Citation: McAuley v Genaille, 2017 MBCA 69 | Date: 20170717
Docket: AI16-30-08565

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Freda M. Steel
Madam Justice Diana M. Cameron
Madam Justice Jennifer A. Pfuetzner

BETWEEN:

TODD HENRY MCAULEY, on his own behalf and THE PUBLIC GUARDIAN AND TRUSTEE as litigation guardian for TODD JR. RHYSE MCAULEY (an infant)	***J. E. Crane*** *and* ***T. M. Keller*** *for the Appellant*
(Applicants) Respondents	***C. B. Paul*** *for the Respondent T. H. McAuley*
- and -	***J. Taylor*** *for the Respondent The Public Guardian and Trustee*
CRAIG GENAILLE as the executor of the estate of LORI ELLEN SINCLAIR	*Appeal heard:* ***January 18, 2017***
(Respondent) Appellant	*Judgment delivered:* ***July 17, 2017***

On appeal from 2015 MBQB 197

PFUETZNER JA

[1] This is an appeal from a judgment granting relief under *The Dependants Relief Act*, CCSM c D37 (the *Act*). All three parties to the application have appealed: Craig Genaille (Genaille) by appeal and Todd Henry McAuley (Todd Sr.) and the Public Guardian and Trustee (the PGT) each by cross-appeal.

Background

[2] Lori Ellen Sinclair (the deceased) and Todd Sr. separated in 2011 after cohabiting for 12 years. They had one child together, Todd Jr. Rhyse McAuley (Todd Jr.), who was born on December 19, 2001. The deceased also had a child from a previous relationship who was, at all relevant times, an adult. Prior to her death, the deceased paid child support to Todd Sr. for Todd Jr. in the sum of $725 per month pursuant to an order under *The Family Maintenance Act*, CCSM c F20. The order provided that support payments were not secured against the estate of the deceased.

[3] The deceased died in March of 2012, leaving a will (the Will) dated October 28, 2011. Genaille is the brother of the deceased and the executor under the Will. The terms of the Will provide that certain gifts are to be paid to named beneficiaries, including a gift of "the aggregate of any amounts paid to [the] estate under or from the Civil Service Superannuation Fund" to the deceased's mother. The residue of the deceased's estate is to be divided into equal shares between Todd Jr. and the deceased's adult child. The executor is directed to hold the share for Todd Jr. in trust until he attains the age of 21 years (the Will Trust). The income from the capital of the Will Trust is directed to be accumulated and added to the capital. The executor is prohibited from encroaching on either the income or capital of the Will Trust for the benefit of Todd Jr.

[4] The funds received by the executor from the Civil Service Superannuation Fund are the primary asset of the estate. Because of this and the fact that there are debts of the estate, there is no residue. Accordingly, there will be no funds to be held under the Will Trust. The estate remains

unadministered, as the funds received by the executor from the Civil Service Superannuation Fund have not been paid to the beneficiary.

[5] The deceased had two policies of insurance on her life. Under the first policy, proceeds of $150,000 were designated for the benefit of Todd Jr. and are held in trust for him pursuant to a trust agreement (the Insurance Trust), the terms of which apparently mirror the Will Trust, although the Insurance Trust is separate and apart from the Will Trust. Genaille is also the trustee of the Insurance Trust.

[6] Proceeds of $50,000 under a second life insurance policy were designated to Todd Jr. However, no proceeds will be paid out by the insurance company, as it denied liability based on material non-disclosure made in the application for insurance.

The Application

[7] In January 2013, Todd Sr. applied for dependants relief under the *Act* as litigation guardian of Todd Jr. and in his own right. The respondent in the application is Genaille in his capacity as executor of the estate. Genaille, in his capacity as trustee of the Insurance Trust, is not a respondent in the application. In March 2015, the Master ordered that the PGT replace Todd Sr. as litigation guardian of Todd Jr.

[8] The issue before the application judge was whether either or both of Todd Sr. and Todd Jr. are entitled to relief under section 2(1) of the *Act*, which provides:

> **Reasonable provision for dependant**
> **2(1)** If it appears to the court that a dependant is in financial

> need, the court, on application by or on behalf of the dependant, may order that reasonable provision be made out of the estate of the deceased for the maintenance and support of the dependant.

[9] The term "dependant" is defined in section 1 of the *Act*. The relevant portions of the definition are:

> **"dependant"** means
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> . . .
>
> (c) a common-law partner of the deceased, where
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> . . .
>
> (ii) cohabitation was not subsisting but had ceased within three years of the deceased's death, or
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> (d) a child of the deceased
>
> (i) who was under the age of 18 years at the time of the deceased's death,
>
> (ii) who, by reason of illness, disability or other cause was, at the time of the deceased's death, unable to withdraw from the charge of the deceased or to provide himself or herself with the necessaries of life, or
>
> (iii) who was substantially dependant on the deceased at the time of the deceased's death,

[10] The evidence before the application judge consisted of three affidavits of Todd Sr.; two affidavits of Genaille; two affidavits of Lenore McLaughlin (a paralegal in the office of Todd Sr.'s solicitor); and the transcript of the cross-examination of Todd Sr. The affidavits attached numerous exhibits, including an excerpt from the examination for discovery of Genaille.

