How do you spell relief? Re-writing wills in Canada

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Introduction to Dependents' Relief Legislation

Imagine the following typical scenario. A woman aged 62 married a man in 1980 when he was aged 70. Both had two adult children from previous marriages. They separated in 1984 and divided the family assets, each receiving $28,000. Later that year she made a will leaving her entire estate to her two independent adult children. The couple resumed cohabitation soon after. The wife died in 1992, leaving an estate worth $18,000. One of her children was then in financially comfortable circumstances, the other less so. The surviving husband had pension income of $1,296 per month and savings of $22,000. He had used most of the funds received at the time of the 1984 separation to pay for his wife's medical expenses. After her death, he sued to receive money from her estate. He lost at trial and appealed. Held, on appeal, the only obligation owed by the wife during her lifetime was to her husband. He had expended his funds for her benefit, the estate was modest and the moral claims of the testator's children, who had not contributed to the estate, were not very high. In the circumstances, the testator failed to make "adequate, just and equitable" provision for her husband. He was entitled to the entire estate (Tweedale v. Tweedale Estate 1995).

We do not choose our time of death, and therefore much is usually left unsaid, undone and unplanned when we die. Our dependents survive,but the loss of a loved one is bad enough, without having to face an uncertain economic future.

In some cases, there is evidence of foresight before the death of the parent or spouse. That planning may have resulted in a derisory provision for the dependent's future needs, or even a statement prohibiting transfer of any of the estate to the dependent.

Families, often fragile from lifetimes of unforgiven bitterness and rancour, come under great stress when a loved one dies.

The worst of humanity often emerges at this point if the conditions are right. It can pit former spouses against each other, step-parents against adult children and children against children to see who has the highest economic and moral claim to the deceased's property. Moreover, one never knows who will show up as a claimant to the estate.

Three separate legislative regimes allow family to come forward after a member's death, and make a claim on the estate. These are matrimonial property division; intestate succession (where

there is no will, the estate is distributed according to a formula to closest family members); and dependent relief legislation. The last will be described in this article.

An 85 year old widower had been left $1 by his wife because he had deserted her to live with another woman. The main asset of the wife's estate was the matrimonial home, which had been bought in 1927 and registered in the wife's name although it had been paid for with plaintiff's money. The couple lived in the house continuously, except in 1976 when he deserted his wife and lived with another woman until 6 months before his wife died. The house was left to their sons. The plaintiff's present income was $3,600 from old age security benefits and $5,000 interest from his bank account. The widower was entitled to a life interest in the house. Evidence indicated the plaintiff had mistreated his wife and had breached his marital duties to her by living with another woman. The wife had agreed to a reconciliation prior to her death, however, and the house, which was the main asset of her estate, had been purchased and maintained by him. Having regard to these factors, the plaintiff's age, and the fact that he lived comfortably because the house was available to live in, he was entitled to a life estate in the house (Jensen v. Jensen 1982).

History

This legislation goes back a hundred years, and represents one of the first proactive social security laws. In fact, the 1910 law in Alberta was called the Married Women's Relief Act, out of a recognition for women as a class in need of protection. The objective of the early legislation was "to place a widow who has been unfairly dealt with in as good a position as if her husband had died intestate (without a will)."

Rationale

The underlying premise of dependent relief legislation is that parents and spouses should support their dependents to the extent that they are able, including out of their estates. Where their estate is clearly able to do so, before a claim is made on the public purse, they have a moral and legal obligation to set aside resources for present and future support. The subject is public policy legislation, giving courts discretion to determine what is just in light of contemporary standards.

Even if one has signed an agreement (such as a marriage or separation agreement, or a settlement in a divorce) to surrender all rights under this legislation, one can still later make a claim; i.e., one may not contract oneself out of the benefit of this family dependent relief legislation. The Act was not passed solely in the interests of a wife, but also for the benefit of husbands, children, and third parties. Therefore, there are more people who may have rights and obligations of support than parties to a bilateral contract.

In force throughout Canada, dependent relief legislation is powerful. It can override even a signed will that dearly leaves everything to named others with an added specific proviso that a certain dependent is not to benefit from the estate at all. In other words, caring for the needs of one's dependents comes first, and one's last wishes may be wholly disregarded.

