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Do testators have moral as well as legal obligations to their dependants? Not in Alberta

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Cases Considered:

Petrowski v. Petrowski Estate, 2009 ABQB 196

Alberta's *Dependants Relief Act*, RSA 2000, c. D-10.5 allows adult children who are unable to earn a livelihood by reason of physical or mental disability to challenge their parent's will if that will does not made "adequate" provision for their "proper maintenance and support." There is similar legislation in other provinces and the leading precedent on what factors a judge should take into account in exercising their discretion to vary a will is a Supreme Court of Canada decision on appeal from British Columbia: *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807. The Supreme Court held in *Tataryn* that a judge was not limited to a needs-based analysis, but should also consider the deceased's moral obligations. However, the British Columbia legislation the Supreme Court interpreted in *Tataryn* differs from Alberta's in two important respects and the Alberta Court of Appeal has yet to consider the relevance of these differences. It is therefore still an open question in Alberta as to whether or not *Tataryn* applies to the interpretation of this province's statute and whether moral obligations can or should be taken into consideration. The *Petrowski v. Petrowski Estate* judgment is the latest Queen's Bench decision to grapple with this issue. It holds that, in Alberta, only the obligations imposed in law by the legislature are moral obligations; law is co-extensive with morality in this context. The result of this decision is that a property owner's freedom to dispose of his property is enhanced.

This case involved an attack on a will by the adult son of the deceased. His father's will left everything to his sister, the daughter and only other child of the deceased. The will was challenged on the basis of the father's alleged lack of testamentary capacity and the daughter's alleged undue influence on her father and his will. Neither of these two challenges was successful. Based on the medical evidence, Madam Justice Andrea Moen had no doubt that the deceased was of "sound and disposing mind" when he made his will (at para. 326). She also found there was no undue influence. These two issues - and similar issues of mental competence and undue influence in connection with land and mines and mineral transfers by the deceased to himself and his daughter - take up 64 pages of this 100 page judgment. The discussion of the law relevant to proving a will formally and its application to the facts of this case is well researched, well organized and thorough. It should prove a useful precedent for those interested in how to

prove a will in solemn form in Alberta or those who need to know what is involved in proving undue influence. These issues are not, however, the focus of this comment.

Neither are the issues connected to the death of the son between the time of trial (December 2007) and the date the judgment was released (March 31, 2009). Had the son been successful, the court would have issued an order *nunc pro tunc*, backdating the judgment to November 8, 2008, a date when the son was still alive.

Instead, I am interested in Justice Moen's discussion of the son's entitlement under the *Family Relief Act*, R.S.A. 2000, c. F-5, something that has nothing to do with the validity of the will. The *Family Relief Act* was replaced by the *Dependants Relief Act*, R.S.A. 2000, c. D-10.5 on June 1, 2003 but the deceased in this case died on February 21, 2001, when the *Family Relief Act* was still in force. The provision of the *Family Relief Act* in question in this case is virtually identical to the current provision in force under the *Dependants Relief Act* and so this case should serve as a persuasive precedent for interpreting the latter. Both are examples of a type of social welfare legislation now commonplace in the Anglo-American legal tradition. See the June 1978 Report No. 29 on Family Relief by the Institute of Law Research and Reform, now the Alberta Law Reform Institute for a brief history and discussion of the purposes of this type of legislation.

Under both statutes, there are two issues. First, only "dependants" of the deceased can ask a court to override a deceased's will and only certain adult children qualify as dependants. Only those children who are over 18 and who are unable by reason of "mental or physical disability to earn a livelihood" can apply: see s. 1(d) of the *Family Relief Act* and s. 1(iv) of the *Dependants Relief Act*. If an adult child can prove they qualify for relief as a dependant family member, the second question is whether the will made "adequate provision" for their "proper maintenance and support" and, if it did not, how much relief is the dependant entitled to in order to provide "proper maintenance and support." The relevant statutory provision under s. 3(1)(a) of both statutes states:

> 3(1) If a person
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> (a) dies testate without making in the person's will adequate provision for the proper maintenance and support of the person's dependants or any of them,
>
> . . .
>
> a judge, on application by or on behalf of the dependants or any of them, may in the judge's discretion, notwithstanding the provisions of the will . . . , order that any provision that the judge considers adequate be made out of the estate of the deceased for the proper maintenance and support of the dependants or any of them.

