<u>**Wills & Estates**</u>
Winter Term 2019

Lecture Notes – No. 15

DEPENDANT'S SUPPORT

Can one completely disinherit one's immediate family? This is a question that all mature legal systems must confront and how a given legal system treats the issue is reflective of social norms and economic structure. In Ontario, married spouse may elect to treat death as a separation and prefer treatment under the *Family Law Act* to their deceased spouse's estate plan. Cohabiting spouses have no such election. This is in respect of property division only. Both married and cohabiting spouses were 'providing support' or were 'under a legal obligation to provide support' at death must provide 'proper support' that is adequate under the Succession Law Reform Act.

A Historical Perspective:

- *Roman Law:*
  It is well known that ancient codes of law prized the ability to make a Will principally in order to stabilize the transmission of family wealth and to ensure the stability of the family or clan in more primitive clan-based societies. Thus the relative stability of the family or clan structure and the relative weak form of the state in these societies favoured a strong degree of control over assets by a head of family to ensure that these collective assets remained together and together passed from one generation to another. In Rome, for example, with its rigid conception of the family based on absolute power (*patria potestas*) of the *paterfamilias* over members of the clan, the ability to leave property was essential. Indeed, the imposition of a duty on the *paterfamilias*'s descendants to perpetuate the family was a near sacred duty. Here the heir did not merely receive the property owned but, by the principles of 'universal succession', the heir replaced his ancestor completely taking over all rights and obligations. But even in Rome the principles were never static and notwithstanding the continuation of the centrality of the family in Roman law until the dissolution of the state, Roman law changed as Roman society and commercial life developed. Thus, by the time of Justinian, family provision was organized through a forced inheritance system whereby the close kin of the testator were entitled to a minimum set share (originally one-quarter, later increased to one-third by Justinian) of the testator's estate which could be increased through the testator's Will. This 'portio legitima' principle still forms the basis of most civilian 'legitim' systems of forced inheritance and some common law lawyers advocate that it remains superior to the common law system.

- *Early English Law:*
  While the English law took the concept of a Will, it did not accept the principle of forced inheritance nor did it rationalize Will-making based on the preservation of the assets and stability of the family corporation. Family ownership did not form part of Anglo-Saxon law.

- English Common Law:
  Whereas civilian systems developed from an orderly arrangement of rights and obligations through Roman law, the common law developed haphazardly and from a variety of influences. Part of that haphazard development produced the principle of (sometimes unfettered) testamentary freedom. The common law courts were not always unsympathetic to the plight of the disinherited spouse or child, softening harsh terms by calling into question the mental capacity of the testator or testatrix (such that the will did not represent true intentions where he or she 'forgot' to include a child), or, more rarely, by refusing to enforce certain clauses as contrary to public policy.

- *Modern Reform – Hats Off to the Kiwis:*
  The New Zealand *Testator's Family Maintenance Act of 1900*, N.Z. Stat. (1900), No. 20 was innovative and influential. The New Zealand statute followed a number of unsuccessful attempts at a quasi-civilian approach to dependents' relief in the 1890s in New Zealand, which were largely rejected on the basis of the set shares in the testator's estate in favour of specific family members. The 1900 statute gave the court a wide jurisdiction to consider claims for 'adequate support' of the testator's spouse and legitimate children.

- *Importation into Canadian Law:*
  In Canada, the New Zealand statute was received warmly. Alberta and Saskatchewan enacted statutes in 1910. Manitoba created a dependent's relief jurisdiction within an existing statute in 1919. British Columbia enacted a statute in practically the same terms as the New Zealand statute in 1920. The Ontario statute was slightly different. The *Dependant's Relief Act*, S.O. 1929, c.47, had the same foundational features as the New Zealand statute but limited the class of applicants (e.g. children had to be under 16 or 'incapable of self-support'), the maximum amount of awards (one-half of the net estate), and set out enumerated criteria for evaluating claims. As such**, the Ontario statute sought to create a balance between unfettered freedom of testation (the liberal view of property rights and certainty of doctrine) and unfettered freedom of the court to provide support out of the estate, in some jurisdictions on moral grounds alone (in essence the creation of an equitable jurisdiction through statute).**

- *Future Developments?*
  If testamentary freedom is an elastic concept that accommodates important social interests other than respect for property rights, then it is principally the family law regime that provide the normative content of those social policies that warrant limitation of that freedom in the law of dependants' relief. Dependants' relief, then, isn't a jurisdiction that raises issues merely about property, morality-based rights, or the ability of courts 'to break a Will' or fill in the intestacy rules. Rather, it begs the question of whether key points of succession law are consistent with changing societal norms, specifically in respect of changing conceptions of the 'family' and social obligations towards people to whom one is closely connected in an aging and multicultural society.

