



ALBERTA  
LAW REFORM  
INSTITUTE



## FAMILY MAINTENANCE AND SUPPORT FROM THE ESTATE OF A PERSON WHO STOOD IN THE PLACE OF A PARENT



REPORT FOR DISCUSSION

# 34

NOV 2020







**FAMILY MAINTENANCE AND SUPPORT FROM  
THE ESTATE OF A PERSON WHO STOOD IN  
THE PLACE OF A PARENT**

REPORT FOR  
DISCUSSION || **34**

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**Deadline for comments on the issues raised in this document is January 31, 2021.**

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This Report for Discussion by the Alberta Law Reform Institute (ALRI) proposes changes to the law regarding family maintenance and support from the estate of a person who has died. Specifically, this Report asks what should happen if the deceased stood in place of a parent to a child of the deceased's spouse or partner.

Issuing a Report for Discussion allows you the opportunity to consider these proposals and to share your views with us. You may respond to one, a few or all of the issues raised. Any comments sent to us will be considered when we make final recommendations.

You can reach us with your comments or with questions about this document on our website, or by mail or e-mail to:

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# Alberta Law Reform Institute

The Alberta Law Reform Institute (ALRI) was established on November 15, 1967 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. Funding for ALRI's operations is provided by the Government of Alberta, the University of Alberta and the Alberta Law Foundation.

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To all of these contributors, we express our gratitude.



# Summary

## **What is this report about?**

There may be a gap in the law for the purposes of support for a child from a person standing in the place of a parent. By “gap in the law” we mean that in Alberta a child can apply for support while the person is alive, but not after the person’s death. This report asks whether the law should be changed so a child could apply for family maintenance and support from the estate of a person who stood in the place of a parent.

## **When is “a person standing in the place of a parent”?**

A “person standing in the place of a parent” is defined in the *Family Law Act*. To be standing in the place of a parent, a person must meet two conditions.

First, the person must be the spouse or partner of the child’s parent. In other words, the person must be the child’s step-parent.

Second, the person must have “demonstrated a settled intention to treat the child as the person’s own child.” It is not enough to be a step-parent, or even to be a very good step-parent. A person is only standing in the place of a parent if they demonstrated a settled intention to treat the child as the person’s own child. There are several factors a court may consider to determine whether a person has demonstrated that settled intention.

## **What is the problem?**

This report compares support under two statutes: the *Family Law Act* and the *Wills and Succession Act*.

The *Family Law Act* applies when a couple separates. Under the *Family Law Act*, a child can apply for and may be entitled to support from a person standing in the place of a parent. A child support order made while the person was alive will usually bind the estate of the person, meaning the child will continue to receive support if the person dies.

The *Wills and Succession Act* applies when a person dies. The *Wills and Succession Act* includes protections for certain family members of a deceased person. If a spouse, partner, or child does not inherit enough to meet their needs, they may apply to court for family maintenance and support from the estate. A child to whom the deceased stood in the place of a parent is not one of the family members who can apply. This means that the child has no chance of receiving family maintenance and support from the estate, no matter how great the child’s need.

ALRI's preliminary view is that the difference between the two statutes is not justified. It is in the best interests of a child to have the opportunity to apply for support, regardless of whether the person standing in the place of a parent is living or dead.

### **What does ALRI propose?**

ALRI proposes changing the law to allow a child to apply for family maintenance and support from the estate of a person who stood in the place of a parent. It should be noted that family maintenance and support would not be granted automatically. A court may order it only if the child requires support and the estate has not provided support that is adequate in the circumstances.

The report also addresses some related issues, including:

- whether there should be a minimum length of time that a child must live with a person to be able to apply for support from the person's estate,
- how to determine priorities between different support obligations,
- who should receive notice of an application, and
- when a child over the age of 18 should be able to apply for support.

### **How can I support or oppose these proposed changes?**

ALRI welcomes your comments and suggestions for improving these recommendations. You can contact us at the address below. There is also an online survey, which you can access at:

[bit.ly/rfd34survey](https://bit.ly/rfd34survey)

### **What happens next?**

ALRI will consider all the comments we receive. After reviewing the comments, we may change our recommendations and will publish a final report.

If you would like to be notified about the final report and our other publications, you may join our mailing list at [www.alri.ualberta.ca](http://www.alri.ualberta.ca)

# Issues / Recommendations

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# Table of Abbreviations

## LEGISLATION

WSA	<i>Wills and Succession Act</i> , SA 2010, c. W-12.2
FLA	<i>Family Law Act</i> , SA 2003, c F-4.5

## LAW REFORM PUBLICATIONS

ALRI Family Relief	<i>Family Relief</i> , Final Report (1978)
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## CASES

<i>Malkhassian</i>	<i>Malkhassian (Trustee of) v Malkhassian</i> , 2014 ABQB 353
<i>Chartier</i>	<i>Chartier v Chartier</i> , [1999] 1 SCR 242



## CHAPTER 1

# Introduction

## A. Family Maintenance and Support after Death

---

[1] The *Wills and Succession Act* consolidated and modernized most of Alberta's succession law into a single statute.<sup>1</sup> Its drafting resulted from a detailed review of Alberta's wills and estate laws and of consultation undertaken by ALRI, government and stakeholders. The WSA continues two traditional principles of succession law in the province. First, the WSA maintains the principle of testamentary freedom as the primary principle of succession law. Testamentary freedom means that a person should be able to dispose of property on death as that person wishes. The WSA recognizes that interfering with a person's testamentary freedom must always be justified. Second, the WSA preserves a long-standing principle in Alberta's succession law that a person must look after that person's family after death.<sup>2</sup> The WSA also continues the protection afforded to family members for their continuing support.

[2] These two principles are balanced in Part 5 of the WSA, the family maintenance and support regime. Part 5 takes a flexible approach to balancing a person's testamentary freedom with the support owed to family members. Procedurally there are three steps to this flexible approach. The first step is definitional, a person must fall under the definition of "family member" in Part 5 in order to bring a claim. The definition of "family member" contains a list of persons in the class and the list is exhaustive. Next a family member must establish that the support provided by an estate, if any, falls below the legislated standard. The WSA mandates that an estate make at least adequate provision for the support and maintenance of a family member. Third, where a court is satisfied that the provision is inadequate, that family member must convince the court to exercise its discretion to make an order against the estate.<sup>3</sup> It is only at the final, discretionary stage of a claim under Part 5 that a person's testamentary freedom may be restrained.

---

<sup>1</sup> *Wills and Succession Act*, SA 2010, c W-12.2 [WSA].

<sup>2</sup> Bill 21, *Wills and Succession Act*, 2010, 3rd Sess, 27th Leg, 2010, at 1066 (Hon Verlyn Olson) [Bill 21, Second Reading].

<sup>3</sup> WSA, note 1, s 88.

[3] This Report's focus is on the first of the three steps of the WSA's family maintenance and support procedure. It asks if a new class of person should be added to the list of "family member". It does not propose to expand the Court's already broad power under the WSA, but asks only if another type of person should be able to ask the Court to exercise its discretion in needful circumstances.

[4] This Report focuses on parents and children. Parent and child relationships are determined by the *Family Law Act*. The WSA refers to the FLA, Part 1 in determining who are parents and children.<sup>4</sup> For this and other reasons consideration of the FLA is integral to this Report's analysis.

[5] The FLA, in Part 1, determines who a child's parents are by reference to birth (including assisted reproduction) and adoption. The provisions limit the number of parents a child can have to two.<sup>5</sup>

[6] In addition Part 3 of the FLA recognises that a person may "stand in the place of a parent".<sup>6</sup> Two conditions must be met for a person to stand in the place of a parent. The first condition is that the person must be either

- a. the spouse of a parent of the child, or
- b. in a relationship of interdependence of some permanence with a parent of the child.<sup>7</sup>

The relationship status between the parent and the person potentially standing in the place of a parent is not determinative. The second condition assesses the relationship between the person and the child. It is only where a person has demonstrated a settled intention to treat a spouse's or partner's child as their own child that the person can be said to stand in the place of a parent. Even "very good" step-parents may not stand in the place of parents. Being a "very good" step-parent is not grounds for imputing the necessary intention to a person alleged to be standing in the place of a parent.<sup>8</sup>

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<sup>4</sup> WSA, note 1, s 1(3).

<sup>5</sup> *Family Law Act*, SA 2003, c F-4.5 [FLA], s 7.

<sup>6</sup> FLA, note 5, s 47.

<sup>7</sup> FLA, note 5, s 48(1)(a).

<sup>8</sup> *Rubin v Gendermann*, 2011 ABQB 71 at para 322; *Omeltschenko v Christopoulos*, 2013 ABQB 33 at paras 24-28. The characteristics of a "very good" step-parent were discussed in *Shirley v Shirley*, 2007 ABCA 281 at para 3.

[7] If a person stands in the place of a parent to a child then the FLA includes the person as a parent for the purposes of support and they have a support obligation to that child.<sup>9</sup> The court can order that support be paid for a child by the person.<sup>10</sup> Finally, a support order made during the life of a person standing in the place of a parent will bind the estate of that person unless the order provides otherwise.<sup>11</sup> Support orders made under the FLA are usually only made on the separation of the person standing in the place of a parent and the biological or adoptive parent.<sup>12</sup> However, the obligation to support a child precedes the adult's separation.

[8] In contrast to the support obligations created under the FLA during life, the WSA does not allow a court to order the estate of a person standing in the place of a parent to provide support to a minor child.<sup>13</sup> It may be that there is a gap in the law.

[9] This Report considers whether the support obligation of a person standing in the place of a parent to a minor child should be limited to orders made while that person is alive. Alternatively, should a court be permitted to make orders for maintenance and support against the estate of a person standing in the place of a parent after that person's death?

[10] While the focus of the Report is on minor children, the Report also considers whether a court might make an order against the estate of a person standing in the place of a parent to support an adult child who is disabled or pursuing higher education. Under both the FLA and the WSA, the support obligations owed to children are extended to these two categories of an adult child. This Report will examine the policy reasons for this extension and ask if they are appropriate to an estate of a person standing in the place of a parent.<sup>14</sup>

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<sup>9</sup> FLA, note 5, ss 47, 49(1).

<sup>10</sup> FLA, note 5, s 50.

<sup>11</sup> FLA, note 5, s 80(1).

<sup>12</sup> FLA, note 5, s 50(2).

<sup>13</sup> WSA, note 1, ss 1(3), and 72.

<sup>14</sup> We recognize that the scope of this report will not capture all the ways in which adult Albertans form and live in relationships. For example, those persons in polyamorous relationships outside the legislated structures of marriage and adult interdependent relationships fall outside the scope of the FLA and the WSA. Similarly, how some families establish parentage also falls outside of the FLA. For example, First Nations customary adoptions may not meet the requirements of settler law. Same sex couples may recognize their child's biological link to a third parent which falls outside of the FLA's two parent structure. These relationships are important and complex, and deserve the full consideration of a specific report. They are, however, out of the scope of this project and as such will not be considered here.

## B. Background to this Project

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[11] Alberta has significantly changed its child support laws. ALRI has studied many of the issues relevant to the changes made to child support legislation. In 1998 ALRI published a report for discussion under its Family Law Project specific to child support.<sup>15</sup> In its Family Law Project Child Support Report for Discussion ALRI recommended Alberta's current legislative framework for child support.<sup>16</sup>

[12] Alberta has also recently changed its wills and succession laws and ALRI made recommendations for their improvement. In 1999 ALRI made recommendations for reform to what was then the *Intestate Succession Act*.<sup>17</sup> In 2002 it recommended the consolidation of Alberta's core succession legislation into one statute.<sup>18</sup>

[13] ALRI has made recommendations on improving Alberta's family maintenance legislation. In 1978 ALRI recommended that children be included in the class of individuals who could bring a maintenance claim against the estate of a deceased, including the estate of a deceased who stood in the place of a parent.<sup>19</sup> ALRI focused on the changes made to the *Divorce Act* of the time, noting that it enabled children to receive maintenance on the grant of a decree nisi of divorce.<sup>20</sup> ALRI accepted that the *Divorce Act* reflected

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...<sup>21</sup>

[14] There are various reasons ALRI is revisiting this issue now.

<sup>15</sup> Alberta Law Reform Institute, *Family Law Project Child Support*, Report for Discussion (1998) at 107-116, online: <[www.alri.ualberta.ca/docs/rfd0183.pdf](http://www.alri.ualberta.ca/docs/rfd0183.pdf)> [ALRI Child Support].

<sup>16</sup> ALRI Child Support at 107-116.

<sup>17</sup> Alberta Law Reform Institute, *Reform of the Intestate Succession Act*, Report (1999) at 137, online : <[www.alri.ualberta.ca/docs/fr078.pdf](http://www.alri.ualberta.ca/docs/fr078.pdf)>.

<sup>18</sup> Alberta Law Reform Institute, *Report on a Succession Consolidation Statute*, Final Report (2002), online : <[www.alri.ualberta.ca/docs/fr087.pdf](http://www.alri.ualberta.ca/docs/fr087.pdf)>.

<sup>19</sup> Institute of Law Research and Reform (Alberta), *Family Relief*, Final Report (1978) at 45-47, online : <[www.alri.ualberta.ca/docs/fr029.pdf](http://www.alri.ualberta.ca/docs/fr029.pdf)> [ALRI Family Relief].

<sup>20</sup> *Divorce Act*, RSC 1970, c D-8, s 2.

<sup>21</sup> ALRI Family Relief, note 19 at 45.

[15] An expanding number of children are treated differently in step-families after the death of a person standing in the place of a parent. The number of step-families is generally acknowledged to be on the rise in Alberta.<sup>22</sup> Alberta law has not kept pace with these societal changes and may no longer reflect current societal attitudes. The WSA was passed into law in 2010. Ten years out may be an opportune time to ensure that our law continues to reflect an appropriate policy outcome.

