TESTAMENTARY FREEDOM AGAINST PROVISIONS FOR
FAMILIES; THE EVOLUTION OF DEPENDENTS'
RELIEF LEGISLATION, WITH PARTICULAR
EMPHASIS ON THE PROVINCE OF BRITISH
COLUMBIA, AS A FLEXIBLE RESTRAINT
ON TESTAMENTARY FREEDOM

By

LEOPOLD AMIGHETTI

B.A., The University of British Columbia, 1957
LL.B., The University of British Columbia, 1960

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Department of Law

The University of British Columbia
1956 Main Mall
Vancouver, Canada
V6T 1Y3

Date 12th October, 1988.
The concept of testamentary freedom has traditionally been associated with the law of succession in jurisdictions with legal regimes based on the common-law system. This concept became subject to abuse and dependents of deceased testators were sometimes left to the mercy of the community for their support.

New Zealand was the first jurisdiction to counteract this abuse by introducing in its law, dependents' relief legislation which, essentially, acted as a flexible restraint on testamentary freedom. This concept retained the traditional testamentary freedom, yet, the courts were given the authority to remedy any abuses of such freedom.

The Canadian common-law provinces through a period of sixty-four years have adopted legislation similar to that enacted in New Zealand.

In Canada, the concept has worked, on the whole, well. Many Canadian jurisdictions have, through the years, adjusted their original legislation to meet what appears to be contemporary norms.
The province of Ontario has undertaken extensive reform, and to a certain extent, has attempted to reconcile the provisions of succession law with that of matrimonial property rights. The province of Ontario appears to have achieved some degree of harmony between the two legal concepts.

The province of British Columbia on the other hand, although the issue has been the subject of a study and a Report of the Law Reform Commission of British Columbia, has retained the legislation as originally enacted in 1920. The jurisprudence has, however, interpreted the statute with such inconsistency that the statute has gone beyond its remedial purpose and has been interpreted as a form of forced heirship. This interpretation cannot be supported by the wording of the statute, nor by its historical intent.

This thesis surveys the various enactments commencing with the one in New Zealand, the progenitor statute, and continuing with those of the Canadian provinces and finally, the U.K. statute. There is also a general comparison of contemporary legislations. The jurisprudence in British Columbia is analysed from the enactment of the legislation and the shifts that the courts have undertaken over the past sixty-eight years are considered. In addition to the philosophical defect of the B.C. legislation, certain technical deficiencies are also considered.
The present law of Ontario, which has been the subject of extensive reform, is analysed and compared with that Province's previous legislation as well as that of the province of British Columbia.

The effect of the present state of law interpreting the British Columbia legislation is such that it can be said that as it stands, it has outlived its social utility and requires review to meet contemporary social norms. The general recommendation is that dependency be a condition precedent to an application for relief, and that the spouse be entitled as of right, in any event, to half of the family assets.

The investigation for this thesis consisted, primarily, of: analysis of the legislative debates, appropriate statutes and the applicable jurisprudence interpreting such statutes.

Supervisor

Date
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PART I: THE EVOLUTION OF DEPENDENTS' RELIEF LEGISLATION IN NEW ZEALAND, CANADA AND ENGLAND
CHAPTER 1.

HISTORICAL BACKGROUND OF
TESTAMENTARY FREEDOM

Few legal agencies are, in fact, the fruit of more complex historical agencies than that by which a man's written intentions control the posthumous disposition of his goods.1

It is far beyond the scope of this paper to trace the evolution of testamentary dispositions. Sufficient for the present purposes to state that the concept of posthumous disposition is divided into two broad positions. The first one permits the transfer of property on death at the absolute discretion of the testator; the other imposes overriding provisions for certain relatives.

Generally, testamentary freedom is attributed to the English law of succession and forced heirship to other systems of jurisprudence, more notably those systems based on Roman law.

We are told2 however, that liberty of testation was recognized in ancient Roman law, but eliminated later as the Roman

1 Sir Henry Maine, Ancient Law, (edited by Ernest Rhys 1917), at p. 103.
Empire developed a basic doctrine of civil law as to inheritance. As a result, certain close relatives became "compulsory" heirs and generally absolutely entitled to a portion of the deceased's estate. This absolute interest is called "legitime". The rule as to "legitime" has been adopted, with various qualifications, by nearly all civil law countries.

Arthur Nussbaum, in his article "Liberty of Testation", observed that:

The peculiarity of the early Roman and the Anglo-Saxon law has aroused the interest of sociologists. Says Max Weber, (1864-1920) the most important German sociologist, in his posthumous 'Sozialoeconomik' [Social Economy] published in 1921: 'Complete, or nearly complete, liberty of testation is only recorded twice: as to Republican Rome and as to English Law; in both cases for expanding nations ruled by a landed gentry. Today the most important territory recognizing liberty of testation, is the territory of greatest economic opportunities: the United States. In Rome, liberty of testation grew up under a bellicose expansion policy which promised a living on conquered land for the disinherited; it vanished through the legitime rule borrowed from Greek law when Rome's colonial period was coming to an end. In English law liberty of testation aimed at maintenance of fortunes within the great families, a goal which can be reached also by measures of a legally opposite, e.g., feudal, nature.'

3 Ibid.

4 Ibid., at pp. 183 and 184.
It could be argued that the reference to such liberty of testation in English law is not necessarily consistent with the concept of maintaining fortunes within the great families. Liberty of testation could have permitted the deceased to destroy the integrity of the family fortune by dividing it amongst many. However, what the author probably meant was that without forced heirship, which would out of necessity cause a division of the fortune, the testator could pass the entire fortune to an individual without having to sever it.
Complete freedom of testamentary disposition is a characteristic attributable to the English law of succession. This characteristic has been recognized by standard books of reference and by the averments of the judiciary.

It is not necessary to go beyond the assertions of recognized legal historians, and other writers, to demonstrate that the so-called traditional freedom of testation in England was a relatively recent phenomenon and of equally relative short duration. So far as personalty is concerned complete testamentary freedom existed from 1724 until the passing of the Inheritance (Family Provision) Act 1938. As to realty there was complete testamentary freedom from the date of the passing of the Act for the Abolition of Military Tenures 1660, again until the Inheritance (Family Provision) Act 1938.

At the prime of testamentary freedom, various philosophies in its support were advanced.

Sir Henry J. Hannen made the following observation:

---


6 A. R. Mellows, The Law of Succession (3rd ed. Butterworth, London, 1977) at p. 237. (A brief and understandable historical background is found in Mellows at page 237.) It should be noted that testamentary freedom did co-exist with the rights of dower and curtesy which in England were abolished only by the enactment of the Administration of Estates Act, 1925 15 Geo. V. c.23.

7 Boughton and Marston v. Knight and Others, (1873), L.R. 3 P. & D. 64.
Accordingly, by the law of England every one is left free to choose the person upon whom he will bestow his property after death entirely unfettered in the selection he may think proper to make. He may disinherit, either wholly or partially, his children, and leave his property to strangers to gratify his spite, or to charities to gratify his pride, and we must give effect to his will, however much we may condemn the course he has pursued. In this respect the law of England differs from that of other countries. It is thought better to risk the chance of an abuse of the power arising from such liberty than to deprive men of the right to make such a selection as their knowledge of the characters, of the past history, and future prospects of their children or other relatives may demand.8

The reason for the philosophy of testamentary freedom may very well have been that advanced by Sir Henry J. Hannen,9 that the testator was better able to judge his testamentary obligations than the State through some rigid predetermined scheme of succession.

The concept of testamentary freedom may also be justified by the thesis advanced by Cockburn C.J. in Banks v. Goodfellow10 in favour of such freedom:

Friendship and tried attachment, or faithful service, may have claims that ought not to be disregarded. In the power of rewarding dutiful and meritorious conduct, paternal authority finds a useful auxiliary; age secures the respect and attentions which are one of its chief consolations. As was truly said by Chancellor Kent, in Van Alst v. Hunter(1), [5 Johnson N.Y. Ch. Rep. at p.159.]

'It is one of the painful consequences of extreme old age that it ceases to

8 Ibid., at p. 66.
9 Ibid., at p. 66.
10 (1870), L.R. 5 Q.B. 549.
excite interest, and is apt to be left solitary and neglected. The control which the law still gives to a man over the disposal of his property is one of the most efficient means which he has in protracted life to command the attentions due to his infirmities.' For these reasons the power of disposing of property in anticipation of death has ever been regarded as one of the most valuable of the rights incidental to property...11

Regardless of the philosophical theory supporting testamentary freedom, the belief that the concept was an inherent part of the English law of succession is not correct. To quote Anthony R. Mellows:

In much the same spirit as people refer, quite inaccurately, to an Englishman's home being his castle, people also seem convinced that a person has an inalienable right to leave his property to whomsoever he wishes. Both notions were derived from the nineteenth century, but are commonly thought to represent immutable principles of English law. In neither case is this so.12

The concept of testamentary freedom did exist in England for a period of approximately two hundred years. The existence of such freedom however, could be supported only against a background identified by Cockburn C.J. in Banks v. Goodfellow.13

Although Banks v. Goodfellow was essentially the first case dealing with testamentary capacity, in his quest to

11 Ibid., at p. 564.
13 Supra, footnote 10.
rationalize the requirements for capacity, Cockburn C.J. explained the nature of the right to dispose, in whole or in part, of a person's assets by Will. After examining, briefly, the English concept against the continental one, he concluded that:

The law of every country has therefore conceded to the owner of property the right of disposing by will either of the whole, or, at all events, of a portion, of that which he possesses. The Roman law, and that of the Continental nations which have followed it, have secured to the relations of a deceased person in the ascending and descending line a fixed portion of the inheritance. 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.14

A clear rationalization of testamentary freedom is found in Cockburn C.J.'s continued analysis of the notion of the power of testation:

[I]t is clear that, though the law leaves to the owner of property absolute freedom in this ultimate disposal of that of which he is thus enabled to dispose, a moral responsibility of no ordinary importance attaches to the exercise of the right thus given. The instincts and affections of mankind, in the vast majority of instances, will lead men to make provision for those who are the nearest to them in kindred and who in life have been the objects of

14 Ibid., at p. 564.
their affection. Independently of any law, a man on the point of leaving the world would naturally distribute among his children or nearest relatives the property which he possessed.... Hence arises a reasonable and well warranted expectation on the part of a man's kindred surviving him, that on his death his effects shall become theirs, instead of being given to strangers. To disappoint the expectation thus created and to disregard the claims of kindred to the inheritance is to shock the common sentiments of mankind, and to violate what all men concur in deeming an obligation of the moral law. It cannot be supposed that, in giving the power of testamentary disposition, the law has been framed in disregard of these considerations. On the contrary, had they stood alone, it is probable that the power of testamentary disposition would have been withheld, and that the distribution of property after the owner's death would have been uniformly regulated by the law itself.

Testamentary freedom could only be supported if testators could act responsibly towards those persons to whom they owe either a legal or moral obligation.

It has been said that "liberty of testation...favors the maintenance of aristocracy..." It has also been observed that in England the effect of the doctrine was considerably restricted by customary marriage settlements. The observations of Cockburn C.J. in Banks v. Goodfellow produce the conclusion that testamentary freedom can exist only against a background of a well-defined responsibility to a person's "kindred". It is unlikely that any one of the reasons were by

15 Ibid., at p. 563.
17 Ibid., at p. 184.
18 Supra, footnote 10.
themselves sufficient to sustain testamentary freedom in English law.

Testamentary freedom in England existed at a time when there were some well-defined norms of conduct in relationship to the "kindred" of a property owner. These norms included such concepts as the making of marriage and other settlements which would assure maintenance of those to whom the testator owed a duty. In addition, it all existed at a time when most of the wealth was represented by realty which had been passed from family to family through the generations and testators probably did not consider such realty as anything else other than family property.

However, the dynamics which sustained the system in England were absent in other parts of the world where the English law of succession had been adopted.
CHAPTER 2.
NEW ZEALAND

Testamentary freedom became a characteristic of the English law of succession and its survival depended, in a large measure, on a well-defined social structure with recognized obligations and built-in protections against the possibility of a deceased's "kindred" being left at the mercy of the State for their support. The inadequacy of the concept was first documented in New Zealand.

During the second reading debates of the Testator's Family Maintenance Bill, after approving the bill "because it deals a blow - and I hope a finishing blow - at the mischievous power of the dead hand", the Honourable Mr. Scotland made the following observation:

There is no doubt, in a new country especially, men who become suddenly rich - nothing to-day and everything to-morrow - are too apt to become unduly inflated with their own importance. They say to themselves, 'We have made the money, and we have a right to do what we please with it, and no one has a right to say nay.' 19

His observation casts a light upon the social background in which the bill was being debated.

A well-defined, or recognized, social structure likely did not exist in new jurisdictions subject to the English law of succession. The reason for this lack of social structure can only be subject to speculation, but was likely due to the pioneer nature of such jurisdictions, and the fact that they did not have the time to evolve a tradition such as existed in England.20

New Zealand was the first common-law jurisdiction in modern times which brought into question the validity of the concept of testamentary freedom. The New Zealand Parliamentary Debates of 1895 disclose the genesis of the process which challenged such freedom. The issue was raised by way of a question from a Mr. J. W. Kelly to the then Minister of Justice.

The following is the entire extract of the debate at that point:

Mr. J. W. KELLY asked the Minister of Justice, If [sic] he will during the present session introduce a Bill to alter the law relating to the succession of property, so as to provide that no widow shall be left entirely destitute, but shall be entitled to some portion, say one-third, of the property of her deceased husband. If not, will the Minister afford every facility for a private member to do so? He had been induced to put this question on the Order Paper through a case which had been brought under his

20 O. K. McMurray, "Liberty of Testation and Some Modern Testations Thereon", (1919), 14 Ill. L. Rev. 96. Professor McMurray states at pages 116 and 117 "Social opinion has usually prevented testators from employing a too arbitrary exercise of their power."
notice lately. It was a case that arose in Invercargill, and in it very great hardship had been done to the widow and other members of the family, as the widow had been left destitute under the will of the deceased husband.

Mr. REEVES said it had, he believed, always been a principle of the English law that a man should have almost unrestricted right to devise personal property by will, and, for a long time past, real property too. In fact, it had been the boast of modern legislation that it had given more complete freedom in this respect than had been possessed previously. It was quite true that in certain countries, like France, where the law was based upon the old Roman law, a father had not the right to deprive his widow and orphans of all the property; and, speaking for himself personally, he thought that was a very just and proper provision. At the same time, it would be a change in our law of such vast importance that it would have to be very carefully considered before it was even suggested in Cabinet. He was sorry that on the short notice he had received on the matter he could not promise the honourable gentleman that it should be considered as he desired.21

In the following year, 1896, Sir Robert Stout introduced in the House of Representatives the Limitation of Disposition by Will Bill.22 The proposed bill, generally, adopted the civil law concept of limiting the disposable portion in a succession. The recommendation was to permit a man to dispose, by his will, of only one third of his estate if he was survived by a wife and children, and one half when he was survived by only a wife or child.

The concept of protecting the widow and the children received enthusiastic support, yet the idea of interfering with

22 92 Ibid., (1896), at pp. 386 and 585.
a man's absolute right of ownership, (which some considered to be an immutable principle of the English law of succession), was repugnant to the House and the bill was discharged.\(^{23}\)

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.

The following comments\(^ {24}\) are illustrative of the attitude of those members who opposed the bill:

Suppose a man had a libertine of a son, that son would only have to lie about and loaf until his father died, knowing that he was sure to get a third of his father's property.

In the near future they would find that men who had any property at all would be exceedingly diffident about marrying.

The chances are that, if she [the wife] got the bulk, some money-hunting scoundrel would marry her and spend the coin, leaving her penniless.

Sir Robert Stout was not discouraged by the defeat of his bill and in 1897 introduced the Limitation of The Powers of Disposition by Will Bill.\(^ {25}\) The bill increased the fraction the testator could dispose by Will to one half. The widow was to receive a fourth, and the children a like amount. This attempt was equally as unsuccessful as the first.

\(^{23}\) 96 Ibid., (1896), at p. 32.

\(^{24}\) 92 Ibid., (1896), at pp. 586 and 587.

\(^{25}\) 98 Ibid., (1897), at p. 546.
A modified measure was introduced to the House in the following year, 1898, under the name Testator's Family Provision out of Estate Bill.\textsuperscript{26} This bill contained no fixed portion of any kind, thereby retaining the concept of testamentary freedom and yet gave the court the power, at its discretion, to make provisions out of the estate for the testator's family. In essence, it gave the court the ability to superimpose on the testator's Will all the social norms which had heretofore moderated testamentary freedom in England.

The bill was introduced by Mr. McNab who reviewed generally the House's objections to The Limitation of the Powers of Disposition by Will Bill which had been introduced in the previous session. The objection was essentially, that a fixed type of distribution might work a very great hardship in circumstances when a wife had left her husband or when the children were wealthier than the testator himself, and the testator was compelled to leave a fixed portion to them.

Mr. McNab also emphasized the fact that all members were aware of men who had died leaving large wealth to others leaving their families in positions of comparative destitution, and although he had no objection to any person leaving large amounts to some outside institution, they should be generous in their Will to others, but only after they had been just to those near themselves.

\textsuperscript{26} 101 \textit{Ibid.}, (1898), at p. 563, 102 \textit{Ibid.}, (1898), at p. 418.
Mr. McNab concluded that the bill he was introducing had met all of the objections of the House to the previous bills, by not placing any limit on the power of disposition by Will, but providing that either a wife or husband or any child who claimed to have been left in a position of comparative destitution having regard to their station in life, could ask for relief by making an application to a judge of the Supreme Court.

He characterized the effect of the bill as one where the court, having satisfied itself of the merits of the application, would make an order to secure a certain portion of the property to provide for the applicant.

The members of the House generally recognized that there were many cases where great wrongs had been done through Wills which did not provide for wives or children, leaving them to the mercy of the state or charitable institutions and therefore a measure of this nature was essential. Members further recognized that there existed:

[A] most flagrant anomaly that a man, the head of a family, should be compelled to provide for his wife and family while he was alive, but dying and leaving plenty of property behind him it was left to himself to determine whether that provision should be continued? Directly he died his wife and family were cast upon charity, and thus became a burden upon society. There was no doubt it was an abuse that should no longer be tolerated.27

27 102 Ibid., (1898), at pp. 422 and 423.
They also recognized that "[t]he family had a right to be protected".28

Some members, although endorsing the bill, felt that it did not go far enough as they would have preferred to see a fixed portion allocated to family members. Others felt that the bill was quite wrong as, in their view, "[n]othing could be a greater wrong than to spoil our young people by leaving them money to squander."29 By way of response it was brought to their attention that the "Bill did not intend to go any further than to compel that the widow and children should be maintained."30

One member, Mr. R. McKenzie, was extreme in his criticism. He characterized the bill as "a lawyer's Bill, introduced by a lawyer."31

It simply made food for lawyers, and afforded opportunities for lawyers to go and contest wills. This Bill ought to be called a Lawyers' Employment Bill. It was not a Bill in the interests of the community at all. It was a Bill to rob the community - to rob widows and orphans - and he hoped the House would never permit a vicious Bill like this to pass to the statute-book.32

28 Ibid., (1898), at p. 423.
29 Ibid., (1898), at p. 424.
30 Ibid., (1898), at p. 425.
31 Ibid., (1898), at pp. 424 and 425.
32 Ibid., (1898), at p. 425.
He concluded with the hope that:

[T]his House would never go and disgrace the statute-book with a measure of the kind now before them.33

The bill did receive second reading and was sent to committee. It did not, however, go to third reading and it was discharged on October 12th, 1899.34

The bill was reintroduced in 1900 as the Testator's Family Maintenance Bill.35 The underlying theme of the House debate was that the bill was a "humanising and Christianising measure".36 The House recognized that "[t]he present law was obviously unjust, and undoubtedly called for an alteration."37

[I]t was an improper thing that any law should allow a man, in leaving an estate, to neglect to provide for his wife and children after his death.38

One of the members, Mr. A. L. D. Fraser, expressed astonishment that such a bill had not been previously brought down by the government and viewed the bill not only as humanitarian but

33 Ibid., (1898), at p. 425.
34 110 Ibid., (1899), at p. 503.
35 111 Ibid., (1900), at pp. 128 and 503.
36 111 Ibid., (1900), at p. 504.
37 111 Ibid., (1900), at p. 505.
38 111 Ibid., (1900), at p. 504.
Really a loud cry for justice from wives and children of deceased persons who had been very wrongly treated.39

Mr. McNab, in moving the bill for second reading, made it clear that it was not the intent of the bill to take away from any person any right to dispose of any part of his property by Will. Rather it was intended to "supervise" such disposition by posing the following question:

Before you dispose of your property, first carry out your obligations; first see that you do not leave any person destitute; first see that any person who is at present dependent on you for his or her support and maintenance is not left on the State for support.40

Mr. McNab identified the philosophical question to be decided as follows "[w]as the State to be liable for the support of the wife and children or was the estate to be liable?".41 His unequivocal answer was that the estate of the person should be liable for such support.

Thus, in an outcry of justice and fairness the bill received second reading.

39 Ibid., (1900), at p. 506.
40 Ibid., (1900), at p. 504.
41 Ibid., (1900), at p. 504.
The bill was debated in the Legislative Council and in its debates Council enunciated the principle behind the bill 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 shall not, through the testator leaving his property away from them, be left perhaps a burden upon the State.

One member, The Honourable Sir G. S. Whitmore, objected to the bill because it went "too far altogether in interfering with the rights of property, and in the fact that it is a premium upon the disobedient child."

Other members, although endorsing the bill, expressed concern to the court's discretion:

[There should be some distinct guidance given to the Court as to what percentage of the estate should be allocated to the wife or children. As the case stands now, one Court will take one view and another Court probably another view, and there will be no systematic dealing with the matter.]

New Zealand thus enacted on the 9th day of October, 1900 The Testator's Family Maintenance Act, 1900. The charging

42 113 Ibid., (1900), at pp. 613 to 619.
43 113 Ibid., (1900), at p. 614.
44 113 Ibid., (1900), at p. 615.
45 113 Ibid., (1900), at p. 617.
46 N.Z. Stat., 1900, No. 20.
clause of the Act read as follows:

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.

'Court' means the Supreme Court or any Judge thereof, and, in the case of deceased Maoris, the Native Land Court.47

By such enactment New Zealand moderated the traditional English testamentary freedom by making testations, when there are spouses or children, subject to court discretion. The provisions have been characterized as "flexible restraints on testamentary freedom"48 and considered as "an independent creation of New Zealand's legislative genius".49

47 Ibid., s. 2.


49 Ibid., at p. 282.

It is interesting to note that New Zealand already had a similar statute, limited however to deceased Maoris. Refer to the comments of the Honourable Colonel Pitt in 113 N.Z. Parliamentary Debates, (1900), at p. 614, where he states:

"I am quite certain there can be no great objection to the Bill, because the principle of the measure has already been recognised by law and recognised by the New Zealand Parliament, and established as law in reference to the Native race. Under 'The Native Land Court Act, 1894' section 46, it is provided,
By the creation of the Act New Zealand appeared to have found a system sufficiently elastic to enable a testator to disinherit his undeserving family, while yet preventing an unjust father or an unfaithful husband from leaving his dependents penniless.

"On every application for the appointment of a successor where the deceased has left a will, and on every application for probate or letters of administration with will annexed, the Court shall inquire if the testator has devised land to a person other than his successor; and, if the testator has so devised land, the Court, if it shall further appear on inquiry that such successor has not, without the land so devised, sufficient land for his support, shall award to such successor a part, or, if necessary for his support, but not otherwise, the whole of the land so devised; and the probate or letters of administration shall be expressly limited to the estate and effects of the deceased other than the land so awarded to the successor."
CHAPTER 3.

BRITISH COLUMBIA

The province of British Columbia (the second province in Canada to adopt such legislation) found itself in similar social conditions as New Zealand and chose to adopt the New Zealand solution to the abuses of testamentary freedom found in the Province.

The province of British Columbia enacted the Testator's Family Maintenance Act on April 17th, 1920. The charging section is Section 3 which reads as follows:

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.

50 S.B.C. 1920, c. 94.

51 Ibid., s. 3.
The section is, for all practical purposes, identical to the equivalent section in its progenitor, the New Zealand statute.52

Unfortunately, unlike the process leading to the enactment of the New Zealand statute, the events leading to the introduction of the bill which ultimately became the statute, are not well-documented by any official source. The only official comment to its enactment is found in the Journals of the Legislative Assembly of the Province of British Columbia where "His Honour the Lieutenant-Governor was pleased to deliver the following gracious Speech:—"

The 'Mothers' Pensions Act' and 'Testator's Family Maintenance Act' are Statutes which I feel confident will tend towards the amelioration of social conditions within the Province.53

It is far beyond the scope of this work to do a minute analysis of the social conditions which prevailed in the Province. It can generally be said, however, that the Act came into being during a time of active social reform. We are told54 that social legislation enacted after World War I was motivated, in part, by concerns for the stability of the Province's society. The social and economic impact of World

52 Supra, footnote 47.
53 Jan. 29 - April 17 Session 1920, Vol. XLIX at p. 255.
54 M. J. Davies, "Services Rendered, Rearing Children for the State: Mothers' Pensions in British Columbia 1919 - 1931", at pp. 256 and 257.
War I, the loss of human life during the same war, the subsequent Spanish flu epidemic, working-class militancy, the triumph of the Bolsheviks in Russia and the fear by reformers and politicians of a proletarian revolution, were forces that combined to influence society's conception of social justice and a need for guarantees for predictability and stability.

Social legislation was seen by the reformers as the base for a stable society through the stability of working-class families. Although it was a fertile era for social legislation, the enactment of the Testator's Family Maintenance Act was the direct result of lobbying by women's organizations with the final power given to them through women's enfranchisement in 1916.

Vancouver women in the early part of the twentieth century were concerned with maternal feminist goals and desired a variety of reforms concerning themselves and their children. The best way to achieve these reforms was to gain the vote. Between 1910 and 1928 five Vancouver women's organizations, in particular, promoted female citizenship.55

An examination of the available minutes of two of these organizations, the University Women's Club (UWC) and the New

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Era League (NEL), indicates a thrust towards promotion and support of legislation for the greater protection of women and children. Their efforts, however, do not appear to have met with any great success until enfranchisement.

One of the publications\textsuperscript{56} dealing with the quest of women for legislative change reports:

During the same year [1911] the Vancouver Local Council reported that when its representative and one from the University Club met with the Attorney General at Victoria to request amendments in the laws of inheritance and those relating to the custody of children, they received an attentive hearing.\textsuperscript{57}

Minutes of the University Women's Club report:

Mrs. McGill, [sic] convenor of the Committee on Laws, reported having interviewed Mr. Bowser, the Attorney-General at Victoria, presenting to him the amendments to existing laws concerning women and children desired by the Club.\textsuperscript{58}

However, later minutes disclose that:

Mrs. McGill [sic] also reported for the Committee on Laws affecting women and children that this session of Parliament had not made any improvements in existing laws.\textsuperscript{59}


\textsuperscript{57} Ibid., at p. 26.

\textsuperscript{58} Jan. 13, 1912, City Archives, Vancouver, B.C.

\textsuperscript{59} University Women's Club Minutes, Nov. 25, 1911, to May 13, 1916, at pp. 42 and 43 - City Archives, Vancouver, B.C.
Later minutes show perseverance and hope. The February 13th, 1915, minutes state:

Mrs. McGill [sic] presented the report of the laws committee. The amendments had been laid before Mr. Bowser, Mr. MacGowan and Mr. Watson and were favorably received.60

Subsequent minutes were even more positive:

Mrs McGill [sic] explained that now woman suffrage was a practical certainty in B.C., in the near future, the section on laws bade fair to be very important. Also that she hoped to be able to use what influence the Club might have in the interest of better laws for women and children. Mrs. McGill [sic] moved and Mrs. McIntosh sec. that the following measures be given the approval of the Club....That provision be made for a widow, whether her husband leaves a will or not.61

The prediction of Mrs. MacGill came true when Mary Ellen Smith was elected to the provincial house in 1918 and spearheaded62 the long overdue social reforms in British Columbia. It was during the decade that she served as an MLA that the Testator's Family Maintenance Act was passed, along with other social legislation.

60 University Women's Club Minutes, February 13, 1915, at p. 212 - City Archives, Vancouver, B.C.

61 University Women's Club Minutes, Sept. 9, 1916, to Jan. 30, 1924, at pp. 13 and 14 - City Archives, Vancouver, B.C.

The advent of the Testator's Family Maintenance Act did receive some publicity. Social legislation was foreshadowed by the announcement of Mary Ellen Smith that:

British Columbia's urgent need of human legislation, rather than additions to the cold material laws already in abundance on the statute books of the Province, constituted the corner stone of the address delivered in the Legislature this afternoon by Mrs. Ralph Smith, junior member for Vancouver. In the speaker's opinion the people as a whole were less concerned about the doings of the farmers' party, the soldiers' party, the labor party, or even the womans' [sic] party than they were about the party that would range itself on the side of human considerations.63

The introduction of the Act was noted as follows:

An Act to secure adequate provision for the maintenance of the wife and children of a testator was introduced this morning into the Legislature by the Hon. J. W. de B. Farris, Attorney-General and Minister of Labor.