Dependants' Relief under the SLRA: The Basics

Who can claim? A dependant of the deceased (or his or her parent under s.58(2), or a specified government agency under s.58(3)) .

See s.57 of the SLRA:

"dependant" means,

(a) the spouse of the deceased,
(b) a parent of the deceased,
(c) a child of the deceased, or
(d) a brother or sister of the deceased,

to whom the deceased was providing support or was under a legal obligation to provide support immediately before his or her death;

What's the basis of the claim? The deceased has failed to make 'adequate provision for the proper support' of the dependant either in the Will or as arises through the intestacy provisions; s.58(1).

For what? An Order for '… proper support … [and] the court, on application, may order that such provision as it considers adequate be made out of the estate…'; s.58(1). The court has a wide jurisdiction in making an order under s.63(1), and can order under s.63(2) provision out of the estate as 'as the court considers appropriate' including periodic or lump sum payments or conveyance of specified properties:

Upon what criteria is the claim assessed? Under s.61(2), the Court must consider a wide range of factors in determining the amount and duration of any order – that is, the court must balance competing claims and rights in respect of the assets of the estate.

When should the claim be made? Any time after the death, but no later than 6 months after an estate certificate is issued unless the court allows an application thereafter in respect of 'any portion of the estate remaining undistributed at the date of the application;' s.61(2).

The estate trustee may not distribute assets pending determination of the application under s.67.

The Requisite Elements of the Claim under Part V of the SLRA

The Succession Law Reform Act, s.58 (1) provides:

> **Where a deceased, whether testate or intestate, has not made adequate provision for the proper support of his dependants or any of them, the court, on application, may order that such provision as it considers adequate be made out of the estate of the deceased for the proper support of the dependants or any of them.**

A dependant's claim for support is taken very seriously. Even if the entire estate is depleted and the testator's wishes as set out in the will are defeated, then "this consequence is consistent with the purpose of s. 58(1) of the *SLRA*": *McElligott Estate v. Damecour*, [2005] O.J. No. 1663 (Sup. Ct.), para. 39.

The Evolving Nature of the Application

In Canada, and elsewhere, the New Zealand statute was warmly received and fit well into an era of the legislative reform of the law of real property. The Ontario statute was enacted in 1929, and had the same foundational features as the New Zealand statute but limited the class of applicants, the maximum amount of awards, and set out enumerated criteria for evaluating claims to provided for some greater certainty. However framed, though, the principle of encroachment on testamentary freedom to ensure family provision was clearly established.

In 1994, the Supreme Court of Canada considered the nature of the jurisdiction in the context of one provincial statute – British Columbia's *Variation of Wills Act*, which remains the most discretionary model in Canada, largely adopting the text of the original New Zealand statute - and the general reasoning in that case has been adopted as part of the general succession law in many provinces by superior courts, including the Court of Appeal for Ontario.

In essence, then, it appears that a national consensus in respect of the fundamental tenets of dependants' relief that considers 'adequate' provision to be that which satisfies both the testator's 'legal' and 'moral' duties to the dependant claimant. It is important to note that while there is a body of foundational principles emerging that the various provincial dependants' relief regimes hold in common, variation in the provincial statutes remains substantial in the details and one must take care to analyse each province's statute and jurisprudence on its own merits.

The import of the Supreme Court of Canada's judgment is to institutionalize a two-step analysis of the claim of a person for provision out of the estate, standing to make a claim being one point of variation between the provinces.

Identification of *legal claims* in the sense of those contractual obligations or *inter vivos* statutory duties that might continue as against the estate are not especially contentious; the duty is established through either private law or statute in a conventional sense, and one need only consider the extent to which it remains to be satisfied in the testamentary context and whether the assets of the estate and competing claims will allow for its

satisfaction entirely or in part. The prototypical example is the claims of surviving spouse to division of family property (in Ontario, where there was a marriage) and support (in all cases where the Family Law Act would consider the decedent and the claimant 'spouses').

***Moral claims* are much more contentious.** The positions taken on the issue will be familiar one to any student of equity. Soft moral or ethical standards tend towards idiosyncratic and subjective evaluations of the equities of a given case ('palm-tree justice') and open the door to speculative litigation and unpredictable application of doctrine. In other words, **there is the danger that the shield created to protect dependants inadequately provided for will be used as a sword by those family members dissatisfied by the testator's or testatrix's Will in an *in terrorem* attack ('settle with me for a greater share of the estate or I will ensure that the assets are severely depleted through litigation'). On the other hand, the very malleability of equitable or quasi-equitable doctrine provides a necessary flexibility to the harsh application of more certain rules in property and the general law of succession.** The fact is that the family law regime is not principally designed for its use in the testamentary context. Constructing a balance between these two dynamics is no easy task.

