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It's Difficult to Disinherit Some Adult Children

By Jonnette Watson Hamilton

Cases Considered:

Soule v. Johansen Estate, 2011 ABQB 403

Alberta Justice has spent the past few years reviewing provincial succession laws and proposing reforms to consolidate and update the relevant provincial statutes. The result of the Alberta Succession Law Reform project was the passage of the new *Wills and Succession Act,* SA 2010, c W12.2 by the Alberta legislature in the fall of 2010 (Bill 21). However, because the changes are extensive, the new *Wills and Succession Act* will not come into force until it is proclaimed and proclamation is not expected until early 2012. It is interesting to consider whether or not the result in *Soule v. Johansen Estate* would have been any different under new law. In her will, Elsie Carrolle Johansen left all of her $116,000 estate to the Calgary Humane Society. She chose to disinherit her only son, Kim Soule, a 51 year old man suffering from hepatitis C, because she did not want her estate to be spent on drugs and alcohol. He asked the court to re-write his mother's will under the *Dependants Relief Act,* RSA 2000, c D-10.5, because he is unable to earn a livelihood. Although Mr. Soule did not appear to be a sympathetic supplicant, he nevertheless prevailed. Justice Sheilah Martin rewrote his mother's will to give all but $10,000 of his mother's estate to Mr. Soule. Her main reason for doing so appears to be the predominantly pragmatic one of relieving taxpayers of the burden of Mr. Soule's support.

Facts

Mr. Soule left school in grade 10 and held a variety of jobs; he worked at the racetrack, he sold cars, and he worked as a roughneck and then as a motorman on a drilling rig. During his time in the oil patch he used marijuana, intravenous drugs, and cocaine. His driver's license was taken away in the mid-1990s for impaired driving. He admitted to the use of crystal meth until late 2007 or early 2008. His uncontradicted but self-serving evidence was that he had not done any form of drugs for the past 3½ years or so, since the birth of his son.

Mr. Soule contracted hepatitis C around 1990. He acknowledged that "it may have been from unprotected sex or from doing drugs" (para. 9). Mr. Soule stated that the hepatitis C causes him to have low-energy levels, difficulties remembering, stiff joints, and frequent migraine headaches.

Around 1997 Mr. Soule left the oil patch because he found the work too physically demanding. He has not worked full time since 2000 and he has not worked at all since 2005.At the time of his application to the Court of Queen's Bench of Alberta, he was living in British Columbia on social assistance. His evidence was that he is living with his common law spouse and his total allowance was $1006.22 per month — $720 for rent, $20 towards a damage deposit, leaving

$266.22 per month for all other expenses. He also receives coverage for prescriptions, dental coverage, and glasses. Mr. Soule's common-law spouse, who is also the mother of his three-year-old son, was said to be unemployable. The child does not live with them. Mr. Soule has no assets other than personal effects and a TV he found in the garbage.

Mrs. Johansen's will was signed in November 2007 and it contains only three clauses. The last clause provided "I give, devise and bequeath all my property, of every nature and kind and wheresoever situate, including any property over which I may have any power of appointment to the Society Prevention of Cruelty to Animals in Calgary, Alberta." (para. 14). The lawyer who drew the will testified that Mrs. Johansen told him that she did not want to leave her estate to her son, Kim Soule, because it would all go to drugs and booze. She instructed him that she wanted to leave her entire estate to the Calgary Humane Society as she had worked with and cared for animals her entire life and she wanted her estate go to a worthy cause.

Law

As Justice Martin notes (at paras. 18 and 19), at common law a testator has a right to choose how to dispose of his or her property. However, legislation enacted across Canada — including Alberta's *Dependant Relief Act* — changed the common law to give courts discretion to override the wishes of testators when they have failed to make adequate provision for certain family members.

Under Alberta's *Dependants Relief Act*, only "dependants" of the deceased can ask a court to override a deceased's will and only certain adult children meet the definition of dependants. Under section 1(iv), only those children who are over 18 and who are unable by reason of "mental or physical disability to earn a livelihood" can apply. If an adult child can prove they qualify as a dependant, they must then show that the testator's will did not make "adequate provision" for their "proper maintenance and support":

> 3(1) If a person
>
> > (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.