Provision is made whereby the courts may provide for maintenance for the wife or children, or both, out of the estate. This means that even if a person dies leaving a will, but without providing for the care of dependents, ample provision may be made by law.64

The Attorney General was further reported as having commented as follows:

Attorney-General Farris this afternoon outlined the provisions of the act to secure adequate provision for the maintenance of the wife and children of a testator.

64 Ibid., April 15, 1920.
In addition to explaining the nature of the bill, outline [sic] in these columns today, Mr. Farris said the measure was one of the links in the Government's chain of social welfare legislation...It did provide, he continued, very necessary assistance to dependent wives and children who were not properly provided for.65

The Colonist was equivocal in its report on the introduction of the bill (which was to become the Testator's Family Maintenance Act). It stated:

The bill now before the Legislature to secure adequate provision for the maintenance of the wife and children of a testator, while designed with a kindly purpose and at the same time with a view to reducing the number of mothers' pensions which the Government will be called upon to pay through new social legislation, opens up a vista of court proceedings in which legacies may be squandered in legal fees. It is true no other power could decide in a matter of this kind save the courts, but there is a possibility, in some cases at least, that such a power will have the effect of destroying the very safeguard which the Government intends to institute. Incidentally, the new legislation is another blow at individual freedom of action, although in this particular instance that may not make it the mark of criticism.

The majority of people are aware that the conception of freedom of disposition by will is familiar in England, although in some other countries alienation is only permitted where the deceased leaves no widow or near relatives. Legal systems which are based on the Roman law provide restrictions such as are now proposed in British Columbia, but in France, which follows this course, the restriction has met with condemnation from eminent legal and economical authorities....In most if not all of its legislation during recent years British Columbia is a copyist, and there is nothing new or radical in the bill introduced yesterday. In legislating in the matter of wills, however, to the extent contemplated the Government is proposing to throw the question into the thickest hedge of legal entanglements and is claiming the right to dispose of property, subject to the decision of the courts, the title to which is not

65 Ibid., April 16, 1920.
vested in the crown. So far as the new legislation will safeguard the rights of the immediate relatives of a deceased person it is good. So far as it squanders estates in legal fees there are at least doubts about the complete efficacy of the bill.66

Helen Gregory MacGill67 commented as follows:

The wife's share in the family estate receives recognition in the Testator's Family Maintenance Act, passed 1920 [sic]. This Act, brought down by Attorney-General Farris, belongs to that new fine school of law-making that is content to enunciate an equitable principle, leaving cases to be decided on their merits. It establishes the rightful claim of the wife (or husband) and children to proper maintenance before effect is given to other gifts or bequests.68

Her comment was, however, more reflective of the acceptance of the Act than that expressed in The Colonist.

While there is little concrete evidence of the intentions of the legislature in passing the Act, it is clear that it was the result of lobbying of women's organizations and the sympathetic views of the then Attorney General.69

66 April 16, 1920 at p. 4.
68 Ibid., at p. 38.
69 H. G. MacGill, in her publication (see footnote 67 supra) stated at pp. 20 and 21:

"The Hon. J. W. deB. Farris, when in London upon invitation addressed the House of Lords upon the British Columbia Equal Guardianship and Testator's Family Maintenance Acts he having sponsored the latter and administered both while Attorney-General."

By letter dated March 10, 1987, an inquiry was made to the
It is regretful, however, that there is no legislative comment either endorsing or rejecting the thesis put forth 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.

Clerk of the Records, Record Office, House of Lords, requesting confirmation of such an address, and particulars thereof. By letter dated March 23, 1987, S. K. Ellison, Esq., Assistant Clerk of the Records advised that he could find no record of any such address. He stated further that the Attorney General "... would not have been able to address a sitting of the House of Lords but very likely he would have been invited to address a group of Lords interested specifically in the subject of the legislation that he sponsored as Attorney General...".
CHAPTER 4.
THE OTHER CANADIAN PROVINCES AND TERRITORIES

The other Canadian provinces also found the concept of testamentary freedom unacceptable and sequentially enacted legislation permitting court interference with testamentary freedom.

Alberta was the first province in Canada to incorporate dependents relief provisions in its statute law, by the enactment of The Married Women's Relief Act.\(^70\) Section 2 thereof provided as follows:

The widow of a man who dies leaving a will by the terms of which his said widow would in the opinion of the judge before whom the application is made receive less than if he had died intestate may apply to the Supreme Court for relief.\(^71\)

It is worthy of note that unlike the New Zealand legislation, the Alberta provisions limited relief to the widow of a testator, limiting its application to wills of males. In addition, it imposed a minimum entitlement for the widow to a sum of no less than that to which she would have been entitled to receive had the deceased husband died intestate.

\(^{70}\) R.S.A. 1910, c.18 (Assented to December 16, 1910).

\(^{71}\) Ibid., s. 2.
The Edmonton Daily Bulletin published the following report:

To Protect Widows.

Hon. Mr. Marshall, in moving the second reading of a bill respecting the rights of married women in the estate of their deceased husbands stated that the bill might perhaps have been better handled by a legal member of the House, and he asked the assistance of the members in perfecting the legislation. The bill was especially applicable in this fast growing country and provided that where a wife had helped her husband in building up a business he should not have the opportunity of depriving her of her share. The operation of the Act, he thought, would be exceptional for few husbands would be so ungenerous as the bill assumes, but provision had to be made for the exceptions....Mr. Marshall explained a number of clauses of the bill, the entire object of which was to prevent widows from being unjustly deprived of an equitable share of their husband's property.

Provisions of Bill.

The Supreme Court is the court of jurisdiction for the enforcement of the Act. Any widow left without an equitable share of the estate of her deceased husband by his will may apply for relief to the Supreme Court, which, after taking all necessary evidence, may make an award of a reasonable amount, equal to her share if her husband had died intestate.72

In a subsequent publication the same newspaper reported that the Hon. Mr. Marshall commented on the proposed legislation as follows: "In some ways this [legislation] was better than a dower law for such could only apply to real estate and not to stocks, etc."73

72 Feb. 23 1910.
It is obvious from the legislation itself and the rationale expressed by the sponsor of the bill, as reported by the newspapers, that the legislation intended something beyond "maintenance". Its intent was to provide the widow with a portion of the testator's estate, using as the yardstick of fairness the amount which the widow would have received had the deceased died intestate. It accepted therefore, by implication, first, that what the legislature had prescribed as the intestate portion was the widow's fair entitlement to the deceased's estate; and second, that there existed the philosophy of forced succession for the widow to an amount of not less than the intestate succession portion.74

After British Columbia75 the province of Ontario was next in the sequence by enacting, in 1929, the Dependants' Relief Act.76 The Ontario provisions77 were modelled after the New Zealand statute yet it contained two variations. The first one, perhaps of no major consequence, was a reference to

74 This brief analysis of the Alberta legislation of 1910 and the journalistic reports, supports certain hypothesis (elsewhere expressed) that testamentary freedom can only operate in a society with well-defined and accepted social norms. It also supports the concept that the intestate succession portion is a fair basis to determine the widow's portion, a concept which has been rejected by the British Columbia Courts. Lastly, it makes allusion to the fact that since the proposed law was initiated by persons with no legal training, they were unable to identify the implications that any such new law may bring with it.

75 See c.3, supra.

76 S.O. 1929, c. 47 (assented to 28th March, 1929).

77 Ibid., s. 3.
"future maintenance". The second one was of greater importance as it limited the applicants to "dependants" which was a defined term and included only "wife or husband", "child of the testator under the age of sixteen", or a child over that age "who through illness or infirmity is unable to earn a livelihood". By the introduction of such limitations Ontario did, from the offset, preclude applications being made by adult children.

The comments in The Globe although referring to a predecessor bill "Widows and Orphans' Maintenance Bill", were indicative of the motivating forces behind The Dependants Relief Act, 1929:

Idea of Bill.

The bill was drawn with the idea of offsetting, in effect, arbitrary attempts by disgruntled heads of families to prevent their immediate heirs from receiving any portion of their estates. A few years ago, as the Prime Minister [sic] explained yesterday, widows were well protected under the Dower Act, since most estates consisted largely of real estate. Of recent years, he pointed out, there had been a trend toward stocks, bonds, and similar personal property, which do not come within the provisions of the Dower Act. The consequence has been that many widows and orphans have been stripped of some of the protection which formerly was theirs.

78 Ibid., s. 2(b).
80 Ibid., at p. 15.
Saskatchewan entered the field next in 1940 with its The Dependants' Relief Act, 1940. The Saskatchewan provisions in common with those in Ontario, limited the applicants to dependents. However, there was an extension of the children's age to twenty-one from that of sixteen in Ontario. Saskatchewan amended its legislation in 1949 to extend the application of its provisions to both testate and intestate deaths.

Manitoba, Nova Scotia, and New Brunswick entered the field in 1946, 1956 and 1959 respectively. The legislative provisions are as follows:

81 R.S.S. 1940, c.36, (assented to March 16, 1940).
82 Ibid., s. 3 and 8.
84 Although the Province of Saskatchewan was a relative latecomer in the field (30 years after Alberta and 20 years after British Columbia), in 1911 the province introduced, by virtue of an Act to amend The Devolution of Estates Act, R.S.S. 1910-11, c.13, s. 11(a) in the following provision:

"11a. The widow of a man who dies leaving a will by the terms of which his said widow would in the opinion of the judge before whom the application is made receive less than if he had died intestate leaving a widow and children may apply to the supreme court for relief."

It will be noted that this section is essentially the same as that contained in The Married Women's Relief Act, R.S.A. 1910, c. 18, s. 2.

85 The Testators' Family Maintenance Act, R.S.M. 1946, c. 64 (assented to April 13th, 1946).
86 Testators' Family Maintenance Act, R.S.N.S. 1956, c. 8, (assented to April 11th, 1956).
provisions in these Provinces are identical, and they are much closer in effect to the British Columbia statutes than the Ontario ones. Although the appropriate section in each Act made reference to "dependent", the term was defined to mean spouse or children of the testator, but with no age limitation of the children.

Newfoundland, the Yukon Territories, the Northwest Territories, and Prince Edward Island introduced dependents' relief legislation in 1962, 1962, 1971 and 1974 respectively. The common theme of their legislation is that it was available for both testate and intestate succession. There was no uniformity however as to the persons entitled to apply.

Newfoundland permitted spouses and children, without age limitations, to apply. Yukon limited the applicants to dependents who were defined as spouse and children but the children were limited to a maximum age of twenty-one years unless infirm. However, the definition of children included natural


90 Dependants Relief Ordinance, R.O.N.W.T., 1971, c. D-44.

91 Testator's Dependants Relief Act, R.S.P.E.I., 1974, c. 47 (assented to June 12th, 1974).

92 Supra, footnote 88, s. 2(a).

93 Supra, footnote 89, s. 2(1).
children, stepchildren or children who might have been subject to a *de facto* but not a *de jure* adoption.

The Ordinance for the Northwest Territories\(^9\) defined children basically in the same manner as those of the Yukon, yet it extended "dependents" to include certain persons in circumstances of cohabitation. Prince Edward Island\(^5\) in its Act included illegitimate children as children and in its definition of dependents, it included grandparents, dependent divorced persons and certain persons in circumstances of cohabitation.

Dependents' relief legislation was introduced into Canada over a sixty-four year span. As anticipated, the degree of complexity as to the persons entitled to apply increased as the date of enactment became a more contemporary one.

\(^9\) Supra, footnote 90, s. 2(a).

\(^5\) Supra, footnote 91, s. 1(a) and (d).
Although England was perceived to venerate the concept of testamentary freedom the House of Lords debates of May 16th, 1928\(^96\) show manifestation that the concept was not totally satisfactory. On that date Viscount Astor gave notice to the House that he wished to introduce a motion to establish a Select Committee to see whether a change was necessary in the law governing testamentary provisions for wives, husbands and children.

After citing a series of incidents where spouses and children had been disinherited, Viscount Astor affirmed "I claim that they [the incidents cited] show that real hardship and injustice occur under the law as it stands..."\(^97\)

He also suggested to the House that these incidents were of sufficient frequency to justify the House taking action to prevent their occurrence as he was

\[\text{[C]onvinced that they [were] entirely inconsistent with and contrary to the broad sense of fairness and}\]

\(^96\) Parl. Deb. H.L., [16 May 1928], at pp. 38 to 62.

\(^97\) Ibid., at p. 40.
fair play associated with this country, and they [were] also opposed to the trend of modern public opinion.98

In his speech to the House he stated that England and Wales were the only two countries in the English speaking world where this sort of hardship and injustice could occur.99 After reviewing, in a general form,100 the pertinent New Zealand legislation and acknowledging its adoption by most of the Dominions; and after making reference to the law of Scotland and that of the various States in the United States of America, he concluded that:

[I]n most of the English speaking countries the law makes it impossible for the type of hardship and injustice to arise which is possible here under our own law.101

The response to this plea was revealing. Viscount Haldane responded that although he was sympathetic to the concept he was "very much averse from putting that duty upon the Judges,"102 as he did not think that judges could intervene in matters relating to Wills wisely.103 He stated "[t]hat is a procedure which I, for my part, very much deprecate being

98 Ibid., at p. 41.
99 Ibid.
100 Ibid., at p. 42.
101 Ibid., at p. 44.
102 Ibid., at p. 47.
103 Ibid.
thrust on the Judges, simply because they cannot know and they are very apt to do injustice."\textsuperscript{104}

Lord Buckmaster did not think that the discretionary duty called for by the proposed legislation akin to that of New Zealand was the "kind of duty that the Courts like to discharge, and [he was] not at all sure that it [was] a duty they discharge at all well."\textsuperscript{105} He would have favoured as much more practical a method where defined portions were prescribed.

The Lord Chancellor in addition to favouring the English concept of testamentary freedom, concluded that if any statute, such as that suggested by Viscount Astor, were implemented which would restrict testamentary freedom it would be of no effect because:

He [the testator] therefore will undoubtedly take the best means he can to evade any law which is passed, and I do not think it would be beyond the ingenuity of the conveyancers of the day to devise a number of ways in which he might achieve this end.\textsuperscript{106}

The Lord Chancellor also brought to Viscount Astor's attention the fact that Parliament was at that time extremely busy and expressed the hope that he would not press the issue.\textsuperscript{107}

\textsuperscript{104} Ibid., at pp. 47 and 48.
\textsuperscript{105} Ibid., at p. 52.
\textsuperscript{106} Ibid., at p. 54.
\textsuperscript{107} Ibid., at p. 57.
Viscount Astor agreed not to press it and commented as follows:

I fully realise that, with the amount of business that has to be dealt with and with the fact that a year hence there will be a General Election, this would be an unsuitable occasion for what would be perhaps a prolonged Inquiry.108

Eleven years later England finally adopted legislation providing for judicial interference with testamentary dispositions which did not make reasonable provisions for the maintenance of a testator's dependents. The Inheritance (Family Provision) Act, 1938109 was enacted on July 13th, 1939.110 It imposed upon the English law of succession flexible restraints similar in principle to those contained in the New Zealand statute.

It is worthy of note that in common with the gestation of the New Zealand statute, the early version of the proposed legislation in England took the form of "forced heirship" providing for specific portions for the spouse and children.111

It is also worthy of note that the opposition expressed in the debates where the concept was mooted, both as to the orig-

108 Ibid., at p. 61.
109 1 & 2 Geo. VI, c.45.
110 Ibid., s. 6(2).
inal bill and subsequent refinements, were reminiscent of those voiced by the members of Parliament in New Zealand during the debate which lead to the enactments of the New Zealand Act, including that:

[T]he people who would gain most from this Bill would be the lawyers, and that large portions of estates would be swallowed up in solicitors' costs and counsel's fees.112

The English legislation, although similar in principle to the New Zealand statute, seems to be a major attempt to retain testamentary freedom and yet impose defined maintenance obligations upon the testator. By defining the obligations, the courts were at least given some guidance, thus attempting to avoid the potential undesirable result, articulated by the critics of the legislation, in England and elsewhere, that the courts should not be given the total discretionary power to revise testators' Wills.

The English Act limited the persons entitled to apply to spouses, unmarried daughters, infant sons and children under disability.113 No application could, in any event, be made if the testator had bequeathed no less than two-thirds of the income of the net estate to a surviving spouse and the only other dependents were children of the surviving spouse.114

113 Supra, footnote 109, s. 1(1).
114 Ibid., s. 1(1).
The court was limited to providing relief by way of income only. If the testator left a spouse and one or more children, then the maximum award, including what was already left in the Will, could not exceed two-thirds of the income of the estate. If the testator had no spouse or a spouse and no dependents then the relief was limited to one-half of the income.115

The Act also provided that the relief provisions terminated upon the remarriage of the spouse or when the children ceased to be dependents, as defined in the Act.116

The English statute left no doubt that its intent was to ensure that a testator fulfilled his responsibility to his spouse and dependent children to a prescribed standard but, subject to such restraint, the testator was free to do as he chose with his estate.

115 Ibid., s. 1(3).
116 Ibid., s. 1(2).
CHAPTER 6.  
CONTEMPORARY DEPENDENTS' RELIEF 
LEGISLATION, AN OVERVIEW

Dependents' relief legislation permitting court interference with testamentary freedom has not remained static. It has undergone substantial changes presumably to adjust and correct its inadequacies and to adapt to changing circumstances molded by economic considerations and contemporary social norms.

The progenitor statute of New Zealand has been subject to radical changes from its original state. The present statute\textsuperscript{117} extends its application to intestate as well as testate succession.\textsuperscript{118} Persons entitled to apply, in addition to the original ones, lawful spouses and legitimate children, now include:\textsuperscript{119} illegitimate children, grandchildren, step-children and, under certain circumstances, parents. The present Act also deems certain assets which do not devolve through the personal representative of the deceased to be part of the estate.\textsuperscript{120}

\textsuperscript{117} The Family Protection Act, 1955 N.Z.S. 1955, No. 88.
\textsuperscript{118} Ibid., s. 4.
\textsuperscript{119} Ibid., s. 3.
\textsuperscript{120} Ibid., s. 2(5).
The English statute, which appeared to offer the greatest preservation of testamentary freedom since the remedy was available to dependents only when they were dependents, and was limited to a specified percentage of the estate's income, has also been subject to substantial change.\textsuperscript{121}

The original class of applicants, spouses and dependent children including unmarried daughters, has been expanded by the addition\textsuperscript{122} of: former spouses who have not remarried; a person other than a child of the deceased who was at some time treated by the deceased as a child of the family in relation to a marriage to which the deceased had at some time been a party; a person, not falling in the previous categories, who was maintained by the deceased immediately before his death.

Whereas the early statute limited relief to income from the estate, the present statute provides for relief when the deceased dying, either testate or intestate, does not make "reasonable financial provision" for the applicant.\textsuperscript{123}

Where the applicant is a spouse\textsuperscript{124} the expression "reasonable financial provision" means such financial provision as would be reasonable in all circumstances of the case for the

\begin{footnotesize}
\begin{enumerate}
\item Inheritance (Provision for Family and Dependants) Act 1975, c. 63, (U.K.).\textsuperscript{121}
\item Ibid., s. 1.\textsuperscript{122}
\item Ibid., s. 1(1).\textsuperscript{123}
\item Ibid., s. 1(2)(a).\textsuperscript{124}
\end{enumerate}
\end{footnotesize}
spouse to receive, whether or not that provision is required for the maintenance of the applicant.

In all other cases the expression is limited to such an award as would be reasonable in the circumstances to provide for the applicant's maintenance.

It seems obvious that in the light of the distinction made between the provisions for spouses and other applicants, the intent of the legislation goes beyond support for the spouse but generally to provide the surviving spouse with a part of the deceased's estate.

To prevent avoidance of its application, the statute contains comprehensive anti-avoidance provisions by including, under certain circumstances, the value of assets which do not devolve through the personal representative and by authorizing the court to upset dispositions or contracts made by the deceased with the intent of avoiding the effect of the legislation.

All the Canadian common law provinces, and territories have dependents' relief legislation, and although the common object of such legislation is to impose restraints on testa-

125 [Ibid.], s. 1(2)(b).
126 [Ibid.], s. 8 and 9.
127 [Ibid.], s. 10.
mentary freedom, there is a wide divergence of the remedial provisions of such legislation.

As to the persons entitled to apply, the spectrum moves from the limited class of lawful spouse and legitimate children under the age of sixteen to a much more extended class that would include adult children, illegitimate children, brothers and sisters, parents and grandparents, as well as persons of the opposite sex with whom the deceased was cohabiting as of date of death.

The application of the Act has been extended in all but two jurisdictions to apply to intestate succession as well as those which are governed by Wills. The limitation provisions, although all specifying six months from date of issuance of the grant of representation, generally provide for an extension of the limitation, at the discretion of the court, in relation to assets that have not been distributed. Some statutes continue to limit the application to assets that devolve through the estate, others extend the application to other assets such as joint tenancies and insurance proceeds which pass outside the estate, including charging certain gifts with the obligation to pay maintenance if there are not sufficient assets in the estate to do so.

Some provinces have specified that agreements excluding the application of the statute will be void. Others have im-
posed a share equivalent to the intestate succession portion as a minimum entitlement for a widow applicant.

Although most of the charging clauses provide for the court to make provisions "adequate for the proper maintenance and support", some direct the court to make provisions that are adequate, just and equitable.

The attached Appendices "A", "B" and "C" provide a Table of Comparison of the principal provisions of the various statutes in force in the Canadian provinces and territories.

It will be readily seen from a glance at the Table of Comparison that, although the source of the legislation is the same, and the purpose of the legislation continues to be the same, philosophically, some provinces have chosen to legislate a "legitimate" portion while others still leave total discretion to the courts. In addition, the persons entitled to apply have, in certain cases, gone far beyond those who were the original sources of concern to the legislators. Again, some provinces have retained the traditional personages, other provinces have included others as potential claimants, presumably to comply with contemporary social norms.
## APPENDIX "A"

### COMPARISON OF CONTEMPORARY DEPENDENTS' RELIEF LEGISLATION IN CANADA

<table>
<thead>
<tr>
<th>Province or Territory</th>
<th>Statute or Ordinance</th>
<th>Persons Entitled to Apply</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Alberta</strong></td>
<td>Family Relief Act, R.S.A. 1980, c.F-2 as amended.</td>
<td>(i) spouse; (ii) child under 18; (iii) child over 18 unable by mental or physical disability to earn a livelihood (n.b. child includes acknowledged illegitimate child of deceased man or illegitimate child of deceased woman). (s.1(d).)</td>
</tr>
<tr>
<td><strong>British Columbia</strong></td>
<td>Wills Variation Act, R.S.B.C. 1979, c.435.</td>
<td>wife, husband or children (by virtue of the Charter of Rights Amendment Act S.B.C. 1985, c.68, assented to December 2, 1985 and effective retroactive to April 17, 1985 the reference to child is to include both children born within or without wedlock). (s.2.)</td>
</tr>
<tr>
<td><strong>Manitoba</strong></td>
<td>The Testators Family Maintenance Act, R.S.M. 1970, c.T 50 of the Continuing Consolidation as amended.</td>
<td>wife, husband or child, and common-law spouse, as defined by the statute. (s.2.)</td>
</tr>
<tr>
<td><strong>New Brunswick</strong></td>
<td>Testators Family Maintenance Act, R.S.N.B. 1973, c.T-4, as amended.</td>
<td>wife, husband or child. (s.1.)</td>
</tr>
<tr>
<td><strong>Newfoundland</strong></td>
<td>The Family Relief Act, R.S.N. 1970, c.124, as amended.</td>
<td>spouse or child. (s.2.)</td>
</tr>
<tr>
<td>PROVINCE</td>
<td>STATUTE OR ORDINANCE</td>
<td>PERSONS ENTITLED TO APPLY</td>
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</tr>
<tr>
<td>NORTHWEST TERRITORIES</td>
<td>The Dependents Relief Act, R.S.N.W.T. 1974, c.D-4, as amended.</td>
<td>(i) widow/widower; (ii) child under 19 years of age; (iii) child over 19 years of age but unable to earn a livelihood because of physical or mental disability; (iv) a person who cohabited with the deceased for one year prior to date of death, and was dependent on the deceased; (v) persons who cohabited with the deceased and with whom the deceased had one or more children; (vi) persons who were acting as foster parents to the children of the deceased and dependent on the deceased for maintenance and support; (s.2.)</td>
</tr>
<tr>
<td>NOVA SCOTIA</td>
<td>Testators' Family Maintenance Act R.S.N.S. 1967, c. 303, as amended</td>
<td>(i) widow, widower or child (which includes a child of whom the testator is the natural parent; (s.1.) (ii) Right to apply does not survive death of dependent; (s.16.) (iii) Court not to recognize the contracting out of the Statute. (s.15(2).)</td>
</tr>
<tr>
<td>ONTARIO</td>
<td>Succession Law Reform Act, R.S.O. 1980, c.488, Part V.</td>
<td>(i) spouse or &quot;common-law spouse&quot;, (ii) parent, (iii) child, (iv) brothers or sisters,</td>
</tr>
<tr>
<td>PROVINCE OR TERRITORY</td>
<td>STATUTE OR ORDINANCE</td>
<td>PERSONS ENTITLED TO APPLY</td>
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</tbody>
</table>
| PRINCE EDWARD ISLAND  | Dependants of Deceased Person Relief Act R.S.P.E.I., 1974 c.D-6. | (i) Widow or widower; (ii) child under 18; (iii) child over 18 who by reason of mental or physical disability cannot earn a livelihood; (iv) grandparent, parent or descendent of the deceased who, for a period of at least 3 years prior to the date of death was dependent upon the deceased was providing support or was under a legal obligation to provide support; (s.57.)