Tataryn v Tataryn Estate
[1994] 2 SCR 807

This was a case involving the British Columbia Wills Variation Act, s.2(1) which read:

> 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.

Here the testator left an estate worth $315,000. He left his widow a life estate in the matrimonial home and made her the beneficiary of a discretionary trust of the income of the residue of the estate, with one of two sons as trustee. That same son was left the remainder interest in the home and residue, as well as a gift of a rental property. The other son received nothing, under clause 4 of the will:

> I HAVE PURPOSELY excluded my son, JOHN ALEXANDER TATARYN, from any share of my Estate and purposely provided for my wife by the trust as set out above for the following reason: My wife Mary and my older son John have acted in various ways to disrupt my attempts to establish harmony in the family. Since JOHN was 12 years old he has been a difficult child for me to raise. He has turned against me and totally ignored me for the last 15 years of his life. He has been abusive to the point of profanity; he has been extremely inconsiderate and has made no effort to reconcile his differences with me. He has never been open to discussion with a view to establishing ourselves in unity. My son EDWARD is respectable and I

> commend him for his warm attitude towards me, his honesty, and his co-operation with me.

The estate plan was thus to limit the widow's access to the property as the testator feared that she would give gifts to the estranged son; the effect was to limit her own access to the property for her own purposes. The S.C.C. held that a just distribution would one that was symmetrical to the widow's position if there had been marital breakdown (a legal basis for a greater share) as well as recognizing the widow's autonomy in the sense independence in her old age without dependence on the discretion of her son (a moral basis for a greater share). She was awarded title to the matrimonial home and the residue of the estate after the gifts to sons.

The judgement of the S.C.C. makes it clear that moral principles ('what a judicious person would do in the circumstances, by reference to contemporary community standards') inform the nature of the entitlement as well as the calculation of the award.

Per McLachlin J:

> 19 This Court rejected the need-maintenance approach to the Act in *Walker v. McDermott*, [1931] S.C.R. 94. At issue was the right of an independent child to share in an estate which the testator had left entirely to his wife. This Court upheld the trial judge's decision to award the child $6,000 of the $25,000 estate, overruling the Court of Appeal's decision that all should go to the wife. Duff J. (as he then was), speaking for the majority, enunciated the following test (at p. 96):
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> 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.
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> *Walker v. McDermott* may be seen as recognizing that the Act's ambit extended beyond need and maintenance…
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> …
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> 23 It has been suggested that this Court ought to replace the "judicious father and husband" test it set out in *Walker v. McDermott* and return to the needs-based analysis which prevailed in the early years of the Act. With great respect to the arguments to the contrary, I am not persuaded that we should do so.
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> …
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> **28 If the phrase "adequate, just and equitable" is viewed in light of current societal norms, much of the uncertainty disappears.**

Furthermore, two sorts of norms are available and both must be addressed. The first are the obligations which the law would impose on a person during his or her life were the question of provision for the claimant to arise. These might be described as legal obligations. The second type of norms are found in society's reasonable expectations of what a judicious person would do in the circumstances, by reference to contemporary community standards. These might be called moral obligations, following the language traditionally used by the courts. Together, these two norms provide a guide to what is "adequate, just and equitable" in the circumstances of the case.

29 The first consideration must be the testator's *legal responsibilities* during his or her lifetime. The desirability of symmetry between the rights which may be asserted against the testator before death and those which may be asserted against the estate after his death has been noted by the dissenting member of the British Columbia Law Reform Commission in its 1983 report on the Act, *Report on Statutory Succession Rights* (Report No. 70). Mr. Close argues (at p. 154):

A person is under a legal duty to support his or her spouse and minor children. If this duty is not observed then it may be enforced through the courts. That a testator's estate should, therefore, be charged with a duty similar to that borne by the testator in his lifetime is not troublesome. It follows that maintenance and property allocations which the law would support during the testator's lifetime should be reflected in the court's interpretation of what is "adequate, just and equitable in the circumstances" after the testator's death.

30 The legal obligations on a testator during his or her lifetime reflect a clear and unequivocal social expectation, expressed through society's elected representatives and the judicial doctrine of its courts. Where provision for a spouse is in issue, the testator's legal obligations while alive may be found in the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), family property legislation and the law of constructive trust: *Pettkus v. Becker*, [1980] 2 S.C.R. 834; *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38 [[1986] 5 W.W.R 289]; *Peter v. Beblow*, [1993] 1 S.C.R. 980 [[1993] 3 W.W.R. 337]. Maintenance and provision for basic needs may be sufficient to meet this legal obligation. On the other hand, they may not. Statute and case law accepts that, depending on the length of the relationship, the contribution of the claimant spouse and the desirability of independence, each spouse is entitled to a share of the estate. Spouses are regarded as partners. As L'Heureux-Dubé J. wrote in *Moge v. Moge* , [1992] 3 S.C.R. 813, at p. 849 [[1993] 1 W.W.R. 481]:

> ... marriage is, among other things, an economic unit which generates financial benefits ... The [Divorce] Act reflects the fact that in today's marital relationships, partners should expect and are entitled to share those financial benefits.