Note that even if the applicant proves s/he is a "dependant" and proves the testator's will does not make adequate provision for their proper maintenance and support, the court still has discretion to refuse or allow the application. Section 3 goes on to say a few things about how a judge should exercise their discretion:

> (2) The judge on the hearing of the application
>
> > (a) may inquire into and consider all matters that the judge considers should be fairly taken into account in deciding the application,
> >
> > . . .

(c) may accept any evidence that the judge considers proper of the deceased's reasons, so far as ascertainable,

(i) for making the dispositions made by the deceased's will, or

(ii) for not making adequate provision for a dependant,

including any statement in writing signed by the deceased.

. . .

(5) The judge may refuse to make an order in favour of any dependant whose character or conduct is such as in the opinion of the judge disentitles the dependant to the benefit of an order under this Act.

After reviewing the relevant statutory provisions, Justice Martin begins her analysis by looking at the leading case in this area, the Supreme Court of Canada decision in *Tataryn v. Tataryn*, [1994] 2 S.C.R. 807, and its discussion of how to balance testamentary autonomy — the right to do with your property what you wish on your death — with the duty to make provision for one's dependents. Most importantly, the Supreme Court said this determination was not limited strictly to a needs test but required a consideration of both legal and moral obligations. Although not quoted by Justice Martin, in one key passage in *Tataryn* (at para 28), McLachlin J. (as she then was) elaborated on the notions of legal and moral obligations:

> [T]wo 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 <u>legal obligations</u>. 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 <u>moral obligations</u>, 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.

Justice Martin looked at (at para. 22) the important differences between the B.C. legislation being discussed in *Tataryn* — the *Wills Variation Act*, R.S.B.C. 1979, c. 435 — and the Alberta legislation, noting in particular that the Alberta legislation appears to place greater emphasis on the needs of the claimant: "Indeed the very title of the Alberta *Act* speaks of "dependency", unlike the broader reference to variation of wills in the British Columbia statute." The fact that the Alberta *Act* restricts the class of adult children eligible to make a claim to who are "unable by reason of mental or physical disability to earn a livelihood" was also seen as emphasizing need:

> Alberta's use of words and limiting concepts such as "dependants", adequate provision, and proper maintenance and support suggest a more focussed review: one that gives priority to the adequacy of the provision from the standpoint of the dependant's needs and maintenance. (para. 23)

In other Alberta cases, *Tataryn* has been applied 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. However, in *Petrowski v. Petrowski Estate*, 2009 ABQB 196, Justice Moen emphasized (at para. 456) 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. Justice Martin appears to have joined Justice Moen in choosing an approach that focused on the

needs of the dependant and not on the obligations, legal and moral, of the testator. (For a discussion of these issues of interpretation, see my post,"Do testators have moral as well as legal obligations to their dependants? Not in Alberta," a comment on *Petrowski v. Petrowski Estate*, 2009 ABQB 196.)

Issues and Analysis

1) Is Mr. Soule a "Dependant"?

The first question for the court was whether Mr. Soule met the definition of "dependant" in section 1(d) of the *Dependants Relief Act*. Was he "a child of the deceased who is 18 years of age or over at the time of the deceased's death and unable by reason of mental or physical disability to earn a livelihood"? .

The medical evidence of disability was scanty. It consisted of a one-page Doctor's report dated August 5, 2009 and Mr. Soule's evidence in an affidavit and the cross-examination on that affidavit. The Doctor's report stated:

A) The diagnosis are - Hepatitis C,
- Hepatitis B,
- Previous drug addiction. He is apparently "clean"- for one year
B) He is unable to exert himself physically, or to concentrate for any length of time
C) In my opinion, he is permanently disabled
D) I expect no change in his condition.

Cross-examination revealed that the doctor relied upon what Mr. Soule reported about his drug use and that no urine sample or other form of drug testing was conducted. There was also a Functional Capacity Evaluation, which indicated that Mr. Soule's reports of function and pain were consistent with objective observations of function and that, although Mr. Soule was physically capable of at least part-time sedentary work, the prospect of his retraining for this work appeared to be poor due to his low level of education and high level of fatigue.

