For Mercy's Sake:

Principles of family maintenance and support in the 20 years since *Tataryn*

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INTRODUCTION

The purpose of this paper is to identify and review the principles guiding family maintenance and support (FMS) applications in Alberta.[1]

First, it will take a brief look at the history of FMS legislation.

Secondly, it will outline the general principles that apply to all applications for FMS in Alberta as extracted from the relevant legislation and case law.

Finally, it will discuss the principles in light of various fact situations and analyze how the principles will — or should — be applied: for example, where there is only one FMS claim, where there are competing FMS claims, where there is an adult interdependent partner instead of a spouse and where spouses were separated at the time of the testator's death. Following each fact situation, a list of cases dealing with similar facts is provided.

Two points must be stressed at the outset:

1. Cases involving FMS claims are driven by their facts. While we attempt to identify some general principles and suggest a unified approach to FMS claims, each case is decided based on its own facts and on how the judge chooses to exercise his or her discretion.

2. FMS legislation is unique because it attempts to balance two very important competing interests: the right to testamentary autonomy on the one hand and the right of family members to receive adequate maintenance and support on the other. The late Justice Johnstone offered the following insight (when speaking about the former *Family Relief Act)*:

> A will is the last opportunity a testator has to benefit his dependants, in order to ensure their needs are met in an appropriate fashion. An

1. While cases from other provinces may be cited, it is important to keep in mind that the legislation varies from province to province and cases from other provinces may be distinguishable on that basis. For example, see Wilson J.'s comments in *Rudd-Birkenbach v. Birkenbach Estate,* 2015 ABQB 3 at para. 40 where he states that Alberta courts "should be cautious before generally relying on B.C. cases applying their *Wills Variation Act*."

> application under the Act is the last chance a dependant has to claim that benefit. For this fundamental reason, applications under the Act are distinct from other maintenance legislation.[2]

Keeping these points in mind, we will now turn to a brief look at the history, and, then, the principles governing modern day FMS claims.

HISTORY

The concept of FMS claims has its roots in New Zealand's *Testator's Family Maintenance Act, 1900*.[3] In Canada, Alberta and Saskatchewan were the first provinces to enact FMS legislation, both in 1910.[4] In *Tataryn v. Tataryn*,[5] the Supreme Court of Canada briefly discussed the history of British Columbia's FMS legislation, the *Wills Variation Act*,[6] and noted that it had been described as social welfare legislation passed as a result of lobbying by women's groups at a time when men owned most property.[7]

The initial Alberta legislation provided only for widows whose husbands had died testate. It was aimed at ensuring that such widows received what was just and equitable from their husbands' estates. While the amount of an award was mostly in the court's discretion, the maximum amount it could award was what the widow would have received if the husband had died intestate.

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2. In *Dupere (Next Friend Of) v. Spinelli Estate*, 1998 ABQB 966 at para. 10.

3. S.N.Z. 1900, c. 20. For a detailed review of the history of FMS legislation in Alberta, see The Alberta Institute of Law Research and Reform, Report No. 29, Family Relief, June 1978. See also Alberta Law Reform Institute's Report for Discussion No. 17, "*Division of Matrimonial Property On Death*", March 1998, Final Report No. 83, "*Division of Matrimonial Property On Death*", May 2000 and Cameron Harvey, *The Law of Dependants' Relief in Canada* (Scarborough: Carswell, 1999), chapter 1.

4. In Alberta, the *Married Women's Relief Act*, S.A. 1910, c. 18 (2nd sess.); in Saskatchewan, the *Devolution of Estates Amendment Act*, S.S. 1910-11, c. 13.

5. [1994] 2 S.C.R. 807.

6. R.S.B.C. 1979, c. c. 435.

7. At 813 and 815.

In the late 1940's, the Alberta legislation was repealed and replaced with the *Testators's Family Maintenance Act*[8] which expanded the scope of the legislation to widowers and minor children. In 1955, that legislation was renamed the *Family Relief Act* and over the course of the past 60 years, it has been amended and renamed on numerous occasions: most notably in 2003, when the *Family Relief Act* was repealed and replaced with the *Dependants' Relief Act,*[9] and in 2010, when the *Dependants' Relief Act* was repealed and replaced with the *Wills and Succession Act* (WSA).[10]

All in all, the last century has seen FMS legislation be expanded greatly in scope, not only in who can apply for relief but also in the amounts and types of relief the court can award. However, one thing has remained constant: whether or not the court will grant relief, and the amount of any FMS award, is entirely in the court's discretion.

We now turn to the principles.

8. **S.A. 1947, c. 12.**

9. **RSA 2000, c. D-10.5.**

10. **S.A. 2010, c. W-12.2, proclaimed in force on 1 February 2012. A portion of Part 5 of the WSA is reproduced in Appendix 1.**

GENERAL PRINCIPLES

A. Purpose of FMS legislation

PRINCIPLE 1:	**The purpose of family support legislation[11] is to ensure that people to whom a testator owed a duty are adequately provided for by the testator's estate. It is remedial legislation, warranting a fair, large and liberal construction that best ensures the attainment of its objects.[12]**

- *Stone Estate (Public Trustee of) v. Stone Estate*, [1994] A.J. No. 419 (Q.B.), var'd 1997 ABCA 380 at para. 5
- *Dupere (Next Friend of) v. Spinelli Estate*, 1998 ABQB 966 at paras. 9 to 11
- *Soule v. Johansen Estate*, 2011 ABQB 403 at para. 19

PRINCIPLE 2:	**The purpose of family support legislation is not to build up an estate for the beneficiaries of a family member.[13]**

- *Stang v. Stang Estate*, 1998 ABQB 113
- *Petrowski v. Petrowski Estate*, 2009 ABQB 196 at paras. 572, 589 and 615
- *Kiernan v. Stach Estate*, 2009 ABQB 150 at para. 71
- *Woods-McKenna v. McKenna-Fenton*, 2015 ABQB 37 at paras. 17 and 18
- *Rudd-Birkenbach v. Birkenbach Estate,* 2015 ABQB 3 at paras. 118 to 119

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11. We will use the terms "family support" or "FMS" to refer to what was formerly known in Alberta as "dependants relief" or '"family relief". We will use the term "family member" in place of "dependant".

12. Citing from *Dupere (Next Friend of) v. Spinelli Estate*, 1998 ABQB 966 at para. 9; cited with approval in *Rudd-Birkenbach v. Birkenbach Estate,* 2015 ABQB 3 at para. 20.

13. There is some discrepancy about whether a claim for FMS survives the death of the applicant. It has been held that there is no need for maintenance and support where the family member has died, and so, the FMS action cannot be continued by executors: *Goverk-Berger v. Gerger Estate* (1986), 22 E.T.R. 195 (Ont. Surr. Ct). However, in *Petrowski v. Petrowski Estate*, 2009 ABQB 196, the court held that the FMS did survive the applicant's death but only up until the date of the applicant's death (see paras. 628 to 631).

PRINCIPLE 3:	**Family support legislation confers a broad discretion on courts and must be read in light of modern values and expectations by reference to contemporary community standards. "The search is for contemporary justice."**

- *Tataryn v. Tataryn*, [1994] 2 S.C.R. 807 at 814-15
- *Koma v Tomich Estate*, 2011 ABCA 186
- *Siegel v. Siegel Estate*, [1995] A.J. No. 1158 (Q.B.) at para. 32
- *Soule v. Johansen Estate*, 2011 ABQB 403 at para. 21
- *Re Lafleur Estate*, 2014 ABQB 698 at para. 51[14]
- *Rudd-Birkenbach v. Birkenbach Estate*, 2015 ABQB 3

PRINCIPLE 4:	**A testator's autonomy to dispose of his or her property on death as he or she wishes should not be interfered with lightly. FMS legislation attempts to balance the interests of testamentary autonomy with the need to provide economic protection to surviving family members. Neither of these values can outweigh the other. Courts should attempt to recognize both interests and should exercise their discretion only so far as the family support legislation requires.[15]**

- *Tataryn v. Tataryn*, [1994] 2 S.C.R. 807 at 824
- *Willan v. Willan Estate*, [1951] A.J. No. 4 (S.C.)
- *Koma v Tomich Estate*, 2011 ABCA 186 at paras. 17 and 24
- *Siegel v. Siegel Estate*, [1995] A.J. No. 1158 (Q.B.) at para. 35
- *Petrowski v. Petrowski Estate*, 2009 ABQB 196 at para. 606, 609 and 616
- *Soule v. Johansen Estate*, 2011 ABQB 403 at para. 19
- *Ponich v. Ponich Estate*, 2011 ABQB 33

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14. The court in *Re Lafleur Estate* discussed current community standards. First, Justice Greckol recognized that current community standards dictate that the surviving spouse be able to make a life for herself or himself, freely and independently. Secondly, she noted the "fluidity of familial relations, and the fact that family ties are undone as readily as they are made." Thus, the court noted the prospect that the surviving spouse may remarry (at para. 52).

15. In *Siegel*, Justice Moreau noted the need of the courts always to pay due regard to the intentions of the testator (at para. 32).

- *Re Eisert-Graydon*, 2003 ABQB 40
- *Woods-McKenna v. McKenna-Fenton,* 2015 ABQB 37 at para. 33
- *Re Lafleur Estate*, 2014 ABQB 698 at paras. 42, 43 and 48

Commentary on Principle 4

1. There may be a range of estate plans that provide adequate provision for the proper maintenance and support of a family member, and, provided that the testator has chosen an option within this range, the will should not be disturbed.

    - *Tataryn v. Tataryn*, [1994] 2 S.C.R. 807 at 824
    - *Siegel v. Siegel Estate*, [1995] A.J. No. 1158 (Q.B.) at para. 35
    - *Woods-McKenna v. McKenna-Fenton*, 2015 ABQB 37 at para. 14
    - *Re Lafleur Estate*, 2014 ABQB 698 at para. 43
    - *Rudd-Birkenbach v. Birkenbach Estate*, 2015 ABQB 3

PRINCIPLE 5:	**Relief under FMS provisions is not automatic, even if an applicant has met the criteria for relief. It is always in the discretion of the court. There is no right or entitlement to relief, only a right to apply for relief.**[16]

- *Stone Estate (Public Trustee of) v. Stone Estate*, [1994] A.J. No. 419 (Q.B.), var'd 1997 ABCA 380 at para. 5 (citing *Dower v. Alberta (Public Trustee)* (1962), 38 W.W.R. (Alta. S.C.T.D.) and *Re Kinloch Estate*, [1972] 2 W.W.R. 445 (Alta. S.C.T.D.))
- *Petrowski v. Petrowski Estate*, 2009 ABQB 196 at para. 487
- *Ponich v. Ponich Estate*, 2011 ABQB 33
- *J.O.K. v. Nelson*, 2013 ABQB 15 at para. 49

16. FMS provisions do not give a family member a legal or equitable right to share in the testator's estate; rather, they enable the court to exercise its discretion in a proper case to ensure that the family member receives adequate provision for his or her proper maintenance and support: see *Stone Estate (Public Trustee of) v. Stone Estate*, [1994] A.J. No. 419 (Q.B.), var'd 1997 ABCA 380 at para. 5 (citing *Dower v. Alberta (Public Trustee)* (1962), 38 W.W.R. (Alta. S.C.T.D.) and *Re Kinloch Estate*, [1972] 2 W.W.R. 445 (Alta. S.C.T.D.)).

B. Who can apply for FMS?

PRINCIPLE 6: To be able to apply for FMS under the WSA, a person must be a "family member".

Commentary on Principle 6

Meaning of family member

1. "Family member" is defined in section 72 of the WSA:

> *72 (b) "family member" means, in respect of a deceased,*
>
> *(i) a spouse of the deceased,*
>
> *(ii) the adult interdependent partner of the deceased,*
>
> *(iii) a child of the deceased who is under the age of 18 years at the time of the deceased's death, including a child who is in the womb at that time and is later born alive,*
>
> *(iv) a child of the deceased who is at least 18 years of age at the time of the deceased's death and unable to earn a livelihood by reason of mental or physical disability,*
>
> *(v) a child of the deceased who, at the time of the deceased's death,*
>
> *(A) is at least 18 but under 22 years of age, and*
> *(B) is unable to withdraw from his or her parents' charge because he or she is a full-time student as determined in accordance with the Family Law Act and its regulations, and*

(vi) a grandchild or great-grandchild of the deceased

(A) who is under 18 years of age, and
(B) in respect of whom the deceased stood in the place of a parent at the time of the deceased's death.

Meaning of Spouse

2. The fact the surviving spouse and the deceased spouse were living separate and apart at the time of the deceased's death does not disentitle the surviving spouse from making an FMS claim.[17] Likewise, the fact the spouses had filed for divorce and one or both had commenced a matrimonial property action, or was entitled to commence a matrimonial property action, does not disentitle the surviving spouse from making a claim.[18]

- *Willan v. Willan Estate*, [1951] A.J. No. 4 (S.C.)
- *Re Edwards*, [1961] A.J. No. 61 (S.C.A.D.)
- *Baker v. Baker Estate*, [1992] A.J. No. 1160 (Q.B.)
- *Zubiss (Moulson) v. Moulson Estate (Church)* (1987), 54 Alta. L.R. (2d) 167 (Q.B.)
- *Chityala v. Chityala Estate* (1986), 71 A.R. 200 (Q.B.)
- *Webb v. Webb Estate*, [1995] 6 W.W.R. 52 (Alta. Surr. Ct.)
- *Stayko v. Stayko Estate*, 2002 ABQB 1005[19]

Meaning of Adult Interdependent Partner

3. To determine whether an applicant is an adult interdependent partner (AIP), the court will look at the definition contained in section 3 of the *Adult Interdependent Relationships Act*

17. For an interesting case in which the deceased purportedly had two living spouses (one in China and one in Canada), see *Re Quon* (1969), 4 D.L.R. (3d) 702 (Alta. T.D.).

18. But, the matrimonial property application will be dealt with first. See discussion below under Principle 28.

19. But the court in *Stayko* refused to grant FMS relief where the parties had been living separate and apart for over 50 years.

