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Reforming Family Maintenance and Support for Children: Bridging Gaps, or Unduly Restricting Testamentary Freedom?

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Report Commented On: Alberta Law Reform Institute, Family Maintenance and Support from the Estate of a Person Who Stood in the Place of a Parent, Report for Discussion 34 (3 November 2020)

ALRI is seeking feedback on Report for Discussion 34 before making final recommendations. Anyone can give feedback by completing a short survey before January 31, 2021.

When a second family in Alberta separates, a child may seek support from a person who stands in the place of a parent under the *Family Law Act*, SA 2003, c F-4.5. However, when a person who stands in the place of a parent dies in an intact second family, a child in need is prevented from seeking support from that person's estate under the *Wills and Succession Act*, SA 2010, c W-12.2 (WSA). From a child's perspective, there is little difference between a parent and a parent-like adult separating and the death of one partner. In either circumstance, the child has lost a source of emotional, intellectual, and financial support. Excluding some children in second families from accessing support while providing it to others may not make for prudent policy in today's legal system. This is what we mean in our Report for Discussion 34 when we say that there may be a gap in the law for the purposes of support for children in Alberta. Should this difference persist in the law as a nod to the testamentary freedom of individuals? Should the gap be bridged by reform to the WSA? Report for Discussion 34 reviews the existing law, analyzes arguments for and against reform, and makes preliminary recommendations.

Not all persons in second families will stand in the place of a parent. Under the *Family Law Act*, a person must be the spouse or partner of the child's parent to stand in the place of a parent. The person must also have "demonstrated a settled intention to treat the child as their own child". Both conditions must be met.

Together with other recommendations, ALRI proposes changing the law to allow a child to apply for family maintenance and support from the estate of a person who stood in the place of a parent. It should be noted that family maintenance and support is not be granted automatically. A court is given the discretion to make an order only if the child requires support and the estate has not provided support that is adequate in the circumstances.

Policy considerations for reforming the law include well-known concepts like the best interests of the children and equality. Reform will also ensure that the current legal and moral obligations of a person standing in the place of a parent are continued after death. Reform may also help to

reduce the burden of provincially-funded support programs by increasing the number of sources available for the support of children: a fiscally responsible measure.

ALRI's preliminary research and early consultation also revealed policy considerations for not reforming the law. The infringement on a person's testamentary freedom is one consideration. Persons standing in the place of a parent, if the law is changed, may be less able to distribute their property after death as they see fit. Reforming the law may mean that some estates have difficulty obtaining evidence that a person did not stand in the place of a parent while alive. Reform may also lead to increased litigation in our court system.

A related objection is that reforming the WSA will mean that some children in second families will be able to seek support from more than their biological or adoptive parents' estates. As the WSA is currently drafted, all children can seek support from the estates of their biological or adoptive parents. In this sense, the WSA treats children equally. However, given the fact that child support orders or agreements bind the estates of the person standing in the place of a parent under the Family Law Act, some children may already receive support from more than just their biological or adoptive parents' estates. The question that needs to be addressed by those raising this objection is: why should only some non-biological or non-adoptive parental estates be excluded from support obligations? It also may be that a child in a second family has only two parents – the child's biological or adoptive parent and the person standing in the place of a parent. These children only have one estate from which support may be requested in circumstances of need. Finally, the WSA is already drafted to address this objection in numerous ways, including by directing a court to consider:

- the size, nature, and distribution of the deceased's estate;
- any property or benefit that the beneficiaries are entitled to receive by reason of the deceased's death;
- the deceased's reasons for including or not including a family member in their estate plan; and
- the family member's capacity to contribute to their own support, including any entitlement from another person (like a biological parent) (s 93).

In other words, wholly disbarring a particular type of child from making a claim makes little sense when the law is equipped with the tools necessary to ensure that estate plans are protected in appropriate circumstances.

The Proposals for Discussion

Early consultation and research have helped ALRI to develop preliminary recommendations for reform of the law. ALRI's Report for Discussion 34 sets out these preliminary recommendations and explains the reasons for them in more detail. The key proposals are:

- A child's biological or adoptive parents should continue to have the primary obligation to support their children.

- A child of a person standing in the place of a parent should be able to seek an order for adequate support from the person's estate after death. Any court ordered obligation of an estate of a person standing in the place of a parent to support a child should be secondary to that of the biological or adoptive parents
- Priority should be given to existing support orders that bind the estate of a person standing in the place of a parent.
- There should not be a residency requirement for a child to be living primarily with a person standing in the place of a parent before that person's death to be able to apply for support.

Any interested person can give feedback on these proposals by completing a short survey before January 31, 2021. You can also send comments to ALRI at the address below:

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