The legal obligation of a testator may also extend to dependent children. And in some cases, the principles of unjust enrichment may indicate a legal duty toward a grown, independent child by reason of the child's contribution to the estate. The legal obligations which society imposes on a testator during his lifetime are an important indication of the content of the legal obligation to provide "adequate, just and equitable" maintenance and support which is enforced after death.

31 For further guidance in determining what is "adequate, just and equitable", the court should next turn to the testator's *moral duties* toward spouse and children. It is to the determination of these moral duties that the concerns about uncertainty are usually addressed. There being no clear legal standard by which to judge moral duties, these obligations are admittedly more susceptible of being viewed differently by different people. Nevertheless, the uncertainty, even in this area, may not be so great as has been sometimes thought. For example, most people would agree that although the law may not require a supporting spouse to make provision for a dependent spouse after his death, a strong moral obligation to do so exists if the size of the estate permits. Similarly, most people would agree that an adult dependent child is entitled to such consideration as the size of the estate and the testator's other obligations may allow. While the moral claim of independent adult children may be more tenuous, a large body of case law exists suggesting that, if the size of the estate permits and in the absence of circumstances which negate the existence of such an obligation, some provision for such children should be made…

32 How are conflicting claims to be balanced against each other? Where the estate permits, all should be met. Where priorities must be considered, it seems to me that claims which would have been recognized during the testator's life -- i.e., claims based upon not only moral obligation but legal obligations -- should generally take precedence over moral claims. As between moral claims, some may be stronger than others. It falls to the court to weigh the strength of each claim and assign to each its proper priority. In doing this, one should take into account the important changes consequent upon the death of the testator. There is no longer any need to provide for the deceased and reasonable expectations following upon death may not be the same as in the event of a separation during lifetime. A will may provide a framework for the protection of the beneficiaries and future generations and the carrying out of legitimate social purposes. Any moral duty should be assessed in the light of the deceased's legitimate concerns which, where the assets of the estate permit, may go beyond providing for the surviving spouse and children.

33 I add this. In many cases, there will be a number of ways of dividing the assets which are adequate, just and equitable. In other words, there will be a wide range of options, any of which might be considered appropriate in the circumstances. Provided that the testator has chosen an option within this range, the will should not be disturbed. Only where the testator has chosen an option which falls below his or her obligations as defined by reference to legal and moral

> **norms, should the court make an order which achieves the justice the testator failed to achieve. In the absence of other evidence a will should be seen as reflecting the means chosen by the testator to meet his legitimate concerns and provide for an ordered administration and distribution of his estate in the best interests of the persons and institutions closest to him. It is the exercise by the testator of his freedom to dispose of his property and is to be interfered with not lightly but only in so far as the statute requires.**

Thus, where possible, the Court should pay deference to the plan created by the testator in balancing obligations owed to multiple dependants.

Cummings v Cummings
(2004), 235 D.L.R. (4th) 474 (Ont CA)

The presence of a moral obligation owed by the decedent to his or his dependants has been explicitly recognized in Ontario law for some time. In *Re Hull Estate* [1943] O.R. 778 (C.A.), in the context of predecessor legislation to the present regime, the morals analysis approved for British Columbia based on the New Zealand jurisprudence was accepted in Ontario and was applied to some extent in subsequent cases with contrasting approaches in the cases under the Succession Law Reform Act in respect of whether 'proper support' (rather than 'maintenance') favoured or disfavoured a claim on moral grounds that was different (and more extensive) than a conventional needs-based analysis. The question went unresolved for some time, but was answered in the Ontario Court of Appeal judgement in *Cummings v Cummings*.

Here, the testator left two children, a son age 24 and a daughter age 18. The son suffered from a degenerative illness - Becker's muscular dystrophy – which would probably confine him to a wheelchair by age 40. Though a university graduate, his employment prospects were poor. At the time of the application, he was attempting to work part-time from home. The daughter was in full-time education at the time of the application. It was agreed that the costs of maintaining the son for his natural life was approximately 10 times the value of the estate. The testator was divorced, and had a second wife. The separation agreement with is first wife provided for a set amount of child support and for it to be a first charge on his estate. In the will, the testator provided a testamentary trust of $125,000 to meet child support obligations with the remainder to the children upon the support obligation ceasing. The total value of the estate was $650,000. At trial, the application was allowed and the fund increased to $250,000 and placed in a trust with the first wife as trustee on the following terms: to pay up to $10,000 for the daughter's education and the rest to the son with a power to encroach on the capital. In the Court of Appeal, the appeal was dismissed.