(AIRA):[20]

> *3(1) Subject to subsection (2), a person is the adult interdependent partner of another person if*
>
> > *(a) the person has lived with the other person in a relationship of interdependence*[21]
> >
> > *(i) for a continuous period of not less than 3 years, or*
> >
> > *(ii) of some permanence, if there is a child of the relationship by birth or adoption,*
>
> *or*
>
> > *(b) the person has entered into an adult interdependent partner agreement with the other person under section 7.*
>
> *(2) Persons who are related to each other by blood or adoption may only become adult interdependent partners of each other by entering into an adult interdependent partner agreement under section 7.*

4. The factors a court will look at to determine whether a relationship of interdependence exists are set out in sections 1(1)(f) and 1(2):

> *1(1)(f) "relationship of interdependence" means a relationship outside marriage in which any 2 persons*
>
> > *(i) share one another's lives,*
> >
> > *(ii) are emotionally committed to one another, and*
> >
> > *(iii) function as an economic and domestic unit*

---

20. S.A. 2002, c. A-4.5.

21. See *Re Henschel Estate*, 2008 ABQB 406 in which the applicant's claim was struck out as having no cause of action because she did not meet the requirement of cohabitation in the same residence. Parties must actually live together; companionship or emotional commitment is not sufficient. See also *Martin v. Riley*, 2014 ABQB 725.

1(2) In determining whether 2 persons function as an economic and domestic unit for the purposes of subsection (1)(f)(iii), all the circumstances of the relationship must be taken into account including such of the following matters as may be relevant:

(a) whether or not the persons have a conjugal relationship;
(b) the degree of exclusivity of the relationship;
(c) the conduct and habits of the persons in respect of household activities and living arrangements;
(d) the degree to which the persons hold themselves out to others as an economic and domestic unit;
(e) the degree to which the persons formalize their legal obligations, intentions and responsibilities toward one another;
(f) the extent to which direct and indirect contributions have been made by either person to the other or to their mutual well-being;
(g) the degree of financial dependence or interdependence and any arrangements for financial support between the persons;
(h) the care and support of children;
(i) the ownership, use and acquisition of property.

- *Re Henschel Estate*, 2008 ABQB 406
- *Kiernan v. Stach Estate*, 2009 ABQB 150
- *Rogers v. Bogi Estate*, 2012 ABQB 253
- *Tait v. Westphal*, 2013 ABQB 668
- *Goehring v. Lightbown*, 2013 ABQB 709
- *Martin v. Riley*, 2014 ABQB 725

5. Although the Court will review the factors outlined in the *AIRA*, it should look at the facts as whole; no one factor will carry more weight than another.

- *Kiernan v. Stach Estate*, 2009 ABQB 150 at para. 42

- *Tait v. Westphal*, 2013 ABQB 668 at paras. 18 and 19

6. It is unclear whether former adult interdependent partners are entitled to apply for relief under the WSA. The definition of adult interdependent partner contained in AIRA expressly excludes former adult interdependent partners[22] and the court in *Vinokurova* held that the common law relationship must be continuous up to the date of death. However, the court in *Tsang* (decided prior to the WSA coming into effect) held that a former common law spouse was entitled to notice of her rights under the former *Dependants' Relief Act* despite being separated from the deceased for 30 years, suggesting that former common law spouses are entitled to apply, much like estranged spouses can.

- AIRA, sections 1(1)(a) and 10
- *Vinokurova v. Seneker*, 2005 ABQB 590
- *Re Tsang Estate*, 2004 ABQB 735

Children under the age of 18 years

7. Age is determined at the time of the death of the testator or intestate.

- WSA, section 72(b)(iii)
- *Re Buchholz*, [1981] 1 W.W.R. 500 (Alta. C.A.)[23]
- *Pauliuk v Pauliuk Estate*, [1986] A.J. No. 936 (Q.B.)
- *Rudd-Birkenbach v. Birkenbach Estate*, 2015 ABQB 3[24]

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22. Section 10 of AIRA defines "former adult interdependent partner" by setting out how an adult interdependent partner becomes a former adult interdependent partner.

23. In *Buchholz*, the testator died leaving a wife and 5 children, 3 of whom were under 18 at the date of his death. His will left everything to his wife. The Public Trustee made an FMS claim on behalf of the minor children. The lower court awarded the minor children maintenance out of the estate and the Court of Appeal affirmed that decision. The case is interesting because it discusses the age at which FMS relief for a minor child should come to an end, although the court does not decide the issue. The court in *Buchholz* also noted the fact that the testator wanted to treat all of his children equally during his life and that he trusted his wife to look after the children's well being.

24. A family member who was only 17 days away from his 18th birthday at date of the testator's death was entitled to make an FMS claim.

8. Children includes legitimate, illegitimate and adopted children of the testator.

- *Pauliuk v Pauliuk Estate*, [1986] A.J. No. 936 (Q.B.)
- *Dupere (Next Friend of) v. Spinelli Estate*, 1998 ABQB 966
- *C.D.T. (Next Friend of) v. T. Estate*, 2003 ABQB 769

9. It is unclear whether step-children or children to whom the testator stood in *loco parentis* are family members for the purposes of making FMS claims.[25]

Query: is this a gap in the legislation which should be filled or, at least, made clear?

10. A parent, guardian, Public Trustee or any other person, in accordance with the *Alberta Rules of Court* or the *Surrogate Rules,* may apply for FMS relief on behalf of a minor child.

- WSA, section 90(a)
- *Re Buchholz*, [1981] 1 W.W.R. 500 (Alta. C.A.)[26]

Adult children unable to earn a livelihood

11. With respect to claims by children over the age of 18 years but unable to earn a livelihood by reason of mental or physical disability, the relevant time to look at whether the child is disabled is the testator's time of death. However, the relevant time to determine whether adequate provision has been made for the adult dependant child is the date of application.[27]

- *Petrowksi v. Petrowski Estate,* 2009 ABQB 196 at paras. 488 to494
- *Soule v. Johansen*, 2011 ABQB 403

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25. To date, Alberta courts have not been called upon to answer this question, although it is notable that the definition of family member includes grandchildren or great-grandchildren to whom the testator stood in the place of a parent at the time of the testator's death.

26. *Buchholz* is an example of an application made by the Public Trustee.

27. The various issues of timing in FMS claims are quite complex, and the courts across the country have not always been consistent. Based on a review of the case law, it is submitted the general rule should be that the time to determine if child is a minor or is suffering from mental or physical disability is the time of the death, but the time to determine whether adequate provision has been made or to determine the size of the estate is the date of the FMS application. This will be discussed in more detail below.

- *Malychuk v. Malychuk Estate*, [1978] A.J. No. 684 (Alta. S.C.T.D.)
- *Carter v. Alberta Conference Corp. of the Seventh Day Adventist Church*, [1998] A.J. No. 1479 (Q.B.)

12. The family member's disability must be established on the preponderance of the evidence.

- *Soule v. Johansen*, 2011 ABQB 403 at para. 36

13. The ability to "earn a livelihood" has been interpreted by Alberta courts to mean that one can provide adequate livelihood for one's proper maintenance and support.[28] If a family member has a means to obtain the funds to maintain and support him or herself, and if these means provide an income adequate for his or her proper maintenance and support, he or she can earn a livelihood.

Query: how will an adult dependent child who is retired and unable to earn a livelihood be treated?

- *Petrowksi v. Petrowski Estate,* 2009 ABQB 196 at paras. 500 and 501
- *Re Lee Estate*, 2006 NWTSC 13
- *Soule v. Johansen*, 2011 ABQB 403

14. The fact that a person has been approved for government assistance such as AISH and CPP disability benefits and/or is a represented adult pursuant the *Adult Guardianship and Trusteeship Act* support the position that a person is disabled for the purposes of FMS claims.

- *Petrowksi v. Petrowski Estate,* 2009 ABQB 196 at para. 500
- *J.O.K. v. Nelson*, 2013 ABQB 15 at paras. 16 and 17

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28. See *Petrowski* at paras. 500 to 556 for a discussion on what "earn a livelihood" means. The Court stated that "earn a livelihood" should not be viewed in the context of any given point in time, but rather as a reflection of a person's life-long economic activity and status (adopting the view from *Re Lee Estate*, 2006 NWTSC 13 (at para. 501)). An erosion of financial status is an indication of a failure to meet the threshold of adequate maintenance and support (at para. 527).

- *Carter v. Alberta Conference Corp. of the Seventh Day Adventist Church*, [1998] A.J. No. 1479 (Q.B.)

15. However, the availability of government assistance for disabled individuals should not be considered in determining whether a person is able to earn a livelihood. Assistance offered by the state to disabled persons does not discharge a parent's obligation to provide support in a will. Nor should government assistance be considered when calculating a family member's income going forward.

- *Petrowksi v. Petrowski Estate,* 2009 ABQB 196 at paras. 521 and 522
- *Stone Estate (Public Trustee of) v. Stone Estate*, [1994] A.J. No. 419 (Q.B.), var'd 1997 ABCA 380 at paras. 23 to 31
- *Re E.A.H.*, 2005 ABQB 678
- *Carter v. Alberta Conference Corp. of the Seventh Day Adventist Church*, [1998] A.J. No. 1479 (Q.B.)

16. There is no requirement that the adult dependent family member received, or even sought, support from the testator during the testator's life.

- *Soule v. Johansen*, 2011 ABQB 403 at para. 30

17. There are conflicting views about whether a court will consider the family member's role in causing or contributing to any disability that may exist. In *Soule*, the court held that it was not open to the court to ask about the family member's role in causing or contributing to the disability, although when the disability is related to drug use, questions of volition, character and conduct may arise. In *Ponich*, the court listed as a consideration the fact that the family member's drug use may have contributed to his mental illness.

- *Soule v. Johansen*, 2011 ABQB 403 at paras. 36 and 51
- *Ponich v. Ponich Estate*, 2011 ABQB 33

18. In the case of a family member who is a represented adult or an incapacitated person, an application for FMS can be brought by the family member's trustee or any other person in accordance with the *Alberta Rules of Court* or the *Surrogate Rules*.

- WSA, section 90(b)

Grandchildren/great-grandchildren

19. In order for a grandchild or great-grandchild of the deceased to have an FMS claim, the grandchild or great-grandchild must be under 18 years of age, and, the deceased must have stood in the place of a parent at the time of the deceased's death. This latter fact must be corroborated.

- *Malkhassian v. Malkhassian*, 2014 ABQB 353

PRINCIPLE 7:	**The onus is on the applicant to prove, on a balance of probabilities, that they are a family member for the purposes of an FMS claim.**

- *Kiernan v. Stach Estate*, 2009 ABQB 150
- *Rogers v. Bogi Estate*, 2012 ABQB 253
- *Tait v. Westphal*, 2013 ABQB 668
- *Goehring v. Lightbown*, 2013 ABQB 709
- *Martin v. Riley*, 2014 ABQB 725

Commentary on Principle 7

1. The applicant's argument that he or she is a family member must be corroborated by other evidence to satisfy section 11 of the *Alberta Evidence Act*.[29]

- *Kiernan v. Stach Estate*, 2009 ABQB 150
- *Rogers v. Bogi Estate*, 2012 ABQB 253
- *Tait v. Westphal*, 2013 ABQB 668
- *Malkhassian v. Malkhassian*, 2014 ABQB 353
- *Goehring v. Lightbown*, 2013 ABQB 709
- *Martin v. Riley*, 2014 ABQB 725

29. R.S.A. 2000, c. A-18.

2. A court should not make a determination on whether an applicant satisfies the criteria for being a family member simply on the basis of conflicting affidavits and documents that would support either party's position. The court cannot try credibility merely by reading affidavits which conflict on primary facts. Therefore, a trial with oral testimony may be required.[30]

- *Charles v. Young*, 2014 ABCA 200, reversing 2013 ABQB 632
- *Goehring v. Lightbown*, 2013 ABQB 709
- *Martin v. Riley*, 2014 ABQB 725[31]

PRINCIPLE 8:	**An application made by a family member is deemed to be made on behalf of all family members who have been served unless the court orders otherwise.**

- WSA, section 92(1)

C. Adequate provision for the proper maintenance and support

PRINCIPLE 9:	**In Alberta, the question for the court in FMS claims is whether the testator made adequate provision for the proper maintenance and support of the family member.**

Commentary on Principle 9

1. Section 88(1) of the WSA provides:

88(1) If a person

30. See Surrogate Rule 64.

31. Note that, in *Martin*, the court accepted that counsel confirmed that, although the parties were aware that they could take this matter to trial, or to a *viva voce* hearing, it was the desire of all parties that the decision be made based upon the available affidavit and cross-examination evidence because "this would achieve the most cost-effective, timely and efficient method of obtaining a final disposition" (at para. 3).

(a) dies testate without making adequate provision in the person's will for the proper maintenance and support of a family member, or

(b) dies either wholly or partly intestate and the share to which a family member is entitled under a will or Part 3 or both is inadequate for the proper maintenance and support of the family member,

the Court may, on application, order that any provision the Court considers adequate be made out of the deceased's estate for the proper maintenance and support of the family member.

2. In *Petrowski*, the court held that the question of whether the testator made adequate provision for the proper maintenance and support of the family member is:

a) an individual matter, tested by a variety of variables;
b) a reflection of lifestyle and history; and
c) an ongoing requirement that may undergo future changes.