[11] The application judge held that: (1) Todd Jr. is a dependant pursuant to section 1 of the *Act*; (2) Todd Jr. is in financial need pursuant to section 2(1) of the *Act*; (3) Genaille, as executor, pay from the estate $725 per month to Todd Sr. for Todd Jr. until Todd Jr. turns 18, for the total sum of $36,250; (4) upon the Insurance Trust vesting in Todd Jr. when he attains the age of 21, Genaille, as trustee of the Insurance Trust, will pay the sum of $36,250 to the estate for distribution under the Will and the balance of the Insurance Trust will be distributed to Todd Jr.; (5) Genaille, as executor of the estate, pay the sum of $50,000 to the PGT to be held for the benefit of Todd Jr. until he attains the age of 18; and (6) that Todd Sr.'s application for dependants relief is dismissed.

The Issues and the Positions of the Parties

[12] There are five primary issues raised by the appeal and cross-appeals. These issues and the positions of the parties are set out below:

1. Did the application judge err in finding that Todd Jr. was in "financial need" within the meaning of section 2(1) of the Act?

[13] Genaille argues that the application judge erred in finding that Todd Jr. was in financial need without evidence of financial need. Genaille points to evidence that was before the application judge, showing the extensive efforts Genaille made to obtain information from Todd Sr. regarding his and Todd Jr.'s income and expenses so that he could assist them. Despite these efforts, while Todd Sr. provided some basic income information in the form of his tax returns, he refused to provide a budget, a breakdown of expenses or any other information to show that his and his son's actual needs were not being met. Genaille argues that "financial need"

within the meaning of the *Act* can only be established if the dependant's reasonable expenses exceed his or her resources.

[14] The PGT argues that the application judge made no error in finding that Todd Jr. was in financial need because there was evidence before the application judge that: Todd Jr. is a child of 14 years of age, is not self-sufficient and, although he is the beneficiary of the Insurance Trust, those funds cannot be accessed until he is 21.

[15] Todd Sr.'s position is that the application judge was correct in finding that Todd Jr. was in financial need. He argues that, rather than looking at whether expenses exceed income to determine financial need, the courts should take a modern approach and focus on the estate's ability to pay. Todd Sr. argues that the Court should be guided by analogy to the *Child Support Guidelines*, Man Reg 58/98 (the Guidelines), with its principle that a child is presumed to be in financial need and the appropriate amount of support is based on the payor's means. Todd Sr. asserts that the application judge did not require evidence of specific expenses on the part of Todd Jr. in order to find "need" under contemporary standards of responsibility.

2. Did the application judge err in ordering support of $725 per month as reasonable provision out of the estate to Todd Sr. for Todd Jr.?

[16] Genaille submits that no provision for monthly support should have been made out of the estate to Todd Sr. for Todd Jr. as there was no evidence that either of them was in financial need.

[17] The PGT does not take a position on the amount of the monthly

support awarded to Todd Sr. However, the PGT argues that the application judge erred in law by characterizing the claim for monthly support payments of $725 from the estate as a claim made on behalf of Todd Jr. when it was really a claim made by Todd Sr. in his own right.

[18] Todd Sr. argues that the application judge did not err in ordering monthly support to him from the estate, but says that the order should have been retroactive to the date of death of the deceased to take into account Todd Jr.'s ongoing needs.

3. Did the application judge err in ordering that the funds from the Insurance Trust be used to reimburse the estate for the child support paid to Todd Sr.?

[19] Genaille's position is that the application judge should not have ordered any relief from the estate as financial need was not proven. Accordingly, he says that the order for the Insurance Trust to reimburse the estate was not necessary.

[20] As previously mentioned, the PGT submits that the monthly payments awarded from the estate are payable to Todd Sr. in his own right. The PGT states that parents are obligated to provide for their children's basic needs, such as food, shelter and clothing. The PGT argues that, since the monthly support payments made to Todd Sr. from the estate are meant to help him satisfy those obligations, the order that the support payments be reimbursed from the Insurance Trust effectively requires Todd Jr. to reimburse his father for paying for his basic childhood needs. The PGT submits that the application judge erred because his order, in essence, requires Todd Jr., upon attaining the age of 21, to reimburse the estate for

support paid to his father.

[21] Todd Sr. argues that the application judge had no jurisdiction to make an order binding the trustee of the Insurance Trust. Section 2 of the *Act* limits the Court to ordering provision for a dependant to be made "out of the estate of the deceased". Todd Sr. submits that the application judge ordered a de facto variation of the Insurance Trust without anyone having brought an application for a variation of the trust in compliance with section 59 of *The Trustee Act*, CCSM c T160. I agree that an application to vary the Insurance Trust could be brought at any time prior to its termination.

4. Did the application judge err in ordering $50,000 to be paid to the PGT as reasonable provision out of the estate for Todd Jr.?

[22] Genaille's position is that the application judge should not have ordered relief in this sum from the estate for Todd Jr. as there was insufficient evidence to prove financial need. However, Genaille conceded both before the application judge and on appeal that he would consent to a payment of $20,000 from the estate as being appropriate provision for Todd Jr.

[23] The PGT submits that the application judge made no error in awarding relief in this amount, which it says is consistent with awards in other cases. The PGT also says that children have an inherent need for funding of expenses beyond basic support, such as extracurricular activities and post-secondary expenses. Parents are not obligated to pay for these expenses regardless of their means to do so.

[24] Todd Sr. says that the application judge erred in this award of relief for two reasons. First, he says that the effect of the order will be to provide Todd Jr. with the capital and income of the fund at the age of 18 and the application judge implicitly assumes, without supporting evidence, that Todd Jr. will be in financial need at that time. Todd Sr. argues that the purpose of the *Act* is to consider the financial need of the dependant at the date of the hearing, and that the application judge erred by considering potential future needs. Second, Todd Sr. submits that the application judge improperly took into account the thwarted intention of the deceased to provide $50,000 of life insurance proceeds for Todd Jr. and that the objectives of the *Act* do not include ordering relief based on the intentions of the deceased.

