of his property pending an ultimate decision by the court".

The Act applies whether the deceased has died testate or intestate.[2] While the Act is not explicit on the point, it would appear that provision may only be granted out of the net estate, that is to say, after all enforceable third party claims have been taken into account or discharged. In making provision, the court is given a wide discretion to impose such conditions and restrictions as it deems fit.[3] The court may order that a lump sum be paid; that specified property be transferred; or that periodic payments be made for the benefit of the dependant.[4] The courts have commonly stated that in general they favour periodic payments as opposed to lump sums as it is not the purpose of the Act to enable a dependant to build up an estate.[5] However, a review of the Manitoba case law discloses a different picture.[6]

The Act provides that the burden or incidence of any provision for maintenance which is ordered should fall rateably upon the whole estate unless otherwise ordered by the court.[7] There is a further discretionary power which permits the judge to exonerate or relieve any part of the estate, either completely or partially, from the incidence of the order.[8] It would appear

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[2] *"The Testators Family Maintenance Act"*, C.C.S.M. c. T50, ss. 3(4), 3(5).

[3] *"The Testators Family Maintenance Act"*, C.C.S.M. c. T50, ss. 6(1), 13.

[4] *"The Testators Family Maintenance Act"*, C.C.S.M. c. T50, ss. 6(3), 6(4).

[5] *See*, for example *In re Lawther Estate*, [1947] 1 W.W.R. 577 at 593 (Man. K.B.).

[6] C. Harvey in "Checklist for Dependants' Relief Proceedings (Manitoba)" (1983), 6 E.&.T.Q. 254 at 256 points out that a review of 28 Manitoba cases since 1947 reveals that lump-sum orders were made in 16 cases, income orders in 4 cases, both lump-sum and income orders in one case, a property order in one case, a suspended order in one case, and five applications were dismissed.

[7] *"The Testators Family Manitenance Act"*, C.C.S.M. c. T50, s.11.

[8] *See*, for example, *Re Steinberg, Simmonds* v. *Rehn* (1969), 3 D.L.R. (3d) 565 (Man. Q.B.).

that the court's power to vary an award is framed broadly enough to permit the court to increase an award at a subsequent point in time, though the incidence of such an order would be confined to those assets of the estate not yet distributed.[9]

1. Who May Apply

Only a "dependant" may apply for relief under the Act. The Act defines a dependant to mean the wife, husband, or child of the testator. "Child" includes a child of the deceased born outside marriage,[10] a child *en ventre sa mere*[11] at the date of the deceased's death and a child lawfully adopted by the deceased. In some jurisdictions the corresponding legislation makes no provision for relief of a child over the age of majority unless such child is, through illness or infirmity, unable to earn a livelihood.[12] There is no such limitation in our Act.

2. Discretionary Power and Its Exercise

The principles upon which the court's discretion should be exercised have been judicially considered in Manitoba and in other jurisdictions with similar legislation. In *Sloane* v. *Bartley* Mr. Justice Kroft noted that Manitoba case law seems to support the following general statements:

1. The Act is more than a statute to supplement or complement those acts dealing with family maintenance and child support.

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[9] *Bowie* v. *The Royal Trust Co.* (1985), 30 Man. R. (2d) 128 (Q.B.).

[10] Subsection 11.2(1) of *"The Family Maintenance Act"*, C.C.S.M. c. F20, provides that, for all purposes of the law of Manitoba, a person is the child of his parents, and his status as their child is independent of whether he is born inside or outside marriage.

[11] This is a child in its mother's womb who is born after the testator's death.

[12] *The Family Relief Act*, R.S.A. 1980, c. F-2, s. 1(d)(iii); *The Dependants Relief Act*, R.S.S. 1978, c. D-25, s. 1(c)(ii) & (iii); *Dependants of a Deceased Person Relief Act*, R.S.P.E.I. 1974, c. D-6, s. 1(d)(iii).

2. The *Act* was not intended to authorize a court to rewrite a new will for a testator.

3. The *Act* allows and expects the court to alter a testamentary disposition to the extent, but only to the extent, that it is necessary to provide for the proper maintenance or support of a spouse or a child, where adequate provision has not been made for that purpose.

4. Although the words "just and equitable", which appear in the enactments of some other jurisdictions are excluded from the Manitoba *Act*, the court must, in applying the section, attempt to do what is just and equitable.

5. In determining what constitutes "proper maintenance and support", it is not necessary that need in the sense of financial deprivation or hardship be demonstrated. What has to be considered are the merits of any claim having regard to an applicant's situation and circumstances as at the date of the death. This consideration must be made in light of relations between the testator and the applicant, the size of the estate, and the strength of the competing claims.

6. The claim of an adult, self-supporting child will almost certainly be weaker than the claim of a spouse or a truly dependent child, and the claim of a child who has supported a parent or contributed in some way to the accumulation of the estate will be stronger than one who has not. There is, however, no hard and fast rule that an adult child can only benefit under the *Act* if he is disabled or if he has provided help and service to the parent, or if the estate is large.[13]

To this list, we set out but one further principle which we have extracted from a review of the Manitoba authorities, namely:

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[13](1980), 4 Man. R. (2d) 41 at 47-48 (Q.B.). On appeal, Mr. Justice Huband (in dissent) noted that no one had quarrelled with the delineation of these guidelines. *See Re Sloane and Bartley* (1980), 119 D.L.R. (3d) 611 at 618 (Man. C.A.).

7. "Proper" maintenance depends on the circumstances and connotes something different from "adequate" maintenance. In determining what is proper maintenance the court will have regard to the station in life of the applicant.[14]

In *In re Lawther Estate*, the judge set forth a comprehensive list of some 15 facts which the court should consider when making an award under the Act:

1. The size of the testator's estate;
2. The size of his family;
3. The ages of his dependants;
4. The station in life of the testator and his dependants;
5. The character and views of the testator;
6. The wishes of the testator, if his failure to perform his duty is due to omission or oversight (e.g., an expressed intention not carried out, to make further provision by will);
7. The relative needs and deserts of the claimants (if the estate is small and the claimants are numerous);
8. The possibility of changes in existing circumstances;
9. The future value of money and rates of interest;
10. The opinions and wishes of a just and wise mother about the education and mode of life of the children of herself and the testator;

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[14]In *Bosch* v. *Perpetual Trustee Company, Limited*, [1938] A.C. 463 at 476 (P.C.) Lord Romer stated:

> The use of the word "proper" in this connection is of considerable importance. It connotes something different from the word "adequate". A small sum may be sufficient for the "adequate" maintenance of a child, for instance, but, having regard to the child's station in life and the fortune of his father, it may be wholly insufficient for his "proper" maintenance. So, too, a sum may be quite insufficient for the "adequate" maintenance of a child and yet may be sufficient for his maintenance on a scale that is "proper" in all the circumstances.

And see Barr v. *Barr*, [1972] 2 W.W.R. 346 at 351 (Man. C.A.); *In re Lawther Estate*, *supra* n. 5, at 583.

11. The situation arising when the testator has been married more than once;
12. The personal income of the dependants;
13. The competing moral claims on the bounty of the testator;
14. The health and mental capacity of the dependants;
15. In the case of a widow, the kind of maintenance to which she had been accustomed during the life of the testator, or to which she would have been accustomed if her husband had then done his duty to her, all this involving a consideration of a) the size of the house in which she is to live; b) the cost of fuel, living expenses, clothing, and replenishing household furnishings; c) taxes, including income tax; d) employment of domestic servants and of persons to tend furnace and grounds, if such servants had been employed in the husband's lifetime or become necessary because of his death or the disability of the widow; e) the necessity for the use of a motor car and the employment of a driver; f) the need for medical care or treatment; g) travelling, particularly if it is necessary to winter in a milder climate.[15]

3. Limitations on the Court's Discretion; The Role of Section 22

Subsection 22(1) of *"The Testators Family Maintenance Act"* appears to set forth a minimum amount or floor to the allowance which may be made under the Act. It reads as follows:

> 22(1) No order shall be made that has the effect of reducing the interest of a husband or wife in the estate of a testator to an amount that, in the opinion of the judge, is less than the share to which the husband or wife would have been entitled under The Dower Act, should he or she elect to take under that Act.

Subsection 22(2) further provides that benefits given to a spouse under *"The Testators Family Maintenance Act"* are in lieu of the fixed share under *"The Dower Act"*, and thereafter no election may be made under *"The Dower Act"*. At first reading, it would appear that the intent of providing this floor is to remove the risk of the applicant spouse who first applies under *"The*

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[15] *In re Lawther Estate, supra* n. 5, at 586-587.

Testators Family Maintenance Act" from receiving less under that Act than under "*The Dower Act*".

In fact, much confusion and uncertainty surrounds the interpretation of these sections. In *Pope* v. *Stevens (Executors of Pope Estate)*,[16] Montague J.A. held that the section merely required that any periodic payment in favour of the spouse should be at least equal to the income which would accrue from the fixed share of the estate under "*The Dower Act*". He stated:

> The provision for maintenance ordered, no matter which "way" is directed to be used, must produce for the widow at least the amount of income that would have accrued to her from one-third of her husband's net estate had she received such one-third as a result of electing to take under sec. 13 of *The Dower Act*.[17]

On the other hand, Adamson J.A., in the same decision, found that subsection 22(1) was directed at an applicant other than the surviving spouse. He noted:

> I am, therefore, of the view that the order referred to in sec. 22 of *The Testators Family Maintenance Act* is an order made for the maintenance of some dependant other than a spouse. The intention of the section is that such an order shall not interfere with or reduce

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[16](1954), 14 W.W.R. 71 (Man. C.A.). This also appears to be the effect of the decision of Williams C.J.K.B. *In re Lawther Estate, supra* n. 5, where he takes into account the life expectancy of the spouse and indicates that it is the cost of an annuity that would provide the spouse with the periodic payment to which he held her entitled, which could not be less than the value of the share she could have elected to receive under "*The Dower Act*".

And see In Re Blackmore Estate, [1948] 1 W.W.R. 1001 at 1011 (Man. K.B.); *Polonsky* v. *Smith*, Man. Q.B. unreported, September 24, 1976, Morse J.

G. Bale in "Limitation on Testamentary Disposition in Canada" (1964), 42 Can. Bar Rev. 367, also advocates this approach.

[17]*Pope* v. *Stevens*, *supra* n. 16, at 84-85. The surviving spouse's share of the deceased's net estate has since been increased to one-half from one-third.

> a spouse's rights under *The Dower Act*. It does not limit the wide discretion given under the sections above referred to except in that respect. Had there been an intention to limit the discretion given under the sections mentioned above it would have been simple to say that an order for the benefit of a spouse shall never be less than he or she would have been entitled to under *The Dower Act*.[18]

In short, this interpretation would preclude a dependant, seeking an order under the Act, from encroaching upon the survivor's fixed share.

4. The Relevance of Character and Conduct

Under subsection 3(3) of *"The Testators Family Maintenance Act"*, the judge is empowered to refuse to make an order in favour "of any person if his character or conduct is such as, in the opinion of the judge, to disentitle him to the benefit of an order" sought. The concept of conduct is a vague and general one. While the statute does not expressly state what character flaw or conduct will warrant disqualification, Freedman J. (as he then was) pointed out in *Sobodiuk* v. *Maclaren (Executrix of Karabin Estate)* that it was an objective test:

> It is the opinion of the judge as to the character or conduct of the applicant that governs. It is not the opinion of the testatrix. The latter may well have felt that the applicant was disentitled to share in the estate, and may, for that reason, have left her nothing in the will. But since it is "moral duty" that must be appraised, the testatrix cannot be the one to judge thereof according to her own opinion of the character or conduct of the applicant, even if formed in all good faith. This is the function of the court, which must consider the matter objectively and in the light of all the circumstances.[19]

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[18] *Pope* v. *Stevens*, *supra* n. 16, at 73.

[19] (1954), 13 W.W.R. (N.S.) 222 at 225-226 (Man. Q.B.). This test was followed in *Re Testators Family Maintenance Act; Re Walker's Will; Walker and Spencer* v. *Rivalin* (1963), 43 W.W.R. 321 at 334 (Man. Q.B.) where the court found that the testator (father) formed an unwarranted opinion and unjust

(Footnote continued to page 15)

It would appear that the onus of proof of bad character rests on any person alleging it and that mere suspicion or inference is not enough.

In addition, section 10 of the Act provides:

> The judge may accept such evidence as he deems proper of the testator's reasons, as far as ascertainable, for making the dispositions made by his will, or for not making provision or further provision, as the case may be, for a dependant, including any statement in writing signed by the testator; and in estimating the weight, if any, to be attached to such statement, the judge shall have regard to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement.

The combined effect of subsection 3(3) and section 10 is to provide the courts with full power to review the conduct of an applicant and generous discretion to determine what should constitute disentitling conduct. We are aware of but one Manitoba case where the court found that the applicant's conduct was such as to forfeit her moral claim on the deceased. In *Re Nixey*,[20] a widow who had deserted her husband without cause many years before his death, was disentitled by her conduct to a claim against the deceased's estate.

(Footnote continued from page 14)
attitude towards the son of such proportions as to affect the testator's sound judgment. The father believed that the son was not properly accounting for the testator's share of the crop and the father became critical of and antipathetic towards his son.

[20](1972), 31 D.L.R. (3d) 597 (Man. Q.B.). In addition, the testator had expressed in his will the reason for making no disposition in favour of his wife.

But see Dmytriw v. *Dmytriw*, Man. Q.B. unreported, July 2, 1975, where Wright J. found that the action of the wife in leaving her husband four years before his death was not culpable or morally blameworthy conduct such as to disentitle her to the benefit of an order under the Act.

A review of the case law from Manitoba and other jurisdictions would appear to suggest that the conduct must be extreme to disentitle an applicant.[21] Conduct not sufficiently grave to disentitle a person to an order may nevertheless be considered in its relation to and effect upon the moral duty owed to the applicant by the deceased. For example, in *Sobodiuk v. MacLaren*, while the strained and disturbed relationship between mother and daughter did not negate the moral duty owed by the testatrix to the applicant, it did whittle down that duty considerably.[22]

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[21]Conduct on the part of the applicants which appeared to repudiate the parent/child relationship between the applicants and the deceased did not disentitle the applicants in *Re Bartel Estate* (1982), 16 Man. R. (2d) 29 (Q.B.), var'd, in part, *Bartel v. Canadian Cancer Society, Manitoba Division*, Man. C.A., unreported, November 22, 1982, Freedman C.J.M. The following extract from the trial decision (at 31-32) describes the relationship between the testatrix and her children:

> The fact is that in the last five years of their mother's life - from the death of their grandmother - the applicants never visited their mother (who had by then retired from her part-time hotel work) and they excluded her from contact with her grandchildren. They state their opinion that she was a strong-willed woman who liked to have her own way and drank too much. Her pathetic retaliation in private was to place a newspaper over a cabinet to hide the photographs of her children and grandchildren and their gifts to her. She accepted the situation but was deeply hurt. And there was to be no final, forgiving reconciliation. When their mother was in the course of death in hospital, her son and her daughter were exercising their legal right to stay away.

And see Hall v. Hall's Estate (1981), 10 Man. R. (2d) 168 (Q.B.) where the court awarded a testator's daughter, a 22 year old high school dropout, an additional $10,000 to complete her education, despite the fact that she had dissipated part of a trust fund provided for her in the will. The estate was valued at approximately $86,000 and under the terms of the will the daughter had already received $20,000; *Re Steinberg*, *supra* n. 8.

[22](1954), 13 W.W.R. (N.S.) 222 (Man. C.A.). *And see Re Bartel Estate, id.*, at the Court of Appeal.

5. Contracting Out

Persons entitled to apply under *"The Testators Family Maintenance Act"* may not, by contract, preclude themselves from claiming benefits under the Act.[23] The jurisdiction of the court to make an award remains, notwithstanding that an agreement was entered into prior to marriage,[24] upon separation[25] or after the deceased's death.[26] Generally, a person can waive benefits conferred by statute but this is not the case where the statute, in addition to protecting private interests, also protects a public interest. The auxiliary public interest embodied in the Act is to protect the public purse by preventing a deceased's dependants from becoming in need of public assistance.[27]

6. Time and Manner of Application

An application under the Act may be made by originating notice of motion, in accordance with the procedure of the Court of Queen's Bench.[28] Evidence on the hearing of the application may be by affidavit or in open court. The latter appears to be the more usual procedure. In accordance with the general limitation period, an eligible dependant should apply to the court

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[23] *Polonsky* v. *Smith*, *supra* n. 16.

[24] *Re Berube*, [1973] 3 W.W.R. 180 (Alta. C.A.).

[25] In *Re Edwards Estate; Re Family Relief Act* (1961), 36 W.W.R 605 (Alta. S.C., App. Div.), it was held that a separation agreement approved by order of a court by which a spouse purported to surrender her rights under the Act does not oust the jurisdiction of the court. *And see Collard* v. *Collard* (1977), 28 R.F.L. 252 (Sask. Surr. Ct.).

[26] *Re Stannard Estate* (1960), 32 W.W.R. 432 (B.C.S.C.).

[27] For a full discussion of this public policy *see Lieberman* v. *Morris* (1944), 69 C.L.R. 69 (Aust. H.C.). Latham C.J. decided the issue on considerations other than those of public policy, but the judgments of the other four members of the court all turn on public policy.

[28] *"The Testators Family Maintenance Act"*, C.C.S.M. c. T50, s.4.

within six months from the grant of probate of the will or letters of administration.[29] This time limit reflects an emphasis on achieving not only certainty but also the prompt administration and distribution of an estate for both the personal representative and the beneficiaries. The limitation period may be extended for late applications but only in regard to that portion of the estate which remains undistributed.[30]

An application by one dependant may be dealt with as (and insofar as the question of limitation is concerned, is deemed to be) an application on behalf of all dependants who might apply.[31] This provision enables the court to grant orders in favour of other dependants on the hearing of an application by one dependant and thus avoid a multiplicity of proceedings; no defence that the other dependants have not applied within the prescribed six month limitation period is available.

7. Suspension of Distribution

Under subsection 3(2), a judge may make a suspensory order, suspending, in whole or in part, the administration of the estate in order that an application may be made at a subsequent date. Presumably, this subsection permits a remedy to be obtained where there is a threatened distribution and an application for relief cannot be brought on short notice.

In addition, section 9 of *"The Testators Family Maintenance Act"* prohibits the deceased's personal representative from proceeding with the distribution of the estate "[w]here an application is made and notice therof is served on the executor or trustee of the estate".[32] The intent of this statutory provision is to inhibit the deceased's personal representative from

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[29] *"The Testators Family Maintenance Act"*, C.C.S.M. c. T50, s.15 (1).

[30] *"The Testators Family Maintenance Act"*, C.C.S.M. c. T50, s.15 (2).

[31] *"The Testators Family Maintenance Act"*, C.C.S.M. c. T50, s. 16.

[32] A strict reading of this section would indicate that it is not notice of an intention to apply which forbids distribution, but only notice of the actual application. The courts, however, have refused to limit the effect of this section.

taking precipitate action to distribute the estate when there is the expectation of an application being filed. When personal representatives distribute an estate in such cases, they do so at their peril.[33] It is clear though that only distribution must be halted; the payment of debts and taxes and the other components of the process of administration are not affected.

8. Appeals

An appeal from an order under *"The Testators Family Maintenance Act"* is the same as from a judgment in any civil cause, but the appeal court appears to exercise a wider discretion to vary the judge's decision under *"The Testators Family Maintenance Act"*. The function of a court of appeal was considered in *Barr* v. *Barr*, where Dickson, J.A. (as he then was) stated:

> While according the judgment of the learned Chief Justice the greatest respect, it should perhaps be observed . . . that the Supreme Court of Canada has held in *Swain et al* v. *Dennison et al* (1966), 59 D.L.R. (2d) 357 at p. 361, [1967] S.C.R. 7, 58 W.W.R. 232, that a Court of appeal, in view of the special nature of *Testators Family Maintenance Act* legislation has both the power and the duty to review the circumstances and reach its own conclusion as to the discretion properly to be exercised in a case such as this.[34]

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[33]The personal representative is liable to account for any loss suffered, unless there is a clear disclaimer by all potential applicants. *See Gilles* v. *Althouse* (1975), 53 D.L.R. (3d) 410 (S.C.C); *Mazur and Boreski* v. *Mazur Estate* (1980), 3 Man. R. (2d) 67 (C.A.); *Re Dentinger* (1981), 10 E.T.R. 6 (Ont. Surr. Ct.). *See generally, In re Simson decd., Simson* v. *National Provincial Bank Ld.*, [1950] 1 Ch. 38.

[34]*Barr* v. *Barr*, *supra* n. 14, at 348. *And see Sloane* v. *Bartley* (C.A.), *supra* n. 13; *Pope* v. *Stevens*, *supra* n. 16.

B. THE EXERCISE OF JUDICIAL DISCRETION; THE OPERATION OF THE ACT IN PRACTICE

1. Rectifying a Breach of Moral Duty

One of the characteristic aspects of judicial interpretation of *"The Testators Family Maintenance Act"* is that the courts place a heavy emphasis on the ethical aspects of cases brought under *"The Testators Family Maintenance Act"*. It is often stated that the primary purpose of the legislation is to enforce a moral duty of the testator towards his dependants. Consequently, the courts conceive their task essentially to be one of correcting a breach of moral duty on the part of the testator. Dickson J.A. (as he then was) described this moral duty in *Barr* v. *Barr*:

> The dominant theme running through the cases, and they are myriad, is one of ethics, even more than economics. Although The Testators Family Maintenance Act is couched in terms which at first impression appear to be pragmatic and economic, "adequate provision for . . . proper maintenance and support", it soon becomes apparent on a review of the authorities *that heavy emphasis is placed upon the moral aspects of the problem* . . . . [I]t is fair to say that the legislation has by and large received a very liberal interpretation. The attitude of the courts has been one of great flexibility.[35] [emphasis added]

Nowhere in the statute is the notion of a "moral duty" to be found; rather, it appears as a judicial gloss on the statute.[36] This concept of moral duty determines not only the existence of a claim but also the quantum and extent of a claim successfully established:

> The Act is . . . designed to enforce the moral obligation of a testator to use his testamentary powers for the purpose of making proper and adequate provision after his death for the support of his wife and children, having regard to his means, to the means and deserts of the several claimants, and to the relative urgency of the various moral claims upon his bounty. The provision which the Court may properly make in default of testamentary provision is that which *a just and wise father would have thought it his moral duty to make* in the interests of his widow and children had he been fully aware of

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[35] *Barr* v. *Barr*, *supra* n. 14, at 350-351.

[36] *Coates* v. *National Trustees Executors and Agency Co. Ltd.* (1956), 95 C.L.R. 494 at 523 (Aust. H.C.).

all the relevant circumstances.[37] [emphasis added]

The Privy Council approved the judgment of Edwards J. in *Re Allardice* v. *Allardice* when he enunciated this moral duty as follows:

> It is the duty of the Court, so far as is possible, to place itself in all respects in the position of the testator, and to consider whether or not, having regard to all existing facts and surrounding circumstances, *the testator has been guilty of a manifest breach of that moral duty which a just*, but not a loving, husband or father owes towards his wife or towards his children, as the case may be.[38] [emphasis added]

These statements are commonplace in Manitoba case law and are quoted liberally throughout the decisions.[39] In *Re Bartel Estate*,[40] Mr. Justice Scollin points out that, in light of the authorities, it is immaterial that the result is sometimes "a statutory post-mortem metamorphosis of the testator into a paragon of wisdom and justice who is seldom encountered on the Clapham omnibus".

2. Deficiencies in the Present Approach

(a) The present approach is anomalous

Approaching the problem from the point of view of rectifying a breach

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[37] *In re Allen (Deceased), Allen* v. *Manchester*, [1922] N.Z.L.R. 218 at 220, per Salmond J., quoted with approval by Lord Romer in *Bosch* v. *Perpetual Trustee Company Limited*, *supra* n. 14, at 479. In the passage which preceded this quote, Lord Romer agreed that "in every case the Court must place itself in the position of the testator and consider what he ought to have done in all the circumstances of the case, treating the testator for that purpose as a wise and just, rather than a fond and foolish, husband or father" (at 478-479).

