INSTITUTE OF LAW RESEARCH AND REFORM

The University of Alberta

Edmonton, Alberta

REPORT NO. 29

FAMILY RELIEF

June, 1978

FAMILY RELIEF

TABLE OF CONTENTS

PAGE NO.

The Institute of Law Research and Reform was established on January 1, 1968, by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Its office is at 402 Law Centre, University of Alberta, Edmonton, Alberta, T6G 2H5. Its telephone number is (403) 432-5291.

The members of the Institute's Board of Directors are Judge W.A. Stevenson (Chairman); W.F. Bowker, Q.C.; R.P. Fraser, Q.C.; Margaret Donnelly; W.H. Hurlburt, Q.C.; Ellen Picard; Dean J.P.S. McLaren; and W.E. Wilson, Q.C. Dr. M. Horowitz is an ex officio member as Vice-President (Academic) of the University and bears no responsibility for this Report.

The Institute's legal staff consists of W.H. Hurlburt, Director; Gordon Bale, Associate Director; T.W. Mapp, Deputy Associate Director; Margaret A. Shone, Counsel; Dr. O.M. Stone, Consultant; and Vijay K. Bhardwaj, J.T. Daines, A.R. Hudson, D.B. McLean, I.D.C. Ramsay and J.M. Towle, Legal Research Officers.

FAMILY RELIEF

I

INTRODUCTION

1. Inception of Project

This project was undertaken as part of our studies on the reform of family law. It also arose out of concern for the ease with which the protection accorded dependants by The Family Relief Act could be circumvented by outright gifts as illustrated by Dower v. The Public Trustee (1962), 35 D.L.R. (2d) 29 (Alta. S.C.) and by setting up a trust as illustrated by Collier v. Yonkers (1967), 61 W.W.R. 761 (Alta. App. Div.). The latter case prompted a letter from Mr. L.D. Hyndman, M.L.A., dated November 13, 1968 to the then Attorney-General, The Honourable E.H. Gerhart, recommending an amendment to The Family Relief Act. This letter was forwarded to the Institute by the Deputy Attorney-General at the direction of the Attorney-General. The Alberta Commissioners to the Conference of Commissioners on Uniformity of Legislation in Canada, which is now known as the Uniform Law Conference of Canada, have also over the years, maintained a great interest in the Uniform Act. Professor W.F. Bowker, at the 1970 meeting of the Conference,recommended that the solution to the problem of avoidance of the Act does not lie in setting aside transfers of property, but in making the donee in suitable circumstances partly responsible for the maintenance of a dependant of the deceased donor (1970 Proceedings, pp. 126-134). This initiative led to adoption of section 21 of the Uniform Act in 1973 by which a donee of an unreasonably large gift might be required to contribute to the maintenance of the deceased donor's dependants (1973 Proceedings, p. 25 and pp. 253-262).

Another initiative in regard to this project came

from Mr. Douglas Fitch (now His Honour Judge Fitch) who was then Chairman of the Family Law Subsection of the Alberta Section of the Canadian Bar Association. He recommended that the definition of a dependant under the Act should be broadened to include a former husband or wife, children born out of wedlock and children to whom the deceased stood in the place of the parent.

The Institute established a committee which was chaired by Mr. J.S. Palmer and on which Mr. Fitch and Mr. J. Currie served. The Institute wishes to acknowledge its gratitude to the members of this committee for their consideration of and report on The Family Relief Act.

As a result of the commitment of the Institute to other projects, it was not possible to prepare consultative documents until 1976. In June of 1976, the Institute published a Working Paper and a shorter Memorandum for Discussion, both of which were widely circulated to members of the public, the legal profession and other special groups of persons whom it was felt might have opinions on reform of The Family Relief Act. We requested that comments on these consultative documents should be forwarded to the Institute by November 30, 1976. We received twenty-six written submissions, some of which were made on behalf of various associations. These submissions were thoughtful and constructive and have assisted the Board of the Institute in formulating the recommendations contained in this report. A list of those persons who have made written submissions to us appears at page 203.

2. General Historical Introduction

(1) England

Freedom of testation was at one time regarded by some

as a hallmark of English law. This is a gross distortion of history. From at least the twelfth century, the prevailing English law was that a man who had a wife or child could not freely dispose of all his personal property at death. If a man died with a widow and a child surviving, his personal estate was divided into three equal parts, the widow's part, the bairn's part and the dead's part. It was only with regard to this latter part that he possessed testamentary power. If there were no issue of the marriage, the widow's share was half the estate. If the wife did not survive, the child or children's share was also half the personal property. This scheme of succession to personalty gradually disappeared in parts of England in the fifteenth century, particularly in the southern ecclesiastical Province of Canterbury, but it did survive in certain areas by local custom. The system survived in the northern ecclesiastical Province of York because of the strength and popularity which the Church maintained. It survived in York until abolished by statute in 1692, except in the City of York itself and the City of Chester. The tripartite division was abolished by statute in Wales in 1696, in the City of York in 1704 and in the City of London in 1724. It appears that the system did survive in some places to a later date but, in general, it may be stated that freedom of testation with respect to personalty prevailed throughout most of England by the eighteenth century.

The rule of primogeniture, that the eldest male child is the heir to realty, arose in the eleventh and twelfth centuries. Gradually a measure of freedom of testation developed with respect to realty through the "use." The Statute of Wills of 1540, as amended in 1542, permitted all land to be devised by will except for land held by military tenure, only two-thirds of which could be devised. With the abolition of military tenure in 1660, all land held in freehold could be devised by will. However, the freedom

to devise land by will was accompanied by the growth of a fetter in the form of dower. In the twelfth century, it became the practice for a bridegroom to name specific lands to be enjoyed by his wife for life should she survive him. Customary dower gradually arose. By the fourteenth century, a widow could claim a one-third life interest in the realty held by her husband during marriage. The economic protection accorded to a widow by customary dower was obviously restricted to those whose husbands owned land and, even among this narrow class, it was very uncertain protection because of devices for barring her right to dower. In 1833, the Dower Act permitted a husband by deed or will to deprive his wife of dower. It can thus be said that "Total freedom--or irresponsibility--of testation as against dependants thus formally reigned for just over a hundred years in England and Wales, from the Dower Act 1883 until the Inheritance (Family Provision) Act 1938 came into operation." (O.M. Stone, Family Law (1977), p. 159). The 1938 English Act and The Inheritance (Provision for Family and Dependants) Act 1975 which has now replaced it, together with other similar Acts in the Commonwealth have all, in a large measure, been shaped by the pioneer legislation of New Zealand of 1900 which introduced flexible restraints on testamentary freedom.

(2) Alberta

Alberta did not adopt the New Zealand approach to protect dependants from the irresponsible use of freedom of testation until 1947 when The Testators Family Maintenance Act, S.A. 1947, c. 12 was enacted. However, Alberta was the first province in Canada to recognize that a wife required protection in regard to an unreasonable will made by her husband. In 1910, The Married Women's Relief Act, S.A. 1910 (2nd Session), c. 18 was enacted. This statute enabled a widow to apply for an allowance out of the estate

if, by her husband's will, she received less than she would have done, had he died intestate. The court was empowered in that circumstance to make such allowance to the widow as "may be just and equitable in the circumstances." Protection from an unreasonable will was not extended to a husband or children of the testator until 1947. At that time, the intestate succession share ceased to be a criterion for application. In 1955, the Act was amended to permit an application by dependants when the deceased died intestate (S.A. 1955, c. 66). This indicated that the Legislature recognized that in some circumstances the rules of intestate succession might not provide for proper maintenance for dependants of a deceased person. The category of dependants was also enlarged in 1969 to include illegitimate children of a woman and those of a man in specified circumstances (S.A. 1969, c. 33). By 1969, The Family Relief Act had basically assumed its present form.

In order to complete the historical picture of protection which is accorded at death, it is necessary to mention The Dower Act, which was first enacted in 1917 (S.A. 1917, c. 14). Alberta has never had common law dower. Parliament in 1886 passed The Territories Real Property Act (S.C. 1886, c. 26) which introduced the Torrens system of registration of titles to land. The 1886 Act abolished dower and curtesy (sections 8 and 9) as these encumbrances on the title were regarded as inconsistent with a land registration system (W.F. Bowker, "Reform of the Law of Dower in Alberta" (1955-61), 1 Alberta L. Rev. 501 at p. 502). The Dower Act of 1917 followed the general pattern of the "homestead" legislation of some of the western states of the United States. Section 4 of the Act gave a widow a life estate in the homestead arising on her husband's death and provided that any disposition without the wife's consent was to be null and void. The protection accorded the widow

was extended to the widower by The Dower Act, 1948, S.A. 1948, c. 7, s. 19.

3. Forced Share or Judicial Discretion

Almost every legal system recognizes that there is a social interest worthy of legal protection by providing that the financial responsibilities of marriage, and usually parenthood, are not to be terminated by death. The most prevalent system is the forced share or "legitim" system. The surviving spouse or children of the deceased may be entitled to a specified portion of the deceased's estate with the deceased's testamentary freedom extending only to the remaining portion. Under French law, the surviving spouse does not have a forced share but is accorded economic protection through the community of property regime. Most states in the United States have adopted a forced share system but only in favour of the surviving spouse.

New Zealand in the 1890's witnessed the clash between the principle of freedom of testation as embodied by the received law of England and the principle of the forced share with which many of its Scottish settlers were familiar. In 1896, Sir Robert Stout introduced a Bill entitled "Limitation of Disposition by Will." This embodied the Scottish civil law position that a man might only dispose by will of one-third of his estate if he was survived by both a wife and child, and of one-half if he was survived only by a wife or child. A similar Bill was introduced in 1897 with the only modification being an enlargement in the faction of the estate that could be freely disposed of by will. Both these Bills met with defeat. In 1898, a compromise solution between absolute freedom of testation and a forced share called "The Testator's Family Provision out of Estate Bill" was introduced by Robert McNab. It did not provide for any forced share but would have simply enabled the court to

provide maintenance out of the estate for a spouse or children where the will had not properly provided for them. This Bill was again defeated but it did contain the basic principle of flexible restraint on freedom of testation through reliance upon judicial discretion. The second McNab Bill was introduced in 1900 and was enacted as The Testator's Family Maintenance Act, 1900. This Act gave the court the discretionary power to make an order out of the estate for proper maintenance and support if the testator failed to make adequate provision for his spouse or children. This statute has served as a basic model and has been adopted by all nine common law provinces of Canada and by the two territories. It has also been adopted by all the Australian states and territories and by England. In the United States, Oregon has adopted it in a modified form.

4. Summary of General Conclusions

The success of this bold legislative experiment by New Zealand is due to the satisfactory reconciliation of two basic social interests of the law of succession. One is testamentary freedom and the other is that dependants of the deceased should receive proper maintenance. Proper maintenance for dependants has two aspects. One recognizes the responsibility of the deceased to his dependants which is of an individual nature. The deceased should not be permitted to leave, without proper support, persons who stood in a certain familial relationship to him at his death. The other is the social responsibility of the deceased to the state. The deceased should provide proper maintenance to his dependants in order that they will not have to be supported from public funds.

It may be argued that another social interest in regard to succession law is that it should provide a fair share to a spouse and children. In the next section of this

report, we will state our view about the property rights which should be accorded the surviving spouse in the estate of the deceased spouse. We are, however, of the opinion that parents fulfil their obligations to children who are not disabled, by supporting them until they attain the age of eighteen years or until they have completed their education or training. Alberta did not follow the New Zealand example of permitting children to apply irrespective of age. In 1947, The Testators Family Maintenance Act, S.A. 1947, c. 12 first permitted children to apply for an award out of the estate of the testator but able-bodied children had to be under the age of nineteen years at his death. The age limit was increased to twenty-one in 1969, (S.A. 1969, c. 33), but as a consequence of the enactment of The Age of Majority Act, S.A. 1971, c. 1, it was reduced to eighteen years in 1971. We have concluded that an age limitation should be retained. This position was also that adopted by a large majority of those who commented upon the Working Paper or the Memorandum for Discussion.

We have therefore concluded that the present policy of The Family Relief Act should be preserved. We believe that testamentary freedom should remain unimpaired provided that the deceased has made adequate provision for the proper maintenance and support of persons standing in a certain familial relationship. This view involves reliance upon broad judicial discretion to determine whether relief will be granted and the amount. With regard to the surviving spouse, we do not believe a forced share would provide appropriate economic protection. When we initially made this decision, we assumed that the surviving spouse would have a property interest in the assets of the deceased spouse under a matrimonial property statute. Although The Matrimonial Property Act passed at the 1978 spring session of the Legislature does not confer any rights upon the surviving spouse who was living with the other spouse at

the time of the death, we remain convinced that a forced share is inappropriate. With regard to an adult able-bodied child, our view is that a parent owes no further duty and should be free to prefer the widow or widower, to prefer one child over another or to disinherit all chidren. With regard to an adult child who is disabled, we think that the parent owes a duty of support.

If the estate is small, a forced share will not provide adequate protection for a surviving spouse or other dependants. If the estate is large, a forced share may interfere with the freedom to dispose of property by will when protection of the surviving spouse or other dependants does not warrant the interference with this freedom. A forced share may provide an unnecessary and perhaps undeserved windfall. Only a statute which gives the judge discretion in determining what is required for maintenance will ensure the maximum amount of testamentary freedom and, at the same time, provide proper maintenance for dependants.

We have also concluded that it is imperative that the protection to dependants accorded by this statute should be as effective as is possible. We will therefore recommend measures which will provide effective protection to dependants against disinheritance. Only a small minority of testators utilize their freedom of testation in an irresponsible way and leave dependants without proper maintenance. Of these only a very small proportion take steps to avoid The Family Relief Act by stripping themselves of property so that there are insufficient or no assets in their estate out of which an order in favour of a dependant may be made. In spite of the fact that this conduct is relatively rare, we have concluded that the injustice cannot be permitted to go unremedied and we will recommend safeguards against it.

5. The Relationship of The Family Relief Act and The Matrimonial Property Act

In Report No. 18, Matrimonial Property (August, 1975), our majority proposal was that death should terminate the statutory regime and the surviving spouse should be entitled to apply to the Court for an order determining the rights of the parties in the same manner as an application for a balancing payment during the lifetime of both spouses. Our minority proposal also contained the recommendation that the surviving spouse of a deceased person should be able to apply for a matrimonial property order.

The Matrimonial Property Act passed at the spring session of the Legislature but not yet proclaimed does not provide for a matrimonial property order to be made where the marriage has been terminated by the death of one spouse where the spouses were living together. The Matrimonial Property Act permits an order to be made only where the marriage has broken down during the lifetime of both spouses. A surviving spouse, which by the Act includes a former spouse or a party to a void or voidable marriage, will only be able to apply if an application could have been commenced immediately before the death of the other spouse, i.e. if the right to apply has crystallized in accordance with section 5 and the section 6 limitation period for bringing the application has not run.

With the exception of one member, the Board regrets that The Matrimonial Property Act does not permit a surviving spouse to apply for a matrimonial property order out of the estate of the deceased spouse where the marriage has not broken down during the lifetime of the parties. It is not, however, our purpose to criticize a decision which has been made by the Government and the Legislature. We are, however, of the opinion that it is our duty to indicate the unequal treatment which some surviving spouses will receive depending

upon whether such a spouse is or is not entitled to a matrimonial property order. In a significant number of cases, this disparity in treatment will not be capable of being equalized through The Family Relief Act.

The Family Relief Act is essentially a support statute and is based on the need of the applicant. Need is a flexible concept but it does not encompass the equitable sharing of an estate. The Matrimonial Property Act is a statute the primary purpose of which is to provide for an equitable division of property and not to provide for need. It is difficult to perceive how a statute which is based on need can in all cases obtain for the surviving spouse a division of property which is as generous as would flow from a statute which is based on equitable sharing.

We will consider the possible disparity in property rights between the survivor of spouses who have lived separately and apart and the survivor of spouses who have continued to live together until death. For instance, a wife who had been living separately for one year would be entitled to a matrimonial property order from her husband's estate, provided that the separation had commenced not more than two years before the husband's death. She would be entitled to half of the property acquired by the spouses during marriage unless the Court considered such a distribution would not be just and equitable. If this property distribution together with any benefit she received under the will, or on the intestacy of her husband, did not provide her with proper maintenance and support, she would also be able to apply for an order under The Family Relief Act. The wife who was living with her husband at the time of his death would not be entitled to a matrimonial property order. If her husband had made a will which gave her little or none of his property, her only remedy would be to apply under The Family Relief Act. The judge under this statute is empowered

only to make an order which will provide her with proper maintenance and support. If the husband's estate is substantial, the total value of the property received by the surviving wife who was living with her husband at the time of his death may be considerably less than half the value of the property acquired by the spouses during the marriage. A wife who was living with her husband when he died may receive a smaller share of her husband's estate than a wife who has been living separately from her husband for a period of at least one year preceding his death, even though all other circumstances are the same.

The disparity in the treatment accorded the wife who is living with her husband as compared with the treatment accorded the wife who has separated is not nearly as significant in regard to small estates as the surviving spouse may be awarded the whole estate under The Family Relief Act. However, even with regard to small estates the surviving wife who has been living with her husband may be at a disadvantage compared with a wife who has been living separately and apart where she is not the sole dependant under The Family Relief Act. Section 15 of The Matrimonial Property Act provides that money or property utilized to satisfy a matrimonial property order is deemed not to be part of the estate with respect to a claim by a dependant under The Family Relief Act. The surviving wife who has lived with her husband up to his death will not have the advantage of section 15 and will have to compete with other dependants under The Family Relief Act.

We concede that The Matrimonial Property Act undoubtedly deals with the great majority of cases in which the division of property belonging to married persons becomes a contentious issue. We believe that, if spouses are living together at death, the spouse who dies first will, but for the exceptional case, dispose of his property by will so as to make generous provision for the surviving spouse. We are,however, disturbed

that, in the exceptional case, a wife who has continued to live with her husband until her husband's death may not receive as large a share of the property of the husband as a wife who has been living separately for a year prior to her husband's death and who is entitled to a matrimonial property order. In some cases, this unfortunate disparity in the property rights of the surviving spouse who is not entitled to a matrimonial property order may be fully or partially corrected through a judge exercising his discretion under The Family Relief Act and making an order out of the estate in favour of the surviving spouse. If The Family Relief Act continues to be a statute based on the need of the applicant, there will be some cases in which no order can be made.

We have considered whether The Family Relief Act should be restructured to compensate for the fact that when a marriage is terminated by death, the surviving spouse who was living with the deceased spouse is not entitled to apply for a matrimonial property order. We have concluded that The Family Relief Act should continue to be a support statute. If there is to be an equitable division of property acquired by parties to a marriage, we believe as we stated in our Matrimonial Property Report that this should be achieved through a matrimonial property statute.

II
THE PRESENT LAW

1. General

The fundamental pattern of The Family Relief Act is simple. It provides for an award from an estate for the maintenance of the surviving spouse and a limited class of children. The maintenance must come from the net

estate after payment of claims against the deceased. An eligible dependant may apply to the court within six months of the grant of probate or administration. There is provision for late application but only in regard to that part of the estate which remains undistributed. The court will determine whether the will or The Intestate Succession Act has made "adequate provision for the proper maintenance and support" of the dependant. If the answer is 'no', the court has a discretion to order that suitable provision be made out of the estate, or it may refuse the application on the grounds of the character and conduct of the claimant. The order may be for a lump sum or periodic payments and the latter may be varied by a subsequent order.

We will now elaborate on some of the significant features of the Act.

2. The Right to Apply

Only a "dependant" may apply for relief under the Act. The word "dependant" does not have its ordinary meaning but is limited to the following categories of persons:

- the spouse of the deceased;
- a child of the deceased who is under the age of eighteen at the time of the deceased's death;
- a child of the deceased who is eighteen 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.

"Child" includes a posthumous child and the illegitimate child of a deceased woman. The illegitimate child of a deceased man who has acknowledged the paternity of the child or who has been declared the father by an affiliation order is included. Also included is an adopted child; section 60 of The Child Welfare Act, R.S.A. 1970, c. 45, provides that "for all purposes an adopted child becomes upon adoption the child of the adopting parents." A child whose parents subsequently inter-marry is also included by virtue of The Legitimacy Act, R.S.A. 1970, c. 205, s. 2.

Parties to a limited class of void marriages and their children are by section 3 given the same rights under the Act as though the marriage were valid. It applies only to parties who have gone through a marriage ceremony following a judicial declaration of presumption of death of the spouse of one of the parties and the marriage is void because the spouse presumed dead was alive at the time of the marriage ceremony.

3. Discretionary Power and Its Exercise

The Family Relief Act does not confer a legal right upon any dependant to receive a portion of the estate but merely empowers the court to make an order granting out of the estate such provision as it deems adequate for the proper maintenance and support of the dependant (section 4(1)). The word "proper" can be interpreted as requiring a consideration of all the circumstances, not only the needs of the dependants and the money or property available for their maintenance, but also the moral position of the claimant vis-a-vis the deceased and other persons having a claim. This interpretation is emphasized

by section 4(2) which says that the judge may "inquire into and consider all matters that he deems should be fairly taken into account in deciding upon the application", and in particular may inquire into the reasons of the deceased for his actions and omissions in connection with the disposition of his estate. Under section 4(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."

The principles upon which the court's discretion should be exercised have, in the course of the years, been developed in the cases relating to this Act and to similar legislation in other jurisdictions.

Alberta case law seems to support the following general statements:

- that all relevant circumstances must be considered;

- that in each case the first inquiry is to determine the need of the applicant for maintenance and support;

- that proper maintenance and support is not limited to bare necessities but must be decided with reference to a variety of circumstances which include the prior standard of living, the size of the estate and the situation of others having a claim upon the deceased;

- that the Act does confer power upon a judge to make a new will for the testator or to alter the rules of intestate succession but only for the purpose of providing proper maintenance and support for dependants;

- that a widow occupies a favoured position and is entitled to more ample provision than the children if the latter are physically and mentally able to maintain and support themselves.

See: In re Willan Estate (1951-52), 4 W.W.R. (N.S.) 114 (Alta. S.C.);
In re Barclay Estate (1952), 5 W.W.R. (N.S.) 308 (Alta. S.C.);
In re Maitland Estate (1953-54), 10 W.W.R. (N.S.) 673 (Alta. App. Div.);
Re Edwards Estate; (1961-62), 36 W.W.R. 605 (Alta. App. Div.);
Re Chugg Estate (1965), 51 W.W.R. 666 (Alta. App. Div.).

4. Character and Conduct

The cases indicate that the judges are hesitant to take into consideration the character and conduct of the applicant. In In re Willan Estate, Egbert J. thought it was not part of the duty of the judge on an application under the Act to weigh the relevant merits and faults displayed by the husband and wife during their marital life.

The word "conduct" does not necessarily mean bad conduct or misconduct. It could refer to the making of an agreement under which the dependant waives his rights under The Family Relief Act, or it might relate to the fact that the applicant has helped to build up the estate about which the application is made (Re Berube, [1973] 3 W.W.R. 180 (Alta. App. Div.)).

Desertion, the institution of divorce proceedings and ill-treatment of the testator by the party claiming relief have been held to constitute disentitling conduct (Re Fischer Estate (1960), 31 W.W.R. 697 (B.C.S.C.); Re Cassidy (1966), 54 D.L.R. (2d) 329 (Sask. Q.B.)), but where efforts are made to make up for the bad conduct an award may be made (Barker v. Westminster Trust Company, [1941] 3 W.W.R. 473 (B.C.C.A.)).

5. Contracting Out

So far as the courts of Alberta are concerned a contract or agreement between husband and wife under which the dependant spouse gives up his or her rights under The Family Relief Act does not oust the court's jurisdiction (Re Edwards Estate, Re Berube, Re Chugg Estate).

6. Dispositions Before Death

The Alberta Family Relief Act does not deal with inter vivos gifts and transfers of property to avoid claims under the Act. In Dower v. Public Trustee (1962), 38 W.W.R. 129 (Alta. S.C.), the plaintiff alleged that her husband had disposed of all his wealth, approximately one million dollars, prior to his death so as to defeat any claim which the plaintiff might have for maintenance

and support, and she contended that the dispositions should be set aside. The court however held that since the Act only empowers the court to make provision out of the estate of the deceased it had no jurisdiction to grant a dependant a portion of any property not owned by the deceased at the date of his death and not forming a part of his estate at that time. Also, in Collier v. Yonkers (1967), 61 W.W.R. 761 (Alta. App. Div.), on an application by a husband, it was held that an irrevocable trust of $100,000, in which the wife had reserved the income for her life with the capital to be held on her death for her children and grandchildren, did not form part of the estate of the wife. It was therefore not available to satisfy an order under the Act.

7. Procedure

Under section 8 of the Administration of Estates Act, potentially eligible dependants resident in Canada must be notified of their rights under The Family Relief Act by an applicant for a grant of probate or administration. A dependant who elects to make an application for relief must apply within six months from the grant of probate or of administration according to subsection 16(1). However, there is provision for late application, but only in regard to that portion of the estate remaining undistributed.

A judge of the Supreme Court of Alberta determines whether the applicant is within the definition of a dependant under the terms of the Act. Then he establishes whether the dependant has been adequately provided for, either in the testator's will or by provision under The Intestate Succession Act, and exercises his discretionary power by either refusing or making an award and determining the amount.

III

FUNDAMENTAL BASIS OF THE LEGISLATION

Before deciding who should be eligible to apply as dependants for an award out of the estate of a deceased person, it is necessary to set forth the philosophy upon which the legislation should be based. In order to enunciate this philosophy, we will consider what other law reform bodies have stated to be the principle upon which this legislation is founded. The Family Law Project Study for the Ontario Law Reform Commission Vol. 3 (1967) at p. 474 states: "The notion of dependence underlies testator's family maintenance legislation and recognizes maintenance above all else in matters of succession to property." The Ontario Law Reform Commission in its Report on Family Law, Part IV Family Property Law (1974) at p. 107 states: "As a matter of general principle, the court should have power to continue against the estate of the deceased ... any support obligations in existence at the date of death, whether legal or de facto." The Succession Law Reform Act, 1977 embodies the principle that the deceased must have been under a legal obligation to provide support or was in fact providing support immediately before his death in order that an application may be made. However, subsection 64(d) restricts the category of dependants to a spouse or "common law spouse", as defined in subsection 64(b), a parent or grandparent, child, grandchild or "a person whom the deceased has demonstrated a settled intention to treat as a child of his family" (subsection 64(a)), or a brother or sister of the deceased.

The Law Commission (England) in its Report No. 61, Family Provision on Death (1974), recommended that a surviving spouse should no longer be confined to receiving maintenance but should have a claim upon family assets

analogous to that of a divorced spouse. If, as we have previously stated, any property rights of a surviving spouse in the estate of the deceased spouse should be conferred by a matrimonial property statute, the only relevant principle is that which the Law Commission believes should be applicable to dependants other than the spouse. The Report at p. 6 states that the "principle on which the detailed recommendations of this report are founded is that for other dependants...the function of family provision legislation should be confined, as it is at present, to securing reasonable provision for their maintenance." The principle upon which the Law Commission believes the statute should be founded also emerges when it considers extending the class of applicants who may apply for family provision. The Commission at p. 25 recommends "that the class of applicants entitled to apply for family provision should be extended to include any person who was being wholly or partly maintained by the deceased immediately before his death."

The Law Reform Committee of Western Australia in its Report on The Protection To Be Given To The Family and Dependants of a Deceased Person (1970) in paragraph 35 states: "Bearing in mind that the legislation would confer a mere right to apply, the Committee believes it reasonable to admit the claim of a person who at the time of the death of the deceased, was ordinarily a member of his household and was being wholly or partly maintained by him and for whose maintenance he had a special moral responsibility." The Committee does not specify how moral responsibility is to be determined but it mentions that it "has in mind an application by a de facto wife or a step-child."

The Law Reform Commission of New South Wales in its Report No. 28 on Testator's Family Maintenance and Guardianship of Infants Act, 1916 (1977), advocates a very large extension in the classes of applicants who are eligible to apply for relief. The principle upon which the Commission believes the Act should be based can be inferred from section 6 of its proposed Bill. It provides at p. 20 that an eligible applicant is the surviving spouse or child of the deceased and any other person:

> (i) who was, at any time, wholly or partly dependent upon the deceased person;
> (ii) who was, at any time, a member of a household of which the deceased was a member; and
> (iii) who is a person whom the deceased person ought not, in the opinion of the Court, to have left without provision for his proper maintenance, education or advancement in life.

Subsection 6(2) provides that a grandchild of the deceased person may qualify as an applicant even though he has never been a member of the household of which the deceased was a member. It can be inferred that the Law Reform Commission of New South Wales believes that the status of spouse or child of the deceased without any limitation as to age is sufficient to permit a person to apply for relief under the statute. In addition, it believes that anyone who has been wholly or partly dependent on the deceased, at any time, and was, at any time, a member of the same household as that of the deceased should be able to apply for relief providing the deceased owed, in the opinion of the court, some moral obligation to provide maintenance, education or advancement in life to that person.

We do not, however, think that a duty should be imposed on one person to provide after his own death for the support of another, simply because the latter was wholly or partly dependent on the deceased immediately prior to his death. Nor do we believe that such a duty should be imposed simply because the deceased provides support for another during his lifetime even if this is qualified by restricting the duty to persons who bear a particular relationship to the deceased. We are also not persuaded that dependency, at some time, accompanied by being a member of the same household as the deceased, at some time, together with the court's view that the deceased owed a moral obligation to a person is a sufficient basis upon which to impose such a duty. We do not think that the law should step in and impose such a duty, except to prevent death from terminating a legal support obligation which existed during the lifetime of the deceased, although the extent of the duty must be modified because of the very great change which is caused by the death of the person obliged to provide the support.