5. Did the application judge err in dismissing Todd Sr.'s application on the basis that he had abandoned his application and, in any event, had not made out a case for relief in his own right?

[25] Genaille concedes that Todd Sr. had not abandoned his application, but submits that the application judge was correct in dismissing the application on its merits, as Todd Sr. did not prove he was in financial need.

[26] The PGT takes no position on Todd Sr.'s application for dependants relief.

[27] Todd Sr. submits that the application judge misapprehended the submissions made in determining that he had abandoned his application for relief. Todd Sr. also argues that the application judge erred in concluding that he was not a dependant and was not in financial need. He says that the

definition of dependant in the *Act* includes his status as a former common-law partner of the deceased and that he provided sufficient evidence of his financial need.

Standard of Review

[28] The standard of review applicable in this case depends upon the nature of the question under review.

[29] The standard of review in respect of factual findings and inferences of fact is that of palpable and overriding error (see *Housen v Nikolaisen*, 2002 SCC 33 at paras 22, 24-25).

[30] The application of a legal standard to facts is a question of mixed fact and law and, in a civil matter, will only be interfered with if the judge has made a palpable and overriding error (see *Housen* at para 37).

[31] On the other hand, an error relating to an extricable principle of law or the mischaracterization of a legal standard will be reviewed on a standard of correctness. In *Housen*, the Court concluded that the initial mischaracterization of the proper legal test (in that case, the requirements for a directing mind of a company) infected or tainted the lower Court's factual conclusion. As the erroneous finding could be traced to an error in law, no deference was required, and the applicable standard was one of correctness.

Analysis and Decision

[32] In addressing the questions raised by this appeal, it will be useful to review the history and purpose of the *Act*, as well as to compare the *Act* to the dependants relief regimes in other Canadian common-law jurisdictions.

Manitoba's Legislative History

[33] As noted earlier, the entitlement provision in the *Act* states (at section 2(1)):

> **Reasonable provision for dependant**
> **2(1)** If it appears to the court that a dependant is in financial need, the court, on application by or on behalf of the dependant, may order that reasonable provision be made out of the estate of the deceased for the maintenance and support of the dependant.

[34] Previously, under *The Testators Family Maintenance Act*, RSM 1988, c T50, as repealed by the *Act*, SM 1989-90, c 42 (the *TFMA*), where the deceased failed to make "adequate provision for the proper maintenance and support" of a dependant, the dependant could apply for "such provision as [the judge] deems adequate" (at section 2(1)). The jurisprudence interpreted this provision as applying not only when a dependant was in need of maintenance, but also on what was considered "moral grounds". As stated by Dickson JA (as he then was) in *Barr v Barr*, 1971 CarswellMan 81 (CA), "the prime purpose of the Act is to enforce a moral duty to make adequate provision for the proper maintenance and support of dependants" (at para 15).

[35] This interpretation of the purpose of the *TFMA* sometimes led Manitoba courts to make lump-sum awards to independent adult children, not in financial need, in order to discharge the testator's moral duties (see *Steinberg Simmonds v Rehn, Re*, 1969 CarswellMan 97 (QB); *Dutka v Dutka*, 1980 CarswellMan 63 (QB); and *Bartel v Holmes*, 1982 CarswellMan 62 (QB), aff'd in part, (22 November 1982), Winnipeg, 275/82 (Man CA).

[36] In 1985, the Manitoba Law Reform Commission, *Report on: The Testators Family Maintenance Act* (Report #63) (Winnipeg: Law Reform Commission, 1985) (the Report), advocated that the entitlement to relief provision under the *TFMA* be changed, as it was concerned about the emphasis that the courts placed on a testator's moral duty (at p 23):

> The Commission is concerned that the emphasis on the moral duty of the testator obscures the basic function of the statute. It has shifted the court's focus from what the needs of the dependant are, to what the deceased has failed to do. If the purpose of the legislation is to make adequate provision for the maintenance of dependants, an inquiry into what, if any, "moral obligation" was owed by the testator to the applicant for relief simply veils the issue.

[37] The Commission went on to state at p 26 that the case law suggests that "family maintenance has in substance been transformed from a mere limitation on testamentary power into an emerging principle that children are entitled to a share of their parents' capital estate." The Commission added that, "The function of '*The Testators Family Maintenance Act*' should be to secure reasonable provision for the surviving dependants; it should not be employed to enable a dependant who has no need for maintenance to acquire a share of the deceased's [estate][1] (at p 27)".

[38] The Commission discussed the objective and subjective approach to this type of legislation, stating (at pp 31-32):

> In a thorough judgment, Wood J. in *Pennington v. Boucher* [(18 April 1984), Vancouver A823339, (BC SC)] describes two competing lines of authority to dependants' relief legislation. He notes:

[1] The replaced word in the Report is "share", but it appears clear that the Commission meant "estate".

> One, exemplified by Mr. Justice Dickson's comment in *Barr v. Barr*, takes a liberal approach to the application of the discretion to be found in s. 2 of the Wills Variation Act and generally rationalizes the intervention of the Court into the testator's expressed desire on the basis of what is said to be the moral or ethical duty of a parent to provide fairly and generously for all children in the absence of any direct evidence of justification for disinheritance. The other line of authority, more analytical in its approach, tends to rely on the plain meaning of the language to be found in s. 2 and bases any such intervention on the answer to the threshold question whether or not there has been adequate provision in the economic sense alone, recognizing that adequate provision in such sense will vary according to a variety of circumstances and will often involve more than mere maintenance.