[38] (1910), 29 N.Z.L.R. 959 at 972-973 (C.A.).

[39] *See*, for example, *Sloane* v. *Bartley* (Q.B.), *supra* n. 13; *Hall* v. *Hall's Estate*, *supra* n. 21.

[40] *Supra* n. 21, at 32.

of moral duty on the part of the testator is somewhat anomolous.[41] Traditionally, the function and task of the court has been to define, adjudicate and enforce legal rights, duties and obligations. Rarely are the courts asked to assess the moral duty of a citizen. Questions of moral obligation have historically been within the purview of theologians, philosophers and individual conscience. Whether or not an individual owes a moral obligation to another, and the extent and nature of such an obligation is inevitably a subjective task. Given any particular fact situation, views may vary widely as to what, if any, moral obligation exists. On what basis should one view be preferred to another?

The experience and expertise of judges well equips them to determine and to resolve matters of legal obligation. It is difficult to identify any factor which makes a judge more competent than a testator to identify what the testator's moral obligations are and the extent to which they should be recognized.[42] The court itself has pointed out that the task of exercising the discretionary power given to the judges is one of great difficulty and delicacy and it must always be one largely of guesswork.[43] In this connection the words of Mr. Justice Oliver Wendell Holmes are apt:

> I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether, and other words adopted which should convey legal ideas uncolored by anything outside the law. We should lose the fossil records of a good deal of history and the majesty got from ethical association, but by ridding ourselves of unnecessary confusion we should gain much in the clearness of our thought.[44]

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[41]We have been assisted greatly by and have drawn heavily on the Reservation by A.L. Close in the Law Reform Commission of British Columbia's *Report on Statutory Succession Rights* (Report No. 70, 1983) 152.

[42]*Id.*, at 153.

[43]*See*, for example, *Bosch* v. *Perpetual Trustee Company, Limited*, *supra* n. 14 at 483.

[44]O.W. Holmes, "The Path of the Law" (1896-97), 10 Harv. L. Rev. 457 at 464.

The Commission is concerned that the emphasis on the moral duty of the testator obscures the basic function of the statute. It has shifted the court's focus from what the needs of the dependant are, to what the deceased has failed to do. If the purpose of the legislation is to make adequate provision for the maintenance of dependants, an inquiry into what, if any, "moral obligation" was owed by the testator to the applicant for relief simply veils the issue. We do not suggest that advancing morality is not one of the chief molding influences upon the law for, as Mr. Justice Holmes stated: "The law is the witness and external deposit of our moral life".[45] Simply put, it is our contention that the purpose of the Act is partially frustrated by the adherence of the courts to this concept of moral duty under *"The Testators Family Maintenance Act"*.

(b) Lack of symmetry

(i) Able-bodied adult claimant

The Commission is of the view that there is a lack of symmetry between the rights which may be asserted against the deceased before death and those which may be asserted against the estate on death. That is, courts will recognize and enforce claims against the testator's estate which could not have been asserted against the testator in his lifetime. The adult able-bodied child seeking a share of his/her parents' capital has no basis on which to assert a claim during the parents' lifetime; on the death of a parent, the adult child who, has been treated sparingly or disinherited, may receive a favourable hearing.[46] In Manitoba, there can be a moral obligation to an able-bodied adult claimant who is comfortably situated financially and who is not dependent upon the testator for support.[47] The following Manitoba cases are authority for this proposition:

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[45] *Id.*, at 459.

[46] *Supra* n. 41 at 154.

[47] In *In re The Testators Family Maintenance Act; In re La Fleur Estate*, [1948] 1 W.W.R. 801 (Man. K.B.), it had been suggested that an award in favour of an adult son, comfortably situated financially might be restricted to

(Footnote continued to page 24)

Re Bartel Estate[48]

A testatrix left the bulk of her $58,000 estate to The Canadian Cancer Society; she bequeathed her adult son and daughter each $1000. There existed an "acrid haze of battle" in the relationship between the testatrix and her children. The children had previously fought with the testatrix over their maternal grandmother's will and eventually obtained a settlement in their favour. Neither of the children was in need of financial assistance. The trial judge held that the moral duty of the testatrix could only be satisfied by awarding each of the children one-quarter of the charitable bequest (i.e. $14,500), in addition to the $1,000 bequest. On appeal, the court reduced this award but still ordered that each of the applicants' bequests be increased to $5,000.

(Footnote continued from page 23)
circumstances where,

1) the adult son suffered from a physical or mental disability or

2) there was no disability but the estate was great.

In *Barr* v. *Barr*, *supra* n. 14, Mr. Justice Dickson broadened these criteria. He noted that orders may be made in small estates in favour of adult sons who were without disability. It was held that there can be a moral obligation to an able-bodied adult son who is comfortably situated financially where the estate is large or the son has contributed materially to the accumulation of the estate. *And see Re Steinberg*, *supra* n. 8.

Mr. Justice Kroft in *Sloane* v. *Bartley*, (Q.B.) *supra* n. 13, appears to have taken the able-bodied claimant one step further. He noted (at 48) that:

> There is, however, no hard and fast rule that an adult child can only benefit under the *Act* if he is disabled or if he has provided help and service to the parent, or if the estate is large.

[48]*Supra* n. 21. Each of the applicants had earlier received $7,000 from their grandmother's estate and had signed a formal release of their mother as executrix of and from any claim related to their grandmother's estate.

Dutka v. *Dutka's Estate*[49]

A testator died unexpectedly leaving the residue of his estate of some $135,000 to his brothers and sisters who were close to and supportive of him. He had bequeathed $25,000 to his own mother. The will was made prior to a joyful reunion with his 27 year old son, whom he had not supported or contacted since the son was an infant. The son was married and earning a decent salary in his regular employment as a buyer for a ship building company. There was evidence that the testator was of a mind to leave his entire estate to the son or to both his son and his grandchild. In order to discharge the father's moral duty to his son, the court awarded the son a lump sum of $45,000.

Re Blowers Estate; Menrad v. *Blowers*[50]

A widow and six adult children applied for relief under *"The Testators Maintenance Act"*. The husband died testate leaving an estate of $55,682 to the woman with whom he lived. The six adult children were not in need of financial assistance. While the judge simply awarded each child $500 he found that "a wise and just father would not have excluded any of his children from his will, and . . . he would have treated all of them equally".[51]

Re Steinberg[52]

An application for relief was made by the son and daughter of the testator. The net amount of the estate was about $56,000. Each of

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[49](1980), 7 Man. R. (2d) 211 (Q.B.).

[50](1982), 16 Man. R. (2d) 288 (Q.B.) In considering the moral obligation to provide for his children, and in assessing the quantum of the awards the court was principally concerned with the father's moral obligation to provide for the woman with whom he had lived.

[51]*Id.*, at 299.

[52]*Supra* n. 8.

the children were to receive approximately $17,000 under the terms of the will; the *de facto* spouse and the estate of the testator's sister were each to receive approximately $8,500. Neither applicant was destitute. The daughter was divorced and had custody of one child and was in receipt of maintenance payments from her former husband. The son had worked in his father's automobile sales business from the time he left school until his father's death, except for short interludes. The court awarded an additional $5,000 to be paid to each of the children by virtue of the family history, the circumstances of the children, *and the claims by the children to the moral bounty of the testator.* No distinction was made between the children as the testator had given them an equal share under the terms of his will and the court saw no reason to vary that equal provision.

To the extent that the moral obligation transcends the question of proper maintenance and support, the function of the statute is obscured. These cases would suggest that family maintenance has in substance been transformed from a mere limitation on testamentary power into an emerging principle that children are entitled to a share of their parents' capital estate.[53] The Manitoba Court of Appeal has expressed caution over this excessively liberal application of the moral duty concept. In *Re Sloane and Bartley*,[54] Matas J.A. pointed out that the court is faced with two conflicting principles under *"The Testators Family Maintenance Act"* - "'a very liberal interpretation of the legislation' by the Courts and the reluctance of the Courts to 'restrain a man's right to dispose of his estate as he pleases'".

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[53]*See also Morris* v. *Morris* (1982), 14 E.T.R. 35 (B.C.C.A.), leave to appeal to the Supreme Court of Canada refused, *Morris* v. *Morris* (1983), 48 N.R. 79 (S.C.C.); *Dalziel* v. *Bradford* (1985), 18 E.T.R. 261 (B.C.S.C.); *Lowres* v. *Lowres* (1984), 17 E.T.R. 281 (B.C.S.C.), where the decision of the testatrix to exclude her son from her bounty was characterized as irrational as "no good reason for her doing so" appeared from the evidence (at 284); *Re Michalson Estate*, [1973] 1 W.W.R. 560 (B.C.S.C.).

[54]*Supra* n. 13, at 616 (C.A.). On appeal, the Court reversed the $15,000 award made to the adult daughter and held that she had failed to satisfy the burden on her of proving the testatrix did not make adequate provision for her

(Footnote continued to page 27)

It is our view that persons who have no rights enforceable against the deceased during his lifetime ought not to be entitled to claim family provision from the estate. The function of "*The Testators Family Maintenance Act*" should be to secure reasonable provision for the surviving dependants; it should not be employed to enable a dependant who has no need for maintenance to acquire a share of the deceased's share. This lack of symmetry is sometimes justified on the basis that while a person during life has continuing needs, after death (s)he has none. We do not find this argument compelling. "It could as easily be invoked to confiscate from a testator, during his lifetime, any wealth in excess of his needs."[55] To accept this argument would, in our opinion, permit an unwarranted encroachment on the testator's power of testamentary freedom.

(ii) Death may terminate legal obligation of support

In contrast, there is also a lack of symmetry in respect to proper maintenance and support when a legal duty borne by the testator in his lifetime cannot be enforced at death. One need only consider a commonly occurring example; that is, maintenance payments by one spouse to another which remain long after the dissolution of the marriage. In many cases, the decree nisi does not fix the spouse's estate with a liability to continue these payments and, accordingly, the support payments cease on death, notwithstanding the fact that the needs of the surviving dependent former spouse do not.[56]

(Footnote continued from page 26)
proper maintenance and support. The testatrix by will had left her estate (valued at $92,945) to be divided equally between two adult daughters, but made no provision for a third adult daughter. Each of the daughters had about the same financial means; none was actually dependent upon the testatrix for support at the material times.

[55] *Supra* n. 41, at 154.

[56] It is generally accepted that a maintenance order that is not specifically for the recipient's lifetime terminates upon the death of the person obligated to pay it. *See*, for example, *Kindzierski* v. *Kindzierski* (1983), 22 Man. R. (2d) 238 (Q.B.), where it was held that there can be no variation of an order so as to fix the former spouse's estate with a liability not imposed during life. The wife applied to vary the decree nisi to bind the husband's estate, but the husband died before the hearing. *And see Ducharme* v. *Ducharme* (1981), 6 Man. R. (2d) 367 (Q.B.).

A compelling example occurred in *Re Moores and Hughes*.[57] The former spouse had instituted proceedings to increase support payments but the husband died (with an estate valued at $450,000) before these proceedings were resolved. The former spouse, aged 54, was unable to work and suffered from paranoid schizophrenia. She was placed on social allowance. In an application for relief under Ontario's *Succession Law Reform Act* a trust for the former spouse in the sum of $30,000 was awarded to maintain the former level of income. In Manitoba, she would not have been able to bring an application. A divorced spouse, or one whose marriage has been annulled is not an eligible applicant under the present *"Testators Family Maintenance Act"*. Notwithstanding the greatly altered structure of family life that has occurred in recent decades, the class of eligible applicants has remained largely unchanged.

(c) Readiness of court to infer intent

In our review of the Manitoba case law, we have also observed that there are occasions where *"The Testators Family Maintenance Act"* would appear to have been invoked when a testator's intentions have been found to be frustrated either by mistake or through neglect in failing to redraft a will after he changed his mind on the provision to be made for a given dependant. In some cases, specific evidence of the testator's intention is available. For example, in *Re Steinberg*,[58] the court noted that it was apparent that the testator had intended to make changes in his will:

> He had said that "he wanted to take out all his sister [sic] and brothers". He had also said he was going to leave his children one dollar each, but Mrs. Rehn did not take this comment seriously. She said in Court, "he would never do that." Mr. Victor confirmed that the testator had expressed a wish to make changes. He did not disclose to Mr. Victor the changes he had in mind. He did say that as soon as he had sold his business and knew where he stood he would see Mr. Victor about making the necessary changes. The changes were never made.

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[57](1981), 136 D.L.R. (3d) 516 (Ont. H.C.J.).

[58]*Supra* n. 8, at 570.

And in *Dutka* v. *Dutka's Estate*[59] Mr. Justice Kroft noted:

> I have little doubt but that in the summer and fall of 1979, Donald Dutka was of a mind to leave his entire estate to the applicant, or to him and the grandchild. This conclusion is supported by the independent evidence of Mrs. Lazaruk and Mr. Corney. Had Donald Dutka lived a little longer, he might have rewritten his will for the exclusive benefit of the applicant. However, such speculation is idle.

In other cases, the courts strain to read the testator's mind from the general circumstances of the case in order to arrive at the conclusion that he would have done the proper thing had he appreciated the situation.[60]

While it might be argued that the result in some of these decisions may well be desirable, it seems wrong, in principle, that *"The Testators Family Maintenance Act"* should be employed to give effect to what the court thought the testator must have intended to do. It is the view of the Commission that the principal objective of the Act should not be to attempt to fulfil the perceived intentions of the testator. Rather, the Act should simply make provision for those dependants for whom adequate provision for proper maintenance and support has not been made.

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[59] *Supra* n. 49, at 221.

[60] *See*, for example, *Linden* v. *Linden*, Man. Q.B. unreported, June 12, 1985, where Barkman J. noted, at p. 9:

> I am of the opinion that the death of her husband and father of her children when they were very young, the necessity for her to work full time to support the family, plus the extreme psychological strain of having the youngest child with behavioural difficulties and learning disabilities, clouded her perspective of her relationship with the daughter to such a degree that it was impossible for her to consider what a wise and just mother should do in providing for the distribution of her estate between the two children.

(d) Uncertainty and inconvenience in the administration of estates

The reservation in the Law Reform Commission of British Columbia's *Report on Statutory Succession Rights* succinctly sets forth what we perceive to be two further difficulties in the application of the moral duty concept, namely uncertainty and inconvenience in the administration of estates:

> The statute is clearly remedial. It would be unremarkable but for the fact that the response of the courts in the exercise of their jurisdiction has gone well beyond the evil that the Act was designed to remedy. The result is that further fetters on freedom of testation have emerged which cannot be justified by the social policy of the statute and which leads [sic] to uncertainty and inconvenience in the administration of estates.
>
> . . .
>
> The adoption of a subjective approach to the *Wills Variation Act* [applicable dependants' relief Act] means that the results of an application for relief become much less predictable. It is an invitation to litigate. Many more disappointed beneficiaries are likely to seek relief, hoping the court will find a moral obligation, than would be the case if the court's attention were focused on the more objective question of proper maintenance and support. Even unworthy claims which have a small chance of success are given an enhanced "nuisance value" with the result that executors may be under pressure to settle them. At best, the deceased's personal representative is less able to predict the outcome of litigation with certainty.
>
> There are other undesirable aspects to this uncertainty. At the time a will is drawn, testators and those advising them cannot assume with confidence that a (perhaps complex) structure of testamentary dispositions will not fail simply because a judge identifies what he perceives to be a moral obligation which was not satisified by the testator in his will.
>
> So long as legislation such as the *Wills Variation Act* is maintained in any form, there can never be absolute certainty. Somewhat divergent views on what constitutes proper maintenance and support is [sic] inevitable. *The prospects of certainty can, however, be greatly enhanced by a retreat from the subjective notion of moral obligation.*[61] [emphasis added]

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[61] *Supra* n. 41, at 152-153.

Nor is the notion of moral duty itself fixed. It has been oft-stated that the court's assessment of moral duty may vary from period to period because the Act "is a living piece of legislation and our application of it must be governed by the climate of our time".[62] This ambulatory approach to the existence and extent of moral duty causes further uncertainty and has led courts to conclude that where relief has been refused in some of the earlier cases it would today be granted.

3. Conclusion

In *Barr* v. *Barr*, Dickson J.A. (as he then was) cautioned that the court must not trample upon testamentary rights: "The court may alter a testator's disposition to the extent necessary to recognize a moral obligation to provide proper maintenance and support, but no further. The pendulum must not go too far".[63] A general conclusion we have reached is that the pendulum has, on occasion, swung too far in re-ordering the estates of deceased persons. In a thorough judgment, Wood J. in *Pennington* v. *Boucher* describes two competing lines of authority to dependants' relief legislation. He notes:

> One, exemplified by Mr. Justice Dickson's comment in Barr v. Barr, takes a liberal approach to the application of the discretion to be found in s. 2 of the Wills Variation Act and generally rationalizes the intervention of the Court into the testator's expressed desire on the basis of what is said to be the moral or ethical duty of a parent to provide fairly and generously for all children in the absence of any direct evidence of justification for disinheritance. The other line of authority, more analytical in its approach, tends to rely on the plain meaning of the language to be found in s. 2 and bases any such intervention on the answer to the threshold question whether or not there has been adequate provision in the economic sense alone, recognizing that adequate provision in such sense will vary according to a variety of circumstances and will often involve more than mere

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[62] *See*, for example, *Re Wilson (deceased)*, [1973] 2 N.Z.L.R. 359 at 362 (C.A.); *Re Sutton*, [1980] 2 N.Z.L.R. 50.

[63] *Supra* n. 14, at 359.

maintenance.[64]

We advocate the adoption of this latter approach as we believe it would provide a more objective approach to the issue of whether a dependant has adequate provision.

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[64]B.C.S.C. unreported, April 18, 1984, No. A82339, Wood J.

CHAPTER 3

THE LAW ELSEWHERE AND PROPOSALS FOR CHANGE ELSEWHERE

Our review of the proposals and recommendations in other jurisdictions has indicated that the pertinent dependants' relief schemes are poles apart in substance as well as in form. Some are far reaching; others are more limited in scope and effect. It is difficult to describe the various dependants' relief schemes along a spectrum as there would appear to be two key factors or components which help to identify the scope and effect of the legislation, namely,

(1) the basis upon which the jurisdiction is to be exercised; and

(2) the categories of eligible applicants.

In some jurisdictions, the classes of eligible applicants have been broadened, while the basis upon which the jurisdiction is to be exercised has been narrowed. Hence, a ready classification of the various schemes is not easily achieved. We shall endeavour to identify both of these key factors in our examination of the dependants' relief schemes in force or proposed in other jurisdictions.

A. ENGLAND'S APPROACH; *INHERITANCE (PROVISION FOR FAMILY AND DEPENDANTS) ACT 1975*

The Inheritance (Provision for Family and Dependants) Act 1975 came into force on April 1, 1976, and was the result of an in-depth examination by the Law Commission which produced a full Report on this subject.[1] The principle upon which the Law Commission believed the statute should be founded is stated at page 6 of their Report: the function of family provision legislation should be confined, as it is at present, to securing reasonable

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[1]The Law Commission (England), *Family Law: Second Report on Family Property: Family Provision on Death* (Report No. 61, 1974).

provision for maintenance.[2] One of the major reforms instituted by the Act was its enlargement of the class of persons entitled to claim provision from the deceased's estate.

Under the previous legislation, the right to commence an application was generally restricted to:

(a) a surviving spouse;
(b) a former spouse who had not remarried; and
(c) a child of the deceased
    (i) who was incapable of self-support because of disability; or
    (ii) who was an unmarried daughter; or
    (iii) who was a son under 21.

The new Act removes all restrictions on applications by children. It now also permits a person to apply as an eligible applicant who is not a child of the deceased but was treated by the deceased, at any time, as a child of the family.[3] In removing the age limitation altogether, the English Law Commission was of the view that an adult child should be able to apply but should only succeed where the court found that the deceased failed to make reasonable provision. Indeed the Commission assumed that a fully self-supporting adult child would not succeed in an application. However, some of the case law would suggest otherwise.[4]

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[2]Where, however, the applicant is the surviving spouse, the Commission recommended that the surviving spouse should no longer be confined to receiving maintenance but should have a claim upon family assets analogous to that of a divorced spouse.

[3]*See*, for example, *Re Leach (deceased), Leach* v. *Lindeman*, [1985] 2 All E.R. 754 (C.A.).

[4]*See*, for example, *Re Christie (deceased), Christie* v. *Keeble*, [1979] 1 All E.R. 546 (Ch. D.) which has been roundly criticized as being in direct conflict with earlier authority in that a very wide meaning is being put on the concept of maintenance. *See* H. Clark, "Financial Provision for Adult Children" (1980), 130 N.L.J. 404.

(Footnote continued to page 35)

The most important new category of permitted applicants is made up of persons who are entitled to apply for provision by reason of their factual relationship of dependency on the deceased at his death.[5] It includes any person who is not otherwise qualified to apply under the Act but "who immediately before the death of the deceased was being maintained, either wholly or partly, by the deceased". The Act provides that a person shall be treated as being maintained by the deceased, either wholly or partly, if the deceased, otherwise than for full valuable consideration, was making a substantial contribution in money or money's worth towards the reasonable needs of that person.[6] The Act further provides that, in considering whether reasonable provision has been made for such a person, and in deciding what provision (if any) to order, the court must have regard to the extent to which, and the basis upon which, the deceased assumed responsibility for the maintenance, and to the length of time for which (s)he discharged that responsibility.[7] Stated simply, any person, whether or not related to the

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(Footnote continued from page 34)
Some writers have suggested that this broad view of maintenance finds support in the Act itself, by reason of the wide range of orders which the court can make in favour of all applicants. *See* E.V. Williams, H.C. Mortimer & J.H.G. Sunnucks, *Executors, Administrators and Probate* (16th ed. 1982) at 621; J.G.R. Marlyn, *The Modern Law of Family Provision* (1978) 12.

For a more restrictive view of maintenance, *see Re Coventry (deceased)*, [1979] 3 All E.R. 815 (C.A.).

[5]By a *de facto* support obligation we mean a factual relationship of dependency on the deceased in those instances where the deceased was under no legal duty to provide support to the person.

[6]*In Re Wilkinson, decd., Neale* v. *Newell*, [1977] 3 W.L.R. 514 (Fam. D.) serves to highlight the very onerous task confronting the courts in measuring the relative worth of each party's contribution. *See also* C.E. Caldwallader, "A Mistresses' Charter" (1981), Conv. Prop. Law (N.S.) 46.

[7]*Inheritance (Provision for Family and Dependants) Act 1975*, c. 63, s. 3(4) (U.K.). It would appear that an assumption of responsibility for the

(Footnote continued to page 36)

deceased can claim provided (s)he comes within these broad limits.[8] The underlying sentiment seems to be that, by accepting responsibility for the maintenance of another during life, these persons may have put themselves under a moral obligation to have their estates continue the maintenance after death. In delimiting the reach of the *de facto* category, some rather startling results have emerged in the case law.[9]

(Footnote continued from page 35)
purpose of the Act need not arise as a result of a person's free and voluntary conduct. *See Re Viner (decd.); Kreeger* v. *Cooper*, [1978] C.L.Y. 3091, where the deceased had been partially maintaining the applicant grudgingly and under pressure from his unmarried sister.

[8]The Law Commission gave the following examples of applicants who may fall in this category:

> An elderly housekeeper may receive food, shelter, warmth and clothing in return for purely nominal services. A nephew may be attending school at the expenses [sic] of the deceased. A widowed sister may be receiving board and lodging in the home of the deceased but making some contribution in cash to the expense of the home.

Supra n. 1, at para. 98. In an appropriate case, parents, grandparents and grandchildren may also fall into this category.

