

The Continuing Relevance of Testator's Family Maintenance Act Cases

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I. INTRODUCTION

THIS ARTICLE IS WRITTEN PRIMARILY for practising lawyers and the judiciary. Its purposes are to provide a first-time comprehensive record of the reported cases respecting the former *Testator's Family Maintenance Act*¹ and to suggest their continuing relevance to *The Dependants Relief Act*² proceedings.

The Testator's Family Maintenance Act was replaced by *The Dependants Relief Act* effective 1 July 1990. *The D.R. Act* radically changed the law of dependants relief in Manitoba. The primary jurisdiction section of *The T.F.M. Act* provided,

- s. 2(1) Where a person (hereinafter called the "testator") dies leaving a will, and without making therein adequate provision for the proper maintenance and support of his dependants, or any of them, a judge on application by or on behalf of such dependants, or any of them, may, in his discretion and taking into consideration all the circumstances of the case, order that such provision as he deems adequate shall be made out of the estate of the testator for the proper maintenance and support of the dependants, or any of them.

Over the years this jurisdiction was implemented not only to take care of financial need, but also to award an equitable share of or to reward a moral claim to the deceased's estate. The primary jurisdiction section of *The D.R. Act* reads,

- s. 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.

Obviously, the court's jurisdiction is restricted to taking care of financial need. There have been only two reported *D.R. Act* cases and neither sheds much light on the Act. So, there is no experience from reported cases of how *The D.R. Act* will be implemented. Parenthetically, resort to *The D.R. Act*

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¹ *The Testator's Family Maintenance Act*, S.M. 1946, c. 64 [hereinafter *The T.F.M. Act*].

² *The Dependants Relief Act*, S.M. 1989-90, c. 43 [hereinafter *The D.R. Act*].

should not be necessary as often as it was to *The T.F.M. Act*. This should follow for three reasons, namely (i) the extension of *The Marital Property Act*³ to the death of a spouse, (ii) *The Intestate Succession Act*⁴ giving a surviving spouse the whole of a deceased spouse's estate when all of the deceased spouse's children are also children of the surviving spouse, and (iii) the restrictive *D.R. Act* definition of child insofar as adult children are concerned.

II. THE CASE LAW

THERE ARE thirty-nine reported *T.F.M. Act* cases. What, if any, is their continuing relevance? Regarding the court's primary jurisdiction, there were three leading cases, namely *Re Lawther Estate*,⁵ *Barr v. Barr*,⁶ and the trial decision in *Sloane v. Bartley*.⁷ Their expositions of the court's primary jurisdiction, including quotations from various commonly quoted cases, are obsolete, except insofar as they relate to financial need as distinct from fair share and moral claim or obligation. Some of *The T.F.M. Act* cases continue to be relevant respecting various secondary matters and on their facts it may be instructive to consider how they would be decided pursuant to *The D.R. Act*. Here they are in chronological order.

A. The T.F.M. Act Cases

1. *Re Lawther*⁸

Along with *Barr v. Barr*,⁹ this case is the most cited case in other jurisdictions for Chief Justice Williams' list of the circumstances to be considered by the court; in this regard it has been superseded by s. 8(1) of *The D.R. Act*, a narrower list due to the narrower focus of *The D.R. Act*; for instance, one of the circumstances considered at some length by the court in *Re Lawther*, contribution of the applicant to the creation of the deceased's estate, is not listed in s. 8(1) of *The D.R. Act*.

Re Lawther is still of some interest in several respects: the statement that the onus is on the applicant;¹⁰ as an example of the court hearing evidence from a

³ *The Marital Property Act*, R.S.M. 1985, c. M-45.

⁴ *The Intestate Succession Act*, S.M. 1989-90, c. 43.

⁵ (1947), 55 Man. R. 142 (K.B.).

⁶ (1972), 25 D.L.R. (3d) 401 (Man. C.A.).

⁷ (1980), 4 Man. R. (2d) 41 (Q.B.).