This area of law confirms that we have both a legal and a moral duty to support those who have become economically dependent on us, for the most part, spouses and children. Parents have been found to be dependents of their children, and siblings of each other, although this is less common. Financial support is an obligation that falls both on us during our lifetimes, and on our estates after we die so far as we leave property that can support our dependents.

A husband was aged 47, married 5 years. During marriage, his wife was the principal breadwinner supplying funds to support his law practice and unsuccessful investments. He lost his licence to practise law. After the death of his wife, he went to live with his parents. The wife left her entire estate of $500,000 to her daughter. The husband claimed $50,000 against her estate and for variation of the will. The wife had a moral duty to provide for the husband despite his bad character and incompetence. As the daughter had adequate means and the husband had no property or income, the husband was awarded $20,000 (Miller v. Miller Estate 1987).

One's moral obligation to dependents is judged based upon society's reasonable expectations of what a judicious person would do in the circumstances by reference to contemporary community standards. The delicate balancing act is not dealing with the cases of obvious need and ability to support. Rather it is where need is equivocal or minimal only by reference to how much the supporter had and how much was left to others. The judge then determines the role of the moral obligation to over-ride the deceased's final testamentary wishes and "claw back" some or all of the estate on moral grounds, not financial need.

Recently in British Columbia, a mother died after three marriages during which she had four children and twelve grandchildren. During her lifetime, she lent money to each of her four children, having lent the least amount to her son from her second marriage. She was predeceased by all three of her husbands. Her estate was valued at $364,000 and her will divided this estate equally among the twelve grandchildren. She left nothing to her children on the basis that they had received enough during her lifetime. The son applied under the legislation to have the will varied to provide for him on the ground that he received less money from his mother than his siblings during her lifetime. She had no legal obligation to provide for him because he was an adult independent child. Nevertheless, the court found a moral obligation existed in this size of estate due to the smaller amount of money he had received during her lifetime. The will was altered and he was given $12,000 more (McLennan v. Fredrickson Estate, June 30, 1999).

How Family Relief Legislation Works

This type of application is common, if only because it represents an opportunity for a windfall with much judicial discretion. The costs of the application may be ordered paid from the estate.

The Supreme Court of Canada has interpreted this legislation to mean if the deceased failed to make adequate provision for a dependent as required, the court would intervene and do what was just and equitable in all the circumstances, taking into account contemporary standards. Once the court was satisfied that the deceased had met the above requirement it could give effect to the testamentary autonomy principle and follow the will of the deceased in disposing with the estate.

The criteria for determining if the requirements of the statute were met were contemporary legal and moral norms. In determining the legal obligation it was no longer acceptable to consider only what the surviving dependent needed. Rather, a spouse should not receive less than one would receive if there was no will (intestacy) or if they were instead divorced. The moral obligation was measured by determining what fell within the reasonable range of contemporary social expectations.

The parties were married in 1988 when he was 76 and she was 69. He died only 49 days later. Under a prenuptial agreement, the wife had waived her rights and agreed to the amounts received under the will. Prior to the marriage, she was independent, with $300,000 cash, a condominium, and other property. She received $700,000 in cash under the will, plus furnishings and other benefits worth $365,470. In addition, she received approximately $800,000 in cash and other benefits from a foundation her late husband had set up in Europe. The value of the estate was $32 million. The wife sued, seeking $7 million more of the estate. Both levels of court concluded that she had been adequately provided for under the will (Hecht v. Hecht Estate (1993).

Decisions may differ when based on family relief statutes of other jurisdictions (including other countries. They may afford little assistance if those statutes are constructed upon a different model and differ very materially in their terms from the statute in which the estate is being administered. For example, this judicial power to re-write wills for the benefit of dependents is generally called "dependent relief" legislation. In British Columbia, it is called the Wills Variation Act, which may reflect a policy to grant less deference to wills in that province in comparison to serving other social policy objectives. This part describes the general policy of this law.

The net value amount of the estate must be first determined. Every case will turn on its own specific combination of facts. The surviving dependent should provide a budget of needs and match them against resources, present and future. The totality of what the dependent has been given by the deceased and otherwise has access to, such as a life estate in a home, specific inheritances, life insurance pay-outs, and monthly income will all be considered by the court to determine whether his or her share of the estate should be increased on the basis of the dependent's needs.