[9]In *Re Beaumont (deceased), Martin* v. *Midland Bank Trust Co. Ltd.*, [1980] 1 All E.R. 266 (Ch. D.), a man aged 78, applied for provision out of the estate of a woman to whom he had never been married, but with whom he had lived for the 36 years preceding her death. He was left nothing under the will and found himself in extremely difficult financial circumstances. Sir Robert Megarry V.C. found that it was proper to measure the relative worth of each party's contribution (at 272). The consequence of this, however, is that an informal arrangement under which the applicant is maintained for what proves to be a full and valuable consideration will be a bar to a claim under the *de facto* dependency category - which was indeed the result in *Re Beaumont*. In short, the greater the efforts of one person to the relationship, the less likely would be that person's prospect of success.

(Footnote continued to page 37)

B. WESTERN AUSTRALIA

The Law Reform Committee of Western Australia in its *Report on The Protection to be Given to the Family and Dependants of a Deceased Person* describes the principle upon which the legislation should be founded as follows:

> 27. The Committee considers that the aim of any reforming legislation should be to permit applications for provision out of the estate of a deceased person from those who, in the normal course of human affairs, might be expected to have had such a close personal relationship with the deceased as to possibly leave the latter, at the time of his death, *under some moral obligation* to make provision for their maintenance, education or advancement in life, irrespective of whether or not a blood tie exists. [emphasis added]
>
> . . .
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> 35. Bearing in mind that the legislation would confer a mere right to apply, the Committee believes it reasonable to admit the claim of a person who at the time of the death of the deceased, was ordinarily a member of his household and was being wholly or partly maintained by him and for whose maintenance he had a special moral responsibility.[10]

Some of these principles were embodied in the *Inheritance (Family and Dependants Provision) Act, 1972* and the classes of possible applicants may be summarized briefly as follows:

(Footnote continued from page 36)
In contrast, in *Malone* v. *Harrison*, [1979] 1 W.L.R. 1353 (Fam. D.), the applicant, who had been the deceased's mistress and companion for 12 years and had been encouraged to depend upon him, was awarded a sum such that from capital income and earnings she would continue to be maintained at that level which the deceased had so provided during his life.

[10]Law Reform Committee, Western Australia, *The Protection To Be Given to the Family and Dependants of a Deceased Person* (Project No. 2, 1970) paras. 27, 35.

(a) the widow or widower of the deceased;

(b) a person whose marriage to the deceased has been dissolved or annulled and who was receiving or entitled to receive maintenance from the deceased;

(c) the children[11] of the deceased;

(d) the grandchildren[12] of the deceased living (which includes a child *en ventre sa mere*) at death who were being maintained by the deceased or the grandchildren living at the death of the deceased whose parent (the child of the deceased) had predeceased the deceased;

(e) the parents of the deceased whether the relationship is determined through lawful wedlock or adoption, or otherwise, where the relationship was admitted by the deceased being of full age or established in the lifetime of the deceased; and

(f) a *de facto* widow who, at the time of the death of the deceased, was being wholly or partly maintained by the deceased, who was ordinarily a member of the household of the deceased, and for whom the deceased had some special moral responsibility to make provision.

While the Law Reform Committee of Western Australia had proposed that any person meeting the criteria for eligibility under the *de facto* category should be permitted to apply, the Act restricts the *de facto* category to a *de facto* widow.

C. NEW SOUTH WALES

The Law Reform Commission of New South Wales in its Report No. 28 on *Testators Family Maintenance and Guardianship of Infants Act, 1916* advocated

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[11]Child in relation to any person or persons includes a child born out of wedlock, an adopted child and a child *en ventre sa mere*.

[12]Grandchild in relation to any person or persons includes a child born out of wedlock and an adopted child of a child of that person.

an enlarged class of eligible applicants.[13] It recommended that the new Act should provide not only for the surviving spouse and children of a deceased person but also for any person:

> (i) who was, at any time, wholly or partly dependent upon the deceased person;
> (ii) who was, at any time, a member of a household of which the deceased person was a member; and
> (iii) who is a person whom the deceased person ought not, in the opinion of the Court, to have left without provision for his proper maintenance, education or advancement in life.[14]

In proposing a three-limbed eligibility test[15] for a person who is neither the legal spouse nor a child of the deceased person, the Commission pointed out that it was trying to avoid the inflexibility which would follow the prescription of a class of eligible applicants. It felt that inflexibility should be avoided and that circumstances, not status, should control eligibility. The Commission was of the view that a widening of the class of eligible applicants would not change the function of the court in proceedings for relief; it would only increase the number of people who might benefit from the discharge of that function.

The Commission's Report has been substantially implemented by the *Family Provision Act, 1982*, No. 160, and the *Testators Family Maintenance and Guardianship of Infants (Family Provision) Amendment Act, 1982*, No. 161. Spouses, *de facto* spouses, children[16] and former spouses are all included as specific categories of eligible applicants under the new *Family Provision Act, 1982*. The Act would appear, however, to depart from the proposed three-limbed eligibility test for others and includes as eligible any person:

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[13]Law Reform Commission, New South Wales, *Report on The Testator's Family Maintenance and Guardianship of Infants Act, 1916* (Report No. 28, 1977).

[14]*Id.*, at para. 2.6.1.

[15]Sometime dependency, sometime membership of the household and reasonable expectation.

[16]Children includes children of the deceased born out of wedlock and adopted children.

(i) who was, at any particular time, wholly or partly dependent upon the deceased person; and

(ii) who is a grandchild of the deceased person[17] or was, at that particular time or at any other time, a member of a household of which the deceased person was a member.

This provision embodies a lifetime concept: a person can be eligible simply by being dependent on the deceased at any time during his/her life; and also, by being a member of the same household as the deceased at any point during his/her life.

Subsection 9(1) of the Act provides that, on application by a person falling into this *de facto* category, the court must first determine, having regard to all of the circumstances of the case, whether there are sufficient factors warranting the making of the application. If not, the court is not to proceed any further. This category of eligible applicant is not restricted to persons who bear a particular familial relationship to the deceased.

D. *UNIFORM DEPENDANTS' RELIEF ACT*

Dependants' relief has been the subject of uniform legislation in Canada since 1945, and the pertinent Act was then entitled *"The Family Maintenance Act"*.[18] In 1974, the Uniform Law Conference of Canada replaced that Act with the *Uniform Dependants' Relief Act* which has been enacted, in part, by four jurisdictions.[19]

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[17]It should be noted that grandchildren do not need to satisfy the member of the household test; sometime dependence only is required. *See* the definition of "eligible person" in subsection 6(1) of the *Family Provision Act, 1982*, No. 160 (N.S.W.).

[18]The New Zealand Act served as the basic model for the Uniform Act.

[19]*Uniform Dependant's Relief Act*, Conference of Commissioners on Uniformity of Legislation in Canada (1974). Ontario, Prince Edward Island, the Yukon and the Northwest Territories have all adopted, at least in part, some of the measures under the Uniform Act. *See*, for example, *The Succession Law Reform Act, 1977*, S.O. 1978, c. 40, cited in the Revised Statutes as *Succession Law Reform Act*, R.S.O. 1980, c. 488; *Dependants of a Deceased Person Relief Act*, 1974 (2nd), c. 47, cited in the Revised Statutes as R.S.P.E.I. 1974, c. D-6.

With one exception, the principal categories of applicants entitled to apply for relief are persons to whom the deceased would have owed a legal obligation to provide support during the deceased's life in accordance with the laws of Manitoba. Under the *Uniform Dependants' Relief Act*, these would include the following dependants:

> (i) the widow or widower of the deceased;
>
> (ii) a child of the deceased who is under the age of . . . [majority] at the time of the deceased's death;
>
> (iii) a child of the deceased who is . . . [of the age of majority] or over at the time of the deceased's death and unable by reason of mental or physical disability to earn a livelihood;
>
> . . .
>
> (v) a person divorced from the deceased who, for a period of at least three years immediately prior to the date of death of the deceased, was dependent upon the deceased for maintenance and support; or
>
> (vi) a person of the opposite sex to the deceased not legally married to the deceased who, for a period of at least three years immediately prior to the date of the death of the deceased, lived and cohabited with the deceased as the spouse of the deceased and was dependent upon the deceased for maintenance and support; . . .[20]

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[20] *Uniform Dependant's Relief Act*, *id.*, s. 1(d)(i), (ii), (iii), (v) & (vi). In Manitoba the mutual support obligation only applies where a man and a woman, not being married to each other, have cohabited continuously for a period of not less than 5 years in a relationship in which one person has been substantially dependent upon the other for support. *See "The Family Maintenance Act"*, C.C.S.M., c. F20, s. 2(3).

Where a man and a woman who are not married to each other have cohabited for a

(Footnote continued to page 42)

The one exception where the court has the power to continue a *de facto* support obligation against the estate of the deceased is set forth under paragraph 1(d)(iv) and includes the following dependants:

> (iv) a grandparent, parent or descendant of the deceased who, for a period of at least three years immediately prior to the date of the death of the deceased, was dependent upon him for maintenance and support;[21]

Strictly speaking, only the "grandparent" and "descendant" of the deceased would fall into the *de facto* category. In Manitoba a child is liable for the support of his dependant parents if it appears that "the . . . [child] has sufficient means to provide for the parent and to the extent that it so appears, having regard to the whole circumstances of the case."[22]

E. ONTARIO'S APPROACH - *SUCCESSION LAW REFORM ACT*

The *Succession Law Reform Act* came into force on March 31, 1978 and evolved after more than ten years of investigation and research.[23] Work was commenced by the Family Law Project of the Ontario Law Reform Commission and culminated in Chapters 9 and 13 of the Commission's *Report on Family Property*

(Footnote continued from page 41)
period of one year or more and there is a child of the union, an application for maintenance and support may be made on behalf of the man or woman while they are still cohabitating or within one year after they cease cohabitating. See "The Family Maintenance Act", C.C.S.M. c. F20, s. 11(1).

[21] *Uniform Dependant's Relief Act*, *supra* n. 19, s. 1(d)(iv).

[22] "*The Parents' Maintenance Act*", C.C.S.M. c. P10, s.2.

[23] *The Succession Law Reform Act, 1977*, S.O. 1977, c. 40, cited in the Revised Statutes as *Succession Law Reform Act*, R.S.O. 1980, c. 488. This Act replaced the dependants' relief provisions of *The Dependants' Relief Act*, R.S.O. 1970, c. 126.

Law in 1974.[24] The principle upon which the Commission thought the legislation should be founded is set out in their Report:

> As a matter of general principle, the court should have power to continue against the estate of the deceased . . . any support obligations in existence at the date of death, whether legal or *de facto*.[25]

There are two limbs to the definition of dependant set forth in paragraph 57(d). First, the Act embodies the principle that the deceased must have been under a legal obligation to provide support or was in fact providing support before death in order that an application may be made. Second, the Act requires that the applicant be in a certain familial relationship to the deceased. The Act broadens the class of dependants to include the following:[26]

(i) The spouse or *de facto* spouse of the deceased.

> The latter is defined in terms of a man or woman who has cohabited with the deceased as husband or wife continuously for a period of not less than five years or in a relationship of some permanence where there is a child of whom they are the parents. Moreover, spouse includes a person whose marriage to the deceased was terminated or declared a nullity.

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[24]Ontario Law Reform Commission, *Report on Family Law; Part IV: Family Property Law* (1974).

[25]*Id.*, at 107.

[26]The Act also made further significant improvements in this area of the law. To name but a few:

(a) It enabled the heirs of an intestate to apply for relief.
(b) It abolished the arbitrary maximum limit on the amount of relief which existed under the old Act; that is, the amount the applicant would have received had the testator died intestate.
(c) It minimized evasion of the Act by extending its ambit to assets that would not pass by will or as a result of the intestacy rules.

(ii) The deceased's parents.

Parent is defined as including a grandparent and a person who treated the deceased as a child of his/her family except where the deceased was placed in his/her home as a foster child for consideration by a person having lawful custody.

(iii) Child of the deceased.

Child is defined to include a child born outside marriage and includes a child conceived before and born alive after the death of the parent. In addition, it includes a grandchild and a person to whom the deceased has demonstrated a settled intention to treat as a child of his/her family, except a child in a foster home.

Under the former Act only a child under sixteen years of age or over sixteen, if (s)he was unable to earn a livelihood through illness or infirmity, had status as a dependant to make application for relief.

(iv) A brother or sister of the deceased.

With regard to the first limb of the definition respecting dependants to whom the deceased was providing support immediately before his death, it seems inevitable that there will be questions with respect to the meaning of the phrase "providing support" and that of the phrase "immediately before his death". While isolated gifts would presumably not amount to a provision for support, the statute does not require that the dependant should have been entirely without other financial means or that the deceased's contributions should have provided the dependant's principal source of support. Would "providing support" include the payment of twenty dollars a week for pocket money or an annual contribution of say eight hundred dollars?

While the Act does not prescribe that *de facto* dependence on the deceased should have existed for a specified minimum period, the requirement that support should have been provided *immediately before the deceased's death* might also give rise to difficulty. What if shortly before the death of the deceased, who had been providing support, some other person or governmental institution assumed the burden of support? If there has been no support for any significant period, would an assumption of responsibility shortly before the death together with some provision in discharge of that responsibility suffice?

With respect to the second limb of the test, the question to be determined in deciding whether there is a legal obligation to provide support is whether an obligation *per se* exists in law,[27] and not whether an application for support at the time immediately before the death of the deceased would have been successful.[28] There can be a legal obligation to support even if an application for support prior to death would not have been successful.

F. LAW REFORM COMMISSION OF BRITISH COLUMBIA; RECOMMENDATIONS FOR REFORM

The Law Reform Commission of British Columbia has recently issued a thorough *Report on Statutory Succession Rights*.[29] The Report pointed out that the British Columbia courts waver between applying tests of need and of moral obligation, and make awards that appear to vary between the protection of dependants from destitution to an equitable reapportionment of the testator's estate. A majority of the Commission recommended that this broad basis of the courts' jurisdiction to make an order under the pertinent dependants' relief legislation should remain unchanged.[30] The principal question should continue to be whether the deceased owed any moral obligation to the applicant in question. The principle of freedom of testation was said to be secondary to the enforcement of a testator's moral obligation to provide for his/her family. It was further argued that a deceased's moral obligations to provide adequately for his/her family differ from *inter vivos* obligations (s)he may have owed them. Principles which determine *inter vivos* obligations were said to be primarily founded upon concepts of maintenance and support. Consequently, in some instances members of the deceased's family

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[27]The legal obligation to provide support is found in *The Family Law Reform Act 1978*, R.S.O. 1980, c. 152. The Act provides that there is a legal obligation to support a spouse, a common law spouse, a parent, and a child who is unmarried and under the age of 18 years.

[28]*Re Cooper* (1980), 115 D.L.R. (3d) 451 (Ont. H.C.J., Div. Ct.).

[29]Law Reform Commission of British Columbia, *Report on Statutory Succession Rights* (Report No. 70, 1983.)

[30]The minority view called for substantive reform.

should have a moral claim to share in the assets of the estate which would not necessarily be limited to support. The basis of this conclusion was that a person's death was said to alter significantly the obligations to family and dependants, in part, because the deceased no longer required his/her estate.

The British Columbia Law Reform Commission goes on to recommend the enlargement of the categories of those entitled to relief, recognizing that a testator may owe moral obligations to people other than his spouse and children. It recommended that the following persons be permitted to apply:

(a) a surviving spouse;

(b) a person whose marriage to the deceased was terminated or declared a nullity if (s)he was receiving or entitled to receive maintenance from the deceased;

(c) a common law spouse who, immediately preceding the death of the deceased,
(i) was cohabiting with the deceased for not less than two years, or
(ii) was receiving or entitled to receive maintenance, pursuant to the *Family Relations Act*, from the deceased;

(d) the deceased's children, posthumous children, and stepchildren.

In addition, the Commission acknowledged the *de facto* dependant but restricted eligibility to limited persons who bear a particular familial relationship to the deceased. Specifically, it was proposed by a majority of the Commission that more distant members of the deceased's family, namely,

(a) grandchildren;
(b) grandparents;
(c) parents;
(d) brothers, sisters, half-brothers and half-sisters

should be permitted to apply, provided they were dependent on the deceased immediately prior to his/her death. No minimum period of dependency was recommended. By "dependent" it was contemplated that the applicant must have relied upon the deceased for some financial source. It was not required that the deceased be either the sole source or a substantial source of support.[31]

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[31] *Supra*. n. 29 at 83-84.

G. ALBERTA INSTITUTE OF LAW RESEARCH AND REFORM; PROPOSALS FOR REFORM

The Alberta Institute of Law Research and Reform issued a *Report on Family Relief*[32] as part of its study on family law reform. The Institute was of the view that reform of *The Family Relief Act* should start from the premise that, generally, it is only the legal support obligation that exists during the lifetime that should be preserved after death. By employing the legal support obligation as the touchstone of eligibility, it was thought that a rational foundation would exist for awarding provision for the support of another from the deceased's estate.

The Alberta Institute rejected the eligibility of a *de facto* dependant on the following grounds:

> We do not, however, think that a duty should be imposed on one person to provide after his own death for the support of another, simply because the latter was wholly or partly dependent on the deceased immediately prior to his death. Nor do we believe that such a duty should be imposed simply because the deceased provides support for another during his lifetime even if this is qualified by restricting the duty to persons who bear a particular relationship to the deceased. We are also not persuaded that dependency, at some time, accompanied by being a member of the same household as the deceased, at some time, together with the court's view that the deceased owed a moral obligation to a person is a sufficient basis upon which to impose such a duty. We do not think that the law should step in and impose such a duty, except to prevent death from terminating a legal support obligation which existed during the

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[32]Institute of Law Research and Reform, *Family Relief* (Report No. 29, 1978). In February, 1985, this report was reviewed by a Standing Committee on Law and Regulations which approved all the recommendations in the Report with the exception that:

(a) a claim of a divorced spouse on the estate be limited to security for support under a subsisting order; and
(b) the issue of when need is to be determined be reviewed by the Institute for inclusion in a supplement to the Report.

> lifetime of the deceased, although the extent of the duty must be modified because of the very great change which is caused by the death of the person obliged to provide the support.[33]

For the most part, eligibility would be restricted to those persons to whom the deceased owed a legal support obligation during life. The Institute noted that *The Family Relief Act* was essentially a support statute which should be based upon the need of an applicant. While it recognized that need was a flexible concept, it emphasized that it should not encompass the equitable sharing of an estate.

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[33] *Id.*, at 23.

CHAPTER 4

RECOMMENDATIONS FOR REFORM

A. FUNDAMENTAL BASIS OF THE LEGISLATION

Before determining who should be eligible to apply as dependants, we think it is essential to set forth a clear and rational foundation upon which the legislation should be founded. Rather than adhering to the moral duty gloss which courts have added to the statute, we propose that a more restrictive view of the proper sphere of the statute be taken. We do not find the moral duty gloss helpful. Nor do we consider that it is properly the function of the courts to ensure that a testator's will should conform to what is inevitably a subjective standard of reasonableness respecting all persons who may have a moral claim. The Commission prefers a more objective approach to the issue of whether adequate provision for the proper maintenance and support of dependants has been made.

The Commission concurs with the views of the Alberta Institute of Law Research and Reform.[1] We believe that reform of *"The Testators Family Maintenance Act"* should start from the premise that the statute should preserve a legal lifetime support obligation by transferring it to the estate, in appropriate circumstances, on the death of the person who owed the obligation. In our estimation, this approach would describe with a good measure of certainty those persons whom the testator should consider when drafting a will. It would provide a degree of symmetry in that the estate would only be charged with a duty where the deceased bore a similar legal obligation during life. By employing the legal obligation of support as the cornerstone of the Act, it is the Commission's hope that the court's focus will shift from the notion of correcting a breach of moral duty to the more objective determination of whether a dependant has reasonable provision for maintenance and support.

We have considered and rejected the proposition that all persons whose sole tie with the deceased was a factual relationship of dependency

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[1] Institute of Law Research and Reform, *Family Relief* (Report No. 29, 1978) 25-26.

should be entitled to apply under the Act. The argument in favour of extending the right to apply to those factually dependent on the deceased is that the deceased, by supporting the person during life, might have created a reasonable expectation that this support would continue after death. No doubt, in some cases, a relationship of dependence during the lifetime of a person may attract some moral responsibility to make provision for the dependant by the will of the deceased. It does not necessarily follow that this responsibility or generosity should give rise to a legal obligation. Moral obligations or expectations should not be transferred into legal obligations without compelling reasons.[2]

We have concluded that *de facto* dependency should not, in itself, be a basis for eligibility. We think that it would introduce greater uncertainty in the planning and administration of estates and cause an unwarranted intrusion upon testamentary freedom. Where the deceased has provided *de facto* support to a person during life, the deceased may well have had valid reasons for not providing for them on death; for example, the deceased may have been prepared to contribute to a person's support during life while (s)he had a reasonable income, but be unwilling to transfer the burden to the estate to the detriment of named beneficiaries. Moreover, a widening of the class of eligible applicants to include a *de facto* dependant would not only constitute an invitation to litigate but also obscure the objective of the Act which, in our opinion, should be limited to preserving a legal support obligation and transferring it to the estate when the dependant is in need of maintenance.

A majority of the Law Reform Commission of British Columbia rejected the legal support obligation as a basis of eligibility. It was the majority's view that this approach was contrary to the fundamental purpose of dependant's relief legislation. While a number of the respondents to British Columbia's working paper favoured that all persons to whom the deceased owed legal support obligations during his/her lifetime should be eligible to apply, the majority argued:

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[2]To do otherwise might mean, in the words of Megarry V.C. in *Re Beaumont*, [1980] 1 All E.R. 266 at 276 (Ch. D.), that "the path of safety seems, rather sadly, to be simply to abstain from any such generosity".

> While this approach describes with some certainty whose interests the testator should consider when making a will, and a minority of the Commission agrees with it, the majority of the Commission thinks that it is contrary to the fundamental purpose of dependant's relief legislation. The testator's death is a significant factor, and the majority of the Commission doubt whether principles which determine *inter vivos* obligations are appropriate to determine testate obligations. Some legal support obligations, perhaps, should not survive the testator's death. Moreover, legal support obligations are primarily founded upon providing for a dependant's need. Need, the majority has concluded, may be one factor, but it is not fundamental to determining the testator's moral obligations.[3]

It is here that we part company with the Law Reform Commission of British Columbia. By recommending the legal support obligation as a foundation for eligibility, we are not suggesting that the court should then be restricted only to *inter vivos* factors. In determining the quantum of an award, this foundation must be tempered by the greatly altered circumstances which death causes; the most obvious one being that the deceased no longer has any immediate or continuing needs.

Nor do we advocate that an order should be restricted to cases of extreme financial hardship. In the following section, we set forth the basis on which the court's discretion should be exercised. It should be borne in mind that eligibility to apply is quite a different matter from entitlement to an award from the deceased's estate. We are concerned here only with the question of eligibility; the court, on the facts, will determine whether to transfer the legal support obligation to the deceased's estate, where the dependant has need of support.

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[3]Law Reform Commission of British Columbia, *Report on Statutory Succession Rights* (Report No. 70, 1983) 82.

B. THE BASIS ON WHICH THE COURT'S DISCRETION SHOULD BE EXERCISED UNDER *"THE TESTATORS FAMILY MAINTENANCE ACT"*

1. The Test

The present test is set out in subsection 3(1) which provides as follows:

> **Provision for dependants not adequately provided for by will.**
>
> 3(1) Where a person (hereinafter called the "testator") dies leaving a will, and without making therein adequate provision for the proper maintenance and support of his dependants, or any of them, a judge on application by or on behalf of such dependants, or any of them, may, in his discretion and taking into consideration all the circumstances of the case, order that such provision as he deems adequate shall be made out of the estate of the testator for the proper maintenance and support of the dependants, or any of them.

The hallmark of the Act is the discretionary power which the court has to make an award if it finds that the deceased has failed to make adequate provision for the proper maintenance and support of a dependant. While the key words, adequate provision for the proper maintenance and support of a dependant, are capable of an objective interpretation, we have seen that a more subjective interpretation has been developed by the judiciary. The subjective approach examines whether the deceased was in breach of a moral duty to the dependant; the objective approach simply considers whether the dependant has adequate provision.