The question, then, was one of balance – how to balance the son's need (which would take all of the estate) and the moral obligations of the testator to his daughter, his present spouse, and his former spouse (who was owed support payments at the testator's death).

Blair JA held:

> 38 Following the legislative changes in 1978, however, there have been conflicting decisions in Ontario as to the role of moral considerations in dependants' relief applications… In *McSween v. McSween Estate*, Carnwath J. said:
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>> I therefore conclude that in seeking the correct meaning to be ascribed to the words "proper support", in Ontario, under the Succession Law Reform Act, primary importance must be attached to the economic situation of the dependant at the time of the hearing as opposed to ethical or moral obligations to be imputed to the deceased at whatever point in time. That is not to say that the opening words of s. 62(1)(a) of the Act should be ignored; there is a requirement to "inquire into and consider all the circumstances of the application". I find, however, that in determining the adequacy of proper support as a prerequisite to the making of an order under s. 58(1) of the Act, that moral or ethical obligations on the part of the deceased are subsidiary to the primary consideration of the economic circumstances of all the parties who would be affected by any order made pursuant to s. 58.
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> 39 Carnwath J. also suggested that a re-examination of the "time-honoured precept" of directing the judge to "put himself in the place of the testator" might be justified as well.
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> **40 In my view these questions have been resolved by the decision of the Supreme Court of Canada in *Tataryn v Tataryn Estate*, [1994] 2 S.C.R. 807 (S.C.C.). There, the Court held that a deceased's moral duty towards his or her dependants is a relevant consideration on a dependants' relief application, and that judges are not limited to conducting a needs-based economic analysis in determining what disposition to make. In doing so, it rejected the argument that the "judicious father and husband" test should be replaced with a needs-based analysis: see para. 23. I see no reason why the principles of *Tataryn* should not apply equally in Ontario, even though they were enunciated in the context of the British Columbia *Wills Variation* Act R.S.B.C. 1979, c. 435, in which the language is somewhat different from that of the *Succession Law Reform Act*.**
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> …
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> 42 There are three differences of note between the British Columbia and the Ontario legislation...
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> 43 I do not think the difference in phraseology between the two statutes is significant. The language of sections 58(1) and 62 of the *Succession Law Reform Act* is broad enough itself. It provides the court with a discretion that is to be exercised upon a consideration of all the circumstances of the application. Nor am I persuaded that the disparity in language between "adequate" and "adequate, just and equitable in the circumstances" is important. As I have already noted, an Ontario court is mandated by the opening wording of subsection 62(1) to "consider all the circumstances of

the application". Moreover, as McLachlin J. observed in *Tataryn*, at para. 13, the making of "adequate" provision and the ordering of what is "adequate, just and equitable" are "two sides of the same coin".

44 The fact that the British Columbia legislation does not exclude adult independent children was weighed as a factor militating against a "needs only" test by McLachlin J. in *Tataryn*. However, it was only one factor of many, and was not dispositive. In any event, the definition of "dependant" in the *Succession Law Reform Act* is broader than that of its predecessor, the *Dependants' Relief Act*, and Ontario courts readily applied the "moral duty" analysis to applications under the latter legislation: see, for example, *Re Hull Estate, supra*.

45 Finally, I do not think the enumerated list of factors the court is required to consider under subsection 62(1) militates against the examination of moral duties. To the contrary, many of the factors outlined invoke such considerations and, as Misener J. noted in *Kipp v. Buck Estate*, [1993] O.J. No. 790 (Ont. Gen. Div.), para. 1, reinforce the notion that moral obligations of the deceased cannot be ignored. I note, for example, the provisions in paragraphs 62(1)(g) [the proximity and duration of the dependant's relationship with the deceased]; (h) [contributions made by the dependant to the deceased's welfare], (i) [contributions by the dependant to the acquisition, maintenance and improvement of the deceased's property and business], (j) [contribution to the deceased's career potential], (k) [legal support obligations by the deceased to other persons], (o) [the claims any other person may have as a dependant], and (r)(ii) [the length of time the spouses cohabited]. Thus, **in spite of other listed factors that relate, directly or indirectly, to needs and means, the provisions of subsection 62(1) of the Act are not limited to economic considerations alone. Moral considerations are relevant to the exercise.**

46 Moral considerations are not something to be contemplated in addition to, or in isolation from, subsection 62(1), however. The legal obligations and moral obligations referred to in *Tataryn* are reflected, for the most part, in the language of that lengthy provision. Thus, the principles of *Tataryn* are to be applied in the context of considering the factors listed and the general direction to consider all the circumstances.