On the issue of meeting the definition of "dependant", Justice Martin once again turned to the decision of Justice Moen in *Petrowski* and her summary of the case law (at para. 500 in *Petrowski*, quoted at para. 35 in *Soule*):

> a) an adult child who receives government assistance or is institutionalized is able to claim testamentary relief, and thus cannot be able to earn a livelihood: *Bidlock Estate (Public Trustee of) v. Vos, E.A.H. (Dependant Adult) (Re),* 2005 ABQB678, 386 A.R. 187, *Stone Estate (Public Trustee of) v. Stone Estate* (1994), 154A.R. 307, 20 Alta. L.R. (3d) 31 (Alta Q.B.), substantially affirmed 209 A.R. 138,54 Alta. L.R. (3d) 225 (Alta. C.A.);
> b) a person who is not "capable of self-sufficiency" may claim testamentary relief, and thus cannot be able to earn a livelihood: *Boje v. Boje Estate; Boje Estate, Re,* 2005 ABCA 73 at para. 17, 250 D.L.R. (4th) 271; and
> c) a child is not a dependant where any inability to earn a livelihood is a consequence of the personal choices and/or laziness of the child: *RE Bowers Estate,* [1955] A.J. No. 33 (QL), 19 W.W.R. 241 (Alta. S.C.).

Justice Martin disagreed with the rule set out in the last case cited, *RE Bowers Estate*. She noted (at para. 36) that the definition of "dependant" in the *Dependants Relief Act* only refers to the presence or absence of a disability; it does not refer to its origin or cause. In her view, it is not open to a court at this stage of the inquiry to ask about the claimant's role in causing or contributing to any disability that may exist. Therefore, despite the apparent cause of Mr. Soule's disability and the poor quality of his medical evidence, Justice Martin held (at para. 38) there was evidence of disability.

On the question of whether that disability resulted in Mr. Soule being unable to earn a livelihood, Justice Martin held that the evidence that he might be capable of part-time sedentary work was not necessarily evidence that he could "earn a livelihood". She found (at para. 39) that his employment pattern corroborated his claims of deteriorating health and inabilities associated with his hepatitis C and the "permanent disability" his physician said he was suffering from. She therefore concluded that that Mr. Soule met the definition of a "dependant".

2) Did Mrs. Johansen make adequate provision for Mr. Soule's maintenance and support?

Section 3(1) of the *Dependants Relief Act* gives a judge the discretion to re-write a will only if the will does not make adequate provision for the "proper maintenance and support of the person's dependants or any of them." One might think this second issue could be dealt with quickly in this case because Mrs. Johansen made <u>no</u> provision for Mr. Soule's maintenance or support. However, whether no provision is adequate for a dependant's proper maintenance and support is something that has to be decided on a case-by-case basis, depending on a number of variables, according to *Tataryn* (at 817). Justice Martin's list of those variables (at para. 42) included previous lifestyle and history; 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; other sources of income of the dependant; the cost of living; and future contingencies that are reasonably foreseeable.

Despite this lengthy list, Justice Martin did easily and quickly conclude (at para. 43) that Mrs. Johansen's will did not make adequate provision for the maintenance and support of Mr. Soule, who suffers from hepatitis C, a medical condition that will not improve and will likely deteriorate with age, and who lives hand-to-mouth on social assistance.

3) Should the Court exercise its discretion in favour of Mr Soule?

Even after concluding that Mr. Soule is a dependant and that his mother failed to make adequate provision for his maintenance, Justice Martin still had a great deal of discretion to decide whether or not to re-write Mrs. Johansen's will. For example, section 3(5) of the *Dependants Relief Act* provides that "[t]he judge may refuse to make an order in favour of any dependant whose <u>character or conduct is such as in the opinion of the judge disentitles the dependant</u> to the benefit of an order under this Act. . ." (emphasis added). Justice Martin listed the following factors as being relevant in the exercise of this discretion:

1. the overall size of the estate;
2. the income and resources of the various competing potential recipients;
3. the present and future requirements of the persons asserting a right to the estate, as dependant on age, health, lifestyle, that are required to meet an adequate standard of support and maintenance;

4. the legitimate expectations and lifestyles of the competing potential recipients;
5. the moral obligation that society places on a person to maintain and support persons in certain relationships and circumstances; and
6. other facts that may negate a right to receive a part of the estate.