- child includes a grandchild and a person to whom the deceased demonstrated a settled intention to treat as a child of his family;

- "common-law spouse" means a man or woman who has been cohabiting immediately before the death of the deceased for a period of not less than three years, or in a relationship of some permanence where there is a child born of whom they are the natural parents;

- parents include grandparents;

- by virtue of the Children's Law Reform Act, R.S.O. 1980, c.68, as amended, specifically s.1, for all purposes of the law of Ontario, there is no distinction between children born in or out of wedlock;

- Waiver of the Act not binding. (s.63(4).)
<table>
<thead>
<tr>
<th>PROVINCE OR TERRITORY</th>
<th>STATUTE OR ORDINANCE</th>
<th>PERSONS ENTITLED TO APPLY</th>
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</thead>
<tbody>
<tr>
<td>SASKATCHEWAN</td>
<td>The Dependants' Relief Act, R.S.S. 1978 c. D-25, as amended.</td>
<td>(i) wife or husband; (ii) child under 18; (iii) child over 18 who by reason of mental or physical disability is incapable of earning a livelihood; -child includes illegitimate child. (s.2.)</td>
</tr>
<tr>
<td>YUKON TERRITORY</td>
<td>Dependants' Relief Ordinance, O.Y.T. 1980 (2d), c.6.</td>
<td>(i) widow or widower; (ii) child under 16; (iii) child over 16 who by reason of mental or physical disability is unable to earn a livelihood;</td>
</tr>
<tr>
<td>Province</td>
<td>Statute or Ordinance</td>
<td>Persons Entitled to Apply</td>
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<td></td>
<td>(iv) a grandparent, parent or descendent of the deceased who for a period of at least 3 years immediately prior to death was dependent upon the deceased for maintenance and support;</td>
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</tr>
<tr>
<td></td>
<td>(v) a person divorced from the deceased who for a period of 3 years prior to death, was dependent upon the deceased for maintenance and support;</td>
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</tr>
<tr>
<td></td>
<td>(vi) a person of the opposite sex who for 3 years prior to date of death had lived and cohabited with the deceased as a spouse of the deceased and was dependent upon the deceased for maintenance and support;</td>
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<td>- a child includes an illegitimate child of the deceased;</td>
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<td></td>
<td>(s.1)</td>
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<td></td>
<td>- Agreements to waive the protection of the ordinance invalid.</td>
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<td>(s.17.)</td>
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</tbody>
</table>
## APPENDIX "B"

### COMPARISON OF CONTEMPORARY DEPENDENTS' RELIEF LEGISLATION IN CANADA

<table>
<thead>
<tr>
<th>PROVINCE OR TERRITORY</th>
<th>STATUS OF THE DECEASED</th>
<th>THRESHOLD QUESTION AND PRESCRIBED RELIEF</th>
</tr>
</thead>
<tbody>
<tr>
<td>ALBERTA</td>
<td>testate/intestate</td>
<td>&quot;Dies testate without making in his Will adequate provision for the proper maintenance and support of his dependents or any of them&quot;; or &quot;Dies intestate and the share under the Intestate Succession Act of the intestate's dependents or any of them in the estate is inadequate for their proper maintenance and support.&quot;</td>
</tr>
<tr>
<td></td>
<td>(s.3.)</td>
<td>Relief provision: adequate for &quot;the proper maintenance and support&quot;. (s.3.)</td>
</tr>
<tr>
<td>BRITISH COLUMBIA</td>
<td>testate (s.2.)</td>
<td>&quot;Dies leaving a Will which does not, in the court's opinion, make adequate provision for the proper maintenance and support of the testator's wife, husband or children.&quot;</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Relief provision: &quot;adequate, just and equitable&quot;. (s.2.)</td>
</tr>
<tr>
<td>MANITOBA</td>
<td>testate/intestate. (s.3(1)(5).)</td>
<td>&quot;Dies leaving a will and without making therein adequate provision for the proper maintenance and support of his dependents or any of them.&quot;</td>
</tr>
<tr>
<td></td>
<td></td>
<td>The general provisions apply also on an intestacy.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Relief provision: &quot;proper maintenance and support&quot;. (s.3(1).)</td>
</tr>
<tr>
<td>PROVINCE OR TERRITORY</td>
<td>STATUS OF THE DECEASED</td>
<td>THRESHOLD QUESTION AND PRESCRIBED RELIEF</td>
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</tr>
<tr>
<td>NEW BRUNSWICK</td>
<td>testate (s.2(l).)</td>
<td>&quot;Dies leaving a will, and without making therein adequate provision for proper maintenance and support of his dependents, or any of them.&quot;</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Relief provision: &quot;proper maintenance and support&quot;. (s.2(l).)</td>
</tr>
<tr>
<td>NEWFOUNDLAND</td>
<td>testate/intestate (s.3(l).)</td>
<td>&quot;Dies testate without having made in his will adequate provision for the proper maintenance and support of his dependents or any of them&quot;; or &quot;Dies intestate and the share under the Intestate Succession Act of the intestate's dependents or any of them in the estate is inadequate for their or his proper maintenance and support.&quot;</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Relief provision: &quot;proper maintenance and support&quot;. (s.3(l).)</td>
</tr>
<tr>
<td>NORTHWEST TERRITORIES</td>
<td>testate/intestate (s.3(l).)</td>
<td>&quot;Dies testate without making in his will adequate provision for the proper maintenance and support of his dependents or any of them&quot;; or &quot;Dies intestate and the share under Intestate Succession Ordinance of the deceased's dependents or any of them in the estate is inadequate for the proper maintenance and support.&quot;</td>
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<td>Relief provision: &quot;proper maintenance and support&quot;. (s.3.)</td>
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| Nova Scotia           | Testate (s.2(1).)      | "Dies without having made adequate provision in his will for the proper maintenance and support of a dependent."  
Relief provision: "proper maintenance and support". (s.2(1).) |
| Ontario              | Testate/intestate. (s.58.) | "Where a deceased, whether testate or intestate, has not made adequate provision for the proper support of his dependents or any of them."  
Relief provision: "proper support". (s.58.) |
| Prince Edward Island | Testate/intestate. (s.1(b).) | "Deceased has not made adequate provision for proper maintenance and support of his dependents or any of them."  
Relief provision: "proper maintenance and support". (s.2.) |
| Saskatchewan         | Testate/intestate. (s.4.) | "Dies leaving a dependent or dependents, an application may be made to the court by or on behalf of any dependent for an order making reasonable provision for his or her maintenance." (s.4.)  
Relief provision:  
(i) "sufficient to provide such maintenance as the Court thinks reasonable just and equitable in the circumstances". (s.9(1).) |
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| YUKON TERRITORY       | testate/intestate.     | (ii) "For spouses, a sum equal to the intestate succession portion will be the minimum award. (s.9(2).)"

"Where a deceased has not made adequate provision for the proper maintenance and support of his dependents or any of them."

Relief provision: "proper maintenance and support". (s.2.)
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PART II: THE NATURE OF RELIEF UNDER THE BRITISH COLUMBIA WILLS VARIATION ACT
CHAPTER 1.

INTRODUCTION

The province of British Columbia chose, as part of its law of succession, to retain the concept of testamentary freedom. To prevent abuse of such freedom the legislature provided the courts with statutory authority to interfere in the distribution of a deceased's estate if he did not discharge his financial obligation to his family.

Unlike so many of its counterparts, the British Columbia legislation has not, for all practical purposes, changed since its enactment. Yet the remedies dispensed and the philosophy applied by the courts have moved radically from what appeared to be the original legislative intent.

The first enactment of the legislation in British Columbia occurred in 1920 under the title, An Act To Secure Adequate Provision for the Maintenance of the Wife and Children of a Testator,¹ (commonly referred to as dependents' relief legislation). British Columbia, thus, joined other jurisdictions which enacted protective legislation to prevent abuses of testamentary freedom.

¹ S.B.C. 1920, c. 94.
The success of this bold legislative experiment by New Zealand is due to the satisfactory reconciliation of two basic social interests of the law of succession. One is testamentary freedom and the other is that dependents of the deceased should receive proper maintenance. Proper maintenance for dependents has two aspects. One recognizes the responsibility of the deceased to his dependents which is of an individual nature. The deceased should not be permitted to leave, without proper support, persons who stood in a certain familial relationship to him at his death. The other is the social responsibility of the deceased to the state. The deceased should provide proper maintenance to his dependents in order that they will not have to be supported from public funds.

An analysis of the jurisprudence which has developed in British Columbia questions the validity of this statement, at least as it applies to that Province. The jurisprudence indicates that the purpose of the Act has become nebulous. In the words of Anthony R. Mellows in his analysis of the jurisprudence in another branch of the law of succession, the interpretation of the Act "has resulted [in] the undignified spectacle of the court's indulging in schizophrenia, ..." The result is that it is difficult today to state with any degree of certainty whether the Act is truly remedial "to provide proper maintenance for dependents", or whether it is a sort of diluted and whimsical form of forced heirship.

4 Ibid., at pp. 70 and 71.
CHAPTER 2.

THE PERTINENT CLAUSE OF THE
ACT AND THE EARLY CASES

The pertinent clause of the Wills Variation Act\(^5\) (the "Act") is subsection 2(1) which states as follows:

2.(1) Notwithstanding any law or statute to the contrary, if a testator dies leaving a will which does not, in the court's opinion, make adequate provision for the proper maintenance and support of the testator's wife, husband or children, the court may, in its discretion, in an action by or on behalf of the wife, husband or children, order that the provision that it thinks adequate, just and equitable in the circumstances be made out of the estate of the testator for the wife, husband or children.

To analyse the purpose of the Act, it is necessary to dissect the subsection. From its wording, it seems clear that condition precedent to its application must be that a testator failed to "make adequate provision for the proper maintenance and support". And, if in the court's opinion, the testator so failed then the court is authorized to make "the provision that it thinks adequate, just and equitable in the circumstances".

The words "maintenance and support" are essentially synonymous\(^6\) and their dictionary meaning is simple: to bear

\(^5\) R.S.B.C. 1979, c. 435.

\(^6\) See infra, footnote 27, D.L.R. at p. 524, W.W.R. at p. 483, B.C.R. at p. 35, see also text, infra, at p. 87.
the expense of sustenance. The mandate of the court is there­
fore to ensure that the testator has fulfilled his statutory
obligation to provide sustenance. As the words "maintenance
and support" are prefaced by the word "proper", it must be
assumed that sustenance must be consistent with the station in
life of the person entitled to such sustenance.

In this connection, as early as 1911 the Privy Council in
Allardice v. Allardice,7 by affirming the decision of the
Court of Appeal of New Zealand, recognized that "proper main­
tenance and support" will differ from case to case.

In Allardice v. Allardice the deceased made no provisions
for the Petitioners, who were five adult children from a pre­
vious marriage of the deceased. These children consisted of
three married daughters and two unmarried sons, all between
the ages of 30 and 38. The trial judge concluded, essen­
tially, that although the children were not well off, they had
long since been out of the dominion of their father and had no
claim upon his estate as they had either supported themselves
or, in the case of female children, had been supported by
their husbands.

The Court of Appeal\(^8\) disagreed with the trial judge as to the three daughters on the basis that they had no adequate means of support and that their husbands might not, in future, support them as well as they had been supported to date of death. The Court of Appeal did, however, agree with the trial judge as to the sons, on the basis that they both had trades and should be able to continue to find employment.

Notwithstanding the qualifications which the word "proper" may impose, when the Privy Council upheld the Court of Appeal decision in \textit{Allardice} v. \textit{Allardice}, by supporting the award to the daughters and making no award to the sons and endorsing the rationale behind the award for the daughters, it made a clear statement that the wording of the Act clearly identified its purpose as being one of providing "maintenance and support".

Once the court has determined that there is a failure to "make adequate provision for the proper maintenance and support" then it can order "the provision that it thinks adequate, just and equitable in the circumstances". From the plain meaning of the Act, it would seem that the purpose of such an order is to remedy the failure by the testator to provide for the "proper maintenance and support", or stated differently, had failed to provide for the expenses of proper sustenance.

\(^8\) (1910), 29 N.Z.L.R. 959.
The early cases in British Columbia interpreting the provisions of the Act left no doubt of its intent and that its enactment was to permit the court to provide maintenance when the testator failed to do so. This intent is supported by the scanty legislative history on the development and enactment of the Act.\(^9\)

\textit{In re Livingston, Deceased}\(^{10}\) is the first reported case under the Act. In this case the testator divided his estate equally between his widow and seven children from a former marriage. The widow applied under the then newly enacted \textbf{Testator's Family Maintenance Act}. The court recognized that in making his Will, the testator did not adequately provide for his wife, and proceeded to interpret the Act by reference to the New Zealand statute and adopted the reasoning in \textit{Allardice v. Allardice}\(^{11}\) that the intention of such remedial legislation was not to interfere with the Will of the testator. Thus, there had to be an inquiry as to the need for maintenance and support and as to the property available.

The judgment concluded that bearing in mind the facts and the purpose sought to be obtained by the legislature, proper maintenance and support could be achieved by investing suf-

\(^9\) See text, \textit{supra}, Part I, c. 3.


\(^{11}\) \textit{Supra}, footnote 7.
ficient funds to provide a specified income to the widow for life.

The court, although adopting the rationale of Allardice v. Allardice\(^\text{12}\) as the purpose of the Act, did not, unfortunately, articulate a clear principle as to its purpose in British Columbia. It did, however, refer to the Act as "remedial legislation" and the relief awarded was clearly limited to provide an annuity consistent with what the court considered to be the widow's needs.

In the next reported case in British Columbia, In re Hall, Deceased,\(^\text{13}\) in which a widow was excluded from her husband's Will, the court made an award setting aside a portion of the estate sufficient to provide a determined amount of income for the widow. In doing so, the court stated that such an order would "effectuate the purpose of the statute".\(^\text{14}\) Unfortunately the court did not amplify on the purpose of the statute other than to say that it was applying the principles laid down in Allardice v. Allardice\(^\text{15}\) and In re Livingston, Deceased.\(^\text{16}\)

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12 Supra, footnote 7.
14 Ibid., at p. 243.
15 Supra, footnote 7.
16 Supra, footnote 10.
In re Stigings, Deceased\(^{17}\) on an application by a widower, the court, without making reference to the purpose of the Act, directed that an amount of income, not to exceed a predetermined amount, be paid to the widower during his lifetime and upon his death the estate was to be distributed according to the terms of the Will.

In Brighten v. Smith\(^{18}\) at trial, upon the application of the widow for relief under the then Wills Variation Act it was held that she was entitled to the whole estate as it was necessary for her to have the entire estate to provide adequate maintenance for her. The estate amounted to $8,000. The Court of Appeal upheld the decision, with MacDonald C.J.A. and Macdonald J.A. dissenting. However, the court divided on the application of the law to the facts of the case, and not on the basic approach to the Act.

The dissenting judgments are of interest as they reflect the early understanding of the purpose of the Act. MacDonald C.J.A. in his judgment obviously considered that the transfer of the entire estate, notwithstanding its size, was beyond the scope of the statute. He commented:

> With respect, I think the order was made under a misapprehension of the object and scope of the legislation in question: it was made upon a wrong

\(^{17}\) (1924), 34 B.C.R. 347 (S.C.).

\(^{18}\) (1926), 37 B.C.R. 518 (C.A.).
principle. The object of the legislation is maintenance, not gift.19

Macdonald J.A., commenting on the order made by the trial judge, stated:

[It] is not an order making adequate provision for maintenance; 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.20

The majority of the court differed only as to whether or not the court could transfer the entire estate to the petitioner. There does not seem to be any difference of opinion as to the purpose of the Act.

The difficulty encountered by the courts in dealing with these matters was made obvious by Martin J.A. He observed:

[W]e are dealing with a matter which is something wholly unknown to our former law, and the whole object of the new statute is to defeat the wishes of the testator. This novel circumstance must be considered by this Court, in relation to the object which is sought to be maintained.21

The object of the Act, at least as it related to spouses, was analysed by McPhillips J.A. as follows:

19 Ibid., at p. 520, (emphasis added).
20 Ibid., at p. 524.
21 Ibid., at p. 520.
Now the Legislature has undertaken to say, and we cannot question its wisdom - and in this respect I am at one with the Legislature - that a husband or wife should make proper provision for the surviving consort. The Legislature has enacted that there is created by marriage a relationship which calls for a provision being made out of the estate.22

[M]y view [is] that the Legislature has enacted that the relationship that exists between husband and wife is such that that relationship has to be recognized, and regarded when there is a testamentary disposition of the estate. If, for instance, the husband or the wife should be in need, that the relationship that exists calls upon the husband or the wife to remember it and make provision, otherwise we should have the husband or the wife, as the case may be, becoming a public charge upon the country. And why should the husband or the wife be a public charge upon the country if there is an estate which primarily ought to pay for the maintenance of that husband or wife?23

It will be noted that the emphasis is on need and the prevention of the spouse becoming a public charge upon the country. McPhillips J.A. concluded that the lower court provided an award that "would enure to her permanent maintenance, thereby preventing her becoming a charge upon the country."24

A review of the early cases, and specifically the comments of the judges in Brighten v. Smith25 whether majority or dissenting, leave no doubt that in the mind of the judges the Act was remedial to provide maintenance and to prevent a spouse, and presumably a child, from being a burden upon the

22 Ibid., at p. 522.
23 Ibid., at p. 523.
24 Ibid., at p. 524.
25 Ibid.
country. There is no suggestion that the testator had obligations beyond those of maintenance and support. The decisions are indeed consistent with the plain meaning of the words of the Act.

The clarity of purposes which can be extracted from the early cases did not survive the decision of Walker v. McDermott.26

CHAPTER 3
WALKER V. McDERMOTT

It has been stated\(^{27}\) that the leading case on dependents' relief legislation in British Columbia is Walker v. McDermott.\(^{28}\) Wilson C.J.S.C. stated in Re Parks Estate:\(^{29}\)

Practically all judgments under this Act commence with quotations from Walker v. McDermott [1931] SCR 94, reversing [1930] I WWR 330, 845, 42 BCR 184, 354, and I shall conform by quoting this oft-cited passage from the judgment of Duff, J. (as he then was) at p. 96:

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 of 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.

The facts of the case are simple. The deceased was survived by his second wife, aged fifty-four, to whom he had been

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\(^{28}\) Supra, footnote 26.

\(^{29}\) (1968), 64 W.W.R. (N.S.) 586 at p. 590 (B.C.S.C.).
married for fourteen years, and an adult daughter, from a previous marriage, aged twenty-three. The main asset of the estate was a hotel in Trail, British Columbia, and the evidence indicated that the wife had assisted with the down payment and thereafter had assumed a large portion of the burden of running the business. At the time of her father's death, the daughter was married, her husband had steady employment and the daughter was not and had not been dependent upon the testator. The daughter was not in necessitous circumstances and the income from the estate would only be sufficient to maintain the widow. By his Will, the testator left the entire estate to his widow. The daughter brought an application under the Act and at trial, in an unreported decision, she was awarded the sum of $6,000 from a net estate of approximately $25,000. The Court of Appeal, with McPhillips J.A. dissenting, set aside the order of the lower court. The reasoning of the judges, both majority and dissenting is of assistance in understanding the subsequent development of the jurisprudence interpreting the Act.

McPhillips J.A., the dissenting Judge, who would have allowed the award to the daughter, observed that:

The legislation which has to be construed and applied is legislation first introduced in the Dominion of New Zealand, a sister nation in the British Commonwealth. It is legislation of somewhat revolutionary nature as against the long maintained law of England, that the testator was at full liberty to dispose of his estate as he thought fit, to even
disinherit his children and others having claims upon him and give his estate to strangers.  

He concluded with the following comment:

The appellant contends in the teeth of the statute and makes bold to say that the respondent the sole child of the testator should receive nothing out of her father's estate. Certainly, there is no lack of hardihood in the appellant, but the law is positive and the Court is not at liberty to legislate by way of the repeal of a remedial statute, in truth, of course, it is not within the province of the Court to legislate - although we see at times as in this case, submissions made to the Court if acceded to would mean that. A provision must be made for the respondent the sole child of the testator.

McPhillips J.A. by his observation that "provision must be made for the respondent the sole child of the testator" interpreted the Act as requiring something more than maintenance and support, and as imposing upon the testator the obligation to make provision for a child even though such child was not in need of maintenance.

The majority of the Court of Appeal followed a line more in keeping with the principles enunciated in the early cases. Martin J.A., for example, observed that:

It clearly appears that he [the trial judge] has, with every respect, proceeded upon a wrong principle in construing the Act as, in effect, one which gives a child a share of the estate as against the widow where the child has not discharged the onus upon it of proving that it is, in the true and proper sense, in need of 'maintenance and support' having regard to her walk in life and all the other circumstances of the case.33

Macdonald J.A. was even more articulate in expressing his views of the philosophy of the Act, when he stated:

Under the order appealed from the sum of $5,000 is transferred from appellant to respondent (not for 'maintenance' because respondent is not in straitened circumstances)....I do not think the Act was intended to apply to such a case. If it does few testators can regard their testamentary dispositions as final.34

This legislation was enacted, as we may gather from its provisions, because in many instances hardship and injustice arose. A husband might disinherit a wife who shared with him the labour of accumulating property, and leave it, e.g. to a woman with whom he maintained immoral relations.35

It is a 'Family Maintenance Act;' not an Act to destroy the free disposition of property by will. It is always a question of fact in each case whether or not it was contemplated that an order should be made, subject to this general consideration that the Court must be satisfied that the testator has been guilty of a breach of that moral duty which parents owe to the surviving parent and to children and it only refers to those for whose maintenance at the time of the testator's death no adequate means of support are available. Discretion is given to apply it where the Court thinks it is just and equitable in the circumstances to exercise the powers conferred. That

33 Ibid., D.L.R. at pp. 952 and 953, B.C.R. at pp. 192 and 193.
34 Ibid., D.L.R. at p. 958, B.C.R. at pp. 198 and 199.
discretion is not judicially exercised unless the object, intent and spirit of the Act is observed.

Although s.3 of the Act may not be happily worded it would not be suggested that an order must be made in all cases where members of a family, adults or minors, are not left anything by a parent's will.36

The Supreme Court of Canada,37 Rinfret J. dissenting, reversed the decision of the Court of Appeal of British Columbia.

Rinfret J., in his dissenting judgment, held that:

I cannot construe the Act to mean that in every case where no provision is made, the section [the present subsection 2(1) of the Act] above quoted is mandatory and the Court must make an order.38

In his view:

The first inquiry therefore must be whether, at the death of the testator, the petitioner lacked those means of maintenance and support which would be proper, having regard to her ordinary circumstances in life. For that purpose, the Court should consider how she has been maintained in the past and what were, when the testator died, the means of support available to her.39

36 Ibid., D.L.R. at p. 959, B.C.R. at pp. 199 and 200.
37 Supra, footnote 26.
He concluded that the petitioner failed to make out a case for the application of the Act. She failed to come within the purview or intent of the Act. Presumably this was because she did not demonstrate need having due regard to her circumstances, and the circumstances of the estate.

The majority judgment was delivered by Duff J. who opened his reasons by stating that the authority of the court came into being, if in the opinion of the judge, adequate provision for the "proper maintenance and support" had not been made. He then proceeded to identify the meaning of "proper maintenance and support" in the often quoted passage of his judgment and concluded that:

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.41

Duff J.'s statement is no more than a restatement of the operative words of the relevant section of the Act, namely:

2(1) ... if a testator dies leaving a will which does not, in the court's opinion, make adequate provision for the proper maintenance and support of the testator's wife, husband or children, the court may, in its discretion, ... order that the provision that it

40 See footnote 29.
thinks adequate, just and equitable in the circumstances be made out of the estate ....42

Duff J. concluded his judgment with the following statement:

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.43

With this statement, intentionally or otherwise, Duff J., vested upon the Act an interpretation under which a supportable argument could be made that a parent has an obligation to leave a portion of his estate to a child regardless of the age or the need of that child.

In any event, the award to the daughter represented approximately twenty-five percent of the net estate. Considering her circumstances, that she was not in need, had not been supported by her father, had reasonable assets and her husband had a good position, the lump sum award cannot be justified under the "support" theory regardless of how generous support might be construed.

42 Supra, footnote 5, (emphasis added).
The court might have made a comparison with the rationale in *Allardice v. Allardice* where the daughters were awarded an annuity on the basis that they had no personal means of support and their husbands may, in future, not be able to support them. The court in *Walker v. McDermott* chose not to consider the rationale of the Court of Appeal of New Zealand in *Allardice v. Allardice* stating that the case was of no help because, amongst other reasons, the facts were so vastly different.

From all aspects, the award in *Walker v. McDermott* can only be supported on the basis that the court interpreted the purpose of the Act as a vehicle for redistribution of the capital of the estate and thus the Supreme Court of Canada attributed to the Act a meaning and a function beyond that contemplated by the legislation and clearly beyond that as defined by the early British Columbia cases and, clearly, beyond the capabilities of the Act.
CHAPTER 4.
THE AFTERMATH OF WALKER V. McDERMOTT

In the aftermath of Walker v. McDermott two distinct lines of cases developed: those which would make "need" a condition precedent to an award and those which would interpret the Act more in the terms of ethics than economics.44

There is no doubt that "need" has been given an extended meaning by the courts. Stout C.J. in Allardice v. Allardice referred to the equivalent statute in New Zealand as "something more than a statute to extend the provisions in the Destitute Persons Act...."45 He further stated that the contemplated support did "not mean merely having a supply of food and clothing"46 and that the matter "should be considered, both as to widow and children, is how she or they have been maintained in the past."47

The Supreme Court of Canada took the same position in Walker v. McDermott when Duff J. said:

45 Supra, footnote 8 at p. 969.
46 Ibid., at p. 969.
47 Ibid., at p. 969.
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.48

Any reference to need in the cases can not, therefore, be limited to "the bare necessities of existence"49 but will vary according to a multitude of circumstances and will frequently involve more than mere maintenance. The other interpretation goes even beyond the extended meaning of need to such an extent so as to prohibit disinheritance.

The two different approaches to the interpretation of the meaning of "adequate provision" were summarized by Wood J. in Pennington v. Boucher.50 He said:

Plaintiff's counsel, in his able submissions, urges me to conclude, on the basis of a number of authorities that have been decided both before and since Walker v. McDermott, that the concept of adequate provision for proper maintenance and support includes a moral or an ethical component, as well as the economic consideration. Indeed, Mr. Justice Dickson, as he then was, in Barr v. Barr, [1972] 2 W.W.R. 346, after reviewing a number of such authorities, concluded at page 350 of the report as follows:

"The dominant theme running through the cases, and they are myriad, is one of ethics, even more than economics. Although The Testators Family Maintenance Act is couched in terms which at first impression appear to be pragmatic and economic, 'adequate provision for . . . proper maintenance and support', it soon becomes apparent on a review of the authorities that heavy emphasis is placed upon the moral aspects

49 See footnote 48.
50 18 April, 1984, Vancouver A82339, unreported (B.C.S.C.).
of the problem. The court was never intended to rewrite the will of a testator and in discharging its difficult task of correcting a breach of morality on a testator's part the court must not, except in plain and definite cases, retrain [sic] a man's right to dispose of his estate as he pleases. But, equally, it is fair to stay [sic] that the legislation has by and large received a very liberal interpretation. The attitude of the courts has been one of great flexibility. Every case must, of course, be decided upon its own facts and circumstances."

I have concluded, after reading all of the authorities provided to me by counsel, that there are two competing lines of authority in this country. One, exemplified by Mr. Justice Dickson's comment in Barr v. Barr, takes a liberal approach to the application of the discretion to be found in Section 2 of the Wills Variation Act and generally rationalizes the intervention of the court into the testator's expressed desire on the basis of what is said to be the moral or ethical duty of a parent to provide fairly and generously for all children in the absence of any direct evidence of justification for disinheritance. The other line of authority, more analytical [sic] in its approach, tends to rely on the plain meaning of the language to be found in Section 2 and bases any such intervention on the answer to the threshold question whether or not there has been adequate provision in the economic sense alone, recognizing that adequate provision in such sense will vary according to a variety of circumstances and will often involve more than mere maintenance.51

A. NEED AS CONDITION PRECEDENT

Coady J. in Re Dawson52 considered the provisions of the Act in the light of an application for relief by two adult children. He observed that "the Act was [not] intended to operate,... [for] an order [to be] made in all cases where

51 Ibid., at pp. 5 and 6.
members of a family, adults or minors, are not left anything by a parent's Will. That is not the test. The statute refers to failure to make 'adequate provisions for the proper maintenance and support.'

In refusing to make an award for the benefit of the adult applicants on the basis that they had no need, Coady J. had no hesitation in concluding that the principle enunciated by Walker v. McDermott supported the view that "[i]f there is no need on the part of the claimant for proper maintenance and support, the Act does not apply."

In Re Hornett the applicant, an adult daughter of the deceased, with reasonable means of her own, submitted that regardless of her needs she had an "undeniable and absolute right to 'adequate provision for her proper maintenance and support' ..." For this position she relied upon the judgment of DesBrisay C.J.B.C. in Re Jones; Jones v. Fox et al. where he stated:

53 Ibid., D.L.R. at p. 534, B.C.R. at pp. 484 and 485.
54 Ibid., D.L.R. at pp. 534 and 535, B.C.R. at p. 485.
It is also to be observed that in Walker v. McDermott, supra, need was not shown by the petitioner and the view that it was necessary that it be shown was rejected by the majority of the Supreme Court of Canada.

The learned judge in my view failed to give due consideration to the question of awarding to the appellant an equitable share of the estate which in my opinion the cases clearly required him to do.

Lett C.J.S.C. in response to this submission simply stated that:

I cannot interpret these words of the learned Chief Justice as counsel for the petitioner asks me to construe them, - namely that a petitioner is not required in any event to show need ....58

More recently, the same position was taken by Aikens J. in Re Harding59 where, in refusing to make an award on behalf of the petitioner, he stated:

I do, however, refuse to make an order in her favour for the reasons explained earlier, which, put shortly, are these: the petitioner has not shown need, so she has not shown that there was any duty owing by her father to her, so he was free to give such benefits as he saw fit to his other children. The Court should not interfere with the way he has disposed of his estate.

A consideration of these cases decided over a period of almost thirty years, leaves no doubt that, at least, in the


minds of the presiding judges, need is a condition precedent to the court exercising its discretion under the statute.

B. EQUITABLE DISTRIBUTION THEORY

Almost contemporaneously, the second line of cases developed commencing with Barker v. Westminster Trust Company.60

O'Halloran J.A. noted that in Walker v. McDermott an award was made to the daughter notwithstanding:

(1) the father had not supported his daughter for five years before his death; and (2) that she had been married one year prior to his death to a young man in a responsible position with a large company, who was in receipt of a reasonably good salary and with good prospects for the future; and (3) the stepmother had contributed largely to the upbuilding and preservation of the estate both in original capital advanced and in work and management up to the time of the father's death.61

He therefore concluded:

[S]uch a judgment could not be founded upon a mere duty to support; it must be manifest that the term 'maintenance' was read to mean something more than 'support' in its ordinary and accepted sense, and was given a meaning consistent only with a wider conception of the equitable powers conferred by the statute.62

60 Supra, footnote 27.


O'Halloran J.A. also pointed out:

On the facts stated the father's 'responsibilities' to which the Court pointed, could not refer to a duty to 'support', for he had not supported his daughter for five years and she was doing very well. Nor was there any room for duty on his part to 'maintain' her, since he had not maintained her for five years and she had bettered her position on marriage. The only 'responsibility' left was not to disinherit her, but rather to 'advance' her, viz., to give her a substantial share of his estate....

