TOWARD A NEW WILLS VARIATION ACT

by

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ABSTRACT

Most common law and civil law jurisdictions have laws in place to provide a safety net so that those who are unfairly disinherited will be able to claim a share in a deceased's estate. Since 1920, British Columbia has been one of those jurisdictions in which a testator's distribution scheme may be varied at the discretion of the Court. However, the absence of a stated purpose of the legislation, a broad judicial discretion to determine what is adequate provision for a spouse and children and the failure of the Supreme Court of Canada in Tataryn v. Tataryn to bring certainty and predictability to the law point to a need for reform.

The goal of this thesis is to complete the sentence "the purpose of legislation restricting testamentary freedom is . . . " and to make recommendations for legislative change to accomplish this purpose. An overview of the law in British Columbia today and the arguments for reform will be outlined in chapters 1, 2 and 3. Chapters 4 through 8 will examine a number of topics to extract policies which might assist in the formulation of a dependant's relief statute's purpose. Historical concepts, family, intestacy and wrongful death legislation as expressions of values will be reviewed. From the doctrine of unjust enrichment, a cause of action independent of a statute, a contract or a tort, but now widely used in claims between family members, will be extracted principles which recognize compensation for the contribution of services and money between family members. Empirical studies about testators' intentions, family and other private relations will be noted in chapter 9. Lastly, chapter 10 will make a number of recommendations for reform. These include:

(a) A statement of the statute's purpose. Persons who have lived together in a relationship of some permanence with financial and emotional interdependence should share equally the assets acquired during their time together and the survivor's need for support should be recognized. Children's support needs should also be met but the testamentary autonomy of persons should be subject only to these two objectives.
(b) The broadening of categories of claimants to include cohabitants and stepchildren with the introduction of age and dependency criteria for the latter.

(c) Criteria to be used in making reasonable financial provision for spouses and children.

(d) A priorities scheme.

(e) The right to waive the statutory rights by agreement.

No attempt is made to provide recommendations for all of the issues that would arise under a new statute.
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DEDICATION

To my wife, Dolores, and my children, Erinn and Quinn,

for their patience, love and support.
CHAPTER 1
INTRODUCTION

The gratuitous transfer of property between generations merits review. Property is something of value, an asset which can be bought, sold or given away. Gratuitous transfers of property are those which are not by way of sale or exchange. During a property owner's lifetime, they occur by gift. On his or her death they take place under the terms of a will or in the manner prescribed in intestacy legislation. American studies indicate that perhaps as much as 80% of household wealth in the United States is derived from inheritance.\(^1\) Canadian data suggests that in the next fifteen years there will be a transfer of $1,000,000,000,000 between generations.\(^2\)

The analysis which follows presupposes a private property regime in which property is owned by individuals. This contrasts with the collective ownership of property which can be used to achieve automatic succession to property. If private property is recognized, there must be some mechanism to deal with what is to happen to an individual's property on his or her death. A number of mechanisms are theoretically available. The property could be buried with the deceased. Ownership could lapse at death and could pass to the person who was first able to take possession of the property. The government could confiscate it entirely, as it partially does now by the use of estate and other taxes. This analysis presupposes the property owner will have some power of disposition on death.

The legal system regulates the passing of property on death in a number of ways. The intestate inheritance rules in each jurisdiction govern the succession to real and personal property when the owner dies without a will by establishing a single set of rules for all intestates. Doctrines such as co-ownership with the survivorship on death feature; contractual arrangements with designated beneficiaries; inter vivos trusts; and pension legislation with designated beneficiaries operate with prior planning to pass a substantial portion of a deceased's assets to others. Taxation statutes which grant preferential tax treatment to transfers to family members impact on the choice
of transferees. The law of wills, subject to any dependant's relief legislation, fixed share, or other restrictions on testamentary autonomy, allows individuals to select asset distribution schemes.

This paper will examine the question: What policies should form the basis for a statute which regulates the freedom of a testator to choose his or her asset distribution scheme? During a person's lifetime, although subject in some jurisdictions to family law legislation and insolvency legislation, there are no restrictions on the transfer of assets. What restrictions ought the law to place on an owner's power of disposition by will in order to protect the family and perhaps others? Situations have arisen and do arise where people have attempted to disinherit those who would otherwise be deserving of a share of their wealth. Most common law and civil law jurisdictions have laws in place to provide a safety net so that those who are unfairly disinherited will be able to protect their interest in the deceased's estate.

British Columbia has been one of those jurisdictions since 1920. While the legislation has not changed since 1920, its interpretation by individual judges at any given time has varied and the overall direction of the law has changed over time. An unsuccessful claimant 25 years ago might well be a successful claimant today. Speaking for the Supreme Court of Canada in 1994, Madam Justice McLachlin said in Tataryn v. Tataryn:

This case requires us to consider the principles to be applied to the British Columbia Wills Variation Act, R.S.B.C. 1979, c. 435 . . . The law is unsettled as to precisely what consideration should govern a court faced with an application . . . The language of the Wills Variation Act is very broad. The Court must determine whether the testator has made "adequate provision" for his spouse and children. If it concludes he or she has not, the Court "may, in its discretion . . . order . . . the provision that it thinks adequate, just and equitable in the circumstances . . ."

The words "adequate, just and equitable" may be interpreted in different ways. At one end of the spectrum, they may be confined to what is "necessary" to keep the dependants off welfare rolls. At the other extreme, they may be interpreted as requiring the Court to make an award consistent with the lifestyle and aspirations of the dependants. Again, they may be interpreted as confined to
maintenance or they may be interpreted as capable of extending to fair property division. Complicating these questions are the issues of the weight to be placed on the "right" of the testator to dispose of his estate as he chooses - ie, testamentary autonomy - and the equities as between the beneficiaries: spouses, and children. Different courts, applying a variety of approaches to these questions have, over time, arrived at different interpretations of the meaning of "adequate, just and equitable." 

The present Wills Variation Act (the "Act") does not state its purpose. Seventy-four years after its enactment it was left to a court to again attempt to describe the objective of the statute. This paper will argue that while the Supreme Court of Canada set out to clarify "the principles to be applied" and defined the yardsticks to determine what is "adequate, just and equitable," the law is still sufficiently unsettled that legislative reform is required.

Fundamental to legislative reform is a discussion of the purposes to be served by the law governing property transfers by will. English authors have noted "[i]nheritance is not only about passing property down the generations. It is also - importantly - now about marriage and the financial responsibilities of spouses to each other." 

If one could complete the sentence: "The purpose of legislation restricting testamentary freedom is . . . ," careful drafting of a statute would eliminate most difficulties which have arisen under the current legislation.

To reach some conclusions as to the recommended purpose of the legislation and other changes which should be incorporated under any new statute, this paper will begin with a review of the law up to the decision of Tataryn in 1994 as a means of illustrating the combined impact of a failure by the legislature to specify the statute's purpose and the granting of a broad judicial discretion to determine awards. Tataryn and the two and one-half years of decisions which have followed it will be analyzed to determine whether, in fact, it accomplished its stated objective of settling the law in British Columbia. It is concluded that it did not. The need for reform will then be argued. The failure of Tataryn to settle the law, the arguments of the 1983 minority report of
the British Columbia Law Reform Commission, the failure to examine the basis of the moral
obligation to a spouse and child, the lack of criteria to quantify a claim, and the according of too
little priority to testamentary autonomy will be advanced as reasons for reform.

To determine the basis on which a testamentary asset distribution scheme might be
judicially varied, other asset distribution and recovery schemes will be examined. First, a short
review of a number of historical concepts will be undertaken. Secondly, some relevant family
legislation and its judicial interpretation will be reviewed to determine what is said about marriage,
the roles of spouses and parents and how these are reflected in the property division and
maintenance which arises from a marriage breakdown. Thirdly, intestacy legislation, "the will
made by the Legislature for the intestate," will be discussed in search for policies which might be
reflected in dependant's relief legislation. In many jurisdictions, dependant's relief legislation
applies on intestacies as well, allowing the statutory distribution scheme to be varied. While there
are good arguments to extend the British Columbia legislation to intestacies, this paper will not
examine that issue. Fourthly, because a deceased person, just like a living person, might have at
his or her death "the money of or some benefit derived from another which it is against conscience
he should keep," principles underlying the doctrine of unjust enrichment will be set out. Mr.
Justice Dickson in Rawluk v. Rawluk said of the application of unjust enrichment and its remedy of
constructive trust in relation to family law:

The application of the remedy . . . can achieve a fair and just result.
It enables the courts to bring that treasured and essential measure of
individualized justice and fairness to the more generalized process
of equalization provided by the (family law) Act.5

The applicability of this statement to dependant's relief legislation will be examined.

Fifthly, wrongful death legislation, with its objective of economic quantification of the
effect of the loss of a person's life on another, provides insights into the question of provable
financial losses flowing from death. Lastly, some empirical data and conclusions about testator’s intentions, family and other private relations will be noted.

Recommendations for reform will then be made. New categories of claimants should be created, the rights of adult independent children to apply for a variation of a will should be eliminated and the testamentary freedom of the deceased should be reaffirmed. The rights of spouses and children under family law legislation and other doctrines should be integrated into their rights under the dependant’s relief legislation. Recommendations, however, will be limited to those addressing the purpose of the legislation and ones incidental to achieving those purposes.

There will always be a need to address the tension between a testator’s testamentary freedom and certain social principles. Any proposals for reform can only attempt to balance the needs of all. The possibility of balancing competing obligations will be greatly enhanced if there is a full discussion of the principles involved.

**Terminology**

The term "testator" will for simplicity be used to describe both men and women who die with a will.

References to the "Act" will be, unless there is further explanation, references to the *Wills Variation Act*, R.S.B.C. 1979, c. 435.

The term "maintenance" or the term "support" will be used to describe financial assistance to provide for the necessaries and amenities of life.
END NOTES


5. Rawluk v. Rawluk 1990 1 S.C.R. 70 [hereinafter "Rawluk"] at 97 - 98 (S.C.C.)
CHAPTER 2
THE LAW IN BRITISH COLUMBIA 1996

The Law to 1994

The present *Wills Variation Act* does not state its purpose. L. Amighetti in his text traces the history of the British Columbia legislation. He notes that New Zealand was the first common law jurisdiction to introduce legislation to restrict testamentary freedom in 1896. This bill adopted the civil law regime of a fixed share for a wife and children. "The unarticulated rationale for opposing the bill was that the testator would always know best how to leave his estate, and to impose some inflexible rule might do injustice." After several unsuccessful attempts, the Testator's Family Maintenance Bill was introduced in 1900 and the principle behind the bill was stated to be as follows:

[T]he principle of the Bill is twofold: First of all, that the testator shall do justice to those dependent upon him - his nearest relatives, wife and children - and also that those persons should not, through the testator leaving his property away from them, be left perhaps a burden upon the State.

On October 9, 1900, the New Zealand *Testator's Family Maintenance Act*, 1900, was passed and contained the following words in section 2:

Should any person die, leaving a will, and without making therein adequate provision for the proper maintenance and support of his or her wife, husband or children, the Court may at its discretion, on application by or on behalf of the said wife, husband, or children, order that such provision as to the said Court shall seem fit shall be made out of the estate of the said deceased person for such wife, husband or children: Provided that the Court may attach such conditions to the order made as it shall think fit, or may refuse to make an order in favour of any person whose character or conduct is such as in the opinion of the Court to disentitle him or her to the benefit of an order under this section.
In British Columbia "the events leading to the introduction of the Bill (which became British Columbia's Testator's Family Maintenance Act) ... are not well documented by any official source" and Mr. Amighetti states:

While there is little concrete evidence of the intentions of the legislature in passing the Act, it is clear that passage was the result of lobbying of women's organizations and the sympathetic views of the then Attorney General.

It is unfortunate that there is no legislative comment either endorsing or rejecting the thesis put forward by the New Zealand Parliament that the burden of maintaining spouse and children should fall upon the estate of the deceased rather than upon the state. It can be assumed that the motivations were identical. However, there is no clear and unequivocal enunciation of the philosophy behind the Act. 4

It will be noted later that dower and curtesy existed in British Columbia until 1925, five years after the Testator's Family Maintenance Act in British Columbia was passed on April 17, 1920. By this time, however, "[n]o widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime, or by his will," and other sections of the Dower Act further restricted the widow's dower rights.5 Effectively, the widow only had a one-third interest in land as to which her husband died intestate. Freedom of testation over personal and real property was otherwise complete. Spouses and children, although given rights under intestacy legislation, were not protected in the event the deceased organized his or her financial affairs by the execution of a will. Based on the degree of testamentary freedom in 1920, there could well have been cause for concern by close family members, and the community generally, that spouses and children could be disinherited and the burden of maintaining them would fall upon the state. Madam Justice McLachlin does not agree that the purpose of the legislation was so restricted. She wrote in Tataryn v. Tataryn:

Nor can I agree that the history of the Act suggests that the only reason for its passage was to prevent persons becoming a charge on the state. While the Act certainly was intended to serve this minimum function, there is nothing to suggest that the women's
groups who lobbied for it or the legislators who adopted it intended it to be confined to cases of need.\(^6\)

The charging section of *An Act to secure Adequate Provision for the Maintenance of the Wife and Children of a Testator* read as follows:

3. Notwithstanding the provisions of any law or Statute to the contrary, if any person (hereinafter called the "testator") dies leaving a will and without making therein, in the opinion of the Judge before whom the application is made, adequate provision for the proper maintenance and support of the testator's wife, husband, or children, the Court may, at its discretion, on the application by or on behalf of the said wife, or of the said husband, or of a child or children, order that such provision as the Court thinks adequate, just, and equitable in the circumstances shall be made out of the estate of the testator for such wife, husband or children.\(^7\)

The references to "a lump sum or a periodical or other payment"\(^8\) and "where the court has ordered periodic payment or has ordered a lump sum to be invested . . . it shall have the power to inquire whether at any subsequent date the party benefitted by its order has become possessed of or entitled to provisions for his proper maintenance and support . . . and may discharge, vary or suspend its order"\(^9\) further support the view that "proper maintenance and support" was the statute's objective.

The early case law proceeded on this basis. Mr. Livingston divided his $14,000 estate between his wife and seven children of a former marriage. His wife (a good and faithful companion to him during his declining years) applied for proper maintenance and support.\(^10\) Mr. Justice MacDonald referred to the New Zealand legislation and the earlier New Zealand case of *Allardice v. Allardice* and stated:

It was pointed out, that the intention of such Act was not to interfere with the will of the testator, to the extent of apportioning his estate, but that 'the first inquiry in every case must be, what is the need of maintenance and support, and the second, what property has the testator left?'

After commenting that the "testator was neglectful of the duty that he owed to his wife, and divided the property irrespective of the necessaries that should have been prevalent in his mind," the court
formulated "a plan which will provide maintenance for the widow according to her station in life" and awarded the widow a life interest in the income and on her death the residue should go to the children. An early Court of Appeal decision, Brighten v. Smith, shows the uncertainty created by a provision which allows a broad judicial discretion without specifying the purpose of the legislation or criteria to be used in exercising the discretion. Charles Smith gave his wife $10, household furniture valued at $250, and the balance of his $8,603 estate to a nephew. The trial judge gave the entire estate to the wife. On appeal, the court was divided three to two and the trial judge's decision was upheld. The majority noted the absence of a record of the trial proceedings and refused to interfere with the trial judge's exercise of his discretion to award a "lump sum" because on the evidence (which was not before the Court of Appeal), this might well "prevent(ing) her becoming a charge upon the country." The two dissenting justices disagreed, stating "The object of the legislation is maintenance, not gift" and "it is really an order transferring the whole estate from the beneficiaries named in the will, to the wife; something which in my view was not contemplated by the Legislature."

Four years later, four of the five judges who participated in the decision in varying Charles Smith's will heard an appeal by Mrs. McDermott from a trial decision which had awarded approximately 25% of her husband's estate to his only daughter of a first marriage. Three of the four judges allowed the appeal concluding that the daughter was "not in straitened circumstances" (ie. there was no need for maintenance) and the statute had as a prerequisite that requirement. It was also noted "that in most cases the widow should be regarded as having a higher claim than any other dependant and the wife had made a substantial contribution to a hotel, the major asset of the estate." At this point the "maintenance" and "need" of an applicant was paramount. On further appeal of the case, the majority of the Supreme Court of Canada held otherwise, stating:

What constitutes "proper maintenance and support" is a question to be determined with reference to a variety of circumstances. It cannot be limited to the bare necessities of existence. For the purpose of arriving at a conclusion, the court on whom devolves the responsibility of giving effect to the statute, would naturally proceed
from the point of view of the judicious father or a family seeking to discharge both his marital and his parental duty; and would of course (looking at the matter from that point of view), consider the situation of the child, wife or husband, and the standard of living to which, having regard to this and the other circumstances, reference ought to be had. If the court comes to the decision that adequate provision has not been made, then the court must consider what provision would be not only adequate but just and equitable also; and in exercising its judgment upon this, the pecuniary magnitude of the estate, and the situation of others having claims upon the testator, must be taken into account. 16

The testator, no doubt, felt himself under great obligations to his wife, and justly so. But I can see nothing in all this to lead to the conclusion that the testator, if properly alive to his responsibilities, as father no less than as husband, ought to have felt himself under an obligation to hand over all his estate to his wife and leave his only child without provision. 17

Nowhere in either the majority’s judgment or Mr. Justice Rinfret’s dissent is there reference to the testamentary freedom of the deceased. Mr. Justice Rinfret dissented on the basis that the need was not established and to attach weight to negative contingencies which might affect the daughter’s future financial position would mean a child could never be excluded. 18 As Madam Justice McLachlin stated in Tataryn "[t]his court rejected the needs maintenance approach in Walker v. McDermott." Mr. Amighetti notes that after Walker v. McDermott "two distinct lines of cases developed: those making "need" a condition precedent to an award and those interpreting the Act more in terms of ethics than economics." 19

Forty-five years after Walker v. McDermott the conflict between the two distinct lines of cases was still unresolved. The trial judge in Lukie et al. v. Helgason and Lukie had varied the will of a testator with a modest estate of $40,000 in favour of two children who were independent, had no close relationship with the deceased and who could demonstrate no financial need. The Court of Appeal allowed an appeal and the two children received nothing. After referring to the two-step process, Mr. Justice Taggart stated with reference to Walker:
In my opinion in determining whether a petitioner is entitled to relief, no question of equity arises. It does arise when one considers the second aspect of the problem, viz., the scope of the relief to be granted to the petitioner who is found entitled thereto.  

Speaking further of the word "need," the justice said:

When I use the word 'need' I must, of course, relate it to the statute and particularly to the words of Duff, C.J. in Walker v. McDermott, already cited. The need of which I speak is (and I make here use of phrases from Walker v. McDermott), one for proper maintenance and support, not limited to the bare necessities of existence and having in view the situation of the petitioners and the standard of living to which, having regard to this and other circumstances, reference ought to be had.

A review of the foregoing authorities and others to which we were referred leads me to the conclusion that in order to succeed it is not necessary for the respondents to show that they are in necessitous circumstances. Rather they must bring themselves within the principles enunciated by Duff J. in Walker v. McDermott.

The court concluded that even this expanded definition of "need" -- that is, something beyond "bare necessities" was not met by the claimants in the case and allowed the appeal, disinheriting the two children. While this decision could be interpreted to re-emphasize the importance of "need," six years later the Court of Appeal varied a will in which the testator had left an entire estate of $270,000 to his widow, excluding two children of a first marriage, which will had been upheld by the trial judge. These two children had been well educated at the expense of the testator and one at least had no financial problems. On the basis that there was unequal treatment of the four children and the increase of the size of the deceased's estate since the will was executed, the court exercised its discretion and gave $75,000 to the less well off of the two children and $50,000 to the other. The requirement of need, however defined, again received less emphasis.
In *Price v. Lypchuk*, the Court of Appeal unanimously concluded that the failure of a testator to meet his moral duties to adult children will justify intervention by the court. The majority concluded on the facts of the case that there was no moral duty owed, but Mr. Justice Esson in dissent held the moral duty did exist. Moral duty remained a basis for a variation and this was confirmed in *Tataryn v. Tataryn*.

Before turning to that case, it is interesting to look at the interpretation placed on similar words used in the Queensland legislation in 1962. A son had had no contact with his father and the Court said "[i]n truth there is the bare fact of paternity and no other mutual relation: the case depends upon that fact and basically nothing else except all the arguments of right and wrong that may be concluded to spring from that source . . . ." In considering the meaning of the words "proper maintenance and support," the court stated "[a]lthough they must be treated as elastic, (they) cannot be pressed beyond their fair meaning." Only if there is a "special need or special claim" that can be shown by an adult child, will the prima facie presumption that an adult son is able to maintain and support himself be displaced and intervention by the court warranted. The court refused to find there was a duty (and in the circumstances, it could only have been a moral duty) of a parent to the adult child and reversed a trial court's decision rewarding the son a one-quarter interest in the estate. Other courts have concluded there is nothing in the language itself which requires the introduction of the concept of a broad moral duty owed by a parent to an adult child as has been done in the British Columbia cases. Judges in British Columbia, in the absence of a stated purpose for the legislation, have developed different interpretations of it. Furthermore, the Court of Appeal has interpreted its powers under section 15 of the Act very broadly. In *Price v. Lypchuk* the Court of Appeal repeated what the Supreme Court of Canada had said in *Swain v. Dennison* about section 17 (now section 15) of the Act which reads "[a] person who considers himself prejudicially affected by an order of the Court may appeal to the Court of Appeal." The Court of Appeal must "defer to the trial judge on any question that depends on an assessment of oral testimony. And, for the sake of quieting litigation, we ought not to tinker" but the Court has a "duty to review the circumstances and reach its own conclusion as to the discretion properly to be
exercised."  

This has greatly increased the likelihood that trial judges will be overruled and that different benches of the Court of Appeal might reach different results on the same set of facts.

**Tataryn v. Tataryn 1994**

In *Tataryn v. Tataryn*, an appeal from the British Columbia Court of Appeal, Madam Justice McLachlin, speaking for all the members of the Supreme Court of Canada, stated "[t]he law is unsettled as to precisely what consideration should govern a court faced with an application under this section." She then set out to clarify the principles applicable to the interpretation of section 2(1) of the Act. The context in which this was done was Mrs. Tataryn's and her son's claim that her husband and his father, after a marriage of 43 years during which the husband and wife had amassed an estate valued at $315,000, did not make adequate provision for them in his will. Because of a dislike for John, one of his two sons, Mr. Tataryn left his wife a life estate in all the estate (but a rental home) with a power to encroach on the capital. The rental house and the gift over of the residence at his wife's death was to go to the other son, Edward. His reasoning was explained in the will. It appeared he wanted his wife to be well cared for but did not leave the assets to her outright because he feared she would pass some or all of them onto John. The Supreme Court of Canada unanimously awarded $10,000 to each son immediately, ownership of the matrimonial home, a life interest in the rental property and the residue of the estate to Mrs. Tataryn. On her death the rental property was to be divided one-third to John and two-thirds to Edward.

The court noted the language of section 2(1) is very broad. The reference to "adequate provision" and "the provision that it (the Court) thinks adequate, just and equitable in the circumstances" are not two different tests but "two sides of the same coin." The court acknowledged that the words were capable of different interpretations ranging from maintenance and what was necessary to keep claimants off the welfare rolls to making "an award consistent with
the lifestyle and the aspirations of dependants" and property division. It conceded the interpretation of the statute had varied over time.

The generosity of the language suggest the legislature was attempting to craft a formula which would permit the Courts to make orders which are just in the specific circumstances and in light of contemporary standards...... Courts are not necessarily bound by the views and awards made in earlier times. The search is for contemporary justice. 

The court identified two interests which are protected by the Act. The first, and main interest, is "adequate, just and equitable provision for spouses and children of testators." This includes not only maintenance but an "adequate, just and equitable share of the family wealth." Secondly, testamentary autonomy is protected because the Act limits testamentary autonomy "only to the extent that this was necessary to provide (spouses and children) with what was 'adequate, just and equitable in the circumstances.'

The court specifically referred to the pre Walker v. McDermott needs-based analysis and rejected the argument made by L. Amighetti that results are "completely at the discretion of the presiding judge" and "his or her own perception of what is fair and right." Instead, the court concluded that much of the uncertainty would disappear if there was "some yardstick, be it need or some other, by which the courts might measure the terms 'adequate, just and equitable.'" In fact, trial courts had already unsuccessfully tried to apply intestacy rules and family law as guidelines. The "yardstick" to determine what in specific circumstances is "adequate, just and equitable" was then defined to be as follows:

1. The legal responsibilities of the testator during his or her lifetime. These will be found in the Divorce Act, family property legislation (such as the Family Relations Act), and the law of unjust enrichment.

2. The testator's moral duties towards spouse and children. "There being no clear legal standard by which to judge moral duties, these obligations are admittedly more susceptible
of being viewed differently by different people. " Madam Justice McLachlin concluded that there will not really be such a degree of uncertainty because society would agree what ought to be done in most circumstances. Of adult dependant children, she wrote:

... most people would agree an adult dependant child is entitled to such consideration as the size of the estate and the testator's other obligations may allow,

and, of independent children:

While moral claims ... may be more tenuous, a large body of case law exists suggesting that if the size of the estate permits and in the absence of circumstances which negate the existence of such obligations, some provision for such children should be made ....

As to the accuracy or usefulness of this statement, more will be said later.

If there are conflicting claims and the estate permits, all claims should be met. If it is necessary to set priorities, legal claims, including the moral claim which accompanies them, should take precedence over moral claims. A framework for balancing claims may be found in the scheme of the will.

Writing further, Madam Justice McLachlin said the application of these guidelines will create a range of options and "only where the testator has chosen an option which falls below his or her obligations as defined by reference to legal and moral norms, should the court make an order which achieves the justice the testator failed to achieve." No further reference to the importance of testamentary autonomy was made at this point despite the applicability of it in weighing the option chosen by the testator. The application of these guidelines to the circumstances of this case led to the conclusion:

1. Mrs. Tataryn must get at least what the Divorce Act and the Family Relations Act would give her.
2. Mrs. Tataryn has a moral claim to having independence from what the testator may see fit to give her through the use of the life estate and for sufficient funds for her "old age."

3. The moral claims of the two sons are not high.\textsuperscript{41}

Three comments on this result should be made:

1. The \textit{Divorce Act} and the \textit{Family Relations Act} alone would not have given Mrs. Tataryn the entire interest in the matrimonial home, $102,000.00 out of $122,000.00 of the cash and a life interest in the rental property (which may not have been a family asset). The Court acknowledges this in the statement "[t]he legal claims of Mrs. Tataryn entitle her to at least half the estate and arguably to additional maintenance."\textsuperscript{42}

2. A lengthy marriage is "a moral claim of a high order." A substantial dollar value was given to this moral claim.

3. The use of a life estate with an unlimited power to encroach on capital is too confining and "fails to recognize (a wife's) deserved and desirable independence, and contributes inadequate recognition of her moral claim."\textsuperscript{43} Given that the Court concedes there is a range of options available to a testator to meet his or her obligations and given the long standing conventional wisdom that a life estate with a power to encroach was a suitable device to accomplish a testator's objective of generosity to a spouse but with control over the residue, a strong case can be made that the life estate was within the range. If one attaches weight to testamentary autonomy and the usual practice of the courts of adhering to the general scheme of the will which was to be as generous to Mrs. Tataryn as was necessary while at the same time ensuring that a substantial part of the estate did not go to an adult independent child who Mr. Tataryn wished to disinherit, Mr. Tataryn's selection of a scheme was not outside "the range."

\textbf{The Law Since 1994}

Since Tataryn was decided in July, 1994; it, like \textit{Walker v. McDermott} before it, has become the basis for trial and appellate court decisions in British Columbia. As of January 15,
1997, Tataryn had been followed 19 times, explained seven times and mentioned 21 times. It was also cited in a dissenting opinion in an unjust enrichment case and distinguished only once on the basis that its facts involved a situation where there was a legal duty. A review of a number of the post Tataryn cases indicates the following:

1. The courts are following the approach set out in Tataryn. They look first to see if there is a legal obligation to the claimant, and then if there is a moral obligation. Legal obligations will take precedence over moral obligations.

2. In the case of adult children who are not dependent, moral obligations alone are a sufficient basis for successful claims.

3. If there is a competition between a child and a spouse, "an adult independent child is entitled to less consideration where the size of the estate if modest" (here, an $18,000 estate). A trial judge, referring to Price v. Lypchuk, said that while "the trend of the authorities is that testators will be found to be under a moral obligation not to disinherit any child," there are exceptions to that general rule where the estate is small, as here, and if there is no compelling reason for making provision for that child" (here a $58,000 estate). This reasoning was approved by the British Columbia Court of Appeal. It continued a long standing practice of treating small estates somewhat differently than large.

4. With the now mandated focus on moral duties, considerable attention has been paid to how to determine the extent of these moral duties. The following criteria have been noted:

   (a) The court may look to see what has passed to a claimant by operation of law and perhaps what has been transferred to the claimant by an inter vivos transaction. Either of these may operate to discharge all or part of a moral duty.

   (b) A testator who has distributed his or her estate equally, per stirpes, between independent adult children prima facie discharges his moral obligations but there is no obligation to treat all children equally.
(c) If there has been a failure to carry out parental obligations to a child at a time when the child was dependent on the parent, this will be sufficient in the future to conclude there is a breach of a moral duty to the adult child. This approach contrasts that of Mr. Justice Taggart in *Lukie* who said:

> However strongly one may deprecate the failure of the testator to maintain some parental ties with and provide support for the two respondents during their minorities, in my opinion past failure alone is an insufficient reason for granting the relief sought by the respondents.

and also that of Mr. Justice Carruthers who said:

> A will speaks from the death of a testator and so ought a provision imposed by the court under the statute to be in accordance with the particular circumstances of the case viewed into the future from the date of death of the testator. A testator is not bound to make amends by his will for past neglect in the performance of his parental obligations in the upbringing of his children or to have the courts do it for him.

It is also in contrast to the position of the English Court of Appeal in *In re Jennings decd* which shared this reasoning.

(d) The relative contributions of the beneficiaries assist in determining the moral obligations. A greater share of an estate may be justified for a plaintiff who "has provided a higher and more ongoing level of assistance and contribution to the testator and, indirectly, to her estate."

(e) When an adult child is in need and that need is not recognized by the testator, there is a breach of a moral obligation. A state scheme providing assistance to the claimant does not erase this moral obligation.

(f) The intent of the testator as expressed by the terms of the will or other written record will be used to determine if the moral obligation has been discharged, but
even if there are "rational and valid reasons" expressed by the testator, the court will still objectively determine the moral duty.\(^1\)

(g) The courts will continue to examine the testator's stated reasons for his or her distribution scheme and if it determines the reasons are wrong, those reasons will not justify the testator ignoring the moral duty which is owed.\(^2\)

5. When an estate is large enough the court will recognize both legal and moral obligations to a spouse and moral obligations to adult independent children.\(^3\)

_Tataryn_ purports to clarify the yardstick to be used in deciding what is adequate provision. With respect to a spouse's claim, it will and already has assisted courts to be able to use the family legislation and unjust enrichment law as a starting point. How the added "provision" which flows from the deceased's moral obligations to a spouse is to be quantified is not yet clear. While some criteria have been set out to measure the moral obligation that is owed to adult children, the courts are still responding on an individual basis to the fact patterns before them. Little has yet been said as to how a spouse's moral claim is to be quantified. In _Tataryn_ a considerable value was placed on the moral claim, undoubtedly influenced by the 43 year marriage. In _Boulanger v. Singh_, the British Columbia Court of Appeal, in considering the claim of a separated spouse who had signed a separation agreement relinquishing claims to her husband's estate, gave a value of $50,000.00 to a "slight moral claim."\(^4\) Clearly judicial discretion will continue to result in a wide range of awards for this moral obligation. Despite the reference in _Tataryn_ to the continued importance of testamentary autonomy, this is rarely mentioned as a factor by trial courts. More emphasis has been placed on testamentary autonomy by a Court of Appeal decision in 1995 and another in 1996. A testator who "had given careful thought to the terms of his will" had his testamentary autonomy upheld.\(^5\) An adult independent child was unsuccessful in varying his father's will from which he was excluded because the father concluded the son had chosen to "abandon the family and live a life morally unacceptable to us."\(^6\) The general scheme of the will, however, is still influential in determining who all the beneficiaries are to be and the general relationship of one beneficiary to another.
END NOTES


2. 113 New Zealand Parliamentary Debates (1890) at 614 [quoted in Amighetti supra note 1 at 10].

3. S.N.Z. 1900 No. 20.

4. Amighetti supra note 1 at 16.

5. An Act for the Consolidation and Amendment of the Law relating to Dower, R.S.B.C. 1897, c. 63, ss. 5, 8, 10; An Act Relating to Dower, R.S.B.C. 1924, c. 71, ss. 5, 8, 10.

6. Tataryn supra c. 1 note 3 at 819.


8. Ibid., s. 5.

9. Ibid., s. 15.

10. In Re Livingston (1922), 31 B.C.R. 468 (B.C.S.C.)

11. Ibid. at 469, 470, 471.


13. Ibid. at 524.


15. Ibid., at 199, 186.


17. Ibid. at 98.

18. Ibid. at 101.

19. Tataryn supra c. 1 note 3 at 816.

20. Amighetti supra note 1 at 37.


22. Ibid. at 23.

23. Ibid. at 25.


29  *Price supra* note 25 at 377 - 378.

30  *Tataryn supra* c. 1 note 3 at 813.


37  *Barker v. Westminster Trust Co.* (1941), 57 B.C.L.R. 21 (B.C.C.A.)


39  *Tataryn supra* c. 1 note 3 at 820 - 822.


46  *Ibid.* at 84.


Tweedale supra note 46 at 173.


Hammond supra note 47 at 35.

Higgins supra note 49 at 129, 130 (B.C.C.A.)


Vielbig supra note 45 at 85.

Hammond supra note 47 at 36.


Newstead supra note 47 at 248.

Lukie supra note 21 at 25 and at 28.


Hammond supra note 47 at 35.

Huang supra note 47 at 162.

Newstead supra note 47 at 250, 251, 255, 256.

Barnsley supra note 47 at 12, 13.

Hammond supra note 47 at 35.

Warwick supra note 46 at 131, 136.
Holland supra note 46 at 123, 124.

Huang supra note 47 at 160, 163.

Mann v. Mann, Vancouver Registry A942728, June 7, 1996 (B.C.S.C.)


Vielbig supra note 45 at 86.

CHAPTER 3

THE NEED FOR REFORM

There is need for reform. Firstly, although the legal obligations of the testator are now to be measured by the Divorce Act, the Family Relations Act, and the law of unjust enrichment, these areas of the law are themselves filled with uncertainty. It will be pointed out in Chapter 5 that the Divorce Act and the Family Relations Act do not create a rationale or contain a single philosophical basis for their provisions. While the partnership model of marriage finds support in court decisions, it has not been formally inserted in the legislation, nor has the legislation been amended to reflect such a model. In combination with the judicial discretionary powers in section 51, (the reapportionment power) the results of the application of the Family Relations Act can vary. As the British Columbia Law Reform Commission notes:

The criteria listed in section 51 are comprehensive, but so general that in practice they are not particularly helpful. The factors listed in section 51 do not operate separately and discretely. The boundaries between them blur. Attributing a particular decision to a particular factor is largely a dishonest exercise, since the factors in themselves do not justify the divisions that are arrived at. At best, they are labels that explain only vaguely the intuitive sense which operates to decide what is fair. The weight courts give to these various considerations appears to vary according to the views of individual judges on the significance of marriage and the impact of the Family Relations Act on entitlement to property.

For the Family Relations Act to work well, a consistent approach to determining entitlement to property must emerge, but this has not yet occurred. Some courts divide family property (including property owned before marriage) more or less equally after a short marriage. These courts view the Family Relations Act as providing that equal entitlement follows from the fact of marriage. Other courts divide family property unequally after a lengthy marriage. These courts view entitlement as depending upon proof of actual contributions to the acquisition of property.