Facts

Before turning to the two issues that arise under s. 3(1), at least a brief recital of some of the facts are necessary. Nick Petrowski died in 2001, at the age of 92. He had made a will in August of 2000 that left all of his property to his daughter, Joan, who he also named as the executrix of his Will. Nick Petrowski also transferred all of his farm land and his mineral titles into the names of himself and his daughter Joan, as joint tenants, and these transfers were challenged by the son as well. At the time of his death, Nick Petrowski had about 11 quarter sections of land with an appraised value of $1,672,800. He also had mines and minerals that produced an annual income of $68,374 to $260,810.

The son, Peter Petrowski, had received farmland and cattle as a gift from his father, Nick Petrowski, when he was between 18 and 22 years old. The father and Peter used the father's machinery and the father helped Peter farm his land. Peter lived with his father until he married in 1963, and then he and his wife lived in a separate house on the father's land until 1967, when Peter and his wife moved to Peter's land.

Peter was injured in a farming accident in 1968. He was paralyzed from the chest down, leaving him unable to walk. Nevertheless, after a long period of recovery, Peter was the one who worked his farm and made all the decisions. Over his lifetime, Peter accumulated a sizable estate. The value of his land and improvements was $852,900 and there was no debt owing on the land. In addition he had savings of $45,000, numerous vehicles, and a pension at the time of trial. The total income from his land, which was leased out, was from $27,000 to $37,000 per year. His annual income, including pensions, was between $39,000 to $49,000 per year. In the five years after his father's death (from 2001 - 2006), Peter also sold cows and calves for a total of just over $350,000. On November 9, 2008, between the time of the trial (December 2007) and the date of the judgment, Peter Petrowski died.

As for the daughter, Joan Petrowski, after her mother died in December 1973, she moved from Edmonton to live with her father on her father's farm. He retired in 1974 at the age of 65, giving his daughter management of the farm. Nick Petrowski made a will in 1974 that left everything to Joan. Joan looked after her father and played a major role in managing the farm. She also went into the business of training and boarding race horses on her father's farm. (Unrelated to the court case, but worth noting as an accomplishment, is the fact that Joan Petrowski's horse, Footprint, won the Canadian Derby in August 2008. Joan, one of first female trainers in Alberta 35 years ago, was only the fourth female trainer in the 78-year history of the prestigious race to win the $300,000 purse. See the story, "Hard work has its rewards: Alberta horse trainer Joan Petrowski wins awards — and respect on the race track" by Lesley MacDonald, published August 29, 2008 in The Edmonton Journal.)

In April of 1977, Nick Petrowski remarried. He and his second wife never divorced, but they did enter into a settlement agreement when they separated. Nick Petrowski's 1974 will, leaving everything to his daughter, pre-dated this marriage and was therefore made void by the marriage. Nick Petrowski was unaware that a subsequent marriage voided a prior will until the lawyer who

drafted his 2000 will advised him of this consequence. (Under s. 17 of the *Wills Act*, R.S.A. 2000, c. W-12, a will is revoked by the marriage of the testator except when there is a declaration in the will that it is made in contemplation of the marriage.) Nick never knew he was intestate between 1977 and 2000, but always thought that all of his property would go to his daughter on his death. Under section 4 of the *Intestate Succession Act*, R.S.A. 2000, c. I-10, however, Joan and Peter would have shared equally in his estate had their father died before making the 2000 will.

The Precedent: *Tataryn v. Tataryn Estate*

The key precedent for the testamentary relief issues is the Supreme Court of Canada judgment in *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807, 116 D.L.R. (4th) 193. *Tataryn* is a unanimous decision of the Supreme Court of Canada, authored by Justice Beverly McLachlin, as she then was. Until 1994, the law was unsettled on the question of precisely what considerations should govern a court faced with an application to vary a will. Both the BC and Alberta statutes leave the amount of the variation to the judge's discretion. *Tataryn* is therefore the authority on what factors a judge should consider in determining if a dependent was unfairly disinherited.

That case came out of British Columbia, however, where the relevant legislation was, at the time, the *Wills Variation Act*, R.S.B.C. 1979, c. 435. That legislation is not the same as the Alberta legislation, and, in Justice Moen's opinion (at para. 442), many of the Alberta decisions that follow *Tataryn* do not take account of the differences in the legislation being applied. There are two main differences. First, the B.C. *Wills Variation Act* allows all adult children to apply to vary their parent's will, regardless of age or (dis)ability. Second, the wording in the B.C. *Wills Act* allows a BC court to order "that the provision that it thinks adequate, just and equitable in the circumstances" be made. The relevant language in Alberta is "adequate provision for proper maintenance and support."

On both of these differences, the B.C. legislation is more generous to dependants than is Alberta's. It is much easier to say that B.C.'s legislation is not needs-based because dependant children in that province are not limited to those who are unable to earn a livelihood, as they are in Alberta. It is much easier to include moral obligations in interpreting B.C.'s legislation because it uses the language of "just and equitable." Alberta's statute uses the language of "adequate" provision and "proper" maintenance and support - phrases not so obviously including moral considerations.