After reviewing both the jurisprudence and the statute O'Halloran J.A. viewed the relief afforded by the Act as follows:

[T]here are, generally speaking, at least two kinds of relief intended by the Testator's Family Maintenance Act. First, there is a form of 'maintenance and support' which is a purely personal allowance to the applicant wife, husband or child. Relief of this nature is analogous to alimony.... Secondly, there is a form of 'proper maintenance' which is as effectively a share of the estate as if it were so bequeathed in the will itself.... Relief of this kind arises most frequently in cases of disinheritance such as this case and Walker v. McDermott.

Sloan J.A., McDonald J.A. and O'Halloran J.A. were the presiding judges in Barker v. Westminster Trust Company. McDonald J.A. dissenting, would not allow the appeal on the basis that the appellant had died. Sloan J.A., without reasons, made the award to the appellant's personal represen-


tatives. Therefore, the opinions expressed in this analysis are those of O'Halloran J.A. only and not those of the other two judges.

Nevertheless, when O'Halloran J.A. stated that the Supreme Court of Canada adopted (in Walker v. McDermott) an interpretation "which in principle and practice accepts a more equitable distribution of the estate ....", the purpose of statute was extended in scope far beyond its original intent.

The concept of an "equitable distribution" of the estate was further developed by DesBrisay C.J.B.C. when he stated:

The learned judge in my view failed to give due consideration to the question of awarding to the appellant an equitable share of the estate which in my opinion the cases clearly required him to do.

Subsequent decisions have taken seriously the observation of DesBrisay C.J.B.C. that he perceived that the obligation of a judge, in dependents' relief matters, is to give due consideration to the question of awarding an equitable share of the estate regardless of need.

In Re Michalson the applicant daughter was as affluent as her father. Moreover, the father gave the following explanation in his Will for disinheriting her:

This recognition of my daughter in this my will should not be interpreted to reflect a lack of parental regard but rather, as I have over the years during my lifetime provided for her generously, and in view of her station in life, I feel no obligation to provide for her further in this my will.

Nonetheless, the court made an award on the basis that there was "a manifest breach of the moral duty owed by the testator to his only daughter ...", and that the "moral duty to the petitioner would have been fulfilled by leaving her a reasonable sum."  

Similar findings were made in Re Osland and in Re Holt. In the latter case, the court rejected a specific submission by counsel for the respondent that the petitioner failed to demonstrate that she was in necessitous circumstances and therefore, failing to show entitlement to relief under the Act.

68 Ibid., at p. 565.
69 Ibid., at p. 567.
The solidification of the view that need was not a condition precedent for relief under the Act, was briefly interrupted by what appeared to be a misunderstanding of the effect of the decision in *Re Lukie*.72

In *Re Lukie* the three members of the court reached the same conclusion, but each based his judgment on a different premise. In common with most cases of this nature, the facts were relatively simple.

The deceased died leaving five adult children surviving and an estate of $40,000. By his Will the testator gave a $1,000 legacy to one daughter, fifty percent of the residue of the estate to each of two sons and nothing to the other two children. The two disinherited children commenced an action and the trial judge73 directed a redistribution of the estate so that all four children would share equally. The legatee daughter did not join in the proceedings. The Court of Appeal reversed the judgment of the trial judge.

Robertson J.A. held that each applicant was adequately and properly maintained at the date of the testator's death and, in his view, there was no room for the application of equitable principles.


Taggart J.A. although admitting that the applicant did not have to establish necessitous circumstances, relied upon the fact that the applicants were totally independent of the testator and could not rely upon their family relationship (i.e. being children) to succeed.

Carrothers J.A. admitted that a testator ought to make provision for the support of claimants in need of assistance, or for those accustomed and dependent upon it. However, as the estate was of limited value and the claimants were not in need of assistance, nor were they accustomed to it, they could not succeed.

It was perhaps the emphasis placed by all three appeal judges on the fact that the applicants were not in need of assistance that led to the misunderstanding of the decision which followed.

In both Re Radcliffe\(^{74}\) and Re Janke\(^{75}\) counsel argued that Re Lukie had the effect to make a finding of need, presumably in its extended meaning,\(^{76}\) condition precedent to relief under the Act.

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\(^{74}\) (1977), 2 B.C.L.R. 220 (S.C.).

\(^{75}\) (1977), 2 B.C.L.R. 378, 3 C.P.C. 249 (S.C.).

\(^{76}\) See text, supra, at p. 87.
The B.C. Law Reform Commission stated: "In Lukie v. Helgason, Mr. Justice Robertson held that the showing of need was an absolute prerequisite to the exercise of the court's discretion." Professor Gordon Bale was led to comment as follows:

The case of Re Lukie, [1975] W.W.D. 44, 20 R.F.L. 73 (B.C.S.C.) may, however, represent a significant change in the way in which the British Columbia statute is applied in the future.

The misunderstanding that might have existed was quickly clarified and Professor Bale's hope was soon shattered. The court in Re Sleno made reference to the same extract of Duff J.'s judgment as did Wilson C.J.S.C. in Re Parks Estate and stated:

That statement has become the cornerstone of most of the judgments given under this section since 1931, and continues to be the basis upon which the statute is interpreted.

80 Supra, footnote 29.
81 Supra, footnote 79 at p. 160.
It unequivocally concluded that:

In contending that proof of need is a condition precedent to recovery counsel for the respondent relies upon the judgment of Robertson, J.A., in Re Lukie et al. and Helgason et al. (1976), 72 D.L.R. (3d) 395, [1976] 6 W.W.R. 395, 26 R.F.L. 164. A careful reading of that judgment, however, indicates that the learned Justice of Appeal did not say that, in principle, the finding of need was a condition precedent....82

Indeed, a careful consideration of Robertson J.A.'s judgment does not disclose any basis for the theory that need, even with the extended meaning given to it by the courts, was to be a condition precedent for relief under the Act.

Up to the time of the decision of Re Lukie, there might have been some doubt as to whether or not need was a condition precedent. The decisions that followed Re Sleno make it clear that there is no such requirement.

In Brauer v. Hilton83 the deceased left nothing in his Will to his three children, who were all of the age of majority, and although not well off, were not dependent on the testator, nor were they in actual need. The Court of Appeal considered that the deceased had "lost sight of his parental

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duty..."84 and accepted the concept that need did not have to be established.

In Granfield v. Williams85 an estranged and disinherited wife, with substantial wealth of her own, was awarded the sum of $100,000 from her husband's estate. In his judgment Carrothers J.A. bluntly stated "that necessitous circumstances need not be shown."

In Morris v. Morris86 the testator left his entire estate of $270,000, plus $170,000 passing by operation of law to his widow, and nothing to his adult children aged forty and thirty-nine both making their own way in life, and indeed one of them a practising lawyer.

The Court of Appeal intervened by awarding lump sums of $75,000 to the daughter and $50,000 to the son. Macfarlane J.A., in his judgment, concluded that the testator was in breach of his moral duty in "his failure ... to revise his will to recognize the legitimate expectation of his other two children to share his capital assets to some degree"87 and that it was "an appropriate case for the Court to exercise its

84 Ibid., at p. 123.
discretion by making the provision which the testator ought to have made for the two children who have been disinherited."\(^{88}\) In making its award, the court seems to have taken the position that the testator was under an obligation to treat his children equally, and that equality with the non-petitioning children should have been reached either inter vivos or post-humously.

Perhaps the most contemporary expression of how the courts are presently viewing the Act can be found in the words of McEachern C.J.S.C. in *Dalziel v. Bradford* where after acknowledging that "[t]he law on this question is difficult to chart."\(^{89}\) the Chief Justice stated that:

What I think the authorities are saying is that the first inquiry is to determine whether the testator made adequate provision for a qualified claimant in his will. If he did not, then the Court may look at all the circumstances and decide in its discretion what a judicious father seeking to discharge his parental duty would do. For good cause such a parent could disinherit a child, and he might not benefit a child who is already adequately maintained; but a judicious father would not look just at the present circumstances of a child, even an adult child, and probable future difficulties for the child and his family must be recognized, subject of course to the size of the estate and other legitimate claims.

The approach, it seems to me, must not be excessively economic for that is not how parental duties are usually discharged.\(^{90}\)

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The Chief Justice thought that the law, based on *Walker v. McDermott*, authorized such an approach. He admitted to some difficulties in reconciling *Morris v. Morris* and *Re Lukie* but explained *Morris v. Morris* as an exception of *Re Lukie*, based upon the size of the estate and the fact that equality could be reached without endangering other legitimate claims. He, likewise, based his reasoning for awarding one-third of the residue of the estate to each child on the fact that equality could be reached without disturbing specific bequests.

It would appear that the Chief Justice has taken the view that as long as legitimate claims are not affected, the court should try for equality amongst the children. Clearly this is the adoption of a concept of equitable distribution, without reference to need. It should perhaps be taken that the law in British Columbia is that, absent special circumstances, a parent must leave his estate equally amongst his children, a clear manifestation of forced heirship.

The concept that the Act is being interpreted by some courts as a "forced heirship" statute is further emphasized by two recent cases that state as a principle that: "no provi-
sion at all must necessarily be regarded as inadequate provi-

The most unequivocal endorsement of such statement is

found in *McCoy v. Paterson et al.*94 The testatrix left her

modest estate to charity and made no provision for two adult

sons expressing her reasons for so doing as follows:

After consideration I have not made any provision for

any of my children because they have not expressed

any kindness and caring. I have made this decision

with the knowledge of the Wills Variation Act

R.S.B.C. 1979, Chapter 435, and amendments thereto.95

In his judgment, Drost L.J.S.C. stated that:

[N]o provision at all must necessarily be regarded as

inadequate provision for the purposes of S.2 of the

Wills Variation Act.96

In *Re Plummer; Minckler v. Pinder*97 the testatrix left her

estate to her grandchildren to the exclusion of her daugh-
ter. In his judgment, Tyrwhitt-Drake L.J.S.C. stated:

A non-disposition, being in so many words no provi-

sion at all, must necessarily be regarded as 'inade-
quate provision' for the purposes of actions such as

this.98

Drost L.J.S.C. in reaching the conclusion that no provision at all must necessarily be regarded as inadequate provision regarded himself bound by


Tyrwhitt-Drake also considered himself bound by the decisions in Greenwood v. Greenwood and Marusyn v. Prill.

However, a close analysis of these two cases does not show that either McEachern C.J.S.C. or Taggart J.A. stated as a principle of law that no provision is necessarily inadequate provision.

In Greenwood v. Greenwood the deceased made no provisions in her Will for her husband. On the application by the husband, McEachern C.J.S.C. stated:

It is apparent that the testatrix died leaving a will and without making adequate provision for the proper maintenance and support of her husband.

99 Supra, footnote 94 at p. 12.
100 Supra, footnote 97 at p. 302.
102 Ibid., at p. 221.
His conclusion that there was no adequate provision was based on his interpretation of the facts of the case and not merely because the deceased had made no provisions in the Will.

In *Marusyn v. Prill*103 a widow was left nothing in the testator's Will. Taggart J.A. delivered the judgment of the court and stated:

> It is clear enough that the testator did not make adequate provision for the proper maintenance and support of his wife. Indeed, he made none at all. Thus, in my opinion, that part of Section 2 of the Wills Variation Act is met.104

When Taggart J.A. stated "Indeed, he made none at all." he was merely making a statement of fact and his conclusion that no adequate provision was made was not based solely on the fact that no provision was made in the Will.

It can be said therefore that the principle enunciated by Drost L.J.S.C. and Tyrwhitt-Drake L.J.S.C. is not supported by the cases upon which they relied. Nor does it have any foundation on the jurisprudence produced by the Act.105 Never-

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104 Ibid., at p. 7.

105 See: Coady J. in *Re Dawson*, supra, at pp. 22 and 23; more recently the statement of Spencer J. in *Patterson v. Lauritsen, Crowther, McKay and Lauritsen* (1985), 58 B.C.L.R. 182 (S.C.) at p. 185, "[Counsel], for the defendants argued that in proper cases an adequate provision may be no provision at all. That seems to follow from s.2(3)(a) of the Act."
theless it is another indication as to the possible interpretation the courts are prepared to place upon the Act.

The jurisdiction of the court in administering the Act is clearly stated in Swain v. Dennison.¹⁰⁶

Maitland J., speaking for the court said:

The entire jurisdiction of the trial judge under this statute is discretionary in character. The relief which may be granted under it is completely dependent on his opinion: (1) As to whether adequate provision for proper maintenance and support has been provided for the spouse and children under the will; and (2) If adequate provision is not thought to be made, as to what provision should be made.¹⁰⁷

The process for the court is twofold, firstly to determine if adequate provision has been made and if not, to remedy such omission. It can be seen, as a statement of general application, that in the cases referred to under the heading "Equitable Distribution Theory" very little attention was given, if any, to determining the adequacy of the provision (or lack of provision) made. The court, almost automatically proceeded to deal with the quantum to be awarded, which in most cases was a lump sum award from the capital of the estate.


The development of the jurisprudence which basically rejects need as condition precedent and adopts "equitable distribution" as the basis for relief under the Act, leaves no doubt that freedom of testation in British Columbia is limited far beyond the court's authority to provide maintenance and support and that the succession regime in the province has become a form of modified forced heirship.

C. PRICE V. LYPCHUK ESTATE

The case of Price v. Lypchuk Estate108 is the most recent illustration of the fact that the Act needs serious and urgent reconsideration. When both majority and dissenting judgments, purporting to apply the principle enunciated in Walker v. McDermott109 came to opposite conclusions it is clear the law is in need of clarification.

The facts of the case are characteristically simple. The deceased, Mr. Lypchuk, who died in 1983, had married for the first time in 1939 and two daughters resulted from that marriage. World War II interrupted the marriage, which was not a happy one, and the deceased served in Europe until the end of the war. Upon his return to Canada in 1945, he found that his wife would not live with him, his two children were being


109 Supra, footnote 26.
cared for by his in-laws and he was not allowed to see them. The spouses were divorced in 1950. The deceased married his second wife shortly after the divorce and had two children. The marriage was a happy one and ended on the death of the second wife in 1980. The deceased had no contact with the children of his first marriage for the period of thirty-five years before his death.

The deceased's estate had a value of about $81,000, all of which was left equally to the two children of his second marriage. The deceased had inherited the totality of his second wife's estate when she died.

The plaintiff, one of the daughters of the first marriage, applied for provision out of the estate under the provisions of the Act. The trial judge found that the deceased did not have good cause for disinheriting the plaintiff and failed to discharge his paternal duty in so doing. The trial judge, therefore, found that the deceased had not made adequate provision for the plaintiff and awarded her an equal share in the estate.

The beneficiaries named in the Will, the children of the second marriage, appealed the decision.

Lambert J.A., Taggart J.A. concurring, allowed the appeal because the long separation effectively eradicated any moral
duty which the deceased might have owed the children of his first marriage.

By contrast, Esson J.A. dissenting, stated that the long separation by itself was not sufficient to permit the deceased to disinherit the children from the first marriage.

In his judgment, Lambert J.A. quoted the often cited passage from the judgment of Duff J. in Walker v. McDermott and concluded that the principles therein enunciated were as valid today as when the decision was handed down in 1931 and were binding on the Court of Appeal. He modified the principles so enunciated by referring to changing social circumstances:

Women now have a valued position in the workplace; everyone is entitled to rely on a widespread network of state financial support; the nuclear family is far from universal; and family relations legislation contemplates and promotes the financial independence of spouses from each other and children from their parents. The judicious father of Walker v. McDermott, seeking to discharge both his marital and his parental duty, must be considered as doing so in accordance with a contemporary view of marital and parental obligations and in accordance with a contemporary view of testamentary independence.

Lambert J.A. also emphasized the fact that moral considerations are relevant and in his opinion, "the very structure of the Act makes it clear that the legislative scheme contem-

110 See text, supra, at p. 74.
111 Supra, footnote 108 at pp. 268 and 269 E.T.R.
plates that the concept of moral duty is an essential element in the working of the Act."\textsuperscript{112}

However, because of the long separation and the fact that the estate was built up, in part, by the second wife to whom he had been married for thirty years, it was not a case where a moral duty could be found that would prevent the testator from disinheriting the children of the first marriage. The appeal was therefore dismissed.

Esson J.A., in his dissenting judgment, best identifies the status of the jurisprudence. He recognizes that in its primary intent, to protect spouses and dependent children, the Act has been generally successful in achieving its object.

However, he states:

The same cannot be said of claims by adult children. The majority of the decided cases, particularly those which have been the subject of appeals, deal with such claims. The law developed in those cases is in a state of disarray such that it is all but impossible to predict with any confidence what result will flow from any given state of facts, and unduly difficult to decide what that result should be.\textsuperscript{113}

He identifies the court's jurisdiction, as provided by Section 2(1) of the Act, as coming into being after it reaches

\textsuperscript{112} Ibid., at p. 270 E.T.R.
\textsuperscript{113} Ibid., at p. 273 E.T.R.
the conclusion that the testator has not made "adequate provision for the proper maintenance and support" for his surviving spouse or children, such negative finding being a condition precedent to the court making an award in favour of the applicant.

Esson J.A. further comments that the language of the section could have been interpreted as requiring the court to make provisions relative to the obligations which existed during the testator's lifetime. It could also have been interpreted as requiring the applicant to demonstrate need for provisions in excess of those contained in the Will. Had it been so interpreted, Esson J.A. states, "there would be an objective basis for deciding whether an able-bodied child could recover."114

However, it has not been so interpreted. On the contrary, a long line of binding decisions have enunciated the concept of "moral duty" to children, and that need is not a condition precedent to the claim. Esson J.A. concludes that "need having been excluded as an essential element, the opinion whether adequate provision has been made must be almost entirely subjective; it must be based largely on the individual Judge's sense of the fitness of things."115

114 Ibid., at p. 274 E.T.R.
115 Ibid., at p. 274 E.T.R.
In a comment, reminiscent of that of O'Halloran J.A., Esson J.A. concluded:

That sense may vary widely from person to person, depending upon such things as religious and cultural background, family history and attitudes, and personal experiences.

He concludes further that the prevailing view, presumably of the judiciary, is that parents have generally some obligation to provide, (in their Will,) for their children regardless of age. He recognized that "It is open to question whether most people, in the British Columbia of 1920 or 1983, would have agreed with that view."

In direct contrast to his perception of the popular view; the inevitable conclusion from the cases, as well as Esson J.A.'s own view of those cases as expressed in his judgment is that a claim by a disinherited child will, with some degree of certainty, succeed. However, the result of any case is uncertain because the remedies are totally discretionary. In Esson J.A.'s own words "there is no way of knowing what provisions will be found to be appropriate in any given case."

Esson J.A. concluded his dissenting judgment by adopting

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116 See text, infra at p. 120.
117 Ibid., at p. 274 E.T.R.
118 Ibid., at p. 274 E.T.R.
119 Ibid., at pp. 274 and 275 E.T.R.
the principle that generally the testator is under a moral
duty not to disinherit his children and awarded the Plaintiff
one-fifth of the estate.

Thus the majority on the facts found that there was no
moral duty owed, it having been displaced by the long separa-
tion. The dissenting judge found that the moral duty had not
been displaced and therefore the testator could not disinherit
his children.

The decision is a further manifestation that the Act is
being utilized by the judiciary as a forced heirship statute
in an environment where testamentary freedom is considered to
be the prevailing philosophy and without the understanding of
forced heirship nor with adequate safeguards which, out of
necessity, are inherent in any such statute. It is inconceivable
that the court could adopt such a stance without some
legislative directions on what portion of their progenitors' estates disinherited children are entitled.
CHAPTER 5.
SURVIVAL OF RIGHT OF ACTION

The thesis that the statute is treated as closer to a forced heirship concept than a remedial one is reinforced by the treatment in the B.C. courts of claimants who have died after the death of the testator. Although there is no case in British Columbia, as yet, that deals with the commencement of an action by the personal representatives of a claimant, there are cases that do make awards in favour of the estate of claimants who have died after commencement of an action.

The question as to whether or not the right of action given by the Act survives the death of a claimant should be divided into three distinct categories:

(1) The claimant who survives the testator but dies without commencing the action.

(2) The claimant who has died after he has commenced the action but before the hearing.

(3) The claimant who dies after the hearing but before all appeal procedures are exhausted, i.e. before "final" judgment is delivered.
As to the first category, there is no case in Canada, or any other jurisdiction with dependents' relief legislation dealing with this point.\(^{120}\)

For purposes of this analysis, categories (2) and (3) may be combined as one. Although the British Columbia Court of Appeal considered in varying degrees the question of survival of actions under the Act in *Barker v. Westminster Trust Company*,\(^{121}\) the case cannot be considered as decisive authority on the issue for two basic reasons. Firstly, no clear ratio is discernable from that decision. To quote from the editorial note\(^{122}\) of that report:

\[\text{In result this judgment decides nothing more than that the trial Judge wrongly exercised his discretion in refusing the applicant maintenance out of his wife's estate. On none of the other important questions raised is there a majority opinion.}\]

\(^{120}\) It could probably be safe to assume from the dictum in the various cases that in jurisdictions other than British Columbia, the Courts would not entertain an action commenced by the representatives of a deceased claimant. See for example *Re McMaster* (1957), 10 D.L.R. (2d) 436 at p. 442, 21 W.W.R.(N.S.) 603 at p. 609 (Alta S.C.) where Egbert J., stated: "I accordingly find that the widow's right to relief and to apply for relief terminated upon her death, and the application for relief by her executors is dismissed."; See also: *Wetzel v. National Trust Company Ltd.* (1956), 4 D.L.R. (2d) 171, 18 W.W.R.(N.S.) 556 (Sask. C.A.), *Re Kerby Estate*, [1949] O.W.N. 187 (Co. Ct.).

\(^{121}\) *Supra*, footnote 27.

Secondly, the wording of the statute is no longer the same as it was when the issue was considered by the Court.

As to the wording of the statute, O'Halloran J.A. considered the then Section 13 which read:

The application may be made by an executor on behalf of any person entitled to apply or by any guardian or next friend of an infant.

He decided that the phrase "an executor" did not refer to "the executor" of the testator but that of the claimant.\(^\text{123}\)

McDonald J.A., on the other hand, would have read Section 13 as contemplating an executor applying on behalf of a living person. In his view, the section contemplated the executor of the testatrix (or) applying on behalf of her husband (his wife) or children, not the executor of the husband (wife) or children applying.\(^\text{124}\) His rationale for this interpretation of the section was that the executor anticipating proceedings under the Act might well wish to originate them himself to bring the matter to a head and accelerate the administration of the estate.

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The diverging interpretations placed on the section are no longer of relevance as Section 13 has been repealed.\textsuperscript{125}

Nevertheless the case is highly relevant since the question of survival of an action under the Act was extensively discussed by two of the judges of the Court of Appeal. The issue was, simply, whether judgment on the appeal should be given despite the death of the claimant before Reasons for Judgment were handed down.

O'Halloran J.A. decided that the right of action given by the Act did survive the death of the applicant, so that the personal representatives of the applicant were entitled to continue the action on his behalf. Macdonald J.A., on the other hand, disagreed with this view and held that the Act did not contemplate the survival of an action after the death of the applicant.

O'Halloran J.A. stated "In this case...it must be held the right vested on the death of the testatrix".\textsuperscript{126}

He further stated that:

\[\text{T}he\ \text{statute\ itself\ plainly\ indicates,\ and\ as\ applied\ in }\text{Walker v. McDermott...the\ provision\ in a}\]

\textsuperscript{125}S.B.C. 1971, c. 64, s. 4.

proper case...may extend to an equitable share in the estate....127

On the basis of such statements it must be concluded, that at least in his view, the Act provided a property right, a chose in action, and thus enforceable by the personal representative of the deceased claimant. It was enforceable even if the claimant, having survived the testator, died before commencing the action.

McDonald J.A. disagreed fundamentally with O'Halloran J.A.'s interpretation of the objects of the statute. In his view the Act did not create a vested right in a dependent to a share of the deceased's estate. In his dissenting judgment, McDonald J.A. stated:

The Court is to be governed by the applicant's needs and moral claims and not by anything resembling legal rights. So, clearly its powers under the Act are no ordinary judicial powers. The questions naturally arise: How can the Court be asked to meet the needs of a person who no longer needs anything? How can the Court properly provide for maintenance of a person who can no longer be maintained?128

Concluding that the right to invoke the court's jurisdiction belonged solely to the dependent and since he was no longer


alive, he stated that there could be no basis for obtaining an award under the Act.

O'Halloran J.A. also found support for his reasoning in the language of the statute itself. Section 3 of the Act provided that the application could be made "by or on behalf of" wife, husband or children of the testator. Section 13 provided that:

The application may be made by an executor on behalf of any person entitled to apply or by any guardian or next friend of an infant.

In O'Halloran J.A.'s view these sections indicated that the statute itself envisaged the possibility that a claimant might die before having established his claim and that, in that event, provision was made for his executor to continue the claim on his behalf.

McDonald J.A. disagreed with O'Halloran J.A.'s interpretation of Sections 3 and 13, holding that they contemplated a right of action being brought on behalf of a living person.129

129 McDonald J.A.'s interpretation of Section 13: (D.L.R. at p. 535, W.W.R. at p. 496, B.C.R. at pp. 47 and 48.)

"I have no doubt that s. 13 contemplates the executor of the testatrix applying on behalf of her husband or children, not the executor of the husband or children applying. This is confirmed by the wording of s. 3, which clearly contemplates a living person's applying (by himself or through another)."

is plausible. However, it is not necessary to form a concluded opinion on this point since O'Halloran J.A., did not rest his decision exclusively on this point and the Section was repealed in 1971, (S.B.C. c.64, s.4.).
The result of Barker, therefore, is to produce two diametrically opposed views as to the right of action given by the statute. In the view of O'Halloran J.A. the Act creates a vested right on the part of a dependent from the moment a testator dies without having made reasonable provision for the dependents in his Will, and such is the nature of this right that it survives the death of the dependent and passes to his personal representative. In the view of McDonald J.A., however, the right to make a claim under the Act does not depend on any vested right but rests instead on a sort of expectation on the part of the dependent that a court will exercise its discretion in his favour if he makes a claim. Such an expectation can, of its nature, only be available to a living dependent.

The next British Columbia case dealing with the question of an award for a deceased applicant, who died after the death of the testator and after filing the petition, but before the hearing, is Re Calladine Estate where Wilson J. adopted the ruling of O'Halloran J.A. in Barker v. Westminster Trust Co. [1941] 3 W.W.R. 473, at 482:

The court should therefore consider the merits of the appeal as they existed when the husband was alive. ... the rights of the parties inter se should be considered as they existed at the commencement of the litigation: Vide In re Keystone Knitting Mills Trade

Mark [1929] 1 Ch 92, 97 LJ Ch 316. The court in coming to its conclusions should be governed by the circumstances as they existed when the statute was invoked.

Wilson J. concluded by awarding to the executor of the deceased claimant a sum equal to what he would have given the claimant if living, thus transferring one-half of the capital of the estate to the estate of the deceased applicant.

The next, and last, case on the subject is Brauer v. Hilton where one of the claimants died after the trial, but before the appeal, and an order was made pursuant to the provisions of Section 11 of the Administration Act, appointing his widow to act as representative of his estate for the purposes of the appeal. Hinkson J.A., without hesitation and without reference to any jurisprudence, and with no apparent argument by counsel, as to the question of the entitlement of the claimants, made an award to the estate of the deceased applicant.

When statements such as: "should receive an equitable share of the estate ."; "responsibility ... not to disinherit ..."; "would a judicious father have disinherited

131 Supra, footnote 83.
132 R.S.B.C. 1960, c. 3.
his only daughter?"\(^{135}\) are combined with the implication of the awards made to deceased claimants and the present view as expressed by Wilson C.J.C.A. in Re Bowe\(^{136}\) "that the circumstances to be taken into consideration are those existing and reasonably foreseeable at the date of the testatrix's death ..." (which would presumably give the applicant a vested right) the inevitable conclusion is that, regardless of the articulated purpose of the statute that it is intended to assure dependents of proper maintenance,\(^{137}\) the actual result of the cases is to assure claimants a fair share of the estate.

It can be said, therefore, that:

In British Columbia, testamentary freedom has been eroded to a considerably greater extent than in other provinces because its Courts have too freely exercised a wide discretion which, it is submitted, is not to be found within the statute. The B.C. Courts have not simply limited testamentary freedom in order to provide maintenance which is clearly mandated by the statute but also to provide a fair distribution of the estate which is not mandated by the statute.\(^{138}\)

\(^{135}\) Supra, footnote 70 at p. 140.


CHAPTER 6.

GUIDELINES FOR EQUITABLE DISTRIBUTION

The origin of the Act was clearly remedial and the early cases leave no doubt that the courts so interpreted the Act. So long as the remedial concept is followed, the Act is quite workable and the early cases, once having determined that the court had jurisdiction, did provide maintenance for the applicant without disturbing the concept of testamentary freedom.

