



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



FINAL REPORT  
**117**  
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**FAMILY MAINTENANCE AND SUPPORT FROM  
THE ESTATE OF A PERSON WHO STOOD IN  
THE PLACE OF A PARENT**

FINAL || **117**  
REPORT

**JANUARY 2022**

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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 these contributors, we express our gratitude.



# Summary

## **What is ALRI recommending?**

In this report, ALRI recommends that Part 5 of the *Wills and Succession Act* be reformed 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.

This recommendation would close a gap in the law about child support. A child may apply for support from a person standing in the place of a parent while the person is alive, but not after the person's death. ALRI has concluded that children should be able to apply for support in both situations.

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

To be a “person 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 intended to treat the child as their own.

## **What is family maintenance and support from an estate?**

A person may leave their property to anyone they wish, but there is a long-standing principle that a person must look after their family after death. If a person does not leave enough money or property to support a family member, the family member may apply for support from an estate.

There are three steps to a claim. All must be met before the family member will receive support.

First, the person applying must be a “family member” listed in Part 5 of the *Wills and Succession Act*. The current list includes the deceased person's spouse, adult interdependent partner, child, and, in some circumstances, a grandchild or great-grandchild.

Second, the family member must show that they need support. They must show that their resources, including any money or property they received from the estate, are not enough to meet their needs.

Finally, a court must decide if the family member should receive additional money or property from the estate and, if so, how much.

The gap in the law affects the first step. A child to whom the deceased stood in the place of a parent is not a “family member” as defined in Part 5 of the *Wills and Succession Act*. That means the child has no chance of receiving support from an estate, no matter how great their need. ALRI’s recommendation would change the definition to include these children.

### **Who would be affected by this recommendation?**

ALRI’s recommendation would benefit children who have a person standing in the place of a parent. These children would be able to apply for support if the person dies.

The recommendation would also affect persons standing in the place of a parent, their estates, and their other heirs. Lawyers who practice wills and estates might see some changes in their practice.

### **Who did ALRI consult about these recommendations?**

We consulted broadly on our preliminary recommendations. Our consultation included three online surveys targeted at the general public. Key results were:

A total of 922 Albertans responded to our online surveys.

Of those, 328 were either step-parents or step-children.

A very large majority (79 per cent) of all survey respondents agreed with ALRI’s recommendation.

A very large majority (78 per cent) of step-parents or step-children agreed with ALRI’s recommendation.

A majority (61 per cent) of the 41 lawyers who responded to our survey agreed with ALRI’s recommendation.

We also held roundtables with lawyers who practice wills and estates or family law. We had individual interviews with lawyers who wanted to participate but were unable to attend the roundtables. The roundtables and interviews helped us refine our recommendations.

### **Why did ALRI make this recommendation?**

ALRI’s recommendation is based on a few key principles.

The first principle is that the best interests of a child should be the main consideration in child support. It is in the best interests of a child to be able to apply for support.

The second principle is that the law should treat all children equally. The existing law treats children differently, based on things that are out of their control. A child cannot decide whether to be raised by biological or adoptive parents or a person standing in the place of a parent. The child may only apply for support from the estate of a biological or adoptive parent. They may not apply for support from the estate of a person who stood in the place of a parent. A child with a person standing in the place of a parent cannot decide whether that person dies. The child may apply for support from the person while the person is alive, but not from their estate after death.

The third principle is that laws should be consistent with each other. ALRI's recommendations would make the *Wills and Succession Act* consistent with other provincial legislation that provides benefits to a child with a person standing in the place of a parent, like the *Family Law Act*, the *Fatal Accidents Act*, and the *Workers' Compensation Act*. It would also be consistent with federal legislation, like the *Divorce Act*, the *Canada Pension Plan*, and the *Income Tax Act*, and legislation in other Canadian jurisdictions.

We heard some arguments against allowing a child to apply for support from the estate of a person who stood in the place of a parent. The main concerns were that this reform would interfere with a person's freedom to leave their property to whomever they wish, that it would make estate planning and administration less predictable, and that it would be difficult to prove a deceased person's intentions. Most of these concerns are already addressed in some way.

### **What details would need to be considered?**

#### Primary obligation to support a child

ALRI recommends that biological or adoptive parents should have the primary obligation to support a child. The estate of a person standing in the place of a parent should be a secondary source of support if needed. ALRI recommends that the *Wills and Succession Act* should include factors for a court to consider when awarding support, including the amount of support paid by the child's parents.

#### What is ALRI recommending?

ALRI recommends that the *Wills and Succession Act* should include a list of factors that indicate whether a person demonstrated a settled intention to treat a child as their own. The list should be consistent with the one in the *Family Law Act*.

### Priority of support orders

A person standing in the place of a parent may have obligations to other children. If there was a support order in place before the person died, requiring the person to pay support to another family member, the estate will usually have to continue paying under that order. ALRI recommends that an existing support order have priority over a new one. Support for a child to whom the person stood in the place of a parent should be available if the estate can pay support after meeting its obligations under the existing support order.

### Notice

A person administering an estate must give notice to the family members eligible to apply for support from an estate. ALRI recommends the same requirements for notice if the deceased person stood in the place of a parent to a child. The person administering an estate should have to give notice to the child's guardians and the Public Trustee.

### Adult children

A child over the age of 18 may apply for family maintenance and support only if:

the child is “unable to earn a livelihood by reason of mental or physical disability”, or

the child is under 22 and a full-time student.

ALRI recommends that the limits should be the same for a child applying for support from the estate of a person who stood in the place of a parent.

# Recommendations

## RECOMMENDATION 1

A child of a person standing in the place of a parent should be added to the class of family members allowed to bring a claim for family maintenance and support under the *Wills and Succession Act*. ..... 59

## RECOMMENDATION 2

The obligation of the estate of a person standing in the place of a parent to provide support for a child should be secondary to the obligation of a biological or adoptive parent to support that child. In addition to the factors listed in section 93 of the *Wills and Succession Act*, when determining the amount and duration of support the estate of a person standing in the place of a parent must pay, the court should have to consider the following:

- the nature and duration of the relationship between the child and the deceased;
- the child's entitlement to support from any another person; and
- the amount of child support that is being paid or should be paid by either or both parents of the child pursuant to the *Family Law Act*, or the *Divorce Act*. ..... 60

## RECOMMENDATION 3

For the purposes of Part 5 of the *Wills and Succession Act*, in determining whether a person has demonstrated a settled intention to treat the child as the person's own, the court should consider the factors that are consistent with s. 48(2) of the *Family Law Act*, namely,

- the child's age;
- whether the person had provided direct or indirect financial support for the child during their life;
- 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 was 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 was living separate and apart from the child's other parent before their death;
- whether the person had considered
  - applying for guardianship of the child,
  - adopting the child, or
  - changing the child's surname to that person's surname;
- the nature of the child's relationship with any other parent of the child; and
- any other factor that the court considers relevant. .... 66

**RECOMMENDATION 4**

For the purposes of family maintenance and support, whether a person stands in the place of a parent should also be defined in a manner that is consistent with section 48(1) of the *Family Law Act*, namely that, the person was the spouse of a parent of the child, or was in a relationship of interdependence of some permanence with a parent of the child..... 71

**RECOMMENDATION 5**

Priority should be given to existing support orders that bind the estate of a person standing in the place of a parent over any potential new family maintenance and support order for a child to whom the person stood in the place of a parent..... 73

**RECOMMENDATION 6**

The word “child” in section 11 of the *Estate Administration Act* should be defined to include a child in respect of whom the deceased stood in the place of a parent. .... 75

**RECOMMENDATION 7**

For the purposes of family maintenance and support, 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 at the time of the deceased’s death:

- the child was unable to earn a livelihood by reason of mental or physical disability; or
- the child was under 22, and unable to withdraw from their parent’s charge because the child is a full-time student as determined in accordance with the *Family Law Act* and its regulations. .... 78



# Table of Abbreviations

## LEGISLATION

WSA	<i>Wills and Succession Act</i> , SA 2010
Bill 21, Second Reading	Bill 21, <i>Wills and Succession Act</i> ", 2nd reading, Alberta, Legislative Assembly, <i>Hansard</i> , 27th Leg, 3rd Sess, No 37 (2 November 2010)
FLA	<i>Family Law Act</i> , SA 2003
CPP	<i>Canada Pension Plan</i> , RSC 1985

## LAW REFORM PUBLICATIONS

ALRI Family Relief	Institute of Law Research and Reform (Alberta), <i>Family Relief</i> , Final Report 29 (1978)
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## CHAPTER 1

## Introduction

**A. Support for Family Members**

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[1] The *Wills and Succession Act* consolidated and modernized most of Alberta's succession law into a single statute.<sup>1</sup> The WSA continues two traditional but competing principles of succession law. 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. Interfering with a person's testamentary freedom must always be justified. Second, the WSA preserves a long-standing principle that a person must look after their family after death.<sup>2</sup> The WSA generally mandates that, at minimum, an estate make adequate provision for the support and maintenance of a family member.

[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. The first step requires that a person meets the definition of "family member" in Part 5. The definition of "family member" is exhaustive; if a person does not fall within one of the defined categories, then they are not able to bring a claim for support. Next, a family member must establish that the support provided by an estate, if any, falls below the legislated standard. Third, even if the provision is inadequate, the family member must convince the court to exercise its discretion to order support from the estate for the family member.<sup>3</sup> It is only at this final, discretionary stage of a claim under Part 5 that a person's testamentary freedom may be restrained. The WSA's approach to family support and maintenance recognizes that interfering with a person's testamentary freedom must always be justified.

[3] This report's focus is on the first of these three steps. It asks if a new class of person should be added to the list of "family member". It does not propose to

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

<sup>2</sup> "Bill 21, Wills and Succession Act", 2nd reading, Alberta, Legislative Assembly, *Hansard*, 27th Leg, 3rd Sess, No 37 (2 November 2010) at 1066 (Hon Verlyn Olson) [Bill 21, Second Reading].

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

change the final two steps that balance testamentary freedom and family maintenance and support.

[4] This report considers parents and children. Parent and child relationships are determined by the *Family Law Act*. The WSA refers to Part 1 of the FLA in determining who are parents and children.<sup>4</sup>

[5] The FLA, in Part 1, determines who a child's parents are by reference to birth (including assisted reproduction) and adoption. For most purposes the provisions limit the number of parents a child can have to two.<sup>5</sup> However, for the purposes of support, Part 3 of the FLA recognises that a person may "stand in the place of a parent".<sup>6</sup>

[6] 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:<sup>7</sup>

- 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.

If the first condition is met, 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 their 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 a "very good" step-parent may not stand in the place of a parent. Being a "very good" step-parent does not impute the necessary intention to treat a child as their own.<sup>8</sup>

[7] If a person meets the legislated criteria for standing in the place of a parent to a child, then the FLA includes that person in the definition of "parent" for the purposes of support. The person then has a support obligation to that child.<sup>9</sup> The court can order that support be paid for that child to satisfy the person's obligation.<sup>10</sup> A support order or agreement made during the life of a person standing in the place of a parent will usually bind the estate of that

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

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

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

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

<sup>8</sup> *Rubin v Gendemann*, 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.

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

<sup>10</sup> FLA, ss 50, 53.

person.<sup>11</sup> Support orders and agreements 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>

[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. To be specific, should the list of family members who may apply for family maintenance and support include a child for whom a person stood in the place of a parent?

[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 a dependent adult child. Under both the FLA and the WSA, the support obligations owed to children may extend to dependent adult children.

## B. Background to this Project

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[11] Alberta has significantly changed its child support laws over the years. 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>14</sup> In the *Family Law Project: Child Support*, ALRI recommended Alberta's current legislative framework for child support.<sup>15</sup>

[12] Alberta has also recently changed its wills and succession laws and ALRI made recommendations for their improvement. In 1999, ALRI made

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

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

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

<sup>14</sup> Alberta Law Reform Institute, *Family Law Project: Child Support*, Report for Discussion 18.3 (1998) at 103–122, online: <[www.alri.ualberta.ca/wp-content/uploads/2020/06/rfd18.3.pdf](http://www.alri.ualberta.ca/wp-content/uploads/2020/06/rfd18.3.pdf)>.

<sup>15</sup> Alberta Law Reform Institute, *Family Law Project: Child Support*, Report for Discussion 18.3 (1998) at 103–122, online: <[www.alri.ualberta.ca/wp-content/uploads/2020/06/rfd18.3.pdf](http://www.alri.ualberta.ca/wp-content/uploads/2020/06/rfd18.3.pdf)>.

recommendations for reform to what was then the *Intestate Succession Act*.<sup>16</sup> In 2002, it recommended the consolidation of Alberta's core succession legislation into one statute.<sup>17</sup>

[13] The support provisions in the WSA have not kept pace with the changes made to support law in the FLA. ALRI made recommendations on improving Alberta's family maintenance legislation in 1978. ALRI recommended that the estates of persons who stood in the place of a parent to a child should be subject to a claim from that child for support after death.<sup>18</sup> ALRI focused on the changes made to the *Divorce Act* of the time, noting that it enabled children to receive support where a divorce order is granted.<sup>19</sup> ALRI accepted that the *Divorce Act* reflected:<sup>20</sup>

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 [the child were their] 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.

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

[15] 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>21</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>22</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.

<sup>16</sup> Alberta Law Reform Institute, *Reform of the Intestate Succession Act*, Final Report 78 (1999), online: <[www.alri.ualberta.ca/wp-content/uploads/2020/05/fr078.pdf](http://www.alri.ualberta.ca/wp-content/uploads/2020/05/fr078.pdf)>.

<sup>17</sup> Alberta Law Reform Institute, *Report on a Succession Consolidation Statute*, Final Report 87 (2002), online: <[www.alri.ualberta.ca/wp-content/uploads/2020/05/fr087.pdf](http://www.alri.ualberta.ca/wp-content/uploads/2020/05/fr087.pdf)>.

<sup>18</sup> Institute of Law Research and Reform (Alberta), *Family Relief*, Final Report 29 (1978) at 45–47, online: <[www.alri.ualberta.ca/wp-content/uploads/2020/03/fr029.pdf](http://www.alri.ualberta.ca/wp-content/uploads/2020/03/fr029.pdf)> [ALRI Family Relief].

<sup>19</sup> *Divorce Act*, RSC 1970, c D-8, s 2; ALRI Family Relief at 45.

<sup>20</sup> ALRI Family Relief at 45.

<sup>21</sup> FLA, s 18.

<sup>22</sup> *Divorce Act*, RSC 1985, c 3 (2nd Supp), ss 2(2), 15.1; *Chartier v Chartier*, [1999] 1 SCR 242 at para 21 [Chartier]; Carol Rogerson, "The Child Support Obligation of Step-Parents" (2001) 18 Can J Fam L 9 at 29.

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

[17] Further, an increasing 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>23</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, it may be an opportune time to consider if our law continues to reflect an appropriate policy outcome.

### C. Scope of this Project

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[18] In November 2020, ALRI published *Family Maintenance and Support from the Estate of a Person Who Stood in the Place of a Parent*.<sup>24</sup> ALRI recommended that the WSA be amended to include children who were raised by a person standing in the place of a parent.

[19] Over the next six months ALRI conducted public consultation. An online survey was released through various channels, and ALRI received responses from 922 people resident in Alberta. Roundtables with members of Alberta's legal profession were held, and telephone and online digital interviews were also conducted.