⁸ *Supra* note 5.

⁹ *Supra* note 6.

¹⁰ *Supra* note 5 at 150.

friend of the testator of the testator's reasons for his testamentary treatment of his wife;¹¹ the court's treatment of the contention that the application was premature because the widow had not taken advantage of a term of the testamentary trust in her favour providing for an encroachment on capital;¹² the illustrative list of the widow's needs;¹³ the statement in favour of a periodic payment order over a lump sum order;¹⁴ the treatment of the incidence of the court's order in respect of the realty affected by the order.¹⁵

2. *Re Blackmore*¹⁶

This case involved a \$2 000 estate of which a separated widow was given nothing by the testator's will. She left him because he "was addicted to unnatural [sexual] practices" and he physically abused her. She contracted polio and subsequently supported herself doing needle work. The court ordered her to receive \$1 800 of the estate, leaving \$200 for a requiem mass directed by the will! The testamentary beneficiaries opposed the widow's application and for this the court penalised them by ordering them to pay her costs:

The beneficiaries, other than the pastor of St. Mary's Cathedral, will pay the applicant's costs of and incidental to this application, which I fix at \$100. I feel that under the circumstances of this most distressing case, with which they must all have been familiar, beneficiaries should have been willing that this small estate should go to one who had been so badly treated and who was in such dire need. They should, at least, not have opposed this application.

This case is of continuing interest for the costs order.

3. *Re Trott*¹⁷

This case involved a 54 year old widow of modest means, in poor health, who was unable to do significant work and an estate of only \$11 000 of which she was left only one-third to be paid in a stipulated monthly payment. The court said, *inter alia*, that "she is not required to show inability to earn her own living in order to succeed" Bearing in mind that s. 2(1) of *The D.R. Act* commences "If it appears to the court that a dependant is in financial need," this statement may continue to have currency respecting surviving spouses and some co-habitees, who unlike all other dependants, except minor children, are defined without a requirement of financial dependence on the deceased.

¹¹ *Re Lawther Estate*, *supra* note 5 at 155–56.

¹² *Ibid.* at 157–58.

¹³ *Ibid.* at 158.

¹⁴ *Ibid.* at 159.

¹⁵ *Ibid.* at 162.

¹⁶ (1948), 56 Man. R. 88 (K.B.).

¹⁷ [1949] 2 W.W.R. 738 (Man. K.B.).

Incidentally, given the modesty of the estate, one would expect, based upon several decisions in other provinces, for the court to have awarded her the whole estate. However, the court niggardly awarded her only an increase in the stipulated monthly payment.

4. *Re La Fleur*¹⁸

Re La Fleur was an application by an able-bodied, employed adult son; apart from the court's treatment of the case in terms of its jurisdiction under *The T.F.M. Act*, the case is indicative of the likely lack of success such an applicant will have under *The D.R. Act*. The case also illustrates the receptiveness of courts across Canada to entertaining a late application under s. 6(3) of *The D.R. Act* and the consideration the courts give to the moral claim of a testamentary beneficiary who is not a statutory dependant.

5. *Re Tiefenbach*¹⁹

This case involved a successful application by two adult daughters of modest means. Probably, they would not even qualify to apply under the definition of "dependant" in s. 1 of *The D.R. Act*:

"[D]ependant" means ...

(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.

Neither was "substantially dependant" on their father at the time of his death. One was employed and the other, while too sick to work, had an employed husband. There is controversy in the cases decided in other provinces concerning the relevance of the income of a child dependant's spouse. In this regard, marriages fail, but then courts order property settlements and maintenance, and failing either there is social assistance. Similarly, a self-sufficient child dependant can become unemployed or unemployable. It is arguable that a self-sufficient child and an unemployable married child should be treated equally.

¹⁸ (1948), 56 Man. R. 44 (K.B.).

¹⁹ (1950), 59 Man. R. 398 (K.B.).