The significance attached by the courts to the other factors listed in section 51 also varies, it would seem, in relation to the particular view held respecting marriage and the rationale for dividing property on its end.
These kinds of inconsistencies can only be corrected by more clearly defining both the philosophy underlying the *Family Relations Act* and the mechanics of division.  

No reform of that legislation is on the horizon. The Commission also said "[i]n British Columbia, the courts have a broad discretion to determine what property is divisible between the spouses, and how the property should be divided between them. This approach tends to invite litigation."[3]

The law of unjust enrichment is another area still filled with uncertainty, as Chapter 7 will illustrate. The doctrine is relatively recent. Its stated objective is to do justice between the parties. Its application, while governed by the elements of an enrichment, a corresponding deprivation and the absence of juristic reason, is still subject to public policy concerns. The selection of a remedy -- quantum meruit or constructive trust -- and the use of the value survived approach to valuation with respect to the latter, can cause considerable variations in the quantum of awards. Contribution has been seen to be a component of the doctrine of unjust enrichment and a basis to evaluate an independent adult's moral claim under the *Wills Variation Act*, but the British Columbia Court of Appeal has said *Wills Variation Act* principles have no application in unjust enrichment.  

This apparent contradiction needs to be addressed. In *Rawluk v. Rawluk* the Supreme Court of Canada held that the *Family Law Act*, 1986, did not replace the common law remedy of unjust enrichment. The latter "enables the courts to bring that treasured and essential measure of individualized justice and fairness to the more generalized process of equalization provided by the Act. That vital fairness is achieved by means of a constructive trust remedy and recognition of ownership."[5] This does nothing to create certainty. As Madam Justice McLachlin pointed out in her dissent in *Rawluk*:

Grafting the remedy of constructive trust onto this scheme would add uncertainty and promote litigation featuring detailed inquiries into how much each party contributed to the acquisition, preservation, maintenance and improvement of the property to the end of having the court declare a constructive trust in one of the parties.  

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[1]"Family Relations Act".
[2]"Rawluk v. Rawluk".
[3]"Wills Variation Act".
[4]"Rawluk v. Rawluk".
[5]"Rawluk v. Rawluk".
[6]"Rawluk v. Rawluk".
The results of Rawluk were discussed by the Ontario Law Reform Commission. It concluded that access to resulting and constructive trusts should be precluded in matters where the Family Law Act applies. Assuming for the moment that Rawluk is applicable in the case of the British Columbia Family Relations Act, the same problems exist in British Columbia. This matter is complicated further by British Columbia case law which holds that recovery under the doctrine of unjust enrichment is not to be "added" to what is otherwise recoverable under the Wills Variation Act.

While there is no question that making family law and unjust enrichment principles the basis for evaluating the deceased's legal obligations to a spouse or child is a considerable improvement over the pre Tataryn situation, the Tataryn guidelines do not create the certainty one would wish and testators require.

Secondly, there are the arguments of Arthur Close, Chairman of the British Columbia Law Reform Commission. Arthur Close disagreed with the majority of the Commission in its 1983 Report and urged reform of the Wills Variation Act. By 1983 the "moral obligations" basis for recovery under the Act was available and although his comments preceded Tataryn by more than 10 years, they are still valid:

1. The moral obligation approach leads to uncertainty. "Whether or not one person owes a moral obligation to another, and the extent and nature of that obligation is almost wholly a subjective matter. Given any particular fact situation, views may vary widely among judges, lawyers, potential testators and potential beneficiaries as to what, if any, moral obligation exists. On what basis is one view to be preferred to another?" The cases before and after Tataryn indicate the truth of that statement. For example, in Price v. Lypchuk Estate, Mr. Lypchuk left his entire estate of $81,000 to his two children of a 30 year happy second marriage which had ended only when his wife died. Mrs. Price, one of two children from Mr. Lypchuk's first marriage, applied to vary the will despite having had no contact with her father for 35 years. The trial judge concluded because the plaintiff and her sister were not responsible for the testator feeling rejected, the testator had not
discharged his parental duty and awarded the plaintiff an equal one-third share of the estate. The Court of Appeal allowed the appeal concluding "the moral duty imposed by the Act does not require a testator who has been rejected by a member of his family to ignore the rejection, nor does it require that all family members be treated equally." Mr. Justice Esson in dissent looked at the same lack of contact and held that it was not a factor which justified disinheritation. Of four judges who looked at the same facts, two thought there was no moral duty and two thought there was one. Since Tataryn, moral duty has been determined by looking into such matters as to what the claimant has received outside the will, whether there was a failure to carry out parental obligations by the testator and the financial circumstances of the claimants. All these factors are capable of subjective interpretation. The conclusions of a judge today may not be of assistance in predicting what a judge might do in the future, particularly in light of Madam Justice McLachlin's comment that "current societal norms" must be considered, the statute must be read "in light of modern values and expectations," and "Courts are not necessarily bound by the views and awards made in earlier times." Testators are being required to plan their affairs now but are subject to guidelines which are uncertain today and which may change as time passes.

2. The moral obligation approach creates unevenness. What is it in the training and experience of judges that makes them more competent than a testator to identify and weigh a testator's moral obligations? If moral obligation is the basis for an adult able-bodied child to recover, why are not other persons, for example de facto spouses, neighbours and friends, to whom there may be also be a moral obligation, included in the class of claimants? Why should an adult child who has no claim during a parent's lifetime be successful after the parent's death? On applications of adult children, particularly in cases with large estates, judges have been very disposed to being generous with a testator's money, but it is impossible to determine what reasoning is being used to reach a particular figure.
3. Widespread dissatisfaction is evident with the moral obligation approach. The Commission invited responses to its Working Paper and "[n]ot a single person who responded to our Working Paper expressed approval of the way in which the courts presently exercise their jurisdiction under the Wills Variation Act." 17

While it is only anecdotal, in more than 25 years of discussions with clients, with other lawyers and with the public at large through public legal education forums and radio programs, the writer has received numerous comments, all negative, about the present statute and case law.

Thirdly, no court, and certainly not the legislature, has examined how a testator comes to owe a moral obligation to a spouse and a child. In Walker, without any discussion, the Supreme Court of Canada states "the court on whom devolves the responsibility of giving effect to the statute, would naturally proceed from the point of view of the judicious father of a family seeking to discharge both his marital and his parental duty." 18 It will be noted in Chapter 4 that H. Maine concluded that the forced share of the civil system was not so much a response to a desire to provide financial security for family, but a way of ensuring the deceased's continued legal existence through his or her family. There has been a long standing concern to provide for a spouse, and one can see how a moral element could become attached to a spousal obligation not to disinherit. The same is not true for adult children. Of the moral duty to children, it was said in Lukie:

The use in several cases of the phrase "moral duty" is, I believe, intended to denote nothing more than the duty of a father (or mother) when making his will to take into account the situation of each of his children and, where adequate provision for the proper maintenance and support of a child does not exist, to make provision therefor. 19

and:

Furthermore, we must constantly bear in mind that any parental obligation or duty that may be found to survive the death of the testator and requiring to be discharged by an order under the statute, can only be economic in character. Generally speaking, the parental obligation or moral duty of a father towards his children inter vivos is to provide, commensurate with his means and
abilities, economic, social and psychological support, love, care, custody and upbringing, all of which diminish, in many cases to the point of extinction, as the children come of age and become independent. Except where the adult child is ill or disabled or otherwise dependent on parental support, this parental obligation and moral duty by effluxion of time loses its significance. Certainly with the death of the parent, all that can remain of that duty is economic in character, a bestowal of inanimate assets, a dispensation of the worldly wealth which the testator is not legally obliged to acquire and retain for others but which he just happens to have at his death. 20

Three distinct bases upon which the parental obligation or moral duty after death could be founded were noted to be:

1. In the case of the dependent adult child, "illness, disability, or ineptness in the child's part in fighting the battle of life."

2. An expectation arising from a continued dependence on the parent or a contribution to the parent's estate by the child.

3. A large enough estate that the rejected child could receive a share which would not materially affect others.

"Clearly the parental obligation or moral duty does not arise solely from the paternity of the applicant." 21 These reasons were repeated as recently as 1986 in Price v. Lypchuk 22 but seem to have been overlooked in the post Tataryn decisions.23

A recent English Court of Appeal decision dealt with a claim by an adult independent son, who the deceased father had not supported as a child, who had no contact with his father except in his very early years and who was left nothing of a £300,000 estate which instead went to charities. While the Court was very sympathetic to the son, it overruled the trial judge who had awarded a share of the estate to the son to whom the deceased had failed to honour his moral and financial obligations. The English legislation requires two questions to be answered:

(a) has reasonable financial provision been made for the applicant, and
(b) if not, what financial provision ought he or she to receive?

For a wife or husband it is to be "such financial provision as would be reasonable in all of the circumstances whether or not it is required for his or her maintenance." For a child it is limited to what is "reasonably required for his or her maintenance." The Court concluded that a parent/child relationship of itself cannot be the basis for an award. The Court repeated its reasoning in an earlier decision which had agreed with a trial judge's statement that there "must . . . be established some sort of moral claim by the applicant . . . beyond the mere fact of a blood relationship." 25

The expectation of the contributing child is now recognized by the law of unjust enrichment. To provide relief to adult children on the basis of moral duty alone ignores the statement: "[i]t is not the purpose of the statute to enable any dependant to build up an estate." 26

However, in light of Madam Justice McLachlin's comments in Tataryn that:

A will may provide a framework for the protection of the beneficiaries and future generations and the carrying out of legitimate social purposes. Any moral duty should be assessed in the light of the deceased's legitimate concerns which, where the assets of the estate permit, may go beyond providing for the surviving spouse and children. 27

this earlier statement of the Act's legislative purpose may be in doubt.

Madam Justice McLachlin based a testator's moral duties obligation on what "most people would agree." 28 She cited no empirical data in support of that conclusion. In fact, the empirical studies that have been undertaken suggest that when a testator dies leaving a spouse and children, a very substantial majority of people feel that no provision need be made for the children. 29 Respondents in these empirical studies would obviously have in mind both possible legal and moral obligations that could be owed. It is noted elsewhere that there is considerable variation throughout Canada as to the right of an adult child to claim. 30 This suggests there is little consensus as to what most "people would agree" and contradicts Madam Justice McLachlin's statement. Until such time
as there is a clear basis established for this "moral obligation to children," paternity alone should be insufficient. The studies, however, reveal that respondents clearly feel there is a moral obligation to spouses since spouses are, in almost all cases, considered to be deserving of more than their legal entitlement at the moment just before the testator's death.

Fourthly, even if reform of the legislation included the recognition of moral obligations to a spouse and/or children in addition to any legal obligation, criteria for the quantification of the value of that obligation are needed. The ranges of awards are so great that one cannot with any certainty put a "price" on any moral obligation which is owed. For example, if a parent failed in his or her parental duties to a young child, is that child entitled to a larger award than a child who now finds himself or herself in difficult financial circumstances and towards whom the parent has never failed in his or her duties? It is very difficult and likely impossible to set out criteria and a formula to quantify the value of a moral obligation other than by establishing a somewhat arbitrary formula. No other legislation or case law has attempted to value "moral duty."

Fifthly, too little attention and priority has been given to testamentary autonomy. Tataryn acknowledges that the "other interest protected by the Act is testamentary autonomy." Testamentary autonomy must only yield to what is "adequate, just and equitable in the circumstances" to the claimant. Family law legislation, upon the happening of a divorce of other triggering event, crystallizes a person's legal obligations to a spouse or child and by implication then creates for that person a separate estate upon which there are no legal claims. A great deal of effort has been devoted to devising schemes which recognize and quantify the amount to which each party to the marriage partnership is entitled. To what extent should a person then be completely free to dispose of this separate estate which would be theirs in family law, by will (as they can otherwise)? From discussion with the public in groups and as clients, the writer has noted that while people might agree to debate with others as to what ought to be theirs, there is a strongly held view that once "theirs" has been determined, it is for them and for them alone to determine its disposal.
In the United States testamentary freedom has received much greater respect. While all but one non-community property state has mandated a forced share to the spouse, there is absolute testamentary freedom with respect to the balance. Professor Chester examined *Hodel v. Irving*, a 1987 decision of the United States Supreme Court which gave constitutional protection to the right of disposing of property on death. The United States Congress had passed legislation which provided that if an American Indian died owning Indian land below a certain size and value, the land would be forfeited to the tribe and could not be passed on. Chester concluded that "the positivist tradition expressing state control of inheritance in all its guises is certainly threatened by the case. On the other hand, the long subordinate natural rights view of inheritance is greatly strengthened." He hypothesizes that the trend, given the increasingly conservative views of elected representatives, may be more protection of testamentary autonomy.  

Lastly, while the Law Reform Commission recommended that the court's jurisdiction to make an order, the *Wills Variation Act* should not be changed, this recommendation was based on the conclusion, unsubstantiated by any data that "[f]ettering the jurisdiction of the courts to prevent claims without merit would also tie their hands in cases where intervention is important." This statement overlooks the need to define the basis on which intervention is justified. To date, the basis for intervention has been by and large left to the judiciary for definition. After 75 years it is an appropriate time for the legislature to set out the policies in the legislation. A statutory scheme based on disclosed policies could give relief in appropriate circumstances. There would be no need for an additional discretionary power to vary. Granted, it is unlikely legislation could be fine-tuned to cover all possible fact patterns successfully, but given that disinheritance is uncommon to begin with, the lack of relief in a few cases would be offset by the certainty for testators and reduced litigation overall.

Having now identified the need for reform, the next six chapters will examine other asset distribution schemes, asset recovery schemes and empirical data.
END NOTES

1. Below at 49 ff.


3. Ibid. at 109.


5. Rawluk supra c. 1 note 5 at 97, 98.

6. Ibid. at 110, 111.


10. Price at 381.

11. Ibid. at 399.

12. Tataryn supra c. 1 note 3 at 820.

13. Ibid. at 814 - 815.

14. Ibid. at 815.


18. Walker supra c. 2 note 16 at 96.

19. Lukie supra c. 2 note 21 at 13.

20. Ibid. at 29.

21. Ibid. at 34.

22. Price supra c. 2 note 25 at 381, 382.


24. In re Jennings, supra c. 2, note 56 at 63.

26  *Lukie supra* c. 2 note 21 at 21.

27  *Tataryn supra* c. 1 note 3 at 823.


29  Below at Chapter 9 at 144.

30  Below at 154.

31  *Tataryn supra* c. 1 note 3 at 815.


33  1983 Succession Report *supra* note 9 at 78.

34  *Ibid.* at 78.
CHAPTER 4
THE PRELEGISLATIVE PERIOD

This chapter contains a short historical review of a number of concepts. It is not a comprehensive history or a critical analysis of the deceased's power to control his or her property on or after death, of testamentary freedom, or prelegislative inroads on that freedom. It is not limited to English or Commonwealth jurisdictions. Its purpose is:

1. To provide some historical background to the introduction of dependant's relief legislation.
2. To illustrate that there has been a long-standing preoccupation with a desire to control the ownership of assets after death.
3. To illustrate the long-standing recognition of the rights of family to assets after death.
4. To illustrate that various devices over time have been used to accomplish objectives based on the social and economic realities of the time.
5. To identify some of the policy objectives behind testamentary freedom and restrictions on that freedom over the years.

Ancient Historical Roots

Sennacherib (681 B.C.) "bequeathed certain bracelets, coronets, and other precious objects of gold, ivory, and precious stones, deposited for safe-keeping in the temple of Nebo to his favorite son Esarahddon." Plato (348 B.C.) among other things freed the slave Diana and said of the farm of Hephaestiades, "It is forbidden to sell or alienate it; but it shall belong to my son, Adimantes, who shall enjoy the sole proprietorship thereof." Aristotle (322 B.C.) spoke of his wife saying, "To remember for my sake the affection Herpylis has always born me, taking care of me and my affairs. If after my death she should wish to marry, they will see that she does not marry anyone below my condition. In that case, besides the presents she has already received, she is to have a talent of silver, three slaves besides the one she has, and the Pyrrhaeus." While it is possible and interesting to review periods prior to those covered by Roman law, the consensus of most writers is that it was the Romans who, by A.D. 534, "had evolved a will which, in many ways, resembled
the will which is recognized by modern American English law." 5 Furthermore, it is difficult to discover a link between pre-Roman happenings and modern law.

Sir Henry Maine states in the brief Preface to The First Edition of Ancient Law: "the chief object of the following pages is to indicate some of the earliest ideas of mankind, as they are reflected in Ancient Law, and to point out the relation of those ideas to modern thought." 6 Maine went on in Ancient Law to analyze the Roman system at some length by looking at the circumstances of the day as the basis for the development of legal concepts. He argues that the topic "testaments or wills" is a useful application of this approach. Maine's discussion takes the following form. Testamentary succession is not "a right conferred by the law of nature." Before the concept of a will can be considered there must be an examination of what interest passes on death, in what form does it pass, to whom may it pass and most importantly for the purposes of this work, how did it come to be that a person was allowed to control the disposition of property after death. The will itself is simply the document setting out what is to occur on death. 7

"The whole set of legal relations in which each of us stands to the rest of the world," makes up, says Maine, "a universitas juris," a "universal succession." He concluded, "[i]nheritance was an universal succession, occurring at a death." "The universal successor was Haeres or Heir." The character of the Haeres was the same whether one became an Haeres by will or on an intestacy. "The notion was that, though the physical person of the deceased had perished, his legal personality survives and descended unimpaired on his Heir or Co-Heirs in whom his identity (so far as the law was concerned) was continued." 8

The personal representative of a deceased who we now call an executor or an administrator finds its origin in this concept, but the personal representative does not have the "closeness of correspondence" which an Heir has to the deceased. The Heir did not represent the deceased, the Heir continued on the deceased's legal existence. The priority in Roman law was to have the universal succession, not to carry out the testator's directions. 9 "The original Will or Testament was therefore an instrument or (for it was probably not at first in writing) a proceeding by which
the devolution of the Family was regulated. With the office of head of the family came the power to control the family's assets. Maine proceeds then to caution us that, "... archaic law ... is full, in all its provinces, of the clearest indications that society in primitive times was not what it is assumed to be at present, a collection of individuals. In fact, and in the view of the men who composed it, it was an aggregation of families." The contrast may be most forcibly expressed by saying that the unit of an ancient society was the Family, and of a modern society, the individual. He goes further stating that, "[t]he Family, in fact, was a Corporation." Using this analogy he concluded that the physical death of an individual does not extinguish the legal position which the deceased held and those who succeeded the deceased did not represent the deceased but continued the deceased's legal existence. So the function of intestate rules and of a will (at first) was not a way to distribute a man's goods but one of among several ways of transferring the representation of the household to a new chief. In Maine's analysis the will was not a device to control the disposition of property after death, which is the way a will is viewed today.

"Wills were never looked upon in the Roman community as a contrivance for parting Property and the Family or for creating a variety of miscellaneous interests, but rather of a means of making better provision for the members of a household than could be secured through the rules of Intestate succession" which rule he concluded preceded testamentary powers.

Despite the origin of the will as a means of ensuring the "universal succession," further analysis by Maine concluded "... the extreme generality of the clause in the Twelve Tables ('Pater familias uti de pecunia tutelave rei suo e legassit, ita jus esto') soon produced a doctrine that the Heir must take the inheritance burdened by any directions which the testator might give him." It was also his conclusion that the early will was only allowed to take effect in the event that there was no family to inherit.

Acceptance of this analysis provides some explanation for the long-standing civil law, forced share, or legitim system in which the surviving spouse or children of the deceased
automatically become entitled to a specified portion of the deceased's estate and the deceased testamentary freedom applies only to the remainder. While the rationale behind such civil law schemes may at first seem to be a desire to provide financially for the deceased's family, Maine's analysis suggests that there was less emphasis on financial provision than a way of ensuring the deceased's and hence the family's continued legal existence.

Deborah H. Batts, on the other hand, in tracing the American indifference to the disinheritance of children, reviews some of the historical roots of inheritance and concludes: "Ancient history, then, would not be a likely source to support our (United States) predilection for not supporting children." She quotes in support of that statement these words of Maine's in reference to the duties of the pater familias:

> It was not a legal duty, for law had not yet penetrated into the precincts of the Family. To call it moral is perhaps to anticipate the ideas belonging to a later stage of mental development; but the expression "moral obligation" is significant enough for our purpose, if we understand by it a duty semiconsciously followed and enforced rather by instinct and habit than by definite sanctions.  

In the end perhaps no conclusion can be drawn as to the actual policy basis behind the earlier Roman law. There was, however, an early preoccupation with the effect of death on the ownership of assets.

**Dower and Curtesy**

Claricia widow of Walter of Greenford claimed from Hugh, son of Walter the third part to two carucates of arable with the appurtenances in Greenford as her dower. And [Hugh] said that she was not married [to Walter], and the plea was sent to the court Christian, and she proved the marriage.

And then Hugh came and acknowledged her third part. So she is to have a writ to her seisin, and Hugh is to be amerced.
The origin of dower, the right of a wife to a life interest in a portion of her deceased husband’s land, is in some doubt. It is suggested that its origin can be traced to the ancient practice of a husband making a gift to his wife for her life of a part of his land.\textsuperscript{20} The Magna Carta of 1217 refers to dower.\textsuperscript{21} By 1481 or 1482 Littleton’s Tenures speaks of dower.\textsuperscript{22} The English law of real property as it developed after the Norman conquest of 1066 accommodated the dower concept. "Nulle terre sans seigneur" (no land without a lord), the basis of English land law created a "feudal pyramid . . . with a King at the apex and the actual occupants of the land at the base." \textsuperscript{23} With the decline of the Roman Empire and the absence of the state to provide protection and security to individuals, feudalism, "A state of society in which the main social bond is the relation between lord and man, a relation implying on the lord’s part protection and defence; on the man’s part protection, service and reverence, the service including service in arms" was imposed by William I after his military victory at Hastings in 1066.\textsuperscript{24} So arose the doctrine of tenures, the terms upon which land was held. There was no absolute ownership of land and all tenants’ interests were held for an "estate," some period of time.

The estate in fee-simple is the closest to absolute ownership and could not from after the Norman conquest until the end of the 13th century be disposed of by will.\textsuperscript{25} The doctrine of uses (similar in character to a trust) was utilized to avoid this restriction until the Statute of Wills Act 1540 authorized the devise of some land and the Tenures Abolition Act 1660 made all land devisable.\textsuperscript{26} The life estate, while not an estate of inheritance like the fee-simple estate, could be created for the life of the tenant himself or the duration of the tenant’s interest could be measured by the life of another person.\textsuperscript{27} Dower, which was the life interest of a wife in land, fell neatly into the "estate" concept. Sir Joseph Jekyll, Master of the Rolls, although writing in 1732, centuries after the origin of dower, speaks of the policy behind dower. He refers to Lord Coke’s comment that "all these dowers were instituted for a competent livelihood for the wife for her life"\textsuperscript{28} and the closeness of the husband and wife relationship and concludes "the husband is bound
by laws of God and man, to provide for her during his life, and after his death, the moral obligation is not at an end, but he ought to take care of her provision during her own life."

He goes on to point out that a wife cannot acquire property of her own during marriage, real property she owns prior to the marriage vests in her husband while she is married, and her personal property becomes her husband's absolutely (or subject to this control) so that on his death she may be destitute. Her husband's real estate is the "only plank she can lay hold of, to prevent her sinking under her distress." 29

At common law, the wife's interest was a third of the real property although local customs could increase this share. At a time when land was the major form of wealth, this was a substantial financial interest. Interestingly the dower interest was not subject to distress for debt, even the King's, but was defeated if the husband held land as a joint tenant (with a right of survivorship). 30 As the right of a tenant to alienate land increased, it became necessary to reconcile this power of alienation with the claims of the wife and various methods were developed to do so, but is was not until the nineteenth and twentieth centuries that dower rights were legally abolished.

Curtesy, the life interest of a husband in the wife's fee-simple or fee-tail estates did not originate with the objective of ensuring the husband did not become destitute. Marriage alone was not sufficient. Four conditions had to be present to permit this life interest to be created: (a) a recognized marriage (b) seisin of the wife of an estate of inheritance which children of the marriage could inherit (c) a child or children born alive during the marriage and (d) the death of the wife. 31 Sir Joseph Jekyll suggests that because a husband could maintain himself from his estate and from the wealth accumulated during the marriage from his wife's estate of which he was the sole manager during her lifetime, "the husband's tenancy by the Curtesy hath no moral foundation and is therefore properly styled a tenancy by the Curtesy of England, that is an estate by the favour of the law of England." 32 Littleton states this Curtesy is unique to England but other writers suggest the concept existed in other countries as well. 33 The policy behind this concept is less clear. One idea is that along with the husband's guardianship rights of his children came a need for resources to
Another idea is that the management rights of the husband over the wife's property could best be continued after her death with this device. The policy behind dower, to give support to a wife on her husband's death, is a very long standing one.

**Civil Law - The Forced Share**

While a wide freedom of testation evolved in English law and later became part of the law of British Columbia, civil law countries, jurisdictions which have a civil law regime, and the United States, have a long history of the use of the forced share as a restriction on the power of testation. It should be noted in passing, however, that even English law restricted testamentary freedom, particularly of land, until the *Statute of Tenures 1660* and for a time "legitim" or "legitimate part" was the law of England. Pollock and Maitland in tracing the history of "the last will" in England note that in addition to restraints on the alienation of land, by the thirteenth century, "it was only the man who left neither wife nor child" who could dispose of all his chattels. The late nineteenth century Scotish scheme in which "[i]f he leaves both wife and child, then the division is tripartite; the wife takes a share, the child or children a share, while the remaining third is governed by the will; we have 'wife's part,' 'bairn's part,' and 'dead's part,'" prevailing in parts of England until the late seventeenth century. Reference has already been made to the additional restrictions placed by dower and curtesy. Instead of relaxing these restraints over time and in place of adopting dependant's relief legislation, the forced share remains in effect in many jurisdictions. Ireland is an interesting case. By the *Succession Act*, 1965, it departed from the English scheme of dependant's relief legislation then in place and gave the surviving spouse a fixed share of the deceased's estate and a surviving child the right to apply to a court for "proper provision."

The primary feature of the forced share system is to set aside or reserve a definite share of the deceased's estate which the deceased may not dispose of by will, or, if the deceased can dispose of the whole estate, the claimant may apply to the Court to obtain a definite share. This contrasts with the British Columbia, English, Australia and New Zealand systems which give the Court a discretion as to the amount it will award. Swiss law, for example, provides that the children, the
spouse and the parents are entitled to a certain fraction of the estate. A testator who leaves children, a spouse, or who has one parent alive at the time of death, may only dispose of a certain quota of his assets. If the testator attempts in his will to interfere with these statutory provisions, each person who is entitled to a legitimate portion may bring an action against all beneficiaries who by the will receive assets in excess of the disposable portion.\textsuperscript{39}

If a testator is subject to the laws of France, and he leaves heirs, either descendants (children) or ascendants (parents), his testamentary freedom is restricted. The estate he can dispose of is called \textit{le disponible} and the share which is reserved for certain heirs is called \textit{la réserve}. If there are no heirs with reserved rights, the testator is free to dispose of his entire estate. Amos and Walton point out that there has been a long history in French law of restrictions on the freedom of testation. They attribute it to a strong feeling that property should stay in the family and a dislike, except among the nobility, for wills which favoured one child over another.\textsuperscript{40} Writing in 1847, J.R. McCulloch noted that while the constitutions of France and England did not differ materially, the extreme unpopularity of the aristocracy at the time of the French Revolution led to the suspension of the custom of primogeniture and the establishment of compulsory succession rules. He goes on to bemoan the evils of such a system which "weakens on one hand the motives to industry (and) it tends . . . to level and obliterate all distinctions of family and wealth . . . . A fortune in France is like a castle built on a quicksand; it is not held together by any principle of cohesion, but will, in a few generations, be broken down into such minute atoms as to be inappreciable."\textsuperscript{41} One suspects that Amos and Walton's view is somewhat more objective than the latter. Amos and Walton also point out that while the law is very complex, about 80% of French people die intestate, the effect of which in almost all cases is to increase the share that would be reserved to the heir. There are several features of the French scheme which are interesting. First, because their Régime Matrimonial is seen to adequately protect the spouse's rights, there is no \textit{réserve} for a spouse. Secondly, the \textit{réserve} is available to kinship relatives, descendants (children and grandchildren) and ascendants (parents and siblings), although the \textit{réserve} of siblings has been largely abolished. This kinship group is broader than the household or immediate family group\textsuperscript{42}.
and is perhaps explained by Maine's analysis indicating the concern for the family's (in a broad sense) continued legal existence.

Forced heirship, the guaranteed right of a person to inherit, has some perceived advantages and disadvantages. The advantages have been summarized as follows:  

1. Grounded in the traditional inter-relationships of family, economics and property, it promotes "family bonding, stability, solidarity, harmony and responsibility."
2. It recognizes the status of the person, acquired by marriage or blood, and the dependence of that person on the deceased.
3. It ensures that the economic needs are met first by the deceased family member and not the state.
4. It recognizes, more so in the case of spouses, the economic and non-economic contributions a family member brings to the family relationship.
5. It satisfies the "general feeling that a (spouse or) child has a reasonable expectancy from his (or her spouse or) parent and our repugnace to the disappointment of that expectancy."
6. It gives the family member a legal protected status, and, in the case of children, a right to equal treatment which reduces sibling rivalry.
7. It allows the testator psychological satisfaction by allowing him or her to continue living through the gift and showing his or her care for the spouse or child.
8. It protects a child from the consequence of his or her parent's remarriage or the entering into of another relationship.

On the other hand, it has its critics:

1. It is a doctrine based on family status which is out of date in today's world of multiple relationships.
2. It is rigid and ignores the actual circumstances of the recipient.
3. If given to spouses and to children, the two groups may be in competition, often for limited resources.\textsuperscript{44}

The applicability of some of these advantages and disadvantages will be examined at the time recommendations are made for reform. It should be noted, however, that by creating a matrimonial property regime that adequately protects a spouse's rights, less reliance need be placed on legislation dealing with the effect of death. Whether a family member's forced share of a deceased's estate arises from that member's réserv\textsuperscript{e}, spousal matrimonial rights or dower and curtesy, there is an inroad into a testator's testamentary freedom.
END NOTES

1 V.M. Harris, Ancient, Curious and Famous Wills (Fred B. Rathman & Co: Littleton, Colorado, 1981) at 13.

2 Ibid. at 14.

3 Ibid. at 15.


7 H.S. Maine, Ancient Law, 10th ed. (London: John Murray, 1911) [hereafter "Maine"] at IX.

8 Ibid. at 156, 157.

9 Ibid. at 159-161.

10 Ibid. at 161-162.

11 Ibid. at 169.

12 Ibid. at 111.

13 Ibid. at 163.

14 Ibid. at 165, 167, 168.

15 Ibid. at 172.

16 Ibid. at 173, 193.

17 Ibid. at 184.

18 Ibid. at 175, 191, 198.

19 D.A. Batts, I Didn't Ask to be Born: The American Law of Disinheritance and a Proposal for Change to a System of Protected Inheritance, 1990, 41 Hastings L.T. [hereinafter "Batts"] 1197 at 1202 to 1204.


See also:


Megarry *supra* note 23 at 471.


*Banks v. Sutton* (1732), 2 P. WMS. 702, 24 E.R. Ch. [hereinafter "Banks"] 922 at 923

Chambers *supra* note 20 at 72 ff.

Littleton *supra* note 22 at 15.

Broom & Hadley *supra* note 20 at 245-250.

Holdsworth at *supra* note 20 185-189.

Banks *supra* note 29 at 923.

Broom & Hadley *supra* note 20 at 246.

Holdsworth *supra* note 20 at 186.

Broom & Hadley *supra* note 20 at 246-247.

Holdsworth *supra* note 20 at 186-187.

Chambers *supra* note 20 at 71.

Hargreaves *supra* note 20 at 74-75.


38 For a short summary of the continental Europe systems see O. Kahn-Freund, *The Bill Compared With the Continental Systems*, 1937, 1 Mod. L. Rev., 304.


42 Amos *supra* note 40 at 333 ff.

43 Batts *supra* note 18 at 1222 - 1225.

CHAPTER 5
FAMILY LAW

Family law legislation provides rules and principles which help resolve various issues on the breakdown of a marriage and on divorce. For example, the British Columbia *Family Relations Act* states that each spouse is entitled to an undivided one-half interest in each family asset as a tenant in common subject to any judicial reapportionment on the basis of fairness.\(^1\) This legislation can also be seen as an expression of values, "a story about the aspirations and directions of a particular society."\(^2\) The legislation does not tell the whole story but it will be used as the basis for the discussion which follows, notwithstanding Henry Maine's comment that:

> With respect to them (ie, progressive societies)... social necessities and social opinion are always more or less in advance of Law. We may come indefinitely near to the closing of the gap between them, but it has a perpetual tendency to reopen. Law is stable: the societies we are speaking of are progressive. The greater or lesser happiness of a people depends on the degree of promptitude with which the gulf is narrowed.\(^3\)

If marital (or indeed succession and dependant's relief) legislation is viewed as a statement of a body of ideas about marriage, the roles of spouses and of parents, one must be cautious in using such statements because the particular legislation may:

(a) reflect the views or practises in society at the time the legislation was passed;
(b) reflect views or practises in the past which the legislature wished to maintain;
(c) reflect views of how family relationships ought to be organized in the future.

**Family Law as a Source of Policies**

Legislation to provide for the sharing of property between spouses on the breakdown of a marriage or divorce exists in each Canadian province and territory. In most jurisdictions the legislation is fairly recent. In British Columbia the *Family Relations Act* came into force in 1979 and is, therefore, a relatively recent expression of provincial values. Since its enactment, judges have had to interpret it, apply the legislation and exercise their discretion where that is permitted.
Case law, therefore, may provide even a more timely expression of values, depending on how quickly judicial decisions reflect the values of society as a whole. It is particularly appropriate for the purposes of this paper to examine the values underlying the division of property and the support of the spouse and children because:

1. An asset distribution and perhaps redistribution scheme is involved which overrides the legal ownership of assets.

2. The potential claimants under family law legislation are also potential claimants in dependant’s relief legislation and fall within what is generally considered to be a family group. It will be noted later that spouses and children derive maintenance rights under the Divorce Act and, in the case of spouses’ property rights, under the Family Relations Act while common law spouses and children derive only maintenance rights under the Family Relations Act.

3. The right to invoke the legislation occurs on the happening of a specified event. Until the event occurs, there is no obligation on a person to act in accordance with the terms of the statute. The federal Divorce Act, once there has been a breakdown of the marriage by reason of a one-year separation, adultery or physical or mental cruelty, permits a claim for financial support by a spouse or child. The British Columbia Family Relations Act permits a claim for maintenance and support and for a share of the family assets by a spouse and for maintenance and support for a child when the spouses enter into a separation agreement, when there is a judicial declaration that there is no reasonable prospect of the spouses reconciling, or when there is a court order for the dissolution of the marriage, judicial separation or annulment. Similarly, it is the death of a testator which allows action to be taken to limit his or her testamentary freedom.

4. Judicial discretion is a feature of dependent’s relief legislation and family law legislation. The Divorce Act, even though it lists the factors to be taken into account, grants the Court a discretion to determine the amount of the support ordered. The Family Relations Act,
while it mandates an equal division of assets in section 43, permits a judicial reapportionment of the property if a judge concludes after considering certain listed factors that an equal distribution would be unfair. Judicial discretion also exists in the making of maintenance and support orders although a number of listed matters must be taken into account. Only recently have guidelines been introduced which operate to reduce the discretionary element of the decision making in child support claims. Judicial discretion has been a predominant feature of dependant's relief legislation.

