Wills & Estates
Winter Term 2024

Lecture Notes – No. 18

IXX. SUPPORT OF DEPENDANTS

1. Introduction

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, a married non-separated 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; support is different. **Each of a married and cohabiting spouse that 'was providing support or was under a legal obligation to provide support immediately before his or her death" (see s.57(1)) 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:
  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 dependants' 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 dependant'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.

2. 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.

3. Legal and Moral Claims : *Tataryn*

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.**

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.

The Court accepted that there is 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 (S.C.C.)

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 independant 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):

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.

Walker v. McDermott may be seen as recognizing that the Act's ambit extended beyond need and maintenance…

…

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.

…

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 dependant children. And in some cases, the principles of unjust enrichment may indicate a legal duty toward a grown, independant 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 dependant

> **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 dependant 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 independant 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.

4. Satisfying the Obligation

Re Cooper
(1980), 30 O.R. (2d) 113 (Div. Ct.)

This was a dispute between a second spouse and his former spouse for herself and a disabled child from the first marriage. The Deceased and the surviving spouse were together for 7 years before he died. The property passing on his death consisted of $69,865, of which $52,460.87 was payable to his former. The wife applied for support out of the Deceased's Estate. The respondent on the reasoning that the wife was never actually "dependant" on the Deceased; that is, each was working and contributing to the household and the surviving spouse earned more than her husband. The Divisional Court rejected such a limiting approach and confirmed that a $15,000 award was appropriate.

Gray J.:

> The realities of modern life in which both partners in a marriage (or a common law relationship) often work and make financial contributions to the family have prompted many changes in the law culminating in the passing of The Family Law Reform Act, 1978 and The Succession Law Reform Act which both came into force on the day of Mr. Cooper's death. Obligations between common law spouses are now recognized. The support obligations between spouses and common law spouses are now mutual (s. 15 of The Family Law Reform Act, 1978). Thus, the Legislature has recognized that these relationships are also economic partnerships to which both parties are expected to contribute.
>
> Therefore, in this case Mrs. Hampton and Mr. Cooper, in sharing common expenses, were each contributing to the support of the other, but Mrs. Hampton's contribution was greater in relation to her income (and perhaps greater in absolute dollars) than was the contribution of Mr. Cooper.
>
> The definition of "dependant" in s. 64 of the Act does not require that the applicant be actually dependant on the deceased. Rather "dependant" is a defined term in the Act with its own special meaning…
>
> …The definition requires two things. First, it requires the person to be in a certain relationship to the deceased. This is set out in items (i) and (iv). Secondly, it requires that the deceased was either providing support or under a legal obligation to provide support to the person claiming to be a dependant immediately before death.
>
> . . .
>
> **These two criteria in the wording of s. 64(d) are quite different and if the deceased was not providing any support to the applicant, nevertheless the applicant still falls within the definition of "dependant" if the deceased was under a legal obligation to provide support. Thus the section contemplates the applicant being a**

dependant within the meaning of the Act even where he or she was not actually dependant on the deceased for support. The definition of dependant in Part II of The Family Law Reform Act, 1978 also contemplates situations in which the applicant is not actually dependant on the person from whom support is being requested.

In any event, since Mrs. Hampton and Mr. Cooper were each contributing to common expenses, it may be said that each in his own way was dependant on the other in the ordinary meaning of the word. Mr. Cooper was dependant on Mrs. Hampton to provide the food and she in turn was dependant on him to pay the rent and other sundries.

Mr. Cooper was providing support to Mrs. Hampton immediately before his death. It is also true that Mrs. Hampton would qualify under the latter requirement of the second test in the definition of dependant because Mr. Cooper was under a legal obligation to provide for his common law spouse by virtue of s. 15 of The Family Law Reform Act, 1978.

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

The presence of a moral obligation owed by the Deceased 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:
>
> > 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.
>
> 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.
>
> **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*.**
>
> …
>
> 42 There are three differences of note between the British Columbia and the Ontario legislation...
>
> 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 independant 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)
>
> 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.

5. Property Subject to an Order

(a) Section 71:

> 71 Where a deceased,
>
> (a) has, in his or her lifetime, in good faith and for valuable consideration, entered into a contract to devise or bequeath any property; and
>
> (b) has by his or her will devised or bequeathed that property in accordance with the provisions of the contract,
>
> the property is not liable to the provisions of an order made under this Part except to the extent that the value of the property in the opinion of the court exceeds the consideration therefor.

Cowderoy v. Sorkos Estate
2014 ONCA 618

A testator promised his farm in return for working on the farm. However, dependant'sn support can still claw back the "value of the property in the opinion of the court exceeds the consideration therefor.