[16] The “best interests of the child” principle has become the only standard in Alberta’s family legislation pertaining to guardianship, parenting, and contact orders.<sup>23</sup> The principle is also a driving force in child support decisions involving persons standing in the place of a parent under Canada’s *Divorce Act*.<sup>24</sup> As the “best interests” principle is now fully entrenched in Alberta law, it seems appropriate to use that principle in other statutes concerned with the support of children.

[17] Further, there is an equality aspect to this issue. Children are being treated differently at law due to factors over which they have no control.

[18] This Report does not propose to change the intestate succession regime in Alberta under Part 3 of the WSA. The issues in an intestacy under Part 3 are different than the issues for maintenance and support under Part 5 and require a different analysis. The intestate succession regime gives certain persons an automatic right to the property, or some part of the property, of the deceased.<sup>25</sup> Part 5 does not give a family member an automatic right to any part of a deceased’s property. Rather, Part 5 gives a family member a right to have their needs considered by a court.<sup>26</sup> While the end result may be the same, in that a

<sup>22</sup> Jonnette Watson-Hamilton, “A Cautionary Tale for Step-Parents and Step-Children” (5 May 2015), , online (blog): *ABlawg* <[ablawg.ca/2015/05/05/a-cautionary-tale-for-step-parents-and-step-children/](http://ablawg.ca/2015/05/05/a-cautionary-tale-for-step-parents-and-step-children/)> [perma.cc/2V7Q-UGTC]; Statistics Canada, “Census family structure including intact families and stepfamilies for couples with children in private households, 2011 counts, all couples, for Canada, provinces and territories” (last modified November 23 2016), online: *Statistics Canada* <[www12.statcan.gc.ca/census-recensement/2011/dp-pd/hltfst/fam/Pages/highlight.cfm?TabID=1&Lang=E&Asc=1&PRCode=01&OrderBy=999&View=1&tableID=303&Couples=1&queryID=1](http://www12.statcan.gc.ca/census-recensement/2011/dp-pd/hltfst/fam/Pages/highlight.cfm?TabID=1&Lang=E&Asc=1&PRCode=01&OrderBy=999&View=1&tableID=303&Couples=1&queryID=1)> [perma.cc/7JXF-PWTH]; Statistics Canada, “Canadian Families: Diversity and Change” (1996) at 2, online (pdf): *Government of Canada Publications* <[http://publications.gc.ca/collections/collection\\_2017/statcan/CS12-0061-1996-eng.pdf](http://publications.gc.ca/collections/collection_2017/statcan/CS12-0061-1996-eng.pdf)> [perma.cc/FP4C-6L9L].

<sup>23</sup> FLA, note 5, s 18.

<sup>24</sup> *Divorce Act*, RSC 1985, c 3 (2nd Supp); *Chartier v Chartier*, [1999] 1 SCR 242

[*Chartier*]; Carol Rogerson, “The Child Support Obligation of Step-Parents” (2001) 18 Can J Fam L 9.

<sup>25</sup> WSA, note 1, s 59.

<sup>26</sup> ALRI Family Relief, note 19 at 15.

family member may end up obtaining some part of an intestate estate, the process is distinctly different. Part 5 involves weighing interests, rights, and abilities that may result in an altered distribution scheme in favour of the family member applicant, or may not. Part 3 involves a mandatory distribution that applies in all circumstances without weighing the needs, interests, or abilities of either the deceased or any spouse, adult interdependent partner, or descendant. Whether or not the intestate distribution system ought to include children of persons standing in the place of parent is out of the scope of this project.

[19] Direct changes to the WSA's intestate regime are out of scope for this project; however, Part 5 of the WSA can affect an intestacy.<sup>27</sup> Where the intestacy provisions do not provide adequately for a family member the court has the discretion to vary the default intestacy distribution rules to provide adequately for the needs of any family member. For this reason some consideration of the effects of Part 5 on intestacies will be necessary.

[20] In this Report ALRI only asks if a child should be able to apply to the Court for an order against the estate of a person standing in the place of a parent if support is inadequate. To assess the adequacy of support a court will necessarily have to assess other sources of support, including the support obligations created by the FLA and the WSA for all parents. As discussed in greater detail under issue 3, the support provided by the estate of a person standing in the place of a parent should be secondary to support obligations of biological or adoptive parents.

### **C. Structure of this Report**

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[21] This Report will assess the position of children being raised by persons standing in the place of a parent, and the issue of support and maintenance orders made against the estate of that person after death.

[22] There are, however, several sub-issues that ought to be canvassed. These sub-issues include:

- Whether the length of the relationship between adult and child should impact a minor child bringing an application against the estate of a person standing in the place of a parent?

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<sup>27</sup> WSA, note 1, s 88(1)(b).



- As with child support, whether the obligation of a person standing in the place of a parent should be a secondary obligation to the children's biological or adoptive parents' obligations?
- Whether priority should be given to existing child support orders that have bound the estate of a person standing in the place of a parent in the context of competing claims against the estate?
- Who should get notice when a personal representative applies to probate a will made by someone who may have been standing in the place of a parent?
- If the estate of a person standing in the place of a parent is bound to provide support to a minor child, whether that support should terminate when the child reaches the age of majority, or should it continue in certain circumstances?
- Finally, what transitional rules might apply if the estate of a person standing in the place of a parent is made subject to claims for maintenance and support?

[23] ALRI is now seeking broad input on the preliminary recommendations in this Report for Discussion. All comments will be considered when ALRI makes its final recommendations.



## CHAPTER 2

# Historic and Current Perspectives

[24] Alberta law has long recognized that freedom of testation should be balanced by the obligations owed to families. Alberta law has also recognized that sometimes those obligations require oversight. However, this has not always been the case in succession law. When English law was received in Alberta, a testator was granted unrestrained testamentary power.

## A. Testamentary Freedom and the Duty to Support Family

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### 1. IN ENGLAND

[25] Freedom of testation developed gradually over hundreds of years in England. From a historical perspective unrestrained freedom of testation over both personal property and land existed for only 105 years, from 1833 to 1938.<sup>28</sup> Before 1833 freedom of testation was severely limited. With respect to personal property the power of disposition was limited to only one part of a man's estate.<sup>29</sup> The remainder was divided between his widow and children.<sup>30</sup> This scheme gradually disappeared in England by 1724, leaving the disposition of a man's personal property to his sole discretion.<sup>31</sup>

[26] Testamentary freedom over real property (i.e. land) underwent a similar development in English law. Before 1540, the doctrine of primogeniture governed the succession of real property and the courts denied any testamentary disposition of land.<sup>32</sup> The passage of the *Wills Act*<sup>33</sup> began expanding a testator's right to dispose of real property by will.<sup>34</sup> Despite the legislative expansion of freedom of testation, disposition of real property remained fettered by customary

<sup>28</sup> England would restrain freedom of testation with *The Inheritance (Family Provision) Act*, 1938, 1 & 2 Geo. 6, ch 45.

<sup>29</sup> At this point in the development of English law, most women could not hold property, and as such the law focused on a man's personal property.

<sup>30</sup> ALRI Family Relief, note 19 at 3; Gordon Bale, "Limitation on Testamentary Disposition in Canada" (1964) 42:3 Can Bar Rev 367 at 368 [Bale]; Hannah Roggendork, "Indefeasible Family Rights: A Comparative View on the Restrictions of Testamentary Freedom" (2018) 22:2 Ed L Rev 211 at 219 [Roggendork].

<sup>31</sup> Elizabeth Travis High, "The Tension Between Testamentary Freedom and Parental Support Obligations: A Comparison between the United States and Great Britain" (1984) 17 Cornell LJ 321 at 323; Bale, note 30 at 368.

<sup>32</sup> Bale, note 30 at 368; Roggendork, note 30 at 219.

<sup>33</sup> *Wills Act*, 32 Hen VIII, c 1, as amended 34 & 35 Hen 8, c 5.

<sup>34</sup> Bale, note 30 at 369; ALRI Family Relief, note 19 at 3-4.

dower. Customary dower allowed a widow to claim a one-third life interest in the real property held by her husband during their marriage. The fettering of testamentary freedom by customary dower ended in 1833 with the *Dower Act*, which empowered a husband to deprive his widow of her customary rights by will.<sup>35</sup> With the passage of the *Dower Act* freedom of testation would be legally supreme as a principle of succession law in England.

[27] Despite the complete removal of legal balances to the powers of testators, testamentary freedom was nevertheless thought to be constrained. In 1870 English jurists argued that a positive moral obligation required a person to provide for the family members dependent upon them. This moral obligation was so strong that it was a necessary and inseparable part of testamentary freedom. In *Banks v Goodfellow* the Court noted that although testamentary freedom was absolute in English law,<sup>36</sup>

a moral responsibility of no ordinary importance attaches to the exercise of the right thus given. The instincts and affections of mankind in the vast majority of instances will lead men to make provision for those who are the nearest to them in kindred, and who in life have been the objects of their affection... It cannot be supposed that in giving the power of testamentary disposition the law has been framed in disregard of these conditions. On the contrary, had they stood alone it is probable that the power of testamentary disposition would have been withheld...

[28] England would officially end the unrestrained power of testamentary freedom in 1938 with *The Inheritance (Family Provision) Act*.<sup>37</sup>

## 2. IN ALBERTA

[29] Alberta became a province in 1905, but officially received England's law of succession as of 1870.<sup>38</sup> It would take Alberta's legislators only five years to reform succession law and begin again to legally balance testamentary freedom with the duty to support family. Alberta's first statute to mandate continuing support for family after a person's death was the *Married Women's Relief Act*.<sup>39</sup>

<sup>35</sup> Bale, note 30 at 369, ALRI Family Relief, note 19 at 4; *Dower Act* 1833, 3 & 4 Will IV c 105 at s 4.

<sup>36</sup> *Banks v Goodfellow*, [1861-73] All ER Rep 47 at 55.

<sup>37</sup> *The Inheritance (Family Provision) Act*, 1938, 1 & 2 Geo. 6, ch 45.

<sup>38</sup> *The Alberta Act*, 1905, 4-5 Edw VII, c 3 (Can.), s 16; J.E. Cote, "The Introduction of English Law into Alberta" (1964) 3 Alta L Rev 232 at 263-264.

<sup>39</sup> *Married Women's Relief Act*, SA 1910, c 18.

The *Married Women's Relief Act* enabled a widow to apply for support from the estate of her husband if, by will, she received less than she would have if her husband had died intestate.

[30] The *Married Women's Relief Act* remained in force in Alberta until 1947 when the Legislature passed *The Testators Family Maintenance Act*.<sup>40</sup> The 1947 Act extended the duty to provide support after death to a husband and children of a testator.<sup>41</sup> A child was defined to include a child lawfully adopted by the testator, and a child who was in the womb at the date of a testator's death and later born alive.<sup>42</sup> A child over the age of nineteen years who was unable to earn a livelihood because of mental or physical disability could also apply under the 1947 Act for relief.<sup>43</sup>

[31] The intestate succession share also ceased to play a role as a standard for measuring the adequacy of support with the 1947 Act.<sup>44</sup> Rather than looking to a fixed share, Alberta legislators adopted the approach taken by New Zealand legislators in 1900.<sup>45</sup> The 1947 Act used a flexible balance to testamentary freedom through reliance on judicial discretion. The 1947 Act's balancing of testamentary freedom was flexible because it did not confer an automatic legal right upon any family member to receive a certain portion of the deceased's estate. Rather, the law allowed certain family members to bring an application to court to ask for an order for maintenance and support out of an estate. It empowered the court to grant an order that would provide maintenance that the court considered adequate but did not mandate that the court make an order where support was inadequate.<sup>46</sup> The flexible approach to balancing testamentary freedom taken in 1947 continues under Alberta's approach to family maintenance in the WSA.<sup>47</sup>

[32] The flexible approach to balancing a person's testamentary freedom extended to cases of intestacy in 1955.<sup>48</sup> In doing so "...the Legislature

<sup>40</sup> *The Testators Family Maintenance Act*, SA 1947, c 12 [The 1947 Act].

<sup>41</sup> The 1947 Act, note 40, s 2(c).

<sup>42</sup> The 1947 Act, note 40, s2(b).

<sup>43</sup> The 1947 Act, note 40, s2 (c).

<sup>44</sup> ALRI Family Relief, note 19.

<sup>45</sup> *The Testator's Family Maintenance Act*, 1900 (NZ), 1900/20.

<sup>46</sup> ALRI Family Relief, note 19 at 15; The 1947 Act, note 40, s 4.

<sup>47</sup> WSA, note 1, s 88.

<sup>48</sup> *An Act to amend The Testators Family Maintenance Act*, SA 1955, c 66, s 5.

recognized that in some circumstances the rules of intestate succession might not provide for proper maintenance for dependants of a deceased person.”<sup>49</sup>

[33] In 1969 the category of dependants was enlarged to include a woman’s children born outside of marriage, and a man’s children born outside of marriage in specific circumstances.<sup>50</sup> The distinctions between children based on their parents’ marital status were abolished in 1991.<sup>51</sup> In 2002 Alberta legislators added adult interdependent partners to the list of persons who could bring a claim for maintenance from a deceased’s estate. The act itself got a new name in 2002 to become the *Dependant’s Relief Act*.<sup>52</sup>

[34] The consolidation of Alberta’s succession law incorporated the *Dependent’s Relief Act* into the WSA. The list of persons who could apply for maintenance and support remained largely the same. However, as with previous revisions of Alberta’s family maintenance regime a notable addition was made. For the first time a class of persons outside of the immediate family of a deceased could bring an application to court against an estate. Grandchildren, under part 5 of the WSA, could now bring a claim for maintenance against the estate of a grandparent, or great-grandparent, where that grandparent was standing in the place of a parent.<sup>53</sup> With the changes brought by the WSA, the name for family support on death changed again, echoing its previous names. Alberta legislators renamed the new Part 5 of the WSA “Family Maintenance and Support”, following “...a modern trend away from describing people as dependants.”<sup>54</sup>

[35] The changes made to Part 5 of the WSA continued the pattern of previous changes to Alberta’s succession laws. That pattern has been to ensure that the class of persons who can bring a claim against an estate for maintenance and support remains consistent with those persons that Albertans consider family.<sup>55</sup> The changes made to the WSA include changes that recognize the familial relationships of Indigenous persons, by including the roles played by grandparents in families. The historical broadening of the category of family member to include adult interdependent partners and grandparents standing in

<sup>49</sup> ALRI Family Relief, note 19 at 5.