5. Ongoing financial support, a feature of both the Family Relations Act and the Divorce Act is an objective of dependant's relief legislation. Although it has rarely been applied, section 4 of the present British Columbia Wills Variation Act states "[i]n making an order the Court may, if it thinks fit, order that the provision shall consist of a lump sum or a periodical or other payment," and section 13 reads:

Where the Court has ordered periodic payments or that a sum be invested for the benefit of a person, it may inquire whether at any subsequent date the party benefitted by its order has become possessed of or entitled to provisions for his proper maintenance or support, and into the adequacy of those provisions, and may discharge, vary or suspend its order, or make another order that is just in the circumstances.

Furthermore, in many cases a need for financial support from the person who is now dies will not end at the death of that person, even though death may operate to transfer assets to the survivor. Particularly in relationships where the capacity to earn employment income is a major asset of the relationship or an infant child requires periodic support payments, death will end that substantial source of income.

6. In Tataryn v. Tataryn Estate, Madam Justice McLachlin acknowledged that the language of the British Columbia Wills Variation Act conferred a broad discretion on the Court. She later refers to the desirability of a "yard stick, be it need or otherwise, by which the Courts might measure the terms 'adequate, just and equitable.'" She notes that trial courts have
turned to actuarial evidence, intestate distribution rules and the *Family Relations Act* for guidance only to, in the latter two instances, be told by the British Columbia Court of Appeal they were incorrect. She identifies "two sorts of norms" which are available and should be addressed. The first are the testator's legal responsibilities during his or her lifetime. These are found in the *Divorce Act*, family property legislation such as the *Family Relations Act* and the law of unjust enrichment. The second are the testator's moral obligations towards a spouse and children.11 This reference to the applicability of family law mandates an examination of the values inherent in such law.

7. There should be some relationship between what a spouse or child receives on the occurrence of a prescribed event in family law legislation and what they might receive on the death of a testator with whom they have a similar relationship. This is not to say that the results should be identical, because the event of death creates consequences that a separation or divorce does not, among which are:

(a) The absence of a requirement that the financial needs of both the claimant and the defendant be considered.

(b) The inability of a deceased person to earn employment income.

(c) The possible creation of wealth as a result of death through the operation of contractual rights under policies of insurance, commercial agreements and pension legislation.

Nevertheless, the event of divorce and the event of death ought not to create an allocation of assets which cannot be rationalized on some stated basis. Because Madame Justice McLachlin turned to family law as one of the guidelines to determine a testator's legal obligations on death, it can be inferred she holds there ought to be some relationship between the consequences of marriage breakdown and death. She states "[u]nder the *Divorce Act* and the *Family Relations Act* she would have been entitled to maintenance and a share in the family assets had the parties separated. At a minimum, she must be given this much on the death of her spouse."12
Family Law Property Rights

The division of property requires three questions to be addressed:

1. What kind of property is subject to division? This requires some definition of the kinds of property which the Court can divide between the parties.
2. How is the property to be valued?
3. What standards should the Court use to divide the property to meet the objectives of the legislation?

The discussion which follows will focus on questions 1 and 3. Before these questions can be answered and the answers put in context, a brief review of the development of property holding within a marriage is required.

Early English matrimonial law's doctrine of the unity of husband and wife made the wife incapable of owning property in her right or denied her the use and benefit of it. A review of the Anglo-American, French and German law concluded that while the legal techniques of each system which denied the wife's property rights differed, they accomplished similar results, namely:

(a) The husband had control of the family assets even if he did not have title;
(b) The husband had the right to the revenue from the family assets;
(c) The husband's power to dispose of his wife's real property was limited;
(d) Devices had developed to protect the wife's interest in all types of property against the actions of her husband.

These laws reflected a patriarchal family model and an assumption that married women were incapable of managing their affairs.
It was not until the *Married Woman's Property Act* of 1882 in the United Kingdom that women acquired the legal capacity to acquire and retain separate property during marriage. With the adoption of married women's property legislation or its equivalent, women achieved formal equality, although until they acquired separate incomes and substantial property of their own, it had little practical significance. At this stage of the development of family law a property owner did not gain or lose property rights on marriage. In the absence of an agreement there was no mechanism at common law to permit the spouse with fewer assets to share in the assets owned by the other spouse. Needless to say, few spouses will determine in advance what is to occur financially on the breakup of a marriage. Once marital difficulties occur, most spouses are unwilling to agree on financial matters.

In the separate property regime which followed the married women's property statutes (and in the absence of an agreement):

(a) assets owned by a person before marriage belong to that person when the marriage ends;
(b) assets acquired by a person during marriage belong to that person when the marriage ends;
(c) assets acquired by the spouses through their common efforts are shared, but not necessarily equally, but in the absence of legislation, this occurs only in jurisdictions where the Courts have developed the concept of unjust enrichment.

Marriage, however, even before the further development of matrimonial property legislation, did bring with it a status which could impact on property rights because of a duty to support the other spouse, occupation rights to a matrimonial home, intestate succession rules giving priority to spouse over blood relatives, and restrictions on testamentary freedom.

Role division within the marriage still meant that in most cases men were engaged in activity which created income and wealth while women were engaged in housekeeping and child care. "Real equality of the sexes required more than the formal freedom of married women to own
and freely manage and dispose of their assets," it required "treating marriage as a joint venture, a partnership, the success of which is due to both partners even though the nature of the contributions are different." However, "the co-existence of these two concepts -- the independence and the equality of each spouse with the idea of marriage as a joint venture -- must of necessity be an uneasy one. The two concepts can never really be completely reconciled. All jurisdictions face the same basic difficulty and have tried to resolve it in different ways."

Shared property rights or "community of property" is sought to be achieved by three types of legislative matrimonial property regimes:

(a) Traditional community of property. On marriage, each spouse is given an immediate one-half interest in all property that is not statutorily defined as either spouse's separate property. Separate property is generally defined to be the property each party brought into the marriage as well as property that comes to either spouse during the marriage by gifts or inheritances. The husband alone has management rights over the community property. The civil law influence from France, Spain and Mexico brought this regime to the United States jurisdictions, among them California and Louisiana, and to the province of Quebec prior to 1970. There are a variety of differences in the definitions of community and separate property and how community property is managed during the marriage, but the immediate one-half interest in property is a common feature. On the death of a spouse in a community property jurisdiction, the distribution of only one-half of marital property is in issue. As a result, there are generally no restrictions on the deceased spouse's testamentary freedom. Since most of the deceased spouse's property remains "separate" in second or late marriage situations, the disinherited spouse would be disadvantaged and have no remedy.

(b) Full and immediate community of property. This has the same ownership results as the traditional community of property regime, but the management of the assets is shared
jointly by the spouses. In its 1975 Report on Matrimonial Property, the British Columbia Royal Commission on Family and Children’s Law identified four beliefs:

1. All persons should be equal under the law.
2. Marriage is a partnership of shared responsibilities.
3. The roles of economic provider and homemaker are of equal value to the relationship.
4. Married women are economically competent.

The Commission recommended the adoption of full and immediate community of property noting that, in addition to reflecting the four beliefs noted, such a system:

(a) reflects the way most British Columbians order their married lives;
(b) supports the commonly held intention of married couples that most assets are "ours" and not "mine or yours;"
(c) divides the community property on the breakdown of the marriage on the same equally shared basis that operated while the marriage was intact.

This recommendation was not adopted in the 1979 British Columbia legislation. The British Columbia Association of Social Workers noted in its brief "The Family is the Best Judge," a response to Bill 69 (the Family Relations Act legislation of 1978):

Bill 69 does not live up to its promise of equal partnership between husband and wife. . . . Full and immediate community of property means that all property including business property acquired during marriage is shareable. . . . Joint management of the community property during marriage would reflect the prevailing attitude of British Columbians today that marriage is an equal partnership.

Deferred Community Property. Separate property rights continue to exist during the marriage. The event of marriage does not change the ownership of assets and no proprietary interest vests in the non-legal owner spouse until a breakdown of the marriage allows a court order to be made. In British Columbia the "triggering events" are the entry of the spouses into a separation agreement, a judicial declaration that there is no reasonable prospect of reconciliation, or a court order for dissolution of the marriage, judicial separation or annulment. All Canadian jurisdictions have passed deferred community
property legislation, although major differences exist in what property is subject to division, the "triggering events," the treatment of the matrimonial home and restraints on disposition.

**British Columbia - Division of Assets**

The British Columbia *Family Relations Act*, which came into effect on March 31, 1979, adopted a deferred community property regime. In Canada, provincial legislation establishes family law property rights and maintenance obligations. The federal *Divorce Act* provides the mechanism to dissolve marriage and to establish maintenance obligations. The *Family Relations Act* provides that on marriage breakdown, each spouse is entitled to a one-half interest as a tenant in common in the family assets.26 The "family asset" definition contains the general statement in section 45 "[p]roperty owned by one or both spouses and ordinarily used by a spouse or minor child of either spouse for a family purpose is a family asset."27

In addition to this use-based test, certain listed assets, such as annuities, pensions and retirement savings plans, are "family assets" without reference to their use. It is not the purpose of this paper to discuss all the difficulties which have arisen in the Courts' attempts to apply the use-based test. The Law Reform Commission of British Columbia reporting in 1989, ten years after the adoption of the legislation, discusses the problems that have arisen from the language of section 45, particularly "ordinarily used," the use of an asset, the sole use of an asset by one spouse and "family purposes."28 Section 45(3)e also includes "a right, share or an interest of a spouse in a venture to which money or money's worth was, directly or indirectly, contributed by or on behalf of the other spouse in the family asset definition."29

Even if property is not used for family purposes, it may be divisible. Section 46 states:

1. Where property is owned by one spouse to the exclusion of the other and is used primarily for business purposes and where the spouse who does not own the property made no direct or indirect contribution to the acquisition of the property by the other spouse
or to the operation of the business, the property is not a family asset.

(2) In section 45(3)e or subsection (1), an indirect contribution includes savings through effective management of household or child rearing responsibilities by the spouse who holds no interest in the property. 30

Neither section 45(3)e nor section 46 requires there to be a family purpose. Business assets and ventures are divisible if there is a direct or indirect contribution to their acquisition or operation by the non-titled spouse. Direct or indirect contributions may include effective management of the household or child rearing responsibilities.

The equal division of family assets and business assets and ventures to which the required contribution has been made can "where the provisions for division of property . . . would be unfair" be "divided into shares fixed by the Court." 31 The criteria to be used by a judge are:

(a) the duration of the marriage;
(b) the duration of the period during which the spouses have lived separate and apart;
(c) the date when property was acquired or disposed of;
(d) the extent to which property was acquired by one spouse through inheritance or gift;
(e) the needs of each spouse to become or remain economically independent and self sufficient; or
(f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse 32

The British Columbia Law Reform Commission has done an analysis of the legislation and its application by the courts in the ten years following its adoption. A number of the Commission's comments are useful in analyzing the purposes of the family legislation and the values which it reflects. The Commission concluded that the Family Relations Act has failed to define the basis for shared property rights. 33 Different rationales to justify shared property rights in family property were identified, each based on a different model of marriage:
(a) Marriage is evidence that the spouses each intend to share all their property. "Marriage (is) a union of body, soul and property." 34

(b) Contribution of money or money's worth create an entitlement to share property. Marriage does not of itself affect property rights.

(c) The separate efforts of spouses benefit each other as spouses and spouses are entitled to share property acquired during the marriage. Marriage is a partnership. 35

The British Columbia Statute does not state its rationale, nor does it use a single philosophical base for its provisions. In section 45 the "family purpose" test is introduced.

Professor Farquhar notes:

The real dilemma of the concept of "family purpose" is that it is not clear just what the Legislature was attempting to accomplish in relation to it. In other words, what is the logical connection between "family purpose" and a division of an asset used for that purpose? Is it because the use is assumed to have given rise to an expectation of division, or because the use denotes the certainty that there has been some form of contribution that would make a division fair? Until a decision is made on this point, the precise meaning of the term "family purpose" will remain obscure, and it will continue to be difficult to predict with accuracy whether any given asset (outside of an obvious one like a matrimonial home) falls into the classification or not. 36

The family purpose test does not point to the adoption of any of the three family models noted above. The Commission states:

The family purpose test does not appear to be supported by any policy or rationale. It might be argued that allowing the property to be used by the family reflects a settled intention to share the property. Or, it is the conduct which may induce a belief that the non-owning spouse shares rights in the property, a belief upon which it may be reasonable to rely. But these are merely guesses, and not particularly convincing, since intention and reliance are not usually identified by the Courts as factors of any significance when dividing family property. 37
In section 45(3)e (direct or indirect contribution to a venture) and section 46 (business assets) contribution is the principle which makes the property divisible. In section 51 unfairness may be found when a property is acquired by one spouse by inheritance or gift (that is, a lack of contribution), the duration of the marriage (a lack of time in which to make a contribution) and "other circumstances relating to the acquisition, preservation, maintenance, improvement or use of the property" (which presumably could again recognize the degree of or lack of contribution). The rationale of use for a family purpose (with no necessary contribution) conflicts with the contribution rationale. "Family use" makes an asset equally divisible under section 45. "Contribution" may lead to a reallocation under section 51. At best, one could conclude that the family model is a combination of (b) -- a marriage does not of itself reflect property rights, contribution does, and (a) -- the "union of body, soul and property" model, because of the "user" principle. The broad discretion to reappropriate and the lack of a statement of the legislation's purpose means:

As a result, the private views of each judge can become the single most important factor in a decision to redistribute:

'The decisions also reflect the varying views of individual judges on the nature of the marriage relationship . . . '

A judge who believes that the matrimonial relationship is a union of body, soul and property is less likely to redistribute than a judge who considers the matrimonial relationship to be merely an association of two persons for specified purposes, and only for the time being.

In contrast to the British Columbia legislation, the Ontario Statute contains the following statement in the Preamble: "[w]hereas it is desirable to encourage and strengthen the role of the family; and whereas for that purpose it is necessary to recognize the equal position of spouses as individuals within marriage and to recognize marriage as a form of partnership . . . ." Furthermore, in concluding that the Ontario Statute recognized and accommodated the remedial constructive trust, Mr. Justice Cory referred to these words in the Preamble and stated (in reference
to the remedy of constructive trust) "[i]t provides a measure of individualized justice and fairness which is essential for the protection of a marriage as a partnership of equals." 42 He states later "[a] marital relationship is founded on love and trust. It brings together two people who strive and sacrifice to obtain common goals for the benefit of both partners."43

In Part I of the Ontario Statute, which deals with the division of family property, there appears this statement:

The purpose of this section is to recognize that child care, household management and financial provision are the joint responsibilities of the spouses and that inherent in the marital relationship there is equal contribution, whether financial or otherwise, by the spouses to the assumption of these responsibilities, entitling each spouse to the equalization of the net family properties. 44

While this statement of purpose refers to contribution, it is in the context of "deeming" that there is an equality of the spouses both as to contribution and as to their share of the partnership assets. It does not take away from the partnership family model recognized in the Preamble. In 1993 the Ontario Law Reform Commission reviewed developments in the law, social norms and the economy. It noted that its 1974 work had concluded that "the separate property regime perpetuated unfairness against many women, and undermined the modern view that marriage is an equal partnership." 45 The recommendations, after which the Family Law Reform Act 1978 was passed, were "founded on the basic principle that spouses should share equally in the value of all assets acquired during their marriage"46 but the equalization scheme adopted by the Legislature in 1978 adopted a "family assets" (property ordinarily used or enjoyed by the family) scheme of division similar to British Columbia. The Family Law Act 1986 introduced further reform and in abolishing the "family assets" approach, moved closer to the partnership principles set out earlier by ensuring that spouses shared the value of assets accumulated during marriage.47 The 1993 Report included a number of recommendations to further ensure that wealth generated during a relationship is shared. For example, the Report recommends all gains or losses in the capital value of an asset or income
earned on such an asset accruing during the marriage would be divisible even if the asset was
acquired by gift or inheritance.\footnote{48} Furthermore, the Commission recommended that the special
treatment, which had included the matrimonial home in divisible property but given no credit for its
value at the date of the marriage, be abolished.\footnote{49} The Commission would move the statutory
scheme even closer to reflecting an equal partnership family model.

The 1993 report also discusses at length the result of \textit{Rawluk}, namely that the common law
doctrine of unjust enrichment and the remedy of constructive trust can be used to compensate for
problems in the statute. A number of its recommendations including those referred to above are
meant to reduce the need for a common law remedy to the point where in the Commissioners'
opinion, spouses who receive the benefit of the statutory equalization scheme should be denied the
common law rights flowing from unjust enrichment.\footnote{50} This approach is significant because by
implication it seeks to integrate the contribution based doctrine of unjust enrichment with the
partnership marriage modelled legislation.

The federal \textit{Divorce Act} does not deal with the division of property, nor does it state its
rationale. More will be said about the policies of the \textit{Divorce Act} in the discussion of maintenance
which follows.

Before leaving the property division discussion of the family law legislation, two matters
should be noted. Canadian deferred property regimes are similar in that they apply only to legal as
to opposed to common law spouses. In British Columbia, for example, the definition of spouse is
limited to a wife or husband in the part of the statute dealing with the division of property although
for other purposes it includes "a man or woman not married to each other, who live together as
husband and wife for a period of not less than two years." \footnote{51} The maintenance provisions apply in
favour of a "spouse" which includes a common law spouse, but the property divisions do not.
Secondly, a child has no property rights. It has already been noted that ongoing financial support is
a feature of both the \textit{Family Relations Act} and the \textit{Divorce Act} and a stated objective of dependant's
relief legislation. A brief review of the maintenance provisions of the matrimonial legislation will follow later.

**Division of Assets - Death of a Party**

The property interest of the entitled spouse in the family assets arises when a triggering event is made. If a separation agreement, a declaratory judgment of no prospect of reconciliation, an order dissolving the marriage, an order for judicial separation or an order annulling the marriage has not been made before one of the parties dies, there is no entitlement to family assets under the *Family Relations Act* by the survivor. This proposition is best illustrated by those cases in which a declaratory judgment has been sought, but a party dies before the declaration is made. In *Ginter v. Ginter* the Court of Appeal held that where an action had been started but the respondent died before the declaration motion was heard, there could be no order because, among other things, the applicant was no longer a "spouse." 52 This reasoning that there must be an order is applicable to all the triggering events under section 43 of the *Family Relations Act* which requires an applicant to have the status of spouse, except the making of a separation agreement. The Court of Appeal noted in *Milne v. MacDonald Estate* that the result of *Ginter* was consistent with those cases which have held that a maintenance order is not an obligation of the deceased's estate.53 This unsettled situation must be addressed by the Legislature. Madam Justice McLachlin used the deceased's family law obligations as one of the guidelines to determine entitlement under the *Wills Variation Act.* 54 These were expressed to be his or her lifetime obligations but the argument could be made that a feature of these ongoing lifetime obligations is that they end at death unless a triggering event has been made.

**British Columbia - Spousal Maintenance**

Support under the *Divorce Act* is corollary relief and under section 4 a court has the jurisdiction to grant such relief "if the court has granted a divorce to either or both former
spouses."  

Spouse is defined in the *Divorce Act* as "a man or woman who are married to each other."  

The statutory criteria for granting spousal maintenance are set out in section 15(5):

(5) In making an order under this section, the Court shall take into consideration the condition, means, needs and other circumstances of each spouse and of any child of the marriage for whom support is sought including:

(a) the length of time the spouses co-habited;

(b) the functions performed by the spouses during co-habitation; and

(c) any order, agreement or arrangement relating to support of the spouse or child.  

The objective of an order for spousal maintenance is set out in section 15(7):

(7) An order made under this section that provides for the support of a spouse should

(a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;

(b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above the obligation apportioned between the spouses pursuant to (8);

(c) relieve any economic hardship of the spouses arising from the breakdown of the marriage;

(d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.  

It has already been noted that "spouse" is defined more broadly in the *Family Relations Act*:

Spouse means a husband or wife and includes a man or woman not married to each other who live together as man and wife for a period of not less than two years where an application under this Act is made by one of them against the other not more than one
year after the date they ceased living together as husband and wife.\textsuperscript{59}

Section 57 of the \textit{Family Relations Act} sets out the obligation to support a spouse with no distinction being drawn between married and unmarried spouses:

57. (1) A spouse is responsible and liable for the support and maintenance of the other spouse having regard to

(a) the role of each spouse in their family;

(b) an express of implied agreement between the spouses that one has a responsibility to support and maintain the other;

(c) custodial obligations respecting a child;

(d) the ability and capacity of, and the reasonable efforts made by, either or both spouses to support themselves; or

(e) economic circumstances.

(2) Except as provided in (1), a spouse or former spouse is required to be self-sufficient in relation to the other spouse or former spouse.\textsuperscript{60}

The criteria for determining the quantum of spousal maintenance (and child maintenance) appear in section 61(2):

(2) Where a spouse or child will be living separate and apart from the spouse or parent against whom the application is made, the court may, as it considers appropriate, adjust the amount of its order under (1) to take into account the needs, means, capacities and economic circumstances of each spouse, parent or child including:

(a) the effect on the earning capacity of each spouse arising from responsibilities assumed by each spouse during co-habitation;

(b) any other source of support and maintenance for the applicant spouse or children;
(c) the desirability of the applicant spouse or child having special assistance to achieve financial independence from the spouse or parent against whom the application is made;

(d) the obligation of the spouse or parent against whom application is made to support another person; and

(e) the capacity and reasonable prospects of a spouse or child obtaining an education or training. 61

An order under the federal Divorce Act would supersede an order under the provincial Family Relations Act, but it does not invalidate it. 62

The Supreme Court of Canada in Moge v. Moge changed the rules of support law in Canada by shifting away from need as a basis for support to a theory of spousal support based on principles of compensation. This shift away from need has already been noted in the interpretation of the Wills Variation Act. In Moge, the Court discussed the distinction which had been made "between 'traditional' marriages in which the wife remains at home, and 'modern' marriages where employment outside the home is pursued." 63 Some judges had used this distinction to conclude that on the dissolution of a modern marriage the goal should be to place both parties in a position of economic self-sufficiency. This could be accomplished by putting a time limit on the supporting spouse's obligations. The Court concluded "the distinction between 'traditional' and 'modern' marriages does not seem (to me) to be as useful as perhaps courts have indicated so far . . . there are much more sophisticated means which may be resorted to in order to achieve the objectives set out in the Act." 64

Secondly, the Court stated "[s]pousal support in the context of divorce, however, is not about the emotional and social benefits of marriage. Rather the purpose of spousal support is to relieve the economic hardship which results from marriage or its breakdown."
It went on to conclude:

This approach is consistent with both modern and traditional conceptions of marriage inasmuch as marriage is among other things, an economic unit which generates financial benefits. . . . partners should expect and are entitled to share in those financial benefits. 65

This statement endorses the partnership model of marriage. This model was also approved of in discussing the guidelines to be applied under the British Columbia Wills Variation Act. In Tataryn v. Tataryn, Madame Justice McLachlin, referring to Moge said "Spouses are regarded as partners." 66 Thirdly, any analysis must apply equally to both spouses, even if the reality is that in most marriages the wife will be the economically disadvantaged partner.67

The Court then turned to the four policy objectives set out in section 15(7) of the Divorce Act and said "[a]ll four of the objectives defined in the Act must be taken into account when spousal support is claimed or an order for spousal support is sought to be varied. No single objective is paramount" 68 and:

The object of self-sufficiency is only one of several objectives enumerated in the section and, given the manner in which Parliament has set out these objectives, I see no indication that any one is to be given priority. Parliament, in my opinion, intended support to reflect the diverse dynamics of many unique marital relationships. 69

The Court then referred to the social context in which support orders are made and, in particular, to the economic barriers faced by women as further grounds to conclude that the statute does not support the self-sufficiency model,70 although it noted later that "the promotion of self-sufficiency remains relevant under this view of spousal support." 71 The court adopts a partnership model of marriage, recognizes "that family law can play only a limited role in alleviating the economic consequences of marriage breakdown"72 and states:

The four objectives set out in the Act can be viewed as an attempt to achieve an equitable sharing of the economic consequences of
marriage or marriage breakdown. At the end of the day, however, courts have an overriding discretion and the exercise of such discretion will depend on the particular facts of each case, having regard to the factors and objectives designated in the Act. 73

While Moge dealt with an application to vary maintenance and did in the end simply apply the four objectives set out in section 17(7) of the Divorce Act to vary the maintenance in favour of the wife, it also provided a commentary on the role of women in marriage and the work place. In doing so, it clearly adopted the partnership model of marriage and the concept that the spousal partners should share in the net creation of wealth during marriage.

In Lodge v. Lodge, the British Columbia Court of Appeal adopted Moge's view of the losses suffered by the spouse (usually the wife) who stays at home or whose career is impacted by child care and household responsibilities and found this view to be a relevant factor in a reapportionment under section 51 of the Family Relations Act in light of section 51(e)'s reference to "the needs of each spouse to become or remain economically independent and self-sufficient." 74 The court did not express a view as to which family model it was adopting. It adopted a view, however, which flows from the family model discussed in Moge and by implication it adopts that family model as well. In Toth v. Toth, the British Columbia Court of Appeal commented that the "compensatory approach" adopted in Moge v. Moge with respect to maintenance was adopted in Lodge v. Lodge with respect to the reapportionment of family assets. 75 The Court in Toth overruled the trial judge's award of a lump sum maintenance award and used a reapportionment of property to adjust for the economic loss suffered by Mrs. Toth and the disproportionate economic gain obtained by Mr. Toth as a consequence of the breakdown of the marriage. The Court noted that:

[Property division and maintenance are closely intertwined. One advantage of this legislative tie is that section 51 may be utilized in the division of property to reflect the relative abilities of the parties to become or remain economically independent and self-sufficient (section 51(e)), and the respective capacities and liabilities of the parties (section 51(f)). These concepts are also relevant to determinations of spousal maintenance. A potential pitfall presented by this legislative link between property and]
maintenance, however, is the danger of double recovery where, for example, property is reapportioned under section 51 and then further reapportioned by an award of lump sum maintenance.\textsuperscript{76}

In \textit{Stuart v. Stuart}, the Court of Appeal considered whether the words in the \textit{Family Relations Act}, section 57(2), "except as provided in subsection (1), a spouse or former spouse is required to be self-sufficient in relation to the other spouse or former spouse" meant British Columbia had a self-sufficiency model rather than a compensatory model. The Court did not answer the question directly but said:

There is no separate head of relief under either statute for 'compensatory spousal support' and Madam Justice L'Heureux-Dube did not say there was. She was simply addressing the factors which under the \textit{Federal Act}, are to be taken into account in determining support and the weight to be given to each.\textsuperscript{77}

It can be concluded that the British Columbia Court of Appeal has adopted the compensation model as described in \textit{Moge}.

\textbf{British Columbia - Child Maintenance}

The \textit{Divorce Act} and the \textit{Family Relations Act} both impose a primary obligation upon parents to support their children. In the federal statute, "child of the marriage" includes children of two spouses or former spouses who:

(a) are under 16 years of age; or

(b) are over 16 years of age and under the charge of the parents but who are unable to withdraw from their parents' charge or obtain the necessaries of life because of illness, disability or other reason.

It also includes a child for whom they both stand in place of parents and a child of whom one is a parent and for whom the other stands in the place of a parent.\textsuperscript{78} If there is dependence by the child on the parents, age is not a bar to recovery. Illness and disability are the listed reasons but "other cause" has been interpreted to include pursuing an education and an inability to find a job and is not
to be restricted by reference to the words "illness and disability." The result in any particular case depends on the particular circumstances. For the purposes of this paper, the policy to note is that dependency of a child brings with it a continued obligation to support that child. This policy is maintained in the proposed amendments to the Divorce Act contained in Bill C-41. The requisite age becomes the age of majority of the child in the province where the child resides. The continued dependency of the child is now described as "by reason of illness, disability, pursuit of reasonable education or other cause to withdraw from their charge or to obtain the necessaries of life."

In the provincial statute "child" means a person under the age of 19 years. No reference is made to "dependence." Parent is defined to include a child’s guardian and a step-parent. In the latter case, criteria are added:

(a) the step-parent must contribute to the maintenance of the child for not less than one year; and
(b) there must be a relationship between the step-parent and the stepchild’s parent based on marriage or living together as man and wife for not less than two years.

The Divorce Act sets out the objectives of an order for child support stating that spouses have a joint obligation to maintain the child and that obligation should be apportioned according to their relative abilities to contribute. The Family Relations Act principles are the same as those applicable to spouses. Bill C-41 introduces the concept of child support guidelines. It is intended that these federal guidelines will prevail unless the province has adopted provincial guidelines. It is beyond the scope of this paper to discuss the merits of judicial guidelines versus statutory guidelines and what impact these guidelines will have upon support orders for children. It is, however, important to note that in an area (family support) in which there was a good deal of judicial discretion, these objectives are sought to be met by the guidelines:

(a) to establish a fair standard of support for children that ensures that children continue to benefit from the financial means of both parents after separation;
(b) to reduce conflict and tension between spouses by making the calculation of child support orders more objective;

(c) to improve the efficiency of the legal process by giving courts and spouses guidance in setting the levels of child support orders and encouraging settlement; and

(d) to ensure more consistent treatment of spouses and children who are in similar circumstances.  

These comments echo some of those already made by this paper in the discussion of the need for reform.

The amounts set out in the guideline schedules are based on economic studies which show that spending on children is directly related to the income level of both parents and the number of children. Secondly, each parent's financial obligation to a child is treated independently. A parent's obligation is to contribute a share of his or her income and is not related to what the other parent must contribute. Adjustments can be made for special child related expenses, such as child care, health related, education and extra-curricular activities and "undue hardship" to either parent or the child.  

This general idea of the "more you have, the more you pay," independent of the need of the child, is somewhat similar to the apparent judicial thought behind the comments in Wills Variation Act cases that if the size of the estate permits, some provision should be made for adult independent children.  

A further amendment contained in Bill C-41 gives priority to child support over a spousal maintenance order.

**Support Obligations - Death of the Payor**

In 1991 the Ontario Court of Appeal in *Linton v. Linton* said:

Although the *Divorce Act* makes no specific provision for making a support order an obligation of the payor's estate, there is ample authority to support the conclusion that the trial judge had jurisdiction to make the support order an obligation of the husband's estate. . . In my view, in a traditional marriage, making a support order binding on the payor's estate is consistent with section 15(7)(a) of the *Divorce Act*. It recognizes in the particular
circumstances, the economic disadvantages arising from the marriage and its breakdown.  

The Nova Scotia Supreme Court (Appeal Division) refused to follow this reasoning and held that there was no jurisdiction to make a support order binding on a father's estate. The British Columbia Court of Appeal, before Linton was decided, referred to the conflicting authorities and while it concluded a support order under the Divorce Act, section 15(2), cannot be made once a person required to pay is dead, it held it was not necessary to decide whether there is jurisdiction to make an order binding the estate of the deceased payor. Shortly afterwards, the British Columbia Court of Appeal again twice avoided the issue. After noting the conflicting authorities, the Court said it would adopt the approach that "assuming the power exists" it was not appropriate to exercise it on the facts of the case. On a third occasion, the Court again refused to decide the issue and made an award which ended when a spouse became the beneficiary of a life insurance policy on her spouse's life. One of the early decisions relied on to support the argument that the obligation to pay support survives death, Snively v. Snively stated the policy well:

It is clear that the purpose and intent of ss. 11 and 12 is to provide for maintenance if and when it is needed. That together with the associated public interest, in my opinion, not only permits but impels a broad interpretation of the implementation of such a purpose and such an intent.

It seems to me that the enactment of the relevant sections of the Divorce Act may have been motivated by the same general nature of concern that there be protection for those who may need it as one might reasonably conclude was a causative factor in legislation such as the Dependants' Relief Act.

Accordingly I think it follows naturally that what Parliament intended to accomplish by those sections was the providing of machinery for awarding maintenance not only during the lifetime of the person against whom the order is made but also following his death.  

Unfortunately the issue has not been decided conclusively in British Columbia.
Conclusions

What conclusions about policy can be drawn from the matrimonial legislation and its British Columbia judicial interpretation (leaving aside for the moment claims based on unjust enrichment)?

1. Property rights to assets in the name of another have only been given to married partners. Such rights are not given to de facto spouses and children.

2. Legislation is silent as to which model of the family is adopted, but a review of the case law in British Columbia and some other Canadian jurisdictions indicates considerable support for the partnership model.

3. Not all assets which are owned by a spouse are subject to being divided on the breakup of the marriage. Non-use of the asset by the family and an absence of contribution to the acquisition or maintenance of the asset seem to underlie this approach.

4. There exists an obligation of maintenance to spouses, to children, to de facto spouses and to de facto children after the breakdown of a marriage (or a marriage-like relationship). The statutes do not specifically address the continuation of the support payments after the death of the payor. In the case of children, the obligation ends when the child reaches the age of 16 years unless there is continued dependence because of schooling or "other cause."

5. The reapportionment of assets may be used as a means of assisting a party to become economically self-sufficient, particularly where a party has been economically disadvantaged as a result of the role they assumed in the relationship.

6. An award of maintenance is subject to variation if the circumstances the payor or the payee change substantially in the future. Reapportionment of assets because of a change in circumstances does not occur.

7. Spouses may substantially alter their statutory rights, but not those of their children, by agreement.

8. The legislature has granted courts considerable discretion in the making of both property and maintenance awards; however, with respect to maintenance awards, there is a
determined effort to establish standards to reduce the use of discretion and guide it when it is exercised.

9. Family law in British Columbia has not addressed the impact of death upon the division of property and the payment of maintenance in a thoughtful and organized way, in contrast, for example, to Ontario which has addressed these issues in their legislation.\textsuperscript{97}
END NOTES

1. Family Relations Act, R.S.B.C. 1979 c. 121, (hereinafter the "Family Relations Act") s. 43, s. 51.


4. Divorce Act, S.C. 1986, c. 4, R.S.C. 1985, c. 3 (2 Supp.) [hereinafter the "Divorce Act"] s. 8, s. 15.

5. Family Relations Act, supra note 1, s. 43, s. 44.

6. Divorce Act, supra note 4, s. 15.

7. Family Relations Act, supra note 1, s. 43, s. 51.

8. Ibid. s. 56, s. 57.


10. Bill C-41, An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act, the Garnishment, Attachment and Pension Diversion Act and the Canada Shipping Act (S.C. 1997, ch. 1) [hereinafter "Bill C-41"].


12. Tataryn supra at 820 - 821.

13. Ibid. at 824.


16. 45 and 46 Vict., c. 75 (U.K.)

17. For example: An Act to Extend the Rights of Property of Married Women, 1887, 36 Victoria, c. 117; Married Women's Property Act, 51 Vict. c. 80 (1887)

18. M. A. Glendon supra at 30.

19. Ibid. at 33.

Ibid. at 30, 31.

(see also Chapter 7 on the use of unjust enrichment).


British Columbia Association of Social Workers, *The Family is the Best Judge* (School of Social Work: University of Victoria 1978) at ii.

Above note 5.

*Family Relations Act, supra* note 1, s. 43.

*Ibid.*, s. 45(2)


*Family Relations Act, supra* note 1, s. 45(3)e.

*Ibid.*, s. 46.


*Family Relations Act, supra* note 1, s. 45, 46.