> We advocate the adoption of this latter approach as we believe it would provide a more objective approach to the issue of whether a dependant has adequate provision.

[39] The Commission recognized the two main approaches in Canadian law on dependants relief—the "moral obligation" approach, currently exemplified by the *Wills, Estates and Succession Act*, SBC 2009, c 13, section 60, and the "needs-maintenance" approach. The needs-maintenance approach requires the court to focus on the dependant and determine whether the dependant is in financial need of maintenance and support before deciding to award relief. The Commission clearly advocated that Manitoba move away from the moral-obligation approach and adopt the more objective needs-maintenance model.

[40] The legislative history of the *Act* also shows an intentional shift from a subjective statute that contemplated provision being made on moral grounds to one that was objective and based on demonstrated financial need. When introducing the *Act* during the second reading of Bill 47, Minister of

Justice and Attorney General, the Hon James McCrae, referred to the Manitoba Law Reform Commission's recommendations and discussed the difference between the *TFMA* and the current Bill, stating (Manitoba, Legislative Assembly, *Debates and Proceedings* (*Hansard*), 34th Leg, 2nd Sess, No 52 (18 October 1989) at 1976):

> Present legislation focuses on maintaining the family of the testator, and the courts have established a moral duty of the testator towards his or her family as being the primary test, while looking at the conduct and the character of the applicant and the state of dependency of the applicant as factors affecting the moral duty. This Bill changes the thrust of the legislation by restricting applicants to those who are truly dependant and do not have reasonable provision for maintenance and support, either from the estate of the [deceased] or from some other source. We submit that if a person has adequate independent means there should be no cause to rewrite their father's or their mother's or their relative's will.
>
> [emphasis added]

[41] Although the *Act* is strictly needs-based, other legislation may address property allocations by a deceased that could, in some cases, be characterized as breaching a moral obligation to a surviving spouse. For example, sections 25 and 25.1 of *The Family Property Act*, CCSM c F25, give a surviving spouse the right to claim an accounting and equalization of property upon the spouse's death, similar to that which is available upon separation or divorce. Section 21 of *The Homesteads Act*, CCSM c H80, gives a surviving spouse a life interest in the homestead upon the death of the deceased spouse. The existence of this other legislation further suggests that the *Act* is meant only to provide for a dependant who is truly in financial need.

[42] The first appellate decision to consider the *Act* was *Davids v Balbon Estate et al*, 2002 MBCA 83. Huband JA, for the Court, considered the difference between the current and former entitlement provisions, and stated (at paras 19-20):

> There is an essential difference between *The Testators Family Maintenance Act* and *The Dependants Relief Act*. Under the former, family members for whom the testator had made inadequate provision for their maintenance and support were entitled to advance a claim. Under *The Dependants Relief Act*, in order to qualify, the claimant must be "in financial need," in which case the court may order that reasonable provision be made out of the estate for the maintenance and support of the dependant. It has been suggested that the test under *The Testators Family Maintenance Act* was a subjective one, based on whether the testator had breached a moral duty to make adequate provision for his or her dependants. On the other hand, the test under *The Dependants Relief Act* is an objective one to determine the dependant's financial need.
>
> However one may look upon it, the object of the legislation under *The Dependants Relief Act* is to ensure that reasonable provision is made out of the estate for the maintenance and support of a dependant who is in financial need.
>
> [emphasis added]

[43] Similarly, in *Lam v Le*, 2002 MBQB 17, Krindle J compared the new legislation to the old, and concluded that, "Under the new legislation, the role of the court is limited to responding to the demonstrated financial needs of a dependant" (at para 11). Also see *Dickinson v Woodiwiss*, 2008 MBQB 136, where Greenberg J indicated that an applicant had to "establish the threshold of financial need" (at para 11); and Cameron Harvey & Linda Vincent, *The Law of Dependants' Relief in Canada*, 2nd ed (Toronto: Thomson Carswell, 2006) at 72, where the authors indicate that lack of need will be a bar to relief in Manitoba.

[44] The Manitoba courts have indicated that "financial need" does not simply mean living at a subsistence level. Rather, the courts have determined that reasonable financial need requires consideration of the lifestyle of the dependant and the deceased while the deceased was alive (see *Dickinson* at para 14; and *Herchak v Popko and Popko (Estate of Lorne Popko)*, 2002 MBQB 3 at para 34).

Dependants Relief in Other Canadian Jurisdictions

[45] Compared to the other Canadian common-law provinces and the territories, the approach taken by the Manitoba Legislature is distinct. Harvey and Vincent refer to Manitoba's legislation as containing a "distinctive primary jurisdiction section" (at p 6), and Cameron Harvey, "Succession and Conflict of Laws" (2005) 31 Man LJ 67 (QL), states that, "our Act, compared to the similar legislation throughout the common-law world, uniquely is based solely on financial need" (at para 22).

[46] No other Canadian jurisdiction's statute uses the language of "financial need" which appears in the *Act*. In the majority of Canadian jurisdictions, applicants are entitled to apply for dependants relief from an estate if the deceased does not make "adequate provision" for their proper maintenance or support. For example, in Ontario, the *Succession Law Reform Act*, RSO 1990, c S26 states (at section 58(1)):

> **Order for support**
> **58(1)** Where a deceased, whether testate or intestate, has not made adequate provision for the proper support of his dependants or any of them, the court, on application, may order that such provision as it considers adequate be made out of the estate of the deceased for the proper support of the dependants or any of them.

