Wills & Estates
Fall Term 2022

Lecture Notes – No. 15

XIX. SUPPORT OF DEPENDENTS

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. C.A.)

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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> …
>
> 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.

XX. SOLICITOR'S LIABILITY

- A solicitor owes a professional duty of competence to his or her client; failure to fulfil this duty may result in professional discipline.

- A solicitor also owes a contractual duty of professional performance to the client.

- **A solicitor also owes a duty of care to potential beneficiaries if such a person is deprived of the legacy through the lawyer's negligence.** The court must first inquire whether:

  (i) **the harm that occurred was a reasonably foreseeable consequence of the solicitor's negligent act**, and,

  (ii) whether **there is a sufficient relationship of proximity between the solicitor and the potential beneficiary**; and,

  (iii) whether there are **policy considerations for refusing to recognize the existence of a duty notwithstanding the findings of foreseeability and proximity**.

  The quantum of damages may reflect the full value of the intended legacy, as well as possible expectancy damages.

The lacuna in the law requires a remedy…

White v. Jones
[1995] 2 A.C. 207

The testator had an argument with his two daughters and decided to disinherit them. A Will was duly executed for that purpose. The father and his daughters reconciled and he gave written instructions to his solicitors to draft a new Will. The solicitors delayed, and during that delay the testator died while on holiday. The daughters successfully sued the solicitors in negligence – extending the scope of liability for pure economic loss to third parties not tied by contract to the tortfeasor and who did not act in explicit reliance on the defendant's assertions or actions.

Per Lord Goff:

> … The question which your Lordships have to decide is whether, in cases such as these, the solicitors are liable to the intended beneficiaries who, as a result of their negligence, have failed to receive the benefit which the testator intended they should receive.
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> …
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> (1) In the forefront stands the extraordinary fact that, **if such a duty is not recognised, the only persons who might have a valid claim (ie the testator and his estate) have suffered no loss, and the only person who has suffered a loss (ie the disappointed beneficiary) has no claim … It can therefore be said that, if the solicitor owes no duty to the**

intended beneficiaries, there is a lacuna in the law which needs to be filled. This I regard as being a point of cardinal importance in the present case.

(2) **The injustice of denying such a remedy is reinforced if one considers the importance of legacies** in a society which recognises (subject only to the incidence of inheritance tax, and statutory requirements for provision for near relatives) the right of citizens to leave their assets to whom they please, and in which, as a result, legacies can be of great importance to individual citizens, providing very often the only opportunity for a citizen to acquire a significant capital sum; or to inherit a house, so providing a secure roof over the heads of himself and his family; or to make special provision for his or her old age …

(3) There is a sense in which the solicitors' profession cannot complain if such a liability may be imposed upon their members. If one of them has been negligent in such a way as to defeat his client's testamentary intentions, he must regard himself as very lucky indeed if the effect of the law is that he is not liable to pay damages in the ordinary way. It can involve no injustice to render him subject to such a liability, even if the damages are payable not to his client's estate for distribution to the disappointed beneficiary (which might have been the preferred solution) but direct to the disappointed beneficiary.

(4) **That such a conclusion is required as a matter of justice is reinforced by consideration of the role played by solicitors in society. The point was well made by Cooke J in Gartside v. Sheffield Young & Ellis [1983] NZLR 37 at 43, when he observed:**

'To deny an effective remedy in a plain case would seem to imply a refusal to acknowledge the solicitor's professional role in the community. In practice the public relies on solicitors (or statutory officers with similar functions) to prepare effective wills.'

…

… In my opinion, therefore, your Lordships' House should in cases such as these extend to the intended beneficiary a remedy under the *Hedley Byrne* principle by holding that the assumption of responsibility by the solicitor towards his client should be held in law to extend to the intended beneficiary who (as the solicitor can reasonably foresee) may, as a result of the solicitor's negligence, be deprived of his intended legacy in circumstances in which neither the testator nor his estate will have a remedy against the solicitor. …

White v Jones was an important development which was soon followed in other jurisdictions and on the same reasoning developed in the House of Lords.

Earl v. Wilhelm
(2000), 183 D.L.R. (4th) 45 (Sask. C.A.)

The solicitor failed to investigate the nature of the assets subject of the Will and as a result the dispositions in the Will were in effectual. Was the solicitor liable to the intended beneficiaries? Yes.