42 Rawluk, supra at 90.
43 Ibid. at 97.
44 Family Law Act Ontario, supra note 41, s. 5(7).
45 1993 Ontario Report, supra c. 3, note 7 at 5.
46 Ibid. at 5.
47 Ibid. at 7 ff.
48 Ibid. at 144.
49 Ibid. at 145.
50 Ibid. at 19 ff., 41 ff., 150.
51 Family Relations Act, supra note 1, s. 1.
53 Milne v. MacDonald Estate (1986), 5 B.C.L.R. (2d) 46 at 51 - 52 (B.C.C.A.)
54 Tataryn, supra c. 1, note 3 at 821 - 822.
55 Divorce Act, supra note 4, s. 4.
56 Ibid., s. 2.
57 Ibid., s. 15(5).
58 Ibid., 15(7).
59 Family Relations Act, supra note 1, s. 1.
60 Ibid., s. 57.
61 Ibid., s. 61(2).
62 Hughes v. Hughes (1977), 1 B.C.L.R. 234 at 238, 239 (B.C.C.A.)
64 Ibid. at 373.
65 Ibid. at 373, 374.
66 Tataryn, supra c. 1, note 3 at 822.
67 Moge, supra note 63 at 375.
68 Ibid. at 376.
69 Ibid. at 377.
70 Ibid. at 377 ff.
71 Ibid. at 383.
72 Ibid. at 387.
73 Ibid. at 387.
76 Ibid. at 76.
78 Divorce Act, supra note 1, s. 2(1), s. 2(2).
80 Bill C-41, supra note 9, s. 1(2).
81 Family Relations Act, supra note 1, s. 1.
82 Ibid., s. 1.
83 Divorce Act, supra note 4, s. 12(8).
84 Above at 65 - 66.
85 Bill C-41, supra note 9, s. 2 (adding s. 15.1 to the Divorce Act).
86 See generally:
87 Bill C-41, supra note 9, s. 11 (adding s. 26.1 to the Divorce Act).
88 Ibid. at 13 - 16.
89 Tataryn, supra c.1, note 3 at 822 - 823.
90 Bill C-41, supra note 9, s. 1 (adding s. 15.3 to the Divorce Act).


Snively v. Snively (1972), 6 R.F.L. 75 at 84 (Ont. S.C.)

97 Family Law Act Ontario, supra note 41, s. 5, s. 6, s. 7, s. 10.
CHAPTER 6
INTESTACY LEGISLATION

A person is said to die "intestate" when he or she does not leave a will disposing of his or her property at death. Intestacies occur for a variety of reasons, among which are a person's deliberate decision not to make a will, an aversion to taking a step (the making of the will) which acknowledges that death is a certainty, and a will which is ineffective because of poor drafting, improper execution or inadvertent revocation by a subsequent marriage. Whatever the reason for the intestacy, common law legal systems have a statute which describes what must happen. Intestacy rules will be used here to describe those rules which determine how the intestate's property is to be distributed on death.

There are a number of reasons to examine a statutory asset distribution scheme triggered by death and a number of law reform commission reports which have commented on them in the search for policies which might be reflected in dependant's relief legislation:

1. The event which permits the distribution of assets is death. While the examination of family law provided a number of insights into policy issues, these were in the context of all the parties being alive.

2. The historical background to and the origin of the statute could disclose criteria which in the past have been deemed to be significant.

3. The statute might contain a distribution scheme consistent with objective ideas of what is fair and correct in society.

4. The statute is as Lord Cairns reasoned "in substance nothing more than a will made by the Legislature for the intestate,"\textsuperscript{1} and as such is a statement about what individual intestates would have included in their wills if consulted.

5. Law reform commissions have reviewed their jurisdiction's statutes with a view to reform and while doing so have assembled empirical data to decide if the existing statutory scheme reflects the current wishes of individuals.
6. Any new dependant's relief legislation that featured a fixed share might be governed by intestacy legislation in determining what that fixed share might be.

7. Some issues which law reform commissions have addressed, for example, spousal entitlement and de facto spouses, are issues which must be addressed in dependant's relief legislation.

The cautions to be kept in mind in reviewing legislation have already been noted.\(^2\) As will be obvious when some of the empirical data is examined from other jurisdictions, the British Columbia legislation, which has not been substantially amended since 1983, may not reflect the ideals and policies of contemporary British Columbia society.

**History of the Legislation**

Reference has already been made in this paper to the Roman's use of wills to avoid "rules of Intestate succession."\(^3\) With respect to England, it is said "[i]f before we speak of our law of inheritance as it was in the twelfth and thirteenth centuries, we devote some small space to the antiquities of family law, it will be filled rather by warnings than by theories."\(^4\) This justifies beginning a historical overview at the end of Henry III's reign (1216 - 1272). At that time, intestate succession to real property gave priority to the deceased's descendants or issue as opposed to ancestors or blood relatives who were not ancestors or issue. Six rules were used to settle the order in which descendants inherited:

- (a) A living descendant excludes their own descendants;
- (b) A dead descendant is represented by their own descendants;
- (c) Males exclude females of an equal degree;
- (d) If males are of equal degree, the eldest inherits (primogeniture);
- (e) If females are of equal degree, they share the inheritance;
- (f) Rule (b) overrules (c) so a granddaughter of a dead eldest son inherits in preference to a younger son.\(^5\)
The rights of the surviving spouse were based on dower and curtesy. These rules were not abolished in England until January 1, 1926.6

Intestate succession to personal property depended on local custom until the Statute of Distribution in 1670 which remained (except for two minor provisions) unchanged until 1890. Entitlement under the 1670 statute as amended was as follows:

(a) A widower was entitled to all his wife's personalty to the exclusion of all others. A widow was entitled to one-half of the personal estate if there were no surviving issue and one-third if there were issue.

(b) Subject to the surviving spouse's rights, children shared equally with no preferences based on gender or age. Children of deceased children took their parent's share as representatives of the ancestor.

(c) If there was a widow but no issue, the next of kin "who are in equal degree" received a half share in the estate. If there was no surviving spouse, the next of kin received all the estate.

"No Representation was admitted among Collaterals after Brothers and Sisters Children."7

Classifying relatives according to their degree of relationship to the deceased is a civil law concept. The degree of relationship corresponds to the number of steps that the relative stands away from the deceased. Relatives of the first degree are parents, of the second degree are grandparents and siblings, of the third degree are great grandparents, uncles, aunts, nephews and nieces, and so on.8

This system was, however, modified for policy reasons so it did not survive in its pure form. Personal property distribution, like real property, was governed after January 1, 1926, by the Administration of Estates Act, 1925.

British Columbia initially maintained a distinction between personal property and real property. The Administration Act of 1897 adopted the distribution scheme of the 1670 Statute of Distribution and included provision for a wife. If the intestate was survived by a wife, she received a one-third interest in the "surplage" of the personal property and the balance went to any children
in equal shares. If there were no children, the wife shared equally with the deceased's next of kin. Real property was first dealt with in 1872. The *Inheritance Act* distributed an intestate's real estate to the intestate's lineal descendants and failing that to his father, his mother and to his collateral relatives in that order. This scheme was amended in 1898 to give a spouse one-half of the real estate if there were no lawful descendants and one-third if there were lawful descendants. British Columbia abolished primogeniture some 27 years before England. Interestingly, in 1877 a Supreme Court judge was given the power to "order that there be retained, allotted, and applied for the support, maintenance and benefit of such concubine and of every such child respectively, so much of the net, real and personal estate as to such court or judge seem fit" limited, however, to the greater of $500 or 10% of the net real and personal estate in the province to each. This principle has survived until today and is contained in section 86 of the present statute.

In 1925, the *Administration of Estates Act* was amended to provide that the deceased's estate included both real and personal property. The *Dower Act* was repealed and dower and curtesy abolished. The distribution scheme then was as follows:

1. There was no distinction between the distribution scheme for men and women.
2. If an intestate died leaving:
   (a) a spouse: The spouse received all the estate if it was less than $20,000. If the estate was greater than $20,000, the spouse received the first $20,000 and shared the balance of the estate with those who would inherit if there was no surviving spouse or issue.
   (b) a spouse and one child: One-half of the estate went to the spouse and one-half to the child or to the child's issue per stirpes.
   (c) a spouse and two children: One-third of the estate went to the spouse and two-thirds to the children or their issue per stirpes.
   (d) no spouse and a child or children: All the estate went to the child or children equally and to their issue per stirpes.
(e) no spouse and no issue: The estate went to the deceased's parents equally or the survivor of them.

(f) no spouse, issue or parents: The estate went to the deceased's brothers and sisters equally. A deceased's brother or sister's children took their parent's share, but if there were only nieces and nephews (the brothers and sisters all predeceasing the intestate), they shared equally.

(g) no spouse, issue, parents, siblings, nieces or nephews: The estate went to the deceased's next of kin "of equal degree of consanguinity" with these additional rules:
   (i) no representation was permitted after brothers and sisters' children;
   (ii) degrees of kindred were computed by going upward from the deceased to the nearest common ancestor, and then downward to the relative;
   (iii) relations of the half blood inherited equally with relations of the whole blood of the same degree.

(h) Illegitimate children were treated as legitimate children of their mother.

(i) Advances to a child were deducted from a child's share.

(j) A spouse living apart from the deceased and "in adultery" at the date of the deceased's death took no share of the estate.14

In 1936 a widow was granted up to three months of her husband's wages owing at the time of his death free from any debts and these monies were not to be included in a testate or intestate's estate.15 In 1955, the share of the surviving spouse was increased by providing that the first $5,000 went to the spouse regardless of who the other relatives might be.16 The $5,000 sum was increased to $10,000 in 1963,17 to $20,000 in 1966,18 and $65,000 in 1983.19 In 1972 there were additional significant changes:

(a) The spouse was given a life interest in the matrimonial home.

(b) The household furnishings went to the surviving spouse.
(c) Separation for more than one year replaced "living in adultery" as a bar to recovery, but the
court was given a discretion to "otherwise order."

(d) The "concubine" was replaced with a common law spouse as defined.

(e) An illegitimate child who was under the "care, control, maintenance, or protection, either
physically or financially of his father" for more than one year before the father's death
could now, like the common law spouse, apply for financial support.

(f) The husband obtained priority for up to three months wages.

This review of the history of the British Columbia intestacy rules and a review of the *Estate
Administration Act* (in which the rules are contained) as it reads today discloses the following:

1. The law has been very stable. In combination with dower and curtesy, the distribution
scheme has remained relatively unchanged for more than 500 years. It has featured:

   (a) A limited share for the widow if the deceased has a child or children. Only in the
last 100 years with the abolishment of dower and primogeniture has the widow
substantially increased her share by having the deceased's real estate become
divisible. The sum for which the widow has priority has increased dramatically in
absolute terms, but not so dramatically in relation to, say, the value of assets such
as land. On the other hand, co-ownership of assets by spouses with the right or
survivorship has greatly increased, as has the availability of pensions, life insurance
and registered savings plans, all with designated beneficiaries. These latter devices
allow substantial portions of the deceased's assets to pass to the spouse outside of
the estate.

   (b) A share for children and in the case of land particularly the oldest male child.
Today's statute could pass a greater share of an estate to the children (when there is
more than one child) than to a spouse.

   (c) A preference has been given to descendants of the deceased. Ancestors and siblings
inherit only when there are no descendants.
(d) Only the surviving spouse has increased his or her share in the estate in the last 70 years.

(e) For more than 100 years there has been a recognition that persons in a relationship other than marriage or by blood (a "concubine," "common law spouse") and children born to unmarried parents could in appropriate circumstances inherit.

(f) A spouse could be disqualified from inheriting by their behaviour (ie. "living in adultery" or "separating with the intention of living separate and apart").

(g) In the case of children, the amount advanced to a child shall be deducted from the share the child would otherwise receive.

(h) The right to inherit arises solely from the inheritor's status in relationship to the deceased. It is independent of any contribution by the inheritor. It does not vary with the length of time for which the status has been ongoing. It is based on the model of marriage which holds that "marriage is a union of body, soul and property."

Suggestions for Reform

These elements of the intestate distribution rules must be used cautiously in the search for principles which ought to underlie dependant's relief legislation. They need not be discarded but they reflect views or practices in the past which fail to meet the needs of British Columbians today and in the future. Fortunately, considerable attention has recently been paid by law reform commissions and researchers to empirical information to determine if this "will made by the Legislature for the intestate" needs to be revoked and a new legislative will proclaimed. To the extent that looking at the intentions of intestates allows one to get a sense of what individuals "feel" is the right way to distribute assets upon death, one also can get a sense of some of the policy objectives which might be incorporated in dependant's relief legislation. Furthermore, the likelihood of testators using avoidance techniques, and the need for anti-avoidance provisions in any dependant's relief legislation will be reduced if the policies behind any dependant's relief legislation correspond as closely as possible to what potential testators and beneficiaries feel is right. A
number of law reform commissions have reached similar conclusions on changes which need to be made to intestacy rules.

In its 1983 Report on Statutory Succession Rights, the Law Reform Commission of British Columbia stated:

In our opinion, the current statutory determination of next of kin and their intestate interests probably corresponds with what the community considers fair and equitable distribution. We see no reason to modify those rules. There are several matters, however, which we think require special consideration.  

These matters, among others, were then identified to be:

1. A need to extend *Wills Variation Act* principles to intestacies where "a fixed scheme... cannot be tailored to individual needs" and so as to "prevent injustice when a deceased fails to observe his obligations to his family." 26 Eight Canadian jurisdictions have already done so.  

2. A need to revise the surviving spouse's share. The Commission referred to some empirical studies and repeated its earlier conclusion that intestate succession rules should reflect community views. "To give effect to the collective view of the community as to what is fair, just and equitable, the surviving spouse (even where there are children) should be entitled to the entire estate upon an intestacy." 28 The Commission's majority recommendation, however, rejected the "all to the spouse" approach and recommended increasing the spouse's preferred share to $200,000 and increasing the spouse's share of the balance of the estate when there are children to one-half from one-third. The Commission felt "in practical terms, the surviving spouse will receive the bulk of the estate." The Commission declined to recommend that when there is a surviving spouse and no children, the next of kin of the deceased should share in the balance of the estate. 29
3. A need to give illegitimate children the same rights as legitimate children. The Commission recommended that there be no distinction between legitimate and illegitimate children.\(^{30}\) The legislation was changed to accomplish this objective.

4. The desirability of repealing the sections of the *Estate Administration Act* which give rights to the common law spouse. The Commission recommended that the common law spouse be given claimant rights under the *Wills Variation Act* which, in turn, would be made applicable to intestate estates.\(^{31}\) They also recommended that the definition of "common law spouse" be amended to delete the requirement that the deceased need have maintained that person since that may disqualify a person who has contributed to the accumulation of the deceased's estate.\(^{32}\)

5. A need to limit the categories of next of kin who are entitled on an intestacy. The Commission concluded that for administrative reasons, persons more distant than the fourth degree of consanguinity to the deceased should not be permitted to share in the deceased's estate unless they were issue of the deceased.\(^{33}\)

6. The doctrine of advancement, the rule that portions advanced to a child during the deceased's lifetime should be deducted from the child's intestate share, should be eliminated. The proposed application of *Wills Variation Act* provisions could be used to alter the statutory scheme if unfairness would otherwise result.\(^{34}\)

7. The special rights of the surviving spouse to a life estate in the matrimonial home. Noting the general administrative problems associated with life estates and the recommended increased preferred share to the spouse, the Commission concluded that this life estate be abolished (although the household furnishings should still go to the surviving spouse) and that the spouse could elect to take the house in specie as part of his or her share.\(^{35}\)

8. In his minority report, A. Close referred to statistical data to support his statement that "all-to-the-spouse as a default rule, has overwhelming support within the community."\(^{36}\)

None of these recommendations reflected a view that there was a fundamental flaw or flaws in the distribution scheme. Fine tuning of some provisions and a substantially increased spouse's share
are adjustments rather than substantive changes. In the text which accompanies the recommendations, there is no discussion of what the general policy objectives of the distribution scheme should be, other than provision for the spouse. Specifically, there is no discussion of the family model which lies behind the present provisions or which ought to be the model on the basis of which change should be made. In fairness to the Commission, once they concluded that "intestate succession in British Columbia generally works well," there was no need to examine policy in depth. No departure from the items listed earlier (stability, increasing the spouse share, etc.) is warranted based on the Commission's views.

The Alberta Law Reform Institute (the "Institute") reported on intestate succession in 1996. Some time will be devoted to a consideration of this report because it is very recent, and unlike a number of older law reform commission reports, it relies more heavily on empirical studies. It was done for a jurisdiction geographically and socially close to British Columbia. This report begins by identifying a number of trends in Canadian society and in Alberta in particular. Because of insufficient funding, no public opinion survey was possible. Information came from Alberta lawyers, English and U.S. studies, Statistics Canada data, and a 1992 study of 999 probate files. The following was noted:

1. The life expectancy of men and women has increased and will continue to increase.

2. Family size is decreasing. The birth rate has decreased and as a result, there are fewer brothers and sisters, aunts and uncles, and cousins.

3. Since 1940, with the exception of the early 1970's, the marriage rate has declined and since 1968 the divorce rate has increased dramatically (from 1,367 per 10,000 marriages in 1969 to 3,982 per 10,000 marriages in 1989). Remarriage has become common and marriages between previously married persons almost quadrupled between 1967 and 1989. Blended families are therefore increasingly common.

4. Common law unions (cohabitation outside marriage) for Canadians over 15 years of age increased from 713,215 in 1981 to 1,451,905 in 1991, although 60% of all Canadians in
these unions were less than 35 years of age. Less than 2% of individuals in each of the age categories 55 - 59 years, 60 - 65 years, and 65 years and over were in such a union, but in 1991 this translated to more than 6,500 individuals in Alberta out of a total of approximately 120,000 in common law unions. In 1991, 10.2% of Alberta couples lived in common law unions.

5. A review of a number of United States studies, an English study, and Alberta surveys and statistics, resulted in the following summary of how estates should be distributed in the event of an intestacy of a person when these people survived:

(a) Spouse and parents but no children. "A healthy majority would give the entire estate to the surviving spouse."

(b) Spouse and children of the relationship. A significant majority (51.6% to 79% depending on the study) would give the entire estate to the spouse.

(c) Spouse and children of another relationship. Significantly fewer (16.8% to 29% in the same studies) respondents would give the entire estate to the surviving spouse.

(d) Children only. Equal treatment of all children, children of a deceased child getting their parent's share, and equal treatment of all grandchildren when all children predecease the intestate was the response of most.

(e) Parents and siblings only. The preferred choice seemed to be a not necessarily equal division among all.

The Institute concluded that the intestacy rules could be designed to serve various purposes:

1. the wishes of intestates;
2. the needs of survivors;
3. the contribution of the survivors to the accumulation of the intestate's estate;
4. the status of certain relationships;
5. or some combination of these.

Rather than examining the various purposes, it recommended that "Unless some compelling social policy requires deviation from the wishes of the majority of intestates, intestacy rules should reflect those wishes." Unfortunately, such an approach does not weigh any of the individual factors.
Relevant to the purposes of this paper are the following recommendations made by the
Institute, which flow from this statement:

The design of the *Intestate Succession Act* should reflect:
(a) the wishes of intestates as measured by the reasonable expectations of the
community at large, and
(b) evolving social policy.\(^48\)

The recommendations were:

1. All of the estate should go to the surviving spouse if there is no issue of the intestate.

2. The wishes of intestates, the distribution preferences of Albertans generally, the needs and
the contribution of a surviving spouse and the special status of marriage (which is reflected
in pensions and benefits, income tax, matrimonial property and succession law), and a
preference for a simple scheme lead to the conclusion that "all to the spouse" should be the
rule where all the children of the intestate are also the children of the surviving spouse.
Even if the surviving spouse has children from another relationship this recommendation
holds. If the deceased has children from another relationship, there is the risk that a
surviving spouse would disinherit the intestate’s children from such a relationship and a
balance must be struck between the potentially competing interests. The recommendation is
that where the intestate has children from another relationship, the surviving spouse should
receive $50,000 or one-half of the estate, whichever is greater, plus one-half the residue.
All children of the intestate should share equally in the other half of the residue.\(^49\)

This approach first disinherits children in favour of a spouse on the assumption (likely correct
from a review of the data) that the surviving parent of the children will treat them fairly,
and, secondly, protects children when the surviving spouse is not their parent. As a result,
despite the apparent enhancement of the spouse’s position at the expense of the children, the
Institute’s recommendation may not, in fact, result in children receiving any less than as a
result, for example, of just increasing the spouse’s preferential share.

3. The conduct of the parties ought to continue to be a bar to inheritance. This is now
measured by adultery in Alberta and separation in British Columbia. The conduct should
be changed to be separation together with an intention to divide property. The latter is to be evidenced by the commencement of marital property proceedings or divorce or a division of property which recognizes their marriage breakdown.\(^50\) This contrasts the views of the English Law Reform Commission, which concluded, partly based on consultations with the public, that a separated spouse should not be disentitled from receiving a share. The reasons were that because it would be necessary to provide a minimum separation period, there would be difficulties of proof, and separated spouses can avoid the intestacy rules by making a will. If such a spouse does not make a will, their marriage should be treated like any other.\(^51\) All the recommendations of this English Law Reform Commission's report have been rejected.\(^52\)

4. An unmarried cohabitant of the opposite sex, if the relationship is longer than three years or there is a "relationship of some permanence immediately preceding the intestate's death, if there is a child of the relationship" should qualify as a beneficiary.\(^53\) In these circumstances, if the intestate was also married but living separate and apart from his or her spouse, the surviving spouse would have no inheritance rights.\(^54\)

5. The doctrine of advancement should be retained for children since it "serves the principle of equal treatment of children."\(^55\)

The Alberta Report reaches similar conclusions to the 1983 British Columbia Commission Report, but it places more emphasis on bringing the legislation into line with "the wishes of intestates as measured by the reasonable expectations of the community at large."\(^56\) This results in recommendations which enhance the surviving spouse's position even more than would the British Columbia recommendations. To the extent that these reasonable expectations "are a reflection of the community's current views of a family model, one could argue there is support for the partnership model of marriage. Children are not members of the economic partnership (although they are family members) and, therefore, should not inherit at the expense of a spouse. Furthermore, the proposed inclusion of cohabitants in the definition of spouse on the basis of a three-year period of cohabitation indirectly acknowledges the direct and indirect economic
contribution of such a person which is consistent with a partnership model of marriage. It ignores any contribution of the separated spouse to the creation of the deceased's estate. Section 111 of the British Columbia Estate Administration Act already makes separation for more than one year a bar unless a court otherwise orders.57

A number of other law reform commissions have authored reports. In 1973 the Law Reform Commission of Western Australia recommended the spouse's preferred share and share of the residue be increased when there are children and the spouse without children no longer shares with the deceased's parents and siblings. It noted the "broad aim of the legislation should be to achieve a just distribution . . . in light of prevailing social attitudes."58 Manitoba's Commission in 1985 recommended increasing the spouse's preferential share and reviewing that share regularly but reducing the preferential share when the intestate had children from an earlier relationship. No recognition should be given to de facto spouses and the doctrine of advancement to children should be maintained.59

The English Law Reform Commission concluded the "principal defect is the failure to ensure adequate provision for a surviving spouse."60 In considering the principles upon which the rules of intestacy might be based, there was no agreement as to the single most appropriate principle to be applied from among "the presumed wishes of the deceased, the needs or deserts of the survivors, and the status of the surviving spouse." Two fundamental points of agreement were that the rules should be simple to understand and operate and the surviving spouse should receive adequate provision.61 The English Commission recommended that the entire estate be left to a surviving spouse even if there were children of that spouse and even if there are children of a previous relationship of the deceased. Results of a public opinion survey showed some disagreement with the latter position.62 While a majority of these surveys held the view that cohabitants should automatically share in the estate, these views were dismissed in favour of "simplicity and clarity of the rules" and "disputes could easily arise as to whether a particular individual was a cohabitant." It was recommended that these views instead be recognized by an
amendment to the dependant’s relief legislation (which applies to testate and intestate estates) to allow cohabitants the right to be claimants. The doctrine of advancement was noted to be "complicated and difficult to administer" and should be abolished.

The 1993 Report of the Queensland Law Reform Commission suggests reforms which by and large move the law in the same direction as those already noted. In particular, it was suggested the surviving spouse should receive the personal property of the intestate (a category which excludes interest in land, money, securities and business property), a statutory legacy of $100,000, the matrimonial home, sufficient funds to a maximum of $150,000 to discharge financial encumbrances on the matrimonial home, an additional $150,000 if there is no matrimonial home and 50% of any balance. The other 50% of the balance, if any, goes to the intestate's children. No account is to be taken of other property or income which may pass outside the deceased’s estate and the recommended entitlement is not based on need as in the case of dependant's relief legislation and is not considered to be overly generous. The Commission commented that "It does not follow that people who decide to live together without taking the formal step of getting married lack commitment or should be exempt from any duties or obligations to each other" and "the arguments in support of granting partners in de facto heterosexual couples rights upon intestacy apply with equal force to the granting of such rights in homosexual couples.” It recommended a definition of spouse which includes a de facto partner of either gender for five years out of the six years before the intestate's death. The suggested qualifying conditions are:

(a) living together on a genuine domestic basis; or

(b) being the parent of a child of an intestate who is less than 18 years old.

Only one person may qualify as a spouse. The other spouse, if there is one, is left to claim under the dependant's relief legislation. The Commission specifically declined to reintroduce any taking into account of benefits received by a child. In this Commission's report, one sees again
recommendations to increase a spouse's share at the expense of children and relatives and to recognize de facto partners.

Since 1969 there has been Uniform Probate Code ("Code") in the United States and it has been repeatedly revised. Some fifteen states have enacted the Code with amendments and nearly all other states have enacted some part or section of the Code. It has been referred to "as a model of modern policy." Article II of the Code contains, among other things, intestacy rules. These rules include provisions for the surviving spouse and non-marital children and their natural parents. The surviving spouse takes all the intestate's estate if:

(a) there are children who are all the intestate's and the surviving spouse's children; or
(b) when the intestate has no descendants or parents.

If parents leave no descendants surviving, the surviving spouse is to receive a preferential share of $200,000 and three-quarters of the residue with one-quarter of the residue passing to the parents. The spouse's share is also reduced if:

(a) There are descendants of the deceased spouse and the surviving spouse and descendants of the deceased spouse alone. In these circumstances there is a preferred share to the spouse of $150,000 together with one-half of the residue.

(b) There are only descendants of the deceased spouse who are not descendants of the surviving spouse. The preferred share of the spouse is now $100,000 and one-half of the residue. Because these shares are in addition to assets which pass outside the estate and protective amounts (homestead allowances, support and maintenance during the period of the estate's administration and an exempt property allowance of $10,000), the Code will pass all of the intestate's estate to a surviving spouse in most cases.

Spouse does not include a de facto partner. The nine community property states protect the spouse by providing for both a lifetime division of property and a method for dividing an estate on death. The doctrine of advancement is restricted by requiring the details of the advancements to
be evidenced in writing, but interestingly the concept is applicable to any individual who is an heir whereas most jurisdictions limit application of this doctrine to children or grandchildren.\textsuperscript{79}

The English Law Reform Commission concluded that the surviving spouse could best be given adequate provision in the great majority of cases by receiving the entire estate. The public opinion survey conducted by them in 1988 and 1989 revealed:

(a) Seventy-nine percent of respondents favoured the spouse receiving the whole estate if there was a surviving spouse and dependant children. The interests of minor children, it was apparently thought, were best served by providing for their surviving parent.

(b) Seventy-two percent of respondents favoured the spouse receiving the whole estate if there was a surviving spouse and independent children.

(c) Spouses of second or subsequent marriages, where there were children of an earlier marriage, should be treated differently. Only 30\% of respondents thought the second wife should inherit all of the estate.

With respect to the latter issue, the Commission concluded that the intestacy rule should not give children of former marriages rights on intestacy because:

(a) The surviving spouse might not receive adequate provision.

(b) Children of former marriages are usually of middle age and unlikely to need financial assistance.

(c) A person who wishes to avoid this result can make a will.

(d) Minor children who are living with the deceased and the surviving spouse may have a claim under family law legislation to maintenance from the surviving spouse.

(e) The circumstances of second marriages vary so much that only a discretionary provision would be able to take them all into account.\textsuperscript{80}
Conclusions

Taking into account the comments of the Law Reform Commissions and the present British Columbia intestacy rules, the following conclusions can be drawn:

1. If an individual fails to exercise their rights to determine the distribution of their property by the use of a will, the state considers that family succession is the preferred solution. It decrees that the deceased's property passes to a spouse, then children, and then to next of kin. Over time, increasing attention has been paid to the entitlement of the surviving spouse.

2. The legal relationship of an individual to the deceased is the sole factor on which the right to inherit depends subject to several minor qualifications, such as separation from the spouse and advancements. The contributions of the inheritor, the length of the relationship, and any other circumstances particular to a given situation are irrelevant.

3. The inheritance which is received under the intestacy rules may or may not be similar to the assets the inheritor would be entitled to from the deceased during the deceased's lifetime. Under the present British Columbia legislation, a spouse with children would be entitled to a substantially larger share on a separation or divorce than on an intestacy (assuming there were relatively few assets passing by operation of law). If the recommendations of the various law reform commissions were adopted in British Columbia, it is likely the spouse would get more on an intestacy than as a result of a "triggering event." Adult children to whom the deceased owes no obligation inter vivos can inherit on the death of a parent.

4. The rules are rigid, and, with the exception of an award to a common law spouse and a separated spouse, permit no discretionary awards by courts. The needs of the inheritor are irrelevant.

5. The rules focus on the transfer of property to the inheritor, not on maintenance. Changes in circumstances, both positive and negative, which arise because of the deceased's death or in the years which follow the deceased's death are ignored.
6. No account is taken, with exception of common law spouses, of relationships which the deceased had which do not arise from marriage or blood. For example, children to whom the deceased stood in loco parentis have no claim.

7. There has been a long standing recognition of "concubines" and now common law spouses.

I will return to some of these conclusions when recommendations for reform are being discussed.
END NOTES

2. Above at 49.
3. Above at 38.

Holdsworth, *supra* c. 4, note 20 at 171 ff.

7. *Statutes at Large*, vol. 3 at 193.
9. *Administration Act*, R.S.B.C. 1897, c.73, s.53.
10. *Consolidated Statutes of British Columbia*, 1877, c.88, s. 1
11. *Statutes of British Columbia*, 1898, c. 40, s. 1, First Schedule.
12. *Destitute Orphan's Act, Consolidated Statutes of British Columbia*, 1877, c. 93, s. 1.
23. Above at 61.
24 Above note 1.
26 Ibid. at 21, 22.
27 Amighetti, supra c.2, note 1.
29 Ibid. at 25, 26.
30 Ibid. at 30.
31 Ibid. at 32, 33, 78, 79, 80.
32 Ibid. at 80, 88.
33 Ibid. at 35, 36, 37.
34 Ibid. at 38, 39.
35 Ibid. at 39 - 44.
36 Ibid. at 159 - 161.
37 Above at 87 - 88.
38 Alberta Law Reform Institute, Reform of the Intestate Succession Act, Report for Discussion No. 16 (Edmonton, 1996) [hereinafter "1996 Alberta Report"].
39 Ibid. at 5.
40 Ibid. at 19.
41 Ibid. at 20.
42 Ibid. at 23, 24.
43 Ibid. at 25, 26.
44 Ibid. at 24 - 29.
46 Ibid. at 47.
47 Ibid. at 49.
48 Ibid. at 49.
49 Ibid. at 50 - 72.


56  *Supra* note 46.

57  *Estate Administration Act, supra* note 13 s. 111.


64  *Ibid.* at 12.


Ibid, at 10.

Ibid, at 37.

Ibid, at 37, 38.

Ibid, at 38, 125, 126.

Ibid, at 73 - 75.

Ibid, at 63 - 70.

English Intestacy 1989, supra note 51 at 8, 9 - 12.
CHAPTER 7
UNJUST ENRICHMENT

The search to find principles underlying asset distribution and recovery schemes would be incomplete without a review of some of the case law and literature which discuss the "remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience he should keep." A deceased person, just like a living person, may at his or her death have "the money of or some benefit derived from another which it is against conscience he should keep." The "another" may not only be an individual who could bring a claim for unjust enrichment, but in a more general sense could be the deceased's family, community or the state for the more general benefits he or she has received from those around him or her during their lifetime. The value of looking at the equitable doctrine of unjust enrichment is that the doctrine has developed in response to a need to "remedy the unjustice that occurs where one person makes a substantial contribution to the property of another person without compensation."  

The doctrine has been developed by the Canadian courts in the context of family relationships, but its application has not been limited to marriage or marriage-like relationships. Nevertheless, in many cases, the contribution has come from services provided by one person to another in circumstances similar to that in which dependant's relief claimants find themselves. Furthermore, Madam Justice McLachlin stated in Tataryn that the legal obligations of the testator might be found in the law of unjust enrichment.

Courts have gone back to some basic principles to develop a cause of action which is independent of a statute, a contract or a tort. In the drafting of any new dependant's relief legislation, the critical first issue to be resolved is "what is the equity which needs to be satisfied?" P. Parkinson in an essay about property disputes between de facto couples identifies three situations which raise inequity:
1. The legal title to property does not reflect the intention of the parties to share ownership. These will give rise to what is later called in this paper, the presumptive resulting trust and the common intention resulting trust.

2. A person's contribution to a family and economic partnership is not reflected in the property ownership when the relationship ends.

3. One party acts to their detriment by foregoing economic opportunities in reliance on the security they expect to receive from the relationship.

Unjust enrichment addresses the equity raised by the last two situations. A discussion of certain terms and concepts is a prerequisite to a more detailed examination of unjust enrichment.

**Terminology**

Peter Birks advances the following definition: "Restitution is the response which consists in causing one person to give up to another an enrichment received at his expense or its value in money." He contrasts restitution, which he labels a response, with contract and tort which "signify a fact or composite set of facts giving rise to legal consequences." Restitution is a response-like compensation and punishment. The tendency to treat restitution in the same sense as tort or contract, he suggests, comes from the fact that "most of the events which give rise to restitution are not, in fact, either contracts or wrongs." What "facts or composite set of facts" give rise to restitution? Birks suggests the general term for these "facts or composite set of facts" is "unjust enrichment at the expense of another: unjust enrichment, for short." Because not all enrichments at another's expense meet with disapproval, the adjective "unjust" is used. Unjust is used in the sense of "disproved" or "reversible." Furthermore, there are two aspects to the words "at the expense of." "At the expense of" can mean that value has passed to one person (the defendant) at the expense of another (the plaintiff). If A pays B $100.00, B is enriched by a "subtraction" from A of $100.00. "At the
expense of" can also refer to "by wrong done to." The analysis here will focus on those situations in which there is "subtraction to the plaintiff."

Some trust law concepts need to be noted. Professor Waters states that a trust can come into existence in two ways. Firstly, a person's words or acts can make it clear that he or she intends to settle property on another by way of a trust. If the words or acts are not clear, the intention needs to be inferred. These trusts, with express or implied intention present, are commonly called express trusts. Secondly, the law imposes the trust machinery in certain circumstances, and the trust arises by operation of law. Three sets of circumstances give rise to what is called the presumptive resulting trust:

(a) A purchases property and title is placed in the name of B or in the names of A and B. B becomes the resulting trustee of A's interest. The term "resulting" describes what happens to the property which is subject to the trust; it results back to A. While the law imposes a trust in these circumstances, Professor Waters points out it is possible to say that A intended the interest which is in B's name to be returned.

(b) A voluntarily transfers property which A owns directly into the name of B or into the names of A and B. B again becomes the resulting trustee of A's interest. Again, it is possible to say that A intended the interest to be returned.

(c) A establishes an express trust but because of uncertainty of the objects, illegality, or public policy trust property remains undisposed of in the trust. This remaining trust property "results back" to A. Even here it could be argued that had A been able to foresee what occurred, A would have intended that the property be returned.

The essential characteristics of all resulting trusts are:

(a) The trustee has title to the property;

(b) The claimant (the would-be resulting trust beneficiary) has provided the property vested in the person bound by the trust, either by supplying the whole or part of the purchase or owning the property before its transfer.
The role of intent in the resulting trust has been considered by various authors. Mr. Justice Dickson states in *Rathwell v. Rathwell*, "[r]esulting trusts are firmly grounded in the settlor's intent as are express trusts, but with this difference - that the intent is inferred, or is presumed as a matter of law from the circumstances of the case." More helpful is T. G. Youdan's view that evidence of intention is relevant only to support or rebut the presumption of a resulting trust. Intention is not the foundation of the trust and it cannot create an interest proportionately greater than the value of the contribution giving rise to the presumption.