<sup>50</sup> *An Act to amend the Family Relief Act*, SA 1969, c 33, s 2.

<sup>51</sup> Bill 50, *Family and Domestic Relations Statutes Amendment Act*, 1991, 3rd Sess, 22nd Leg, 1991 (assented to June 25, 1991), SA 1991, c 11.

<sup>52</sup> *Adult Interdependent Relationships Act*, SA 2002, c A-4.5, s 35.

<sup>53</sup> WSA, note 1, ss 72(b)(vi), 73.

<sup>54</sup> Bill 21, Second Reading, note 2 at 1066-1067 (Hon. Verlyn Olson).

<sup>55</sup> Bill 21, Second Reading, note 2 at 1066-1067 (Hon. Verlyn Olson).

the place of parents acknowledges the increasing importance of less formalized familial relationships in the lives of Albertans today.

## **B. Standing in the Place of a Parent**

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### **1. COMMON LAW**

[36] Generally there was no legal obligation on a parent to maintain a child during life under the English common law, except for the operation of the poor law.<sup>56</sup> It follows that a person was not liable for the expenses of maintaining their spouse's children from a previous marriage.<sup>57</sup> This rule held except where a person stood in the place of a parent to the children.<sup>58</sup>

[37] The English courts grappled with the concept of a person stepping into the place of a child's parent during the early 19<sup>th</sup> century. Wills and estates law contributed to developing the theory of when a person stands in the place of a parent. English jurists held that a natural, or moral, duty on testators urged that provision be made for their families in their wills.<sup>59</sup> This moral duty led to several legal presumptions. For example, the English common law presumed that in giving a gift to a child during life, after having provided for that child in a will, a testator did not intend for the provision in the will to survive. Absent evidence to the contrary, the gift in the will was deemed satisfied by the gift made during life.<sup>60</sup> The courts eventually extended the presumption to a person who stood in the place of a parent to a child.<sup>61</sup> To find a person standing in place of a parent, a court need only look to the testator's intention to take on the "...parental offices and duties to which the subject in question has reference".<sup>62</sup> This standard, looking only at the intention of the person alleged to be standing in the place of a parent, became the common law test.

[38] The concept of standing in the place of a parent was also used to provide maintenance in specific circumstances for children from the estates of testators.

<sup>56</sup> *Cooper v Martin* (1803), 4 East 76 at 84; *Bazeley v Forder* (1868), LR 3 (QB) 559 at 565.

<sup>57</sup> *Tubb v Harrison* (1790), 4 TR 118 at 119.

<sup>58</sup> *Stone v Carr* (1799), 3 Esp 1 at 2.

<sup>59</sup> *Banks v Goodfellow*, [1861-73] All ER Rep 47 at 55.

<sup>60</sup> *Pye, ex parte* (1811), 34 ER 271 at 275.

<sup>61</sup> *Powys v Mansfield* (1837), 40 ER 964 at 967; *Groat v Kinnard*, (1914) 20 DLR 421 at para 19. The WSA, note 1, has abolished these presumptions in s 110 and in their place provided for an application to court to resolve the issue in s 109.

<sup>62</sup> *Powys v Mansfield* (1837), 40 ER 964 at 967.

The concept was used where a parent, or a person standing in the place of a parent, created a trust for a minor. If that trust was made payable at some future date, with no provision for the maintenance of that child before that date, then the court could order that the interest earned by the trust be used for the maintenance of the child. This was true even if the legacy was contingent on the child surviving to a certain age.<sup>63</sup>

## 2. LEGISLATION

### a. Tort legislation

[39] Some of the earliest examples of standing in the place of a parent in Canadian legislation come from fatal accidents statutes.<sup>64</sup> One example is the Saskatchewan *Fatal Accidents Act, 1920*.<sup>65</sup> Under the Act the term “child” included a person to whom the deceased stood in the place of a parent.<sup>66</sup> The Saskatchewan Court of Appeal held that to stand in the place of a parent a person must have evidenced an intention of occupying the role ordinarily occupied by a parent for the provision of a child’s pecuniary wants.<sup>67</sup> The Court held that the mere assertion of dependence of one party upon another fell short of expressing the degree of a moral relationship which would cause a finding that the person was standing in the place of a parent.<sup>68</sup>

[40] Worker’s compensation legislation throughout Canada also makes use of the concept of standing in the place of a parent.<sup>69</sup> In Alberta this has been the

<sup>63</sup> *Spark v Perrin* (1870), 7 Gr 519 at para 1.

<sup>64</sup> *Carignan v Carignan*, [1990] 1 SCR 242, at para 11.

<sup>65</sup> *The Fatal Accidents Act, 1920*, SS 1920, c 29, [Saskatchewan 1920 Act]. Alberta’s fatal accidents legislation granted step-children some benefits since at least 1922. However, the trend in Alberta has been to limit the type of benefit to which step-children are entitled. *The Fatal Accidents Act*, RSA 1922, c 96, s 2; *The Fatal Accidents Act*, RSA 1942, c 125, s 2; *The Fatal Accidents Act*, RSA 1955, c 111, s 2; *The Fatal Accidents Act*, RSA 1970 c 138, s 2(a); *Fatal Accidents Act*, RSA 1980, c F-5, ss 1(a), 8(1)(a); *Fatal Accidents Act*, RSA 2000, c F-8, ss 1(a), 8(1)(a) [FAA]; *Fatal Accidents Amendment Act*, SA 2010, c 6, s 2.

<sup>66</sup> Saskatchewan 1920 Act, note 65, s 2.

<sup>67</sup> *Shtitz v Canadian National Railway*, [1927] 1 WWR 193at paras 30-31 [Shtitz].

<sup>68</sup> *Shtitz*, note 67 at para 32.

<sup>69</sup> *Workers Compensation Act*, RSBC 2019, c 1, s 1, definition of “family member”, (b); *Workers Compensation Act*, RSA 2000, c W-15, [the WCA] s 1(1)(e); *The Workers Compensation Act, 2013*, SS 2013, c W-17.11 2(1)(e); *The Workers Compensation Act*, CCSM c W200 s 1(1) definition of “child”; *Workplace Safety and Insurance Act, 1997*, SO 1997, c 16, Sch A, s 2(1) definition of “dependents”; *Workers Compensation Act*, SNS 1994-95, c 10, s 2 (h) definition of child; *Workers Compensation Act*, RSNB 1973, c W-13, s 1 definition of “member of the family.”



case since the *Workmen's Compensation Act* came into force.<sup>70</sup> Jurisprudence from Alberta interprets when a person is standing in the place of a parent under the WCA in the same way as the term “stands in the place of a parent” is interpreted under the FLA or *Divorce Act*.<sup>71</sup>

**b. Family and divorce legislation**

[41] The concept that a person could stand in the place of a parent eventually took hold in Canadian divorce and family law. Most provinces, including Alberta, received England's *Divorce and Matrimonial Causes Act, 1857* as the law that governed divorce.<sup>72</sup> The 1857 Act created an exception to the common law rule that a person was not legally obligated to support their children during life, enabling a court to make an order for the maintenance of children.<sup>73</sup>

[42] Canadian divorce legislation remained relatively stagnant until 1968 when Parliament overhauled the *Divorce Act*.<sup>74</sup> For the first time Canadian divorce legislation included persons standing in the place of parents.<sup>75</sup> Children raised by a person standing in the place of a parent were included in the defined term “children of the marriage”. As children of the marriage a court could order maintenance to be paid for these children by any spouse who stood in the place of a parent, and for making orders related to their custody, care and upbringing.<sup>76</sup> Canadian courts would follow the English common law definition of standing in the place of a parent in Canadian divorce law.<sup>77</sup>

[43] Divorce law would receive a second overhaul in 1986.<sup>78</sup> Included in the changes made in 1986 was the analysis of when a person stood in the place of a parent. The Supreme Court of Canada would list a new set of non-exhaustive factors for the courts when determining if a person stood in the place of parent:

<sup>70</sup> The *Workmen's Compensation Act*, SA 1918, c 5, ss 2(l).

<sup>71</sup> *Elgie v Alberta (Workers' Compensation, Appeals Commission)*, 2009 ABCA 277 at para 65.

<sup>72</sup> *The Divorce and Matrimonial Causes Act, 1857*, 20 + 21 Vict, c 85 [1857 Act]; *Report of The Special Joint Committee of The Senate and House of Common on Divorce* (Ottawa, 1996) at 47-53 [Joint Committee Report].

<sup>73</sup> 1857 Act, note 72, s 35; Alison Diduk, “*Carignan v Carignan*: When is a Father nor a Father? Another Historical Perspective” (1990) 19 Man LJ 580 at 591.

<sup>74</sup> *Divorce Act*, SC 1968, ch 24 [The 1968 Act]; Joint Committee Report, note 72 at 52.

<sup>75</sup> The 1968 Act, note 74, s 2(a).

<sup>76</sup> The 1968 Act, note 74, ss 10-11.

<sup>77</sup> *O'Neil v Rideout* (1975), 22 RFL 107, 1975.

<sup>78</sup> *Divorce Act*, RSC 1985, c 3 (2nd Supp).

- whether the child participates in the extended family in the same way as would a biological child;
- whether the person provides financially for the child (depending on ability to pay);
- whether the person disciplines the child as a parent;
- whether the person represents to the child, the family, the world, either explicitly or implicitly, that he or she is responsible as a parent to the child;
- the nature or existence of the child's relationship with the absent biological parent.<sup>79</sup>

[44] Alberta's family legislation would not include the terminology of standing in the place of a parent until the *Family Law Act* was passed into law. However, the concept of a person standing in the place of a parent was used as a means to allow a non-biological, non-adoptive parent to apply for joint guardianship under Alberta's *Domestic Relations Act*.<sup>80</sup> The treatment of the term "standing in the place of a parent" in the FLA is considered in the next chapter.

### c. Canada Pension Plan

[45] Under the *Canada Pension Plan* a child is defined to include an individual adopted legally or in fact, and over whom the contributor had custody or control, again either legally or in fact.<sup>81</sup> To help determine whether or not an individual was a child of the contributor, including one adopted in fact, certain information must be provided. The information covers various topics including the marital status of the contributor, who had the decision-making authority over the child, who provided support to the child, and where the child lived.<sup>82</sup>

[46] Where an individual is a dependent child of a contributor, meaning under 18, or in full-time attendance at school or university and under 25, then the individual can apply for an orphan's benefit if the contributor dies.<sup>83</sup>

<sup>79</sup> *Chartier*, note 24 at para 39.

<sup>80</sup> *Langdon v York*, [1995] AWLD 098.

<sup>81</sup> *Canada Pension Plan*, RSC 1985, c C-8, s 42(1) definition of "child" [CPP].

<sup>82</sup> *Canada Pension Plan Regulations*, CRC, c 385, ss 52(f), (g), and (i) [the *CPP Regulations*].

<sup>83</sup> CPP, note 81, ss 42(1), 44(f) definition of "dependent child" and "orphan."

[47] *Canada (Minister of Social Development) v Viby* considered the orphan's benefit under the CPP.<sup>84</sup> A mother applied for the CPP's orphan's benefit for her three children. Two of the three children were her children from a previous marriage, while the third was hers and the contributor's. Before the contributor's death, the woman and the contributor separated. At first instance, an orphan's benefit was denied to the woman's older two children. However, after appearing before a Review Tribunal the decision was overturned and the orphan's benefit was allowed. The Minister appealed the decision to the Canada Pension Appeals Board.

[48] The Board in *Viby* undertook an analysis under the CPP and the CPP Regulations similar to that undertaken under the FLA and the *Divorce Act*. The Board considered if the contributor was acting like a parent during the relationship, including who was making decisions for the benefit of the children and where support came from. After analyzing the underlying facts, the Board could not find that the older children had been adopted "in fact" by the contributor.<sup>85</sup> It seems likely that the contributor in *Viby* was not standing in the place of a parent. However, the analysis undertaken by the Board suggests that that a child of a person standing in the place of a parent could obtain a CPP orphan's benefit under the correct circumstances.<sup>86</sup>

### C. Summary

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[49] Testamentary freedom developed gradually in a legal regime that had historically limited that freedom. Testamentary freedom was only given free reign for a little over a century. In Alberta, testamentary freedom existed in a wholly unrestrained state for only five years before balances were put in place. Today the class of persons who may apply to court for maintenance and support has broadened to the point that it now includes family members outside of the traditional nuclear family.

[50] The concept of a person standing in the place of a parent has also expanded to where it is now found, in one form or another, in state-level pension

<sup>84</sup> *Canada (Minister of Social Development) v Viby*, 2007 CarswellNat 5438 [*Viby*].

<sup>85</sup> *Viby*, note 84 at para 9.

<sup>86</sup> A similar argument is available to certain persons standing in the place of parents under the *Income Tax Act*, RSC 1985, c 1 (5th Supp), s 252(1)(b). The CRA's current position is that the section is very strict as to when a person is "wholly dependent" on a taxpayer. However, the CRA does acknowledge that when a taxpayer has made a *de facto* adoption of a child then they would be considered a parent under the subsection.

plans, worker's compensation regimes, and fatal accident legislation. At heart, the concept recognizes the obligations that might be created when a person demonstrates a settled intention to treat a child as their own.