47 I conclude, therefore, that the disparities between the British Columbia and Ontario statutes are not sufficiently telling to preclude the application of *Tataryn* in this province.

48 There is another reason why the Tataryn approach fits in Ontario as well. The view of dependants' relief legislation as a vehicle to provide not only for the needs of dependants (thus preventing them from becoming a charge on the state) but also to ensure that spouses and children receive a fair share of family wealth, was also important to the Court's analysis in that case. Society's values and expectations change. In earlier times, the prevailing view was that on termination of

a marriage the husband was obliged to maintain the wife, and nothing more. At present, however, the provisions of the *Divorce Act* R.S.C., 1985, c. 3, family property and family support legislation, and the law relating to constructive trusts, all reflect society's expectations that children will be properly supported and that spouses are entitled not only to proper support but also to a share in each other's estate when a marriage is over. These expectations are not confined to British Columbia. They are mirrored in Ontario as well through the provisions of the *Divorce Act* and the *Family Law Act* R.S.O. 1990, c. F.3.

49 As Justice McLachlin remarked in *Tataryn*, the Act must be interpreted through the prism of modern values. At paragraphs 15 and 28 she said:

> The language of the Act confers a broad discretion on the court. The generosity of the language suggests that the legislature was attempting to craft a formula which would permit the courts to make orders which are just in the specific circumstances and in light of contemporary standards. This, combined with the rule that a statute is always speaking (Interpretation Act, R.S.B.C. 1979, c. 206, s. 7), means that the Act must be read in light of modern values and expectations. What was thought to be adequate, just and equitable in the 1920's may be quite different from what is considered adequate, just and equitable in the 1990's. (underlining added)
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> If the phrase "adequate, just and equitable" is viewed in light of current societal norms, much of the uncertainty [about the lack of clear legal standards by which to judge moral duties] disappears. Furthermore, two sorts of norms are available and both must be addressed. The first are the obligations which the law would impose on a person during his or her life were the question of provision for the claimant to arise. These might be described as legal obligations. The second type of norms are found in society's reasonable expectations of what a judicious person would do in the circumstances, by reference to contemporary community standards. These might be called moral obligations, following the language traditionally used by the courts. Together, these two norms provide a guide to what is "adequate, just and equitable" in the circumstances.

Thus, in Ontario, the Court retains a jurisdiction to evaluate claims based on moral grounds but only through the criteria set down by the statute.

Dagg v. Cameron Estate
2017 ONCA 366 (Ont. C.A.)

This case was heard by the Court of Appeal notwithstanding that the parties had settled and the appeal was moot. At issue was the proper meaning and application of Section 72(7) of the *Succession Law Reform Act* which had until this matter gone without judicial consideration. Sections 72(1)(f) and 72(7) provide:

> **Value of certain transactions deemed part of estate**
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> 72. (1) Subject to section 71, for the purpose of this Part, the capital value of the following transactions effected by a deceased before his or her death, whether benefitting his or her dependant or any other person, shall be included as testamentary dispositions as of the date of the death of the deceased and shall be deemed to be part of his or her net estate for purposes of ascertaining the value of his or her estate, and being available to be charged for payment by an order under clause 63 (2) (f),
> …
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> (f) any amount payable under a policy of insurance effected on the life of the deceased and owned by him or her;
> …
>
> Rights of Creditor
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> 72. (7) This section does not affect the rights of creditors of the deceased in any transaction with respect to which a creditor has rights.

The agreed statement of facts submitted by the parties set out a dispute between the separated wife of the Deceased and his partner with whom he was living and was pregnant with his child. The Deceased died while the child was *in utero* and a dependants' support application was commenced on behalf of the child and his mother after the child's birth. The question for the Court was in respect of a policy of life insurance owned by the Deceased on his own life. The separated wife argued that the proceeds fell outside the notional estate (as provided by s.72(1)(f)) as a consent Order made between the Deceased and his wife in Family Court provided that he designate her irrevocably on any life insurance. Before his death, the Deceased changed the beneficiary designation from the separated wife to name the wife, their two children, and the Deceased's new partner as beneficiaries. The fly in the ointment was that there was nothing in the consent Order and no separation agreement that required the Deceased to carry life insurance nor that specifically provided that the proceeds of the insurance were to act as security against spousal and child support owed to the Deceased's first family.