Most of these factors focus on the needs of the dependant. As Justice Martin notes (at para. 45), in many ways this is an easy case because there are no competing duties owed different family members — the choice is between a family member and a charity. Justice Martin was of the opinion (at para. 47) that "most would say that a parent's estate should not benefit a charity when that person's child is permanently disabled and lives on government assistance." The latter point is quite significant; in *Petrowski* Moen J. had noted (at para. 521) that "Alberta courts appear to conclude that the assistance offered by the state to disabled persons does not discharge a parent's obligation to provide support in a will ..."

Justice Martin did take into account Mrs. Johansen's reasons for disinheriting her son, noting (at para. 49) that she did not want to support what she thought was his drug habit. However, Justice Martin noted that Mrs. Johansen was unaware that her son had stopped taking drugs and unaware of her obligations under the *Dependants Relief Act* at the time she made her will.

Was Mr. Soule disqualified from relief under section 3(5) because his disability was related to drug use and raised questions of volition, character and conduct? According to Justice Martin, there is little case law considering what type of conduct that disentitles a dependant to relief. For her, what was decisive was the choice between Mr. Soule's mother supporting him or taxpayers supporting him. She concludes (at para. 52):

> I am persuaded that Mrs. Johansen's legal and moral obligations weigh more heavily than his behaviour and her reaction to it. Mr. Soule says he has stopped using drugs and has "stopped drinking", meaning he drinks but in greatly reduced amounts. Even if such were not the case, it is not clear why he should be supported by the public purse when private funds exist (emphasis added).

In her discussion of the applicable law, Justice Martin appears to have joined Justice Moen in *Petrowski* in choosing an approach that emphasizes the needs of the dependant and not the obligations, legal and moral, of the testator. However, in her application of the law to the facts, Justice Martin relied upon both Soule's need and "society's reasonable expectations of what a judicious person would do in the circumstances, by reference to contemporary community standards", i.e., the testator's moral obligations. She was of the opinion (at para. 47) that "most would say that a parent's estate should not benefit a charity when that person's child is permanently disabled and lives on government assistance." There was no empirical evidence proffered to back that assertion of fact, but Justice Martin is writing to an audience given a choice between supporting Mr. Soule themselves, through their income tax contributions, or approving of her decision to have his mother support him with her $116,000 estate. I would hazard a guess that this pragmatic decision would garner public support.

Would the Result Likely be Different under the new *Wills and Succession Act*?

The new *Wills and Succession Act* replaces and consolidates a number of statutes: the *Wills Act*, RSA 2000, c. W-12; *Intestate Succession Act*, RSA 2000, c I-10; *Dependants Relief Act*, RSA 2000,c. D-10.5; *Survivorship Act*, RSA 2000, c S-28; and section 47 of the *Trustee Act*, RSA 2000, c T-8, s 47. It also makes major amendments to the *Matrimonial Property Act*, RSA 2000,

c M-8 and some minor amendments to the *Administration of Estates Act*, SA 2000 c A-2 and the *Family Law Act*, SA 2003 c F-4.5. Interestingly, the *Dower Act*, RSA 2000, c D-15 is unchanged and the rights under the *Dower Act* prevail over a will or rights on intestacy. A summary of the changes is available: see Government of Alberta, Justice and Attorney General, The New Wills and Succession Act, SA 2010 C. 12.2 -- A Summary of Changes, April 27, 2011.

Under Part 5 of the new *Wills and Succession Act*, the provisions of the *Dependants Relief Act* are largely carried forward. The terminology will change, with "dependants" being replaced by "family members" (s. 72(b)). However, aside from a limited expansion for full-time students, eligibility for status as a "family member" will be the same as it is now for status as a "dependant." Section 72 (b) defines "family member" to include

> (iv) a child of the deceased who is at least 18 years of age at the time of the deceased's death and unable to earn a livelihood by reason of mental or physical disability,
> (v) a child of the deceased who, at the time of the deceased's death,
> (A) is at least 18 but under 22 years of age, and
> (B) is unable to withdraw from his or her parents' charge because he or she is a full-time student as determined in accordance with the Family Law Act and its regulations

The only other substantive change is the addition of an open-ended list of factors the courts are to take into account in exercising their discretion to re-write a will (s. 93). According to Alberta Justice, the most important thing to note about this list is that "there is no change to the rule as set out in *Tataryn* and *Stang*": see "New Wills and Succession Act, SA 2010 C. 12.2 -- A Summary of Change", at 3-4).In *Stang v. Stang Estate*, 1998 ABQB 113, Justice Johnstone had determined (at para. 27) that the only change *Tataryn* made to the interpretation of Alberta's *Dependants Relief Act* was to expand the testator's moral obligations, but only in such a way as to not conflict with the needs-maintenance approach that was mandated by Alberta's legislation.

