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LIMITATION ON TESTAMENTARY DISPOSITION IN CANADA

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Beyond all the controverted questions of jurisprudence lies the master-problem whether the law exists for the sake of enlarging or for the sake of restricting the liberties of man.[1]

I. *Introduction.*

If by liberty we mean that sphere in which unrestricted individualism holds sway, the answer to the question, I think, must be that the law exists for restricting the liberties of man. However, the law at a particular point in time indirectly protects the liberties of man. For instance, an individual's freedom of speech is made more effective because other persons cannot assault him with impunity if he says something with which they disagree. But over time, the purpose of the law is not to enlarge but to restrict the scope for free individual self-assertion. We have entered an era of greater social sensitivity in which the law places limitations upon self interest in order to recognize what are considered to be other important social interests. Individual freedom is merely one of the social interests with which the law is concerned.

The dependants' relief legislation is a good example of a statute which limits individual freedom in order to recognize another

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[1] C.K. Allen, Legal Duties (1931-32), 40 Yale L.J. 331.

social interest. The law had long recognized that a husband had a duty to support his wife and family and therefore, during his life, his property was subject to this obligation. However, until recently death was held to terminate this duty so that there was no obligation to provide for his wife and children in his will.

II. *Historical Introduction.*

During the eighteenth and nineteenth centuries, liberty of testation was enthroned as a great and necessary institution. John Locke maintained that free testation was a natural right and a neccessary incident to property. Nevertheless, English law which permitted freedom of testation was in marked disharmony with most other legal systems. In addition, unlimited testamentary disposition was not a very ancient doctrine of English law.

In England from at least the twelfth century, the general law was that a man who had a wife or children could not freely dispose of all his personal property by will. If a man died with a widow and child surviving, his personal estate was divided into three equal parts, the wife's part, the bairn's part and the dead's part. It was only with respect to the latter part that the decendant's power of disposition extended.[2] This custom was so widespread that a special writ was developed called the writ *de rationabili parte bonorum* by means of which a wife and children could obtain their respective shares.[3] This scheme of succession to personalty gradually disappeared in many parts of England during the fourteenth century. However, it persisted until abolished by statute in York in 1692, in Wales in 1696 and in London in 1724.[4] Thus by the eighteenth century, freedom of testation with respect to personalty prevailed throughout England.

With respect to realty, the rule of primogeniture arose in the eleventh and twelfth centuries. To a considerable extent this can be attributed to the feudal lords' need for military service. If a tract of land was divided among many sons, there would not be a sufficient concentration of wealth to provide and equip a knight.[5] Gradually a measure of freedom of testation developed with respect to realty through the "use" but the Statute of Uses of 1535 interfered with this freedom. This statute caused so much discontent among landowners that they allied themselves with a re-

[2] Pollock and Maitland, History of English Law, vol. 2 (2nd ed., 1952), p. 348.

[3] Holdsworth, A History of English Law, vol. 3 (3rd ed., 1923), p. 550.

[4] *Ibid.*, p. 552.

[5] *Ibid.*, pp. 172-173.

volt known as the "Pilgrimage of Grace". In 1540, the King found it prudent to have the Statute of Wills enacted. This statute as amended in 1542 enabled all land held by socage tenure and up to two-thirds of that held by knight service to be freely devised.[5A] Finally, in 1660 when military tenure was abolished all freeholders had complete freedom to devise their lands.[5B]

The development of freedom of testation with respect to realty was accompanied by the growth of a fetter in the form of dower. In the twelfth century, it became the practice for a bridegroom at the time of marriage to name specific lands to be enjoyed by his wife for life should she survive him.[6] In the twelfth and thirteenth centuries, dower continued to be a matter of bargain between the spouses and their families.[7] However, contractual dower gradually became less prevalent, and customary dower took its place. By the fourteenth century, a widow could reject the dower provided for her on marriage and claim the customary one-third life interest in the realty held by her husband during the marriage.[8] The Dower Act of 1833 eliminated dower as a fetter on alienation as the husband was empowered by will or deed to deprive his wife of dower.[9] It was, therefore, not until 1833 in England that testamentary absolutism was enthroned. Its reign continued in England until 1938 when the Inheritance (Family Provision) Act was passed.[10]

In a primarily agricultural society in which realty was the most important asset, dower probably provided a wife with a considerable measure of economic protection. During the nineteenth and twentieth centuries, the trend from a predominantly rural to a predominantly urban society was accompanied by a marked change in the form of individual wealth. Gradually, realty ceased to constitute the bulk of most men's estates; and the significance of chattels, stocks, bonds, bank balances and insurance proceeds increased. This transformation of individual wealth meant that the protection afforded the widow by dower diminished with the passage of time. This trend was in harmony with the prevailing

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[5A] *Ibid.*, vol. 4 (1924), pp. 464-466. [5B] 12 Cha. 2, c. 24.

[6] Haskins, The Development of Common Law Dower (1948-49), 62 Harv. L. Rev. 42.

[7] *Ibid.*, at p. 46. [8] *Ibid.*, at p. 54.

[9] 3 & 4 Will. 4, c. 104. However, dower was not formally abolished until 1925 by the Law of Property Act 1925, 15 & 16 Geo. 5, c. 20.

[10] Inheritance (Family Provision) Act 1938, 1 & 2, Geo. 6, c. 45 which has been amended by the Intestates' Estates Act 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 64. For an analysis of the legislation see Laskin, Dependant's Relief Legislation (1939), 17 Can. Bar Rev. 181 and Crane, Family Provision on Death in English Law (1960), 35 N.Y.U.L. Rev. 984.

political philosophy of the eighteenth century, which insisted upon the maximum scope for individual free will.

Gradually, there arose an appreciation of the fact that, in the field of succession, social interests, other than testamentary freedom, warranted consideration. There was a growing concern about the needs of dependants and a recognition of the moral responsibility owed by testators to their dependants. These social interests have gradually won recognition by the law and the function, once adequately performed by dower, is now undertaken by statutes commonly called Testators' Family Maintenance Acts or Dependants' Relief Acts.

III. *Forced Shares or Judicial Discretion.*

If it is admitted that there is a social interest worthy of legal protection in providing that the financial responsibilities of marriage and parenthood should not be terminated by death, it is then necessary to determine the mode in which testamentary disposition should be limited. The traditional civil-law approach has been that of forced heirship. The parent's power of testamentary disposition is restricted by the indisposable portion called the legitim. Since fixed portions of personalty had been part of the common-law approach to succession in the distant past and dower is a limited type of fixed portion in realty, it is rather surprising that all common-law jurisdictions have not adopted the legitim of the civil law in order to meet the problem of protecting dependants.

The fact that Commonwealth countries have adopted flexible restraints on testamentary disposition is in a large measure due to the imaginative statute introduced by New Zealand in 1900 called the Testator's Family Maintenance Act.[11] This Act gave the court the discretionary power to make an order providing for proper maintenance and support out of the estate if the testator's will failed to so provide for the wife, husband or children. The success of this bold legislative experiment has served as a guide within the Commonwealth. In the United States, on the other hand, most jurisdictions have adopted rigid limitations which are not unlike the legitim of the civil law, although in general only the widow and widower receive protection.[12]

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[11] 64 Vic., c. 20 (N.Z.). For an analysis of the cases under this Act see Brown, Dependants' Relief Act (1940), 18 Can. Bar Rev. 261 and 449 and R.J.D. Wright, Testator's Family Maintenance in Australia and New Zealand (1954).

[12] Leach, Cases and Text on the Law of Wills (2nd ed., 1955), pp. 16-19.

A brief consideration of the merits of these two general approaches is, I think, warranted. If the most important attribute of the law is that it should be certain, it might appear that the legitim of the civil law and the forced shares of the United States should be preferred. However, certainty with respect to law means predictability which does not necessarily require a fixed rule such as is involved in legitim. Mr. Justice Oliver Wendell Holmes stated that: "The primary rights and duties with which jurisprudence busies itself again are nothing but prophecies."[13] It is, I believe, possible for practitioners to predict, within tolerable limits, the situations in which dependants will receive assistance and the approximate extent of that assistance under legislation which gives the court discretion about maintenance. The discretionary approach cannot, therefore, be disqualified on the ground that it is uncertain.

If we accept the position that society has two basic interests in the law of succession, testamentary freedom and proper maintenance for dependants, it is necessary to consider how the two approaches reconcile these two interests. The forced share scheme automatically comes into operation whenever dependants receive by will less than their statutory share. No matter how handsomely a wealthy testator has provided for his dependants, no matter how unworthy they may be, and no matter how beneficial his planned disposition may be, his will will be ineffective to the extent that it encroaches upon the wife's fixed share. This indicates that the forced share principle with respect to large estates interferes with testamentary freedom when protection of the widow does not warrant it. With regard to small estates, forced heirship may provide inadequate protection for the widow or widower. Only statutes which give the judge discretion in determining what is required for proper maintenance will ensure the maximum amount of testamentary freedom and at the same time provide adequate maintenance for dependants.

