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CASES DECIDED UNDER THE BRITISH COLUMBIA TESTATOR'S FAMILY MAINTENANCE ACT INVOLVING ADULT CHILDREN PETITIONERS

1. In *Re Mary Ann McAdam* (1924-25) 35 B.C.R. 547, [1925] 2 W.W.R. 593 (B.C.S.C.)

Facts

Petition by the adult and married daughter of the testatrix whose net estate amounted to $33,000. The petitioner had not been supported by parents for six years prior to the death of the testatrix. Testatrix stated that she was making no provision for the petitioner because she had been adequately provided for out of her father's estate. This legacy had been lost by the petitioner in poor investments managed by her husband. The petitioner was found to be in need of proper maintenance and support. She had been forced to take on extra outside work in order to assist in maintaining the family. Her husband had been unsuccessful in attempts to contribute "to the family exchequer".

Decision

The court, following *Allardice* v. *Allardice* (1910) 29 N.Z.L.R. 959, observed that the case may exist where because a child had maintained himself and had accumulated means, he might be unsuccessful in a petition under the Act. But where the court finds that the petitioner is in need of extraneous help, that such help can be provided out of the estate, and that the testator has been in breach of the moral duty that a just, but not loving parent owes to his children, in not providing for that need, the court should make such order as would repair the breach.

The court expressly refused to allow the fact that the petitioner was the only child of the testatrix, that the legacy from the petitioner's father had been wasted, or the amount the petitioner would have received had the testatrix died intestate, to affect its determination.

Award

$6,000, to be held in trust at interest and to be dispensed in $100 monthly payments until principal and interest was exhausted. The award was not to be in a lump sum so as to avoid it meeting the same fate as the legacy from the father.

2. In *Re Edworthy Estate* (1927-28) 39 B.C.R. 474, [1928] 1 W.W.R. 737 (B.C.S.C.)

Facts

Petitioner is the 32 year old daughter of the testator. At the time of his death she had been supporting herself modestly but adequately. At the time of her mother's death she had gone to care for the testator but had been forced to leave by his indecent conduct towards her. She had been replaced by another who cared for the testator for two years till his death and to whom the testator left his entire estate the net value of which is about $2,400.

Decision

In view of the absence of any great need, the inadequacy of the estate to provide an income of anything

more than $100 a year, and the just claim of the stranger who cared for the testator prior to his death the petition was dismissed. That the petition of a son or daughter in good health and in the prime of life stands in a different position from that of a widow of middle age or older was observed.

3. *Walker* v. *McDermott* [1931] S.C.R. 94

Facts

Petition by the adult and married daughter of the testator whose entire estate of $25,000 was left to his widow. The petitioner had provided for herself prior to her marriage and was adequately provided for by her husband at the time of the petition and there is every reason she will continue to be so provided for.

Decision

Per Duff J. for the majority: What constitutes "proper maintenance and support" is not limited to bare necessities. The court must

> . . . proceed from the point of view of the judicious father of a family seeking to discharge both his marital and parental duty; and would . . . consider the situation of the child . . . and the standard of living to which . . . reference ought to be had.

If adequate provision has not been made, the court must determine what would be adequate as well as

just and equitable, "and in exercising its judgment upon this, the pecuniary magnitude of the estate, and the situation of others having claims upon the testator must be taken into account" (page 96). The testator was under great obligation to his wife but it is possible out of an estate of this size to make adequate provision for the wife and still give the petitioner something. This the testator should have done "if properly alive to his responsibilities as father no less than a husband."

The court restored the trial judgment which had been reversed by the Court of Appeal.

Award

$6,000 from which $1,000 (which the wife had voluntarily paid to the petitioner) should be deducted.

Dissent

Per Rinfret: The Act is only intended to prevent a spouse or child from going without proper maintenance and support where the estate can provide it but has not. The first inquiry should be whether the petitioner was in need having regard to her ordinary circumstances at the time of the testator's death. She was not in need so the testator's disposition of his estate should not be disturbed by an order making provision for the petitioner.

4. In *Re Hoffman* (1930-31) 43 B.C.R. 463, [1931] 1 W.W.R. 293

Facts

Petition by adult daughter and infant daughter of the testator who left his entire estate of $12,769.25 to a person not related to him. The testator had been divorced from his wife when the petitioners had been infants and had never showed any concern for their welfare.

The adult petition is a student at a college from which she is soon to graduate with a teacher's certificate. She has been maintained by maternal relatives.

Decision

Following *Walker* v. *McDermott* the court held that

> A judicious father with an estate of over $12,000, seeking to discharge towards her his parental duty, considering her situation, the standard of living to which she was accustomed and the fact she was to graduate in June and must then look for employment, which might not be immediately obtainable--certainly not before autumn when schools would open--and the further fact that she was entirely dependent on her maternal relatives could not, in my opinion, give her less than $1,000.

This would have been more had the circumstances of the infant petitioner not been such that she required much more generous provision (she had an incurable heart condition making employment impossible and marriage unlikely).