A contemporary example of a most novel, yet totally practical and realistic, guide post in making an award based on the remedial philosophy was that used by Lander L.J.S.C. (as he then was) in Bates v. Bates et al.\(^{139}\) Using actuarial evidence, he ordered that a sum be set aside from the estate to provide income to the deceased's widow. In using this approach, the judge treated the Act as remedial and provided a remedy for the protection of the widow. It is unfortunate that the Court of Appeal\(^ {140}\) although upholding Judge Lander's decision did not see fit to comment upon his method of reaching the award.


As far as can be determined, this is the only reported case that has used actuarial evidence to quantify the award. The concept is clearly desirable as it avoids "intuitive assessment", and the dangers of relying on the "discretion of the Judge" as graphically described by O'Halloran J.A. It would go a long way towards restoring the statute to its original philosophy.

Difficulties are encountered, however, when the courts use the Act for purposes of allocating an "equitable share" of the estate, either to augment a provision already made or to prevent disinherition. At this point, the Act is not equipped to serve as a "forced heirship statute" and the courts have struggled to identify a guideline or standard.

This problem was identified by Macdonald J.A. in Re Lewis and an attempt was made by O'Halloran J.A. to deal with it. Without articulating the thesis O'Halloran J.A. must have recognized that if he were to use the Act as a

143 Although the methodology used by Lander L.J.S.C. is novel and more scientific the concept and result were no different than those used by the early B.C. cases decided immediately after the enactment of the Act. (See text, supra, at pp. 3 to 10.)
144 See infra, footnote 195.
145 Supra, footnote 27.
vehicle to prevent disinherition, it was essential for him to find guidelines or norms which were not outlined in the Act itself. In grasping for standards he stated that:

What is the standard or the yardstick by which the Court shall determine if a provision is adequate, just and equitable? The words of the statute 'in the opinion of the Judge before whom the application is made' should not be read too literally, for then we would revert to the time when Equity was interpreted by the length of the 'Chancellor's foot' and of which Lord Camden was prompted to write:

'The discretion of the Judge is the law of tyrants; it is always unknown; it is different in different men; it is casual and depends upon constitution temper and passion. In the best it is often-times caprice; in the worst it is every vice folly and passion to which human nature is liable.'

However, there is a standard for the guidance of the Judge. It is the standard set up by law for the distribution of intestate estates.146

He concluded that the "intestacy provisions of the Administration Act ... provide a convenient and recognized standard for determining whether adequate provision has been made..."147

During the next forty years, the principle propounded by O'Halloran J.A. (supra) was treated with indifference by the Courts of British Columbia, and was neither enthusiastically


adopted nor violently rejected, although a few cases made reference to it. In 1982, however, Seaton J.A. rejected the argument that the proper standard to apply was what the claimant would have received in an intestacy under the Administration Act and concluded "that the test laid down in the Wills Variation Act is sufficient expression of the legislative will, ..."

In the ongoing search for a reasonable standard to be applied in an application under the Act, Taylor J. introduced

148 Re Willan, [1951] 4 W.W.R. 114 at p. 132 ( Alta. S.C.), Egbert, J. stated "[W]ith all respect, I think there is nothing in the statute of British Columbia which justifies such an interpretation being placed upon it...".

149 In Re Dupaul (1941), [1941] 4 D.L.R. 246 at p. 247, 56 B.C.R. 532 at pp. 534 and 535 (C.A.) O'Halloran J.A. commented:

"The combined sum so nearly approximates the share of the estate the husband would have received if the wife had died intestate (vide s. 112(2) of the Administration Act, R.S.B.C. 1936, c. 5), it is not difficult to believe, that in his search for a standard of public policy to guide his discretion in the difficult decision he had to make, the learned Judge turned to the intestacy provision as a generally accepted indication of what was 'adequate just and equitable in the circumstances.'"

In Re Jones Estate (1959), 30 W.W.R. (N.S.) 498 (B.C.S.C.) Ruttan J. observed at pp. 507 and 508 that:

"there is some authority in this province for the proposition that the court's discretion is restricted by the same rule which governs the apportionment of estates to widows and children upon intestacies under the Administration of Estates Act, R.S.B.C. 1948, ch. 6."

However, it was not a rule that must be rigidly followed although it merited the most careful consideration.

a reasonable, although short-lived concept not dissimilar to that of O'Halloran J.A. when he [O'Halloran J.A.] adopted the intestate succession provision as a standard. In Richards v. Person et al.\textsuperscript{151} Taylor J. commenced his judgment by stating:

This action ... raises the question whether a surviving spouse can today reasonably be held entitled to less under the Wills Variation Act, R.S.B.C. 1979, c. 453, than would have been awarded under the Family Relations Act, R.S.B.C. 1979, c. 121, on a separation during their lives.

He concluded:

[T]hat where ... the court is vested with broad discretion and required to do that which appears just it ought always to seek guidance by reference to contemporary custom, and particularly to those rules which the community has adopted as part of the statute law. Where the community has declared that spouses should, prima facie, share certain assets equally on a divorce or voluntary separation, that is something which a court can hardly ignore in deciding what allocation of such assets would be 'adequate, just and equitable' upon death.\textsuperscript{152}

Given that conclusion, he applied, the standard that would have been applied in a claim under the Family Relations Act.\textsuperscript{153}


\textsuperscript{152} Ibid., at p. 671.

\textsuperscript{153} R.S.B.C. 1979, c. 121.
An appeal was taken from Taylor J.'s decision\(^{154}\) and although the quantum of the award was not disturbed, the principle of referring to the Family Relations Act as a guide was totally rejected. Carrothers J.A. stated in his judgment:

> I appreciate the temptation to adopt this ... [the provisions of the Family Relations Act] ... as a measure of community standard when determining 'adequate provision' under the Wills Variation Act. However, the considerations and equitable forces operating on a division of assets following an inter vivos marriage breakdown are vastly different from and irrelevant to those which come into play upon the death of a spouse, and are, with respect, improper considerations under the Wills Variation Act.\(^{155}\)

Hinkson J.A. agreed with the disposition of the appeal as indicated by Carrothers J.A.. He also adopted Seaton J.A.'s rejection in Bates v. Bates\(^ {156}\) of counsel's submission that the theory of the Family Relations Act as a guide, as put forth by Taylor J.,\(^ {157}\) should be considered.

The combined result of these two Court of Appeal decisions is that it is not proper for the court to consider either the provisions of intestate succession or the Family Relations Act in making an award in an application under the

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\(^{156}\) See supra, footnote 150.

Act, forcing the courts to be increasingly subjective in their awards.

A treatment of the Family Relations Act is beyond the scope of this paper; however, there is in British Columbia a lack of symmetry between the testator's obligation before and after his death. If marriage breakdown during the testator's lifetime is, in general terms, an event which triggers the equal distribution of marital property, it is logical that a marriage breakdown caused by death should be an equal triggering event. Taylor J. attempted to bring some harmony between the Family Relations Act and the Act. The Court of Appeal did not feel it could endorse such concept and in fact rejected it.

In this context, it is worthy of note that the province of Ontario by its newly enacted Family Law Act\(^\text{158}\) generally makes provision that the value of all property accumulated by spouses during their marriage, including the matrimonial home, is to be shared equally when the marriage ends. The concept is extended to the termination of marriage by the death of a spouse. If a deceased spouse's net family property exceeds the net family property of the survivor, then the surviving spouse would be entitled to one-half the difference.

\(^{158}\text{S.O. 1986, c.4, which received Royal Assent on January 17th, 1986, and proclaimed in force on March 1st, 1986.}\)
CHAPTER 7.

ASSETS SUBJECT TO THE ACT AND
THE AVOIDANCE OF ITS APPLICATION

The provisions of the Act can only apply to those assets which devolve through the deceased's personal representative. Those assets which devolve outside the deceased's estate, and therefore outside the control of the personal representative, are immune from possible charge by the Act.

This principle was clearly identified by the Alberta Supreme Court in Dower v. Public Trustee et al. where Riley J. in his judgment stated:

No part of any property with which he has parted during his lifetime can be administered by the court under The Family Relief Act and the statute does not regulate or refer to dispositions made during the deceased's life-time. The court, therefore, has no jurisdiction to grant a dependent a share of any property which was not owned by the deceased at the date of his death and is not comprised in his estate. Gifts made inter vivos with an intent to reduce the size of a man's estate do not hinder, delay or defeat his dependents' claims under the statute as the statute does not authorize any interference with inter vivos dispositions of his property.

He then concluded with the following observation:


It may well be socially undesirable to allow a husband to deliberately impoverish himself by denuding himself of well nigh all his assets during his lifetime, to the point that an application for relief under The Family Relief Act would be abortive, and I quite concede that the state may well have an interest to seeing that a husband carries out his responsibilities for the support of his wife and his dependents, both during his lifetime and following his death—an interest in the avoidance of penury, an interest in a workable Family Relief Act. That, of course, is a matter for the Legislature and not for the Courts.161

The principle goes beyond inter vivos gifts. Kellock J.,162 in the Supreme Court of Canada when dealing with similar legislation, stated:

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. Instead of containing any provision that a dependant is entitled to a higher right than creditors, as is here contended by the appellant, the statute is express in placing the dependant in a less favourable position.163

A close consideration of the cases, in this area, leaves no doubt that established property concepts have been inviolate. The courts have considered dependents' relief legislation as a control over testamentary freedom and therefore "a limitation on the freedom of the individual to do what he

163 Ibid., at pp. 519 and 520.
likes with his own."\(^{164}\) The courts have concluded that if the courts were to include outside assets as part of the "estate" "it would be legislating, and not interpreting",\(^ {165}\) which "of course is a matter for the Legislature and not for the Courts".\(^ {166}\)

The courts have recognized that "it may well be socially undesirable to allow a husband to deliberately impoverish himself by denuding himself of ... his assets during his lifetime to the point that an application for relief under the Family Relief Act would be abortive ..."\(^ {167}\) They have lamented their inability to make allowances out of excluded assets,\(^ {168}\) yet appear to have concluded that they cannot interfere with established property concepts even if they are being used for the specific purpose of avoiding the application of the remedial provisions of dependents' relief legislation.\(^ {169}\)

\(^{164}\) In re Kensington (deceased), Kensington and another v. Kensington and others, [1949] N.Z.L.R. 382 at p. 397.

\(^{165}\) Ibid., at p. 398.


\(^{167}\) Ibid., D.L.R. at p. 40, W.W.R. at p. 142.


The following are the most common types of asset tenure that can effectively neutralize the provisions of dependents' relief legislation:

(i) **Joint Tenancies**

Theoretically a person may avoid the provisions of dependents' relief legislation by transferring property into his and his selected beneficiary's name in joint tenancy. By so doing the testator ensures that the property so transferred does not pass on his death to the personal representatives and therefore is unable to be charged with an order under dependents' relief legislation.

There seems to be only one decisive case in Canada on the subject. In *Re Maxwell Estate*\(^{170}\) in proceedings under The Dependants' Relief Act, R.S.S. 1953, ch. 121, interpreting provisions similar to those common to most dependents' relief legislation in the country, the court concluded:

\[ \text{[T]he husband's one half share of the joint property shown as part of his estate by the executors was not in law part of his estate as the term is defined in sec. 2 (1) of the Act:...} \]

It seems clear that he no longer had power to dispose of his share of the joint property by will, so it follows that it is not part of his estate for the purposes of the Act.\(^{171}\)

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\(^{170}\) *Re Maxwell Estate* (1962), 38 W.W.R. 23 (Sask. Q.B.).

\(^{171}\) Ibid., at pp. 24 and 25.
Although the Maxwell Estate is the only relevant precedent it may be limited in scope because the court found that the circumstances were not a deliberate attempt to avoid the provisions of dependents' relief legislation.

(ii) Gifts Inter Vivos

In the early developments of dependents' relief jurisprudence, both the courts of Australia and New Zealand articulated the principle that if a valid gift was made inter vivos, the courts had no power to interfere with it even if the result of the gift was to avoid the provisions of dependents' relief legislation.

In re Richardson, deceased\textsuperscript{172} in considering inter vivos alienation of assets the court stated:

If a person disposes of his property otherwise than by will, although the result may be that the persons mentioned are left at his death without adequate provision for the purposes set out, this Court cannot interfere with his disposition made during his life.\textsuperscript{173}

The Supreme Court of New Zealand in \textit{Re Thomson (deceased), Thomson and another v. Thomson},\textsuperscript{174} in dealing with similar circumstances adopted the views expressed by Poole J. in the

\begin{itemize}
\item \textsuperscript{172} [1920] S.A.L.R. 24.
\item \textsuperscript{173} Ibid., at p. 40.
\item \textsuperscript{174} [1933] N.Z.L.R. 59.
\end{itemize}
Richardson case\textsuperscript{175} and held that: "The statute in no way attempts to regulate dispositions in life.",\textsuperscript{176} and that: "The Act then makes an \textit{ex post facto} interference with the exercise of testamentary powers, but does not further interfere with alienation."\textsuperscript{177}

It is important to note that in the Thomson case an allegation was made that the testator had completed the \textit{inter vivos} gift with the express purpose of defeating the dependents' relief statute. The court concluded that there was no evidence before it to satisfy such allegation,\textsuperscript{178} leaving unanswered the pertinent question of what would the court have done if it were proven that the \textit{inter vivos} gift was as a direct result of a plan to avoid the statute.

The most cogent decision dealing with the question of \textit{inter vivos} alienation is that of \textit{Dower v. Public Trustee et al.}\textsuperscript{179} where an application was made, \textit{inter alia}, to have certain \textit{inter vivos} gifts declared void or alternatively, impressed with a trust, on the grounds that the gifts had been made with the express purpose of avoiding the provisions of the Alberta \textit{Family Relief Act}. Although the transfers were

\begin{itemize}
\item \textsuperscript{175} \textit{Supra}, footnote 172.
\item \textsuperscript{176} \textit{Supra}, footnote 174 at p. 62.
\item \textsuperscript{177} \textit{Ibid.}, at p. 63.
\item \textsuperscript{178} \textit{Ibid.}, at p. 62.
\item \textsuperscript{179} \textit{Supra}, footnote 159.
\end{itemize}
substantial they were made gratuitously and had the effect of rendering the estate virtually impecunious. The court rejected the claim and in so doing considered, in detail, the effect of inter vivos alienation on the Act.

Riley J., stated:

I am of the opinion that no action lies under 13 Eliz., c. 5 [Fraudulent Conveyances Act] by a wife or widow to set aside transfers or gifts of property made by her husband during his lifetime with an alleged intent to defeat her claim to a "fair" or "proper" share of his estate under the Family Relief Act, R.S.A. 1955, c. 109.

While the words 'Creditors and others' in 13 Eliz., c. 5 should be given a broad interpretation, they include only such persons who have 'legal or equitable' claims against the grantor or settlor. In May on Fraudulent and Voluntary Dispositions of Property, 3rd ed., it is said, p. 102:

'The words 'creditors and others' are wide enough to include any person who has a legal or equitable right or claim against the grantor or settlor, by virtue of which he is, or may become, entitled to rank as a creditor of the latter.'

His conclusion therefore was that:

No part of any property with which he has parted during his lifetime can be administered by the Court under the Family Relief Act and the statute does not regulate or refer to dispositions made during the deceased's lifetime.

It is of note that Riley J. articulated the principle that:

At common law a wife had no right to a share of her husband's estate and there was no limit on a husband's power to dispose of his own property by gift or by will.182

He then adopted part of the reasoning of Ford J.A. in Corlet v. Isle of Man Bank Ltd.183 which stated:

Counsel for the appellant makes the concession, in the soundness of which I agree, that the settlor's intention to avoid, escape or evade the payment of succession duty in Alberta or in Ontario and to prevent recourse being had by his widow to the Widows Relief Act, R.S.A. 1922, c. 145, is of no significance except as assisting in finding whether or not the trust instrument was or was not of a testamentary character.184

On the basis of his articulated principle and the reasoning of Ford J.A., Riley J. made the statement of public policy that, although socially undesirable to permit a spouse to divest himself of his assets during his lifetime so as to neutralize the protection of dependents' relief legislation, there was nothing in the legislation to prevent such course of action.185

184 Ibid., at p. 166.
Such statement answered the question, of the effect of deliberate course of conduct, which was left unanswered by the Supreme Court of New Zealand in the Thomson case, and leads to the conclusion that unless prohibited by the words of the statute, plans for the avoidance of the remedies available under dependents' relief legislation would not be set aside by the court.

(iii) Inter Vivos Trusts

In keeping with the general principle that the court has no jurisdiction to grant a share of any property which was not owned by the deceased at the date of his death, inter vivos settlements have the effect of removing assets from the estate of the testator, preventing them from being charged under dependents' relief legislation.

In Re Emele Estate¹⁸⁶ the Saskatchewan King's Bench Court held that assets passing by virtue of an inter vivos trust were not to be considered part of the estate for purposes of allocation of assets under the appropriate remedial provisions of the dependent's relief legislation.

Similarly, in Collier v. Yonkers et al.¹⁸⁷ a wife, prior to her death, settled the sum of One Hundred Thousand Dollars

¹⁸⁶ [1941] 2 W.W.R. 566.
upon a corporate trustee to pay the income to her upon her life and, upon her death, to distribute corpus amongst her children and grandchildren by representation. The estate assets, other than the trust fund, were of insignificant value. The husband argued that the trust fund formed part of the estate and subject to the provisions of the appropriate relief legislation. The Court of Appeal upholding the decisions of the trial judge held that:

The trust fund is not part of the estate of the wife and the court has no power under the Act to order that provision be made thereout for the husband.188

In re Paulin189 the court refused to include two duly created trust funds which, by virtue of the trust provisions, passed to the deceased's children on his death as part of the "estate" for purposes of the appropriate dependents' relief legislation. In reaching its conclusion, the court left no doubt that it was excluding the trust funds:

Notwithstanding the possibilities which this interpretation of the Act involves for those who may seek by non-testamentary dispositions to defeat the claims of a particular dependant or dependants, it seems to me no other view is possible,...190

188 Ibid., at p. 763.
190 Ibid., at p. 464.
(iv) Other Assets Excluded From the Provisions of Dependents' Relief Legislation

The general principle enunciated in *Dower v. Public Trustee*¹⁹¹ is equally applicable to other assets which, in fact, pass to designated beneficiaries independent of the testator's Will.

It has been held therefore, that: life insurance policies payable to a designated beneficiary do not form part of the estate;¹⁹² and similarly that pension funds and annuities could not be charged under the provisions of dependent's relief legislation.¹⁹³

Whether or not a proven intent to avoid the provisions of dependents' relief legislation would void any *inter vivos* transfer, or impress the subject matter of such transfer with a trust, or whether such transfer, socially undesirable as it may be, cannot be attached by the court, is really not the issue. The issue really is the potential to avoid the protection of dependents' relief legislation and at the very least, the exposure of a claimant to extended litigation to adjudicate on the effect of such transfer.

¹⁹¹ *Supra*, footnote 159.


Therefore, for effectiveness, if the statute is to be used as a remedial device, should contain anti-avoidance procedures otherwise it does not achieve its objective.
CHAPTER 8.

CONCLUSION

The courts in British Columbia have, to a great extent, approached the interpretation of the Act subjectively. Great emphasis is placed on the concept that there is a moral duty owed by the testator and, often, the remedy for a breach of such duty is a redistribution of the capital of the estate. The Act is remedial, its genesis clearly reflects such intentions. The Act should receive a fair and liberal interpretation so as to achieve its objectives. However, any interpretation which supports a concept of equitable redistribution of the estate cannot be justified by the wording of the Act and introduces dangerous uncertainties. In addition, such interpretation leaves both testators and claimants without definite criteria as to when an award will be made and the size of any award.

O'Halloran J.A. recognized the need for a definite and identifiable criteria.\(^{194}\) Macdonald J.A. in Re Lewis Estate\(^ {195}\) observed that:

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\(^{194}\) See text, supra, at p. 120.

In view of the decision of the Supreme Court of Canada in *Walker v. McDermott*, [1931] 1 D.L.R. 662, [sic] we are compelled to go to unexpected lengths in interfering with wills,....

The decision suggests the need of an amendment to disclose the intention of Parliament beyond the possibility of misunderstanding because as the statute now stands with that construction put upon it there is an invitation (now frequently acted upon) to attack wills without just cause thereby promoting domestic discord and injustice.

Unfortunately O'Halloran J.A.'s suggested criteria has been rejected\(^{196}\) and the legislative amendment "to disclose the intention of Parliament" sought by Macdonald J.A. never materialized.

The treatment of the Act by the British Columbia courts, and the awards made, shift its purpose from remedial to one giving proprietary rights to the persons entitled to apply under it. The awards made reflect a tendency to a "forced heirship" philosophy but the Act was not intended as such, and unlike true "forced heirship" statutes prevalent in other jurisdictions, it does not contain defined criteria to quantify the amount of the award.

Unless British Columbia is prepared to live with testamentary uncertainty, the legislation should clarify the purpose of the Act and enact appropriate amendments, whether they are to confirm the remedial nature of the Act or to codify a true forced heirship concept.

\(^{196}\) See text *supra*, at pp. 120, 121, 122 and 123.
The Law Reform Commission of British Columbia ("Commission") rejected the opportunity to recommend reform for the clarification of the purpose of the Act. The Commission recognized that "[the] chief criticism of dependant's relief legislation rests on the fact that it is discretionary, involving court application". However, notwithstanding this recognition the Commission concluded that:

The discretionary nature of the relief is also its strongest and most appealing feature, since it permits the greatest flexibility in handling these matters on a case by case basis.

The Commission further stated that the Act, in addition to giving the courts a great deal of flexibility, also permits the court to consider the interest of dependents of the deceased other than the spouse. In the opinion of the Commission "these are compelling reasons to retain dependant's relief legislation and not to tinker with its basic structure."

As to the nature of the court's discretion the Commission recognized and acknowledged that the courts

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198 Ibid, at p. 74.
199 Ibid, at p. 74.
200 Ibid, at p. 74.
[W]aver between applying tests of need and of moral obligation, and make awards that appear to vary between protecting dependants from destitution to equitably reapportioning the testator's estate.201

In spite of this recognition, the Commission expressed a view that under current law need is not a condition precedent for a successful application under the Act but one of many factors to be considered by the courts when exercising their broad discretion and that such broad discretion to the court was desirable.202

An alarming misunderstanding of the purpose of the Act is manifested in the following comments made by the Commission:

When, therefore, a testator by will prefers one or more members of his family over others equally deserving, the court should be permitted to inquire into the circumstances surrounding the making of the will in order to determine the testator's motivations. One function served by the Wills Variation Act, therefore, is to guard the testator from being victimized by grasping relatives and others. This is a function the Wills Variation Act could not serve if an applicant's success was based upon need. It is important, therefore, for the courts' discretion under the Wills Variation Act to remain as broad as possible.203

There is no legal basis for the proposition that the Act is to function as a safeguard against undue influence or any such like unlawful pressures upon the testator.

201 Ibid, at p. 75.
202 Ibid, at p. 75.
203 Ibid, at p. 76.
The Commission does recognize that the Act is responsible for a great deal of litigation. It also accepts the criticism of practitioners which collectively reflect the following view:

First, they were concerned that the current Act provides little certainty to whether an application will be successful, and what portion an applicant may be entitled to. Second, they were concerned that the current Act is being abused. Many unmeritorious applications are being brought. Rather than incur the expense of a trial, settlements of these nuisance claims are often made.204

Yet, the Commission concluded205 that as the language of the Act is capable of a more narrow interpretation than that which it has received the broad jurisdiction enjoyed by the court is largely of its own making. The Commission observed that the judges must find a broad jurisdiction useful to avoid injustice and therefore the courts' jurisdiction under the Act should not be confined.

The comments of the Commission, although not articulated in precise terms, make it clear that the Commission is endorsing, without fully understanding its implications, a form of equivocal forced heirship philosophy. By also viewing the Act as a safeguard against undue influence, when the testator favours one or more members of his family over others, (presumably not supportable under a proper undue influence claim)

204 Ibid, at p. 78.
205 Ibid, at p. 78.
the Commission would further endorse a concept that there is an obligation to treat claimants with some degree of equality. These concepts are, however, inconsistent with a broad court discretion which is also endorsed by the Commission. It is suggested that any theory that results in "forced heirship" or equality of treatment of claimants is not harmonious with the concept of broad discretion, as on any particular fact situation, views may vary widely amongst judges, testators and beneficiaries and no consistency of result could be anticipated.

The Commission has failed to recognize that it is impossible to impose a regime of "forced heirship" through dependent's relief legislation which is essentially remedial.

During the past sixty years the courts have, on the whole, used the Act as an antidisinheritance vehicle in contradiction with the original concept of the legislation. The Commission, essentially endorses such use of the Act, although the results have not been entirely satisfactory, and chose to recommend that the jurisdiction of the court should not be restricted or changed.

The Commission's recommendation is both alarming and disappointing. It had within its grasp the ability to recommend a solution to what is a most unsatisfactory condition. The Commission should have been unequivocal in recommending either:
1. A truly remedial system where, need in its extended meaning is the condition precedent; or

2. a true regime of forced heirship, whereby the testator is compelled to leave a certain portion of his estate to certain members of his family, presumably spouse and children.

Yet it chose to maintain the status quo with all its uncertainties and inconsistencies.

The reservations expressed\(^\text{206}\) by Arthur L. Close, the Commission's Vice-Chairman [as he then was] are much more reflective of the interpretation the courts ought to place on the Act. He recognizes that the original purpose of the Act was remedial, and that it was intended to satisfy the public concern that a testator may leave his dependents in needy circumstances and those persons becoming a charge upon the public purse; or in any event, that it was inhumane to require the testator's dependent to eke out an existence at a much inferior standard to that provided by the testator during his lifetime.

In the Vice-Chairman's view, the courts' decisions have gone beyond the social policy of the Act and in so doing have created an environment of uncertainty and fertile ground for

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\(^{206}\) Ibid, at pp. 152 to 157.
litigation by disappointed beneficiaries, even those who may be adult enjoying a comfortable lifestyle and not dependent upon the testator.

His recommendation would therefore be that claims under the Act be restricted to the testator's "dependents" which would be a class, limited generally, to the spouse and children under a certain age or under disability. In making this recommendation, there is also an acknowledgement that so long as dependents' relief legislation exists there will be uncertainty, but such uncertainty would be limited to what is "maintenance" as opposed to what is an equitable portion of the estate.

The recommendation would go a long way to clarify the purpose of the Act, would be consistent with its original intent, and would restore harmony with the philosophy of testamentary freedom.

207 Ibid, at pp. 157 and 158.
PART III: PERSONS ENTITLED TO APPLY UNDER THE BRITISH COLUMBIA WILLS VARIATION ACT
PERSONS ENTITLED TO APPLY
UNDER THE BRITISH COLUMBIA
WILLS VARIATION ACT

Section 2 of the Act identifies and limits "the testator's wife, husband or children" as the persons who may invoke its application. There is a reasonable body of jurisprudence which has interpreted the meaning of the persons entitled to apply and, in most circumstances, the law is well settled.
CHAPTER 1.

WIFE AND HUSBAND

There is no question that a reference to "wife" and "husband" can only mean a relationship resulting from a lawful marriage. The Nova Scotia Supreme Court in Re O'Connell,\(^1\) dismissed the application of a common-law spouse of seven years under the equivalent statute in that Province. Grant J. considered the definition of "widow" in Stroud's Judicial Dictionary:

A widow is a woman who has survived a man to whom she was lawfully married, and who was his wife at the time of his death.\(^2\)

He than concluded\(^3\) that in order to qualify under the statutory provision the relationship of the applicant and the deceased had to be that of a lawful marriage.

The wording of the Act does not admit any other type of union or relationship. However, where the validity of the marriage is brought into question the courts will presume in

\(^{1}\) (1979), 109 D.L.R. (3d) 584 (N.S.T.D.).

\(^{2}\) Ibid., at p. 585.

\(^{3}\) Ibid., at p. 585.
favour of its validity until evidence is adduced that in fact the marriage is a nullity.  

The status of the spouse is determined at the date of death of the testator and the fact that a decree nisi of divorce was issued to the parties prior to the death of one of the spouses does not alter the status of the applicant.  

Similarly, a remarriage after the death of the testator does not affect the ability of the surviving spouse to claim relief under the Act. In Bailey v. Public Trustee and Others in interpreting the meaning of the words "husband" or "wife" where the applicant remarried after the date of death of the testator but prior to the hearing, the court made the following statement:

[T]he status of a wife is fixed by her position at the moment immediately before the death of the husband, and that, being a wife then, she is a qualified applicant at any time subsequently.

It should be noted that the Act refers to "wife" and "husband". The New Zealand statute under interpretation by the Bailey case also used like words. A contrary view could

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easily be taken in jurisdictions where the applicant is referred to as "widow" or "widower".

The position of a surviving spouse, who has obtained, or has submitted to, a divorce in a foreign jurisdiction and the validity of such divorce is not recognized in Canada, is not settled. Prima facie, such a spouse would in the eyes of a British Columbia court continue to be a husband or wife within the meaning of the Act. However, the foreign decree can under certain circumstances be a bar to relief under the Act.