IV. *Development of Canadian Legislation.*

Alberta, in 1910, was the first province to enact legislation restricting testation and was followed closely by Saskatchewan.[14] Both statutes protected only the widow. The Alberta statute in section 2 made a condition precedent to the court's jurisdiction that the

[13] Holmes, The Path of the Law (1896-97), 10 Harv. L. Rev. 457, at p. 458.

[14] S. A., 1910 (2), c. 18. S. Sask., 1910-11, c. 13.

wife received less by will than she would have received on an intestacy and by section 8 the court was empowered to make such allowance as might be just and equitable in the circumstances. In *McBratney* v. *McBratney*, Mr. Justice Iddington, in his dissenting judgment, took the view that once the court received jurisdiction under section 2 it had discretionary power under section 8 to make any allowance and was not limited to the wife's intestate share.[15] This is, I believe, the more reasonable interpretation but as a result of the majority decision, the discretionary power of the court was limited to the intestate share. The use of such words as, remarkable, to describe the statute and, extraordinary, to describe the power it conveyed indicate that the majority of the court was not sympathetic toward the legislation and, as a result, not reluctant to limit its scope.

The Saskatchewan statute clearly indicated that the only discretion that the court might exercise was to give the widow what she would have received on an intestacy or dismiss her application. The relief for which the statute provided was relief from a will by which she was left less than her intestate share. In Manitoba, a statute passed in 1919 explicitly states that a widow or widower shall be entitled to one third of the spouse's estate except where the will has provided the widow or widower with a life income of $6,000.00 *per* annum or property whose value is not less than $100,000.00.[16]

The year 1920 marks a significant turn in the tide. Up until then, Canadian legislation appeared to be moving in favour of a fixed share solution to the dilemma of testamentary freedom and proper maintenance for dependants. British Columbia, in 1920, became the first Canadian province to adopt the complete discretionary approach of New Zealand and to include widowers and children in the ambit of its protection.[17] In 1929, an Ontario statute incorporated the basic principle of the New Zealand legislation but imposed certain limitations upon the judge's discertion, the chief one being that no dependant was to receive more than if the testator had died intestate.[18]

Over the years, the legislation of the Prairie provinces has come to resemble more closely the New Zealand statute in that the scope of the protection has been increased to include widowers and children and the area of judicial discretion has been greatly

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[15] (1919), 59 S.C.R. 550.
[16] S. M., 1919, c. 26, ss. 13, 14 and 21.
[17] S.B.C., 1920, c. 94. [18] S. O., 1929, c. 47.

enlarged.[19] In 1956, Nova Scotia passed the Testators Family Maintenance Act.[20] In 1959, New Brunswick placed upon the statute book an Act bearing the same name.[21] In 1962, Newfoundland passed The Family Relief Act.[22] These statutes also follow the New Zealand pattern in their reliance upon judicial discretion.

Prince Edward Island and Quebec have not passed statutes limiting testamentary disposition. Prince Edward Island does have a Dower Act but this limitation on testamentary disposition can no longer be considered as effective protection except in a minority of cases.[23] In Quebec, a widow is protected through community of property. However, through an ante-nuptial contract, she can be separate as to property.[24] The ante-nuptial contract may also exclude dower rights and such a stipulation binds not only the wife but in addition the children.[25] If she is separate as to property, the ante-nuptial contract may provide her with certain property which may be adequate for her maintenance should she survive her husband. However, a woman separate as to property has no remedy if her husband does not provide for her adequately either in the ante-nuptial contract or in his will. Quebec lacks legitim, one of the distinctive features of the civil law; it was a casualty of the clash between the common and the civil law.[26] One of the provisos included in the Quebec Act of 1774, which restored the civil law, was that absolute freedom of disposition by will should prevail.[27]

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[19] This can be attributed largely to the work of the Commissioners on Uniformity of Legislation in Canada. A model Act was recommended by the Conference of Commissioners in 1945 and amended in 1957. The model Act has been adopted by Manitoba and New Brunswick and with slight modification by Alberta and Newfoundland. 1962 Proceedings 44th Annual Meeting of Conference of Commissioners on Uniformity of Legislation in Canada, List of Model Acts Recommended 1918 to 1962 inclusive.

[20] S.N.S., 1956, c. 8.

[21] S.N.B., 1959, c. 14.

[22] S.N., 1962, c. 56. This statute brought to a close 128 years of testamentary freedom because the Chattels Real Act, R.S.N., 1952, c. 142 which was originally enacted in 1834 abolished dower by transforming all lands, tenements and hereditaments into chattels real which pass to the executor or administrator of the deceased as personal property passes to the personal representatives.

[23] R.S.P.E.I., 1951, c. 46.

[24] Quebec Civil Code, arts. 1262 and 1263.

[25] *Ibid.*, arts. 1431, 1444 and 1445.

[26] Dainow, Unrestricted Testation in Quebec (1935-36), 10 Tul. L. Rev. 400.

[27] Shortt and Doughty, Documents Relating to the Constitutional History of Canada (2nd ed., 1918), p. 570.

V. *A Comparison of Some Aspects of the Canadian Legislation.*

(i) *Who Is a Dependant.*

(a) *Spouse and children*

The obvious point at which to commence a comparison of the statutes of the eight provinces that have placed limitations upon testamentary disposition is to consider the persons who are eligible to apply. The wife or husband of the testator is eligible under all eight statutes.[28] Children of the testator are eligible without any restriction as to age under the British Columbia, Manitoba, New Brunswick, Newfoundland and Nova Scotia statutes. In Ontario, the age limit is sixteen years, in Alberta nineteen years and Saskatchewan twenty-one years. Each of the three provinces that impose age restrictions make a child of any age eligible if through mental or physical disability the child is unable to earn a livelihood.

It would appear that a child, who is over the age limit in those provinces which prescribe a limit, has very different rights than if the British Columbia, Manitoba, New Brunswick, Newfoundland or Nova Scotia statute were applicable. But in fact, the difference in the rights of able bodied sons is not nearly as pronounced as one might think from merely comparing the statutes. In *Re La Fleur Estate*, Williams, C.J.K.B. gave a concise summary of the law:

> A widow occupies the most favoured position, while relief is not given so readily to a widower. Infant children usually receive some measure of relief, directly or indirectly, by increased allowance to the parent. Adult daughters, married or single, receive relief more often than it is refused to them. . . . But the position of adult sons, who are not physically or mentally disabled, is different. . . . I find that, with the exception of two cases to be considered later, no orders have been made in favour of adult sons except where (1) the adult son suffered from a physical or mental disability; (2) there was no disability but "the estate was great."[29]

In small or medium sized estates an able bodied adult son will not succeed unless there are special circumstances;[30] a heart

[28] As the eight statutes will be referred to frequently, footnotes will be subsequently omitted. The eight Acts are: The Family Relief Act, R.S.A., 1955, c. 109; Testator's Family Maintenance Act, R.S.B.C., 1960, c. 378; The Testators Family Maintenance Act, R.S.M., 1954, c. 264; Testators Family Maintenance Act, S.N.B., 1959, c. 14; The Family Relief Act, S.N., 1962, c. 56; Testators Family Maintenance Act, S.N.S., 1956, c. 8; The Dependant's Relief Act, R.S.O., 1960, c. 104; The Dependant's Relief Act, R.S.S., 1953, c. 121.

[29] [1948] 1 W.W.R. 801, at pp. 810-812 (Man. K.B.).

[30] *Re Saunders Estate* (1945-46), 62 B.C.R. 204 (S.C. in Ch.).

condition,[31] a permanent injury to leg and hip,[32] an illness causing recurrent lay-offs.[33] Where the net estate amounted to $770,000.00, it was ordered that an able bodied son, age twenty-two, should receive $200.00 a month instead of $70.00 as the will provided.[34] However, the status of adult daughters is more favourable in British Columbia, Manitoba, New Brunswick, Newfoundland and Nova Scotia than in the other three provinces.[35]

(b) *Illegitimate children*

An illegitimate child is only provided for in the Nova Scotia and British Columbia statute.[36] In the Nova Scotian Act, child is defined to include a child of which the testator is the natural parent. The British Columbia Act states that: "For the purposes of this Act, an illegitimate child shall be treated as if he were a legitimate child of his mother." Thus in Nova Scotia, the illegitimate child can apply for proper maintenance from the estate of either his natural mother or father but in British Columbia, only the mother's estate is subject to an order.