The law has long recognized that a husband has a duty to support his wife and minor children and therefore during his life subjects his property to this obligation. However, during the nineteenth century death had the effect of terminating this duty and freeing his property from such obligation. The Married Women's Relief Act, S.A. 1910 (2nd Sess.), c. 18 provided that a widow might apply to a judge for an allowance out of the estate, if her husband made a will under which she received less than she would have, had he died intestate. The Act emphasized the connection between the lifetime support obligation and the widow's right to apply for relief. Section 10 provided that a defence that would have been available to the husband in any suit for alimony was to be equally available to his personal representatives in an application under the Act. This provision was deleted from

The Widows Relief Act, R.S.A. 1922, c. 145. This amendment probably reflected the belief that the deceased husband owed a social responsibility to the state to see that his wife was adequately provided for at death. This social responsibility was more important than the fact that her conduct might constitute a bar to an alimony application by the wife if her husband were still alive. As the husband is dead, a judge in making an award under the statute need no longer be as concerned about the husband's sensibilities as would be the case were alimony to be sought during his lifetime. In addition, he obviously no longer needs the assets he may have accumulated during his life. The award under The Widows Relief Act, R.S.A. 1922, c. 145, s. 8 was still to be such "as may be just and equitable in the circumstances." Conduct of the wife in regard to the marriage would still be relevant but any defence which the husband would have had if it had been an application for alimony ceased to be decisive.

In 1947, The Testators Family Maintenance Act, S.A. 1947, c. 12 was extended to provide that a husband and children under the age of nineteen years could apply for relief from a testator's estate. The statute accordingly did more than simply prevent death from terminating a legal support obligation which existed during the lifetime of the deceased, as alimony or maintenance could not at this time be claimed by a husband. It was not until the enactment of the Divorce Act, S.C. 1967-68, c. 24 which came into force on July 2, 1968, that the support obligation between spouses became reciprocal upon divorce, and it was also not until 1973 that the support obligations under The Domestic Relations Act were made reciprocal in the Supreme Court (S.A. 1973, c. 61).

However, these reciprocal support obligations only arose on divorce, nullity, judicial separation or in an action limited to alimony where the plaintiff would be entitled to a judgment for judicial separation or for restitution of conjugal rights.

It should, however, be noted that The Maintenance Order Act which was first enacted in 1921 (S.A. 1921, c. 13) and is now chapter 222 of R.S.A. 1970 provides in section 3 that:

> The husband, wife, father, mother, and children of every old, blind, lame, mentally deficient or impotent person, or of any other poor person who is not able to work, shall provide maintenance, including adequate food, clothing, medical aid and lodging, for such person.

Originally, this Act was solely for the benefit of the Province or municipality which maintained the individual. In 1948, the person entitled to maintenance under the above quoted section 3 was empowered for the first time to apply himself for a maintenance order against the person liable (S.A. 1948, c. 48). It is interesting to note that this occurred at approximately the same time as the extension of the category of dependants brought about by The Testators Family Maintenance Act. It is not our purpose to contend that the statutes which preceded the present Family Relief Act simply extended a lifetime support obligation by permitting a dependant to apply for relief from the estate of the deceased person who owed a lifetime support obligation.

We believe that reform of The Family Relief Act should start from the premise that, in general, it

is only the legal support obligation that exists during the lifetime that should be preserved after death, in order that we may have a clear and rational foundation for determining when a judge should have the power to make provision for the support of another from the deceased's estate. This rational foundation must, however, be tempered by the greatly altered circumstances which death causes, the most obvious one being that the deceased person no longer needs or can enjoy his own property. In regard to the matrimonial support obligation which may continue after separation or divorce, we have emphasized in Report 27, Matrimonial Support, that the spouses should, where this is feasible, attain self-sufficiency within a reasonable period of time after marriage breakdown. There are two reasons why the arguments in favour of this proposition are weaker when the marriage is dissolved by death. One is that where marriage is terminated by the death of one spouse, the surviving spouse will usually be older than in the case of marriage breakdown, and economic rehabilitation will in many cases not be a reasonable objective. The second is that the objective of self-sufficiency for the dependent spouse on marriage breakdown is not merely advocated as desirable for that person, but also because a lifetime lien against the income of the other spouse is considered to be debilitating. In the case of a marriage terminated by death, an allowance from the estate of the deceased cannot obviously have any effect upon the deceased.

We envisaged that with the enactment of a matrimonial property statute, the number of needy spouses and consequently the number of spouses who have to apply under The Family Relief Act would decline substantially. However, as The Matrimonial Property Act permits an order to be made only where the marriage has broken down, there will probably not be a significant decrease in the applications made by spouses. The importance of The Family Relief Act will

decline for the separated spouse but for most spouses and all other dependants, it will remain the only protection against an irresponsible will. Since the rules of intestate succession are tailored to provide an appropriate distribution in the average situation, they may provide an inappropriate distribution in the exceptional case and thus The Family Relief Act will continue to be of assistance in such cases. As we will be recommending an extension of the class of dependants, the statute will become more significant to more people.

IV

SCOPE AND SUMMARY OF RECOMMENDATIONS FOR REFORM

We will make recommendations for the extension of the class of dependants who are entitled to apply under The Family Relief Act. We will advocate the adoption of a more objective approach to the issue of whether adequate provision for proper maintenance and support has been made. As part of this more objective approach, we will recommend that the circumstances as they exist at the date of the hearing and not at the date of death should be considered. We will suggest that the statute list factors which the judge should take into consideration in exercising his discretion. We will make a recommendation to clarify when an estate is to be regarded as distributed. This is an issue which becomes relevant in regard to late applications and to applications for the variation of an existing order. We will suggest that the types of orders which the judge may make should be broadened. We will make a recommendation which will provide for the termination of some periodic awards. We will advocate that provision should be made for an interim order where a dependant is in need, even though all the circumstances cannot be immediately ascertained. We will recommend that the power of variation should be clarified to remove any doubt that an upward variation may be made with regard to that part

of the estate which remains undistributed. We will suggest that the deterrent involved in the denial of costs contained in the present subsection 14(4) in regard to estates of less than $5,000 should be eliminated. We will propose a change in the provision which covers contracts to leave property by will which are complied with by the testator so as to accord greater respect to such contracts without unduly restricting the protection which the statute accords to the testator's dependants. Our proposed change will provide the same treatment to the person who contracted with the deceased whether or not the deceased complied with or breached his contract. We will recommend that property subject to an order should be extended to include movable property situated in Alberta even though the deceased did not die domiciled in Alberta. The extended jurisdiction would apply only if a dependant is resident in Alberta at the time of the deceased's death and the deceased died domiciled in a jurisdiction which does not have legislation comparable to our Family Relief Act. Finally, but perhaps of the greatest significance, we will recommend that where there are insufficient assets in the net estate of the deceased and the deceased has made a transfer or a designation which is in the nature of a "will substitute," or has made an unreasonably large transfer of property for less than full consideration within three years of his death, the person who benefitted may be required to contribute to the maintenance and support of the deceased's dependants.

V

CLASSES OF DEPENDANTS

1. Spouses

By far the most important category of dependants under The Family Relief Act is the surviving spouse. We also believe that applications by the surviving wives will continue to be far more prevalent than those by the surviving husbands. We say this for two major reasons. One is that a male, on the average, marries a female 2.3 years younger than himself (in Canada in 1974 the average age at first marriage was 24.7 years for males and 22.4 years for females), and the average life expectancy of a female exceeds that of a male by 6.1 years at the age of 25. The second is that the traditional division of functions will likely continue to prevail within many marriages in the foreseeable future so that more married men will continue to seek paid employment outside the home than will married women though the difference will probably continue to narrow over time. As there will continue to be more widows than widowers and as the widowers will probably have more assets and earning capacity than the widows, more applications will be made by widows than widowers.

The support obligation on death recognized by The Family Relief Act should continue to be reciprocal in the same way as the support obligation which becomes enforceable on marriage breakdown. We do not condone sexually-based discrimination in regard to the ascertainment of the needs of the surviving spouse. For example, we do not believe that the statement made approximately 30 years ago in In re La Fleur Estate, [1948] 1 W.W.R. 801 (Man. K.B.) at p. 810 that "a widow occupies the most favoured position, while relief is not given so readily to a widower" should

or does reflect the present law. We believe instead that the case of Re Clayton, [1966] 2 All E.R. 370 (Ch. D.), although an English case under the 1938 Act, probably reflects, or, in our opinion, should reflect current Canadian judicial opinion. Ungoed-Thomas J. at p. 372 stated:

> I certainly do not see in the Act of 1938 a greater onus of proof on the surviving husband than on the surviving wife. It is simply a question in each case, be the claimant husband or wife, whether in all the circumstances as established in evidence, the deceased's failure to make any, or enough, provision for a surviving spouse is unreasonable; and I, for my part, find no material assistance nowadays from contemplating the sex of a claimant, or considering it a circumstance on its own when all the material circumstances have to be considered.

In two reported Alberta cases in which widowers were the applicants, there is no indication that they were treated differently than if a widow had applied (Re Cranston Estate (1962-63), 40 W.W.R. 321 (Alta. S.C.) and Re Becker (1964), 46 D.L.R. (2d) 574 (Alta. S.C.)). In Re Stigings (1924), 34 B.C.R. 347, Hunter C.J.B.C. at pp. 347-348 stated in Chambers that: "there is no difference between the application of a widower and that of a widow under the provisions of the Act." In Re Blackwell, [1948] 3 D.L.R. 621 (Ont. C.A.), it was stated that application by widowers should not be readily entertained, but the Ontario Court of Appeal, nevertheless, refused to interfere with the exercise of discretion by the Surrogate Court Judge who made an order in favour of a widower where the widow's estate was small.

We do recognize that some discrimination against the surviving husband existed in the legislation until 1969. In 1955 (S.A. 1955, c. 66) it became possible for the first time for a widow to make an application in the

case of a person who died without a will but a widower could only apply where there was a will. It was not until 1969 (S.A. 1969, c. 33) that a surviving husband could make application for relief where his wife died without a will. Since 1969, however, the statute has treated the surviving spouses equally, regardless of sex. We believe that the legislation reflects everything that can be done to ensure that the widower should be treated in the same way as the widow in determining the needs of the surviving spouse.

Recommendation #1

That the proposed Act should provide that:

"Dependant" includes the spouse of the deceased.

[s. 2(c)(i)]

2. Able-Bodied Children

Under the present Act, the adult child is not permitted to apply for relief out of the estate of his deceased parent unless he is unable by reason of mental or physical disability to earn a livelihood. In addition to Alberta, only Saskatachewan and Prince Edward Island impose an age limitation on the application by a child. The Succession Law Reform Act, 1977 of Ontario eliminated its age limitation on March 31, 1978.

Of the people whom we consulted and from the submissions which we received, the large majority favoured the continuation of an age limit for able-bodied children. A substantial number advocated that there should be an exception to the age limit in favour of children who had not completed their education or training. Our basic principle is that the legal support obligation

that existed during lifetime should be imposed upon the estate of the deceased if the disposition of his estate does not satisfy the support obligation which previously existed. It may be argued that section 3 of The Maintenance Order Act, R.S.A. 1970, c. 222 states that a parent is required to provide maintenance for a child under the age of sixteen years and makes no stipulation about education and that the obligation of the parent's estate under The Family Relief Act should terminate at the same time. However, the Divorce Act, R.S.C. 1970, c. D-8, s. 2 defines "children of the marriage" as "each child of the husband and wife who at the material time is (a) under the age of sixteen years, or (b) sixteen years of age or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw himself from their charge or to provide himself with necessaries of life." In Jackson v. Jackson, [1973] S.C.R. 205, it was held that a provincial Age of Majority Act has no effect on the meaning to be given to the words "children of a marriage" and that the words "disability or other cause" were to be construed to include inability resulting from the "necessity of attending school or college for the purpose of completing such education as is necessary to equip the child for life in the future" (p. 217). The Supreme Court of Canada also decided that drawing the line with regard to age and the amount of education or training is in the discretion of the judge granting the decree nisi of divorce.

It may appear somewhat unusual that upon divorce, corollary relief under the Divorce Act is available for education but if the parents are living together the child does not have any right to require his parents to provide funds for his education or training. This, however, may simply reflect reluctance to impose duties upon family members who are living together. We believe that a parent has an obligation to provide education and training for a child

commensurate with his means and the child's abilities and aptitudes, which obligation is a legal duty under the Divorce Act, and which we believe should be extended beyond the death of a parent and should be imposed upon the estate of the parent.

We do not, however, believe that the estate of a parent who dies should be obliged to provide support for the perpetual student. For this reason, we advocate an age limitation upon dependency which is brought about by attending school or acquiring technical or vocational training. We have selected the age of 23. It is in a sense an arbitrary figure but it does represent the age by which a person should have obtained his first university degree or have completed his technical or vocational training, if he has applied himself to it.

We recognize that an age limitation of 18 years with a further limitation of 23 years for a child who has not completed his education or training may impose hardships in some cases. Although as we have said, the large majority thought otherwise, several persons who commented on our Working Paper thought that there should be no age limitation in regard to children of the deceased. Several examples were given which illustrated the unfair result which might flow from an age limitation. One was the unmarried or widowed daughter who returned to look after an elderly parent and yet received nothing under the parent's will. She might never have acquired any training which would permit her to earn a living, or, if she had acquired some training, this training may have been rendered obsolete during the years that she devoted to looking after her parent. Another example was the adult child who worked on the parent's farm or in the parent's business who may have been content to receive a very modest wage with the expectation that the farm or business

would be given to him under his parent's will. The adult child would probably have no capital with which to commence the operation of a farm or business after his parent's death, if he or she received nothing under the will.

We do not perceive any satisfactory way of including the cases in which there might be hardships if a testator made a will which left little or nothing to an adult child who might have legitimate expectations of benefitting under the will, while excluding others.

The abolition of an age limitation would, we believe, tend to result in an undesirable encroachment upon a testator's freedom to make a will. An example of what we regard as an unwarranted interference in the will of a testator is Re Michalson Estate, [1973] 1 W.W.R. 560 (B.C.S.C.). In this case, the testator, a widower, age 93, died with a net estate of about $107,000 of which $36,000 was bequeathed to relatives and friends and the remainder to charities. The petitioner was a daughter, age 55, who was the only child and received nothing under the will. She had, however, received lifetime gifts from her father of about $40,000 and her two children each received legacies of $10,000. She was married to a radiologist who had an annual income in excess of $50,000. She owned securities worth about $50,000 and she was the sole owner of the family residence valued at about $60,000. In spite of the extremely affluent situation enjoyed by the petitioner and the generous lifetime gifts by the testator, she was awarded $20,000 out of the estate. Although we recognize that this is an extreme example, we believe that it does indicate that the removal of the age limit would be undesirable.

Recommendation #2

That the proposed Act should provide that:

"Dependant" includes

> *a child of the deceased who is under the age of 18 at the time of the deceased's death,*
>
> *a child of the deceased under the age of 23 at the time of the deceased's death who has not completed his education or his technical or vocational training and was dependent on the deceased at the time of the deceased's death, or would have been dependent had the deceased survived.*

[s. 2(c)(ii)&(iii)]

3. Children Born Out of Wedlock

The basic recommendation in our Report 20, the Status of Children, is that all children, whether born in or out of wedlock, should be accorded equal treatment by the law. Therefore, we believe that eligibility as a dependant under The Family Relief Act should depend on the biological fact of parenthood, and not on whether children were born in or out of wedlock. As we have previously stated, under the present Act a child born out of wedlock may apply in regard to the estate of his mother. In regard to his father's estate, a child may only apply if the father has acknowledged paternity or has been declared to be the father by an order under The Maintenance and Recovery Act or similar prior legislation. In Report 20, we recommended that a child should be able to claim under The Family Relief Act in regard to the father's estate if there is a presumption of parentage by reason of the man's cohabitation with the child's

mother throughout the year preceding the child's birth, if he is registered as the father of the child under the Vital Statistics Act at the joint request of himself and the child's mother, if a declaration of parentage is obtained within prescribed limitation periods, or if there is an order which declares him to be a parent for the purpose of maintenance. We believe that there is adequate protection in our proposed Status of Children Act so that estates are not subject to trumped-up claims.

Recommendation #3

That the proposed Act should provide that:

"Child" includes

a child born out of wedlock, subject to The Status of Children Act.

[s. 2(b)(ii)]

Until The Status of Children Act is passed, or, in the event that it is not, we make the following alternative recommendation.

Alternative Recommendation #3

That the proposed Act should provide, in the alternative, that:

"Child" includes

a child born out of wedlock to a man now deceased who

(A) has acknowledged the paternity of the child, or

(B) has been declared to be the father of the child by an order under The Maintenance and Recovery Act or any prior Act providing for affiliation or paternity orders, or

(C) has regularly supported the child in circumstances giving rise to the inference that the deceased considered himself to be the father of the child, and

a child born out of wedlock to a woman now deceased.

[s. 2(b)(ii)&(iii)]

4. Posthumous Children

Our present Act provides that a "child" includes a child of the deceased born after the death of the deceased. The Uniform Dependants' Relief Act also specifically provides for such a child. Ontario, which had previously not provided explicitly for such a child, has done so in its new Succession Law Reform Act, 1977. It may be argued that the provision is not necessary, particularly in view of a recommendation which we will make that the circumstances of the application should be determined as at the date of the hearing. Nevertheless, in Elliot v. Joicey, [1935] A.C. 209 (H.L.) Lord Russell at p. 233 stated that: "words referring to children or issue "born" before, or "living" at, or ..."surviving", a particular point of time or event, will not in their ordinary or natural meaning include a child en ventre sa mere at the relevant date." This proposition is subject to a number of qualifications. However, it does appear wise to continue to provide explicitly for such a child.

Recommendation #4

That the proposed Act should provide that:

"Child" includes

a child of the deceased born after the death of the deceased.

[s. 2(b)(i)]

5. Adopted Children

Section 60 of The Child Welfare Act, R.S.A. 1970, c. 45 provides that "For all purposes an adopted child becomes upon adoption the child of the adopting parent...." No question of the eligibility of an adopted child to make an application for relief out of the estate of his deceased adopting parent could arise. Therefore, it is not necessary to include explicitly the adopted child within the category of child.

6. Disabled Adult Children

Mentally or physically disabled adult children are eligible as dependants under the present Act if they are unable to earn a livelihood. In Re Bowers Estate (1956), 19 W.W.R. 241 (Alta. S.C.) the application by two adult children was refused on the basis that they had failed to show that they came within the category of persons "unable by reason of mental or physical disability to earn a livelihood." However, the judge said at p. 243 that he did not think that too rigid a construction should be placed upon these words.

Several persons who commented on the Working Paper felt that the phrase should be somewhat less stringent. The problem is in finding words which would admit only the meritorious claims without opening up the category to adult children whose earning capacity is only slightly impaired by some mental or physical disability. The Maintenance Order Act provides that a "father, mother... of every... blind, lame, mentally deficient...person, or of any other destitute person who is not able to work, shall provide maintenance, including adequate food, clothing, medical aid and lodging, for such person." The

standard of maintenance which it is the duty of a parent to provide to a child would appear to be simply a subsistence level. This is a lifetime duty which a parent owes to his child. It may be argued that the radically changed circumstances which occur at death, one being that the deceased no longer has to support himself, might justify a heavier duty after than before death in regard to a child who suffers from a mental or physical disability.

As it might be possible to construe the existing provision as limited to a child who had no capacity to earn anything which could possibly be described as a "livelihood", we recommend the inclusion of the word "reasonable" to describe the word "livelihood". The child with no capacity to earn any livelihood would probably be cared for in a provincial institution and be in less need than the disabled adult child who, although severely handicapped, might still be able to function outside an institution. The latter child, in our opinion, should, in appropriate circumstances, receive an award out of the estate.

Recommendation #5

That the proposed Act should provide that:

"Dependant" includes

> *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 reasonable livelihood.*

[s. 2(c)(iv)]

Private and Public Responsibility for Disabled Dependants

If a deceased is survived by a mentally or physically disabled child the problem of balancing parental and public responsibility for disabled children may arise. We have been informed that in regard to disabled children over the age of 18 years, the province assumes full financial responsibility if they are in an institution. Even if the adult child is cared for at home, the province provides financial assistance regardless of the income or wealth of the parents. With regard to children under 18, it appears that it is generally the departmental practice to assume all financial responsibility if the child is in a provincial institution. The mother is generally required to assign the family allowance of the disabled child to the province. Under the Child Welfare Act, there is provision for making an order for maintenance against the parent where an order of wardship has been made.

There is thus a rather peculiar situation. During the lifetime of the parents, generally speaking, there is no financial liability in regard to children who suffer from a very severe mental or physical disability. However, on death, the Public Trustee regards it as his duty to apply on behalf of the disabled child. Thus financial obligations that were not enforced during the lifetime of the parent may be enforced on death. In response to our Working Paper which we issued on Family Relief the very relevant view was expressed in one submission that:

> It seems inconsistent to me that although we do not expect parents in their lifetime to contribute to the support of their adult children in these circumstances, we do in the Family Relief Act.... I know this issue is of great concern to parents of handicapped children in this province and there may be some expectation that this report would deal with this specific issue.

One argument which can be made in favour of this apparently anomalous situation is that the disabled child may recover sufficiently to leave a provincial institution, and, if an application has not been made and the estate has been fully distributed, there will be no funds to assist him to achieve rehabilitation. Of course, if the province is prepared to assume the obligation of support while the child is disabled perhaps it should also be prepared to assume the lesser obligation of assisting with the rehabilitation. Another argument which can be made in favour of the present approach is that, on the death of the surviving parent, the parents no longer require their assets for their own support. However, there may be situations in which another child has a strong moral claim or a compelling need for the property, and the adverse consequences of the claim by the incapacitated child on the family are as great as if the parents were still alive.

There is a basic humanitarian argument that can be made in favour of full public responsibility for persons sufficiently disabled that they must be institutionalized. Often the parents of disabled children suffer greatly from the tragedy of having given birth to a severely disabled child. If they have maintained the child in their home for many years but then find that they must have the child institutionalized, they may have suffered enough. Perhaps they should be free on their death to leave their estates to their able-bodied children. The

public should perhaps be prepared to bear fully the financial responsibility of the tragedy of the birth of disabled children. If this is thought to extend public responsibility too far, parents of disabled children should perhaps at least have the assurance that if they treat all their children, able and disabled, equally, no application will be made in regard to the mentally or physically disabled child who receives care or assistance from the province.

There is no consistency in the case law on this subject. In Re Pfrimmer (1969), 2 D.L.R. (3d) 525 (Man. C.A.) Dickson J.A. at p. 526 stated:

> A testator exercising the duty imposed upon him by the Act would have to consider, among other things, the following:
>
> (a) the possibility of recovery by the disabled person;
>
> (b) the minimal nature of State support which in most cases is unable to be much above subsistence level; and
>
> (c) the position of those for whom the disabled person is himself responsible, such as wife and children.

An award of $10,000, which was made in favour of the physically handicapped adult son who was confined in a provincial institution, was secured by a first charge upon the real property of the estate with interest at 5% on the unpaid balance. The net estate was approximately $40,000 and the testator was survived only by his two sons. He left his whole estate to his able-bodied son who had farmed the land which was the major asset of the estate.

In Re Kinloch (1972), 23 D.L.R. (3d) 465 (Alta. S.C.), the testator died and, as he was not survived by his wife, his estate of approximately $15,000 went to his two adult children named in his will. A daughter who had on twelve occasions been admitted to the Alberta Hospital at Ponoka received nothing under the will. Mr. Justice Cullen found that although the applicant was married at the time of the testator's death she was a dependant within the Act as she was unable by reason of mental or physical disability to earn a livelihood. At the time of the application, she was a divorced woman but had obtained no maintenance on divorce. At p. 474, the judge stated that the daughter "was adequately provided for, and Kinloch as testator was entitled to distribute his estate on the footing that his daughter Beatrice could and should take advantage of the universal health scheme which was about to come into effect..." He also cited with approval Australian and New Zealand authority for the proposition that there is no duty to provide by will for reimbursement to the State of maintenance costs of a mentally afflicted child. It must, however be recognized that in this case the size of the estate was very modest.

In Re Millar (1977), 71 D.L.R. (3d) 120 (P.E.I.S.C.), a testatrix died leaving an estate of $25,000 which was to be divided mainly among her ten adult children equally. A son, Roy, age 56, who was incapable of maintaining himself, brought an application for relief out of the estate. By his mother's will, his share was to be held on trust with the income to be used for his care and with power in the trustees to encroach on the capital for his benefit. It was found that Roy's share of the estate would not meet adequately his needs unless the welfare assistance grants were continued. Trainor C.J. stated at p. 127 that "in some circumstances, a testator

has a right to take into consideration State assistance provided by statute when making provisions for persons who by statute are declared to be dependants." The evidence indicated that if the applicant were to receive an amount in excess of $700 his welfare assistance grants would terminate. The judge decided that, as no financial benefit would accrue to the applicant, he should use his discretion to dismiss the application.

It is exceedingly difficult to define the boundary between public and private responsibility for the support of a person who qualifies as a dependant under the statute. Where the estate is large, we see no reason why provision should not be made out of a parent's estate for the support of a disabled child. It may be somewhat anomalous that during the parent's lifetime the Province did not enforce the parent's obligation for support but does so at death. However, the deceased no longer has a need for his assets and, if his estate is large, the competing claims for a share of his estate may all be satisfied. Where the estate is small and there are competing claims which cannot be satisfied, we feel that a judge may properly dismiss the application on behalf of a disabled person who is receiving support from the Province. We therefore recommend that the financial responsibility assumed by a government for a mentally or physically disabled dependant should be one of the factors which is taken into account in determining whether an order should be made.

Recommendation #6

That the proposed Act should provide that:

Upon the hearing of an application under this Act, the judge shall consider all matters that should be taken into account, including the financial responsibility assumed by a government for a mentally or physically disabled dependant.

[s. 3(3)(h)]

7. A Child whom the Deceased Treated as if he were his own Child

Section 2 of the Divorce Act, R.S.C. 1970, c. D-8, defines "child" to include "any person to whom the husband and wife stand *in loco parentis* and any person of whom either of the husband or the wife is a parent and to whom the other of them stands *in loco parentis*." Accordingly such children may be entitled to maintenance on the granting of a decree nisi of divorce. Under the present Family Relief Act, however, a child to whom a deceased person stood *in loco parentis* is not entitled to apply for relief from the estate of a deceased person.

We appreciate that the Divorce Act provision is not itself a sufficient rationale since it applies only to the children of divorced parents. However, we accept the section as reflecting a change in public policy in the direction of recognizing the obligation which arises when a person demonstrates a settled intention of treating a child as though he were his own child. We do not believe that we are departing too far from the principle that The Family Relief Act is the vehicle by which a lifetime support obligation is continued after death and imposed upon the deceased's estate, and we accordingly think that some provisions should be made.

We are, however, reluctant to suggest the imposition of too heavy an obligation upon the estate of a deceased person because of the generosity which he extended to a child during his lifetime. Too onerous an obligation might deter a person from assuming parental obligations in regard to children who need a home because of the death of their own parents or for other reasons. Death, as we have said, obviously eliminates the needs

of the deceased but it equally eliminates a person's earning capacity which may have been a factor which influenced his decision to bring a child into his home. He may prefer that only his own children should share in his estate which is fixed in size and may have no earning power. If the chidren whom he has treated as children of his own have attained their majority, we believe that they should not be able to apply for relief even if they are mentally or physically incapacitated. We have had difficulty in defining the line at which public and parental responsibility for severely incapacitated children should be drawn but with regard to persons toward whom the deceased has voluntarily assumed the responsibility of acting as a parent, we feel that, provided the person has attained the age of eighteen years, it is the state which should assume responsibility.

We believe that there should continue to be some distinction between a person who is a child of the deceased and a person who is not but who was treated by the deceased as his own child. If one person wishes to treat another person in the same way as a natural child, he can do so by his will. If he does not, we believe that the person who was treated as though he were a child should only have a right to apply for maintenance out of the deceased's estate for the period until he attains the age of eighteen. If the support obligation were to continue beyond this time, it may be that the deceased's estate would be insufficient to provide for the dependent spouse and children. It might be contended that, if the surviving spouse and children are not adequately provided for, a judge would not likely make a substantial award in favour of a person whom the deceased simply treated as though he were his child and that no harm would be done by allowing the claim to be

made. However, this does not appear to be a complete answer. If the legislation were to give the person whom the deceased treated as his own child the same rights to make an application, it could easily be inferred that it intended that such a person be treated in the same way as a natural child. It has been suggested on the other hand, that a deceased should be able by will to exclude the possibility of an application by a person whom he treated as though he were his child. However, we do not believe that a person should, unilaterally, be able to shed by will a support obligation even though it is one he voluntarily assumed. As we have said, we believe this support obligation should be imposed on the estate only until the person treated by the deceased as his child attains 18 years of age. To remove any doubt that a foster child might be a dependant under the statute, we have decided to exclude him specifically.