In Downton v. Royal Trust Co. et al., in which the wife submitted to the jurisdiction of the Court of Nevada to permit her husband to obtain a divorce (although it was subsequently found that the divorce was not valid in Canada), Laskin J. commented as follows:

My canvass of typical cases which have reached Canadian Courts indicates that the only claim to consistency that they exhibit is the application of a preclusion doctrine against a spouse who, having obtained a decree of divorce or nullity from a foreign Court incompetent to give it, seeks thereafter to assert that incompetence in order to gain a pecuniary advantage against his or her spouse or the estate of the spouse. The doctrine has an ethical basis: a refusal to permit a person to insist, to his or her pecuniary advantage, on a relationship which that person has previously deliberately sought to terminate.


The court thus clearly recognized, as a general principle, the preclusion doctrine that a spouse who has either obtained, or has submitted to, a decree of divorce from a foreign court incompetent to give it, can not rely on the invalidity of the decree to gain a benefit.

The court, however, recognized that under certain circumstances the doctrine should be qualified and the court should take into consideration the reasons, conditions and circumstances under which the parties submitted to the "jurisdiction of an incompetent foreign court".9

In the Downton case the evidence permitted the court to reach the conclusion that the wife did not derive any benefits from the foreign decree. It was not a case where she benefitted from it and on the death of her husband chose to rely on its invalidity to obtain additional benefits.

The court therefore concluded that in the circumstances of the case the preclusion doctrine should not apply and the wife was allowed to rely on the invalidity of the foreign decree. The court observed:

The present case stands, therefore, as one where the wife's formal submission to the foreign Court was not followed by any act or conduct in reliance upon it

nor was there any acceptance by her of benefits under it.10

The reasoning of the **Downton v. Royal Trust Co. et al.**11 case was adopted in **Re Jones** where in circumstances offering substantially similar facts the court stated:

According to that [**Downton v. Royal Trust Co. et al.**] judgment 'a broad and flexible approach based on equity is to be adopted in weighing the applicability of the preclusion doctrine'. Disqualifying inequity may exist, for instance, where 'action has been taken in reliance on the (foreign) divorce or expectations are based on it or when the attack on the divorce is inconsistent with the earlier conduct of the attacking party': report at p. 452 S.C.R., p. 413 D.L.R.12

The court concluded:

Applying these guidelines to the instant case I find that Alice [the wife] received no pecuniary benefit from the divorce and is not precluded from denying it on that ground.13

Therefore, based on ethical and equitable consideration, the court chose not to apply the doctrine of preclusion.


11 **Supra**, footnote 7.


Notwithstanding the fact that the issue is not settled, the two cases give a strong direction to the effect that if the applicant has had no benefit as a result of the foreign divorce he may attack its validity to establish that he qualifies as a spouse. On the other hand, if the applicant has relied upon the foreign divorce to gain benefits, or has acted in such manner that in the circumstances taken as a whole, it would be inequitable for him to plead the invalidity of the divorce the court will not allow him to do so.
CHAPTER 2.

CHILDREN

The recent enactment of the Charter of Rights Amendment Act, 1985\(^{14}\) has totally altered the interpretation which the courts had placed upon the meaning of the word "children".

Until the advent of the Charter of Rights Amendment Act, 1985 there was no question that a reference in the Act to "children" could only mean legitimate children unless the children were claiming through their mother's estate when Section 2(2)\(^{15}\) of the Act applied. The Section reads as follows:

\[(2) \text{For the purposes of this Act, an illegitimate child shall be treated as if he were a legitimate child of his mother.}\]

The question was unequivocally settled by Meredith J. in Re Brosseau Estate\(^{16}\) where the following point of law was put

\(^{14}\) S.B.C. 1985, c. 68 (received Royal Assent on Dec. 2, 1985 and came into force by B.C. Reg. No. 392/85. The pertinent sections for the purposes of this review, s. 80 and s. 119, were, by the Regulation brought into force with retroactive effect as at April 17, 1985).


to him for determination:

Are illegitimate children entitled to apply for provision from the estate of their father pursuant to the provisions of The Testator's Family Maintenance Act?

After reviewing an earlier decision on the point\(^\text{17}\) and the addition of Section 2(2)\(^\text{18}\) he concluded that:

I can only conclude that the addition of the subsection was remedial: to bring into the purview of the Act not only legitimate issue but illegitimate as well. Illegitimate children now have recourse under the Act but in respect of the estate of a deceased mother not father. As the Legislature, in extending the category of persons entitled to claim, limited the extension in the way that it did, I must answer the question passed [sic] on this application in the negative.\(^\text{19}\)

The new Charter of Rights Amendment Act, 1985 has removed, \textit{inter alia}, any distinction,\(^\text{20}\) for the purposes of the Act between legitimate and illegitimate children. Therefore, a child, regardless whether born in or out of wedlock, may apply for relief from either parent's estate.\(^\text{21}\) This development brings the Act in harmony with most other similar statutes in Canada and essentially adopts the recommendation of the Law


\(^{18}\) See \textit{supra}, footnote 15.

\(^{19}\) \textit{Supra}, footnote 16 at p. 256.

\(^{20}\) \textit{Supra}, footnote 14, s. 80.

\(^{21}\) \textit{Ibid.}, s. 119 (repeals s. 2(2) of the Act).
Reform Commission of British Columbia that no distinction should be made between children of married or unmarried parents.\textsuperscript{22}

By virtue of the Adoption Act\textsuperscript{23} and specifically Section 11(1) which states:

For all purposes an adopted child becomes on adoption the child of the adopting parent, and the adopting parent becomes the parent of the child, as if the child had been born to that parent in lawful wedlock. The reference to "child" in the Act will include an adopted child so long as the formalities of adoption have been observed. Therefore, a child who has been adopted by the testator, in accordance with the provisions of the Adoption Act, is entitled to claim under the provisions of the Act.\textsuperscript{24}

\begin{itemize}
\item \textsuperscript{22} Law Reform Commission of British Columbia, Report on Statutory Succession Rights, (1983) at p. 88 and 89.
\item \textsuperscript{23} R.S.B.C. 1979, c. 4.
\item \textsuperscript{24} Although there are no cases decided under the Act dealing with a claim by a natural child of the deceased who has been adopted, the decision of Hyde L.J.S.C. in Re Hartman; Mernickle v. Westaway (1985) 19 E.T.R. 304, was cause for alarm. Hyde L.J.S.C. would have allowed an adopted child to participate in the intestate succession of the estate of his natural parent. Fortunately, the Court of Appeal of British Columbia, Mernickle v. Westaway (1986) 1 B.C.L.R. (2d) 267, 22 E.T.R. 213, reversed Hyde L.J.S.C. on the basis that an adopted child ceases, on adoption, to be the child of his existing parents. Had the lower court decision been upheld, adopted children could, conceivably, have claimed, under the Act, against the estates of their natural parents.
\end{itemize}
It is immaterial for the purposes of the Act if a child is born in or out of wedlock or whether the child is the natural child or adopted child of the parents. The child must, however, be the child of the parent. Stepchildren or children to whom the parent stood in loco parentis can not qualify as "children" under the Act. 25

However, as the validity of an adoption is determined by the law of the place where that child was adopted, if the adoption has taken place outside the province of British Columbia, the child's status must be determined by reference to the place of adoption.

In Re (Mrs.) Mary Ann McAdam, 26 in an application by a child who had been adopted under the laws of the State of California, the argument was made, inter alia, that the Act did not afford relief to the petitioner, as she was only an adopted child of the deceased, and an alien residing in California. The court's response to this argument was:

In order to effect proper legal adoption, there should be, at least, a substantial compliance with all the essential requirements of any statute in force in the country where adoption takes place. The burden of proving such compliance rests upon the party asserting it, even though the tendency of the Courts may be, not to insist upon a strict compliance with such further statutory requirements. I find that this burden has been fully satisfied. ... I


think the rights and liabilities of an adoption are based upon the law of the locality in which it occurs. Once legal adoption takes place, it cannot be lightly destroyed. It is binding upon all parties concerned. So, if, as I have found, the adoption of Mrs. Seybold was legal in California, it thereby gave her the same standing and rights, as if she were the natural born child of her adoptive parents, no matter where they might reside in the future. She did not lose such rights through Mrs. McAdam leaving California and taking up her residence in British Columbia.27

The adoption must, however, be a legal one. In re Esplin Estate28 the petitioner argued that while there was no de jure adoption there was a de facto one, and that such was sufficient to bring him within the provisions of the then Wills Variation Act. Coady J. concluded that absent a de jure adoption the petitioner could not have "acquired any status entitling him to apply under the Testator's Family Maintenance Act, which applies only to a surviving wife, husband or child."29

The wording of the Act clearly limits its application to the deceased's children, and makes no reference to grandchildren. Nevertheless the issue came before the British Columbia Court of Appeal in Re Compton-Lundie Estate30 where the court

27 Ibid., D.L.R. at p. 139, W.W.R. at pp. 594 and 595, B.C.R. at p. 549,
in the judgment delivered by Bird J.A., reversing the trial judge as to his award to grandchildren who petitioned under the Act, stated "the Act does not, in our view, extend to making provision out of his estate for a testator's grandchildren..."31

31 Ibid., at p. 230. The Chief Justice of the Supreme Court of British Columbia seems to have made an Order on January 29th, 1958, in favour of grandchildren. Bird J.A. made reference, at page 230, to "reasons for judgment of the learned trial judge". An attempt was made to obtain those reasons to determine the rationale of the court in making an award for grandchildren. Regrettably the records of the trial and the appeal are no longer available at the Vancouver Registry.
CHAPTER 3.
PUBLIC TRUSTEE ON BEHALF OF CHILDREN

The issue of the right and obligation of the Public Trustee to commence proceedings on behalf of infants has received little judicial consideration.

The Supreme Court of Alberta In re Denton Estate\textsuperscript{32} had to rule on an application by the Public Trustee on behalf of infants. The facts of the case were simple. The testator was survived by his wife and five infant children.\textsuperscript{33} By his Will, the testator left his entire estate to the widow. The evidence of the widow was most favourable as it showed her to be a caring, dedicated and responsible mother. Nevertheless Ford J. concluded that:

\textit{[A]fter giving the question some anxious thought, I have reached the conclusion that a sense of prudence must indicate that it [the Will] does not ensure such adequate provision.}\textsuperscript{34}

He therefore provided that a portion of the estate be set aside for the maintenance and support of the children.

\textsuperscript{32} [1950] 2 W.W.R. 848.
\textsuperscript{33} All of whom qualified as "dependants" within the meaning of the Alberta Legislation.
\textsuperscript{34} Supra, footnote 32, at p. 851.
The logical conclusion of Ford J.'s findings is that regardless of the surviving guardian's ability, or legal obligation to maintain, the court must ensure that provisions are made in the Will for infants.

This issue was again considered in Alberta in Public Trustee v. Buchholz\(^ {35}\) where the testator left his entire estate to his widow and the Public Trustee brought an action on behalf of two infant children. The court, once more, ordered that a portion of the estate be reserved for the maintenance and support of the children.

The Court of Appeal\(^ {36}\) perceived that the Public Trustee was asking the court to make the appeal a "test case" for the proposition that in all estates when a testator fails to make provisions for the maintenance and support of infant children, the court should order an award if the Public Trustee chooses to make an application for maintenance and support.

The court, in the circumstances of the case, did not consider it appropriate for setting any such policy or precedent. As to the Public Trustee's reliance upon In re Denton Estate\(^ {37}\) the court's response was that "the decision in Re Denton should be reconsidered in the appropriate case. ...."\(^ {38}\)

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36 Ibid., at p. 506.
37 Supra, footnote 32.
38 Supra, footnote 35, at p. 509.
The Court of Appeal, at the very least, cast doubt on the principle that might have been extracted from the decision of Re Denton.

The issue has been dealt with in British Columbia only once, and then only by obiter dicta. In In The Matter of The "Equal Guardianship of Infants Act", R.S.B.C. 1960, Chapter 130, As Amended and In The Matter Of Cynthia Jane Malat and Dinnise Ann Malat, Infants the Public Trustee applied to be appointed guardian of the daughters, aged twelve and seventeen years respectively, for the limited purpose of launching an application on their behalf under the provisions of the then Testators' Family Maintenance Act. Meredith J. dismissed the application on the technical point that the Public Trustee had failed to obtain the consent of the two daughters as required by the then Equal Guardianship of Infants Act.

Although the lack of consent was sufficient ground for the application to fail, Meredith J. in his judgment chose to comment as follows:

In any event I do not think it has been shown, nor should it be assumed, that, even if proceedings under the Testator's Family Maintenance Act were to result in some special provision for the two children out of

40 R.S.B.C. 1960, c. 378.
41 R.S.B.C. 1960, c. 130, s. 14(1).
the estate, such provision would in net advance the welfare of the children. Proceedings under the Act would effectively pit the children against their mother, thrust upon the estate unwanted costs, occasion anxiety, pre-occupation and other strains on all sides, to say nothing of the risk of family discord. The possible disruption might well be much more harmful to the children than any benefit they might possibly receive from the estate.

I have not the slightest reason to suppose that Mrs. Malat will do other than the best for all her children during her lifetime. Nor should I speculate that she will do other than make adequate provision for her children out of what may remain of her assets, including those inherited from her husband, on her death.

Accordingly, as I am inclined to the view that the order sought would detract from rather than advance the interest of the two children, the order is refused.42

In the same light Lieberman J.A. recognized in Public Trustee v. Buchholz43 the conflict raised by society's concern for the welfare of dependent children and "our traditional concept of the privacy and sanctity of the family unit, and the right of one parent to depend upon the other to provide maintenance and support in all facets to their children..."44

Lieberman J.A. further commented as follows:

I am, however, cognizant of the deep resentment that people in our society feel towards governmental interference into essentially private family areas, particularly where all the evidence leads to only these conclusions, namely: that the children are

42 Supra, footnote 39 at p. 2.
43 Supra, footnote 35.
44 Ibid., at pp. 506 and 507.
being treated with love and understanding; that they are being brought up in an excellent environment; that their education is being encouraged; and that there is ample provision for their maintenance and support.45

A great deal of sympathy can be channelled in support of the concept that one parent should have the right, on death, to rely upon the other for the continued support of dependent children. But, what is the Public Trustee to do when faced with circumstances akin to those of Re Malat, and other cases discussed in this section?

At least in the province of Alberta the pertinent statute46 provides that when at the date of death the spouses are living together and the children are living with or being supported by the spouses or either of them, there is no obligation on the Public Trustee to make an application on behalf of the children if the Public Trustee is satisfied that the child or children will receive adequate maintenance and support.

British Columbia does not have similar legislation and therefore it can not be said that the Public Trustee can always exercise his discretion by examining the surviving guardian to determine whether or not an action is indicated.


46 Family Relief Act, R.S.A. 1970, c. 134, s. 15 [am. 1971, c. 1, s. 21(2)].
Unless it can be said that the Public Trustee should be entitled to rely on the common law\textsuperscript{47} and the statutory\textsuperscript{48} obligations of parents to support children, then the position in British Columbia may lead to the inevitable result that notwithstanding the circumstances in each individual case, the Public Trustee, in order to fulfill his responsibility, has no choice but to bring an application in every case where no provisions have been made for infants under the Will regardless of the outcome of such application.

This condition is clearly unsatisfactory. The Public Trustee should be permitted to exercise his discretion as to whether or not an action should be brought. The British Columbia statute should be amended to at least give the Public Trustee the discretion given to the Public Trustee in the province of Alberta.\textsuperscript{49}


\textsuperscript{48} \textit{Family Relations Act}, R.S.B.C. 1979, c. 121, s. 56(1).

\textsuperscript{49} See \textit{supra}, footnote 46.
CHAPTER 4.

RECOMMENDATIONS OF THE LAW REFORM
COMMISSION OF BRITISH COLUMBIA

The Law Reform Commission of British Columbia\textsuperscript{50} after considering Reports from other like commissions and analysing family rights under other statutes \textsuperscript{51} made the following recommendation:

(10) (1) That the \textit{Wills Variation Act} be amended to permit the following persons who survive the deceased to apply:

(a) spouse;

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

(c) common law spouse who, immediately preceding the death of the deceased,

   (i) was cohabiting with the deceased for not less than two years, or

   (ii) was receiving or entitled to receive maintenance, pursuant to the \textit{Family Relations Act}, from the deceased;

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

(2) That the \textit{Wills Variation Act} be amended to permit the following persons to apply if they were dependent on the deceased immediately prior to his death:

\textsuperscript{50} \textit{Op. cit.}, footnote 22, at pp. 78 to 89.

\textsuperscript{51} Such as the \textit{Family Relations Act} R.S.B.C. 1979, c. 121; the \textit{Estate Administration Act} R.S.B.C. 1979, c. 114.
(a) grandchildren;
(b) grandparents;
(c) parents;
(d) brothers, sisters, half-brothers and half-sisters.

(3) For the purposes of paragraphs (1) and (2), when determining relationships to the deceased, no distinction should be made between children of married or unmarried parents.52

Although the recommendation extends the class from what it presently is, it is much more limited in scope to recommendations made by other commissions which would extend the right to apply beyond the family members and would include close friends. The rationale behind limiting the extension was basically a recognition, by the Commission, of the concept that a person is under an obligation to consider the needs of his family, but not the needs of close friends who survive him.

Yet the Act, in its initial stages, was intended to provide protection for the deceased's spouse and children. One of the main reasons put forth by the propounders of the legislation, both in British Columbia and other jurisdictions, was that such members of the family should not become a financial burden on society and that there was confusion in a system of law where the deceased owed an obligation to such members of his family during his lifetime, yet not after his death. The Commission53 justifies extending the persons entitled to apply

53 Ibid.
on the basis that a testator has an obligation to consider the needs of his family, beyond his spouse and children, even though the importance of the family in contemporary society may have diminished.

The Commission theorizes that such extension may have the result of increased litigation, yet it concludes that action by such extended class would seldom occur.

The humane motives behind the recommendations are difficult to attack. However, the result sought to be achieved should be one of logic, and harmony with other statutes. There is at present statutory obligation to provide maintenance by one spouse to the other spouse; by a parent to a child; and by a child to a parent. Why should the obligations to maintain be different during the lifetime of the testator and after his death? This was one of the complaints voiced by the legislators in their various jurisdictions which introduced dependents' relief legislation. The introduction of such legislation was intended, in part, to achieve harmony between inter vivos and posthumous obligations. An extension such as that recommended by the Commission is regressive and would only add to the present malfunctioning of the Act.

If it is socially desirable to extend the persons entitled to apply, it should be done only after a restatement of the

54 Supra., footnote 48, ss. 56, 57 and 58.
philosophy of the Act and other collateral social legislation. Other jurisdictions have done so. The extensions, where applicable, have been tabulated in the Schedules to Part I (supra). In addition the province of Ontario's legislation, which reflects the most contemporary review of dependents' relief, is analysed in detail in Part IV (infra).
CHAPTER 5.

PERSONS UNDER DISABILITY AND RECEIVING
SUPPORT FROM THE STATE

Generally, there is little difficulty in determining those persons entitled to apply. The Act is clear, and the pertinent provisions of the Charter of Rights Amendment Act, 1985 removing any distinction between children born in or out of wedlock are also clear. To the extent that there are any questions, the jurisprudence provides adequate guidance.

There is, however, a very important exception to this general statement, specifically: whether or not a claimant would, or should, be excluded by virtue of the fact that such claimant is under some disability, either mental or physical, and is being maintained by the state.

The issue really is: is a person who is otherwise entitled to apply under the Act not entitled to relief merely because that person is maintained by the state through one of its social support schemes?

The cases, with very few exceptions, deal with persons suffering from mental disabilities. The emphasis in this discussion will therefore be on mentally disabled applicants. Yet the principle should be of equal application
to persons receiving state support regardless of the nature of their disability.

There are conflicting lines of authority as to the extent of the testator's duty to make provisions for a mentally disabled dependent who is being maintained by the state, and the law in British Columbia is far from clear. As the jurisprudence in British Columbia refers to that of other jurisdictions a brief analysis of the pertinent cases of those jurisdictions is essential.

The province of British Columbia, like many other jurisdictions, supplies care, at public expense, to the mentally incapacitated. Testators whose families include a mentally incapacitated member sometimes choose not to make testamentary provisions for him. The question in such cases is whether or not the Public Trustee as the "guardian" of such person can obtain an order under the Act requiring the estate to defray some or, indeed, pay all of the costs of such care.

Underlying this question is the issue of the nature of the benefit programmes administered by the state. On the one hand it can be said that all taxpayers contribute to financing such programmes and that there is therefore an absolute entitlement without further contribution. On the other hand, there exists the argument that although care itself is universally available, once the person for whom the care is being supplied has,
or is entitled to, funds of his own, he or she should contribute to the cost of such care.

Courts have not directly dealt with the underlying policy issue, presumably leaving such to the legislators. However, their treatment of such questions indicates extreme philosophical positions. Some courts have said that no testator, however large his means, need contribute. This view is found strongly articulated in England and New South Wales. Some other courts specifically those of New Zealand favour the idea of contribution, subject to the size of the estate and the needs of other claimants. The latter view is also predominant in Canada where estates of even moderate size have been made to contribute. The British Columbia Courts appear to require not only contribution to the cost of the state care, but also for provisions of extra amenities for the benefit of the institutionalized persons.

A. New Zealand Cases

New Zealand, as the first Commonwealth jurisdiction to enact dependents' relief legislation, not surprisingly was the first to deal with the issue of testamentary contribution in the case of institutionalized dependents.

In re McCarthy; Public Trustee v. Public Trustee the facts were that for some time before the testator's death, his wife had been a patient in a mental hospital and there was a nom-
inal charge only to the testator for such care. On his death, the testator made no provision for her in his Will.

Edwards J. stated that:

[The testator] having succeeded in casting the burden of nearly five-sixths of the cost of his wife's maintenance upon the community during his lifetime, has endeavoured to impose the whole of that liability upon the community after his death. Obviously it would be impossible to imagine a case in which the salutary provisions of the Family Protection Act could more properly be invoked than in this.55

The remarks of Edwards J. have often been cited as favouring variance of Wills to reimburse the state.

The issue came before the New Zealand Court of Appeal in the case of Curtis v. Adams56 where the trial judge augmented the provision for a child of the testator, who was a mental patient, at the cost of his other children's share. In reviewing the existing jurisprudence the appellate judges considered the case of In re McCarthy57 and other decided cases "of little assistance".58 However, the Court stated unequivocably:

57 Supra, footnote 55.
The Public Trustee was entitled to make application under the section, but we think that in a small estate the Court, in considering the various moral claims of the children of a testator, must take into consideration that an allowance made in favour of a child confined in a mental hospital is not in point of fact for its personal benefit, but is in relief of the general taxpayer.

The Court stated further that:

If this were a substantial estate it might have been the case that the moral duty of the testator would have required him to make provision for the payment of the mental hospital fees of his afflicted son, and that the Court should have made an order repairing any failure in his duty in that respect ...59

Obviously, the view of the Court was that the Public Trustee, in his representative capacity, had a right to bring the application, however, the Court before making an award would consider the size of the estate.

The position taken by the Court of Appeal in Curtis v. Adams is not quite as inflexible as that expressed by Edwards J. In re McCarthy where contributions were required. Nevertheless the Court of Appeal imposes a duty, subject to the size of the estate, to make provisions for the payment of hospital fees recognizing that such payments are not, generally, for the personal benefit of the patient, but for the taxpayer in general.

The philosophy underlining the Australian cases is not totally free from doubt. In Re Williams⁶⁰ Napier J. ordered that a husband's estate contribute to the maintenance of his widow, an inmate of a state mental hospital, stating that he could not take into account that an order in her favour would, in reality, benefit only the state.

Some five years later, Napier J. modified his position in In re Whiting.⁶¹ He recognized his earlier apparent contradicting decision in re Williams and distinguished it on the basis that the assets were greater and the testamentary beneficiary had no moral claim upon the estate.

Nevertheless, he clearly identified the issue as follows:

The question which has been principally debated in this case is whether the Court, in the discharge of this duty, should take into consideration the fact that any allowance, which may be made to the applicant, will not really enure for her benefit but will go in relief of the cost of her support in the State institution in which she now is, or in other words, in relief of the general taxpayer.⁶²

In reaching his conclusion he stated:

⁶² Ibid., at p. 192.
I cannot shut my eyes to the fact that the applicant has no real interest in the relief that is claimed.63

He therefore decided:

In the circumstances of this case, where the relief, if granted, would not enure to the benefit of the applicant herself, but to the benefit of the general taxpayer, I have no hesitation in refusing the application.64

Perhaps the strongest view rejecting an application on behalf of an incapacitated claimant is found in Re W. S. Duff.65 On an application on behalf of a survivor in a mental institution, Sugerman J. rejected the views expressed in cases such as Curtis66 and Whiting67 that the matter may turn upon the size of the estate. His analysis was basically that:

The State undertakes the burden of the maintenance in hospitals of mentally afflicted members of the community. The cost of such maintenance is discharged out of revenue.68

The duty of the estate of a deceased father to reimburse to the State the cost of maintaining a mentally afflicted child must, I think, be sought elsewhere than in the Testator's Family Maintenance Act,

63 Ibid., at p. 193.
64 Ibid., at p. 194.
65 (1948), 48 S.R. (N.S.W.) 510, 65 W.N. 282 (N.S.W. Sup. Ct.).
66 Supra, footnote 56.
67 Supra, footnote 61.
68 Supra, footnote 65, S.R. (N.S.W.) at p. 511, W.N. at p. 283.
and that, as it seems to me, whether the estate is large or small.69

The proper approach, then, appears to me to be that provision should not be made which would merely have the effect of relieving the revenue of a charge without conferring any benefit upon the applicant. A provision may of course be made where the applicant is benefited, even though in bringing about this result there is or may be some relief of the revenue.70

An analysis of the judgment in Re W. S. Duff would indicate that Sugerman J.'s views can be summarized as follows:

(1) Under present social legislation the state has a duty to maintain mentally infirm individuals.

(2) If such duty is to be shifted from the state to the estate of a deceased parent, there should be clear statutory language.

(3) The duty imposed upon the state does not negate an equal duty of a parent or a spouse to provide for an incompetent dependent

[I]n so far as provision may be made for benefits to the child [or spouse] other than or additional to mere maintenance during the period of confinement in a State mental hospital, such provision ought, subject of course to all other relevant circumstances, to be made, and in this respect the size of the

69 Supra, footnote 65, S.R. (N.S.W.) at p. 512, W.N. at p. 283.

70 Ibid., S.R. (N.S.W.) at pp. 512 and 513, W.N. at p. 284.
estate and the claim upon it are relevant circumstances.\(^\text{71}\)

However, in the absence of a High Court decision it is hard to say whether the Duff case reflects the Australian law.

C. English Cases

There is only one reported English case involving claims by mentally incapacitated dependents. In Re Watkins (deceased), Hayward v. Chatterton and Others\(^\text{72}\) the court refused to vary the Will of a testator who during the latter part of his life had maintained his daughter, the plaintiff, in a private mental hospital. Shortly before the death of the testator the National Health Service Act, 1946 placed upon the State responsibility to maintain persons in the daughter's position. The evidence was such, and it was accepted, that the testator expressed his intention to leave her care to the state as soon as the Act came to effect.

The court considered "whether it was reasonable for the testator to make provision for the plaintiff on the footing that she could and should be maintained free of charge under

\(^{71}\) Supra, footnote 65, S.R. (N.S.W.) at p. 513, W.N. at p. 284.

the National Health Service Act, 1946." Roxburgh J. had no hesitation in giving an affirmative reply.

Through the judgment he makes no reference to the testator's moral duty, nor to the fact that the order sought by the plaintiff would really not be for her benefit but for the benefit of the state.

The underlined theme of the judgment reflects the philosophy that the new health scheme was meant to relieve not just patients but also their families of the burden of supplying care and therefore the testator had no such obligation under his Will. No Commonwealth cases were referred to.

Although not dealing with mentally incapacitated persons, Millward v. Shenton provides an interesting parallel as it relates to the general concept as to whether or not a testator is relieved from responsibility to provide for a dependent merely because that dependent is receiving support from the state.

In this case, the testatrix, a widow, left her entire estate to charity and nothing to her six children on the rationale that they were, inter alia, self-supporting. The

fact was, however, that one of her sons was physically incapacitated and totally dependent on state assistance.

The trial judge took the position that it was reasonable for the testatrix to make no provision for the applicant, presumably because of the support he was receiving from the state. Lord Denning M.R. rejected the view of the trial judge on the basis that there was no reason for depriving the son of anything merely because he was receiving state assistance and stated:

So far from state assistance being a ground for giving him less, it is a ground for giving him more by doing something to alleviate the distress under which he suffers. It may not necessarily be by increasing his income. It may be better by providing a lump sum so as to enable him to have a television set, or a car, or even a better house. A lump sum would be best here.75

The Millward case does not deal with the responsibility for making provisions for dependents who are mentally incapacitated but it does deal with a case where the state, through its welfare scheme, is providing support to a person who is incapable of looking after himself. What the court seems to have done is to make provisions from the estate for something beyond mere subsistence "above the breadline".76

75 Ibid., All E.R. at p. 1028.
76 Ibid.
In Re Watkins the court did not disturb the provisions in the Will on the basis that the testator had made his Will relying on the provisions of the National Health Service Act, 1946. Although not articulated, it may be that the court recognized that in addition to the state provided support, the incapacitated daughter had been provided with a portion of the estate which would, in due course of time, provide her with additional "comforts".