It would appear that the word "proper" has been one factor causing the courts, through the exercise of their discretionary power, to emphasize the notion of moral duty. Some courts appear to interpret "proper" to mean more than making provision sufficient to enable a dependant to live decently and comfortably according to his/her own station in life; it is said to include a moral or ethical duty to provide fairly and generously for all dependants. So as to advance what we perceive the purpose of the Act to be, we recommend that the word "proper" be eliminated from the test.

The principal purpose of the Act should be confined to ensuring that a person makes reasonable provision for the maintenance of those whom (s)he is liable to maintain during life. We think that the following test, reasonable provision for the maintenance and support of a dependant, would be an objective one. The question would simply be whether, in all the circumstances of the case viewed objectively, the dependant has reasonable provision for maintenance and support.[4] It would not be a question of deciding how the deceased's assets should be fairly divided, nor would it be a question of determining whether it might have been reasonable for the deceased to have provided for the applicant. Rather, the discretion under the Act would be restricted to reasonable provision for maintenance.

What is reasonable provision for maintenance and support necessarily depends on the facts and circumstances of the particular case being considered at the time. We later recommend a number of guidelines to assist the court in determining whether an applicant has reasonable provision for maintenance. On the one hand, the test should not be too severely restricted in its meaning; it should not mean just enough to enable a person to get by at a subsistence level.[5] On the other hand, it should not mean anything which may be regarded as reasonably desirable for the dependant's general benefit.

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[4]Similarly, in *Re Goodwin*, [1969] 1 Ch. 283 at 287, 288, Megarry J. in construing the English test, namely, whether the court is "of the opinion that the disposition of the deceased's estate is not such as to make reasonable provision for the maintenance" of a dependant, noted that this test was an objective one:

> The statutory language is thus wholly impersonal. The question is simply whether the will or the disposition has made reasonable provision, and not whether it was unreasonable on the part of the deceased to have made no provision or no larger provision for the dependant.
>
> . . .
>
> In my judgment the question is not subjective but objective. It is not whether the testator stands convicted of unreasonableness, but whether the provision in fact made is reasonable.

[5]In the colourful language of Mr. Justice Harman, in *Re Borthwick*, [1949], 1 Ch. 395 at 401, it should not mean "that you can only give the dependant just enough to put a little jam on his bread and butter".

In our estimation, the proper construction of this test should rest on the concept that "reasonable provision" is not a single point on a spectrum, but an area. That is, there is a point at which provision for the maintenance of a dependant becomes so small as to be wholly unreasonable, as well as a point at which the provision becomes so large as to be eminently unreasonable. Between these points there is an area, wide or narrow according to the circumstances of the case, embracing provisions of greater or lesser amount, all of which can objectively be classified as reasonable financial provision. Where the provision made by the testator is within the range of reasonableness, then the court should not award further provision. But if the court is of the opinion that the provision falls below the requisite standard, then it should exercise its jurisdiction to advance a provision to any point within that range of reasonable provision.[6]

One further point requires mention at this juncture. Subsection 3(1) provides that where a person dies leaving a will and "without making therein adequate provision", the court may make an award. It might be possible to construe this provision as limiting the question of whether adequate provision has been made simply to the terms of the will. The condition under subsection 3(1) should not be that the will does not provide for maintenance but that a dependant is left without reasonable provision for maintenance and support, from whatever source. Similarly, the Alberta Institute points out that, under the present subsection, it is somewhat peculiar to say that a will leaving nothing to a dependant makes adequate provision for the proper maintenance and support simply because the dependant possesses independent [financial] means and therefore there is no need.[7]

To make the language of the section more in keeping with what we

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[6]Terrence Sheard in "Dependants' Relief Act" in Special Lectures of the Law Society of Upper Canada - Real Property (1951) 174, suggests that this approach is the correct one and supplies the key to an understanding of how Dependants' Relief Acts should be administered.

[7]*Supra* n. 1, at 60.

perceive the proper function of the Act to be, we recommend the inclusion of the word "otherwise" to the test. That is to say, the court should only have discretion to make an award when it appears that the dependant does not have reasonable provision for maintenance and support either from the estate of the deceased or otherwise.

So as to insure better the attainment of the objects of the Act, we think it might be very useful to incorporate an objects or purpose clause in one of the opening sections under *"The Testators Family Maintenance Act"*. Such a clause would set forth the policy or fundamental basis of the legislation. While it is rather difficult to draft such a clause with precision, it would be both a convenient and important means of clarifying the scope and effect of our recommendations for reform.[8] Accordingly, we recommend:

RECOMMENDATION 1

That subsection 3(1) of "The Testators Family Maintenance Act" (hereinafter referred to as the Act) be repealed and the following subsection be substituted therefor:

> *Where it appears to the court that a dependant does not have reasonable provision for maintenance and support either from the estate of the deceased or otherwise, the court, on application by or on behalf of the dependant, may order that reasonable provision be made out of the estate of the deceased for the maintenance and support of the dependant.*

RECOMMENDATION 2

That there be an objects and purpose clause at the beginning of the Act to clarify that its purpose is to transfer the legal support

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[8]In the Canadian Legislative Drafting Commentaries, (1979) of the Uniform Law Conference of Canada, it is noted that a purpose provision can be most useful where it has a limited and known function. For example:

> Where there is a substantial reform in a matter in which traditional jurisprudence is deeply ingrained. The detailed substantive provisions require some flexibility for judicial discretion and the possibility

(Footnote continued to page 56)

obligation owed by a deceased during life to the estate of the deceased where a dependant is without reasonable provision for maintenance and support.

C. CLASSES OF ELIGIBLE DEPENDANTS

Having determined that the purpose of *"The Testators Family Maintenance Act"* should be to preserve a legal lifetime support obligation by transferring it, in appropriate circumstances, to the estate, we turn now to examine the threshold question - who should be eligible to apply?

1. Spouses

At present, the surviving spouse may apply under *"The Testators Family Maintenance Act"*. The legislation defines a dependant, in the case of a spouse, in strict terms as a "wife" or "husband". It is implicit that this definition would also include the spouse who was separated but not divorced from the deceased at death. We do not question the right of the surviving spouse to commence proceedings under the Act; spouses have the mutual obligation to contribute reasonably to each other's support and maintenance.[9] In this respect, we make no proposal for change.

We now turn to consider whether, for the purposes of *"The Testators Family Maintenance Act"*, eligibility should be granted to

(a) former spouses;
(b) *de facto* spouses.

(a) Former spouses

We noted earlier that in Manitoba a former spouse is not an eligible applicant under *"The Testators Family Maintenance Act"*. By the term "former spouse" we mean a person whose marriage with the deceased was, during the

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(Footnote continued from page 55)
arises that the ingrained judicial thinking may be reintroduced in the exercise of judicial discretion.

[9] *"The Family Maintenance Act"*, C.C.S.M. c. F20, s. 2(1).

deceased's lifetime, dissolved or annulled by decree. We examine first the status of a divorced spouse and then we explore the eligibility of a spouse whose marriage with the deceased has been annulled.

(i) Divorced spouse

Under section 4 of *"The Family Maintenance Act"*, a spouse has the obligation, after separation, to take all reasonable steps to become financially independent of the other spouse. It is contemplated that this same objective of economic self-sufficiency will soon be expressly embodied in the *Divorce Act*.[10] Where economic self-sufficiency is possible, the court may impose a fixed duration for maintenance. The Commission endorses the principle that the law should, where it is possible, encourage parties to become self-supporting within a reasonable period of time after separation.

It is recognized, however, that in some cases economic self-sufficiency might not be a feasible goal due to the deteriorating health or advancing age of the dependant spouse. Accordingly, under both the *Divorce Act* and *"The Family Maintenance Act"*, maintenance may be made a fixed obligation upon the deceased's estate and extend for the life of the economically dependent former spouse.[11]

We have been advised that the more usual practice is for specific periodic payments to be awarded until further order of the court. Such an order gives rise to a continuing obligation and, under present law, can be varied within limits on a material change in the condition, means, needs and other circumstances of the former spouse. If a maintenance order is not specifically fixed for the recipient's lifetime, the payments terminate on the death of the person subject to the liability. However, the needs of the recipient former spouse do not necessarily expire. In accordance with our view that *"The Testators Family Maintenance Act"* is to be founded on the premise that it is to transfer the legal support obligation owed by a deceased

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[10]There are a number of proposals for reform to the present *Divorce Act*, R.S.C. 1970, c. D-8. *See* "An Act to amend the Divorce Act", Bill C-46, and "An Act respecting divorce and corollary relief", Bill C-47, 33rd Parl., 1st Session. Second Reading May 22, 1985.

[11]*See*, for example, *Katz* v. *Katz* (1983), 21 Man. R. (2d) 1 (C.A.).

during life over to his/her estate, we think that a former spouse should, in appropriate circumstances, be entitled to apply for an order to cover the period during which support is needed.

That being said, what, if any, restrictions should govern the divorced spouse's eligibility to apply? We examine first whether eligibility should be limited to a divorced spouse who, at the time of death, was entitled to support as a result of a court order or pursuant to an agreement with the deceased. Second, we explore whether the remarriage of one of the parties to a divorce should preclude the eligibility of that party to apply.

(aa) Divorced spouse entitled to maintenance

Where a former spouse is entitled to periodic payments of maintenance, we see no difficulty in including such a spouse as an eligible applicant. But what of a former spouse whose application for maintenance was refused at the hearing or who never sought an award at the dissolution of the marriage? Does it follow that no legal obligation to support remains and that all ties between the spouses have been severed? The short answer is that the law is somewhat unclear and that judicial opinions exist at both ends of the spectrum.

The first decisions under the *Divorce Act* almost uniformly held that any corollary relief by way of maintenance must be awarded at the same time as the granting of the decree nisi of divorce.[12] If none were awarded, the court thereafter was said to have no jurisdiction subsequent to the decree nisi to make an award of original maintenance. This led to the growth of nominal or protective maintenance awards to ensure the preservation of the former spouse's right to seek a variation of an order.

Today, the more recent trend in the case law suggests that the courts do have jurisdiction to entertain an application for original maintenance

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[12]*See*, for example, *Daudrich* v. *Daudrich* (1971), ?? D.L.R. (3d) 611 (Man. C.A.) where Freedman C.J.M., speaking on behalf of a unanimous five-man Court of Appeal, affirmed the trial decision of Tritschler C.J.Q.B. and held that when no order for maintenance is made upon granting a decree nisi of divorce, the court thereafter has no power to do so. *And see Dokken* v. *Dokken* (1980), 113 D.L.R. (3d) 738 (Man. Q.B.).

after the decree of divorce *in certain limited circumstances*.[13] In accordance with this line of authority the legal obligation to support *per se* may remain, notwithstanding the divorce. Nonetheless, what is becoming increasingly clear is that very special facts are required to satisfy the court as to the propriety of granting an order on its merits, given the initial silence or refusal at the divorce hearing.[14] Important policy reasons warrant this approach. When the court dissolves a marriage, it endeavours to resolve all disputes between the parties so that the spouses may begin a new life under reasonably stable and known conditions. There must be some finality and degree of certainty so parties can plan for the future.

In view of these policy reasons, we have concluded that a former spouse should only be a dependant if there is, at the time of death, a subsisting support order or a support agreement in favour of that former spouse.[15] This was also the approach recommended by the Institute of Law Research and Reform[16] and the Law Reform Commission of British Columbia[17]. However, we can see no rationale for restricting the former spouse to an arbitrary period of dependence as is the case under the *Uniform Dependants' Relief Act*. To be an eligible dependant under the Uniform Act a person divorced from the deceased must have been receiving maintenance and

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[13]*Goldstein* v. *Goldstein* (1976), 67 D.L.R. (3d) 624 (Alta. C.A.); *LeMesurier* v. *LeMesurier*, [1981] 2 W.W.R. 591 (Man. Q.B.).

[14]For a thorough discussion of this case law and some general principles regarding the court's jurisdiction to make an award of original maintenance subsequent to the decree nisi, *see* F.M. Steel, "The Award of Maintenance Subsequent to Decree Nisi: A Question of Jurisdiction or Discretion?" (1981), 19 R.F.L. (2d) 33.

[15]In its audit of succession legislation, the Report of the Charter of Rights Coalition (Manitoba) also recommended that the definition of dependant be amended to include a former spouse who was receiving or entitled to receive maintenance from the deceased at the date of death, pursuant to a decree nisi of divorce.

[16]*Supra* n. 1, at 48.

[17]*Supra* n. 3, at 84.

support from the deceased for a period of at least three years immediately preceding the date of death of the deceased.

Under our proposal, therefore, a former spouse would not be an eligible applicant if the court in the divorce proceeding refused to make a support order and there was no subsisting support agreement. Nor would a former spouse, who received a lump sum order in divorce proceedings which has since been satisfied as at the time of death, be eligible. However, where the court makes a nominal award in the divorce proceedings, the former spouse would be eligible as a dependant.[18] It would then depend on the particular facts of the case as to whether or not it would be appropriate for that former spouse to receive an order under *"The Testators Family Maintenance Act"*.[19] Finally, where the order or agreement grants support for the life of the dependent former spouse, this spouse would be entitled to apply. This entitlement to continuing maintenance would be a relevant factor in determining what, if any, further award to make. Similarly, the fact that a former spouse is entitled to a fixed period of maintenance would be relevant in assessing any further award in his/her favour.

(ab) Effect of remarriage

Should the remarriage of one of the parties to a divorce preclude the eligibility of that party to apply? Under paragraph 1(1)(b) of the English *Inheritance (Provision For Family and Dependants) Act, 1975*, only "a former wife or husband who has not remarried" may so apply. This provision was supported by the Law Commission in England.[20] According to the Law Commission's Report, this recommendation was based on the fact that, in

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[18]For the most part, nominal awards are most often made where a person is currently in need of support but his/her former spouse has no ability to pay, or where there is a reasonable and substantiated expectation that there will be a change in the foreseeable future which will significantly alter the existing situation. *See*, for example, *Dokken* v. *Dokken*, *supra* n. 12, at 742.

[19]*See*, for example, *Re Tothivan* (1982), 36 O.R. (2d) 410 (Surr. Ct.).

[20]The Law Commission (England), *Second Report on Family Property: Family Provision on Death* (Report No. 61, 1974) 16.

England, if one of the parties remarries during their joint lives, his/her claims against the other party come to an end.[21] In Canada, remarriage does not necessarily terminate all claims against a former spouse; though it is true that on an application to vary, the remarriage of a spouse will often cause the court to discharge or reduce any obligation earlier imposed to provide for the former spouse. Nonetheless, there may well remain occasions where a former spouse, who has since remarried, should be entitled to relief. The Law Reform Commission of British Colombia notes the following example in its Report:

> One can envision for example a marriage of long duration with the deceased, a grossly unfair division of matrimonial property on marital break-up, an ill-considered and tragic second marriage by the former spouse which breaks up leaving her impoverished. If the deceased dies and his estate is immense, might not a court find in favour of the remarried spouse?[22]

It is the view of this Commission that remarriage of a party should not, of itself, bar a claim by a former spouse. We repeat that we are concerned here only with the question of eligibility to apply and not entitlement to an award. The court will determine whether an award should be made in favour of the applicant. It would, of course, still be a prerequisite that there be an order or agreement for maintenance or support in favour of the former spouse who has since remarried. Accordingly we recommend:

> *RECOMMENDATION 3*
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> *That the Act be amended to permit a person to apply as a dependant whose marriage to the deceased was terminated by a decree absolute of divorce and in whose favour an order or agreement for maintenance and support was subsisting immediately prior to the deceased's death.*

(ii) Decree of nullity; void, voidable marriages

A decree of nullity is not a divorce by another name. Quite apart from the power to grant a divorce, the courts have power to make orders

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[21] *The Matrimonial Causes Act 1973*, c. 18, s. 28 (U.K.).

[22] *Supra* n. 3 at 87-88.

annulling marriages and declaring a purported marriage to be void or voidable. A void marriage is invalid from the outset; a voidable marriage is one that may be rendered invalid by the court in annulment proceedings.[23] The basis of the law governing nullity in Manitoba is English law, generally, as it stood after the passing of the first *Matrimonial Causes Act, 1857*.[24] Although at common law *interim* alimony could be ordered in a nullity action, permanent maintenance could not be ordered after a decree of nullity issued.[25] For this reason, certain provincial enactments specifically provide for maintenance after a decree of nullity.[26] In the absence of such legislation, it would appear that there is no power to order maintenance on any decree for nullity of a marriage.[27]

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[23]We use the term "annulled" to include both the case where a decree is made declaring a marriage to have been void *ab initio* and the case where a decree is made avoiding a voidable marriage.

[24]*The Matrimonial Causes Act 1857*, 20 & 21 Vict., c. 85 (U.K.). *And see B. v. B.*, [1935] 1 W.W.R. 290 (Man. C.A.).

[25]*See Power on Divorce and Other Matrimonial Causes* (3rd ed. 1980). For a full listing of the case authorities *see* H.R. Hahlo, *Studies in Canadian Family Law*, "Nullity of Marriage" 651 at 693, fn. 215.

[26]In Canada, the position varies from province to province. *See* British Columbia, *Family Relations Act*, R.S.B.C. 1979, c. 121, ss. 1, 61; Alberta, *Domestic Relations Act*, R.S.A. 1980, c. D-37, ss. 22, 23; Saskatchewan, *The Queen's Bench Act*, R.S.S. 1978, c. Q-1, s. 33; Ontario, *Family Law Reform Act*, R.S.O. 1980, c. 152, ss. 1(f)(ii) & (iii), 15; New Brunswick, *Child and Family Services and Family Relations Act*, S.N.B. 1980, c. C-2.1, s. 111; Prince Edward Island, *Family Law Reform Act*, S.P.E.I. 1978, c. 6, ss. 2(f), 16; Northwest Territories, *Domestic Relations Ordinance*, R.O.N.W.T. 1974, c. D-9, s. 22.

[27]A party to a void marriage might obtain maintenance under *"The Family Maintenance Act"* if (s)he fell within the framework of subsection 2(3) of that Act. That is to say, if the parties lived together as husband and wife for the designated period of five years and the applicant commenced an application while they are still cohabiting or within one year after they cease cohabiting.

In an earlier Commission Report entitled *Breach of Promise to Marry*,[28] we concluded that the law in this regard in Manitoba was far from satisfactory. Specifically, Manitoba has no legislation under which an order for the payment of maintenance can be made in connection with a decree of nullity. At that time, we made no recommendation for reform as the subject matter was beyond the scope of the Report and it was felt that it could be more properly addressed in our review of the legal support obligations which should be transferred to the estate under *"The Testators Family Maintenance Act"*. Hence, we consider this issue now.

It is trite to note that spouses of marriages that have been annulled may be in financial need. Whether the marriage is void or voidable, we are of the view that the court should have the power to award maintenance to either spouse, subject to one proviso: namely, if a spouse knew or had reason to believe when the marriage was solemnized that it was void, such a spouse should not be entitled to an award for maintenance. This same proviso operates under *"The Marital Property Act"* to preclude such a person from invoking any benefits under that Act.[29] When awarding maintenance in nullity proceedings, we think that the court should consider the factors and guidelines set out in section 5 of *"The Family Maintenance Act"* so far as they may be relevant to the circumstances of the particular case. Accordingly, we recommend:

RECOMMENDATION 4

That subject to recommendation 5, "The Family Maintenance Act" be amended to provide that in nullity proceedings, whether the marriage is void or voidable, the court have the power to award maintenance and support to either spouse in accordance with the criteria set out in subsection 5(1) of "The Family Maintenance Act" as far as they are relevant to the circumstances of the particular case.

RECOMMENDATION 5

That in the case of a party to a void marriage who knew or had

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[28] The Manitoba Law Reform Commission, *Report on Breach of Promise to Marry* (Report #59, 1984) at 17 *et seq.*

[29] *"The Marital Property Act"*, C.C.S.M. c. M45, s. 2(3).

reason to believe when the marriage was solemnized that it was void, that party should not be entitled to any award of maintenance under "The Family Maintenance Act".

We turn now to consider whether the survivor of a void or voidable marriage should be eligible to claim reasonable provision from the deceased's estate. If the marriage has been annulled during the spouses' joint lives and a support order is made in favour of the spouse, we can see no reason why such a former spouse would not be entitled to apply for relief from the deceased's estate. If no decree of nullity is pronounced during the lifetime of both spouses, the voidable marriage becomes unimpeachable as soon as one of the spouses dies. Accordingly, the surviving spouse of a voidable marriage would be an eligible applicant under the present Act.

This may not be the case, however, with respect to the survivor of a void marriage that has *not* been annulled during the lifetime of both spouses. Any third party with a pecuniary or status interest may sue for a decree of nullity after the death of one of the parties to the void marriage. For example, beneficiaries under the deceased's will may challenge the validity of the marriage with the hope of securing additional benefits under the deceased's will. If the challenge were successful, the surviving spouse of a void marriage would not be an eligible applicant. It is the Commission's view that it would not be just to exclude a purported "spouse" from claiming reasonable provision for maintenance when that spouse thought (s)he was making a legally and socially recognized marriage commitment and intended to do so, but whose marriage attempt turns out to have been ineffective. We would, however, prohibit the party, who knew or had reason to believe that the marriage was void when it was solemnized, from any entitlement under *"The Testators Family Maintenance Act"*. Accordingly, we recommend:

RECOMMENDATION 6

That the Act be amended to permit the following persons to apply as a dependant:

(1) a person, whose marriage to the deceased has been annulled, and in whose favour an order or agreement for maintenance and support was subsisting immediately prior to the deceased's death; and

(2) a person whose marriage to the deceased was void, provided (s)he did not know or had no reason to believe that the marriage was void when it was solemnized.

(b) *De Facto* Spouses

As a result of a very recent amendment to *"The Testators Family Maintenance Act"*, the list of eligible applicants now includes a *de facto* spouse.[30] By *de facto* spouses we mean a man and woman in a relationship in which the partners are not legally married to each other but live together as husband and wife.[31] In the course of our review of *"The Testators Family Maintenance Act"*, we too had concluded that *de facto* spouses should be permitted to apply for relief.[32]

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[30]*The Statute Law Amendment (Family Law) Act*, S.M. 1985, c. 49, s. 4(2). Prior to this amendment, it was clear from the case law that the courts recognized the moral claim of a *de facto* spouse when the deceased conferred benefits under the will. For example, in *Re Blowers Estate* (1982), 16 Man. R. (2d) 288 (Q.B.), the father died leaving a will which did not provide for any of his six adult children but which left his entire estate to the woman he had lived with. In determining the quantum of the award to each of the children, the court held that it should consider the father's moral obligation to the woman he lived with. Mr. Justice Morse (at 300) agreed with the following statement by Mr. Justice Hunt in *Kilborne* v. *Kilborne*, Man. Q.B. unreported, April 3, 1973.

> A court can take into account moral obligations of a testator to a mistress and illegitimate children, and it must also take into account the moral obligation of a testator to a woman with whom he has lived for many years as husband and wife and who has borne his children.

In balancing the competing moral claims, the court awarded each child the sum of $500 in respect of his/her claim under *"The Testators Family Maintenance Act"*.

And see Re Steinberg (1969), 3 D.L.R. (3d) 565 at 571 (Man. Q.B.); *In re LaFleur Estate*, [1948] 1 W.W.R. 801 at 815 (Man. K.B.).

[31]Such spouses are also commonly referred to as "common law spouses".

[32]In its audit of succession law, the Charter of Rights Coalition (Manitoba) had also proposed that the *de facto* spouse be permitted to advance a claim under *"The Testators Family Maintenance Act"*.

In specifically defined circumstances, *"The Family Maintenance Act"* recognizes that a legal obligation may be imposed on a *de facto* spouse to contribute reasonably to the other's support and maintenance.[33] Where a *de facto* relationship is ended by the death of one of the spouses, the possibility remains that financial provision may be required. *"The Testators Family Maintenance Act"* is, in our view, the appropriate vehicle by which this legal support obligation should be transferred to the deceased's estate, where the facts and circumstances of the case so warrant.