- *Petrowksi v. Petrowski Estate,* 2009 ABQB 196 at para. 534

PRINCIPLE 10:	**What is adequate for proper maintenance and support goes beyond the bare necessities. Courts will look beyond mere need to decide what is adequate provision for the proper maintenance and support of the family member.**

- *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807 at 819-20
- *Willan v. Willan Estate*, [1951] A.J. No. 4 (S.C.)
- *Koma v Tomich Estate*, 2011 ABCA 186
- *Boychuk (Public Trustee of) v. Boychuk*, 2008 ABQB 38
- *Siegel v. Siegel Estate*, [1995] A.J. No. 1158 (Q.B.) at para. 27

- *Petrowski v. Petrowski Estate*, 2009 ABQB 196
- *Dupere (Next Friend of) v. Spinelli Estate*, 1998 ABQB 966
- *Re Lafleur Estate*, 2014 ABQB 698
- *Woods-McKenna v. McKenna-Fenton,* 2015 ABQB 37
- *Rudd-Birkenbach v. Birkenbach Estate*, 2015 ABQB 3

Commentary on Principle 10

1. While it is clear that the courts look beyond the family member's bare necessities in deciding FMS claims, some Alberta courts have made reference to a "needs-maintenance" approach. These cases focus on the difference in wording between the Alberta and British Columbia legislation. They conclude that, in Alberta, the inquiry into whether adequate provision of proper maintenance and support has been made must be assessed from the standpoint of the family member's needs and maintenance because the Alberta legislation, unlike the BC legislation, focuses on dependancy of the family member. This discussion should not be interpreted to mean that a testator only has to meet the mere needs or bare necessities of a family member.

    - *Stang v. Stang Estate*, 1998 ABQB 113 at paras. 22 to 29
    - *Petrowski v. Petrowski Estate*, 2009 ABQB 196 at para. 456
    - *Soule v. Johansen Estate*, 2011 ABQB 403 at para. 23
    - *Rudd-Birkenbach v. Birkenbach Estate*, 2015 ABQB 3 at para. 45

PRINCIPLE 11:	**The term "proper maintenance and support" requires the court to consider the standard of living which the family member is accustomed to or ought to be accustomed to.**

- *Willan v. Willan Estate*, [1951] A.J. No. 4 (S.C.)
- *Re Protopappas Estate*, [1987] A.J. No. 160
- *Siegel v. Siegel Estate*, [1995] A.J. No. 1158 (Q.B.) at para. 32
- *Stang v. Stang Estate*, 1998 ABQB 113
- *Dupere (Next Friend of) v. Spinelli Estate*, [1998] A.J. No. 1276 (Surr. Ct.)
- *Re Lafleur Estate*, 2014 ABQB 698

- *Woods-McKenna v. McKenna-Fenton,* 2015 ABQB 37[32]
- *Rudd-Birkenbach v. Birkenbach Estate*, 2015 ABQB 3

PRINCIPLE 12:	**The relevant time for determining whether adequate provision for the proper maintenance and support of a family member has been made is the time of the FMS application.**[33]

- *Willan v. Willan Estate*, [1951] A.J. No. 4 (S.C.)[34]
- *Malychuk v. Malychuk Estate*, [1978] A.J. No. 684 (Alta. S.C.T.D.)
- *Carter v. Alberta Conference Corp. of the Seventh Day Adventist Church*, [1998] A.J. No. 1479 (Q.B.)

PRINCIPLE 13:	**The onus is on the applicant to satisfy the court that the will does not make adequate provision for the proper maintenance and support of the family member.**

- *Re deBeaudrap* (1983), 44 A.R. 100 (Alta. C.A.) at para. 35
- *Re Protopappas Estate*, [1987] A.J. No. 160 (Q.B.)
- *Malychuk v. Malychuk Estate*, [1978] A.J. No. 684 (Alta. S.C.T.D.)

32. The court in *Woods-McKenna* discussed the need to consider the family member's actual cost of living — that is, the cost that is necessary for the family member to continue to live the kind of lifestyle he or she enjoyed prior to the testator's death. Merely using statistical averages is not the correct method; nor is providing over-inflated expenses. Justice Bensler noted that "[f]or counsel to stake out opposite ends of a conceptual spectrum while leaving the Court to make a proper determination without benefit of reasonable evidence is an increasingly common practice but it is a practice to be actively discouraged" (at para. 46).

33. However, there are cases from other provinces which suggest the relevant time for determining whether adequate provision for the proper maintenance and support of a family member has been made is the date of death. See, for example, *Re Brown* (1969), 70 W.W.R. 543 (Sask. Q.B.); *Morris v. Morris* (1982), 41 B.C.L.R. 239 (C.A.) and *Walker v. Dubord* (1992), 45 E.T.R. 209 (B.C.C.A.).

34. The Court in *Willan* suggested that the court should consider the circumstances not only as they exist at the time of the application, but as they may likely be altered in the future.

D. Legal and moral obligations

PRINCIPLE 14:	**In deciding whether provision is adequate for the proper maintenance and support of a family member, the court should consider two sets of societal norms: legal obligations owed by the testator and moral obligations owed by the testator. Together, these legal and moral norms provide a guide to what is adequate provision for proper maintenance and support.**

- *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807 at 820-23
- *Koma v Tomich Estate*, 2011 ABCA 186
- *Petrowski v. Petrowski Estate*, 2009 ABQB 196

Commentary on Principle 14

1. It is clear that both legal and moral obligations must be considered.

    - *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807
    - *Petrowksi v. Petrowski Estate,* 2009 ABQB 196
    - *Re Lafleur Estate*, 2014 ABQB 698 at para. 17

2. Some courts have used terms such as “guide”, “yardstick” and “starting point” to describe how the legal and moral obligations should be viewed.

    - *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807 at 821[35]
    - *Siegel v. Siegel Estate*, [1995] A.J. No. 1158 (Q.B.) at para. 38[36]

35. Where the court stated “[t]ogether, these two norms provide a guide to what is adequate, just and equitable” in the circumstances of the case” (at p. 821).

36. Where the court stated “[u]sing the *Divorce Act* principles as a yardstick for the determination of the legal obligations of the testator at the time of his death…” (at para. 38).

- *Dupere (Next Friend of) v. Spinelli Estate*, [1998] A.J. No. 1276 (Surr. Ct.) at para. 12[37]

PRINCIPLE 15:	**Legal obligations are those that would be imposed by law on a testator during his or her lifetime were the question of provision for the family member to arise.**

- *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807 at 820-23
- *Siegel v. Siegel Estate*, [1995] A.J. No. 1158 (Q.B.)
- *Stang v. Stang Estate*, 1998 ABQB 113 at paras. 22 to 32
- *Petrowski v. Petrowski Estate*, 2009 ABQB 196 at para. 447

Commentary on Principle 15

Legal obligations owed to spouses

1. With respect to claims by surviving spouses, legal obligations are generally found in matrimonial property principles, the *Divorce Act* provisions dealing with spousal support, unjust enrichment principles (constructive trust)[38] and, possibly, dower provisions.[39]

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37. Where the court stated "[i]ndeed, certain legal obligations, such as the obligations of living parents to their children, may provide a starting point" (at para. 12).

38. For a discussion on the principles of unjust enrichment, including the criteria for establishing a claim and the appropriate remedy (including how to value a monetary claim), see *Kerr v. Baranow*, 2011 SCC 10. Although that case does not deal with an FMS claim, its discussion would apply to claims of unjust enrichment made pursuant to an FMS claim. See also *Lemonine v. Griffith*, 2014 ABCA 46.

39. The issue of dower is beyond the scope of this paper. Suffice it to say that there has been inconsistent treatment by the courts on whether dower rights take precedent over FMS claims. There are cases that group dower rights into the legal obligation analysis: see for instance *Re Broen*, 2002 ABQB 806 and *Stadler v. MacDonald*, 2001 ABQB 408. However, in *Carlson v. Carlson*, [1983] A.J. No. 991 (Q.B.), the court took the view that it could not override the widow's dower rights. Another case suggests that dower rights take priority over FMS claims but that the Court retains the authority to make an order conditional on a spouse relinquishing dower rights and interest if necessary, to make adequate provision out of a deceased's estate for the proper maintenance and support of a dependant: *J.O.K. v. Nelson*, 2013 ABQB 15 at paras. 49 to 52.

    It should be noted that s. 2 of the WSA provides that in the event of a conflict between the *Dower Act* and a provision of Part 2 or 3 respecting a spouse's rights in respect of property after the death of the other spouse, the *Dower Act* prevails. Section 2 does not mention Part 5 of the WSA which deals with FMS.

    Query: can it be argued that the Legislature intended Part 5 to prevail over dower rights since Part 5 is not

- *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807 at 821
- *Siegel v. Siegel Estate*, [1995] A.J. No. 1158 (Q.B.) at para. 36*ff*
- *Stang v. Stang Estate*, 1998 ABQB 113
- *Re Lafleur Estate*, 2014 ABQB 698[40]
- *Woods-McKenna v. McKenna-Fenton,* 2015 ABQB 37

Legal obligations owed to AIPs

2. With respect to adult interdependent partners (AIPs), legal obligations may be found in unjust enrichment principles.[41]

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mentioned in section 2 of the WSA?

For a case dealing with whether a party can waive dower rights in a prenuptial agreement, see *Starosielski v. Starosielski Estate*, 1998 ABQB 651.

40. In *Lafleur*, the court also noted that the deceased had a legal obligation to support his spouse's mother whom he had co-sponsored for permanent residency.

41. For a discussion of unjust enrichment principles and the appropriate remedies see *Kerr v. Baranow*, 2011 SCC 10 and "*Kerr v. Baranow* - The Wages of Sin Revisited", a paper prepared and presented by Jason L. Wilkins of Dunphy Best Blocksom LLP (assisted by Shale Monds) for the Legal Education Society's seminar on Matrimonial Property Division held in January 2015 in Edmonton and February 2015 in Calgary. See also *Lemonine v. Griffith*, 2014 ABCA 46 dealing with the issue of division of property in common law relationships and see *Koma v Tomich Estate*, 2011 ABCA 186 where the Court of Appeal stated:

> 16 … a claim for relief under the *[Dependants' Relief] Act* is not intended to be a surrogate method of advancing a constructive trust claim. Such a claim is an assertion of a proprietary interest in the property of the deceased, and does not depend on the exercise of any judicial discretion under the *Act*. A claim under the *Act*, on the other hand, assumes that the applicant has no proprietary right in the assets in question, and seeks a statutory redistribution of those assets. The two types of claims are based on inconsistent assumptions about the true ownership of the property in question. What the applicant might have received on a hypothetical break up of the relationship is more important in determining what sort of ongoing support the applicant should receive under the *Act*, rather than as a basis for the redistribution of property. If the applicant claims a proprietary entitlement under a constructive trust claim, that claim should be advanced directly.

Thus, where the family member is seeking an order giving him or her a proprietary interest in property, he or she must make a separation application claiming unjust enrichment and constructive trust. Where the family member is claiming relief under FMS, and no proprietary interest *per se*, no separate unjust enrichment claim is necessary and the court will consider unjust enrichment principles as part of the legal obligation analysis.

Legal obligations owed to minor children

3. With respect to children under the age of 18, legal obligations are found in the *Divorce Act* provisions dealing with child support, child support guidelines and any other legislation dealing with support of minor children.[42]

- *Dupere (Next Friend of) v. Spinelli Estate*, 1998 ABQB 966
- *Re Lafleur Estate*, 2014 ABQB 698[43]

Other legal obligations

4. The court in *Petrowski* stated that "legal obligations" include claims flowing from family support legislation that arise only on the death of the testator. A claim under family support legislation whether by a spouse, adult dependent child, or any other family member, should be ranked in the same manner as a legal obligation that arose during the testator's lifetime.[44]

- *Petrowski v. Petrowski Estate*, 2009 ABQB 196 at paras. 479 to 483

Desirability of symmetry

5. With respect to legal obligations, there is a "desirability of symmetry between the rights which may be asserted against the testator before death and those which may be asserted against the estate after his death."

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42. For example, the *Family Law Act*, S.A. 2003, c. F-4.5 and the regulations thereunder.

43. The Court in *Lafleur* rejected the argument that the interests of the surviving spouse (who was also the care giver and guardian of the deceased's children) and the interests of the minor children, are the same (at para. 38). Greckol J. held that such an argument (which had been successful in *Woycenko Estate*, 2002 ABQB 640) ignores the eventuality that the spouse may remarry and the desire of the deceased to preserve a portion of his estate for his children without it being vulnerable to claims of a third party who subsequently becomes involved with the surviving spouse.

44. Although in *Petrowski*, Moen J. suggests, in *obiter*, that legal obligations which arose during the testator's lifetime take precedence over legal obligations arising on death (at para 592).

- *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807 at 821
- *Siegel v. Siegel Estate*, [1995] A.J. No. 1158 (Q.B.) at para. 32
- *Stang v. Stang Estate*, 1998 ABQB 113 at paras. 22 to 32
- *Petrowski v. Petrowski Estate*, 2009 ABQB 196 at para. 447

6. Some courts have used terms such as "guide", "yardstick" and "starting point" to describe how legal obligations should be viewed. Likewise, courts have also stated that maintenance and support allocations which the law would support during the testator's lifetime *"should be reflected"* in the court's interpretation of what is adequate, just and equitable (or in Alberta, in the court's interpretation of what is adequate provision for the proper maintenance and support of a family member).[45]

- *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807 at 821[46]
- *Siegel v. Siegel Estate*, [1995] A.J. No. 1158 (Q.B.) at para. 38[47]
- *Dupere (Next Friend of) v. Spinelli Estate*, [1998] A.J. No. 1276 (Surr. Ct.) at para. 12[48]

7. However, other courts have suggested that legal obligations represent the minimum amount a family member is entitled to.[49] Thus, according to this view, a surviving spouse is entitled to at least the same allocation of matrimonial property that he or she would have been entitled to if the spouses had separated prior to the death of the testator.

- *Stang v. Stang Estate*, 1998 ABQB 113 at paras. 26 to 30
- *Gow v. Gow Estate*, 1998 ABQB 1073

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45. See, for example, *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807 at 821. This statement is cited in *Siegel v. Siegel Estate*, [1995] A.J. No. 1158 at para. 1.

46. Where the court stated "[t]ogether, these two norms provide a guide to what is adequate, just and equitable" in the circumstances of the case" (at p. 821).

47. Where the court stated "[u]sing the *Divorce Act* principles as a yardstick for the determination of the legal obligations of the testator at the time of his death…" (at para. 38).