## CHAPTER 3

# The Current Law

[51] This chapter summarizes the current legislation regarding persons standing in the place of a parent, and their exclusion from Part 5 of the WSA.

## **A. Standing in the place of a parent in Part 3 of the Family Law Act**

[52] The FLA obligates a person standing in the place of a parent to support their children and empowers the courts to make child support orders in appropriate circumstances.<sup>87</sup> A child support order made during the life of a person standing in the place of a parent will bind the estate of that person, unless the support order provides otherwise.<sup>88</sup> These obligations are balanced by rights, including the right to bring an application for child support from another parent.<sup>89</sup>

### **1. RELATIONSHIP WITH CHILD'S PARENT**

[53] To be found to be a person standing in the place of a parent that person must be related to the parent of the child in one of two ways. Either the person must be a spouse of the parent of the child, or the person must be in a “relationship of interdependence of some permanence” with the parent of the child.<sup>90</sup> Under the *Adult Interdependent Relationships Act*, which applies to unmarried partners, two people are in a relationship of interdependence when they share one another's lives, are emotionally committed to each other, and function as an economic and domestic unit.<sup>91</sup>

### **2. SETTLED INTENTION TO TREAT THE CHILD AS THEIR OWN**

[54] The existence of a relationship between a person and a child's parent is not sufficient grounds to find that a person was standing in the place of a parent. The FLA creates a distinction between persons standing in the place of a parent and those who are step-parents. Only those persons who meet the second part of

<sup>87</sup> FLA, note 5, ss. 47-50.

<sup>88</sup> FLA, note 5, s 80.

<sup>89</sup> FLA, note 5, s 50(1)(b).

<sup>90</sup> FLA, note 5, ss 1(n), 48(1)(a).

<sup>91</sup> *Adult Interdependent Relationship Act*, SA 2002, C A-4.5 , s 1(1)(f).

the test of a person standing in the place of a parent must support children. To meet that test the person must also have demonstrated a settled intention to treat the child as the person's own child.<sup>92</sup> In determining if a person has demonstrated a settled intention to treat a child as the person's own child the court is given the discretion to consider several factors, including:

- the child's age;
- the duration of the child's relationship with the person;
- the nature of the child's relationship with the person, including
  - the child's perception of the person as a parental figure,
  - the extent to which the person is involved in the child's care, discipline, education and recreational activities, and
  - any continuing contact or attempts at contact between the person and the child if the person is living separate and apart from the child's other parent;
- whether the person has considered
  - applying for guardianship of the child;
  - adopting the child, or
  - changing the child's surname to that person's surname;
- whether the person has provided direct or indirect financial support for the child;
- the nature of the child's relationship with any other parent of the child; and
- any other factor that the court considers relevant.<sup>93</sup>

[55] These factors provide a contextual approach in the objective assessment of the relationship between the person alleged to have been standing in the place of a parent and the child.<sup>94</sup> No one factor predominates in a court's analysis.<sup>95</sup>

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<sup>92</sup> FLA, note 5, s 48(1).

<sup>93</sup> FLA, note 5, s 48(2).

<sup>94</sup> *A.(T.M.) v H.(S.V.)*, 2007 ABQB 765 at para 33.

<sup>95</sup> *B.(D.) v F.(S.)*, 2012 ABPC 263 at paras 49-59.

[56] Two cases help to contrast how the factors under subsection 48(2) can lead to a finding that someone is standing in the place of a parent. In *A.(T.M.) v H.(S.V.)* the issue to be determined by the court was if the applicant was standing in the place of a parent under the FLA. The applicant sought a declaration that he was standing in the place of a parent to the respondent's child. The applicant was not biologically related to the child and had not undertaken the adoption process. The parties had been living with each other for approximately 6 months before the child was born. Fourteen months after the birth of the child the parties separated. The court noted that the applicant had always been involved in the child's life. The respondent mother sometimes called the applicant the "father to be" during her pregnancy, and referred to him as the father after the birth of the child. The applicant added the respondent and the child to his life insurance policy and as dependants on his Alberta Health Care coverage. The applicant was the only father figure in the child's life from the time of birth. The applicant was involved in the care of the child, however, there was disagreement as to the extent of his involvement. Ultimately the court declared that the applicant was standing in the place of a parent to the child.<sup>96</sup>

[57] In contrast to the decision reached in *A.(T.M.)* is the decision reached in *Rubin v Gendermann*.<sup>97</sup> One issue before the court was whether the defendant was standing in the place of a parent to the plaintiff's two children for the purposes of child support. The Court noted that the duration of the relationship between defendant and children, spanning roughly 8 years, was a long one. However, the relationship did not develop to a significant degree, it was not formalized, and the children's biological father continued to have a joint-custody arrangement and was actively involved in their lives. The defendant had a minimal role in control over the children. Considering all of the factors under subsection 48(2) the Court held that the defendant was not standing in the place of a parent and did not order child support.<sup>98</sup>

## **B. Standing in the Place of a Parent in the Wills and Succession Act**

[58] In Alberta only a family member can apply for the proper maintenance and support from the estate of a deceased where the support provided by the

<sup>96</sup> *A.(T.M.) v H.(S.V.)*, 2007 ABQB 765 at paras 35-54.

<sup>97</sup> *Rubin v Gendermann*, 2011 ABQB 71 [*Rubin*].

<sup>98</sup> *Rubin*, note 97 at paras 314-322.

estate is inadequate.<sup>99</sup> A “family member” is defined to include a deceased’s spouse, adult interdependent partner, child under 18, child who is over 18 at the time of the deceased’s death but is unable to earn a livelihood due to mental or physical disability, or is a full-time student, and a grandchild or great-grandchild in particular circumstances.<sup>100</sup>

[59] A “family member” as defined under the WSA does not include a child that a person standing in the place of a parent treated as their own. Rather, the WSA refers only to a “child of the deceased”.<sup>101</sup> To determine if a person is a “child” of the deceased the WSA refers to the FLA, Part 1.<sup>102</sup> Section 7 of the FLA creates the rules of parentage in the province. It states that, for all purposes of the law of Alberta, a person is the “child” of his or her parents.<sup>103</sup> The relationship of parent and child is then defined in a biological manner, or through the formal adoption process provided for by law.<sup>104</sup> The WSA does not include the broader test of standing in the place of a parent which the FLA provides for support purposes under Part 3. Only the narrow, biological or adoptive definition of parentage in Part 1 of the FLA applies to the definition of “child” as used in the WSA.<sup>105</sup>

[60] However, the WSA does recognize that a grandparent can stand in the place of a parent for maintenance and support.<sup>106</sup> A grandparent stands in place of a parent if that grandparent demonstrated a settled intention to treat the grandchild as the grandparent’s own child.<sup>107</sup> The Court is given the discretion to consider several factors to determine if the requirements from subsection 73(2) have been met. These factors are very similar to those of a person standing in the place of a parent under the FLA and include:

- the grandchild’s age;
- the duration of the relationship between the grandchild and grandparent;

<sup>99</sup> WSA, note 1, s 88.

<sup>100</sup> WSA, note 1, s 72(b).

<sup>101</sup> WSA, note 1, s 72.

<sup>102</sup> WSA, note 1, s 1(3).

<sup>103</sup> FLA, note 5, s 7(1).

<sup>104</sup> FLA, note 5, s 7(2)(a)-(c).

<sup>105</sup> *Interpretation Act*, RSA 2000, c I-8, s 13, *O’Hara v Belanger*, [1990] WWR 214; *Dares v Newman*, 2012 ABQB 328 [*Dares*]; *Peters v Peters*, 2015 ABCA 301.

<sup>106</sup> Also included are great-grandparents and great-grandchildren. WSA, note 1, s 73(1).

<sup>107</sup> WSA, note 1, s 73(2).



- the nature of the relationship between the grandchild and grandparent, including
  - the grandchild's perception of the grandparent as a parental figure, and
  - whether, as between the parents and grandparent, the grandparent was the primary decision maker with respect to the grandchild's care, discipline, education and recreational activities;
- whether the grandparent considered applying for guardianship of the grandchild;
- the nature of the grandchild's relationship with his or her parents; and
- any other factor the Court considers relevant.<sup>108</sup>

[61] Additionally, there is a residency requirement. Since the grandchild's birth, or for at least two years before the grandparent's death the grandchild's primary home must have been with the grandparent, and the grandparent must have provided the primary financial support for the grandchild.<sup>109</sup> This time requirement for grandchildren and grandparents helps a court to discern the creation of a new family unit.

[62] There has only been one reported case considering the requirements of section 73. In *Malkhassain (Trustee of) v Malkhassain* the Court considered an application by the Public Trustee for a declaration that the intestate deceased was standing in the place of a parent to his granddaughter.<sup>110</sup> The Court noted that it should be cautious in equating a generous grandparent who assists an adult child and a grandchild with an intention to treat the grandchild as their own child.<sup>111</sup> In the Court's view 16 months of cohabitation was too limited a period upon which to base a finding of a "settled intention". Further, there was no evidence that the deceased made any parental decisions, or considered applying for guardianship of the grandchild. The deceased's adult child was an active parent to the deceased's grandchild. These support provisions of the WSA were

not intended to capture all of those familial relationships where three generations live together for some period of time. Something more

<sup>108</sup> WSA, note 1, s 73(3).

<sup>109</sup> WSA, note 1, s 73(2) (a)-(b).

<sup>110</sup> *Malkhassian (Trustee of) v Malkhassian*, 2014 ABQB 353 [*Malkhassian*].

<sup>111</sup> *Malkhassian*, note 110 at para 44.

must be shown than the fact that the grandparent provided childcare while the parent was working, or that the grandparent provided direct or indirect financial support to their children or grandchildren.<sup>112</sup>

[63] All parents, those who stand in the place of a parent or otherwise, owe a support obligation to their children during life. Similarly, biological or adoptive parents owe a support obligation to their children after death. However, it is only one type of person standing in the place of a parent, a child's grandparent or great-grandparent, that may owe a support obligation after death. The test for whether a grandparent or great-grandparent was standing in the place of a parent under the WSA is very similar to the test for a person standing in the place of parent under the FLA.

### **C. Summary**

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[64] The WSA excludes the estates of persons standing in the place of a parent from the operation of Part 5. The reason for this exclusion is because the FLA uses a biological or adoptive definition for parent and child under Part 1 for all purposes of the law in Alberta. Persons standing in the place of a parent are included in the term "parent" under Part 3 of the FLA for support purposes. However, this expanded definition only applies to Part 3 of the FLA, and not outside of that act for Alberta law. Given the differences between support provisions in the FLA and the WSA, there appears to be a gap in the law. The FLA provides support for all children, and binds the estates of any person against whom a support order is made. The gap in Alberta law treats certain children differently without any reference to their actual need.

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<sup>112</sup>*Malkhassian*, note 110 at para 50.

## CHAPTER 4

## Should the Gap in the Law be Addressed?

[65] Previous chapters reviewed the legal history of family maintenance and support in Alberta and identified a gap in the law. This chapter assess the case for reform of the WSA to bridge that gap.

### ISSUE 1

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When should a child of a person standing in the place of a parent be able to apply for an order for adequate support from the person's estate?

#### A. Best Interests of the Child

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[66] Canadian family law has undergone a shift in the preceding decades, both generally and in terms of support. That shift resulted in the child's best interests taking centre stage and becoming the only consideration when resolving issues relevant to guardianship, parenting and contact orders, and access enforcement in family law.<sup>113</sup> In step-families, "...the 'best interests' principle leads to a focus on the economic needs of children and the economic dislocation they suffer when formerly relied-upon support from a step-parent is lost...."<sup>114</sup>

[67] In the case of persons standing in the place of a parent the entrenchment of the "best interests" principle is best seen following the Supreme Court of Canada's decision in *Chartier*.<sup>115</sup> The parties had been married for approximately one year before their separation. The respondent admitted that he had stood in the place of a parent to his step-daughter during the parties' marriage. However, he also alleged that he had repudiated that relationship after separation. Before *Chartier* some courts had found that any obligations of a person standing in the place of a parent could be unilaterally terminated on the breakdown of the adults' relationship.<sup>116</sup> Bastarache J, writing for a unanimous court, rejected that argument. The law that, "will best serve children is one that recognizes that when people act as parents toward them, the children can count on that

<sup>113</sup> FLA, note 5, s 18; *Jane Doe v Alberta*, 2005 ABQB 885 at para 31.

<sup>114</sup> Carol Rogerson, "The Child Support Obligation of Step-Parents" (2001) 18 Can J Fam L 9 at 29.

<sup>115</sup> *Chartier*, note 24.

<sup>116</sup> *Carignan*, note 64 at paras 58-62.

relationship continuing and that these persons will continue to act as parents towards them".<sup>117</sup>

[68] The Alberta Court of Appeal had already come to the same conclusion as the Supreme Court. In *Theriault*, a man had married a woman with two sons from a previous relationship. The husband advised and supervised the two boys. At a hearing for an order for child support the husband argued that he was not a person standing in the place of a parent to the boys and, if he was, he had terminated that relationship. Child support was awarded against the husband and the husband appealed. The Court of Appeal dismissed the appeal and held that it is

not in the best interests of children that step-parents or natural parents be permitted to abandon their children, and it is their best interests that should govern. Financial responsibility is simply one of the many aspects of the office of parent. A parent, or stepparent, who refuses or avoids this obligation neglects or abandons the child.<sup>118</sup>

[69] The Alberta Court of Queen's Bench has also used the best interests principle when analyzing support obligations of a person standing in the place of a parent under family law agreements. In *Jane Doe v Alberta*, a woman and man were in a long-term cohabiting relationship.<sup>119</sup> The woman wanted to have a child; however, the man did not. The woman bore a child through artificial insemination from an unknown donor. During the pregnancy, and after birth, both man and woman continued their relationship. The man and woman sought to preclude any financial or legal rights or obligations being found against the man by entering into a contract regarding guardianship, parenting, and support. The parties brought a special chambers proceeding to have the contract recognized as binding. The Court refused the application. The Court held that the FLA did not allow the man and woman to enter into a contract that would be binding in these circumstances. Rather, the rights and responsibilities of the adults were balanced with the need to protect and provide for the child. Thus, the FLA does not "allow a categorical preference to be given to the parent's desires over the best interests of the child".<sup>120</sup>

[70] The best interests principle is firmly entrenched in Canadian family and divorce law. Various levels of court have used this principle when deciding

<sup>117</sup> *Chartier*, note 24 at para 32.