[47] This language is very similar to that formerly applicable in Manitoba under the *TFMA*.

[48] The same or comparable language is currently used in Alberta[2], Nova Scotia[3], Prince Edward Island[4], Newfoundland and Labrador[5], Yukon[6], Northwest Territories[7] and Nunavut[8]. Similarly, in Saskatchewan[9], dependants can apply for a "reasonable" amount of maintenance from an estate if the deceased did not make "reasonable" provision for their maintenance. New Brunswick's entitlement provision[10] uses slightly different language, indicating that, if the dependant's "resources" are not sufficient to provide adequately for the dependant, a judge may order an adequate provision out of the estate for the maintenance and support of the dependant. In British Columbia[11], if adequate provision for a dependant's proper maintenance and support is not made in a will, the dependant can apply for provision out of the estate that is "adequate, just and equitable in the circumstances".

[49] In British Columbia, an application can be brought for a share of the estate on moral grounds regardless of financial need. In reviewing such a claim, the Court will take into account whether the testator acted "fairly" towards family members. The leading case on this approach is *Tataryn v Tataryn Estate*, [1994] 2 SCR 807. See also *Kish v Sobchak Estate*, 2016

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[2] *Wills and Succession Act,* SA 2010, c W-12.2, section 88(1).
[3] *Testators' Family Maintenance Act*, RSNS 1989, c 465, section 3(1).
[4] *Dependants of a Deceased Person Relief Act*, RSPEI 1988, c D-7, section 2.
[5] *Family Relief Act*, RSNL 1990, c F-3, section 3(1).
[6] *Dependants Relief Act,* RSY 2002, c 56, section 2.
[7] *Dependants Relief Act*, RSNWT 1988, c D-4, section 2(1).
[8] *Dependants Relief Act*, RSNWT (Nu) 1988, c D-4, section 2(1).
[9] *The Dependants' Relief Act*, *1996*, SS 1996, c D-25.01, section 6(1).
[10] *Provision for Dependants Act*, RSNB 2012, c 111, section 2(1).
[11] *Wills, Estates and Succession Act*, SBC 2009, c 13, section 60.

BCCA 65; and *Eckford v Vanderwood*, 2014 BCCA 261 at para 37.

[50] *Tataryn* was decided under British Columbia's previous legislation, the *Wills Variation Act*, RSBC 1979, c 435. However, the entitlement provision in the current *Wills, Estates and Succession Act* is essentially the same. There is no definition of "children" under British Columbia's legislation, which means that independent adult children may apply for relief, unlike under the *Act*. In *Tataryn*, the Court determined that the history and language of British Columbia's *Wills Variation Act* did not support a needs-maintenance approach to its application. The Court, in *Tataryn*, focussed instead on whether the testator had met his or her legal and moral obligation to provide an adequate provision to dependants.

[51] In *Tataryn*, McLachlin J (as she then was) equated "adequate" with "adequate, just and equitable" (at p 814), and considered how these words could be interpreted. She stated (*ibid*):

> The words "adequate, just and equitable" may be interpreted in different ways. At one end of the spectrum, they may be confined to what is "necessary" to keep the dependants off the welfare rolls. At the other extreme, they may be interpreted as requiring the court to make an award consistent with the lifestyle and aspirations of the dependants. Again, they may be interpreted as confined to maintenance or they may be interpreted as capable of extending to fair property division.

[52] McLachlin J noted that the language of the *Wills Variation Act* conferred a broad discretion on the Court, indicating the Legislature's intention that orders had to be just in the specific circumstances and in light of contemporary standards (at pp 814-15).

[53] McLachlin J considered the evolution of the jurisprudence in

British Columbia and preferred the later cases which held that the legislation did not mandate a strictly needs-maintenance approach, but could encompass the testator's moral duty to give a fair share of the capital of the estate to family members, even in the absence of need (see pp 817-19). In coming to this conclusion, she stated (at p 819):

> First, I cannot agree that the wording of the [*Wills Variation Act*] suggests a strict needs-based test. As noted above, the wording is broad and capable of embracing changing conceptions of what is "adequate, just and equitable". The [*Wills Variation Act*] does not mention need. Moreover, if need were the touchstone, the failure to exclude independent adult children from its ambit presents difficulty.
>
> [emphasis added]

[54] Unlike the British Columbia legislation, the *Act* uses financial need as a threshold for entitlement, excludes independent adult children and does not use words such as "discretion" and "adequate, just and equitable". Furthermore, the history of the Manitoba legislation shows that the legislators intended relief under the *Act* to be confined to cases where the dependant does not have other means for maintenance and support. The history and language of the *Act* clearly reflects a needs-maintenance approach to dependants relief.

[55] The structure of the *Act* confirms this. For example, section 2(1) of the *Act* indicates that a court may order reasonable provision for the maintenance and support of the dependant if it appears that the dependant is in financial need. This is the sole threshold test that must be met in order to qualify for relief. It is only once that test is passed that a court can consider additional factors in order to determine the appropriate amount and duration of the award of relief. Section 8(1) of the *Act* provides that:

Determination of amount

8(1) In determining the amount and duration, if any, of maintenance and support, the court shall have regard primarily to the financial needs of the dependant and shall consider all of the circumstances of the application, including,

(a) the size and nature of the deceased's estate;

(b) the assets and financial resources that the dependant has or is likely to have in the foreseeable future;

(c) the measures available for a dependant to become financially independent and the length of time and cost involved to enable the dependant to take such measures;

(d) the age and the physical and mental health of the dependant;

(e) the capacity of the dependant to provide for his or her own support;

(f) if the dependant is a spouse or common-law partner, any distribution or division of property that the dependant has received or is entitled to receive under *The Homesteads Act* or *The Family Property Act* [CCSM c F25];

(g) the assets that the dependant is entitled to receive from the estate of the deceased otherwise than by an order under this Act;

(h) the claims that any other dependant or any other person has upon the estate;

(i) any provision which the deceased while living made for the dependant and for any other dependants;

(j) if the dependant is a child, the child's aptitude for and reasonable prospects of obtaining an education;

(k) if the dependant is a child to whom the deceased stood in loco parentis, the primary obligation of the child's parents to maintain the child and whether the parents have discharged that obligation.