The relevance of *Tataryn* in Alberta therefore lies in its general approach to the issue of will variation to provide for a dependant, and not in its interpretation of a different piece of legislation. *Tataryn* held that a judge was not limited to a needs-based economic analysis but should also consider the deceased's moral obligations; see paras. 18-33 on "The Jurisprudence - Need or Something More?" in *Tataryn*. Earlier cases decided that the B.C. statutory wording of "adequate, just and equitable in the circumstances" meant the amount needed to support the spouse and children of the testator. However, the Supreme Court of Canada rejected this interpretation in 1931 in *Walker v. McDermott*, [1931] S.C.R. 94 at 96, holding that "proper

maintenance and support" was not limited to the bare necessities but instead had to be approached from the perspective of "the judicious father of a family seeking to discharge both his marital and his parental duty." *Walker v. McDermott* introduced the interpretation of moral obligation into the requirement for "proper maintenance and support," which is the phrasing in Alberta's *Family Relief Act*. This point is not, however, considered in the judgment.

After *Walker v. McDermott*, the lower court decisions in B.C. follow two lines. The majority applied the approach in *Walker*, using the principle that spouses and children were entitled to an equitable share of the estate even in the absence of need. As (now) Chief Justice McLachlin notes in *Tataryn* (at para. 21), "'[m]oral duty' became the watchword." A second line of cases followed the older view that the testator's will could be varied only on the basis of need.

In *Tataryn*, it had been argued that the Supreme Court should replace the "judicious father and husband" test from *Walker v. McDermott* and return to the needs-based analysis which prevailed in the early years of the Act. The Court refused to do so for a number of reasons. First, the B.C. *Wills Variation Act* does not mention need. Neither does it exclude the independent adult child - something the Alberta Act does. The wording of the statute emphasizes the judge's discretion, not a mathematical calculation.

The court in *Tataryn* did acknowledge the uncertainty introduced into the law by *Walker v. Mcdermott* and noted that courts which had followed its approach had suggested a variety of ways to measure "adequate, just and equitable" to make it more predictable. In the key passage (at para 28), McLachlin J. sets out how courts are to interpret the B.C. *Wills Variation Act* to reduce uncertainty:

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

According to *Tataryn*, the primary consideration (at para. 29) is the testator's legal responsibilities during his or her lifetime. A person is under a legal duty to support his or her spouse and minor children during his or her lifetime. Enforcing such a duty on the person's estate on their death was not considered troubling: see the British Columbia Law Reform Commission 1983 *Report on Statutory Succession Rights* (Report No. 70) at 154. After considering the legal duties, the court is then to consider the testator's moral duties to his or her spouse and/or children. The Court in *Tataryn* acknowledges (at para. 31) that these obligations are more susceptible of being viewed differently by different people. The Court also notes (at

para. 32) that if claims conflict and the estate is not large enough to meet them all, then claims which would have been recognized during the testator's life — claims based on legal obligations — should generally take precedence over moral claims.

Despite the reliance of *Tataryn* on the wording of the B.C. *Wills Variation Act*, its legal and moral obligations approach has guided the interpretation of differently worded statutes elsewhere in Canada. For example, in Ontario, *Cummings v. Cummings* (2004), 235 D.L.R. (4th) 474 (C.A.) was the first case since that province's *Succession Law Reform Act*, R.S.O. 1990, c. S.26, came into effect where the Ontario Court of Appeal examined the extent to which a court should take into account moral or ethical considerations. Section 58 of the *Succession Law Reform Act* provides that "[w]here a deceased . . . has not made adequate provision for the proper support of his dependants or any of them, the court, on application, may order that such provision as it considers adequate be made out of the estate of the deceased for the proper support of the dependants or any of them" - a provision very similar to that in Alberta. Earlier Ontario decisions had rejected the approach of the courts in Western Canada which followed *Tataryn*. In *Cummings*, however, the Court of Appeal held that a court must take into account a deceased's person's moral obligations in order to avoid causing injustice. See the comment on *Cummings v. Cummings* by Sender B. Tator and Felice C. Kirsh in (2004) 23 Estates, Pensions, and Trusts Journal 189.