48. Where the court stated "[i]ndeed, certain legal obligations, such as the obligations of living parents to their children, may provide a starting point" (at para. 12).

49. See, for instance, *Stang v. Stang Estate*, 1998 ABQB 113.

8. Query: Does symmetry require that FMS awards should be, at a minimum, equal to what legal obligations would dictate? For example, is a surviving spouse entitled to receive, at a minimum, what maintenance and support allocations or matrimonial property provisions would give him or her? Or, are legal obligations such as matrimonial property provisions a mere starting point or guide for the court in assessing whether adequate provision for the proper maintenance and support of a surviving spouse has been made?

PRINCIPLE 16:	**After the legal obligations have been considered, the testator's moral obligations must be considered in assessing whether the family member receives what is adequate provision for his or her proper maintenance and support.**

- *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807 at 821-822
- *Siegel v. Siegel Estate*, [1995] A.J. No. 1158 (Q.B.)
- *Petrowski v. Petrowski Estate*, 2009 ABQB 196
- *Re Lafleur Estate*, 2014 ABQB 698 at para. 17

Commentary on Principle 16

1. Moral obligations are those found "*…in society's reasonable expectations of what a judicious person would do in the circumstances, by reference to contemporary community standards*."

    - *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807 at 821

2. Moral obligations vary in strength on the basis of social expectation. Some moral claims may be stronger than others and it is up to the court to weigh the strength of each claim and assign to each its proper priority.

    - *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807 at 823
    - *Petrowski v. Petrowski Estate*, 2009 ABQB 196 at para. 452

3. In general, the moral claim of a surviving spouse is to be considered of the highest order. This recognizes that marriage is an economic unit to which both parties have contributed and that the surviving spouse is entitled to be provided for in his or her final years.

- *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807 at 824
- *Boychuk (Public Trustee of) v. Boychuk*, 2008 ABQB 38
- *Re Broen Estate*, 2002 ABQB 806 at para. 19
- *Stang v. Stang Estate*, 1998 ABQB 113 at para. 53
- *Gow v. Gow Estate*, 1998 ABQB 1073
- *J.O.K. v. Nelson*, 2013 ABQB 15 at para. 36
- *Rudd-Birkenbach v. Birkenbach Estate*, 2015 ABQB 3[50]
- *Woods-McKenna v. McKenna-Fenton*, 2015 ABQB 37 at paras. 17 to 23

Query: where there are competing FMS claims, should the court look at all of the circumstances to determine if the FMS claim of another family member is as high or higher than the spouse's?[51] Or, should the spouse's claim automatically be ranked higher?

E. Other factors to be considered when assessing FMS claims

PRINCIPLE 17:	**In addition to the legal and moral obligations, courts must consider the factors set out in section 93 of the WSA when considering applications for FMS.**

Commentary on Principle 17

1. Section 93 of the WSA provides that courts shall consider the following factors in considering

50. See paragraph 122 of *Rudd-Birkenbach* where the court accepted the respondent's submission that a child's claim to a deceased parent's estate is more far removed than that of the surviving spouse because "[u]nlike a spouse, a child is not the financial partner of the parent deceased. A child does not have an expectation of financial sharing during the testator's life in the same way that a spouse does. A child of the deceased has no right to amass an estate under the guise of a dependant's relief application."

51. In *Boychuk*, *Stang, Gow* and *Broen*, there were no competing FMS claims by other family members – the spouse had the only FMS claim against the estate.

FMS claims:

> *93 In considering an application for the maintenance and support of a family member, the Court shall consider, as applicable,*
>
> *(a) the nature and duration of the relationship between the family member and the deceased,*
> *(b) the age and health of the family member,*
> *(c) the family member's capacity to contribute to his or her own support, including any entitlement to support from another person,*[52]
> *(d) any legal obligation of the deceased or the deceased's estate to support any family member,*
> *(e) the deceased's reasons for making or not making dispositions of property to the family member, including any written statement signed by the deceased in regard to the matter,*
> *(f) any relevant agreement or waiver made between the deceased and the family member,*
> *(g) the size, nature and distribution of*
> *(i) the deceased's estate, and*
> *(ii) any property or benefit that a family member or other person is entitled to receive by reason of the deceased's death,*
> *(h) any property that the deceased, during life, placed in trust in favour of a person or transferred to a person, whether under an agreement or order or as a gift or otherwise, and*

52. The family member may be required to disclose his or her financial position when making an FMS claim (WSA, s. 95) and the size of the family member's own estate is clearly a factor the courts consider when deciding whether the deceased made adequate provision for the proper maintenance and support of the family member. However, the cases are not clear on whether the family member is expected to exhaust his or her own savings or assets before using money from the estate where, for example, the court awards a life estate in a certain bank account, with the balance going to other beneficiaries when the family member dies. While the court has discretion to impose any conditions or restrictions it sees fit on FMS awards (WSA, s. 96), it rarely does so. Of course, the principle that FMS claims should not be used to build up an estate for the family member must always be kept in mind.

(i) any property or benefit that an individual is entitled to receive under the Matrimonial Property Act, the Dower Act or Division 1 of this Part by reason of the deceased's death,

and may consider any other matter the Court considers relevant.

Commentary on Principle 17

1. Query: Do the "legal obligations" referred to in section 93(d) mean those same legal obligations discussed by the court in *Tataryn*? If yes, can it now be argued that legal obligations are simply a factor the court must consider (that rank with all other section 93 factors) instead of being the first set of social norms a court should consider and the obligations having the highest priority? Alternatively, does "any legal obligation of the deceased" in section 93(d) refer to other obligations pursuant to court orders (such as child support)? In the recent case of *Woods-McKenna*, the court seems to suggest that the legal obligations referred to in s. 93(d) are the same ones discussed by the court in *Tataryn*.

    - *Woods-McKenna v. McKenna-Fenton*, 2015 ABQB 37 at para. 28

2. *Lafleur Estate* is an example of a case where the court noted the deceased had a legal obligation to support a third party - his wife's mother whom he had co-sponsored for permanent residency

    - *Re Lafleur Estate*, 2014 ABQB 698

3. Section 93(f) lists any relevant agreement or waiver made between the deceased and the family member as a factor to consider. However, section 103 of the WSA states that an FMS order may be made despite any waiver or agreement to the contrary by a family member. Also, there are many cases holding that parties cannot contract out of FMS provisions for public policy reasons. The best view is that, while parties cannot contract out of FMS provisions, contracts such as prenuptial agreements, matrimonial property settlement

agreements and dower releases[53] can be considered by the court as factors in assessing whether the deceased made adequate provision for the proper maintenance and support of a family member in the circumstances.

- *Re Edwards*, [1961] A.J. No. 61 (S.C.A.D.)
- *Webb v. Webb Estate*, [1995] 6 W.W.R. 52 (Alta. Surr. Ct.)
- *Skworoda v. Skworoda Estate*, 2008 ABQB 240
- *Stepaniuk v. Kozial* (1985), 60 A.R. 47 9Q.B.)
- *Re Berube*, [1973] 3 W.W.R. 180 (Alta. C.A.)
- *Re Sheremata Estate*, 1998 ABQB 205
- *Woods-McKenna v. McKenna-Fenton*, 2015 ABQB 37[54]

PRINCIPLE 18:	**In addition to the section 93 factors (which must always be considered), the court should consider several common law factors when deciding whether an FMS award should be made.**

Commentary on Principle 18

1. The list of factors that a court should consider when deciding whether to make an FMS award as established by case law (*the common law factors*) is as follows:[55]

- the size of the estate;
- other family member(s);
- the age and state of health of the family member(s);
- the station in life of the testator and the family members(s);

53. For a case dealing with whether a party can waive dower rights in a prenuptial agreement, see *Starosielski v. Starosielski Estate*, 1998 ABQB 651.

54. Where the court held that, in light of section 103 of the WSA, nothing turned on the Pre-Nuptial Agreement (at para. 37).

55. It should be noted that this list is not exhaustive and the courts can consider any factor it considers relevant: see *Koma v Tomich Estate*, 2011 ABCA 186 at para. 18 and *Re Lafleur Estate*, 2014 ABQB 698 at para. 45.

- the character of the testator and the family member(s);[56]
- the likelihood of the family member(s)' needs increasing;
- the likelihood of inflation;
- other sources of income of the family member(s);[57]
- the mode of life to which the family member(s) "ought" to be accustomed;
- cost of living;
- claims of others against the estate (or competing moral claims); and
- other future contingencies that are reasonably foreseeable.

- *Koma v Tomich Estate*, 2011 ABCA 186 at para. 18
- *Willan v. Willan Estate*, [1951] A.J. No. 4 (S.C.)
- *Stone Estate (Public Trustee of) v. Stone Estate*, [1994] A.J. No. 419 (Q.B.), var'd 1997 ABCA 380 at paras. 23 to 31
- *Dupere (Next Friend of) v. Spinelli Estate*, [1998] A.J. No. 1276
- *Re Protopappas Estate*, [1987] A.J. No. 160 (Q.B.)
- *Pauliuk v. Pauliuk Estate*, [1986] A.J. No. 936 (Q.B.)
- *Petrowski v. Petrowski Estate*, 2009 ABQB 196 at paras. 503
- *Ponich v. Ponich Estate*, 2011 ABQB 33[58]
- *Re Lafleur Estate*, 2014 ABQB 698
- *Rudd-Birkenbach v. Birkenbach Estate*, 2015 ABQB 3

2. Although the section 93 factors and common law factors overlap to some extent, they do not entirely do so and, arguably, both sets of factors are relevant.

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56. For a case where the court focussed on the applicant's character, see *Re Kinsella Estate*, 2004 ABQB 664. See also *Soule v. Johansen*, 2011 ABQB 403 where the court suggested that when a family member's disability is related to drug use, questions of volition, character and conduct may arise (at para. 51).

57. See *Rudd-Birkenbach v. Birkenbach Estate*, 2015 ABQB 3 where the court rejected the respondent's submission that the applicant, a minor child, could rely on his mother to contribute to his maintenance and support. In that case, the deceased's estate was valued at over $46 million and the applicant's mother had modest assets. The court stated the mother's contribution would be "negligible" compared to what the estate can and should pay (at para. 94).

58. Note that Veit J.'s list of factors in *Ponich* varies from the other cases listed and suggests that whether there is another parent alive that can support a family member may be a relevant factor (see paras. 24 and 25).

3. The cases refer to the common law list as a list of factors a court should consider *when assessing moral obligations* or *when determining the threshold level of maintenance and support*. In contrast, section 93 refers to the list contained there as factors a court <u>*shall*</u> consider in considering applications for family maintenance and support of a family member. Since not all of the common law factors are included in section 93, it is arguable that the common law factors continue to apply and should be considered by courts when assessing moral obligations (in addition to the section 93 factors).

PRINCIPLE 19:	**In assessing proper maintenance and support, a court should not assume that government funded programs such as AISH and CPP will always be available to a family member.**

- *Stone Estate (Public Trustee of) v. Stone Estate*, [1994] A.J. No. 419 (Q.B.) var'd 1997 ABCA 380 at paras. 23 to 31
- *Petrowksi v. Petrowski Estate,* 2009 ABQB 196 at para. 522
- *B.G.B. (Public Trustee of) v. S.V.*, 2003 ABQB 683

F. Competing FMS claims

PRINCIPLE 20:	**Where there are competing FMS claims and the size of the estate permits, all FMS claims should be met.**

- *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807 at 823

PRINCIPLE 21	**In situations where there are competing FMS claims but an insufficient estate to satisfy all claims, it is up to the court to weigh the strength of each claim.**

- *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807 at 823
- *Petrowski v. Petrowski Estate,* 2009 ABQB 380 at para. 452
- *J.O.K. v. Nelson*, 2013 ABQB 15 at para. 33

PRINCIPLE 22	**Where there are competing FMS claims, legal obligations generally take precedence over moral claims.**[59]

- *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807 at 823
- *Petrowski v. Petrowski Estate*, 2009 ABQB 380 at paras. 451 and 452

PRINCIPLE 23	**In assessing competing moral obligations, the court considers** [60]
1.	**the overall size of the estate;**
2.	**the income and resources of the various competing potential recipients;**
3.	**the present and future requirements of the persons asserting a right to the estate, as dependant on age, health, lifestyle, that are required to meet an adequate standard of support and maintenance;**
4.	**the legitimate expectations and lifestyles of the competing potential recipients**
5.	**the moral obligation that society places on a person to maintain and support persons in certain relationships and circumstances; and**
6.	**other facts that may negate a right to receive a part of the estate.**

- *Petrowski v. Petrowski Estate*, 2009 ABQB 380 at para. 594, citing *Tataryn*, *Dupere*, *Lee*, *Kinsella*, and *Re E.A.H*.

59. But given Moen J.'s conclusion in *Petrowski* that claims under family support provisions are legal obligations arising on death which are to be ranked with all other legal obligations arising during the deceased's lifetime, it is unclear how a situation could exist where there is more than one FMS claimant but only one has a legal claim.

60. These supplement, and to some extent reiterate, the section 93 and common law factors discussed above.

G. What constitutes the "deceased's estate" for the purposes of an FMS claim?

PRINCIPLE 24:	**Unless the Court orders otherwise, orders for provision for maintenance and support charge the whole of the deceased's estate over which the Court has jurisdiction.**

Commentary on Principle 24

1. Section 98 of the WSA provides:

> *98 Unless the Court orders otherwise, an order for maintenance and support under this Division charges the whole of the deceased's estate or, if the Court does not have jurisdiction over the whole estate, the whole of that portion of the estate over which the Court has jurisdiction.*

2. The court only has jurisdiction to distribute assets located within Alberta. But, presumably, the court can take the value of foreign assets into account in FMS claims similarly to what is done in matrimonial property disputes.