[56] The listed factors are only relevant in determining the amount and duration of the support. Threshold eligibility for relief, however, is solely assessed on the dependant's financial need.

[57] Given the different legislative focus of the *Act*, it is therefore not surprising that *Tataryn* and the cases that apply its principles (see, for example, *Cummings v Cummings*, 2003 CarswellOnt 571 (Sup Ct J)), aff'd 2004 CarswellOnt 99 (CA), leave to appeal to SCC refused 2004 CarswellOnt 2686), have not been embraced by the Manitoba courts.

[58] Nor is it surprising that courts in other Canadian jurisdictions do not discuss financial need in depth, except as one of a list of factors used to determine adequate provision for a dependant. A strict needs-maintenance approach has been rejected. In these jurisdictions, need is simply one of a number of factors to consider, and the absence of evidence about the dependant's income or expenses or the absence of evidence of financial need will not necessarily disqualify the applicant from receiving relief. See, for example, *Webb v Webb Estate*, 1995 CarswellAlta 111 at paras 30-33, 58 (Surr Ct); *Redmond v Redmond Estate*, 1996 CarswellNS 441 at paras 14-19, 31 (SC); *Re Broen (Estate)*, 2002 ABQB 806 at paras 22-24; *Thronberg Estate*, 2003 SKQB 114 at paras 6-7; *Boje v Boje (Estate of)*, 2005 ABCA 73 at para 23; *Skworoda v Skworoda (Estate)*, 2008 ABQB 240 at paras 36, 53, 55, 63; *Koma v Tomich Estate*, 2011 ABCA 186 at paras 19-22; *Soule v Johansen Estate*, 2011 ABQB 403 at paras 41-43; *Nelson Estate*, 2013 ABQB 15 at paras 21, 61; *MacDonald Estate*, 2014 PESC 7 at paras 18-23; *McKenna Estate (Re)*, 2015 ABQB 37 at paras 40 *et seq*; *David v Beals Estate*, 2015 NSSC 288 at paras 49-50; *Lafleur v Lafleur*, 2016 ABCA 7 at para 15; and *Scott v Seier Estate*, 2016 SKCA 76 at para 3.

Treatment of Future and Extra Expenses of Children

[59] This appeal raises the issue of whether the Court can consider future expenses, as well as the proper approach to extra expenses of children beyond basic support.

[60] As for future or contingent expenses, in my view, the Legislature did not intend the *Act* to be interpreted to prevent the Court from considering future or contingent events. Indeed, the *Act* clearly suggests that the Court may do just that when determining the amount and duration of a support order. In particular, section 8 of the *Act* indicates that the Court should consider "all of the circumstances of the application", including:

- the assets and financial resources that the dependant "is likely to have in the foreseeable future" (section 8(1)(b));

- the measures available for a dependant "to become financially independent and the length of time and cost involved" to achieve this (section 8(1)(c)); and

- "if the dependant is a child, the child's aptitude for and reasonable prospects of obtaining an education" (section 8(1)(j)).

[61] Most of the Canadian jurisprudence that has considered expenses beyond basic support (such as post-secondary education or extracurricular activities) has determined that these are not inherent needs that require funding from an estate. Most of the case law, including *CERB v BYEML*, 2004 MBQB 52, suggests that there should be evidence of some realistic possibility that the expense will occur. The courts seem content with

evidence that the child has expressed an interest in university or extracurricular activities, or has been excelling at school.

[62] In addition, evidence that the surviving parent and the child cannot reasonably afford the university or extracurricular expenses is required. The absence of financial information led the Court in *Lam* to deny relief to a father who had applied on behalf of his 16-year-old daughter after her mother died. The daughter deposed that she wished to go to university, would be dependent for the foreseeable future, and that her father was "unable to provide her with all the financial resources that she requires" (at para 8). However, Krindle J was not satisfied, on the evidence, that the girl was in financial need, noting a lack of "meaningful particularity" in the application (*ibid*). In this regard, Krindle J noted that the father had provided "no particulars as to his income or his expenses, or his ability to support his daughter" (*ibid*). She concluded that, even if she had accepted, on this evidence, that the daughter was in financial need "that could not be met by her custodial parent" (at para 13), it was impossible to determine what amount would constitute reasonable provision out of the estate for the maintenance and support of the dependant without knowing the present financial circumstances of the custodial parent of the child.