(c) *Adopted children*

The statutes of Alberta, Manitoba, New Brunswick, Newfoundland and Nova Scotia explicitly say that a child shall include an adopted child, while those of British Columbia, Ontario and Saskatchewan do not. However, an adopted child is within the scope of the legislation in all provinces, as the latter three provinces each have statutes to the effect that an adopted child shall become the child of the adopting parents for all purposes as if the child had been born to the parents in lawful wedlock.[37] There is some doubt about the status of a person "adopted" under an informal arrangement. In *Re Esplin*, it was held that the person in such a situation is not entitled to claim under the Testa-

[31] *In re Dunn Estate*, [1944] 3 W.W.R. 289 (B.C.S.C.).
[32] *In re Fergie Estate*, [1939] 3 W.W.R., 573 (B.C.S.C.).
[33] *In re Dickinson Estate*, [1944] 2 W.W.R. 1 (B.C.S.C.).
[34] *Re Jones Estate*, [1934] 3 W.W.R. 726, (1934-35), 49 B.C.R. 216 (S.C.).
[35] *Walker* v. *McDermott*, [1931] S.C.R. 94; *Re Tiefenbach Estate* (1950), 58 Man. R. 398 (K.B.); *Laventure* v. *Killey* (1953), 8 W.W.R. 337.
[36] It has been held specifically that an illegitimate child is not a child within the meaning of the Manitoba and Saskatchewan Acts; *Re La Fleur, supra*, footnote 29; *Re Kolbu*, [1951] 1 D.L.R. 462 (Sask. C.A.); *Re Brown*, [1953] 3 D.L.R. 278 (Man. C.A.). The Newfoundland statute states that a child includes a child who has been legitimated by virtue of the Legitimacy Act, R.S.N., 1952, c. 164.
[37] Adoption Act, R.S.B.C., 1960, c. 4, s. 10; The Child Welfare Act, R.S.O., 1960, c. 53, s. 76; The Child Welfare Act, R.S.S., 1953, c. 239, s. 79.

tor's Family Maintenance Act of British Columbia.[38] In *Re Lawther*, it was held that an applicant who was not formally adopted but who was treated by the testator as his child, may be considered to have been lawfully adopted for the purposes of applying under the Testator's Family Maintenance Act of Manitoba.[39] In the former case, the applicant was the nephew of the testatrix's husband and in the latter case, the applicant was the child of the testator's wife by a former marriage.

(d) *Child "en ventre sa mère"*

The child "en ventre sa mère" is explicitly included as a dependant in the statute of Alberta, Manitoba, New Brunswick, Newfoundland, Nova Scotia and Saskatchewan. It cannot, however, be inferred from this that such a child would not receive protection in British Columbia or in Ontario.

In considering this matter, the essential issue is to determine the date at which the court inquires about the adequacy of the provision for dependants. There are three possible dates, the date of the making of the will, the date of death and the date of application. In *Re Hull*, Laidlaw J.A. said: "The Court must judge the act of the testator at the time he made his will . . . . In my opinion, the learned Judge did not give proper consideration and effect to the facts existing at the date of the will. On the contrary, he was, perhaps, unduly influenced by the needs of the applicant more than eight years later."[40] In *Re Cole*, Ilsley C.J. stated that: "There is, I think, much to be said for the proposition that the relevant date is not the date of making the will, nor the date of the application as held in British Columbia—but the date of the testator's death. However, this consideration is irrelevant in the present case and I am not sure that it was relevant in *Re Hull*".[41] In *Re Urquhart* the determination of the relevant date was the key issue.[42] After the testator's death, his daughter contracted polio. The provision for her in the will viewed at the date of the testator's death was entirely just and adequate and the subsequent illness was not something which he could reasonably have been expected to anticipate. Mr. Justice Wilson did make an order in favour of the daughter stricken with polio but indicates that if he were not bound by authority he would hold that

[38] [1946] 2 D.L.R. 404 (B.C.S.C.).
[39] [1947] 2 D.L.R. 510, [1947] 1 W.W.R. 577 (Man. K.B.)
[40] [1944] 1 D.L.R. 14, at pp. 19-20 (Ont. C.A.).
[41] (1958), 12 D.L.R. (2d) 406, at p. 416 (N.S.S.C.).
[42] (1956), 5 D.L.R. (2d) 235 (B.C.S.C.).

it was not the date of application but of death that was relevant. He stated that:

> If it were not for the decision of Robertson J., I must say that I would find myself attracted to the proposition that the relevant date is not that of the application . . . but that of the date of the testator's death, that being the last time at which he could have made a proper and just will, and the court in making a new will for the testator . . . should confine itself to a consideration of such circumstances as then existed or could then reasonably have been foreseen.[43]

This reasoning stems from the court's conception of their task as one of correcting a breach of moral duty of the testator. Judicial interpretation in Canada has followed that of New Zealand in its heavy emphasis upon the moral aspect of the problem. In *re Allardice*, a New Zealand case which is much quoted in Canadian judgments, the court said:

> It is the duty of the court, so far as is possible, to place itself in all respects in the position of the testator, and to consider whether or not, having regard to all existing facts and surrounding circumstances, the testator has been guilty of a manifest breach of that moral duty which a just, but not a loving, husband or father owes towards his wife or towards his children, as the case may be.[44]

If this passage does set out the proper task of the judiciary, it follows that the relevant date should be the date of the testator's death as Mr. Justice Wilson believes. *Re Urquhart* indicates that in some instances the effectiveness of the legislation can be reduced and the purpose of the legislation partially frustrated by the adherence of the courts to this conception of their duty under the statute. If the purpose of the legislation is to make adequate provision for the maintenance of dependants, the emphasis on the moral duty of the testator merely obscures the issue. This fact was emphasized by Guy J.A. in *Re Martin Estate* when he said:

> Thus, in order for the Act to be of any appreciable significance, the court must consider the character of the estate itself and the number of dependants at the time the application is made. Otherwise, each application would merely develop into a critical analysis of the moral duty of the testator in earlier circumstances, which might bear no relationship to the actual requirements of the dependants or the size of the estate now.[45]

In this connection the words of Mr. Justice Oliver Wendell Holmes are apt:

> I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether, and other words

[43] *Ibid.*, at p. 238. [44] (1909), 29 N.Z.L.R. 959, at p. 972.
[45] (1962), 40 W.W.R. 513 (Man. C.A.).

> adopted which should convey legal ideas uncoloured by anything outside the law. We should lose the fossil records of a good deal of history and the majesty got from ethical associations, but by ridding ourselves of unnecessary confusion we should gain very much in the clearness of our thought.[46]

This view does not imply that advancing morality is not one of the chief moulding influences upon the law for, as Holmes J. stated: "The law is the witness and external deposit of our moral life."[47] The contention is that the efficacy of the law will be increased by maintaining as clear a division between law and morals as possible at a particular point in time; while recognizing that advancing morality is one of the chief engines propelling the law into new fields.

Approaching the problem from the point of view of rectifying a breach of moral duty on the part of the testator is not specifically authorized by any of the Canadian statutes. If the courts confine their attention to determining whether adequate provision has been made for dependants, it seems obvious that the material time for such a determination can only be the date of the application. If this view is accepted, a child "en ventre sa mère" would receive the protection of the statute in all eight Canadian jurisdictions. If either the date of the will or the date of the testator's death constitute the relevant date, a child "en ventre sa mère" might not come within the ambit of the protection of the statute in British Columbia and Ontario,[48] if the husband did not know that his wife was pregnant.

(ii) *Condition Precedent to Jurisdiction.*

(a) *Testator's failure to make provision for maintenance of dependants*

The condition precedent to jurisdiction to make an order charging a testator's estate is basically the same in Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Nova Scotia. The fact which gives the court jurisdiction is that the testator has not made adequate provision for proper maintenance and

[46] Holmes, *op. cit.*, footnote 13, p. 464.

[47] *Ibid.*, at p. 459.

[48] The prevailing view seems to favour the date of application as the relevant date: *Re Jones, supra*, footnote 34; *Re Willian Estate* (1951-52), 4 W.W.R. 114 (Alta. S.C.); *Re Calladine Estate* (1958), 25 W.W.R. 175 (B.C.S.C.). However the Judicial Committee of the Privy Council held in *Dunn* v. *Dunn*, [1959] A.C. 272 that the facts to be considered are those existing at the date of the testator's death and not those as at the date of application with respect to the New South Wales Statute. This judgment was quoted with apparent approval by Lett C.J. B.C.S.C., in *Re Hornett* (1962), 33 D.L.R. (2d) 289, at p. 291.

support of dependants. In Saskatchewan, the condition precedent to jurisdiction is that reasonable provision has not been made for the maintenance of dependants. The Ontario statute is significantly different, in that it gives the court jurisdiction only where the testator has not made adequate provision for the future maintenance of dependants, and empowers the court to make adequate provision. "Proper" is used in the section but refers only to the mode in which adequate provision is to be made.