- *Alpugan v. Baykan*, 2014 ABCA 152[61]
- *Chikonyora v. Chikonyora*, 2013 ABCA 320[62]

61. A matrimonial property case.

62. A case dealing with the requirement to disclose of foreign property in a matrimonial property dispute.

PRINCIPLE 25:	**In awarding provision for maintenance and support, the court looks to the deceased's *net* estate — after debts, liabilities, and reasonable estate administration expenses are paid — to determine the size of the estate available to FMS claimants.**[63]

- *Boje v. Olson*, 2009 ABQB 749
- *Boychuk (Public Trustee of) v. Boychuk*, 2008 ABQB 38
- *Argue v. Ebeling Argue Estate*, 2008 ABQB 299
- *Dupere (Next Friend Of) v. Spinelli Estate*, [1998] A.J. No. 1276 (Surr. Ct.)
- *Webb v. Webb Estate*, [1995] 6 W.W.R. 52 (Alta. Surr. Ct.)
- *Pauliuk v. Pauliuk Estate*, [1986] A.J. No. 936 (Q.B.)
- *Re G.E.S. Estate*, 2003 ABQB 674
- *Re Rubis Estate*, 2006 ABQB 381
- *Re Hearn Estate*, [1945] O.J. No. 236 (Ont. C.A.)
- *Downton v. Royal Trust Co.* (1980), 8 E.T.R. 229 (Nfld. C.A.)
- *Kuhn v. Kuhn Estate*, [1992] N.S.J. No. 74 (T.D.)
- *Kazarian v. Fraser*, 2011 ONSC 3794
- *Re Lafleur Estate*, 2014 ABQB 698
- Cameron Harvey, *The Law of Dependants' Relief in Canada* (Scarborough: Carswell, 1999) at 169 to 178

Commentary on Principle 25

1. The Alberta legislation does not define "deceased's estate", unlike Saskatchewan's *Dependant's Relief Act, 1996*[64] which defines "estate" to mean:

> *2(1) "estate" means all the property of which a deceased had a*

63. A review of cases decided under the former DRA confirms that it is the net estate that is available with respect to FMS claims: see, for example, *J.O.K v. Nelson*, 2013 ABQB 15, *Boje v. Olson*, 2009 ABQB 749, and *Re G.E.S. Estate*, 2003 ABQB 674. While the wording under the WSA is slightly different, it is submitted that the court should continue to look to the net estate of the deceased.

64. S.S. 1996, c. D-25.01.

power to dispose by will, otherwise than by virtue of a special power of appointment, less the amount of the deceased's funeral, testamentary and administration expenses and debts and liabilities that are payable out of his estate on his or her death.

2. Section 9 of Alberta's former *Dependants' Relief Act* (DRA) provided:[65]

> *9 Unless the judge otherwise determines, the incidence of any provision for maintenance and support that is ordered pursuant to this Act falls ratably*
>
> *(a) on the whole estate of the deceased, or*
>
> *(b) if the jurisdiction of the judge does not extend to the whole estate, on that part of the estate to which the jurisdiction of the judge extends,*
>
> *and the judge may relieve any part of the deceased's estate from the incidence of the order for maintenance and support.*

This wording has been interpreted to mean *net* estate: see *Downton v. Royal Trust Co.* (1980), 8 E.T.R. 229 (Nfld. C.A.) and other cases noted above.

While no cases were found interpreting the wording set out in the current section 98 of the WSA, it is submitted that the same principles apply and it is the net estate that the courts will look to.

3. The costs of winding up the estate, including the legal costs of defending an FMS claim, are properly considered estate administration expenses, provided that the executor acted reasonably and in good faith in defending the action.[66]

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65. This wording is still present in British Columbia: see section 65 of British Columbia's *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13.

66. See the Alberta Law Reform Institute's Report for Discussion No. 17, "*Division of Matrimonial Property On Death*", March 1998 and Final Report No. 83, "*Division of Matrimonial Property On Death*", May 2000 for a discussion of priorities and estate administration expenses.

- *Boje v. Olson*, 2009 ABQB 749
- *Re Broen Estate*, 2002 ABQB 806
- *Kowalski v. Kowalski Estate*, 2005 ABQB 378
- *Kazarian v. Fraser*, 2011 ONSC 3794
- *Downton v. Royal Trust Co.* (1980), 8 E.T.R. 229 (Nfld. C.A.)

4. In *Boje v. Olson*, 2009 ABQB 749, Graesser J. upheld a prior ruling that the specific bequests were to be paid before the FMS award, and the FMS award was to be paid out of the residue of the estate (at para. 78). However, that case dealt with a claim under the DRA which contained different wording than the current WSA. Section 9 of the DRA stated that the incidence of any provision for maintenance and support ordered "falls ratably on the whole estate of the deceased." The WSA does not contain the words "falls ratably".[67]

5. In general, courts should take the approach used in MPA actions and look at the net value of the estate *at the time of trial or time of distribution* to determine what is adequate provision for a family member. However, courts do have discretion to use a different date, such as the date of death, if the circumstances warrant it.[68]

- *Willan v. Willan Estate*, [1951] A.J. No. 4 (S.C.)[69]
- *Hodgson v. Hodgson*, 2005 ABCA 13
- *Baker v. Baker Estate*, [1992] A.J. No. 1160 (Q.B.)
- *Repas v. Repas*, 2012 ABQB 572
- *Downton v. Royal Trust Co.* (1980), 8 E.T.R. 229 (Nfld. C.A.)[70]

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67. See the Alberta Law Reform Institute's Report for Discussion No. 17, "*Division of Matrimonial Property On Death*", March 1998 and Final Report No. 83, "*Division of Matrimonial Property On Death*", May 2000 for a discussion on what part of the estate should bear the burden of a matrimonial property order.

68. See the Alberta Law Reform Institute's Report for Discussion No. 17, "*Division of Matrimonial Property On Death*", March 1998 and Final Report No. 83, "*Division of Matrimonial Property On Death*", May 2000 for a discussion on valuation date for matrimonial property purposes.

69. The Court in *Willan* suggested that the court should consider the circumstances not only as they exist at the time of the application, but as they may likely be altered in the future.

70. In *Downton*, the court used the net value as of the date of deemed realization of the estate assets.

It is submitted that this approach is consistent with the approach taken with respect to matrimonial property actions, and is arguably, the best way to ensure that people to whom a testator owes a duty are adequately provided for by the testator's estate. It is also consistent with the case law where courts tend to look at the assets as of date of trial although providing no discussion on the issue of date of valuation.

This approach would also be consistent with the fact that, where a family member has applied for FMS outside the six month limitation period set out in section 89 of the WSA, the Court may, in its discretion, make an FMS order with respect to any part of the estate that is not distributed *at the date of the application*.[71]

6. If the estate is insolvent, there is no estate for FMS purposes.[72]

- *Kazarian v. Fraser*, 2011 ONSC 3794
- Cameron Harvey, *The Law of Dependants' Relief in Canada* (Scarborough: Carswell, 1999) at 171, citing *Re Thomson Estate*, [1942] 2 W.W.R. 46 (Sask. C.A.); Cf. *Re McIntyre*, [1925] 3 W.W.R. 172 (Alta. T.D.)

PRINCIPLE 26:	**Assets which do not form part of the estate for probate purposes, such as property held in joint tenancy, joint bank accounts and life insurance or investments with named beneficiaries, do not form part of the deceased's estate for the purposes of FMS claims.**[73]

- Cameron Harvey, *The Law of Dependants' Relief in Canada* (Scarborough: Carswell, 1999) at 170-71

71. See discussion in *Willan v. Willan Estate*, [1951] A.J. No. 4 (S.C.).

72. See the Alberta Law Reform Institute's Report for Discussion No. 17, "*Division of Matrimonial Property On Death*", March 1998 and Final Report No. 83, "*Division of Matrimonial Property On Death*", May 2000 for a discussion of insolvent estates and matrimonial property orders.

73. The Ontario, PEI, NWT and Yukon statutes specifically include property such as joint bank accounts, property held in joint tenancy and life insurance in the deceased's estate. See, for example, s. 72 of Ontario's *Succession Law Reform Act*, R.S.O. 1990, c. S. 26 and s. 19 of PEI's *Dependants of a Deceased Person Relief Act*, R.S.P.E.I. 1998, c. D-7. Alberta has no such provision.

PRINCIPLE 27:	**Property given in a will in accordance with a contract to do so, made in good faith and for valuable consideration, is not subject to an FMS order except to the extent that the value of the property, in the opinion of the court, exceeds the consideration received by the testator under the contract.**

- WSA, section 102

PRINCIPLE 28:	**Where, in addition to making an FMS claim, a surviving spouse has either filed a matrimonial property claim under the *Matrimonial Property Act* (MPA) prior to the deceased spouse's death or within 6 months of the date of the grant of probate or administration, the matrimonial property claim must be decided first and the FMS claim applies to what is left in the estate after the matrimonial property order is awarded.**[74]

- *Baker v. Baker Estate*, [1992] A.J. No. 1160 (Q.B.)
- *Zubiss (Moulson) v. Moulson Estate (Church)* (1987), 54 Alta. L.R. (2d) 167 (Q.B.)

Commentary on Principle 28

1. The rationale for this principle is that section 15 of the MPA provides that money paid or transferred to a surviving spouse under the MPA does not form part of the estate of the deceased and is not subject to a claim against the estate by a dependant under the *Dependants' Relief Act*.[75]

2. While it is clear that matrimonial property actions that have been filed prior to, or at the same time as, FMS claims must be dealt with first — and that the FMS claims proceed only with respect to what is left in the estate after the matrimonial property is divided — it is not clear whether a matrimonial property division is required where the spouses were not separated and the surviving spouse makes an FMS claim.

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74. It is important to note that, in order to file a matrimonial property action after the deceased spouse's death (but within 6 months of the grant of probate or administration being issued), the surviving spouse must have been eligible to commence a matrimonial property action immediately before the death of the deceased spouse. Thus, the factors set out in sections 3 and 5 of the MPA must be satisfied. For example, the parties must have been living separate and apart for at least one year.

75. Note that the MPA has not yet been amended to refer to the WSA.

One view is that there is no requirement that a matrimonial property analysis has to be done first and that the matrimonial property be taken out of the estate before the FMS claim is decided. According to this view, the court has the complete discretion to give the surviving spouse more or less than what a matrimonial property allocation would give him or her depending on the circumstances of the case. While matrimonial property principles should be considered and used as a guide in FMS claims, the court is not bound by them.

However, the opposing view is that, in considering legal obligations owed by the testator to the surviving spouse, the court is bound to ensure that the surviving spouse receives at least as much as he or she would have received under a matrimonial property division. This view takes the position that the law should treat surviving spouses who were still happily married to, or who were at least still cohabiting with, the testator at the time of the testator's death the same as those spouses who were separated from their deceased spouse at the time of death.[76] This line of thought focuses on the desirability of symmetry discussed above, and is based on the notion that the surviving spouse is, and always has been, the beneficial owner of one half of the matrimonial property.[77]

Query: which line of reasoning is more persuasive?

PRINCIPLE 29:	**Where the family member has applied for FMS outside the six month limitation period set out in the WSA, the Court may, in its discretion, make an FMS order with respect to any part of the estate that is not distributed at the date of the application.**

- WSA, section 89(2)

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76. See the Alberta Law Reform Institute's Report for Discussion No. 17, "*Division of Matrimonial Property On Death*", March 1998 and Final Report No. 83, "*Division of Matrimonial Property On Death*", May 2000 for a discussion of this issue. See also *Gow v. Gow Estate*, 1998 ABQB 1073 in which the court interprets *Tataryn* so that surviving spouses receive, at a minimum, what they would have been entitled to under a MPA division. However, there were no competing FMS claims in *Gow* and it is unclear what the court would have done had their been competing claims. See also *Stang v. Stang Estate*, 1998 ABQB 113 in which the court discusses the principle that surviving spouse should not be worse off than a divorcing or separating spouse eligible for a MPA division.

77. The former s. 117 of the WSA (which was never proclaimed in force) addressed this issue by providing for matrimonial property sharing on death.

- *Koma v Tomich Estate*, 2011 ABCA 186
- *Tait v. Westphal*, 2013 ABQB 668

PRINCIPLE 30:	**Where the family member has applied for FMS outside the six month limitation period set out in the WSA, and the entire estate has been distributed by the time the application is made, there is no estate which the family member can claim under FMS and the application will be dismissed.**

- *Re Singer Estate*, 2000 ABQB 944, aff'd 2002 ABCA 294

H. Types of Relief

PRINCIPLE 31:	**The court has wide discretion to order a remedy to a family member to whom the testator did not make adequate provision for the adequate maintenance and support. The remedy may be fashioned as an amount payable annually or otherwise, as a lump sum to be paid or held in trust, or by a transfer or assignment of a specified property.**

Commentary on Principle 31

1. Sections 87 to 108 of the WSA set out the courts' broad powers in FMS claims. In particular, the court may:

   - make any provision that it considers adequate (s.88(1));
   - make an order in respect of one or more family members (s. 88(2));
   - make an order in respect of all or any part of the estate (s. 88(3));
   - limit or terminate any period of temporary possession of the family home (s. 88(4));
   - allow an application to be made outside the 6 month limitation period (with respect to any part of the estate that is not distributed at the date of the application) (s. 89(2));

- consider any matter it considers relevant (s. 93);
- make an interim order (s. 94);
- impose any conditions or restrictions that it considers appropriate (s. 96(1));
- direct that provision for adequate maintenance and support be made out of and charged against the estate in the proportion and the manner the courts considers appropriate (s. 96(1)(a));
- direct that provision for maintenance and support be made out of income or capital, or both (s. 96(1)(b));
- give all necessary directions for the execution of the transfer or assignment of estate property as needed (s. 96(2); and
- direct immediate distribution of the estate (s. 97).