[20] ALRI's consultation results show high support for the proposed reforms. ALRI asked:

Should a minor child of a *deceased step-parent who stood in the place of a parent during life* be able to bring a claim against that

<sup>23</sup> Jonnette Watson Hamilton, "A Cautionary Tale for Step-Parents and Step-Children" (5 May 2015), ABlawg (blog), online: <[www.ablawg.ca/2015/05/05/a-cautionary-tale-for-step-parents-and-step-children/](http://www.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*, Family and Households Highlight Tables (Ottawa: Statistics Canada, 2016), online: <[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*, Catalogue No 12F0061XPE (Ottawa: Statistics Canada, 1996), online: <[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>24</sup> 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 (2020), online: <[www.alri.ualberta.ca/wp-content/uploads/2020/11/RFD34.pdf](http://www.alri.ualberta.ca/wp-content/uploads/2020/11/RFD34.pdf)>.

person's estate for maintenance and support in needful circumstances?

79% of survey participants answered “yes” to this question.

[21] Alongside this key issue there are several sub-issues to be canvassed. These sub-issues include:

- How should a person who stood in the place of a parent be defined?
- What 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 end when the child reaches the age of majority, or should it continue in certain circumstances?
- Finally, what transitional rules should apply if the estate of a person standing in the place of a parent is made subject to claims for maintenance and support?

[22] This report does not propose changes to the intestate succession regime in Alberta. The issues in an intestacy under Part 3 of the WSA 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 family member may end up obtaining some part of an estate through a family maintenance and support claim, the process is distinctly different. Part 5 involves weighing interests, rights, and abilities that may result in an altered distribution scheme to satisfy an unmet need of the family member applicant, or may not. Part 3 involves a mandatory distribution that applies in all circumstances without weighing the

<sup>25</sup> WSA, ss 59, 66–67.

<sup>26</sup> WSA, s 88; ALRI Family Relief at 15.



needs, interests, or abilities of either the deceased or any spouse, adult interdependent partner, or descendant. Whether the intestate distribution system ought to include children of persons standing in the place of parent is out of the scope of this project.

[23] This report will not capture how some families establish parentage. 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 who currently falls outside of the FLA's two parent structure. Similarly, all the ways in which adults form and live in relationships are beyond this report's focus. 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. All of 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.



## CHAPTER 2

## The Law and its Policies

[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>27</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>28</sup> The remainder was divided between his widow and children.<sup>29</sup> This scheme gradually disappeared in England by 1724, leaving the disposition of a man's personal property to his sole discretion.<sup>30</sup>

[26] Testamentary freedom over real property (ie 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 that did not go first to the eldest son.<sup>31</sup> The passage of the *Wills Act*<sup>32</sup> began expanding a testator's right to dispose of real property by

<sup>27</sup> England would restrain freedom of testation with *The Inheritance (Family Provision) Act, 1938* (UK) 1 & 2 Geo VI, c 45; ALRI Family Relief at 4.

<sup>28</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>29</sup> ALRI Family Relief at 3; Gordon Bale, "Limitation on Testamentary Disposition in Canada" (1964) 42:3 Can Bar Rev 367 at 368 [Bale]; Hannah Roggendorf, "Indefeasible Family Rights: A Comparative View on the Restrictions of Testamentary Freedom" (2018) 22:2 Ed L Rev 211 at 219.

<sup>30</sup> Elizabeth Travis High, "The Tension Between Testamentary Freedom and Parental Support Obligations: A Comparison between the United States and Great Britain" (1984) 17:2 Cornell Intl LJ 321 at 323; Bale, note 29 at 368.

<sup>31</sup> Bale, note 29 at 368; Hannah Roggendorf, "Indefeasible Family Rights: A Comparative View on the Restrictions of Testamentary Freedom" (2018) 22:2 Ed L Rev 211 at 219.

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

will.<sup>33</sup> Despite the legislative expansion of freedom of testation, disposition of real property remained fettered by customary 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>34</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>35</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>36</sup>

## 2. IN ALBERTA

[29] Alberta became a province in 1905 but officially received England's law of succession as of 1870.<sup>37</sup> It would take Alberta's legislators only five years to reform succession law and begin to legislatively balance testamentary freedom

<sup>33</sup> Bale, note 29 at 369; ALRI Family Relief at 3–4.

<sup>34</sup> Bale, note 29 at 369; ALRI Family Relief at 3–4; *Dower Act*, 1833 (UK) 3 & 4 Will IV, c 105 at s 4.

<sup>35</sup> *Banks v Goodfellow*, [1861-73] All ER Rep 47 at 55.

<sup>36</sup> *The Inheritance (Family Provision) Act*, 1938 (UK) 1 & 2 Geo VI, c 45; ALRI Family Relief at 4.

<sup>37</sup> *The Alberta Act*, 1905 (Can), 4-5 Edw VII, c 3, s 16; JE Cote, "The Introduction of English Law into Alberta" (1964) 3:2 Alta L Rev 262 at 263–264.

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>38</sup> 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>39</sup> The 1947 Act extended the duty to provide support after death to a husband and children of a testator.<sup>40</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>41</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>42</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>43</sup> Rather than looking to a fixed share, Alberta legislators adopted the approach taken by New Zealand legislators in 1900.<sup>44</sup> The 1947 Act's balancing of testamentary freedom was discretionary; it did not confer an automatic legal right on 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 allowed 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>45</sup> The flexible approach to balancing testamentary freedom taken in 1947 continues under Alberta's approach to family maintenance in the WSA.<sup>46</sup>

[32] The ability to apply for family maintenance and support was extended to cases of intestacy in 1955.<sup>47</sup> In doing so "the Legislature recognized that in some

<sup>38</sup> *Married Women's Relief Act*, SA 1910 (2nd Sess), c 18, s 2.

<sup>39</sup> *The Testators Family Maintenance Act*, SA 1947, c 12, s 22 [The 1947 Act].

<sup>40</sup> The 1947 Act, note 39, s 2(c).

<sup>41</sup> The 1947 Act, note 39, s 2(b).

<sup>42</sup> The 1947 Act, note 39, s 2(c).

<sup>43</sup> ALRI Family Relief at 5.

<sup>44</sup> *The Testator's Family Maintenance Act*, 1900 (NZ), 1900/20; ALRI Family Relief at 7.

<sup>45</sup> ALRI Family Relief at 14-15; The 1947 Act, note 39, s 4.

<sup>46</sup> WSA, s 88.

<sup>47</sup> *An Act to amend The Testators Family Maintenance Act*, SA 1955, c 66, s 5.

circumstances the rules of intestate succession might not provide for proper maintenance for dependants of a deceased person.”<sup>48</sup>

[33] In 1969, the category of family members 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>49</sup> The distinctions between children based on their parents’ marital status were abolished in 1991.<sup>50</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 *Dependants Relief Act*.<sup>51</sup>

[34] The consolidation of Alberta’s succession law incorporated the *Dependants 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 further addition was made.

Grandchildren 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>52</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>53</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 considered to be family.<sup>54</sup> The changes made to the WSA include changes that recognize the family 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 the place of parents acknowledges the increasing importance of diverse familial relationships in the lives of various people today.

<sup>48</sup> ALRI Family Relief at 5.

<sup>49</sup> *An Act to amend the Family Relief Act*, SA 1969, c 33, s 2(b).

<sup>50</sup> *Family and Domestic Relations Statutes Amendment Act*, 1991, SA 1991, c 11.

<sup>51</sup> *Adult Interdependent Relationships Act*, SA 2002, c A-4.5, s 35, amending the *Dependants Relief Act*, RSA 2000, c D-10.5, s 1(a).

<sup>52</sup> WSA, ss 72(b)(vi), 73.

<sup>53</sup> Bill 21, Second Reading, note 2 at 1067 (Hon Verlyn Olson).

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

[36] 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 to ensure family members had adequate support. 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.

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

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[37] 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 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.

### **1. COMMON LAW**

[38] 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>55</sup> It follows that a person was not liable for the expenses of maintaining their spouse's children from a previous marriage.<sup>56</sup> This rule held except where a person stood in the place of a parent to the children.<sup>57</sup>

[39] 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. The common law developed the concept of being *in loco parentis* to a child as a means to provide maintenance in specific circumstances for children from the estates of testators. 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>58</sup> To find a person was *in loco parentis*, a court

<sup>55</sup> *Cooper v Martin* (1803), 4 East 76 at 84; *Bazeley v Forder* (1868), LR 3 QB 559 at 565.

<sup>56</sup> *Tubb v Harrison* (1790), 4 TR 118 at 119.

<sup>57</sup> *Stone v Carr* (1799), 3 Esp 1 at 2.

<sup>58</sup> *Spark v Perrin* (1870), 17 Gr 519 at para 1.

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>59</sup> This standard, looking only at the intention of the person alleged to be *in loco parentis*, became the common law test.

## 2. SOCIAL WELFARE LEGISLATION

### a. Tort Legislation

[40] Some of the earliest examples of standing in the place of a parent in Canadian legislation come from fatal accidents statutes.<sup>60</sup> One example is the Saskatchewan *Fatal Accidents Act, 1920*.<sup>61</sup> Under the Act, the term "child" included a person to whom the deceased stood in the place of a parent.<sup>62</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>63</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>64</sup>

[41] Workers' compensation legislation throughout Canada also makes use of the concept of standing in the place of a parent.<sup>65</sup> In Alberta, this has been the case since the *Workmen's Compensation Act* came into force.<sup>66</sup> Jurisprudence from Alberta interprets when a person is standing in the place of a parent under

<sup>59</sup> *Powys v Mansfield* (1837), 40 ER 964 at 967.

<sup>60</sup> *Carignan v Carignan* (1989), 61 Man R (2d) 66 (CA) at para 11, 1989 CarswellMan 199 [cited to WL Can].

<sup>61</sup> *The Fatal Accidents Act, 1920*, SS 1920, c 29. 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 196, 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); *Fatal Accidents Amendment Act*, SA 2010, c 6, s 2-3(a).

<sup>62</sup> *The Fatal Accidents Act, 1920*, SS 1920, c 29, s 2.

<sup>63</sup> *Shtitz v Canadian National Railway*, [1927] 1 WWR 193 (SKCA) at para 30, 1926 CarswellSask 113 [cited to WL Can].

<sup>64</sup> *Shtitz v Canadian National Railway*, [1927] 1 WWR 193 (SKCA) at para 32, 1926 CarswellSask 113 [cited to WL Can].

<sup>65</sup> *Workers Compensation Act*, RSBC 2019, c 1, s 1 "family member"; *Workers' Compensation Act*, RSA 2000, c W-15, s 1(1)(e); *The Workers Compensation Act, 2013*, SS 2013, c W-17.11, s 2(1)(e); *The Workers' Compensation Act*, CCSM, c W200, s 1(1) "child"; *Workplace Safety and Insurance Act, 1997*, SO 1997, c 16, Schedule A, s 2(1) "dependents"; *Workers' Compensation Act*, SNS 1994-95, c 10, s 2(h); *Workers' Compensation Act*, RSNB 1973, c W-13, s 1 "member of the family".

<sup>66</sup> *The Workmen's Compensation Act, 1918*, SA 1918, c 5, s 2(l).



current workers' compensation legislation in the same way as the term "stands in the place of a parent" is interpreted under the FLA or *Divorce Act*.<sup>67</sup>

**b. Canada Pension Plan**

[42] 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>68</sup> To help determine whether 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>69</sup>

[43] 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>70</sup>

[44] *Canada (Minister of Social Development) v Viby* considered the orphan's benefit under the CPP.<sup>71</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.

[45] 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>72</sup> It seems likely that the contributor in *Viby* was not standing in the

<sup>67</sup> *Elgie v Alberta (Workers' Compensation, Appeals Commission)*, 2009 ABCA 277 at para 65.

<sup>68</sup> *Canada Pension Plan*, RSC 1985, c C-8, s 42(1) "child" [CPP].

<sup>69</sup> *Canada Pension Plan Regulations*, CRC, c 385, ss 52(f)-(g), (i).

<sup>70</sup> CPP, note 68, ss 42(1) "dependent child", "orphan", 44(1)(f).

<sup>71</sup> *Canada (Minister of Social Development) v Viby*, 2007 CarswellNat 5438 (WL Can) (Pen Apps Bd).

<sup>72</sup> *Canada (Minister of Social Development) v Viby*, 2007 CarswellNat 5438 (WL Can) (Pen Apps Bd) at para 9.

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>73</sup>

### 3. FAMILY AND DIVORCE LEGISLATION

#### a. Divorce

[46] 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>74</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>75</sup>

[47] Canadian divorce legislation remained relatively unchanged until 1968 when Parliament overhauled the *Divorce Act*.<sup>76</sup> For the first time Canadian divorce legislation included persons standing in the place of parents.<sup>77</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 by any spouse who stood in the place of a parent, and for making orders related to their custody, care and upbringing.<sup>78</sup> Canadian courts would follow the English common law definition of standing in the place of a parent in Canadian divorce law.<sup>79</sup>

[48] Divorce law would receive a second overhaul in 1986.<sup>80</sup> Included in the changes made in 1986 was the analysis of when a person stood in the place of a

<sup>73</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.

<sup>74</sup> *The Divorce and Matrimonial Causes Act, 1857*, 20 & 21 Vict, c 85; *Report of The Special Joint Committee of the Senate and House of Common on Divorce* (Ottawa, 1996) at 47-53.

<sup>75</sup> *The Divorce and Matrimonial Causes Act, 1857*, 20 & 21 Vict, c 85, s 35; Alison Diduck, "Carignan v. Carignan: When is a Father not a Father? Another Historical Perspective" (1990) 19:3 Man LJ 580 at 591.

<sup>76</sup> *Divorce Act*, SC 1967-68, c 24; *Report of The Special Joint Committee of The Senate and House of Common on Divorce* (Ottawa, 1996) at 52.

<sup>77</sup> *Divorce Act*, SC 1967-68, c 24, s 2(a).

<sup>78</sup> *Divorce Act*, SC 1967-68, c 24, ss 10-11.

<sup>79</sup> *O'Neil v Rideout* (1975), 7 OR (2d) 117 (Surr Ct).

<sup>80</sup> *Divorce Act*, RSC 1985, c 3 (2nd Supp).

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>81</sup>

- 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; and
- the nature or existence of the child's relationship with the absent biological parent.

[49] Alberta's family legislation would not include the terminology of standing in the place of a parent until the FLA was passed. 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>82</sup>

#### **b. Part 3 of the Family Law Act**

[50] The FLA obligates a person standing in the place of a parent to support their children and allows the courts to make child support orders in appropriate circumstances.<sup>83</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>84</sup>

[51] In order to have an obligation to support a child, a person must meet two conditions. First, they must be in a defined relationship with the child's parent. Second, a person must demonstrate a settled intention to treat a child as their own.

<sup>81</sup> *Chartier* at para 39.

<sup>82</sup> *Langdon v York* (1995), 161 AR 279 (QB).

<sup>83</sup> FLA, ss 47-50.

<sup>84</sup> FLA, s 80(1)-(2).