Award

$1,000

5. In *Re Clegg Estate* (1932-33) 47 B.C.R. 447

Facts

The petitioner is the second wife of the testator. Under his will the testator left the proceeds of insurance policies and that amount of the rest of the estate as would equal 1/3 of the total estate (the insurance proceeds being considered part of the estate for these purposes) to the petitioner. The remainder was to be divided equal among five children of his first wife. The insurance money amounted to $2,600 and the rest of the estate to $2,250 so that by the will the petitioner would take only the insurance money. The children would each receive $436.

The petitioner was 62 and unable to work. Four of the five children (including one who was an infant) are adequately provided for. The fifth is 24 years of age and is married with one child. "She says she is continually under doctor's care and unable, and will not be able for a year, to fulfil any household duties." Neither she nor her husband have any means. Her husband is unable to obtain employment and they are in necessitous circumstances.

Decision

The petitioner will receive use of a house which makes up $750 of the estate, rent free, $10 a month and the taxes and insurance on the house out of the estate.

The fifth child will receive $300 in six $50 monthly payments. Whatever is left at the petitioner's death will be divided as per the will.

[NOTE: What the daughter takes now when she is in need is less than what she would have taken under the will, $436, though when the final distribution is made, she may take more.]

6. In *Re Jones Estate* (1934-35) 49 B.C.R. 216
[1934] 3 W.W.R. 726

Facts

The petitioner is one of five children, two of whom are infants. The petitioner is of age, married and has one child. He has a good education, $5,000 of his own which he is using to start a business.

By the will, the testator divides his $770,000 estate in such a way as to provide each child with $1,500 per year until 22, then $2,000 a year till 25, then $3,000 a year till 30, and $3,500 till 35 at which the child shall receive $100,000. The petitioner was cut out of this scheme by a codicil as a result of his entering what the testator considered an ill-advised marriage. The petitioner was to receive $70 a month for life. If when he became 35 he was free of disputes and troubles with his present wife and under no liability to pay her any share of money received from the estate, he would be reinstated and receive $100,000.

The codicil was upheld in other proceedings as being designed to promote harmony between husband and wife

but the court at that time was not directing its attention to an application under the Act.

Decision

Following *Walker* v. *McDermott* the court held that one factor which should be considered is the "obligations and necessities of the child, arising from the fact that the child has, and may have more children" (p. 221). Also, if it is accepted that the petitioner "contracted an ill-advised marriage and had become entangled in disputes and trouble with his wife"--this is the very time he would need his father's assistance since it is more likely he could succeed in marriage if he was better able to provide. The argument that with his education and savings he should be able to maintain himself and family adequately was answered by saying that such an argument was no doubt made in the *McDermott* case but had not been given effect to. The chance that his present business venture might fail was observed as well as the fact that while an order made now might be cut down later, if the present applications were dismissed he could not make a second.

Award

The monthly payment was increased from $70 to $200.

[It may be noted that the other children and the widow had supported the petition.]

7. In *Re Rattenbury Estate* (1935-36) 51 B.C.R. 321.

Facts

The petitioners are two children of the testator by his first marriage. The petition is opposed by the two children of the second marriage. The testator left an estate of about $28,000 but at his death he was domiciled in England so that the only assets which an order under the Act can bind are lands in B.C. valued at $2,750. The estate was divided entirely among the second wife and the children of that marriage.

The first petitioner, a son, is 37 years old, is married with one child and is on relief. The second petitioner, a daughter, is 32 years old, is married with one child. Her husband earns $100 a month and they own a $2,200 house. The children of the second marriage will share $35,000 at least (some of this from their mother's estate).

Decision

The testator failed to make adequate provision for the proper maintenance and support of the petitioners.

Award

Following *Walker* v. *McDermott* a just and equitable award would be $125 a month to the son and $25 a month to the daughter for a year with liberty for them to apply to extend the period.

8. In *Re Fergie Estate* (1938-40) 54 B.C.R. 431; [1939] 3 W.W.R. 573

Facts

The petitioner is the 47 year old son of the testatrix who left her estate of $11,109.96 to her other son, his wife, and a friend. The petitioner is married and has one child. He earns $150 a month as a travelling salesman and must pay travelling expenses out of this. He uses a cane and requires frequent treatment for his leg which was injured in a childhood accident. The testatrix apparently left him out of her will because he had not written to her for several years and because she thought he had once tried to have her put in a lunatic asylum--this he denies. With the will was found a letter asking the other son to take care of the petitioner. The other son is a dentist with adequate income and security.

Decision

Following *Alardice* v. *Alardice* and *Walker* v. *McDermott* the court held that the testatrix did not make adequate provision for the proper maintenance and support of the petition.

Award

$2,000.

9. In *Re Estate of Hubert Shadforth* (1942-43) 58 B.C.R. 317

Facts

Petition by the daughter of a testator whose estate amounted to $24,033.33. The petitioner is entitled to $789.56 under the will. She is a trained nurse and is married. The testator paid her an allowance of $15 per month until his death.

A petition was also made by the wife of the testator who received $12,577.77 proceeds from an insurance policy, $1,005-50 under the will and a life pension amounting to $134 a month.

The matrimonial home, still occupied by the testator's wife, stocks amounting to $9,000 and the residuary estate was left to a woman with whom the testator had been living and by whom he had an infant child. Other than what the testator left her, this woman has no property.