Recommendation #7

That the proposed Act should provide that:

"Dependant" includes

> *a person under the age of 18 to whom the deceased has demonstrated a settled intention of treating as though he were his own child and who was wholly or partially dependent upon the deceased for maintenance at the time of the deceased's death, but does not include a person placed in a foster home for compensation.*

[s. 2(c)(v)]

8. Judicially Separated Spouses

At the present time, the judicially separated spouse is entitled to apply. However, The Domestic Relations Act, R.S.A. 1970, c. 113, section 12 provides that after a judgment of judicial separation, if a husband or wife dies intestate the surviving spouse does not share in the estate. We considered whether a judicially separated spouse should only be permitted to apply where there is a subsisting alimony order or a support agreement. This would equate such spouses to divorced spouses. However, a judicially separated spouse is entitled to seek an order for alimony or maintenance and we have consistently taken the position that The Family Relief Act should preserve legal lifetime support obligations. Therefore, we believe the judicially separated spouse should continue to be entitled to apply. Accordingly, we make no recommendation for change.

9. Former Spouses

A divorced spouse, or one whose marriage has been annulled is not entitled to apply under the present Family Relief Act. In most cases, the support payments made to the economically dependent former spouse, whether under an order of support or under an agreement as to support, cease on the death of the person subject to the liability. Yet the needs of the surviving dependent former spouse do not. As a result of our conception of The Family Relief Act as a statute which transfers the legal support obligation owed by a deceased during his lifetime over to his estate, we believe that a former spouse should be entitled

to apply under it. This would be the case only if the surviving former spouse, at the time of death, was entitled to support as a result of a court order or pursuant to an agreement with the deceased.

In our Report 27, Matrimonial Support, we have subscribed to the view that when a marriage breaks down, the law should, where it is feasible, encourage each party to become self-supporting within a reasonable period of time. Thus we anticipate that many support orders in favour of a spouse or former spouse will only be for a limited period of time in order to assist the economically dependent spouse to achieve financial self sufficiency. Although more orders should be of a shorter duration, we recognize that because of the age or health of the dependent person, financial self-sufficiency may not be a feasible goal. Therefore some orders and some agreements will have to be for the life of the economically dependent spouse. In these, and also in other cases to cover the limited period during which support is needed, The Family Relief Act should make it possible for the former spouse to apply for relief out of the deceased's estate.

We have considered whether a court on or after the granting of a decree of divorce or a decree or declaration of nullity should be empowered to order that either party to the marriage shall not be entitled on the death of the other party to apply under The Family Relief Act. Such a provision is contained in section 15 of the Inheritance (Provision for Family and Dependants) Act, 1975 of England. As the English statute includes as an applicant a former spouse of the deceased who has not remarried, such a section appears necessary. As we propose that a former spouse should only be a dependant if there is a

subsisting support order or a support agreement in favour of that former spouse immediately prior to the death of the deceased, we have decided that it is neither necessary nor desirable to include a provision for prospectively ousting the jurisdiction of the court to hear a family relief application made by a former spouse.

We believe that the result of the divorce or nullity proceedings will automatically determine whether a former spouse is able to apply under our proposed Family Relief Act. If the court in these proceedings refuses to make a support order and there is no subsisting support agreement, neither former spouses will be a dependant of the other under the proposed Act. Therefore, the survivor will not be able to apply for an order from the estate of the first to die. If the court in divorce or nullity proceedings makes a lump sum order and this order has been satisfied, there would be no subsisting support order when the former spouse who was initially made liable dies. In this case, it appears that the ousting of the jurisdiction of the court to hear a family relief application flows automatically and appropriately from what is done in the divorce or nullity proceedings.

If the court granting the divorce or nullity decree makes an order for periodic payments which is to continue for the joint lives of the former spouses, the surviving former spouse who is entitled to the periodic payments will be a dependant under our proposed Act and will be able to apply for an order from the estate of the liable former spouse. It is difficult to conceive of a situation in which the court granting the divorce or nullity decree would wish to bar a former spouse from applying under

The Family Relief Act where the court ordered that periodic support payments should be made to that former spouse for the joint lives of the parties to the former marriage. Where the court orders periodic support payments for the joint lives of the former spouses, it would appear that the former spouse entitled to the payments is a person for whom the court believes that the attainment of economic self-sufficiency is not a feasible objective. The needs of this former spouse in receipt of periodic payments will not disappear on the death of the former spouse who is liable for the periodic payments. The former spouse entitled to the periodic payments should and would be a dependant under our proposed Family Relief Act.

In one case, it may be argued that the appropriate result may not flow automatically from the support order made in the divorce or nullity proceedings. This is the situation in which the court makes a nominal award in order to preserve the right of the former wife to make a subsequent application for an order for maintenance and support. Such nominal awards are generally only made where the former wife is currently in need of support but the former husband has no capacity to pay, or where the former wife is not currently in need of support but it can be foreseen that she may have a potential future need for support.

If a former wife with a nominal support order does not make a subsequent application for support, should she be able to apply under The Family Relief Act? Under our proposal, she would qualify as she is a former spouse who has subsisting support order in her favour even though it is nominal. We have considered whether we should provide that nominal support orders do not qualify a former spouse to be a dependant under our proposed Act. Such a

provision would require us to define what is a nominal order. This appears to us to be an intractable problem. We reluctantly conclude that a former spouse entitled to a subsisting support order whether it is nominal or otherwise should be classified as a dependant of the deceased former spouse who is liable. We believe that we can rely on the discretion of the judge hearing the family relief application. Even though a former spouse with a nominal award would be a dependant under our proposed Act, there is no necessity for a judge to make an order in favour of such a dependant. In most instances, we would expect that an application by a former spouse with only a nominal support order would be unsuccessful.

We also believe that a former spouse should be able to apply for an order under the Act even if there is no subsisting order or agreement as to support, provided that an application for a maintenance or support order has been made but not determined prior to the death of the former spouse. This should, of course, only apply where an order of support would have been granted had the deceased survived. We appreciate that this provision is likely to cause some difficulty in that the judge who is hearing the application will have to determine whether the applicant would have received matrimonial support had the deceased survived. However, not to provide for this situation would create a gap in the protection accorded a former spouse under The Family Relief Act.

A few support orders award support for the life of the economically dependent former spouse even if the spouse who is liable dies. A support agreement may do the same. These orders or agreements create an obligation against the estate of the liable spouse in favour of the surviving former spouse. We considered recommending that in such a case the survivor be required

to relinquish the rights under the order or agreement before applying under the Act. However, we believe the few cases in which the support obligation continues against an estate by an order or agreement can be most easily handled by judicial discretion. The judge may make any order under The Family Relief Act in favour of the applicant either conditional upon the applicant relinquishing the other rights or by taking these other rights into consideration in determining the amount of the order to be made to the applicant.

Recommendation #8

That the proposed Act should provide that:

"Dependant" includes

> *a person whose marriage to the deceased was terminated or declared void by a decree absolute of divorce or a decree or declaration of nullity of marriage and in whose favour an order or agreement for maintenance or support was subsisting immediately prior to the deceased's death or in whose favour, in the opinion of the judge, an order for maintenance or support would have been granted, provided that an application for the order had been made but not determined during the lifetime of the deceased.*

[s. 2(c)(vi)]

10. A Person who has Entered into a Void Marriage

Under the present Family Relief Act, a party to a void marriage is entitled to apply in only one circumstance. A judge must have made a declaration of presumption of death prior to the spouse of the person presumed dead going through a marriage ceremony with another person. If it is later

found that the person presumed dead was alive when the marriage ceremony was performed, the parties to the void marriage and their children have the same rights under the Act as though it were a valid marriage.

We think that this is too restrictive. We believe that a person who entered into a marriage ceremony reasonably believing that the ceremony would create a valid marriage should be entitled to apply for support during the lifetime of the other party. Therefore, we also believe that upon the death of the other party such a person should be entitled to apply for relief out of the estate of the other party.

Recommendation #9

That the proposed Act should provide that:

"Spouse" includes

> *a person whose marriage to the deceased was void if such person did not know or had no reason to believe the marriage was void.*
>
> [s. 2(g)(ii)]

11. A Spouse of a Polygamous Marriage

Re Quon (1969), 4 D.L.R. (3d) 702 (Alta. S.C.) appears to be the only Canadian case in which the issue of whether a spouse who entered into a potentially polygamous marriage might apply for relief is even inferentially considered. In this case, the deceased, who was at that time domiciled in China, entered into a Chinese customary marriage in 1914 or 1915. He later emigrated to Canada and, in 1942, after he had become domiciled in a province of Canada, he went through a marriage ceremony with a Canadian woman. His will left approximately half

the estate to the Canadian woman and the remaining portion to the son of the Chinese customary marriage. Both the Canadian woman and the woman of the Chinese customary marriage sought relief under the Act. Mr. Justice Kirby considered that the primary question was who was the lawful widow of the deceased. He quoted from Lee v. Lau, [1964] 2 All E.R. 248 (P.D.A.) at p. 252 that:

> Under a Chinese customary marriage, even if the title of "wife" is given only to the woman who was joined to the man at the marriage ceremony, that ceremony cannot be said to bring about a union to the exclusion of all others, since the husband can take fresh partners, to whose status some legal recognition is given.

Mr. Justice Kirby then cited Ali v. Ali, [1966] 1 All E.R. 664 (P.D.A.) for the proposition that a potentially polygamous marriage is converted into a monogamous union upon the acquisition by the husband of an English domicile for the purpose of making English matrimonial remedies available. He then concluded that the Chinese marriage was valid in Canada and the marriage to the Canadian woman was invalid. It is not clear whether it was essential for the success of the application by the Chinese woman that her potentially polygamous marriage had been rendered monogamous by a change of domicile of her husband, but this inference might fairly be drawn from the case. However, dependants' relief legislation has been classified as succession law, and it may therefore, be argued that the requirement that a marriage be a union of one man and one woman to the exclusion of all others has no application, because it deals only with matrimonial law.

We believe that a party to a polygamous marriage valid by the law under which it was celebrated should be entitled to apply for relief under our Act. We see no reason to distinguish between the potentially polygamous marriage

and the marriage which is polygamous in fact. The law can deal with claims for support by more than one spouse just as it can deal with claims by more than one child, and indeed our previous recommendations involve the possibility of conflicting claims by a widow and a divorced spouse.

Recommendation #10

That the proposed Act should provide that:

"Spouse" includes

> *a person whose marriage to the deceased was entered into under a law which permitted polygamy, whether or not either party to it has, or at the time of the marriage or thereafter had, a spouse other than the other party.*

[s. 2(g)(i)]

12. Parents, Grandparents and Grandchildren

Under the present Family Relief Act, a parent, grandparent or grandchild is not a "dependant" and therefore is not entitled to apply under the Act. However, under the Uniform Dependants' Relief Act, adopted by what is now known as The Uniform Law Conference of Canada, a "dependant" includes "a grandparent, parent or descendant of the deceased who, for a period of at least three years immediately prior to the date of the death of the deceased was dependent upon him for maintenance and support."

The Uniform Act appears to be based on the premise that a dependant who stands in a certain relationship to the deceased should be able to apply for relief out of the deceased's estate if there was either a legal obligation for support or a factual dependency on the deceased. We take a more restrictive view of the proper sphere of the statute. As we have previously stated, we think that the

statute should preserve a legal lifetime support obligation by transferring it to the estate on the death of the person who owed the obligation. Under The Maintenance Order Act, R.S.A. 1970, c. 222, there is a legal support obligation running from a child to his parents and grandparents and also from parents and grandparents to children and grandchildren. However, subsection 4(2)(b) states that the liability of the grandfather does not arise unless both the father and mother are unable, while the grandfather is able to provide maintenance. Similarly, subsection 4(3) indicates that the support obligation of the grandchild to his grandparent only arises when the child is unable to support his parents.

If The Maintenance Order Act were the foundation for the legal support obligation which is continued after death against the estate, it would be necessary to include parents, grandparents and grandchildren as dependants. We do not believe that The Maintenance Order Act can be a foundation for such a support obligation. It was originally enacted in England for the benefit of the parish and its main purpose is still to protect the Province, even though since 1948, a person entitled to maintenance has been empowered to apply himself for a maintenance order against the person liable. The statute is rarely invoked and the obligations which it purports to create appear to be somewhat artificial.

We believe, however, that the protection of The Family Relief Act should be extended to parents or grandparents who were dependent on the deceased for a period of at least three years immediately prior to the death of the deceased and that they should be classified as dependants. It is our belief that the special relationship of children to parents and grandparents, together with the expectation raised by the provision of support for a period of three

years, justifies classifying parents and grandparents as dependants. This is a small, but, we believe, justifiable departure from our general principle of viewing The Family Relief Act as transferring to the estate the legal support obligation owed by the deceased during his lifetime.

We do not believe that grandchildren should be classified as dependants. A grandparent has no responsibility for bringing grandchildren into the world and has no control over their number or general responsibility for them. The situation will, of course, be different if the grandparent has treated the grandchild as if he were his own child. If he has, the grandchild would be a dependant under our recommendation #7.

Recommendation #11

That the proposed Act should provide that:

"Dependant" includes

> *a parent or grandparent of the deceased who, for a period of at least three years immediately prior to the date of the death of the deceased, was dependent upon the deceased for maintenance and support.*

[s. 2(c)(vii)]

13. Persons Living Together Outside of Marriage

Men and women do live together outside of marriage. Certain statutes provide such persons with legal rights in limited circumstances. Strong arguments can be advanced both for and against extending legal rights to persons in these circumstances. We recognize that severe hardship may result from denying a right to apply to a man or woman who has cohabitated for a substantial period

of time. On the other hand, both parties may have chosen to live together outside of marriage for the very reason that they did not wish the incidents of marriage to apply to their relationship. To permit an application would in some cases frustrate the initial intention of both parties when they entered into the relationship. It can also be argued that legislation should encourage persons to marry. To convey similar rights on persons who chose not to marry may not encourage marriage. We believe that the rights and duties of men and women living together outside marriage deserve special study. We now have a study in progress. We do not think that we should decide whether or not to make any recommendation to extend The Family Relief Act to include these persons until our Study on Persons Living Together Outside Marriage is completed.

14. All Dependants

Instead of enumerating the categories of dependants who are entitled to apply for support out of a deceased's estate, it would be possible to give all persons who were actually dependent on the deceased prior to his death the right to apply under The Family Relief Act. The basis for the right to apply would then be that the deceased by supporting the dependant during his lifetime may have created a reasonable expectation that support would continue after his death. We regard this basis as too speculative. We reiterate that, in our opinion, the best touchstone is whether a legal support obligation existed during the lifetime of the deceased. If it did, this legal support obligation should in appropriate circumstances be imposed on the estate, but new obligations should not be imposed without good reasons. This we believe achieves the proper balance between the public interest in seeing that persons who have a legitimate claim to look to the deceased for support receive that support and the public interest in seeing that freedom to make a will is not unduly restricted.

VI

THE EXERCISE OF DISCRETIONARY POWER

1. General

The hallmark of dependants' relief legislation and of our Family Relief Act is the discretionary power which a judge has to make an award if he believes that a deceased person's will or the rules of intestate succession do not adequately provide for the proper maintenance and support of a dependant. We think that the discretionary system strikes a fair balance between the interests of dependants and the interest in preserving as much testamentary freedom as is consistent with the legitimate interests of dependants.

We believe, however, that it is somewhat peculiar to say that a will leaving nothing to a dependant makes adequate provision for the proper maintenance and support simply because the dependant possesses independent means and therefore there is no need. When the will provides nothing for a dependant but the judge does not exercise his discretion in favour of a dependant, it is not because the will provides proper maintenance but because the dependant himself possesses adequate resources for proper maintenance. We therefore propose a small amendment to the major provision in the Act which grants a judge discretionary power to make an award out of the estate. We do not contend that this constitutes a change in substance for the Act has always been construed so that if there is no need, an order will not be granted. Our proposal simply makes the language of the provision consistent with judicial interpretation. We propose that the judge should only have discretion to make an award when it appears that the dependants or any of them do not have proper maintenance and support either from the estate of the deceased or otherwise. It is the addition of the words "or otherwise" that is new.

Recommendation #12

That the proposed Act should provide that:

Where, upon the application by or on behalf of the dependants or any of them, it appears to a judge that the dependants or any of them do not have proper maintenance and support either from the estate of the deceased or otherwise, the judge may in his discretion, notwithstanding the provisions of the will or the law relating to intestacy, order that such provision as he deems adequate be made out of the estate of the deceased for the proper maintenance and support of the dependants or any of them.

[s. 3(1)]

2. Factors to be Considered

Under the present Act, the discretionary power of the judge is virtually unfettered. There is no limitation on the value of the award which he may make. He may consider all matters that he deems should be fairly taken into account. He may accept such evidence as he deems proper of the deceased's reasons for making his will and for not making adequate provision for a dependant.

We are in general agreement with the need for this unfettered discretion. However, we have concluded that it would be desirable to have a list of factors which a judge should consider in regard to an application. It is our opinion that all of the factors which we will recommend have in the past been used to determine whether or not an order should be made and the amount of any such order. The enumeration of these factors in a list which does not purport to be exhaustive will not, in our view, alter the way in which awards are made under the Act. It is, in our opinion, useful for the Legislature to confirm the factors which have been regarded as important in making an order under the Act.

One of these factors has always been the financial resources of the dependant. Where the dependant is a spouse, the financial resources include the benefits to which the spouse is entitled under The Dower Act and they will include the spouse's benefit under The Matrimonial Property Act, when it is proclaimed. As The Matrimonial Property Act only provides for a matrimonial property order to be made in favour of the surviving spouse where the marriage has broken down during the lives of the spouses and the limitation period has not run, few surviving spouses will be entitled to such an order. The assets which the dependant is entitled to receive from the deceased's estate either by will or through intestate succession constitute another factor. They are included in the first factor, the financial resources of the dependant, but the assets which the dependant is entitled to receive from the deceased's estate merit separate consideration. A function of the statute is to determine whether the deceased has made adequate provision for the proper maintenance and support of his dependants. Thus the source of the dependant's resources is important. We have already recommended (Recommendation #6) that the factors to be considered by the judge should include the responsibility assumed by a government for a mentally or physically disabled dependant.

We believe that the age and health of the dependant has been a factor which courts have considered in the past and should continue to consider as very relevant in the future. Another factor which we think is also important is the claims which any other dependant or any other person has upon the estate. The claims which other dependants of the deceased have upon the estate must obviously be considered and be reconciled in making an order under the Act. The cases also support the view that even though a person is not a dependant and therefore cannot be an

applicant, the courts should recognize a moral claim on the testator where he has given such a person benefits under the will (In re La Fleur Estate, [1948] 1 W.W.R. 801 (Man. K.B.) and Re Quon (1969), 4 D.L.R. (3d) 702 (Alta. S.C.)).

We think also that any provision which the deceased while he was alive made for the dependant and for other dependants should continue to be considered by the judge. We believe that the conduct of the dependant in relation to the deceased is another relevant factor. However, we would not wish to see this factor construed as authorizing a very detailed assessment of conduct of the dependant in relation to the deceased and it should therefore appear without emphasis as one of the list of factors. We agree with Mr. Justice Egbert,who in In re Willan Estate (1951-52), 4 W.W.R. (N.S.) 114,(Alta. S.C.) at pp. 118-119,stated that "it is not part of the duty of a judge on an application of this kind to weigh the relative merits and faults displayed by the husband and wife during their marital life."

The list of factors, in our opinion, should also include any agreement between the deceased and the dependant. We believe that, even if the agreement is one in which the dependant agrees not to apply under this statute, the jurisdiction of the court should not be ousted. The judge should, however, take into account the agreement and the consideration received for it in determining whether he should exercise his discretion to make an award in favour of the dependant.

A very important factor, in our opinion, has always been the value of the net estate of the deceased. Proper maintenance and support is a relative concept and must be construed with reference to the net estate of the deceased. We also believe that where the deceased has utilized "will substitutes" or has made unreasonably large dispositions of property within three years of death, a judge should also take this into account. Another very important criterion is, of course, the needs of the dependant which we believe may be assessed on the basis of the dependant's prior standard of living.

The final factor which we recommend that a judge should consider is any transfer of property by a dependant after the death of the deceased at less than fair market value. A dependant should not be able, in our opinion, to unilaterally increase his needs by transferring property at less than its fair market value between the death of the deceased and the time the judge hears the dependant's application for relief.

Recommendation #13

That the proposed Act should provide that:

Upon the hearing of an application under this Act, the judge shall consider all matters that should be taken into account, including:

(a) the financial resources which the dependant has and is likely to have in the immediate future, and, in the case of a spouse, any benefits to which the spouse is entitled under the provisions of The Dower Act and The Matrimonial Property Act;

(b) the assets which the dependant is entitled to receive from the estate of the deceased otherwise than by an order under this Act;

(c) the age and health of the dependant;

(d) the claims which any other dependant or any other person has upon the estate;

(e) any provision which the deceased while living has made for the dependant and for any other dependants;

(f) the conduct of the dependant in relation to the deceased;

(g) any agreement between the deceased and the dependant;

(h) the financial responsibility assumed by a government for a mentally or physically disabled dependant;

(i) the value of the property passing on the death of the deceased and the property referred to in section 22(1)(b) (of the proposed Act, Appendix A);

(j) the needs of the dependant, in determining which the judge may have regard to the dependant's prior standard of living;

(k) any transfer of property by a dependant after the death of the deceased at less than fair market value.

[s. 3(3)]

3. Time of the Application

We believe that the present provision that the application must be made within six months from the grant of probate of the will or of administration is appropriate, particularly in view of the discretion granted to the judge to permit a late application if he deems it just in respect of the estate which remains undistributed at the date of the late application. It will be necessary later to discuss what meaning should be ascribed to "the estate remaining undistributed." We will also have to consider special time limits in regard to the imposition

of personal obligations upon a person who has benefitted from a"will substitute"or an unreasonably large disposition within three years of death. However, we approve of the present section 16 prescribing the six month period, combined with section 18 which, if an application has not been made, by inference permits the personal representative to distribute the estate after the lapse of six months from the grant. We believe that these provisions appropriately recognize the interest of dependants and the interest of the executor or administrator and the beneficiary in the prompt administration and distribution of the estate. We make no recommendations for change.

4. Time of Determining whether Adequate Provision has been made for Proper Maintenance

There are conceivably four times at which to determine whether a testator has made adequate provision for the proper maintenance of dependants. They are: (1) the date of the making of the will, (2) the date of the testator's death, (3) the date of the application, (4) the date of the hearing. There is some authority for each of the four dates. However, the weight of authority is in favour of making the determination as at the testator's death.

We believe that the date of the deceased's death has been selected because the courts have tended to emphasize the idea that the statute is designed to correct a breach of a moral duty. In the case of In re Allardice (1910), 29 N.Z.L.R. 959 (C.A.), at pp.972-973 Chapman J. stated: "It is the duty of the court...to consider whether...the testator has been guilty of a manifest breach of that moral duty which a just, but not loving husband or father

owes towards his wife or towards his children, as the case may be." If this is the proper task of the judge, it seems that the relevant date should be the date of the testator's death as this is the latest date at which the testator may make a just will. In re Allardice has been frequently quoted in Canadian cases and it is suggested that this explains why the weight of authority is in favour of the date of the deceased's death. However, the fact remains that not one of the statutes mentions any moral duty. In the High Court of Australia in Coates v. National Trustees Executors and Agency Co. Ltd., (1956-57) 95 C.L.R. 494 at p. 523, Fullagar J. stated: "The notion of 'moral duty' is found not in the statute but in a gloss on the statute." We believe that it is not a helpful gloss. These statutes do not impose a legal or moral duty to draw a will in any particular way. As Viscount Simon, L.C. in Dillon v. Public Trustee of N.Z., [1941] A.C. 294 (P.C.)at p. 301 stated:

> What the statute does is to confer on the court a discretionary jurisdiction to override what would otherwise be the operation of a will by ordering that additional provision should be made for certain relations out of the testator's estate, notwithstanding the provisions which the will actually contains. If the testator does not make adequate provision in his will for wife, husband, or children, he does not thereby offend against any legal duty imposed by the statute. His will-making power remains unrestricted, but the statute in such a case authorizes the court to interpose and carve out of his estate what amounts to adequate provision for these relations if they are not sufficiently provided for.

We believe that the statute should simply direct the judge to determine whether the deceased's dependants have adequate provision for their proper maintenance. If

the dependants do not have adequate provision for their maintenance, the judge should make provision out of the estate. Emphasis on the moral duty of the testator obscures the basic function of the statute. That function, in our view, is to transfer the legal lifetime support obligation of the deceased to the deceased's estate where the dependant has need of support. This need, in our view, should be determined as at the date of the hearing and not as at the date of the deceased's death. In many cases, it will not matter whether it is the date of death or the date of the hearing, but there are cases in which there may be a dramatic change in the needs of a dependant through illness or an accident after the testator's death. In Re Urquhart (1956), 5 D.L.R. (2d) 235 (B.C.S.C.), for example, the daughter of the testator contacted polio after the testator's death. In order that the statute should provide maximum protection to the deceased's dependants, we believe the circumstances considered should be those that exist at the date of the hearing. We note that the Law Commission (England) in its Report No. 61 Family Provision on Death (1974) at p. 28 stated:

> We recommend that it be made clear in future family provision legislation that the relevant circumstances for the court to consider are those existing at the date of the hearing and not those existing at the date of death.

The Law Reform Commission of New South Wales in its Report No. 28 on the proposed Family Provision Bill provided in subsection 9(2) at p. 138 that: "the Court shall have regard to the circumstances existing from time to time up to the time when the question arises, whether or not foreseeable at the date of the death of the deceased person."

Recommendation #14

That the proposed Act should provide that:

In determining whether the dependants or any of them do not have proper maintenance and support, the judge shall have regard to the circumstances enumerated in subsection (3) of section 3 as they exist at the date of the hearing of the application.

[s. 3(2)]

VII

TYPES OF ORDERS WHICH SHOULD BE AVAILABLE

1. Property Presently Available for an Order

Section 4 of the present Family Relief Act provides that the judge may make an order out of the estate of the deceased for proper maintenance and support of dependants. The Act defines "testator" and "will" very broadly. Section 2(h) states: "'testator' means a person who by will or by any other instrument or act so disposes of real or personal property or any interest therein that the property or interest will pass on his death to some other person." Section 2(i) defines "will" in an equally broad way. It would appear that these broad definitions were intended to comprehend such things as a donatio mortis causa, a revocable trust and a designation of a beneficiary under an insurance policy.

The Ontario Act considered in Kerslake v. Gray, [1957] S.C.R. 516 contained identically wide definitions of testator and will. However, the Supreme Court held that the proceeds of policies of insurance payable to an ordinary beneficiary do not form part of the estate within the meaning of The Dependants' Relief Act. It held that a dependant might only look to the estate that the personal representa-

tive of the deceased is entitled to administer. It could be contended that this decision is not applicable to the Alberta statute in that two sections of the Ontario Act relied upon to reach the result are not contained in the Alberta Act. One section limited the award to that which the dependant would have received on an intestacy. In that case, the deceased died insolvent and therefore it was contended that no award could be made. Intestacy, in spite of the wide definition of "testator", was considered to have its ordinary meaning. Another section provided that a judge might direct that a dependant shall rank as a creditor where he has given personal assistance, a gift or a loan of money or other property for the advancement of the testator in a business or occupation, but otherwise "an allowance payable under this Act shall be postponed to the claims of creditors of the estate." Kellock J. at p. 519 stated: "This section would seem in the clearest terms to indicate that the sole source from which any allowance granted under the Act is to be satisfied is the assets to which creditors are entitled to look."

It is generally believed that Kerslake v. Gray renders the extended definition of "testator" and "will" a dead letter. This is probably the case. In addition, since we will subsequently make recommendations which will make the Act much more difficult to circumvent, we believe that the extended definition of "testator" and "will" should be eliminated from the Act. This will affirm the present position that a dependant can only look to the net estate which is administered by the personal representative of the deceased. If the net estate is insufficient to provide proper maintenance, we will later recommend that a personal obligation should be imposed on persons who benefit from "will substitutes" and unreasonably large dispositions within three years of death.

Recommendation #15

That in the proposed Act:

The extended definition of "testator" and "will" should not appear in order that only the net estate administered by the personal representative in the first instance, is available out of which to make an order for proper maintenance.

2. Kinds of Awards

Under the present Act, subsection 6(3) empowers a judge to make out of income or corpus or both the following orders:

(a) an amount payable annually or otherwise;
(b) a lump sum to be paid or held on trust;
(c) any specified property to be transferred or assigned, absolutely or in trust or for life, or for a term of years to or for the benefit of the dependant.

This provides the judge, in general, with sufficiently wide latitude to make an order which is appropriate to the circumstances. However, the Law Commission (England) in its Report No. 61 at p. 31 recommended that "the court should have power to make an order that assets forming part of the estate be applied in acquiring property or other rights for the applicant or for settlement for his benefit." It envisaged that this power might be utilized particularly where a home did not form part of the estate or where the surviving spouse wished to move to a smaller home. This has been provided for in section 2(1)(e) of the English Act. We believe that this is a useful additional power for our court to possess.

Recommendation #16

That the proposed Act should give the judge power to order:

the acquisition out of property comprised in the estate of such property as may be specified, to be transferred or assigned absolutely or in trust, or for life, or for a term of years to or for the benefit of the dependant.