6. Re Cousins²⁰ and Re Pfrimmer²¹

These two cases concerned institutionalised adult children. Probably, they continue to be the common law of Manitoba, indicating that even though the basic needs of a spouse or child are being provided by the government they cannot be ignored by a spouse or parent. The practical advice is an appropriate bequest conditional upon its use to provide additional comforts.

7. Re Brown Estate: Trainor v. Toronto General Trusts Corp.²²

This case continues to be a useful illustration of the problem of qualifying a child as a dependant by implied adoption. One of the child applicants was so qualified but she would have the same difficulty under *The D.R. Act* obtaining a favourable order as the daughters in *Re Tiefenbach*.²³

8. Re Day Estate: Laventure v. Killey²⁴

In this case the court made an order suspending administration of the estate to enable a non-needy adult daughter to make an application in the future should she ever become in need. Assuming that a non-needy adult child qualifies to apply under *The D.R. Act*, this case continues for *The D.R. Act* to suggest the tactic in cases where adult children are not currently in need or unable to provide for their own livelihood (remember *Re Tiefenbach*²⁵ and *Re Brown Estate*²⁶) of asking the court pursuant to s. 3 of *The T.F.M. Act* for a suspending order respecting all or part of the administration of the estate, especially if the residuary beneficiary is not a statutory dependant. Parenthetically, Justice Maybank said, "[i]t is true ... that it is a *sine qua non* for an applicant to show actual need before the court will vary a testator's will."²⁷ Arguably, this was not true at the time under *The T.F.M. Act* and certainly it was not true at the time of *Barr v. Barr*.²⁸ However, it is true under *The D.R. Act*.

²⁰ (1951), 59 Man. R. 372 (K.B.)

²¹ (1968), 66 W.W.R. (N.S.) 574 (Man. C.A.).

²² (1953), 61 Man. R. 154 (C.A.).

²³ *Supra* note 19.

²⁴ (1953), 61 Man. R. 198 (Q.B.).

²⁵ *Supra* note 19.

²⁶ *Supra* note 22.

²⁷ *Ibid.* at 203.

²⁸ *Supra* note 6.

9. Re Karabin Estate: Sobodiuk v. McLaren²⁹

This case continue to be important for Justice Freedman's frequently cited comments about disqualifying character or conduct. However, it is arguable that disqualifying character or conduct is no longer relevant since *The D.R. Act* has to do only with financial and not moral obligation.

10. Pope v. Stevens³⁰

Pope v. Stevens had to do with a very needy 60 year separated widow. She would be as deserving under *The D.R. Act* as she was under *The T.F.M. Act* for the order made for her. The court said that the testator could have transferred during his lifetime the farmland he devised to his grandsons and a son and it would have been beyond the reach of the court; but, not having done so, on his death the moral obligation to his widow took preference over the moral obligation he owed to his sons who had helped him farm the lands. The court's discussion of s. 22 of *The T.F.M. Act* is obsolete as it has not been continued in *The D.R. Act*.

A lump sum order "was urged ... in order that [the widow] ... may acquire a home." While recognising "the desirability of this course of action" from the widow's point of view, with reference to several cases, including *Re Brown Estate*,³¹ which espouse the virtue of periodic payments, the court ordered a monthly payment for her life.

Pope v. Stevens is also of continuing importance (i) for its articulation of the jurisdiction of the Court of Appeal,³² (ii) as an illustration of the ability of separated spouses to apply, and (iii) of a waiver not barring an application.

11. Re Reinsch³³

This case concerned another separated widow application. Its continuing interest is respecting the court ordered incidence of the lump sum award made for the widow. The court ordered it to come out of the bequests made to the two legitimate children, who were near their majority, but not out of the bequest to an infant, illegitimate child.

²⁹ (1954), 62 Man. R. 334 (Q.B.).

³⁰ (1954), 63 Man. R. 162 (C.A.).

³¹ *Supra* note 22.

³² *Supra* note 30 at 170-71.

³³ (1956), 19 W.W.R. (N.S.) 63 (Man. Q.B.).