In Alberta, *Tataryn* has been applied in many decisions to rule out a needs-based economic analysis and to require an analysis based on both legal and moral obligations. See, e.g., *Siegel v. Siegel Estate* (1995), 177 A.R. 282 (Surr. Ct.); *Gow v. Gow Estate*, 1998 ABQB 1073 (Surr. Ct.); *Stang v. Stang Estate*, 1998 ABQB 113, 58 Alta. L.R. (3d) 201. The Alberta Court of Appeal, however, has yet to explicitly endorse this approach.

In *Petrowski* (at para. 449), Justice Moen agrees that *Tataryn*'s principles for determining whether a legal obligation exists do apply in Alberta. On the question of moral obligation as part of the second issue before the court, Justice Moen rejected *Tataryn*. She held (at paras. 453 and 458) that *Tataryn* provided only "guidance" as to the meaning of "proper maintenance and support" and an analytical framework within which the court could interpret the Alberta legislation. She emphasized the difference in the wording in the Alberta statute and noted that other Alberta decisions have argued that the Alberta statute's reference to "adequate for proper maintenance and support" suggests a needs-based approach: *Stang* at para. 25, citing *Ostrander v. Kimball Estate*, [1996] S.J. No. 444 (Q.B.) at para. 32. She pointed out (at para. 456) that "[t]he Alberta legislation requires only an adequate distribution, that is, adequate to meet the requirements of the party who has challenged the distribution, that is, a "needs-maintenance approach."" Although somewhat confusing, she concluded (at para. 451) that "[i]n Alberta, following *Tataryn*, a testator has both legal and moral obligations." And she does, in her application of the law to the facts, consider the matter of both legal and moral obligations owed by Nick Petrowski to his children.

How could Justice Moen both reject *Tataryn*'s idea of a separate and independent moral obligation and consider Nick Petrowski's moral obligation to his son? She does so by equating the moral to the legal.

The First Issue: Section 1(d) of the *Family Relief Act*

Before dealing with Nick Petrowski's legal and moral obligations, the court had to first consider whether the son, Peter, was eligible under the *Family Relief Act*. Recall that in Alberta, in order to qualify as a dependant, an adult child must be disabled and by reason of that disability unable to earn a livelihood. Recall that this is one of the ways in which our statute differs from B.C.'s. *Tataryn* is not relevant to this issue. Was Peter Petrowski a dependant of his father, Nick Petrowski? Was the son someone who was unable by reason of "mental or physical disability to earn a livelihood" at the time of his father's death?

There was no issue over whether or not Peter was disabled at the date of his father's death. As he had aged, he developed a number of medical conditions relating to his confinement to a wheelchair and it was the doctors' opinion that as of the time of trial, Peter was completely and permanently disabled.

The question was whether Peter was unable to earn a livelihood due to his disability. Justice Moen also held (at paras. 486 and 502) that earning a livelihood, in the context of section 3(1), meant achieving a threshold income adequate for proper maintenance and support. (The term "threshold" appears to be a synonym for an extremely low ceiling.) Determining that threshold is highly contextual, and a number of cases have now held that the following factors are all to be taken into account: the age and health of the dependant, the needs of the dependant, the likelihood of the needs of the dependant increasing, the station of life of the deceased and the dependant, the mode of life to which the dependant ought to be accustomed, the other sources of income of the dependant, the cost of living, and future contingencies that are reasonably foreseeable. See *Petrowski* at para. 503, *Carter v. Adventist Church*, [1998] A.J. No. 1479 at para. 28 (QL), *Pauliuk v. Pauliuk Estate* (1986), 73 A.R. 314 (Q.B.) and *Dupere (Next Friend of) v. Spinelli Estate* (1998), 229 A.R. 137 at para. 28 (Surr. Ct.).

At the time of trial, Peter and his wife Annette's annual living expenses were about $17,000 per year. This was, the judge noted (at para. 552), a "modest" lifestyle. Adding in $8,000 for the couple's medical and dental, clothes and entertainment expenses, Justice Moen arrived at a total annual expense figure of $28,000. Having found that their income was between $39,000 and $49,000 per year, leaving a cushion of between $11,000 and $21,000 per year (plus the savings and cattle proceeds) Justice Moen held (at para. 551) that Peter had met his needs out of his income and did not require any assistance from his father's estate. She did review at some length the evidence of his need for and the cost of possible future home care, new wheelchairs, wheelchair ramps, lifts, mattresses, etc. All of these "extras" were judged within the surplus $11,000 income, if not paid for by the government's Aids to Daily Living.

Having concluded that Peter was capable of and was earning a livelihood at the time of his father's death, it seems that Peter did not qualify to apply for relief under the *Family Relief Act*. However, Justice Moen found instead (at para. 561) that Nick Petrowski did not have, at the date of his death, a legal obligation to support his son Peter. The question of legal and moral obligation is the second issue.