From the traditional presumptive resulting trust, there emerged in Canada the concept of the "common intention resulting trust." In *Murdoch v. Murdoch*, Mr. Justice Laskin in dissent stated:

The wider questions raised in those cases included, first, the effect of s. 17 of the *Married Women's Property Act* (similar to s. 12 of the *Ontario Act* referred to in the *Thompson* case), a matter irrelevant to the present appeal, and second, the circumstances under which trust doctrines could be invoked to support claims by one spouse or former spouse to an interest in property formerly held as to legal title by the other. It is this second matter that controls the disposition of the present appeal.

On one point, a starting point, there can be no dispute. The fact that legal title is vested in a person does not necessarily exclude beneficial interests in others. Evidence of a common intention before or at the time of acquisition, qualifying the formal legal title is generally admissible.

In *Rathwell*, Mr. Justice Dickson stated:

The presumption of a resulting trust is sometimes explained as the fact of contribution evidencing an agreement; it has also been explained as a constructive agreement. All of this is settled law: *Murdoch v. Murdoch, supra; Gissing v. Gissing, supra; Pettitt v. Pettitt, supra*. The Courts are looking for a common intention manifested by acts or words that property is acquired as a trustee.
Intention is not a prerequisite to the application of the doctrine of constructive trust. In *Rathwell*, Mr. Justice Dickson reviews resulting trust principles and concludes with these words:

Some of these situations may be analyzed as an agreement or common intention situations. Such intention is generally presumed from a financial contribution. The doctrine of resulting trusts applies. In others a common intention is clearly lacking and cannot be presumed. The doctrine of resulting trust then cannot apply. It is here that we must turn to the doctrine of constructive trust.

. . . The hallmark of the constructive trust is that it is imposed irrespective of intention; indeed, it is imposed quite against the wishes of the constructive trustee.17

While it is clear from the early comments that intention is not part of a constructive trust, it was confusing whether the doctrine of constructive trust was "a third head of obligation, quite distinct from contract and tort," 18 and a "juridical foundation" for a claim,19 or whether the imposition of a constructive trust occurs when it is an appropriate remedy for unjust enrichment.

In *Peter v. Beblow* the Supreme Court of Canada resolved any such confusion and the whole Court adopted this approach:

(a) Did an unjust enrichment exist, that is was there an enrichment, a corresponding deprivation and the absence of a juristic reason for the enrichment?

(b) What is the appropriate remedy?

Two alternate remedies are identified:

(1) A monetary award, "a payment for services rendered on the basis of quantum meruit or quantum valebant"; and

(2) The "equitable remedy, available traditionally where one person was possessed of legal title to property in which another had an interest. . . . the constructive trust." 20
Constructive trust is not a term which is interchangeable with unjust enrichment. Constructive trust is a concept which is part of restitution. It is one means by which the Court "causes one person to give up to another an enrichment received at his expense." Constructive trust is potentially available as a remedy for other causes of action. As P. Birks states:

This makes it immediately possible to see that constructive trusts do not logically or necessarily correspond with and only with 'unjust enrichment'. If legal title is in one person, an equity raises a beneficial interest, as opposed to a security interest such as a charge or a lien, in another, there is necessarily a trust. And if that trust is not raised by reference to a settlor's intent, express, implied or presumed, it follows that the trust must be constructive.

When a Court decides to use the remedy of constructive trust, two terms are used in discussing the extent of the trust. "Value received" looks at the value of the services or other contributions which the claimant has made in order to determine the extent of the trust. This is analogous to the quantum meruit approach to valuation and attaches a dollar value to the labour and other contributions made. "Value survived" looks to the amount by which the property has been improved (to date this has always been a positive figure) as a result of the claimant's contributions.

Unjust Enrichment: Judicial Origin

The development of the doctrine of unjust enrichment in Canada has been relatively recent. It is, as will become obvious, largely a made in Canada concept. It began in 1954 when Mr. Justice Cartwright in Deglman v. Guaranty Trust Co. of Canada and Constantineau referred to an English case in which Lord Wright stated:

It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution.
Referring to Lord Mansfield's words in *Moses v. Macferlan*, Lord Wright continued:

In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money. Lord Mansfield prefaced this pronouncement by observations which are to be noted. If the defendant be under an obligation from the ties of natural justice, to refund; the law implies a debt and gives this action [sc. *indebitatus assumpsit*] founded in the equity of the plaintiff's case, as it were, upon a contract (*quasi ex contractu* as the Roman law expresses it). Lord Mansfield did not say that the law implies a promise. That law implies a debt or obligation which is a different thing. In fact, he denies that there is a contract; the obligation is as efficacious as if it were upon a contract. The obligation is a creation of the law, just as much as an obligation in tort. The obligation belongs to a third class, distinct from either contract or tort though it resembles contract rather than tort. This statement has been the basis of the modern law of quasi-contract, notwithstanding the criticisms which have been lodged against it. Like all large generalizations, it has needed and received qualifications in practice.

Faced with a claim to land which was barred by the Statute of Frauds, and unable to find an express promise or implied promise to pay for personal services performed by the claimant, Mr. Justice Cartwright, speaking for the majority, relied on Lord Wright's comments to impose an obligation to pay the claimant the fair value of the services. He expressed no reservations about establishing a principle for intervention, the then dimensions of which were unknown.

Beginning in 1975, the Supreme Court of Canada considered in a series of cases how the property rights of cohabitees, in the absence of statutory provisions, should be recognized with particular emphasis on the value that is to be given to homemaker contributions. In *Murdoch v. Murdoch*, Mr. Justice Laskin in his dissent recognized the substantial contribution of physical labour and the financial contribution made by Mrs. Murdoch to a ranching business by reasoning:

A Court with equitable jurisdiction is on solid ground in translating into money's worth a contribution of labour by one spouse to the acquisition of property taken in the name of the other. . . . It is unnecessary in such a situation to invoke present day thinking as to the coequality of the spouses to support an apportionment in favour
of the wife. It can be grounded on known principles whose adaptability has, in other situations, been certified by this Court: cf Deglman v. Guaranty Trust Co. of Canada and Constantineau.\(^\text{27}\)

He then considered the applicability of the common intention resulting trust but concluded that in order to avoid the "artificial attribution of a common intention to the spouses," the appropriate relief mechanism was the constructive trust "which does not depend on evidence of intention."\(^\text{28}\) Referring to the United States jurisprudence, he did not define unjust enrichment but stated it to be the "basis of the constructive trust" and "the formula through which the conscience of equity finds expression."\(^\text{29}\)

Three years later in Rathwell v. Rathwell, Mr. Justice Dickson, although not speaking for a majority of the Court, said on this point:

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.\(^\text{30}\)

This statement is the first use of the phrases "an enrichment, a corresponding deprivation, and the absence of any juristic reason for the enrichment" and from then on defines the circumstances which must be present to find an unjust enrichment.

Unable to find a common intention resulting trust, a majority of the Supreme Court of Canada speaking through Mr. Justice Dickson said in Pettkus v. Becker "[i]f she [Miss Becker, a common law spouse] is to succeed at all, [in her claim for an interest in land and the business] constructive trust emerges as the sole juridical foundation for her claim."\(^\text{31}\) While the term "constructive trust" was used in place of unjust enrichment, (in error), the majority of the Court did adopt the three requirements of enrichment, deprivation and absence of juristic reason set out in Rathwell.\(^\text{32}\) In speaking of the facts of the case and the three requirements, the majority concluded
Mr. Pettkus received the benefit of nineteen years of unpaid labour (an enrichment) and Miss Becker received little or nothing in return (a deprivation). In speaking of the absence of juristic reason, this comment was made:

Where one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in property and the other person in a relationship freely accepts benefits conferred by the first person 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. 33

The absence of juristic reason here is equated with finding circumstances where there is "reasonable expectation" and it is "unjust" to allow someone to retain a benefit which expands on the earlier "such as a contract or disposition of law."

Mr. Justice Martland who in Pettkus had said of the constructive trust "the adoption of this concept involves an extension of the law as so far determined by this Court. Such an extension is, in my view, undesirable" 34 joined in the unanimous decision of the Court in Sorochan v. Sorochan. 35 In considering what recognition should be given to Mary Sorochan's 42 years of farming, household and child rearing labour, the Court concluded:

(a) The maintenance and preservation of the land resulting from Mary Sorochan's labour conferred a significant benefit on Alex Sorochan (her unmarried spouse).

(b) The giving of one's labour without compensation is a deprivation.

(c) There was no juristic reason for the enrichment because Mary Sorochan "was under no obligation, contractual or otherwise, to perform the work and services in the home or on the land" and referring back to Pettkus v. Becker said:

The Court held that this third requirement would be met in situations where one party prejudices himself or herself with the reasonable expectation of receiving something in return and the other person freely accepts the benefits conferred by the first person in circumstances where he or she knows or ought to have known of that reasonable expectation. 36
It should be noted that the third element now had two aspects to it:

(a) The absence of an obligation; and

(b) Prejudice with the reasonable expectation of receiving something in return and a receiving of the benefits by someone who knows or ought to know of the expectation.

The three requirements were subject to further analysis in Peter v. Beblow. "A straightforward economic approach" to enrichment and deprivation is to be taken. What the claimant has contributed must be determined to have economical value to the defendant and so also should the claimant's deprivation from an economic perspective. The entitlement and detriment are "morally neutral." 37

Faced with the argument that the housekeeping and child care services were voluntarily given by Catherine Beblow, which in the Court's view raised moral and policy questions, the Court examined the matters which should be considered in deciding whether there was an absence of juristic reason for the enrichment. While "the list is flexible, and the factors may vary with the situation . . . in every case, the fundamental concern is the legitimate expectation of the parties." 38 It is in the context of examining this expectation that one looks to whether there is a common law, equitable or statutory obligation owed by the claimant to the defendant. Services performed by a common law spouse are not performed because of a common law, equitable or statutory obligation and are not a gift. 39 One must also look to whether there is a public policy which supports the enrichment. After a review of the literature and cases, Madam Justice McLachlin concluded there is no doubt that the law recognizes the value of domestic services; these may give rise to equitable claims, and there being "no justification . . . to vitiate the unjust enrichment claim" the unjust enrichment claim was made out. 40 Mr. Justice Cory added some additional comments with respect to enrichment and deprivation. He concluded that if there was an enrichment, there will "invariably" be a deprivation and if there is an enrichment, "a corresponding deprivation is
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automatic." With respect to the absence of juristic reason and the reasonable expectation of the claimant, he said:

The test put forward is an objective one. The parties entering a marriage or a common law relationship will rarely have considered the question of compensation for benefits. If asked, they might say that because they love their partner, each worked to achieve the common goal of creating a home and establishing a good life for themselves. It is just and reasonable that the situation be reviewed objectively, and that an inference be made that, in the absence of evidence establishing a contrary intention, the parties expected to share in the assets created in a matrimonial or quasi-matrimonial relationship, should it end.

Whether the end of the relationship occurs as a result of separation or divorce or by death, the "expectation" would be present.

If the facts are sufficient to find an unjust enrichment, "a second doctrinal concern arises: the nature of the remedy." Two alternatives are available, a monetary award that is payment for services rendered (or contributions made) on the basis of quantum meruit or quantum valebant and the constructive trust. R. Goode points out that the function of restitution "is to reverse by operation of law the unjust enrichment of the defendant, D, obtained either at the expense of the plaintiff, P, or through a wrong done to him. The modes of reversal are the vesting or revesting in P of tangible or intangible property held by D and the order for payment of money by D to P by way of debt or damages." Madam Justice McLachlin for the majority stated "I hold the view that in order for a constructive trust to be found, in a family case as in other cases, monetary compensation must be inadequate and there must be a link between the services rendered and the property in which the trust is claimed."

It is not the purpose of this paper to consider at any length when each of the two remedies will be applied. It is significant, however, that if unjust enrichment is found, there is proprietary relief available. This is particularly so because, in looking at the manner in which the extent of the proprietary relief is to be determined, the Supreme Court of Canada stated the "value survived"
approach is to be preferred over the "value received" approach. Since death will, in many cases, occur at the end of a lengthy relationship between the parties and at a time when capital contributions and work outside the home are contributing very little, if any, to the increase in the deceased's wealth, the value survived approach is the best estimate of what is fair having regard to the parties' expectations.

At this point, it will be useful to examine an actual case to see how these principles have been applied. Ms. Clarkson and her mother came to Canada from Scotland in 1948. M (against whose estate a claim was later made by Ms. Clarkson) lived common law with Ms. Clarkson's mother until her death in 1981. M treated Ms. Clarkson as his daughter and she, until his remarriage and his death shortly thereafter, acted as a daughter towards him. She assisted with her mother's health care and visited and telephoned her mother and stepfather frequently. After her mother's death, Ms. Clarkson helped her stepfather through a three year period of despondency and after surgery moved to his house to care for him for eight months. She gave up employment and relationship opportunities to maintain her close relationship with her stepfather and provide him care. There were few economic exchanges between the two, but Ms. Clarkson was found to have lived throughout her adult life with the expectation that her stepfather's estate, and particularly his house, would be hers upon his death. M's will left $1,000.00 to Ms. Clarkson and divided the balance of some $280,000.00 equally between M's new wife of six months and his son from a first marriage. The trial judge found that Ms. Clarkson did what she did for her stepfather out of love and affection and not because she expected to be paid. Ms. Clarkson could not claim under the Wills Variation Act because she was not a "child" within that statute, but she was successful in establishing a claim for unjust enrichment and receiving a monetary award of $125,000.00 which was upheld on appeal. M was enriched by the varied services of substantial value given by Ms. Clarkson. Ms. Clarkson suffered a deprivation because she was not paid for the services and she gave up employment and relationship opportunities. Ms. Clarkson was under no obligation to do what she did and in looking at her expectations with respect to the property, it was not unjust
that she should be entitled to a successful claim, which together established that there was no juristic reason for the enrichment.

While unjust enrichment exists as a cause of action independent of any statutory recognition and in itself is a basis on which a person might claim against an estate (and would remain so independent of any statutory reform of the Wills Variation Act), it is useful to determine what principles underlie unjust enrichment and what principles have emerged as the case law has developed this cause of action.

Enrichment and Deprivation

The cases have repeatedly used terms such as "against conscience," and "natural justice and equity." It is the very generality of these terms that has led some judges to retreat from their application for fear of where their application might lead. At the same time, it was because of their expression of a desire to do justice that the Supreme Court of Canada developed the unjust enrichment concept. In addition to these general statements, more specific principles emerged:

1. There need be no special relationship between the parties to give rise to a claim. It need not be a blood relationship, a contractual relationship, such as marriage, or the marriage-like relationship commonly referred to as common law. The essential elements are the contribution creating an enrichment and deprivation and the absence of juristic reason.

2. Domestic and household services done by one person for another are compensable. They are not to be considered given because of a duty or obligation. They have real value and are to be given recognition by attaching a monetary value to them using quantum meruit principles or by valuing them through a proprietary interest in an asset or assets.

3. Even if the services are given out of love and affection without any expectation of payment, they are not to be treated as a gift. Compensation may still be payable in respect of them.

4. The legitimate expectations of a person to a benefit from the estate of a deceased will be recognized. While contributions may be made out of love and affection without expectation
of payment, a person may still have a general expectation based on either statements made by a deceased or on a presumption of such an expectation in the absence of contrary evidence. Relating this to the estate situation, an adult child might acknowledge that what he or she did for his or her parent(s) they did out of love and affection and without expecting to be paid, but nevertheless they have a belief that they (as children) should inherit. To put it differently, the child would say "I would have done all I did even if there was no wealth to inherit" but "I still expect to inherit something."

5. There are no public policy concerns which bar a successful claim even when the other factors are present.

Returning to the *Clarkson v. Crossan Estate*, it is very interesting to note that the Court said, having concluded Ms. Clarkson lacked the status to bring a *Wills Variation Act* claim "[t]he principles to be applied with respect to a claim made under the Act as expressed in *Tataryn v. Tataryn Estate* have no application to a claim founded, as here, on unjust enrichment." 54 The principles in *Tataryn* are that the deceased’s legal obligations and then the deceased’s moral obligations to the claimant must be examined in order to determine if a successful claim exists. Clearly M had no legal obligation to support his stepdaughter. One could conclude that the moral obligation which presently allows independent adult children to recover under the *Wills Variation Act* legislation (and whose basis is stated to be what "most people would agree" 55) would have as part of its basis some of the considerations that are found when deciding that Ms. Clarkson’s claim was not unjust.

While the law of unjust enrichment has been greatly refined since it first emerged in 1954, the weighing of the enrichment and the corresponding deprivation and the "absence of juristic reason" concept created some difficulties. Some time will be spent in examining these two issues to illustrate that when Madam Justice McLachlin says, in reference to the guidelines to be applied in determining what is adequate provision, legal obligations are to be found in the doctrine of unjust enrichment, she is not pointing to an area of the law where there is any degree of certainty.
Tataryn cannot in this respect deliver the certainty it purports to give to the determination of Wills Variation Act claims.

After Deglman, the discussion in Murdoch, Rathwell, Pettkus, Sorochan and Peter focused on whether domestic services, first in the context of a marriage relationship and then in the context of a common law relationship, were compensable. Trial judges in applying the higher court decisions were, on occasion, struggling with how to deal with the defendant's arguments that — yes the defendant had benefitted, but so had the plaintiff — and one should be offset against the other. The plaintiff could only succeed if there was, after this "balancing calculation," a substantial contribution by the plaintiff.

The parties were mutually enriched by services willingly and freely given to each other, concluded one judge in denying a claim. The fact that each party gained something from the more than three-year relationship was a factor in the successful defence of another claim. In the British Columbia Court of Appeal it was the conclusion that there was no imbalance which led to Ms. Peter's action being dismissed (later, of course, overruled by the Supreme Court of Canada).

When McLean v. Grandmont was considered by the Court of Appeal in 1993, just before judgment in Peter v. Beblow was handed down, the trial judge's reasons, in which he referred to "an imbalance sufficient to find deprivation," were quoted but the trial judge was overruled because he was found to have erred in concluding there was a juristic reason for any enrichment. No comment was made on the appropriateness of using the balancing approach. A year later in Harrison, after concluding that significant contributions had been made by Ms. Harrison during the five year unmarried spousal relationship, this comment was made:

Perhaps in another case it might be argued that a claimant in Ms. Harrison's position had not been unjustly deprived, by being denied her share of such an increment in value in the family home, for the reason that she received other benefits from the cohabitation as a whole which outweighed it. In the present case, the evidence does not show this to be so.
In Crick, the majority concluded that there was a benefit to Ludwig and that "The appellant was not compensated for any of this assistance. Making provision for her living expenses does not adequately compensate her." Madam Justice Southin, however, took a different view and concluded there was no enrichment and a corresponding deprivation in this relationship which, as has already been noted, she characterized as one in which one participant took no advantage of the other. She listed what each party had done for the other and by implication weighed one's contributions against the other's and found little or no difference. Whether her approach was really any different from the majority and only differed in the conclusion reached is difficult to determine because their conclusion on the facts was reached without much comment about the balancing process.

Mr. Justice Lambert in his dissent in Bruyninckx addressed the issue more directly. He characterized a marriage or marriage-like relationship in the same way as Mr. Justice Cory did in Peter. It is a partnership in which each person contributes in their own way, but it is not appropriate to apply to the partnership the accounting concepts of the business relationship. It is difficult to put an economic value on some of what is exchanged and "(t)he spouses do not hold each other to a strict accounting of benefits and detriments; they do not set one off against the other . . ." He goes on to say:

In short, I do not think that there is any basis in a marriage relationship or even in relationship like marriage for a "net value received after set off" approach and an award of monetary damages. It is not that there is a juristic reason in the marriage relationship for the benefit and corresponding deprivation. To reach that conclusion would be to extend the protection of the law to couples who did not marry but to deny that protection to couples who did. I am not prepared to support that conclusion. Instead, the distinction lies in the concept of living together in a marriage or in a relationship like marriage. The law does not measure the ordinary give and take of married life in terms of benefit and detriment for the purposes of the law of unjust enrichment.

The majority did not go into such an analysis.
Ms. Gensig lived with Mr. Hutchings from 1983 to 1989. They did not have what the trial judge called a "blended relationship" although Ms. Gensig provided many of the domestic services done by other plaintiffs in the cases to which reference has already been made. The trial judge stated "[t]here is no evidence before me of the parties having blended their lives or finances, of joint efforts on their part to create or maintain a family unit or enterprise to be shared by them in the event of the breakup of the relationship." 65 This reasoning echoes Madam Justice Southin's comments when she wrote "[t]he social reality, however, is that many of these couples have no such intention (ie. to have the permanent quality of a formal marriage). They are simply having a good time without intending any commitment, emotional or economic, to each other." 66 The Court of Appeal agreed with the trial judge's assessment that a business relationship was established between Ms. Gensig and Mr. Hutchings and that the contributions took place in the context of that relationship. These were oral reasons and the latter conclusion was not used to reason that there was a juristic reason (the partnership) for the enrichment. Mr. Justice Finch, in fact, pointed to the trial judge's finding that there was no enrichment and deprivation to dismiss the appeal. Because there are references to a lack of a substantial contribution, the non-blended relationship, and the business relationship, it is not possible to conclude exactly what the Court of Appeal was saying in this case about the enrichment / deprivation question. Ford v. Werden was an opportunity for the Court of Appeal to address the issue directly.67

Ms. Ford and Mr. Werden's relationship lasted for four years, during the last year of which they lived together and she had their child. The trial judge characterized the relationship as a "common law marriage" which characterization was, after some discussion, accepted by the Court of Appeal. Each person was employed and each was able to add to their separate assets during the period of the relationship. Ms. Ford claimed an interest in the house in which they lived together and a money award. Other matters were settled before trial except maintenance for the child. The trial judge concluded Mr. Werden had been unjustly enriched by domestic services given before the
purchase of the house and work at the property, and awarded $40,000.00 on the basis of value received.

The Court of Appeal looked to see if the three necessary elements had been shown. Madam Justice Newbury began by noting that Pettkus, Peter and Sorochan all "involved relationships of marked imbalance between the parties . . . the common law husband being the 'bread winner' and the common law wife having foregone the pursuit of a career and the acquisition of assets on her own account, being entirely dependent upon him. The case at bar is quite different." This comment echoes Madame Justice Southin's comments in Crick v. Ludwig that she was "not talking about a relationship in which one of the participants takes, in a real sense, advantage of the other." 68 She went on to say after referring to the provision of spousal services by both parties:

At the least, it appears that each party contributed to and benefitted by the relationship in financial and emotional terms, that each retained his or her independence, and that each was able to pursue personal financial goals without significant contribution or hindrance from the other. 69

She then pointed out that the British Columbia Court of Appeal had undertaken a "net benefit - net deprivation analysis" in Peter and denied the common law wife's claim only to be overruled by the Supreme Court of Canada. Madam Justice Newbury then tries to determine what the Supreme Court of Canada was saying on this balancing of benefits and deprivations issue. She noted Madam Justice McLachlin and Mr. Justice Cory both concluded that Ms. Peter's housekeeping and child care services were of benefit to Mr. Beblow and were a detriment to Ms. Peter because she received no compensation for them. One might question whether the Supreme Court's obvious desire to give value to domestic services led it to depart from looking first at what services were performed, secondly whether these services are compensable and thirdly, whether or not there was a net deprivation to the plaintiff after having considered what she had received from the relationship. This would have been more consistent with the thought expressed earlier that there must be a "subtraction to the plaintiff."
Faced, however, with Madam Justice McLachlin's conclusion that there was a benefit and a deprivation and Mr. Justice Cory's statement that "if it is found that the defendant has been enriched by the efforts of the plaintiff there will, almost as a matter of course, be deprivation suffered by the plaintiff," Madam Justice Newbury stated "[i]t is not clear to me whether the majority of the Court intended to endorse this approach and to lay down as a rule that spousal services must generally be assumed to have benefitted one party to the deprivation of the other." 70 She, I believe correctly, then points out that by doing so, namely assuming that where there is benefit that there is deprivation, "would constitute a departure from the fundamental principles that underlie unjust enrichment and from the 'straight forward economic approach' taken in the past." 71 It is preferable if one is to apply the fundamental principles to determine if a subtraction to the plaintiff has occurred. As will be noted later in this paper, the meaning of the third element, absence of juristic reason, is already becoming confused enough without turning to it to resolve the enrichment deprivation issue.

Because the Court was unclear as to what is meant by the Supreme Court of Canada on the enrichment/deprivation issue, Madam Justice Newbury turns to the third element to determine if the claimant should succeed as she suggests Madam Justice McLachlin did. Given previous pronouncements by the Supreme Court of Canada that spousal services are valuable, compensable, and there is no obligation in the sense of a duty at common law, in equity or by statute to provide such services (which, as will be noted later, is one explanation of juristic reason), she turns to the second component of absence of juristic reason, namely is the enrichment "unjust." For this analysis she relies on Mr. Justice Cory's definition "whether a party's expectation to share in the other's property is a legitimate one." 72 She contrasts situations where one party "has subverted her economic independence to the greater good of the family, foregoing opportunities to maximize her own income stream or asset base" with non-traditional common law relationships in which "each party confers 'benefits' on the other without expecting to be paid -- except perhaps in kind with reciprocal services" and in which "neither person expects to compensate or be compensated." She does not at that point conclude by saying that the unjust element is therefore absent. She goes
on to say that public policy as expressed in the *Family Relations Act* and at common law does not extend property rights to persons who are not married. She then concludes by stating:

> Overall, it is my view that there is no 'unjustness' that needs to be remedied in the circumstance by the imposition of a special rule or presumption not found in the general law of unjust enrichment, and that ultimately, the analysis should involve a close examination of the facts in each case.

Whether it is a combination of these two reasons (no subversion of economic independence and an unmarried relationship) which creates the lack of unjustness is not clear. Would the absence of a subversion of economic independence standing alone be sufficient? Going on, the Court then says that the trial judge erred in giving a remedy for unjust enrichment "based on his characterization of the parties' relationship as a common law one" and "The corollary of the Court's rejection in *Peter v. Beblow* of the notion that there are some types of services that by their nature should not give rise to claims in unjust enrichment, must be there is no basis for assuming that because of their nature, spousal services are to be accorded a special status and are not subject to the ordinary principles of restitution." 73 The correctness of this comment has already been commented on.

The result seems to be that instead of looking to see whether in economic terms there has been a subtraction to the plaintiff, one must now consider the more nebulous concept of what is just. This is a needlessly complicated approach and could potentially lead to varying decisions at the trial level, if not in the Court of Appeal, as to which circumstances are "just" and which are "unjust." Given that the just/unjust analysis has also become part of the third element, it now means that the just/unjust analysis must be undertaken twice, once to determine if there is an enrichment/deprivation and then again to determine if there is absence of a juristic reason. This later concept will now be examined. However, it should be recalled that it has already been noted in Chapter 3 that the partnership model of marriage seems to be emerging as the model which ought to underlie asset distribution on the breakdown of a marriage. To date it does not seem that the
courts have turned to the more detailed depreciation/benefit analysis which has troubled judges in the unjust enrichment cases in looking at the application of the partnership model.

**Absence of Juristic Reason**

The first reference to the third element of unjust enrichment appeared in these words: "The absence of any juristic reason - such as a contract or disposition of law - for the enrichment." 74 Mr. Justice Dickson expanded on these words used by him in Rathwell in Petkus. Because the law does not compensate every person who has conferred a benefit on another "It must, in addition, be evident that the retention of the benefit would be 'unjust' in the circumstances of the case." 75 The original phrase "juristic reason" has as a dictionary meaning a reason "relating to, created by, or recognized in law." 76 This is consistent with the words that followed, "such as a contract or disposition of law" and the suggestion that a synonym for "juristic" is "judicial." 77 It is also consistent with the analysis done by the British Columbia Court of Appeal in Clarkson in which the Court concluded "'absence of juristic reason' should be interpreted to mean, in brief form, 'under no obligation'; and in its extended form, 'under no obligation, contractual, statutory or otherwise to enrich the other party.'" 78 Trial judges have generally used this interpretation for the purposes of determining whether an enrichment can be found.

In Petkus, however, Mr. Justice Dickson in deciding that the third requirement was present, did not use language which referred to whether an obligation was present or not. He said:

> Where one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in property and the other person in a relationship freely accepts benefits conferred by the first person 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. 79

This introduced the idea that it "must be unjust to allow the recipient of the benefit to retain it."

This element of unjustness added to the statement that the enrichment had to be made without obligation. Every enrichment, even though made without obligation, will not necessarily be unjust
and a separate finding of unjustness will need to be made. Mr. Justice Lambert in *Bruyninckx*
restated the elements of the unjust enrichment cause of action as follows:

(a) the conferral of a benefit;
(b) the suffering of a corresponding deprivation;
(c) the absence of any requirement that the benefit be transferred; and
(d) all in a relationship and in a way which the courts will categorize as unjust, in accordance with a contemporary application of principles of equity. 

In doing so he recognized in (d) the separate need for an element of "unjustness." The meaning of this third element was not closely considered in *Peter* but Madam Justice McLachlin did use these words in reference to the third element: "Since there was no obligation existing between the parties which would justify the unjust enrichment and no other arguments under this broad heading were met . . ." [my emphasis] which supports Mr. Justice Lambert's approach as do the further comments that moral and policy questions are to be considered in the third element. 

Considerable attention was given to the meaning of juristic reason in *Clarkson* which was decided after *Peter*. There the majority of the Court referred back to *Sorochan* and seized on the Court's use of the word "include" (in reference to what must be found in order to have unjust enrichment) and commented "[t]he use of the word 'include' suggests that the list was not exclusive, as will become apparent when considering the third requirement - absence of juristic reason for the enrichment. Other factors may be taken into consideration." The quote from *Sorochan* in fact used the word "include" for the first time. *Rathwell* and *Pettkus* referred only to three elements. Nothing in the reasoning of *Sorochan* could lead one to believe that the use of the word "include" was meant to expand the three requirements to four or more.

That other factors are to be taken into account other than whether there is an existing obligation, is however supported by the discussion which has taken place in unjust enrichment cases in the commercial law field. In *Atlas Cabinets*, for example, a case in which subcontractors on a construction project sued a lender which had failed to advance loan monies to the owner/contractor, the majority said this after referring to the three circumstances required to be present:
In the context of a domestic relationship, those three circumstances are likely to be simpler to apply than in the context of a commercial relationship, where the essence of the relationship is the enrichment of the participants, perhaps at the expense of each other, all in the name of fair and honest business dealing.

and later:

To my mind the key to the correct interpretation and application of the decision of the Supreme Court of Canada on this subject to a commercial relationship is to focus on the 'unjust' element of 'unjust enrichment,'

and still later:

In my opinion, the concept of the injustice of the enrichment as being against sound commercial conscience must continue to guide the application of the three tests in Pettkus v. Becker when they are applied to a commercial setting.

In this reasoning there seems to be reliance on the use of the word "unjust" as a basis to add something more to the three elements. This overlooks that it is the three elements that create the "unjust enrichment"; that is, the "unjustness" is found where the three elements are present. Nevertheless, this idea of "want of commercial good conscience" has been referred to in a number of subsequent trial and Court of Appeal decisions and seems firmly entrenched in British Columbia jurisprudence.

Arguably, the "want of good conscience" addition to the requirements violates the stated undesirability of dividing unjust enrichment cases into two (commercial and family) or more categories just as having differing rules for the application of the remedy of constructive trust would. On the other hand, if its addition is viewed as being an element of the third factor required because of the special nature of commercial relationships, it may not create a second category of cases.
What facts then have given rise to a denial of an unjust enrichment claim because there is a juristic reason for the enrichment and deprivation? Defendants who have sought to defeat claims because the provision of domestic services arises as an obligation of a common law relationship or as a gift have been unsuccessful. *Peter* made it clear (to the extent that previous cases did not) that there is no general duty to perform such services nor are they to be considered as a gift from one partner to another. 89 A finding that there was an arrangement between the parties to operate a farm defeated a wife’s claim to certain farm lands. 90 A father and son relationship provided the juristic basis for the enrichment in another case involving farm property. 91 On the other hand, when a trial judge found an agreement between the parties, it was not sufficient to exclude a claim apparently on the basis that the unjust enrichment claim for the plaintiff’s efforts which enhanced the property was separate from the agreement. 92

In *Pettkus*, a comment was made by Mr. Justice Dickson which has led to some statements which in some factual situations may prove to be a bar to recovery. He concluded it would be unjust if one person prejudices themselves in the expectation they will receive a property interest from their contributions and the other person accepts the benefits when they know or ought to know of the expectation. 93 This statement could and should have been interpreted to mean that the circumstances outlined were an *illustration* of unjustness. While Madam Justice McLachlin said "the test is flexible, and the factors to be considered may vary with the situation before the Court," she then relied on the *Pettkus* statement to say that "In every case, the fundamental concern is the legitimate expectation of the parties." 94 Mr. Justice Cory stated a preferable approach:

The test put forward is an objective one. The parties entering a marriage or common law relationship will rarely have considered the question of compensation for benefits. If asked, they might say that because they love their partner, each worked to achieve the common goal of creating a home and establishing a good life for themselves. It is just and reasonable that the situation be viewed objectively and that an inference be made that, in the absence of evidence establishing a contrary intention, the parties expected to
share in the assets created in a matrimonial or quasi-matrimonial relationship, should it end.95

This more fairly states the reality of what occurs when parties enter into a marriage or marriage-like relationship, or one of the other relationships which gives rise to an unjust enrichment claim.

Mr. Justice Cory goes on to state:

It is not necessary that there be evidence of promises to marry or to compensate the claimant for the services provided. Rather, where a person provides 'spousal services' to another, these services should be taken as having been given with the expectation of compensation unless there is evidence to the contrary.

In many cases, if not most cases, the contributions may begin without any thought of receiving compensation and it will be difficult to determine when the expectation of compensation arose. Is one not to be credited for the contributions made before the expectation arose? If expectation is an essential factor, logically one should not be compensated for the contributions made at a time when there was no expectation since these would not result in an unjust enrichment. Counsel for the appellant in Clarkson, however, argued unsuccessfully that the compensable services began later than when the claimant would have them begin in order to reduce the quantum.96 At present it seems clear that a claimant who cannot prove a reasonable expectation on his or her part or perhaps convince a court that the situation when viewed objectively leads to an inference of an expectation will not succeed.

In the cases since Peter v. Beblow, one sees the struggle by the Courts to deal with what one writer has referred to as the "problems with the contribution approach."97 He lists these problems as follows:

(a) Mutual benefit conferral. This paper has referred to this concept by the terminology "net benefit -- net deprivation analysis" and "balancing." As the cases illustrate, the claimant will be contributing and will in turn be receiving contributions from another. In Werden, one sees the potential for difficulties which may be developing.
(b) The treatment of homemaker contributions. Since *Peter v. Beblow*, this issue has been resolved and the Courts seem to have accepted, without reservation, that such services are compensable and are not to be seen as rendered pursuant to some obligation.

(c) The inflation factor. The concept of "value survived" has been the response to the question "to what extent should a party who has contributed for a period of time share inflationary gains, the value of the contribution and/or the value of an original investment in which the contributor did not participate?"

This struggle is far from being over. The courts need to continue to develop the principles of unjust enrichment. Until those developments are complete, uncertainty will still exist when one seeks to apply the principles to a fact pattern.

Conclusions

In the search to find principles underlying asset distribution and recovery schemes, the law of unjust enrichment identifies and discusses a number of matters which ought to be considered in developing policies for dependant's relief legislation.