[63] For Canadian cases on applications for relief by or on behalf of minor children generally, see *McSween v McSween Estate*, 1985 CarswellOnt 710 (Surr Ct); *Pauliuk v Pauliuk*, 1986 CarswellAlta 213 (QB); *Gaspar (Litigation Guardian of) v Gaspar Estate*, 1997 CarswellOnt 3066 (Ct J (Gen Div)); *VTD (Next Friend of) v Spinelli (Estate)*, 1998 ABQB 966; *Handlen et al v Boose et al*, 2001 BCSC 1528; *Re Woycenko (Estate of)*, 2002 ABQB 640; *Re JKT (Estate of)*, 2003 ABQB 769; *Madore-Ogilvie*

(Litigation Guardian of) v Ogilvie Estate, 2008 ONCA 39; *Stone v Rybroek*, 2010 SKQB 155; *Birkenbach Estate (Re)*, 2015 ABQB 3; *Adams v Schmidt*, 2016 SKQB 401; and *In Re Camsell Estate*, 2016 NWTSC 62.

Application to this Case

[64] The first issue raised is whether Todd Jr. is in financial need within the meaning of the *Act*. This is a question of mixed fact and law, subject to review on the basis of palpable and overriding error.

[65] Todd Sr. argues that financial need on his part and on that of Todd Jr. can be presumed because, as Todd Jr.'s surviving parent, he is no longer receiving child support payments from the deceased. Todd Sr. relies on *CERB*, a prior decision of the application judge. This is the only Manitoba case in which a court has presumed need by relying upon evidence of what the appropriate amount of child support would have been under the Guidelines based on the deceased's income.

[66] In my view, it is not appropriate to use the Guidelines as a means to determine if the surviving parent or child is in "financial need" within the meaning of the *Act*. As explained, the purpose of the *Act* is to provide for dependants who have demonstrated financial need. The purpose of the Guidelines, on the other hand, is not to respond to demonstrated financial need of children and custodial parents, but, as noted by James C MacDonald & Ann C Wilton, *Child Support Guidelines: Law and Practice*, 2nd ed (Carswell, 1998) (WLNext Can), to "establish a fair standard of support for children, to reduce conflict and tension between parents, to improve the efficiency of the legal process, and to ensure consistent treatment of parents or spouses and their children" (emphasis added).

[67] The focus of the Guidelines is on a fair allocation of the paying parent's income, not on the actual financial needs of the child. In that way, the Guidelines adopt a "fair-share" approach to child support obligations of living parents, as opposed to the decidedly "needs-maintenance" approach of the *Act*. In addition, the Guidelines are ill-suited to determining the obligations of a deceased parent since the Guidelines are based solely on the paying parent's income. Presumably, in the vast majority of cases, the deceased parent's income would cease upon death.

[68] Judges should be very cautious in inferring that the loss of child support payments upon a deceased parent's death means that the surviving parent or child is in financial need, without further evidence. A surviving parent may be able to reasonably support himself and the child from other means. The idea of using a child support model, such as the Guidelines, as an equivalency for financial need under the *Act* is not appropriate. Ultimately, the applicant has the onus to prove that the dependant is in financial need, not that the applicant has lost child support payments from the deceased.

[69] For these reasons, while, in some cases, it may be appropriate for the Guidelines to be considered as a factor, they should not be used as the sole means to determine if a child is in financial need for purposes of the *Act*.

[70] The PGT argues that there was sufficient evidence here of financial need on the part of Todd Jr. as he is a minor child, is not self-sufficient and will have no access to funds from the Insurance Trust until he is 21. This is not sufficient to form the basis of a finding of financial need on the part of a

minor. There was also evidence before the application judge that Todd Jr. lives with his father, but there was no evidence that Todd Sr. is unable to provide for Todd Jr.'s financial needs.

[71] Todd Sr. failed to provide any meaningful particulars of his income, assets and expenses or those of Todd Jr. The evidence provided did not demonstrate that either he or Todd Jr. was in financial need. Accordingly, the judge made a palpable and overriding error when he concluded, based on the record, that Todd Jr. was in financial need within the meaning of the *Act*.

[72] The second issue is whether the application judge erred in ordering support of $725 per month as reasonable provision out of the estate to Todd Sr. for Todd Jr. Again, this is a question of mixed fact and law, subject to review on the basis of palpable and overriding error.

[73] As argued by the PGT, the child support is an award made to Todd Sr., not Todd Jr. Like any award of child support to a parent, its purpose is to help the parent discharge his or her obligation to provide for the child's needs.

[74] The application judge's award of monthly child support to Todd Sr. in the amount of $725 per month was premised on his finding that Todd Jr. was in financial need. As noted, this finding was made in error and without evidence to support a finding that Todd Sr. was in financial need. Accordingly, I would set aside the award of monthly child support.

[75] The third issue is whether the application judge erred in ordering that, upon Todd Jr. attaining the age of 21, funds from the Insurance Trust be

used to reimburse the estate for the child support paid to Todd Sr. This question raises an extricable question of law, that is, whether the application judge had the jurisdiction to make an order affecting the Insurance Trust. Accordingly, the standard of review is correctness.

[76] Todd Sr.'s argument that the application judge had no jurisdiction to make an order under the *Act* affecting the Insurance Trust, is very compelling (see *King v King*, 1990 CarswellMan 81 at para 7 (QB)). However, this ground of appeal can be disposed of simply on the basis that, since its purpose was to reimburse the estate for child support paid to Todd Sr. and that order has been set aside, the order for reimbursement must also be set aside. Therefore, I would set aside the application judge's order that, upon the Insurance Trust vesting in Todd Jr. when he attains the age of 21, Genaille, as trustee of the Insurance Trust, pay the sum of $36,250 to the estate for distribution under the Will.

[77] The fourth issue is whether the application judge erred in ordering $50,000 to be paid to the PGT as reasonable provision out of the estate for Todd Jr. This is also a question of mixed fact and law, subject to review on the basis of palpable and overriding error.