There is scope for arguing that "proper", "reasonable" and "adequate" define different standards of maintenance.[49] It could be legitimately maintained that "adequate" refers to what is sufficient to provide an average standard of living. The Ontario Court of Appeal has specifically stated that this is not necessarily the meaning of "adequate" and that adequacy is to be measured by the standard of living which she enjoyed during the life of the testator.[50] Lord Romer in *Bosch* v. *Perpetual Trustee Co.* stated that the word "proper" connotes something different than "adequate".[51] Mr. Justice Kellock has also warned that authorities under the New Zealand and United Kingdom statutes should be accepted with caution in applying the Ontario legislation because of such differences as "proper" and "adequate".[52] In spite of such warnings, there is little evidence that the courts have placed any emphasis on the different words used to describe the standard of maintenance.[53] The courts in each jurisdiction rely liberally upon decisions in other jurisdictions.

[49] The differences in the Ontario, British Columbia and New Zealand statutes was emphasized by Gray, Dependants' Relief Legislation (1939), 17 Can. Bar Rev. 233.

[50] *Re Beyor Estate*, [1950] O.W.N. 117 (C.A.).

[51] [1938] A.C. 463.

[52] *Meyer* v. *Capital Trust Corp. Ltd.*, [1948] S.C.R. 329.

[53] In *Shaw* v. *Regina and Saskatoon Cities and Toronto General Trusts Corporation (No. 3)* (1944), 1 W.W.R. 433 (Sask. C.A.), Martin C.J.S. said at p. 439; "Speaking generally I do not think that the differences in language used in describing 'maintenance' can be said to make any difference in the construction to be placed on the various statutes." *In Re Lawther Estate, supra*, footnote 39, Williams C.J.K.B. states at p. 585 (W.W.R.): "The words 'just and equitable' appear in the British Columbia Act . . . as they do in the Saskatchewan Act . . . . Duff, J. seems to use these words as controlling 'adequate' but I do not think he intended to give the section any other interpretation than he would have given to the words of the Manitoba section which in substance are 'adequate for proper maintenance and support considering all the circumstances of the case'." In *Re Gray Estate*, [1950] 2 W.W.R. 854 (Alta. S.C.) and *In Re Willian Estate, supra*, footnote 48, also indicate that no significance should be attached to different words used to describe the standard of maintenance. In British Columbia, however, there are cases which indicate that inclusion of the words "just and equitable" empowers the court not only to make an allowance for proper maintenance and support but also to award an equitable share of the estate to the petitioner.

(b) *Deceased died testate*

A condition precedent to jurisdiction is that the deceased shall die testate in every province except Alberta, Newfoundland and Saskatchewan. However, in these three provinces if a person dies intestate and the intestate share received by a dependant is inadequate for proper maintenance, a judge is empowered to make adequate provision out of the estate. This extension of the jurisdiction in these three provinces represents a significant advance. Dependants may be left without proper maintenance as a result of intestacy as well as testacy. The rules of intestate succession are after all a general set of rules which in the individual case may be most inappropriate. If the interest in providing dependants with adequate maintenance is important enough to warrant modifying the interest which society has in testamentary freedom, there can be no possible reason for not permitting the rules of intestate succession to be modified in order that dependants may have adequate maintenance. There is no social interest comparable to testamentary freedom to weigh in the balance in determining whether a court should be empowered to provide proper maintenance for dependants on an intestacy. It cannot be said that society has an important interest in maintaining inviolate a set of mechanical rules for intestate succession.

In order to indicate that dependants may not be adequately provided for by the intestate distribution in the provinces which have dependants' relief legislation but which do not empower the courts to alter the intestate distribution, a concrete example will be given. The distribution in British Columbia, Manitoba, New Brunswick, Nova Scotia and Ontario will be compared. We will consider that the intestate has died with a net estate of $30,000.00 half realty and half personalty and leaves a widow and two adult children. As can be seen from the table the intestate share of the

In *Barker* v. *Westminster Trust Company*, [1941] 4 D.L.R. 514 (B.C.C.A.), O'Halloran J.A. held that the equitable share was the intestate share and an award was made even though the husband died before the judgment was delivered. *In Re Jones* (1962), 30 D.L.R. (2d) 316 (B.C.C.A.), Des Brisay C.J. B.C. states at p. 319 that: "The cases on our statute do not support the learned judge's view that the fundamental purpose of the Act is to provide maintenance and that a petitioner must show need. . . . the learned judge in my view failed to give due consideration to the question of awarding to the appellant an equitable share of the estate which in my opinion the cases clearly require him to do." These two cases appear to be at variance with cases in other provinces. However, it must be noted that in *Barker* v. *Westminster Trust Company, supra,* McDonald J.A. dissented and there is no indication that Sloan J.A. agreed with the reasons for judgment of O'Halloran J.A. *In Re Jones* has been carefully considered by Lett C.J. *in Re Hornett, supra,* footnote 48 and if his explanation of this case is correct, the variance is not substantial.

widow is very small in Nova Scotia as she does not share in the distribution of the realty; although she would also have a dower interest in the realty. If the relationship between widow and the two adult children is strained, the widow may be in a sorry financial plight in Nova Scotia, Manitoba, New Brunswick and British Columbia. Even in Ontario where she receives $23,333.33 adequate provision might require the full $30,000.00.

	SHARE OF	
	Widow	*Child*
British Columbia[54].	5,000.00 + ⅓ (25,000.00) = $13,333.33	⅓ (25,000.00) = $8,333.33
Manitoba[55]	⅓ (30,000.00) = $10,000.00	⅓ (30,000.00) = $10,000.00
New Brunswick[56] .	⅓ (30,000.00) = $10,000.00	⅓ (30,000.00) = $10,000.00
Nova Scotia[57].....	⅓ (15,000.00) = $5,000.00	½ (15,000.00) + ⅓ (15,000.00) = $12,500.00
Ontario[58]	20,000.00 + ⅓ (10,000.00) = $23,333.33	⅓ (10,000.00) = $3,333.33

On the other hand, if the adult child is, through illness, unable to earn a livelihood, on intestacy, he will fare worst in Ontario and best in Nova Scotia. To some extent intestacy may tend to present fewer problems than arise from testate succession in that, in the former, the estate necessarily remains within the family, while in the latter, the problems may arise and often do arise because the testator has made gifts to persons outside the family. Nevertheless, where the estate is relatively small and family relations are not harmonious, the intestate distribution may result in needless suffering because of poor distribution of the estate among the members of the family.

There appears to be no adequate reason for not making the estate of an intestate subject to the dependants' relief legislation in British Columbia, Manitoba, New Brunswick and Nova Scotia. However, in the case of Ontario nothing would be accomplished by including intestacies under the Dependants' Relief Act unless section 10, which limits allowance to the amount to

[54] Administration Act, R.S.B.C., 1960, c. 3, s. 101.
[55] The Devolution of Estates Act, R.S.M., 1954, c. 63, s. 6.
[56] Devolution of Estates Act, R.S.N.B., 1952, c. 62, s. 21.
[57] Descent of Property Act, R.S.N.S., 1954, c. 69, ss. 2 and 6.
[58] The Devolution of Estates Act, R.S.O., 1960, c. 106, ss. 11 and 30 as am. by S.O., 1960-61, c. 22, s. 1.

which the applicant would have been entitled if the testator had died intestate, were deleted.

(c) *Testator's domicile*

In Ontario and Saskatchewan, a condition precedent to jurisdiction is that the testator died domiciled within the province.[59] The inclusion of these few extra words significantly affects the rights of dependants. For instance, if a husband deserts his wife in Ontario or Saskatchewan and dies domiciled in a province which does not have a similar statute, Quebec or Prince Edward Island, the wife has no recourse even though the husband has both movable and immovable property in Ontario or Saskatchewan. If the husband dies domiciled in one of the provinces which does limit testamentary disposition, the movable property wherever situate and the immovable property within those jurisdictions will be subject to an order for her maintenance.[60] This result follows because these statutes have been characterized as testamentary and not matrimonial law and because of the conflict of laws rule that succession to movables is determined by *lex domicilii* at death and succession to immovables by the *lex loci rei sitae*.[61]

In the case of *Williams* v. *Moody Bible Institute*[62] which was decided under the Widows' Relief Act of Saskatchewan of 1910, the widow was able to claim one third of the immovable property of her husband located in Saskatchewan even though her husband died domiciled in Illinois. If this case had been decided under the present Dependants' Relief Act, the wife would not have been entitled to relief since, unlike the Widows' Relief Act, it specifies that the testator must die domiciled in Saskatchewan. It seems highly unlikely that this Act which extended the scope of protection to the husband and dependant children, was intended to reduce the protection afforded the widow in this way. Nevertheless, this is the result which follows from requiring as a condition pre-

[59] The Ontario statute says: "Where it is made to appear to a judge of the surrogate court of the county or district in which the testator was domiciled at the time of death. . . ." This expression has been criticized since domicile is inappropriate with reference to a jurisdiction smaller than a province. Falconbridge, Conflict of Laws—Dependants' Relief and Family Maintenance Acts—Domicile Situs (1941), 19 Can. Bar Rev. 539.