[s. 6(2)(d)]

3. Suspensory Order

The present subsection 4(4) provides that a judge may make a suspensory order, suspending in whole or in part administration of the estate in order that an application may be made at a subsequent date. We believe that this type of order should continue to be available and warrants the prominence of a separate section as in the Uniform Dependants' Relief Act.

We believe that the present subsection 4(4) contains a small drafting error in its reference to "administration" rather than to "distribution". It is clear that it is distribution which should be suspended and not the payment of debts and the collecting of the assets of the estate.

Recommendation #17

That the proposed Act should provide that:

The judge may make a suspensory order, suspending in whole or in part the distribution of the deceased's estate to the end that application may be made at any subsequent date for an order making specific provision for maintenance and support.

[s. 5]

4. Interim Orders

We believe that provision should be made for the making of an interim order in cases where a dependant is in need, but where the judge is unable to ascertain all the circumstances that should be taken into account in making a final order. So that relief may be obtained expeditiously, we also believe that a judge should have the discretion to make an interim order even though not everyone interested or affected has been served and heard as provided in the present section 17(1)(a) (section 18(1)(a) of the proposed Act), particularly if their place of residence is unknown.

Recommendation #18

That the proposed Act should provide that:

Notwithstanding section 18(1)(a), where a dependant is in need, an application may be brought and the judge may make such interim order as he considers appropriate, even tnough the matters referred to in section 3(3) have not been ascertained.

[s.8]

5. Duration of the Orders

The present Family Relief Act gives minor children the right to apply for relief out of the estate of the deceased parent. We have already recommended (Recommendation #2) that this should be broadened to include an application for relief to complete one's education or training. However, the case of In re Denton Estate, [1950] 2 W.W.R. 848 (Alta. S.C.) went much further. The judge in that case rejected the argument that an able-bodied child who was less than the age limit at the time of the deceased parent's death could only be provided with maintenance until he attained the age limit which was then 19 years. The judge at p. 850 stated:

> Its purpose, as gathered from the language of the whole Act, is so much more far-reaching than such an interpretation would allow as to point to an intention to make a child under the age of 19 years at the time of the testator's death a dependant, in as broad a sense as one over that age who is unable to earn a livelihood by reason of mental or physical disability.

The testator in this case left an estate of over $280,000. His holograph will read: "I leave everything I own to my wife Elizabeth. She can act as trustee to see that the children get good and complete education out of my estate." The public trustee made an application on behalf of the five children of the marriage who ranged in age from 2 months to 11 years at the time of their father's death. The judge ordered that a trust of $100,000 should be established and held by a court-appointed guardian with the income to be paid to the widow for the maintenance and education of the children subject to a power of encroachment. As each child attained the age of 25 years, one half of the share of the child in the corpus was to be paid to the child. The balance of the child's share of the corpus was to be paid when the widow in her discretion might decide and in the interim the income was to be paid annually to the child. The important aspect is that maintenance was provided into adulthood and then a share of the estate was to be given to the children. Yet if one of the children had attained the age limit before his father's death, he would not have had even the right to apply.

Biblow v. Royal Trust Co. (1977) 3 A.R. 203 (Alta. S.C.) was decided differently. In that case, a testator left his entire estate of about $65,000 to the eldest son of his first marriage which had ended in divorce. The second wife applied and the Public Trustee applied on behalf of the three infant children of the first marriage. No order was made in favour of the second wife. The marriage had lasted only nine days and was terminated by the

suicide of the testator. Mr. Justice Laycraft ordered that $6,000, $9,000 and $12,000 should be paid to the Public Trustee for the infant children who were 14, 12 and 10 years of age respectively at the time of the testator's death. The amount of the order would appear to have been arrived at by multiplying the number of years that would elapse until each child had attained the age of 18 years by $1,500. It would therefore appear that Mr. Justice Laycraft believes that The Family Relief Act is to provide maintenance only until a child attains the age of eighteen years. We believe that this is the way in which the Act should be construed. However, In re Denton Estate was not discussed. We believe it important to eliminate any doubt that so far as minor able-bodied children are concerned, the purpose of the Act is to enable them to receive maintenance and support out of the estate of their deceased parent until they attain age 18 or until they complete their education. This will eliminate the arbitrary result coming about because the death occurred when one child was 17 and another was 18 years of age. A mentally or physically disabled person who is not capable of earning a livelihood but who recovers and becomes capable of earning a livelihood should cease receiving periodic payments. It is our belief that the disposition of the deceased's estate should only be altered to provide for a dependant who needs support. When the need ends, so should the order. We have also recommended that a person whom the deceased treated as though he were a child should only be supported out of the estate until the person attains age 18. We also believe that where an order provides support by way of a lump sum or the transfer or acquisition of specific property, the order should bear a close relationship to the amount of support which would be required until the dependant, if a child, attains the age of majority or until an event occurs, which would terminate a periodic payment.

Recommendation #19

That the proposed Act should provide that:

(1) An order that provides for periodic payments shall specify that the order terminates:

(a) in the case of a child, either upon the attainment of the age of eighteen years or upon completion of his education or training but not later than the attainment of the age of twenty-three years;

(b) in the case of a child who is mentally or physically disabled, upon the attainment of the age of eighteen years or upon his becoming capable of earning a reasonable livelihood, whichever occurs later;

(c) in the case of a person referred to in section 2(c)(v), upon the attainment of the age of eighteen years;

(d) in any other case, not later than the death of the dependant.

(2) An order that provides for support by way of a lump sum, the transfer of specific property or the acquisition of specific property shall be related to the amount of support which is expected to be required until the dependant attains the age or the event referred to occurs which would terminate an order for periodic payments under subsection (1).

[s. 7(1) and (2)]

VIII

INCIDENCE OR BURDEN OF THE ORDER

When a judge decides that an order must be made out of the estate to provide proper maintenance and support of a deceased's dependant, an independent issue arises as to who should bear the burden which necessarily flows from the exercise of judicial discretion. This is an important issue which has received little attention. The larger judicial discretion to intervene to provide proper maintenance for a dependant seems to have eclipsed the somewhat lesser issue of allocating the burden which the intervention must impose on someone.

Several positions may be adopted in regard to the allocation of the burden or incidence of the order. One is that the order should cause the net estate to abate in the same way in which debts affect the distribution of an estate. Debts are first paid out of property which is undisposed of by the will, then out of residue, then out of general legacies and finally out of specific legacies and devises. This was the approach adopted in In re Davison Estate, [1919] 2 W.W.R. 100 (Sask. C.A.), a case in which pro rata reduction was specifically rejected under S.S. 1910-11, c. 13 which provided relief for a widow who was left with less than her intestate share. A second approach is that there should be strict pro rata abatement in regard to all property which passes on the death of the deceased. A third approach is that there should in general be pro rata abatement in regard to all property but that this should be subject to judicial discretion to alter the distribution of the burden. A fourth approach is to leave the incidence of the order to the discretion of the judge and if the discretion is not exercised, the benefits under the will or on an

intestacy should abate pro rata. The difference between the third and fourth approaches is basically a difference in emphasis. The third stresses pro rata abatement and the fourth the discretion of the judge. In each case, if the judge does not exercise his discretion, there will be pro rata abatement. A variant of the third approach, pro rata abatement tempered by judicial discretion, is that the statute might direct the judge in adjusting the burden of the order to attempt to respect the intention of the testator to the maximum extent possible while providing for proper maintenance of dependants.

It would appear that our present Act adopts the fourth approach. The judge under subsection 6(2) is given complete discretion about what part of the estate is to bear the burden of the order and then in section 10, it is provided that unless the judge otherwise determines,the order is to fall rateably upon the whole estate. The Uniform Dependants' Relief Act in section 10 provides that the incidence of the order falls rateably upon the estate subject to the provision that the court may order that the burden may be charged against the whole or any portion of the estate as seems proper.

We prefer to start with pro rata abatement tempered by judicial discretion. Some judicial discretion in determining the burden of an award appears to be absolutely essential. A dependant who thought he had received fair treatment or who did not wish to show disrespect for the testator might not apply. However, another dependant who thought he did not receive proper maintenance might successfully make application. If there is strict pro rata reduction in benefits under the will, this might result in placing a dependant who refrained from making an application in a position of need. Rigid pro rata reduction is therefore not

feasible in all circumstances. Also, strict pro rata reduction would be inconsistent with the direction to the judge contained in recommendation #13 that the claims of any other dependant or any other person must be taken into account.

We think, however, that the Act should go on to ensure that testamentary freedom will only be restricted to the extent necessary to provide proper maintenance for dependants. We have therefore subscribed to the pro rata approach only on the basis that, in many cases, this will result in the least interference with the testator's intentions. We recognize that a rateable allocation of the burden will not achieve this end in some cases and therefore judicial discretion is essential. In exercising the discretion in allocating the burden of the order, the judge should always strive to interfere with the testator's intention as little as possible consistent with achieving the purpose of the statute. It is conceded that determining the relative importance that a testator attaches to testamentary gifts may be difficult and, in some cases, impossible. However, the testator may provide the way in which his gifts are to abate for the payment of debts. From this, it could be inferred the gifts to which he attached the greater importance. There would appear to be no justification in ignoring the importance which he attached to the various bequests and devises, except to provide proper maintenance for dependants. In some cases, it may be impossible to determine the testator's intention and, in other cases, the order may amount to such a large proportion of the estate that it might be difficult to perceive what the testator's intention would be under such

drastically altered circumstances. However, to the extent that it is possible, the testator's intention should be respected in the allocation of the burden of the order.

We now summarize our views. As a first approximation to according respect to the testator's intentions, there should be a pro rata reduction in benefits. If this distribution of the burden would appear to do greater damage to the testator's intention than is necessary under the circumstances, the judge should have discretion to allocate the burden but should exercise that discretion in a way in which it may reasonably be inferred would interfere as little as possible with the testator's intentions.

Recommendation #20

That the proposed Act should provide that:

(1) Subject to subsection (2), the incidence of any provision for maintenance and support that is ordered pursuant to this Act shall fall rateably upon the whole estate, whether the deceased died testate, intestate or partially intestate, or upon that part of the deceased's estate to which the jurisdiction of the judge extends.

(2) The judge may order that the provision for maintenance and support be made out of and charged against the whole or any portion of the estate in such proportion and in such manner as to him seems proper.

(3) In exercising the discretion under subsection (2), the judge shall have regard to the intentions of the testator insofar as they can be ascertained or inferred from the will or from surrounding circumstances.

[s. 11(1), (2) and (3)]

IX

VARIATION OF AN ORDER

Section 7(b) of the present Act empowers a judge, where periodic payments have been ordered, to discharge, vary or suspend the order or to make an alternative order in accordance with the circumstances. The power of variation under the present Act is restricted to the orders providing for periodic payments. With the greater scope in the types of orders which may be made, we believe that the variation powers should be wider. We do not believe that an order for a lump sum which is to be paid directly to a dependant should be subject to variation. However, we believe a lump sum held in trust might in proper circumstances be varied. It would also seem that orders providing for specified property to be transferred on trust or for life or a term of years should be capable of variation. In recommending the widening of the power of variation, we believe that reliance should be placed on the judge not to order variation in unsuitable circumstances. Where changed circumstances permit, the variation power should be used in order to achieve the testator's intention to the greatest extent possible provided his dependants have or receive proper maintenance.

There does not appear to be any reported Canadian case in which there has been an upward variation in an order, except by way of appeal of the original order as opposed to a separate application for variation. In order to place the issue beyond doubt, we recommend that it should be explicitly stated that the power of variation comprehends both upward and downward variation. Unless a suspensory

order has been granted, it does mean that the power of variation can only affect the estate which happens to remain undistributed at the date of the application for variation.

Under the English legislation only the property which was set aside under the original order may be resorted to in order to provide additional maintenance. If the whole estate was charged, the court on an application for variation has the same power as on an original application. If only part of the estate was charged, but another part of the estate remains undistributed, under the English Act only the part of the estate charged is available. This considerably restricts upward variation. The English approach to variation may be influenced considerably by the very rigid enforcement of the time limit for an original application. The time limit itself probably reflects an emphasis on the interest of achieving certainty in the administration and distribution of an estate for both the personal representatives and the persons who benefit under the will or on the intestacy. Section 4 of the English Act which re-enacted existing legislation,provides that an application shall not be made after six months elapses from the grant of probate or administration, except with the permission of the court. In Re Kay, [1965] 3 All E.R. 724, (Ch.D.), permission for late application was denied where the application was one day late because of the solicitor's inadvertence. At that time, the extension of time was subject to qualifications. With a general discretion to extend the time, permission for late application may be more readily granted. The fact remains that Alberta courts have, under subsection 16(2), readily allowed late applications as to the portion of the estate remaining undistributed at the date of application. The interest of dependants seeking relief under the Act has been accorded more importance than the interest of the beneficiary

who wishes to know with certainty what property he will receive by will or on an intestacy. For example, in Re Norton (1964), 44 D.L.R. (2d) 617 (Alta. S.C.), a widow was permitted to apply for relief about 13 years after the grant of probate. A liberal approach to late applications is only consistent with a liberal approach to applications for variation.

We believe that the same considerations which militate in favour of this kind of discretion conferred by this statute also militate in favour of a liberal power of variation.

Recommendation #21

That the proposed Act should provide that:

Where an order has been made under this Act, a judge at any subsequent date may:

(a) for the purpose of giving effect to the order, give such further or other directions as he deems necessary;

(b) inquire whether the dependant benefitted by the order is self-sufficient either through becoming entitled to the benefit of any other provision for his proper maintenance and support or for any other reason;

(c) inquire into the adequacy of the provision ordered; and

(d) vary up or down, or discharge or suspend the order, or make such other order as he deems fit in the circumstances with the exception that a lump sum ordered to be paid directly to a dependant may not be varied.

[s. 9]

X

ASSETS AVAILABLE FOR A LATE APPLICATION OR ON VARIATION

One question arises upon late application for relief under The Family Relief Act, and also upon an application for upward variation of an order made under it. The question is: what property can be used to provide the relief claimed? The present Act gives no specific answer to the question in the case of applications to vary. In the case of late applications, it answers the question by saying that the application can be made, if the judge allows it, "as to any portion of the estate remaining undistributed." It is necessary to consider the meaning of these words.

An Alberta case which first considered somewhat similar words was In re Hourston Estate, [1919] 1 W.W.R. 521 (App. Div.). The Statutes Amendment Act, S.A. 1916, c. 3, s. 25 added the words "except as to any portion of the estate unadministered at the date of the application" to section 12 of The Married Women's Relief Act, S.A. 1910 (2nd Sess.) c. 18 which read as follows: "No application shall be entertained under this Act after six months from the death of the husband." In the Hourston case, one argument advanced by the executor against the widow's claim was that no estate remained unadministered. At the trial level, the executors had been successful. However, Ives J. who delivered the judgement of the Appellate Division rejected the argument of the respondents that they were seized of the estate as

trustees and not as executors. He noted that they had twice passed accounts at intervals of five and nine years after the testator's death and were treated as executors. Probably as a result of this decision, the issue was clarified by the legislature passing subsection 16(2) of the Statutes Amendment Act, S.A. 1919, c. 4. It repealed section 12 of The Married Women's Relief Act and substituted the following:

> If the application be made after the expiration of six months from the death of the husband the allowance, if any, shall be made so as to affect only such beneficiaries under the will as are interested in such portion of the estate as at the date of the application remains unadministered in the hands of the executors or administrators or undistributed in their hands as trustees under the will.

The legislature thus in 1919 made it clear that the transformation of an executor into a trustee was immaterial. As long as the personal representative had assets undistributed, it did not matter whether he had completed the administration and had become a testamentary trustee. This section remained in these terms until the passage of The Testators Family Maintenance Act, S.A. 1947, c. 12. The limitation section in that Act was based on the Uniform Act and refers, as does the present Act, only to "any portion of the estate remaining undistributed at the date of the application." We do not think that this change in wording represented a deliberate change in policy by the legislature and no subsequent Alberta case has

seized upon these words to prevent an award being made on a late application on the basis that an executor has ceased to act as an executor and holds the assets as a testamentary trustee.

The case law of other jurisdictions would indicate that such an argument may be available. Canadian cases are inconclusive. In Re Hull Estate, [1944] 1 D.L.R. 14 (Ont. C.A.) it was argued, on an application made eight years after the testator's death, that the estate was no longer in the hands of the executor as executor but as a testamentary trustee and was therefore not available under the Ontario statute. Laidlaw J.A. at p. 17 stated:

> It is quite clear that the provisions of the statute can operate only on the "portion of the estate remaining undistributed at the date of the application." No portion which has been distributed to beneficiaries or placed in trust out of the control of the executor is affected in any way.

The words "placed in trust out of the control of the executor" indicate that if the executor had made a transfer to an independent trustee, such property would no longer be available to satisfy an order. Therefore, it might be inferred that the simple transition from executor to testamentary trustee which occurs when administration has been completed does not put the assets out of the control of the executor.

There are New Zealand and Australian cases which indicate that the completion of the administration is a decisive date in determining whether a late application can be made, though based on different legislation. The New Zealand Family Protection Act, 1908, section 33(9) provided that no application for extension of time to apply under the Act could be made after the "final distribution" of the estate. This term was considered in Public Trustee v. Kidd, [1931] N.Z.L.R. 1 (S.C.) in which Adams J. cited numerous authorities the last of which was Attenborough and Son v. Solomon, [1913] A.C. 76 (H.L.) and at p. 5 stated:

> These authorities established the proposition that when executors who are also trustees have got in the estate and performed the duties of their office they thenceforth hold the property remaining vested in them as trustees for the beneficiaries under the will. It has then ceased to be part of the estate.

This decision was approved by the Full Court of the New Zealand Supreme Court in In re Donahue, [1933] N.Z.L.R. 477(S.C.). These decisions were legislatively overruled by a 1939 amendment to the New Zealand Act and section 2(4) of the present Act now reads:

> For the purposes of this Act no real or personal property that is held upon trust for any of the beneficiaries in the estate of any deceased person who died after the 7th day of October, 1939, shall be deemed to have been distributed or to have ceased to have been part of the estate of the deceased by reason of the fact that it is held by the administrator after he has ceased to be administrator in respect of that property and has become trustee thereof, or by reason of the fact that it is held by any other trustee.

In the Australian state of Victoria, the Administration and Probate Act 1958, No. 6191 in section 99 also provides that no late application may be permitted after "final distribution." In Brown v. Holt, [1961] V.R. 435 (S.C.), Pape J. adopted the reasoning of the New Zealand cases and at p. 441 stated:

> I am prepared to accept the view that there has been a final distribution of an estate, when the executors have got in all the estate and have completed their executorial duties and have assented to the dispositions of the will taking effect, so that thereafter they hold the estate as trustee for the person entitled.

The facts of a New South Wales case are somewhat different but the New South Wales statute also provides that every application for extension of time to apply shall be made before "final distribution" of the estate. In Re Pratt (1963), 80 W.N. (N.S.W.) 1416 (S.C. in Eq.) an application for extension of time was made over 45 years after the testator's death by his adopted daughter. The testator's widow had been left a life estate in the residue which consisted of a house and the executors were by the will directed on the death of the widow to sell the house and distribute the proceeds. McLellan, Chief Justice in Equity, held that as the will directed that the estate should be converted into cash before dividing it between the beneficiaries and since this had not been done, "final distribution" had not occurred. The late application was thus permitted.

Our Act does provide that if no application has been made within the six-month period following the granting of probate or administration, the personal representative may proceed to distribute the estate. Our Act thus does not unduly impede the administration and distribu-

tion of an estate. It must, however, be conceded that in permitting late applications or in permitting an upward variation in an existing order, there are conflicting interests which must be balanced. Beneficiaries wish to know that the provision made for them by a testator will not be adversely affected by an order under the Act after the lapse of the time period for making an application. In conflict with the interest of the beneficiary in certainty after the lapse of a given period is the interest of society in providing effective economic protection to the dependants of deceased persons. It would be possible to provide that no late applications may be made;

(1) after the personal representative has ceased to act as an executor or an administrator - when he has collected the assets of the estate and paid the debts,

(2) after the property has indefeasibly vested in interest in the beneficiary, where the will creates a trust,

(3) after the property has vested in possession in the beneficiary, where the will creates a trust,

(4) after the executor has actually distributed the property to the beneficiary.

The first time limit accords the maximum amount of protection to the beneficiary. The fourth time limit is the one which New Zealand has opted for and which the legislature of Alberta selected in 1919. It provides maximum protection to dependants and consequently detracts to the maximum extent from the interest of the beneficiary who wishes to know with certainty what he will receive under the deceased's will as soon as possible. The Law

Reform Commission of New South Wales in its Report on The Testator's Family Maintenance and Guardianship of Infants Act, 1916, Report No. 28 (1977) has advocated at p. 19 that,in regard to a late application,property held by a person no longer as personal representative but as trustee should still be available as long as the property has not become absolutely vested in interest in the beneficiary. However, where there is a subsisting order and it is established that the applicant for variation is experiencing hardship as a result of an exceptional change of circumstances since the granting of the order, the New South Wales Law Reform Commission at p. 61 recommends that the court be empowered to make provision out of all property held by the personal representative even as a trustee, except for property which has actually vested in possession in a beneficiary. Thus the New South Wales Law Reform Commission has adopted the second approach in regard to late applications. Property is unavailable if it has become indefeasibly vested in interest. In regard to an application for upward variation, that Commission has adopted the third approach. Property is unavailable only if it has become vested in possession.

A distinction may be drawn as the New South Wales Law Reform Commission has done between a late application and an application to vary upward an existing order. The basis for this difference is that the beneficiaries have been placed on notice by the initial order that their interest having been once encroached upon, may, because of the power of variation, be encroached upon further in the future. Except for this distinction, the consideration of late applications and of an application to vary upward an existing order present the same kind of conflict of interest problems between beneficiaries and dependants.

An argument in favour of making the time when the personal representative ceases to be a personal representative and becomes a trustee decisive is that if the testator has provided for a testamentary trust rather than an outright disposition of his estate, this should not fortuitously increase the protection which his dependants may enjoy. A counter argument to this is that a will establishing a testamentary trust which provides a surviving spouse with only a fixed income per year does not permit the dependant to guard against the impact of inflation. However, even accepting that there is an element of fortuitous protection depending upon whether the testator establishes a testamentary trust or provides for an outright disposition, we are inclined to overlook this fortuitous element in the interest of having a Family Relief Act which provides as much relief as is possible.

Another argument arises from the problem of determining when an executor ceases to be an executor and becomes a testamentary trustee. We believe that the determination of when this transition takes place would create a substantial amount of litigation. In Solomon v. Attenborough, [1912] 1 Ch. 451 (Ch.D.), the issue was whether a pawnbroker obtained good title when one executor, without the knowledge of the other executor, pledged articles of silver plate belonging to the estate of the testator and then used the money for his own purposes. Fletcher Moulton L.J. at p. 458 stated: "I perfectly agree with the learned judge that one can put no limit of time to the office of executor; nor do I think that an executor has ceased to be an executor because he has passed his accounts. Some claim might turn up and it would find him an executor - not re-create

him an executor." Nevertheless, he went on to hold that the plate was in the executor's hands as trustee and therefore the pawnbroker did not obtain title. The decision was upheld by the House of Lords, Attenborough v. Solomon, [1913] A.C. 76. The case, we believe, indicates the difficulty involved in determining when an executor ceases to be an executor and becomes a testamentary trustee. This is an issue which we think should be avoided in family relief applications.

We would not like to see family relief applications giving rise to the problem of determining whether property has or has not indefeasibly vested in interest in the beneficiary. The Law Reform Commission of New South Wales has admitted that the distinction raises fine points of law. It would undoubtedly give rise to a considerable amount of litigation. Subject to the uncertainties of litigation, the adoption of the distinction in connection with both late applications and applications to vary would mean that once a gift has vested indefeasibly in interest, even though possession is postponed, for example, during the lifetime of the surviving spouse, the beneficiary knows with certainty that either he or his estate will benefit. This certainty, in our opinion, is obtained only be introducing considerable complexity and only by substantially reducing the protection which the statute can provide to dependants of the testator.

We believe that the most appropriate solution to the problem of determining when any portion of an estate remains undistributed is the solution which was adopted in Alberta in 1919. If the property has not been transferred to the beneficiary or to another person as a trustee, we believe that the property in the hands of the personal representative either in that capacity or as a trustee should be available either to permit an upward variation in an existing order or at the discretion of the judge to satisfy a late application.

We appreciate that this solution to the problem may in some cases have an unfortunate effect. A beneficiary who might wish to leave his share of the estate in the hands of an executor or trustee for the benefit of all concerned may be reluctant to do so since the property would be placed in jeopardy under The Family Relief Act. This might have unfortunate consequences, particularly in cases in which the executor is empowered to carry on a family business or a farm. This approach could also have some unusual effects on the incidence or burden of family relief orders. The incidence of orders may depend upon whether the executor has actually distributed the property under the will, has transferred the property to another person as trustee or is holding the property as trustee himself. Only if the executor is still holding the property either as executor or as a trustee will the property be available to satisfy an upward variation of an existing order or to satisfy a late application. This approach might cause a testator to direct the executor to pay the net estate to a separate trustee after the estate has been administered in order to avoid the continued exposure of his estate to The Family Relief Act. We recognize that the approach which we propose does have certain problems but we do not believe that they are serious. We do, however, believe that in determining whether property is still liable to the Act, the judge should not be directed to consider whether or not the executor is holding the property as an executor or as a trustee.

Recommendation #22

That the proposed Act should provide that:

For the purpose of either, an application made after the lapse of six months from the grant of probate or administration, or an application for upward variation of an existing order, property held for beneficiaries by the personal representative of the deceased person shall be deemed to remain undistributed even if the personal representa-

tive has ceased to act as the personal representative in respect of that property and has become a trustee.

[s. 17(3)]

XI

CONTRACTING OUT OF THE ACT

Our Family Relief Act does not contain any provision in regard to contracting out of the statute. However, it has been consistently held by Alberta courts that a contract or agreement between husband and wife under which spouses give up rights under The Family Relief Act does not oust the court's jurisdiction. In Re Berube, [1973] 3 W.W.R. 180 (Alta. App. Div.), Cairns J.A. in regard to an agreement not to make a claim under The Family Relief Act at p. 182 stated: "We do not think that, irrespective of whether the agreement was made before or after the marriage, the jurisdiction of the Court is ousted...." In Re Edwards Estate (1961-2), 36 W.W.R. 605 (Alta. App. Div.), it was held that even a separation agreement approved by order of a court by which a spouse purported to surrender her rights under the Act does not oust the jurisdiction of the court. As a general rule, a person can waive benefits conferred by statute but this is not the case where the statute, in addition to protecting personal interests, also protects a public interest. The auxiliary public interest embodied in The Family Relief Act is to protect the public purse by preventing a deceased's dependants from becoming public charges.

In our Working Paper, we asked the question whether contracting out of the Act should be permitted, subject to safeguards. In response to this issue those who commented were almost equally divided between not allowing parties to a marriage to contract out and those in favour of contracting out, subject to appropriate safeguards.

In our Matrimonial Property Report, No. 18, the majority opinion was in favour of a deferred sharing regime but it was recommended that parties should be able to contract out, subject to safeguards. It appeared reasonable to the majority to permit contracting out as the matrimonial property regime was intended to provide a fair share; if the parties believe that they can more appropriately do this by contract, they should have the power to do so, subject to adequate safeguards. Support agreements do not, however, oust the jurisdiction of the courts to make support awards and we did not recommend a change in this in our Matrimonial Support Report, No. 27. We believe that prior to or during the subsistence of the marriage, parties should not have the power by contract to oust the jurisdiction of the court under The Family Relief Act. Its function is not to confer a fair share but to make adequate provision for proper maintenance. The Family Relief Act is the ultimate back-up to matrimonial support laws.

There are arguments to the contrary. Particularly in the case of a second marriage in which there are children of a first marriage, there is something to be said for parties being able to contract out of The Family Relief Act. A senior and highly respected member of the legal profession in a carefully considered submission on our Working Paper stated:

> In my view there should be provision for another type of contract, one or two I have seen in actual practice, and that is the case of a mutual contract made in contemplation of marriage of a middle-aged or elderly widow and widower both of whom have grown family and who are well off and neither of whom would be dependent on the other during the joint lives. In such cases such a couple might wish to have some assurance that, on the death of one of them, the other could not make an application and drain off a substantial part of the estate which, on the death of the other, would pass to the other's own family.

We consider this to be a very forceful consideration. However, we believe that considerable caution should be exercised before recommending a change which is inconsistent with all the case law which has developed in Alberta and in the Commonwealth. It would also be contrary to the Uniform Dependants' Relief Act which, in section 17, provides that "An agreement by or on behalf of a dependant that this Act does not apply or that any benefit or remedy provided by this Act is not to be available is invalid." Section 16 of the Prince Edward Island statute is identical. Subsection 15(2) of the Nova Scotia statute provides that "If a dependant has entered into any agreement with a testator in his lifetime the consideration for which is a promise by the dependant not to apply under this Act for relief from the provisions of the testator's will, such promise is not binding under this Act." The Succession Law Reform Act, 1977 of Ontario, which came into force on March 31, 1978, provides in subsection 70(4) that "An order under this section may be made notwithstanding any agreement or waiver to the contrary." This Act also states that an agreement between the deceased and a dependant, is a circumstance which the court shall consider upon hearing the application (s. 69(1)(a)(xiv)). This presumably comprehends any agreement waiving rights under the Act. We believe that this is a reasonable compromise. We would not wish to see a second spouse or any spouse, who thought he or she was well provided for at the time of the marriage, or who signed an agreement in order to avoid friction with the other spouse, find himself or herself in a state of penury on the death of the other spouse and absolutely barred from applying. However, where there is an agreement, it should be taken into consideration in determining the amount of any award.