**i. Relationship with Child's Parent**

[52] To be found to be a person standing in the place of a parent, that person must be in a defined relationship with the parent of the child. 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>85</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>86</sup>

**ii. Settled Intention to Treat the Child as Their Own**

[53] 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 the test of a person standing in the place of a parent have a support obligation. To meet that test the person must also have demonstrated a settled intention to treat the child as the person's own child.<sup>87</sup> In determining whether a person has demonstrated a settled intention to treat a child as their own child, the court is given the discretion to consider several factors, including:<sup>88</sup>

- 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;

<sup>85</sup> FLA, ss 1(n), 48(1)(a).

<sup>86</sup> *Adult Interdependent Relationships Act*, SA 2002, C A-4.5, s 1(1)(f).

<sup>87</sup> FLA, s 48(1)(b).

<sup>88</sup> FLA, s 48(2).

- 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.

[54] 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>89</sup> No one factor predominates in a court's analysis.<sup>90</sup>

[55] Two cases help to contrast how the factors under section 48(2) can lead to a finding that someone is or is not standing in the place of a parent. In *A(TM) v H(SV)*, 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 their 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>91</sup>

<sup>89</sup> *A(TM) v H(SV)*, 2007 ABQB 765 at para 33.

<sup>90</sup> *B(D) v F(S)*, 2012 ABPC 263 at paras 49–59.

<sup>91</sup> *A(TM) v H(SV)*, 2007 ABQB 765 at paras 35–54.

[56] In contrast to the decision reached in *A(TM)* is the decision reached in *Rubin v Gendemann*.<sup>92</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 section 48(2), the Court held that the defendant was not standing in the place of a parent and did not order child support.<sup>93</sup>

#### 4. STANDING IN THE PLACE OF A PARENT IN THE WILLS AND SUCCESSION ACT

[57] In Alberta, only a family member can apply for maintenance and support from the estate of a deceased.<sup>94</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>95</sup>

[58] A "family member" as defined under the WSA does not include a child that a person who stood in the place of a parent treated as their own. Rather, the WSA refers only to a "child of the deceased".<sup>96</sup> To determine if a person is a "child of the deceased", the WSA refers to the FLA, Part 1.<sup>97</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>98</sup> The relationship of parent and child is then defined in a biological manner, or through the formal adoption process.<sup>99</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.

<sup>92</sup> *Rubin v Gendemann*, 2011 ABQB 71.

<sup>93</sup> *Rubin v Gendemann*, 2011 ABQB 71 at paras 314–322.

<sup>94</sup> WSA, s 88.

<sup>95</sup> WSA, s 72(b).

<sup>96</sup> WSA, s 72(b)(iii)–(v).

<sup>97</sup> WSA, s 1(3).

<sup>98</sup> FLA, s 7(1).

<sup>99</sup> FLA, s 7(2)(a)–(c).

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>100</sup>

[59] However, the WSA does recognize that a grandparent can stand in the place of a parent for maintenance and support.<sup>101</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>102</sup> The court is given the discretion to consider several factors to determine if the requirements from section 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:<sup>103</sup>

- the grandchild’s age;
- the duration of the relationship between the grandchild and grandparent;
- 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 their parents; and
- any other relevant factor.

[60] Additionally, there is a residency and support 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. Further, the

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<sup>100</sup> *Interpretation Act*, RSA 2000, c I-8, s 13; *O’Hara v Belanger*, (1989), 98 AR 86 (QB); *Dares v Newman*, 2012 ABQB 328 at paras 64–82; *Peters v Peters Estate*, 2015 ABCA 301 at para 12.

<sup>101</sup> Also included are great-grandparents and great-grandchildren: WSA, s 73(1).

<sup>102</sup> WSA, s 73(2).

<sup>103</sup> WSA, s 73(3).

grandparent must have provided the primary financial support for the grandchild.<sup>104</sup>

[61] There has only been one reported case considering the requirements of section 73. In *Malkhassian Estate (Re)*, 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>105</sup> The Court noted that it should be cautious in equating a generous grandparent with an intention to treat the grandchild as their own child.<sup>106</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.<sup>107</sup> 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 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.

[62] All parents, biological, adoptive, and those who stand in the place of a parent, owe a support obligation to their children during life. Biological and adoptive parents also owe a support obligation to their children after death. However, only one type of person standing in the place of a parent, a child's grandparent or great-grandparent, 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.

<sup>104</sup> WSA, s 73(2).

<sup>105</sup> *Malkhassian Estate (Re)*, 2014 ABQB 353 [*Malkhassian*].

<sup>106</sup> *Malkhassian*, note 105 at para 44.

<sup>107</sup> *Malkhassian*, note 105 at para 50.



## C. Other Policies Important to Reform

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### 1. THE BEST INTERESTS OF THE CHILD

[63] Courts and legislatures have come to use the best interests of the child to analyze support obligations during life.<sup>108</sup> In doing so, Canadian legal institutions are upholding their obligations under the United Nations Convention on the Rights of the Child.<sup>109</sup> In support law, “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>110</sup>

[64] 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>111</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>112</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 relationship continuing and that these persons will continue to act as parents toward them.”<sup>113</sup>

[65] The Alberta Court of Appeal had already come to the same conclusion as the Supreme Court. In *Theriault v 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

<sup>108</sup> FLA, s 18; *Doe v Alberta*, 2005 ABQB 885 at para 31, aff’d 2007 ABCA 50, leave to appeal to SCC refused, 31986 (21 July 2007).

<sup>109</sup> *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 at art 3(1) (entered into force 2 September 1990).

<sup>110</sup> Carol Rogerson, “The Child Support Obligation of Step-Parents” (2001) 18 Can J Fam L 9 at 29.

<sup>111</sup> *Chartier* at para 21.

<sup>112</sup> *Carignan v Carignan* (1989), 61 Man R (2d) 66 (CA) at paras 58–62, 1989 CarswellMan 199 [cited to WL Can].

<sup>113</sup> *Chartier* at para 32.

had terminated that relationship. Child support was awarded against the husband and the husband appealed.<sup>114</sup> 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 step-parent, who refuses or avoids this obligation neglects or abandons the child.

[66] 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 *Doe v Alberta*, a woman and man were in a long-term cohabiting relationship.<sup>115</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>116</sup>

[67] The best interests principle is firmly entrenched in Canadian family and divorce law. Various levels of court have used this principle when deciding issues surrounding child support. It seems prudent to use the best interests of the child principle when assessing the inclusion of another category of child for the purposes of support under the WSA.

[68] 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 from a child's perspective. In both

<sup>114</sup> *Theriault v Theriault* (1994), 149 AR 210 (CA) at para 13 [*Theriault*].

<sup>115</sup> *Doe v Alberta*, 2005 ABQB 885, aff'd 2007 ABCA 50, leave to appeal to SCC refused, 31986 (21 July 2007).

<sup>116</sup> *Doe v Alberta*, 2005 ABQB 885 at para 37, aff'd 2007 ABCA 50, leave to appeal to SCC refused, 31986 (21 July 2007).

circumstances, the child has lost a source of emotional, intellectual, and financial support. The best interests of the child policy, in these situations, suggests that the obligation to support a child continues whether the child's parents have separated, divorced, or if one of them has died.

## 2. SECONDARY NATURE OF SUPPORT OWED BY A PERSON STANDING IN THE PLACE OF A PARENT

[69] However, the best interests of the child policy does not mean that children have unfettered access to support from persons standing in the place of a parent. The best interests of the child policy applies to biological or adoptive parents as well, and these individuals should not be able to escape their obligations simply because someone else raised a child as their own. As such, in support law the obligation of a person standing in the place of a parent to support a child is outweighed by that of the child's biological or adoptive parents when quantifying a support claim.

[70] In Alberta, a court is given specific considerations it must make when determining the amount of child support owed by a person standing in the place of a parent. Those considerations are:<sup>117</sup>

- the amount of determined under the prescribed child support 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; and
- any other factor that the court considers relevant.

[71] The secondary nature of the support obligation owed by a person who stands in the place of a parent holds true across Canada. 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

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<sup>117</sup> FLA, s 51(5).

adoptive parents.<sup>118</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 court to consider any other parent's legal duty to support the child.<sup>119</sup>

[72] The secondary nature of the obligation to support children owed by a person who stood in the place of a parent is already contemplated by the WSA. Section 93 directs a court to consider the support obligations a family member may have from other people when exercising its discretion to make an order.<sup>120</sup> In estate law, the consideration is important. Unlike family law child support orders, support from an estate generally comes 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 can help to protect the finite resources of the estate without prejudicing the best interests of the child.

## D. Summary

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[73] The best interests of the child is an important policy consideration when analyzing support obligations for parents and step-parents. The best interests policy ensures that the impact on children from the actions of adults is reduced, at least from a financial perspective for purposes of support. However, the best interests principle is not unfettered and is balanced by a policy that directs that the obligation of a person standing in the place of a parent to support children is secondary to that of biological or adoptive parents.

[74] If reform is made to the WSA to allow children to bring claims against the estate of a person who stood in the place of a parent, then this balance between the best interests of the child and the secondary nature of the obligation to support children should remain

<sup>118</sup> *Family Law Act*, SBC 2011, c 25, s 147(5); *Family Maintenance Act*, CCSM, c F20, ss 36(4).

<sup>119</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*, NB Reg 2021-19, s 3; *Provincial Child Support Guidelines*, NS Reg 53/98, s 5; *Child Support Regulations*, PEI Reg EC2021-98, s 3; *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>120</sup> WSA, s 93(c).

## CHAPTER 3

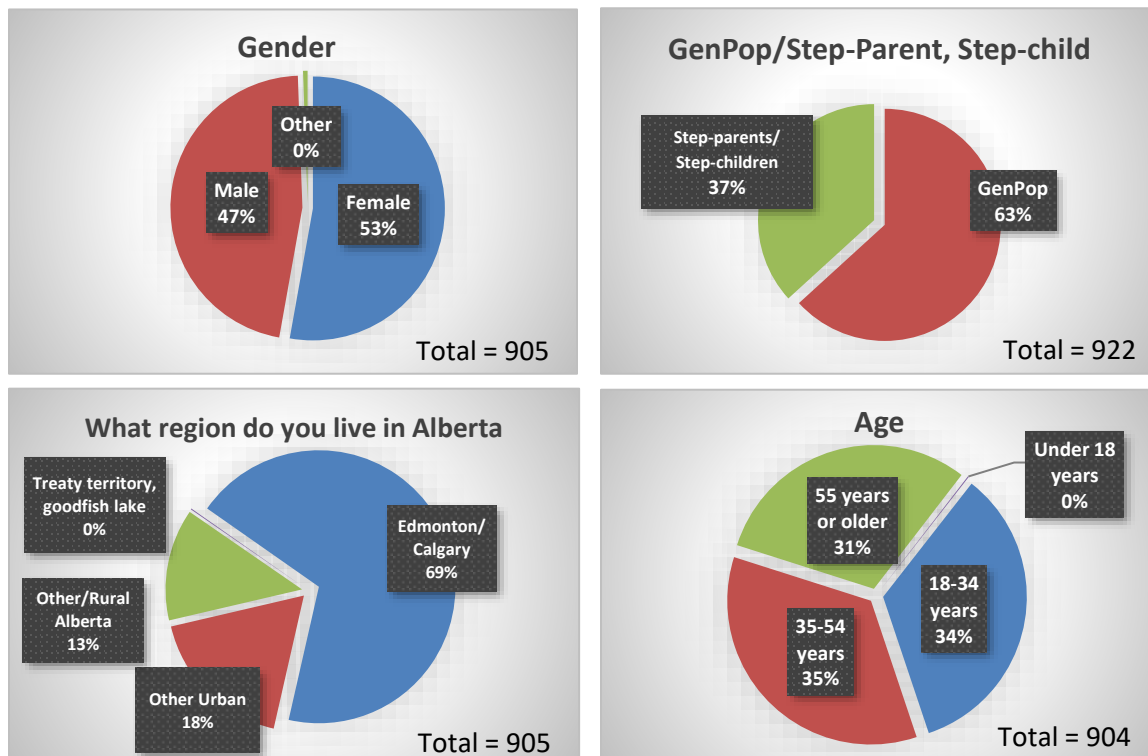
## Public Consultation

[75] ALRI engaged in public consultation between December 2020, and May 2021 using different means. Surveys were circulated through service providers to obtain as broad a sample as possible, and a survey was also available on ALRI's website. ALRI received responses from 922 people resident in Alberta through these online surveys.<sup>121</sup> Roundtables were held with members of the legal profession, and telephone, and video interviews were conducted. We received emails and other written correspondence from individuals and organizations particularly concerned with the proposed reforms.

## A. Surveys

### 1. DEMOGRAPHICS

The charts below provide a breakdown of the demographics of participants to the three surveys conducted or commissioned by ALRI.<sup>122</sup>



<sup>121</sup> Not every participant answered every question. For each survey question presented, we have included the total number of participants who did answer that specific question.

<sup>122</sup> Support for reform was lowest among members of Alberta's legal profession. The responses from lawyers are discussed below in section 5.

## 2. REFORM GENERALLY

[76] Before moving on to an analysis of the survey results, it is worth mentioning that a number of survey participants noted the complexity of the issues involved. Over 100 responses noted that the answers would depend on the circumstance, that the law needed to be flexible, or explicitly agreed with the policy reasons both for and against reform. At least 49 responses indicated that an opinion could not be formed, either because of a lack of specific facts, or because the matter was highly complex and they did not feel knowledgeable enough to make an informed decision. The following response is representative of those participants who thought the issue was complex and saw both sides, “Well see I get that part too. A person should be able to choose what is left and for who... but again equality. Wow a lot to think about.”

[77] ALRI’s surveys asked participants for their opinion on the main issue: should children be able to bring a family maintenance and support claim against the estate of a person who stood in the place of a parent? In general, 79% of all survey participants were in favour of reform. This level of support largely held across all collected demographics in ALRI’s surveys. It does not appear to matter what gender a participant was, if they lived in urban or rural areas, or how old they were. The only factor that was seen to reduce support for reform was working in the legal profession.

[78] ALRI also sought participants’ opinions on the policy reasons for and against reform to gauge public support for these policies. In particular, the surveys asked participants for their opinion on what role, if any, the best interests of the child should play in policy decisions.