[60] *Ostrander* v. *Houston* (1915), 8 W.W.R. 367 (Sask. S.C. en Banc); *Re Rattenbury Estate*, [1936] 2 W.W.R. 554 (B.C.S.C.); *Re Elliott*, [1941] 2 D.L.R. 71 (B.C.S.C.).

[61] *Pouliot* v. *Cloutier*, [1944] S.C.R. 284. In this case, Kerwin J. stated that the true view of the law on this matter was expressed by Falconbridge, Administration and Succession in Conflict of Laws (1934), 12 Can. Bar Rev. 67 and 125.

[62] [1937] 4 D.L.R. 465 (Sask. C.A.).

cedent to jurisdiction that the testator die domiciled in the particular jurisdiction. The hardship which this condition precedent can inflict upon dependants argues cogently for its deletion.[63]

(iii) *Property Subject to an Order Under the Legislation.*

One of the grave shortcomings of the dependants' relief legislation is that it fails to cope with the problem of *inter vivos* gifts reducing the estate.[64] This deficiency can be over emphasized in that one very significant deterrent to reducing an estate through gifts is that, since life's duration is uncertain, a man will be reluctant to reduce his estate without limit since he himself may become destitute. However, one type of gift which a person who believes he is dying is not restrained from making is a *donatio mortis causa*, because if he does recover from the illness, he may cancel the gift. Another type of transaction which a spouse is not restrained from entering into through fear of destitution is a transfer of property on trust with a reservation of the income for life or of other substantial benefit. The restraint is also ineffective if the spouse as settler of the trust retains the power of revocation or has a general power of appointment under the trust. The restraint is weak with respect to gifts of property by the spouse to be held by the donee and the spouse as joint tenants. Finally, in the case of a person who realizes that his death is both imminent and certain, the restraint upon making *inter vivos* gifts engendered by fear of destitution is non-existent.

It is not difficult to recognize the grave defect in the legislation which permits a spouse to render its provisions nugatory through *inter vivos* transfers, which reduce the estate to such an extent that insufficient funds remain out of which to order adequate maintenance. This defect was clearly appreciated by Mr. J. Allen, a member of the House of Representatives of New Zealand, who on July 12th 1900 speaking on the second reading of the Testator's Family Maintenance Bill asked, "whether the honourable member as a lawyer, could not see his way to drive a coach and four horses through the Bill if it became law. . . . It was quite possible for him before he died, to transfer the whole of his property to certain sons or daughters, or to trustees for certain persons and then leave no provision for his wife".[64A]

It is, however, more difficult to devise a suitable way in which

[63] An interesting case which indicates how a husband's incorporation of a company to hold his realty can affect a wife's rights under the Act is *Re Corlet*, [1942] 3 D.L.R. 72 (Alta. S.C.).

[64] *Dower & Dower* v. *The Public Trustee* (1962), 35 D.L.R. (2d) 29 (Alta. S.C.).

[64A] New Zealand Parliamentary Debates (1900), vol. 3, p. 507.

to prevent a coach and four horses being driven through the legislation than it is to recognize the gap. It is necessary to reconcile important social interests. There is the interest in protecting dependants against *inter vivos* transfers which have the effect of depriving them of adequate maintenance after the death of the spouse. There is the interest in permitting as wide a scope as possible to freedom of alienation. There is also the interest in maintaining maximum security of transaction and security of title in order that trade and commerce is not impeded.[64B]

To give dependants an inchoate right analogous to dower in all assets transferred by the spouse *inter vivos* would be an impracticable and intolerable infringement of the social interest in security of transaction and security of title. The dependants should only have a right to claim against the donee or a transferee of the donee who has not given consideration and only for an amount not in excess of the value of the gift at the date of transfer. If the subject matter of the gift was retained in the same form and subsequently depreciated, the donee should only be liable to the extent of its value at the date of application by the dependants of the donor. This right to claim contribution from the donee should arise only if the estate is insufficient to permit an order for adequate maintenance to be made and only if the gift were unreasonably large under the circumstances existing at the date of transfer. Such a change would not place in jeopardy the title of the donee in the subject matter of the gift. It would not therefore interfere with the social interest in security of transaction and in security of title. However, the donee may be injuriously affected not merely by being deprived of the value of the gift but as a result of changing his position in reliance upon the gift. In order to minimize the possible harm which may accrue to the donee, an exemption from contribution could be made with respect to gifts made more than three years before the date of death provided that the deceased did not retain any benefit or interest in the gift. It is time that the gap in the legislation which permits a coach and four horses to pass was remedied. It is time that real protection against disinheritance was assured.

On the other hand, it is thought by some that the Privy Council in *Dillon* v. *The Public Trustee of New Zealand* extended the scope of the legislation to include property which should not be subject

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[64B] For an excellent and detailed discussion of the problem and for a proposed model Act to deal with it, see W. D. Macdonald, Fraud on the Widow's Share (1960).

to an order.[65] It held that property devised or bequeathed in fulfilment of a contract entered into *inter vivos* for valuable consideration was subject to an order under the Family Protection Act, 1908, of New Zealand. This case has been severely criticized on the ground that the Privy Council considered the children to be claiming only as beneficiaries under the will and ignored their claim arising out of the contract.[66] It has been pointed out that this is tantamount to saying that dependants should be given priority over the testator's creditors. However, the Privy Council denied that the children were creditors but admitted that they gave valuable consideration. If someone has given valuable consideration under a contract, it appears difficult to contend that because a testator fulfilled his contract and gave the property agreed upon to that person, that person ceases to be a creditor even if he does not receive the property. It must be admitted that the testator has fulfilled the contract in that he has left the particular property agreed upon; yet, as Myers C.J. of the New Zealand Court of Appeal said:

> The effect of the decision appealed against is that where A enters into a contract with B, for valuable consideration that he will by his last will and testament devise certain lands to B, and A subsequently . . . actually performs his contract, B is to be in a worse position than if A had committed a breach of his contract. It would be an extraordinary thing if our law permitted such a result.[67]

Disapproval of the Privy Council decision has manifested itself in an exempting section being included in the statutes of Alberta, Manitoba, New Brunswick, Newfoundland, Nova Scotia and Saskatchewan. These sections state that where a testator *bona fide* and for valuable consideration contracts to leave property by will, such property shall be exempt from the statute except to the extent that the property exceeds the consideration received by the testator. In the British Columbia and Ontario statutes, there is no such provision. Presumably, *Dillon* v. *Public Trustee of New Zealand* would be followed and all of the property would be subject to an order even though it had been left in fulfilment of a contract for which the testator had received valuable consideration. The scope of the *Dillon* case might be limited to situations in which the contract was between members of a family, as the contract in the *Dillon* case was between a father and his children. However, the Ontario Court of Appeal in *Olin* v.

[65] [1941] A.C. 294.
[66] D.M. Gordon, Note (1941), 19 Can. Bar Rev. 603.
[67] [1939] N.Z.L.R. 550, at p. 559.

Perrin indicated it would follow the *Dillon* case even though the person who gave the valuable consideration was a housekeeper.[68]

An exemption clause similar to that passed by the six provinces previously enumerated is warranted as it provides adequate protection for dependants in that the property is only exempt to the extent that the testator receives valuable consideration. At the same time, it protects persons who have given valuable consideration under a contract from being deprived of what they expected to receive by a court saying, in effect, that the testator, by making them beneficiaries, fulfilled the contract but as beneficiaries their interests are subject to the dependants' relief legislation.

Another great defect in the legislation is that insurance monies, payable either to an ordinary beneficiary[69] or to a preferred beneficiary[70] do not form part of the estate of a deceased person and therefore are not subject to the dependants' relief statutes. Mr. Justice Kellock stated that: "The sole source from which any allowance granted under the Act is to be satisfied is the assets to which creditors are entitled to look."[71] Happily, this is a defect which is capable of being easily remedied. All that would be necessary is a provision stating that for the purposes of dependants' relief legislation, insurance monies payable either to an ordinary or preferred beneficiary shall be treated as forming part of the testator's estate. There is no reason to believe that this provision would cause any difficulty and in the case of small estates it may permit the courts to award adequate relief to dependants where it would not otherwise be possible.