Decision

The court followed *Shaw* v. *Toronto General Trust Corporation et al* [1942] S.C.R. 513, where it was held that an applicant under the Saskatchewan Dependants' Relief Act, R.S.S. 1940, c. 111 bore the onus of satisfying the court that the testator's will had not made reasonable provision for her maintenance--this being a condition precedent to the court making an order for relief.

Since the court was of the opinion in this case that adequate provision had been made for both petitioners their petitions were dismissed.

10. In *Re Dickinson, Deceased* (1943-44) 60 H.C.R. 214; [1944] 2 W.W.R. 1

Facts

The petitioner is the 48 year old, married son of a testatrix whose entire estate of $15,000 was left to another son. There is also a daughter who took nothing under the will and claims nothing. The petitioner owns a home valued at $3,500, has savings of $300 and earns $2,000. He has suffered from gall bladder trouble for 18 years and his illness has affected and probably will seriously affect his earning capacity. The court found that although he had remained on friendly terms with his parents till their deaths, he had not been given any of their estates because they disapproved of the woman he had married.

Decision

The court refused to accept the argument that *Walker* v. *McDermott* went so far as to say that a petitioner standing in the same relationship to the testatrix as the principal beneficiary, the petitioner's brother, and there being such a difference between what each took under the will ($1 to the petitioner, $15,000 to the brother) "this automatically entitled the court to draw the conclusion [that] adequate provision had not been made for the proper maintenance and support of the petitioner."

It was pointed out that the judgment of Duff J. in *Walker* v. *McDermott* ". . . while stating that there is a variety of circumstances which a just father must take into consideration in regard to his child, and in respect thereto must make proper and adequate provision for the child, nevertheless indicates that these circumstances must be special circumstances" (page 216).

In that case the special circumstances were the probability of children being born to the petition and the fact that the petitioner and her husband had been unable to save antying.

> It seems to me that the *Walker* v. *McDermott* case does not go farther than to say that when it is disclosed to the court that the parent has failed to make proper and equitable provision therefor, then the court should step in and do what the parent should have done.
>
> (p. 217)

Shaw v. *Toronto General Trusts Corporation* [1942] S.C.R. 513 is then quoted for the proposition that the onus is on the petitioner to satisfy the court that adequate provision has not been made.

It was held that the petitioner here had satisfied the court that in light of his physical condition, adequate provision had not been made for him.

Award

$3,000

11. In *Re Estate of Polly Dunn* (1943-44) 60 B.C.R. 457
[1944] 3 W.W.R. 289

Facts

The petitioner is one of two adult sons of a testatrix whose estate amounted to $13,000. Legacies of $200 each were given under the will to three grandchildren of the testatrix, one being the son of the petitioner. The petitioner received $300 while his brother received the residue of the estate.

The petitioner is unemployed and has suffered injury in an industrial accident for which he is no longer receiving compensation but which has left him with a heart condition which impedes his earning ability. The petitioner was the "ne'er-do-well of the family" and had received money from the testatrix, her husband, and the brother on previous occasions. The testatrix was unaware of the petitioner's physical condition, not having communicated with him for three years prior to her death. The brother is considerably better off than the petitioner.

Decision

Following the interpretation given the judgment of Duff J. in *Walker* v. *McDermott* by Farris, C.J.S.C. in *Re Dickinson, supra,* the court held that the "special circumstances" of the petitioner showed that there had not been proper provision for his maintenance in the will.

Award

$2,000 in $35 monthly payments

12. In *Re Estate of Sidney Stewart Dawson*
(1944-45) 61 B.C.R. 481;
[1945] 3 D.L.R. 532.

Facts

The petitioners are two adult daughters of a testator whose estate had a value of about $5,000. The estate, consisting of land, farming equipment, and livestock, was left, in accordance with a loose family partnership agreement to the testator's son and grandson who were largely responsible in recent years for the success of the farming operation. The petitioners are both married , are in their late forties, and are supported adequately by their husbands. One has adult children who may reasonably be expected to support her if need be.

Decision

The Act is not intended to operate in all cases where children are not left anything. Nor was it intended to interfere with the testator's right to prefer one child to another.

Since the petitioners here are not in need of maintenance and the claims of the son and grandson on the testator's bounty were exceedingly more meritous, the petition was dismissed.

13. In *Re Estate of Frederick Saunders* (1945-46) 62 B.C.R. 204

Facts

The petitioner is the adult son of the testator who left practically his entire estate of $10,000 to his

niece. The petitioner is employed as a teacher. He had not communicated with his father for over 20 years at the end of which his father had refused any reconciliation. The niece had provided the testator comfort and affection in his declining years.

Decision

Restating the law as he had found it to be in *Re Dickinson, supra,* Farris, C.J.S.C. said that *Walker* v. *McDermott* decided that if the court is to interfere, the circumstances that the father overlooked with the result that he did not make proper and adequate provision for his children must have been "special circumstances".

There being nothing special in the petitioner's circumstances and having in mind that the estate was small, that the petitioner had been separated from his father for over a quarter century, and that there was someone else who it was reasonable for the testator to favour, the petition was dismissed.