<sup>118</sup> *Theriault v Theriault*, 1994 ABCA 119 at para 13 [*Theriault*].

<sup>119</sup> *Jane Doe v Alberta*, 2005 ABQB 885, aff'd 2007 ABCA 50 [*Jane Doe v Alberta*]

<sup>120</sup> *Jane Doe v Alberta*, note 119 at para 37.

issues surrounding child support. It seems prudent to use the best interests principle when assessing the inclusion of another category of child for the purposes of support under the WSA.

[71] Adequate support, or more avenues for adequate support, for a minor child will be in that child's best interest. In terms of providing maintenance and support for a child there is a strong similarity between two adults separating and the death of one partner, at least not from a child's perspective. In both circumstances the child has lost a source of emotional, intellectual, and financial support. During life a child can count on the support of the person standing in the place of a parent, and can seek an order if that person does not satisfy the support obligations under the FLA. Children should also be able to rely on a person standing in the place of a parent to plan for their support after death such that their continued security can be protected.

[72] The Alberta Legislature passed the *Children First Act* in 2013 and recognized that the "well-being, safety, security, education and health of children are priorities for Albertans".<sup>121</sup> The preamble in the CFA is a clear statement by the Alberta Legislature of the policy goals for legislation involving children. From a policy perspective, children are more likely to receive adequate support if there are more sources available from which that support can be drawn. Albertans already recognize that, "...children are the future of the province and that ensuring that every child has the opportunity to become a successful adult will benefit society as a whole".<sup>122</sup> By allowing children of persons standing in the place of parents to bring maintenance claims against that person's estate Alberta law will better serve children and eventually better serve Albertans.

## **B. Equality**

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[73] At heart the CFA seeks to ensure that all children are treated equally. The preamble in the CFA acknowledges that the well-being, safety, and security of children are priorities, and that the provision for children to become successful adults is highly important. The WSA excludes children of persons standing in the place of parents from requesting the courts' intervention for their maintenance and support after the death of that person. This determination is made solely on the child's status within that child's new family unit; a status the child had little to no choice in creating. No reference is made to the needs of the child, or to the

<sup>121</sup> *Children First Act*, 2013 c C-12.5 [The CFA] at the preamble.

<sup>122</sup> The CFA, note 121.

responsibilities of the persons who must support that child during life. In other words, some children are wholly barred from receiving the maintenance and support they may very much need based on a personal characteristic they have little or no control over.

[74] As the law operates, any child can apply for maintenance and support from their biological or adoptive parents' estates. In this sense, families and children are treated equally by the WSA.<sup>123</sup> However, support may not be forthcoming from a biological or adoptive parent or their estate. A child's biological or adoptive parent may already be deceased, their estate probated. Alternatively, support might be owed but cannot or will not be paid by a living parent. The definition of "family member" in the WSA does not permit the court to assess if it is appropriate for a further source to address the needs of certain children when they would otherwise have their needs unsatisfied.

[75] The availability of other sources of support for a child weighs against granting an order for support under the WSA.<sup>124</sup> It is an argument that could be used in the defence of an estate plan. However, that same argument should not be used as a means to foreclose access to the remedies in Part 5 when it leaves some children without the support required to address their needs. The WSA's flexible balancing of testamentary freedom is already well equipped to address this situation in ways that a blanket rule cannot.

[76] Finally, some children are treated differently at law but only after the death of the person standing in the place of a parent. Children of persons standing in the place of parents may obtain support from those persons and their estates if an order is granted while the person is alive. Again, the law treats children differently based on a circumstance those children had no control over: the death of a parental figure in their life.

[77] The distinction drawn by the WSA between children does not help to fulfill the policy goals of the CFA. The distinction is based on characteristics of certain children, those raised by a person standing in the place of a parent who died in that parental role. The distinction wholly restricts access to necessary support and maintenance for those children. The distinction made in the WSA is inequitable, unfair, and potentially discriminatory.

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<sup>123</sup> See, for example, the argument in *Dares*, note 105.

<sup>124</sup> WSA, note 1, s 93(c).

## C. Operation of the Law

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[78] The law should operate so it makes sense to those whom it affects. Unless there is a strong policy reason to do otherwise the law should also reflect what most people would expect to happen.

[79] In claims for maintenance and support after death this policy has been considered. *Tataryn* was decided under B.C.'s *Wills Variation Act* and concerned a question of quantification, not inclusion in the status of who can bring a claim under the legislation.<sup>125</sup> The SCC directed Canadian courts to consider both the legal and moral obligations imposed on members of Canadian society when assessing the adequacy of a bequest to a beneficiary. The Alberta Court of Appeal has followed the SCC's direction.<sup>126</sup> The policy consideration of looking to legal and moral responsibilities, already present in Alberta, is a good one and should be followed when considering who can bring a claim under the WSA.

[80] In terms of legal obligations, preliminary legal research yields examples of the support obligations based upon the parent-like relationship between persons standing in the place of a parent and children. Family and divorce statutes make child support payable upon the breakdown of the relationship between adults. The FAA allows some recompense to children in step-families, while other provinces provide greater coverage for the child of a person standing in the place of a parent.<sup>127</sup> Worker's compensation legislation also includes compensation for children of persons standing in the place of a parent where the worker died during employment.

[81] Freedom of testation has always been associated with a moral duty to provide for the family members one leaves behind. The English Court of Queen's Bench argued that without this moral responsibility freedom of testation would not have developed as it did under English law. The concept of standing in the place of a parent developed hand-in-hand with this moral responsibility. The concept found its way into the English courts' analysis of the presumption against double portions, the presumption of a gift between parent and child, and in very specific circumstances to maintain a child.<sup>128</sup> Canadian case law analyzing when a person stood in the place of a parent also considered the moral underpinnings in much the same way as English jurists had in the preceding

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<sup>125</sup> *Tataryn v Tataryn*, [1994] SCR 807.

<sup>126</sup> *Boje Estate, Re*, 2005 ABCA 73 at para 19.

<sup>127</sup> *Fatal Accidents Act*, RSA 2000, c F-8, ss 1, 7, 8(1).

<sup>128</sup> See footnotes 60-63.

century. The focus has shifted from the primacy of the adult's intention to other factors, including children's best interests. However, at heart the degree of moral obligation of a person who evidenced a settled intention to treat a child as the person's own child remains, and has legal consequences.

[82] Canadian legislation can provide benefits both to children of persons standing in the place of parents, and the person standing in the place of a parent. The CPP provides for an orphan's benefit in circumstances, and the *Income Tax Act* provides tax deductions to certain persons who may stand in the place of parents. Given these benefits, the moral obligation of a person to care for their family should also extend to a moral obligation to ensure that those family members do not unduly burden Canada's social support network.

[83] Finally, permitting a minor child to claim support from the estate of a person standing in the place of a parent does not provide an automatic entitlement for that child. It simply provides the opportunity to bring a claim to request adequate support in needful circumstances.

## D. Impact on Families in Alberta

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### 1. STATISTICS

[84] The number of step-families in Alberta is significant. Statistics Canada notes that as, "...long as re-entering into relationships in the form of common-law unions or remarriage continues to rise, the number of [step-families] will continue to grow".<sup>129</sup> According to the 2016 census, there were 593,415 families in Alberta with at least one child under age 24 living in the household.<sup>130</sup> Those families were further classified as follows:

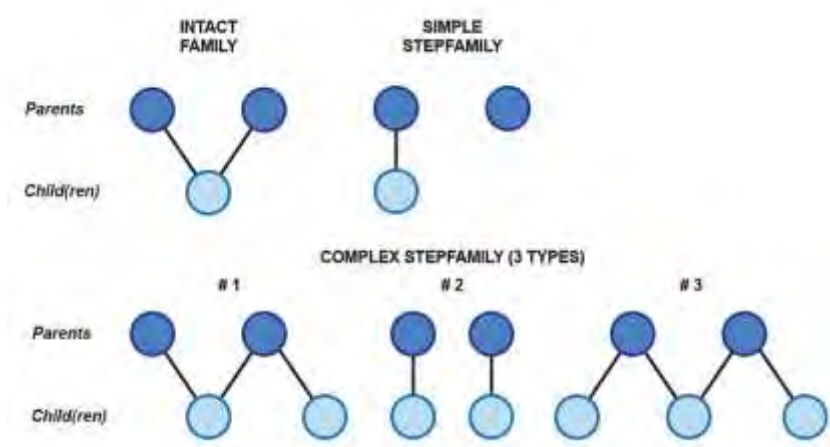
<sup>129</sup> Statistics Canada, "Canadian Families: Diversity and Change" (1996) at 2, online (pdf): *Government of Canada Publications* [http://publications.gc.ca/collections/collection\\_2017/statcan/CS12-0061-1996-eng.pdf](http://publications.gc.ca/collections/collection_2017/statcan/CS12-0061-1996-eng.pdf) [perma.cc/5B5X-JLD6].

<sup>130</sup> Statistics Canada, "Census Family Structure Including Stepfamily Status (9) and Number and Age Combinations of Children (29) for Census Families with Children in Private Households of Canada, Provinces and Territories, Census Metropolitan Areas and Census Agglomerations, 2016 and 2011 Censuses - 100% Data" (17 June 2019), online: *Statistics Canada* <<https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/dt-td/Rp-eng.cfm?TABID=2&Lang=E&APATH=3&DETAIL=0&DIM=0&FL=A&FREE=0&GC=0&GID=1235625&GK=0&GRP=1&PID=109639&PRID=10&PTYPE=109445&S=0&SHOWALL=0&SUB=0&Temporal=2016&THEME=117&VID=0&VNAMEE=&VNAMEF=&D1=0&D2=0&D3=0&D4=0&D5=0&D6=0>> [perma.cc/3UF3-ECGP].



- 413,425 intact families<sup>131</sup>
- 126,040 lone parent families
- 53,945 step-families

The census further divides step-families into two categories – simple and complex.<sup>132</sup> In a simple step-family, all children are the “biological or adopted children of only one married spouse or common-law partner, and their birth or adoption preceded the current relationship”. In a complex step-family, there can be a mix of children from each spouse or partner and biological or adopted children of the current relationship. The following figure is helpful.



**Figure 2: Statistics Canada breakdown of families with children**

[85] In Alberta, there are more simple step-families than complex step-families. The average number of children in a simple step-family in Alberta is 1.4. By definition, a complex step-family must have at least two children and the average number of children in a complex step-family in Alberta is 2.9. However, a large number (42.5%) of complex stepfamilies have only two children.<sup>133</sup>

<sup>131</sup> An intact family is defined as a two parent couple family that is not a stepfamily: Statistics Canada, “Census in Brief Portrait of children’s family life in Canada in 2016” (2 August 2017), online: *Statistics Canada* < [www12.statcan.gc.ca/census-recensement/2016/as-sa/98-200-x/2016006/98-200-x2016006-eng.cfm](http://www12.statcan.gc.ca/census-recensement/2016/as-sa/98-200-x/2016006/98-200-x2016006-eng.cfm) > [perma.cc/N5CK-V5U9].

<sup>132</sup> Statistics Canada, “2016 Census of Population: Families, households and marital status” (16 June 2017), online: *Statistics Canada* < [www12.statcan.gc.ca/census-recensement/2016/ref/98-501/98-501-x2016004-eng.cfm](http://www12.statcan.gc.ca/census-recensement/2016/ref/98-501/98-501-x2016004-eng.cfm) > [perma.cc/KQU8-BKMR].

<sup>133</sup> Of complex stepfamilies with at least one child under 24, there are 10,220 families with two children and 13,790 families with three or more children.

[86] This report focuses on children under the age of 18. There are 19,900 simple step-families and 14,685 complex step-families with at least one child under 18. As a later chapter discusses the situation of children who may require maintenance beyond 18 it is relevant to consider step-families with adult children. There are 8,920 simple step-families and 1,335 complex step-families with at least one child between the ages of 18 and 24.

[87] Between April 1, 2016 and March 31, 2017 there were 120 spousal adoptions in Alberta.<sup>134</sup> This would seem to be the minimum number of persons standing in the place of parents in our province. Just before the adoption taking effect these persons were likely standing in the place of parents.<sup>135</sup> When compared to the roughly 54,000 step-parents in the province, the number of known persons standing in the place of parents is rather small. There are likely over 120 persons who would qualify as a person standing in the place of a parent in Alberta. The adoption process can be convoluted and expensive, and not all persons standing in the place of parents desire to undertake the burden of legally formalizing their relationship. Further, adoption will remove one biological parent's status as a parent in favour of the adoptive parent. A biological parent may not wish to relinquish their status as parent which impedes a person standing in the place of a parent from formalizing their relationship with a child. Nevertheless, the 120 spousal adoptions is the only quantitative data we have. At best, the available statistics give us a floor (120) and a ceiling (53, 945) to estimate the number of persons who might be standing in the place of parents in Alberta.

## E. Situation in other Provinces

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[88] Two other Canadian provinces allow for applications to be made to court for support from the estate of a person standing in the place of a parent.<sup>136</sup> In

<sup>134</sup> Alberta.ca, *Adoption Statistics*, online: Alberta.ca <https://www.alberta.ca/adoption-statistics.aspx> [perma.cc/LLD9-3TSH].