## Support For Policies That Favour Reform

	Please indicate how much you agree or disagree that all children should be treated equally regardless of status when making a claim against a parent's estate.			Please indicate how much you agree or disagree that reform is needed to align the Wills & Succession Act with the current legal and moral obligations of step-parents who stood in the place of a parent during life.		
Row Labels	Gen Pop	Step-Parents/Step-Children	Total	Gen Pop	Step-Parents/Step-Children	Total
Total	542	338	880	542	337	879
Strongly Agree	47%	50%	48%	36%	38%	37%
Somewhat agree	33%	31%	32%	38%	39%	38%
<b>Neither agree nor disagree</b>	<b>9%</b>	<b>8%</b>	<b>9%</b>	<b>13%</b>	<b>12%</b>	<b>13%</b>
Somewhat disagree	4%	5%	4%	5%	5%	5%
Strongly disagree	4%	4%	4%	3%	3%	3%
Not sure	3%	2%	3%	5%	3%	4%
<b>NET: Agree</b>	<b>80%</b>	<b>81%</b>	<b>80%</b>	<b>74%</b>	<b>77%</b>	<b>75%</b>
<b>NET: Disagree</b>	<b>8%</b>	<b>9%</b>	<b>8%</b>	<b>8%</b>	<b>8%</b>	<b>8%</b>

## Support For Policies Against Reform

	Please indicate how much you agree or disagree that law should not be changed because it puts the estate of the deceased step-parent at a disadvantage in court.			Please indicate how much you agree or disagree that law should not be changed because it will lead to increased legal action.			Please indicate how much you agree or disagree that law should not be changed because it interferes with a person's freedom to choose who should benefit from their estate.		
Row Labels	Gen Pop	Step-Parents/Step-Children	Total	Gen Pop	Step-Parents/Step-Children	Total	Gen Pop	Step-Parents/Step-Children	Total
Total	518	329	847	518	327	845	515	327	842
Strongly Agree	8%	16%	11%	9%	17%	12%	13%	22%	16%
Somewhat agree	18%	22%	20%	25%	25%	25%	35%	30%	33%
<b>Neither agree nor disagree</b>	<b>36%</b>	<b>23%</b>	<b>31%</b>	<b>30%</b>	<b>24%</b>	<b>28%</b>	<b>26%</b>	<b>18%</b>	<b>23%</b>
Somewhat disagree	17%	17%	17%	24%	21%	23%	19%	18%	18%
Strongly disagree	7%	13%	9%	8%	10%	9%	5%	9%	7%
Not sure	14%	9%	12%	4%	3%	3%	2%	3%	3%
<b>NET: Agree</b>	<b>27%</b>	<b>38%</b>	<b>31%</b>	<b>34%</b>	<b>42%</b>	<b>37%</b>	<b>48%</b>	<b>52%</b>	<b>49%</b>
<b>NET: Disagree</b>	<b>23%</b>	<b>30%</b>	<b>26%</b>	<b>32%</b>	<b>31%</b>	<b>32%</b>	<b>24%</b>	<b>27%</b>	<b>25%</b>

Overall Support For Reform					
Should a minor child of a deceased step-parent who stood in the place of a parent during life be able to bring a claim against that person's estate for maintenance and support in needful circumstances?					
Row Labels	GenPop	Total	Step-Parents/Step-Children	Total	Total
No	21%	107	21%	67	174
Yes	79%	410	79%	247	657
Total	100%	517	100%	314	831

## RESPONSES IN FAVOUR OF REFORM

[79] The following themes were identified after reading each individual consultation response. In total, just over 12,000 written responses to consultation questions were reviewed by ALRI. Responses generally tending to focus on the well-being, safety, health, or protection of children were coded to the “best interests of the child” theme. This theme was created after analyzing responses to ALRI’s best interests of the child as policy questions and using the most common responses as a filter for coding to the theme. Responses speaking about what a step-parent “should” do were coded to the theme relating to moral duty. Responses with concepts of equality or fairness were coded to the respective theme, and so on.

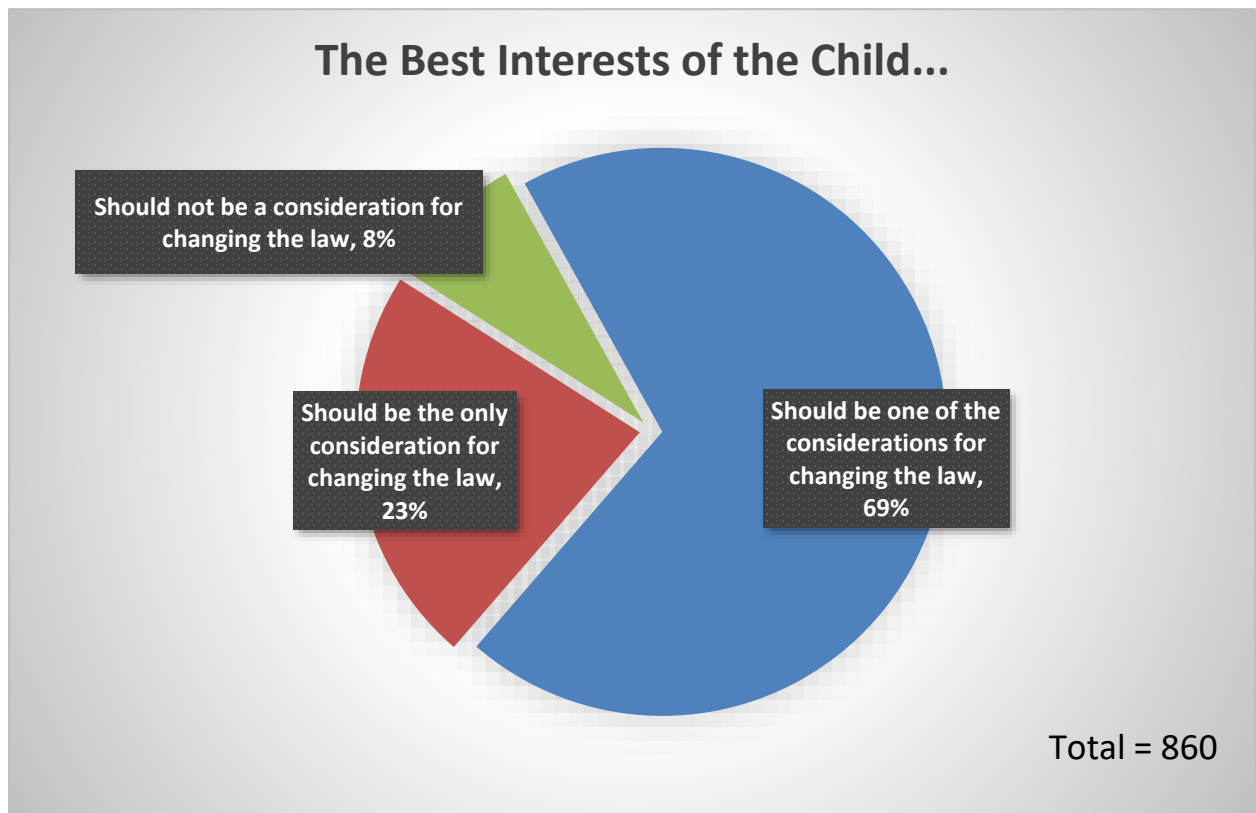
### a. Best interests of the child

[80] ALRI asked participants to indicate whether they thought the best interests of the child should:

- be the only policy consideration for changing the law;
- be one of the policy considerations for changing the law; or
- not be a policy consideration for changing the law.



The following chart displays the percentage for each answer.



[81] Participants were of the opinion that children's best interests should be considered. Many of the participants who did not support reform thought that the best interests of the child should play a role in policy decisions. In total, 92% of all participants said that the best interests of the child should be either one of the policy considerations for changing the law, or the only consideration when it comes to policy.

[82] Survey participants were very concerned that children be protected and receive the support they need. An emblematic, relatively simple statement is: "children need to be protected by every means possible." One respondent, after reading the policy reasons against reform had this to say: "Good valid points but it is still better to give the child options." Finally, one participant thought,<sup>123</sup>

This child may well have completely depended on the step parent and had forged an equally strong relationship. They should not have their

<sup>123</sup> As discussed below there is a great deal of cross-over between themes in those responses that are supportive of reform. Many responses were coded to multiple themes.

financial well being and support network completely destroyed simply because of lack of biological connection.

**b. Once a person stands in the place of a parent a moral duty to support arises**

[83] The next most popular reason to amend the law was a moral duty associated with standing in the place of a parent. Participants commented that the actions or attitudes of step-parents resulted in responsibility for a child. For example, one participant stated, "I feel that since a step parent or adoptive parent took the responsibility of being in whole part of child's life [sic] that they also took on the full responsibility in every aspect of the child's life."

[84] Closely related to the moral obligation associated with standing in the place of a parent were themes that the estate's duty to support a child was a continuation of the duty of the step-parent during life. "If the deceased looked after the child as their own while alive, the precedent has been set as far as I'm concerned."

[85] Another closely related theme to the moral obligation of standing in the place of a parent was the similarity between step-parents and biological parents.

If the step-parent has been standing in and acting like that child is their own for years, why should the child not have access to that parent's money when they die? They were just as much their parent as their biological parent.

**c. Equality**

[86] The third most popular theme discussed by participants was equality. Participants who made comments regarding equality felt that the law should treat children equally regardless of their biological connection, or lack thereof, to their family members. "I think that in the circumstances indicated it would only be fair to treat the step child the same as all other children. There is no difference in the overall relationship dynamics."

[87] Participants also noted that there may be circumstances where equality may not be appropriate. These participants noted that step-children,

regardless of whether they are legally adopted, should be treated equally as other children, provided that is the intent of both the child and parent. However, if for whatever reason, the step child does not have a relationship with the parent, then equal treatment might not be suitable.

Other participants thought there might be considerations that should prevent total equality. Participants identified “extenuating circumstances” or “other reasons” but did not elaborate on what these circumstances or reasons might be. Nevertheless, it does appear that these participants thought that children should be treated equally as a default position with the ability to apply for family maintenance and support from the estate of a person who stood in the place of a parent.

#### **d. Fairness**

[88] The fourth most popular theme was fairness. It is likely not surprising that fairness was closely related to the theme of equality:

I believe it would be unfair for the minor to not be able to apply for maintenance and support from the estate of a step-parent who stood in the place of a parent. So, it is only logical that the law be changed.

Put another way,

the child had the step parent caring for and providing for them in life so only fair the child should be protected and care[d] for after death in way of the estate.

#### **e. Other popular themes in favour of reform**

[89] The forgoing four themes were the most popular when it came to reasons for supporting reform. However, the total number of responses in each theme are relatively close, within a few dozen responses. These top themes also had a fairly high degree of correlation with each other. In other words, many responses from one theme were coded to one or more of the others. For example,

If a step-parent legally raised the child as if they were biologically their own, including supporting the child financially in their life, it would only make sense that the child should have the same legal access as any biological child would. To do so otherwise is discrimination against children who never chose to be without biological parent(s), and is invalidating the very real relationship that step-parent and child had.

[90] Other themes that were popular with participants were:

- importance of family;
- that the obligation of a person standing in the place of a parent to support a child was tied to a biological or adoptive parent’s obligation to support the child;

- justice;
- need;
- the need for flexibility/ depends on circumstance;
- the fact that a child has no control over their parents' decisions;
- a hunch that leaving something to a child was likely the step-parent's desire; and
- a worry that the estate was potentially the only source of support for a child in certain circumstances.

[91] Finally, a large number of responses pointed to factors that participants felt would be very important in deciding whether or not a child should be able to receive an order for family maintenance and support. These responses support reform but pointed out that not every child in a step-relationship should be entitled to an order from the court. The factors that were included in participants' responses were the:

- deceased's intentions/ views;
- child's age;
- child's view;
- length of the relationship; and
- type of relationship between child and step-parent.

The similarity between these responses and the factors for determination of when a person stands in the place of a parent under the FLA is clear.

### **3. RESPONSES AGAINST REFORM**

#### **a. Testamentary freedom**

[92] The most popular reason given for not reforming the law, by a very large margin, is testamentary freedom. Participants argued that all people should be wholly free to leave their estate to whomever they wish. For example, "I suppose it is up to the individual how they want to divide their estate. The survivors must accept this whether good or bad." Or, put another way, a "will is the last testament someone can have on earth, their final wishes, no court should have the right to over rule that."

[93] Others argued that only biological parents have an obligation to support their children, and people standing in the place of parents should have complete testamentary freedom.

I don't support it. If they aren't biologically related, then it would be up to the step parent to choose to provide support for the benefactor [sic] via the will.

**b. Primacy of biology or adoption**

[94] Coming in a distant second to the theme of testamentary freedom is the theme of the primacy of biology or adoption. Participants' comments coded to this theme felt that only a biological or adoptive relationship justified an entitlement to maintenance and support. For example, "I believe biological children should have rights to both parents' estates. However, I do not believe that non biological children should have the same right."

[95] This theme did have similarities to testamentary freedom and was not absolute. Some participants commented that step-children should only be entitled to bring a claim for maintenance and support if there were no biological children of the deceased. On a related point, participants were concerned that allowing step-children to bring a claim would take away from biological children's portion of the estate. One participant put it this way, "perhaps [there] is also a biological child who would want to make a claim also."

**c. Other themes against reform**

[96] The following themes against reform also came out of an analysis of the surveys:

- possibility for greed or misuse of an application by a child's guardian;
- reform will overly complicate the law;
- reform will open the flood gates for litigation; and
- an assertion that the ability to adopt is sufficient.

[97] Testamentary freedom had well over 200 responses coded to it, while the primacy of biology and adoption had just slightly over 100 responses. All the other themes against reform did not obtain nearly as much support. Unlike the themes in support of reform, opposition to reform is much more targeted.

#### 4. RANKED SUPPORT OBLIGATIONS

[98] Participants were asked to rank the support obligations of biological and

[100] A small number of participants felt that the state should provide support for children. Largely, this was because of the payment of taxes. For example, the “government was happy to take their parents’ money while they were alive so now is time for them to act as parents.”

adoptive parents, step-parents, and the state during life and after the death of a step-parent. The following charts provide participants answers.

[99] The majority of participants largely agreed that while living, and after the death of a step-parent, biological and adoptive parents have the first priority when it comes to support obligations. Biological and adoptive parents were most often followed by step-parents, and then the state. However, in each ranking, the percentages dropped off after death for the dominant party in that ranking. For example, during the life of a step-parent, biological and adoptive parents were ranked with the primary responsibility to support children by nearly 90% of participants. After the death of a step-parent, biological and adoptive parents were ranked with the primary responsibility by nearly 81% of participants. The responses from participants do not indicate why this trend occurs.<sup>124</sup> While the death of a step-parent does change how participants view the support obligations of biological and adoptive parents, step-parents, and the state, it does not drastically change the overall rankings.

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<sup>124</sup> Participants were provided with an option to rank an “Other” and then specify who that other person or entity might be. Most often participants that responded with “other” suggested that the child should live with another family member, indicating they were confusing payment of support with guardianship or parenting time. These answers were significantly smaller than the foregoing three answers, and do not account for the reduction in percentages in the main three categories. For simplicities sake, they were left out of this analysis.

Ranked Support Obligations			
	While all of the following are alive, who should have the primary obligation to support a minor child?	While all of the following are alive, who should have the primary obligation to support a minor child?	While all of the following are alive, who should have the primary obligation to support a minor child?
	1ST PRIORITY	2ND PRIORITY	3RD PRIORITY
The State	6%	78%	77%
Biological or adoptive parents	90%	7%	3%
A step-parent standing in the place of a parent	4%	15%	20%
Total	822	767	628
	Upon the death of a step-parent who stood in place of a parent, who should have the primary obligation to support a minor child?	Upon the death of a step-parent who stood in place of a parent, who should have the primary obligation to support a minor child?	Upon the death of a step-parent who stood in place of a parent, who should have the primary obligation to support a minor child?
	1ST PRIORITY	2ND PRIORITY	3RD PRIORITY
The State	15%	22%	70%
Biological or adoptive parents	5%	63%	24%
A step-parent standing in the place of a parent	80%	15%	6%
Total	805	732	651

## B. Persons in Step-relationships

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[101] ALRI specifically sought the responses of people in step-relationships. Around 79% of survey participants in step-relationships support reform.<sup>125</sup> There were also 246 open-ended responses from participants in step-relationships. These open-ended responses are more nuanced. Some responses acknowledged difficulty with reform where the change to the law does not consider testamentary freedom, and the need for flexibility in the law. For some participants it appears that reform is not a black/white issue. Rather, there are various thoughts a person might have on the topic that require consideration before making the decision to either support or not support a change to the law.