14. In *Re McPhee Estate* [1947] 1 W.W.R. 741

Facts

The petitioner is one of two surviving children of the testator whose estate amounted to $107,000. The entire estate was divided among grandchildren and spouses of deceased children and grandchilden, each taking approximately $8,000. The two surviving children take nothing

under the will. The son does not make application under the Act because he received substantial assistance in his lifetime. The petitioner, the testator's daughter also received considerable assistance from the testator during his lifetime. She is 60 years old, married with two children both of whom take under the will. She was attentive to her father until his death. She did not take under the will because her husband, in whom the testator had once had considerable confidence, had been convicted of violating a trust in his employment and had spent several years in jail. The testator lost all confidence in the petitioner's husband as a result and wished no part of his estate to come into his hands. The petitioner's husband has re-established himself to some extent and earns about $150/month.

Decision

The factors established in *Re Morton Estate* [1934] 3 W.W.R. 719 at 720 as being those which the court should consider when deciding on an application under the Act by a wife are equally applicable to an application by a child. They are:

(1) The station in life of the parties.
(2) The age, health and general circumstances of the applicant.
(3) The means possessed by the testator at the time of his death.
(4) The property or means which the applicant possessed in her own right.

The fact that the other surviving child makes no claim for a reason that would also apply to the petitioner should not preclude a successful petitioner though it may be considered.

Award

$100 a month until distribution of the estate (at the coming of age of the youngest of the 13 beneficiaries under the will). At distribution the executor shall deduct $1,000 from each beneficiaries' share ($13,000) which shall be invested and out of the income or corpus if necessary, the executor shall pay $100 a month to the petitioner. Any money remaining at the petitioner's death will be returned to the 13 beneficiaries in equal shares.

15. In *Re O'Neill Estate* [1949] 2 W.W.R. 429.

Facts

The petitioner is the only son of the testatrix whose estate of $6,000 was given mostly to her friends. To the petitioner the testatrix left a legacy of $5 a month till he reached 50 years of age, and thereafter $10 a month, to be paid out of the income of the residue.

The fact that the testatrix had any estate at all was not known till after her death. There was evidence that one of her main objectives in writing a will was to prevent her son from taking the entire estate.

The petitioner is 38, married and earns $150 which he claims is not adequate.

Decision

The testatrix gave careful consideration to her will and was in a better position to judge the deserts of the petitioner than is the court. Her provision for the petitioner is just and fulfills her moral duties to him. Petition dismissed.

16. In *Re Stewart* (1962) 31 D.L.R. (2d) 601.

Facts

The petitioner is the only daughter of the testatrix who left her entire estate of $19,000 to her brother. The petitioner does not seem to be in any great need, she is married and owns a house and bank account jointly with her husband. The petitioner and the testatrix were never on very good terms but in the last two years of the testatrix's life the petitioner behaved in such a way toward her mother as to convince the judge that she hated her mother and he found it difficult to think of any justification for her conduct. The brother was good to the testatrix and is a deserving object of her bounty.

Decision

The court followed a decision of the Manitoba Queen's Bench (*Re Karabin* (1954) 62 Man. R. 334) where it was decided that it is the objective opinion of the court and not the subjective opinion of the testatrix that should be considered in determining the effect on the testatrix's moral duty of the petitioner's character or conduct.

The court found that in spite of the petitioner's conduct, the testatrix still had a moral duty to make some provision for her out of her estate, though the duty was minimal in degree.

Award

$2,000

17. In *Re Hornett Estate* (1962) 38 W.W.R. 385

Facts

The petitioner is the 54 year old daughter of the testatrix who left her entire estate of $8,238 to her son, another daughter and the petitioner's son. The petitioner is married and employed. The combined income of she and her husband amounts to $350 per month. Her husband owns revenue property valued at $30,000. The testatrix had cared for the petitioner's son for a great deal of his childhood.

Decision

In *Re Jones Estate; Jones* v. *Fox and McCarvill* (1961-62) 36 W.W.R. 337, affm'd by S.C.C. (1962) 37 W.W.R. 597 it was held (in an application by the wife of a testator) that

> . . . the view that the fundamental purpose of the . . . Act is to provide maintenance and that a petitioner must show need is incorrect. . . . [The] Act requires that the petition receive an equitable share of the estate. While the court should

> take into consideration the petitioner's separate property, said separate property should be considered in determining what is "just and equitable" not what is an adequate provision for maintenance.
>
> (headnote)

The petitioner relied on this case to support her argument that by law she had

> . . . an undeniable and absolute right to "adequate provision for her proper maintenance and support" regardless of [her] need for maintenance and support or of the size of the estate of the testatrix and without taking into consideration her separate property or the circumstances of herself and her husband

The court refused to interpret the *Jones* case as supporting the petitioner's argument. If considered in its context and in light of the authorities upon which these conclusions were based. Also, the court in the *Jones* case was considering what would be a just and equitable provision out of a very large estate ($777,308.71) while the estate in the present case was small ($8,238). The *Jones* case cannot be taken as laying down a general rule that a petitioner is entitled to a share of the estate although the evidence does not disclose any need.

Considering the adequacy of the maintenance already available to the petitioner, the size of the estate and "the reasonableness of the testatrix's bounty to the son of the Petitioner" (page 396) the court dismissed the petition.