Often an application may be made in conjunction with matrimonial property division. If there is no will, the dependent relative can apply for a greater share than one is entitled to under the intestacy rules. In other cases, the executor may apply to the judge for advice and directions. The Public Trustee can also apply to vary the will on behalf of others.

An order for adequate provision can be made even where the estate is small (e.g. $1600). It is irrelevant if the parties kept assets separate during marriage, or were themselves separated. In Re Tero, (1949), the parties had lived apart and independently for 40 years and a family relief order was still made.

The definition of "dependent" is usually inclusive. "Spouse" includes a common law spouse. Multiple consecutive marriages or cohabitation arrangements (such as married but living with another person), extended families of elderly parents living with their children, and more than

one set of children, all open the door to many different dependent applicants. Anyone in the world can apply for relief, but must do so in the judicial district and province in which the estate is being administered. One has to apply within the statutory time limitation (such as 6 months after death), or face the prospect that the estate will have been distributed with nothing left to claim.

The applicant must be alive at the time the order is made, because it is for the financial support of that person. The purpose of this law is not to assist a dependent in building up an estate but solely to provide for adequate maintenance. For example, in a case where the surviving mother applied for a farm with the purpose of transferring it to one of her sons she was denied relief on the basis that it was not for the dependent.

The factors generally considered by the court are the size of estate, the needs of all dependants (as evidenced by their number, age, health, and other personal circumstances such as educational needs), other sources of income, the standard of living to which these dependants had become accustomed, and the claims of others on estate. The length of the dependency is also relevant. Minor dependencies include short marriages, late in life where the spouses did not become a single economic unit and did not enter into the relationship of mutual benefit and contribution that usually comes with marriage.

Judges will look at what the applicant would have been legally entitled to if she had brought action under matrimonial property legislation, divorce, or separation laws during the deceased's lifetime or under intestacy laws. They take into account tax implications of distribution, so as to gross up the distribution to reach net income targets. Other competing moral claims, such as the applicant's lifestyle, and whether she sacrificed inordinately for the deceased are considered. One in obvious need is unlikely to be disentitled to this relief by virtue only of one's conduct.

A man left all his property to his sister and to charities. His destitute widow applied for an order that she receive from the estate the share she would have received had he died without a will. For 30 years the widow had worked hard on the testator's farm and had put $1,000 of her own into it. In 1923 she left him, for cause, and never saw him again. He became ill with almost complete paralysis and begged her to return, but she refused. The application was granted. While the widow may have been unduly severe, it was on the whole just that she be given a share in the estate (Re Wilson Estate 1937).

Where a surviving dependent is subject to the discretion of an executor, adequate provision for proper maintenance has not been made. An applicant is entitled to a clear proportion vis-a-vis other beneficiaries because the entire estate is to bear the burden of any support ordered under this legislation. Decisions are mindful not only of the circumstances as they exist at the time of the application but as they may likely be altered in the future. Payment may be made by way of a lump sum or as an annuity.

In terms of the deceased's legal obligation toward the widow, had the spouses separated prior to the testator's death, the widow would have been entitled to a share of the matrimonial assets as well as maintenance, and therefore she was entitled to as much on the death of her husband. The

widow was entitled to independence in her old age and should not have to be dependent on the discretion of her son who was administering the estate.

"Proper" maintenance and support, where that term is found in the legislation, has been interpreted to be wider than "adequate" maintenance. So if the testator hoarded the money and subjected the claimant to only a modest standard of living, the court is likely to now grant her more than minimal expenses. In other words, on the basis of equity, one can be compensated to more than the standard of living to which one has become accustomed if the circumstances justify it.

Nothing in this legislation means that one has to be equal or fair to one's dependents -- only that their basic needs have to be provided for. The legislation is not intended to automatically operate, and an order made, in all cases where members of a family, adults or minors, are left out of a parent's will. That is not the test. The statute refers to failure to make adequate provision for the proper maintenance and support.

A family relief award is not damages. It is more like an allowance. This law gives no dependent a legal or equitable right to a share of a deceased's estate. It merely confers on judges a discretion to satisfy a moral claim.