Lauwers J.A.:

> [44] In policy terms, s. 71 of the SLRA occupies a halfway house between two more extreme outcomes of the contest between the dependant's relief applicant and the intended recipient of a bequest. The first is that dependants' relief legislation should entirely override any contrary contractual obligations; this was the outcome in Dillon v. Public Trustee of New Zealand, 1941 CanLII 383 (UK JCPC), [1941] A.C. 294 (P.C.). The second is that valid contracts cannot be overridden by the dependants' relief legislation; this was the outcome in Schaeffer v. Schuhmann, [1972] A.C. 572 (P.C.).
>
> **[45] The halfway house reached by s. 71 of the SLRA is that when a contract results in the transfer of property by will, dependant's relief claims can attach to any value of the property in excess of the consideration given under the contract.**
>
> **[46] The trial judge found that Gus and the Cowderoys made an agreement that Gus would bequeath the properties to them. As I have explained, there is no basis for disturbing that finding.** The bequest of the properties is deemed to have been made in Gus's will. Consequently, on the trial judge's findings, s. 71 ought to have been considered: Gus entered into a contract to devise property and, on the basis that equity deems to be done that which ought to be done, he made the devise in accordance with the provisions of that contract. The consequence of the trial judge not considering s. 71 in these

circumstances, is that the Cowderoy brothers were left better off than if Gus had fulfilled his promise and bequeathed the farm and cottage properties under the will.

[47] Given s.71, the trial judge ought to have considered whether there was any excess value in the farm and cottage properties over the consideration provided to Gus by the Cowderoy brothers. That is, he was obliged to determine whether "the value of the property in the opinion of the court exceeds the consideration therefor." The trial judge did not make that determination.

[48] In his decision in Rena's application, the trial judge found, at para. 14 that the value of the Estate was reduced to about $1.3 million because of the transfer of the farm and cottage properties. The trial judge did not value the "consideration" provided by the Cowderoy brothers for the farm and cottage properties.

[49] In my view, the evidence given to support the quantum meruit claim, coupled with the parties' submissions as to the value of the services provided by the Cowderoys, provide a sufficient proxy to conclude that the value of the farm and cottage properties exceeds the value of the work performed by the Cowderoy brothers.

[50] The Cowderoy brothers made an alternative claim in the Statement of Claim for payment on a quantum meruit base for the work they did for Gus, but did not quantify it there. Their written submissions to the trial judge asserted that the plaintiffs' had each spent a total of 10,000 hours working on the farm property, and that a fair and reasonable hourly rate would be $25.00. This would put the value of the work, at its highest, at $500,000, for a share of $250,000 each.

[51] The Estate took the same position as it did in its written submissions at trial: The Cowderoy brothers should be compensated for 14,000 hours of work multiplied by $5.55 (the average minimum wage from 1985-2003) or $77,000 each. In the alternative, the Estate Trustee submits in its factum that this court could award compensation in the amount of $250,000 each to the Cowderoy brothers as requested by them.

[52] The difference between the value of the farm and cottage properties of $1.3 million and the highest possible quantum meruit claim of $500,000 would leave excess value, within the meaning of s. 71, of $800,000.

[53] In conclusion, once the bequest is deemed to have been made, s. 71 of the SLRA ought to have been considered. It would be incongruous, and contrary to the purpose and intent of the SLRA, if the Cowderoy brothers were better off because of the testator's failure to make the bequest of the properties, as he was obliged to do pursuant to the Breakfast Agreement, than they would be had he had kept his promise

and made the bequest; since the value of the farm and cottage properties exceeds the value of the work performed by the Cowderoy brothers, as a bequest that excess value would have been amenable to a dependant's relief order. This also disposes of the submission made by Rena's counsel in oral argument that, because Gus had failed to bequeath the properties, s. 71 does not apply, and the properties fall into the estate completely free of the claims of the Cowderoy brothers.

(b) Section 72(1):

The statute provides:

> 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),**
>
> (a) gifts mortis causa;
>
> (b) money deposited, together with interest thereon, in an account in the name of the deceased in trust for another or others with any bank, savings office, credit union or trust corporation, and remaining on deposit at the date of the death of the deceased;
>
> **(c) money deposited, together with interest thereon, in an account in the name of the deceased and another person or persons and payable on death under the terms of the deposit or by operation of law to the survivor or survivors of those persons with any bank, savings office, credit union or trust corporation, and remaining on deposit at the date of the death of the deceased;**
>
> **(d) any disposition of property made by a deceased whereby property is held at the date of his or her death by the deceased and another as joint tenants;**
>
> (e) any disposition of property made by the deceased in trust or otherwise, to the extent that the deceased at the date of his or her death retained, either alone or in conjunction with another person or persons by the express provisions of the disposing instrument, a power to revoke such disposition, or a power to consume, invoke or dispose of the principal thereof, but the provisions of this clause do not affect the right of any income beneficiary to the income accrued and undistributed at the date of the death of the deceased;

> **(f) any amount payable under a policy of insurance effected on the life of the deceased and owned by him or her;**
>
> **(f.1) any amount payable on the death of the deceased under a policy of group insurance; and**
>
> **(g) any amount payable under a designation of beneficiary under Part III.**
>
> (2) The capital value of the transactions referred to in clauses (1) (b), (c) and (d) shall be deemed to be included in the net estate of the deceased to the extent that the funds on deposit were the property of the deceased immediately before the deposit or the consideration for the property held as joint tenants was furnished by the deceased.