18. In *Re Gentile Estate* (1964) 47 W.W.R. 382.

Facts

The petitioner is an adult son of the testatrix whose estate of $20,000 was divided, subject to a life estate in the testatrix's sister, so as to give the petitioner $5,000 and his two brothers the remainder in equal shares. The petitioner has an income of $10,000 per year. He has some sort of infirmity but the court dismissed it as a consideration because, as the testatrix was aware, he had had it since childhood. The two other brothers are less well off then the petitioner--they have incomes of $5,600 per year and $6,500 per year.

Decision

The court, citing *Walker* v. *McDermott* held that there was an onus on the petitioner to establish that the testatrix had breached a moral duty in failing to divide her estate equally among her three sons. Following the *Dawson* case, the court observed that the Act did not present the testatrix from prefering one child to another. The petition was dismissed.

19. In *Re Fraser Estate* (1965) 50 W.W.R. 268 (B.C.C.A.)

Facts

The petitioners are the son and daughter of the testator whose estate amounted to $28,000. Of this, the petitioners are each to take $1,000. The reamining $26,000 is to be divided between the testator's brothers.

The petitioners are both married. The daughter's husband earns $360 per month and until recently the daughter herself worked for $300 per month. They own a farm valued at $9,000 and two cars. They have three children.

The son of the testator has no children. He has left his employment to attend university and is working on a master's degree. He is supported by his wife.

The petitioners and the testator were on reasonable terms though they had not lived together since early childhood and the petitioners had avoided meeting with their father since he was nearly always drunk. The petitioners point out that there would be no estate of the size there is had their father given them proper support.

The testator was on good terms with his brothers and had been cared for by them to some extent.

Decision

At trial the judge reduced the brothers' legacies to $1,000 each and ordered that the remainder of the estate be divided between the petitioners.

On Appeal

Per Whittaker J.A. for the majority. The fact that both petitioners do not suffer for lack of the bare necessities does not affect their application. Both are currently endeavoring to build their standard

of living to a height which is reasonably consistent with the manner in which the testator allowed them to be raised. The daughter is doing so by working outside the home so that her children may not be getting proper care and attention. The son is doing so by attending university during which time he is supported by his wife.

The testator ought to have considered these things. His failure to do so has been properly corrected by the trial judge.

Per Sheppard J.A. dissenting: In deciding the petition the court must make four inquiries

> (1) Whether there is any need for provision for proper maintenance and support.
>
> (2) Whether or not there is a parental duty to provide it.
>
> (3) And that leads into an inquiry into the situation of the child, the standard of living to which the father has accustomed him, the fortune of the father and whether or not the child has or is capable in whole or in part of maintaining himself or herself.
>
> (4) The relief to be allowed is that "just and equitable in the circumstances". (272)

The evidence showed no need in the petitioners and that they had been capable of maintaining themselves adequately in the past. "The purpose of the statute is not merely to increase her capital assets or her standard of living." (p. 273).

Even if there were need, there was no parental duty to provide for it because he had not provided for

the petitioners in the past or accustomed them to any particular standard of living.

Award

$13,000 to each petitioner.

20. *Swain* v. *Dennison* (1966) 54 W.W.R. 606 (B.C.C.A.) affm'd by [1967] S.C.R. 7

Facts

The petitioners were three of five children of the testatrix who in her will divided her estate of $120,000 approximately as follows:

To a friend	$ 200	not in dispute
To a granddaughter	2,000	not in dispute
To Mrs. Swan, a daughter	300	Petitioners
To Mrs. Chadwick, a daughter	4,500	Petitioners
To Mr. Woods, a son	a life interest in 27,000	Petitioners
To Mrs. Hislop, a daughter	43,000	Respondents
To Mrs. Dennison, a daughter	43,000	Respondents

At trial the judge found this division to be unjust and ordered that it be revised except as to the first two dispositions by dividing the entire estate which was to be paid to the children equally among them.

The petitioner, Mrs. Swain and her husband, were not on good terms with the testatrix--who had wanted to

disinherit her completely but was dissuaded by the solicitor. There was no conduct justifying disinheritance. The petitioner had contributed considerable energy to the family enterprise before leaving home when 21 years old.

The petitioner Mrs. Chadwick, is slightly more financially secure than Mrs. Swain. She too contributed to the family enterprise without remuneration. She had lived in a remote place so had not been in close communication with her family for some time before the testatrix's death.

The petitioner Mr. Woods contributed greatly to his parents' enterprise and this was recognized later by his father who assisted him in accumulating an estate which at the time of the petition amounted to $85,000. His wife has some property of her own and a small independent income.

The appellants are younger than any of the petitioners, have several infant children, were much closer to the testatrix, and had looked after her in later years.

Decision

The trial court judge was wrong to conclude that everyone's entitlements were equal. By *Re Dawson* a just parent can prefer one child to another and this testatrix had certain preferences. The trial judges order "comes very close indeed to the making of a new will rather than remedying the fault of the old."

Award

Mrs. Swain $10,000 (and $300 from will)
Mrs. Chadwick $10,000 (and $2,000 from will)
Mr. Woods life estate as per will.

21. In *Re Parks Estate* (1968) 64 W.W.R. 586

Facts

The petitioners are the wife and two sons of the testator who gave his entire estate of $53,000 to his daughter subject to trusts in favour of his wife.

The court found that the petition of the wife was well founded and made an order consistent with that finding.