1. The doctrine of unjust enrichment exists independently of contract, tort or a statute. Its focus is on adjusting for benefits "which it is against conscience" a person should keep. It looks at the "equity which needs to be satisfied." Because of this focus, a claimant under dependant's relief legislation should be able to recover at least what is recoverable under unjust enrichment. If a claimant can not, there is a danger that a statute would be seen as unfair unless the claimant can rely on his or her separate unjust enrichment action.

2. While Madam Justice McLachlin points to unjust enrichment as a source of a testator's legal obligations, and a guideline for recovery under the present statute, unjust enrichment is itself an area of law filled with uncertainty, particularly as to the quantum of an award.

3. As the doctrine of unjust enrichment has developed and because of its reliance on the contribution of the plaintiff, some of the difficulties of evaluating a claim when there is
mutual benefit conferral have emerged. This leads to focusing on not only what is contributed but what is received by the claimant.

4. The case law has established that domestic and household services done by one person for another, even when given out of love and affection, are compensable. They are not to be considered a gift.

5. Considerable attention has been paid to quantifying the value of the contributions. The relief can be on a quantum meruit basis or the proprietary remedy of constructive trust. The latter, it has been pointed out, gives the claimant the right to participate in inflationary gains in the value of the asset. It supports the partnership model of a relationship and the corresponding concept that the partners should share in the wealth created during their relationship, even if the original asset was contributed by only one of them.

6. While the partnership model of a relationship is referred to, the courts are reluctant to apply the accounting concepts of a business relationship. One judge expressed this thought by saying "[w]ithout venturing into a bean counting exercise, her efforts can be summarized as . . . ." 98

7. Even though contributions may be made out love and affection without expectation of payment, a contributor, particularly a close family member, may have an expectation of inheritance.

8. Even when there is a contribution, a deprivation and the absence of any requirement that the benefit be transferred, there still may be a need for "unjustness" for a claim to be established. In the case of an independent adult child and a large estate, this might be the source of a feeling of unjustness. On the other hand, for a person who feels strongly in favour of testamentary autonomy, there would be no "unjustness" on which to base a claim in such a case. The unjustness would be the interference with the testator's wishes.

A review of unjust enrichment to determine principles for dependant's relief legislation has much to recommend it.
END NOTES


Fibrosa, supra note 1 at 38.


25. Fibrosa, supra note 1 at 61-62.

26. Deglman, supra note 23 at 734.


28. Ibid. at 453, 454.

29. Ibid. at 455.

30. Rathwell, supra note 13 at 455.

31. Petkus, supra note 19 at 847.

32. Ibid. at 848.

33. Ibid. at 849.

34. Ibid. at 859.


36. Ibid. at 46.

37. Peter v. Beblow, supra note 2 at 990.

38. Ibid. at 990.

39. Ibid. at 990, 991.

40. Ibid. at 992-995.

41. Ibid. at 1012.

42. Ibid. at 1017.

43. Ibid. at 987.

44. "quantum meruit" - pay as much as the labour was reasonably worth.

"quantum valebant" - pay as much as the goods were reasonably worth.


46. Peter v. Beblow, supra note 2 at 997.
Ibid., at 998.

Ibid. at 1000.

Clarkson v. McCrossen Estate, supra c.3, note 4.

Fibrosa, supra note 1 at 61

Moses, supra note 24 at 1012.

Petkus, supra note 19 at 859.

Deglman, supra note 23 at 734 - 735.

Clarkson v. McCrossen Estate, supra note 49 at 89.

Tataryn, supra c.1, note 5 at 822.


Harrison at 279.

Crick v. Ludwig (1994) 95 B.C.L.R. (2d) 72 [hereinafter "Crick"] at 77 (B.C.C.A.)

Ibid. at 85.

Peter v. Beblow, supra note 2 at 1012, 1013, 1014.

Bruyninckx, supra c. 2, note 44 at 363.


Crick, supra note 61 at 85.

Ford v. Werden, Vancouver Registry CA19795, July 11, 1996 (B.C.C.A.) [hereinafter "Ford"].

Crick, supra note 61 at 85.

Ford, supra note 67 at para. 8, 9.

Ibid. at para. 13.

Ibid. at para. 14.

Ibid. at para. 15, 16.
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Ibid, at para. 17, 18, 19.

Rathwell, supra note 13 at 455.

Pettkus, supra note 19 at 848.


Clarkson v. McCrossen Estate, supra c. 3, note 4 at 91.

Pettkus, supra note 19 at 849.

Bruyninckx, supra c. 2, note 44 at 356, 357.

Peter v. Beblow, supra note 2 at 989.

Ibid. at 990.

Clarkson v. McCrossen Estate, supra c. 3, note 4 at 89.

Rathwell, supra note 13 at 455.

Pettkus, supra note 19 at 848.

Sorochan, supra note 35 at 43 to 46.


Peter v. Beblow, supra note 2 at 996.

Ibid. at 991 - 995.

Bruyninckx, supra c. 2, note 44 at 343 ff.

Strudwick v. Strudwick Estate, et al. (March 29, 1996), Kamloops 21273 at 8 (B.C.S.C.)

McLean, supra note 59 at 360, 361.

Pettkus, supra note 19 at 849.
Peter v. Beblow, supra note 2 at 990.

Ibid. at 1017.

Clarkson v. McCrossen Estate, supra c. 3, note 4 at 99, 100.

Parkinson, supra note 4 at 271 ff.

For a discussion of "contribution" problems see 1989 Commission Report, supra c. 3, note 2, at 18, 19 and Pickelein v. Gillmore (February 21, 1997), Vancouver CA020028 (B.C.C.A.)

Barnaby v. Petersen, et al. (1 October, 1996) Courtenay, s. 3244 at p. 63 (B.C.S.C.)
CHAPTER 8
WRONGFUL DEATH LEGISLATION

Family law and intestacy rules define one's statutory obligations to family, next of kin, and de facto spouses. Restitution requires the return of contributions made and benefits conferred so as to prevent unjust enrichment. Tort law provides "compensation for the harm suffered by those whose interests have been invaded owing to the conduct of others." When a death occurs, two issues arise in tort law:

(a) Who can proceed with the cause of action that the deceased would have had, had he or she not died?

(b) Who may claim that they have suffered a loss as a result of the deceased's death and what compensation may they recover?

The Estate Administration Act allows personal representatives of the deceased to bring and maintain actions the deceased could have if living but prohibits claims for pain and suffering, damages for death or the loss of expectation of life and future earnings. At common law, the answer to (b) was no one, because there was no right of action against a tort-feasor if the injured party died. With the increase in the number of fatal accidents which accompanied the development of railways, the English Parliament passed the Fatal Accidents Act (Lord Campbell's Act) in 1846, the principles of which now form part of the legislation of each Canadian province. The scheme of the legislation is similar in most jurisdictions and implements the theory that the deceased kin have suffered economic loss.

Principles

1. Who may sue? Certain named individuals are statutory beneficiaries on whose behalf the action is brought by the deceased's personal representatives. In British Columbia these are:

(a) a child, which includes a person to whom the deceased stood in loco parentis and a person whose step-parent was the deceased;
(b) a parent, which includes a grandparent and a step-parent;
(c) a spouse, which includes a husband or wife of the deceased or a person who lived
with the deceased as husband and wife for not less than two years ending no earlier
than one year before the death of the deceased.

Step-parent is further defined to include a person who lives with the parent of a child as
husband or wife for not less than two years and who contributes to the support of the child
for not less than one year.\(^5\) This list of potential claimants is broader than is presently
found in the *Wills Variation Act* or the intestate rules of the *Estate Administration Act*,
particularly with the addition of step-parent and stepchild. While claimants are sometimes
referred to as "dependants" a review of the heads of recoverable damages will show that a
claimant need not necessarily show a loss of support.

2. Nature of the act complained of. The act must cause the death of the deceased. The
deceased must have been in a position to successfully sue the defendant had he or she not
died of the wrongful act.\(^6\)

Aside from the preceding derivative feature, the cause of action is
'new in its species, new in its equality, new in its principle'. The
Act did not transfer any claim of the deceased to his personal
representative, but created a new right protecting specifically and
exclusively the interests of his family. No account is therefore
taken, in assessing damages, of the personal injuries and suffering
for which the deceased would have been able to recover, had he
survived. Provided he had a right of action at the time of his death
which could not have been defeated by a complete defence, the
damages to which his dependants are entitled are assessed on an
entirely independent basis.\(^7\)

3. General principle of damages. The principle is expressed in various ways. The British
Columbia Statute states "[t]he Court or jury may give damages proportionate to the injury
resulting from the death to the parties respectively for whose benefit the action has been
brought."\(^8\)
Ontario is somewhat more specific. The statutory beneficiaries may:

Recover their pecuniary loss resulting from the injury or death . . .

(which) may include:

(a) actual expenses reasonably incurred for the benefit of the person injured or killed;
(b) actual funeral expenses reasonably incurred;
(c) a reasonable allowance for travel expenses actually incurred in visiting the person during his or her treatment or recovery;
(d) where, as a result of the injury, the claimant provides nursing, housekeeping or other services for the person, a reasonable allowance for loss of income or the value of the services; and
(e) an amount to compensate for the loss of guidance, care and companionship that the claimant might reasonably have expected to receive from the person if the injury or death had not occurred. 9

In contrast to the approaches in family law, intestate succession, unjust enrichment and the present Wills Variation Act, wrongful death legislation seeks to apply tort principles to place a monetary value on what a statutory beneficiary has lost as a result of a person's death. A review of the heads of damages gives some insight into what it is that a person loses when someone dies. The losses, however, which can be recovered under the legislation, are not, because of the emphasis on pecuniary losses and the exclusion of pain, suffering and grief, a complete quantification of the claimant's loss. While this is generally true, Mr. Justice Ritchie, speaking on behalf of the Supreme Court of Canada, said:

I cannot think the injury contemplated by the legislature ought to be confined to a pecuniary interest in a sense so limited as only to embrace loss of money or property, but that, as in the case of a husband in reference to the loss of a wife, so, in the case of children, the loss of a mother may involve many things which may be regarded as of a pecuniary character. The term pecuniary is not used by the legislation, and this, of itself, I think, affords a good reason for saying that that term should not be introduced in a narrow confined sense as applicable only to an immediate loss of money or property. . . .
I am free to admit that the injury must not be sentimental or the damages a mere solatium, but must be capable of a pecuniary estimate; but I cannot think it must necessarily be a loss of so many dollars and cents capable of calculation. The injury must be substantial; the loss, a loss of a substantial pecuniary benefit, and the damages are not to be given to soothe the feelings of the husband or child, but are to be given for the substantial injury. It may be impossible to reduce such an injury to an exact pecuniary amount.

... as to the children, I agree with Mr. Justice Armour that there is an education in religion, morals and virtue which, owing to the peculiar confidence inspired by the relationship of the mother and child, can be imparted to the children by the mother alone; I think that such education is a benefit and advantage to the child and is capable of being estimated in money, and that the deprivation of a mother’s superintendence and care of the children, occasioned by the death of the mother, is a pecuniary loss to the children.10

The principles for recovery in personal injury damage assessments are well understood and are often applied and have legitimacy. It is noted, however, that there are significant differences between personal injury damage assessment and fatal injury damage assessments, particularly:

(1) the claim is based on determining the degree of dependency a claimant had on the deceased, to the extent that the deceased had surplus resources over and above what he or she expended on him or herself; (2) taxation, ignored in personal injury calculations on loss of earning capacity, is deducted in fatal injury assessment; (3) damages for fatal injury covers only pecuniary losses save where the legislation provides for compensation for "loss of guidance, care and companionship"; (4) the types of contingencies differ.11

When assessing the amount of the award, however, courts will rely on actuarial evidence and mathematical calculations, just as in personal injury cases.

In assessing what a wife was entitled to, Mr. Justice Dickson said "[t]he appellant is entitled to an award of such an amount as will ensure her the comfort and station in life which she would have enjoyed but for the untimely death of her husband." 12 The approach which is used is to identify the pecuniary benefits the deceased would have enjoyed if he had lived and then determine
the extent to which the claimants would have shared in those benefits. Ultimately, it is not the deceased's losses which are recoverable, but only the portion of those losses which would have flowed through to the claimants. These will be accruing in both the pre-trial and the post-trial periods. Three heads of damages which appear are:

1. What portion of the deceased's income would be expended on the claimants? The period of the loss for a spouse is normally based on the joint life expectancy of the claimant spouse and the deceased. In the case of a child, the period of loss will extend to the age of majority (the theoretical end of dependence) although if evidence could be led of a continuing need, that ought, in principle, to allow for recovery. "The usual method of calculation is to start with the deceased's total annual income and deduct from it all expenditures that the deceased would have made for purposes other than the claimant's benefit, including what would have been spent on the deceased's support, for the deceased on pleasure and for other purposes. The remaining sum is the claimant's loss or, in the case of several claimants, such as a spouse and children, the total loss of the group." While each case depends on its facts, a rough 'rule of thumb seems to be that 70% of a male wage earner's income goes to support his family if he is a sole supporter of the family from outside work. When there are two incomes, it has been suggested that 30% of the joint income goes to the support of the deceased spouse. This recognizes the financial dependency of a spouse or child on the deceased. There is no financial recovery under this heading for any "moral obligation" owed by the deceased.

2. Loss of services (as opposed to income) provided by the deceased. Children may recover for the "care, education . . . training . . . guidance, example and encouragement" they would have received from a deceased parent, because it is a pecuniary loss. In some provinces, but not British Columbia, a claim may be made under the statute for "an amount to compensate for the loss of guidance, care and companionship that the deceased might
reasonably have expected to receive from the injured person if the injury had not occurred.\footnote{18}

The Ontario Court of Appeal concluded in speaking of this addition to the original \textit{Fatal Accidents Act} wording:

It recognizes, as its preamble states, the desirability of encouraging and strengthening the role of the family in society, and, in Part V, granted family members greater protection against family losses than was previously available to them. Relational interests within the family have long been recognized and accorded legal protection . . . .

In enacting s. 60(2), the Legislature intended to extend the measure of damages by permitting recovery for loss of guidance, care and companionship on a non-pecuniary basis. If this were not so, s. 60(2)(d) would be meaningless . . . .

That provision, in my view, was expressly designed to accommodate non-pecuniary awards for family losses of this nature, and, it follows, to reform the law by enlarging the measure of damages accordingly.\footnote{19}

This heading to some extent recognizes the moral obligations of a parent to a child.

The Court also said in reference to a parent's claim for the wrongful death of minor children:

This represents an important step forward in cases involving the wrongful death of minor children. Pecuniary loss concepts have proven excessively restrictive in these cases and have produced awards wholly incommensurate with the true loss sustained by a child's death. By expanding the measure of damages to include non-pecuniary elements of loss, the \textit{Family Law Reform Act} recognizes the child as an integral part of the family unit, not simply as a potential source of future service or monetary gain, and provides an effective basis for more realistic and just damages than those awarded under the \textit{Fatal Accidents Act} for tortious violations of this family relationship.\footnote{20}
The value of homemaking services provided by the deceased to the claimants is recoverable. Various valuation issues have arisen and the effect of the gratuitous provision of such services by others has been examined but a discussion of those is beyond the scope of this paper.

3. If the claimant can show that the deceased would have accumulated capital assets throughout his or her normal life span and he or she would normally have expected to inherit from the deceased's estate, a "loss of inheritance" can be claimed.

The death of a child presents a series of problems since the quantification of the claimant's loss are very much dependent on the evidence of a particular case. It was noted in considering a father's claim for his young son's death "[t]he claim of the plaintiff was pressed to extinction by the weight of the multiplied contingencies." The remarriage of a spouse, the adoption of a child, the contributions of surrogate parents and deductions for various other contingencies have impacted upon awards, but do not distract from the basic heads of damages which have been identified here. While loss of inheritance is identified as a recoverable head of damages, there is little discussion as to why it should be one. There is reference to "expectation" but that in itself is a somewhat tenuous basis for a claim. The importance of the wrongful death legislation is its focus on the calculation of damages based on standardized tort law approaches. Of all the "asset distribution schemes" occasioned by death, it looks most closely at the question of provable financial loss.

*Estate Administration Act*, supra c. 6, note 13, s. 70, 71.


For example: *Family Compensation Act*, R.S.B.C. 1979, c. 120.


*Family Compensation Act*, R.S.B.C. 1979, c.120 [hereinafter "Family Compensation"] s. 1.


*Family Compensation*, supra note 5, s. 3(2).

*Family Law Act*, Ontario, supra c.5, note 41, s. 61.


*Family Law Act*, supra c.5, note 41, s. 60(2)d.


*Vana*, supra note 17.


Rainaldi, *supra* note 16 at 27 - 162.18 ff.
CHAPTER 9

EMPIRICAL STUDIES

Some literature is available which provides empirical data and conclusions about testators' intentions, family and other private relations. A few of these studies will be examined. In one, 800 probated wills were studied in England.\(^1\) Random sampling was done for the years 1959, 1969, 1979, and 1989. One-half of the people died in the south east of England and one-half in the north west. Wills could have been written at any time up to and including the year they were probated and the authors point out that one must not overlook the legal context in which these wills were written. In particular, there is relative testamentary freedom in that there is no fixed share, dependant's relief legislation exists, and assets can and do pass outside the estate.\(^2\) English dependant's relief legislation allows spouses, children, stepchildren and any person dependent on the deceased to claim.\(^3\) Some useful information appears and if one assumes that the data is representative of what occurs in British Columbia, it may be of assistance.

1. Only 30% of those who die over age 18 leave a will which is admitted to probate.\(^4\) There is no data available in British Columbia to compare to this. Of the 120 estates processed by the Vancouver Probate Registry in 1981, 84% were testate and 16% were intestate.\(^5\) In 1977 on two days, Ministry of Finance records indicate that 78% of estates were testate and 22% were intestate.\(^6\) Alberta data from three months in 1992 in three registries covering 999 estates indicated 80% were testate and 20% were intestate.\(^7\) Neither the British Columbia nor Alberta data indicate what percentage of the population which dies does so intestate and testate, although from the registry data it would seem intestacy might be less common in British Columbia and Alberta than in England.

2. Equal numbers of men and women made wills although the median age at the time the will was made by women was 73 years as compared to 69 years for men. Will making is concentrated in those over 50 years of age. This means most of their wealth would have already been accumulated and it is unlikely the testators had minor children.\(^8\)
3. Fifty percent of wills were made less than five years before death and only 25% were made ten years or more before death. The testator's "world" and obligations at the time of the making of the will did not likely change substantially between the date of the will making and death.

4. "Our wills support the idea that will makers in England do in fact favour family members in their bequeathing decisions despite the considerable freedom to bequeath which the law allows . . . ." Spouses were beneficiaries in 37% of wills and the sole beneficiary in 25% of the wills. Children were beneficiaries in 36% of wills. No data was available to determine who actually survived the testator. Ninety-two percent of testators named at least one relative amongst their first choice of beneficiaries. Fifty-six percent of bequests go to a relative of the same generation (spouse, siblings or cousins, although the latter two do not receive major portions of estates). Fifty-four percent of bequests go to the first descendant generation (children, nieces and nephews).

5. Little could be concluded about who was excluded.

This study draws a number of conclusions which are relevant to the issues arising in dependant's relief legislation. Firstly, "there is . . . no doubt that formal bequeathing is treated as a family matter and has continued to be so treated, in the face of far reaching social and economic change, since the 1950's. . . ." Secondly, the authors identify two ways in which individuals can be 'positioned' as beneficiaries. "Ascriptive positioning" is done by testators who use the genealogical status of beneficiaries as the key positioning principle. Beneficiaries of the same kin type are treated equally or the estate goes to a single beneficiary, most commonly the wife. This conclusion is then made:

What does this tell us about the way in which wills are being used? It suggests that testators who position their beneficiaries ascriptively may well be expressing a model of testamentary responsibility based on kin types. Though of course we cannot know what was in the mind of these testators when they wrote their wills, the pattern observed suggests that the role of the will for these testators is to execute a set of clear-cut responsibilities to kin
based upon ascriptive genealogical position. Such a version of responsibilities may also imply a mirror image of rights, so that people in certain genealogical categories in relation to the testator are deemed to have a right of an inheritance, and those outside these categories have no formal rights. 16

"Relational positioning" acknowledges that there is individuality in beneficiaries and they should be treated in different ways. It is usually applied to categories of kin who are not direct descendants of the testator and who are usually siblings, nephews and nieces, and is characteristic of wills where no spouse beneficiary is named.

By comparison with ascriptive positioning, the more variable and flexible approach to the inclusion and treatment of beneficiaries here suggests that these testators have a weak notion of the rights of certain specified kin to inherit or of their own responsibilities to pass on property straightforwardly to them, and a strong notion of testamentary freedom. However, in some senses, this is tempered by the general tendency to treat spouses and children (where present) more favourably than other kin, and by the common pattern of differential (rather than obviously unequal) bequeathing within a kin type which involves giving different items of personal property to all members of that type. In some senses, this latter form of differential bequeathing may both support the notion to equality within a kin type whilst also recognising the individuality of particular relationships. The exercise of freedom here is not whether to bequeath, but how to do it. 17

This type of positioning is most likely to be used by unmarried testators, particularly widows, and spinsters.

Thirdly, the study concludes:

The messages about testamentary freedom and its expression are mixed, therefore. On the one hand, we find no evidence of a widespread disinclination to favour those categories of kin which the law assumes testators to have some responsibility for, and the position of surviving spouses seems particularly strong. On the other hand, we do see the operation of principles which seem contrary to the idea that genealogical position or economic dependence confer inheritance rights. Ironically, perhaps,
bequeathing behaviour in relation to spouses reinforces other legal processes which mean increasingly that it is surviving spouses - usually women - or people who have never been married, who are those most likely to find themselves in a position where relational positioning, and the exercise of a more radical testamentary freedom, may seem a real possibility.  

As part of the research for the book "Inheritance in America from Colonial Times to the Present" the authors took will samples from Bucks County, Pennsylvania, a rural and industrial area, and Los Angeles County, California, a community property state with a much more diverse population, although not necessarily a different "probate population." Interestingly, in Bucks County in 1979 36.2% of adult descendents had wills admitted to probate while in 1980 18.9% of Los Angeles County decedents did. The latter figure seems more representative of other United States counties but both should be noted in comparison to the English figure of 30%. Fifty-five percent of all male, married testators in Bucks County and 48% in Los Angeles County gave their entire estate to their wife, although these percentages declined as the value of the estate increased. A further 20% in each county put time limitations on a bequest to the wife, increasing to approximately 50% with time limitations when estates were in excess of $120,000. The authors conclude "[i]n these late twentieth century wills, spouses are of overriding importance, although the desire to control their bequest by granting life estates remains strong among the affluent" and "[a] prominent characteristic of the American inheritance system throughout the centuries has been its steady focus on the nuclear family. Despite almost complete testamentary freedom, Americans have wherever possible limited their substantial bequests to spouse, sons and daughters." 

Another study listed seven consequences of death (cessation of experiences, uncertainty as to life after death, fear as to what might happen to one's body, inability to care for dependants, grief to others, end to projects, and fear of pain) and a later study of wills clients using these categories concluded wills clients responded more heavily to "inability to care for dependants" than the original study. This comment is made:

There are two sides to this point. First, as a behavioral observation: The indefinite provision of support, support which
will continue even after the provider is dead, is a step toward immortality. Second, the provision of support is a moral imperative. Moral breadwinners provide for their dependents, and it is therefore immoral for them to refuse to do so, or to neglect their support duties. And this moral imperative is applicable even after the breadwinner is dead. One of the things he should do for his family is make present provision for their support in the event of his death.

Perhaps these feelings lie behind the data noted in the Buck's County and Los Angeles County study.

An earlier study in the United States of 659 estates in Cuyahoga County (Cleveland), Ohio, and interviews with 1,234 persons who were legal next of kin and/or beneficiaries of the decedents disclosed, among other things, the following information:

(a) Sixty-nine percent were testate estates and 31% intestate, a higher percentage than in other U.S. studies. The older the decedent, the more likely he or she died testate.

(b) The average age of the survivor group was 48.4 years, 20 years younger than the decedent and 57.9% of the survivor group had wills.

(c) Ninety-one percent of testators were survived by spousal or decedent next of kin and so would be 93% of the survivors interviewed. Eighty-five percent of both groups made the spouse sole heir even when there were children.

(d) Remarriage lessened the likelihood that the second spouse would receive all, particularly in cases where estates were larger and the marriage of shorter duration.

(e) Of 453 decedent testates, only two left a minor child. Twenty-six of 27 survivor testators with minor children left everything to the minor children equally. Of 21 with minor and adult children, all but one who disinherited the adult children left their estates to both categories.

(f) Forty-seven percent of testators who died with adult children left their estates to the adult children equally. The others most commonly disinherited a child or named persons as
beneficiaries in addition to the children, exhibiting a tendency to exercise their testamentary freedom. Children who were preferred were often children who had taken on the care of their parent which was viewed as being worthy of compensation by survivors. Ninety-one percent of the survivors treated their adult children equally.\textsuperscript{30}

(g) It was observed that testators almost uniformly treated their immediate family more generously than the intestacy rules for the jurisdiction. Furthermore, in a very substantial number of intestate cases, persons gave up their rights in favour of the surviving spouse, as "it was the right and proper thing to do."\textsuperscript{31}

The reaction of the survivors of these testators is quite interesting. Where there was a spouse and descendants, 80.7\% thought the distribution completely fair, 14.5\% were indifferent and only 4.8\% felt it was unfair, the latter mostly being survivors of remarried decedents. When there was no spouse and children were treated unequally, there was the greatest feeling of unfairness but that still amounted to only 12.5\% of the 232 persons interviewed.\textsuperscript{32} From this data one must conclude that, even in a jurisdiction where there was no restriction on testamentary freedom other than a forced one-third share to the spouse, testators do not commonly disinherit spouses or children. In fact, particularly with respect to spouses, they most frequently give a greater increased share over that required by law.

Jeffrey Rosenfeld surveyed the literature on disinheritance in 1982, disinheritance being defined as "cases where people act vindictively toward offspring or kin and behave in such a way that they intentionally violate the norms of reciprocity that ordinarily structure relationships among them."\textsuperscript{33} Most investigations concluded approximately 5\% of will makers dis inherited an heir.\textsuperscript{34} Remarriage and childlessness (when people name non-family beneficiaries) are the most common causes.\textsuperscript{35} Writing in 1938, J.L. Gould noted that in the preceding five years in New Zealand, 77 of 4,396 wills probated (1.75\%) were contested under the New Zealand legislation.\textsuperscript{36} Between 1938 and 1950, 2,000 applications were made under the English statute, an average of less than 170 per year. There were only 42 reported cases by 1960. Some of the latter related to procedural points. In view of the relatively few cases where the statute was invoked, it was suggested by one author
that "it would seem safe to assume that many more wills or family arrangements have been made with the Act in mind." 37 The data in this chapter will be used later in the analysis of policies that should be reflected in new dependant's relief legislation.
END NOTES


2. Ibid. at 37, 38.

3. Ibid. at 24 - 29.

4. Ibid. at 50.


6. Ibid. at 180 ff.


8. Wills 1996, supra c.1, note 3 at 51, 52, 58, 59, 60.

9. Ibid. at 57, 58.

10. Ibid. at 73.

11. Ibid. at 76.

12. Ibid. at 70.

13. Ibid. at 77, 78, 80.

14. Ibid. at 81 - 86.

15. Ibid. at 163.

16. Ibid. at 164, 165.

17. Ibid. at 165, 166.

18. Ibid. at 181.


20. Ibid. at 15 - 17.

21. Ibid. at 199 - 200.

22. Ibid. at 206.

23. Ibid. at 207.


26 *Ibid.* at 86
27 *Ibid.* at 89.
CHAPTER 10
RECOMMENDATIONS FOR REFORM

A number of recommendations for reform will be made, but no attempt will be undertaken to recommend all the changes that should be incorporated in any new statute. Recommendations in this paper will be limited to those necessary to address the purpose of the legislation and those incidental to such recommendations. For the purposes of this chapter, the term "legislation" will refer to the new legislation replacing the present Act. Any new statute would need to contain additional jurisdictional, administrative and procedural provisions which will not be covered in this paper.

Dependant’s relief legislation has generally followed one of the following two formats:

1. The award of "adequate, just and equitable provision" to the claimant. Jurisdictions such as Canada (with the exception of Quebec), England and other Commonwealth countries have followed the New Zealand legislative model.

2. The award of a fixed share to the claimant. Civil law jurisdictions and non-community property United States have this type of legislation which in one of its more sophisticated forms appears in the Uniform Probate Code.

The recommendations which follow would result in a modification of the first legislative scheme. While the fixed share has merit and is spoken favourably by L. Amighetti in his text,1 it would be a "foreign idea" in British Columbia and there would be resistance to its adoption. Rather than move directly to such a scheme, the recommendations which follow will achieve similar results by quantifying the claim more precisely and integrating the after death claims with inter vivos claims.

Inherent in a discussion of the purpose of the legislation and the options for reform is a discussion of who may claim under the statute. The persons who ought to be entitled to apply
under the legislation will be recommended first. Such recommendations, however, do also lead to a discussion of the legislation's purposes.

**Who May Apply Under The Legislation?**

British Columbia presently has one of the most restricted categories of claimants. Claimants are limited to the testator's spouse and children born in and out of wedlock. Efforts by litigants to "broaden" these two categories to stepchildren and an unmarried partner have been unsuccessful. Insofar as unmarried partners are concerned, these efforts may be renewed in light of the recent decisions relating to claims by same sex couples and the Charter of Rights and Freedoms.²

L. Amighetti provides a comparison of the persons entitled to apply under the various provincial statutes.³ All provinces and territories allow the surviving spouse to apply. Three jurisdictions allow a divorced spouse to apply. One of these jurisdictions requires there to be a maintenance order in effect and the other two require the divorced person to be dependent upon the deceased for maintenance for three years immediately prior to the death. Four provinces allow a child to apply with no qualifications, and six impose an age qualification which ranges from 16 to 19 years. Ontario allows a child who the deceased was under a legal obligation to support to apply. Six others allow a child under a disability to apply even if they are older than the specified age. Parents, grandparents, brothers and sisters, foster parents of the deceased child and stepchildren are also eligible claimants in some jurisdictions, usually with the requirement that they remain supported by the deceased. Other Commonwealth countries allow a variety of persons to apply.

**Spouses**

It is clear from all the policies reviewed in this paper that a spouse married to the testator has a long standing legal claim for maintenance. Recently, family law has given spouses greater and greater legal claims to property which is defined in some way with reference to the marriage.
Intestacy legislation in British Columbia has given spouses a substantial share of the intestate's estate for nearly 100 years. Over time legislative reform has increased the spouse's share of an intestate's estate and law reform commissions have recommended even greater shares for the surviving spouse. The empirical data in chapter 9 supports these conclusions. Recognition of the contributions of spouses was the foundation for the development of the law of unjust enrichment in Canada. The Supreme Court of Canada in Tataryn pointed out the strong moral obligation of the testator over and above any legal obligation to provide for a spouse if the size of the estate permits.

A spouse from whom the testator was separated, but who has not obtained an order for maintenance and/or division of property, should be treated the same as a spouse who was not separated despite separation being a partial bar to inheriting under the British Columbia Estate Administration Act. In the case of a separated spouse who has an order for maintenance and/or a share of family assets, that order or those orders should be binding on the deceased's estate. This topic will be examined in more detail later in this paper.

Recommendation 1:

A spouse, a person married to the testator, should remain entitled to claim under the legislation. A spouse includes a person who entered into a void marriage unless the marriage was dissolved or the person remarried before the testator's death.

Former Spouses

The British Columbia Law Reform Commission recommended that former spouses who are receiving maintenance from the deceased be entitled to apply because there may be an ongoing moral obligation to such a person, and the present law as to what happens to a maintenance order on death, including whether it is subject to variation, is not clear, but otherwise agreed that "the rights of spouses upon marriage dissolution, should be governed by matrimonial legislation."
Other jurisdictions have included such persons within the definition of claimant. Uniformity with those jurisdictions on this issue is not desirable. The reasons given by the Law Reform Commission are not persuasive. The divorce has ended the previous spouse's status as a spouse and a divorce or other proceedings will have resulted in a maintenance order and a property distribution. These will have determined the deceased's legal obligations to his or her spouse. It is in those proceedings that the court should bring about a fair result. That result should not be subject to being "second guessed" by a court applying Wills Variation Act criteria. The moral obligation to a previous spouse, if any, will be even more difficult to determine and then quantify than that to an existing spouse. Any such obligations should not be a basis for including a previous spouse as a claimant. Persons need to know there is a finality to claims against them and that they can plan their financial affairs accordingly. To add to the uncertainty which already flows from the variation of maintenance awards under the family law legislation by imposing yet another means of review needlessly complicates matters. The rights of the separated or former spouse under the family law legislation should not be enhanced but only protected. On the other hand, it should be made clear that if a maintenance order is outstanding and by agreement or the terms of the order it is not to end on the death of the person obligated to make the payments, it is to survive the payor's death and that such an order can be varied. It is recognized that this may mean all of an estate is required to meet these pre-death obligations. It also means more thought must be given at the time orders are made as to how the payment of these orders are to be secured upon the death of the payor.

**Recommendation 2:**

The family law legislation should be amended:

(a) to allow a maintenance order, by its terms or by express agreement, or an agreement between the spouses respecting maintenance, to continue after the death of the person obligated to pay and to allow it to be varied;
(b) to clarify that agreements made between the spouses dividing property or an order for the division of property are binding upon the testator's estate.

De Facto Spouses

De facto spouses have had a claim under the British Columbia Estate Administration Act for an allowance from an intestate's estate since 1877, under the British Columbia Family Relations Act for maintenance, under the federal Canada Pension Plan legislation for a survivor's pension, and have had their contributions recognized in the law of unjust enrichment. The federal income tax legislation has been broadened to equate de facto spouses with legal spouses. Other statutes have also broadened the definition of spouse. De facto opposite sex spouses are granted status in dependant's relief legislation in five Canadian jurisdictions with qualifying cohabitation periods of one to five years, which is shortened to one year or no time if there is a child of the relationship. The British Columbia Law Reform Commission recommended an expanded class of applicants in order to recognize all those to whom the deceased might have a moral obligation. This expanded class included de facto spouses. There was no discussion as to the basis for the finding of a moral obligation although it seemed linked to the idea that "close family" is a group to whom one owes a moral obligation.

The number of unmarried heterosexual couples appears to be increasing and they now form 10% of families identified by the 1991 census, and this issue cannot be ignored any further. With continuing high rates of divorce and lengthening life expectancies, there is now and there will be a growing number of single persons who may enter into living together relationships. Unless one maintains a position that nothing short of the status of marriage will give rise to a dependant's relief claim, the eligibility of de facto spouses must be addressed in dependant's relief legislation. There is also a need to bring British Columbia legislation in conformity with the protection given to residents of Manitoba, the Northwest Territories, Ontario, Prince Edward Island and the Yukon Territories so that the rights of Canadians in the common law provinces will not vary dramatically. The partnership model of marriage, which legislatively and in the case law is receiving increasing
reconciliation, describes the relationship of many couples who are living together. The Ontario Law Reform Commission notes these policy considerations for ending the different treatment of married and common law spouses:

(a) Common law spouses pool resources, make joint economic plans, provide each other with emotional and financial support and raise children just as do married couples.

(b) Expectations are now such that both parties to a common law relationship expect to have rights and obligations.

(c) The law of unjust enrichment allows compensation for economic and non-economic contributions and this should be reduced to a statutory scheme.