Not only have insurance proceeds been excluded from the ambit of the dependants' relief Act but the narrow definition given to estate has also been held to exclude municipal pension fund payments and Canadian Government annuity payments.[72] In the case of the Canadian Government annuity, another reason put forth for concluding that it was not subject to an order was that payments from the consolidated revenue fund cannot be affected by a provincial statute.[73]

Since in the future a greater proportion of an individual's income is likely to be channelled into insurance, pension funds and annuities, it is essential that they be included in property subject

[68] [1946] O.W.N. 35 (C.A.).
[69] *Kerslake* v. *Gray*, [1957] S.C.R. 516.
[70] *Re Dalton and Macdonald*, [1938] 2 D.L.R. 798 (B.C.C.A.).
[71] *Kerslake* v. *Gray*, *supra*, footnote 69, at p. 519.
[72] *Re Young Estate*, [1955] O.W.N. 789 (C.A.).
[73] *Ibid.*, 792.

to an order under the dependants' relief Act. Otherwise, the legislation is going to become less effective with the efflux of time.

(iv) *Limitations on Discretion of the Court as to the Amount of the Allowance which may be Ordered.*

The legislation of Alberta, British Columbia, New Brunswick, Newfoundland and Nova Scotia contains no rules fettering the discretion of the court concerning the value of the award which may be made to a dependant. In Ontario, Manitoba and Saskatchewan, the principle of the New Zealand statute whereby the amount of the allowance is discretionary has only been partially accepted. It is rather interesting to note that the Ontario statute places a ceiling on the allowance with no floor, while the statutes of Manitoba and Saskatchewan provide a floor to the allowance with no ceiling.

The maximum provided by the Ontario statute is the amount which the applicant would have received on an intestacy and applies to all dependants. In the case of a small estate, this rule may not prevent the court from making an allowance which will adequately provide for a widow or widower because the Devolution of Estates Act now entitles them to the first $20,000.00.[74] However, it does mean that the court is powerless to grant any relief to an adult son or daughter who through illness is unable to earn a livelihood if the testator's estate is less than $20,000.00. This is so even though the widow may be in very comfortable financial circumstances apart from the will and even though she may not even be a beneficiary. This conclusion indicates the danger inherent in rules which set a maximum limit to an allowance based upon what would be received by the applicant on an intestacy. The danger is greatest with respect to small estates where such a rule may completely deprive the court of the power to make adequate provision for a dependant.

In Manitoba, a widow or widower under The Dower Act has the power of electing either to take under the will or to receive one-third of the spouse's estate in addition to a life interest in the homestead unless the will provides at least an annual life income of $6,000.00 or property valued at $100,000.00.[75] The Testators Family Maintenance Act states that the value of an allowance made to the wife or husband of the testator shall not be less than if an election had been made under The Dower Act. The husband

[74] S.O., 1960-61, c. 22.

[75] R.S.M., 1954, c. 65 ss. 13, 14 and 23. It should be noted that in this connection the Act refers to both real and personal property.

or wife of the testator, if not satisfied with the will, can either elect to take a third of the estate or, if not satisfied with this, can apply under the Testators Family Maintenance Act. The floor provided in the latter statute removes the risk of the applicant receiving less than under The Dower Act. The Manitoba position is unique in Canada in that the forced share principle has been maintained with respect to the husband and wife and in addition the discretionary approach has been adopted for all dependants. The Prairie Provinces originally adopted the forced share principle. Alberta and Saskatchewan, when they passed their dependants' relief statutes embodying the discretionary approach, abandoned the forced share principle. Thus in Manitoba, the wife or husband of the testator has greater rights against the spouse's estate. If the estate is in excess of $300,000.00, the wife is assured of receiving at least $100,000.00 or an annual income for life of $6,000.00. If less than $300,000.00, she is assured of at least one-third and if this is not adequate for proper maintenance, the widow can apply under the Testators Family Maintenance Act.

There appear to be two possible reasons which might account for retention of the fixed share for the wife or husband of the testator after the Testators Family Maintenance Act was passed in 1946.[76] One is that the legislature feared that the Act might lead to

[76] However, if the spouse decides to apply under The Testators Family Maintenance Act, this does not mean that the spouse will receive, as a minimum award, the one third share provided by The Dower Act as his or her absolute property. It has been held consistently that the purpose of the statute is to provide maintenance and not to permit the accumulation of an estate. Consequently, the courts prefer to order a periodic payment rather than a lump sum. There is some confusion about the interpretation of section 22(1) of The Testators Family Maintenance Act, *supra*, footnote 28. It has been interpreted as requiring merely that the spouse's annual income should be at least equal to the income which would accrue from one third of the net estate. Montague J.A. in *Pope* v. *Stevens* (1955), 14 W.W.R. 71, at pp. 84-85 states that: "The provision for maintenance ordered, no matter which 'way' is directed to be used must produce for the widow at least the amount of income that would have accrued to her from one-third of her husband's net estate had she received such one-third as a result of electing to take under s. 13 of The Dower Act". The present value of an annual payment equal to the annual income from one-third of the net estate would only be equal in value to one third of the net estate if the life expectancy of the spouse were infinite.

It is submitted that section 22(1) requires that the present value to the spouse of the periodic payment ordered, taking into account the life expectancy of the spouse, should be equal in value to at least one third of the net estate which the spouse could have elected to receive under the Dower Act. This is the effect of the decision of Williams C.J.K.B. in *Re Lawther Estate*, *supra*, footnote 39, at pp. 594-595 (W.W.R.). Williams C.J.K.B. takes into account the life expectancy of the spouse and indicates that it is the cost of an annuity, that would provide the spouse with the periodic payment to which he held her entitled, which could not be less

a large increase in litigation if it stood alone. By retaining the provisions in the Dower Act which permit the widow or widower of the testator to elect to take a third of the estate, many applications by the widow or widower might not be brought under the Testators Family Maintenance Act. This possible explanation is probably not satisfactory as it has been found that actions under the dependants' relief Act have not significantly swelled the amount of litigation in the courts. Over a five year period, it was found in New Zealand that the number of wills contested under the Act constituted only one point seventy-five percent of those which were proved.[77] It should also be recognized that this number does not represent a net increase in litigation, for some of the applications under the Act would involve wills which would probably have been contested on the grounds of undue influence or lack of testamentary capacity if the Act had not been passed.

The only other explanation for retaining forced heirship for the husband and wife after giving the courts the power to make adequate provision for the maintenance of dependants would appear to be that the legislature considers that the law should take cognizance not only of the interest which society has in seeing that dependants have adequate maintenance but also that the wife or husband of the testator should receive a fair share of the estate as defined by the Dower Act. It may be wrong to attribute this motive to the Manitoba legislature as the forced share for the widow or widower of the testator may have been retained without considering that the Testators Family Maintenance Act would, standing alone, provide adequate maintenance for the wife and husband. However, since the Testators Family Maintenance Act explicity refers to the fixed share provided for under the Dower Act, it is probably legitimate to conclude that the law of Manitoba is intended to recognize another social interest—that of the wife or husband to a fair share in the estate of the spouse.

The Dependants' Relief Act of Saskatchewan also imposes a minimum on the allowance which can be awarded but only with respect to the wife. If she is given an allowance, it cannot be less than what she would have received if her husband had died intestate leaving a widow and children. Unlike the Manitoba statute which assures the wife and husband of a fixed share, the wife in Saskatchewan is only eligible for an allowance if she can prove

than the value of the share she could have elected to receive under The Dower Act.

[77] Joseph Gold, O. Kahn-Freund and W. Breslauer, Freedom of Testation (1937-38), 1 Mod. L. Rev. 296, at p. 304.

that her husband has so disposed of his estate that reasonable provision has not been made for her maintenance. If she does not possess adequate means, the court will make an order making reasonable provision for her maintenance. However, if the court decides to assist her, the value of the allowance must be equal to at least one-third of the estate.

In the case of large estates, the Saskatchewan statute may require a completely unnecesssary amount of interference with the testator's disposition. Let us consider a wealthy testator who has always lived frugally, and believes that it would be in the best interest of his children to go out in to the world without a large inheritance because he believes they will be more industrious. He leaves his wife what he considers to be enough to provide reasonable maintenance for her and the children under twenty-one, and the great bulk of his estate he leaves to worthy charities. If the wife does not think that she has been adequately provided for, she may apply under The Dependants' Relief Act; and if the court agrees with her contention, it cannot award her merely an allowance which together with the provision for her in the will would, in the opinion of the court, constitute reasonable maintenance; but it must give her a minimum of one-third of the estate.[78] The children may through the mother obtain large estates contrary to the wishes of the father. It seems rather strange to find a provision in the Saskatchewan legislation that tends to mediate in favour of the continuance of the concentration of wealth. A wealthy socialist who firmly believed that there should be greater equality in the distribution of wealth might be frustrated in his individual effort to contribute to this end.