Per Sherstobitoff JA accepting the authority of *White v. Jones*:

> [23] As observed by Lord Goff in White v. Jones, the liability of a lawyer to a disappointed beneficiary in respect of a will which has failed to carry out the testator's intention because of the lawyer's negligence has been much discussed. Notwithstanding the formidable difficulties in finding liability within the principles which had applied for at least a century to the legal relationship between lawyer and client, the overwhelming weight of authority in common law jurisdictions over the past 20 years or so has been in favour of finding liability one way or another, usually by an extension of the principle in Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd., [1964] A.C. 465…
>
> [24] The principle in Hedley Byrne has been made a part of the law of Canada by Haig v. Bamford, [1977] 1 S.C.R. 466…
>
> [25] However, it is difficult to apply the Hedley Byrne principle to the relationship of lawyer and disappointed beneficiary. The work is clearly done for the testator, not the beneficiary. Perhaps more importantly, it cannot be said that the disappointed beneficiary has in any way relied on the exercise by the lawyer of proper care and skill.
>
> [26] There are many other problems in extending the liability of a lawyer to disappointed beneficiaries. They were analyzed and summarized by Lord Goff in White v. Jones the following way.
>
> [27] The first problem is that the relationship between a lawyer and client is usually contractual, and there can be no liability to a third party because of the doctrine of privity of contract. Furthermore, the scope of the lawyer's duties to his client is fixed by the terms of the retainer, and at least in theory, the lawyer may protect himself by including terms in the retainer agreement. In the case of liability to a third party, this protection would be lost because there is no contract with the third party.
>
> [28] The second difficulty is that, while a lawyer may be concurrently liable to his client in contract and in tort, there is no duty of care owed by the lawyer to the disappointed beneficiary in tort (aside from assumption of responsibility under the principle in Hedley Byrne). This is reinforced by the fact that the claim is one for purely financial loss, and no action lies in tort for such a loss. (This is not so in Canada…) Furthermore, the claim is one for a mere loss of expectation, as opposed to an existing right, and, again, no action lies in tort for such a loss. These claims fall in the zone of contractual liability rather than tortious liability.

[29] A third argument against recognition of liability in tort is the difficulty of placing limits on cases in which liability would be allowed. Logically, liability would have to be imposed in cases of inter vivos gifts where the defect was for some reason irreparable. Logically, liability could not be limited to specific named beneficiaries and liability would have to be extended to indeterminate classes of persons who have been affected.

[30] Finally, it would be illogical to impose a duty on the lawyer to the disappointed beneficiary when the testator himself owed no such duty. And recovery by a disappointed beneficiary from the lawyer would have the effect of increasing the size of the testator's estate because it would not be possible to recover any part of the estate which had lawfully devolved on others even though it was not the testator's intention.

[31] Against these arguments, Lord Goff juxtaposed what he termed to be the reasons of justice which prompt judges and academic writers to conclude that a duty should be owed by the testator's lawyer to a disappointed beneficiary…

…

[36] After balancing all of these factors, Lord Goff concluded as follows at p. 710:

In my opinion, therefore, your Lordships' House should in cases such as these extend to the intended beneficiary a remedy under the Hedley Byrne principle by holding that the assumption of responsibility by the solicitor towards his client should be held in law to extend to the intended beneficiary who (as the solicitor can reasonably foresee) may, as a result of the solicitor's negligence, be deprived of his intended legacy in circumstances in which neither the testator nor his estate will have a remedy against the solicitor. Such liability will not of course arise in cases in which the defect in the will comes to light before the death of the testator, and the testator either leaves the will as it is or otherwise continues to exclude the previously intended beneficiary from the relevant benefit.

[37] He went on to note that his solution involved no unacceptable circumvention of the law of contract, that no problem arose by reason of the loss being purely economic, and that the assumption of responsibility would be subject to any term of the contract between the lawyer and the testator which might exclude or limit liability. Although the damages were for loss of expectation, he saw no reason to make a distinction between liability for contractual negligence where such damages were available and negligence arising under the Hedley Byrne principle.

[38] As to the "spectre of solicitors being liable to an indeterminate class", he pointed out that the ordinary case is one in which the intended beneficiaries are a small number of identified people. More difficult cases should be left until they are before the court.

[39] Lord Browne-Wilkinson, in his concurring opinion, said at pp. 717-18:

[T]he law will develop novel categories of negligence "incrementally and by analogy with established categories". In my judgment this is a case where such development should take place since there is a close analogy with existing categories of special relationship giving to a duty of care to prevent economic loss. The solicitor who accepts instructions to draw a will knows that the future economic welfare of the intended beneficiary is dependent upon his careful execution of the task. It is true that the intended beneficiary (being ignorant of the instructions) may not rely on the particular solicitor's actions. But, as I have sought to demonstrate, in the case of a duty of care flowing from a fiduciary relationship liability is not dependent upon actual reliance by the plaintiff on the defendant's actions but on the fact that, as the fiduciary is well aware, the plaintiff's economic well-being is dependent upon the proper discharge by the fiduciary of his duty. Second, the solicitor by accepting the instructions has entered upon, and therefore assumed responsibility for, the task of procuring the execution of a skilfully drawn will knowing that the beneficiary is wholly dependent upon his carefully carrying out his function. That assumption of responsibility for the task is a feature of both the two categories of special relationship so far identified in the authorities. It is not to the point that the solicitor only entered on the task pursuant to a contract with the third party (ie the testator). There are therefore present many of the features which in the other categories of special relationship have been treated as sufficient to create a special relationship to which the law attaches a duty of care. In my judgment the analogy is close.

[40] The trial judge adopted the reasoning of the majority in White v. Jones. We agree that he was correct in so doing. There are two reasons for this.