The importance of the case generally has less to do with the facts of the case and more to do with the intersection of the dependants' law regime in the *Succession Law Reform Act* and the support regime in the *Family Law Act* which may continue against the estate of a support payor. Thus the Court put the issue for resolution as follows:

> *Where a support payor owns a life insurance policy and has been required by court order to name the spousal or child support recipient as the*

> *irrevocable beneficiary of the policy, upon the payor's death what rights does the support recipient have to the policy's proceeds in the face of a competing claim by another dependant of the deceased brought under Part V of the SLRA?*

In resolving the issue that Court of Appeal accepted a number of propositions as correct:

First, the rationale behind the so-called "claw back" provisions set out in s.72(1) of the *Succession Law Reform Act* which swell the value of the estate for dependants' support purposes is less about intentional evasion of support obligations by the deceased and more about the proper maintenance of dependants. Brown J.A. held that "…s. 72(1) captures transactions even if they are not made by a testator with the specific intention of evading obligations to support dependants. However, the legislative history of s. 72 certainly identifies preventing the evasion of support obligations on death as the mischief the section seeks to address. Or, as this court described the section's purpose in *Madore-Ogilvie (Litigation Guardian of) v. Ogilvie Estate*, 2008 ONCA 39 (CanLII), 88 O.R. (3d) 481, at para. 39, it operates to prevent arrangements that "jeopardise the maintenance of the deceased's dependants."

Second, there is a policy interest in maintaining the integrity of the support regime set out in the *Family Law Act* and the *Divorce Act* in their testamentary effect and particularly with respect to security in the form of life insurance on the life of the payor spouse. Brown J.A. held:

> [56] The *Family Law Reform Act*, S.O. 1978, c. 2 ("FLRA"), was enacted on March 16, 1978, four months after the *SLRA* came into force. Section 19(1)(j) of the *FLRA* provided that on an application for support, a court may order that "a spouse who has a policy of life insurance as defined in Part V of The Insurance Act designate the other spouse or child as the beneficiary irrevocably." Section 19(1)(k) also empowered a court to order "the securing of payment under the order, by a charge on property or otherwise."
>
> [57] Those provisions have been carried forward, in slightly modified form, as ss. 34(1)(i) and (k) of the Family Law Act…
>
> [58] The jurisprudence commonly treats the purpose of a beneficiary-designation order under s. 34(1)(i) of the FLA as securing the support obligation of a spouse in the event of his or her death: *Smylie v. Smylie*, 2006 CarswellOnt 7456 (S.C.), at para. 77; *Thomas v. Thomas*, [2003] O.J. No. 5401 (S.C.), at para. 96.
>
> [59] As to s. 34(1)(k), in *Katz v. Katz*, 2014 ONCA 606 (CanLII), 377 D.L.R. (4th) 264, this court held, at para. 69, that the sub-section "is broad enough to permit a court to order a spouse to obtain an insurance policy to secure payment of the order following the payor spouse's death. The concluding words 'or otherwise' in s. 34(1)(k) afford the court broad scope for securing the payment of a support order."
>
> The court continued, at para. 70:

> Because a support payor's estate is bound by a support order following the payor's death, the court making a support order is entitled to secure the payments to be made in the event of the payor's death by requiring the payor to obtain and maintain life insurance for a specified beneficiary while the support order is in force and to give directions concerning the extent to which the payout of the insurance proceeds will discharge the support obligation: see *Laczko v. Laczko* (1999), 1999 CanLII 14998 (ON SC), 176 D.L.R. (4th) 507 (Ont. S.C.), at pp. 511-12.

Third, notwithstanding that the relevant Family Court order at issue in the case did not specifically identify the use of the insurance to secure the Deceased's support obligations in the facts of the case, the Court of Appeal accepted that the separated wife had a legitimate interest and a "right" within the meaning of Section 72(7) regardless of whether she was a "secured" creditor in the ordinary sense.

Last, the resolution of the issue was thus identified by Brown J.A.:[1] "I conclude that where, at the time of his death, a spousal or child support payor owns a policy of insurance that is subject to a court order requiring the designation of the support recipient as the irrevocable beneficiary of the policy, s. 72(7) protects from the claw back of s. 72(1) that part of a policy's proceeds needed to satisfy the deceased's obligations to the spousal and child support recipients, calculated in accordance with the support orders in place at the time of his death." Brown J.A. continued:

> **[76] Under both the *FLA* and the *Divorce Act*, a court can secure the payment of support obligations by formally granting a charge against property. However, the jurisprudence discloses that the more common practice is for a court to order a support payor to designate the support recipient as the irrevocable beneficiary under a life insurance policy. While colloquially such an order is described as one that "secures" payment of the support obligations in the event of the payor's death, it would be more accurate to say that such an order makes available a pool of money – the proceeds of the life insurance policy – to satisfy the support payor's obligations calculated in accordance with the support orders in place at the time of his death.**
>
> **[77] Where such a beneficiary-designation order is made ancillary to a spousal or child support order, the support recipient is a creditor of the deceased in a "transaction with respect to which a creditor has rights." The transaction is the purchase or maintenance by the deceased of a policy of insurance on his life, which stands available, by operation of court orders, to satisfy the deceased's spousal or child support obligations on his death by designating the support recipient as the beneficiary of the policy. For the purposes of s. 72(7), the support recipient is a creditor of the deceased because, as the court-ordered designated beneficiary under the policy of insurance, the support recipient has the legal right to look to the policy's proceeds to satisfy the deceased's support obligations calculated as at the time of his death. Those obligations can include (i) any existing arrears and (ii)**

[1] 2017 ONCA 366 at para. 75 (Ont. C.A.)

the present value of any future support obligations, calculated by reference to the terms and duration of the support order in place at the time of his death.