Although we have concluded that it would be undesirable to confer a power to contract out of The Family Relief Act even subject to safeguards, we do not think that the proposed Act should include section 17 of the Uniform Act which provides that an agreement not to apply is invalid. It might be argued that if the agreement is invalid, the court should not even consider the agreement or any consideration received for it in making an award. We believe the agreement should be considered in determining the amount, if any, which should be awarded to the dependant. We have previously recommended (Recommendation #13) that any agreement between the deceased and the dependant should be a factor to be considered upon the hearing of an application. We now recommend that the proposed Act should set out the present law that an order may be made notwithstanding any agreement or waiver in regard to The Family Relief Act.

Recommendation #23

That the proposed Act should provide that:

An order may be made notwithstanding any agreement or waiver in regard to this Act.

[s. 3(6)]

XII

CONTRACTS TO LEAVE PROPERTY BY WILL

Section 13 of The Family Relief Act provides that where a testator "bona fide and for valuable consideration" entered into a contract to leave property by will and makes a will in accordance with the contract, the property is not subject to an order except to the extent that the value of the property left by will exceeds the consideration received by the testator. The origin of this provision is section 17 of the Model Testators Family Maintenance Act adopted by the Conference of Commissioners on the Uniformity of Legislation in 1945. It appears to be a legislative amendment of Dillon v. The Public Trustee, [1941] A.C. 294 (P.C.). The Report of the Manitoba Commissioners on Protection of Family Maintenance had drawn attention to this case (1944 Proceedings, 447 at p. 450). The Privy Council in the Dillon case in effect characterized the rights of a promisee under a contract to devise or bequeath property as those of a beneficiary and not those of a creditor. The promisor was considered to have fulfilled his contract once he had complied with the formality of naming the promisee as beneficiary in his will in regard to the property which was the subject matter of the contract. According to the Dillon case, the promisee was subject to the same disabilities as an ordinary beneficiary in the sense that the property left by will in accordance with the contract might be utilized to satisfy an order for dependants. This does not seem fair to the promisee. The promisee expected to receive the property and not merely to be named as a beneficiary and then as a beneficiary to have the devise or bequest reduced to provide maintenance for the promisor's dependants.

Section 13 of The Family Relief Act could be described as treating the promisee as a creditor to the extent to which he had provided valuable consideration, and as merely a beneficiary to the extent to which the property left by will exceeded the consideration provided by the promisee. The unfairness of the Dillon case was modified while, at the same time, a testator was prevented from denuding his estate of assets and thus preventing an effective order from being made through making a contract to leave property by will.

Section 13 of The Family Relief Act and section 15 of the Uniform Act adopted in 1974 do not, however, cover the situation in which the testator makes a contract to leave property by will and then breaches his contract by failing to make a will in accordance with the agreement. According to the Dillon case, this would not create a problem for dependant relief legislation since the measure of damages is not the value of the property which the testator agreed to leave by will but what the promisee would have received had he been named as a beneficiary, and since the devise or bequest would be subject to a reduction by an order under the dependant relief legislation the measure of damages would reflect this. Viscount Simon, at p. 305, stated that such legislation "affects the unqualified operation of a contract to make a will in a particular form, whether the contract is fulfilled or whether it is broken." Thus for effective dependant relief legislation it is not essential, according to the Dillon case, to consider the possibility of the testator failing to make a will in compliance with the contract.

The situation may, however, have been completely changed because thirty years later the Privy Council in Schaefer v. Schuhmann, [1972] A.C. 572, refused to follow its own opinion in the Dillon case. The Privy Council in the Schaefer case has adopted the creditor theory of the rights of the promisee and has rejected the beneficiary theory. It held, Lord Simon of Glaisdale dissenting, that the court had no power to make any provision out of property which the testator had agreed to devise to the promisee. It would appear to follow that if the testator had breached his contract by failing to leave the property to the promisee, the measure of damages would not be reduced because of dependant relief legislation but would be the whole value of the property and would be payable to the promisee in priority to the dependants. If the Schaefer case were to be followed in Alberta, it would appear that the anomalous result would follow that the promisee might get the full value of the property if the testator breached his contract, while, if the testator fulfilled his contract, the promisee might only receive the value of the consideration which he has given by virtue of section 13 of The Family Relief Act. The difference between the value of the property which the testator had left by his will and the consideration provided by the promisee might be used to make a maintenance award under the Act.

The Dillon case was vigorously attacked by D.M. Gordon in (1941), 19 Can. Bar Rev. 603, and supported at pp. 756-7 in the same volume by an unnamed correspondent. Mr. Justice Egbert in In re Willan Estate (1951-52) 4 W.W.R. (N.S.) 114 (Alta. S.C.) at p. 134 in referring to the Dillon case stated that the Privy Council had held that

"the court might make an order for the proper maintenance and support of the widow, even though such order would have the effect of causing a breach of this prior valid and otherwise enforceable agreement" and classified this as a "somewhat startling finding". This seems to indicate a disapproval of the beneficiary theory of the rights of the promisee to a contract to leave property by will of the Dillon case and a preference for the creditor theory subsequently adopted in the Schaefer case. In Olin v. Perrin, [1946] 2 D.L.R. 461 (Ont. C.A.), Laidlaw J.A. refused to follow the Dillon case and at p. 471 stated:

> He was bound to dispose of those assets in accordance with his binding promise....In consequence there are no assets of the estate out of which the Court can order an allowance for maintenance to the applicant.

However, Gillanders J.A. approved of the Dillon case and was prepared to follow it. The third judge did not express a view about the Dillon case and the Court declined to make an award, but on the basis that the applicant was not entitled to an award and not on the basis that there were no assets subject to the award.

In Re Johnson Estate (1955-56), 17 W.W.R. 88 (Sask. Q.B.),a widow brought an application under The Dependants' Relief Act. The case involved a contract to leave property by will but the judge did not consider Dillon v. The Public Trustee. The testator in the Johnson case had made an agreement with his housekeeper that he would make a will giving her the house and contents. He complied with this agreement and also made the housekeeper the residuary beneficiary but the debts of the estate were such that there was no residue. Mr. Justice Thomson dismissed the widow's claim and at p. 91 stated:

> If after making the agreement to leave her the said property the testator failed to keep his promise or agreement, Mrs. Lynn would clearly have had a good cause of action against his estate for the value of her services... I am satisfied that the claim which Mrs. Lynn could have asserted would have eaten up the estate and there would have been nothing available for the applicant under The Dependants' Relief Act.

It is uncertain whether Canadian courts will accept the beneficiary theory or the creditor theory. It therefore appears necessary to make recommendations which will solve the problems no matter which theory in the end prevails. If the beneficiary theory of the Dillon case prevails, the protection accorded by The Family Relief Act is not threatened whether the deceased breached or performed his contract. If the creditor theory of the Schaefer case prevails and there is a breach of contract, the promisee will be able to recover as damages the value of the property which the testator agreed to leave by will. The result may be that there is no property out of which an order for maintenance may be made.

Section 13 of The Family Relief Act was designed to maintain a proper balance between the interests of the promisee and of the dependants on the assumption that the beneficiary theory of the Dillon case would be adopted. We believe that the provision can be improved. We believe that a contract to leave property by will should be respected to the maximum extent, consistent with proper maintenance being provided for dependants. As section 13 now reads, an order may be made in an amount by which the value of the property which the testator agreed to and did leave by will, exceeds the value of the consideration which the deceased actually received. This

is so even though there are sufficient other assets in the estate out of which an order might be made. We do not suggest that a judge ordinarily would make an order respecting property which the testator contracted to leave by will if there were sufficient other property out of which to make the order. The trial judge in the Schaefer case, however, did make an order which was to be satisfied out of the property which the testator had agreed to leave by will even though there were other assets out of which the order might have been paid (Re Seery (1969), 90 W.N. (Pt. 1) (N.S.W.) 400 (S.C. in Eq.)). We believe it should be explicitly stated that, where a testator made a contract to leave property by will, such property should not be subject to an order if there are sufficient assets in the estate to provide for proper maintenance for a dependant after the transfer of the property which the deceased agreed to leave by will. We think that The Family Relief Act should not interfere with contracts unless the maintenance of dependants requires interference, and then only to a limited extent.

Where there are insufficient assets other than the property that the testator agreed to leave by will, we think that the maximum order should be limited to the amount by which the value of the property exceeds the consideration received by the testator in money or money's worth. There are difficult valuation problems involved in this apparently simple proposition.

The Law Reform Commission of New South Wales has considered the problem presented by contracts to leave property by will in Report 28, (at pages 43-46). The solution which

the Commission has proposed involves determining whether the value of the property which the deceased has agreed to leave by will exceeds the value of the consideration received by the deceased person, both valuations being made at the time of the agreement. To the extent that the value of the property exceeds the value of the consideration received by the deceased, the Court is empowered to make an order. The maximum order is equal to that excess value multiplied by the ratio which the value of the property that the deceased has agreed to leave by will at the date of the order bears to the value of the same property at the date of the agreement.

We were initially very attracted to this solution to the problem of reconciling the interest in protecting contractual rights and the interest in providing a deceased's dependants with proper maintenance. We are now inclined to believe that the provision endeavours to achieve an accuracy which is generally unattainable. The simplest example of a contract to leave property by will is one in which the promisor agrees to leave specific property by will and the consideration received by the promisor is money. For example, let us assume that A agrees with B that A will devise Blackacre to B or B's estate in return for B paying to A $10,000 at the time of the agreement. The New South Wales approach would appear to be to compare the value of Blackacre at the date of the agreement with the $10,000 received by A. If they are equal then no matter how much Blackacre increased in value between the date of the agreement and the time of A's death, no amount would be available out of which an order might be made in favour of A's dependants. However, B will obviously not pay A the fair market value of Blackacre because B will not receive Blackacre until A dies. The greater the life expectancy of A and the greater the rate of interest which should be used to dis-

count the value of Blackacre from the expected date of A's death back to the date of the agreement, the smaller will be the relationship between the consideration paid by B to A for Blackacre as compared with the value of Blackacre at the time of the agreement. Unless one takes into account the life expectancy of A and the rate of interest which should be used to discount the value of Blackacre from the expected date of A's death back to the date of the agreement, the proposed approach does not appear to be valid.

Even in the simplest example of a contract to leave property by will, fairness to the promisee seems to require consideration of the life expectancy of the promisor and the appropriate rate of interest to use in order to determine the present value of the specific property to B at the date of the agreement. These problems are compounded when the promisor agrees to leave all of the property which he has when he dies to the promisee. The value of the property subject to this agreement is indeterminate on the date of the agreement and only becomes quantified at the date of the promisor's death. Where the consideration by the promisee is not the payment of a sum of money but is a course of conduct, for instance, the undertaking of housekeeping or nursing services for the lifetime of the promisor at no wages or at a wage below the fair market value of the services, the value of the consideration received by the promisor at the date of the agreement is not easy to determine. It will depend upon the life expectancy of the promisor. A continuing course of conduct of this kind, we believe, is the more usual type of consideration given by the promisee to the promisor under agreements to leave property by will.

If A makes an agreement to devise Blackacre, valued at $50,000 to B in consideration of a promisee by B to care for A for life without other remuneration, it would appear that it is the value of the promise by B which should be valued at the date of the agreement according to the approach of the New South Wales Commission. If A had a life expectancy of 15 years, the value to A of B's promise to care for A for A's lifetime without remuneration might amount to $50,000. However, if A dies in a car accident the day after making the agreement, we are not prepared to say that Blackacre should be totally exempt from an order under The Family Relief Act where the testator has needy dependants and Blackacre is the only significant asset in his estate. In spite of the fact that it may have been a fair bargain at the date of the agreement, in view of the life expectancy of A, we are not certain that we would wish to see the whole of the unexpected windfall under the contract accrue to the benefit of B, unless there were other assets in A's estate out of which provision for A's dependants might be made.

We believe that the New South Wales approach, though attractive, would be difficult or impossible to apply in some circumstances. In addition, we believe that it may not effect the proper balancing of the interest in upholding contracts and the interest in providing adequate maintenance for dependants. We have reluctantly concluded that there is no simple formula that is capable of producing the appropriate result in all the variety of circumstances in which a contract to leave property by will may be made. We have concluded that a good deal of impressionistic assessment will be necessary in order to ascertain what amount out of the property which the deceased agreed to leave by will should go to the promisee and what amount should be subject to an order under the statute in favour

of the deceased's dependants. In ascertaining the amount which is not to be subject to an order, we believe that the value of both the property which the promisor has agreed to leave by will and the consideration received by the promisor should be assessed at both the date of the agreement and at the date of the promisor's death. Other matters which we think the judge should consider are as follows: the reasonable expectations of the parties as to the life expectancy of the deceased at the date of the contract; if the property was not ascertained at the date of the contract, the reasonable expectations of the parties as to its likely nature and extent; if the consideration was a promise, the reasonable expectations of the parties as to that which would be delivered under the promise and,finally,the amount by which the net estate is insufficient to provide proper maintenance and support for the dependant.

We also think it is necessary that our provision should cover situations in which the deceased has not simply made a contract to leave property by will. It should, for example, cope with the situation in which a person agrees with his spouse to make a joint or mutual will leaving all the property which they possess at the time of their deaths to the children of the marriage and the spouses agree not to revoke the will. If the first spouse dies having complied with the agreement and the surviving spouse remarries and makes a new will leaving all his property to his second spouse, the children of the first marriage could bring an action against the personal representative under the new will and require him to hold the property on an implied or constructive trust for themselves. In this case, it might be necessary for the implied or constructive trust to be encroached upon in order to make property available for the proper maintenance of the second spouse under The Family Relief Act.

There is one other problem which we should mention. Section 16 of the Uniform Act which is section 13 of the Alberta Act has been criticized by the Law Commission (England) in its Report No. 61. The Commission at p. 59 states:

> The Canadian draft provision applies where the deceased has entered into the contract "bona fide". The implication appears to be that if he entered into the contract mala fide the whole of the property devised or bequeathed should be available to satisfy an order under the draft Act. The precise distinction which is intended to be drawn by the use of the expression "bona fide" might well be the subject of argument. Our own view is that the important distinction is between cases where the deceased has entered into a binding contract and cases where he has not.

We agree with the criticism of the Law Commission and believe that not only "bona fide" but also and "for valuable consideration" should be deleted from the provision which takes the place of the present section 13.

Recommendation #24

That the proposed Act should provide that:

(1) This section applies if

(a) the deceased made a contract to leave property by will, and

(b) there would be insufficient assets in the net estate to provide proper maintenance and support for a dependant after the transfer of the property which the deceased agreed to leave by will

but otherwise the rights of the other party to such a contract shall not be affected by an order under this Act.

(2) The judge may order that the rights of the other party to the contract

(a) to receive the property, or

(b) to recover damages for the breach of contract

shall be subject to an order made under section 3 to the extent determined by the judge under subsection (3) of this section.

(3) In determining the extent to which the rights of the other party to the contract shall be made subject to an order under section 3, the judge

(a) shall have regard to

(i) the value of the property and the value of the consideration at the date of the contract and at the date of the hearing,

(ii) the reasonable expectations of the parties as to the life expectancy of the deceased at the date of the contract,

(iii) if the property was not ascertained at the date of the contract, the reasonable expectations of the parties as to its likely nature and extent,

(iv) if the consideration was a promise, the reasonable expectations of the parties as to that which would be delivered under the promise, and

(v) the amount by which the net estate is insufficient to provide proper maintenance and support for the dependant, and

(b) shall ensure that the order will not deprive the other party to the contract of the right to receive property or damages in an amount which is not less than the value of the consideration received by the deceased in money or money's worth.

(4) For the purpose of this section

(a) a contract to leave property by will shall include a contract to make a will or not to revoke a will and

(b) "the rights of the other party to the contract" shall include the right of any other person claiming relief through an implied or constructive trust arising out of the contract or its breach.

[s. 21(1) to (4)]

XIII

PROPERTY OUT OF WHICH AN ORDER FOR FAMILY RELIEF MAY BE GRANTED

The present Family Relief Act, in section 4, provides that a judge may order that proper maintenance and support as he deems adequate for a dependant be made out of the estate of the deceased. In spite of the wide definition given to "testator" and "will" in section 2, it is generally accepted that only the net estate in the hands of the personal representative is presently available to satisfy an order under The Family Relief Act.

A very serious defect in the legislation is the ease with which the applicability of the Act may be avoided. Lifetime gifts and "will substitutes" may be utilized so that there is little or no estate in the hands of the personal representative. In such cases little or no relief may currently be granted under the Act, and we think that the law should be amended to provide effective protection against this means of avoidance.

The defect in the legislation has been recognized from the time of its first enactment. Mr. J. Allan, a member of the House of Representatives of New Zealand, on July 12th, 1900, speaking on the second reading of the Testator's Family Maintenance Bill asked: "whether the honourable member as a lawyer, could not see his way to drive a coach and four horses through the Bill if it became law.... It was quite possible for him before he died, to transfer the whole of his property to certain sons or daughters, or to trustees for certain persons and then leave no provision for his wife." (N.Z. Parliamentary Debates (1900), vol. 3, p. 507) In a letter dated April 14th, 1953, Sir Clifton Webb, Minister of Justice for New Zealand, indicated that he was not indifferent to the problem of avoidance but stated that:

> The only reason why nothing has been done to amend the legislation is that we have not succeeded in devising a practical method of avoiding dispositions made to defeat claims without causing as many anomalies and injustices as are cured.
>
> (Letter quoted by W.D. Macdonald in his book Fraud On The Widow's Share (1960) at p. 297)

A small step towards more effective protection for dependants was taken by New Zealand in 1955. The Family Protection Act, 1955, No. 88 in subsection 2(5) provided that:

> For the purposes of this Act the estate of any deceased person shall be deemed to include all property which is the subject of any donatio mortis causa made by the deceased.

In Canada, the Conference of Commissioners on Uniformity of Legislation in Canada first became concerned with the opportunity for the evasion of the policy of the statute in 1964. At the 1964 Conference, it was agreed that the Commissioners should consider the cases arising in their own jurisdictions (1964 Proceedings, p. 24) affecting the Uniform Acts which were reported upon by the late Dean Horace E. Read. One of these cases was Dower v. The Public Trustee (1962), 38 W.W.R. 129 (Alta. S.C.) (1964 Proceedings, Appendix K at pp. 86-7). This case dramatically illustrated the weakness of the legislation. A testator during several years preceding his death denuded his estate through lifetime gifts aggregating about one million dollars. The gifts were made to the children of his first marriage. He was thus able to defeat the claims of his second wife under the statute. Between 1965 and 1973, the commissioners evolved two anti-avoidance provisions. Uniform Section 20 was largely the work of Mr. Allan Leal and was based upon the amendments to The Decedent Estate Laws of New York 1965, c. 665. These amendments dealt with the similar problem of protecting the surviving spouse's elective share. Uniform Section 21 followed Professor Bowker's recommendation, contained in a report to the Institute which was subsequently made available to the Commissioners on the Uniformity of Legislation in Canada. This recommendation was that the appropriate way in which to deal with the evasion of the policy of the Act is to provide that if the estate were insufficient to provide maintenance, the court should be empowered to require the transferee of certain property to contribute to the maintenance of dependants. Professor Bowker indicated that his recommendation was based on the draft Act proposed by W.D. Macdonald in his book Fraud on the Widow's Share.

The Dependants' Relief Act as adopted at the 1974 meeting of The Uniform Law Conference of Canada, as it is now called, has two anti-avoidance provisions formulated on different premises (1973 Proceedings, Appendix K, pp. 253-62). Although the meaning of section 20 is ambiguous, it would appear to be intended to make the value of certain transactions part of the estate and also to make them subject to an order under the Act. The mechanism for doing this is not clear but it appears that it is intended to operate whether or not there are sufficient assets in the deceased's actual net estate out of which an order may be granted. Section 21 empowers the court to impose upon the transferee of an unreasonably large disposition made within one year of death, a personal obligation to provide support for dependants where there are insufficient assets in the net estate out of which to provide adequate maintenance.

In one sense, there is a similarity between sections 20 and 21 of the Uniform Dependants' Relief Act. Neither requires proof that the deceased intended to evade the policy of the Act. We believe that it would be a mistake to make the operation of the anti-avoidance provision conditional upon proof of the deceased's intention to avoid the Act. There is the serious problem that the intention does not become relevant to an application under the Act until after the person is dead. To base the operation of the anti-avoidance provision of the Act on the intention of a person who is dead appears artificial and impractical. We believe that the intention of a deceased person even if ascertainable is irrelevant. The simple practical question, in our view, is whether there are or are not sufficient assets in the actual net estate of the deceased to provide proper maintenance for dependants. If assets are insufficient, the anti-avoidance provision of the Act should become operative.

We agree with the Law Commission (England) in its Report No. 61 at p. 49 when it states: "it is a matter of overriding importance to ensure that family provision laws are effective." However, we disagree with the Law Commission in believing that the Act will be effective if the anti-avoidance provisions are predicated upon the intention to defeat an application under the Act. The Law Reform Commission of New South Wales in its Report No. 28 has devised a technique to prevent the evasion of the purpose of the Act through the imposition of a statutory trust in regard to certain property. However, gifts made within three years of death are only made subject to the statutory trust if they were made with the intention of defeating an application under the Act, wholly or in part.

We prefer the non-subjective approach that is embodied in sections 20 and 21 of the Uniform Dependants' Relief Act. The Uniform sections 20 and 21 were adopted by Prince Edward Island in 1974 and are sections 19 and 20 of the Dependants of a Deceased Person Relief Act, S.P.E.I. 1974 (2nd), c. 47. Uniform section 20 in its 1967 form was adopted by the Northwest Territories, O.N.W.T. 1971 (2nd), c. 5, s. 20 and Uniform section 21 was also adopted but in a very abbreviated form. Ontario in The Succession Law Reform Act, 1977, has adopted an improved version of Uniform section 20. Section 79 provides that "the capital value of the following transactions...shall be included as testamentary dispositions... and shall be deemed to be part of his net estate for purposes of ascertaining the value of his estate, and being available to be charged for payment by an order...." This removes the ambiguity in Uniform section 20 by clearly stipulating that

the capital value is included both for the purpose of determining the value of the estate and also for the purpose of being subject to an order under the Act. Section 79 of the Ontario Act also represents an improvement over Uniform section 20 in that paragraph (g) also includes the designation of a beneficiary of a death benefit under a pension fund and an annuity, and specifically includes a retirement savings plan and a home ownership savings plan as defined in the Income Tax Act (Canada) (section 54 of the Ontario Act). Section 21 of the Uniform Act has not been adopted by Ontario. (Since sections 20 and 21 of the Uniform Act and section 79 of the Ontario Act are frequently mentioned, they are for convenience reproduced in Appendix D to this Report.)

We believe that something comparable to Section 21 is essential. Section 79 of the Ontario Act and section 20 of the Uniform Act do not prevent a deceased from denuding his estate by inter vivos gifts. We do not over emphasize this deficiency. A significant deterrent to reducing an estate by outright gifts is the uncertainty of life's duration. A person will be very reluctant to reduce his estate without limit because he himself may become destitute. However, a person who realizes that his death is both imminent and certain will not be subject to any restraint in making outright gifts because the fear of destitution will be non-existent, and the Dower case shows that it is not always a deterrent.

Section 79 of the Ontario Act and section 20 of the Uniform Act do not bring into the estate an irrevocable inter vivos trust under which the settlor does not have the power to consume or dispose of the principal. A wealthy person or a person who was only moderately wealthy but whose

life expectancy was short could transfer his whole estate to a trustee and reserve to himself only a life estate. As he did not reserve to himself the power to revoke the disposition or to encroach upon capital, such a disposition would not be caught by clause 79(1)(e) of the Ontario Act which is clause 20(1)(e) of the Uniform Act. We think that a remedy should be provided. If a person reserves an interest in income or the possession of property, in appropriate circumstances an order should be capable of being made.

An example is Collier v. Yonkers (1967), 61 W.W.R. 761 (Alta. App. Div.). There, a wife transferred $100,000 on trust to pay the income to herself for life with the remainder to her children and grandchildren. She was survived by her husband who applied under The Family Relief Act. He argued that the trust fund formed part of his wife's estate and that provision for his proper maintenance and support could be made out of it. Both the trial judge and the Appellate Division held that the trust fund did not form part of the wife's estate and was therefore not subject to an order under The Family Relief Act. This case prompted Mr. L.D. Hyndman, M.L.A., to suggest to the then Attorney-General, Mr. E.H. Gerhart, the need to reform The Family Relief Act. We agree with this position. We believe that an irrevocable trust should be subject to an order where the settlor has reserved the income of the trust for his life and there are insufficient assets in his net estate out of which to make an order for the proper maintenance of his dependants.

We are also of the view that the approach of Uniform section 21 is preferable to that of section 20. We believe

that the anti-avoidance provision should only become operative when there are insufficient assets in the estate out of which an order providing proper maintenance may be made. We believe that it is an unnecessary complication to deem what is not part of the estate to be part of the net estate in all cases even though there is a sufficient net estate in the hands of the personal representative out of which an order for proper maintenance may be made. We believe the approach of Uniform section 21 is less likely to create problems in the vast number of estates where there has been no attempt to evade the policy of the Act.

We also believe that where the net estate is insufficient to provide a dependant with proper maintenance, the simpler solution is to empower the judge to impose a personal obligation, with an appropriate upper limitation, on the transferee of certain dispositions to contribute to the support of a dependant. This approach appears necessary if protection against a person reducing his estate is to extend to outright gifts. The interest in protecting dependants against outright gifts or transfers for less than full consideration, which might have the effect of depriving them of proper maintenance after the deceased's death, must be balanced against other interests. There is the interest in permitting as wide a scope as possible for a person during his lifetime to do as he wishes with his property. There is also the important social interest in maintaining maximum security of transaction and security of title in order that daily trade and commerce is not impeded. We believe that the right to claim contribution from the transferee should arise only if the net estate is insufficient to permit an order providing for proper maintenance for dependants to be made. The maximum amount which a transferee should be required to contribute to the support of the deceased trans-

feror's dependant is the difference between the value of the property received by the transferee and the consideration paid by the transferee. The imposition of this personal obligation on the transferee would not place in jeopardy the title of the transferee to the property or the power of the transferee to transfer it to a third party. It would not therefore interfere with the social interest in security of title.

Our recommendation is that where there are insufficient assets in the net estate out of which to provide proper maintenance, a judge should be empowered to require the person who benefitted or any person who holds property on his behalf to contribute to the support of the deceased dependants in the following situations in which the deceased did not receive full valuable consideration:

(1) Where the deceased made a transfer under which he retained the possession or enjoyment of or the right to income from the property;

(2) Where the deceased made a transfer under which he retained a power to revoke the transfer or a power to consume, to encroach upon or to dispose of the property;

(3) Where the deceased made a transfer so that property is held by the deceased and another with right of survivorship;

(4) Where the deceased made a designation of a beneficiary to receive a death or survivorship benefit in regard to an annuity, pension plan, retirement savings plan or any other similar plan intended to provide income for retirement;

(5) Where the deceased made a designation of a beneficiary to receive any amount payable under a policy of insurance which was effected on the life of the deceased and owned by him;

(6) Where the deceased made an unreasonably large transfer of property within three years of the deceased's death, not including a transfer where the parties are dealing at arm's length.

We believe that the obligation which a judge may impose upon the person who has benefitted by the enumerated acts of the deceased should not exceed the value of the benefit received less the value of the consideration given by the person who has benefitted. We also believe that the dependant claiming under this section should have the burden of establishing that the property was provided by the deceased. If real property is held in joint tenancy, we believe that for the purpose of the computation of the benefit received by the survivor or survivors, for which he or they are accountable under this Act, the value of the benefit should on the deceased's death be taken to be equal to the ratio of contribution of the deceased to the contribution of all the parties multiplied by the fair market value of the property at the time of the deceased's death.

In regard to one of the six acts in which the deceased might engage and which would result in the court being empowered to make an order against the person benefitted, we have suggested a time limit of three years. We are not generally in favour of a specific time limit in this aspect of family relief because the time limit is arbitrary and because of the discontinuity which the time limit produces. If a deceased disposes of most of his estate through a lifetime gift and lives for two years and 364 days, a dependant will be able to seek relief from the person benefitted. If the deceased lives for an additional day after disposing of his estate through a lifetime gift, a dependant will have no remedy. It is quite unlike a statute of limitation because

under a statute of limitation, the bringing of the action within the limitation period is within the control of the plaintiff. A time limit in this context, on the other hand, is dependent solely upon the fortuitous timing of the deceased's death measured from the making of the unreasonably large transfer of property.

We have, however, reluctantly concluded that it is necessary for there to be a time limit. We believe that a person who has received a gift of property or a transfer of property for less than full consideration should know with certainty that he will actually be able to enjoy the full benefit conferred upon him after the lapse of a certain period of time. With the passage of time in regard to an outright gift, there is a reliance interest in the transferee which should be recognized and protected by a cut-off period. The time period of three years which we have selected is somewhat arbitrary. It is the time period suggested by W.D. Macdonald in his book Fraud on the Widow's Share. He selected three years because in his study of all the cases in which the date of transfer and the date of death could be determined, 67 per cent of the transfers to defeat the widow's elective share in the United States occurred within three years of death (Macdonald, p. 153). Many of these transfers were not outright transfers in which the deceased retained no interest. We thus believe that a three year time period with regard to unreasonably large outright transfers in which the deceased retained no interest should catch the great bulk of outright transfers to defeat an application under the Act.