The requirement, that if the court makes an order in favour of the widow its value must not be less than one-third of the husband's estate, may result in a wealthy testator's freedom being restricted to a much greater extent than is necessary to assure the wife reasonable maintenance. Unlike the situation in Manitoba, the Saskatchewan statute does not assure the wife of a fixed share in her husband's estate. The one-third share in the Saskatchewan Act is contingent and will only arise if the testator has failed to make reasonable provision for his wife. The purpose of the statute is not therefore to assure the wife a fair share in her husband's estate. However, if its only purpose is to secure reasonable maintenance it is unnecessary.

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[78] *Shaw* v. *Regina and Saskatoon and Toronto Gen. Trust Corpn.*, *supra*, footnote 53 and *In re Daneliuk Estate*, [1951] 2 W.W.R. 45 (Sask. C.A.).

The dependants' relief legislation may be looked upon as a threat to the testator. It says, in effect, that if you fail to provide reasonable maintenance for your dependants, the court may interfere with your will. The minimum provision of the Saskatchewan Act is an additional penalty attached to this threat. The testator is told by the statute that if he does not provide reasonable maintenance for his wife, the court will not only provide her with reasonable maintenance out of the estate but will penalize him for attempting to avoid his matrimonial responsibilities by awarding her a minimum of one-third of his estate. Such provision may have, therefore, the effect of reducing the number of widows who find it necessary to apply under the statute. This is probably not a sufficiently important consideration to warrant imposing the additional limitation on testamentary disposition.

If proper maintenance is the guiding principle of the legislation, the intestate share is completely irrelevant. In Ontario, the intestate share is used as a ceiling on the value of the allowance awarded to all dependants, while in Saskatchewan it is used as a floor with respect to the wife's allowance. Not only is it irrelevant but the intestate share used as a ceiling may prevent the court from making adequate allowance, while used as a floor it tends to restrict testamentary freedom unnecessarily.

(v) *Contracting out of Dependants' Relief Legislation.*

> As a general rule any person can enter into a binding contract to waive the benefits conferred upon him by an Act of Parliament, or, as it is said, can contract himself out of the Act, unless it can be shown that such an agreement is in the circumstances of the particular case contrary to public policy.[79]

It has long been recognized that the dependants' relief legislation is intended not only to protect the personal interests of dependants but also to protect a public interest, in that it attempts to prevent a testator's dependants from becoming public charges. Mr. J. Chapman in *Gardiner* v. *Boag* states that the Family Protection Act, 1908 of New Zealand is "a declaration of State policy, and that, as such it is paramount to all contracts".[80] The position in Canada is also that a married woman cannot contract out of her statutory right to apply for maintenance out of her husband's estate as it is a matter of public as well as private concern.[81]

[79] Halsbury's Laws of England (2nd ed., 1931), vol. 7, p. 168. For a discussion of this matter see Laskin, The Protection of Interest by Statute and the Problem of "Contracting Out" (1938), 16 Can. Bar Rev. 669.

[80] [1923] N.Z.L.R. 739, at p. 745.

[81] *Re Anderson Estate*, [1934] 1 W.W.R. 430 (Alta. App. Div.); *Re*

Although this interpretation has also been accepted with respect to The Dependants' Relief Act of Ontario,[82] a complication has arisen in Ontario as a result of the interpretation given to section 9 of the statute. This section states that: "No order shall be made under this Act in favour of a wife who was living apart from her husband at the time of his death under circumstance which would disentitle her to alimony." The seed from which the difficulty has germinated was sown in *Re Carey*.[83] In that case, a wife covenanted in a separation agreement that she would not make any claim against her husband or his estate in return for a monthly payment. The wife was granted relief under the statute but the reference to section nine was to cause difficulties. Robertson C.J.O. said:

> In my opinion it is impossible, having regard to the terms of sec. 9 of The Dependants' Relief Act, to apply them to the respondent. She was not in any proper sense of the word "disentitled" to alimony. On the contrary the circumstances under which she was living apart from her husband were such that she was entitled to alimony and had a right to recover it if at any time her husband had ceased to pay her the sums agreed upon for her maintenance.[84]

From this position, it was only a short logical step to say that if a lump sum separation agreement were made, the wife would be disentitled to alimony and therefore section 9 would bar an allowance being made under the Dependants' Relief Act. This step was taken in *Olin* v. *Perrin*[85] and has been followed.[86] In such cases, the burden of supporting dependants may be placed upon the State rather than upon the estate of the testator. This approach is not consistent with the general purpose of the statute but results from the broad interpretation given to the words "under circumstances which would disentitle her to alimony". Interpreting these words as referring to misconduct, desertion or adultery, would have been just as reasonable and would have had the virtue of being more in harmony with the tenor of the legislation.

In Re Sexton Estate indicates that a lump sum separation

Lewis, [1935] 2 D.L.R. 45 (B.C.C.A.); *Jones* v. *Kline*, [1938] 4 D.L.R. 391 (Alta. S.C.); *Re Rist*, [1939] 2 D.L.R. 644 (Alta. App. Div.); *Re Foxe*, [1944] 2 D.L.R. 392 (B.C.S.C.); *Re Edgelow* (1956), 1 D.L.R. (2d) 126 (B.C.S.C.); *Re Stannard* (1960), 32 W.W.R. 432 (B.C.S.C.); *Re Hawley Estate* (1962), 38 W.W.R. 354 (Sask. Q.B.); *Re Edwards* (1961-62), 36 W.W.R. 605 (1962), 31 D.L.R. (2d) 308 (Alta. App. Div.).

[82] *Re Duranceau*, [1952] O.R. 584 (C.A.); *Re Close*, [1952] O.W.N. 660 (C.A.).

[83] [1940] O.R. 171 (C.A.).

[84] *Ibid.*, at p. 177.

[85] [1946] O.R. 54 (C.A.).

[86] *Nowakowski* v. *Martin*, [1951] O.R. 67 (C.A.); *Re Smith*, [1958] O.W.N. 415 (H.C.); *Re Stadnyk*, [1963] 1 O.R. 95 (C.A.)

agreement will not bar relief under The Dependants' Relief Act of Ontario if the agreement was obtained by the husband through fraud about his financial resources.[87] This may be a fruitful way for a wife who has entered into a lump sum separation agreement to get around *Olin* v. *Perrin*, as a husband is inclined to underestimate his financial resources in order to minimize the lump sum payment.

The Testators Family Maintenance Act of Nova Scotia contains a section identical to section 9 of the Ontario statute. An interesting question is whether Nova Scotia, in addition to Ontario, prevents a wife, who has accepted a lump sum separation payment, from obtaining maintenance out of her husband's estate. The doubt arises because the Nova Scotia statute is the only Canadian statute which specifically says that a promise, not to apply under the Act for relief from the provisions of the testator's will, is not binding on the dependant. It would appear that this provision does not rule out the applicability of *Olin* v. *Perrin* because the wife is not barred from applying by reason of her promise to refrain from making any claim against his estate, but because she has accepted a lump sum in a separation agreement.

A lump sum separation agreement is not in itself a suitable reason for preventing any relief being given under the Act but, depending on the size of the payment, it may justify the court from refusing to exercise the jurisdiction given to it. It would seem preferable that the situation in Ontario and Nova Scotia be brought into line with that in the other six provinces where no agreement, even one with respect to a lump sum separation agreement, can oust the jurisdiction of the court to order an allowance out of the testator's estate.[88]

(vi) *Manner of Making Allowance.*

All eight provincial statutes give the court wide discretion in determining the mode in which the estate should be charged. The court may order that the allowance should consist of a periodic payment, or a lump sum, or the conveyance of certain property either absolutely, for life, or for a term of years. In the case of small estates, a lump sum payment, often of the whole estate, is the only provision which is feasible.[89] The general rule is that a

[87] [1954] O.W.N. 65 (C.A.).
[88] *Re Edwards Estate*, *supra*, footnote 81.
[89] *Re Salthammer Estate*, [1947] 1 W.W.R. 187 (Sask. K.B.); *Re Marsh*, [1950] 2 W.W.R. 238 (Sask. K.B.); *Re Rybe Estate* (1961-62), 36 W.W.R. 133 (Alta. App. Div.).

lump sum should not be ordered, as the purpose of the legislation is not to permit a dependant to accumulate an estate, but to provide proper maintenance.[90] Periodic payments are preferred by the court.[91] The court endeavours, where possible, to refrain from making an order which requires a disposition of assets in a manner contrary to the intention of the testator.[92]

Except for Ontario and Saskatchewan, the other provincial statutes give the court the power to discharge, vary, or suspend the order. The Ontario legislation makes no reference to the matter but in *Re McCaffery*,[93] and in *Re Rice*,[94] it has been decided that only a final order can be made. In *Re Hannah*, the right to make a further application was reserved but only because the value of the estate was uncertain at the date of application.[95] The Saskatchewan statute only permits variation on the ground that a material fact was not disclosed to the court when the application was made.[96]

If a court has ordered periodic payments or has directed a lump sum invested for the dependant, there appears to be no reason why such an allowance should not be reduced if the dependant has subsequently obtained additional financial resources. The testator's wishes can now be more fully complied with, and the opportunity to do so should be grasped. But, if the circumstances of the dependant change for the worse, it might be inequitable or impossible to increase the allowance. It would be intolerable to have the administration of estates indefinitely postponed until it could be ascertained whether a dependant might require a greater allowance. The executor must be at liberty to distribute the estate in accordance with the will as varied by an order under the dependants' relief legislation. However, if by the will the distribution of the estate is postponed, there would seem to be no objection to permitting a subsequent application where the dependant's circumstances have materially changed. This is the situation in Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Nova Scotia and it would appear to be preferable to that of Ontario and Saskatchewan where the order is final.