12. Re Keroack Estate³⁴

This case indicates that a divorced spouse could not apply under *The T.F.M. Act*; however, this state of affairs has been ameliorated by the definition of "dependant" in s. 1 of *The D.R. Act* including

- s. 1(c) a person of the opposite sex to the deceased not legally married to the deceased who ...
 - (iii) was being paid or entitled to be paid maintenance and support by the deceased under an agreement or a court order at the time of the deceased's death.

13. Packer v. Packer³⁵

This decision is relevant respecting what constitutes a homestead, but it is of no interest respecting the dependants relief aspect of the case. A court today pursuant to *The D.R. Act* could make the same order for the widow as was made pursuant to *The T.F.M. Act*.

14. Re Martin³⁶

Re Martin was most important for the court's decision that the date for assessing all the circumstances was the date of the hearing, not the date of the deceased's death; this has been codified in s. 2(3) of *The D.R. Act*.

15. Re Walker's Will³⁷

This case concerned an application by two adult children of modest means unable by reason of poor health to work any longer. While the daughter had been given by the deceased's will \$6 000 of the \$20 000 estate, the rest was given to acquaintances and none to the son who had contributed very materially to the creation of the estate and to the deceased's welfare in his old age. The court's discussion, at some length of its jurisdiction under *The T.F.M. Act* is, of course, of no continuing interest. The court ordered lump sums for the two children. Whether a court could make the orders under *The D.R. Act* would depend upon whether the court would hold the children qualified to apply as being "unable ... to provide [themselves] ... with the necessaries of life." Arguably, the son's contribution to the creation of the deceased's estate and the deceased's welfare are irrelevant under *The D.R. Act*.

³⁴ (1958), 65 Man. R. 96 (Q.B.).

³⁵ (1959), 31 W.W.R. (N.S.) 22 (Man. Q.B.).

³⁶ (1962), 40 W.W.R. (N.S.) 513 (Man. C.A.).

³⁷ (1963), 43 W.W.R. (N.S.) 321 (Man. Q.B.).

16. Re Steinberg³⁸

This case resulted in lump sum orders for two able-bodied adult children, 29 and 34 years old of modest means, who would not qualify to apply under *The D.R. Act*. *Re Steinberg* is only relevant for a few incidental points: it is another example of a late application being entertained; it also states that the onus is on the applicant, as it continues to be; it illustrates the respect the court gives to non-statutory dependants who have contributed to the creation of the deceased's estate; and that a dependant's estrangement is not necessarily disqualifying conduct.

17. Re Nixey³⁹

Re Nixey involved an application by a 68-year-old widow with "minimal" assets, who had deserted her husband 31 years earlier. For her desertion (i) the deceased said in his will he left her nothing, and (ii) the court dismissed her application. A court could come to the same disposition under *The D.R. Act*.

18. Barr v. Barr⁴⁰ and Re Lawther⁴¹

As mentioned earlier, this pair were leading Manitoba cases on the court's jurisdiction under *The T.F.M. Act*. *Barr* was widely quoted for Dickson J.A.'s statement, "[t]he dominant theme running through the cases, and they are myriad, is one of ethics, even more than economics."⁴²

This reflected the point of view that dependants relief legislation was as much or more to do with equitable share than need. Quite clearly, by the wording of the dependant definitions, and ss. 2(1) and 8(1), *The D.R. Act* has only to do with need. So, *Barr v. Barr* is an obsolete case insofar as the exposition of the court's jurisdiction is concerned. Probably, the applicant adult son would not qualify to apply under *The D.R. Act*. If contribution to the creation of the deceased's estate continues to be a relevant circumstance under *The D.R. Act* this case is a good example of a court's consideration of this circumstance.

The court's statement of its appellate jurisdiction continues to be germane.⁴³

³⁸ (1969), 3 D.L.R. (3d) 565 (Man. Q.B.).

³⁹ (1972), 31 D.L.R. (3d) 597 (Man. Q.B.).