What of the new list of factors the courts are to take into account in exercising their discretion to re-write a will? Section 93 of the new Act provides as follows:

> 93 In considering an application for the maintenance and support of a family member, the Court shall consider, as applicable,
> (a) the nature and duration of the relationship between the family member and the deceased,
> (b) the age and health of the family member,
> (c) the family member's capacity to contribute to his or her own support, including any entitlement to support from another person,
> (d) any legal obligation of the deceased or the deceased's estate to support any family member,
> (e) the deceased's reasons for making or not making dispositions of property to the family member, including any written statement signed by the deceased in regard to the matter,
> (f) any relevant agreement or waiver made between the deceased and the family member,
> (g) the size, nature and distribution of
> (i) the deceased's estate, and

(ii) any property or benefit that a family member or other person is entitled to receive by reason of the deceased's death,

(h) any property that the deceased, during life, placed in trust in favour of a person or transferred to a person, whether under an agreement or order or as a gift or otherwise, and

(i) any property or benefit that an individual is entitled to receive under the Matrimonial Property Act, the Dower Act or Division 1 of this Part by reason of the deceased's death,

and may consider any other matter the Court considers relevant.

Would consideration of this list of factors change the outcome in *Soule*? One thing to note about the list is that it is very open-ended, given its "any other matter" ending. Another thing to note is that all of the factors appear to be relevant to all three issues that confront the courts in these applications: eligibility as a "family member", whether the testator made adequate provision for the applicant's maintenance and support, and whether the Court should exercise its discretion in favour of the applicant. This may add uncertainty. For example, Justice Martin held (at para. 30) that the fact that Mr. Soule never sought support from his mother when she was alive was not a relevant consideration for the first issue, in determining his eligibility. Under the new section 93(a), a court must consider "the nature and duration of the relationship between the family member and the deceased" apparently at all stages of its analysis. That consideration could include whether the family member sought support from the deceased when the deceased was alive.

There is nothing specific in section 93 dealing with the claimant's role in causing or contributing to any disability that may exist. The current section 3(5), which provides that a judge "may refuse to make an order in favour of any dependant whose character or conduct is such as in the opinion of the judge disentitles the dependant to the benefit of an order" is absent from the current version of the new Act. (There is already one amendment to the yet-to-be-proclaimed Act — the *Wills and Succession Amendment Act*, *2011,*SA 2011 c 16 (Bill 14), amending section 8). However, as Soule's character and conduct were not decisive to Justice Martin's conclusion, the absence of a "blameworthiness" factor in the section 93 list would not have changed the outcome of Soule had the new Act applied.

Even more noticeably absent from the section 93 list of factors in the new Act is any explicit reference to moral obligation. The relevance of a moral obligation was the key point in *Tataryn* and *Stang* and Alberta Justice made a point of saying that "there is no change to the rule as set out in *Tataryn* and *Stang*." However, the list of factors in section 93 specifically refers to legal obligations, with no reference to moral obligations. On the other hand, the list of factors Justice Martin considered (at para. 44) included "the moral obligation that society places on a person to maintain and support persons in certain relationships and circumstances." And it was the testator's moral obligation which was the decisive factor for Justice Martin — his mother had a moral obligation on her death to support Mr. Soule, given his need and his dependence on the public purse.

Given the emphasis on the family member's need in section 93(b) and (c) and the lack of any other family members to trigger a balancing under section 93(d) and (g), the outcome in *Soule* would probably not be different under the new Act. It might be more difficult to justify, and more weight might have to be given to Mrs. Johansen's reasons for trying to disinherit her adult son (section 93(e)). But in a contest between a family member living on taxpayer's money and a charity, the same result could probably be justified under the new Act.

Disinheriting adult children receiving social assistance will continue to be difficult. Nevertheless, a little more clarity about just what Alberta Justice means by saying "there is no change to the rule as set out in *Tataryn* and *Stang*" in the new *Wills and Succession Act* would be helpful.

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