### a. Responses in favour of reform

[102] The most popular themes with persons in a step-relationship are:

- once a person stands in the place of a parent a moral duty to support arises;
- best interests of the child;
- equality; and
- similarity between step-parents and biological/adoptive parents.

[103] People in step-relationships tended to think more in terms of the moral duty to support children. For example, there “has to be support for a minor child from a deceased step-parent who, in fact, acted as the biological parent.” Or, put another way, the “minor, tho a step child was raised as if he/she was their own child, should have access to the estate of the step parent.”

[104] The comments coded to themes regarding the best interests of the child and equality largely echoed those comments made by the general population.

[105] Persons who identified as being in a step-relationships also focused on the similarities between step-parents and biological or adoptive parents to a significant degree. Simply put, “step-parents are parents.”

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<sup>125</sup> ALRI defined a step-relationship to be a current or former step-parent, and a step-child. In total, 242 participants identified as step-parents, and 86 identified as step-children.



## b. Responses against reform

[106] The persons identifying as being in a step-relationship had the same reasons to not reform the law as the general population did. Testamentary freedom was the most popular reason, followed by the primacy of biology and adoption. Two examples follow,

A parent/step parent should be allowed to decide if their child/step child should have their property or not. That is how it works. They were the original owners of the property first therefore they should be the ones to make that decision.

I am in the situation that I cared for my step kids when they were under 18 but had no intention of leaving them anything from my estate. They have a parent/parents who should be planning for that unless I've expressly agreed to it in advance.

[107] Once again, however, testamentary freedom was the preferred policy for opponents of reform. The next most popular theme, the primacy of biology and adoption, had less than half of the number of responses coded to it.

## C. The Legal Profession

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### 1. SURVEYS

[108] Generally, support for reform was high across all collected demographics in each survey. This was true in all cases but one. While the majority of legal professional participants support making change to the WSA, the legal profession is less supportive of reform than the general population. There were 41 survey participants who identified as legal professionals that worked in wills and estate planning.<sup>126</sup> Of these 41 participants, only 38 participants answered the question regarding whether or not the WSA should be reformed; 23 legal professionals answered that they were in support of reform (61%), while 9 answered that they were opposed to reform. Five professionals indicated they neither agreed nor disagreed, one legal professional was not sure, and three legal professionals did not answer the question. However, some of these final nine legal professionals left comments that could be characterized as not supporting reform. These comments were generally provided as answers to questions that asked for reasons not to reform the WSA. As such, it is difficult to analyze if

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<sup>126</sup> ALRI defined a legal professional as someone who works in will and estate planning or estate probate/administration as a lawyer, judge, law professor, or other legal professional.

these nine participants were actually opposed to reform, or just answering the question that was asked before abandoning the survey.

**a. Responses in favour of reform**

[109] Legal professionals providing responses in favour of reform focused on the practicalities of reform. Legal professionals were concerned with the deceased's intentions,

The testator's intentions are critical. If he/she wanted to provide for the child for whom he stands in a position of parent he would. He might not because he doesn't believe he is in that position. I do not believe a step child (not adopted and perhaps with another two parents still alive) should be treated equally to a natural child. But I think the door should be open to the application just not on an equal basis.

**b. Responses against reform**

[110] Legal professionals not in support of reform were concerned with infringements on testamentary freedom, like other participants. However, legal professionals did not find this the major objection. Legal professionals were equally concerned with the potential misuse of a family maintenance and support claim by a child's guardian, a lack of evidence from the deceased, and the potential for a chilling effect on the formation of second families. The following quote is just one example.

As a retired wills and estates lawyer, I can advise from 40 years of practice that the vast majority of clients wish to benefit their own children with their estates, and not their spouse's children. In fact, many clients specifically express concerns about step children having a potential claim against their estates. When advised that they have no claim, they were relieved. One of the reasons expressed is that this is the legal obligation of the other parent of the child to provide support. i.e. the biological parent who is the ex-spouse of the current partner. Testators do not want the ex-spouse of their partner to have any entitlement to their estate. This could happen if the step-child dies, and then their share of the estate passes to his/her parent (the ex-spouse). Another way this could happen is the ex-spouse making a claim against the estate for family maintenance and support, and then controlling the award on behalf of his/her child. There is a concern that the child will be used by the ex-spouse for his/her own benefit and not for the benefit of the child. The Public Trustee no longer monitors the trustee of a minor's trust. There is no watchdog.

[111] These differences between the legal profession and the general population are important. Some legal professionals noted that the decision to exclude step-children from the WSA was intentionally made after consultation with the estate bar.

At the time of the design of the Wills and Succession Act, Alberta Justice undertook extensive consultations with the Surrogate Bar. We made it clear, and we were assured that the new legislation would not allow step children to make a claim against the estate of a step parent. We have been advising our clients, both before and after the implementation of the Wills and Succession Act, that step children do not have a claim against their estate.

## 2. ROUNDTABLES AND INTERVIEWS

[112] To seek further input and context to the survey results, ALRI held two roundtables with members of the legal profession in Alberta. Members who practiced in wills and estates or family law participated in the roundtables. Interviews were also conducted with lawyers that were unable to attend the roundtables but wanted to participate in consultation.

[113] Members of the profession that practice predominantly in family law acknowledge that the test for standing in the place of a parent is highly fact specific and difficult to predict. However, the test does provide assistance to the task of advising clients on how to resolve issues relevant to their possible support obligations.

[114] At the roundtables, estate practitioners were most concerned with the consequences of reform. Practitioners envisioned multiple estates having potential claims brought against them by a single child. The concern is that serial relationships on the part of one parent could yield a situation where a single child has access to four, five, six, or more estates. Family practitioners confirm that these types of serial relationships happen and it often complicates the task of assigning a support obligation to any single step-parent. Estate practitioners see testamentary freedom as a way to solve the issue. If a step-parent wants to leave something to a child who is not their own, then they are free to do so. If not, then they are not obligated to and that is the end of the matter.

[115] Practitioners argued that reform would allow an estate to defend a claim, but that a defence would be complicated to raise and expensive to execute. Some estate practitioners that support reform want changes that promote certainty for estate planning. Their suggestion is to define when a person stood in the place of

a parent in a way that can objectively exclude some estates. Managing an estate in this context would be significantly more straightforward, so too would planning estates in advance of death.

[116] Some family practitioners also thought that a more straightforward definition would make the arguments regarding when a step-parent stood in the place of a parent for family maintenance and support claims more clear.

## **D. Written Responses**

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[117] We received written responses from interested stakeholders. Generally, these written responses did not support reform of the WSA. Again, however, comments received in writing did acknowledge agreement with some of the policies that tend to support reform.

## **E. Summary of Consultation**

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[118] ALRI's consultation results show a strong support for reform. The majority of consultation participants support ALRI's first recommendation. A very large percentage of survey participants agree that the best interests of the child should be a policy consideration when deciding whether or not to reform the WSA. Consultation participants in favour of reform often cite a moral duty to support children, equality, and fairness as the main reasons that law ought to be reformed.

[119] However, there is some opposition to reform among participants. In particular, lawyers, as a group, tend to have the most opposition to reform. Reasons not to reform the law focus predominantly on testamentary freedom. Opponents of reform also cite the primacy of biology or adoption as the main reason to not reform the definition of "family member". A theme that is particularly important to professionals is that the law remain predictable and as certain as possible in the context of any reform.

## CHAPTER 4

## Should the Law Be Changed?

[120] Children raised by persons who stand in the place of parents are entitled to support from those persons. The obligation to support children is potentially life-long, and can be extended past death by order of the court, or the agreement of a parent and a person standing in the place of a parent. However, for children raised by a person who stood in the place of a parent, there is no way for a court to order support after the death of that person. This appears to leave a gap in the law in terms of the support available to children.

[121] This chapter will examine the policy reasons for changing the law to and those for leaving the law unchanged.

### A. The Best Interests of the Child

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[122] As noted in Chapter 2, having more avenues for support for a child will be in that child's best interest. During life, a child can count on the support of the person standing in the place of a parent and can seek a court 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.

[123] 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>127</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. People 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>128</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 people.

<sup>127</sup> *Children First Act*, SA 2013 c C-12.5, at the preamble [CFA].

<sup>128</sup> CFA at the preamble.

## 1. BALANCED BY BIOLOGICAL OR ADOPTIVE PARENTS

[124] Estate practitioners were particularly concerned with the potential for applications on behalf of a single child against several estates. Legal professionals, in a number of ways, expressed a valid concern that reform could lead to relatively baseless claims being brought against estates. The concerns were also echoed in ALRI's survey consultation data.

[125] These concerns are already present in the family maintenance and support provisions of the WSA. Spouses, or adult interdependent partners may currently bring claims for maintenance and support, and those claims may or may not have merit. An analysis that someone was a deceased's adult interdependent partner, or former adult interdependent partner, is factually complex.

[126] It is an ex-spouse, or a former adult interdependent partner who are likely to be a child's surviving biological or adoptive parent. They are most likely to bring a claim against the estate of a person who stood in the place of a parent on behalf of the child. The WSA intentionally limits those persons who are able to bring a claim against on behalf of a minor.<sup>129</sup> Parents are included in the list of persons able to bring a claim on behalf of a minor without approval of the court.

[127] When assessing if the law should be changed and any risks posed by spurious claims, the limited pool of persons able to bring an application on behalf of a child is significant. In the FLA, a biological or adoptive parent's duty outweighs that of a person standing in the place of a parent. This policy should continue to operate after the death of a person standing in the place of a parent. When a court makes a family maintenance and support order, any support ordered for a child will need to come from generally finite resources. Sometimes, the existing beneficiaries' shares must be reduced.

[128] Ensuring that biological and adoptive parents' obligations continue to outweigh persons who stood in the place of a parent helps to protect against spurious claims. Where a biological or adoptive parent is a beneficiary of an estate their share may need to, and perhaps should be, be reduced first to help fund the support order for the child, as it is their duty to support the child before any other.

[129] Further, a surviving biological or adoptive parent to a child who is not a beneficiary in the deceased's will, and not the deceased's "family member" also take risks in bringing baseless claims on behalf of a child. If a child is in sufficient

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<sup>129</sup> WSA, s 90(a).

need to merit a family maintenance and support award, a court will need to analyze the abilities of the surviving parents to support the child.<sup>130</sup> Were a court to find that the parent bringing the claim was not meeting their obligation to support the child, then that parent could face the risk of a subsequent support order being made against them.

[130] In other words, it is true that reform will increase the risk of inappropriate claims being brought before the courts. This risk is not novel to the reforms under consideration. However, reform of the WSA can proceed in such a way that the risk, already limited by the language of the WSA, can be mitigated further.

[131] Decisions from the Alberta courts help to demonstrate how the secondary nature of support for persons who stand in the place of a parent can work in practice in the estate context.

[132] 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 two-thirds of the combined total of both persons' income, was to pay two-thirds of the table amount that the biological parent's income would have dictated.<sup>131</sup> A similar result was obtained in *S(J) v S(D)*.<sup>132</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 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.

[133] This is not the only approach to reduce the possible burden on the estate of a person who stood in the place of a parent. In *J(SS) v J(BS)*, a person standing in the place of a parent applied to pay only half of the guideline amount of

<sup>130</sup> WSA, s 93(c).

<sup>131</sup> *Holmedal v Holmedal* (1997), 215 AR 152 (QB).

<sup>132</sup> *S(J) v S(D)*, 2005 ABQB 4.

support.<sup>133</sup> The child's biological parent had had no contact with the child, and had not paid support since the late 1980s. 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 from the person standing in the place of a parent. 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>134</sup> In a maintenance and support claim having the flexibility provided by these various approaches may help a court tailor, on a case-by-case basis, how the support being paid from an estate is secondary to that being provided by biological or adoptive parents.

[134] Finally, it is possible for an estate to simply argue that no support ought to be paid given the priority of any surviving parents' obligation to support a child. At least one court has held that a person standing in the place of a parent did not have to pay any support. The case turned on the fact that the child was living with a biological parent whose income provided the child with a relatively high standard of living.<sup>135</sup>

[135] By ensuring that a biological or adoptive parent's obligation to support a child outweighs the obligation of a person who stood in the place of a parent, the WSA will offer some protection for the estate of a person who stood in the place of a parent. Third party proceedings, as described in *J(SS) v J(BS)*,<sup>136</sup> could also ensure that the obligation of the estate remains limited. An estate facing a claim for support and maintenance under the WSA could initiate a claim under the FLA for child support from any other surviving parent.<sup>137</sup>

[136] The best interests of the child and the secondary nature of the obligation to support children owed by a person who stood in the place of a parent help to reduce the risks faced by these persons' estates. This approach to support obligations is also supported by ALRI's consultation data. Eighty-one percent of ALRI's survey participants thought that a biological or adoptive parent has the primary obligation to support a child after the death of a person who stood in the place of a parent.

<sup>133</sup> *J(SS) v J(BS)*, 1999 ABQB 408.

<sup>134</sup> *J(SS) v J(BS)*, 1999 ABQB 408 at para 20.

<sup>135</sup> *Vongrad v Vongrad*, 2005 ABQB 52 at para 36.

<sup>136</sup> *J(SS) v J(BS)*, 1999 ABQB 408 at paras 20-21.

<sup>137</sup> FLA, ss 50(1)(b),(d).



## B. Equality

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[137] 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 who stood in the place of parents from requesting the courts' intervention for their maintenance and support after the person's death. 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 currently being made to the needs of the child, or to the responsibilities of the persons who must support that child during life. In other words, some children are wholly barred from a source of the maintenance and support they may very much need based on a personal characteristic they have little or no control over.<sup>138</sup>

[138] 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. 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, and their estate finished with probate. 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.

[139] The availability of other sources of support for a child weighs against granting an order for support under the WSA.<sup>139</sup> It is an argument that could be used to justify an estate plan that excludes a child. 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 the needs of children in ways that a blanket rule cannot.

[140] It can also be argued that equality should be measured by access to adequate support rather than by the number of parents – biological, adoptive, or standing in the place of – from whom that support may be obtained. If a child is not adequately supported by their biological or adoptive parents, is it justified to

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<sup>138</sup> *Dares v Newman*, note 100, at paras 149–152.

<sup>139</sup> WSA, s 93(c).

bar that child's ability to claim support, simply because a specific person has died? The fact that the law allows a child to claim support from a person who stood in the place of a parent while that person is alive suggests otherwise. That child's needs are sufficient to justify requiring a person who demonstrably acted as the child's parent to pay support. That person's death has not changed the child's needs. The child's requirement for adequate support remains, only the definitions of the current law deny the child a chance to have them satisfied.

[141] 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. Importantly, a child can neither control whom their parent begins a new marriage-like relationship with, nor if or when that new parent-like person dies. The distinction wholly restricts access to necessary support and maintenance for those children based on events that a child cannot affect. The distinction made in the WSA is inequitable, unfair, and potentially discriminatory.

## C. Operation of the Law

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[142] The law affecting after death support 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. The operation of the law should also be consistent unless there is a strong policy argument for different outcomes in different legislation.