The criteria for eligibility of *de facto* spouses to apply under *"The Testators Family Maintenance Act"* are identical to those which govern an application for maintenance during the *de facto* spouses' joint lives. Specifically, subsection 4(2) of *"The Statute Law Amendment (Family Law) Act"* provides:

> **Common-law spouse.**
> 3(6) Where the testator
> (a) cohabited with a person continuously for a period of not less than 5 years immediately preceding death in a relationship in which that person was substantially dependent upon the testator; or

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[33]Subsection 2(3) of *"The Family Maintenance Act"*, C.C.S.M. c. F20, provides:

> **Obligation where cohabit for 5 years.**
>
> **2(3)** The obligation under subsection (1) also exists where a man and a woman, not being married to each other, have cohabited continuously for a period of not less than 5 years in a relationship in which one person has been substantially dependent upon the other for support, if an application under this Act is made while they are cohabiting or within 1 year after they cease cohabiting and section 8 applies with the necessary changes to that application.

Where *de facto* spouses have not cohabited for a period of 5 years, subsection 11(1) provides that there may be an obligation of support if they *have cohabited for a period of one year or more and there is a child of the* union.

(b) cohabited with a person continuously for a period of not less than 1 year immediately preceding death and there is a child of the union; or

(c) was paying maintenance to a person pursuant to a written agreement or a court order;

that person shall be deemed to be a dependant and shall, subject to subsection (7), be entitled to apply under subsection (1).

No right where agreement to the contrary.

3(7) Where the testator and the person have agreed in writing that the person would have no right to maintenance from the testator, the person shall not have the benefit of clause (6)(a).

The right to apply on death is subject to the same safeguard set forth under *"The Family Maintenance Act"*, namely that there will be no eligibility where the *de facto* spouses have agreed in writing that no claim for maintenance from the other would be sought. The aim of paragraph (c) of subsection 3(6) is to ensure that a former *de facto* spouse is treated similarly to a divorced spouse in whose favour a maintenance order or agreement has been made.

We would, at this juncture, point out two small and somewhat technical drafting considerations. First, we are concerned that the legislation is too broadly drafted in that paragraph (a) potentially extends eligibility beyond persons in *de facto* marriages to other dependant persons who meet the stated criteria. Second, we suggest that paragraph (c) be broadened to encompass not only a *de facto* spouse receiving maintenance but also a *de facto* spouse <u>entitled to</u> maintenance pursuant to a written agreement or a court order.

4. Children

(a) Able-bodied adult

Under the present Act, the adult able-bodied child is permitted to apply for relief out of the estate of his/her deceased parent. In Alberta, Saskatchewan and Prince Edward Island the adult child is not an eligible applicant unless (s)he is unable by reason of mental or physical disability to earn a livelihood.[34] We observed earlier that on occasion in Manitoba an

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[34] *Family Relief Act*, R.S.A. 1980, c. F-2, s. 1(d)(iii); *The Dependants Relief Act*, R.S.S. 1978, c. D-25, s. 1(c)(iii); *Dependants of a Deceased Person Relief Act*, R.S.P.E.I. 1974, c. D-6, s. 1(d)(iii).

application by an adult able-bodied child has led to an undesirable encroachment upon testamentary freedom.[35] The Commission has concluded that this situation is at odds with our basic principle that, in general, it is the legal support obligation that existed during life that should be imposed upon the estate.

Generally stated, under subsection 12(1) of *"The Family Maintenance Act"* each parent is required to provide reasonably for a child's support, maintenance and education, until the child attains the full age of 18 years. We advocate that this same age limit should govern an application for support and maintenance from the deceased's estate. A recent amendment to subsection 12(5) of *"The Family Maintenance Act"* provides further that support may continue beyond the age of 18 years on such terms as the court considers just where it is satisfied that a child is unable by reason of illness, disability or other cause, to withdraw from the charge of the parent or to provide himself with the necessaries of life.[36]

In *Zacharias* v. *Zacharias*,[37] Bowman J. points out that this new section under *"The Family Maintenance Act"* reflects the provisions of the *Divorce Act* insofar as it applies to children beyond the age of 18. Section 2 of the *Divorce Act* defines children of the marriage to mean:

> . . . each child . . . sixteen years of age 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.

In *Jackson* v. *Jackson*[38] it was held by the Supreme Court of Canada that the words "disability or other cause" were to be construed to include

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[35]*See* the discussion at pages 23-27.

[36]*"The Family Maintenance Act"*, C.C.S.M. c. F20, s. 12(5)

[37](1985), 34 Man. R. (2d) 192 (Q.B.).

[38](1973), 29 D.L.R. (3d) 641 at 649 (S.C.C.). The court noted that where the line should be drawn past which divorcing parents no longer have an

(Footnote continued to page 69)

inability which is occasioned by the "necessity of attending school or college for the purpose of completing such education as is necessary to equip the child for life in the future". Hence, it would appear that parents may have an obligation to provide funds for the education or training of their child, which obligation may be enforced as a legal duty.[39]

This duty would not, however, appear to be such as to create an obligation to support an able-bodied son or daughter through an indefinitely extended educational career. While there is no upper age limit under the *Divorce Act* (or under *"The Family Maintenance Act"*), the courts are generally reluctant to order support beyond the first university degree or diploma. We agree with the following approach of the Alberta Institute:

> We do not, however, believe that the estate of a parent who dies should be obliged to provide support for the perpetual student. For this reason, we advocate an age limitation upon dependency which is brought about by attending school or acquiring technical or vocational training. We have selected the age of 23. It is in a sense an arbitrary figure but it does represent the age by which a person should have obtained his first university degree or have completed his technical or vocational training, if he has applied himself to it.[40]

Accordingly we recommend:

(Footnote continued from page 68)
obligation to support their children over the age of sixteen years is one which is best left to the discretion of the court to determine having regard to the conduct of the parties and the condition, means and other circumstances of each of them.

[39]Where, however, the son (who was over 18) had a regular part-time job and was in receipt of an interest-free student loan, the court found that he was not entitled to maintenance, while attending at school. *See Swidzinsky* v. *Swidzinsky*, Man. C.A. unreported, April 12, 1985, Matas J.A.; *Zacharias* v. *Zacharias*, *supra* n. 37.

[40]*Supra* n. 1, at 33.

RECOMMENDATION 7

That the Act be amended to permit a child of the deceased to apply as a dependant where that child is under the age of 18 at the time of the deceased's death.

RECOMMENDATION 8

That the Act be amended to permit a child of the deceased to apply as a dependant where the child is under the age of 23 at the time of the deceased's death and has not completed his/her education, technical or vocational training.

(b) Other remedies for adult able-bodied child

The adoption of an upper age restriction would preclude all adult children from bringing an application unless they came within the specific exceptions proposed in this Report. There will, however, be cases where an adult child should receive a portion of the parent's estate. Typically, this may arise when one member of a family comes to live with and look after another, or remains on the family farm at no (or simply modest) wages, on the understanding, or in the expectation that (s)he will benefit upon the deceased's death. This expectation usually takes the form of being left some money or interest in property, which legacy or benefit fails to materialize.[41]

While we appreciate that there are cases which call for a remedy, it is the view of the Commission that *"The Testators Family Maintenance Act"* ought not to be used to answer a question which raises issues quite different from those which we believe *"The Testators Family Maintenance Act"* ought to address. Stated simply, these cases raise the troublesome question of whether or not a person, who comes to help the deceased on the faith of a promise or reasonable expectation of ultimate benefit, should receive a reward for these services, if this promise or expectation is not kept. While *"The Testators Family Maintenance Act"* is not, in our opinion, the appropriate vehicle for

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[41] *See*, for example, *Barr* v. *Barr*, [1972] 2 W.W.R. 346 (Man. C.A.); *Re Walker's Will* (1963), 43 W.W.R. 321 (Man. Q.B.); *Dawydiuk* v. *Dawydiuk*, Man. Q.B. unreported, August 14, 1975, Nitikman J.

such claims, we do believe that there are a variety and sequence of other remedies that are available at common law. As this is an important concern, we briefly set forth four avenues or causes of action which may be available, depending upon the particular facts and circumstances of the case, namely:

(i) *quantum meruit*;
(ii) constructive trust;
(iii) proprietary estoppel;
(iv) contracts to leave property by will.

(i) *Quantum meruit*

Where an adult able-bodied child renders services to a parent in the expectation of receiving a legacy on the death of the recipient (i.e. the parent) of the services, it may be open to the child to invoke the traditional *quantum meruit* doctrine. Generally stated, an action for *quantum meruit* is based upon the rendering of services by one person to another who has requested (expressly or impliedly) such services or acquiesed in their performance with the knowledge that the services were not to be rendered gratuitously. The services must, however, in some way be casually connected to the conduct of the recipient so as to lead justifiably the applicant to believe that the services would be remunerated. So long as it is clear that the services were either requested or freely accepted *and* were not intended to be rendered gratuitously, the person would be entitled to seek restitutionary relief.[42]

In determining whether or not services were rendered gratuitously, Canadian courts have generally relied on a series of rebuttable presumptions. Where the services are rendered by near relatives or members of the same household to one another, the presumption is that the services have been rendered gratuitously.[43] In the present context, the onus would be on the

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[42]G.H.L. Fridman and J.G. McLeod, *Restitution* (1982) 454.

[43]*See*, for example, *Mooney* v. *Groutt*, (1903), 6 O.L.R. 521 (Div. Ct.) (sisters); *Walker* v. *Boughner* (1889), 18 O.R. 448 (H.C.J., Q.B. Div.) (parent-child); *Mercantile Trust Co.* v. *Campbell* (1918), 43 O.L.R. 57 (C.A.) (aunt-niece); *Cann* v. *Cann* (1971), 2. Nfld. & P.E.I. R. 595

(Footnote continued to page 72)

adult able-bodied child to prove that in the particular circumstances of the case the services were not rendered out of "familial duty" but rather were intended to be paid for.[44]

It does not appear necessary to prove a contractual relationship between the parties as a prerequisite to recovery. Where the plaintiff has rendered the services in the "hope of a legacy" (s)he may only recover on a quantum meruit basis if the hope was known to the recipient and the recipient accepted the services freely on the understanding that the services were not to be gratiutous.[45] Where restitutionary relief is allowed on a quantum meruit basis, the adult child would be entitled to compensation out of the estate of the deceased based upon the reasonable or fair market value of the services rendered.

(ii) Constructive Trust

Depending on the particular facts of the case, it may also be possible for an adult able-bodied child who has helped the deceased to acquire or maintain property or whose labour has enhanced the deceased's property to advance a claim of constructive trust. This is a broad and flexible equitable proprietary remedy. It is imposed without reference to an intention to create a trust, and its purpose is to remedy a result otherwise unjust. Dickson J. (as he then was), in the milestone majority decision of the Supreme Court of

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(Footnote continued from page 71)
(P.E.I.S.C.) (nephew-uncle); *Kennedy* v. *Doyle's Estate* (1976), 12 Nfld & P.E.I. R. 521 (Nfld. Dist. Ct.) (parent-child); *Re Mather* (1923), 25 O.W.N. 53 (H.C. Div.) (in-laws).

[44]Where, however, the family members were not living together in a household arrangement, the presumption, as in the case of strangers, is that the services were intended to be paid for although the presumption in this case is more easily rebutted than in the case of strangers. *See Mooney* v. *Grout*, *id*.

[45]*Baxter* v. *Gray* (1842), 3 M. & G. 771, 133 E.R. 1349 (C.P.), *Walker* v. *Boughner* (1889), *supra* n. 43.

Canada in *Pettkus* v. *Becker*[46] enunciated the three requirements to be proved in respect of a constructive trust:

(1) an enrichment;
(2) a corresponding deprivation, and
(3) an absence of any juristic reason for the enrichment.[47]

While the most recent applications of the doctrine have occurred in matrimonial and cohabitation property cases, the potential scope and

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[46](1980), 117 D.L.R. (3d) 257 (S.C.C.). In an earlier decision of the Supreme Court, *Rathwell* v. *Rathwell*, [1978] 2 S.C.R. 436 at 455, Dickson J., speaking for himself, Laskin C.J.C. and Spence J. said:

> The constructive trust, as so envisaged, comprehends the imposition of trust machinery by the court in order to achieve a result consonant with good conscience. As a matter of principle, the court will not allow any man unjustly to appropriate to himself the value earned by the labours of another. That principle is not defeated by the existence of a matrimonial relationship between the parties; but, for the principle to succeed, the facts must display an enrichment, a corresponding deprivation, and the absence of any juristic reason - such as a contract or disposition of law - for the enrichment.

[47]In *Pettkus* v. *Becker*, *id.*, Dickson J. further clarified these elements by noting that there has to be a causal connection between the contributions made by the non-titled party and the asset in dispute. He noted that where one party prejudices himself in the reasonable expectation of receiving an interest in property, and the other person in the relationship freely accepts benefits conferred, in circumstances where he knows or ought to have known of that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it.

See also Holland v. *Alkemade* (1985), 19 E.T.R. 10 (Ont. C.A.) where Arnup J.A. also addresses the three conditions necessary for the application of the equitable doctrine of unjust enrichment.

application of the remedial constructive trust is very considerable.[48] For example, in *Hussey* v. *Palmer*[49] the claimant was given a proportionate share in the value of her son-in-law's house on the basis that, having been invited by her daughter and son-in-law to live with them, she had paid a contractor to build another bedroom on their house, in the expectation she would live there for her remaining life. The nature of a constructive trust as a remedy is that it would secure to the adult child specific recovery of the asset (s)he claims, or a proportionate share when (s)he seeks part of an asset or its value.

(iii) Proprietary estoppel

Another possible solution has emerged in the form of the doctrine of proprietary estoppel.[50] Proprietary estoppel may arise where a person has done acts in reliance on the belief that (s)he has, or will acquire, rights in or over another's land.[51] Usually, but not invariably, these acts consist

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[48]For a thorough discussion of this case and its implications, *see* D.W.M. Waters, *Law of Trusts in Canada* (2nd. ed. 1984) 378 *et seq.*; A.J. McClean, "Constructive and Resulting Trusts - Unjust Enrichment in a Common Law Relationship - *Pettkus* v. *Becker*" (1982), 16 U.B.C.L.Rev. 155; J.L. Dewar, "The Development of the Remedial Constructive Trust" (1982), 60 Can. Bar Rev. 265; J.D. McCamus, "New Developments in the Law of Remedies" in Special Lectures, Law Society of Upper Canada (1981) 85; T.G. Youdan, "Developments in Property Law: The 1982-83 Term" (1984), 6 Supreme Court L.R. 279 at 293. For a case commentary, *see* G.R. Strathy, "The Constructive Trust As A Restitutionary Remedy: The case of *Hussey* v. *Palmer*" (1974), 32 U.T. Fac. L. Rev. 83.

[49][1972] 3 All E.R. 744 (C.A.). *See also Lake Manitoba Estates Ltd. and Dumont* v. *Communities Economic Development Fund* (1980), 2 Man. R. (2d) 295 (C.A.).

[50]It is also known as "estoppel by encouragement or acquiescence". *See* G. Spencer Bower and A.K. Turner, *The Law Relating to Estoppel by Representation* (3rd ed. 1977) Chapter XII.

[51]The question as to whether a promise can give rise to proprietary estoppel where its subject matter is property other than land remains an open one.

of erecting buildings on, or making other improvements to, the land in question.[52] While there is some uncertainty as to the operative facts that are required to bring the doctrine into play, some indication of these may be found in *Willmott* v. *Barber*[53] and *Ramsden* v. *Dyson*[54] both of which have gained acceptance in Canada and England.[55] The cases can be broadly divided into two groups or categories.

In the first, one party is acting under a mistake as to the existence or as to the extent of his/her rights in or over another's land. On the faith of this mistaken belief, the party then makes some expenditure on another's land or does some act. Even though the mistake was not induced in any way by the landowner, (s)he might be prevented from taking advantage of it, particularly if (s)he "stood by" knowing of the mistake.

In the second category, there is not simply acquiescence by the landowner but encouragement. The other party acts in reliance on the landowner's promise, or on conduct or on a representation from which a promise can be implied, that the party has an interest in land or that one will be created in his/her favour.[56] Where the requirements of proprietary estoppel are satisfied, the party who encouraged or acquiesced is precluded from denying the existence of the rights in question and may indeed be compelled to grant them.

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[52] *Chitty on Contracts* (25th ed. 1983) 226.

[53] (1880), 15 Ch. D. 96.

[54] (1866) L.R. 1 H.L. 129 at 170.

[55] In Canada, *see generally McBride* v. *McNeil* (1912), 27 O.L.R. 455 (H.C.J.); *Jacques* v. *Hopkins*, [1931] 2 W.W.R. 277 (Alta. S.C., App. Div.). In England *see Inwards* v. *Baker*, [1965] 1 All E.R. 446 (C.A.); *Pascoe* v. *Turner*, [1979] 1 W.L.R. 431 at 436 (C.A.); *Crabb* v. *Arun District Council*, [1976] Ch. 179 (C.A.); *Kammins Ballrooms Co. Ltd.* v. *Zenith Investments (Torquay) Ltd.*, [1971] A.C. 850 at 884 (H.L.).

[56] *Supra* n 52, at 226.

A recent example is *Griffiths* v. *Williams*.[57] The defendant had lived for many years with her mother in the latter's home and had often been told that the house would be hers for life; she had also spent money improving it. The mother, however, left the house to the defendant's daughter, who as co-executor of the will sought possession. The Court of Appeal held that the executors could not obtain possession. No mention was made of any contractual rights of the defendant, but it was held that as a result of the deceased's conduct an equity had arisen in the defendant's favour. This would be satisfied by the grant to her of a long lease determinable upon her death. These cases appear to form an important exception to the general rule that an estoppel cannot create a cause of action.[58]

(iv) Contract to leave property by will

It may also be possible for the adult child to commence an action against the estate for breach of contract.[59] A contract to make a will contemplates a promise by a person to a promisee that the person will leave a legacy or devise either to the promisee or to a designated third party. In return for the promise, the person often obtains material support or personal services from the promisee. It is to be emphasized that this arrangement is a contract, not a will; the substantive and formal validity of the arrangement depends on the law of contracts. As with any other kind of contract, it would

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[57][1978] E.G. Digest of Cases 919.

[58]*Supra* n. 50 at 306.

[59]While *Balfour* v. *Balfour*, [1919] 2 K.B. 571 establishes that there is a presumption that an agreement made in a domestic context is not intended to have legal consequences, that presumption is, however, one of fact only, and may be rebutted: *Jones* v. *Padvatton*, [1969] 1 W.L.R. 328 (C.A.).

S.M. Waddams in *The Law of Contracts* (1977) points out at page 102 that:

> The variety of agreements between family members that have from time to time been enforced shows that generalization is unsafe, and suggests that no special requirement of intention exists except in the objective sense. As elsewhere, it is the reasonableness of the promisee's expectation, not the promisor's intention, that is relevant.

be necessary to prove the existence of the requisite contractual elements.[60]

(c) Disabled adult children

Mentally or physically disabled children are eligible as dependants under the present Act. Subsection 17(1) of *"The Testators Family Maintenance Act"* provides that an application may be made on behalf of a "mentally disordered" person within the meaning of *"The Mental Health Act"* by the committee or the Public Trustee. The case law, however, is not entirely clear as to what effect state financial assistance to the dependant should have on the duty owed to the disabled adult child.

In *Re Cousins*[61] the testator's will left one-third of his estate (valued at approximately $16,500) to the widow and the remainder in equal shares to all of the children but one son who was in a psychiatric facility. There was evidence that the son was not likely to recover, in the sense of a cure, and would be confined to institutional care. Williams C.J.K.B. held that the testator was under a moral duty to such a dependant, notwithstanding that his needs were being provided for by the government at state expense:

> There is in Manitoba a moral duty on a testator, who is able to do so, to make provision for the maintenance and support of an afflicted child, of whatever age, who is confined in a mental hospital. I hold that that moral duty is to the child and not to the state.
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> But while the moral duty exists, and is at large as it were, it will, of course, only be enforced with due regard to the estate of the testator, the necessities of the objects of his bounty, and all the circumstances of the case.[62]

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[60] *See generally Hendry* v. *Zimmerman*, [1948] 1 W.W.R. 385 (Man. C.A.); *Schaefer* v. *Schuhmann*, [1972] A.C. 572 at 583 (P.C.); *Hiller's Estate* v. *Hiller's Estate* (1983), 41 A.R. 602 (Q.B.).

[61] (1952), 59 Man. R. 372 (K.B.). *And see Penty* v. *Mott* (1984), 16 E.T.R. 175 (B.C.S.C.); *Re Deis* (1983), 13 E.T.R. 88 (Sask. C.A.).

[62] *Re Cousins*, *id.*, at 383-84.

The court awarded a lump sum of $2,100 be paid to the son, charged as to $300 on each of the interests which the seven children would take under the will.

The decision in *Re Cousins* was followed by the Manitoba Court of Appeal in *Re Pfrimmer*[63] where the applicant son, paralysed and totally disabled physically and dependent on provincial welfare, was entitled to an award of $10,000 from a net estate of approximately $40,000. The testator was survived by two sons and he had left his whole estate to his able-bodied son who had helped to farm the land. Dickson J.A. (as he then was) stated that a testator should consider, among other things, the following:

> (a) the possibility of recovery by the disabled person;
> (b) the minimal nature of State support which in most cases is unable to be much above subsistence level; and
> (c) the position of those for whom the disabled person is himself responsible, such as wife and children.[64]

A somewhat different attitude, however, is evident in *Dawydiuk* v. *Dawydiuk*, where Nitikman J. cited the fact that the applicant daughter had been dependent on the state for financial care as a relevant factor in considering the moral duty of the testator towards her.

> The testator was entitled to feel that there was no moral duty on him to provide for her substantially as any money allowed her from the estate would not increase the amount of support and maintenance she would enjoy, additional to what she receives from the state, except for the sum of $200.00.[65]

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[63](1968), 2 D.L.R. (3d) 525 (Man. C.A.); rev'd (1968), 69 D.L.R. (2d) 71 (Man. Q.B.) where Deniset J. dismissed the application on the basis that a testator does not fail in his moral duty if he considers that one of the relevant circumstances regarding his dependants' means is help from the state. Leave to appeal to the Supreme Court of Canada was refused (1968), 2 D.L.R. (3d) 720.

[64]*Id.*, at 526.

[65]Man. Q.B. unreported, August 14, 1975, Nitikman J., at 24. The daughter had on a number of occasions been admitted to psychiatric care. *And see Re Millar* (1976), 71 D.L.R. (3d) 120 (P.E.I.S.C.); *Re Kinloch* (1972), 23 D.L.R. (3d) 465 (Alta. S.C.).

The evidence indicated that the applicant was happy and contented with her foster home. She had been bequeathed a legacy of $500 under the terms of the deceased's will and no further order was made in her favour.

This approach would appear to follow a line of cases from Australian and New Zealand courts which contend that there is no duty to provide by will for reimbursement to the state for maintenance costs of a mentally or physically handicapped child. The courts have refused the applications on the ground that no moral duty is involved, since no financial benefit would accrue to the dependant personally but would simply relieve the general taxpayer.

Quite apart from the moral duty recognized by the courts, a recent amendment to subsection 12(5) of *"The Family Maintenance Act"* now provides that the court, on application, may extend the legal obligation to provide support to a child beyond 18 years of age where it is satisfied that the child is unable by reason of illness or disability to furnish himself/herself with the necessaries of life. On the death of a parent, it may become a very real possibility that a disabled child is unable to earn a reasonable livelihood. It is our view that *"The Testators Family Maintenance Act"* should preserve this legal obligation by transferring it to the estate, where the disabled child is in need of financial provision.

We recognize that it is exceedingly difficult to define the boundary between public and private responsibility for the support of physically or mentally handicapped children over the age of 18 years. We have been informed that in regard to disabled children over the age of 18 years, the province assumes full financial responsibility under *"The Social Allowances Act"* if the child is unable to earn an income sufficient to meet the basic necessities.[66] It has been pointed out that it is anomalous that during the

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[66] *"The Social Allowances Act"*, C.C.S.M. c. S160, s. 5(1). As with all other applicants for social assistance, the handicapped person must undergo a "means test".