[41] Firstly, we agree with the reasoning of Lord Goff and Lord Browne-Wilkinson. The law as it existed prior to the series of judgments referral herein contained an anomaly when it left a lawyer free of liability for professional negligence, and a disappointed beneficiary without a remedy for a loss which occurred as a result of that negligence, in circumstances such as existed in this case. To use Lord Goff's words, at p. 711:

> Let me emphasise that I can see no injustice in imposing liability upon a negligent solicitor in a case such as the present where, in the absence of a remedy in this form, neither the testator's estate nor the disappointed beneficiary will have a claim for the loss caused by his negligence.

This is the injustice which, in my opinion, the judges of this country should address by recognising that cases such as these call for an appropriate remedy, and that the common law is not so sterile as to be incapable of supplying that remedy when it is required.

[42] Secondly, as noted previously, the now numerous precedents in England, Australia, New Zealand and Canada overwhelmingly favour the same result. Academics and text-book writers generally favour it… All of this leads us to conclude that the principle stated in White v. Jones may be

said to be so well established in most common law jurisdictions that it should be recognized as established in Saskatchewan as well.

The duty is not owed to beneficiaries under a previous Will:

Johnston Estate v. Johnston
2017 BCCA 59 (B.C.C.A.)

A. MacKenzie J.A.:

33 In *Graham v. Bonnycastle* [2004 ABCA 270], the court undertook a comprehensive review of the existing jurisprudence on solicitor negligence, including *Earl v. Wilhelm* (2000), 189 Sask. R. 71 (Sask. C.A.); and *Worby & Ors v. Rosser*, [1999] E.W.J. No. 3133 (Eng. C.A.). The majority recognized that imposing a duty of care on solicitors in favour of beneficiaries under a former will would create untenable conflicts of interest and make solicitors reluctant to act for elderly testators looking to change their testamentary arrangements. The court declined to impose such a duty, saying:

[31] . . . several decisions have recognized the untenable situation that would be created by extending solicitors' duty of care to include beneficiaries under a former will. Beneficiaries under a former will have other remedies available to them, and may block probate of the will where testamentary capacity is not established. The estate also has a remedy available where it suffers a loss as a result of solicitor negligence. There is no justification for imposing a duty on solicitors taking instruction from a testator for a new will to protect the interests of beneficiaries under a former will. There is not a sufficient relationship of proximity and there are strong policy reasons for refusing to recognize the existence of a duty. It is not fair, just and reasonable to impose a duty.

[Emphasis added.]

(See also *Harrison v. Fallis* [2006 CarswellOnt 3545 (Ont. S.C.J.)], 2006 CanLII 19457.)

34 I note that in the present case, David is indeed pursuing other remedies including a claim that Norman lacked testamentary capacity.

35 In *Korpiel v. Sanguinetti*, the court considered, among other issues, whether a solicitor owed a duty to beneficiaries named in a client's former will. The plaintiffs in Korpiel were relatives of an elderly testator who had instructed his solicitor to prepare a will bequeathing his home to the plaintiffs; some years later, the testator changed his mind and instructed the solicitor to draft a new will leaving the plaintiffs only a small bequest. The plaintiffs challenged the new will and brought suit against the solicitor for breach of fiduciary duty. Mr. Justice Taylor canvassed the relevant jurisprudence from a number of common law countries. He concluded that it was clear from the case law that solicitors owe no duty to beneficiaries beyond the competent

fulfillment of the testator's testamentary instructions. As to the allegation of a breach of fiduciary duty alleged by the plaintiffs, the court said this:

> 37 A fiduciary relationship is determined upon an examination of the nature of the relationship and its characteristics. [As observed] by LaForest J. in *Lac Minerals Ltd. v. International Corona Resources Ltd*., [1989] 2 S.C.R. 574 at 646:
>
> [t]he obligation imposed may vary in its specific substance depending on the relationship, though compendiously it can be described as the fiduciary duty of loyalty and will most often include the avoidance of a conflict of duty and interest and a duty not to profit at the expense of the beneficiary.
>
> 38 Were a solicitor to conduct herself as proposed by plaintiffs' counsel, it would be impossible to avoid a conflict of duty and interest if the solicitor refused to follow the client's interest and instructions in preference to that of the potential beneficiary at least so far as the interest is concerned. Similarly, this would also occur if the solicitor was to advocate for inclusion of persons or terms of disposition contrary to specific instructions of the client. Such a duty to the public, being those who might potentially be beneficiaries (an indeterminate class of persons), by any measure would clearly result in a conflict of the solicitor's primary duty to his client. It is only in the fulfillment of the duty of care to the client that a resulting duty can be said to be owed to those the client desires to benefit through his testamentary dispositions. Thus, the duty owed to beneficiaries is the duty to properly fulfill solicitor's instructions and where he or she fails, to recompense those who would otherwise benefit.

36 In my opinion, the judge was correct in law when she found David's claims were bound to fail to the extent they were based on a duty owed to him as a beneficiary under a former will. The judge properly considered the decision in *Graham v. Bonnycastle* and was persuaded that a solicitor cannot owe a duty of care to a beneficiary to not take instructions from a testator that might adversely affect the beneficiary's interest.