### 1. A REASONABLE EXPECTATION

[143] In claims for maintenance and support after death, this observation has been considered. *Tataryn v Tataryn Estate* was decided under British Columbia's *Wills Variation Act* and concerned a question of support quantification, not inclusion in the status of who can bring a claim under the legislation.<sup>140</sup> The Supreme Court 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. In other words, the legal obligations imposed on a testator during life are an important indication of the content of

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<sup>140</sup> *Tataryn v Tataryn Estate*, [1994] 2 SCR 807.

legal obligations for that testator after death.<sup>141</sup> The Alberta Court of Appeal has followed the Supreme Court's direction.<sup>142</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.

## 2. A CONSISTENT OPERATION

[144] In terms of legal obligations, the law has several 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 Alberta *Fatal Accidents Act* 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>143</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.

[145] Canadian legislation provides benefits both to children of persons standing in the place of parents, and the person standing in the place of a parent. The Canada Pension Plan provides for an orphan's benefit in certain circumstances, and the *Income Tax Act* provides tax deductions to certain persons who may stand in the place of parents.<sup>144</sup> The *Workers' Compensation Act* provides benefits to children on the death of a person standing in the place of a parent.<sup>145</sup> Limiting the impact on these social support programs by enforcing an estate's obligation to support family in appropriate circumstances is the very reason that regimes like Part 5 of the WSA were originally created.<sup>146</sup>

[146] 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. Creating the ability to apply

<sup>141</sup> *Tataryn v Tataryn Estate*, [1994] 2 SCR 807 at para 30.

<sup>142</sup> *Boje v Boje (Estate of)*, 2005 ABCA 73 at para 19.

<sup>143</sup> *Fatal Accidents Act*, RSA 2000, c F-8, ss 1(a), 7; *The Fatal Accidents Act*, RSS 1978, c F-11, ss 2(a), 4-4.1; *The Fatal Accidents Act*, CCSM, c F50, ss 1 "child", 3.

<sup>144</sup> CPP, note 68, ss 42(1) "dependent child", "orphan", 44(1)(f); *Income Tax Act*, RSC 1985, c 1 (5th Supp), s 252(1)(b).

<sup>145</sup> *Workers' Compensation Act*, RSA 2000, c W-15, s 1(1)(e).

<sup>146</sup> Elizabeth Travis High, "The Tension Between Testamentary Freedom and Parental Support Obligations: A Comparison between the United States and Great Britain" (1984) 17:2 *Cornell Intl LJ* 321 at 323-326; Joseph Dainow, "Restricted Testation in New Zealand, Australia and Canada" (1938) 36:7 *Mich L Rev* 1107 at 1109; Ralph C Brashier, "Disinheritance and the Modern Family" (1995) 45:1 *Case W Res L Rev* 83 at 125.

for support after death reflects what the majority of our survey participants thought should happen after death. It would also be consistent with support options available under other provincial and federal legislation both during life and after death.

[147] 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 the FLA's child support provisions. The court is tasked with looking at the relationship between a grandparent and grandchild to see if the grandparent was treating the grandchild as their 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.

[148] 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 by the testator before the vesting of a trust.<sup>147</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.

[149] 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.

[150] 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>148</sup> In 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

<sup>147</sup> *Spark v Perrin* (1870), 17 Gr 519 at para 1.

<sup>148</sup> *The Dependants Relief Act*, CCSM, c D37, s 1 "child"; *Succession Law Reform Act*, RSO 1990, c S.26, s 57(1) "child". 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: <lawreformcommission.sk.ca/FinalReportonTheIntestateSuccessionAct.pdf>[perma.cc/6VCA-PLYV].

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>149</sup>

[151] 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>150</sup>

[152] In both statutes, a child placed into a foster home for “valuable consideration” is excluded from the definition of “child”.<sup>151</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.

[153] The Northwest Territories and Nunavut each include children who have been adopted pursuant to First Nations’ customary adoptions in their legislation.<sup>152</sup>

[154] Changing the law to allow children to claim against the estate of a person who stood in the place of a parent has been considered in other jurisdictions. In Canada, Saskatchewan has made a recommendation for reform of the *Dependents Relief Act* that includes these children.<sup>153</sup> The New Zealand Law Commission has preliminarily recommended to continue to include these children in its recent review of succession law.<sup>154</sup> Reform in Alberta will be consistent with the trends presented by these initiatives.

## D. Evidentiary Concerns

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[155] 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

<sup>149</sup> *Monkman v Beaulieu*, 2003 MBCA 17.

<sup>150</sup> *Pigott Estate v Pigott* (1998), 25 ETR (2d) 12 (ONCJ); *Mihaescu v Zodian Estate*, [2009] WDFL 3370 (ONCJ).

<sup>151</sup> *The Dependents Relief Act*, CCSM, c D37, s 1 “child”; *Succession Law Reform Act*, RSO 1990, c S.26, s 57(1) “child”.

<sup>152</sup> The same statute applies both in the Northwest Territories and Nunavut: *Dependents Relief Act*, RSNWT 1988, c D-4, s 1 “child”, as duplicated for Nunavut by s 29 of the *Nunavut Act*, SC 1993, c 28.

<sup>153</sup> Law Reform Commission of Saskatchewan, *Reform of The Intestate Succession Act*, 1996, Final Report (2017) at 22, online: <<https://lawreformcommission.sk.ca/FinalReportonTheIntestateSuccessionAct.pdf>>

<sup>154</sup> New Zealand Law Commission, *Review of Succession Law: Rights to a person’s property on death*, Issues Paper 46 (2021) at 4.40-4.42, online <<https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/Law%20Commission%20-%20Review%20of%20Succession%20Law%20-%20Issue%20Paper%2046.pdf>>

evidence. However, advanced estate planning may assist with 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>155</sup> Were the estates of persons who stood in the place of parents to be 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 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, 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.

[156] The analysis presented above is subject to two comments. First, we realize that some people won't engage in estate planning. The ability to plan an estate to help mitigate against the risk of a family maintenance and support claim will not help in these circumstances. Second, as noted in Chapter 1, a family maintenance and support application involves weighing interests, rights, and abilities that may result in an order to satisfy an unmet need of the family member applicant. The deceased's reasons for making or not making dispositions of property to any family member is only one factor a court must analyze in any family maintenance and support claim.<sup>156</sup> It is not a determinative factor. A deceased's reasons may, or may not, be persuasive to a court in the face of other relevant factors present in any particular situation.

[157] Some consultation participants noted that the family law test of when a person stands in the place of a parent is complex and provides many factors for a court to consider. A deceased person cannot provide evidence of their intention,

<sup>155</sup> WSA, s 93(e).

<sup>156</sup> WSA, s 93.

which is one of the factors used to determine if a person stands in the place of a parent. This makes a defence to a claim difficult for an estate.

[158] Again, however, this problem already exists for other “family members” under the WSA. Finding that someone was an adult interdependent partner, or was a former adult interdependent partner of a deceased is a fact specific analysis and requires evidence of a deceased person’s intentions. Yet, these types of “family members” are able to bring a claim against the estate of their deceased partner. Similarly, grandparents had to have demonstrated a settled intention to treat a grandchild as their own during life, and a grandchild must prove this settled intention in order to successfully bring a claim.

[159] A person’s desire to treat a child as their own is only one factor that a court must analyze when deciding if a person stood in the place of a parent. A large number of survey responses pointed to factors that participants felt would be very important in deciding whether or not a child should be able to receive an order for family maintenance and support. These responses support reform, but pointed out that not every child in a step-relationship should be entitled to an order from the court. The factors that were included in participants’ responses were the:

- deceased’s intentions/views;
- child’s age;
- child’s view;
- length of the relationship; and
- type of relationship between child and step-parent.

[160] An analysis of participants’ comments and the FLA test demonstrates that a deceased’s intention is only one factor of many that should be considered when deciding if a person stands in the place of a parent. Nothing in the FLA test suggests that the person’s intention is the dominant consideration above all others. Rather, all factors must be looked at together, holistically, in order to come to a decision. While a lack of evidence of a deceased’s intentions would make the analysis harder, it does not make drawing a conclusion that a person stood in the place of a parent during life impossible. The difficulty of determining if a person stood in the place of a parent after that person’s death should not be a sufficient reason to prevent reform. As one participant noted,

I think that again it comes down to fairness and equality. There will always be situations in any legal action where it is hard to determine certain facts. That is what the courts are for, to make a judgement. Even when it is difficult to do so

[161] The *Alberta Evidence Act* contains a provision that increases the evidentiary burden on an applicant under the WSA's family maintenance provisions.<sup>157</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 applies to family maintenance actions.<sup>158</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 a will benefits from evidentiary provisions meant to balance the inability of an estate to gather fresh evidence after the death of the testator.

[162] 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 *Alberta Evidence Act*. As previously stated, this report makes no recommendations to allow a child to claim an intestate share of the estate of a person standing in the place of a parent.

## **E. Testamentary Freedom**

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[163] In Chapter 3, consultation results revealed that people who do not support reform thought that testamentary freedom was the number one reason to leave the law unchanged. Allowing children to make claims against the estates of persons who stood in the place of a parent is seen as an infringement on this right. The right to freely dispose of property after death means that those persons standing in the place of parents who want to leave part of their estate to a child not biologically or adoptively related to them are free to do so. However, the majority of consultation respondents argued that the best interests of the child, equality, fairness, and the duty to support family limited a person's right to leave their estate to whomever they wish.

<sup>157</sup> *Alberta Evidence Act*, RSA 2000, c A-18, s 11.

<sup>158</sup> WSA, s 3(3); *Malkhassian*, note 105 at para 36.



[164] Historically speaking, testamentary freedom in Alberta was unrestricted for only five years before legislators began to balance the right with the duty to support family. The common theme concerning reform to Alberta's family maintenance and support legislation has been to broaden the definition of family members to ensure that it reflects the type of people viewed as family.<sup>159</sup> A large majority of our consultation participants argue that children raised by persons who stood in the place of a parent are family for that person.

## F. Impact of Change on Families in Alberta

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### 1. STEP-FAMILY DEMOGRAPHICS

[165] The number of step-families in Alberta is significant. Statistics Canada notes that "[a]s 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>160</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>161</sup> Those families were further classified as follows:

- 413,425 intact families<sup>162</sup>
- 126,040 lone parent families
- 53,950 step-families

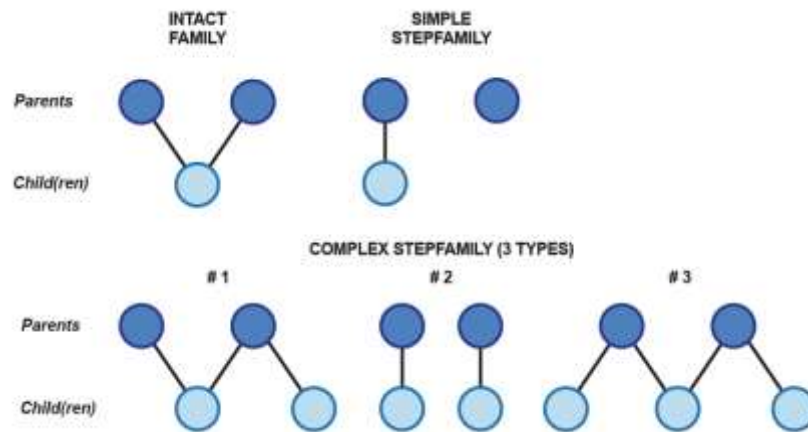
<sup>159</sup> Bill 21, Second Reading, note 2 at 1066–1067 (Hon Verlyn Olson).

<sup>160</sup> Statistics Canada, *Canadian Families: Diversity and Change*, Catalogue No 12F0061XPE (Ottawa: Statistics Canada, 1996) at 2, online: <publications.gc.ca/collections/collection\_2017/statcan/CS12-0061-1996-eng.pdf> [perma.cc/FP4C-6L9L].

<sup>161</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*, Catalogue No 98-400-X2016024 (Ottawa: Statistics Canada, 2019), online: <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].

<sup>162</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*, Catalogue No 90-200-X (Ottawa: Statistics Canada, 2017), online: <www12.statcan.gc.ca/census-recensement/2016/as-sa/98-200-x/2016006/98-200-x2016006-eng.cfm> [perma.cc/N5CK-V5U9].

The census further divides step-families into two categories – simple and complex.<sup>163</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.”<sup>164</sup> 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**

[166] In Alberta, there are more simple step-families than complex step-families. According to the 2016 census, Alberta had 29,935 simple step-families and 24,010 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>165</sup>

[167] 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

<sup>163</sup> Statistics Canada, *2016 Census of Population: Families, households and marital status*, Catalogue No 98-501-X (Ottawa: Statistics Canada, 2017), online: <[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>164</sup> Statistics Canada, *2016 Census of Population: Families, households and marital status*, Catalogue No 98-501-X (Ottawa: Statistics Canada, 2017), online: <[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>165</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.

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.

[168] Between 1 April 2019 and 31 March 2020 there were 120 spousal adoptions in Alberta.<sup>166</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>167</sup> When compared to the roughly 54,000 step-parents in the province, the number of persons standing in the place of parents will be less. 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.

## G. Recommendations

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[169] 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 estates of persons who stood in the place of a parent 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>168</sup>

[170] 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

<sup>166</sup> Alberta Adoption Services, *Adoption Statistics* (Edmonton: Government of Alberta, 2020), online: <[www.alberta.ca/adoption-statistics.aspx](http://www.alberta.ca/adoption-statistics.aspx)> [perma.cc/9NLX-YQGG]. The adoption process can be convoluted and expensive, and not all persons standing in the place of a parent 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.

<sup>167</sup> *Child, Youth and Family Enhancement Act*, RSA 2000, c C-12, ss 58.1–59; FLA, 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>168</sup> Alberta, Alberta Justice, *Succession Law Reform Stakeholder Consultation: Summary of Input* (Edmonton: Alberta Justice, 2009) at 4, online: <[open.alberta.ca/dataset/1e6cf759-2c9c-455e-9704-7b4d7c94c80b/resource/07c1f233-ffdd-4a9e-90a5-257838cce60e/download/2009-succession-law-reform-stakeholder-consultation-summary-input-2009-10.pdf](https://open.alberta.ca/dataset/1e6cf759-2c9c-455e-9704-7b4d7c94c80b/resource/07c1f233-ffdd-4a9e-90a5-257838cce60e/download/2009-succession-law-reform-stakeholder-consultation-summary-input-2009-10.pdf)> [perma.cc/Q9M2-CQ5V].

a settled intention to treat the children as their own, Alberta's family and divorce law impose an obligation to support those children. Alberta succession law, by excluding these children from the benefits of Part 5, does not further the policy goals set by the CFA. 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 treats these children inequitably.

[171] ALRI's consultation data strongly supports the case for reform. Our survey participants cited the best interests of the child, the existing legal and moral obligations of persons standing in the place of a parent, equality, fairness, and other reasons, as strong motivating factors to change the law. On the other hand, testamentary freedom appears to be the most significant reason to not reform the WSA. Practitioners and lay people alike cited this policy reason most often when arguing against reform. However, in Alberta testamentary freedom has been balanced by a statutory duty to support family since 1910, and a moral duty to support family much earlier. Most of ALRI's consultation participants argued that children raised by persons standing in the place of a parent are that person's family. As such, that person's testamentary freedom ought to be balanced by their duty to support family – in particular children. This is merely an extension of a duty they already have during life.