The sons are aged 49 and 46. Both are railway workers with modest incomes, modest property holdings and reasonable security for the future. The beneficiary under the will is more financially secure than her brothers.

Both sons remained at home for several years after leaving school and before marrying and during that time paid room and board.

Decision

The court reviewed the law with reference to the issue of whether or not the need of the petitioner is a governing factor in deciding whether or not the testator has dealt justly with him. *Re Hornett* is quoted for the

conclusion that the importance of need may depend upon the size of the estate. The estate in this case was thought not to be large--possibly of less value (considering inflation) than the value of the estate in *Walker* v. *McDermott*.

The court observed that there seemed to be no reason for disinheriting the sons but noted that there is no onus on "the executrix to justify disinheritance; on the contrary, the petitioners bear the onus of proving entitlement" (p. 594). The court said that it would not have made a will like that of the testator's but ". . . I should have more justification for interfering with a disposition than the fact that I would not myself have made it."

Following *Swain* v. *Dennison* it was concluded that allowances may be made for purposes other than bare subsistence.

Award

To the wife: $5,000 and the income from the rest of the estate and the right to use the corpus should it be necessary

To the daughter: 3/5 of the remainder (approximately $27,000)

To the sons: 1/5 each of the remainder (approximately $9,000 each)

22. In *Re Page Estate* (1969) 67 W.W.R. 407.

Facts

The petitioner is the adult son of a testator whose estate after large *inter vivos* gifts immediately before death amounted to $40,000. The petitioner took a substantial legacy under the will. Another son of the testator was the principal beneficiary.

The petitioner suffers various physical impediments as a result of war service which moved the court to describe him as partially disabled. He earns nothing but has a pension which had been $215 per month but which was reduced when he received the legacy under the will to $172 per month. His father made him substantial gifts to pay off the mortgage on his home and buy a car. He was not on good terms with his father or the rest of the family. If he takes anything further from the estate his pension will abate further. The testator was aware of this and took it into consideration when making his will.

The principal beneficiary has a substantial income and lives in a very expensive home inherited from his father. The testator had lived with this son and been nursed by his wife. The court found that the gift and legacies given this son were consistent with the testator's moral duty.

Decision

The court noted two principles

(1) the judge must determine what was the moral duty of the testator;

(2) ". . . in all but large estates a testator is entitled to leave little or nothing to an adult son who is self-reliant, self-supporting, and in good health" (page 413).

On this basis the court concluded that if it were not for the petitioner's physical disability the petition would have been dismissed. Also if the petitioner had not been entitled to a pension the court would have increased the proportion of the residue of the estate he would take by diminishing that of the principal beneficiary. But as there is a pension and it would abate by the exact amount of any increase, in the petitioner's inheritance the petition should be dismissed. Arguments that the court should not consider the abatement of the pension were not accepted and the cases on which they were based (In *Re Brousseau Estate* (1952-53) 7 W.W.R. 262 and in *Re Cousins Estate* (1952) 5 W.W.R. 289) were distinguished on the ground that in those cases the payment by the state in maintaining lunatics had "eleemosynoary motivation" while the petitioner had in a sense earned his pension. The testator's consideration of the abatement and his testimentary action based on that consideration were considered the action of a wise and just father.

23. In *Re Bailey Estate* [1972] 1 W.W.R. 39.

Facts

The petitioner is the only son of a testatrix who left her entire estate of $250,000 to her husband (the petitioner's step-father) with the understanding (which the husband admits) that it be used for the

maintenance of the petitioner's sons. The petitioner had an unhappy childhood having been brought up apart from his parents and has not been successful in marriage himself. After leaving school and even during his marriages he lived in his mother's premises and after the breakup of his second marriage his children were cared for by his mother and her husband. The petitioner has been unable to hold a job, has been convicted of several crimes and has conducted himself in such a manner as to cause the judge to describe him as irresponsible and an incompetent weakling. He has received much in the way of gifts and loans (not repaid) of money from the testatrix to help him when in difficulty. The testatrix's husband is wealthy in his own right and has committed himself to providing what will be ample maintenance for the grandchildren of the testatrix out of his own estate.

Decision

Following *Re Stewart, supra,* the court observed that it is the opinion of the judge as to whether the character or conduct of the petitioner should disentitle him. It is not the opinion of the testatrix. The court cited *Allardice* v. *Allardice* (1910) 29 N.Z.L.R. 959 and found guidance in the words at page 969 of that case: "A child, for example, that has been living on a father's bounty could not be expected to begin the battle of life without means."

The court concluded that regardless of how subjectively justified the testatrix's act of disinheriting her son had been, she owed a moral duty to him, a duly she owed to nobody else.

> I think that this good lady had, in the absence of any other claims, not altogether dispite the character and conduct of the petitioner, but to an extent because of that character and conduct, to which her well-meant actions may have contributed, a moral duty to provide for the petitioner, a duty minimal in degree, but nevertheless a duty.
>
> (Page 108)

Award

$300 a month during his life.

24. In *Re Stubbe Estate* [1973] 1 W.W.R. 354.

Facts

The petitioner is the only son of the testator whose estate of $54,000 was, by the will, to be distributed equally among 5 step-daughters of the testator and the petitioner. The testator and his first wife, the petitioner's mother, were separated and during the petitioner's childhood he was not adequately provided for. He is now 49 and employed with an adequate income. The petitioner and the testator were on good terms in the petitioner's adulthood.