<sup>135</sup> *Child, Youth and Family Enhancement Act*, RSA 2000, c C-12, ss 58.1, 59; FLA, note 5, s 48. The mandatory considerations to be made by the court under the CYFEA parallel the considerations under the FLA s 48. Further, an adult's consideration of adopting a child is a consideration the court may take into account under s 48. It seems likely that if a person were to die immediately before filling an adoption application to court, that a court would consider the person to be standing in the place of a parent.

<sup>136</sup> Manitoba's *The Dependents Relief Act*, CCSM, c D37, s 1; and Ontario's *Succession Law Reform Act*, RSO 1990, c S 26, s 57(1). At least one other law reform agency, the Law Reform Commission of Saskatchewan, has also suggested including these children in a recent publication: Law Reform Commission of Saskatchewan, *Reform of The Intestate Succession Act, 1996, Final Report (2017)* at 22, online: <https://lawreformcommission.sk.ca/FinalReportonTheIntestateSuccessionAct.pdf> [perma.cc/6VCA-PLYV].

Manitoba, the *Dependants Relief Act* defines a “child” to include a child to whom the deceased stood *in loco parentis* (in the place of a parent) at the time of the deceased’s death. The courts in Manitoba have had to look outside of that province’s statute to arrive at a definition of *in loco parentis* for the province’s child support laws. The Manitoba courts have relied on the analysis and definition of “stands in place of a parent” under the *Divorce Act*.<sup>137</sup>

[89] The *Succession Law Reform Act* from Ontario includes in its definition of a child a person whom the deceased had demonstrated a settled intention to treat as a child of his or her family. The courts in Ontario have also had to look outside of the *Succession Law Reform Act* to arrive at a list of factors for when a “settled intention” has been demonstrated.<sup>138</sup>

[90] In both statutes a child placed into a foster home for “valuable consideration” is excluded from the definition of “child”.<sup>139</sup> A child placed into a foster home would be excluded under Alberta law because the child was not a child of the spouse or partner of the person standing in the place of a parent.

[91] The Northwest Territories and Nunavut each include children who have been adopted pursuant to First Nations’ customary adoptions in their legislation.<sup>140</sup>

## F. A Consistent Change

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[92] The potential change to be made to the WSA is not drastically different from what already exists under its family maintenance provisions. Under the WSA courts are already tasked with an analysis for grandparents and great-grandparents that is similar to that in the FLA’s child support provisions. The court is tasked with looking at the grandparent/grandchild relationship itself to see if the grandparent was treating the grandchild as the grandparent’s very own child. To add children of persons standing in the place of parents to Part 5 of the WSA is consistent with the current law for grandparents.

[93] Historically, the relationship of standing in the place of a parent was used in the courts to provide for the maintenance of children where none had been left

<sup>137</sup> *Monkman v Beaulieu*, 2003 MBCA 17.

<sup>138</sup> *Pigott Estate v Pigott*, 25 ETR (2d) 12; *Mihaescu v Zodian Estate*, [2009] WDFL 3370.

<sup>139</sup> *The Dependants Relief Act*, CCSM, c D37, s 1; *Succession Law Reform Act*, RSO 1990, c S 26, s 57(1).

<sup>140</sup> *Dependants Relief Act*, RSNWT 1988, c D-4.

by the testator before the vesting of a trust.<sup>141</sup> The concept is not unknown territory in estate law and has precedence on a highly related topic. Again, the change is consistent with previous considerations of when a person is standing in the place of a parent.

[94] Government and social assistance programs can be accessed to provide support to children who have had a person standing in the place of a parent die. Both the *Workers Compensation Act* and *Canada Pension Plan* may provide benefits to children on the death of a person standing in the place of a parent. Limiting the impact on these programs by ensuring that an estate is available to provide support in appropriate circumstances is the very reason that regimes like Part 5 of the WSA were originally created.<sup>142</sup>

[95] It is during the life of a person standing in the place of a parent that the planning stages of the person's estate occurs. It is also during life that a person standing in the place of a parent must support children under the FLA. Including the estates of these persons in the WSA will thus promote coherence in the law between these two statutory regimes.

## G. Evidentiary Concerns

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[96] If a claim is brought against the estate of a person standing in the place of a parent on behalf of a minor child then the estate may have problems obtaining evidence. However, advanced planning on behalf of wills practitioners ought to be able to overcome this issue. For example, the WSA mandates that a court consider the deceased's reasons for making or not making dispositions of property to any family member.<sup>143</sup> Were the estates of persons standing in the place of parents subject to the WSA's family maintenance provisions then a prudent testator should record their reasons for not providing for a child. Those reasons can, and perhaps should, include facts related to whether or not the deceased was standing in the place of a parent, following a detailed list of factors similar to those identified in the FLA. The deceased's reasons for not providing for a specific child should also include why, if the deceased was standing in the place of parent, the deceased excluded that child. Just as there are good reasons

<sup>141</sup> *Spark v Perrin* (1870), 7 Gr 519 at para 1.

<sup>142</sup> Elizabeth Travis High, "The Tension Between Testamentary Freedom and Parental Support Obligations: A Comparison between the United States and Great Britain" (1984) 17 Cornell LJ 321 at 323; Joseph Dainow, "Restricted Testation in New Zealand, Australia and Canada" (1938) 36 Mich L Rev 1107 at 1109; Ralph Brashier, "Disinheritance and the Modern Family" (1995) 45 Case W Res L Rev 83 at 125.

<sup>143</sup> WSA, note 1, s 93(e).

for not including particular biological or adopted children in a person's will, there will be good reasons for excluding a child of a person standing in the place of a parent. These reasons include existing support from other sources, lack of ability to provide support given the other obligations of the estate, or the provision of support during life that was unique to that child. Where two remarried spouses or adult interdependent partners each agree that their respective estates should not go to any non-biological, non-adopted child but only to their biological or adopted children, then practitioners ought to record that wish in an estate plan and thus better preserve evidence of intention. It is at the estate planning stage that evidence ought to be gathered and preserved knowing that a claim could be made by any child.

[97] The *Alberta Evidence Act* contains a provision that increases the evidentiary burden on an applicant under the WSA's family maintenance provisions.<sup>144</sup> Section 11 of the *Alberta Evidence Act* mandates that in an estate action a party seeking an order against an estate shall not obtain a verdict, judgment, or decision on that party's own evidence, unless the evidence is corroborated by other material evidence. Section 11 of the *Alberta Evidence Act* applies to family maintenance actions.<sup>145</sup> This means a minor child seeking support will need to provide additional evidence to the court to prove that the deceased was standing in the place of a parent. An estate with an explicit will benefits from evidentiary provisions meant to balance the inability of an estate to gather fresh evidence after the death of the testator.

[98] Part 5 also affects intestacies. The intestacy provisions under Part 3 do not provide children of a person standing in the place of a parent with a right to the person's property if they die without a will. However, if amended Part 5 would allow a court to ensure that an intestate estate provide necessary support in appropriate circumstances. In these circumstances, an intestate estate also has the benefit of section 11 of the *Evidence Act*.

## H. Is Reform Needed?

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[99] The WSA was enacted in 2010 and proclaimed in force in 2012. The expansion of the term "family member" was canvassed heavily during the Alberta government's consultation before enacting the WSA. During consultation efforts it appears that there was general support for adding the

<sup>144</sup> *Alberta Evidence Act*, RSA 2000, c A-18, s 11.

<sup>145</sup> WSA, note 1, s 3(3); *Malkhassian*, note 110 at para 36.

estates of persons standing in the place parents to the list of estates open to claims made by minor children. The majority of consultation participants agreed that these estates “should only be eligible if the deceased was supporting the [child] at the time of death and... acting” in the place of a parent.<sup>146</sup> Nevertheless, and likely because of further consultation, the Legislature excluded the estates of persons standing in the place of parents except for grandparents and great-grandparents. It may be that the policy decisions made by the government then have not changed, and that these estates should continue to be excluded from the operation of the WSA.

[100] Ten years after the adoption of the WSA, family structure in Alberta continues to change. As people enter into new relationships they may bring with them children from their previous relationships. Where those new relationships take on permanency, and where the non-biological, non-adoptive adult displays a settled intention to treat the children as their own, then Alberta succession law should reflect the current legal and moral obligations of persons standing in the place of parents during life. By not including these children from the benefits of Part 5, the WSA does not further the policy goals set by the CFA of ensuring that every child has the necessities required to become successful adults. Further, by denying needful children any opportunity to apply for support orders after the death of a person standing in the place of a parent the WSA detrimentally treats these children inequitably.

[101] Albertans generally would also benefit from reform. One of the main reasons cited for passing modern family maintenance legislation was to ensure that, in appropriate circumstances, a deceased’s family would not become a burden on the state.<sup>147</sup> Members of Alberta’s Legislature have recently voted to increase the support options available to families. Many MLAs noted that the Legislature should do whatever it can to support families in the Province.<sup>148</sup> By not providing for some children in its family maintenance legislation, the Alberta Legislature has foreclosed an alternate source of support for children that could stand in the place of its public support regimes.

[102] Some practitioners have noted that many of their clients do not want part of their estates going to their step-children. Where a person does not wish to

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<sup>146</sup> Marcomm Works, “Alberta Justice Succession Law Reform Stakeholder Consultation Summary of Input” (October 2009) [unpublished, archived at Alberta Law Reform Institute] at 4.

<sup>147</sup> Joseph Dainow, “Restricted Testation in New Zealand, Australia and Canada” (1938) 36 Mich L Rev 1107 at 1109; Ralph Brashier, “Disinheritance and the Modern Family” (1995) 45 Case W Res L Rev 83 at 125.

<sup>148</sup> Bill 28, *Family Statutes Amendment Act*, 2018, 4th Sess, 29th Leg, 2018, at 2135 (Hon Angela Pitt), 2137 (Hon. Ronald Orr), and 2138 (Hon. Laila Goodridge).

leave a gift to step-children, it seems likely that the person does not have the required “settled intention” of treating that step-child as their own child. The family circumstances that are the focus of this report reflect a much narrower category than typical step-parent and step-children relationships. Not every step-parent and step-child relationship will give rise to the moral and legal responsibility associated with standing in the place of a parent. Similarly, not every step-parent must pay child support under the FLA or *Divorce Act*. Alberta succession law should operate in light of the legal and moral obligations already expected of a person standing in the place of a parent. To operate in that light, claims by children of persons standing in the place of parents should be permitted under the WSA. However, only those persons who demonstrably treated a child as their own during life – not as a child of their new partner, but indistinguishably from their own children – should have their estates subject to a potential court order after death.

[103] Making the estates of persons standing in the place of parents subject to possible claims brought by a child they treated as their own will likely lead to increased litigation. The expansion of the “family member” definition will allow more applicants to seek support from an estate. The question seems to be: will the increase in litigation be a flood or a trickle?

[104] We do not have accurate data to answer this question one way or the other. The WSA treats children of persons standing in the place of a parent differently with potentially drastic consequences. Yet an order for maintenance will be made only when an estate can accommodate a redistribution to fulfill needful support. Leaving the children with no remedy based on the spectre of increased litigation seems unjustified.<sup>149</sup> Even given the increased risk of litigation, estate planning professionals have tools to help mitigate the risk in advance of any action.

[105] Given the benefit to children presented by reform, the best interests of the child principle, the decreased burden on the state, and the general approach to how a law should operate, the case for reform seems strong. We recommend, pending further consultation, that the WSA be amended.

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<sup>149</sup> See *Dares*, note 105.

## **RECOMMENDATION 1**

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A child of a person standing in the place of a parent should be able to seek an order for adequate support from the person's estate after death.

[106] We welcome any comments you may have in support of or in opposition to this recommendation or additional options for reform

### **I. What Type of Support?**

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#### **1. LEVEL OF SUPPORT - ADEQUACY**

[107] If the estate of a person standing in the place of a parent is subject to orders for maintenance and support of children after death then they will have an obligation to support children "adequately". The family maintenance provisions of the WSA are not meant to enable a wholesale will variation. Rather, the provisions are only open to those applicants who require support that is adequate in the circumstances and that has not been provided for in the estate.<sup>150</sup> When assessing what is adequate, a court must look to both legal and moral responsibilities and, when assessing a testator's moral responsibilities, a court looks to contemporary community standards.<sup>151</sup>

#### **2. SECONDARY SUPPORT**

[108] Following *Tataryn*, adequate and proper support from the estate of a person standing in the place of a parent ought not to be a first resort. The idea that an order against the estate of a person standing in the place of a parent to provide proper support is secondary to other sources of support is expanded upon below, under Issue 3. For our purposes now, it should be sufficient to note that in Alberta the support required at law from a person standing in the place of a parent during life is outweighed by that of a biological or adoptive parent. The legal responsibilities of a person standing in the place of a parent during life should reduce the obligation of that person's estate after death to a secondary position.

<sup>150</sup> WSA, note 1, s 88.

<sup>151</sup> *Tataryn v Tataryn*, [1994] SCR 807 at para 28; *Boje Estate, Re*, 2005 ABCA 73 at para 19.



[109] One method for providing secondary support is to simply do nothing and attempt to tie a child's claim to the claim for support from the surviving parent. A surviving parent could bring their own claim for maintenance against the estate of a person standing in the place of a parent either as a spouse or an adult interdependent partner of the deceased.<sup>152</sup> It is possible for a court to consider that the surviving parent must support their child, and that the deceased may have been supporting the spouse's efforts to raise a child while alive.<sup>153</sup> These possibilities, when combined with the SCC's direction to assess a person's legal and moral responsibilities during life, could increase the maintenance ordered to be paid from an estate to a spouse or adult interdependent partner.