We do not believe that there should be any time limit in regard to the first five of the six types of transfers or designations. The first five are essentially "will

substitutes" in which the deceased has retained income or possession, the power to revoke or encroach, the right to sever the joint tenancy or the right to designate a beneficiary of life insurance or of a death benefit or survivorship benefit. In these cases there should be little or no reliance interest in the person benefitted which should warrant protection by providing a cut-off date.

We have recommended that outright transfers made within three years of the deceased's death should give rise to the possibility that the person benefitted should have to contribute to the support of the dependants of the transferor only if the transfer was "unreasonably large." We concede that what constitutes an unreasonably large transfer is not without its definitional problems. We have adopted the criteria in the Uniform subsection 21(3) to assist the court in making this determination. The criteria in Uniform subsection 21(3) are basically those which W.D. Macdonald sets out in his Model Act, section 7 (Macdonald, p. 312). We also believe that the value of the order made against the person who has benefitted should be limited to the amount by which the judge considers the transfer to have been unreasonably large.

We do not wish to see transfers of property which occur between persons dealing at arms length impugned simply because one party obtained a better bargain. Thus we believe that an unreasonably large transfer of property within three years of death should not include a transfer where the parties bargain at arm's length.

We are also of the opinion that, where it is established to the satisfaction of the judge that more than one person benefitted from one of the six enumerated acts, the burden

should be borne by those benefitted in proportion to the benefit which they have received. However, we believe that the judge should have some discretion about the burden and should take into account the injurious effect of an order to make contribution in the light of circumstances occurring between the date of the transfer and the date when the transferee received notice of an application under the Act.

We recognize that life insurance has many business purposes. One of these business purposes is to fund buy-sell agreements between partners of unincorporated businesses or shareholders in a private company. In order to protect such agreements funded by insurance and other business uses of insurance, we believe that an amount payable under a policy of insurance should not be subject to an order under this section where such amount is payable to a third party pursuant to a bona fide contract.

We are of the view that there should be a special limitation period for the commencement of an application under this section. The usual limitation provision of six months from the grant of probate or administration would not be fair in all cases. If a person held all his property in joint tenancy, or if he had given all his property away before he died, no grant of probate or administration would ever be made. In addition, even though there are assets in the estate, an application for a grant of probate or administration may not be made for many years after the deceased's death. Persons who have benefitted by acts of the deceased enumerated in the recommendation are entitled to be able to rely on these benefits after the lapse of some period of time. We believe that an application for an order under this section must be made within six months from the grant of probate or administration and in any event not later than two years from the death of the deceased.

The purpose of this recommendation is to prevent the evasion of the policy of this Act. It could therefore be argued that it would be legitimate for the section to apply to a transferee in respect of transactions effected before our proposed Act is proclaimed as long as the deceased died after the date of proclamation. We think, however, that the statute should not take away vested property rights and that it should therefore only apply prospectively.

Recommendation #25

That the proposed Act should provide that:

(1) If an application is made for an order under section 3 of this Act, the judge may make an order under subsection (2) of this section where:

(a) there are insufficient assets in the net estate of the deceased out of which to provide proper maintenance and support for a dependant, and

(b) the deceased, without receiving full valuable consideration in money or money's worth, has done any of the following:

(i) made a transfer under which the deceased retained at the time of his death the possession or enjoyment of, or the right to income from, the property or substituted property;

(ii) made a transfer under which the deceased retained at the time of his death a power, either alone or in conjunction with any other person, to revoke the transfer or to consume, to encroach upon or to dispose of the property or substituted property;

(iii) made a transfer so that any property, including money on deposit with a bank or other institution receiving deposits, or any other chose in action, is held jointly at the time of the deceased's death by the deceased and another or others with the right of survivorship;

(iv) made a designation of a beneficiary to receive a death or survivorship benefit in regard to an annuity, pension plan, retirement savings plan or any other similar plan intended to provide income for retirement;

(v) made a designation of a beneficiary to receive any amount payable under a policy of insurance which was effected on the life of the deceased and owned by him;

(vi) made an unreasonably large transfer of property within three years of his death, not including a transfer where the parties are dealing at arm's length,which is not included within the above clauses (i) to (v).

(2) The judge may order, in regard to any property affected by the acts of the deceased set out in clause (1)(b), that the person who benefitted or any person who holds property on behalf of the person benefitted, shall pay to the estate of the deceased or directly to the dependant, as the judge may direct, such amount as the judge considers adequate for the proper maintenance and support of a dependant.

(3) The value of the order for support made under subsection (2) shall not exceed the value of the benefit received by the person affected by the order, less the value of the consideration in money or money's worth given by that person.

(4) Any person seeking to have the judge exercise the powers granted by subsection (2), with regard to any property,shall have the burden of establishing that the property, or any part of it, was provided by the deceased.

(5) Where real property is held in joint tenancy, the benefit of the survivor or survivors on the death of the deceased is the ratio of the contribution of the deceased to the contribution of all the parties multiplied by the fair market value of the property at the time of the deceased's death.

(6) An amount payable under a policy of insurance shall not be subject to an order under this section where such amount is payable to a third party pursuant to a bona fide contract with the deceased.

(7) In determining whether a transfer of property is unreasonably large under clause (1)(b)(vi), the judge shall consider:

(a) the ratio of the value of the property transferred to the value of the property comprising the net estate of the deceased at the time of his death;

(b) the aggregate value of any property disposed of under prior or simultaneous transfers and for this purpose the judge shall consider all transfers drawn to his attention whether made prior or subsequent to three years preceding the death of the deceased;

(c) any moral or legal obligation of the deceased to make the transfer;

(d) the amount, in money or money's worth, of any consideration paid by the person to whom the property was disposed;

(e) any other circumstances that the judge considers relevant.

(8) The amount which a judge may under subsection (2) order to be paid by a person who has received an unreasonably large transfer of property under clause (1)(b)(vi) shall not exceed the amount by which the judge considers the transfer to have been unreasonably large.

(9) The burden of all orders made under subsection (2), unless the judge otherwise directs, shall be shared by the persons benefitted on a pro rata basis as determined by the judge.

(10) In deciding whether to give a direction under subsection (9), the judge shall consider the injurious effect of an order to pay made under subsection (2) on a person to whom property was transferred in view of any circumstances occurring between the date of the transfer of the property and the date on which the transferee received notice of the application under this Act.

(11) The judge may make a suspensory order directing the person who benefitted or any person who holds property on behalf of the person benefitted not to transfer any property affected by the acts of the deceased set out in clause (1)(b) where, in the opinion of the judge, there may be insufficient assets in the net estate of the deceased out of which to provide proper maintenance and support for a dependant to the end that an application may be made at a subsequent date for an order making specific provision for maintenance and support.

(12) This section does not prohibit any corporation or person from paying or transferring any funds or property to any person otherwise entitled unless the corporation or person has been personally served with a certified copy of a suspensory order enjoining such payment or transfer.

(13) Personal service upon the corporation or person holding any funds or property of a certified copy of a suspensory order shall be a defence to any action or proceeding brought against the corporation or person with respect to the fund or property during the period such order is in force.

(14) This section does not affect the rights of creditors of the deceased in any property with respect to which a creditor has rights.

(15) An application for an order under this section must be made within six months from the grant of probate or of administration and in any event not later than two years from the death of the deceased.

(16) This section does not apply to any transfer, transaction or designation made before the coming into force of this Act.

XIV
NOTIFICATION OF DEPENDANTS OF THEIR RIGHT TO APPLY UNDER THE ACT

We regard the function of advising dependants of their right to apply under The Family Relief Act as a matter of crucial importance. Laws intended to provide protection for persons are useless if these laws are not known by or communicated to the persons who should benefit. Laws must not be merely legislative window dressing. Alberta can take pride in the fact that it has from a very early date provided a good procedural device for informing persons whom this legislation was designed to protect.

The Married Women's Relief Act was passed in 1910, (S.A. 1910 (2nd Session), c. 18) and an order in council made on January 20, 1921 (O.C. 98-21) added Rule 929a to the Alberta Rules of Court, 1914. It placed a duty on the person applying for probate or letters of administration with will annexed to satisfy the District Court judge that a surviving widow, resident in Alberta and entitled to apply, was fully aware of her rights under the Act. Unless the judge was so satisfied, probate or letters of administration were not to be issued. The judge might direct that a copy of the Act be forwarded to the widow and might delay the issue of probate or letters of administration until such time as she had become informed of her rights under the Act.

This rule was carried forward into the Rules of the Supreme Court of Alberta 1944, as rule 992. Rule 992 was amended by the following orders in council, O.C. 1164-47, O.C. 1449-48, O.C. 1628-51 and O.C. 265-56. When the Administration of Estates Act, S.A. 1969, c. 2 was passed,

rule 992 became section 8 of that Act. This section provides that an applicant for a grant of probate or administration shall send a copy of the application and a notice setting out the rights of dependants under The Family Relief Act. The application for the grant and the notice of dependants' rights under the Act must be sent to a spouse of the deceased if the spouse is not the sole beneficiary under the will or under The Intestate Succession Act and also to each child of the deceased who is 18 years of age or over at the time of the deceased's death and unable to earn a livelihood by reason of a physical disability. The requirement is confined to a spouse or physically disabled child who resides in Canada. The applicant for a grant of probate or administration must also send a copy of the application to the Public Trustee where the deceased is survived by a child who was under the age of 18 at the time of the deceased's death and to the committee of a child of the deceased who was 18 years of age or over and unable to earn a livelihood by reason of a mental disability.

Subsection 8(4) of the Administration of Estates Act states that a grant of probate or administration shall not be issued unless the judge is satisfied that the requirements of this section have been complied with, but the judge is given discretion to waive the requirements where a person cannot be found after reasonable enquiry. The cases of Re Lychowyd Estate (1963), 43 W.W.R. 129 and Re MacLaren Estate (1964), 48 W.W.R. 639, which are both decisions of Patterson, D.C.J., indicate the requirements about giving notice of the rights of dependants under The Family Relief Act. In the first case, it is stated that it is preferable for the solicitor advising not to be the solicitor for the estate and, in any case, some record of the advice given should be retained. An appropriate letter of advice is set out in the latter case.

We have considered whether notice of an application for probate or administration and of the rights of dependants under the Act should be given to those dependants who are resident outside Canada. We have concluded that such protection should be accorded all dependants under the Act whether they reside in or outside Canada.

If the dependant is resident in a jurisdiction where there is doubt that an order would accrue to the personal benefit of a dependant, the court may decline to exercise its discretion. Although it was obiter dictum Milvain J., as he then was, in Re Lukac Estate (1963), 44 W.W.R. 582 (Alta. S.C.) at p. 587 stated: "a judge should and would exercise his discretion against making any award where the dependant lives behind the Iron Curtain in a jurisdiction where the authenticity of the information is doubtful and the disposition of funds more so." In Zajac v. Zwarycz (1965), 49 D.L.R. (2d) 52 (Ont. C.A.), it was held that a judge should be satisfied that, if an order is made, substantial benefit will accrue to that dependant. However, in Re Parkanski (1966), 56 D.L.R. (2d) 475 (Sask. Q.B.), an application for relief by an adult son living in modest circumstances in Hungary was granted without discussion of whether the benefit would accrue to the son. Also in Re Soroka Estate (1977), 25 R.F.L. 169 (Ont. S.C.), a widow who resided in Russia was awarded $1,200 per year out of the estate together with a lump sum to cover her air fare to Canada. Mr. Justice Goodman at p. 178 stated: "Bearing in mind her age of 65 years, the uncertainty of her being able to obtain and retain ownership of real estate in the U.S.S.R., ... I do not consider an award of a lump sum for the purpose of acquiring a home, or for any other reason, to be appropriate save and except as hereinafter mentioned."

The issue of whether a dependant will or will not personally benefit from an order is independent of the issue of whether all dependants should be notified of an application for probate or administration and of their rights under The Family Relief Act. We believe that all dependants under our statute should be informed of their rights whether they reside in or outside Canada. We appreciate that this will impose a greater burden on the executor or administrator, particularly in view of the expanded classes of dependants which we have recommended.

Section 8 of The Administration of Estates Act states that the applicant for a grant of probate or administration shall send a notice of the application and a notice pertaining to their rights to dependants under The Family Relief Act who reside in Canada. It would be unfair to the applicant for a grant of probate or administration to continue to have this categorical duty imposed upon him in view of both the expanded classes of dependants which we have recommended and our proposal that notice be given to all dependants and not simply those resident in Canada. We believe that the obligation of an applicant for probate or administration should be to take or cause to be taken reasonable steps to identify all dependants. The applicant should then have a duty to serve those dependants, no matter where they are resident, whose identity has been revealed by the reasonable steps he has taken or has caused to be taken to ascertain them.

We will therefore recommend that a new section 8 should be substituted for the present section 8 of the Administration of Estates Act. We will also recommend that Paragraph 2 of Forms 2 and 3 and Paragraph 3 of Form 4 of the Surrogate Rules should be deleted and replaced by a new paragraph.

Recommendation #26

1. *That section 8 of The Administration of Estates Act, R.S.A. 1970, c. 1 should be replaced by the following:*

   (1) Where an application is made for a grant of probate or administration, the applicant shall take or cause to be taken reasonable steps to identify all dependants of the deceased under The Family Relief Act and shall:

   (a) where the deceased is survived by a child who was under the age of 18 at the time of the deceased's death and who resides in Alberta, send a copy of the application to the Public Trustee;

   (b) where the deceased is survived by a dependant who is subject to an order under The Mentally Incapacitated Persons Act or a guardianship order, trusteeship order or a certificate of incapacity under The Dependent Adults Act, send a copy of the application to the committee, trustee or guardian of that dependant.

   (c) with regard to the surviving spouse and all other dependants, whether they reside in Alberta or elsewhere, send a copy of the application and a notice pertaining to the rights and the definition of a dependant under The Family Relief Act to each dependant under that Act.

(2) Where the deceased is survived by a dependant who was 18 years of age or over at the time of the deceased's death and is under a mental disability but for whose estate there is no committee or trustee, the judge may, having regard to the value of the estate, the circumstances of the dependant and the likelihood of success of an application made on the dependant's behalf under The Family Relief Act:

(a) direct that a grant of probate or administration of the deceased's estate not be issued until a committee or trustee has been appointed for the dependant's estate, and

(b) direct that the applicant or some other person apply to have a committee or trustee for the dependant's estate appointed under The Mentally Incapacitated Persons Act or The Dependent Adults Act.

(3) A grant of probate or administration shall not be issued unless the judge is satisfied that the requirements of this section have been complied with, except that the judge may waive the requirement to send a copy of the application or a notice to any person where it is shown to his satisfaction that the person could not be found after reasonable inquiry.

(4) In this section, "child", "dependant" and "spouse" have the meanings given them in The Family Relief Act. **(Appendix B)**

2. *That paragraph 2 of Form 2, paragraph 2 of Form 3 and paragraph 3 of Form 4 of Schedule 1 to The Surrogate Rules, Alta. Reg. 20/71 as amended, should be replaced by the following:*

That I have taken or caused to be taken reasonable steps to identify all dependants of the deceased under The Family Relief Act and to the best of my knowledge the deceased at the time of his death left him surviving (here list the names, ages, addresses and basis of dependency respectively of all dependants under The Family Relief Act including

1. *the spouse of the deceased*
2. *a child under 18 years of age*
3. *a child under 23 years of age who has not completed his education*
4. *a child 18 years of age or over who is unable by reason of mental or physical disability to earn a reasonable livelihood*
5. *a person under 18 years of age treated by the deceased as his own child*
6. *a person whose marriage with the deceased was terminated or declared void and in whose favour an order or agreement for maintenance or support was subsisting prior to the deceased's death*
7. *a parent or grandparent dependent upon the deceased for at least three years prior to the deceased's death*

and the name of any committee appointed for the estate of any dependant) (and if any person is interested in the estate and is a missing person or convict as defined by the provisions of the Public Trustee Act, such particulars as may be known to the applicant shall be set out.)

. . . . . .

. . . . . .

and resided during six years immediately preceding his death at the following places

. . . . . .

. . . . . .

[Appendix C]

XV

WHAT COURT OR COURTS SHOULD EXERCISE THE JURISDICTION CONFERRED BY THE FAMILY RELIEF ACT

Generally throughout Canada the Supreme Court of the Province or its counterpart has sole jurisdiction under statutes similar to our Family Relief Act. There are two exceptions, Saskatchewan and Ontario, where two different courts may be involved.

In Saskatchewan, the Court of Queen's Bench and the Surrogate Court have concurrent jurisdiction. Until 1967, subsection 4(2) of The Dependants' Relief Act, R.S.S. 1965, c. 128 stated that the District Court had jurisdiction if the applicant was not entitled to more than $3,000 without an order under the Act, but the value of the allowance ordered could not exceed $3,000, exclusive of the benefit to which the applicant might otherwise be entitled. The jurisdiction of the District Court was also subject to agreement in writing of the personal representative. In 1967, subsection 4(2) was repealed and court was defined to mean the Court of Queen's Bench or the Surrogate Court of Saskatchewan (S.S. 1967, c. 23, S.S. 3 and 2). The concurrent jurisdiction of two courts in Saskatchewan does not appear to have created any problems.

In Ontario, subsection 4(4) of The Dependants' Relief Act, R.S.O. 1970, c. 126, permitted a motion to be made to a judge of the Supreme Court, by the personal representative, the applicant, or any other person interested in the estate, to obtain an order that the application should be heard by a judge of the Supreme Court, provided the estate of the testator exceeded $10,000. The motion

to remove the application had to be made before the hearing of the application in the Surrogate Court. In all other cases, the application is heard by a judge of the Surrogate Court who is a county or district court judge. Under the Succession Law Reform Act, 1977, which came into force on March 31, 1978, section 65(c) states that court means the Surrogate Court. Section 82 continues the power to have the application removed into the Supreme Court of Ontario but the value of the estate must be $20,000 and, in addition, it is now necessary that the judge of the Supreme Court must be satisfied that the application is "of such a nature and of such importance as to render it proper that it should be disposed of in the Supreme Court." This will undoubtedly mean that most applications will be heard by the Surrogate Court.

We have considered whether the Supreme Court of Alberta and the Surrogate Court of Alberta should have concurrent jurisdiction. If the will has been challenged in the Surrogate Court on the basis of lack of testamentary capacity, fraud or undue influence, the Surrogate Court judge will already be familiar with the facts of the case. The Surrogate Court judge will thus be in a much better position to render a decision on a family relief application because of this familiarity. It appears to us that there may be valid reasons for conferring concurrent jurisdiction upon the Surrogate Court of Alberta. We have, however, decided not to make a recommendation in this Report because the restructuring of the Alberta courts is now under discussion.

XVI

FAMILY RELIEF AND THE CONFLICT OF LAWS

New Zealand, Australian, and Canadian statutes have not in general provided any conflict of laws rules about the application of dependants' relief legislation. Thus the particular statute has been held to apply to movable property no matter where the property is situated if the deceased died domiciled in the jurisdiction and to immovable property situated in the jurisdiction, regardless of where the deceased died domiciled. Exceptions are Ontario and the Yukon Territory, where a condition precedent to the assumption of jurisdiction is that the testator must die domiciled in Ontario and the Yukon Territory respectively. However, The Succession Law Reform Act, 1977, has eliminated the need for the deceased to die domiciled in Ontario where the death occurs after March 31, 1978, when the new Act came into force. Subsection 3(1) of the Dependants' Relief Ordinance, Y.T.O. 1975, c. D-3 provides that "Where a person dies domiciled in the Yukon Territory...an application may be made...."

In England, however, the jurisdiction of the court to hear applications for family provision under the original Inheritance (Family Provision) Act 1938, and now under the Inheritance (Provision for Family and Dependants) Act 1975 is limited to cases where the deceased died domiciled in England. The Law Commission in Report No. 61 discussed the issue of the basis of jurisdiction. At pp. 66-67, it stated:

> 260. The choice in our view lies between (a) adhering to the present basis of jurisdiction under the English Acts and (b) following the New Zealand example, and adopting a basis of jurisdiction which conforms with the general rule of private international law. Either alternative will in practice involve anomalies and difficulties.

261. To illustrate the difficulties which will arise from adhering to the existing English rule, we may take the example of a testator who dies domiciled in New Zealand leaving land in England and without making adequate provision for his dependants. The New Zealand courts would have no jurisdiction to make an order for family provision affecting the English land because it is not situated in New Zealand, and the English courts would have no jurisdiction because the testator was not domiciled in England. On the other hand, the basis of jurisdiction adopted by the New Zealand courts will also give rise to anomalies and difficulties. In the example given, the English courts could order family provision from the immovables in England, while the New Zealand courts could order family provision from the movable property of the testator, wherever situate. But in such a situation it would be difficult for the courts of either country to assess the amount of family provision which should be ordered, or to pay proper regard to the interests of all the beneficiaries of the estate of the deceased.

262. We do not think that the solution to these problems lies in moving from a basis of jurisdiction which gives rise to one set of difficulties to a basis of jurisdiction which gives rise to another. Moreover, as a matter of principle, we think there is something to be said for the view to which the English rule gives effect, namely, that the question whether the surviving members of a deceased person's family should have a claim to an interest in his estate should be governed by his personal law, that is, the law of his domicile. However that may be, we think that a fully rational system would involve changes in the rules of private international law which could only be effected by an international convention. We note that the law relating to family property will be one of the subjects for discussion at the Hague Conference on Private International Law in 1976. Pending a satisfactory solution to the problems by international convention, we think there is much to be said for adhering to the present rule that family provision should be regulated by the personal law of the deceased and therefore, in this respect, we propose no change.

We are not convinced by the argument of the Law Commission that "the question whether the surviving members of a deceased person's family should have a claim to an interest in his estate should be governed by his personal law, that is, the law of his domicile." Further, we are not convinced that the anomalies indicated by the Law Commission in regard to the New Zealand and Alberta approach are particularly serious. In any case, the anomalies can be alleviated. Rather than adopt the limitation of jurisdiction of the English legislation, we propose an extension beyond that now provided by the conflict of laws rules. The Law Reform Commission of New South Wales in its 1974 Working Paper on Testator's Family Maintenance and Guardianship of Infants Act, 1916, at p. 124 proposed that:

> New South Wales should follow the South Australian example and extend the Court's jurisdiction under the Act. The extension to which we refer is to allow the Court, in favour of an applicant who is ordinarily resident in New South Wales, to make an order affecting the personal property of a deceased person which is situated in New South Wales, whether or not the deceased was, at the time of his death, domiciled in New South Wales.

We would agree with the proposed extension of jurisdiction but only in limited circumstances. We believe that it should be in regard to movable property and not to personal property in order that all property situated in Alberta would be subject to an order under The Family Relief Act. We also believe that if the deceased did not die domiciled in Alberta, the situs of movables in Alberta should only confer jurisdiction on an Alberta court if there is a dependant resident in Alberta and if the law of the deceased's domicile does not provide for an order for maintenance to be made out of the estate.

In its final report the Law Reform Commission of New South Wales, Report No. 28, at p. 39 stated:

> In relation to assets in this State, we think now that the Court should have jurisdiction without regard to the place of residence of an applicant. As we see it, the Court should not be closed to a person with a moral claim to property which is within the jurisdiction of the Court merely because he does not live within that jurisdiction.

We recognize the force of this argument. However, we are not convinced that Alberta should legislate for the benefit of anyone in the world simply because a person dies owning movables in Alberta. The deceased and his dependants may both be domiciled and resident in a jurisdiction which has no comparable legislation. A legitimate question would be why Alberta should transform a non-resident into a dependant with a right to apply under the Act simply because the deceased owned movables in Alberta, when this is not a right which is conferred by his own domicile or residence or by the domicile of the deceased. However, an equally legitimate question is why the owning of land in Alberta by the deceased as opposed to the owning of movables should confer on dependants rights under the statute in such circumstances.

The present situation as to immovables may be regarded as anomalous. However, it might also be thought of as a natural consequence of our law which provides that all rights to land are, in general, governed by the law of the situs of land and that succession to land is governed by the law of the situs. If an Alberta court did not take jurisdiction under The Family Relief Act in regard to Alberta land, there would be no court which would have power to affect immovables situated in Alberta. This would create a serious gap in the pro-

tection provided by such statutes. The vacuum in the protection provided by this legislation does not appear to have concerned the Law Commission (England) unduly because it has recommended that domicile in England of a deceased person should continue to be a condition precedent for a dependant to apply for relief under the English legislation. This means that if a person dies domiciled in Alberta and his only asset is English land, a dependant will be unable to apply for relief. However, if a person dies domiciled in England and his only asset is Alberta land, a dependant will be able to apply for relief under our Family Relief Act.

We believe that it is necessary that Alberta courts should continue to assume jurisdiction to make an order affecting immovables situated in Alberta as otherwise a vacuum would arise. Where the deceased died domiciled outside of Alberta owning Alberta immovables, no court would have power to make an order affecting such property unless the Alberta court assumes jurisdiction. It may be that under our Family Relief Act a person is regarded as a dependant of a deceased person even though no support obligation was owed by the deceased to that person under the law of the deceased's domicile or the law of the domicile or residence of that person. Therefore, it is possible that, in some cases, the result of assuming jurisdiction on the basis of immovables situated in the jurisdiction may appear anomalous.

We believe that we should start with the premise that the protection accorded dependants of a deceased person by our Family Relief Act is reasonable. It is the kind of protection which is provided by all Canadian common law

jurisdictions. Therefore until there is only one law of succession applicable to a deceased's estate it is important that no vacuum be created in regard to immovables situated in Alberta. By refraining from stating that a condition precedent to an application under The Family Relief Act is that the deceased died domiciled in Alberta, the Alberta statute may be invoked by a dependant and an order for proper maintenance and support may be made out of the immovables in Alberta.

We could state that a dependant no matter where he may reside may make an application under our Act in regard to immovables situated in Alberta, but make the application subject to the deceased having died domiciled in some Canadian jurisdiction. This would not, in our opinion, be desirable. It is possible that a person might die domiciled in England, New Zealand or in a state of Australia and the only substantial asset in his estate might be land in Alberta. The policy behind the statutes of these jurisdictions would be defeated unless the Alberta court is prepared to assume jurisdiction to make an order under The Family Relief Act in regard to the Alberta land.

We do not believe that it would be advisable to restrict the assumption of jurisdiction of the Alberta court in regard to Alberta immovables to cases in which the deceased died domiciled in a jurisdiction which has legislation comparable to our Family Relief Act. The discretionary power granted to a judge under The Family Relief Act is only one mode of providing protection to dependants of a deceased person. Many other jurisdictions provide protection by giving a forced share to a spouse or children. As long as Alberta adheres to the conflict

of laws rule that succession to immovables is governed by the law of the situs, it appears to us that our Family Relief Act should apply where there are immovables situated in Alberta, regardless of where the deceased died domiciled or where the dependants are resident. Applying The Family Relief Act to Alberta immovables even though the deceased died domiciled outside Alberta may create somewhat different obligations in favour of dependants than those which arise under the law of the deceased's domicile. This, in our view, is less objectionable than failing to recognize any obligation of a deceased's estate to dependants in regard to Alberta immovables.

We therefore think that our courts should continue to assume jurisdiction to grant an order in regard to immovables situated in Alberta, irrespective of either where the deceased died domiciled or where the dependant may reside or be domiciled. We do so largely on the basis that to do otherwise would create a vacuum in such legislation in respect to Alberta immovables owned by the deceased person.

This argument based on avoiding a vacuum does not apply to movables which are situated in Alberta as the conflict of laws rule is that succession to movables is governed by the law of the deceased's domicile. We also assume that an order by the court of the deceased's domicile in regard to movables situated in Alberta would be recognized in Alberta. There does not appear to be any Canadian case in which an order made by the court of the deceased's domicile in regard to movables not situated in that jurisdiction has been recognized or has been refused recognition by the jurisdiction in which the movables are situated. We believe that such orders made

by the deceased's domicile should and would be recognized in regard to movables situated outside the deceased's domicile. In Ostrander v. Houston (1915), 8 W.W.R. 367 (Sask. S.C. En Banc), a testator died domiciled in Alberta leaving movables and immovables in both Alberta and Saskatchewan. The will which disposed of all his property made no provision for his widow. Letters probate were granted in Saskatchewan and the widow applied for relief under the Saskatchewan statute. Haultain C.J., at p. 372 stated:

> Unfortunately the applicant in this case did not make a similar application to the Alberta Court. If she had, the Court could only have awarded her her proportion of the whole personal estate and of such portion of the real estate as is situated in Alberta. The Alberta Court could not in any way deal with land in Saskatchewan...

It would appear that the Saskatchewan court would have recognized an order by the Alberta court in regard to personal property of the deceased which was situated in Saskatchewan. However, no Alberta order had been sought.