Estate planning for mentally and physically disabled persons is complex. Many parents direct in their wills that an amount be set aside under a discretionary trust so as not to impair the handicapped child's ability to receive social assistance.

lifetime of the parents the financial obligation for a disabled adult child is not ordinarily enforced but may be imposed on death.[67]

All the circumstances of the case should be considered to determine the line at which public and parental responsibility for disabled children should be drawn. The size of the estate is one important factor. Where the estate is large, it may well be appropriate that financial provision should be made out of the parent's estate for support of a disabled adult under provincial care. Where the estate is small and there are competing claims which cannot all be satisfied, a judge might think it advisable to dismiss the application on behalf of a disabled person, who is receiving support from the province. In any event, it is the Commission's view that any financial responsibility assumed by a government for a mentally or physically disabled dependant should be considered by the court in determining what, if any, order for financial provision should be made. This proposal is set forth later within the list of factors we recommend be considered in an application under the Act.

RECOMMENDATION 9

That the Act be amended to permit a child of the deceased to apply as a dependant when the child is 18 years of age or over at the time of the deceased's death and unable by reason of illness or disability to earn a reasonable livelihood.

RECOMMENDATION 10

That at the hearing of an application under "The Testators Family Maintenance Act", the judge consider the financial responsibility assumed by a government for a mentally or physically disabled dependant.

(d) A child to whom the deceased stood in *loco parentis*

The Commission has considered whether the Act should permit persons treated by the deceased as his/her children to apply for maintenance from the estate. Subsection 12(4) of *"The Family Maintenance Act"* recognizes that in

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[67] Institute of Law Research and Reform, *supra* n. 1, at 40.

certain defined circumstances a parent may have a legal obligation to provide reasonably for the support and maintenance of a child to whom the parent stands *in loco parentis*. It provides as follows:

> Person standing in loco parentis
>
> 12(4) A person who stands in loco parentis to a child has the obligation to provide reasonably for the support, maintenance and education of that child until the child attains the full age of 18 years, but the obligation is secondary to that of the child's parents under subsection (1) and is an obligation only to the extent that those parents fail to provide reasonably for the child's support, maintenance or education.

The term *in loco parentis* means something more than the bare provision of the child's pecuniary wants.[68] It implies an intention on the part of the person to fulfil the office and duty of a parent.[69] It should be noted that this obligation is secondary; liability does not arise unless the child's natural parents fail to provide reasonably for the child's support, maintenance or education.

In Ontario, England and New South Wales a child to whom the deceased stood *in loco parentis* is permitted to apply under the pertinent dependants' relief legislation. The Alberta Institute of Law Research and Reform also recommended that such a child be permitted to apply.[70] Under Manitoba's *"Testators Family Maintenance Act"*, however, a child to whom a deceased person stood *in loco parentis* has no right to apply for relief from the estate of a deceased person. We believe that a child to whom the deceased stood *in loco parentis* should be an eligible applicant, and, in appropriate

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[68]Though it is *sine qua non* that the person must provide a large part of the financial support necessary for the child's maintenance.

[69]*Timmerman* v. *Timmerman*, [1976] 4 W.W.R. 296 (Man. Q.B.); *Proctor* v. *Proctor* (1975), 57 D.L.R. (3d) 766 (Man. Q.B.).

[70]*Supra* n. 1 at 45. However, the Alberta Institute recommended that the support obligation should be imposed on the estate only until the person treated by the deceased as his/her child attains 18 years of age.

circumstances, this support obligation may be imposed upon the deceased's estate. In determining whether the deceased stood *in loco parentis* to a child, the court should have regard to the extent and the basis upon which the deceased assumed responsibility and the length of time for which the deceased discharged that responsibility. In determining the amount, if any, which should be awarded to such a child, we think it appropriate for the court to consider whether or not the natural parents have failed in their primary obligation to provide for the child. Finally, we propose that a foster child should be specifically excluded as a dependant under *"The Testators Family Maintenance Act"*. Accordingly, we recommend:

RECOMMENDATION 11

That the Act be amended to permit a child to whom the deceased stood in loco parentis to apply as a dependant, but not a child placed in a foster home for compensation by a person having lawful custody.

RECOMMENDATION 12

That at the hearing of an application by a child to whom the deceased stood in loco parentis, the judge consider the liability of any other person to maintain the child and whether that person has discharged that responsibility.

5. Parents, Grandparents and Grandchildren

Under the present law, a parent is not eligible to apply under *"The Testators Family Maintenance Act"*. A child is, however, under a "limited" legal support obligation to his/her parents during his/her life.[71] This obligation is set forth under section 2 of *"The Parents' Maintenance Act"*:

Liability of child.

2 A son or daughter is liable for the support of his or her dependent parents if it appears that the son or daughter has sufficient means to provide for the parent and to the extent that it

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[71] Parents' maintenance legislation was the subject matter of an informal report prepared by the Manitoba Law Reform Commission (Report #11A, 1981).

so appears, having regard to the whole circumstances of the case.[72]

It would appear that liability for maintenance is dependent upon destitution or inability of the parent to maintain himself/herself by reason of age, disease or infirmity.[73] The maximum liability under the Act is a weekly sum of twenty dollars per child.[74] From our review of the case law, the statute has been invoked on only one occasion in Manitoba.[75]

In light of the facts that the statute is rarely invoked and the obligations which it attempts to set forth are somewhat artificial or spurious (given the restricted liability), we do not regard *"The Parents' Maintenance Act"* itself as a persuasive basis for transferring such a support obligation to the estate. Nonetheless, we think that there is reason to classify parents as eligible dependants under the Act. Quite apart from *"The Parents' Maintenance Act"*, it is our belief that the special bond and nature of the relationship of child to parent, coupled with *de facto* dependancy at the date of the child's death, warrants a slight departure from our general principle of simply transferring the legal support obligation imposed during life to the estate.[76] It is our view that the protection of *"The Testators Family Maintenance Act"* should be extended to parents who were dependent on the deceased immediately prior to the death of the deceased.[77]

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[72]The first legislation in England addressing the question of parents' maintenance dates to 1601 when *The Poor Relief Act, 1601*, 43 Eliz., c. 2, was enacted. From its inception, the Act embodied a public interest in that the state levied a fine against those who defaulted on their legal obligation.

[73]*"The Parents' Maintenance Act"*, C.C.S.M. c. P10, s. 3(1).

[74]*"The Parents' Maintenance Act"*, C.C.S.M. c. P10, s. 4(1).

[75]*Ioculano* v. *Ioculano*, Man. Prov. J. Ct. (Fam. Div.) unreported, August 7, 1979.

[76]These same factors led the Alberta Institute to classify both parents and grandparents as dependants. *Supra* n. 1, at 56.

[77]Our proposal departs from the legal lifetime support obligation in that we do not suggest that a maximum liability of $20 per week be adopted.

Unlike the Alberta Institute and the drafters of the uniform Act, we do not recommend that grandparents be classified as eligible applicants. In Alberta there is a "secondary" legal obligation running from a person to his/her grandparents under *"The Maintenance Order Act"*.[78] No such legal support obligation exists in Manitoba. We therefore recommend against an extension in this regard.

We are in agreement with the Alberta Institute, however, when it proposes that grandchildren should *not* be eligible as dependants. It notes that a grandparent has no responsibility for bringing grandchildren into the world and has no control over their number or general responsibility for them. The situation would, of course, be different if the grandparent has treated the grandchild as if (s)he were his/her own child, that is to say, if (s)he has stood *in loco parentis*. In such a case, the grandchild would be a dependant in accordance with recommendation 11. Accordingly, we recommend:

RECOMMENDATION 13

That the Act be amended to permit a parent of the deceased to apply as a dependant where, immediately prior to the date of the death of the deceased, the parent was dependent upon the deceased for maintenance and support.

D. THE ROLE OF SECTION 22

We noted earlier that considerable uncertainty exists with respect to the application of subsections 22(1) and (2) of *"The Testators Family Maintenance Act"*.[79] The case law is inconclusive as to whether this section ensures that the surviving spouse will receive at least the minimum entitlement which (s)he would have otherwise received pursuant to the fixed share under *"The Dower Act"*. Nor is it clear whether this section precludes the court from awarding a share to a dependant which would encroach upon the surviving spouse's fixed share.

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[78] *"The Maintenance Order Act"*, R.S.A. 1980, c. M-1, s. 3(3). Liability of a grandchild does not arise if a child of the person in respect of whom an order is sought is able to maintain that person.

[79] *See* the discussion at page 13.

The difficulty stems, in part, from subsection 22(2) which provides that if the surviving spouse should first apply under *"The Testators Family Maintenance Act"* rather than first seek a fixed share of the deceased's estate, (s)he has no further right to elect under *"The Dower Act"*.[80] We do not think that provision for the maintenance and support of a dependant is the same as fixed proprietary rights in the deceased's estate. By providing that benefits given to the spouse by an order under *"The Testators Family Maintenance Act"* are in lieu of a fixed share under *"The Dower Act"*, this section appears to equate two distinct, though related concepts. Further, the suggestion that a spouse has the right to demand and receive one-half of the deceased's estate as his/her own absolute property in possession would appear to be inconsistent with the objective of the Act which, in our estimation, should be to ensure reasonable provision for the maintenance of a dependant. As the interrelation between *"The Testators Family Maintenance Act"* and *"The Dower Act"* is of first importance, the Commission is of the view that these sections require legislative clarification.

In our earlier *Report on An Examination of "The Dower Act"* we observed that the first step should be to ascertain the property rights of the surviving spouse. Once that has been determined, the next step should be to consider the possibility of whether the surviving spouse or other dependants might have a need for reasonable support and maintenance. To this end, we recommended that subsections 22(1) and (2) of *"The Testators Family Maintenance Act"* be repealed and that the Act be amended to ensure that the authority of the court in dependants' relief proceedings is subject to the right of the surviving spouse to seek and to receive an allocation of property on death. In short, we thought that there should be no encroachment upon the surviving spouse's priority position by other dependants.[81] Further, we proposed that an accounting of property on death should not bar the right of the surviving spouse to make an application under *"The Testators Family Maintenance Act"*.

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[80]It is still open, however, for the survivor to elect a life estate in the homestead under *"The Dower Act"*.

[81]In its audit of succession legislation, the Report of The Charter of Rights Coalition (Manitoba) recommended that the entitlement of the surviving spouse under *"The Dower Act"* ought not to be reduced by virtue of an order in favour of other dependants under *"The Testators Family Maintenance Act"*.

We envisioned that *"The Testators Family Maintenance Act"* would operate as a supplement to, but not a substitute for, a deferred sharing regime. Where a distribution of property on death had been effected, we did not foresee that the court would ordinarily award further provision under *"The Testators Family Maintenance Act"*. An award under the Act should be confined to those cases where the surviving spouse does not have adequate provision for his/her proper maintenance and support. In determining whether adequate provision for the surviving spouse had been made, we recommended that the court should have regard to any benefits received by the surviving spouse in an accounting on death.[82]

The deferred sharing regime proposed by the Commission to replace the fixed share under s. 15 of *"The Dower Act"* has not yet been implemented. While we make no further formal recommendation on this subject area, it is essential to recognize that whatever scheme is in place, be it a fixed share under *"The Dower Act"* or deferred sharing regime, subsections 22(1) and (2) under *"The Testators Family Maintenance Act"* require legislative clarification.

E. TIME FOR DETERMINING WHETHER ADEQUATE PROVISION HAS BEEN MADE

As of what date is the court to assess whether an applicant under dependant's relief legislation has been adequately provided for? The case law suggests at least four conflicting points in time, namely:

a) the date the testator made his will;[83]
b) the date of the testator's death;[84]

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[82] A full discussion of these recommendations may be found at pages 83-87 of The Manitoba Law Reform Commission's *Report on An Examination of "The Dower Act"* (Report #60, 1984).

[83] *Re Hull*, [1944] 1 D.L.R. 14 at 20 (Ont. C.A.)

[84] *Re Cole* (1958), 12 D.L.R. (2d) 406 (N.S.S.C.); *Re Brown Estate* (1969), 70 W.W.R. 543 (Sask. Q.B.); *Re Novikoff* (1968), 1 D.L.R. (3d) 484 (B.C.S.C.); *Re Bowe* (1971), 19 D.L.R. (3d) 338 (B.C.S.C.); *Dun* v. *Dun*,
(Footnote continued to page 87)

c) the date *"The Testators Family Maintenance Act"* proceedings were commenced;[85]

d) the date of the hearing.[86]

Most cases seem to favour the date of the testator's death as the appropriate time at which to determine whether adequate provision has been made. The principal argument in favour of this date is that it is the last opportunity or chance for the testator to recognize his obligations. The courts have generally considered events after the deceased's death only to the extent that they would have been reasonably foreseeable by the deceased immediately before his/her death.[87]

Ordinarily, nothing turns on which date is selected because there is usually no change in the dependant's circumstances between the date of the deceased's death and the time of hearing. Sometimes, however, an applicant's

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(Footnote continued from page 86)
[1959] 2 All E.R. 134 (P.C.); *Millward* v. *Shenton*, [1972] 2 All E.R. 1025 (C.A.); *McDermott* v. *Walker*, [1930] 1 D.L.R. 945 (B.C.C.A.); *rev'd* on other grounds [1931] S.C.R. 94.

[85]*Barker* v. *Westminster Trust Co.*, [1941] 4 D.L.R. 514 (B.C.C.A.); *Re Calladine* (1958), 25 W.W.R. 175 (B.C.S.C.).

[86]*Re Jones (No. 3)*, [1934] 3 W.W.R. 726 (B.C.S.C.); *Re Willan Estate*, [1951-52] 4 W.W.R. (N.S.) 114 (Alta. S.C.); *Re Urquhart* (1956), 5 D.L.R. (2d) 235 (B.C.S.C.); *Re Martin Estate* (1962), 40 W.W.R. 513 (Man. C.A.); *Maldaver* v. *Canada Permanent Trust Co.* (1977), 1 E.T.R. 41 (N.S.S.C., T.D.); *Maldaver* v. *Canada Permanent Trust Co.* (1982), 29 R.F.L. (2d) 147 (N.S.S.C., T.D.); *Malychuk* v. *Malychuk*; *Taschuk* v. *Malychuk* (1978), 6 Alta. L.R. (2d) 240 (S.C., T.D.).

[87]However, it would appear that the content of the concept of "reasonable foreseeability" for the purposes of dependants' relief proceedings has not been developed fully by the courts. For the most part, the courts have considered on an ad hoc basis the question of what types of contingencies they may take into account. *See generally* M.M. Litman, "Annotation - Limitations on the Use of Future Contingencies in Calculating Awards Made under Dependant's Relief Legislation" (1979), 4 E.T.R. 257.

position has changed or deteriorated dramatically after the testator's death, either through illness or accident .[88] This occurred in *Re Martin Estate*, a decision of the Manitoba Court of Appeal, where the sudden unhappy and penurious condition of the daughter arose after her mother's death. The court held that it is appropriate for the court to consider all of the circumstances, including those at the date when the applicant is heard by the judge. Mr. Justice Guy set forth the following rationale:

> Thus, in order for the Act to be of any appreciable significance, the court must consider the character of the estate itself and the number of dependants *at the time the application is made*. Otherwise, each application would merely develop into a critical analysis of the moral duty of the testator in earlier circumstances, which might bear no relationship to the actual requirements of the dependants or the size of the estate now.[89] (emphasis added)

We are in agreement with this approach. To remove the issue beyond doubt, we have concluded that it should be explicitly stated that the courts ought to be permitted to consider the actual circumstances of the case as at the date of the hearing. All events after the deceased's death should be taken into account and not merely those within the reasonable foresight of the deceased at the time of death. Only then can the court be reasonably certain that the order it makes is appropriate. Several other jurisdictions have enacted or recommended this same time frame; Ontario, England and New South Wales all require that the adequacy of provision for support should be measured as of the date of the hearing.[90] Accordingly we recommend:

RECOMMENDATION 14

That in determining whether a dependant has reasonable provision for maintenance and support, the judge consider the circumstances as they exist at the date of the hearing of the application.

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[88] *Supra* n. 86.

[89] *Supra*, n. 86 at 518.

[90] *Succession Law Reform Act*, R.S.O. 1980, c. 488, s.58(3); *Family Provision Act, 1982*, No. 160, s. 9(3)(c) (N.S.W.).

F. INTERIM APPLICATIONS

The death of the deceased may create an immediate need by a dependant for financial provision while the estate is being administered. Yet, it may take many months or years after the death of the deceased before the court is able to determine finally a claim under the Act. The power to award interim payments is an important one but, in the absence of specific statutory authority, the court has no power to award interim maintenance.

Under section 21 of *"The Testators Family Maintenance Act"*, captioned *Enforcement of Order*, "a judge may make such order or direction or interim order or direction as may be necessary to secure to the dependant out of the estate the benefit to which he is found to be entitled".[91] [emphasis added] It is unclear whether this section requires that there be no doubt as to the dependant's entitlement before an order for interim relief may issue. What if the judge is unable to ascertain all the circumstances that should be taken into account in making a final order but the dependant is in immediate need of financial provision?

Section 64 of the Ontario *Succession Law Reform Act* makes specific provision for interim awards and provides some guidance in this regard:

> 64. Interim order. - Where an application is made under this Part and the applicant is in need of and entitled to support but any or all of the matters referred to in section 62 or 63 have not been ascertained by the court, the court may make such interim order under section 63 as it considers appropriate.

In *Re Puliver*[92] the court considered this section on an application by a former wife of the deceased who sought an interim order for support out of the estate. It was held that where an applicant could put forward substantial evidence to support her claim as a dependant and could prove that the deceased died domiciled in Ontario, the application for interim

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[91] This provision appears to be patterned on subsection 19(2) of the *Uniform Dependants' Relief Act*.

[92] (1982), 39 O.R. (2d) 460 (H.C.J.).

relief should proceed even though these questions were still in issue in the substantive application. Madam Justice Van Camp noted that to interpret the section strictly and require that there be no doubt as to entitlement would effectively deprive dependants of any interim relief if any question were raised as to entitlement other than quantum.

The provision of interim awards is open to the objection that there may be little likelihood of the estate recovering moneys paid to an applicant who is eventually unsuccessful in his/her claim. In theory, there is force to this argument. In practice, however, experience in other jurisdictions which have incorporated such a power would suggest that these fears are unfounded.[93] Perhaps, in an appropriate case, the court might make an order for the security for the repayment of an amount made under an interim award.[94] While we recognize that this is not a complete answer to the objection raised, we concur with the comments of the New South Wales Law Reform Commission:

> All that can be said is that the times when a person needs immediate assistance are likely to far outnumber the times an applicant is ultimately unsuccessful. And, the Court can be expected to be wary of making orders for immediate assistance in favour of applicants with very doubful prospects of success.[95]

In our estimation, it should be clarified that the court has power to order interim maintenance even where the judge is unable to ascertain all the circumstances that should be taken into account in making a final order. Specifically, the court should have power to make an interim order for relief where it is satisfied, first, that the applicant is in immediate need of financial assistance but it is not yet possible for the court to determine what order, if any, should be made for the applicant; and second, that property forming part of the estate of the deceased person is, or can be made, available to meet the need of the applicant. We recommend this second

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93*See* J.G.R. Martyn, *The Modern Law of Family Provision* (1978) 31.

94*Supra* n. 92 at 462.

95Law Reform Commission, New South Wales, *Report on The Testator's Family Maintenance and Guardianship of Infants Act*, 1916 (No. 28, 1977) para. 2.10.2.

requirement in order to ensure that there will be no encroachment upon the surviving spouse's entitlement to a fixed share of the estate under *"The Dower Act"*.[96] As a matter of drafting, we think it better to place the power to award interim relief in a separate section.

So that relief may be obtained expeditiously, we also believe that a judge should have the discretion to make an interim order even though everyone interested or affected has not been served and heard as provided in recommendation 17. While in the usual course, notice of an application for an interim award should be given to interested parties, this may occasionally pose a substantial impediment. We agree with the approach advocated by the Law Reform Commission of British Columbia, namely, "that the court . . . should have power, in exceptional circumstances, to permit the application to be heard upon service of the deceased's personal representative alone".[97] Accordingly we recommend:

RECOMMENDATION 15

That where an application is made under "The Testators Family Maintenance Act" and it appears to the court

(i) that the dependant is in immediate need of financial assistance, but it is not yet possible to determine what order (if any) should be made; and

(ii) property forming part of the estate of the deceased is or can be made available to meet the need of the applicant;

the court have the power to make such interim order as it considers appropriate.

RECOMMENDATION 16

That the application for interim support may be heard upon service of the deceased's personal representative, with leave of the court, or on such terms as the court may see fit.

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[96] *See* the discussion at pages 84-86.

[97] *Supra* n. 3, at 98.

G. NOTICE TO POTENTIAL APPLICANTS

At present, there is no procedural device for ensuring that all persons who might be possible applicants are notified of a pending claim by another dependant. A number of jurisdictions provide that where an application is pending, the court cannot make any order until it is satisfied that all persons who may be interested in or affected by the order have been served with notice of the application.[98] Any person interested in or affected by an order is entitled to be present and to be heard in person or by counsel at the hearing. The Commission favours the inclusion of a similar statutory provision. The manner of effecting notice of a pending application would be a matter to be provided for by the rules of court. Accordingly, we recommend:

RECOMMENDATION 17

That where an application is made on behalf of a dependant, the court should not make any order under the Act unless it is satisfied that all persons who are or may be interested in or affected by the order have been served with notice of the application as provided by the rules of court, and every such person should be entitled to be present and to be heard in person or by counsel at the hearing.

H. VARIATION OF ORDERS

We observed earlier that courts may vary an order made under the Act.[99] The principal purpose of this power of variation appears to be to permit the court to decrease an existing award where the dependant's assets or financial means have improved. The amount by which an order is reduced would fall back into the estate.

While in other jurisdictions there is no power to increase the

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[98] *See*, for example, *Succession Law Reform Act*, R.S.O. 1980, c. 488, s. 63(5).

[99] *"The Testators Family Maintenance Act"*, C.C.S.M. c. T50, s.7.

provision made by an existing order,[100] the Manitoba case of *Bowie* v. *Royal Trust Company*[101] confirms that the power of variation comprehends an upward variation. It is clear, however, that this power of upward variation can only affect the estate assets which remain undistributed at the date of the application for variation as Mr. Justice Jewers stated in that case:

> It may be seen, then, that the court can only make provision for payments "out of the estate" and there is no express authority for the court to order payments to be made out of any other fund, including legacies distributed to beneficiaries to which the recipients are absolutely entitled and which would no longer form part of the estate, but would belong to them.[102]

Most jurisdictions have recommended that there be a power to vary an order upward because the flexibility of such a power enables the courts to ensure that the provision it makes remains adequate. We envisage that the power of upward variation would very rarely be invoked and would be exercised with great caution, and only when clearly called for by a marked change in circumstances. We have concluded that the court's power to vary an award should remain as it is, with one exception. Other statutes restrict the power of variation to instances when the court has ordered either periodic payments or a lump sum to be invested for the benefit of the dependant.[103] The Commission advocates this same approach. Orders for lump sum payments or for transfers of property absolutely to the dependant should be final and not subject to later variation. It would be impracticable to re-open matters after the property or lump sum had been distributed. This would not, however,

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[100] *Maldaver* v. *Canada Permanent Trust Co.* (No. 2) (1982), 12 E.T.R. 231 (N.S.S.C., T.D.).

[101] *Bowie* v. *Royal Trust Company* (1985), 30 Man. R. (2d) 128 (Q.B.).

[102] *Id.*, at 130. Otherwise, to compel a beneficiary to return property which has been transferred to him in his own right would put in utter peril the beneficiary's security of title to property and may cause severe hardship if the beneficiary has changed his position in reliance on the gift from the estate.