[78] The PGT argues that children have an inherent need for support for extra expenses (such as post-secondary education or extracurricular activities), and that no financial information need be provided to justify an award from the estate for these expenses. As seen, even in the provinces that follow *Tataryn*, the courts do not appear to accept that children have an inherent need for support for post-secondary education or extracurricular activities, and the courts do not automatically make a provision out of the

estate to cover such contingencies. Rather, the courts expect some evidence that there is a fair possibility that the child will go to university, and will consider whether the child actually needs funding from the estate. Awards for such expenses are often (and, in my view, appropriately) made as a lump sum from the estate. In Manitoba, of course, demonstrated financial need is required even to open the door to relief under the *Act*. Thus, evidence that the surviving parent and the child cannot reasonably afford the university or extracurricular expenses would be required.

[79] As already explained, there was insufficient evidence on the record to form a basis for the application judge's finding that Todd Jr. was in financial need. There was no evidence provided of any specific or contingent financial need that could form the basis for the award of $50,000 made to the PGT on behalf of Todd Jr. However, in light of Genaille's concessions that it would be appropriate for the sum of $20,000 to be set aside for Todd Jr., I would vary the order of the application judge only to the extent of substituting the sum of $20,000 for the sum of $50,000.

[80] The fifth and final issue is whether the application judge erred in dismissing Todd Sr.'s application on the basis that he had abandoned his application and, in any event, had not made out a case for relief in his own right. This is also a question of mixed fact and law, subject to review on the basis of palpable and overriding error.

[81] The application judge made no error in dismissing Todd Sr.'s application for further relief in his own right, as there was insufficient evidence on the record to prove that Todd Sr. was in financial need.

Costs of the Appeal

[82] Both Genaille and the PGT requested their costs of the appeal from the estate. Genaille advised that he was not seeking costs from Todd Sr. I note that the application judge made no order as to costs. Usually, in civil appeals, the Court will order costs against the unsuccessful party, even in estate litigation matters (see *McDougald Estate v Gooderham*, 2005 CarswellOnt 2407 at paras 86-88 (CA)). However, in this case, additional considerations arise because, not only is this is an estate litigation matter, it involves a dependants relief application.

[83] Historically, the traditional rule in estate litigation was that the costs of all parties were payable from the estate. However, this rule has given way to a more modern approach that seeks to discourage needless litigation. Unless certain public policy considerations apply to the litigation, the normal civil litigation costs rules will generally apply. The public policy considerations that support an order for all parties' costs to be paid from the estate are where the litigation was considered necessary either: (1) due to issues created by the testator; or (2) to ensure that estates are properly administered (see *Ronald v Ronald and Ronald*, 2004 MBQB 82 at para 10, aff'd *Ronald Estate, Re*, 2005 MBCA 70; *Sawdon Estate v Sawdon*, 2014 ONCA 101 at paras 82-85; and *Neuberger v York*, 2016 ONCA 303 at para 24).

[84] The modern approach to costs in estate litigation has not been applied as stringently in dependants relief matters, where even unsuccessful applicants often receive their costs from the estate. However, this will not always be the case, particularly if the application was without any merit (see

Kowalyk et al v Zenyk, 2007 MBQB 311 at para 62; and *Petrowski v Petrowski Estate*, 2009 ABQB 753).

[85] Also relevant is the long-standing principle that an executor is entitled to indemnification from the estate for all reasonable costs incurred in executing his or her duties (see *Geffen v Goodman Estate*, [1991] 2 SCR 353 at 390; and *Manitoba (Public Trustee) v Ballen*, 1992 CarswellMan 73 at para 14 (CA)). This right of indemnification extends to reasonable legal fees on a solicitor-and-client basis (see *Merry Estate v Merry Estate*, 2002 CarswellOnt 3993 at paras 41, 48 (Sup Ct J)).

[86] In this case, Genaille acted reasonably throughout and his position was ultimately successful on appeal. Genaille is entitled to his costs from the estate on a solicitor-and-client basis.

[87] The PGT's participation in this litigation was made necessary due to the position advanced by Todd Sr. and the conflict inherent in his initially pursuing applications in his own right and on behalf of Todd Jr. The PGT was represented by one of his staff lawyers. In these circumstances, solicitor-and-client costs are not suitable. Instead, I would order that the PGT is entitled to party-and-party costs from the estate in accordance with the Court of Appeal tariff.

[88] In light of the position on costs taken by Genaille and the considerations that apply to costs in dependants relief matters, I would not award costs against Todd Sr. Nor, however, am I willing to order that his costs be paid from the estate. The appeal by Genaille was necessary due to errors made by the application judge. However, this matter should never have been before the application judge. The record shows that Genaille

attempted to work with Todd Sr. very early on to ensure that reasonable provision was made for Todd Jr.'s needs. It was Todd Sr.'s obstinate unwillingness to provide any meaningful financial information that made it impossible for a settlement to be achieved.

Conclusion

[89] For the foregoing reasons, Genaille's appeal is allowed in part, the cross-appeal of Todd Sr. is allowed in part and the cross-appeal of the PGT is allowed.

[90] The judgment of the application judge dated February 29, 2016 is set aside with the exceptions of para 5 (which is varied to substitute the sum of $20,000 for the sum of $50,000) and para 6.

[91] Genaille is entitled to costs of this appeal from the estate on a solicitor-and-client basis. The PGT is entitled to party-and-party costs of this appeal from the estate in accordance with the tariff. Todd Sr. is not entitled to costs.

Pfuetzner JA

I agree: Steel JA

I agree: Cameron JA