37 I agree with the reasoning in *Graham v. Bonnycastle* and I would adopt it: there is no justification for imposing a duty on solicitors taking instructions from a testator for a new will to protect the interests of beneficiaries under a former will. To impose such a duty would put the solicitor in an obvious and untenable conflict of interest; the result would be unsustainable and unsupportable at law. As a duty of care is a crucial element of a negligence claim, it was "plain and obvious" David's claims in negligence, based on the duty described, were bound to fail. The judge was correct in concluding that his claim was hopeless in law.

38 Similarly, a claim for breach of fiduciary duty has no prospect of success in the absence of a recognized fiduciary duty. I agree with Taylor J.'s conclusion in Korpiel that it is only in discharging a solicitor's duty to his

> client that it can be said that a parallel duty is owed to those persons the client wishes to benefit. In other words, any duty owed by a solicitor to a beneficiary in a will must mirror the duty owed to the testator: the duty to competently fulfill the testator's instructions. Thus, a solicitor cannot owe an independent fiduciary duty to the beneficiary of a will, for, if the testator's instructions were to conflict with the beneficiary's interests, the solicitor would be unable to avoid conflicting duties to both parties.
>
> 39 It follows that I would not accede to this ground of appeal.

Nor is it owed to an intestate heir that might benefit in respect of a non-testamentary act…

Byrn v. Farris, Vaughan, Wills & Murphy LLP
2017 BCCA 454 (B.C.C.A.)

The plaintiff was a disappointed daughter suing in respect of her parent's estates. A Statutory Declaration in a lawyer's file was evidence that the mother considered severing a joint tenancy with her husband before she died. The severance was never made and the property passed to the father on the mother's death by survivorship.

Groberman J.A. considered the law on negligence in Will drafting and held that the plaintiff had no standing to sue:

> [18] The defendant law firm was engaged by Ms. Mackin, and owed her a duty of care in providing professional services. Any damages resulting from negligence – whether from a failure to effect a severance of the joint tenancy, or from a failure to register the severance of a joint tenancy that had been effected – was damage to the estate. If Ms. Byrn suffered any loss, it was in her capacity as a person entitled to a portion of the estate on intestacy.
>
> …
>
> [21] In *White v. Jones*, [1995] 2 AC 207, [1995] 1 All E.R. 691, [1995] UKHL 5, the House of Lords further analysed and established the right. Wilhelm v. Hickson, 2000 SKCA 1 (CanLII), discusses the historical doctrinal reasons for denying recovery, and then summarizes the rationale for the judgment in White v. Jones:
>
> > [31] Against these arguments, Lord Goff juxtaposed what he termed to be the reasons of justice which prompt judges and academic writers to conclude that a duty should be owed by the testator's lawyer to a disappointed beneficiary.
> >
> > [32] Firstly, if no such duty is imposed, the only persons with a valid claim, the testator and his estate, have suffered no loss, and the only person who has suffered a loss, the disappointed beneficiary, has no claim. *This indicates a lacuna in the law which needs to be filled.*

> [33] Secondly, there exists a need to recognize the importance of the rights of persons to leave their property to whom they please and a need to rectify mistakes which frustrate those rights.
>
> [34] Thirdly, there is no injustice in making a lawyer whose negligence has defeated his client's testamentary intentions liable to pay damages, even if the damages are payable direct to the disappointed beneficiary rather than to his client's estate for the purpose of distribution to the disappointed beneficiary.
>
> [35] Finally, the public relies on lawyers to prepare effective wills. To deny an effective remedy amounts to a refusal to acknowledge a lawyer's professional role in the community.
>
> [36] After balancing all of these factors, Lord Goff concluded as follows at [All E.R.] p. 710:
>
> In my opinion, therefore, your Lordships' House should in cases such as these extend to the intended beneficiary a remedy under the Hedley Byrne principle by holding that the assumption of responsibility by the solicitor towards his client should be held in law to extend to the intended beneficiary who (as the solicitor can reasonably foresee) may, as a result of the solicitor's negligence, be deprived of his intended legacy *in circumstances in which neither the testator nor his estate will have a remedy against the solicitor*. Such liability will not of course arise in cases in which the defect in the will comes to light before the death of the testator, and the testator either leaves the will as it is or otherwise continues to exclude the previously intended beneficiary from the relevant benefit.
>
> [Emphasis added.]

[22] In *Graham v. Bonnycastle*, 2004 ABCA 270 (CanLII), the limited nature of this extension of liability was emphasized. After citing a number of English and Canadian cases, the Court said:

> [23] These decisions do not support any extension of the duty of care beyond a duty to those beneficiaries who were intended to benefit from the bequest which failed as a result of the solicitor's negligence. As stated by Lord Goff in White v. Jones at [All E.R.] pp. 702-3, the rationale for the extension of responsibility to prospective beneficiaries was to fill a gap in the law. *The duty is only extended where no other remedy exists* and there is no public interest reason for not extending the duty as the interests of the intended beneficiary coincide with that of the testator client.
>
> [Emphasis added]

[23] The reasoning of the Alberta Court of Appeal in *Graham v. Bonnycastle* was recently adopted by this Court in *Johnston Estate v. Johnston*, 2017 BCCA 59 (CanLII).