A widow brought an application on the ground that her husband did not make adequate provision for her by his will. The estate was worth over $10 million. By the will, the applicant was given the matrimonial home (encumbered by a $20,000 mortgage), together with its contents, 1,000 shares producing an income of $2,000 per annum and valued at $28,000, an income for life of $24,000 per annum and a second income (at her option) of $20,000 per annum. The applicant possessed substantial assets of her own capable of producing an income of $12,000 to $30,000 a year. The application was dismissed. Despite the magnitude of his estate it could not be said that husband failed in his duty to make adequate provision for applicant (Nickle v. Jones 1974).

Conclusion

It is considered one of the most basic, ultimate rights: to choose who you give your property to when you die. This right essentially remains intact. Family relief legislation imposes one major qualification. You are free to dispose of your property, but first you must provide for the needs of your dependents if there is value in your estate to do so.

One is advised to talk about such matters with loved ones during one's lifetime. If everything is done on the basis of mutual trust and joint tenancies, one's estate and corresponding acrimony is reduced. Obviously, if there is no money in one's estate, family relief and protection laws do not apply.

Family relief legislation is generally a blunt instrument to ensure basic needs and the interests of equity toward our dependents are met. It shows us that we have a legal, as well as a moral, obligation to support our dependents, and this continues even after "death do us part". One may expect fewer of these applications today in light of greater economic independence of spouses, in comparison to the past.

Family feuds and estrangements often lead parents and other supporters to intentionally make no provision for children and dependents in wills. This may be done deliberately or inadvertently: a dependent is completely overlooked in the will or not provided adequately for. More than anything else, leaving a physically or mentally dependent child out of your estate will lead to a judge re-writing the will. This may be by testacy (will) or intestacy (no will).

A court may be asked later if that supporter acted judiciously to support the dependent in light of current community standards. One must usually have good valid reasons at time of death for disinheriting a child. The judge is put in a position later to determine whether the disinheriting was morally justified.

A wife and husband had four children of whom the oldest, the applicant, was adopted. He left home in 1970, at age 17, as a result of an argument with his mother. Although his parents attempted to establish a relationship with him afterward, he rebuffed all of their efforts. The parents made their wills in 1974, leaving their respective estates to each other, and if the spouse died first, the estates should go to the couple's three biological children equally. Each will contained a statement referring to the adopted son, who had chosen to "abandon the family and live a life morally unacceptable to us". Each will stated that to be the reason for disinheriting him. The man died in 1981 and the woman in 1990. The estate had a value of approximately $525,000. The son was single, in good health, with no dependents, and earnings of $33,000 per year. He sought a share of the estate. The action was dismissed. On an application under the Act, the Court must first determine whether adequate provision has been made for applicant. If it has, that is the end of the matter. If it has not, the court must determine whether the plaintiff is in need. If not, the court must determine whether the deceased's reasons for disinheriting the plaintiff were rational and valid. If they were, the court ought not to interfere. The burden is on the plaintiff to prove the reasons were false or unwarranted. Here, no provision was made for the son, but he was not in need. On the evidence, the mother excluded him from her will because she believed he had abandoned the family and had treated her and her husband in a hateful and hurtful way in the ensuing years. The son failed to demonstrate that those reasons were false or unwarranted (Kelly v. Baker 1996).

Other conclusions that may be drawn from this legislation and its interpretation over the years is that deference is variably paid to testamentary intentions; the applicant has the burden of proof to establish need; the estate has the resources to answer that need, illness and disability of dependents will be viewed favorably, and moral grounds may be used to win or lose a dependent relief application.

It is a common occurrence for each spouse to agree in a separation agreement or settlement of divorce, and even to include in their wills their intention to keep their estates separate and to dispose of them as they wish. They should know that they may still apply after the death of the other for a portion of the other estate.

Reading through the judicial decisions in this subject is like reading a chapter of the book of human nature. Family members angry with dependents attempt to completely or insultingly disinherit them. Dependents come forward to pick over the estate for more at the expense of other beneficiaries. Some applications are brought to exercise the applicant's sense of outrage.

Money issues divide people and motivate family relief applications. Some think `why not take a chance in court' if there is enough money involved and a reasonable prospect of winning.

A judge has wide discretion in each case. The results are hard to predict. The best may be to try to avoid such disputes during one's lifetime as best one can. One is reminded of the aphorism from The Parliament of Byrds, 1550, "little money, little law".