[103] *See*, for example, *Wills Variation Act*, R.S.B.C. 1979, c. 435, s. 13.

preclude a variation application where the lump sum is held in trust or specified property is transferred on trust or for life or a term of years.

To clarify the issue of upward variation, we recommend that it should be explicitly stated that the power of variation comprehends both an upward and downward variation, bearing in mind, of course, that an upward variation would only be feasible where the assets are not yet distributed at the time of the variation application. Accordingly, we recommend:

RECOMMENDATION 18

That paragraph 7(c) of the Act be repealed and a paragraph comparable to the following be substituted therefor:

> *That where an order has been made under the Act, the court at any subsequent date may discharge, or vary up or down, or suspend the order, or make such order as the judge deems fit in the circumstances but specified property transferred absolutely to a dependant or a lump sum ordered to be paid directly to a dependant may not be varied.*

I. PROPERTY AVAILABLE FOR A LATE APPLICATION OR ON VARIATION

An order made pursuant to an application brought outside the limitation period may be allowed "as to any portion of the estate remaining undistributed at the date of the application". The meaning of "undistributed" is not certain and it is unclear as to what property can be used to provide the relief claimed. We noted earlier that this same question arises in an application for upward variation.

A commonly held view is that an estate is "distributed" when the personal representative has gathered in all of the assets and completed the administrative duties so that thereafter (s)he holds the property, both real and personal, in the character of trustee for the beneficiaries.[104] Such

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[104]The determination as to the precise point at which the personal representative has completed administration and thereafter becomes a testamentary trustee has caused some difficulty. *See*, for example, *Attenborough* v. *Solomon*, [1913] A.C. 76 (H.L.).

assets then cease to be part of the estate and, strictly speaking, would not be available to satisfy a claim.

In our view, it would be incongruous to deny jurisdiction so soon as executorial duties are complete. Merely holding as trustee, once administrative duties have been completed, should not imply that the estate has been distributed for the purposes of either the limitation period for a late application or for an upward variation; such an interpretation would frustrate rather than facilitate the purposes of the Act. Where the deceased's property has not actually been distributed to the respective beneficiaries or to an independent trustee, we think that property in the hands of the personal representative either in that capacity or as trustee should be available to permit upward variation of an existing order and to satisfy a late application.[105]

Making a late application or an application for upward variation only binding upon that portion of the deceased's property not actually distributed to the beneficiaries would differentiate between testamentary trusts and outright dispositions. That is, testamentary trusts would be part of the property available for distribution whereas outright dispositions would be protected. We have concerns with a test which would insulate beneficiaries of outright distributions from an award. In light of these concerns, we considered whether it would be possible to provide that no late application or variation may be made

(1) after the property has indefeasibly vested in interest in the beneficiary, where the will creates a trust; or

(2) after the property has vested in possession in the beneficiary, where the will creates a trust.

We have concluded that both these approaches would give rise to more difficulties than either solved. We concur with the following comments of the Alberta Institute:

> We would not like to see family relief applications giving rise to the problem of determining whether property has or has not

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[105] This same approach has been advocated by the Institute of Law Research and Reform, *supra* n. 1, at 84.

> indefeasibly vested in interest in the beneficiary. The Law Reform Commission of New South Wales has admitted that the distinction raises fine points of law. It would undoubtedly give rise to a considerable amount of litigation. Subject to the uncertainties of litigation, the adoption of the distinction in connection with both late applications and applications to vary would mean that once a gift has vested indefeasibly in interest, even though possession is postponed, for example, during the lifetime of the surviving spouse, the beneficiary knows with certainty that either he or his estate will benefit. This certainty, in our opinion, is obtained only be [sic] introducing considerable complexity and only by substantially reducing the protection which the statute can provide to dependants of the testator.[106]

In permitting late applications or granting an upward variation, it must be conceded that there are conflicting interests to be balanced. On the one hand, beneficiaries want to know that the testamentary provision made for them by the deceased will not be adversely affected by an order under the Act after the lapse of the limitation period; on the other hand, there is the interest of society in ensuring that deserving dependants of the deceased have reasonable provision for maintenance and support.[107] In recommending that a late application or variation may be permitted provided the personal representative has not actually distributed the property to a beneficiary or transferred it to an independent trustee, we have favoured the interests of a dependant.

To balance the interests of the beneficiary, we propose that the court should only be permitted to allow an application which is out of time in limited circumstances.[108] At present, the court's discretion to extend the

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[106] *Supra* n. 1, at 92.

[107] *Supra* n. 1, at 89.

[108] The limited discretion to permit time-barred applications would not apply in circumstances where one applicant has commenced an action in time. Other applicants may join in the action even after the six month limitation period has expired. *See "The Testators Family Maintenance Act"*, C.C.S.M. c. T50, s. 16.

six month limitation period is unfettered. In our estimation, the court should have the jurisdiction to extend the limitation period only where it is satisfied that

(a) the dependant did not know or had no reason to know of the occurrence of the death of the deceased until after the lapse of the limitation period;

(b) the dependant's need for maintenance and support did not arise until after the lapse of the limitation period; or

(c) there were circumstances substantially beyond the dependant's control which prevented the dependant from commencing the application within the limitation period.

We think that this approach would strike a reasonable balance between the interests of dependants and those of beneficiaries under the will.

We do not suggest any specific measures with respect to upward variation, as a distinction may be drawn between upward variation and late applications. In the case of a variation, beneficiaries have been placed on notice by the initial order that their interest may be called upon in the future because of the power of variation.

There are two further points worth noting. First, it should be remembered that the court has power to exonerate or relieve portions of the estate from the incidence of any order. On a time-barred application, where there are assets remaining in a number of testamentary trusts, it may be appropriate to relieve the share of a deserving beneficiary under a particular trust. Second, the court, in determining whether and in what manner it should exercise its discretionary power, would consider the competing claims which any other beneficiary has upon the estate. Depending upon the facts and circumstances of the particular case, it may well be that no award should be made or the quantum of an award reduced in light of the competing claims. Accordingly, we recommend:

RECOMMENDATION 19

That section 15 of the Act be repealed and a section comparable to the following be substituted therefor:

15(1) In this section, "limitation period" means that period of time which is no later than six months after the grant of probate or the issuance of letters of administration.

(2) Subject to subsection (3), no application for an order under section 3 may be brought after the expiry of the limitation period.

(3) The court may allow an application to be brought at any time as to any portion of the estate remaining undistributed at the date of the application where it is satisfied that:

(a) the dependant did not know or had no reason to know of the occurrence of the death of the deceased until after the lapse of the limitation period;

(b) the dependant's need for maintenance and support did not arise until after the lapse of the limitation period; or

(c) there were circumstances substantially beyond the dependant's control which prevented the dependant from commencing the application within the limitation period.

J. CONTRACTING OUT OF *"THE TESTATORS FAMILY MAINTENANCE ACT"*

"The Testators Family Maintenance Act" does not contain any express provision in regard to contracting out of the statute. However, the courts have held that a person may not, by contract, preclude himself/herself from claiming benefits under the Act. The Act protects a public interest by ensuring that dependants who should be maintained out of the deceased's estate are not maintained at public expense.

This same public interest would appear to be protected under subsection 7(3) of *"The Family Maintenance Act"* which permits the court to make an order for maintenance under that Act where the spouse has become a public charge or a person in need of public assistance, notwithstanding that the spouse had earlier released the other from liability for support or had agreed to accept specified periodic amounts. Similarly, in divorce proceedings, the court will refuse to be bound by a separation agreement where to allow the agreement to stand would make a spouse a public charge.[109]

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[109] *Dragun* v. *Dragun* (1984), 32 Man. R. (2d) 71 at 77 (Q.B.).

In other jurisdictions, applicants are expressly permitted to waive rights under the pertinent dependants' relief Act. For example, in England, in proceedings for divorce, judicial separation, or nullity, the court is empowered, if the parties to the marriage agree, to bar future applications for family provision.[110] The release of rights under the New South Wales *Family Provision Act, 1982*, on the other hand, is not restricted to proceedings for dissolution of the marriage; though the power to contract out at any point during the marriage is strictly controlled. The release must be approved by the court and the court must have regard to whether the agreement was prudent, fair and reasonable, and whether the releasing party had obtained independent advice.[111]

In favour of this power to contract out, it may be argued that it provides an important means whereby parties can determine or finalize their affairs. In both England and New South Wales, the basis for recommending this power was that if parties to divorce or other matrimonial proceedings could enter into an agreement which, if sanctioned by the court, would effectively bar any claim to maintenance by one spouse while the other lives, it seemed anomalous to forbid parties from waiving the right to family provision on death. Such is not, however, the law in Manitoba.

We believe that there should be no power to bar the jurisdiction of the court under *"The Testators Family Maintenance Act"*. In our estimation, it would frustrate the object and purpose of the Act to hold a dependant to a covenant not to apply for reasonable provision for maintenance. The reasoning, from the judgment of Williams J. in *Liberman* v. *Morris*, seems apposite:

> The scope and policy of the Act, as indicated by the principal section, is, therefore, to empower the court in the public interest

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[110] *Inheritance (Provision for Family and Dependants) Act 1975*, c. 63, s. 15 (U.K.). It would appear, however, that prior to or during the subsistence of the marriage, parties would not have the power by contract to oust the jurisdiction of the court under the *Inheritance (Provision for Family and Dependants) Act 1975*.

[111] *Family Provision Act, 1982*, No. 160, s. 31 (N.S.W.).

> to control for an important purpose the distribution of a testator's estate. It is clear to my mind that to allow contracting out would prevent or tend to prevent the Act assuring to the dependants of a testator that full and effective benefit which it expressly states to be its purpose.[112]

The Commission is of the view that *"The Testators Family Maintenance Act"* should set out the present law - that an order may be made notwithstanding any agreement or waiver to the contrary.[113]

This does not mean that a fair and well-considered agreement between the parties is to be disregarded. To the contrary, we think that an agreement is an important guidepost and ought to be given considerable weight in determining whether the dependant has adequate provision.[114] In a proper case, the court may refuse to make an order. Accordingly, we recommend:

RECOMMENDATION 20

That the Act provide that the court may make an order under the Act notwithstanding any agreement or waiver to the contrary.

RECOMMENDATION 21

That in determining whether to grant an application, the court consider whether any agreement has been entered into between the deceased and the dependant to the effect that the Act does not apply, or that any benefit or remedy provided by the Act is not available.

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[112][1944] 69 C.L.R. 69 at 92 (Aust. H.C.).

[113]This is also the approach adopted under section 17 of the *Uniform Dependants' Relief Act*, though we do not suggest that the wording of section 17 be followed as it provides that the agreement itself is invalid.

[114]*See*, for example, *Boulanger* v. *Singh* (1984), 18 E.T.R. 1 at 8 (B.C.C.A.); *Re Dyer* (1984), 18 E.T.R. 44 (Ont. Surr. Ct.).

K. CONFLICT OF LAWS

Difficulties may arise when a testator leaves assets in different jurisdictions in which there are various statutory provisions and rules of law which may or may not permit the dependants of a testator to apply for maintenance. *"The Testators Family Maintenance Act"* does not provide any conflict of laws rules regarding the application of dependants' relief legislation. A problem of characterization of the legislation arises, for one cannot discover what private international law rules are applicable without classifying the legislation in question. The prevailing view would seem to be that dependants relief legislation is to be characterized as a limitation on the testator's disposing power, that is to say, as pertaining to succession.

The general rules of conflict of laws are that succession to movables is governed by the last domicile of the deceased, and that succession to immovables is governed by the *lex rei sitae*. Specifically, the jurisdictional principles on which *"The Testators Family Maintenance Act"* operates may be stated as follows:

(1) The courts of the testator's domicile alone can exercise discretionary power under the statute of the forum to affect the deceased's assets within the place of domicile, whether movable or immovable.

(2) The same courts of the testator's domicile alone can exercise discretionary power under the statute of the forum to affect movables outside the place of domicile.

(3) The courts of the situs alone can exercise discretionary power to affect immovables outside the place of domicile, and then only if there is dependants' relief legislation in the situs providing for it.

In all cases, the domicile or residence of the dependant is irrelevant.

1. An Extended Jurisdiction For Movables

The Commission has considered whether or not the court's jurisdiction should be extended to movables of the deceased which are situated in Manitoba in regard to a person domiciled outside Manitoba. Specifically, the Commission has examined whether the situs of movables in Manitoba should

confer jurisdiction on a Manitoba court where there is a dependant habitually resident in Manitoba, and the law of the deceased's domicile does not provide for an order for maintenance to be made out of the estate.[115] This was the general approach recommended by the Alberta Institute of Law Research and Reform in its report and we have drawn heavily on their recommendations.[116]

At the outset, we should point out that we did not consider this extended jurisdiction in response to widespread difficulties with the Act's present application. Rather, we started from the premise that the provisions of *"The Testators Family Maintenance Act"* were both reasonable and necessary to assure adequate provision for dependants of the deceased. The Commission is of the view that this extended jurisdiction would be most beneficial to a dependant resident in the province where the deceased leaves movable property in the province but died domiciled in a jurisdiction which lacks any comparable legislation to *"The Testators Family Maintenance Act"*.[117]

While this extended jurisdiction would alter the general rule of conflict of laws that succession to movables is governed by the law of the deceased's domicile, it might be characterized as a rather modest change in light of the approach adopted in South Australia and New South Wales. Both of these jurisdictions allow the court to make an order affecting the personal property of the deceased which is situated in their respective jurisdictions, irrespective of the deceased's domicile or place of residence of the

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[115]In Manitoba, under *"The Domicile and Habitual Residence Act"*, C.C.S.M. c. D96, ss. 8(1), 8(2), the domicile and habitual residence of each person is in the state and a subdivision thereof in which that person's principal home is situated and in which that person intends to reside. Unless a contrary intention is shown, a person is presumed to intend to reside indefinitely in the state and subdivision thereof in which that person's principal home is situated.

[116]*Supra* n. 1, at 136 *et seq*.

[117]This proposed extended jurisdiction is limited to *movables* in Manitoba as the situs alone of immovables in Manitoba already confers jurisdiction on the Manitoba courts under general conflict of law rules.

dependant.[118] The Law Reform Commission of New South Wales observed that the court should not be closed to a person with a moral claim to property which is within the jurisdiction of the court merely because the applicant does not live within that jurisdiction.[119]

The Commission is not persuaded that movables in the state alone should confer jurisdiction upon a Manitoba court without regard to the place of residence of the dependant. We concur with the following comments of the Alberta Institute of Law Research and Reform:

> The New South Wales Commission seems to justify this position on the basis that a dependant has a moral claim to such property. We, however, have subscribed generally to the proposition that what The Family Relief Act should do is to transfer the legal support obligations which existed during the lifetime of the deceased to his estate. If by the law of the deceased's domicile, no provision is made to transfer the lifetime support obligations over to his estate on his death, we do not believe that the situs of movables is a sufficient basis to create rights in favour of a dependant no matter where he is resident. A majority of our Board, however, believes that where a person is resident in Alberta and there are movables situated in Alberta of a deceased who died domiciled outside Alberta, Alberta has a legitimate legislative interest in making that person a dependant, assuming that the person would have been a dependant had the deceased died domiciled in Alberta.[120]

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[118] *Inheritance (Family Provision) Act*, 1972-75, s. 7(1)(a)(S.A.) gives the court jurisdiction where the deceased was either domiciled in South Australia or owned real or personal property in that state, regardless of domicile. *Family Provision Act, 1982, No. 160*, s. 11(1)(b)(N.S.W.).

[119] *Supra* n. 95 at 39.

[120] *Supra* n. 1, at 144. An auxiliary reason identified for this legislative interest was that a person resident in Alberta should not become a charge on the public purse if the deceased had property out of which an award under *The Family Relief Act* might be made, regardless of where the deceased died domiciled.

In order to avoid any possibility of conflicting orders in relation to movables, we think that the extended jurisdiction should be limited to those cases in which the law of the deceased's domicile lacks any comparable legislation.[121] By comparable legislation to *"The Testators Family Maintenance Act"* we mean legislation wherein a court or judge is empowered to make an order for maintenance out of the deceased's estate in favour of a dependant.[122] Without such a limitation, it would mean that two different courts would have power to make an order affecting the movable property. What if orders respecting the movable property were made in favour of different dependants? Whose order would prevail? In addition, it might mean that the issue of support for a dependant could be litigated first in the jurisdiction in which the deceased died domiciled and subsequently relitigated in Manitoba.

Like the Alberta Institute, we acknowledge that this approach would not always provide relief for a person who would be characterized as a dependant according to our *"Testators Family Maintenance Act"*. For example, while the law of the deceased's domicile may have legislation comparable to the *Family Relief Act*, a dependant under Manitoba's statute may not be defined as such under the law of the deceased's domicile. In addition, the court of the deceased's domicile may decline to make an order in favour of the dependant or make an order which is substantially less than would have been made under *"The Testators Family Maintenance Act"*. Nonetheless, the Commission is in agreement with the Alberta Institute's conclusion that the rule of the conflict of laws that succession to movables is governed by the law of the domicile at death should mean that deference is paid to the succession law of the deceased's domicile in relation to movables.

To summarize, we recommend the incorporation of a specific conflict of laws section in *"The Testators Family Maintenance Act"*. The existing

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[121] It is assumed that an order by the court of the deceased's domicile in regard to movables situated in Manitoba would be recognized in Manitoba. *See*, for example, *Senkiw* v. *Muzyka* (1969), 4 D.L.R. (3d) 708 (Sask. C.A.); aff'd (1970), 12 D.L.R. (3d) 544 (S.C.C.).

[122] It is not intended that reasonable advances by the personal representative to persons who are beneficiaries under the will and which are

(Footnote continued to page 105)

conflict of laws rules which have been developed would continue subject to the proposed extended jurisdiction in favour of a dependant habitually resident in Manitoba in regard to movables situated in the province.

RECOMMENDATION 22

That the Act provide that a dependant, whether habitually resident in Manitoba or elsewhere, may make an application in regard to

(i) an interest in land situated in Manitoba; or

(ii) an interest in movables, no matter where such property is situated, if the deceased died domiciled in Manitoba.

RECOMMENDATION 23

That the Act provide that where

(i) the deceased died domiciled outside Manitoba; and

(ii) the law of the domicile of the deceased has no provision for any person to apply to a court for an order for maintenance (other than an order empowering the personal representative to make advances to a beneficiary during the administration of an estate);

a dependant habitually resident in Manitoba at the time of the death of the deceased may bring an application in regard to any interest in movables situated in Manitoba at the time of the death of the deceased.

2. Immovables in Manitoba

At present, where a testator dies domiciled in one jurisdiction leaving property in the jurisdiction of his domicile and immovables in another, it may be necessary to make application under the family provision legislation of at least two jurisdictions. This arises from the conflict of law rules which state that jurisdiction over immovables is exercisable only by

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(Footnote continued from page 104)
made during the period of administration would constitute comparable legislation.

the *lex situs*. We are not here concerned with conflicting orders in regard to one estate but rather with the same dependant or competing dependants commencing two applications. Dual applications may, for example, become necessary where there is insufficient property, over which the court of the deceased's domicile has jurisdiction, for a proper grant of maintenance to be made in favour of a dependant.

It has been suggested that this presents a number of problems. For example, it is argued that it is difficult for the courts of the two jurisdictions to assess the amount of family provision which should be ordered, or to pay proper regard to the interests of all the beneficiaries of the estate of the deceased.[123] This problem of the lack of integration of orders was one of the reasons which led The Law Commission (England) to advocate that a condition precedent to jurisdiction should continue to be that the deceased died domiciled in the jurisdiction.[124] We do not recommend that *"The Testators Family Maintenance Act"* contain any provision making relief conditional on the domicile of the testator within the jurisdiction, as a serious gap or void in the scope of the Act would be created.[125] This void would arise where a deceased died domiciled outside of Manitoba owning immovables in Manitoba: if the Manitoba court did not take jurisdicton under *"The Testators Family Maintenance Act"*, no other court would have the power to make an order affecting the immovables. Such cases might be of comparatively frequent occurrence and the inability of the Manitoba courts to grant maintenance in such cases, in our estimation, would be a defect of some importance.

It remains to consider whether any attempt should be made to alleviate some of the problems which may arise where there is more than one application in different jurisdictions for a maintenance order in regard to a single estate. The Alberta Institute proposed that:

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[123]*Supra* n. 20, at 66.

[124]*Supra* n. 20, at 65-67.

[125]*See generally* J.H.C. Morris, "The Choice of Law Clause in Statutes" (1946), 62 L.Q.R. 178.

> . . . [Where] a deceased did not die domiciled in Alberta but owned an interest in land in Alberta, a judge should be able to adjourn an application until a similar application made by a dependant in the jurisdiction in which the deceased died domiciled has been concluded.[126]

This approach would permit the court to assess more effectively whether an order should be granted by postponing a decision until any application made in the domicile of the deceased has been concluded. For example, once it is clear that adequate provision has already been made by the court in the deceased's domicile for the maintenance of an applicant, it is unlikely that the courts in Manitoba would grant further maintenance. While it should be recognized that no totally satisfactory solution is available as long as there is more than one law of succession applicable to a deceased's estate, the proposal of the Alberta Institute would appear to alleviate some of the problems identified. We therefore recommend its adoption.

RECOMMENDATION 24

That the Act provide that where

(i) a deceased died domiciled outside Manitoba leaving an interest in land situated in Manitoba; and

(ii) an application under the Act is brought in Manitoba;

the court in Manitoba may stay the application pending the conclusion of a similar proceeding in the jurisdiction in which the deceased died domiciled.

In conflict of laws, Canadian courts have generally adopted the civil law distinction between movables and immovables rather than the historical and technical distinction between realty and personalty at common law in ascertaining the legal system which governs the merits of the case. It should be noted that realty is not synonymous with immovables or personalty with movables. Under Part II, Conflict of Laws, of *"The Wills Act"*, both an

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[126] *Supra* n. 1, at 151.

"interest in land" and an "interest in movables" are defined.[127] We recommend that phrases be similarly drafted in *"The Testators Family Maintenance Act"*. We recommend:

RECOMMENDATION 25

That an interest in land be defined to include a leasehold estate as well as a freehold estate in land, and any other estate or interest in land, whether the estate or interest is real property or personal property.

RECOMMENDATION 26

That an interest in movables be defined to include an interest in tangible or intangible things other than land; and include personal property other than an estate or interest in land.

L. ANTI-AVOIDANCE PROTECTION

It is generally accepted that the disposal of property before death and the creation of will substitute arrangements[128] pass the property which is the subject matter of the transfer outside the probate or administrative process. Hence, only the property remaining in the hands of the deceased's personal representative would be available to make an award under *"The Testators Family Maintenance Act"*. A person may avoid *"The Testators Family Maintenance Act"* merely by disposing of his/her property during life or adopting some other qualified form of transfer.

The problem of avoidance was identified in our *Report on An Examination of "The Dower Act"*. The lack of any protective measures was characterized as a fundamental defect in the dower legislation. We discussed at length the arguments, both on policy and detail, which prompted the suggested reform. Anti-avoidance measures were proposed for the deferred sharing regime on death in order to provide consistent treatment to a spouse in a pre- and post-death allocation of property. There are some anti-avoidance provisions in place under *"The Marital Property Act"* which

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[127] *"The Wills Act"*, C.C.S.M. c. W150, ss. 39(a), 39(b).

[128] A will substitute is a device short of an outright disposition wherein a substantial degree of control over, or interest in, the property is retained by a person during his/her life but the assets do not form part of the person's estate at death. One example might be a revocable trust in which the spouse retains a power of encroachment.

may be invoked in an accounting during the parties' joint lives. It was the Commission's view that it would be most anomalous if a spouse were permitted to defeat an accounting on death but not an allocation during the spouse's joint lives.

To this end, we set forth a comprehensive anti-avoidance scheme which was designed to operate, both in an accounting on death and during the spouses' joint lives, so as to ensure that one spouse could not deprive the other of an equitable distribution of marital property. Generally stated, we proposed that four activities or types of conduct could be examined by the court, namely:

(a) dissipation of an asset;
(b) an unreasonably large disposition;
(c) defined will substitute arrangements; and
(d) a contract to leave property by way of will.