[78] Such an interpretation of s. 72(7) is faithful to the scheme and object of Part V of the *SLRA*, which places limits on the reach of the claw backs contained in s. 72(1). It also harmonizes the operation of Part V of the SLRA with the insurance beneficiary-designation powers granted to courts under family law legislation: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Toronto: LexisNexis Canada Inc., 2014), at §11.2 – 11.5. The interpretation recognizes that although a policy of insurance ordered to stand available to satisfy a deceased's family law support obligations may fall within the language of s. 72(1)(f), it is not a transaction by the deceased designed to avoid his responsibilities to his dependants. On the contrary, it is a transaction intended to provide for family law support-order dependants. By "clawing back" into the deceased's net estate only that portion of the proceeds of a life insurance policy in excess of the amount required to satisfy the deceased's family law support obligations, funds may be made available to support his other dependants while, at the same time, discharging his existing family law support obligations.

[Emphasis added.]

At the end of the day, both family law and estates lawyer should be interested in *Dagg v. Cameron Estate* to make the point that Family Court orders that provide for security in the form of life insurance proceeds will take the proceeds of a dependants' support application made by other dependants to the extent that the proceeds relate to the support obligation; that is, funds in excess of the security against the support obligation may fall into the notional estate of the deceased. Certainly the parties to family law litigation can design ways for such proceeds to fall completely outside Section 72(1)(f) of the *Succession Law Reform Act* but where they do fall into the notional estate a balancing of interests in required. Estates lawyers will be interested in future in the quantification of support obligations with specificity to identify what part of insurance proceeds may be attacked.

Habberfield v. Sciamonte
2017 ONSC 4332 (Ont. S.C.J.)

This case deals with the limitation period provisions set out in Section 61 of the *Succession Law Reform Act* respecting dependants' support obligations:

Limitation period
61. (1) Subject to subsection (2), no application for an order under section 58 may be made after six months from the grant of letters probate of the will or of letters of administration.

Exception
(2) The court, if it considers it proper, may allow an application to be made at any time as to any portion of the estate remaining undistributed at the date of the application.

While no new ground is broken, the judgment of Justice Lofchik usefully sets out the relevant criteria that ought to inform the Court's exercise of its discretion in allowing an application to continue against the undistributed assets of an estate:

> (a) The Court has the discretion to allow the application to proceed at any time as to any portion of the estate remaining undistributed at the date of the application.
>
> (b) The discretion of the Court under section 61(2) to allow an application to proceed although it is brought after the time limit has expired under the SLRA must be exercised judicially, with considerations of the delay involved, the reasons for the delay, and the extent of prejudice in the Estate's defence of the claim.
>
> (c) The Court's discretion to extend the limitation period under section 61(2) is to be exercised in a broad and liberal manner.
>
> (d) In deciding whether to grant the extension, the court must determine whether the situation bears review of whether or not the Deceased made adequate provision in his Will for the proper maintenance and support of his dependents.
>
> (e) The question is not whether the Deceased has in fact done so, but whether there is a sufficient basis for review. This requires a consideration of what is equitable (in relation to the "proper" support of dependents as contemplated by the SLRA).
>
> (f) While delay (including the reason for delay) is a factor to consider, a request for an extension is not grounded solely in "good cause" being shown for the delay. The discretion to extend or refuse is a question of what is equitable between the parties, in all the circumstances.
>
> (g) In the absence of prejudice to the Estate, equity tends to favour granting an extension:
>
> The judge is thus given a discretion to be exercised on the principle of promoting justice between those interested in the estate. It is clear that he must refuse an application if the delay in applying would work an injustice. Further than that it would seem that he must find that justice, in so far as the principle of the Act defines the kind of justice that the Legislature had in mind, requires that the application should be heard.

In the case itself, the application was brought by an elderly lady years after the death of her alleged spouse. The reason for delay was said to be family dynamics and a late realization that the support provided to her under the testator's Will was inadequate. Justice Lofchik emphasized the lack of prejudice that would arise in the circumstances of the case in exercising his discretion to allow the application to continue in relation to the estate which had about $2,000,000 still undistributed in the form of realty.