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Contentious Matters in Wills and Estates

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Family Maintenance and Support Claims: Why Step-Parents (and Other Claimants) Do Not Have the King Midas Touch

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FAMILY MAINTENANCE AND SUPPORT CLAIMS:

WHY STEP-PARENTS (AND OTHER CLAIMANTS) DO NOT HAVE THE KING MIDAS TOUCH

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INTRODUCTION

This paper discusses the necessary evidence, use of experts, cross-examination, and recent case law in advancing family maintenance and support [FMS"] claims.

FAMILY MAINTENANCE AND SUPPORT: OVERVIEW

The purpose of FMS is to ensure that the family members of a deceased, to whom the deceased owes a duty, are adequately provided for by the deceased's estate.¹ A central rationale for FMS is to prevent family members from becoming a charge on the state when they should be provided for by the deceased.²

Legislation

The *Wills and Succession Act*, SA 2010, c W-12.2 [WSA] provides that if a person dies without making "adequate provision" in their will for the proper maintenance and support of a family member then, upon application, the Court may order the adequate provision of maintenance and support be made out of the deceased's estate.³

A person must be a "family member" of the deceased in order to apply for FMS. Section 72(b) of the WSA defines a family member as:

- (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

¹ *Soule v Johansen Estate*, 2011 ABQB 403 at para 19.

² *Ibid* at para 21.

³ *Wills and Succession Act*, SA 2010, c W-12.2, s 88(1) [WSA].

- (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
- (i) 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 death⁴

The Court's ability to make an order for maintenance and support is set out in s. 96 of the WSA which allows the Court to direct that provision for maintenance and support be charged against the estate in the proportion and manner that the Court considers appropriate, and that provision may be made out of income or capital, including by an amount payable or by transfer of a specified property absolutely.⁵

In considering an application for maintenance and support, the Court must consider the factors listed in s. 93 of the WSA as follows:

- 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

⁴ *Ibid*, s 72(b).

⁵ *Ibid*, s. 96.

- (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.⁶

Additional Resources

For further information and an excellent discussion on the history, principles, relevant legislation and case law guiding FMS applications in Alberta, refer to Anne de Villars, Q.C.'s LESA paper *For Mercy's Sake: Principles of Family Maintenance and Support in the 20 Years Since Tataryn*.⁷

FAMILY MAINTENANCE AND SUPPORT: APPLICATIONS

This portion of the paper addresses the practical aspects of preparing and responding to FMS Applications.

An FMS Application is brought by a party who seeks maintenance and support (the "Applicant"). For an Applicant to be successful in claiming FMS entitlement, the Applicant must prove that:

1. He or she meets the definition of a family member set out in the WSA; and
2. He or she is entitled to receive maintenance and support subject to the WSA.

Once satisfied, an inquiry will be made to determine what amount is adequate to provide for the proper maintenance and support of the Applicant, having regard to the standard of living that the Applicant was accustomed to prior to the deceased's death.

Each FMS Application (Form C1) must set out details of the following, to be considered by a Court in its determination of the standing of an Applicant:

⁶ *Ibid*, s 93.

⁷ Anne S de Villars & Dawn M Jones, "For Mercy's Sake: Principles of Family Maintenance and Support in the 20 Years Since *Tataryn*" (2015) Legal Education Society of Alberta *48th Annual Refresher: Wills & Estates*.