

Restraining Disinheritance

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Cases Considered:

[Re Boychuk \(Estate\), 2008 ABQB 38](#)

The idea that a deceased person's estate should be available to those who were dependent upon the deceased during his or her lifetime is an idea recognized by many legal systems. Sometimes it finds expression in the forced distribution of shares of a deceased's estate; in other cases, a maintenance principle is adopted. Alberta originally adopted the forced share approach. The Married Women's Relief Act, enacted in 1910, authorized a court to grant a widow who had been left less in her husband's will than she would have been entitled to as her intestate share "such allowance ... as may be just and equitable in the circumstances." The courts interpreted that provision to mean the widow was entitled to an amount equivalent to her intestate share: *McBratney v. McBratney* (1919), 50 D.L.R. 132. However, within a generation, Alberta shifted to the more flexible maintenance approach and extended protection to children. In Alberta's current statute, the Dependents Relief Act, the deceased's dependants are entitled to adequate maintenance from his or her estate. The core of the maintenance approach is the broad discretion granted by statute to a judge to award a dependant found to have been inadequately provided for such provision as the judge considers adequate. [The Dependents Relief Act, R.S.A. 2000, c. D-10.5](#), provides as follows (emphasis added):

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, or

(b) dies intestate and the share under the Intestate Succession Act of the intestate's dependants or of any of them in the estate is inadequate for their proper maintenance and support,

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 or the Intestate Succession Act, 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.

One constraint on the judge's discretion under this type of legislation is the requirement that a dependant be "worthy" or "deserving." This notion of deserving dependants was a theme of English poor relief laws in the 19th century, laws that were inherited by the territories that became the Prairie Provinces. It has continued through to today's statute and was an issue in this case. Section 3(5) of the Dependents Relief Act states:

(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 (emphasis added).

In *Re Boychuk (Estate)*, the deceased, William Boychuk, had made a will which left his entire estate of about \$62,600 to two of his five surviving adult children, Victor Boychuk and Laurain Chrapko. He had made this will in 2003 when he was 89 years of age. The will named the same two adult children as the executors of his estate. His widow, Bessie Boychuk, had been his wife for 71 years. She was 91 years of age and had been living in a long term care facility since 1997, suffering from dementia and a stroke. She received nothing in her husband's will. Neither did the deceased's other 3 surviving adult children.

The Office of the Public Trustee — part of Alberta Justice — was managing the property of the widow. They brought this application under the Dependants Relief Act for a direction that the residue of her husband's estate be paid to the Public Trustee for Bessie Boychuk's maintenance and support.

The executors — the two of the five surviving adult children who were also the beneficiaries under the will — were granted probate of the will in March 2007. They paid funeral expenses, memorial service expenses, taxes, accounting fees and legal fees out of the estate. There was no quarrel with these payments. However, they also paid themselves, as beneficiaries of their father's estate, \$14,400 each. There was just over \$16,000 left in the estate at the time of the Public Trustee's application.

The first issue decided by Mr. Justice Eric F. Macklin was whether or not Bessie Boychuk was a dependant of the deceased, William Boychuk. Section 1(d)(i) of the Dependants Relief Act provides that a spouse is a dependant and, as his wife of 71 years, Bessie Boychuk clearly qualified.

The second question was whether William Boychuk had made adequate provision for the proper maintenance and support of his wife. The court combined the adequate provision issue with the issue of whether or not Bessie Boychuk was a worthy or deserving dependant, even though the latter consideration is a separate one in the legislation. How does a court decide what is adequate? Courts have developed two methods, both comparative. The first is to compare the provision for the dependant in the will to the legal support obligations the deceased would have had had they still been alive. The second is to compare the provision in the will to society's reasonable expectations. The court added the necessity for deserving conduct and character to this second part of the test.

On the "legal obligation" comparison, the executors argued that, considering the means and needs of their father and mother, the deceased would have had only a minimal or no legal obligation to provide support to Bessie Boychuk during his lifetime. They noted their mother could not "enjoy the income and assets which she already has in her estate" and "would not be able to enjoy any benefit from additional income to her estate." However, as Mr. Justice Macklin noted, their mother's ability to "enjoy" income and assets had nothing to do with whether or not she could have fun using them and everything to do with her having the use and benefit of the money for her care. Even if she had enough for her current needs, would it always be enough? In any event, the court held that it was William Boychuk's legal obligation to provide his wife of 71 years with adequate support in his will and he did not. On the "moral obligation" or society's reasonable expectations comparison, Mr. Justice Macklin again noted the length of the marriage

and also Bessie Boychuk’s extensive contributions to the family, the family farm and business, and the family assets. In other words, he thought she “deserved” her husband’s estate. Her character or conduct was judged to entitle her to an order for her maintenance and support.

In the end, the court ordered that the entire estate, less only the legitimate expenses, be paid to the widow. Did this include only the \$16,000 left in the estate or did it also include the \$14,400 the two executors had paid themselves as beneficiaries? Section 17(1) of the Dependents Relief Act provides that “[u]ntil the expiration of 6 months from the grant of probate of the will . . . the executor . . . shall not distribute any portion of the estate to any beneficiary without the consent of all the dependants of the deceased . . . “. The executors had not asked for or received the consent of the Public Trustee on behalf of the widow to the distribution of \$14,400 to each of them. The Act goes on to say what happens if the executors do distribute an estate without consent:

17(3) If an executor . . . distributes any portion of the estate in contravention of subsection (1) and provision for maintenance and support is ordered by a judge to be made out of the estate, the executor . . . is personally liable to pay the amount of the distribution

As a result, the court found the two adult children of the deceased who were his executors personally liable to repay the \$28,800 they had paid themselves. This amount, plus the \$16,000 left in the estate — a modest total of \$44,800 — was ordered to be paid to the Public Trustee for the use and benefit of the widow, Bessie Boychuk.