[110] However, there are two issues with tying a child's need for support to their surviving parent's claim from an estate. First, as a child ages the needs of that child may diverge from those of the child's surviving parent.<sup>154</sup> Enabling a minor child to bring a claim will ensure that the maintenance and support paid by the estate will go to the successful child's needs even when they diverge from the surviving parent. For example, should a surviving parent re-marry or re-partner, competing interests between parent and child may arise. The Court of Appeal has pointed out that no one can predict what will happen when there are competing claims on finite resources.<sup>155</sup> Where a monetary award benefits the parent only, there is no protection afforded to the child. An award specific to children of a person standing in the place of a parent provides an additional level of protection for a child in a needful situation. Second, it may be that the child would have a superior claim on the estate as compared to the surviving spouse or partner.

### 3. DISCRETIONARY BENEFIT

[111] Under both the WSA and the FLA the court is left with the discretion to make an award if a person was standing in the place of a parent. The discretionary nature of the order provides flexibility for courts so the unique circumstances of each family can be accounted for. Not every step-parent stands

<sup>152</sup> WSA, note 1 ss 72(b)(i)- (ii).

<sup>153</sup> WSA, note 1, s 93. Section 93 ends with the words "...and may consider any other matter the Court considers relevant." Although this particular piece of s 93 has not been considered in the context of children and persons standing in the place of parents, it could be broad enough to include the presence of a child when a court is considering the quantification of the surviving parent's claim.

<sup>154</sup> *Lafleur v Lafleur*, 2016 ABCA 7 at para 32 [*Lafleur*].

<sup>155</sup> *Lafleur*, note 154.

in the place of a parent.<sup>156</sup> A discretionary award under the WSA applying to persons standing in the place of parents will ensure that Alberta law can adapt to the individual, practical realities facing Albertans.

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<sup>156</sup> See, for example, *Gill v Gill*, 2017 ABQB 264; and *White v Hawk*, 2014 ABQB 530. See also Basterache J.'s comments in *Chartier*, note 24 at para 40.

## CHAPTER 5

## Additional Issues

[112] If the recommendation to amend the WSA is adopted, then there are additional issues to consider. This chapter examines those issues and makes further recommendations.

### A. Residency Requirements

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#### ISSUE 2

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Should there be a residency requirement for a child to live with and be supported by a person standing in the place of a parent before death in order to apply for support?

[113] The WSA already recognizes that a grandparent, or great-grandparent may stand in the place of a parent for the purpose of maintenance and support. As drafted, the WSA requires that a child have their primary residency with a grandparent since birth, or for at least two years immediately before the grandparent's death. This issue asks if there should be a similar residency requirement for a person standing in the place of a parent who is not a grandparent.

[114] The FLA does not currently have a residency requirement in order for a person to be found to be standing in the place of a parent. Rather, the FLA points to the degree of permanence of a relationship of interdependence between the biological or adoptive parent and the person standing in the place of a parent. This is a departure from the common law test. Under the common law, a person need only have demonstrated a settled intention to treat the child as the person's own child.<sup>157</sup> The common law did not require a relationship between the person and the child's parent.

[115] The FLA does not create a bright-line test for what qualifies as a relationship of interdependence of "some permanence". However, Alberta jurisprudence suggests that a relationship that lasted for a period of months is not likely to qualify. In *M.(P.) v D.(S.)* a relationship in which two people shared a bedroom for 4 months and a house for 14 months was not of sufficient

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<sup>157</sup> Alberta Law Reform Institute, "Family Law Project: The Conclusion" (2004) at 29, online : <[www.alri.ualberta.ca/docs/fr093.pdf](http://www.alri.ualberta.ca/docs/fr093.pdf)>; *M.(P.) v D.(S.)*, 2008 ABQB 109 at paras 29-32.

permanence to qualify.<sup>158</sup> The same result has occurred in the Provincial Court of Alberta under similar circumstances.<sup>159</sup>

[116] Case law decided under the *Adult Interdependent Relationships Act* also suggests that a relationship of months will not qualify as of sufficient “permanence” when analyzing a relationship of interdependence. In *Evans v Nelson*, a relationship with 5 months of cohabitation was a daily work-in-progress with no permanence.<sup>160</sup>

[117] It is clear that, “in family matters, the relationship of the person to the natural parent has always been a crucial factor in determining if that person is standing in the place of a parent. In all cases the relationship must be a marriage or a marriage-like relationship.”<sup>161</sup> Thus, under the FLA there must be a new family unit that forms on some permanent basis in order for an adult to be standing in the place of a parent.

[118] In the situation of grandparents or great-grandparents the formation of the family unit cannot use the same criteria as between a couple and a child. There is automatically a familial relationship from birth or adoption. However, courts need a method to differentiate between a grandparent assisting with childcare or financial support from a grandparent standing in the place of a parent. Under the WSA that mechanism appears to be the requirement that a child be primarily living with the grandparent, and be primarily supported by the grandparent for at least two years preceding the grandparent’s death, or since the birth of the child. If the grandparent did not have the primacy of care for two years before death or since the birth of the child then other figures would be in the parental role. Thus, the parent-like relationship between grandparent and grandchild would not arise.

[119] Extending the primary residency requirement to children and other persons standing in the place of parents does have appeal. The primary residency requirement would provide a clear definition for anyone alleged to be standing in the place of a parent. If the child did not primarily reside with the person alleged to be standing in the place of a parent then the person does not meet the definition, and a child cannot bring a claim for support and maintenance. This would, in turn, help to create greater certainty when planning

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<sup>158</sup> *M.(P.) v D.(S.)*, 2008 ABQB 109 at para 57.

<sup>159</sup> *D.(D.) v S.(C.)*, 2012 ABPC 322.

<sup>160</sup> *Evans v Nelson*, 2017 ABPC 141.

<sup>161</sup> *D.(D.) v S.(C.)*, 2012 ABPC 322 at para 19.

these estates. A person who had separated from a spouse or adult interdependent partner before the residency period expired would know with certainty that they were not standing in the place of a parent and their estate could be planned accordingly without consideration for the child.

[120] A residency requirement does not simply create a definitional component, however. Including this requirement would also end the status of standing in the place of a parent in specific circumstances. If a person met the definition of a person standing in the place of a parent, but were to later separate from the parent of the child then the person might cease to stand in the place of a parent for the purposes of the WSA after two years. If the person did not primarily reside with the child for two years after separation then the child would no longer be able to make a claim for support against that person's estate if they die. Ending the status of standing in the place of a parent might encourage the biological or adoptive parent to pursue support orders for the child under the FLA or the *Divorce Act*. This would in turn promote the early resolution of claims.

[121] However, a residency requirement ignores the "best interests" analysis. The Alberta Court of Appeal and the Supreme Court of Canada have made it clear that the parent-child relationship between a person standing in the place of a parent and a child can survive the separation or divorce of the adults. If that relationship and duty to support can survive separation then, perhaps, so too should the ability to bring a claim against the estate of a person standing in the place of a parent. Creating a hard and fast rule support for a child based on residency ignores the complexities of the relationships between children and those who act as parents towards them, particularly for very young children. A residency requirement would deprive some children of the benefit of support due to decisions made by adults, decisions those children have had little to no control over. These children would be deprived of support despite, or with no reference to, the need of the children.

[122] A residency requirement would penalize a child in situations where a biological or adoptive parent did not need to bring a child support application after separation because the person standing in the place of a parent was providing support without an order or formal written agreement. The residency requirement would also penalize a child where a parent has sought child support

orders from the court after separation, but no final or binding order has been made prior to the person's death.<sup>162</sup>

[123] Neither Ontario's *Succession Law Reform Act* nor Manitoba's *Dependants Relief Act* contain a residency requirement for a person standing in the place of a parent.<sup>163</sup>

[124] Under the FLA criteria, the court is provided with the discretion to consider any continuing contact or attempts at contact between the person standing in the place of a parent and the child after the breakdown of the adults' relationship.<sup>164</sup> The FLA contains the following factors that a court could use to determine if the person was standing in the place of a parent after the separation of the adults but before the death of the person:

- the presence of continuing contact between the person and the child after separation;
- the duration of the child's relationship with the person; and
- the nature of the relationship between child and the person.<sup>165</sup>

By incorporating these factors into a definition of when a person stands in the place of a parent in the WSA a balance can be struck between the benefits and detriments of a bright line rule defining the relationship based upon residency.

## **RECOMMENDATION 2**

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There should not be a residency requirement for a child to be living primarily with a person standing in the place of a parent before that person's death to be able to apply for support.

[125] We welcome any comments you may have in support of or in opposition to this recommendation or additional options for reform.

<sup>162</sup> See, for example, *McElligot Estate v Damecour*, [2005] WDFL 2725.

<sup>163</sup> *The Dependants Relief Act*, CCSM, c D37, s 1.

<sup>164</sup> FLA, note 5, s 48(2)(c)(iii).

<sup>165</sup> FLA, note 5, s 48(2).

## B. Priority of orders against the Estate of a Person Standing in the Place of a Parent

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### 1. PRIORITY LIES WITH BIOLOGICAL OR ADOPTIVE PARENTS

#### ISSUE 3

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How should a court balance the obligations of biological or adoptive parents with the estates of persons standing in the place of parents when making orders for maintenance and support?

[126] If the WSA is amended to make the estate of a person standing in the place of a parent subject to applications for family maintenance and support orders then questions of priority arise. As identified in the introduction to this Report and in Chapter 4, biological and adoptive parents have the primary obligation to support their children. This section considers the impact of a biological or adoptive parent's primary obligation to support a child on orders against the estate of a person standing in the place of a parent.

[127] Under the FLA the obligation of a person standing in the place of a parent is secondary to the obligation of a biological or adoptive parent. In determining the amount and duration of support the court must consider:

- the amount determined under the prescribed guidelines;
- the amount of child support that is being paid or should be paid by either or both legal parents of the child;
- the duration of the relationship between the person standing in the place of a parent and the child for whose benefit the order is sought;
- any other factor that the court considers relevant.<sup>166</sup>

[128] British Columbia's *Family Law Act*, and Manitoba's *Family Maintenance Act* also expressly include a direction to courts that the obligation of a person standing in the place of a parent to provide support is secondary to that of the child's biological or adoptive parents.<sup>167</sup> All other provinces and territories, including the federal government, empower a court to make an order for child support other than as set out in the applicable child support table, and directs a

<sup>166</sup> FLA, note 5, s 51(5).

<sup>167</sup> *Family Law Act*, SBC 2011, c 25, s 147(5); *Family Maintenance Act*, CCSM c F20, ss 36(2)-(3).

court to consider any other parent's legal duty to support the child.<sup>168</sup> Of the foregoing statutes and regulations, Alberta's FLA is the most comprehensive in the direction given to courts.

[129] Before the adoption of the FLA and the Alberta *Child Support Guidelines*, the Alberta Court of Appeal held that the child support obligations of a biological or adoptive parent and a person standing in the place of a parent were joint and several.<sup>169</sup> However, the Court also had the following to say,

[it] may well be that the obligation of the natural father has primacy, but that is not a universal proposition. It would very much depend on the circumstances of the case, including the actual roles performed by the two fathers in the course of the upbringing of the child. In any event, that is best decided in a proceeding for contribution among the parents, not a proceeding for support by or for the child.<sup>170</sup>

[130] The observation in *Theriault* that the obligation of the biological or adoptive parent may have primacy has had some uptake in Alberta after the adoption of the FLA and the *Child Support Guidelines*. One approach to the primacy of a biological parent's support obligation is to reduce the support that would be payable by a person standing in the place of a parent by some amount. In one Queen's Bench case the court decided that the correct approach where there was a biological or adoptive parent able to provide support and a person standing in the place of a parent able to provide support was to require each person to pay a proportionate share of support based on income. This meant that the biological parent, whose income was 2/3 of the combined total of both persons' income, was to pay 2/3 of the table amount that the biological parent's income would have dictated.<sup>171</sup> A similar result was obtained in *S.(J.) v S.(D.)*<sup>172</sup> In this case the person standing in the place of a parent had applied to terminate his child support payments when he discovered that he was not the biological father of his former wife's child. The biological father was paying no support and the child's mother had chosen not to pursue him for any support. The Court

<sup>168</sup> *Federal Child Support Guidelines*, SOR/97-175, s 5; *The Family Maintenance Regulations*, 1998, RRS c F-6.2, Reg 1, s 3; *Child Support Guidelines*, O Reg 391/97, s 5; *Child Support Guidelines Regulation*, NB Reg 98-27, ss 3, 4(4); *Child Maintenance Guidelines*, NS Reg 53/98, s 5; *Child Support Guidelines Regulations*, PEI RegEC668/97, s 2; *Child Support Guidelines Regulations*, NLR 40/98, s 5; *Yukon Child Support Guidelines*, YOIC 2000/63, s 5; *Child Support Guidelines*, NWT Reg 138-98, s 7.

<sup>169</sup> *Theriault*, note 118 at para 4.

<sup>170</sup> *Theriault*, note 118 at para 23.

<sup>171</sup> *Holmedal v Holmedal* (1997), 215 AR 152.

<sup>172</sup> *S.(J.) v S.(D.)*, 2005 ABQB 4.



concluded that the support to be paid by the person standing in the place of a parent was half the guideline amount determined by that person's income.