I. Procedural Issues

The following statutory provisions are important when acting for personal representatives and/or making or defending FMS claims:[78]

Duty of personal representative to give notice of applications for grants to family members

Section 7 of the *Administration of Estates Act* provides:

> *7(1) When an application is made for a grant of probate or administration, the applicant shall send a copy of the application and a notice pertaining to the rights of family members under Part 5 of the Wills and Succession Act to*
>
> > *(a) the spouse of the deceased, if the spouse is not the sole beneficiary under the will of the deceased or under Part 3 of the Wills and Succession Act and if the spouse resided in Canada at the date*

78. A portion of Part 5 of the WSA is reproduced in Appendix 1.

of the death of the deceased,

(b) the adult interdependent partner of the deceased, if the adult interdependent partner is not the sole beneficiary under the will of the deceased or under Part 3 of the Wills and Succession Act and if the adult interdependent partner resided in Canada at the date of the death of the deceased,

(c) each child of the deceased who was an adult at the date of the death of the deceased and is unable by reason of physical disability to earn a livelihood and who resided in Canada at the date of the death of the deceased, and

(d) a child of the deceased who, at the time of the deceased's death,

(i) is at least 18 but under 22 years of age, and

(ii) is unable to withdraw from his or her parents' charge because he or she is a full time student as determined in accordance with the Family Law Act and its regulations.

. . .

(4) When an application is made for a grant of probate or administration, the applicant shall send a copy of the application to

(a) the Public Trustee, if the deceased is survived by

(i) a child who was a minor at the time of the deceased's death, or

(ii) a minor grandchild or great-grandchild in respect of whom the deceased stood in the place of a parent at the time of the deceased's death,

(a.1) the guardian of a child, grandchild or great-grandchild referred to in clause (a), and

(b) the committee of the estate of a child of the deceased who was an adult at the time of the deceased's death and is unable by reason of mental disability to earn a livelihood.

(5) If the deceased is survived by a child who was an adult at the time of the deceased's death and is unable by reason of mental disability to earn a livelihood but for whom a trustee has not been appointed, the judge may, having regard to the value of the estate, the circumstances of the child and the likelihood of success of an application made on the child's behalf under Division 2 of Part 5 of the Wills and Succession Act,

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

(b) direct that the applicant or some other person apply to have a trustee appointed for the child under the Adult Guardianship and Trusteeship Act.

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

Time limit for making FMS applications:

Section 89 of the WSA provides:

> *89(1) Subject to subsection (2), an application must be commenced within 6 months after the grant of probate or administration is issued.*
>
> *(2) The Court may allow an application to be made at any time respecting any part of the estate that is not distributed at the date of the application.*

How to commence an FMS application:

Part 2 of the *Surrogate Rules* applies to FMS claims:

> *58 A person may commence an application under this Part by filing*
>
> *(a) an application in Form C1, and*
>
> *(b) an affidavit in Form C2.*

Who must be served with an FMS application:

Section 91 of the WSA provides:

> *91(1) Notice of an application under this Division must be served*
>
> *(a) on the personal representative of the estate and all family members,*
>
> *(b) on any other persons who may be interested in or affected by an order under this Division, and*

(c) on the Public Trustee if a person who is, or who at the date of the deceased's death was, under 18 years of age, is interested in the estate.

(2) For the purpose of subsection (1)(a) and (b),

(a) a child who is under 18 years of age is to be served by serving

(i) the parents or guardians of the child, unless subclause (ii) applies, or

(ii) the Public Trustee, if the child is subject to a permanent guardianship order under the Child, Youth and Family Enhancement Act,

(b) a represented adult is to be served by serving his or her trustee, and

(c) an incapacitated person is to be served by serving the Public Trustee.

(3) Where the Public Trustee is required to be served under subsection (1)(c), the Public Trustee may make representations on the application but is under no duty to do so, and the application must not proceed until the Public Trustee is represented on the application or has expressed the intention of not being represented.

(4) It is unnecessary to serve the Public Trustee under subsection (1)(c) in respect of a child on whose behalf the Public Trustee is served under subsection (2)(a)(ii).

FACTUAL SCENARIOS – FOR DISCUSSION PURPOSES

Note: For the purposes of these scenarios, we have assumed that there is a heterosexual relationship and that the woman has outlived the man. This assumption is purely for ease of reference and the same principles will apply to same sex marriages and relationships and where the man outlives the woman.

A. One family member: surviving spouse, not separated

Facts

The deceased died leaving a surviving spouse with whom he was still living as husband and wife. The deceased leaves his entire estate to his children and nothing to his wife. All of the deceased's children are independent and able to earn a livelihood.

Analysis

- The wife is a family member entitled to apply for FMS.
- There are no competing FMS claims.
- The court will consider the legal obligations the deceased owed to his wife if she had made a claim for support during his lifetime. Thus, the court will consider MPA principles for matrimonial property division and *Divorce Act* provisions regarding spousal support.
- The court will consider what the wife would be entitled to if the couple had separated instead of the husband dying. In doing so, the court will apply the principles set out in the MPA, including exemptions, and the *Divorce Act*. The number arrived at will serve as a guide to the court in determining whether the amount given in the will is adequate provision for the proper maintenance and support of the wife.[79]

79. Or, according to the opposing view of matrimonial property on death (discussed at pages 23 to 27 and 41 to 42), this number will serve as the minimum amount the spouse is entitled to.

- The court must then consider the factors set out in section 93 of the WSA. These factors include the length of the marriage, the wife's age and health status and the wife's ability to support herself.

- The court will then consider the moral obligations owed to the deceased's wife. This will involve considering the common law factors (some of which would are the same as the section 93 factors).

- Using the amount the wife would have received under MPA principles and *Divorce Act* as a guide, the court will determine if there are any factors (section 93 or common law) that warrant increasing or decreasing the amount given under the will.[80]

- The court will exercise its discretion in deciding whether adequate provision for the wife's proper maintenance and support has been made.

- In this scenario, since the will leaves nothing to the spouse, it is likely the wife will be awarded part of the estate. The court would look at the number that MPA and *Divorce Act* principles would support and increase or decrease that number according to the factors set out in section 93 and the common law to ensure that the wife receives adequate provision for her proper maintenance and support.

- Since there are no competing FMS claims, the wife would likely receive, at a minimum, an amount equivalent to what she would have received under a MPA division and the *Divorce Act* principles.

Cases

- *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807
- *Koma v Tomich Estate*, 2011 ABCA 186
- *Siegel v. Siegel Estate*, [1995] A.J. No. 1158 (Q.B.)

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80. Or, alternatively, the court will consider the MPA and *Divorce Act* entitlements as a minimum that the spouse is entitled to, and will increase the amount if the section 93 and/or common law factors so warrant.

- *Webb v. Webb Estate*, [1995] 6 W.W.R. 52 (Alta. Surr. Ct.)
- *Stang v. Stang Estate*, 1998 ABQB 113
- *Gow v. Gow Estate*, 1998 ABQB 1073
- *Re Protopappas Estate*, [1987] A.J. No. 160 (Q.B.)
- *Re Eisert-Graydon*, 2003 ABQB 40
- *Foulon v. Foulon Estate*, [1981] A.J. No.10 (Q.B.)
- *Gavinchuk v. Mickalyk*, 2003 ABQB 849
- *Re Friend Estate*, [2000] A.J. No. 997 (Surr. Ct.)
- *Salomans v. Salomans*, 2001 ABQB 434
- *Stadler v. MacDonald*, 2001 ABQB 408
- *Kosic v. Kosic*, 2002 ABQB 325
- *Lumley v. Lumley Estate*, 2002 ABQB 326
- *Re Sheremata Estate*, 1998 ABQB 205
- *Kowalski v. Kowalski Estate*, 2005 ABQB 378
- *Re Broen Estate*, 2002 ABQB 806
- *Re G.E.S. Estate*, 2003 ABQB 674
- *Re Rubis Estate*, 2006 ABQB 381
- *Argue v. Ebeling Argue Estate*, 2008 ABQB 299
- *Boychuk (Public Trustee of) v. Boychuk*, 2008 ABQB 38
- *Skworoda v. Skworoda Estate*, 2008 ABQB 240
- *Roy v. Prebushewski*, 2014 ABQB 125
- *Woods-McKenna v. McKenna-Fenton,* 2015 ABQB 37

B. One family member: surviving AIP, not separated

Facts

The deceased died leaving a surviving AIP with whom he was still living with in an interdependent relationship. The deceased leaves his entire estate to his children from a previous marriage and nothing to his AIP. All of the deceased's children are independent and able to earn a livelihood.

Analysis

- The AIP is a family member entitled to apply for FMS.[81]

- There are no competing FMS claims.

- The court will consider the legal obligations the deceased owed to his AIP if she had made a claim for support during his lifetime. Since MPA and *Divorce Act* principles do not apply to AIPs, the court will consider whether the surviving AIP had a claim for unjust enrichment against the deceased.

- The court will consider the value of the AIP's unjust enrichment claim using the principles set out in *Kerr v. Baranow* and subsequent cases. This number will serve as a guide to the court in determining whether the amount given in the will is adequate provision for the proper maintenance and support of the surviving AIP.

- The court will consider section 93 factors.

- The court will consider the moral obligations owed to the deceased's AIP and the common law factors to determine if there are any factors that warrant increasing or decreasing the amount given under the will.

- The court will exercise its discretion in deciding whether adequate provision for the AIP's proper maintenance and support has been made.

- In this scenario, since the will leaves nothing to the AIP, it is likely the AIP will be awarded part of the estate. The court will look at the value of any unjust enrichment and increase or decrease that number according to the factors set out in section 93 and the common law factors to ensure that the AIP receives adequate provision for her proper maintenance and

81. This is assuming that the claimant is, in fact, an AIP. If there is any question concerning the claimant's status as an AIP, the court will first do an analysis to determine if the AIP criteria are satisfied. If yes, the rest of the FMS analysis will proceed; if no, the application will be dismissed.

support.

Cases

- *Re Woycenko Estate*, 2002 ABQB 640
- *Re Henschel Estate*, 2008 ABQB 406
- *Kiernan v. Stach Estate*, 2009 ABQB 150
- *Koma v. Tomich Estate,* 2011 ABCA 186
- *Rogers v. Bogi Estate*, 2012 ABQB 253
- *Tait v. Westphal*, 2013 ABQB 668
- *Goehring v. Lightbown*, 2013 ABQB 709
- *Charles v. Young*, 2014 ABCA 200, reversing 2013 ABQB 632
- *Martin v. Riley*, 2014 ABQB 725

C. One family member: surviving spouse, but separated at time of death

Facts

The deceased died leaving a surviving spouse with whom he had been living separate and apart from for over one year due to breakdown of the marriage. The deceased and his wife had filed for divorce but no divorce had yet been granted. The deceased leaves his entire estate to his children and nothing to his estranged wife. All of the deceased's children are independent and able to earn a livelihood. The estranged wife files an MPA claim at the same time as her FMS claim.[82]

Analysis

- The estranged wife is a family member entitled to apply for FMS.

- There are no competing FMS claims.

82. The analysis would be the same if the estranged wife had filed an MPA claim prior to the deceased's death but it had not yet been resolved.

- The court will first consider the estranged wife's MPA claim and determine what she is entitled to pursuant to MPA principles, including taking into account exemptions.

- Once the MPA division is complete, the court will go on to assess the estranged wife's FMS claim against what is remaining in the deceased's estate after the MPA division has taken place.

- In assessing the FMS claim, the court must consider section 93 factors.

- The court will then consider the moral obligations owed to the deceased's estranged wife and the common law factors to determine if there are any factors that warrant increasing or decreasing the amount given under the will, taking into account the amount the estranged wife has already received under the MPA division.[83]

- The court will exercise its discretion in deciding whether adequate provision for the estranged wife's proper maintenance and support has been made.

Cases

- *Willan v. Willan Estate*, [1951] A.J. No. 4 (S.C.)
- *Baker v. Baker Estate*, [1992] A.J. No. 1160 (Q.B.)
- *Zubiss (Moulson) v. Moulson Estate (Church)* (1987), 54 Alta. L.R. (2d) 167 (Q.B.)
- *Chityala v. Chityala Estate* (1986), 71 A.R. 200 (Q.B.)
- *Webb v. Webb Estate*, [1995] 6 W.W.R. 52 (Alta. Surr. Ct.)
- *Stayko v. Stayko Estate*, 2002 ABQB 1005[84]
- *Moravec v. Moravec*, 1998 ABQB 198

83. The amount received by the estranged wife pursuant to the MPA claim will now form part of the estranged wife's estate for the purposes of assessing her FMS claim and is a factor the court will consider under section 93(c) and the common law.

84. The court refused to grant FMS relief where parties had been separated for over 50 years.

D. One family member: surviving AIP, but separated at time of death

Facts

The deceased died leaving a surviving AIP with whom he had been living separate and apart from for several months, but less than one year, due to breakdown of the relationship.[85] The deceased leaves his entire estate to his children and nothing to his estranged AIP. All of the deceased's children are independent and able to earn a livelihood.

Analysis

- The estranged AIP is a family member entitled to apply for FMS.[86]

- There are no competing FMS claims.

- The court will consider the legal obligations the deceased owed to his estranged AIP if she had made a claim for support during his lifetime. Since MPA and *Divorce Act* principles do not apply to AIPs, the court will consider whether the surviving estranged AIP has a claim for unjust enrichment against the deceased.

- The court will consider the value of the estranged AIP's unjust enrichment claim using the principles set out in *Kerr v. Baranow* and subsequent cases. This number will serve as a guide to the court in determining whether the amount given in the will is adequate provision for the proper maintenance and support of the estranged AIP.

- The court must consider section 93 factors.

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85. Note that if the parties had been living separate and apart for over 1 year, they would become former AIPs and the surviving AIP may not be a family member: see s. 10 of AIRA.

86. This is assuming that the claimant is, in fact, an AIP. If there is any question concerning the claimant's status as an AIP, the court will first do an analysis to determine if the AIP criteria are satisfied. If yes, the rest of the FMS analysis will proceed; if no, the application will be dismissed.

- The court will then consider the moral obligations owed to the estranged AIP and the common law factors to determine if there are any factors that warrant increasing or decreasing the amount given under the will.

- The court will exercise its discretion in deciding whether adequate provision for the estranged AIP's proper maintenance and support has been made.