⁴⁰ *Supra* note 6.

⁴¹ *Supra* note 5.

⁴² *Barr v. Barr*, *supra* note 8 at 350

⁴³ *Supra* note 6 at 408.

19. Dushenko v. Royal Trust Co.⁴⁴

This decision concerned an application of an employed daughter living in the Ukraine. It was dismissed and should be dismissed under *The D.R. Act* as far as can be told from the *W.W.D.* note.

20. Dmytriw v. Dmytriw⁴⁵

This case involved an application by a 60-year-old widow who left her husband after forty-one years of marriage during which she helped raise their children, kept the house, and assisted in running the family farm. Unlike *Re Nixey*⁴⁶ the court did not hold her desertion to be disqualifying conduct. She owned a \$16 000 house and received \$200 per month in pension income. The court awarded her \$15 000 of her husband's \$50 000 estate. Aside from the discussion of its jurisdiction under *The T.F.M. Act*, this case would be decided for the same reasons under *The D.R. Act*, except perhaps for the emphasis on her contribution to the creation of the deceased's estate.

21. Podolski v. Podolski⁴⁷

Podolski v. Podolski had to do only with the incidence of settled claims under *The Dower Act* and *T.F.M. Act*. The Court gave effect to a testamentary direction that any share to which the separated widow might become entitled was to be paid out of the residue.

22. Dutka v. Dutka's Estate⁴⁸

This was another case which would be a non-starter under *The D.R. Act*. It concerned the application of an adult, employed son, estranged from his father by a marriage breakdown which occurred before his birth. He found his father shortly before his father died. A warm relationship developed, but his father died before changing the will he made before his son found him.

23. Sloane v. Bartley⁴⁹

This decision regarded an application by an adult daughter with no need or significant moral claims, which was successful at trial, not surprisingly, but reversed and dismissed on appeal, surprisingly. The application would be a non-starter under *The D.R. Act*.

⁴⁴ [1975] *W.W.D.* 76 (Man. Q.B.).

⁴⁵ [1975] 22 *R.F.L.* 382 (Man. Q.B.).

⁴⁶ *Supra* note 39.

⁴⁷ (1979), 4 *E.T.R.* 161 (Man. Q.B.).

⁴⁸ (1980), 7 *Man. R.* (2d) 211 (Q.B.).

⁴⁹ (1980), 7 *Man. R.* (2d) 222 (C.A.).

The Court of Appeal reaffirmed the statement of its appellate jurisdiction in *Barr*;⁵⁰ Huband J.A. in dissent made a worthwhile cautionary statement similar to statements made in other jurisdictions.

24. *Mazur & Boreski v. Mazur & Boyko*⁵¹

This case had to do with what is now s. 7 of *The D.R. Act* staying distribution of an estate until an application has been disposed of. With reference to *Gilles v. Althouse*⁵² the court held the personal representatives, who had distributed the estate, liable to fulfil the award of the court.

25. *Hall v. Hall's Estate*⁵³

This decision involved an application that was made more than six months after the deceased's death, but no mention of the lateness of the application is made in the court's reasons for judgment. The applicant was an adult daughter of 18 years. Although she had dissipated over half of the \$20 000 she received as a result of her father's death, a further \$10 000 was awarded to her essentially because of how well-off her mother was and the equitable share judicial gloss of *The T.F.M. Act*. The lengthy case quotes concerning the court's jurisdiction are completely irrelevant to *The D.R. Act*. It is difficult to see how the applicant could come within the current definition of a dependant child.

26. *Re Cook & Cook*⁵⁴

This decision resulted in a creative use of *The T.F.M. Act* to alter the application of what is currently s. 47 of *The Trustee Act*.⁵⁵

Carrying on business

- s. 47(1) Where a farmer or the sole proprietor of an unincorporated business dies intestate, and the surviving spouse wishes to carry on the farming operation or business for the benefit of himself or herself and any infant children with capital belonging to himself or herself and them, the administrator may permit the surviving spouse to do so for as long as the administrator deems advisable, and the administrator is not responsible for losses incurred in the farming operation or business while it is so carried on.