[24] The plaintiff relies on the decision of the English Court of Appeal in *Carr-Glynn v. Frearsons (A firm)*, [1998] 4 All ER 225, [1998] EWCA Civ 1325 as extending solicitor's liability. In that case, a solicitor drew up a will that included a specific bequest of the testator's interest in co-owned property to the plaintiff. The solicitor recognized that it was unclear whether the property was owned by the testator and the co-owner as joint tenants or as tenants in common, but failed to follow up on the question. In particular, the solicitor was negligent in not taking steps to sever what was, in fact, a joint tenancy. When the testator died, the property remained in joint tenancy, and her interest passed by survivorship to the remaining joint tenant rather than through the estate to the intended beneficiary. The intended beneficiary received nothing, and brought action against the solicitor.

[25] At first instance, the plaintiff's claim was dismissed, on the basis that the loss suffered was that of the estate, and the intended beneficiary had no right to pursue it. An award of damages to the estate, however, would not have conferred any benefit on the intended beneficiary. It would have passed through the estate to the residual beneficiaries rather than to the plaintiff, who was only given a specific bequest in the will.

[26] The Court of Appeal saw the case as one requiring an extension of the doctrine in *White v. Jones*. At All E.R. 231, it described the problem:

> At first sight the facts in the present case take it outside the principle as stated by Lord Goff. This is a case in which the estate, itself, would have a remedy.
>
> The question, therefore, is whether the remedy which the House of Lords was prepared to extend to a disappointed beneficiary in *White v Jones* is confined to those cases, of which *White v Jones* was an example, in which the estate itself has no remedy – so that, absent a remedy at the suit of the beneficiary, there is no remedy at all; or is to be further extended to cases in which the estate does have a remedy but where the estate's remedy will be of no advantage to the disappointed beneficiary.

[27] At All E.R. 234, the Court set out its reasoning for extending the remedy in White v. Jones:

> Lord Goff identified as "the real cause for concern" in cases such as White v Jones what he described (at [A.C.] 262F) as:
>
> > … the extraordinary fact that, if a duty owed by the testator's solicitor to the disappointed beneficiary is not recognised, the only person who may have a valid claim has suffered no loss, and the only person who has suffered a loss has no claim.
> >
> > That was the lacuna which had to be filled in cases of that nature. Lord Goff held (at 268B-C), that the courts were entitled

> – indeed, bound – to fashion a remedy to meet the need. For my part, I would find it equally extraordinary and as much a real cause for concern if the only person for whose benefit a valid claim could be pursued (the residuary legatee) was a person who had suffered no loss – because, absent the respondents' negligence, the property would not have formed any part of the residue – and the only person who has suffered a loss (the appellant) has no claim. I am satisfied that it would be consistent with the approach of the majority of the House of Lords in White v Jones to fashion a remedy in cases of this nature also, if that can be done without imposing a double liability on the solicitors, in order to avoid what would otherwise be an injustice. It seems to me that that is a legitimate step to take in the light of what Lord Nolan described (at 295B) as "the pragmatic, case-by-case approach which the law now adopts towards negligence claims".

[28] The Court, therefore was prepared to make "an incremental extension to the holding in *White v. Jones*", covering cases where the intended beneficiary would receive no benefit from an action brought by the estate.

[29] In my view, *Carr-Glynn* does not assist the plaintiff. First, this is not a case involving testamentary instructions. The evidence contains no suggestion that the solicitor was ever instructed to draw a will giving Ms. Byrn an interest in the real property. Her only entitlement arises as an intestate successor.

[30] More importantly, any damages suffered as a result of the solicitor's negligence are damages to the estate. Ms. Byrn's only entitlement to those damages would be as a person entitled to share in the residue of the estate. Thus the conundrum that justified the incremental extension of solicitor's liability to cases like Carr-Glynn is completely absent in this case. There is no lacuna in the case law to be filled. An action brought by the estate, if successful, will completely compensate Ms. Byrn for any loss she may have suffered.

[31] Section 151 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 recognizes that there are situations in which it is appropriate for a beneficiary or successor to have the right to bring an action in the name of the personal representative of the estate. The section requires a person in the plaintiff's situation to follow specific procedures to obtain leave to bring such an action. The section is an attempt to balance the rights of beneficiaries and successors with the broader interests of the estate as a whole.

[32] Ms. Byrn has not made an application to bring this action under s. 151, nor is it an action brought on behalf of the personal representative. As it is not a case in which a lacuna in the law requires the recognition of a direct right on the part of a beneficiary to bring action, the plaintiff lacks standing to make the claim.

The duty of care arises only upon a valid retainer:

Hall v. Bennett Estate
(2003), 64 O.R. (3d) 191 (C.A.)