Further, it was recommended that third parties, who were the recipients of such transfers or devices, could be called upon to contribute in specifically defined circumstances.

We have considered whether further anti-avoidance measures should be developed under *"The Testators Family Maintenance Act"* so as to preclude a person from divesting himself/herself of property prior to death. Specifically, anti-avoidance protection under *"The Testators Family Maintenance Act"* would be of greatest value to dependants other than the surviving spouse. For the reasons which follow, the Commission has concluded that *"The Testators Family Maintenance Act"* should not be buttressed by anti-avoidance measures.

Such a scheme might have much to commend it if it could be made to operate effectively and to produce a result which, on balance, was workable, just and certain. In the end, however, we fear that any scheme we might devise could not be framed to fulfil these criteria. Such a scheme would, of necessity, have to be exceedingly complex and could give rise to more difficulties than it solved. For example, what if a dependant (under *"The Testators Family Maintenance Act"*) and the surviving spouse under a deferred

sharing regime both seek to include the same impugned transfer as part of the estate and both could look to the third party for recovery? Such questions are not easily resolved.

Nor do we think anti-avoidance measures are necessary under *"The Testators Family Maintenance Act"*, if our proposals under a deferred sharing regime were adopted. The number of Canadian cases on evasion is not large and it may fairly be said that any mischief is not widespread. In the majority of cases on avoidance, it would appear that the deceased was attempting to avoid a claim by the surviving spouse for maintenance and support, not claims by other dependants.[129] While it is true that persons other than the surviving spouse may be eligible applicants under *"The Testators Family Maintenance Act"* who, in theory, would benefit if *"The Testators Family Maintenance Act"* were buttressed by anti-avoidance measures, in practice, this is not where the principal mischief has occurred. Moreover, even where there has been a depletion of the deceased's estate, eligible children of the deceased may look to the surviving spouse for support who ordinarily would be under a legal obligation to maintain them.

If there is to be effective protection, we believe this can best be achieved through the operation of a deferred sharing regime on death. We, therefore, make no general recommendation that *"The Testators Family Maintenance Act"* be buttressed by anti-avoidance provisions.

1. Contracts to Leave Property By Will

It remains to consider the one anti-avoidance measure already in place under *"The Testators Family Maintenance Act"*, namely, contracts to leave property by will. A contract to leave property by will contemplates a promise by a person to a promisee that the person will leave a legacy or a

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[129] *See*, for example, *Re Moores and Hughes* (1981), 136 D.L.R. (3d) 516 (Ont. H.C.J.); *Dower* v. *Public Trustee* (1962), 38 W.W.R. 129 (Alta. S.C.); *Collier* v. *Yonkers* (1967), 61 W.W.R. 761 (Alta. S.C., App. Div.); *Re Young Estate*, [1955] O.W.N. 789 (C.A.).

devise either to the promisee or a designated third party. The person usually retains full use of and enjoyment of the property which is the subject matter of the contract during his/her lifetime. In return for the promise, the person often obtains material support or personal services from the promisee.

Section 18 of *"The Testators Family Maintenance Act"* provides as follows:[130]

> Exemption of property bequeathed under contract.
>
> 18 Where a testator, in his lifetime, bona fide and for valuable consideration, has entered into a contract to devise and bequeath any property, real or personal, and has by his will devised or bequeathed that property in accordance with the provisions of the contract, that property is not liable to the provisions of an order

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[130]The origin of this provision is found in section 15 of the *Uniform Dependants' Relief Act. supra* n. 15. This section would appear to be a legislative response to the case of *Dillon* v. *The Public Trustee of New Zealand*, [1941] A.C. 294 (P.C.). There the Privy Council held that the property devised or bequeathed pursuant to a contract entered into *inter vivos* for valuable consideration may be employed to satisfy an order for dependants. The rights of the promisee were characterized as those of an ordinary beneficiary under a will and hence, were subject to the same disabilities.

This decision has been the object of adverse comment. *See, for example,* D.N. Gordon, "Conflict Between Limitations on Testamentary Power by Statute and Contract" (1941), 19 Can. Bar Rev. 603; Laidlaw J.'s dissent in *Olin* v. *Perrin*, [1946] O.R. 54 at 65 (C.A.).

The majority of the Privy Council, however, declined to follow the *Dillon* case in *Schaefer* v. *Schuhmann*, *supra* n. 60. Lord Simon of Glaisdale dissented. The Privy Council found that the promisee under an enforceable contract to leave property by will has rights which exist independently of the will and so is not simply a legatee. Accordingly, the property under the contract is not subject to claims by dependants under family provision legislation.

This judicial conflict would appear to stem from differing views as to how the person named in both the contract and the will is to be classified; one view perceives him as a beneficiary of the deceased, the other as a creditor of the estate.

made under this Act except to the extent that the value of the property in the opinion of the judge exceeds the consideration received by the testator therefor.

We examined this legislative provision in our earlier Report and identified a number of shortcomings in the legislation. These may be highlighted as follows:

(a) Property which was the subject matter of a contract should not be liable to an order if there are sufficient other assets in the estate to satisfy a claim.

(b) Contribution from the promisee should not be permitted when (s)he is not privy to an intent on the part of the deceased to evade a claim.

(c) Section 18 does not specify what redress is available if the deceased breached the contract by failing to make a will in accordance with the agreement.[131]

We concluded that if the policy behind the balancing claim under a deferred sharing regime were to be given full weight, the anti-avoidance scheme must contain some legislative provision permitting the review of contracts to leave property by will. The present requirement that the value of the property exceed the consideration received by the testator was retained, though a number of factors were set forth to assist the court in assessing the adequacy of the consideration furnished.[132] To address the above deficiencies, we recommended:

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[131]It has been suggested that a promisee, under this section, would be better off if the testator failed to comply with the agreement. That is to say, the promisee would, in this case, rank as a creditor of the estate and as *such would take in priority to any dependants relief order even if the* promisee's consideration were inadequate. *See Schaefer v. Schuhmann, supra* n. 60.

[132]The Commission was mindful that there may be some rather difficult evaluation problems confronted when reviewing the consideration provided by the promisee. *Supra* n. 82, at 154.

(1) that property should only be subject to an order if there were insufficient other assets in the estate to meet a balancing claim;

(2) that both an intention to defeat the rights of the other spouse and the promisee's actual or constructive notice of this intent should be established;

(3) that whether or not the deceased complied with the agreement, the promisee's right to receive property or recover damages (in an amount which was not less than the consideration (s)he had furnished) should be preserved.

These same measures would, in our view, improve the operation of section 18 and strike a fairer balance between the competing equities of a contractual promisee and dependants under *"The Testators Family Maintenance Act"*. We therefore recommend their adoption. We do not envisage any difficulty integrating this one anti-avoidance provision in place under the Act with the scheme proposed for a deferred sharing regime for the following reasons. First, in both instances it is proposed that the third party's liability to contribute should be no more than the extent to which the consideration furnished was inadequate. Second, in the case of competing claimants (a dependant under *"The Testators Family Maintenance Act"* and a surviving spouse under a deferred sharing regime), priority would be accorded to the surviving spouse under a deferred sharing regime in light of the recommendations contained in our earlier Report. Accordingly we recommend:

RECOMMENDATION 27

That subject to recommendation 28, where a person has entered into an enforceable contract to devise property by will, the court may order that the rights of the promisee to the contract, whether or not the person complied with the agreement, be subject to an order under the Act provided the court is satisfied that:

(1) the value of the property exceeds the value of the consideration received by the person in money or money's worth;

(2) the person entered into the contract with the intention of removing property from his/her estate in order to reduce or defeat a claim under the Act;

(3) the promisee to the contract had actual or constructive notice of this intent; and

(4) there would be insufficient assets in the estate to make reasonable provision for the maintenance and support for a dependant after the transfer of the property which the deceased agreed to leave by will.

RECOMMENDATION 28

That in exercising its power in relation to a contract to leave property by will, the court ensure that any order will not deprive the promisee of the right to receive property or to recover damages for the breach of the contract in an amount which is at least equal to the value of the consideration received by the deceased in money or money's worth.

RECOMMENDATION 29

That in determining whether the value of the property exceeds the value of the consideration received by the deceased and in what manner to exercise its powers, the court should have regard to:

(a) the value of the property and the value of the consideration at the date of the contract;

(b) the reasonable expectations of the parties as to the life expectancy of the deceased at the date of the contract;

(c) if the property was not ascertained at the date of the contract, the reasonable expectations of the parties as to its likely nature and extent; and

(d) if the consideration was a promise, the reasonable expectations of the parties as to that which would be delivered under the promise.

M. FACTORS TO BE CONSIDERED IN THE EXERCISE OF DISCRETIONARY POWER

The Commission has considered whether the legislation should set forth guidelines for the court to consider in exercising discretionary power. Guidelines would, in a sense, be the heart of the jurisdiction because it is they which would assist the court in coming to decisions in particular cases. Apart from the reference to the "character or conduct" of the dependant and the direction that the court may consider evidence of the deceased's reasons,

"The Testators Family Maintenance Act" gives the court little aid as to what it should take into account when exercising its power.

In practice, the discretionary power of the court is virtually unfettered; the court may consider all matters which it deems should fairly be taken into account. While we are in general agreement with the need for this unfettered discretion, the Commission has concluded that there would be merit in setting forth a list of guidelines that would not purport to be exhaustive but would assist the court in regard to an application. We have observed that both the Ontario and English Acts set forth comprehensive guidelines, though neither list is intended as exclusive of the matters to which the court may have regard.[133] In both jurisdictions it has been customary for the courts to consider them *seriatim*.

Most of the factors we recommend that a court should have regard to are self-explanatory and have been considered and developed by courts in earlier case law. Some of the factors we suggest are similar to those to be accounted for in determining an application by the dependant for financial provision during the deceased's life. The four factors set forth in paragraphs (g), (k), (l) and (n) have been specifically set forth in earlier recommendations.

We do not think that specific statutory direction is required in relation to the conduct which may disentitle an applicant. While the concept of conduct is a vague and general one, this does not seem to have caused any difficulty. We appreciate that a broad spectrum of acts by the applicant, which may imply poor character or conduct, should not disentitle the applicant from eligibility for an award. In our view, the conduct of the applicant in relation to the deceased is a question of fact best left to the court. We therefore make no recommendation for specific statutory direction, apart from that already set out in subsection 3(3) of the present Act.

Some of the guidelines we recommend would apply to all applicants generally, while others would apply only to particular categories of

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[133] *Succession Law Reform Act*, R.S.O. 1980, c. 488, s. 62; *Inheritance (Provision for Family and Dependants) Act 1975*, c.63, s.3 (U.K.).

applicants. We reiterate that these guidelines should simply be a checklist to assist the court in determining whether an applicant has reasonable provision and, if not, in determining what provision to order. Accordingly, we recommend:

RECOMMENDATION 30

That in determining whether a dependant has reasonable provision for maintenance and support, and what provisions the order should contain and, in particular, in determining what is reasonable for the purposes of the order, the court consider all the circumstances of the application, including:

(a) the size and nature of the estate of the deceased;

(b) the assets and financial resources which the dependant has or is likely to have in the foreseeable future;

(c) the measures available for a dependant to become financially independent and the length of time and cost involved to enable the dependant to take such measures;

(d) the age and the physical and mental health of the dependant;

(e) the capacity of the dependant to provide for his/her own support;

(f) the needs of the dependant, having regard to the dependant's accustomed or prior standard of living;

(g) where the dependant is a spouse, any distribution or division of property which the dependant has received or is entitled to receive under "The Dower Act" or "The Marital Property Act";

(h) the assets which the dependant is entitled to receive from the estate of the deceased otherwise than by an order under "The Testators Family Maintenance Act";

(i) the claims which any other dependant or any other person has upon the estate;

(j) any provision which the deceased while living has made for the dependant and for any other dependants;

(k) any agreement between the deceased and the dependant;

(l) the financial responsibility assumed by a government for a mentally or physically disabled dependant;

(m) where the dependant is a child, his/her aptitude for and reasonable prospects of obtaining an education;

(n) where the dependant is a child to whom the deceased stood in loco parentis, the liability of any other person to maintain the child and whether that person has discharged that responsibility.

N. THE CROWN AND *"THE TESTATORS FAMILY MAINTENANCE ACT"*

Under the present law, the Crown is not bound by the provisions of *"The Testators Family Maintenance Act"*. Accordingly, it is possible that the deceased might die intestate without next-of-kin and the estate would escheat to the Crown in right of Manitoba even though there is a dependant under the Act. For example, the deceased may die intestate and be survived solely by a child to whom the deceased stood in *loco parentis* or by a former spouse who has a subsisting maintenance order in his/her favour against the deceased. To prevent the possibility of the Crown taking as the ultimate heir where the deceased is survived by a dependant, we propose that there should be a separate section which provides that the Crown is bound by the *"The Testators Family Maintenance Act"*. This is the approach adopted under section 22 of the *Uniform Dependants' Relief Act*. Accordingly, we recommend:

RECOMMENDATION 31

That the Crown be bound by "The Testators Family Maintenance Act".

O. TRANSITIONAL PROVISION

As the proposed recommendations would confer eligibility on persons who presently do not have a right to apply for relief out of the estate of a deceased person, the Commission is of the view that the recommendations should

apply only to estates of persons who die after the coming into force of the legislation implementing these recommendations. Accordingly, we recommend:

RECOMMENDATION 32

That the proposed amendments to the Act apply to estates of persons who die on or after the date the amendments come into force.

CHAPTER 5

SUMMARY OF RECOMMENDATIONS

1. That subsection 3(1) of *"The Testators Family Maintenance Act"* (hereinafter referred to as the Act) be repealed and the following subsection be substituted therefor:

   > Where it appears to the court that a dependant does not have reasonable provision for maintenance and support either from the estate of the deceased or otherwise, the court, on application by or on behalf of the dependant, may order that reasonable provision be made out of the estate of the deceased for the maintenance and support of the dependant. (p. 55)

2. That there be an objects and purpose clause at the beginning of the Act to clarify that its purpose is to transfer the legal support obligation owed by a deceased during life to the estate of the deceased where a dependant is without reasonable provision for maintenance and support. (pp. 55-56)

3. That the Act be amended to permit a person to apply as a dependant whose marriage to the deceased was terminated by a decree absolute of divorce and in whose favour an order or agreement for maintenance and support was subsisting immediately prior to the deceased's death. (p. 61)

4. That subject to recommendation 5, *"The Family Maintenance Act"* be amended to provide that in nullity proceedings, whether the marriage is void or voidable, the court have the power to award maintenance and support to either spouse in accordance with the criteria set out in subsection 5(1) of *"The Family Maintenance Act"* as far as they are relevant to the circumstances of the particular case. (p. 63)

5. That in the case of a party to a void marriage who knew or had reason to believe when the marriage was solemnized that it was void, that party should not be entitled to any award of maintenance under *"The Family Maintenance Act"*. (pp. 63-64)

6. That the Act be amended to permit the following persons to apply as a dependant:

   (1) a person, whose marriage to the deceased has been annulled, and in whose favour an order or agreement for maintenance and support was subsisting immediately prior to the deceased's death; and

   (2) a person whose marriage to the deceased was void, provided (s)he did not know or had no reason to believe that the marriage was void when it was solemnized. (pp. 64-65)

7. That the Act be amended to permit a child of the deceased to apply as a dependant where that child is under the age of 18 at the time of the deceased's death. (p. 70)

8. That the Act be amended to permit a child of the deceased to apply as a dependant where the child is under the age of 23 at the time of the deceased's death and has not completed his/her education, technical or vocational training. (p. 70)

9. That the Act be amended to permit a child of the deceased to apply as a dependant when the child is 18 years of age or over at the time of the deceased's death and unable by reason of illness or disability to earn a reasonable livelihood. (p. 80)

10. That at the hearing of an application under *"The Testators Family Maintenance Act"*, the judge consider the financial responsibility assumed by a government for a mentally or physically disabled dependant. (p. 80)

11. That the Act be amended to permit a child to whom the deceased stood *in loco parentis* to apply as a dependant, but not a child placed in a foster home for compensation by a person having lawful custody. (p. 82)

12. That at the hearing of an application by a child to whom the deceased stood *in loco parentis*, the judge consider the liability of any other person to maintain the child and whether that person has discharged that responsibility. (p. 82)

13. That the Act be amended to permit a parent of the deceased to apply as a dependant where, immediately prior to the date of the death of the deceased, the parent was dependent upon the deceased for maintenance and support. (p. 84)

14. That in determining whether a dependant has reasonable provision for maintenance and support, the judge consider the circumstances as they exist at the date of the hearing of the application. (p. 88)

15. That where an application is made under *"The Testators Family Maintenance Act"* and it appears to the court

    (i) that the dependant is in immediate need of financial assistance, but it is not yet possible to determine what order (if any) should be made; and

    (ii) property forming part of the estate of the deceased is or can be made available to meet the need of the applicant;

    the court have the power to make such interim order as it considers appropriate. (p. 91)

16. That the application for interim support may be heard upon service of the deceased's personal representative, with leave of the court, or on such terms as the court may see fit. (p. 91)

17. That where an application is made on behalf of a dependant, the court should not make any order under the Act unless it is satisfied that all persons who are or may be interested in or affected by the order have been served with notice of the application as provided by the rules of court, and every such person should be entitled to be present and to be heard in person or by counsel at the hearing. (p. 92)

18. That paragraph 7(c) of the Act be repealed and a paragraph comparable to the following be substituted therefor:

> That where an order has been made under the Act, the court at any subsequent date may discharge, or vary up or down, or suspend the order, or make such order as the judge deems fit in the circumstances but specified property transferred absolutely to a dependant or a lump sum ordered to be paid directly to a dependant may not be varied. (p. 94)

19. That section 15 of the Act be repealed and a section comparable to the following be substituted therefor:

> 15(1) In this section, "limitation period" means that period of time which is no later than six months after the grant of probate or the issuance of letters of administration.
>
> (2) Subject to subsection (3), no application for an order under section 3 may be brought after the expiry of the limitation period.
>
> (3) The court may allow an application to be brought at any time as to any portion of the estate remaining undistributed at the date of the application where it is satisfied that:
>
> (a) the dependant did not know or had no reason to know of the occurrence of the death of the deceased until after the lapse of the limitation period;
>
> (b) the dependant's need for maintenance and support did not arise until after the lapse of the limitation period; or
>
> (c) there were circumstances substantially beyond the dependant's control which prevented the dependant from commencing the application within the limitation period. (pp. 97-98)

20. That the Act provide that the court may make an order under the Act notwithstanding any agreement or waiver to the contrary. (p. 100)

21. That in determining whether to grant an application, the court consider whether any agreement has been entered into between the deceased and the dependant to the effect that the Act does not apply, or that any benefit or remedy provided by the Act is not available. (p. 100)

22. That the Act provide that a dependant, whether habitually resident in Manitoba or elsewhere, may make an application in regard to

    (i) an interest in land situated in Manitoba; or

    (ii) an interest in movables, no matter where such property is situated, if the deceased died domiciled in Manitoba. (p. 105)

23. That the Act provide that where

    (i) the deceased died domiciled outside Manitoba; and

    (ii) the law of the domicile of the deceased has no provision for any person to apply to a court for an order for maintenance (other than an order empowering the personal representative to make advances to a beneficiary during the administration of an estate);

    a dependant habitually resident in Manitoba at the time of the death of the deceased may bring an application in regard to any interest in movables situated in Manitoba at the time of the death of the deceased. (p. 105)

24. That the Act provide that where

    (i) a deceased died domiciled outside Manitoba leaving an interest in land situated in Manitoba; and

    (ii) an application under the Act is brought in Manitoba;

    the court in Manitoba may stay the application pending the conclusion of a similar proceeding in the jurisdiction in which the deceased died domiciled. (p. 107)

25. That an interest in land be defined to include a leasehold estate as well as a freehold estate in land, and any other estate or interest in land, whether the estate or interest is real property or personal property. (p. 108)

26. That an interest in movables be defined to include an interest in tangible or intangible things other than land; and include personal property other than an estate or interest in land. (p. 108)

27. That subject to recommendation 28, where a person has entered into an enforceable contract to devise property by will, the court may order that the rights of the promisee to the contract, whether or not the person complied with the agreement, be subject to an order under the Act provided the court is satisfied that:

    (1) the value of the property exceeds the value of the consideration received by the person in money or money's worth;

    (2) the person entered into the contract with the intention of removing property from his/her estate in order to reduce or defeat a claim under the Act;

    (3) the promisee to the contract had actual or constructive notice of this intent; and

    (4) there would be insufficient assets in the estate to make reasonable provision for the maintenance and support for a dependant after the transfer of the property which the deceased agreed to leave by will. (113-114)

28. That in exercising its power in relation to a contract to leave property by will, the court ensure that any order will not deprive the promisee of the right to receive property or to recover damages for the breach of the contract in an amount which is at least equal to the value of the consideration received by the deceased in money or money's worth. (p. 114)

29. That in determining whether the value of the property exceeds the value of the consideration received by the deceased and in what manner to exercise its powers, the court should have regard to:

    (a) the value of the property and the value of the consideration at the date of the contract;

    (b) the reasonable expectations of the parties as to the life expectancy of the deceased at the date of the contract;

    (c) if the property was not ascertained at the date of the contract, the reasonable expectations of the parties as to its likely nature and extent; and

    (d) if the consideration was a promise, the reasonable expectations of the parties as to that which would be delivered under the promise. (p. 114)

30. That in determining whether a dependant has reasonable provision for maintenance and support, and what provisions the order should contain and, in particular, in determining what is reasonable for the purposes of the order, the court consider all the circumstances of the application, including:

(a) the size and nature of the estate of the deceased;

(b) the assets and financial resources which the dependant has or is likely to have in the foreseeable future;

(c) the measures available for a dependant to become financially independent and the length of time and cost involved to enable the dependant to take such measures;

(d) the age and the physical and mental health of the dependant;

(e) the capacity of the dependant to provide for his/her own support;

(f) the needs of the dependant, having regard to the dependant's accustomed or prior standard of living;

(g) where the dependant is a spouse, any distribution or division of property which the dependant has received or is entitled to receive under *"The Dower Act"* or *"The Marital Property Act"*;

(h) the assets which the dependant is entitled to receive from the estate of the deceased otherwise than by an order under *"The Testators Family Maintenance Act"*;

(i) the claims which any other dependant or any other person has upon the estate;

(j) any provision which the deceased while living has made for the dependant and for any other dependants;

(k) any agreement between the deceased and the dependant;

(l) the financial responsibility assumed by a government for a mentally or physically disabled dependant;

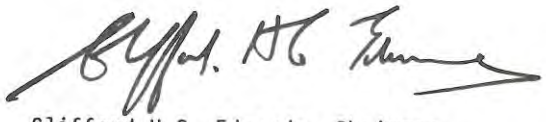
(m) where the dependant is a child, his/her aptitude for and reasonable prospects of obtaining an education;

(n) where the dependant is a child to whom the deceased stood *in loco parentis*, the liability of any other person to maintain the child and whether that person has discharged that responsibility. (pp. 116-117)

31. That the Crown be bound by *"The Testators Family Maintenance Act"*. (p. 117)

32. That the proposed amendments to the Act apply to estates of persons who die on or after the date the amendments come into force. (p. 118)

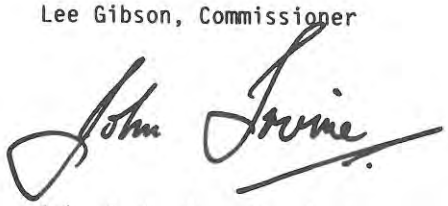
This is a Report pursuant to subsection 5(2) of *"The Law Reform Commission Act"*, signed this 16th day of December 1985.



Clifford H.C. Edwards, Chairman

Knox B. Foster, Commissioner

Lee Gibson, Commissioner



John J. Irvine, Commissioner

Gerald O. Jewers, Commissioner