Decision

The petitioner is in a different position from the other beneficiaries under the will in that he is the testator's only blood relative. Had this not been the case the petition would have been dismissed. The court found that the testator had a moral duty to repair the neglect he had shown the testator in childhood and having failed to do so in the will, the court was justified in interfering.

Award

One-third of the estate ($18,000) to the petitioner, remaining two-thirds to be divided equally among the step-daughters.

25. In *Re Michalson Estate* [1973] 1 W.W.R. 560

Facts

The petitioner is the only daughter of the testator who left his entire estate of $107,000 to various beneficiaries none of which was the petitioner. The petitioner was never very close to the testator who the court described as being difficult to get along with. During the later years of his life he was a frequent visitor in the petitioner's home until some incident upset him to the point that he decided to disinherit her. After that the petitioner made frequent visits to the testator but he refused to talk to her.

The petitioner is financially very secure being married to a radiologist who earns $50,000 a year. She owns the family home solely ($60,000) and has securities valued at $50,000. She received many gifts from the testator during his life.

Decision

> "In my view there has been a manifest breach of the moral duty owed by the testator to his only daughter, a daughter raised without the benefit of a mother and without any real love or affection from the father. (Page 567)

Award

$20,000.

LIST OF CASES

1. In *Re Mary Ann McAdam* (1924-25) 35 B.C.R. 547; [1925] 2 W.W.R. 593.

2. In *Re Elworthy Estate* (1927-28) 39 B.C.R. 474; [1928] 1 W.W.R. 737.

3. *Walker* v. *McDermott* [1931] S.C.R. 94.

4. In *Re Hoffman* (1930-31) 43 B.C.R. 463; [1931] 1 W.W.R. 293.

5. In *Re Clegg Estate* (1932-33) 47 B.C.R. 447.

6. In *Re Jones Estate* (1934-35) 49 B.C.R. 216; [1934] 3 W.W.R. 726.

7. In *Re Rattenbury Estate* (1935-36) 51 B.C.R. 321.

8. In *Re Fergie Estate* (1938-40) 54 B.C.R. 431; [1939] 3 W.W.R. 573.

9. In *Re Estate of Hubert Shadforth* (1942-43) 58 B.C.R. 317.

10. In *Re Dickinson* (1943-44) 60 B.C.R. 214; [1944] 2 W.W.R. 1.

11. In *Re Estate of Polly Dunn* (1943-44) 60 B.C.R. 457; [1944] 3 W.W.R. 289.

12. In *Re Estate of Sidney Stewart Dawson* (1944-45) 61 B.C.R. 481; [1945] 3 D.L.R. 532.

13. In *Re Estate of Frederick Saunders* (1945-46) 62 B.C.R. 204.

14. In *Re McPhee Estate* [1947] 1 W.W.R. 741.

15. In *Re O'Neill Estate* [1949] 2 W.W.R. 429.

16. *Re Stewart* (1962) 31 D.L.R. (2d) 601.

17. *Re Hornett Estate* (1962) 38 W.W.R. 385.

18. *Re Gentile Estate* (1964) 47 W.W.R. 382.

19. *Re Fraser Estate* (1965) 50 W.W.R. 268.

20. *Swain* v. *Dennison* (1966) 54 W.W.R. 606 affm'd by [1967] S.C.R. 7.

21. *Re Parks Estate* (1968) 64 W.W.R. 586.

22. *Re Page Estate* (1969) 67 W.W.R. 407.

23. *Re Bailey Estate* [1972] 1 W.W.R. 99.

24. *Re Stubbe Estate* [1973] 1 W.W.R. 354.

25. *Re Michalson Estate* [1973] 1 W.W.R. 560.

The following table is an attempt to correlate the information extracted from the preceding cases.

Some interesting points which can be observed from a brief examination of the table include:

(1) In 17 cases, the petitioners financial security was considered at least adequate. Only 7 of these failed. The petitions of 9 petitioners were dismissed. Of these 5 petitions were against small estates, 3 against medium estates and 1 was against a large estate.

(2) Four petitioners were considered very secure financially, and only one of these failed.

(3) None of the petitioners who were less than adequately provided for failed.

(4) Of the 5 petitioners who had physical disabilities, only 1 failed.

(5) Ten petitioners who were left something under the will successfully petitioned. Three failed.

(6) In 7 cases the spouse of the testator or testatrix survived but only in one of these cases did the petition fail.

(7) The most frequent reason for disinheritance was that the testator felt a greater obligation to provide out of his estate for someone other than the petitioner. In only 2 of the 11 such

cases was there a surviving spouse. Interestingly 9 of the petitioners who had been disinherited for this reason saw their petitions dismissed.

(8) Three testators felt they had been sufficiently generous to the petitioners during their lifetimes and for this reason reduced the legacy left to the petitioner or completely disinherited. Only in one case did the court agree.

May other comparisons can be made but it may be noted that the usefulness of these comparisons may be limited by the fact that in these cases possibly the most influential factor in the determination of the case is the discretion of the judge involved. This discretion forms the denominator in each case and without a method of reaching a common denominator, a case comparison can not safely be used to support any conclusions.