[172] Estate professionals' concerns for certainty are valid. However, these same certainty concerns do not prejudice similar categories of persons, like adult interdependent partners, from applying for support. Reform will make outcomes less predictable and less certain from an administrative and planning perspective. It will also make the law more flexible and responsive to the needs of children. Reform will give the power to a judge to decide if a person stood in the place of a parent to a child during a relationship between that person and the child's parent. An application on behalf of these children will still require corroborating evidence, will continue to have to demonstrate need, and must convince a court to exercise its discretion to make an order for support. In making that support order, a court will need to balance the duty to support family members with the deceased's testamentary freedom. Finally, an application that is truly necessary will need to be brought with some haste, or lose a potentially substantial amount of the estate from which support could be obtained.<sup>169</sup> In these circumstances, the trade-offs that must be made for allowing

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<sup>169</sup> WSA, s 89.

children to make an application against the estate of a person who stood in the place of a parent under Part 5 seems acceptable.

## **RECOMMENDATION 1**

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A child of a person standing in the place of a parent should be added to the class of family members allowed to bring a claim for family maintenance and support under the *Wills and Succession Act*.

[173] However, support law in Alberta has recognized that the obligations of a person standing in the place of a parent are not exactly the same as for biological or adoptive parents. The FLA creates a support obligation for persons standing in the place of parents, but that obligation is secondary to the obligation of biological or adoptive parents. ALRI's consultation data strongly supports this approach to support for children after death.

[174] Having someone stand in the place of a parent does not relieve other parents of their own obligations. Reform should ensure that surviving parents to a child continue to support that child, as mandated by the FLA. Reform that ensures the obligation of a biological or adoptive parent to support a child has priority of the obligation of an estate of a person standing in the place of a parent will help. For these reasons, ALRI recommends extending the protection given to a person who stands in the place of a parent during life to their estate.

[175] As discussed in Chapter 2, section 93 of the WSA is in many ways similar to the considerations outlined in section 51(5) of the FLA. However, section 93 allows the court discretion to consider sections 93(a)-(i) "as applicable". An explicit direction that the estate's obligation is secondary to that of a child's biological or adoptive parents' obligation, similar to section 51(5) of the FLA, should be contained in the WSA together with specific factors to consider in determining the support to be paid by the estate of a person who stood in the place of a parent. An explicit statement helps to ensure that a deceased's testamentary freedom is interfered with minimally, if at all, where there are other sources of support able to meet the needs of the child.

## **RECOMMENDATION 2**

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The obligation of the estate of a person standing in the place of a parent to provide support for a child should be secondary to the obligation of a biological or adoptive parent to support that child. In addition to the factors listed in section 93 of the *Wills and Succession Act*, when determining the amount and duration of

support the estate of a person standing in the place of a parent must pay, the court should have to consider the following:

- the nature and duration of the relationship between the child and the deceased;
- the child's entitlement to support from any another person; and
- the amount of child support that is being paid or should be paid by either or both parents of the child pursuant to the *Family Law Act*, or the *Divorce Act*.

## CHAPTER 5

# How Should the Law Be Changed?

## A. How Should a Person Who Stood in the Place of a Parent Be Defined?

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[176] Chapter 2 discussed how a step-parent is defined to stand in the place of a parent under the FLA, and how a grandparent stands in the place of a parent under the WSA. Recommendation 1 is that the WSA should be reformed to include the estate of a step-parent who stood in the place of a parent in Part 5. What test should determine who stood in the place of a parent for the WSA?

### 1. THE DIFFERENCES BETWEEN THE TWO CURRENT APPROACHES

[177] Legislated list of factors to determine a person's settled intention to treat a child as their own are found in the WSA and the FLA. The factors are similar but do have some differences.

[178] The differences between the FLA and the WSA do not end there. Support law in Canada, and particularly Alberta, has not relied exclusively on the common law concept of standing *in loco parentis* since at least 1986.<sup>170</sup> As discussed in Chapter 2, there are limits placed on the types of persons whose settled intention matters for the purposes of support. The FLA looks to the relationship between parent and step-parent to limit the applicability of the settled intention factors, while the WSA looks to the primacy of the relationship between grandparent and grandchild.

### 2. THE SETTLED INTENTION FACTORS

[179] Both step-parents and grandparents have to demonstrate a settled intention to treat a child as if the child was their own to stand in the place of a parent. Lists of factors are provided by both the FLA and WSA to help the court determine if a person demonstrated the settled intention. Many of the factors used to measure a person's settled intention are identical; however, there are subtle differences between the WSA and the FLA. In the following table, the

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<sup>170</sup> *Carignan v Carignan* (1989), 61 Man R (2d) 66 (CA) at paras 24-25, 1989 CarswellMan 199 [cited to WL Can]; *Theriault* at paras 6-8.

differences between the list of factors used to determine a person's settled intention are underlined:

<i>Family Law Act</i>	<i>Wills and Succession Act</i>
<ul style="list-style-type: none"> <li>▪ the child's age;</li> <li>▪ the duration of the child's relationship with the person;</li> <li>▪ the nature of the child's relationship with the person, including <ul style="list-style-type: none"> <li>▫ the child's perception of the person as a parental figure,</li> <li>▫ <u>the extent to which the person is involved in the child's care, discipline, education and recreational activities,</u> and</li> <li>▫ <u>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;</u></li> </ul> </li> <li>▪ <u>whether the person has considered</u> <ul style="list-style-type: none"> <li>▫ applying for guardianship of the child,</li> <li>▫ <u>adopting the child,</u> or</li> <li>▫ <u>changing the child's last name to their own last name;</u></li> </ul> </li> <li>▪ <u>whether the person has provided direct or indirect financial support for the child;</u></li> <li>▪ the nature of the child's relationship with any other parent of the child; or</li> <li>▪ any other factor that the court considers relevant.</li> </ul>	<ul style="list-style-type: none"> <li>▪ the grandchild's age;</li> <li>▪ the duration of the relationship between the grandchild and grandparent;</li> <li>▪ the nature of the relationship between the grandchild and grandparent, including <ul style="list-style-type: none"> <li>▫ the grandchild's perception of the grandparent as a parental figure, and</li> <li>▫ <u>whether or not the grandparent was the primary decision maker with respect to the grandchild's care, discipline, education and recreational activities;</u></li> </ul> </li> <li>▪ whether the grandparent considered applying for guardianship of the grandchild;</li> <li>▪ the nature of the grandchild's relationship with their parents; or</li> <li>▪ any other factor the court considers relevant.</li> </ul>



[180] The first difference to note is that courts will consider the extent to which a step-parent was involved in the child's care, discipline, education and recreational activities. However, the courts consider whether or not a grandparent was the primary decision maker with respect to the grandchild's care, discipline, education, and recreational activities. This sets out a higher standard for grandparents.

[181] For both step-parents or grandparents, courts will consider whether or not a step-parent or a grandparent considered applying for guardianship of a child. However, for step-parents, the court can also look at whether or not a step-parent considered adopting the child or changing the child's last name to their own. These factors for step-parents are broader.

[182] There is one additional factor that courts consider for step-parents, but do not consider for grandparents when looking at settled intention: 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. It makes sense to exclude this factor for grandparents. A grandparent cannot separate, in the legal sense of that word, from their child. It is also likely that a grandchild and grandparent will continue to be in a loving relationship despite what happens to the child's parent's relationship. Finally, the residency requirement for grandparents (as discussed below) makes this factor repetitive for them. However, post-separation contact is quite important for step-parents. Lawyers maintaining a family practice noted in consultation that this factor is often very persuasive in disputes involving the issue of support from a step-parent alleged to be standing in the place of a parent.

[183] The list of settled intention factors used for step-parents has been developed through both the common law and legislation. The list of settled intention factors for grandparents used in the WSA appears to be based off this list, but tailored to the grandparent context. As practitioners noted, the FLA test used for step-parents brings with it the benefit of judicial consideration. For these reasons, ALRI recommends using the list of settled intention factors used in the FLA for a court to determine if a person stood in the place of a parent for the purposes of Part 5 of the WSA.

**a. excluding certain estates**

[184] The settled intention factors can be used in the WSA to exclude specific estates where necessary and appropriate. In other words, estates should be excluded from the operation of Part 5 where an obligation to support children

during life would not arise. If a person did not demonstrate a sufficiently settled intention to treat a child as if the child were their own while alive, then their estate should not be subject to a claim.

[185] The criteria used to evaluate a step-parent's settled intention are fact specific, complex, and many of them are likely to cut both ways in any analysis. However, these same concerns do not prejudice similar categories of persons from applying for support. Adult interdependent partners may apply for support under Part 5. These types of adult relationships also require a factually specific analysis to determine if they merit inclusion in the legally defined category.

[186] Relying on the settled intention factors to exclude the estates of certain persons from a support obligation does not automatically impact those person's testamentary freedom any more than for other defined "family members". The test to determine a person's settled intention is harder to apply; that's it. The factors listed in section 93 of the WSA are meant to balance a person's testamentary freedom with their obligation to support family members. These factors will need to be analyzed in any maintenance and support claim. Allowing children to claim against the estates of persons who stood in the place of parents during life might impact that person's testamentary freedom, or it might not. That balancing will happen the same for these children as it will for every other category of persons who are "family members".

**b. consistent with which legislation**

[187] When engaging in consultation on this project, ALRI discovered that many participants thought that reform should be consistent with other legislation in Alberta. Some participants argued that reform to Part 5 should always be consistent with the WSA, while others argued that reform would be more usefully accomplished if consistency with the FLA was promoted. Given that each statute's list of settled intention factors have subtle differences, which regime should reform be consistent with?

[188] Practitioners agreed, in both roundtables, that there are distinct differences between families with step-parents standing in the place of a parent and families with grandparents standing in the place of a parent. These differences greatly affect which considerations should be used to evaluate the relationship between person and child. It seems prudent to follow this observation when determining which settled intention factors are used for reform. The list of factors used in the FLA is meant to apply specifically to step-

parents, while the settled intention factors used in the WSA were tailored to grandparents.

[189] For example, the continuing relationship between a person standing in the place of a parent and a child is not included in the list of settled intention factors in the WSA for grandparents. However, family law practitioners state that this factor is important when determining when a step-parent stands in the place of a parent under the FLA. In the estate context, a deceased is unable to provide direct evidence of intention. As such, evidence of the continuing contact between child and deceased before the death of the step-parent seems important. It may be particularly relevant where the deceased separated from their spouse or partner prior to their death. Excluding this consideration by adopting the list of settled intention factors under the WSA for step-parents would probably be disadvantageous for estates. Using the list of settled intention factors from the FLA, however, ensures that the specific considerations relevant to a step-child and step-parent relationship are included in the WSA. Thus, reform to the WSA permitting claims against the estates of persons who stood in the place of a parent should follow the list of settled intention factors in the FLA, and should be tailored to the estate context.

### **RECOMMENDATION 3**

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For the purposes of Part 5 of the *Wills and Succession Act*, in determining whether a person has demonstrated a settled intention to treat the child as the person's own, the court should consider the factors that are consistent with s. 48(2) of the *Family Law Act*, namely,

- the child's age;
- whether the person had provided direct or indirect financial support for the child during their life;
- 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 was 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 was

living separate and apart from the child's other parent before their death;

- whether the person had considered
  - applying for guardianship of the child,
  - adopting the child, or
  - changing the child's surname to that person's surname;
- the nature of the child's relationship with any other parent of the child; and
- any other factor that the court considers relevant.

### 3. LIMITS ON THE SETTLED INTENTION FACTORS

[190] Under the FLA, a person must also be the spouse of a parent of the child, or in a relationship of interdependence of some permanence with the parent of the child.<sup>171</sup> 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>172</sup> The common law did not require a relationship between the person and the child's parent.

[191] Neither the FLA nor the *Adult Interdependent Relationships Act* 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 permanence to qualify.<sup>173</sup> The same result has occurred in the Provincial Court of Alberta under similar circumstances.<sup>174</sup> In *Evans v Nelson*, a relationship with 5 months of cohabitation was a daily work-in-progress with no permanence.<sup>175</sup>

[192] Under the WSA, the deceased must have been the child's grandparent or great-grandparent. Further, the grandparent must have primarily supported and

<sup>171</sup> FLA, s 48(1).

<sup>172</sup> Alberta Law Reform Institute, *Family Law Project: The Conclusion*, Final Report 93 (2004) at 29, online: <[www.alri.ualberta.ca/wp-content/uploads/2020/05/fr093.pdf](http://www.alri.ualberta.ca/wp-content/uploads/2020/05/fr093.pdf)>; *M(P) v D(S)*, 2008 ABQB 109 at paras 29–32.

<sup>173</sup> *M(P) v D(S)*, 2008 ABQB 109 at para 57.

<sup>174</sup> *D(D) v S(C)*, 2012 ABPC 322.

<sup>175</sup> *Evans v Nelson*, 2017 ABPC 141.

primarily resided with their grandchild. Both of the conditions, primary support and primary residency, must be met either since the child's birth, or for the two years preceding the grandparent's death. If neither of the conditions are met, then an analysis of a grandparent's settled intention is unnecessary.

[193] In its Report for Discussion, ALRI explored the idea of using the approach set out in the WSA for grandparents to restrict the range of children who could apply for maintenance and support against the estate of a person who stood in the place of a parent. Ultimately, ALRI decided that no residency period should apply, and proceeded to consult on that basis. Other ideas to limit the types of children who could make a family maintenance and support claim were explored by the consultation participants. These ideas include:

- using some basis of support provided to a child during life as a measure for assessing a claim to support after death;
- allowing step-parents to contract out of any support obligation;
- creating a specific definition for when a person ceased standing in the place of a parent, similar to what is done in section 10 of the *Adult Interdependent Relationships Act*, and excluding those estates from the operation of the WSA; and
- changing the relevant time period of the settled intention analysis (for example, to just prior to the death of the person alleged to have stood in the place of a parent).

[194] One consultation participant had the following to say about a residency requirement:

At minimum, there should be a residency requirement. Not unlike settled intention, it will be challenging to gather evidence of residency that is independent of the applicant's evidence.

To be consistent with the WSA, the participant noted, the residency requirement should include a time frame for the minimum length of time the child was supported by a person standing in the place of a parent prior to death.

[195] However, most practitioners had a different view. Practitioners commented that most parents want to help their children. In the case of grandparents, this includes helping with the support of their children's children. Grandparents largely tend to care for grandchildren, help raise them, and support them. However, these grandparents do not all stand in the place of a

parent. Practitioners noted that the current test in the WSA is useful to help differentiate between these different types of grandparents.

[196] Practitioners argued that the analysis used in the WSA makes less sense in the context of step-parents. Parenting time orders, emergency protection orders, guardianship orders, and other orders can all influence the nature of support and residency for a child. Defining whether or not a child was “primarily supported by” and “primarily resided with” a step-parent standing in the place of a parent in these various contexts becomes problematic. All parties to a claim for maintenance and support for a child would have to assess the entirety of the parenting relationships to establish which one had “primacy” for support and residency. Practitioners pointed out that using the existing formulation of the FLA test brings the benefit of judicial consideration. It also uses the familiar concept, developed under *Adult Interdependent Relationships Act*, of a relationship of interdependence. Practitioners would rather use the familiar definitions from the *Adult Interdependent Relationships Act* than an untested concept borrowed from a situation it was not intended for.