Perhaps the English position is really no different than that expressed in Re W.S. Duff. 77

D. Canadian Cases

The Canadian provinces have produced numerous cases on the issue of testamentary provisions for mentally incapacitated people who are receiving support from the state, and although it could not be said that Canadian courts have unequivocally adopted the New Zealand philosophy and rejected the Australian and English ones, it can be said that there is clear preference for the former.

British Columbia offers the first reported case in Re Taylor Estate 78 where the testator left nothing for his widow who was institutionalized. Cody J. varied the Will of the

77 See text supra, at pp. 175, 176 and 177.
testator to provide for amenities, as and when needed, beyond those supplied by the institution. No mention was made of the concept that the burden of maintenance should be transferred from the state to the estate of the deceased.

The next Canadian decision is In re Cousins Estate, which has become a leading case and is generally considered in most subsequent decisions on the subject. In his judgment, Williams C.J.K.B. specifically rejected the principle enunciated in Re W. S. Duff (Deceased) [and inferentially that of in Re Watkins] and made the pronouncement that:

[T]here is in Manitoba a moral duty on a testator, who is able to do so, to make provision for the maintenance and support of an afflicted child, of whatever age, who is confined in a mental hospital. I hold that that moral duty is to the child and not to the state.

Williams C.J.K.B. chose to minimize the apparent importance given in Curtis v. Adams to the size of the estate by his comment that "but in my view the size of the estate is only a circumstance to be considered in determining what, if any, allowance should be made."

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80 Ibid., W.W.R. at p. 296, Man. R. at p. 381.
81 Supra, footnote 65.
82 Supra, footnote 72.
84 Supra, footnote 56.
He did recognize that:

[W]hile the moral duty exists, and it is at large as it were, it will, of course, only be enforced with due regard to the estate of the testator, the necessities of the objects of his bounty, and all the circumstances of the case.86

The next case in the chronology is the British Columbia decision of Re Brousseau Estate.87 The testator in his Will made provisions for the payment of his widow's maintenance in a provincial institution. An application was made on behalf of the widow for a larger portion of the estate so as to permit her being admitted to a private facility. Part of the argument made by counsel for the beneficiaries opposing the application was that the various statutes dealing with mental hospitals and mentally incompetents made provisions for maintenance for such persons by the state and therefore, the responsibility of such maintenance fell upon the state and not the testator.

To this argument Clyne J. responded:

Without deciding whether the relative provisions of these Acts would enable the public authorities to recover the cost of Mrs. Brousseau's maintenance from her husband's estate if he had not provided for payment by his will, I am of the opinion that the argument of learned counsel for the beneficiaries begs

the question. We are not considering the method of recovery of the cost of hospitalization of a lunatic in this case but whether a lunatic wife is entitled to share in her husband's bounty.88

He adopted the position taken in In re Cousins:

[T]here are cases such as In re Cousins (1952) 5 WWR (NS) 289, where Williams, C.J.Q.B. in a learned and comprehensive judgment reviews all the authorities on the point and comes to the conclusion that:

'Whatever may be the policy of the legislature with regard to the recovery of maintenance costs, I am of opinion that the policy of the legislature as shown by that Act is that it is the moral duty of a testator to make adequate provision for the proper maintenance and support of his dependant child who, by reason of mental infirmity, is unable to maintain and support himself.'89

Clyne J. concluded as follows:

To my mind it is clear that a man has a moral duty to support his wife in sickness and in health and the duty extends during their joint lives and after his death, in so far as his means permit. In my view, that moral duty is not discharged by reason of the fact that the state will look after his family if he does not and I have no hesitation in following the judgment in the Cousins case in preference to other authorities cited to me by counsel.90

Counsel for the residuary beneficiaries argued that the testator in fact made adequate provision for his wife as the

90 Ibid., D.L.R. at p. 671, W.W.R. at pp. 269 and 270.
public institution provided as good medical care as any private one in British Columbia. In responding to this argument, Clyne J., relying on the medical evidence that, while conceding the parity of medical care between public and private facilities, a private institution would provide more "quietness and a degree of privacy", stated as follows:

I am of the opinion that provision should also be made to ensure that she should have the best possible treatment while she remains ill, having regard to the size of the estate.

Clyne J. did not, therefore, limit the responsibility to the minimum care which would be provided by public facilities, but related such responsibility to the size of the estate and the care it could buy.

Some years later, Deniset J. of the Manitoba Queen's Bench attempted a different approach in Re Pfrimmer Estate where the deceased, a widower, was survived by two adult children, one of whom was an inmate of a provincial hospital and entitled to receive financial assistance from the Department of Welfare of the province of Manitoba for the cost of his care and maintenance. In his Will, the deceased left his entire estate to his other son.

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91 Ibid., D.L.R. at p. 672, W.W.R. at p. 270.
Deniset J. recognized that any benefaction to the incapable son would end up in the provincial coffers through the Department of Welfare. He also recognized that the policy of the legislature as to the Testators Family Maintenance Act was that a testator owed a duty of maintenance and support to his dependent children who, by reason of mental infirmity, were unable to maintain themselves, and yet there was no evidence of the legislature's intent as to dependents who were being maintained by the state.

Relying on the rationale of Re Watkins\(^94\) he concluded:

In my view it is reasonable today for a testator, fully aware of his moral obligations towards his wife and children, to take into account when making his will that the State does take care of the needy, and, in the absence of express legislation to the contrary, he does not fail in his moral duty if he considers that one of the 'relevant circumstances' regarding his dependants' means is help from the State.\(^95\)

On appeal,\(^96\) however, Deniset J.'s decision was reversed and the Court of Appeal reiterated that a testator's moral duty may persist, notwithstanding state support. Dickson J.A. stated, in delivering his judgment:

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\(^94\) Supra, footnote 72.

\(^95\) Supra, footnote 93, D.L.R. at p. 76, W.W.R. at p. 767.

We share the view implicit in the judgment of Williams, C.J.Q.B. in the Cousins case, supra, that a testator may owe a moral obligation to a disabled dependant notwithstanding that such dependant is being maintained by the state. A testator exercising the duty imposed upon him by the Act would have to consider, among other things, the following: (a) The possibility of recovery by the disabled person; (b) The minimal nature of state support which in most cases is unable to be much above subsistence level; and (c) The position of those for whom the disabled person is himself responsible, such as wife and children.97

In 1980 in Hawker et al. v. Hawker Estate98 the Saskatchewan Court of Queen's Bench in varying a Will where the testator left everything to a mentally sound child, and nothing to his three mentally handicapped adult children, made the following statement of the law:

It is now settled law in this province that the Dependants' Relief Act recognizes that it is the moral duty of the testator to make adequate provision for the proper maintenance and support of a dependent child of whatever age who, by reason of mental infirmity, is unable to maintain and support himself, even though his needs have to be provided by the state or he is a patient in a provincial institution maintained by the province. These principles were enunciated by the Manitoba Court of Appeal in Re Pfrimmer Estate (1969), 66 W.W.R. 574, and by Williams, C.J.K.B., in Re Cousins Estate, [1952] 5 W.W.R. 289, and were approved by Culliton C.J.S., in Spicer v. Fawell, an oral decision of the Saskatchewan Court of Appeal delivered on April 26, 1971.99

99 Ibid., at p. 435.
In less than a year after the decision in Hawker, Cameron J. of the same Court (Saskatchewan Court of Queen's Bench) took a conflicting position in Re Deis; Deis v. Deis\(^{100}\); reversed (sub nom Re Deis; Spicer v. Deis).\(^{101}\)

The case is somewhat different from the point of view that it involved an intestate succession and the application was brought by the widow with the result that the application was being resisted by a mentally incapable son as opposed to the mentally incapable son having originated the application. Nevertheless the principles considered are no different than those required to be considered if the son had commenced the proceedings.

Cameron J. considered that the son's needs were fully met by certain provisions contained in the statute law of the province of Saskatchewan and that therefore a testator should be able to rely on such statutory provisions in settling his will. He commented as follows:

I do not think they should be viewed as charitable or gratuitous. They are provisions which he and the rest of us have created and make possible. We contribute to them. They amount to good sense and good planning by all of us for which we, including this testator, pay appropriately. In that sense he has already made provision for the retarded son.\(^{102}\)


\(^{102}\) Supra, footnote 100, Sask. R. at p. 262, E.T.R. at p. 73.
Cameron J. rejected the theory that a testator had no obligation to provide reimbursement to the state for the cost of maintenance in an institution, preferring to view the problem from the following perspective:

Ample provision has been made for the retarded son of this deceased. In a very real sense, the deceased, as a taxpayer, has provided for this assistance. As a member of society as a whole he too is entitled to the benefits of the financial resources of the province and has, along with all of us, seen to it that those resources are directed to this and other purposes. He has thus met his obligations.\(^{103}\)

The Saskatchewan Court of Appeal reversed Cameron J.'s decision confirming the line of authorities running through the decisions of *In re Cousins*, *Re Pfrimmer Estate* and quoting the statement of Maher J. in *Hawker v. Hawker*\(^{104}\) concluded that such statement "correctly and succinctly stated"\(^{105}\) the law.

In the most recent British Columbia decision, *Penty v. Mott et al.*\(^{106}\) a testatrix left her entire estate to charities and made no provisions for her mentally handicapped twenty-seven year old son. The Public Trustee brought proceedings on behalf of the son. The argument was made on behalf of the charities that no provision should be made for the claimant


\(^{104}\) *Supra*, footnote 98.


unless it could be shown that such provisions would assist to provide a "better life".

MacKinnon J. rejected the argument taking the following position:

Counsel have produced no authority to support the proposition submitted that a 'better life' is the proper criterion or test by which the Court should determine if the testatrix made adequate provision for the care and maintenance of Donald. I am of the view the issue here is whether or not an award should be made when Donald's needs are now being provided by the public purse. Implicit in the submission of the defendants is the proposition that, if all of Donald's needs are properly met by the public purse, then no award should be made. The authorities do not support such a proposition.107

After reviewing the decisions of Cousins, Brousseau, Pfrimmer, Hawker and Deis, he concluded as follows:108

I adopt the principles enunciated in the cases referred to above109 and conclude the testatrix failed in her moral obligation to provide for her son.

The court then directed that the entire estate be set aside and that some or all of the income be used for the proper care and maintenance of the claimant.


109 Cousins, Brousseau, Pfrimmer, Hawker, and Deis.
Of note is the fact that whereas the two original British Columbia decisions on the subject, namely, in Re Taylor and Re Brousseau Estate, the court was ready to vary the Will so as to provide for amenities not provided by the state care, or for an improved level of care, the decision of the Penty case would indicate that the testator's estate may be called upon as the primary source of financing.

E. Summary of British Columbia Decisions

The law in British Columbia appears to be as follows:

(a) A testator's moral obligation to provide for a mentally incompetent dependent is not negated by the provisions of care under state schemes. In effect, a testator has a duty to absorb, or reimburse the state for, such costs.  

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(b) The testator's obligation to contribute to the mentally incompetent dependent's maintenance exists regardless of whether or not the dependent would benefit personally from any part of the contribution.  

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110 Penty v. Mott et al, supra., footnote 106.
111 Penty v. Mott et al, supra, footnote 106.
(c) Even where the testator has voluntarily arranged to reimburse the state for the maintenance, the court may vary the Will to provide for additional amenities not supplied by the state but which the dependent is able to appreciate. This will depend on the size of the estate and if sufficiently large, the court may even require the provision of private care.\textsuperscript{112}

(d) The courts are not reluctant to delay the estate administration pending clarification of the dependent's future needs or development of state schemes.\textsuperscript{113}

F. Nature of State Support

It is difficult to extract a clear principle from the cases dealing with applications by, or on behalf of, persons receiving state support. In \textit{Re W.S. Duff}\textsuperscript{114} the court took the view that the state had the legal responsibility to maintain mentally afflicted members of the community. If such person had any assets, they could, by virtue of the appropriate statute, be used by the state to defray that person's costs beyond the basic state support.

\textsuperscript{112} \textit{Re Brousseau Estate}, supra, footnote 87.

\textsuperscript{113} \textit{Re Taylor Estate}, supra, footnote 78; \textit{Penty v. Mott et al.}, supra, footnote 106.

\textsuperscript{114} Supra, footnote 65.
Similarly, in *Re Watkins*\textsuperscript{115} the court held that a testator was entitled to rely, in making his Will, on the provisions of the appropriate legislation which provided for free medical care.

In *Re Kinloch Estate*\textsuperscript{116} the testator left nothing to a daughter suffering from a mental disorder and permanently in a mental hospital. On an application on behalf of the disabled daughter the court adopted the reasoning in *Re Watkins* on the basis that the province of Alberta was about to introduce a universal hospitalization plan applicable to all residents within the Province under which those requiring hospital care would receive it at no expense to themselves and therefore the deceased was entitled to rely upon this knowledge and make no provision for a mentally sick dependent.

The British Columbia case of *Re Page Estate*,\textsuperscript{117} although the applicant was not mentally incapable, he was receiving state support. The applicant, the elder son of the testator, was partially disabled as a result of war service and was in receipt of a government pension. The pension would abate in direct proportion to any benefit he may derive from the estate. Gould J. dismissed the petition:

\textsuperscript{115} Supra, footnote 72.


Because he is entitled to a pension, and because that pension would abate virtually pro tanto as any increased participation in the estate I might award...

Gould J. also rejected the argument that he should not consider the petitioner's pension and its prospective abatement, distinguishing the two cases given in its support, Re Brousseau and Re Cousins, on the basis that the two cases were concerned with costs of maintenance for applicants who were patients in mental institutions.

In his rejection, he concluded that:

> In my view, it would have been an attitude nothing short of blind stupidity had this testator not,... acted testamentarily upon the fact that the petitioner was in receipt of a pension ... that ... would abate to the extent of inheritance.

One might question the distinction drawn by Gould J. between the pension in this case and the cost of maintaining patients in a mental hospital. He characterized the disability pension as one that had been earned in the same sense as a corporate pension payable to an employee upon his retirement. By contrast, his characterization of payment to mental hospital patients was that of "the eleemosynary motivation of

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118 Ibid., at p. 414.

119 Ibid., at p. 415.
the state in providing institutions for its destitute lunatics".  

A better identification and treatment of this issue is found in Re Millar. The testatrix left a small estate equally between her ten adult children. One of them was incapable of looking after himself and was in receipt of assistance under the appropriate welfare assistance legislation. Under the provisions of such legislation, entitlement to assistance would terminate or be reduced if a sum were to be received from the estate greater than that portion provided by the testatrix.

The court, although recognizing that the circumstances were not entirely similar, adopted the rationale in Re Watkins which, in the court's view, established that in some circumstances, the testator has the right to take into consideration state assistance provided by statute when making provisions for persons entitled to apply under dependents' relief legislation.

120 Ibid., at p. 415. The reference in the judgment to "lunatics" results from the fact that persons under mental incapacity came under the jurisdiction of the Lunacy Act, R.S.B.C., 1948 c. 194. The Lunacy Act was repealed on July 1st, 1962, by An Act Respecting the Estates of Mentally Incompetent Persons, S.B.C. 1962, c. 44. The title An Act Respecting the Estates of Mentally Incompetent Persons was repealed on November 7th, 1973 and the short title, The Patients' Estates Act was substituted for it. The name change was made by s. 24 of An Act to Amend the Mental Health Act, 1964, S.B.C. 1973, c. 127, s. 24. The Patients' Estate Act became the Patients Property Act, R.S.B.C. 1979, c. 313 at the time that many of the British Columbia statutes were changed in 1979.

The evidence in the Re Millar case indicated that any money the petitioner might get would go to reduce his welfare allowance. The court adopted the dictum of the Ontario Court of Appeal in Zajac v. Zwaryz\textsuperscript{122} that in order for dependent relief statutes to serve their purpose, any award under them must result in a substantial benefit accruing to the recipient.

On the basis of the evidence, the court dismissed the application as it was unable to find that an award, if made, would result in a substantial benefit to the applicant.

An analysis of In Re Barclay Estate\textsuperscript{123} and Re Kinloch Estate may provide some insight in the inconsistency of the cases. The judgment of Ford J. in In Re Barclay Estate responded to the submission that the law, in cases dealing with the obligation of testators to provide for maintenance for persons in state maintained hospitals, was that expressed in Re Watkins, as follows:

I am unable to appreciate how the decision in In re Watkins; Hayward v. Chatterton, 65 LJ Ch 410, [1949] 1 All ER 695, in which it was held that the testator was entitled to distribute his estate on the footing that his mentally ill daughter in a private institution should take advantage of the provisions of the National Health Service Act, 1946, of England, about to be put into effect, can be applied to the facts here. We have no similar Act in Alberta.\textsuperscript{124}


\textsuperscript{123} (1952), 5 W.W.R. (N.S.) 308 (Alta. S.C.).

\textsuperscript{124} Ibid., at p. 313.
Cullen J. in *Re Kinloch Estate* distinguished *Re Barclay* on the basis that:

There has been a change in circumstances since that decision; the change in circumstances is that with effect 1st July 1969 there is a universal hospitalization plan applicable to all residents within the Province of Alberta and while there is still some modicum which must be paid by persons in receipt of hospitalization benefits, the principle enunciated in *Re Watkins; Hayward v. Chatterton*, supra, is now equally applicable in the Province of Alberta.125

The existence of a universal hospitalization law such as the *National Health Service Act, 1946* of England, or the universal hospitalization plan for residents of the province of Alberta, referred to in *Re Kinloch Estate*126 should clearly be circumstances which should be taken into account.

The question, however, is should the testator be expected to replace the support provided by the state.

In British Columbia the Guaranteed Available Income for Need Act127 [GAIN] provides:

2.(1) Subject to this Act and the regulations, the minister may pay, out of money authorized by an Act of the Legislature, money necessary for the administration of income assistance and social service


126 *Ibid*.

127 R.S.B.C. 1979, c. 158.
programs and the provision of income assistance and social services in the amounts as in his discretion he considers advisable to assist in whole or in part, individuals, whether adult or minor, or families.128

The regulations provide in Section 22.(1) as follows:

22.(1) The Director, in his discretion, may authorize an administering authority to provide assistance to pay costs of services described in this Section if an individual is unable to provide adequately out of his or her own resources for such services.

The regulations therefore permit the Director to provide the per diem charge in hospitals operated by the province of British Columbia. However, if the patient's personal estate exceeds a certain amount, then the provisions of GAIN will not apply. The burden would therefore be shifted from the state to the individual. As an example, in Penty v. Mott et al.129 the award made by the court would go firstly to satisfy the per diem charges, which had been previously paid by the Province; and secondly to provide better assistance to the patient.

Much earlier Re Taylor Estate130 provided for amenities, as and when needed, beyond those supplied by the institution. Re Brousseau Estate131 also made provisions so that the

128 Ibid., s. 2(1).
129 Supra, footnote 106.
130 Supra, footnote 78.
131 Supra. footnote 87.
patient could obtain the best possible care available under the circumstances, including moving into private facilities. 

Re Taylor Estate ignored the question of state responsibility and Clyne J. in Re Brousseau Estate specifically refused to deal with it.

It would be difficult to present a valid and supportable argument that a testator need not make provisions for a patient if such provisions would improve the patient's lot in life. It is also, equally difficult to argue, enthusiastically, in favour of the concept that any award under the Act would merely replace hospital costs previously paid by the state.

This is another area that requires serious consideration by the legislature to determine what is, exactly, expected from the Act.

G. Law Reform Commissions

The question touching on the obligation of maintenance of an incapacitated person has not received much consideration by the various law reform commissions in Canada.

(a) Ontario

The Ontario Law Reform Commission\(^\text{132}\) did not consider the subject. Furthermore it is to be noted that none of the

cases involving incompetent dependents was decided in Ontario. It is also unlikely that any such case will arise in the future as under the *Succession Law Reform Act*\(^{133}\) in order to have standing to apply for variation of a Will the applicant must satisfy a test of dependency on the testator.

(b) **The Alberta Institute of Law Research and Reform**

The Alberta report\(^{134}\) states "there is no consistency in the case law on this subject." and there is no logic to the apparently anomalous situation where during the lifetime of the parents, generally speaking, there is no financial liability in regard to children who suffer from a very severe mental or physical disability, but on death the Public Trustee regards it as his duty to apply on behalf of disabled children.

In response to the inconsistency in the cases the Institute comments as follows:

> It is exceedingly difficult to define the boundary between public and private responsibility for the support of a person who qualifies as a dependant

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133 R.S.O. 1980, c. 488.

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.135

The Institute concluded its report with the following specific recommendation:

That the proposed Act should provide that:

Upon the hearing of an application under this Act, the judge shall consider all matters that should be taken into account, including the financial responsibility assumed by a government for a mentally or physically disabled dependant.136

(c) British Columbia

The Law Reform Commission of British Columbia137 considered the observations of the Alberta Institute but did not consider any recommendation necessary.

135 *Ibid.*, at p. 44.
136 *Ibid.*, at p. 44.
The British Columbia Commission, commented upon the Alberta Institute's recommendation as follows:

It is arguable that this is a factor the courts already take into account. There is no need for a specific direction to consider whether there is public funding for a dependant. In the usual case, if the estate is large, or there is no other claimant, public financial assistance should be irrelevant. The courts seem to take these factors into consideration only in circumstances where it is reasonable to do so.\textsuperscript{138}

Unfortunately, the British Columbia jurisprudence is not supportive of the Commission's conclusion and for the sake of uniformity and clarity the British Columbia Commission should have made a recommendation similar to that of the Alberta Institute.

\textsuperscript{138 Op. cit., footnote 22, at p. 58.}
PART IV: AN ANALYSIS OF THE SUCCESSION LAW REFORM ACT OF ONTARIO; A CONTRAST OF IT WITH THE NOW REPEALED DEPENDANTS' RELIEF ACT OF ONTARIO AND THE PRESENT BRITISH COLUMBIA WILLS VARIATION ACT
CHAPTER 1.

INTRODUCTION


The objective articulated by the Explanatory Note to the Bill is to provide a comprehensive reform of the law of testate and intestate succession as part of the general review of family law.

The SLRA is essentially a combination of The Wills Act, The Devolution of Estates Act, The Survivorship Act, and The Dependants' Relief Act, all of which have been repealed except for the administration of estates portion of The Devolution of Estates Act. The SLRA matured after more than ten years of investigation and research. It had its genesis in the Family Law Project of the Ontario Law Reform Commission

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1 R.S.O. 1970, c. 499.
2 R.S.O. 1970, c. 129.
3 R.S.O. 1970, c. 454, am. S.O. 1972, c. 43, s.1.

The SLRA is the most contemporary Canadian attempt to reconcile the treatment of posthumous disposition of property in the overall context of family law and, its application as it relates to dependents' relief, reflects the most radical statutory departure from testamentary freedom by any Canadian province except for Prince Edward Island.¹

It is therefore appropriate to examine the provisions of the SLRA, as they apply to dependents' relief, in relation to the now repealed Dependents' Relief Act (DRA) and to the British Columbia Wills Variation Act.⁶

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¹ The Dependents Relief Act, R.S.P.E.I. 1974, c. D-6 provides by Section 19 that the value of certain transactions (e.g. DMC, Joint Tenancy, Insurance) are deemed part of the estate; and by Section 20 that the donee of a gift may be required to pay maintenance and support.

⁶ R.S.B.C. 1979, c. 435.
CHAPTER 2.

ANALYSIS OF THE SUCCESSION LAW REFORM ACT OF ONTARIO AND A CONTRAST WITH THE DEPENDANTS' RELIEF ACT OF ONTARIO

1. Testate, Intestate

Under the DRA, before the provisions of the statute could be invoked the deceased must have died testate. Subsection 2(1), the charging section, simply made reference to "the testator ..." By contrast, the corresponding section of the SLRA, subsection 58(1), extends the application of the statute to circumstances where a deceased has died testate or intestate. By extending the application of the statute to intestate succession, Ontario has joined the growing number of provinces not limiting dependents' relief to testate succession.  

2. Applicants

A further condition precedent for invoking the DRA was that the testator had not made provision for the maintenance of his dependents. Subsection 1(a) defined "dependent" as the

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7 Relief limited to testamentary succession is found only in: British Columbia, Wills Variation Act, R.S.B.C. 1979, c. 435; New Brunswick, Testators' Family Maintenance Act, R.S.N.B. 1973, C.T.-4; Nova Scotia, Testators' Family Maintenance Act, R.S.N.S. 1967, c. 303, as amended.
spouse, children under the age of sixteen, or children over sixteen but through illness or infirmity unable to earn a livelihood. The class of persons entitled to claim relief under the statute was therefore very limited.

One of the more notable developments of the SLRA is the widened range of persons who may qualify for relief, and the elaborate qualifications and tests which the court must apply before members of each category can qualify.

Subsection 57(d) contains the basic definition and sets out the groups of persons who may seek relief. These are: spouse or common-law spouse of the deceased; a parent of the deceased; a child of the deceased; or a sibling of the deceased; to whom the deceased was providing support or was under a legal obligation to do so immediately before his death. Although the class of persons has been extended, the relationship by itself is not enough. A dependent, to qualify under the SLRA, must not only be a member of the specified class, but must also be in receipt, or be legally entitled to receive, support at the date of death of the deceased.

Subsection 57(d) clearly provides that only a person "to whom the deceased was providing support or was under a legal obligation to provide support immediately before his death" may be a "dependent".
As each class is subject to extended meanings they require individual examination:

**Spouses:**

Paragraph 57(d)(i) gives legal recognition to "common-law spouses" and gives members of that class status as dependents and therefore right to relief under the statute. The term "common-law spouse" is defined in subsection 57(b), and to qualify a person, either male or female, must have cohabited with the deceased immediately before his or her death for a continuous period of not less than five years. If there are children involved of whom the deceased and the applicant were the natural parents, then the five year condition precedent is replaced by a "relationship of some permanence". Subsection 57(b)(ii), by its wording, contemplates only a living child. No provision has been made for unions where there are no living children but there is a child *en ventre sa mere* and such child is born after the expiration of the limitation period as prescribed in section 61.

A person whose marriage to the deceased was terminated or declared a nullity is, by subsection 57(g), included within the definition of spouse.
Children:

Subsection 57(a) of the SLRA extends the meaning of "child" to include grandchildren and persons to whom the deceased had demonstrated a settled intention to treat as a child of his family, but does not include a foster child placed in a home for consideration.

By virtue of the definition contained in subsection 57(a) and (d), it is conceivable that a child could be a dependent of both a natural parent, legally obligated to support him, and a "step-parent" who voluntarily supports him.

Subsection 57(a) incorporates the provisions of clause 1(1)(a) which removes any differentiation between children born within or without marriages, and includes posthumous births. Clause 1(1)(a) also incorporates the effect of sections 86 and 87 of the Child Welfare Act, which clarify the legal relationship between adopted children and their natural and adoptive parents, essentially making the adopted children the natural children of the adoptive parents but not of the natural parents.  

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8 R.S.O. 1980, c. 66.

Parents:

Subsection 57(f) of the SLRA extends the meaning of parent to include a grandparent and a person who has demonstrated a settled intention to treat the deceased as a child of his family but excludes a "foster parent".

Siblings:

Paragraph 57(d)(iv) includes brothers and sisters of the deceased as persons entitled to seek relief under the statute.

Even though the SLRA has greatly extended the class of person who may seek relief over those in the DRA, the condition precedent for qualification is the provision of support, either voluntarily or as a result of a legal obligation, or the legal obligation to provide support. The class of applicants is, therefore, limited to those who were truly dependent on the deceased, therefore making the relief available under the SLRA strictly remedial.

One area of deficiency of the DRA was the lack of identification of the time at which circumstances should be considered for determining the adequacy of the provisions contained in the deceased's Will. The SLRA removes this
uncertainty by specifying in subsection 58(3) that adequacy shall be determined as of the date of the hearing of the application.

3. **Factors in Aid of Determining Quantum of Entitlement**

Both statutes, DRA and SLRA, contain a list of matters for the court's consideration upon the hearing of an application. The lists are similar in nature but the DRA, in sections 7 and 8, directed the court to only seven items, while the SLRA, in paragraphs 62(1)(a) and (c) refers to seventeen. Both statutes also empower the court to consider any other circumstances it sees fit.

Neither list is exhaustive, but the greater length and specificity of the SLRA list may be an indication that the legislature intends that less attention will be paid to non-enumerated factors. In addition, the DRA in authorizing the court, in subsection 7(g), to look at factors beyond those enumerated in the statute used the words "generally [to] any matter that the judge thinks should be fairly taken into account". The SLRA, paragraph 62(1)(a) simply refers to "all the circumstances in the application".