The Second Issue: Section 3(1) of the *Family Relief Act*

In this part of her judgment, Justice Moen assessed the legal obligations that the deceased had towards both his son, Peter, and his daughter, Joan, during his lifetime and the moral obligations that he had to both of them. She then ranked the obligations, looking at the relative priority of each child's claim. Taking into account all of that, she then addressed the issue of whether or not the division of Nick Petrowski's estate was adequate to provide for the proper maintenance and support for his son, Peter.

In connection with legal obligations that Nick Petrowski owed to his children during his lifetime - obligations that arise from statutes or the common law - Justice Moen held that Joan had a valid legal claim on the basis of unjust enrichment for half of her father's estate. To find an unjust enrichment, she found an enrichment on the part of Nick, a corresponding deprivation on the part of Joan, and no legal justification for the enrichment. Her father could not have retired at the age of 65 unless Joan took over running the farm, as she did. Joan never married and had no children. She spent most of her life looking after the farm and ensuring her father's needs were met. She received no compensation for these services.

Peter argued that his father had a legal obligation to support him under the *Maintenance Order Act*, R.S.A. 2000, c. M-2, which was in force when Nick Petrowski died but is no longer in force. In order to find a legal obligation after death, under the *Tataryn* approach a pre-death legal obligation is required that becomes extended and considered after the testator's death. As Justice McLachlin noted in *Tataryn* (at para. 28), dependency flows from an obligation to support, rather than any support provided or reliance upon that support during the testator's lifetime. Apparently, the archaic *Maintenance Order Act* was the only possible statute Peter could have applied under while his father was alive. But under the *Maintenance Order Act*, Peter had to prove he was, literally, a "destitute" person. It is a needs test - and an extremely meager one at that. Peter, according to the evidence, was able to support himself and his family during his father's lifetime. As a result, he failed to prove that his father had a legal obligation, during his lifetime, to support his son under that statute.

That finding under the *Maintenance Order Act* should have ended the discussion of a legal obligation. Recall that, according to Tataryn (at para 28), legal obligations are those which the law would impose on a person during his or her life were the question of provision for the claimant to arise. However, Justice Moen went on to consider that a legal obligation for support after Nick Petrowski's death might nonetheless be found in the *Family Relief Act*. If Peter qualified as a dependant under s. 1(d) - if he was unable to earn a livelihood due to physical or mental disability - then this would be a legal obligation. It was an obligation that did not arise

until Nick Petrowski died, and thus not the kind of legal obligation Tataryn contemplated. Still, Justice Moen concluded (at para. 483) that "the legal obligation that flows from the *Family Relief Act* at the testator's death should be analysed as one of the legal obligations on a testator as described in the *Tataryn* analysis, and that the legal obligation should be ranked in the same manner as a legal obligation that arose during the testator's lifetime."

However, as already pointed out, Justice Moen held that Nick Petrowski did not have a legal obligation, at the date of his death, to his son Peter, since Peter was capable of and was earning a livelihood at that time.

The next question Justice Moen addressed (beginning at para. 562) was whether Nick Petrowski had, at the date of his death, a moral obligation to his son. Earlier in the judgment (at para. 453), Justice Moen had questioned whether a court in Alberta could award any part of the estate to a dependant based only on moral obligations. *Tataryn* had held that a moral obligation by itself was enough in the context of the B.C. legislation. In the face of Alberta's *Family Relief Act*, however, Justice Moen explicitly held (at para. 566) that:

> [I]f there is no legal obligation then there can be no moral obligation. For the court to find a moral obligation when no legal obligation exists would be for the court to legislate.

Indeed, Justice Moen found (at para. 568) that because Nick Petrowski had no legal obligation to his son, he had no moral obligation. Nevertheless, Justice Moen did consider the moral obligations that Nick Petrowski would have had to his son if he had a legal obligation. Her consideration of moral obligations at this point is entirely circular, since moral obligations are defined as those that flow from legal obligations, and a legal obligation would have got Peter the relief he was seeking without needing to resort to a moral obligation.

Justice Moen found that Nick Petrowski took steps to provide for his son that met the community standards expected of a parent. He took substantial and effective steps to provide for Peter with the gifts of land to Peter when Peter was young, and by other support provided at or shortly after that point. She also considered his moral obligation to his daughter and held there was one based on her findings of unjust enrichment.

Basically, Nick Petrowski provided for his son Peter when Peter was young by giving him a start as a farmer, and he provided for his daughter Joan on his death. He satisfied his legal and moral obligations to his children, although, in Alberta, those obligations are one and the same according to this judgment. There is no moral obligation in this province without a legal one.