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[90] *In re Willan Estate*, *supra*, footnote 48; *Re McMaster Estate* (1957), 10 D.L.R. (2d) 436 (Alta. S.C.).

[91] *Re Suddaby*, [1958] O.W.N. 391 (C.A.); *Re Brousseau*, [1952] 4 D.L.R. 664 (B.C.S.C.); *Re McCaffery*, [1931] O.R. 512 (App. Div.).

[92] *Re Schmidt*, [1952] O.W.N. 418 (C.A.).

[93] *Supra*, footnote 91.

[94] [1952] O.W.N. 465 (H.C.).

[95] (1930-31), 39 O.W.N. 499 (Div. Ct.).

[96] *Re Finnimore* (1956), 1 D.L.R. (2d) 725 (Sask. C.A.).

(vii) *Matters considered by the Court in Determining the Allowance.*

The matters to be considered by the court before making an order are set out in some of the statutes. The most detailed list is to be found in the statute of New Brunswick, Newfoundland and Nova Scotia. In general, the matters are fairly obvious considering the purpose of the legislation. In order to determine the amount that should be allowed, the court has to consider the financial circumstances of the applicant and the testator and the claims of any other dependant on the testator. However, there are some matters to which the court is referred that do not appear to have any bearing upon determining what allowance is necessary to provide the dependant with proper maintenance. How can the relations of the dependant to the testator be relevant in determining an allowance which is supposed to provide proper, reasonable or adequate maintenance?

The Alberta, Manitoba, New Brunswick, Newfoundland, Nova Scotia and Saskatchewan legislation states that a judge may accept such evidence, as he deems proper, of the deceased's reasons for making the dispositions he did and for not making adequate provision for dependants. Again, it is difficult to conceive of a circumstance in which such information could be of assistance in deciding what allowance will provide the dependant with proper maintenance. Such considerations might be relevant under the British Columbia statute because the court is empowered to make such provision as it thinks adequate, just and equitable in the circumstances. The other statutes merely empower the court to make an order providing the dependant with proper, reasonable or adequate maintenance.

There is some confusion about the purpose of the statute. Some of this confusion has been introduced by the judiciary in insisting that their function is to correct the testator's breach of moral duty. Accepting this as the function, the judiciary is led to place undue emphasis upon the relations between the applicant and the testator. For instance, Mr. Justice Freedman stated:

> In appraising the extent of the moral duty that was owed by the testatrix to the applicant, therefore, I am justified in taking into account the strained and disturbed pattern of their relationship. I do not say that the circumstances obliterated such moral duty. I do feel however, that it whittled it down very considerably.[97]

The better approach, it is submitted, is that which was adopted in *Re McCaffery,* where family relations were considered irrelevant

[97] *Sobodink* v. *MacLaren* (1954), 13 W.W.R. 222, at p. 224 (Man. Q.B.).

in determining whether adequate provision had been made. Mr. Justice Riddell said: "We are not compelling the testator to do the right thing by his wife and children, the fair thing, the decent thing. The Surrogate Court Judge and we are performing duties . . . imposed by the Legislature and that is the sole jurisdiction."[98] Mr. Justice Kellock considered that the history of marital relations was entirely foreign to a matter arising under the provisions of the Ontario statute and stated: "It is sufficient therefore that the appellant is the widow of the testator."[99]

Blame for a considerable amount of the doubt about the function of the statute must be attributed to the legislatures. The Ontario statute sets out explicitly the matters to be considered. They are: the circumstances of the testator and the applicant, the claims of other dependants, any *inter vivos* provision made for the dependant and any money or property provided by the dependant for the testator. None of these matters have any moral connotation and therefore, after finding that the testator has failed to make adequate provision, the court can direct itself solely to the question of what allowance will provide adequate maintenance. However, the statutes of Alberta, Manitoba, New Brunswick, Newfoundland, Nova Scotia and Saskatchewan, which permit the judge to consider evidence about the testator's reasons for making the disposition he did, seem to constitute an invitation to embark upon a consideration of the testator's moral duty. The statutes of New Brunswick, Newfoundland, Nova Scotia and Saskatchewan specifically direct the attention of the court to the relations of the dependant and the testator.

Such directions compel one to ask whether the legislation is intended to provide proper maintenance, or whether it is to provide dependants with an equitable share in the estate of the testator. The legislature assigned the court an exceedingly difficult task when it directed it to make an allowance out of the testator's estate for either proper, reasonable or adequate maintenance of dependants. Proper, reasonable or adequate maintenance is an amorphous concept such as "necessaries" in that it also depends upon the person's station in life.[100] But the legislature, having assigned a difficult task, has compounded the problems by directing the court's attention to matters which are irrelevant to the statute's stated purpose.

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[98] *Re McCaffery*, *supra*, footnote 91, at p. 517.

[99] *Meyer* v. *Capital Trust Corp. Ltd.*, *supra*, footnote 52, at p. 331.

[100] *In re Morton Estate*, [1934] 3 W.W.R. 719 (B.C.S.C.); *In re Willian Estate*, *supra*, footnote 48.

The Ontario statute appears on this score superior to those of other provinces in that it directs attention only to those matters which are relevant to determining what allowance will provide adequate maintenance. I think it would be a beneficial step if the provisions in the statutes of the other provinces which serve to direct the court to consider the moral duty of the testator were deleted. It is a difficult task to determine what is proper maintenance but it is an impossible task for a judge to decide what constitutes an equitable share of the estate. The one person who could give evidence from which it might be possible to determine what constitutes an equitable share, of necessity cannot be present. In any case, should freedom of testation be restricted to a greater extent than is necessary to provide proper maintenance for dependants? In my opinion, it should not.

If, however, an affirmative answer is given to this question, there is still the problem of determining the most appropriate mode of providing dependants with an equitable share of the testator's estate. I do not believe that this can be best achieved by introducing the concept of moral duty into dependants' relief legislation. It would merely obscure the purpose of the legislation. It would be better to provide in a separate statute a forced share for those dependants who it is believed, are entitled to an equitable share. This approach would only provide a rough approximation to a solution of the problem, but it is essentially a problem incapable of solution. It is certainly a problem which it would be unfair to ask the judiciary to attempt to solve. As in Manitoba, the dependants' relief legislation would still be required to protect those dependants not given a fixed share and in addition, those whose fixed share was not sufficient to provide proper maintenance.

VI. *Conclusion.*

On the basis of the experience in the eight provinces of Canada with respect to dependants' relief legislation, one is justified in concluding that it represents a reasonable readjustment between the individual's interest in freedom of testation and the interest of his family and of society in general in seeing that the financial responsibilities of marriage are not terminated by death. This legislation can be recommended to the two provinces of Canada which have not attempted to reconcile these interests, as a tested solution. It is by no means perfect, but it does appear to constitute an appropriate limitation on the individual's anti-social use of his freedom of testation.

The amendment of this legislation with a view to preventing or limiting the possible evasion of it should also serve as a convenient time to cast out of our law an outmoded right which constitutes a nuisance in conveyancing transactions. The retention of dower could no longer be justified when the dependants' relief legislation affords the widow adequate protection.[101]

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[101] Dower survives in full vigour in Ontario, New Brunswick, Nova Scotia and Prince Edward Island. In the historic legal sense dower has been abolished in the Western provinces. However, the wife has a life interest in the homestead should her husband predecease her. (Dower Act, R.S.A., 1955, c. 90; Wive's Protection Act, R.S.B.C., 1960, c. 407; Dower Act, R.S.M., 1954, c. 65; Homestead Act, R.S.S., 1953, c. 111). Dower was abolished in Newfoundland in 1834 by The Chattels Real Act now R.S.N., 1952, c. 142. In Quebec, there is legal or customary dower which consists of a life interest for the wife and ownership for the children of one half of the immovables which belong to the husband at the time of the marriage and of one half of the immovables which he inherits from his ascendants (Civil Code of Lower Canada, arts. 1426, 1427, 1433, 1434). However, an ante-nuptial contract can and generally does exclude dower and this binds not only the wife but the children. (Arts. 1431, 1444, 1445).