[131] However, the reduction of the support payable by a person standing in the place of a parent is not consistently applied. In *J.(S.S.) v J.(B.S.)* a person standing in the place of a parent applied to pay only half of the guideline amount of support.<sup>173</sup> The child's biological parent had had no contact with the child, and had not paid support since the late 1980's. The Court did not grant the application. Rather, the Court held that where a biological or adoptive parent is not providing support a court should not automatically reduce the support to which a child is entitled. The application was dismissed; however, the person standing in the place of a parent was granted leave to bring the biological parent before the court to determine the support that should be paid by that parent.<sup>174</sup> In another case the court concluded that the person standing in the place of a parent did not have to pay any support as the child was living with the biological father whose income provided the child with a relatively high standard of living.<sup>175</sup>

[132] Alberta is not unique in the disparate approaches and outcomes to quantifying the child support obligation of a person standing in the place of a parent. Rather, the decisions reached by other provinces' courts are as disparate as the decisions reached in Alberta.<sup>176</sup>

[133] The WSA also contains a provision which directs a court to consider the support obligations a family member may have from other people.<sup>177</sup> In the maintenance and support area of estate law, the consideration is important. Unlike family law child support, support from an estate must come from a fixed source. An annual income may not be earned by an estate. By ensuring that a court considers a child's alternative sources of support, the WSA protects the finite source of support that makes up the estate. Third party proceedings, as described in *J.(S.S.) v J.(B.S.)*<sup>178</sup>, could also ensure that the obligation of the estate remains limited. An estate facing a claim for support and maintenance under the

<sup>173</sup> *J.(S.S.) v J.(B.S.)*, 1999 ABQB 408 [J.(S.S.)]

<sup>174</sup> *J.(S.S.)*, note 173 at para 20.

<sup>175</sup> *Vongrad v Vongrad*, 2005 ABQB 52 at para 36.

<sup>176</sup> See, for example: *D. (F.E.) v L. (L.W.)*, 2000 BCSC 1309; *Elliott v Elliott*, 2001 BCSC 472; *Symons v Taylor* (2000), 10 RFL (5th) 443 (Ont SCJ); *Forbes v Forbes* (1994), 2 RFL (4th) 121 (Sask. Q.B.).

<sup>177</sup> WSA, note 1, s 93(c).

<sup>178</sup> *J.(S.S.)*, note 173 at paras 20-21.

WSA, could initiate a claim under the FLA for child support from any other surviving parent under the FLA.<sup>179</sup>

[134] The WSA is already drafted in such a way as to make the obligation of an estate of a person standing in the place of a parent to support a child secondary to that of the child's biological or adoptive parents. The WSA states that the court must consider the factors found in section 93 as they apply to the fact situation before the court. An explicit direction that the estate's obligation is secondary to that of a child's biological or adoptive parents' obligation should ensure that a court must consider both subsections 93(a) and (c) without detracting from the court's discretion under the statute. An explicit statement would also help to ensure that a deceased's testamentary freedom is interfered with minimally, or not at all, where there are other sources of support open to the child.

### **RECOMMENDATION 3**

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A child's biological or adoptive parents should continue to have the primary obligation to support their children. Any court ordered obligation of an estate of a person standing in the place of a parent to support a child should be secondary to that of the biological or adoptive parents.

[135] We welcome any comments you may have in support of or in opposition to this recommendation or additional options for reform.

## **2. PRIORITY IN THE ESTATE'S OBLIGATIONS**

### **ISSUE 4**

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What priority should be given to existing support orders that bind the estate of a person standing in the place of a parent?

[136] The obligations of the estate of a person standing in the place of a parent, as compared to the obligations of biological or adoptive parents is not the only question of priority. Where step-families have formed, may be existing support orders for other children that need consideration.

[137] Support orders made against a person standing in the place of a parent during life will bind the estate of that person.<sup>180</sup> However, the personal representative of the estate may apply to the court to have that support order

<sup>179</sup> FLA, note 5, s 50(1)(b).

<sup>180</sup> FLA, note 5, s 80.

terminated or varied.<sup>181</sup> What should be done where a child is applying for maintenance and support from the estate of a person standing in the place of a parent, but that estate is bound by a child support order or agreement made against the person for another child during life? Which order should take priority?

[138] This issue came before the Ontario Court of Appeal tangentially in *Dagg v Cameron Estate*.<sup>182</sup> The deceased was required by a court order to maintain his ex-wife and mother of their children as an irrevocable beneficiary on a life insurance policy. After his death the deceased's new partner applied for maintenance and support. Using a specific provision under the Ontario *Succession Law Reform Act*, the trial judge held that the entire insurance policy could be clawed back to form part of the estate and was available for use under the maintenance and support application.<sup>183</sup> The Court of Appeal overturned the trial judge's and the Divisional Court's ruling on the matter and held that the insurance policy, to the extent that it was needed to cover the support order, was not available for claw back. Any excess insurance proceeds, however, could be clawed back into the estate for maintenance and support.

[139] Like Alberta's FLA, Ontario's *Family Law Act* directs that support orders bind the estate of the payor.<sup>184</sup> If the wording of these statutes is to have any meaning in the context of an estate with finite assets then these support orders, made during life, ought to be given priority over maintenance and support claims brought after the support orders were made. Further, the WSA directs courts to consider any legal obligation of the deceased, or the deceased's estate to support any family member.<sup>185</sup>

#### **RECOMMENDATION 4**

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Priority should be given to existing support orders that bind the estate of a person standing in the place of a parent.

[140] We welcome any comments you may have in support of or in opposition to this recommendation or additional options for reform.

<sup>181</sup> FLA, note 5, s 80.1(2).

<sup>182</sup> *Dagg v Cameron Estate*, 2017 ONCA 366.

<sup>183</sup> The WSA does not contain a similar claw back provision.

<sup>184</sup> *Family Law Act*, RSO 1990, c F.3, s 34(4).

<sup>185</sup> WSA, note 1, s 93(d).

## C. Notice

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### ISSUE 5

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Who should get notice if the deceased may have been standing in the place of a parent?

[141] Both the *Surrogate Rules*, and the *Estate Administration Act*, require that notice be given to the beneficiaries of an estate, and to persons who may have other rights, including those under the WSA.<sup>186</sup> The notice requirements under the EAA include a deceased's "family members" as defined in Part 5 of the WSA.<sup>187</sup> If estates of persons standing in the place of parents are included under the WSA, who should get notice if the deceased may have been standing in the place of a parent?

[142] Two subsections of section 11 are relevant to persons standing in the place of parents. Subsection 11(g) requires that the Public Trustee be provided with notice if the deceased is survived by a minor child or a grandchild to whom the deceased stood in the place of a parent at death. Subsection 11(h) requires that the guardian of a child or grandchild from subsection (g) also be given notice.

[143] Providing mandatory notice to the Public Trustee when minor children survive adults is good policy and ensures that an impartial, knowledgeable party can review probate applications. This is no different when a deceased stood in the place of a parent to a child and the same mandatory policy should apply.

[144] When a person standing in the place of a parent dies there may be two living guardians for the child. Service on "the guardian" may require notice to both surviving guardians of the child. Alberta law does not make this notice mandatory in all circumstances, however. The factual situation may not require notice to be provided to both guardians in every instance. A child may have two guardians without the same powers, responsibilities and entitlements of guardianship regarding that child under a court order.<sup>188</sup> Ultimately, personal representatives and their legal counsel need to be provided with the flexibility to ensure that appropriate notice is given to the correct individual with the decision-making powers over that child. The EAA, as drafted provides this flexibility.

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<sup>186</sup> *Surrogate Rules*, Alta Reg 130/1995; *Estate Administration Act*, SA 2014, c E-12.5 [EAA].

<sup>187</sup> EAA, note 186, c E-12.5, s 11.

<sup>188</sup> FLA, note 5, s 32.

[145] It is possible that this flexibility will lead to mischief. A personal representative may need to provide notice to a guardian who has no interest in the estate of the person who stood in the place of a parent. For example, a former spouse of a surviving parent cannot bring a claim against the estate of the person who stands in the place of a parent. Where that former spouse is the guardian of a child, however, then they could bring a support and maintenance claim against the estate for vexatious reasons rather than the child's needs. It is also possible that a person with an interest in the estate may need to be provided with notice on behalf of a child. That interested person may decide not to bring an application under the WSA for the child for fear of reducing their share of the estate. In either case providing notice to the Public Trustee should provide the balance that third-party, independent review can bring.<sup>189</sup>

[146] A final issue involves determining when a person stood in the place of a parent for the purposes of providing notice of an application. The status as a person standing in the place of a parent is determined by a court, absent the express agreement of that person. Prudence seems to suggest that personal representatives and lawyers should provide notice in those close situations where a person may, or may not, have stood in the place of a parent.

#### **RECOMMENDATION 5**

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When providing notice to family members under the *Estate Administration Act*, both the child's guardian and the Public Trustee should be served when the deceased may have stood in the place of a parent.

[147] We welcome any comments you may have in support of or in opposition to this recommendation or additional options for reform.

### **D. Support for Adult Children**

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#### **ISSUE 6**

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When should a child over the age of 18 be able to apply for support from the estate of a person standing in the place of a parent?

[148] The preceding sections have focused on whether a change should be made to the WSA to allow the court to order that the estate of a person standing in the

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<sup>189</sup> For example, in *Malkhassian*, note 110, it was the Public Trustee who brought an application for maintenance and support against a grandparent's estate and not the grandchild's biological parents.

place of a parent appropriately support a minor child. This issue asks if the ability to make orders for support ought to extend past the age of 18 in some circumstances.

[149] The FLA was recently amended regarding adult children and the support obligations owed to them during life by parents, including persons standing in the place of parents. The result has been to increase the range of adult children able to claim support.<sup>190</sup> Before the changes, only those children under 18 years of age, or between the ages of 18 and 22 and unable to withdraw from their parents' charge because of full-time education could claim support from parents.<sup>191</sup> Now any child who is over the age of 18 and is unable to withdraw from the charge of that child's parents or is unable to obtain the necessities of life because of:

- illness,
- disability,
- being a full-time student as determined under the prescribed guidelines, or
- other cause

can apply for support from their parents.<sup>192</sup>

[150] In 2018 the Alberta Court of Queen's Bench heard an application that challenged the constitutionality of the previous definition of a child in Part III of the FLA.<sup>193</sup> The Court found that the effect of the FLA before its change created a distinction between dependent adult children in school and dependent adult children with a disability. Further, the unintended effect of the FLA was to create a distinction between adult disabled children of married couples, who can make a claim to support under the *Divorce Act*, and adult disabled children of unmarried couples, who had no alternative recourse.<sup>194</sup> The FLA widened the gap between the historically disadvantaged adult disabled children. It had,

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<sup>190</sup> *Family Statutes Amendment Act*, SA 2018, c 18, s 1.

<sup>191</sup> FLA, note 5, s 46 as it appeared on November, 2018.

<sup>192</sup> FLA, note 5, s 46.

<sup>193</sup> *Ryan v Pitchers*, 2019 ABQB 19 [Ryan].

<sup>194</sup> *Ryan*, note 193 at paras 18-19.

the effect of reinforcing, perpetuating, and exacerbating disadvantage on the basis of the enumerated ground of disability and based on the analogous ground of marital or family status.<sup>195</sup>

[151] The Legislature, in response, passed the *Family Statutes Amendment Act*. MLAs from both sides of the floor supported the legislative changes. MLAs agreed that the changes were beneficial and that the Legislature should do whatever it can to support families. Further, the changes to the FLA would provide much-needed support for parents with children with disabilities.<sup>196</sup>

[152] As some practitioners rightly pointed out, there is a difference between a claim against a living person for ongoing child support, and giving a child a claim against an estate. It seems, to a large extent, that the difference lies in the absence of future, annual income as a source of support. Estates are generally fixed and a person has to plan ahead for what to do with that property. A person can only plan on what to do with the fixed assets of their estate given the facts of which they are aware when they are planning. Changing a person's estate plan because of inadequate support for a family member will redirect assets that were planned to go elsewhere. Terminating the support ordered against the estate of a person standing in the place of a parent for a child at 18 would be the surest way to ensure that the total support payable is finite.

[153] The risk to any amendment to the WSA that limits a right to support and maintenance of a child from a person standing in the place of a parent to a minor child is a potential *Charter* challenge. The distinction would be based upon age, disability, or family status. These are enumerated or analogous grounds under a section 15 analysis. The best way to mitigate against the risk would be to allow a court to order the estate of a persons standing in the place of a parent to support a child who is not a minor in prescribed circumstances. These prescribed circumstances ought to be the same as those in place for the WSA's "family member" definition for when a person is a child.<sup>197</sup>

## **RECOMMENDATION 6**

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A child over the age of 18 should only be able to apply for support from the estate of a person standing in the place of a parent where the child

<sup>195</sup> *Ryan*, note 193 at para 25.

<sup>196</sup> Bill 28, *Family Statutes Amendment Act*, 2018, 4th Sess, 29th Leg, 2018, at 2135 (Hon Angela Pitt), 2137 (Hon. Ronald Orr), and 2138 (Hon. Laila Goodridge).

<sup>197</sup> WSA, note 1, ss72(b)(iii), (iv), (v). The inclusion of grandchild or great-grandchild under the definition of "family member" should also be changed to reflect this recommendation.

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

[154] We welcome any comments you may have in support of or in opposition to this recommendation or additional options for reform.

## **E. Transitional Provisions**

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[155] If the changes suggested in the Report are made, people ought to have time to consider what the change in the WSA will mean for their future, and that of their beneficiaries and family members. As with the recent changes made to the FLA it's, "important that all people have the opportunity to learn about [the change] and how it will affect them before it comes into law".<sup>198</sup> Estate planning professionals will also need time to advise their clients regarding the changes, and assess their client's situation to see if the changes will affect them. In appropriate circumstances, wills may need to be redrafted. Any changes made to the WSA should not take effect for at least 2 years.

[156] Further, the estates of persons who have died before the coming into force of any changes should not be subject to them. To make these estates subject to new changes would be to impinge on their testamentary freedom in situations where there were no legal means to challenge their decision after death. It would be a retrospective change enforcing a new standard that didn't exist when an estate was being planned.

[157] We will address transitional provisions more specifically once we have the benefit of consultation on these proposed changes. However, we welcome specific comments you may have on transition provisions.

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<sup>198</sup> Bill 28, *Family Statutes Amendment Act*, 2018, 4th Sess, 29th Leg, 2018, at 2138 (Hon. Laila Goodridge).





Deadline for comments on the issues raised in  
this document is **January 31, 2021.**

Please complete the online survey at:  
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