Cases

- *Re Tsang Estate*, 2004 ABQB 735
- *Vinokurova v. Seneker*, 2005 ABQB 590

E. One family member: minor child

Facts

The deceased died leaving no spouse or AIP but a minor child from a previous relationship. The deceased leaves his entire estate to his parents and nothing to his child.

Analysis

- The child is a family member entitled to apply for FMS.

- There are no competing FMS claims.

- The court will consider the legal obligations the deceased owed to his child if someone had brought a claim for child support on the child's behalf during the deceased's lifetime. *Divorce Act* principles governing child support, *Family Law Act* provisions along with case law and child support guidelines will be considered.

- The court will consider the value of the child's claim for child support and use this number as a guide to determine whether the amount given in the will is adequate provision for the proper maintenance and support of the child.

- The court must consider section 93 factors.

- The court will consider the moral obligations owed to the deceased's child and the common law factors to determine if there are any factors that warrant increasing or decreasing the amount given under the will.

- The court will exercise its discretion in deciding whether adequate provision for the child's proper maintenance and support has been made.

- In this scenario, since the will leaves nothing to the child, it is likely the child will be awarded part of the estate. The court will look at the number that child support principles will support and increase or decrease that number according to the factors set out in section 93 and the common law to ensure that the child receives adequate provision for his or her proper maintenance and support.

Cases

- *Dupere (Next Friend Of) v. Spinelli Estate*, [1998] A.J. No. 1276 (Surr. Ct.)
- *C.D.T. (Next Friend of) v. T. Estate*, 2003 ABQB 769
- *Re Buchholz*, [1981] 1 W.W.R. 500 (Alta. C.A.)
- *Pauliuk v. Pauliuk Estate*, [1986] A.J. No. 936 (Q.B.)
- *Rudd-Birkenbach v. Birkenbach Estate*, 2015 ABQB 3

F. One family member: child over the age of 18 but unable to earn a livelihood due to physical or mental disability

Facts

The deceased died leaving no spouse or AIP but a child over the age of 18 years who is unable to earn a livelihood by reason of mental or physical disability. The deceased leaves his entire estate to charity and nothing to his adult child.

Analysis

- The court will first have to determine whether or not the child was unable to earn a livelihood by reason of mental or physical disability.

- There are no competing FMS claims.

- The court will first determine if child is mentally or physically disabled. If no, the application will be dismissed. If yes, the FMS analysis will continue.

- Assuming the child is mentally or physically disabled, the court will go on to determine if the child is, by reason of the mental or physical disability, unable to earn a livelihood. If the child is able to earn a livelihood, the application will be dismissed. If the child is not able to earn a livelihood by reason of the disability, the FMS analysis will proceed.

- The court will consider the legal obligations the deceased owed to his disabled adult child. The legal obligation to a disabled adult child stems from the FMS provisions in the WSA and, possibly, unjust enrichment principles (if applicable).

- If an unjust enrichment claim exists, the court will consider the value of the unjust enrichment claim using the principles set out in *Kerr v. Baranow* and subsequent cases. This number will serve as a guide to the court in determining whether the amount given in the will is adequate provision for the proper maintenance and support of the disabled adult child.

- The court will consider section 93 factors.

- The court will consider the moral obligations owed to the deceased's disabled adult child and the common law factors to determine if there are any factors that would warrant increasing or decreasing the amount given under the will.

- The court will exercise its discretion in deciding whether adequate provision for the disabled adult child's proper maintenance and support has been made.

- In this scenario, since the will leaves nothing to the disabled adult child, it is likely the disabled adult child will be awarded part of the estate. The court will look at the number that any unjust enrichment claim will support and the section 93 and common law factors to ensure that the disabled adult child receives adequate provision for her proper maintenance and support.

Cases

- *Stone Estate (Public Trustee of) v. Stone Estate*, [1994] A.J. No. 419 (Q.B.)
- *Petrowski v. Petrowski Estate,* 2009 ABQB 380
- *Boje v. Boje Estate* , 2002 ABQB 113,var'd 2005 ABCA 73
- *Soule v. Johansen*, 2011 ABQB 402
- *Re E.A.H.*, 2005 ABQB 678
- *Malychuk v. Malychuk Estate*, [1978] A.J. No. 684 (Alta. S.C.T.D.)
- *Carter v. Alberta Conference Corp. of the Seventh Day Adventist Church*, [1998] A.J. No. 1479 (Q.B.)
- *Re Kinsella Estate*, 2004 ABQB 664
- *B.G.B. (Public Trustee of) v. S.V.*, 2003 ABQB 683

G. Competing claims: spouse/AIP and minor child

Facts

The deceased died leaving a surviving spouse with whom he was still living as husband and wife. The deceased also left one or more minor children from a previous relationship. The deceased leaves his entire estate to his spouse and nothing to his children. The mother of the minor children (or the Public Trustee) applies for FMS for the children.

Analysis

- The wife and the minor children are family members entitled to apply for FMS.

- The application on behalf of the minor children is deemed to be made on behalf of all family members.

- The court will consider the legal obligations the deceased owed to his wife if she had made a claim for support during his lifetime. Thus, the court will consider MPA principles for property division, *Divorce Act* provisions regarding spousal support and any constructive trust claim.

- The court will consider what the wife would be entitled to if the couple had separated instead of the husband dying. This number will serve as a guide to the court in determining whether the amount given in the will is adequate provision for the proper maintenance and support of the wife.[87]

- The court will consider the legal obligations the deceased owed to his minor children if someone had made a claim for child support during his lifetime. Thus, the court will consider *Divorce Act* provisions regarding child support, Alberta's *Family Law Act* and child support guidelines.

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87. Or, according to the opposing view on matrimonial property on death (see pages 23 to 27 and 41 to 42), this number will serve as the minimum amount the spouse is entitled to and the child's FMS claim can only apply to what is left in the estate.

- The court must consider the factors set out in section 93 of the WSA.

- The court will then consider the moral obligations owed to the deceased's wife and children. This will involve considering the common law factors (some of which would are the same as the section 93 factors).

- The court will weigh the strengths of each claim.

- The court will exercise its discretion in deciding whether adequate provision for the wife's and children's proper maintenance and support has been made.

- In this scenario, since the will leaves nothing to the children, it is likely the wife and children will be ordered to share the estate.

Cases

- *Pauliuk v. Pauliuk Estate*, [1986] A.J. No. 936 (Q.B.)
- *Raniseth (Public Trustee of) v. Raniseth Estate*, [1990] A.J. No. 1224 (Q.B.)
- *Re Lafleur Estate*, 2014 ABQB 698

H. Competing claims: spouse and child over 18 but unable to earn a livelihood due to physical or mental disability

Facts

The deceased died leaving a surviving spouse with whom he was still living as husband and wife. The deceased also left a child over the age of 18 but unable to earn a livelihood due to physical or mental disability from a previous relationship. The deceased leaves his entire estate to his spouse and nothing to his disabled adult child. The trustee of the disabled adult child applies for FMS relief.

Analysis

- The wife and the disabled adult child are both family members entitled to apply for FMS.

- The application on behalf of the disabled adult child is deemed to be made on behalf of all family members.

- The court will consider the legal obligations the deceased owed to his wife if she had made a claim for support during his lifetime. Thus, the court will consider MPA principles for property division, *Divorce Act* provisions regarding spousal support and any constructive trust claim.

- The court will consider what the wife would be entitled to if the couple had separated instead of the husband dying. This number will serve as a guide to the court in determining whether the amount given in the will is adequate provision for the proper maintenance and support of the wife.[88]

- The court will consider the legal obligations the deceased owed to his disabled adult child. This may include an unjust enrichment claim (if applicable) and will also include the FMS claim which arose upon the deceased's death.

- The court must consider the factors set out in section 93 of the WSA.

- The court will then consider the moral obligations owed to the deceased's wife and his disabled adult child. This will involve considering the common law factors (some of which would are the same as the section 93 factors).

- The court will weigh the strengths of each claim.

- The court will exercise its discretion in deciding whether adequate provision for the wife's and

88. Or, according to the opposing view on matrimonial property on death (see pages 23 to 27 and 41 to 42), this number will serve as the minimum amount the spouse is entitled to and the adult child's FMS claim can only apply to what is left in the estate.

disabled adult child's proper maintenance and support has been made.

- In this scenario, since the will leaves nothing to the disabled adult child, it is likely the wife and disabled adult child will be ordered to share the estate.

Cases

- *J.O.K. v. Nelson*, 2013 ABQB 15

I. Competing claims: two or more minor children

Facts

The deceased died leaving no spouse or AIP but two minor children from two separate relationships. The deceased leaves his entire estate to his parents and nothing to his children. The mother of one of the children applies for FMS relief for her child.

Analysis

- The minor children are family members entitled to apply for FMS.

- The application on behalf of one minor child is deemed to be made on behalf of all family members.

- The court will consider the legal obligations the deceased owed to his children if someone had brought a claim for child support on the their behalf during the deceased's lifetime. *Divorce Act* principles governing child support, *Family Law Act* provisions, along with case law and child support guidelines will be considered.

- The court will consider the values of the children's claims for child support and use these numbers as a guide to determine whether the amount given in the will is adequate provision

for the proper maintenance and support of each child.

- The court must consider section 93 factors.

- The court will consider the moral obligations owed to the deceased's minor children and the common law factors to determine if there are any factors that warrant increasing or decreasing the amount given under the will.
- The court will exercise its discretion in deciding whether adequate provision for the children's proper maintenance and support has been made.

- In this scenario, since the will leaves nothing to the children, it is likely the children will be awarded all or part of the estate in proportions the court deems fair and just in the circumstances.

Cases

- *Re Buchholz*, [1981] 1 W.W.R. 500 (Alta. C.A.)
- *Pauliuk v. Pauliuk Estate*, [1986] A.J. No. 936 (Q.B.)

J. Competing claims: two children over 18 but unable to earn a livelihood due to physical or mental disability

Facts

The deceased died leaving no spouse or AIP but two children over the age of 18 years who are both unable to earn a livelihood by reason of mental or physical disability. The deceased leaves his entire estate to charity and nothing to his disabled adult children. The trustee of one of the disabled adult children applies for FMS relief.

Analysis

- The court will first have to determine whether or not each adult child is unable to earn a livelihood by reason of mental or physical disability.
- The court will determine if each child is mentally or physically disabled. If no, the application with respect to that child will be dismissed. If yes, the FMS analysis will continue.

- Assuming both adult children are mentally or physically disabled, the court will go on to determine if each child is, by reason of the mental or physical disability, unable to earn a livelihood. If the child is able to earn a livelihood, the application will be dismissed with respect to that child. If the child is not able to earn a livelihood by reason of the disability, the FMS analysis will proceed.

- Assuming both adult children are unable to earn livelihoods by reason of their disabilities, the court will consider the legal obligations the deceased owed to his disabled adult children. The legal obligations to a disabled adult child stem from the FMS provisions in the WSA and, possibly, unjust enrichent principles (if applicable).

- If an unjust enrichment claim exists, the court will consider the value of the unjust enrichment claim using the principles set out in *Kerr v. Baranow* and subsequent cases. This number will serve as a guide to the court in determining whether the amount given in the will is adequate provision for the proper maintenance and support of the disabled adult child.

- The court will consider section 93 factors.

- The court will consider the moral obligations owed to the deceased's disabled adult children and the common law factors to determine if there are any factors that warrant increasing or decreasing the amount given under the will.

- The court will exercise its discretion in deciding whether adequate provision for the disabled adult children's proper maintenance and support has been made.

- In this scenario, since the will leaves nothing to the disabled adult children, it is likely the disabled adult children will be awarded all or part of the estate in proportions that the court deems fair and just in the circumstances. The court will look at the value of any unjust enrichment claim and the section 93 and common law factors to ensure that each disabled adult child receives adequate provision for his or her proper maintenance and support.

Cases

- *Malychuk v. Malychuk Estate*, [1978] A.J. No. 684 (Alta. S.C.T.D.)

APPENDIX 1

Wills and Succession Act
S.A. 2010, c. W-12.2

Part 5

Family Maintenance and Support[89]

Definitions

72 In this Part,

(a) "family home" means

(i) a house or part of a house that is a self-contained dwelling unit,

(ii) a part of business premises used as living accommodation,

(iii) a mobile home,

(iv) a residential unit as defined in the Condominium Property Act, or

(v) a suite that, at the time of a deceased's death, was ordinarily occupied by the deceased and the deceased's spouse or adult interdependent partner as their home and was owned, whether wholly or in part, or leased by the deceased but not by the deceased's surviving spouse or partner;

(b) "family member" means, in respect of a deceased,

(i) a spouse of the deceased,

(ii) the adult interdependent partner of the deceased,

89. Division 1 of Part 5 deals with temporary possession of the family home and has been omitted from this Appendix.

(iii) a child of the deceased who is under the age of 18 years at the time of the deceased's death, including a child who is in the womb at that time and is later born alive,

(iv) a child of the deceased who is at least 18 years of age at the time of the deceased's death and unable to earn a livelihood by reason of mental or physical disability,

(v) a child of the deceased who, at the time of the deceased's death,

(A) is at least 18 but under 22 years of age, and

(B) is unable to withdraw from his or her parents' charge because he or she is a full-time student as determined in accordance with the Family Law Act and its regulations, and

(vi) a grandchild or great-grandchild of the deceased

(A) who is under 18 years of age, and

(B) in respect of whom the deceased stood in the place of a parent at the time of the deceased's death;

(c) "household goods" means personal property that,

(i) at the time of a deceased's death, was owned by the deceased or both the deceased and the deceased's spouse or adult interdependent partner, and

(ii) at the time of a deceased's death, was needed or being ordinarily used for transportation, household, educational, recreational or health purposes by the deceased's spouse or adult interdependent partner or by any child described in clause (b)(iii) or (iv) who is residing in the family home;

(d) "spouse" includes a party to a void or voidable marriage.