A solicitor was called to the hospital for a patient with whom he had no pre-existing professional relationship. The patient lay dying and indicated to the solicitor that he wished to make bequest of a store to friend. The solicitor did not prepare the will according to these instructions because solicitor believed the instructions were incomplete and that patient lacked testamentary capacity. The patient drifted in and out of consciousness during the interview with the solicitor and could not stay conscious except for a short while at a time. The patient died not having made a will and the estate went intestate. Was the solicitor liable for not completing the will? No.

At trial, 40 E.T.R. (2d) 65, Manton J. reviewed the evidence and held:

> 43 The defendant himself said in his evidence that Bennett seemed to be with it and had a good sense of time and place. In his memorandum, he says that in their discussion Bennett told him Peter Hall was his lawyer and he wanted him to take care of things. He knew who we were and why we were there, he says. He took time answering questions and sometimes had to be woken to continue the conversation, but he was at no time confused and occasionally smiled. The defendant says that Bennett told him that his daughter and each of his two grandchildren should each get $100 so that they can't get his estate. Then he made five oral bequests:
>
> 1. Ronald Lapointe, cousin $10,000 & his car
>
> 2. Wendy Day, $20,000
>
> 3. Lisa MacDonald $5,000
>
> 4. Peter Hall, the property & store at 34 Main St. for his personal use
>
> 5. Brenda Bennett $10,000
>
> 44 I find that Bennett had the capacity to make a will on January 13th, 1996, and that the defendant had enough information to prepare a will to dispose of at least part of his assets. I also find that the defendant did not fulfill his duty of care to the plaintiff to prepare a will for Bennett. The defendant knew who the executor of the estate should be. Although Bennett did not use the word executor when referring to his friend the plaintiff, it would have been easy to conclude that Bennett wanted the plaintiff to act as executor of his estate. He could have then left $100 to Bennett's daughter and $100 each to his two grandchildren. Bennett had repeated to him several times the reason why he did not want to leave money to his daughter. The defendant could have then made provisions for the five specific bequests stated and added a paragraph indicating that it was Bennett's wish not to leave more than the token bequest to his daughter and grandchildren, and he could also have written in the will itself

the reason why he was doing so. The defendant could have said nothing about the residue so long as he stated that he did not want his daughter and grandchildren to benefit more than what was provided in the will.

45 I find that, during the more than one hour the defendant was with Bennett, he spent too much time worrying about Bennett giving him a list of assets and about what would be done with the residue of the estate.

46 I also find that if, instead of worrying about the list of assets and the residue of the estate, the defendant had concentrated on writing down, in the form of a will, the last wishes of Bennett, then the persons that Bennett wanted to exclude from his will would not have benefited from his estate.

Damages were set at $124,500 on agreement.

In the Court of Appeal, the appeal was successful. Per Charron JA:

48 As stated earlier, **it is well-settled that a solicitor who undertakes to prepare a will has the duty to use reasonable skill, care and competence in carrying out the testator's intentions. This duty includes the obligation to inquire into and substantiate the testator's capacity to make a will. This first obligation is of fundamental importance**. After all, if the testator does not have the requisite testamentary capacity, the preparation of a will in accordance with his expressed wishes at the time may only serve to defeat his true intentions.

49 The solicitor's duty of care is, of course, owed primarily to the client. However, the appellant rightly concedes that a solicitor's duty of care may extend to a person other than the client where that other person is injured as a result of the solicitor's negligence in performing the work for which he or she was retained by the client. Hence, **a solicitor who is negligent in his or her professional work may be liable not only in contract (and possibly in tort) in respect of the client, but also in tort in respect of others to whom a duty of care can be shown to exist**.

50 The Chancery Division recognized the existence of a duty of care owed by a solicitor to a prospective beneficiary under a will in *Ross v. Caunters* (1979), [1980] 3 All E.R. 580, [1980] Ch. 297. In that case, the solicitors who prepared a will for a testator sent it to him for execution without warning him that the will should not be witnessed by the spouse of a beneficiary. This warning should have been given because, according to the governing statutory provisions, where a beneficiary or a spouse of a beneficiary attested a will, the gift to that beneficiary was void. The beneficiary whose spouse attested the will was successful in his claim for damages against the solicitors for negligence.

51 The House of Lords subsequently reached a similar result in *White v. Jones*, [1995] 1 All E.R. 691. A solicitor who was unreasonably slow in

preparing a will, such that the testator died before it was executed, was found liable to a prospective beneficiary who was not his client.

52 The appellant submits, and in my view correctly so, that whether a solicitor does owe a duty of care to a third party beneficiary so as to found an action in negligence will depend on the circumstances. The question of whether a duty of care arises is a question of mixed fact and law to be determined by the court in accordance with the two-stage test in *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.), as revisited by the Supreme Court of Canada in *Cooper v. Hobart*, [2001] 3 S.C.R. 537. At stage one of the test, the inquiry is twofold. **The court must first inquire whether the harm that occurred was a reasonably foreseeable consequence of the defendant's act, and next, whether there is a sufficient relationship of proximity between the parties. At stage two of the test, the court must determine whether there are policy considerations for refusing to recognize the existence of a duty notwithstanding the findings of foreseeability and proximity.**

53 The appellant submits that, as a general proposition, no duty of care can arise with respect to the preparation of a will in the absence of a retainer between the solicitor and the client. He submits that the retainer is the anchor that grounds both the contractual duty owed to the client and the duty of care that may be owed to third parties in tort. The appellant takes the position that, in this case, no retainer to prepare a will was given or accepted. He submits that Bennett was incapable of fully conveying his testamentary intentions to Frederick. Given the incomplete instructions, Frederick never accepted a retainer to draw a will and, consequently, no duty of care arose in respect of the carrying out of Bennett's testamentary wishes.