Brian Burrows

TABLE OF CASE CORRELATION

Case Number [From Table of Cases]		1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	total	
A. The Estate:																												
1. Size of estate (a) S-small, M-medium, L-large	1	M	S	M	S	S	L	S	S	M	M	S	S	S	L	S	M	S	M	M	L	M	M	L	M	L	31	1
(b) in thousands of dollars	2	33	2.4	25	12.7	2.2	770	2.7*	11.1	24	15	13	5	10	107	6	19	8.2	20	28	120	53	40	250	54	107		2
2. Estate of a testator	3		x	x	x	x	x	x		x			x	x	x					x		x	x		x	x	15	3
3. Estate of a testatrix	4	x							x		x	x				x	x	x	x		x			x			10	4
4. Spouse of testator (testatrix) survives	5			x		x	x	x		x												x		x			7	5
B. The Petitioners:																												
1. Daughter of testator (testatrix)	6	x	x	x	x	x			x	x			x	x		x		x	x		x	x	x				x	16	6
2. Son of testator (testatrix)	7						x	x		x		x	x		x		x			x		x			x	x	x	x	x	x		16	7
3. Age (where given)	8		32			24		37	32	47		48		40	40		60	38		54						49							8
4. Married	9	x		x		x	x	x	x	x	x	x	x	x			x	x	x	x		x	x									17	9
5. Petitioner was a beneficiary under will	10					x	x				x		x					x			x	x	x	x	x	x			x		x		13	10
6. Financial position (a) very secure	11																		x		x	x									x		4	11
(b) adequate	12		x	x	x		x				x	x		x	x			x				x	x	x	x	x	x			x			17	12
(c) less than adequate	13	x				x			x	x			x								x											6	13
(d) in poverty	14							x				x					x															1	14
7. Petitioner suffers from some physical disability	15					x				x		x	x											x							5	15

Case Number [From Table of Cases]		1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	Total	
C. Reason for Disinheritance or Small Legacy																												
1. Petitioner adequately provided for by another source (e.g., estate of other parent)	16	x																									1	16
2. Adequate *inter vivos* gifts	17											x									x			x			3	17
3. Obligation of testator to others	18		x	x						x			x	x	x		x	x	x		x	x	x				11	18
4. Lack of contact between petitioner and testator in later years	19																				x						1	19
5. Absence of any family feelings between testator and petitioner due to separation or divorce, etc.	20				x					x				x						x	x				x		6	20
6. Effect that greater legacy would have had on other source of petitioner's income (e.g., war pension)	21																						x				1	21
7. Disapproval of petitioner's spouse--ill-advised marriage	22						x				x				x												3	22
8 Personality conflict between petitioner and parent	23								x			x		x							x			x		x	6	23
9. Conduct of petitioner considered to be irresponsible	24																							x			1	24
10. Conduct of petitioner was abusive toward testator	25																x										1	25

Case Number [From Table of Cases]		1	2	3	4	5	6	7		8	9	10	11	12		13	14	15	16	17	18	19		20			21		22	23	24	25	totals	
D. Factors Upon Which Award Based																																		
1. Largeness of estate	26			x													x															2	26
2. Financial need of petition (a) general	27	x						x	x				x										x									4	27
(b) short term	28				x	x																										2	28
3. Dependence of petitioner on support from relatives	29				x																											1	29
4. High standard of living to which the petitioner had been allowed by the testator (testatrix) until latter's death	30				x																	x	x									3	30
5. Dependence of petitioner on testator (testatrix) until latter's death	31																												x			1	31
6. Future needs of petitioner re: children	32			x			x																									2	32
7. Possibility of failure of petitioner's current business ventures	33						x																									1	33
8. Contribution of petitioner to the building of the estate	34																							x	x		x	x				4	34
9. Neglect by the parent when petitioner was infant	35				x																	x	x							x	x	5	35
10. Court disapproval of reason for disinheritance	36						x			x														x	x		x	x		x		x	8	36
11. Failure of testator to fulfill 'moral duty' the basis of which was not specified	37																		x													1	37
12. Financial stability of principal beneficiary	38												x														x	x					3	38
13. Absence of moral claim supporting principal beneficiary's legacy	39																														x		1	39

Case Number [From Table of Cases]		1	2	3	4	5	6	7		8	9	10	11	12		13	14	15	16	17	18	19		20			21		22	23	24	25	Total	
E. Award																																		
1. Size (in thousands of dollars)	40	6		6	1	.3	*	1.5	.3	2		3	2				*		2			13	13	10	10		9	9		*	18	20		40
2. Granted in a lump sum	41			x	x					x		x							x			x	x	x	x		x	x			x	x	13	41
3. Granted in periodic payments or on other terms	42	x				x	x	x	x				x				x													x			8	42
4. Size of award influenced (reduced) by claims of others	43				x	x																					x	x					4	43
5. Dismanting judgment	44																					x	x										1	44
F. Reasons for Dismissing Petition																																		
1. Smallness of estate	45		x													x				x													3	45
2. Absence of need	46		x											x	x					x													4	46
3. Justness of claims of others	47		x											x	x	x				x	x												6	47
4. Adequacy of provision in will	48										x															x			x				3	48
5. Approval of reason for disinheritance	49																				x								x				2	49