[197] Consultation participants who argued for other means to exclude children from the provisions of Part 5 of the WSA were concerned, primarily, with testamentary freedom. Another concern that came from consultation for these participants was a desire for certainty in the law.

[198] Any approach that helps to narrow the applicability of the settled intention factors used to determine if a person stood in the place of a parent promotes certainty for estate planning and administration. Objective criteria will better help to eliminate possible applicants and help to reduce risk to estates.

[199] Excluding some children from applying for support will reduce the number of new cases coming before the courts. Participants argued that this would help to mitigate against a feared flood of new applicants.

#### **a. Analysis**

[200] Neither Ontario’s *Succession Law Reform Act* nor Manitoba’s *Dependants Relief Act* contain a residency requirement for a child to have lived with a person standing in the place of a parent.<sup>176</sup> These two acts rely solely on the definition of a person standing the place of a parent as used in the support law generally, and in the *Divorce Act*. In other words, Ontario and Manitoba rely on the settled

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<sup>176</sup> *Succession Law Reform Act*, RSO 1990, c S.26, s 57(1); *The Dependants Relief Act*, CCSM, c D37, s 1.

intention factors to determine if a person stood in the place of a parent.<sup>177</sup> Following a similar path to that taken by Ontario and Manitoba will result in uniformity with jurisdictions that allow claims against these estates.

[201] The WSA adopts the terminology of standing in the place of a parent, but it changes the analysis in a very important way. It changes the focus on the relationship in the definition to exclusively that between grandparent and grandchild. In large part, this is because of the differences between the relationships involved, and the consequences of those differences from a legal perspective. As argued by practitioners, a family involving a step-parent standing in the place of a parent looks different than a family with a grandparent standing in the place of a parent. The consequences of those differences are important when determining a support obligation, and the legal definitions for those relationships should take these differences into consideration. Extending some protection to the estates of other persons who stood in the place of parents because that protection is used for grandparents in the WSA does not adequately address these differences between families. It may cause more problems than it solves.

[202] Using a residency and support period significantly departs from the legislated standard for support owed by a person standing in the place of a parent during life. The residency and support period will terminate a support obligation on death in certain situations that would not be terminated during life and, as discussed under Recommendation 1, this is exactly the mischief in the law that reform is supposed to remedy. For example, after separation a person standing in the place of a parent may support a child without a formal court order or support agreement. If a residency and support period is used in the definition for when a person stood in the place of a parent in the WSA, and if the child does not primarily reside with that person for two years prior to their death, then the child will be unable to apply for family maintenance and support. That child, in this circumstance, has lost a source of support on the death of the person. However, if the person who stood in the place of a parent had not died, but had simply ceased supporting the child, then the child would continue to be able to bring a child support claim against the person to ensure that the person's support obligation was met. Thus, reform that uses a residency and support definition would not be in the excluded child's best interest and is inequitable. ALRI has used the best interests of the child and equality as guiding policies for

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<sup>177</sup> *Pigott Estate v Pigott* (1998), 25 ETR (2d) 12 (ONCJ); *Mihaescu v Zodian Estate*, [2009] WDFL 3370 (ONCJ); *Monkman v Beaulieu*, 2003 MBCA 17.

this project. The vast majority of ALRI's consultation participants have acknowledged the importance of considering the best interests of the child and equality policies for the purposes of reform.

[203] Any of the other proposals designed to limit the applicability of the settled intention factors, and thereby exclude children from Part 5 of the WSA, share the same problems with a residency period. We have been unable to find a way that increases certainty for estates in a manner that prioritizes and preserves the best interests of the child, and the principles of support for family after death. Our consultation data shows support for the best interests of the child policy to a high degree, higher than any other policy considered. Further, the best interests of the child policy, and equality, are preferred over policies that limit risks to estates or that decrease litigation. None of the options investigated in consultation to exclude children can satisfy the policies that consultation revealed to be the most important. ALRI does not recommend them.

[204] Rather than relying on factors designed to exclude only some children from the family maintenance and support regime, protections for estates are already in place under the WSA.<sup>178</sup> ALRI has previously noted

intent of Part 5 is to provide maintenance and support to family members in need following the death of a spouse, partner or parent. There is an element of urgency in bringing such application. Section 89 requires that an application be brought within six months of the grant of probate or administration of the deceased's estate.

[205] This urgency helps to limit the impacts of ALRI's proposed reforms. From an estate administration perspective, the uncertainties presented by reform will only exist for a period of time after the death of a person. It is true that this time period varies. It is also true that the period is relatively short. In situations of serial partners, a surviving parent of a child will need to bring an application within six months of probate, or risk losing a large part of the estate against which a claim can be made.<sup>179</sup> Where support for a child is truly needed, it seems far less likely that a surviving parent would take the risk of losing any amount of support. The WSA's limitation period mitigates against some uncertainty and encourages the prompt, and early resolution of claims. That likely provides little comfort to estate professionals planning estates prior to death; however, relying

<sup>178</sup> Alberta Law Reform Institute, *Assisted Reproduction After Death: Parentage & Implications*, Final Report 106 (2015) at para 73, online: <[www.alri.ualberta.ca/wp-content/uploads/2020/05/FR106.pdf](http://www.alri.ualberta.ca/wp-content/uploads/2020/05/FR106.pdf)>.

<sup>179</sup> WSA, s 89. Section 89(2) provides the court the discretion to allow a family maintenance and support application "at any time respecting any part of the estate that is not distributed at the date of the application".



on the existing limitation periods in the WSA alone to address concerns relating to certainty obviates issues from an equality perspective.

[206] Nevertheless, some limit should be put on when a person's settled intention matters to legally create an obligation to support a child after death. Given the support in ALRI's consultation results for the policy that the support provisions in the WSA should align with the current legal and moral support obligations of step-parents during life, this limit should be consistent with the obligation owed to children during life. Under the *Divorce Act*, a person's settled intention is only relevant for the purposes of support if that person was married to a parent of the child. The FLA also limits the applicability of the settled intention factors by directing the court's attention to the type of relationship between parent and step-parent. In other words, during life "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>180</sup> To follow the logic that led to Recommendation 1, this same limitation should apply to estates of persons who stood in the place of a parent in the WSA.

#### **RECOMMENDATION 4**

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For the purposes of family maintenance and support, whether a person stands in the place of a parent should also be defined in a manner that is consistent with section 48(1) of the *Family Law Act*, namely that, the person was the spouse of a parent of the child, or was in a relationship of interdependence of some permanence with a parent of the child.

#### **4. CONCLUSION**

[207] Children become a person's family member in circumstances sufficient to trigger an obligation to provide support in the circumstances defined in the FLA. Death should not change this, but it currently does. Recommendations 1, 2, 3, and 4 seek to remedy this. Consultation feedback supports an analysis that treats all children equally, and that reforms the WSA in a manner in keeping with the legal and moral obligations of step-parents during life. Any of the exclusions proposed for children in consultation do not treat all children equally, are not in keeping with the legal and moral obligations of step-parents during life, or both.

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<sup>180</sup> *D(D) v S(C)*, 2012 ABPC 322 at para 19.

## B. Priority of Orders Against the Estate of a Person Standing in the Place of a Parent

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[208] Where step-families have formed, there may be existing support orders for other children that need consideration.

[209] Support orders made against a person standing in the place of a parent during life will bind the estate of that person.<sup>181</sup> However, the personal representative of the estate may apply to the court to have that support order terminated or varied.<sup>182</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?

[210] This issue came before the Ontario Court of Appeal tangentially in *Dagg v Cameron Estate*.<sup>183</sup> The deceased had been ordered by a court to designate his separated spouse as an irrevocable beneficiary to a life insurance policy to secure support orders. 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 in the maintenance and support application.<sup>184</sup> The Court of Appeal overturned the trial judge'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. The specific decision turned on the interpretation of Ontario law that does not apply in Alberta. However, the Court made it very clear that orders imposed by a court to ensure payment of a support obligation must be satisfied before considering the pool of funds available for a maintenance and support application.

[211] The *Maintenance Enforcement Act* provides that a maintenance order takes priority over any unsecured judgment debt of the debtor, other than another

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<sup>181</sup> FLA, s 80.

<sup>182</sup> FLA, s 80.1(2).

<sup>183</sup> *Dagg v Cameron Estate*, 2017 ONCA 366.

<sup>184</sup> The WSA does not contain a similar claw back provision.

maintenance order.<sup>185</sup> However, because a maintenance and support order meets the definition of a “maintenance order”, it does not specify which maintenance order ought to take priority.<sup>186</sup>

[212] The FLA, directs that support orders bind the estate of the payor.<sup>187</sup> Further, the WSA directs courts to consider any legal obligation of the deceased, or the deceased’s estate to support any family member.<sup>188</sup> If the wordings of these statutes are to have any meaning in the context of an estate with finite assets, then support orders made during life ought to be given priority over maintenance and support claims brought after the death of the person.

### **RECOMMENDATION 5**

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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 over any potential new family maintenance and support order for a child to whom the person stood in the place of a parent.

## **C. Where a Person May Have Stood in the Place of a Parent**

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[213] 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>189</sup> The notice requirements under the EAA include a deceased’s “family members” as defined in Part 5 of the WSA.<sup>190</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?

[214] Two parts of section 11 are significantly relevant to persons standing in the place of parents. Section 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. Section 11(h) requires that the guardian of a child or grandchild from subsection (g) also be given notice.

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<sup>185</sup> *Maintenance Enforcement Act*, RSA 2000, c M-1, s 20.

<sup>186</sup> *Maintenance Enforcement Act*, RSA 2000, c M-1, s 1, definition of “maintenance order”.

<sup>187</sup> *Family Law Act*, RSO 1990, c F.3, s 34(4).

<sup>188</sup> WSA, s 93(d).

<sup>189</sup> *Surrogate Rules*, Alta Reg 130/95, s 9.1; *Estate Administration Act*, SA 2014, c E-12.5, s 10.

<sup>190</sup> *Estate Administration Act*, SA 2014, c E-12.5, s 11.

[215] 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.

[216] In consultation, some participants were concerned with the impact that reform would have on the Public Trustee's office. The Office of the Public Guardian and Trustee is increasingly busy, and likely has limited resources. However, the Office of the Public Guardian and Trustee is given wide discretion and powers over its own process. It is not obligated to act in every case, and can create internal procedures to help streamline any new process required.<sup>191</sup>

[217] 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. 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>192</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.

[218] 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 directly 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. However, as discussed in Chapter 4, a parent bringing this type of claim will face financial risk given Recommendation 2.

[219] 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

<sup>191</sup> WSA, ss 91(3), 104; *Public Trustee Act*, SA 2004, c P-44.1, ss 5-6.

<sup>192</sup> FLA, s 32.

representatives and lawyers should provide notice in close situations where a person may, or may not, have stood in the place of a parent.

## **RECOMMENDATION 6**

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The word “child” in section 11 of the *Estate Administration Act* should be defined to include a child in respect of whom the deceased stood in the place of a parent.

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

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[220] The preceding sections have focused on whether and how to change the WSA to allow the court to order that the estate of a person standing in the place of a parent appropriately support a minor child. This section considers when to make orders for support past the age of 18.

[221] 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 3 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.<sup>195</sup> It had,

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.

[222] The Legislature, also aware of this issue, passed the *Family Statutes Amendment Act*. MLAs from both sides of the floor supported the legislative changes that did away with the distinction. MLAs agreed that the changes were beneficial, and that the Legislature should do whatever it can to support families.

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

<sup>194</sup> *Ryan v Pitchers*, 2019 ABQB 19 at paras 18–19.

<sup>195</sup> *Ryan v Pitchers*, 2019 ABQB 19 at para 25.

Further, the changes to the FLA would provide much-needed support for parents with children with disabilities.<sup>196</sup>

[223] The result has been to increase the range of adult children able to claim support.<sup>197</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>198</sup> Now any child who is over the age of 18 and is unable to withdraw from the charge of their 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.<sup>199</sup>

[224] 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.

[225] 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 potentially analogous

<sup>196</sup> "Bill 28, Family Statutes Amendment Act" 2nd reading, Alberta, Legislative Assembly, *Hansard*, 29th Leg, 4th Sess (27 November 2018) at 2135 (Hon Angela Pitt), 2137 (Hon Ronald Orr), 2138 (Hon Laila Goodridge).

<sup>197</sup> *Family Statutes Amendment Act, 2018*, SA 2018, c 18, s 1(2).

<sup>198</sup> FLA, s 46(b) as it appeared on November 2018.

<sup>199</sup> FLA, s 46(b) as amended by the *Family Statutes Amendment Act, 2018*, SA 2018, c 18, s 1(2).

grounds under a section 15 analysis.<sup>200</sup> 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.

[226] In consultation, ALRI explored alternates to our initial recommendation. One alternative coming from consultation was to limit the ability for an adult, dependent child to apply for support only to those circumstances where there was a court order for support payable by the deceased in place prior to the child turning 18. The intent behind the alternative is to provide sufficient evidence that the deceased stood in the place of a parent to warrant an adult, dependent child to bring a claim.

[227] Limiting dependant adult children's ability to apply for support after death only in circumstances where there is an existing support order or agreement is overly repetitive. The FLA already specifies that these types of orders or agreements bind the estate of a step-parent.<sup>201</sup> Allowing dependent adult children to apply only in these circumstances gives them a less certain right than they already have and is unlikely to be used. If a need to vary the child support order is necessary, then this is also contemplated in the FLA.<sup>202</sup>

[228] The WSA already limits when an adult child may bring a claim for family maintenance and support. Any reform to Part 5 of the WSA should be consistent with those limits. Further, the WSA's limits mirror those now found in the FLA and are less likely to face constitutional challenge.<sup>203</sup>

## **RECOMMENDATION 7**

For the purposes of family maintenance and support, 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 at the time of the deceased's death:

- the child was unable to earn a livelihood by reason of mental or physical disability; or

<sup>200</sup> *Dares v Newman*, note 100, at paras 149-152. The court in *Dares*, in *obiter*, laid out an analysis for why "family status" could be an analogous ground for a step-child. This analysis largely hinged on the immutability of the characteristic of being a step-child from the point-of-view of the child. However, the court declined to find that a violation of the *Charter* had occurred due to a lack of evidence of disadvantage or prejudice.

<sup>201</sup> FLA, s 80.

<sup>202</sup> FLA, s 80.1.

<sup>203</sup> WSA, ss 72(b)(iii)-(v).

- the child was under 22, and unable to withdraw from their parent's charge because the child is a full-time student as determined in accordance with the *Family Law Act* and its regulations.

## E. Transitional Provisions

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[229] If the changes suggested in this 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 is, "important that all people have the opportunity to learn about [the change] and how it will affect them before it comes into law."<sup>204</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 come into force for at least one year after enactment.

[230] 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 means alter the estate plane at the time it was made. It would be a retrospective change enforcing a new standard that didn't exist when an estate was being planned.

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<sup>204</sup> "Bill 28, Family Statutes Amendment Act" 2nd reading, Alberta, Legislative Assembly, *Hansard*, 29th Leg, 4th Sess (27 November 2018) at 2138 (Hon. Laila Goodridge).







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