54 **The appellant further submits that the imposition of a duty of care in any case must be fair, just, and reasonable having regard to all the circumstances. He submits that the imposition of a duty of care in respect of the preparation of a will in deathbed circumstances such as those that arose in this case would place solicitors in an untenable situation. He describes the resulting dilemma in his factum as follows:**

> **To impose a duty of care in favour of third party prospective beneficiaries in deathbed circumstances where there is a risk that the testator lacks capacity makes solicitors in those circumstances the guarantors of third party beneficiaries' inheritances. If the solicitor determines that the testator lacks capacity and declines to draw the will, the solicitor is exposed to a suit by the third party prospective beneficiaries. If, on the other hand, the solicitor in the same situation draws the will and attends to its execution, the solicitor is exposed to a suit by the personal representatives of the estate for the costs incurred by the estate in determining that the testator lacked capacity. The result is a no-win situation for solicitors.**

55 The appellant notes further that the imposition of a duty of care as that imposed in this case ignores the important principle that a solicitor is independent from his client and under no legal obligation to accept a retainer.

56 I will consider first the duty of care owed to the client. **As a general proposition, I agree with counsel for the appellant that the existence of a retainer is fundamental to the question of duty of care. The retainer is usually the very basis of the relationship between a solicitor and a client. Hence, insofar as the client is concerned, the absence of a retainer will usually be determinative, and no duty of care will arise in respect of the preparation of a will. It is simply a matter of common sense that there can be no liability in contract for the negligent performance of services that a solicitor never undertook to perform. Insofar as any possible liability to the client in tort is concerned, in the absence of a retainer, there would have to be other circumstances that gave rise to a duty of care. Such circumstances would be unusual.** For example, it is conceivable that a duty of care could arise, even in the absence of an actual retainer, where a solicitor either by words or conduct negligently represents that he will accept a retainer and the "client" relies on this representation to his or her detriment. If the reliance was both foreseeable and reasonable, a duty of care may well arise according to the usual principles governing the tort of negligent misrepresentation as set out in *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165. There is no suggestion that anything of the sort happened in this case.

57 **Insofar as the potential liability in negligence to a third party is concerned, the existence of a duty of care, as stated earlier, will depend on the presence of both foreseeability and proximity. Again, it is my view that the existence of a retainer is fundamental to the question of duty of care.** In the absence of a retainer, the harm that may be occasioned to the third party beneficiary by the failure to make a will may still be foreseeable but, absent exceptional circumstances, it is my view that there would be insufficient proximity between the parties to give rise to a duty of care. It is usually the retainer that creates the necessary proximity not only between the solicitor and the client but between the solicitor and the third party.

[58] In this case, it cannot be disputed that, at the very least, Frederick had undertaken to interview Bennett with a view to obtaining instructions to prepare a will. He therefore had to bring the skill of a reasonably prudent solicitor to this task. As discussed earlier, his first obligation was to inquire into Bennett's testamentary capacity before undertaking to do a will. It is my view that the evidence in support of Frederick's opinion that he did not have sufficient instructions to prepare a will and that Bennett lacked testamentary capacity was overwhelming. Indeed, in the circumstances, it is my view that his duty was to *decline* the retainer. I can only conclude that the trial judge's conclusions to the contrary were based on his mischaracterization of the issues, and his

misapprehension of the test on testamentary capacity, both errors of law that are subject to review in this court on a standard of correctness. On the latter question, it is my view that this is yet another case where apparent lucidity has been mistakenly equated with testamentary capacity.

[59] Hence, on all the circumstances, I conclude that Frederick fulfilled any obligation that he owed to Bennett and, in the absence of any retainer to prepare a will, he owed no duty of care to Hall.

[60] While this conclusion is sufficient to dispose of this appeal, I wish to comment briefly on an additional question that was raised on appeal because of the result at trial, namely, whether it was even open to the court to found liability on Frederick's decision to decline the retainer to prepare a will. The appellant submits that such a finding runs contrary to the contractual nature of the retainer and the general principle that a solicitor is free to accept or refuse a retainer.

[61] It is neither necessary nor advisable to answer this additional question in a determinative way in this case. However, I find it important to note, if only for guidance in future cases that, in my view, it is at least questionable whether Frederick, regardless of his opinion on Bennett's capacity, could be found to be under any *legal* obligation to accept the retainer to prepare Bennett's will. If, for example, the facts had been otherwise and Frederick had been of the view that Bennett was able to make a will but nonetheless declined the retainer, the exigent circumstances would undoubtedly give rise to a serious question of professional conduct and, depending on all the circumstances, could form the basis of disciplinary proceedings. I note in this respect the following commentary to Rule 3.01 of the Rules of Professional Conduct of the Law Society of Upper Canada:

The lawyer has a general right to decline a particular representation (except when assigned as counsel by a tribunal), but it is a right to be exercised prudently, particularly if the probable result would be to make it difficult for a person to obtain legal advice or representation.