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10 As early as 1947 Williams C.J.K.B. In re Lawther Estate, [1947] 1 W.W.R. 577 at pp. 586 and 587 (Man. K.B.) enumerated 15 matters which in his view was a summary of what the courts would normally consider. The 15 items In re Lawther Estate are very similar to those enumerated in the SLRA and are, in any event, those commonly considered by courts dealing with matters of dependents' relief.
The DRA contained, in section 8, an interesting provision whereby a dependent might receive, from the estate, compensation for assistance given in the form of money or services, to advance the deceased in a business or occupation. This provision existed in addition to, and independently of, the list of circumstances enumerated under section 7. The SLRA does not segregate such assistance as an independent head of relief. Subparagraph 62(1)(a)(vii) of the SLRA merely makes such contribution one of the numerous factors which the court is directed to consider.

By virtue of section 9 of the DRA a wife "who was living apart from her husband at the time of his death under circumstances that would disentitle her to alimony" was barred from seeking relief under the statute. It should be noted that there was no similar bar or exclusion, applicable to a husband. By contrast the SLRA includes the conduct of both spouses as a relevant factor, and rather than imposing an absolute prohibition, the resulting conduct is one of the factors which the court is directed to consider. Subparagraph 62(1)(a)(xii) refers to a course of conduct amounting to "an obvious and gross repudiation of the relationship".

The DRA is silent as to the wishes of the deceased while it is implicit in the provisions of the SLRA that the deceased's reason for his actions are relevant. The SLRA gives the court, in paragraph 62(1)(c) and subsection 62(2)
wide discretion to evaluate the deceased's wishes and consider related evidence in making an award.

Section 10 of the DRA provided that any allowance to an applicant was subject to a maximum limit so that the allowance plus any provision under the Will would not exceed the amount to which the applicant would be entitled if the testator had died intestate. The SLRA does not contain such limitation.

One of the most important features of the SLRA is the underlying protection of the prospective claimant. The protection takes into consideration the prospective claimant's own actions as well as those of the deceased.

The question whether or not a beneficiary can contract out of the protection of the dependents relief legislation has been the subject matter of judicial debate, but it can be taken as settled law¹¹ that the courts will not be bound by a contract waiving the protection of such legislation. It can be taken as equally settled law¹² that the courts will ignore forfeiture clauses which would deprive a named beneficiary from the benefits otherwise provided in the Will if the


beneficiary commenced proceedings under dependents' relief legislation, _inter alia_, as being against public policy.

The SLRA has essentially codified the common law by introducing a statutory provision in subsection 62(4) whereby an order under the section "may be made notwithstanding any agreement or waiver to the contrary". The wording does not appear to be an absolute prohibition but it seems to adopt the rationale of the cases namely that the court may consider such agreements, give them the necessary weight, but not be bound by them.

4. **Avoidance Schemes**

It was recognized in the House of Representatives of New Zealand, as early as at the time of introduction of the Bill, (which was destined to be the progenitor of all statutes of dependents' relief), that such legislation was susceptible to evasion by transfer of property _inter vivos_ and other transactions. It was said that the legislation contained so many loopholes that it was relatively simple for a person "to drive a coach and four horses" through the legislation.\(^\text{13}\)

Essentially, a testator by the utilization of jointures, _inter vivos_ trusts or designations of beneficiaries in

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\(^{13}\) *New Zealand, Parliamentary Debates* (1900), Vol. 3, at p. 507, (Per. Mr. J. Allen). See also analysis in Chapter 7, Part II, *supra*. 
insurance or annuity contracts, could arrange his affairs in such a fashion so as to pass, on his death, his assets to designated, or predetermined, beneficiaries outside his estate, and thus defeat the protection afforded by dependents' relief legislation.

The SLRA has implemented safeguards to avoid such plans, by introducing Section 72 which includes in the net estate of the deceased the capital value of certain *inter vivos* transactions. The section provides that various transactions made by the deceased during his lifetime shall be testamentary dispositions and directs that their capital value be included for purposes of determining the net value of the estate of the deceased, and that the assets be made available to be charged for payment towards the dependents' support.

The transactions are enumerated in Section 72 and are generally the following:

(i) gifts *mortis causa*,

(ii) bank accounts held by the deceased in trust for others,

(iii) joint accounts in the name of the deceased and others, subject to the right of survivorship,
(iv) property held in joint tenancy by the deceased and others,

(v) disposition of property whereby the deceased still retains at his death, either alone or with others the power to revoke the disposition or to use or dispose of the principal of it,

(vi) proceeds of life insurance on the deceased, which is owned by him, and

(vii) any amount payable under a designation of beneficiary under Part III of the SLRA, generally proceeds from pensions, retirement, welfare and other like plans.

The anti-avoidance measures contained in Section 72 of the SLRA certainly go a long way towards responding to the concern first expressed in the New Zealand House of Representatives. Although at first glance the measures appear to be severe, it should be noted that the capital value of such transactions that may be included is limited to gratuitous transfers. Subsection 72(2) protects the legitimate interests of other parties to bank accounts or other property held by the deceased either in trust or jointly. In addition, Section 71 creates a general exception to the provision of subsection 72(1), where the property is being devised or bequeathed in compliance with a bona fide inter vivos contract for valuable consideration.
The burden of proof, provided by Subsection 72(3) in impugning a transaction protected by Subsection 72(1) falls upon the dependent. On the other hand, where a dependent is the beneficiary of a transaction contemplated by Subsection 72(1), Subsection 72(4) shifts to such beneficiary the burden of proof of proving his or her contributions.

An additional protection to the beneficiary is found in section 73 of the SLRA which renders invalid any "mortgage, charge, or assignment" given by a dependent in expectation of an order granting relief.

As a final measure of protection to the dependent against the acts of the deceased, Subsection 58(1) of the SLRA extends relief to intestate successors. Thus a deceased can no longer avoid the court's discretion by dying intestate and relying on the rules of intestate succession for the distribution of his property.

5. **Limitation**

The DRA provided, by Subsection 4(2), for a limitation period so that an action was to be brought at the time of the application for probate when the application for probate was being made by or on behalf of the wife or husband or a guardian on behalf of an infant child. In all other cases the action was to be brought within three months from the date of death of the testator, always with discretion to the court to
extend the time, but limited to any portion of the estate remaining undistributed at the time of the application.

The SLRA, by Section 61, has altered the limitation provisions to six months from the date of the Grant of Letters Probate of the Will or of Letters of Administration, always with discretion to the court to extend the time as to any portion of the estate remaining undistributed at the date of the application.
CHAPTER 3.

CONTRAST BETWEEN THE SUCCESSION LAW REFORM ACT OF ONTARIO AND THE WILLS VARIATION ACT OF BRITISH COLUMBIA

There are a number of differences between the SLRA and the British Columbia Wills Variation Act (WVA) but the most significant ones can be identified as follows:

1. Jurisdiction of the statute;

2. Persons entitled to claim under the statute;

3. Relevant date;

4. Factors going to entitlement;

5. Limitation period;

6. Protection of dependents.

For purposes of analyzing some of the differences, it will be useful to quote Subsections 2(1) and (2) of the WVA which collectively represent the charging clause and identify the persons entitled to apply. The subsections read as follows:

2.(1) Notwithstanding any law or statute to the contrary, if a testator dies leaving a will which does not, in the
court's opinion, make adequate provision for the proper maintenance and support of the testator's wife, husband or children, the court may, in its discretion, in an action by or on behalf of the wife, husband or children, order that the provision that it thinks adequate, just and equitable in the circumstances be made out of the estate of the testator for the wife, husband or children.

(2) For the purposes of this Act, an illegitimate child shall be treated as if he were a legitimate child of his mother.

1. Jurisdiction of the Statute

It will be noted that Subsection 2(1) brings the statute into effect only when the deceased is a testator. Therefore the WVA has no application in an intestate succession. By contrast, the SLRA applies to both testate and intestate successions.

2. Persons Entitled to Claim Relief Under the Statute

It will again be noted that, by virtue of Subsection 2(1), the only class of person entitled to make an application and receive an award under the Act is the testator's wife, husband and children. Subsection 2(2) extends the meaning of children to include illegitimate children as if they were legitimate children of the mother. By virtue of the newly enacted Charter of Rights Amendment Act, for the purposes of the WVA, all distinctions between legitimate and illegitimate children are removed. Thus the class of applicants, as it

14 S.B.C. 1985, c. 68.
relates to children, is extended to remove any such difference.

The SLRA has greatly extended the class of person who may potentially apply to include persons other than spouses and children, but with the condition that the deceased was providing support, or was under a legal obligation to do so immediately before his death.

3. Relevant Date

The question of the time or date to determine entitlement and for valuing the estate has been a question of considerable judicial debate in British Columbia, and the subject of a recommendation by the Law Reform Commission of British Columbia. Nevertheless the WVA continues to be silent on the point.

The SLRA, by Subsection 58(3) has identified the date of hearing of the application as the time to measure the adequacy of the provision made.

4. Factors Going to Entitlement

The SLRA contains in paragraph 62(1)(a) a lengthy catalogue of factors which the court must take into consideration

in making an award. In addition, the court is given further discretion to consider anything else it may consider relevant.

The WVA does not contain a catalogue with analogous factors, although as a matter of routine the British Columbia Courts consider circumstances similar to those enumerated in the SLRA.\(^{16}\) However both statutes contain almost identical provisions, Subsection 2(3), WVA and paragraph 62(1)(e) SLRA, making the deceased's reasons for his arrangements relevant.

5. **Limitation Period**

Although both statutes impose a limitation period of six months from the date of probate of the Will or the date of the Grant of Administration, unlike Section 10 of the WVA, Section 61 of the SLRA gives the court discretion to extend the time in respect to an application insofar as there is undistributed property within the estate.

6. **Protection of Dependents**

Section 2(1) of the WVA provides that the court may make adequate provision for the proper maintenance and support of dependents "out of the estate of the testator". The fact that only those net assets in the hands of the personal representative are available to satisfy an order represents a serious

\(^{16}\) See footnote 10.
defect in the legislation as, with judicious planning a testator may render his assets totally untouchable by any order under the Wills Variation Act.

The WVA continues with this original defect. Yet it appears that there is no recognition by the legislature that avoidance of the Act by proper asset planning is a problem which it should address.

In this connection the conclusion of the Law Reform Commission of British Columbia\textsuperscript{17} is of note. It concluded that:

If intent to avoid the Wills Variation Act is required, in all probability very few transactions will be susceptible to attack. In the Working Paper we concluded that anti-avoidance legislation is not necessary .... We see no reason to depart from that conclusion.\textsuperscript{18}

\textsuperscript{17} Op. cit., footnote 15.

\textsuperscript{18} Ibid., at p. 97.
CHAPTER 4.

THE FAMILY LAW ACT OF ONTARIO
AND CONCLUSION

The SLRA has recognized the need to prevent the avoidance of its provisions by enabling assets passing outside of the estate to be charged for the protection of the claimant.

It has also greatly extended the class of persons entitled to apply but only those who were in receipt of support or legally entitled to receive it can actually qualify to claim under the SLRA. Outside of spouses, including common-law spouses, and children under the age of eighteen years of age, (all of whom have a statutory right to maintenance,) all other claimants must show actual maintenance at the time of death of the deceased or a legal entitlement to it.

Notwithstanding the extension in scope of prospective applicants, the SLRA has interfered with the integrity of testamentary freedom only to the extent that is necessary to fulfill the deceased's obligations to those who were de facto or de juris dependent upon him.

The remedial and protective measure of the Act has been emphasized by the extension of the class of applicants and by adding anti-avoidance provisions. Yet the deceased has been
left with a degree of certainty that his posthumous intent will not be arbitrarily altered.

Any consideration of the SLRA must be supplemented by reference to the newly enacted *Family Law Act*, (FLA).\(^{19}\)

It is beyond the scope of this thesis to analyse the effects of this statute. However, it must be observed that its enactment reflects the adoption by the legislature of the province of Ontario, of the philosophical principle enunciated by the Ontario Law Reform Commission's *Report on Family Law* to the effect that; although spouses should enjoy a matrimonial regime of separate property during the currency of marriage, they are to "be entitled to an appropriate equal sharing in family assets upon the termination of the marriage by death or divorce ..."\(^ {20}\)

The explanatory preamble of the FLA states, in part:

> Whereas 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;

In keeping with the policy disclosed in its preamble the FLA generally provides that, upon the death, either testate or

\(^{19}\) S.O. 1986, c. 4.

intestate, of the first spouse, the value of the net family property accumulated by the spouses during their marriage is to be determined and then shared equally between the estate of the deceased spouse and the surviving spouse.\textsuperscript{21}

The term "net family property" is defined as property owned by the spouses less: debts, liabilities, property brought into the marriage (other than the matrimonial home) and certain excluded property such as property acquired by gift or inheritance after the marriage.\textsuperscript{22}

The FLA does provide for an election for the surviving spouse to take under the Will, or under the intestate succession provisions, as the case may be, or to participate in the deceased spouse's estate through the equalizing formula.\textsuperscript{23}

By enacting the FLA, Ontario has, in fact, recognized a matrimonial regime of deferred community property which crystallizes upon the termination of marriage by any means. In so doing, Ontario has also legislated the minimum entitlement of a surviving spouse.

\textsuperscript{21} Supra, footnote 19, s. 5.

\textsuperscript{22} Op. cit., s. 4.

\textsuperscript{23} Op. cit., s. 6.
It is too early to examine the effect of the FLA on dependent relief claims. In theory the provisions for dependents' relief will continue to be available but the courts will have to consider the surviving spouse's entitlement to the net family property in making an award.

Presumably, therefore, applications under Part V\(^2\) of the SLRA should diminish as a surviving spouse will, under the provisions of the FLA, receive a fair proportion of the deceased spouse's estate. The net effect of the FLA should be to improve the position of many surviving spouses by providing them with a fair share of the deceased spouse's estate without having to resort to litigation.

\(^{24}\) Support of Dependants.
PART V: CONCLUSION
CONCLUSION

A. Technical Deficiencies

The Act is subject to various technical deficiencies, the most important of which, from an administration point of view, are:

1. Statutory Definition of Date of Sufficiency

The Act is silent on the subject as to what date the court is to consider circumstances of the claimants and of the deceased's estate for purposes of determining the adequacy of the benefaction under the Will, and therefore the quantum of any proposed award.

The jurisprudence in British Columbia provides authority, to a greater or lesser extent, for three possible times as the appropriate time to determine whether adequate provision, within the meaning of the Act has been made. These dates are:

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1 Re Hull, [1941] 1 D.L.R. 14, [1943] O.R. 778 (C.A.) concluded that the date of making the Will was the pertinent date. The courts in British Columbia considered this decision but chose not to follow it. See Re Bowe, infra, footnote 2 and Re Urguhart, infra, footnote 4. This date cannot, therefore, be considered as a possibility in British Columbia.
(a) the date of the testator's death;²

(b) the date when dependent relief proceedings commence;³

(c) the date of the hearing.⁴

2. Opportunity for Inter Vivos Evasion

The Act has no mechanism for preventing inter vivos planning intended to render it impotent. Only those assets which devolve through the deceased's personal representative are available to the court to make an appropriate award.⁵ The Act should, if intended as a preventative against abuse, contain anti-avoidance provisions.⁶

3. Limitation Period

Section 10 of the Act requires that an action be commenced


⁵ For a more extensive analysis of the subject see supra, Part II, c. 7.

⁶ For examples of provinces adopting anti-avoidance provisions see supra, Part I, Appendix "C".
within six months from "the date of issue of probate", or the date of resealing in the province. Questions have arisen as to the meaning of the term "issue". It appears that the question is now settled and that the term "issue" has been defined as the date on which the grant was entered in the records of the Court Registry.7

The rationale behind this logical conclusion is that from that date onward nothing further is required to perfect the grant. Conversely, until that date the personal representative could not prove his position or authority.

A more significant problem, however, is that the Act does not specify the meaning of "probate". The term "probate" (as it relates to matters of Wills), means to prove the Will.

However, there are two kinds of probate, specifically; probate in common form, and probate in solemn form. Probate in common form, is granted in the Supreme Court of British Columbia, without any formal procedure in court on an ex parte application made by the executor. Probate in solemn form, by contrast, is in the form of a final decree, or order, pronounced in open court, usually after a trial, when all affected persons are parties to the proceeding, either as plaintiffs or defendants.

The principal difference of effect between the two grants is that probate in common form is revocable, while probate in solemn form is irrevocable, unless there is fraud, or a subsequent valid Will is found.  

The Act does not specify which probate is meant and it may be argued that a reference to probate must mean in solemn form and that the limitation period should not apply until an order for solemn form has been obtained. There is no contemporary jurisprudence on the subject. However some support for the position that probate must mean an order in solemn form can be obtained from the judgment of Lord McLaren in Pattison's Trustees v. University of Edinburgh.  

If the Act is subject to this possible interpretation, there is no certainty to a personal representative that even though he waits for the six month period that he is thereafter immune from attack.

B. Philosophical Inconsistency

All of the above deficiencies are, on the whole, technical defects which can be easily remedied by simple statutory amendments.


9 (1889), 16 Court Sess. Ca. 73 at p. 75.
Of greater importance and concern, however, is the lack of definition and identification of the philosophy underlying the nature of the remedy to be provided by the Act.

The province of British Columbia, in common with many other jurisdictions in the Commonwealth, adopted the English concept of testamentary freedom. The freedom was abused and the legislature, to counterattack such abuses, introduced dependents' relief legislation as a flexible restraint on the freedom, giving the court the power to remedy such abuses.

The intent of the legislature was remedial. The sketchy historical evidence supports this position and so do the aver­ments of the judges who decided the early cases in British Columbia.¹⁰

However, the courts in British Columbia have gone far beyond the original purpose of the statute. The recent deci­sions at the Court of Appeal level have left an impression that the Act is intended as an anti-disinheritance device.¹¹

The most recent manifestation of the adoption of this position is found in Kaetler v. Kaetler Estate¹² where in an application brought by disinherited adult children, Bouck J.,

¹⁰ See supra, Part II. c. 2.
¹¹ See supra, Part II, c. 4.
referring to *Morris v. Morris*\(^{13}\) stated:

\[\text{[I]n a relatively recent judgment from our Court of Appeal a will was varied where the testator failed to treat his four children equally in respect to the distribution of the capital of the estate. This was found to be a breach of parental duty.}...\] \(^{14}\)

The province of British Columbia, again in common with other Commonwealth jurisdictions, adopted as part of its law of succession, testamentary freedom. Such freedom has been curtailed by the imposition of the Act as a remedy against abuses. The Act was never intended to create a regime of compulsory succession, or forced heirship, such as is found in jurisdictions that develop systems of law based on Roman law. Jurisdictions that have adopted forced heirship have well defined rules identifying the exact portion of the estate that is to go to each person benefiting from such regimes. There are no ambiguities and there is no flexibility. The rules are certain and precise.

Yet, the recent decisions in British Columbia, advertently or inadvertently, are purporting to apply a forced heirship system without the benefit of the rules necessary for such a system to function with certainty and fairness.

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\(^{13}\) See *supra*, Part II, footnote 86.

\(^{14}\) *Supra*, footnote 12, at p. 105.
It is sufficiently difficult for a judge to apply the Act for purposes of providing the maintenance which the testator failed to provide. Yet, no matter how difficult that task may be, a judge faced with the task may refer to a multitude of guidelines\textsuperscript{15}, including the standard of living enjoyed by the applicant before the death of the testator.

Notwithstanding the availability of identifiable guidelines, both the legislators and the judiciary have expressed concern that the task of making discretionary awards is one that is not handled well by judges and have lamented the lack of legislative guidelines.\textsuperscript{16}

Yet, the British Columbia courts have gone one step further by not limiting their award to support (no matter how extended a meaning one could attribute the term) but to an equitable distribution of the estate assets. They have taken upon themselves the task of determining an equitable distribution with even less guidelines than those available in determining maintenance and support. The inevitable conclusion\textsuperscript{17} is that, for the foreseeable future, a testator who is survived by a child, whether dependent or not, can anticipate that if the disinherited child makes a claim, the child will

\begin{flushleft}\	extsuperscript{15} Some of which, apparently logical and in keeping with contemporary social norms, have been rejected. See supra, Part II, c. 5.
\end{flushleft}

\begin{flushleft}\	extsuperscript{16} See supra, Part I, c.5, Part II, c. 7.
\end{flushleft}

\begin{flushleft}\	extsuperscript{17} See supra, Part II, c. 4 A and B.
\end{flushleft}
likely succeed. The quantum of the award will be unpredictable as most of the cases make the quantum award without proper rationalization, other than to state that there was a breach of the moral duty of the testator. 18

In addition, if the philosophy of the Act is remedial it could be argued that the persons entitled to apply under the Act should be enlarged in keeping with revisions undertaken by other provinces. 19 Such general extension is a matter of policy and there are no particular compelling arguments one way or another. Indeed, in British Columbia, there does not appear to be any other philosophical manifestations that persons other than spouses and children should be entitled to relief under the Act.

The legislature has, however, made a philosophical pronouncement by recognizing rights of persons, who are unmarried yet have cohabited as spouses. 20 The Estate Administration Act 21 provides that such person, subject to statutory qualifications, may be entitled to a share in the deceased's estate

18 See for example rationale in Kaetler v. Kaetler Estate, supra, footnote 12.

19 For examples of extended class of persons entitled to apply see supra, Part I, Appendix "A".

20 The term "common-law spouse" has been deliberately avoided as it is the writer's view that it has no legal meaning in British Columbia (unless specifically defined by the particular statute) and has been subject to misuse in common parlance as well as in the jurisprudence and the statutes, all leading to unnecessary confusion.

21 R.S. c. 114, s. 85 and 86.
on an intestate death, subject to the court's discretion. Yet such individuals do not have a right to discretionary relief when the deceased dies testate as the Act only admits application by lawful spouses.22

It seems inconsistent that such individuals be given rights and protection under an intestate succession and not under a testate one. The Act should be adjusted to create harmony between the two statutes.

It is suggested that the present status of the law, as it relates to dependents' relief, is intolerable. Unless remedial steps are taken, it would appear that dependent relief litigation will escalate absorbing what is already a scarce judicial resource. The prognostications23 of the legislators who viewed dependents' relief legislation as a source of pension for lawyers or an avenue for depleting the estate with litigation will become a reality. But what are legal advisors to do? If the jurisprudence says that there is generally a duty not to disinherit, are they not justified in bringing actions on behalf of their disinherited clients? Indeed, would they not be guilty of malpractice if they did not advise their clients that although the issue of quantum could not be prognosticated, there could be a reasonable anticipation for success in such an action? Notwithstanding

22 For a more extensive analysis of the subject see supra, Part III, c. 1.

23 See supra, Part I.
the recent Court of Appeal cases, the history of the Act, and the Act itself, do not justify the present position of the jurisprudence.

A consideration of the history of the Act, and its present interpretation, viewed in the context of the system, as a whole, of succession rights as well as rights to family property, should lead our legislators to the safe conclusion that the Act, in its present form, has outlived its social utility, and should be replaced or at least restructured.

C. Recommended Restructure

The replacement or restructuring of the Act should be considered from two major premises:

1. Testamentary Freedom or Forced Heirship

   If the principle of testamentary freedom is to continue in British Columbia, then dependency should be condition precedent to the application of the Act. If the legislators conclude that a regime of forced heirship is what the citizens of British Columbia should have, then well-defined guidelines (akin to those in jurisdictions where compulsory succession is the underlying philosophy) should be included in the Act so as to provide certainty and consistency. Either approach will go a long way to reduce litigation.
Whether or not the class of persons entitled to apply should be extended is a matter of policy and so long as their entitlement is based on dependency, either de facto or de juris, such an extension does no more than to make the testator recognize posthumously obligations which he had by operation of law or which he had assumed voluntarily, inter vivos. On the other hand if a regime of forced heirship is the choice the persons entitled to benefit should not be extended, but limited to spouses and children.

2. Family Property

There is an unacceptable inconsistency between the provisions for division of family property between spouses, - as a result of marriage breakdown or a termination of a marriage during the spouses lifetime and - as a result of death. An attempt to reconcile or integrate the two provisions was rejected by the British Columbia Court of Appeal.\(^\text{24}\)

There is, however, no reason why distribution of family property should be different on a termination of marriage during life than as a result of death. They are both terminations and the distribution of such assets should follow the same principle.

\(^{24}\) See supra, Part II, c. 6.
The Act should be adjusted to recognize such a principle. The province of Ontario has done that recently and British Columbia could easily adopt legislation akin to that of the province of Ontario and thus reflect a more realistic recognition of present social norms. This type of legislation would clearly reduce litigation as the surviving spouse would receive, by operation of law, a substantial portion of the deceased spouse's estate. And dependent's relief would still be available on the basis of need.

Roscoe Pound said "Law must be stable, and yet it cannot stand still."  

The evolution of the jurisprudence interpreting the Act has certainly not stood still. Yet, partially as a result of the courts misunderstanding of the purpose of the Act, the law on the subject has not been stable. It is time that the legislators give the people of this province the legal stability they deserve.

25 See supra, Part IV, c. 4.

BIBLIOGRAPHY

A. BOOKS


B. ARTICLES AND ANNOTATIONS

Ashley, A. "A Note on the Claims of Spouses and Children to a Part of Personal property as Illustrated by the Traditional Systems of the Channel Islands and Isle of Man Respectively, and their Position Today There and in Scotland", (1953) 2 Int. & Comp C. L.Q. 274.


--------. "Inheritance by Pretermitted Children", (1937) 32 Ill. L. Rev. 1.


--------. "The Early Sources of Forced Heirship; It's History in Texas and Louisiana", (1941) 4 La. L. Rev. 42.
"Unrestricted Testation in Quebec", (1936) 10 Tul. L. Rev. 401.


Gold, J. "Freedom of Testation, the Inheritance (Family Provision) Bill", (1938) 1 M.L.R. 296.


McMurray, O.K. "Liberty of Testation and Some Modern Limitations Thereon", (1919) 14 Ill. L. Rev. 96.


C. REPORTS OF LAW REFORM COMMISSIONS


D. STATUTES

An Act Respecting the Estates of Mentally Incompetent Persons, S.B.C. 1962, c. 44.

Administration Act, R.S.B.C. 1960, c. 3.

Administration of Estates Act, 1925, 15 Geo. V. c. 23.

Adoption Act, R.S.B.C. 1979, c. 4.


Dependants' Relief Act, S.O. 1929, c. 47.


The Dependents' Relief Act, R.S.O. 1970, c. 126.

The Dependents' Relief Act, 1940, R.S.S. 1940, c. 36.

The Dependents' Relief Act, R.S.S. 1978, c. D-25.


The Dependents' Relief Act, R.S.S. 1953, c. 121.


Dependants' Relief Ordinance, R.O.Y.T. 1962, c. 9.
Dependants' Relief Ordinance, O.Y.T. 1980, (2d), c. 6.
The Devolution of Estates Act, R.S.O. 1970, c. 129.
The Devolution of Estates Act, R.S.S. 1910-11, c. 13.
Equal Guardianship of Infants Act, R.S.B.C. 1960, c. 130.
Estate Administration Act, R.S.B.C. 1979, c. 114.
Family Relations Act, R.S.B.C. 1979, c. 121.
Family Relief Act, R.S.A. 1970, c. 134.
The Family Relief Act, R.S.N. 1962, c. 56.
The Family Relief Act, R.S.N. 1970, c. 124.
Guaranteed Available Income for Need Act, R.S.B.C. 1979, c. 158.
The Inheritance (Family Provision) Act, 1938, 1 & 2 Geo. VI, c. 45.
Inheritance (Provision for Family and Dependants) Act, 1975, c. 63 (U.K.).
Lunacy Act, R.S.B.C. 1948, c. 194.
The Married Women's Relief Act, R.S.A. 1910, c. 18.
Patients Property Act, R.S.B.C. 1979, c. 313.
Succession Law Reform Act, R.S.O. 1980, c. 488.
The Survivorship Act, R.S.O. 1970, c. 454.
Testators' Dependants Relief Act, R.S.P.E.I. 1974, c. 47.
Testator's Family Maintenance Act, S.B.C. 1920, c. 94.
Testator's Family Maintenance Act, R.S.B.C. 1960, c. 378.
Testators' Family Maintenance Act, R.S.N.S. 1956, c. 8.
Testator's Family Maintenance Act, R.S.N.S. 1967, c. 303.
The Testator's Family Maintenance Act, 1900 N.Z. Stat., 1900, No. 20.

The Testators' Family Maintenance Act, R.S.M. 1946, c. 64.


Wills Variation Act, R.S.B.C. 1979, c. 435.
PUBLICATIONS


Amighetti, L. (Contributing Author) "Income Taxation in Canada." Prentice Hall of Canada Ltd.