We believe that there is no compelling need for our courts to assume jurisdiction to make an order out of movables situated in Alberta which is comparable to the need to make an order out of immovables situated in Alberta. We therefore reject the approach adopted in South Australia which confers on its court the power to make an order solely because there is personal property situated in the State (Inheritance (Family Provision) Act, 1972, No. 32, s. 7). We do not agree with the Law Reform Commission of New South Wales when it advocates that movables in the State should confer jurisdiction

upon a court without regard to the place of residence of an applicant. The New South Wales Commission seems to justify this position on the basis that a dependant has a moral claim to such property. We, however, have subscribed generally to the proposition that what The Family Relief Act should do is to transfer the legal support obligations which existed during the lifetime of the deceased to his estate. If by the law of the deceased's domicile, no provision is made to transfer the lifetime support obligations over to his estate on his death, we do not believe that the situs of movables is a sufficient basis to create rights in favour of a dependant no matter where he is resident. A majority of our Board, however, believes that where a person is resident in Alberta and there are movables situated in Alberta of a deceased who died domiciled outside Alberta, Alberta has a legitimate legislative interest in making that person a dependant, assuming that the person would have been a dependant had the deceased died domiciled in Alberta. It should, however, refrain from doing so where a conflicting order might arise in regard to movables.

This legislative interest arises because we wish to provide protection to residents of Alberta who are dependants of a deceased person for their own personal benefit. An auxiliary reason for Alberta's legislative interest is that a person resident in Alberta should not become a charge on the public purse if the deceased had property out of which an award under The Family Relief Act might be made, regardless of where the deceased died domiciled.

We believe that the proposed extended jurisdiction in regard to movables situated in Alberta will be of the

greatest use where the deceased died domiciled in a jurisdiction which lacks any comparable legislation to The Family Relief Act. In such cases, there will not be any problem about conflicting orders because the law of the deceased's domicile will not be granting a maintenance order in respect of the deceased's estate.

We must decide whether the proposed extended jurisdiction should be restricted to those cases in which the law of the deceased's domicile lacks any comparable legislation to The Family Relief Act in the sense that no court or judge is empowered to make an order for maintenance out of the estate. The advantage of limiting the extended jurisdiction to this situation is that there will not be any possibility of conflicting orders. A disadvantage in limiting the proposed extended jurisdiction over movables in Alberta in this way is that the law of the deceased's domicile may have legislation comparable to The Family Relief Act but the Alberta resident, although a dependant under the Alberta statute, may not be a dependant under the law of the deceased's domicile. It must, however, be recognized that even if the Alberta resident is a dependant according to both The Family Relief Act and legislation in the domicile of the deceased, the dependant may not receive an order for proper maintenance from the jurisdiction of the deceased's domicile. The Court of the deceased's domicile may decline to make an order in his favour or may make an order which is substantially less than would have been made under The Family Relief Act. We are, however, reluctant to see the matter of support for dependants of a deceased litigated once in the jurisdiction in which the deceased died domiciled and subsequently relitigated in Alberta.

Therefore, we believe that it would be preferable to limit the proposed extended jurisdiction of our statute to situations in which there is a person who is a resident of Alberta and is a dependant under our Act, the deceased died domiciled in a jurisdiction that has no statute comparable to our Family Relief Act, and the deceased had movables in Alberta at the time of his death. This will not always provide adequate protection for a person who is a dependant according to our statute where the deceased dies domiciled outside of Alberta. It will assure that conflicting orders will not be made in relation to movables. The rule of the conflict of laws that succession to movables is governed by the law of the domicile at death should, in our opinion, mean that deference is paid to the succession law of the deceased's domicile in relation to movables. If the law of the deceased's domicile defines a dependant differently than does the Alberta statute, we do not believe that an Alberta court should have the power to make an order for support from movables in Alberta even in favour of an Alberta resident. If the law of the deceased's domicile does not make any provision for an application by any of the deceased's dependants for proper maintenance out of the deceased's estate, we believe that it is legitimate for Alberta to rectify what it regards as a deficiency in the succession law of the deceased's domicile. We believe we should do so only for a person who is resident in Alberta in regard to movables which are situated in Alberta at the deceased's death. We have no doubt that Alberta has the legislative competence to change the conflict of laws rules in regard to succession. However, as we do not make any recommendation for change in these rules, we believe that the succession law of the domicile of the deceased with relation to movables deserves to be treated with deference. Therefore, we should only

be prepared to rectify a deficiency in the succession law of the deceased's domicile where Alberta has a legitimate legislative interest. We believe that this legitimate interest only arises where there is a person who is resident in Alberta and who would have been a dependant had the deceased died domiciled in Alberta. To avoid the problem of possible conflicting orders, the Alberta court should only assume jurisdiction where the deceased has died domiciled in a jurisdiction that lacks legislation comparable to The Family Relief Act.

A minority of our Board does not approve of the proposed extended jurisdiction in relation to movables situated in Alberta. These Board members object to the proposal in both principle and practice for a number of different reasons. One reason is that the proposed extended jurisdiction is an encroachment upon the rules of the conflict of laws that succession to movables is governed by the law of the deceased's domicile. A related reason is that it will increase the difficulty in advising a testator in that an exception will be created to the rule that it is the law of the domicile which applies to movables. Another objection is that it will impose a new difficulty for non-Alberta personal representatives. Where the deceased dies domiciled outside Alberta owning movables in Alberta, it appears that, because Alberta does not levy succession duty, it has been possible for non-Alberta personal representatives to avoid resealing or obtaining an ancillary grant in Alberta. Another objection is that the foreign personal representative will be able to remove movable property from Alberta and the proposed extended jurisdiction will not therefore be effective in providing protection for the resident Alberta dependant. A further objection is the lack of personal jurisdiction over the foreign personal representative.

The majority of our Board believes that the proposed extended jurisdiction is justifiable as Alberta has a valid legislative concern to provide protection for residents of Alberta. The majority believes that deference should be paid to conflict of laws rules but that such rules should not be regarded as sacrosanct. The proposal is only a modest incursion on the conflict of laws rule that succession to movables is governed by the law of the domicile of the deceased. It is a modest change when compared with that of South Australia. South Australia in 1972 conferred jurisdiction on its court solely on the basis of personal property being situated there. The Law Reform Commission of New South Wales has recommended that jurisdiction should be assumed solely on the basis of situs of any property. The majority concedes that in regard to some tangible personal property, there is little to prevent a foreign personal representative from coming to Alberta and removing the property. However, a major proportion of movables in terms of value probably consist of such assets as shares, bonds and debts. If they have an Alberta situs, such assets can only be removed out of Alberta through the assistance of an Alberta resident. The majority thus believes that the proposed extended jurisdiction in regard to movables can be effective and the foreign personal representative will have the same incentive to come to Alberta to oppose an application by an Alberta resident in regard to Alberta movables as he presently has in regard to immovables.

It would be difficult to assess how frequently the proposed extended jurisdiction might be utilized. Alberta is a province which has experienced an enormous influx of population. There are, therefore, many persons in

Alberta whose domicile of origin is not Alberta. The case of Re Corlet [1942] 3 D.L.R. 72 (Alta. S.C.) indicates how a person whose domicile of origin is not Alberta can render The Family Relief Act protection nugatory. Wilfred Ewan Corlet died in December, 1935, in Calgary after residing in Canada for 26 years. In spite of his long residence in Canada, and being called to the Bar in Alberta, it was held that he was still domiciled in the Isle of Man, his domicile of origin, to which he expressed a desire to return and had even made tentative plans for doing so (Re Corlet and Isle of Man Bank (No. 2), [1938] 3 D.L.R. 800 (Alta. S.C.)). At the time of his death, his entire estate consisted of movables, some of which were shares in W.E. Corlet Co. Ltd. which owned eight lots in Calgary. Mr. Justice Howson consequently concluded that the Widows Relief Act, R.S.A. 1922, c. 145 was inapplicable because the deceased died domiciled in the Isle of Man and there was no immovable property situated in Alberta.

It would appear that in this case there was an attempt to avoid the provisions of the Widows Relief Act. In Corlet v. Isle of Man Bank Ltd., [1937] 3 D.L.R. 163 (Alta. App. Div.), it was necessary to determine whether an instrument settling life insurance policies on trust to become effective on the death of the settlor, with a power of revocation reserved to the settlor, was a testamentary disposition required to be executed in accordance with the Wills Act. It was held that it was not. Ford J.A. stated at p. 166 that "the settlor's intention to avoid, escape or evade the payment of succession duty in Alberta or in Ontario and to prevent recourse being had by his widow to the Widows Relief Act, R.S.A. 1922, c. 145, is of no significance except as

assisting in finding whether or not the trust instrument was or was not of a testamentary character." It might also be noted that the widow in this case was not entitled to a life estate in the last home lived in with her deceased husband as it was owned by a company which he had incorporated (Re Corlet, [1939] 3 D.L.R. 798 (Alta. S.C.)). The Corlet case does appear to represent a case where an extended jurisdiction would have been beneficial.

It may be that the occurrence of this kind of avoidance is infrequent. However, this does not mean that the injustice should go unremedied. A person disposing of all his estate during his lifetime to defeat an application under The Family Relief Act is relatively rare. We, however, have decided that this situation must be remedied. Similarly, we believe that a person who attempts to retain his domicile of origin, because that jurisdiction does not have legislation comparable to The Family Relief Act or who acquires a new domicile of choice in a jurisdiction lacking such a statute, should not be able to deprive dependants in Alberta from making an application in regard to movables situated in Alberta.

The present Family Relief Act does not have a conflict of laws provision. We propose a conflict of laws section. Subsection (1) of this proposed section will simply state the existing conflict of laws rule which has been used to determine the scope of our legislation. Subsection (2) will provide for the proposed extended jurisdiction in favour of an Alberta resident in regard to movables situated in Alberta where the deceased died domiciled outside Alberta unless the law of his domicile makes provision for anyone to apply to a court or judge for an order for maintenance to be paid out of the estate of the deceased.

The proposed subsection (3) attempts to alleviate the problems which arise when there is more than one application in different jurisdictions for a maintenance order in regard to one estate. This problem arises because there is not one law which determines the succession to all property owned by the deceased. Subsection (3) proposes that where a deceased did not die domiciled in Alberta but owned an interest in land in Alberta, a judge should be able to adjourn an application until a similar application made by a dependant in the jurisdiction in which the deceased died domiciled has been concluded. It will permit our court to assess more effectively whether an order should be granted by postponing a decision until any application made in the domicile of the deceased has been concluded. The problem of the lack of integration of orders was one of the reasons which led the Law Commission (England) to advocate that a condition precedent to jurisdiction should continue to be that the deceased died domiciled in the jurisdiction. No totally satisfactory solution is available as long as there is more than one law of succession applicable to a deceased's estate. Subsection (3) will, in our opinion, alleviate some of the problems.

The proposed subsection (4) simply defines an interest in land and an interest in movables as it is done in subsection 38(1) of The Wills Act, R.S.A. 1970, c. 393. For the purpose of conflict of laws, the division between an interest in land and an interest in movables is the relevant division of property rather than the usual domestic division between realty and personalty.

Recommendation #27

That the proposed Act should provide that:

(1) A dependant whether resident in Alberta or elsewhere may make an application under section 3 in regard to an interest in land situated in Alberta, or in regard to an interest in movables, no matter where such property is situated, if the deceased died domiciled in Alberta.

(2) A dependant resident in Alberta at the time of the deceased's death, may make an application under section 3 in regard to an interest in movables situated in Alberta at the time of the deceased's death even though the deceased died domiciled outside Alberta unless the law of the domicile of the deceased makes provision for a person, whether or not he is a dependant under this Act, to apply to a court or judge for an order for maintenance, other than an order restricted to the duration of administration, to be paid out of the estate of the deceased.

(3) Where the deceased did not die domiciled in Alberta but owned an interest in land situated in Alberta, a judge may adjourn an application made under section 3 until any application made by a dependant under similar legislation in the jurisdiction in which the deceased died domiciled has been concluded.

(4) In this section,

(a) an interest in land includes a leasehold estate as well as a freehold estate in land, and any other estate or interest in land whether the estate or interest is real property or is personal property;

(b) an interest in movables includes an interest in a tangible or intangible thing other than land, and includes personal property other than an estate or interest in land.

[s. 4(1) to (4)]

XVII

COSTS AS A DETERRENT TO APPLYING UNDER THE ACT

Subsection 14(4) of the present Act provides that where the value of the estate is less than $5,000, no costs of or incidental to an application should be awarded out of the estate, except for the executor's or administrator's costs. This provision has been carried forward from The Testators Family Maintenance Act, S.A. 1947, c. 12, in which it was subsection 13(4). The Uniform Dependants' Relief Act does not contain any provision about costs. Only the provinces of Saskatchewan, Ontario and the Yukon Territory have sections referring to costs in their statutes. These sections do not limit the discretion of a judge in awarding costs in small estates. The purpose of the Alberta subsection 14(4) is probably to discourage claims which might deplete small estates.

We do not believe that a cost deterrent should be explicitly included in the statute. Costs should be left to the discretion of the judge. If it is an unmeritorious application which clearly should not have been made, the judge may penalize the applicant whether it is a small or large estate by declining to order costs out of the estate or by awarding costs against the applicant. If it is a meritorious claim, the judge should not be deprived of his discretion to order costs out of the estate simply because the estate is small. If, in the case of a meritorious application, the estate is so small that all the estate is awarded as a lump sum to the applicant, the applicant in effect bears the costs of the application. If it is a meritorious application in regard to a small

estate but not all the estate is awarded to the applicant, we can see no reason why costs of the application should not be borne by the estate. In addition, we are generally opposed to the introduction of arbitrary limitations unless they are necessary. We can see no really useful purpose in distinguishing between a net estate for probate or administration fees which amounts to $4,999 and one which amounts to $5,000 or more. The awarding of costs should not be based on a monetary distinction. We believe that costs should be in the discretion of the judge in both small and large estates.

Recommendation #28

That the proposed Act should not have a section dealing with costs for small estates. Costs should be in the discretion of the judge for all estates.

XVIII

THE CROWN AND THE FAMILY RELIEF ACT

Under the present Family Relief Act, subsection 12(2) provides that "Her Majesty is bound by the provisions of this section". The section to which Her Majesty is bound is the section that provides that the order changes the will as at the date of the deceased's death. This would no longer be sufficient under our proposed Act. A deceased might die intestate and as a result of The Ultimate Heir Act, R.S.A. 1970, c. 376, as amended by The Universities Amendment Act, 1973, S.A. 1973, c. 58, s. 17, his property might pass to the Crown in right of Alberta even though there is a dependant under our proposed section 2(c)(v). A dependant under this provision is "a person under the age of 18 to whom the deceased has demonstrated a settled intention of treating as though he were his own child...." Such a person might not bear any blood relationship to the deceased and therefore might not qualify as a next of kin of the deceased. It is possible that the deceased might die intestate without next of kin and the Crown in right of Alberta would take even though there was a dependant under the proposed new Family Relief Act. If the deceased died intestate and is survived solely by a former spouse who has a subsisting order in her favour against the deceased, the Crown in right of Alberta would again take even though there is a dependant under our proposed Act. This might have occurred under our present Act but only in the very limited circumstances of the type of void marriages provided for in section 3. The probability of the Crown taking as the ultimate heir even though the deceased is survived by a dependant would be increased considerably under our proposed Act.

To prevent the possibility of the Crown in right of Alberta taking as the ultimate heir where the deceased is survived by a dependant, we make two proposals. We believe that there should be a separate section which provides that the Crown is bound by the whole Act and not simply by a section of the Act. We also think that the present section 12 should be recast so as to apply both to the case in which the deceased dies with a will and where he dies intestate. The proposed section would provide that an order made under the Act has effect from the date of the deceased's death and if he dies intestate as though The Intestate Succession Act had been amended to give effect to the provisions of the order.

Recommendation #29

That the proposed Act should have to separate sections providing that:

(1) The Crown is bound by this Act.

[s. 26]

(2) Where an order is made under this Act then for all purposes the order has effect as from the date of the deceased's death and

(a) the will, if any, has effect from that date as if it had been executed with such variations as are necessary to give effect to the provisions of the order and

(b) the intestacy, if any, has effect from that date as if The Intestate Succession Act had been amended to give effect to the provisions of the order.

[s. 14]

XIX

PROVISIONS CARRIED FORWARD INTO THE NEW ACT

We have previously stated that we believe that the present Family Relief Act is a basically sound statute. We have as a result simply made some recommendations for improvement including expanding the category of persons who qualify as dependants and making it more difficult for persons to evade the policy of the Act.

There are many provisions which we believe should simply be carried forward into the new statute. In two sections, we have made minor changes in drafting which we believe will help to clarify the meaning of the sections. As there is no change in substance, we think that separate consideration of these sections is unnecessary. The following sections, in our opinion, should be contained in the new Act.

Section of the present Family Relief Act	Brief Description of the purpose of the Section	Section of the proposed Family Relief Act
4(2)(c)	Evidence of deceased's reason for making disposition in will or not making adequate provision for dependant may be admitted by judge.	3(4)

Section of the present Family Relief Act	Brief Description of the purpose of the Section	Section of the proposed Family Relief Act
4(3)	Weight to be given to deceased's reasons for making will.	3(5)
6(1)	Order may impose conditions or restrictions.	6(1)
6(4)	Necessary directions pursuant to an order of transfer or assignment of property.	6(3)
9	Additional powers of a judge.	12
10	Judge, after making an order in favour of a dependant during whose life the will provides for postponement of distribution of the estate, is empowered to order immediate distribution of residue.	10
11	No mortgage charge or assignment of an anticipated order is valid.	13
14(1),(2),(3)	Mode of making application.	15(1),(2),(3)

Section of the present Family Relief Act	Brief Description of the purposes of the Section	Section of the proposed Family Relief Act
15	Situation in which there is no obligation on Public Trustee or guardian to apply on behalf of a child.	16
16(1),(2)	Time for making application.	17(1),(2)
17(1),(2)	Procedure in relation to an application for an order.	18(1),(2)
18(1),(2),(3)	No distribution of estate until the lapse of six months from the death of deceased except for reasonable advances to dependants who are beneficiaries.	19(1),(2),(3)
19(1),(2),(3)	After notice of an application,no distribution of the estate otherwise than in accordance with the order.	20(1),(2),(3)
20	Mode of Enforcement of order.	23
21	Certified copy of order to be filed with the clerk of the court.	24
22(1),(2)	Appeal to the Appellate Division of the Supreme Court of Alberta.	25(1),(2)

Recommendation #30

That the above-mentioned sections should be contained in the proposed Act in the form in which they appear in Appendix A to this Report.

XX

TRANSITIONAL PROVISION

As there are some features of the proposed Act which are remedial in nature, it might be argued that there is no need to restrict its application to estates of persons who die after the Act comes into force. We are also mindful of the undesirability of having to refer years later to a repealed statute to cover a late application or an application for variation of an existing order in regard to the estate of a person who died before the coming into force of the proposed Act. However, the proposed Act would confer the status of a dependant on persons who presently do not have a right to apply for relief out of the estate of a deceased person. For that reason, we believe that the proposed Act should apply only to estates of persons who die after the coming into force of the proposed Act. We also think that the present Act should be repealed but that it should be preserved where an application is made for provision from an estate of a person who has died prior to the coming into force of the proposed Act. The present Act should also be preserved where an application for variation of an order is made in regard to the estate of a person who died prior to the effective date of the proposed Act.

It should also be noted that the proposed Act will not become fully operative even in cases where the death occurs after the coming into force of the new Act. Section 22 attempts to cope with the problem of the evasion of the policy of the Act presented by "will substitutes" and unreasonably large dispositions of property between persons who are not dealing at arm's length. Subsection 22(16) provides that the section does not apply to any transfer or designation made before the coming into force of this Act.

The purpose behind this subsection is to prevent vested property rights from being retroactively affected regardless of when the deceased dies.

Recommendation #31

That the proposed Act should contain the following provision:

(1) This Act applies to an application made for provision from the estate of a person who dies after the coming into force of this Act.

(2) Subject to subsection (3), The Family Relief Act being chapter 134 of the Revised Statutes 1970 is repealed.

(3) The Family Relief Act repealed by subsection (2) continues in force as if unrepealed where either an application is made for provision from an estate or an application for variation of an existing order is made and the person whose estate is affected died prior to the coming into force of this Act.

[s. 27]

W. F. BOWKER
MARGARET DONNELLY
R. P. FRASER
W. H. HURLBURT
J. P. S. McLAREN
ELLEN PICARD
W. A. STEVENSON
W. E. WILSON

BY: _____
CHAIRMAN

_____
DIRECTOR

June, 1978

CROSS REFERENCE BETWEEN RECOMMENDATIONS AND

PROPOSED ACT AND OTHER APPENDICES

(References to Sections are to Sections in the Proposed Act in Appendix A)

Recommendation No.	Page No.	Subject	Reference in Appendix
1	31	Spouse is a dependant	Sec. 2 (c)(i)
2	35	Children are dependants	Sec. 2 (c)(ii) & (iii)
3	36	Child includes child born out of wedlock	Sec. 2 (b)(ii) & (iii)
4	37	Child includes a posthumous child	Sec. 2 (b)(i)
5	39	Disabled adult child is a dependant	Sec. 2 (c)(iv)
6	44	Financial responsibility assumed by a government is a factor in making an order	Sec. 3 (3)(h)
7	47	Child whom the deceased treated as his own child is a dependant	Sec. 2 (c)(v)
8	53	Former spouse with a support order or agreement is a dependant	Sec.2 (c)(vi)
9	54	Spouse includes some persons who have entered into a void marriage	Sec. 2 (g)(ii)

Recommendation No.	Page No.	Subject	Reference in Appendix
10	56	Spouse includes parties to a valid polygamous marriage	Sec. 2(g)(i)
11	58	Dependant includes a parent or grandparent who was dependent for three years	Sec. 2(c)(vii)
12	61	Order for proper maintenance and support may be made if dependants lack such support	Sec. 3 (1)
13	64	Factors to be considered in making an order	Sec. 3 (3)
14	69	Time for determining whether dependants have proper support is time of hearing	Sec. 3 (2)
15	71	Extended definition of "testator" and "will" should not appear	
16	72	Power to order acquisition of property	Sec. 6 (2)(d)
17	72	Suspensory order may be made	Sec. 5
18	73	Interim order may be made	Sec. 8
19	76	Duration of an order for periodic payments and the relationship of other orders	Sec. 7
20	80	Incidence of an order	Sec. 11
21	83	Variation of an order	Sec. 9

Recommendation No.	Page No.	Subject	Reference in Appendix
22	93	Property available for a late application or on variation	Sec. 17 (3)
23	97	Jurisdiction not ousted by agreement or waiver	Sec. 3 (6)
24	108	Contracts to leave property by will	Sec. 21
25	123	Beneficiary of a "will substitute" or an unreasonably large disposition may be made liable where net estate is insufficient	Sec. 22
26	131	Notification of dependants	App. B & C
27	152	Conflict of laws	Sec. 4
28	154	No provision for a cost deterrent for small estates	
29	156	Effect of an order on the Crown, a will and the rules of intestate succession	Sec. 26 & Sec. 14
30	160	Sections to be carried over to proposed Act	Sec. 3(4) 3(5) 6(1) 6(3) 10 12 13 15(1)(2)&(3) 16 17(1)&(2) 18(1)&(2) 19(1)(2)&(3) 20(1)(2)&(3) 23 24 25(1)&(2)

APPENDIX A

The Family Relief Act

1. This Act may be cited as The Family Relief Act.
2. In this Act,
   (a) "application" means an application for maintenance and support under this Act;
   (b) "child" includes
      (i) a child of the deceased born after the death of the deceased, and
      (ii) a child born out of wedlock, subject to The Status of Children Act;

   Alternative

   (b) (until The Status of Children Act is passed, or, in the event that it is not) "child" includes
      (i) a child of the deceased born after the death of the deceased,
      (ii) a child born out of wedlock to a man now deceased who
         (A) has acknowledged the paternity of the child, or
         (B) has been declared to be the father of the child by an order under The Maintenance and Recovery Act or any prior Act providing for affiliation or paternity orders, or
         (C) has regularly supported the child in circumstances giving rise to the inference that the deceased considered himself to be the father of the child, and
      (iii) a child born out of wedlock to a woman now deceased;

(c) "dependant" means

(i) the spouse of the deceased,

(ii) a child of the deceased who is under the age of 18 at the time of the deceased's death,

(iii) a child of the deceased under the age of 23 at the time of the deceased's death who has not completed his education or his technical or vocational training and was dependent on the deceased at the time of the deceased's death, or would have been dependent had the deceased survived,

(iv) 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 reasonable livelihood,

(v) a person under the age of 18 to whom the deceased has demonstrated a settled intention of treating as though he were his own child and who was wholly or partially dependent upon the deceased for maintenance at the time of the deceased's death, but does not include a person placed in a foster home for compensation,

(vi) a person whose marriage to the deceased was terminated or declared void by a decree absolute of divorce or a decree or declaration of nullity of marriage and in whose favour an order or agreement for maintenance or support was subsisting immediately prior to the deceased's death, or in whose favour, in the opinion of the judge, an order of support would have been granted, provided that an application for the order

had been made but not determined during the lifetime of the deceased,

(vii) a parent or grandparent of the deceased who, for a period of at least three years immediately prior to the date of the death of the deceased, was dependent upon the deceased for maintenance and support;

(d) "judge" means a judge of the Supreme Court;

(e) "letters probate" and "letters of administration" include letters probate, letters of administration or other legal documents purporting to be of the same legal nature granted by a court in another jurisdiction and resealed in this province;

(f) "Public Trustee" means the Public Trustee appointed pursuant to The Public Trustee Act;

(g) "spouse" includes

(i) a person whose marriage to the deceased was entered into under a law which permitted polygamy, whether or not either party to it has, or at the time of the marriage or thereafter had, a spouse other than the other party,

(ii) a person whose marriage to the deceased was void if such person did not know or had no reason to believe the marriage was void;

3. (1) Where, upon the application by or on behalf of the dependants or any of them, it appears to a judge that the dependants or any of them do not have proper maintenance and support either from the estate of the deceased or otherwise, the judge may in his discretion, notwithstanding the provisions

of the will or the law relating to intestacy, order that such provision as he deems adequate be made out of the estate of the deceased for the proper maintenance and support of the dependants or any of them.

(2) In determining whether the dependants or any of them do not have proper maintenance and support, the judge shall have regard to the circumstances enumerated in subsection (3) as they exist at the date of the hearing of the application.

(3) Upon the hearing of an application under this Act the judge shall consider all matters that should be taken into account, including:

(a) the financial resources which the dependant has and is likely to have in the immediate future, and, in the case of a spouse, any benefits to which a spouse is entitled under the provisions of The Dower Act and The Matrimonial Property Act;

(b) the assets which the dependant is entitled to receive from the estate of the deceased otherwise than by an order under this Act;

(c) the age and health of the dependant;

(d) the claims which any other dependant or any other person has upon the estate;

(e) any provision which the deceased while living has made for the dependant and for any other dependants;

(f) the conduct of the dependant in relation to the deceased;

(g) any agreement between the deceased and the dependant;

(h) the financial responsibility assumed by a government for a mentally or physically disabled dependant;

(i) the value of the property passing on the death of the deceased and the property referred to in section 22(1)(b);

(j) the needs of the dependant, in determining which the judge may have regard to the dependant's prior standard of living;

(k) any transfer of property by a dependant after the death of the deceased at less than fair market value.

(4) The judge upon the hearing of the application

(a) may in addition to the evidence adduced by the parties appearing direct such other evidence to be given as he deems necessary or proper, and

(b) may accept such evidence as he deems proper of the deceased's reasons, so far as ascertainable,

(i) for making the dispositions made by his will, or

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

including any statement in writing signed by the deceased.

(5) In assessing the weight to be given to a statement referred to in subsection (4), clause (b), the judge shall have regard to all the circumstances

from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement.

(6) An order may be made notwithstanding any agreement or waiver in regard to this Act.

4. (1) A dependant whether resident in Alberta or elsewhere may make an application under section 3 in regard to an interest in land situated in Alberta, or in regard to an interest in movables, no matter where such property is situated, if the deceased died domiciled in Alberta.

(2) A dependant resident in Alberta at the time of the deceased's death, may make an application under section 3 in regard to an interest in movables situated in Alberta at the time of the deceased's death even though the deceased died domiciled outside Alberta unless the law of the domicile of the deceased makes provision for a person, whether or not he is a dependant under this Act, to apply to a court or judge for an order for maintenance, other than an order restricted to the duration of administration, to be paid out of the estate of the deceased.

(3) Where the deceased did not die domiciled in Alberta but owned an interest in land situated in Alberta, a judge may adjourn an application made under section 3 until any application made by a dependant under similar legislation in the jurisdiction in which the deceased died domiciled has been concluded.

(4) In this section,

(a) an interest in land includes a leasehold estate as well as a freehold estate in land, and any other estate or interest in land whether the estate or interest is real property or is personal property,

(b) an interest in movables includes an interest in a tangible or intangible thing other than land, and includes personal property other than an estate or interest in land.

5. The judge may make a suspensory order, suspending in whole or in part the distribution of the deceased's estate to the end that an application may be made at any subsequent date for an order making specific provision for maintenance and support.

6. (1) The judge, in any order making provisions for maintenance and support of a dependant, may impose such conditions and restrictions as he deems fit.

(2) The judge may make an order for proper maintenance and support out of the income or capital or both in one or more of the following ways as he deems fit:

(a) an amount payable annually or otherwise;

(b) a lump sum to be paid or held on trust and payable at one time or by instalments;

(c) any specified property to be transferred or assigned absolutely or in trust, or for life, or for a term of years to or for the benefit of the dependant;

(d) the acquisition out of property comprised in the estate of such property as may be specified to be transferred or assigned absolutely or in trust, or for life, or for a term of years to or for the benefit of the dependant.