[62] It is important to note, however, that while the Rules of Professional Conduct may inform a court's decision on the questions of duty and standard of care, they do not, *in and of themselves*, create legal duties that found a basis for civil liability. The question of whether a duty of care arises in a negligence action is one that must be determined according to general principles of tort law as discussed earlier. Hence, before a result such as that achieved at trial in this case is reached, a court should address the important question whether in all the circumstances the solicitor was under a legal obligation to accept a retainer.

The standard of care is reasonableness:

McCullough v. Riffert
2010 ONSC 3891

Per Mulligan J:

> [1] **Robert McCullough died on February 21, 2008 just ten days after visiting his lawyer to give instructions for a Will. The Will, which was not signed, would have left his entire estate to his niece Sarah Audra McCullough (Sarah). In this action his niece Sarah, the disappointed beneficiary, claims against his lawyer Diana Siglinda Riffert (the lawyer) in negligence. The issue in this trial is simply this: in the circumstances here, was the lawyer negligent in not attending to the preparation and execution of the Will before Robert died.** For reasons that follow, I find that there was no negligence on the part of the lawyer in these circumstances.
>
> …
>
> [44] A decision in this case requires the examination of three questions:
>
> (1) what is the standard of care required of the solicitor in preparation of a Will;
> (2) is the solicitor liable to a disappointed beneficiary;
> (3) in the circumstances of this case did this solicitor fail to meet the standard of care.
>
> …
>
> [57] While best practices may have indicated that the lawyer should have prepared a Will on the day of the visit or instructed on a holograph Will there are many more factors indicating such a standard would impose too high a burden on a careful and competent lawyer.
>
> **[58] It should be remembered that Robert took no independent steps to obtain a new Will to reflect his stated intentions. He declined the offer of a lawyer's visit to his home as being too expensive. When the Will kit was obtained and prepared for him he found that its completion was too complicated. Although he had at least two contacts with the lawyer years earlier it fell to his niece to make this appointment.**
>
> [59] The lawyer gave evidence in a straight forward manner and candidly admitted that Robert had lost a great deal of weight and appeared emaciated. I accept her evidence that she had no recollection of the detailed conversation with Sarah about Robert's poor health when the appointment was first set up. I accept her evidence that if Sarah had used the words "he had seen death" it would have made an impression on her in further alerting her to his state of health. However, even if such a conversation did take place, it was still incumbent on the lawyer to make her own observations of Robert and ask appropriate probing questions.

[60] In my view the following factors inform my decision that the lawyer met the standard of care required in these circumstances:

• An appointment was arranged at the lawyer's office within one week of Robert's niece's telephone call with the lawyer. Three days later a draft Will was prepared and sent out to Robert for review. The lawyer noted on the file that the will should be signed by February 29th. This would have been about two and a half weeks after the initial interview.

• Robert attended at the office by walking in with the assistance of a cane and with some help from his niece. He was dressed in a track suit and a jacket. The lawyer did not have the benefit of seeing him at home in his bathrobe and in a dishevelled state in the weeks leading up to the office visit.

• At the office visit Robert did not express any urgency other than a desire to complete the Will before a proposed trip to Texas.

• The lawyer asked if he had seen a doctor and noted his negative answer and his explanation.

• When Robert saw the lawyer he had not seen a doctor and there was no diagnosis as to his weight loss. Nor was there a diagnosis that he was subject to a terminal illness. This was not a visit to the client's hospital or palliative care bedside.

• After the office visit Robert did not call back to advise as to the possible alternate executor or to inquire if the Will was ready.

• Sarah did not call back in the days following the office visit to see if the Will was ready and to arrange a second appointment for Robert.

• When Robert died ten days later Sarah expressed shock; she was taken aback and not expecting it.

[61] There may be circumstances where a solicitor does have a professional obligation to give priority to the preparation of a Will as soon as possible. Visits to a hospital, nursing home or a palliative care centre will give rise to greater urgency. The more so when the lawyer has the benefit of medical advice that the client has a terminal illness. Even when a client visits the lawyer's office, the level of urgency can be raised, especially in cases where the client is elderly or has been diagnosed with a serious illness which could be life-threatening.

[62] In my view, there is a continuum between a client who presents without any particular concerns regarding health or age and a client who is clearly on his or her death bed. The level of urgency to prepare a will quickly will increase as factors mount. There may be situations where a lawyer should prepare a brief will at the first

interview with a very elderly or a terminally ill client. Best practices may indicate that course of action to be prudent in such situations. There always exists the possibility that a client could die from the illness or an accident after the first meeting with the lawyer. To fail to prepare a will quickly may fall below the standard of care for a reasonably competent solicitor depending on all the facts in this continuum. However, I am not satisfied that, on the facts here, the lawyer fell below the standard of care.