SA 2010 cW-12.2 s72 effective February 1, 2012 (O.C. 19/2012)

Grandchildren and great-grandchildren

73(1) In this section, "grandparent" includes a great-grandparent and "grandchild" includes a great-grandchild.

(2) For the purposes of section 72(b)(vi)(B), a deceased grandparent stood in the place of a parent to his or her grandchild if, during life, the grandparent demonstrated a settled intention to treat the grandchild as his or her own child and if, since the grandchild's birth or for at least 2 years immediately before the grandparent's death,

(a) the grandchild's primary home was with the grandparent, and

(b) the grandparent provided the primary financial support for the grandchild.

(3) The Court may, in an application to determine whether the criteria set out in subsection (2) are met, take any or all of the following factors into account:

(a) the grandchild's age;

(b) the duration of the relationship between the grandchild and grandparent;

(c) the nature of the relationship between the grandchild and grandparent, including

(i) the grandchild's perception of the grandparent as a parental figure, and

(ii) 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;

(d) whether the grandparent considered applying for guardianship of the grandchild;

(e) the nature of the grandchild's relationship with his or her parents;

(f) any other factor the Court considers relevant.

SA 2010 cW-12.2 s73 effective February 1, 2012 (O.C. 19/2012)

. . .

Definitions

87 In this Division,

(a) "incapacitated person" has the same meaning as in the Public Trustee Act;

(b) "interested person" means a person referred to in section 91(1)(b);

(c) "Public Trustee" means the person appointed as the Public Trustee under the Public Trustee Act;

(d) "represented adult" means an adult who has a trustee under the Adult Guardianship and Trusteeship Act.

SA 2010 cW-12.2 s87 effective February 1, 2012 (O.C. 19/2012)

Order for maintenance and support of family member

88(1) If a person

> (a) dies testate without making adequate provision in the person's will for the proper maintenance and support of a family member, or
>
> (b) dies either wholly or partly intestate and the share to which a family member is entitled under a will or Part 3 or both is inadequate for the proper maintenance and support of the family member,

the Court may, on application, order that any provision the Court considers adequate be made out of the deceased's estate for the proper maintenance and support of the family member.

(2) The order may be made in respect of one or more family members.

(3) The order may be made in respect of all or any part of the estate, and regardless of whether there is a will or intestacy.

(4) The order may limit or terminate any period of temporary possession or any right of a surviving spouse or adult interdependent partner under Division 1 if, and to the extent that, the Court considers the limitation or termination necessary to provide for the proper maintenance and support of another family member.

SA 2010 cW-12.2 s88 effective February 1, 2012 (O.C. 19/2012)

Time for making an application

89(1) Subject to subsection (2), an application must be commenced within 6 months after the grant of probate or administration is issued.

(2) The Court may allow an application to be made at any time respecting any part of the estate that is not distributed at the date of the application.

SA 2010 cW-12.2 s89 effective February 1, 2012 (O.C. 19/2012)

Who may make an application

90 An application under this Division may be made by a family member on his or her own behalf or

(a) in the case of a family member who is under 18 years of age, on behalf of that family member by

(i) the family member's parent or guardian,

(ii) the Public Trustee, or

(iii) any other person in accordance with the Alberta Rules of Court or the Surrogate Rules made under the Judicature Act,

or

(b) in the case of a family member who is a represented adult or an incapacitated person, on behalf of that family member by

(i) the family member's trustee, or

(ii) any other person in accordance with the Alberta Rules of Court or the Surrogate Rules made under the Judicature Act.

SA 2010 cW-12.2 s90 effective February 1, 2012 (O.C. 19/2012)

Who must be served

91(1) Notice of an application under this Division must be served

(a) on the personal representative of the estate and all family members,

(b) on any other persons who may be interested in or affected by an order under this Division, and

(c) on the Public Trustee if a person who is, or who at the date of the deceased's death was, under 18 years of age, is interested in the estate.

(2) For the purpose of subsection (1)(a) and (b),

(a) a child who is under 18 years of age is to be served by serving

(i) the parents or guardians of the child, unless subclause (ii) applies, or

(ii) the Public Trustee, if the child is subject to a permanent guardianship order under the Child, Youth and Family Enhancement Act,

(b) a represented adult is to be served by serving his or her trustee, and

(c) an incapacitated person is to be served by serving the Public Trustee.

(3) Where the Public Trustee is required to be served under subsection (1)(c), the Public Trustee may make representations on the application but is under no duty to do so, and the application must not proceed until the Public Trustee is represented on the application or has expressed the intention of not being represented.

(4) It is unnecessary to serve the Public Trustee under subsection (1)(c) in respect of a child on whose behalf the Public Trustee is served under subsection (2)(a)(ii).

SA 2010 cW-12.2 s91 effective February 1, 2012 (O.C. 19/2012)

Representative action

92(1) An application is deemed to be made on behalf of all family members who have been served unless the Court orders otherwise.

(2) Nothing in this Division deprives a family member who has not received notice of the application of any rights the family member has under this Division.

SA 2010 cW-12.2 s92 effective February 1, 2012 (O.C. 19/2012)

Matters to be considered by the Court

93 In considering an application for the maintenance and support of a family member, the Court shall consider, as applicable,

(a) the nature and duration of the relationship between the family member and the deceased,

(b) the age and health of the family member,

(c) the family member's capacity to contribute to his or her own support, including any entitlement to support from another person,

(d) any legal obligation of the deceased or the deceased's estate to support any family member,

(e) the deceased's reasons for making or not making dispositions of property to the family member, including any written statement signed by the deceased in regard to the matter,

(f) any relevant agreement or waiver made between the deceased and the family member,

(g) the size, nature and distribution of

(i) the deceased's estate, and

(ii) any property or benefit that a family member or other person is entitled to receive by reason of the deceased's death,

(h) any property that the deceased, during life, placed in trust in favour of a person or transferred to a person, whether under an agreement or order or as a gift or otherwise, and

(i) any property or benefit that an individual is entitled to receive under the Matrimonial Property Act, the Dower Act or Division 1 of this Part by reason of the deceased's death,

and may consider any other matter the Court considers relevant.

SA 2010 cW-12.2 s93 effective February 1, 2012 (O.C. 19/2012)

Interim order

94 The Court may make any interim order or direction it considers appropriate providing for

(a) the protection or preservation of the assets of the estate, or

(b) the administration of the estate, including the suspension of administration.

SA 2010 cW-12.2 s94 effective February 1, 2012 (O.C. 19/2012)

Disclosure of financial information

95(1) In this section, "party" means a family member or a personal representative of the deceased's estate.

(2) A party to an application under this Division shall, on the written request of another party, provide that other party with financial information as provided for by the regulations that is necessary for the determination of maintenance and support.

(3) This section applies in addition to any applicable disclosure, questioning or other processes under any other Act or regulation.

(4) The Court may, on application, order that information provided under this section must not be disclosed to others except as may be provided for in the order.

(5) If a party fails to comply with a request under subsection (2), the Court may, on application, do one or more of the following:

(a) order the party to provide some or all of the required information to one or more other parties or to the Court;

(b) dismiss any application made by or on behalf of that party, but proceed to hear the application in respect of the other parties;

(c) proceed to hear the application and, in the course of doing so, may draw an adverse inference against the party who failed to comply with the request and impute income or assets to that party in an amount the Court considers appropriate;

(d) award costs in favour of one or more other parties.

(6) Financial information provided by an employer, partner or principal of a party or by any other person pursuant to an order under subsection (5)(a) may be received in evidence as prima facie proof of its contents.

SA 2010 cW-12.2 s95 effective February 1, 2012 (O.C. 19/2012)

Orders respecting quantum, duration and payment

96(1) The Court may, in making an order for maintenance and support, impose any conditions and restrictions that the Court considers appropriate and may

(a) direct that provision for maintenance and support be made out of and charged against the estate in the proportion and in the manner that the Court considers appropriate,

(b) direct that provision for maintenance and support be made out of income or capital, or both, in one or more of the following ways:

(i) by an amount payable annually or otherwise;

(ii) by a lump sum to be paid or held in trust;

(iii) by transfer or assignment of a specified property, whether absolutely or in trust and whether for life or for a term of years, to or for the benefit of the family member.

(2) If a transfer or assignment of property is ordered, the Court may

(a) give all necessary directions for the execution of the transfer or assignment by the personal representative or by any other person as the Court may direct, or

(b) grant a vesting order.

SA 2010 cW-12.2 s96 effective February 1, 2012 (O.C. 19/2012)

Order for immediate distribution

97 If distribution of the deceased's estate is, under a will of the deceased, postponed until after the death of any family member and an order is made under this Division for the maintenance and support of that family member, the Court may, in making an order for maintenance and support, direct immediate distribution of the estate after providing for the payment, or for the securing of the payment, of the ordered maintenance and support.

SA 2010 cW-12.2 s97 effective February 1, 2012 (O.C. 19/2012)

Effect of order

98 Unless the Court orders otherwise, an order for maintenance and support under this Division charges the whole of the deceased's estate or, if the Court does not have jurisdiction over the whole estate, the whole of that portion of the estate over which the Court has jurisdiction.

SA 2010 cW-12.2 s98 effective February 1, 2012 (O.C. 19/2012)

Further orders

99(1) The Court may, at any time after an order for maintenance and support is made,

(a) give any directions that the Court considers necessary to give effect to the order,

(b) discharge, vary or suspend any provision of the order respecting periodic payments, or

(c) fix a periodic payment or lump sum to be paid by a beneficiary under a will or intestacy, in substitution for an amount originally ordered to be paid out of the portion of the estate in which the beneficiary is interested.

(2) If the Court fixes a periodic payment or lump sum under subsection (1)(c), the Court may further direct that

(a) the periodic payment be secured in any manner the Court considers appropriate, or

(b) the lump sum be paid to a specified person and be dealt with in any manner the Court considers appropriate for the benefit of the person to whom the substitute payment is payable.

SA 2010 cW-12.2 s99 effective February 1, 2012 (O.C. 19/2012)

Effect of order on will

100(1) An order under this Division for maintenance and support has effect as if it were made immediately on the death of the deceased, and the deceased's will, if any, has effect from that time as if it had been executed with any variations that are necessary to give effect to the order.

(2) The Crown is bound by this section.

SA 2010 cW-12.2 s100 effective February 1, 2012 (O.C. 19/2012)

Assignment of claims

101 A mortgage, assignment or similar charge given by a family member

(a) in anticipation of any entitlement under a maintenance and support order, and

(b) before the order is entered

is void.

SA 2010 cW-12.2 s101 effective February 1, 2012 (O.C. 19/2012)

Contracts respecting estate property

102 If a testator has, by will, disposed of property in accordance with a contract that the testator, during life, entered into in good faith and for valuable consideration, the property is not subject to an order under this Division for maintenance and support except to any extent that the value of the property, in the opinion of the Court, exceeds the consideration received by the testator under the contract.

SA 2010 cW-12.2 s102 effective February 1, 2012 (O.C. 19/2012)

Rights not affected by contract

103 An order may be made under this Division despite any waiver or agreement to the contrary by a family member.

SA 2010 cW-12.2 s103 effective February 1, 2012 (O.C. 19/2012)

Application by Public Trustee

104(1) Where the Public Trustee is trustee for a family member who

(a) is subject to a permanent guardianship order under the Child, Youth and Family Enhancement Act, or

(b) is a represented adult or an incapacitated person,

the Public Trustee is under no duty to make an application under this Division on behalf of the family member if the Public Trustee is satisfied that the family member is receiving adequate support.

(2) The Public Trustee may make, but is under no duty to make, an application under this Division on behalf of a family member not referred to in subsection (1)(a) who is under 18 years of age.

SA 2010 cW-12.2 s104 effective February 1, 2012 (O.C. 19/2012)

No liability for decisions made in good faith

105 No action lies against the Public Trustee or any person for anything done or omitted to be done in good faith under this Division, including a decision to make or not to make an application on behalf of a family member.

SA 2010 cW-12.2 s105 effective February 1, 2012 (O.C. 19/2012)

No early distribution without consent or Court order

106(1) The personal representative of an estate shall not distribute any portion of the estate to any beneficiary until the expiration of 6 months from the grant of probate of the will or of administration without the consent of all the family members unless authorized to do so by an order of the Court.

(2) A personal representative that distributes any portion of an estate in contravention of subsection (1) is personally liable to pay an amount equal to any maintenance and support that is payable under an order under this Division and that ought to be paid out of the portion of the estate distributed.

(3) Nothing in this section prevents a personal representative from making reasonable advances for the maintenance of any family members who are beneficiaries.

SA 2010 cW-12.2 s106 effective February 1, 2012 (O.C. 19/2012)

Estate subject to order

107(1) On notice of an application under section 88 being given to the personal representative, the estate is subject to the provisions of any order that may be made and the personal representative shall not distribute or dispose of the estate except in accordance with that order.

(2) A personal representative that distributes or disposes of any portion of an estate in any manner in contravention of subsection (1) is personally liable to pay the amount distributed or disposed of to the extent that any provision, or part of a provision, for maintenance and support under an order under this Division ought to be made out of the portion of the estate distributed or disposed of.

(3) In addition to being personally liable as provided in subsection (2), a personal representative that wilfully contravenes subsection (1) is guilty of an offence and liable,

(a) in the case of an individual, to a fine of not more than $5000 and in default of payment to a term of imprisonment of not more than 60 days, and

(b) in the case of a corporation, to a fine of not more than $25 000.

SA 2010 cW-12.2 s107 effective February 1, 2012 (O.C. 19/2012)

Transitional

108(1) This Division applies only in respect of deaths occurring after the coming into force of this section.

(2) The Family Relief Act, as it read immediately before it was amended by the Adult Interdependent Relationships Act, continues to apply in cases of death occurring on or before June 1, 2003.

(3) The Dependants Relief Act, RSA 2000 cD-10.5, continues to apply in cases of death occurring after June 1, 2003 but before the coming into force of this section.

SA 2010 cW-12.2 s108 effective February 1, 2012 (O.C. 19/2012)