(d) The state should not (in some cases) be asked to assume a financial responsibility that properly belongs to an individual.\(^\text{13}\)

Commenting on the extension of the application of spousal support provisions beyond marriage by the Ontario Legislature, the Ontario Court of Appeal wrote in \(M v. H\):

\[
\text{[T]he Legislature must simply be taken to have recognized that, insofar as spousal support obligations were concerned, it was neither fair nor effective to choose marriage as the exclusive marker for the identification of intimate relationships which might require, upon breakdown, some access to the equitable dispute resolution scheme created by the legislation. . . . The underlying objectives of the legislation. . . . would be better achieved if the legislative net were cast wider so as to include other people with similar needs.}\(^\text{14}\)
\]

The English Law Commission, while it refused to recommend that cohabitants take under the intestacy rules (despite public opinion to the contrary) did recommend that cohabitants be entitled to claim under the English dependant's relief legislation.\(^\text{15}\)

In the United States the following definition of a family unit has been suggested:

Two or more persons who share resources, share responsibilities for decisions, share values and goals, and have a commitment to
one another over time....regardless of blood, legal ties, adoption or marriage. 16

The part of this definition referring to sharing and commitment sets out the features of the partnership model of a relationship, be it accompanied by marriage or not. The Alberta Law Reform Institute, however, notes that there are different degrees of commitment:

The relationship can be: 1) short lived with little or no personal commitment, 2) a trial marriage, 3) a relationship involving a lifelong commitment to the other partner, or 4) a relationship at some other point along the commitment continuum. 17

After a review of a number of statutory definitions of cohabitant, the Institute concluded that a definition should include a lengthy period of time, this being the best indication of commitment, and an element of public acknowledgement that the relationship is a family unit. The latter now appears in legislation where phrases such as "living in the conjugal relationship outside marriage," "living together as husband and wife," and "held out by the deceased in the community in which they lived as the deceased's consort" are used. 18 The Alberta Institute's recommendation was to define cohabitant as one who is not married to the deceased but who continuously cohabited in a conjugal relationship with the deceased for three years before the death. If there is a child of the relationship it is sufficient if the relationship is of some permanence and no specific time period is required. 19 The Queensland Law Reform Commission considered the arguments supporting a two year, three year and five year period. It recommended a two year period for property adjustments and maintenance at the end of a relationship, concluding that two years sufficiently demonstrates a substantial relationship. Trivial and unmeritorious claims would be avoided and meritorious claims would reach the courts. A two-year period was needed in the interests of uniformity with other legislation. 20 The British Columbia Commission reached a similar conclusion but it did not address the situation where there is a child of the relationship. 21 Any definition setting time limits will to some extent be arbitrary but there is merit in making the time period in British Columbia similar to the Family Relations Act. On the other hand, the Family Relations Act two-year period creates an
entitlement to maintenance only and an extension of this period is justified because there will now be a right to maintenance and a share of property.

In addition to a qualifying period or there being a child of the de facto relationship, the Queensland Law Reform Commission recommended the Court be able to make a property adjustment or maintenance order if a de facto partner made substantial contributions to property, financial resources, or family welfare and the failure to make such an order would result in serious injustice to the de facto partner. These circumstances are, it is submitted, now adequately covered in British Columbia by the law of unjust enrichment.22

A separate, but related issue is whether same sex cohabitants should be included in the definition of de facto spouses. Most of the reasoning which applies to heterosexual cohabitants leads one to the conclusion that same sex couples should be included. The Ontario Court of Appeal concluded in M v. H "[t]he evidence is overwhelming that cohabitation between partners who have intimate relationships, regardless of sexual orientation, creates emotional and financial interdependencies." 23 As an English text on cohabitation notes "[t]he common law and equitable remedies discussed here, however, are in theory equally available to homosexual and heterosexual couples." 24 This subject has been discussed recently in the context of family law claims by the Ontario Law Reform Commission 25 and the Alberta Institute in the context of testamentary claims without reaching a conclusion.26 Legislatures are now faced, subject to the successful appeal of M v. H to the Supreme Court of Canada, with a need to face this issue. The majority of the Ontario Court of Appeal said "[t]he inclusion of unmarried heterosexual couples in the legislative scheme (the Ontario Family Law Act) as it pertains to spousal support obligations without at the same time including same sex couples. . . . opened the door to M's claim of inequality."27

It is beyond the scope of this paper to fully outline the debate but given the decision in M v. H, a recommendation will be made to include same sex couples in the definition of cohabitant.
Various terms have been used to describe the requisite relationship between two unmarried persons. The British Columbia *Family Relations Act* uses the term "live together as man and wife." The Ontario family legislation uses the term "cohabited" which is defined further to mean "live together with a conjugal relationship." In the interests of using plain English, the term "marriage-like relationship" has been chosen.

**Recommendation 3:**

A cohabitant who falls within the following definition should be treated as a spouse of the testator:

"For the purposes of this Act, 'spouse' means a person of either sex who is not married to the testator and who continuously cohabited in a marriage-like relationship with the testator:

(a) for at least three years immediately preceding the death and ending not less than three months before the death of the testator; or

(b) for at least one year immediately preceding the death and ending not less than three months before the death of the testator if there is a child of the relationship."

**Children**

A child born outside marriage, an adopted child, and a posthumous child should all be clearly identified as children within the statute so there is no need to look to other legislation (for example, as at present to the *Adoption Act*) to clarify who is a child. More problematic is whether a definition of child should include an age and/or dependency qualification and whether the definition should be expanded to include stepchildren. British Columbia presently has neither of these two qualifications and stepchildren cannot claim under the Act.

Family law imposes an obligation upon a parent to support a child under a specific age and until dependency ends. There is no reason for this obligation to cease at the parent’s death. Because the courts generally have ignored the maintenance aspect of section 2(1) of the *Wills*
Variation Act and not used sections 4 and 13 to make and vary maintenance orders, the focus of Wills Variation Act applications has turned from maintenance to the payment of a capital sum to children. Family law has never imposed an obligation upon a parent to pay a capital sum to a child (except as a means of securing the payment of maintenance). A capital sum could, of course, become a fund from which maintenance could be paid. Aside from those cases where there is a continued dependency because of illness, a mental or physical disability which prevents a child from earning a livelihood, or in the case of a child continuing to obtain an education, the only obligation to an adult independent child would be a moral one. The Alberta Law Reform Commission, in recommending that an age limitation should be retained said "[w]e are . . . of the opinion that parents fulfill their obligation to children who are not disabled by supporting them until they obtain the age of 18 years or until they have completed their education." 31 A. Close pointed out "[w]hether or not one person owes a moral obligation to another, and the extent of that obligation is almost always a wholly subjective matter." 32 The extent of any moral obligation and how it is to be discharged is best left to a testator. Canadian jurisdictions are presently divided on whether to impose qualifications on a child claimant under dependant's relief legislation. Intestacy legislation has never imposed any qualifications. Wrongful death legislation allows a claim but there must be proof of a financial loss. The doctrine of unjust enrichment can be used to provide relief in those limited cases where a child may be able to point to a sufficiently substantial contribution to the deceased's estate. A good number of the litigated cases under the Act in British Columbia involve either claims between competing adult beneficiaries or between an adult child of an earlier relationship and the deceased's spouse. The imposition of qualifications on the would-be child claimant would reduce litigation substantially. It has already been noted that expectation alone, without contribution and enrichment, is not sufficient to found a claim of unjust enrichment.33 Expectation alone by an adult child is not a sufficiently sound basis for a claim that testamentary autonomy must yield to it. Empirical studies do not indicate great public support for claims by adult independent children, particularly where there is a spouse. Furthermore, such studies do not indicate that many children are disinherited. These studies may, however, be
impacted in jurisdictions where there is dependant's relief legislation by testators including in their wills gifts to adult children only because they have been cautioned by advisors about the legislation. For all these reasons, and particularly to recognize more fully the testamentary autonomy of the testator, the rights of children to claim should be restricted.

Six Canadian jurisdictions allow an adult child unable by reason of disability to earn a livelihood to apply under dependant's relief legislation. The Alberta Institute said:

It is exceedingly difficult to define the boundary between public and private responsibility for the support of a person who qualifies as a dependant under the statute. Where the estate is large, we see no reason why provision should not be made out of a parent's estate for the support of a disabled child. It may be somewhat anomalous that during the parent's lifetime the Province did not enforce the parent's obligation for support but does so at death. However, the deceased no longer has a need for his assets and, if his estate is large, the competing claims for a share of his estate may all be satisfied. Where the estate is small and there are competing claims which cannot be satisfied, we feel that a judge may properly dismiss the application on behalf of a disabled person who is receiving support from the Province. We therefore recommend that the financial responsibility assumed by a government for a mentally or physically disabled dependant should be one of the factors which is taken into account in determining whether an order should be made.

As to what is to occur when there are competing claims which cannot be satisfied, a priorities scheme will be recommended later. The British Columbia Commission did not discuss a dependency requirement in any detail because "no threshold requirement should be required for the deceased's . . . children to bring an application." In the interests of uniformity between jurisdictions, to recognize the moral duty of parents to adult dependant children (discussed later), and for the reasons suggested above by the Alberta Institute, adult dependant children should be eligible claimants.
Recommendation 4:

The definition of child in the legislation should include a requirement that the child be under 19 years of age or 19 years of age and older and unable by mental or physical disability, or enrollment in a full time program of education to earn a livelihood.

Stepchildren

The Family Relations Act adopts the principle that a step-parent who contributes to the support of a child for not less than one year is obligated to support that child.37 Similar provisions are found in the legislation of other provinces. The Divorce Act defines a child of the marriage to include "any child for whom they (the divorcing spouses) both stood in the place of parents" and "any child of whom one is the parent and for whom the other stands in place of a parent"38 and imposes an obligation to support such a child.39 Stepchildren are eligible claimants under British Columbia's wrongful death legislation.

The British Columbia Law Reform Commission reviewed this issue in the context of considering who might be included in an expanded category of claimants. A majority of the Commission would have included stepchildren because of the moral obligation owed to such a person. A minority would have limited stepchildren to those to whom the testator owed a legal obligation to support.40 The English Law Reform Commission recommended extending the class of applicants to include those who were dependent on the testator, which included stepchildren.41 The Alberta Institute considered whether stepchildren should inherit on an intestacy and recommended they should not because "the relationships between step-parents and stepchildren vary too much to support a generalization that the majority of step-parents would want their stepchildren to share in their estate." 42 Imposing an age and dependency qualification together with the existence of a discretionary judicial power would go a considerable way to meet this concern.

In the introduction to "Step-Families and the Law," a survey of the rights of step-families in the United States, it is noted "[t]he traditional emphasis on the nuclear family has effectively
prevented many individuals, who live in other family situations, from enjoying the same type of legal recognition and protection" yet in the United States in 1990 29% of all married couple households contained at least one stepchild under age 18. There is, in Canadian family law legislation, recognition of a non-traditional family, and the recognition now should be extended to dependant's relief legislation.

Recommendation 5:

The definition of a child should include a child who:

(a) is the child of a spouse as defined in the statute, or
(b) is a child for whom the testator stood in place of a parent,

provided that in both cases the testator contributed to the support and maintenance of the child for not less than one year before the testator's death. The child must also meet the requirements recommended for children generally.

Close Family

The British Columbia Law Reform Commission recommended that "close family" be included as claimants but only if these individuals were "dependent" by which is meant they relied on the deceased for some financial support. No threshold of support was recommended. While there is some appeal to the rationale behind such a recommendation, the statistical information does not support the idea that there is a widespread tendency of testators to avoid such obligations. Section 58(1) and (2) of the Family Relations Act create an obligation on a child to support parents but seems little used. In Hammond v. Hammond, the legal responsibilities of a child to a parent under section 58 assisted the court in concluding that there was a juristic reason for an enrichment which might have flowed to the parent. On the basis that the need to create certainty, to recognize testamentary autonomy and to discourage litigation is important, this recommendation should not be followed.
Recommendation 6:

The categories of claimants should be restricted to spouses and children as defined in these recommendations.

Survival of Claimants

A further matter to be addressed is whether the claim of an otherwise qualified person should survive that person's own death. For the purposes of this discussion, this issue will be examined in two stages:

1. The period immediately following the testator's death.
2. The period after this but before the final determination of a claim by the obtaining of a judgment.

It is very common, to the point of almost being mandatory, for a will to provide that a spouse must survive the testator by a set period of time -- usually 14 or 30 days, in order to inherit. This usually takes the following form: "[t]o give the residue of my estate to my (spouse), if my (spouse) survives me for a period of 30 days."

A similar clause will often be included in a bequest to children. The rationale for attaching a condition is:

(a) It will avoid the duplication of the expense and the additional time that would be required to probate two wills. Estate duties have not been a significant expense for British Columbia estates, but recent announcements by the British Columbia government which will increase probate fees by 133% (to 14% of estates greater than $50,000.00) begin to make this expense a more significant one.

(b) It will mean that the will of the spouse who is first to die will determine to whom that spouse's estate will go. If the two spouses have similar wills, it will, of course, make no
difference as to the final result. It may prevent, however, the surviving spouse's next of kin or choice of beneficiaries from inheriting. This may be particularly important in second marriage or relationship cases where "spouses" may not have the same ultimate beneficiaries in mind.

(c) A testamentary bequest is intended to be personal to the beneficiary and is not intended to augment the beneficiary's estate. This rationale has long been one adopted by the British Columbia courts in making awards under the Will Variation Act.

This issue was examined by the Alberta Institute in the context of intestacies and it was recommended that a 15 day survivorship clause be enacted which would deal with all persons who survive, not just the spouse. Similar comments were made by the English Law Reform Commission which, in recommending a 14 day survivorship clause for the English intestacy legislation, commented:

(a) the current practice was to incorporate a survivorship clause in wills, and
(b) the majority of respondents to such a suggestion in their working paper favoured such a clause.

The Queensland and New South Wales Law Reform Commissions have recently made a similar recommendation as to the length of the survivorship. Queensland data from 1992 and 1993 indicated that in fatal road accidents 96% of victims died instantly or within seven days, and all victims died within 19 days after the accident. It must be noted, however, that persons who died after 30 days from the accident were not for statistical purposes considered to have died as a result of the accident. This data supports the recommendation of a relatively short survivorship period. The United States Uniform Probate Code contains survivorship provisions.

Given these comments, a section to address this issue should be added.
Recommendation 7:

A 15 day survivorship period should be added to the qualifications to be a claimant.

Whether or not the cause of action survives the death of a claimant has been examined by the British Columbia courts. It has been concluded that the cause of action does survive the claimant's death. A widow's right to claim was held to vest at the time of her death. The latter death of a claimant is a substantial change in the circumstances of a claimant and is a circumstance which may be taken into account in determining what provision is "adequate, just and equitable," but is not a bar to recovery. This reasoning is persuasive and the legislation should contain a provision so stating.

Recommendation 8:

A claimant's cause of action should survive the claimant's own death provided that the death occurs after the 15 day survivorship period.

Purpose of the Legislation

It is now necessary to return to a consideration of the purposes of the statute. The purpose of the legislation will not be the same for all claimants. In the discussion that follows the term "spouse" and "children" have a meaning which reflects the recommendations made so far, that is "spouse" includes the de facto spouse and "child" includes the stepchild. Both, however, are limited by the recommendations already made.

The Spouse

The purposes of the legislation for the spouse are as follows:

1. To extend to the surviving spouse any inter vivos legal duty of maintenance owed to him or her by the deceased, bearing in mind the income and capital payments the
spouse receives as a result of the testator's death. Historically the common law and later family law legislation has made one spouse liable for the maintenance of the other in specified circumstances. There is no logical reason not to extend this duty of maintenance beyond death, except perhaps a more limited ability of the deceased to pay because of the deceased's loss of income. It has been recognized in intestacy rules indirectly by the award of a capital sum to the spouse and by allowing de facto spouses to apply for maintenance and support. Claims under wrongful death legislation permit loss of income as a head of damages. It was the original objective of dependant's relief legislation and remains a feature of all dependant's relief legislation today. Empirical studies have shown it to be an accepted obligation.

2. **To allow the surviving spouse a share of the deceased's assets comparable to what he or she would receive under family law legislation which has the partnership model of marriage as its basis.** As the English Law Reform Commission said, "[t]he first . . . principle is that maintenance should no longer be retained as the objective in determining family provision for a surviving spouse and the court's powers should . . . be as wide as its power to award financial provision on divorce." Madam Justice McLachlin said in *Tataryn* the widow must be given "at a minimum" what she would have received in family law on separation. The guiding principle, however, should be that all wealth generated during a relationship should be shared equally. This means the surviving spouse's share in British Columbia may be greater or may be less than would be awarded under the present *Family Relations Act* which does not have the partnership model as its basis. Given, however, that the partnership marriage model is partly recognized in the British Columbia *Family Relations Act*, that it is receiving increasing support in the case law and that it is being recommended by law reform commissions as part of the purpose of family legislation, the result may not be significantly different than what the family law legislation now produces or after further amendments may produce. The adoption of this approach would reduce the difficulties created by second marriages or de facto relationships because wealth
accumulated before or after the relationship would be excluded from the division. There would be an increased likelihood that similar property distributions would occur on the breakup of a marriage and on death, although for the present it would increase the share of the de facto spouse on death. This later increase may not be as much as one might at first think if the de facto spouse’s unjust enrichment claim were taken into account. More will be said on the extent of the estate to be divided later.

3. **To recognize and to quantify the moral obligation that one spouse owes to the other.**

Family law, the law of unjust enrichment and the wrongful death legislation have not recognized a moral obligation of one spouse to another. In contrast, empirical studies indicate it is widely believed that a surviving spouse ought to receive substantially more than they would be legally entitled to on the breakup of the relationship or under the intestacy rules. This can be accounted for by concluding that this additional amount is based on the sense that there is a moral obligation.

**The Child**

The purposes of the legislation for a child are as follows:

1. **To extend to the surviving child any inter vivos duty of maintenance owed to him or her by the deceased.** Just as for the spouse, the common law and family law legislation have made a parent liable for the support of his or her children in specified circumstances. This should be extended beyond death. Intestacy rules and wrongful death legislation recognize such a claim, and it was the original objective of dependant’s relief legislation. Empirical studies have not addressed this issue as directly as in the case of a spouse. Firstly, the statistical data, especially from England, does not indicate that a large number of testators die with infant children. Secondly, since in a majority of cases the surviving spouse will be the parent of the infant children, the spouse’s inheritance is indirectly available to support the children. Thirdly, there is only a small percentage of
disinheritances overall, and, while there is no statistical data, it seems less likely a parent would disinherit an infant child than an adult child. Fourthly, the child's rights are recognized in pension schemes. With the increasing likelihood that one or both parents will have worked for a period of time, an infant child will be entitled to Canada Pension Plan pension benefits and, if the parents are separated or divorced, perhaps other pension income. Fifthly, tax legislation recognizes the potential need of dependent children and allows registered retirement savings plans to pass to dependent children free of tax.

To recognize and quantify the moral duty that a parent owes to a child to whom there is no inter vivos legal duty, but who is by reason of a mental or physical disability or enrollment in a full time program of education unable to earn a livelihood. Support for the recognition of this moral duty is found in the reasoning of the British Columbia Court of Appeal in Lukie. The parent's obligation should be limited to "illness and disability" situations and those in which the child continues to be dependent on the parent while obtaining an education. The latter concept is recognized in the Divorce Act. The reasoning ought, however, not to be extended to two of the situations referred to in Lukie:

(a) "Ineptness on the child's part in fighting the battle of life." This, while having some merit, would be too broad a description and very difficult to quantify. Any exercise to quantify such a claim would presumably involve a discussion as to who is to blame for the "ineptness." The current law already illustrates the divergent views which develop when the courts proceed to consider the history of a child / parent relationship.

(b) "A large enough estate that the rejected child could receive a share that would not materially affect others." Where this rationale has been applied, it has been applied because insufficient weight has been given by the courts to the testamentary autonomy of the deceased. A reading of the cases in which there is a large estate gives one the uneasy feeling that the court is taking the view that there is "enough money to go around," "the deceased is not here anymore and has no need of this,"
so "let's make everyone a little unhappy -- the beneficiar... they feel they deserve."
To continue its application "would clothe judges with a very wide power to apply what has been described as 'palm tree justice' without the benefits of any guidelines." To use Madam Justice McLachlin's words, although she would not agree with the result, "the absolute testamentary autonomy of the nineteenth century was required to yield to the interests of spouses and children to the extent, and only the extent (my emphasis), that this was necessary to provide the latter with what was 'adequate, just and equitable in the circumstances.'" One can no longer keep referring to testamentary freedom as a protected interest without actually using the principle to limit the entitlement of potential claimants. The "large estate" recoveries are often by claimants without any "need" and who have a sufficiently tenuous moral ground that the words of Chief Justice Cockburn are applicable:

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.

If a testator has made a will, testamentary freedom should prevail over a claim based on status alone. Intestacy legislation which allows a child to inherit capital based on status alone is "default" legislation and ought not to be persuasive on the issue when there is a will.
The Testator

The purposes of the legislation for the testator are as follows:

1. **To allow to the greatest extent possible the testator freedom to dispose of his or her assets on death consistent with his or her right to dispose of these assets during his or her lifetime.** There has been a long standing recognition of testamentary freedom. Discussions with the public lead the writer to believe that the public considers there to be a right to greater testamentary freedom than an individual now has. The empirical data does not indicate that this power is being abused. Even in the reported cases where testator's reasons are recorded or can be inferred from the distribution scheme, there are few, if any, cases which indicate testators are acting without reason. There may be a critical judicial examination of the reasons which lead to the reasons being disregarded, but there is rarely no understandable reason for the testator's action. Reported cases usually involve fact patterns, for example second marriages with children from an earlier relationship, where there are genuine competing claims. From the writer's experience, testators struggle to resolve these conflicting claims. They do not act maliciously or mischievously. In the English study, the interviews with the survivors (the beneficiaries of the probated wills studied) showed there was a high degree of acceptance of the schemes of distribution. The discretionary system, advocated because of its flexibility, will not necessarily produce just results in all cases. Look, for example, at *Currie v. Bowen*. Here the wife made a very substantial contribution to the enhancement of her husband's estate. He left her nothing in his will, leaving all of his estate to relatives. She, unfortunately, died shortly after his death. While she still had the standing to bring a claim, her claim for a share of his estate was disallowed and all her contributions were lost to her estate. Judicial discretion can be exercised in a way which creates unjust results. Furthermore, because there has been no legislative intervention since 1920, judges have been left to determine what is a just result.
What is "just" has varied not only with the judge in each case, but over time as is evidenced by the two competing lines of cases over the years.

2. **To give predictability and comparability to results and to guide testators in the planning of their financial affairs.** Testators seem prepared to deal with the uncertainty of the timing of their deaths, but they want to be sure what will actually happen when it is time to distribute their assets. Madam Justice McLachlin states "...there will be a range of options, any of which might be considered appropriate in the circumstances. Provided the testator has chosen an option within this range, the will should not be disturbed." 62 In fact, there are often not a range of options from the testator's point of view. Do you leave an individual a gift or not? That issue does not create a "wide range of options." If the testator has decided to give a person something, how great should that something be? A testator is likely to have an amount in mind, not a wide range of amounts. How, given today's state of the law, can even an experienced lawyer predict what falls outside the range of options? How does one explain to a testator that if his or her reasons for the testamentary scheme are made known (which may assist in defending any Wills Variation Act claim), a judge may conclude they are inappropriate and therefore find grounds to vary the will.

The English study suggests that people die fairly close to the date at which their will was made. What, however, if the testator makes his or her will and there is a lapse of considerable time before death with either no revision of the will or a lack of capacity to revise a will? Will a testator's distribution scheme be tested by new standards determined by "the search for contemporary justice," 63 standards which are developed after the ability to change the will exists?

3. **To avoid the expense created by litigation.** Litigation is expensive and the testator's estate will bear some of the expenses either because of an award of costs to the successful claimant and/or because a beneficiary is paying their legal expenses out of their specific bequest or their share of the residue. Particularly in modest estates, the cost of the
litigation may consume a substantial portion of the estate leaving insufficient monies to meet even the needs of the beneficiary. This is particularly true when the opponents are a spouse and children of whom the spouse is not the parent and the litigation is being driven by emotions. In Tweedale the testator left her $18,000 estate to two adult independent children of a prior marriage. What would be left of the $18,000 after a summary trial and an appeal to the Court of Appeal, even though no costs were awarded and even though the husband was ultimately awarded the entire $18,000?64 The husband’s separate estate was $22,000 in savings and a vehicle. He had $1,296 per month pension income. Testators regularly express the view that they want their families, not their lawyer, to benefit from their estates.

**The Spouse, the Children and the Testator**

The purpose of the legislation for the spouse, the children and the testator are as follows.

**To minimize the emotional upset related to the testator’s death.** A review of a representative number of the cases over some 60 years indicates a number of common participants in the litigation under the Act.65 Two general situations emerge:

(a) All the litigants are members of the same family. There has been only one spouse and all the children are related by blood to the deceased and to the surviving spouse, if there is one.

(b) The deceased has married more than once and has more than one family (or lived in a common law relationship). The second family may be a spouse alone or a spouse and children of that second spouse to whom the testator is not related by blood or adoption.

The grief process of survivors has been discussed by various writers. Each family member plays a variety of roles within the family unit and the carrying out of these roles keeps most families in general balance. When a family member dies, his or her roles become vacant and an imbalance
created. The survivors must adjust over time to the new dynamics.\textsuperscript{66} If at the same time a dispute arises over the distribution of the testator's assets, there will be additional disruption if one or more family members withdraw from the rest. This will add to and prolong the imbalance situation.

Testators, when alerted by their professional adviser to the possibility of litigation, usually want to avoid any additional upset to what they know will be caused by their deaths. Generally, family members do not want to cause or experience emotional turmoil. The spouse and the children should be spared to the extent possible the additional emotional trauma of litigation and the destruction of family relationships.

\textbf{Society at Large}

The purposes of the legislation for society at large are as follows:

1. \textbf{To ensure that when there are monies available the burden of caring financially for spouses and children is carried by the testator.} This was the original purpose of dependant's relief legislation. It was a proper objective in 1920 and remains one today.

2. \textbf{To reduce litigation and the costs associated with resolving disputes in the courts.} A number of recent studies and reports have pointed out the increasing demands that litigation places on the justice system and the limited resources that are available to meet those demands.\textsuperscript{67}

3. \textbf{To have a legislative scheme which accords as closely as possible to the expectations of people and thereby decreases the likelihood of testators undertaking avoidance activities.} To date the \textit{Wills Variation Act} has not had provisions addressing assets which pass outside the will, nor have the courts looked with any particular disfavour on a testator who has arranged his affairs so as to avoid the possible impact of the \textit{Wills Variation Act}. Any new scheme should to the extent possible create a legal environment which does not operate to encourage testators to avoid the impact of the legislation by inter vivos actions.\textsuperscript{68}
**Legislative Initiatives**

Having stated the purposes of the legislation from the perspectives of the spouse, the child, the testator and society at large, this writer suggests that a series of recommendations are required to carry into effect these purposes.

**Recommendation 9:**

The legislation should state its purpose.

**Recommendation 10:**

The stated purpose of dependant's relief legislation in British Columbia should be as follows:

The objective of this Act is to provide that:

(a) When two persons have lived together in a relationship of some permanence, with financial and emotional interdependence, and that relationship is severed by death, the assets acquired during the time they were together should be equally shared. If after the sharing of these assets one party is likely to suffer economic hardship as a result of participation in the relationship, that person's need for support should be recognized.\(^{69}\)

(b) The needs of children for ongoing financial support during the period of their dependency should be met after the death of a person with whom they had a relationship of financial and emotional dependence.

(c) The testamentary autonomy of persons should be subject only to the objectives referred to in (a) and (b).

(d) The financial burden of litigation on small estates should be eliminated.
The Testator's Estate

The Act gives the court power to "order such provision as the Court thinks adequate, just and equitable in the circumstances . . . to be made out of the estate of the testator for (a) wife, husband or children." 70 "Estate" is not defined by the statute. The Supreme Court of Canada looked at the meaning of the term "estate" in the Ontario dependant's relief statute which in 1950 had a similar wording to British Columbia. It concluded:

This section would seem in the clearest terms to indicate that the sole source from which any allowance granted under the Act is to be satisfied is the assets to which creditors are entitled to look. The assets to which creditors are entitled to look are the assets which the personal representative of a testator is entitled to administer. 71

This is the interpretation which has been used in British Columbia. Joint tenancies, contractual agreements with designated beneficiaries and pension schemes may transfer substantial wealth on death to individuals outside of the testator's estate. Inter vivos gifts and inter vivos trusts also form no part of an estate. On the other hand, L. Amighetti correctly notes:

Benefits conferred upon a plaintiff or on other beneficiaries by the testator during his lifetime, or which pass by operation of law on death, are properly considered by the courts when ascertaining the financial state of the plaintiff and deciding whether provision ought to have been made. 72

Decisions since Tataryn have applied this reasoning. 73

What is included in the testator's estate is relevant for a number of reasons:

1. Dependant's relief legislation, unless it is drafted to override a number of established property ownership concepts, can only redistribute assets over which the deceased's personal representative has control. It would be a task well beyond the scope of this paper to attempt to address all the changes required to override such concepts as inter vivos powers to dispose of assets and the rights of third party creditors. This discussion will
proceed on the basis that only assets passing under the will will be available to satisfy claims of spouses and children.

2. While only the assets passing under the will will be available to satisfy claims, the deceased's enhanced estate is relevant for some purposes. Referred to in the United States Uniform Probate Code as the "augmented estate," this concept is created for the purposes of calculating the value of the elective share (in this case) of a spouse. An examination of this concept focuses on what might or should be considered to be available for the surviving spouse. The augmented estate has four "segments" which, if reviewed in detail, lead to a very complicated calculation but which generally are:

(i) Assets which are part of the deceased's estate for probate purposes, less liabilities of the estate (but not estate or inheritance taxes). This is similar to the "estate" referred to in the Act.

(ii) Assets over which the deceased, immediately before death, retained certain interests, powers or relationships. These assets pass outside the deceased's estate but are used to calculate the elective share and may be reclaimed to fund the elective share if the assets referred to in (i) are insufficient. These would include property over which the deceased had a general power of appointment (for example, property in a trust the deceased could revoke), an interest in joint tenancy with a person or persons other than the surviving spouse, life insurance proceeds from a policy over which the deceased had the power to change the beneficiary and some inter vivos transfers to third parties in which the deceased retains specified interests or powers.

(iii) Gratuitous transfers received or derived by the surviving spouse as a result of the deceased's death. These include benefits of life insurance, assets received as the surviving joint tenant and generally those types of assets in (ii) where the spouse receives the asset, not the third party. This segment does not include what the spouse receives from the deceased's estate or the value of family protection such as a homestead allowance.
(iv) All the property of the surviving spouse, including assets acquired prior to and during the marriage, both earned and gratuitously derived.

Excluded from all these inclusions are transfers to third parties for value, transfers a spouse consented to or joined in and life interests of the deceased in trusts established by third parties. An agreement between the spouses which is in writing, voluntary and not unconscionable and relinquishes rights to the elective share can be effective. A scheme for the funding of the elective share from the various categories is also contained in the Code. The "augmented estate" encompasses a much broader range of assets than do "family assets" in British Columbia family law or the assets subject to division in community property jurisdictions which generally grant a one-half interest only in assets earned during the marriage and exclude property obtained prior to marriage or derived from third persons from inheritance or gratuitous transfers during the marriage.

In Ontario some of the concepts of dependant's relief legislation are integrated with the family law statute. On the death of a spouse, the surviving spouse may elect to receive his or her entitlement under the will or under the intestate rules or "if the net family property of the deceased spouse exceeds the net family property of the surviving spouse, the surviving spouse is entitled to one-half the difference between them." The Court has the power to award more or less than that amount if equalizing the net family properties would be unconscionable having regard to stated criteria. In addition, the Court has power, on application, to award support (as opposed to a share of the assets) under the "Support of Dependents" provisions of the Succession Law Reform Act.

The "net family property" of a spouse is a defined term in the Ontario family legislation which is calculated as follows:

1. Determine the value of all property owned by the spouse at the valuation date (itself a defined term which refers to events such as separation, divorce and the day before a
spouse's death). "Property" is broadly defined to include all present and future interests whether vested or contingent.  

2. Exclude from the value of property (but not the matrimonial home) the following: gifts and inheritance after the date of the marriage, proceeds or the right to proceeds of a life insurance policy, personal injury damages, property into which excluded property is traceable and property which the parties have by domestic contract agreed to exclude.  

3. Deduct the spouse's debts and liabilities at the valuation date.  

4. Deduct the value of property owned by the spouse (other than a matrimonial home) net of debts and liabilities as of the date of the marriage.  

5. If the deceased spouse owned the matrimonial home with a third party as a joint tenant, the joint tenancy is deemed to be severed immediately before death so that the deceased spouse's share remains part of his or her "net family property."  

The 1993 Report of the Ontario Law Reform Commission, it has already been noted, has recommended adjustments to these definitions to move the statutory scheme to one reflecting an equal partnership family model, thereby assuring that all wealth generated during a relationship is shared, including gains, losses and income from excluded assets. The Ontario definition of a spouse's net family property adjusted by the recommendations of the 1993 Law Reform Commission Report most closely resembles the concept of "estate" which is recommended here because:  

1. It is consistent with the family model which describes a marriage as a partnership.  

2. It best reflects the concepts found in the law of unjust enrichment.  

3. It supports the enhancement of a spouse's testamentary freedom.  

4. It does not seem to have created any inequities or administrative problems which are not, within reason, capable of being addressed by refining the legislation.
5. It recognizes that individuals may, in their lifetime, enter into more than one relationship of some permanence with financial and emotional interdependence during which relationship assets are acquired.

Such a definition of estate does not, however, fully address the support obligations of a testator to a spouse and children. How are these support obligations to be funded? It has already been stated that the income and capital payments accruing to a spouse as a result of the testator's death should be taken into account in any extension of the inter vivos duty of maintenance owed by the deceased to a spouse, but to what extent should the testator's entire wealth (as opposed to a defined "estate") be considered when establishing maintenance? The awards of maintenance against a living person are influenced greatly by the payee's income earning ability, which ability ends on death. After the testator's death, all that remains is a capital fund. For society at large the purpose of the legislation has been described to be "[t]o ensure that when there are monies available the burden of caring financially for spouses and children is carried by the testator."

To implement this purpose all of the deceased's capital which passes to the executor should be considered available for the payment of:

1. a maintenance order or agreement for maintenance which continues after death in favour of a spouse;
2. a maintenance order or agreement for maintenance which continues after death in favour of a child;

and in establishing the amount of maintenance that is payable to a spouse or child.

Recommendation 11:

The legislation should contain two definitions of "estate." The first definition, to be used as the basis for determining the spouse's entitlement to a share of the deceased's assets, should reflect the principle that only economic wealth accumulated during a spousal
relationship should be shared equally (hereinafter referred to as the "marital estate"). The second definition, to be used as the basis for establishing the amount of maintenance that is payable to a spouse or child and to fund maintenance orders or agreements which survive death, should include the deceased's entire estate which passes to the personal representative (hereinafter referred to as the "enhanced estate").

Provision for a Spouse

The present section of the Act as it relates to a spouse reads in part as follows:

If a testator dies leaving a will which does not, in the court's opinion, make adequate provision for the proper maintenance of the testator's wife (or) husband, the court may, in its discretion . . . order the provision it thinks adequate, just and equitable in the circumstances be made out of the estate . . . for the wife (or) husband. 83

Recommendations for new definitions of "spouse" and "estate" have already been made. How is the balance of the Court's power to intervene to be described?

In the discussion of the purposes of the legislation for the spouse, three obligations of the testator were identified:

1. a maintenance obligation;
2. an obligation to share assets;
3. a moral obligation.

"Adequate, just and equitable provision" has had to satisfy all three obligations in British Columbia and in many other jurisdictions. In Ontario, the family property legislation deals with the sharing of assets and the succession legislation with the obligation to properly support a spouse. Moral obligations are not directly addressed. In England the term used is "reasonable financial provision" which for spouses is further defined as "such financial provision as it would be reasonable in all the circumstances of the case for a husband or wife to receive, whether or not that provision is required
for his or her maintenance." In the United States, in jurisdictions where the Uniform Probate Code has been adopted, the spouse's elective share is a percentage of the "augmented estate" which increases at 3% for each year of the marriage after the first for the first 10 years of marriage, and then at 4% per year to become a maximum of 50% after 15 years or more, with a minimum amount of $50,000.00. "The accrual approach theorizes that marriages are similar to economic partnerships and thus the partnership interest of one spouse should increase in the other spouse's assets as the marriage endures." No separate recognition is given to maintenance requirements of a spouse.