This section claws back into the Estate certain assets that pass outside the Estate for support purposes.

Moores v. Hughes
1981 CanLII 1870 (Ont. H.C.)

Here the real value of the Estate passed under two policies of insurance, under a pension plan and through a joint bank account. A dispute arise between the Deceased's former and surviving spouses when the former spouse applied for support. The Court held that (i) proceeds already paid are "payable" for the purposes of Section 72(1), and, that group life insurance was available for support. Please note that the statute was subsequently amended to include group life insurance within Section 72(1).

Robins J. held, after setting out Section 72:

> That section makes a significant change in the law as it stood before the enactment of the Succession Law Reform Act. Certain specified transactions effected by a deceased before his death are now to be included as testamentary dispositions as of the date of death and deemed part of his net estate for the purposes of ascertaining its value and being available for the support of a dependant. **Manifestly, the section was intended to ensure that the maintenance of a dependant is not jeopardized by arrangements made, intentionally or otherwise, by a person obligated to provide support in the eventuality of his death.** It is designed to alleviate the hardship that can be visited on a dependant by causing money or property to pass directly to a beneficiary (donee or joint tenant) and not as part of the estate. Such transactions can, and often do, result in the amount passing in the estate being only a small percentage of the total sum passing upon the death of the deceased, as here where $40,000 is in the estate as against $365,000 outside it.
>
> Turning then to the specific transactions in this case which it is contended should, under s. 72, be included as testamentary dispositions as of the date of Moores' death.

First, the deceased owned an insurance policy with Cuna Insurance Company under which the sum of $15,285.86 was paid to Anne after his death. That was clearly a policy covered by s. 72(f) and must be included in the net estate for the purposes of ascertaining the value of the estate.

Second, the deceased was covered as an employee of the Co-Operators under a group life policy. Anne has received about $150,000 as the beneficiary of this insurance. The policy was issued by the Co-Operators Life Insurance Company as insurers and the policy holder is C.I. Management Group Limited, a company no doubt associated with the Co-Operators. This group policy covers the life of the employee and the amount payable is subject to increase based on the number of dependants of the employee. In this case, Moores was listed as having two dependants (as that term was intended for insurance purposes) his wife, Anne, and his son. The policy, it is of consequence to note, is convertible to an individual plan with the Co-Operators without medical evidence of insurability, within 31 days of termination of employment.

The argument is that it was not a policy owned by the deceased and accordingly is not to be included in his estate for present purposes. I cannot agree. In my view the policy falls within the intent of s. 72(f) and its proceeds should be reflected in the estate. The meaning of words in a statute is to be gathered from the connection in which they are used. Here, the deceased could designate to whom the policy was to be paid; the policy was a benefit of his employment; in reality, he paid for the policy by his services to the company; and he was entitled to convert to an individual plan without a medical on terminating his employment. As a practical matter the policy was held by the management company for the benefit of the group and the members of the group were the beneficial owners of the policy. I see no reason why this type of insurance should be excluded from the purview of s. 72(h) and good reason why it should be included. To all intents and purposes the deceased "owned" this insurance and for the purposes of this type of legislation can be considered the owner of the policy insofar as his coverage is concerned.

…

It is argued that neither the insurance nor the pension plan proceeds can be included under s. 72 because of their distribution prior to these proceedings. The argument centres on the word "payable" in cls. (f) and (g) of s. 72(1). With deference, I can see no merit in that argument. It is evident that as a practical matter payments will be made (as they were here) shortly after, if not immediately as in the case of joint bank accounts, the death of the deceased. The insurance company, the trustees of a pension fund, a bank, or anyone paying or transferring funds or property covered by s. 72 is not prohibited from doing so and is freed of any liability unless there has been service made of a suspensory order enjoining such payment or transfer as provided for in s. 59 of the Act. **The fact that no suspensory order was obtained, hardly an unlikely situation, does not**

render the proceeds unavailable. In short, the word "payable" includes "paid" for the purposes of this legislation.

Furthermore, the combined effect of s. 72 and s. 63(2)(f) together with s. 78(2) and s. 66 manifest the Legislature's intention to ensure the availability of such funds or property. I interpret these sections and the general scheme of the statute to enable the court to trace funds or property included in s. 72 if necessary to persons to whom they may have been paid or transferred. If such authority is not present the aim of the Act can be frustrated simply because payment was made, as here, before the proceedings could conceivably have been instituted. No prejudice results from the payment because whether the funds are held by the insurance company or trustee or beneficiary, the result is the same. In each case it is available for inclusion in the net estate under s. 72.

In this case I propose to make a charging order only against the proceeds of the insurance or so much thereof as I consider necessary for the protection of the dependant. The pension plan has been converted to the income annuity in favour of Anne and to interfere with that at this time would involve serious tax ramifications. I would not want to jeopardize the tax deferral that has been effected by converting the pension plan proceeds into the registered annuity. If, however, I considered it necessary to do so, to give effect to s. 62, I would.

[Please note that the statute was subsequently amended to include group life insurance within Section 72(1).]