(3) Where a transfer or assignment of property is ordered, the judge

(a) may give all necessary directions for the execution of the transfer or assignment by the executor or administrator or such person as the judge may direct, or

(b) may grant a vesting order.

7. (1) An order that provides for periodic payments shall specify that the order terminates:

(a) in the case of a child, either upon the attainment of the age of eighteen years or upon completion of his education or training but not later than the attainment of the age of twenty-three years;

(b) in the case of a child who is mentally or physically disabled, upon the attainment of the age of eighteen years or upon his becoming capable of earning a reasonable livelihood, whichever occurs later;

(c) in the case of a person referred to in section 2(c)(v), upon the attainment of the age of eighteen years;

(d) in any other case not later than the death of the dependant.

(2) An order that provides for support by way of a lump sum, the transfer of specific property or the acquisition of specific property shall be related to the amount of support which is expected to be required until the dependant attains the age or the event referred to occurs which would terminate an order for periodic payments under subsection (1).

8. Notwithstanding section 18(1)(a), where a dependant is in need, an application may be brought and the judge may make such interim order as he considers appropriate, even though the matters referred to in section 3(3) have not been ascertained.

9. Where an order has been made under this Act, a judge at any subsequent date may:

(a) for the purpose of giving effect to the order, give such further or other directions as he deems necessary;

(b) inquire whether the dependant benefitted by the order is self-sufficient either through becoming entitled to the benefit of any other provision for his proper maintenance and support or for any other reason;

(c) inquire into the adequacy of the provision ordered; and

(d) vary up or down, or discharge or suspend the order, or make such other order as he deems fit in the circumstances with the exception that a lump sum ordered to be paid directly to a dependant may not be varied.

10. Where a testator's will provides that the distribution of his estate is postponed until after the death of a dependant and such dependant has obtained relief under this Act or a former Act, a judge may, upon the application of any person interested and upon such notice as he deems proper, direct immediate distribution of the residue of the estate remaining after providing for the payment or for the securing of the payment of the amount awarded under this Act to the dependant.

11. (1) Subject to subsection (2), the incidence of any provision for maintenance and support that is ordered pursuant to this Act shall fall rateably upon the whole estate, whether the deceased died testate, intestate or partially intestate, or upon that part of the deceased's estate to which the jurisdiction of the judge extends.

(2) The judge may order that the provision for maintenance and support be made out of and charged against the whole or any portion of the estate in such proportion and in such manner as to him seems proper.

(3) In exercising the discretion under subsection (2), the judge shall have regard to the intentions of the testator insofar as they can be ascertained or inferred from the will or from surrounding circumstances.

12. A judge at any time

(a) may fix a periodic payment or lump sum to be paid by a legatee, devisee or beneficiary under an intestacy to represent, or in commutation of, such proportion of the sum ordered to be paid as falls upon the portion of the estate in which he is interested,

(b) may relieve such portion of the estate from further liability, and

(c) may direct

(i) in what manner such periodic payment is to be secured, or

(ii) to whom such lump sum is to be paid and in what manner it is to be dealt with for the benefit of the person to whom the commuted payment is payable.

13. A dependant has no capacity to anticipate an order under this Act, and any mortgage, charge or assignment of or with respect to an order, made before the granting of that order is invalid.

14. Where an order is made under this Act then for all purposes the order has effect as from the date of the deceased's death, and

(a) the will, if any, has effect from that date as if it had been executed with such variations as are necessary to give effect to the provisions of the order and

(b) the intestacy, if any, has effect from that date as if The Intestate Succession Act had been amended to give effect to the provisions of the order.

15. (1) An application for maintenance and support under this Act may be made in the matter of the estate of the deceased by originating notice under the Alberta Rules of Court.

(2) An application may be made

(a) by the trustee of the estate of a dependant 18 years of age or older on behalf of the dependant where the dependant is one for whose estate a trustee has been appointed by a court or designated by statute, and

(b) by a parent or by a guardian appointed by the court or by the Public Trustee, on behalf of an infant dependant.

(3) Where the dependant is an infant or the subject of an order under The Mentally Incapacitated Persons Act or a guardianship order, trusteeship order or a certificate of incapacity under The Dependent Adults Act, or a person for whose estate the Public Trustee is trustee, notice of any application in respect of an estate in which the dependant is interested shall be served on the Public Trustee and any other trustee, and the Public Trustee or any other trustee is entitled to appear and to be heard upon the application.

16. Where it appears that at the date of the deceased's death the spouses were living together, and

(a) all the children of the deceased who at the date of the deceased's death were under the age of 18 years, and

(b) all the children of 18 years of age or over who by reason of mental or physical disability were unable to earn a reasonable livelihood,

were living with or being supported by the spouses or either of them, there is no obligation on the guardian, Public Trustee or other person representing a child who is a dependant under this Act, to make an application on behalf of the child, if the guardian, Public Trustee, or other person is satisfied that the child is receiving adequate maintenance and support.

17. (1) Subject to subsection (2), no application may be made except within six months from the grant of probate of the will or of administration.

(2) A judge may, if he deems it just, allow an application to be made at any time as to any portion of the estate remaining undistributed at the date of the application.

(3) For the purpose of either an application made after the lapse of six months from the grant of probate or administration, or an application for upward variation of an existing order, property that is held for beneficiaries by the personal representative of the deceased person shall be deemed to remain undistributed even if the personal

representative has ceased to act as the personal representative in respect of that property and has become a trustee.

18. (1) Where an application is made on behalf of a dependant

(a) the judge shall not make an order until he is satisfied upon oath that all persons who are or may be interested in or affected by the order have been served, in accordance with the Alberta Rules of Court, with notice of the application and a copy of this section, and every such person is entitled to be heard in person or by counsel at the hearing, and

(b) the application shall, except as otherwise ordered by the judge, be deemed to be an application on behalf of all dependants who have been so served.

(2) Nothing in this section deprives a dependant who has not actually received notice of an application of any rights such dependant would otherwise have under this Act.

19. (1) Until the expiration of six months from the grant of probate of the will or administration, the executor, administrator or trustee shall not distribute any portion of the estate to any beneficiary without the consent of all of the dependants of the deceased, or unless authorized to do so by order of a judge made on summary application.

(2) Nothing in this Act prevents an executor, administrator, or trustee from making reasonable advances for maintenance to dependants who are beneficiaries.

(3) Where an executor, administrator or trustee distributes any portion of the estate in contravention of subsection (1), if any provision for maintenance and support is ordered by a judge to be made out of the estate, the executor or trustee is personally liable to pay the amount of the distribution to the extent that such provision or any part thereof ought, pursuant to the order or this Act, to be made out of the proportion of the estate distributed.

20. (1) Upon notice of any application being given to the executor, administrator or trustee the estate shall be held subject to the provisions of any order that may be made, and the executor, administrator, or trustee shall not proceed with the distribution of the estate otherwise than in accordance with such order.

(2) Where an executor, administrator or trustee distributes or disposes of any portion of the estate in any manner in contravention of subsection (1), if any provision for maintenance and support is ordered by a judge to be made out of the estate, the executor, administrator, or trustee, is personally liable to pay the amount of the same to the extent that such provision or any part thereof ought, pursuant to the order of this Act, to be made out of the portion of the estate distributed or disposed of.

(3) In addition to being personally liable as provided in subsection (2), an executor, administrator or trustee who wilfully contravenes the provisions of subsection (1) is guilty of an offence and liable on summary conviction

(a) in the case of a natural person to a fine of not more than $1,000 and in default of payment to a term of imprisonment of not more than 60 days, and

(b) in the case of a corporation to a fine of not more than $5,000.

21. (1) This section applies if

(a) the deceased made a contract to leave property by will, and

(b) there would be insufficient assets in the net estate to provide proper maintenance and support for a dependant after the transfer of the property which the deceased agreed to leave by will

but otherwise the rights of the other party to such a contract shall not be affected by an order under this Act.

(2) The judge may order that the rights of the other party to the contract

(a) to receive the property, or

(b) to recover damages for the breach of contract

shall be subject to an order made under section 3 to the extent determined by the judge under subsection (3) of this section.

(3) In determining the extent to which the rights of the other party to the contract shall be made subject to an order under section 3, the judge

(a) shall have regard to

(i) the value of the property and the value of the consideration at the date of the contract and at the date of the hearing,

(ii) the reasonable expectations of the parties as to the life expectancy of the deceased at the date of the contract,

(iii) if the property was not ascertained at the date of the contract, the reasonable expectations of the parties as to its likely nature and extent,

(iv) if the consideration was a promise, the reasonable expectations of the parties as to that which would be delivered under the promise, and

(v) the amount by which the net estate is insufficient to provide proper maintenance and support for the dependant, and

(b) shall ensure that the order will not deprive the other party to the contract of the right to receive property or damages in an amount which is not less than the value of the consideration received by the deceased in money or money's worth.

(4) For the purpose of this section

(a) a contract to leave property by will shall include a contract to make a will or not to revoke a will and

(b) "the rights of the other party to the contract" shall include the right of any other person claiming relief through an implied or constructive trust arising out of the contract or its breach.

22. (1) If an application is made for an order under section 3 of this Act, the judge may make an order under subsection (2) of this section where:

(a) there are insufficient assets in the net estate of the deceased out of which to provide proper maintenance and support for a dependant, and

(b) the deceased, without receiving full valuable consideration in money or money's worth, has done any of the following:

(i) made a transfer under which the deceased retained at the time of his death the possession or enjoyment of, or the right to income from, the property or substituted property;

(ii) made a transfer under which the deceased retained at the time of his death a power, either alone or in conjunction with any other person, to revoke the transfer or to consume, to encroach upon or to dispose of the property or substituted property;

(iii) made a transfer so that any property including money on deposit with a bank or other institution receiving deposits, or any other chose in action, is held jointly at the time of the deceased's death by the deceased and another or others with the right of survivorship;

(iv) made a designation of a beneficiary to receive a death or survivorship benefit in regard to an annuity, pension plan, retirement savings plan or any other similar plan intended to provide income for retirement;

(v) made a designation of a beneficiary to receive any amount payable under a policy of insurance which was effected on the life of the deceased and owned by him;

(vi) made an unreasonably large transfer of property within three years of his death not including a transfer where the parties are dealing at arm's length,which is not included within the above clauses (i) to (v).

(2) The judge may order, in regard to any property affected by the acts of the deceased set out in clause (1)(b), that the person who benefitted or any person who holds property on behalf of the person benefitted, shall pay to the estate of the deceased or directly to the dependant, as the judge may direct, such amount as the judge considers adequate for the proper maintenance and support of the dependant.

(3) The value of the order for support made under subsection (2) shall not exceed the value of the benefit received by the person affected by the order, less the value of the consideration in money or money's worth given by that person.

(4) Any person seeking to have the judge exercise the powers granted by subsection (2) with regard to any property shall have the burden of establishing that the property, or any part of it, was provided by the deceased.

(5) Where real property is held in joint tenancy, the benefit of the survivor or survivors on the death of the deceased is the ratio of the contribution of

the deceased to the contribution of all the parties multiplied by the fair market value of the property at the time of the deceased's death.

(6) An amount payable under a policy of insurance shall not be subject to an order under this section where such amount is payable to a third party pursuant to a bona fide contract with the deceased.

(7) In determining whether a transfer of property is unreasonably large under clause (1)(b)(vi), the judge shall consider:

(a) the ratio of the value of the property transferred to the value of the property comprising the net estate of the deceased at the time of his death;

(b) the aggregate value of any property disposed of under prior or simultaneous transfers and for this purpose the judge shall consider all transfers drawn to his attention whether made prior or subsequent to three years preceding the death of the deceased;

(c) any moral or legal obligations of the deceased to make the transfer;

(d) the amount, in money or money's worth, of any consideration paid by the person to whom the property was disposed;

(e) any other circumstances that the judge considers relevant.

(8) The amount which a judge may under subsection (2) order to be paid by a person who has received an unreasonably large transfer of property under clause (1)(b)(vi) shall not exceed the amount by which the judge considers the transfer to have

been unreasonably large.

(9) The burden of all orders made under subsection (2), unless the judge otherwise directs, shall be shared by the persons benefitted on a pro rata basis as determined by the judge.

(10) In deciding whether to give a direction under subsection (9), the judge shall consider the injurious effect of an order to pay made under subsection (2)on a person to whom property was transferred in view of any circumstances occurring between the date of the transfer of the property and the date on which the transferee received notice of the application under this Act.

(11) The judge may make a suspensory order directing the person who benefitted or any person who holds property on behalf of the person benefitted not to transfer any property affected by the acts of the deceased set out in clause (1)(b) where, in the opinion of the judge, there may be insufficient assets in the net estate of the deceased out of which to provide proper maintenance and support for a dependant to the end that an application may be made at a subsequent date for an order making specific provision for maintenance and support.

(12) This section does not prohibit any corporation or person from paying or transferring any funds or property to any person otherwise entitled unless the corporation or person has been personally served with a certified copy of a suspensory order enjoining such payment or transfer.

(13) Personal service upon the corporation or person holding any funds or property of a certified copy of a suspensory order shall be a defence to any action or proceeding brought against the corporation or person with respect to the fund or property during the period such order is in force.

(14) This section does not affect the rights of creditors of the deceased in any property with respect to which a creditor has rights.

(15) An application for an order under this section must be made within six months from the grant of probate or of administration and in any event not later than two years from the death of the deceased.

(16) This section does not apply to any transfer, transaction or designation made before the coming into force of this Act.

23. An order made or direction given under this Act may be enforced in the same way and by the same means as any judgment, order or direction of the Supreme Court of Alberta can be enforced, and a judge may make such interim order or direction as appears necessary

(a) to protect or preserve the assets of the estate, or

(b) to provide for the carrying on of the administration of the estate until final dispositions of the application has been made.

24. (1) A certified copy of every order made under this Act shall be filed with the clerk of the court out of which the letters probate or letters of administration issued.

(2) A memorandum of the order shall be endorsed on or annexed to the copy, in the custody of the clerk, of the original letters probate or letters of administration, as the case may be.

25. (1) An appeal lies to the Appellate Division of the Supreme Court of Alberta from any order made under this Act.

(2) The Appellate Division upon such appeal may affirm, annul or vary the order in such manner as in its discretion it deems proper.

26. The Crown is bound by this Act.

27. (1) This Act applies to an application made by a dependant for relief in regard to a person who dies after the coming into force of this Act.

(2) Subject to subsection (3), The Family Relief Act being chapter 134 of the Revised Statutes 1970 is repealed.

(3) The Family Relief Act repealed by subsection (2) continues in force as if unrepealed where either an application is made for provision from an estate or an application for variation of an existing order is made and the person whose estate is affected died prior to the coming into force of this Act.

APPENDIX B

The Administration of Estates Act

The Administration of Estates Act, R.S.A. 1970, c. 1 is amended by deleting section 8 and substituting the following:

(1) Where an application is made for a grant of probate or administration, the applicant shall take or cause to be taken reasonable steps to identify all dependants of the deceased under The Family Relief Act and shall:

(a) where the deceased is survived by a child who was under the age of 18 at the time of the deceased's death and who resides in Alberta, send a copy of the application to the Public Trustee;

(b) where the deceased is survived by a dependant who is subject to an order under The Mentally Incapacitated Persons Act or a guardianship order, trusteeship order or a certificate of incapacity under The Dependent Adults Act, send a copy of the application to the committee, trustee or guardian of that dependant.

(c) with regard to the surviving spouse and all other dependants, whether they reside in Alberta or elsewhere, send a copy of the application and a notice pertaining to the rights and the definition of a dependant under The Family Relief Act to each dependant under that Act.

(2) Where the deceased is survived by a dependant who was 18 years of age or over at the time of the deceased's death and is under a mental disability, but for whose estate there is no committee or trustee, the judge may, having regard to the value of the estate, the circumstances of the dependant and the likelihood of success of an application made on the dependant's behalf under The Family Relief Act:

(a) direct that a grant of probate or administration of deceased's estate not be issued until a committee or trustee has been appointed for the dependant's estate, and

(b) direct that the applicant or some other person apply to have a committee or trustee for the dependant's estate appointed under The Mentally Incapacitated Persons Act or under The Dependent Adults Act.

(3) A grant of probate or administration shall

not be issued unless the judge is satisfied that the requirements of this section have been complied with, except that the judge may waive the requirement to send a copy of the application or a notice to any person where it is shown to his satisfaction that the person could not be found after reasonable inquiry.

(4) In this section, "child", "dependant" and "spouse" have the meanings given them in The Family Relief Act.

APPENDIX C

The Surrogate Court Rules, Schedule 1

Schedule 1 to The Surrogate Court Rules, Alta. Reg. 20/71 is amended by deleting paragraph 2 of Form 2, paragraph 2 of Form 3 and paragraph 3 of Form 3 and substituting the following:

That I have taken or caused to be taken reasonable steps to identify all dependants of the deceased under The Family Relief Act and to the best of my knowledge the deceased at the time of his death left him surviving (here list the names, ages, addresses and basis of dependency respectively of all dependants under The Family Relief Act including

1. the spouse of the deceased
2. a child under 18 years of age
3. a child under 23 years of age who has not completed his education
4. a child 18 years of age or over who is unable by reason of mental or physical disability to earn a reasonable livelihood
5. a person under 18 years of age treated by the deceased as his own child
6. a person whose marriage with the deceased was terminated or declared void and in whose favour an order or agreement for maintenance or support was subsisting prior to the deceased's death
7. a parent or grandparent dependent upon the deceased for at least three years prior to the deceased's death

and the name of any committee appointed for the estate of any dependant) (and if any person is interested in the estate and is a missing person or convict as defined by the provisions of the Public Trustee Act, such particulars as may be known to the applicant shall be set out.)

. . . . . .

. . . . . .

and resided during six years immediately preceding his death at the following places

. . . . . .

. . . . . .

APPENDIX D

The Uniform Dependants' Relief Act

Sections 20 and 21

20 (1) Subject to section 15, for the purpose of this Act, the capital value of the following transactions effected by a deceased before his death, whether benefiting his dependant or any other person, shall be included as testamentary dispositions as of the date of the death of the deceased and shall be deemed to be part of his net estate for purposes of ascertaining the value of his estate:

(a) gifts mortis causa;

(b) money deposited together with interest thereon, in an account in the name of the deceased in trust for another or others with any chartered bank, savings office, credit union or trust company, and remaining on deposit at the date of the death of the deceased;

(c) money deposited, together with interest thereon, in an account in the name of the deceased and another person or persons and payable on death pursuant to the terms of the deposit or by operation of law to the survivor or survivors of those persons with any chartered bank, savings office, credit union or trust company, and remaining on deposit at the date of the death of the deceased;

(d) any disposition of property made by a deceased whereby property is held at

the date of his death by the deceased and another as joint tenants with right of survivorship or as tenants by the entireties;

(e) any disposition of property made by the deceased in trust or otherwise, to the extent that the deceased at the date of his death retained, either alone or in conjunction with another person or persons by the express provisions of the disposing instrument, a power to revoke such disposition, or a power to consume, invoke or dispose of the principal thereof; but the provisions of this clause do not affect the right of any income beneficiary to the income accrued and undistributed at the date of the death of the deceased;

(f) any amount payable under a policy of insurance effected on the life of the deceased and owned by him.

(2) The capital value of the transactions referred to in clauses (b), (c) and (d) of subsection (1) shall be deemed to be included in the net estate of the deceased to the extent that the funds on deposit were the property of the deceased immediately before the deposit or the consideration for the property held as joint tenants or as tenants by the entireties was furnished by the deceased.

(3) Dependants claiming under this Act shall have the burden of establishing that the funds or property, or any portion thereof, belonged to the deceased.

(4) Where the other party to a transaction described in clause (c) or (d) of subsection (1) is a dependant, such dependant shall have the burden of establishing the amount of his contribution, if any.

(5) This section does not prohibit any corporation or person from paying or transferring any funds or property, or any portion thereof, to any person otherwise entitled thereto unless there has been personally served on such corporation or person a certified copy of a suspensory order made under section 3 enjoining such payment or transfer.

(6) Personal service upon the corporation or person holding any such fund or property of a certified copy of such suspensory order shall be a defence to any action or proceeding brought against the corporation or person with respect to the fund or property during the period such order is in force and effect.

(7) This section does not affect the rights of creditors of the deceased in any transaction with respect to which a creditor has rights.

21 (1) Where, upon an application for an order under section 2, it appears to the court that:

(a) the deceased has within one year prior to his death made an unreasonably large disposition of real or personal property:

(i) as an immediate gift inter vivos, whether by transfer, delivery, declaration of revokable or irrevocable trust or otherwise; or

(ii) the value of which at the date of the disposition exceeded the consideration received by the deceased therefor; and

(b) there are insufficient assets in the estate of the deceased to provide adequate maintenance and support for the dependants or any of them;

the court may, subject to subsection (2), order that any person who benefited, or who will benefit, by the disposition pay to the executor, administrator or trustee of the estate of the deceased or to the dependants or any of them, as the court may direct, such amount as the court deems adequate for the proper maintenance and support of the dependants or any of them.

(2) The amount that a person may be ordered to pay under subsection (1) shall be determined in accordance with the following rules:

1. No person to whom property was disposed of is liable to contribute more than an amount equal to the extent to which the disposition was unreasonably large;
2. If the deceased made several dispositions of property that were unreasonably large, no person to whom property was disposed of shall be ordered to pay more than his pro rata share based on the extent to which the disposition was unreasonably large;

3. The court shall consider the injurious effect on a person to whom property was disposed of from an order to pay in view of any circumstances occurring between the date of the disposition of the property and the date on which the transferee received notice of the application under section 2;
4. If the person to whom the property was disposed of has retained the property he shall not be liable to contribute more than the value of his beneficial interest in the property;
5. If the person to whom property was disposed of has disposed of or exchanged the property, in whole or in part, he shall not be liable to contribute more than the combined value of any remaining original property and any remaining proceeds or substituted property;
6. For the purposes of paragraphs 4 and 5 "value" is the fair market value as at the date of the application under section 2.

(3) In determining whether a disposition of property is a disposition of an unreasonably large amount of property within the meaning of subsection (1), the court shall consider:

(a) the ratio of value of the property disposed of to the value of the property determined under this Act to comprise the estate of the deceased at the time of his death;
(b) the aggregate value of any property disposed of under prior and simultaneous dispositions and for this purpose the court shall consider all dispositions drawn to its attention

whether made prior or subsequent to one year prior to the death of the deceased;

(c) any moral or legal obligations of the deceased to make the disposition;

(d) the amount, in money or money's worth, of any consideration paid by the person to whom the property was disposed;

(e) any other circumstance that the court considers relevant.

The Succession Law Reform Act, 1977
S.O. 1977, c. 40, s. 79

79 (1) Subject to section 78, for the purpose of this Part, the capital value of the following transactions effected by a deceased before his death, whether benefiting his dependant or any other person, shall be included as testamentary dispositions as of the date of the death of the deceased and shall be deemed to be part of his net estate for purposes of ascertaining the value of his estate, and being available to be charged for payment by an order under clause f of subsection 2 of section 70,

(a) gifts mortis causa;

(b) money deposited, together with interest thereon, in an account in the name of the deceased in trust for another or others with any chartered bank, savings office, credit union or trust company, and remaining on deposit at the date of the death of the deceased;

(c) money deposited, together with interest thereon, in an account in the name of the deceased and another person or persons and payable on death pursuant to the terms of the deposit or by operation of law to the survivor or survivors of those persons with

any chartered bank, savings office, credit union or trust company, and remaining on deposit at the date of the death of the deceased;

(d) any disposition of property made by a deceased whereby property is held at the date of his death by the deceased and another as joint tenants;

(e) any disposition of property made by the deceased in trust or otherwise, to the extent that the deceased at the date of his death retained, either alone or in conjunction with another person or persons by the express provisions of the disposing instrument, a power to revoke such disposition, or a power to consume, invoke or dispose of the principal thereof, but the provisions of this clause do not affect the right of any income beneficiary to the income accrued and undistributed at the date of the death of the deceased;

(f) any amount payable under a policy of insurance effected on the life of the deceased and owned by him; and

(g) any amount payable under a designation of beneficiary under Part III.

(2) The capital value of the transactions referred to in clauses b, c and d of subsection (1) shall be deemed to be included in the net estate of the deceased to the extent that the funds on deposit were the property of the deceased immediately before the deposit or the consideration for the property held as joint tenants was furnished by the deceased.

(3) Dependants claiming under this Part shall have the burden of establishing that the funds or property, or any portion thereof, belonged to the deceased.

(4) Where the other party to a transaction described in clause c or d of subsection (1) is a dependant, he shall have the burden of establishing the amount of his contribution, if any.

(5) This section does not prohibit any corporation or person from paying or transferring any funds or property or any portion thereof, to any person otherwise entitled thereto unless there has been personally served on the corporation or person a certified copy of a suspensory order made under section 66 enjoining such payment or transfer.

(6) Personal service upon the corporation or person holding any such fund or property of a certified copy of a suspensory order shall be a defence to any action or proceeding brought against the corporation or person with respect to the fund or property during the period the order is in force.

(7) This section does not affect the rights of creditors of the deceased in any transaction with respect to which a creditor has rights.

ACKNOWLEDGMENTS

The Institute acknowledges the continuing grant from the Alberta Law Foundation which, together with the funds provided by the Attorney-General and the University of Alberta, makes the Institute's work possible.

We have been greatly assisted in this project by the work of the Conference of Commissioners on Uniformity of Legislation in Canada, now known as the Uniform Law Conference of Canada. This body prepared and adopted a model statute entitled The Testators Family Maintenance Act in 1945 and a Uniform Act entitled the Dependants' Relief Act in 1974. These statutes have played an important role in the reform of this area of the law in Canada.

We have benefitted from the work of other law reform bodies which have advocated reform of existing legislation. They are the Ontario Law Reform Commission, the Law Commission (England), the Law Reform Commission of New South Wales and the Law Reform Committee of Western Australia. We are also indebted to Professor W. D. Macdonald for his perceptive book Fraud on the Widow's Share and in particular for his approach to the problem of the evasion of the policy of the statute through inter vivos dispositions of property.

We also wish to acknowledge our gratitude to Mr. J. Currie, Mr. D. Fitch (now His Honour Judge Fitch) and Mr. J. S. Palmer who were the members of a committee which was established in 1969. The committee reported to the Institute about expanding the category of dependants to include a divorced spouse and a child to whom the deceased stood in the place of the parent. It also considered the problem of the evasion of the policy of the statute through inter vivos dispositions.

Byron Rutley, then of the Institute's legal staff, did much of the original research and organization for the project, which was carried to the Working Paper stage by Gerry van der Ven. This report is largely the work of Gordon Bale, the Associate Director of the Institute, whose article Limitation on Testamentary Disposition in Canada, (1964) 42 Can. Bar Rev. 367, provided much of the foundation upon which the project rests. Andrew R. Hudson of the Institute's legal staff also made a substantial contribution in the final report stage.

We appreciate also the time and trouble taken by those who made written submissions to us and whose names appear in the following list.

LIST OF SUBMISSIONS

1. H.J. Amerongen, Q.C., 825-10189-101 St., Edmonton

2. Mrs. R. Fortier, Devon

3. W.N. Gilbert, Campbell Professional Building, Peace River

4. D.T. Hatch, 205 - 5th Avenue S.W., Calgary

5. Dr. M.G. Hesse, Chairperson, Status of Women Group, Canadian Federation of University Women, Lethbridge

6. M.W. Howey, Q.C., Chairman, Edmonton subsection of Wills and Trusts, Canadian Bar Association

7. L.D. Hyndman, Q.C., Master in Chambers, Supreme Court of Alberta, Edmonton

8. H. Jacobson, 2431 - 26 A Street S.W., Calgary

9. L. Jensen, President, Women of Unifarm, 9934-106 St., Edmonton

10. E. Kush, Q.C., Box 369, Hanna, Alberta

11. A.M. Lambert, Cochairperson, Options for Women, 10006 - 107 Street, Edmonton

12. J. Law, Treasurer, Trust Companies Association of Canada, Alberta Section

13. J.L. Lewis, 201 Imperial Bank Building, 9990 - Jasper Avenue, Edmonton

14. J. Olynyk, 16219 - 86 Avenue, Edmonton

15. Dr. J. Montgomery, Coordinator of Family Studies, Faculty of Home Economics, University of Alberta, Edmonton

16. A.S. Romanchuk, 9928 - Richmond Avenue, Grande Prairie

17. A.K.H. Rose, Box 129, Lacombe

18. A.H. Russell, Edmonton

19. L.E. Taylor, Supervisor, Social Service Department, The City of Calgary

20. J.M. Thomson, Q.C., 1125 IBM Building, 606-4th St. S.W., Calgary

SUBMISSION LIST

21. G.E. Trott, 440 One Thornton Court, Edmonton

22. F.J. Newson , Q.C., 700-3 Sir Winston Churchill Sq., Edmonton

23. Ms. V. Lyall, 10643 - 103 St., Edmonton

24. M.J. Gillespie, Convenor, Status of Women Group, University Women's Club, Edmonton

25. Mrs. B. Robinson, 16418 - 105A Avenue, Edmonton

26. W. B. Williston, Q.C. , Toronto-Dominion Centre, Toronto.