The three most likely fact patterns when a spouse dies will be:

1. A surviving spouse for whom no maintenance order has been made and for whom there has been no division of assets. Here the parties are still cohabiting in a marriage-like relationship or, having separated, have yet to agree on maintenance and/or a division of assets.

2. A surviving spouse for whom only maintenance or a division of assets has been resolved by agreement or by court order. The parties will have separated but their new financial relationship will not yet be completely resolved.

3. A surviving spouse for whom both maintenance and a division of assets has been agreed upon or which has been ordered by a court.

Dealing first with the latter situation, a recommendation has already been made that such orders and agreements, if the order or agreement so provides, shall continue after a testator's death and be binding upon the testator's estate. This situation need not be further provided for in the dependant's relief legislation.

With respect to the first fact pattern above, an approach suggested by these words of the British Columbia Court of Appeal in Toth should be followed:
Property division and maintenance are closely intertwined. One advantage of this legislative tie is that section 51 may be utilized in the division of property to reflect the relative abilities of the parties to become or remain economically independent and self-sufficient (section 51(e)), and the respective capacities and liabilities of the parties (section 51(f)). These concepts are also relevant to determinations of spousal maintenance. A potential pitfall presented by this legislative link between property and maintenance, however, is the danger of double recovery where, for example, property is reapportioned under section 51 and then further reapportioned by an award of lump sum maintenance.

A single award combining a property division and a maintenance award and the recognition of the moral obligation to the spouse should be made. As the Court points out, the first two are "closely intertwined." Furthermore, there is a pressing need to allow estates to be wound up in a reasonable time and as Madam Justice McLachlin said in rejecting the concept of an ongoing life estate in a fund, periodic payments "fail to recognize her (a wife's) deserved and desirable economic independence and constitutes inadequate recognition of her moral claim." Ongoing spousal maintenance obligations frustrate these objectives.

The first component of such a single award should be a property allocation which follows the Ontario model (as modified by the recommendations of the 1993 Ontario Law Reform Commission Report). The surviving spouse should receive one-half of the difference between his or her "net family property" or to use the definition recommended earlier, "marital estate" and the deceased's marital estate. This would give the deceased and the surviving spouse each a one-half interest in the assets acquired during the time of the relationship. It could give a British Columbia spouse more or less than he or she is presently entitled to under the British Columbia family law regime but recognizes the direction in which family law is moving.

The second component of such a single award is the share of the enhanced estate which recognizes any need the survivor has for support after the receipt of the first component of the award, benefits under the will, and property passing directly to the survivor as a result of the
spouse's death. Since there will be a discretionary element to the quantification of this component, criteria should be established by the legislation to guide the Court in making its judgment. Such criteria have been inserted in family law legislation and other dependant's relief legislation and should include at least the following:

(a) the applicant's current assets and means;
(b) the assets and means that the applicant is likely to have in the future;
(c) the applicant's capacity, now or in the future, to contribute to his or her own support;
(d) the applicant's age and physical and mental health;
(e) the applicant's needs, in determining which the court shall have regard to the applicant's accustomed standard of living;
(f) the measures available for the applicant to become able to provide for his or her own support and the length of time and cost involved to enable the applicant to take those measures;
(g) the proximity and duration of the applicant's relationship with the deceased;
(h) whether the applicant has a legal obligation to provide support for another person;
(i) any agreement between the deceased and the applicant;
(j) any previous distribution or division of property made by the deceased in favour of the applicant by gift or agreement or under court order;
(k) the claims that any other person may have as an applicant;
(l) a course of conduct by the applicant during the deceased's lifetime that is so unconscionable as to constitute an obvious and gross repudiation of the relationship;
(m) whether the applicant has undertaken the care of a child who qualifies as an applicant;
(n) any other legal right of the applicant to support, other than out of public money.\(^88\)

While the Act now states that "the court . . . may refuse to make an order in favor of a person whose character or conduct, in the court's opinion, disentitles him or her to the benefit of an
order," conduct should be limited to that referred to in (1) above and should, as it does on family law, have no relevance in the division of assets.

The third component of such a single award is a share of the marital estate which recognizes the moral obligation of the deceased to the surviving spouse. The difficulties of quantifying by a monetary sum a person's moral obligations have already been commented on, but in view of the substantial support shown for the rights of spouses to all or a substantial portion of an estate, this component cannot be ignored. While it is entirely arbitrary, but bearing in mind the need for certainty, it is suggested that this component be given a value of 10% of the marital estate. Marital estate is used because that is the measure of what the spouses have created while together. No reduction of this 10% is proposed if the parties have separated, although it might be argued the moral obligation is less. Logically, conduct of the kind referred to in (1) above, if it impacts on the maintenance component, should also reduce or eliminate the award for the moral obligation component. Elimination of the 10% will be recommended for reasons of simplicity once the requisite conduct has been found. This approach is not entirely consistent with the comments of the British Columbia Law Reform Commission.

If the surviving spouse has already resolved a maintenance claim or a claim for the division of assets to an agreement or an order, the award under the legislation will then deal only with the unresolved components. From any award which would otherwise be made will be deducted the value of assets of the deceased which the spouse receives under the will or by operation of law.

The results of judicial intervention in small estate cases has already been commented on. Where the "marital estate" and the "enhanced estate" are modest, the financial burden of litigation on such an estate should be eliminated. If all three obligations of a testator are outstanding, all of a modest enhanced estate should go to the surviving spouse, subject only to any agreement between the spouses to the contrary. The effect of such agreements will be dealt with further later. Any definition of a modest estate must be somewhat arbitrary. Sixty-five thousand dollars is the
preferred sum going to a spouse under the British Columbia intestacy rules and that sum has not been adjusted since 1983. In its 1983 report the British Columbia Law Reform Commission recommended increasing the spouse's preferred share on an intestacy to $200,000.00. The latter figure will be adopted here but it should be reduced by any property the spouse receives outside the estate as a result of the testator's death.

It is conceded that the suggested approach complicates the wording of any legislation but it is required to reduce the present uncertainty and inconsistency of awards, to recognize the increasingly varied fact patterns which exist and to implement the recommended purposes of the legislation.

Recommendation 12:

The Court should be given the power to vary a will so as to make reasonable financial provision for a spouse, such financial provision to:

1. Be consistent with the stated purposes of the legislation.
2. Recognize such of the following three obligations of the testator as have not been quantified at his or her date of death. The first obligation shall be to transfer to the surviving spouse sufficient assets so that he or she will have an equal share of the combined "marital estate" as that term has been defined. The second obligation will be to transfer to the surviving spouse a share of the deceased's enhanced estate which recognizes the spouse's need for support after the receipt of any marital estate, the 10% in respect of the moral obligation, any beneficial interest under the will and any property passing outside of the will as a result of the spouse's death. The third obligation will be to transfer to the surviving spouse an additional 10% of the marital estate unless the spouse has been guilty of a course of conduct during the deceased's lifetime that is so unconscionable as to constitute an obvious and gross repudiation of the relationship.
3. All the enhanced estate where such enhanced estate is modest.

Provision for a Child

The present section of the Act, as judicially interpreted, permits awards based on need and/or a testator’s moral obligation to children -- infant, adult, dependent and independent. Recommendations for a new definition of child have already been made. The purposes of the legislation for a surviving child are limited to recognizing any inter vivos duty of maintenance and a parent’s moral duty to support a child who by reason of a mental or physical disability or enrollment in a full time program of education is unable to earn a livelihood. There is only to be a maintenance obligation.

The most likely fact patterns when a testator who is a "parent" (as that is understood in relation to the new definition of "child") dies will be:

1. A child under the age of 19 years in respect of whom no maintenance order has been made. In these circumstances the needs of the child will be the primary consideration. The Child Support Guidelines place considerable emphasis on the income of the parent obligated to pay but the deceased will have no income. Just as for the spouse, there will be a discretionary element in the quantification of this maintenance so criteria should be established. They should include the following:

   (i) Factors such as those listed with the spouse maintenance component;

   (ii) (a) the child’s aptitude for and reasonable prospects of obtaining an education;

        (b) the child’s need for a stable environment;

        (c) if the child is a child of the age of sixteen years or more, whether the child has withdrawn from parental control;

        (d) the liability of any other person to maintain the child.

2. A child under the age of 19 years or older in respect of whom a maintenance order has been made before the parent’s death. It has already been recommended that family law
legislation be amended to allow a maintenance order by its terms to continue after the death of the person obligated to pay and to allow it to be varied.

3. A child over the age of 19 years in respect of whom there is no legal duty of support but to whom, because of a disability or attendance at an educational institution, there is a moral duty of support. The needs of the child will be the primary consideration. Criteria should be established to guide the Court and should include those referred to above for children.

Recommendation 13:

The Court should be given the power to vary a will so as to make reasonable financial provision for a child, such financial provision to:

(a) Be consistent with the stated purposes of the legislation;
(b) Recognize the obligation of the testator to support a child when that obligation has not been quantified at the testator's death;
(c) Be the entire enhanced estate when such enhanced estate is modest and there is no spouse.

Priorities

Madam Justice McLachlin said on the issue of priorities:

How are conflicting claims to be balanced against each other? Where the estate permits, all should be met. Where priorities must be considered, it seems to me that claims which would have been recognized during the testator's life - i.e., claims based upon not only moral obligations but legal obligations - should generally take precedence over moral claims. As between moral claims, some may be stronger than others. It follows to the court to weigh the strength of each claim and assign to each its proper priority.
The present *Wills Variation Act* states:

1. Payments that are ordered to claimants are to fall "rateably on the whole estate of the testator" unless the court otherwise orders.

2. If part of an estate is outside the province, the payment may be ordered to come from those assets within the province.

3. Part of the estate may be exonerated from the application of an order.

4. A beneficiary's share may be used to fund a periodic payment or lump sum.\(^{93}\)

The present statute does not directly address what is to occur if there are insufficient assets to meet all the testator's obligations as the court finds them to be. The British Columbia *Estate Administration Act* contains a schedule which gives the priorities for payment when an estate is insolvent. After listing a number of specific debts and claims, none of which include obligations to beneficiaries or dependant's relief claimants, the statute states "all other claims . . . shall be paid rateably and without preference." \(^{94}\) The British Columbia Law Reform Commission in its 1983 report did not cover this topic.

The statutes of other jurisdictions are generally silent on priorities. There are some exceptions. In Ontario an order for payment to a child under the *Succession Law Reform Act* (the Ontario dependant's relief legislation) has priority over the election of a spouse to a share of the deceased's net family property.\(^{95}\) In England, the court is directed to consider "the financial resources and financial needs" of other applicants under the statute when making an order for a particular applicant.\(^{96}\) All of this is of little assistance.

The recommended definitions create the following categories of claimants:

1. spouses;

2. de facto spouses (here used to refer to spouses to whom the testator is not married);

3. children who are under 19 years of age;

4. children are over 19 years of age but dependent on the deceased;
5. stepchildren, either under the age of 19 years or over the age of 19 years and dependent.

The extent to which the spouse is seen as a favoured beneficiary has already been commented on. There is an inter vivos legal obligation to this person. Their claim should be first. If there are minor children of the deceased whose other parent is a surviving spouse those children will be maintained by or have a claim for maintenance from their surviving parent. If there are minor children of whom the surviving spouse is not the parent, there will be another parent to whom the children can look to for support. The guidelines in Bill C-41, however, give priority to the maintenance claims of children.97 Because it has already been recommended that maintenance orders continue after the death of the person obligated to pay,98 maintenance claims of children will have to be given priority despite the reasoning just outlined. Since the guidelines are to be adopted by provincial legislatures, there is no basis to distinguish between children (whose maintenance rights are found in the Divorce Act) and stepchildren (whose maintenance rights are found in the Family Relations Act). The obligation to adult children is not covered by the Guidelines, is morally based, and can justifiably be placed behind the legal obligation to a spouse and a de facto spouse.

In the interest of Cameron v. Cameron, the British Columbia Public Trustee claimed on behalf of an eleven year old child that the child’s mother’s will which left everything to her husband should be varied to provide a share of the estate for the daughter. In rejecting the child’s claim, Mr. Justice Hood concluded the child was being properly maintained and supported by her father and the mother had discharged her moral duty despite being urged to conclude there was no absolute certainty the child’s situation would continue.99 Indirectly the court seems to have accepted the argument noted above that the surviving spouse and parent will care for the child or be subject to a claim by the child for maintenance. More problematic is the basis on which to resolve the conflicting claims of a spouse and a de facto spouse. Any resolution is somewhat arbitrary. Given that the deceased did enter into a marriage relationship, a long recognized legal institution, this obligation should be given priority over the claim of the de facto spouse. Furthermore, the burden should be placed on the testator to avoid conflicting claims by divorcing a spouse or reaching an inter vivos agreement (in the way later recommended in this paper) to eliminate conflicting claims
by two spouses. The actual likelihood of a priorities problem developing is reduced by other recommendations made here because of the distinction between the "marital estate" and the "enhanced estate" which may reduce the pool of assets from which a spouse (including a de facto spouse) has a claim for a share, leaving assets available to meet other obligations. Within a category of children all should rank equally.

**Recommendation 14:**

The legislation should establish the priority to be given to conflicting claims. The following should be given priority in the order in which they are listed: minor child and stepchild; spouse; de facto spouse; adult dependent children and dependent stepchildren.

**Multiple Claims**

The rights given to spouses are meant to reflect the legal and moral obligations that the testator has to that spouse during the testator's lifetime which includes obligations under the Divorce Act, the Family Relations Act, the doctrine of unjust enrichment and the partnership model of marriage. This is consistent with the view taken by the Supreme Court of Canada. It is also consistent with the recommendations of the Ontario Law Reform Commission. Minor and adult children, however, may have an unjust enrichment claim which will not be recognized by the support obligation of the testator.

**Recommendation 15:**

The legislation should provide that a spouse who elects to claim under the legislation is barred from bringing an action for unjust enrichment but a child is not.

**Agreements and Contracting Out**

The arguments for and against the ability of persons to contract out of dependant's relief legislation are briefly but well summarized by the British Columbia Law Reform Commission in its
1983 Report. Because the "Act was designed to ensure that individuals recognized their support obligations so that the public was not required to shoulder the burden," a public interest was protected. L. Amighetti notes:

The question of whether or not a beneficiary can contract out of the Act has been the subject matter of some judicial debate. The general consensus of the courts has been that, while an exclusion agreement constitutes an important factor to be considered, the courts will not be bound by a contract waiving the protection of the legislation.

On the other hand, the Commission said "it is important for the parties to determine their affairs" and noted that the courts are giving effect to contracts to leave by will to third parties which may operate to reduce the assets available to meet claims and indirectly affect the public interest. Agreements can encourage people to discuss, negotiate, compromise and replace litigation. If the purpose of the Family Relations Act is to ensure family property should generally be shared equally whether the spouses have considered the issue or not, a broad jurisdiction to vary spousal agreements would be consistent with that purpose. If the purpose of the Family Relations Act is to provide a formula for the division of property when the spouses cannot agree, there should be a narrow jurisdiction to vary.

Family situations are not as simple as they once were. For example, it has become commonplace for parties to marry again, either because of divorce or the death of a spouse, and to bring to that new marriage assets assembled before the relationship and children of a previous relationship. Recommendations have already been made which will expand the category of claims, increase the complexity and number of possible relationships and increase the potential for conflicting claims but insufficient assets. Family law (which also has an increasing public interest component) has recognized the usefulness of an agreement between two parties which has been properly reached. In an unjust enrichment case in which an agreement said in effect "What is mine is mine and what is yours is yours," the judge concluded:
Both parties understood the contract, which made sense at their stage in life, especially since each had children from their defunct marriages. It is evident that the parties, during their cohabitation, abided by the terms of their contract. ... In my opinion courts should uphold such contracts in the absence of duress, undue influence or unconscionability. 106

Those comments are relevant here. In Lobe v. Lobe Estate, the British Columbia Court of Appeal noted that while a Wills Variation Act action could not be barred by a marriage agreement, such an agreement "may serve to reduce or nullify any legal obligation a testator may otherwise have during his lifetime" and "it becomes a consideration to be taken into effect in assessing the moral obligations of a testator at the time of his death ... " 107 This illustrates the willingness of the courts to use an agreement for some purposes. The British Columbia Law Reform Commission in its report on spousal agreements recommended that spouses be able to waive rights under the Wills Variation Act. 108 The legislation should provide a formula for the distribution of property on death only if the parties have not otherwise agreed.

There are, therefore, two issues to resolve:

1. Will an agreement be permitted to override any public policy concerns?
2. What grounds, if any, will permit a court to set aside or vary an agreement?

For the reasons already noted, an agreement to waive or modify rights under the dependant's relief legislation should be permitted, however, such agreements should be capable of being set aside or partially set aside if:

1. a party failed to disclose significant financial or other relevant information;
2. a party did not understand the nature or consequences of the agreement;
3. the agreement was obtained by the use of fraud, duress or undue influence;
4. the agreement is unconscionable;
5. The party seeking to set aside the agreement did not have independent legal advice or a court has not approved the agreement.

Recommendation 16:

The legislation should contain a provision that a potential claimant have the power to agree with the testator to waive or modify their claim under the legislation provided that such an agreement be capable of being set aside if certain circumstances exist.
END NOTES

1 Amighetti, supra c. 2, note 1 at 169, 173.
2 Wills Variation Act R.S.B.C. 1979, c. 435, s. 2(1).


For some of the Charter of Rights and Freedoms arguments, see infra note 14.

Amighetti, supra c.2, note 1 at 181 - 185.

Above at 86.


Amighetti, supra c. 2, note 1 at 181 - 185.

Estate Administration Act, supra c. 6, note 13, s. 85 - 86; c. 4, note 12.

Family Relations Act, supra c. 5, note 1, s. 1.


1996 Alberta Report, supra c. 6, note 38 at 84, 85.

Ibid. at 88, 89.

Ibid. at 91.


24 S. Parker and J. Dewar, Cohabitants 4th ed. (Bodmin, Cornwall: Hartnolls, 1995) at 1.

25 Cohabitants, supra note 13 at 32 - 59.

26 1996 Alberta Report, supra c. 6, note 38 at 119.

27 M v. H, supra note 14 at 440.

28 Family Relations Act, supra c. 5, note 1, s. 1.

29 Family Law Act Ontario, supra c. 5, note 41, s. 29, s. 1

For a discussion of the meaning of "conjugality", see M v. H, supra note 14 at 441-443.

30 Divorce Act, supra c. 5, note 4, s. 2(1).

Family Relations Act, supra c. 5, note 1, s. 56, s. 61.

31 Institute of Law Research and Reform, Family Relief, Report No. 29 (University of Alberta, Edmonton: June, 1979) [hereinafter "Family Relief Report No. 29"] at 8.


33 Above at 108 ff.

34 For a summary see Amighetti, supra c. 2, note 1 at 181 - 185.

35 Family Relief Report No. 29, supra note 31 at 44.

36 1983 Succession Report, supra c. 3, note 9 at 84.

37 Family Relations Act, supra c. 5, note 1, s. 1, s. 56.1.

38 Divorce Act, supra c. 5, note 4, s. 2(2).

39 Divorce Act, supra c. 5, note 4, s. 15(2), s. 15(8).

40 1983 Commission, supra c. 3, note 9 at 81 - 83.


42 1996 Alberta Report, supra c. 6, note 38 at 125.


44 1983 Succession Report, supra c. 3, note 9 at 83, 84.
Hammond, supra c. 2, note 47 at 40.

1996 Alberta Report, supra c. 6, note 38 at 166 - 168.


U.P.C., supra c. 6, note 73 at 61 - 63.


For similar reasoning in respect of the Estate Administration Act, s. 86, see Stout Estate Re: 1990, 33 E.T.R. 263 at 268 (B.C.S.C.)


English Commission 1974, supra note 15 at 5.

See for example, Canada Pension Plan Act, R.S.C. 1985, c. C-8, s. 42 ff.

Income Tax Act, R.S.C. 1985, supra note 10, s. 146(1).

Lukie, supra c. 2, note 21 at 13, 29.

Divorce Act, supra c. 5, note 4, s.2(1), s. 2(2).

Petkus, supra c. 7, note 19 at 859.

Tataryn, supra c. 1, note 3 at 815.

Banks v. Goodfellow (1869/70) S.L.R. Q.B. 549 at 564.

Currie v. Bowen.

Tataryn, supra c. 1, note 3 at 824.

Ibid. at 815.

Tweedale, supra c. 2, note 46.

Walker, supra c. 2, note 16.


Re Parks (1968) 64 W.W.R. 586 (B.C.S.C.)
Price, supra c. 2, note 25.

Vielbig, supra c. 2, note 45.


70 Act, *supra* c. 5, note 10, s. 2.


72 Amighetti, *supra* c. 2, note 1 at 124.

73 Above at 18.

74 U.P.C., *supra* c. 6, note 73 at 85 - 104.

75 *Family Law Act Ontario, supra* c. 5, note 41, s. 5(2), s.6.

76 *Ibid., s. 5(6).*

77 *Succession Law Reform Act,* Revised Statutes of Ontario, 1990, Ch. S.26, Part V.

78 *Family Law Act Ontario, supra* c. 6, note 41, s. 4(1) "Property".

79 *Ibid., s. 4(2).*

80 *Ibid., s. 26(1).*

81 Above at 61 - 62.


83 Act, *supra* c. 5, note 10, s. 2(1).

84 *Inheritance (Provision for Family and Dependents Act) Act,* 1975, (hereinafter "English Inheritance Act"), c. 63, s. 1(1).

85 U.P.C., *supra* c. 6, note 73 78 - 85.

86 Toth, *supra* c. 5, note 75 at 76.
87 Tataryn, supra c. 1, note 3 at 825.


89 Act, supra c. 5, note 10, s. 3.

90 1983 Commission, supra c. 3, note 9 at 89 - 91.

91 Ibid. at 89.

92 Tataryn, supra c. 1, note 3 at 823.

93 Act, supra c. 5, note 10 s.5, 5, 7.

94 Estate Administration Act, supra c. 6, note 13, s. 114.

95 Family Law Act Ontario, supra c. 6, note 41, s. 6(12).

96 English Inheritance Act, supra note 83, s. 3(1)b.

97 Above at c. 5, note 90.

98 Above at 156.


100 Above at 16 - 17.

101 1993 Ontario Report, supra c.5, note 45 at 150.

102 1983 Succession Report, supra c. 3, note 9 at 103.

103 Amighetti, supra c. 2, note 1 at 139.

104 1983 Succession Report, supra c. 3, note 9 at 103.

105 For other uses of agreements, see:

106 Tazlaff v. Gabowry (December 17, 1996), Kamloops 21296 (B.C.S.C.)

107 Lobe, supra note 101 at 133.

CHAPTER 11

CONCLUSIONS

In chapter one of this thesis, I noted that the challenge is to complete the sentence "the purpose of legislation restricting testamentary freedom is . . . ." From 1920 until now that challenge has had to be met by the judiciary with little or no guidance from the legislature. The words "adequate, just and equitable provision," as chapter two notes, are now to be interpreted by turning to the testator's legal responsibilities during his or her lifetime and the testator's moral duties toward a spouse and children. Secondary to what is adequate, just and equitable provision for spouses and children is the testamentary autonomy of the testator. As chapter three points out, this conclusion in Tataryn v. Tataryn has not, unfortunately, sufficiently answered the question in its discussion of the need for reform. There needs to be legislative debate on the issues which are raised by dependant’s relief legislation. Chapters four through nine by referring to some historical concepts, legislation, unjust enrichment and empirical studies, provide the background for such debate and the development of the recommendations. In chapter four some history shows us that there has been a long standing preoccupation with the control of assets after death and a recognition of the rights of the surviving family, the two interests identified by Madam Justice McLachlin in Tataryn.

The various aspects of family law discussed in chapter five show present and growing support for the partnership model of marriage and the extension of that reasoning to the economic consequences which flow from any marriage-like relationship. Factors important to the distribution and perhaps reapportionment of assets on a breakdown of a relationship and the obligation to support various individuals are noted. More is said later in the recommendations on the need to integrate these rights and obligations with what occurs after the death of the payor.

In chapter six a deceased's "legislated will," imposed by the legislature through the intestacy rules, is examined. The concepts in this legislation are long standing, but must be
examined cautiously because of the many still to be addressed suggestions for reform which have been made by law reform commissions in many jurisdictions. Generally, the legal relationship of an individual to the deceased is now the sole factor on which the right to inherit depends. To a limited extent this may recognize factors such as a contribution to the acquisition of the assets. This is particularly true in the case of the surviving spouse whose entitlement should, according to the recommendations of most commissions, be substantially increased.

Examining the doctrine of unjust enrichment in chapter seven provides an opportunity to identify those elements which must be present in order for a person whose contribution to a family or an economic partnership is not reflected in the ownership of the assets and/or who has given up economic opportunities in reliance on the security they expect to receive from the relationship. Because the doctrine stands independent of contract, tort, and any statute, the focus can be an adjusting for benefits "which it is against conscience" a person should keep. The importance of contribution, particularly as evidenced by domestic and household services, clearly emerges from the judicial decisions, although ultimately there is the need for "unjustness," however vaguely defined, to be present for a recovery to occur.

In contrast to unjust enrichment is the wrongful death legislation discussed in chapter eight. The application of this tort created by legislation to various circumstances directs attention to the provable economic losses flowing from a person's death. Relatively precise methods are used by the courts to quantify such losses. As in family law, the category of claimants extends beyond a spouse and children.

Chapter nine provides some useful empirical data as to what testators are actually doing and survivors' reactions to those distribution schemes before the recommendations for reform are made in chapter ten. The recommendations have been listed in a summary of recommendations which follows this chapter. The thrust of them is as follows:
1. The definition of spouse should be broadened to include cohabitants. The definition of children should be broadened to include stepchildren, but the eligibility of children and stepchildren should be restricted by age and dependency criteria.

2. After identifying the purposes of the legislation from the perspectives of the redefined spouse and children, the testator, and society at large, the objective of the legislation is stated to be:
   (a) an equal sharing of assets accumulated by financially and emotionally interdependent partners and the recognition of any surviving partner's need for support and of the need to support children;
   (b) the otherwise unlimited testamentary autonomy of persons.

3. The identification of criteria to determine what is reasonable financial provision for claimants when a will is varied.

4. The establishment of priorities for conflicting claims.

5. The granting of the power to persons to arrange their affairs by agreement without judicial intervention.

The recommendations do not speak to the only solutions which are possible. They do identify some of the issues which must be addressed, and they are supported by the analysis which this thesis has undertaken.
BIBLIOGRAPHY

Texts


Harris, V.M. *Ancient, Curious and Famous Wills*. Fred B. Rathman & Co: Littleton, Colorado, 1981.


**Periodicals**


P. LaNovara, "Changes in Family Living" (1993) 29 Canadian Society Trends, 12.


**Law Reform Commission Reports**


**Case Law**


*Barker v. Westminster Trust Co.* (1941), 57 B.C.L.R. 21.


*Cameron v. Cameron Estate* (1991), 41 E.T.R. 30


*Cooper v. Cooper* (1874/5), L.R. 7, English and Irish Appeal.

Dunne v. Hayes (June 26, 1992) Kamloops 18428
Gensig v. Hutchings Vancouver Registry CA017714, April 24, 1996, B.C.C.A.
In Re Coventry deced (1980), c. 461.
In Re Livingston (1922), 31 B.C.R. 468.


Mann v. Mann, Vancouver Registry A942728, June 7, 1996.


Milne v. MacDonald Estate (1986), 5 B.C.L.R. (2d) 46.


Moses v. Macferlan (1760), 2 Burr. 1006.


Peter v. Beblow (1990), 50 B.C.L.R. (2d) 266.


Pickelein v. Gillmore (February 21, 1997), Vancouver CA020028.


Rawluk v. Rawluk 1990 1 S.C.R. 70.

Re Parks (1968) 64 W.W.R. 586.


The St. Lawrence & Ottawa Railway Company v. Lett (1885), 11 S.C.R. 422.


Tazlaff v. Gabowry (December 17, 1996), Kamloops 21296.


Walker v. McDermott (1931), S.C.R. 94.


Vanguard Distributors Ltd. v. Balaclava Enterprises Ltd. (September 6, 1994) Vancouver Registry C934083.


Statutes

45 and 46 Vict., c. 75 (U.K.)

Administration Act, R.S.B.C. 1897.


Administration Amendment Act, 1925, S.B.C. 1925, c.2.

Administration of Estates Act, 1925 (U.K.), An Act for the Better Settling of Intestate Estates.

An Act for the Consolidation and Amendment of the Law relating to Dower, R.S.B.C. 1897, c. 63; An Act Relating to Dower, R.S.B.C. 1924, c. 71.

An Act to Amend the Administration Act, S.B.C. 1972, c.3.

An Act to Extend the Rights of Property of Married Women, 1887, 36 Victoria, c. 117; Married Women's Property Act, 51 Vict. c. 80 (1887)

Bill C-41, An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act, the Garnishment, Attachment and Pension Diversion Act and the Canada Shipping Act (S.C. 1997, ch. 1).


Consolidated Statutes of British Columbia, 1877, c. 80

Deceased Workmen's Wages Act, R.S.B.C. 1948, c. 371.

Destitute Orphan's Act, Consolidated Statutes of British Columbia, 1877, c. 93.

Divorce Act, S.C. 1986, c.4, R.S.C. 1985, c.3 (2 Supp.).

Estate Administration Act, R.S.B.C. 1979, c. 114.

Family Compensation Act, R.S.B.C. 1979, c. 120.

Family Law Act, Revised Statutes of Ontario 1990, Ch. F.3 (am. 1993, c.27, Sched.)

Family Relations Act, R.S.B.C. 1979 c. 121.


Income Tax Act, R.S.C. 1985 (5th suppl.) c. 1 as amended.

Inheritance (Provision for Family and Dependants Act) Act, 1975, c. 63.

S.N.Z. 1900 No. 20.

Statutes at Large, vol. 3.

Statutes of British Columbia, 1898, c. 40, s. 1, First Schedule.

Succession Law Reform Act, Revised Statutes of Ontario, 1990, Ch. S.26, Part V.


Testator's Family Maintenance Act, S.B.C. 1920 c. 94.
*Wills Variation Act, R.S.B.C. 1979, c. 435.*

**Newspaper Articles and Other**

113 New Zealand Parliamentary Debates (1890) at 614.


"Looming Inheritance Fortune has Tax Collectors Smiling" *The Globe and Mail* (2 June 1995).
SUMMARY OF RECOMMENDATIONS

Recommendation 1

A spouse, a person married to the testator, should remain entitled to claim under the legislation. A spouse includes a person who entered into a void marriage unless the marriage was dissolved or the person remarried before the testator's death.

Recommendation 2:

The family law legislation should be amended:

(a) to allow a maintenance order, by its terms or by express agreement, or an agreement between the spouses respecting maintenance, to continue after the death of the person obligated to pay and to allow it to be varied;

(b) to clarify that agreements made between the spouses dividing property or an order for the division of property are binding upon the testator's estate.

Recommendation 3:

A cohabitant who falls within the following definition should be treated as a spouse of the testator:

"For the purposes of this Act, 'spouse' means a person of either sex who is not married to the testator and who continuously cohabited in a marriage-like relationship with the testator:
(a) for at least three years immediately preceding the death and ending not less than three months before the death of the testator; or

(b) for at least one year immediately preceding the death and ending not less than three months before the death of the testator if there is a child of the relationship."

Recommendation 4: ................................................................. 164

The definition of child in the legislation should include a requirement that the child be under 19 years of age or 19 years of age and older and unable by mental or physical disability, or enrollment in a full time program of education to earn a livelihood.

Recommendation 5: ................................................................. 165

The definition of a child should include a child who:

(a) is the child of a spouse as defined in the statute, or

(b) is a child for whom the testator stood in place of a parent, provided that in both cases the testator contributed to the support and maintenance of the child for not less than one year before the testator's death. The child must also meet the requirements recommended for children generally.

Recommendation 6: ................................................................. 166

The categories of claimants should be restricted to spouses and children as defined in these recommendations.
Recommendation 7: ................................................................. 168

A 15 day survivorship period should be added to the qualifications to be a claimant.

Recommendation 8: ................................................................. 168

A claimant's cause of action should survive the claimant's own death provided that the death occurs after the 15 day survivorship period.

Recommendation 9: ................................................................. 177

The legislation should state its purpose.

Recommendation 10: ................................................................. 177

The stated purpose of dependant's relief legislation in British Columbia should be as follows:

The objective of this Act is to provide that:

(a) When two persons have lived together in a relationship of some permanence, with financial and emotional interdependence, and that relationship is severed by death, the assets acquired during the time they were together should be equally shared. If after the sharing of these assets one party is likely to suffer economic hardship as a result of participation in the relationship, that person's need for support should be recognized.
(b) The needs of children for ongoing financial support during the period of their dependency should be met after the death of a person with whom they had a relationship of financial and emotional dependence.

(c) The testamentary autonomy of persons should be subject only to the objectives referred to in (a) and (b).

(d) The financial burden of litigation on small estates should be eliminated.

Recommendation 11: ................................................................. 182

The legislation should contain two definitions of "estate." The first definition, to be used as the basis for determining the spouse's entitlement to a share of the deceased's assets, should reflect the principle that only economic wealth accumulated during a spousal relationship should be shared equally (hereinafter referred to as the "marital estate"). The second definition, to be used as the basis for establishing the amount of maintenance that is payable to a spouse or child and to fund maintenance orders or agreements which survive death, should include the deceased's entire estate which passes to the personal representative (hereinafter referred to as the "enhanced estate").

Recommendation 12: ................................................................. 188

The Court should be given the power to vary a will so as to make reasonable financial provision for a spouse, such financial provision to:

1. Be consistent with the stated purposes of the legislation.

2. Recognize such of the following three obligations of the testator as have not been quantified at his or her date of death. The first obligation shall be to transfer to the surviving spouse sufficient assets so that he or she will have an
equal share of the combined "marital estate" as that term has been defined. The second obligation will be to transfer to the surviving spouse a share of the deceased's enhanced estate which recognizes the spouse's need for support after the receipt of any marital estate, the 10% in respect of the moral obligation, any beneficial interest under the will and any property passing outside of the will as a result of the spouse's death. The third obligation will be to transfer to the surviving spouse an additional 10% of the marital estate unless the spouse has been guilty of a course of conduct during the deceased's lifetime that is so unconscionable as to constitute an obvious and gross repudiation of the relationship.

3. All the enhanced estate where such enhanced estate is modest.

Recommendation 13: ........................................................................................................... 190

The Court should be given the power to vary a will so as to make reasonable financial provision for a child, such financial provision to:

(a) Be consistent with the stated purposes of the legislation;
(b) Recognize the obligation of the testator to support a child when that obligation has not been quantified at the testator's death;
(c) Be the entire enhanced estate when such enhanced estate is modest and there is no spouse.

Recommendation 14: ........................................................................................................... 193

The legislation should establish the priority to be given to conflicting claims. The following should be given priority in the order in which they are listed: minor child and stepchild; spouse; de facto spouse; adult dependent children and dependent stepchildren.
Recommendation 15: .................................................................................. 193

The legislation should provide that a spouse who elects to claim under the legislation is barred from bringing an action for unjust enrichment but a child is not.

Recommendation 16: .................................................................................. 196

The legislation should contain a provision that a potential claimant have the power to agree with the testator to waive or modify their claim under the legislation provided that such an agreement be capable of being set aside if certain circumstances exist.