⁵⁰ *Supra* note 6.

⁵¹ [1980] 3 W.W.R. 289 (Man. C.A.).

⁵² [1976] 1 S.C.R. 353.

⁵³ (1981), 10 Man. R. (2d) 168 (Q.B.).

⁵⁴ (1981), 121 D.L.R. (3d) 190 (Man. Q.B.).

⁵⁵ *The Trustee Act*, R.S.M. 1987, c. T-160.

Accounting

- s. 47(2) A surviving spouse who carries on a farm operation or business in accordance with subsection (1) shall
- (a) in due course, make good to the infant children and their representatives any losses which he or she incurs in carrying on the operation or business; and
 - (b) account to the administrator for the profits of the operation or business, less a reasonable allowance for the services of the spouse in carrying on the operation or business and for the cost of maintaining and educating the children while so doing.

The court used *The T.F.M. Act* to exempt the surviving spouse for liability for any losses pursuant to then s. 49 of *The Trustee Act*. Under *The Intestate Succession Act*, a surviving spouse is entitled to the whole of a deceased's spouse's estate, unless there is surviving a child of the deceased who is not also a child of the surviving spouse; this is different from what was the law pursuant to the former *Devolution of Estates Act*,⁵⁶ which was the law at the time of *Cook*. Under the *Devolution of Estates Act* there was a sharing of the residue of an estate larger than the surviving spouse's primary entitlement. Resort to s. 47 of *The Trustee Act* will occur less often now than under *The Devolution of Estates Act*; but, when resort to s. 47 is in order a court should be able to make the same use of *The D.R. Act* as the *Cook* court made of *The T.F.M. Act*.

27. Re Bartel Estate⁵⁷

This was an outrageous decision, although arguably justifiable pursuant to the equitable share judicial gloss which had been put on *The T.F.M. Act*, awarding two adult children a greater share of their mother's estate after they had treated her in a most churlish manner. Happily, not being dependant upon her or unable to provide the necessaries of life for themselves, they would not succeed under *The D.R. Act*.

The case also exemplifies a court inferring reasons of the testator as is allowed by s. 8(2)(c) of *The D.R. Act*.

28. Menrad v. Blowers⁵⁸

This case concerned an unsuccessful application by a widow with a divorce decree *nisi*. It was unsuccessful not because of the decree *nisi*, but because of what she had agreed to receive pursuant to a property settlement made in conjunction with the decree *nisi* and because of her then *Dower Act*⁵⁹ entitlements. As

⁵⁶ *The Devolution of Estates Act*, S.M. 1970, c. D-70.

⁵⁷ (1982), 16 Man. R. 29 (Q.B.).

⁵⁸ (1982), 137 D.L.R. (3d) 309 (Man. Q.B.).

⁵⁹ *The Dower Act*, S.M. 1970, c. D-100.

well, the case illustrates the usual judicial sympathy to not interfere with a testamentary fulfilment of a moral obligation recognised by a testator to a non-statutory dependant.

The deceased's children, all adults capable of providing for themselves, made successful applications, receiving ridiculous token orders of \$500 each, presumably pursuant to the equitable share judicial gloss put on *The T.F.M. Act*. Under *The D.R. Act* their applications should be dismissed.

The court refused to deal with two further issues, namely whether the testamentary beneficiary had illegally sold a couple of estate assets and whether the decree *nisi* had severed the joint tenancy ownership of a cottage owned by Mr. and Mrs. Blowers. Similarly, while courts in other jurisdictions have combined martial property and dependants relief claims, usually they have refused to deal with matters beyond the jurisdiction conferred by their dependants relief statute.

29. *Bowie v. Royal Trust Co.*⁶⁰

This case concerned an application to increase an annuity ordered sixteen years earlier pursuant to *The T.F.M. Act*. Unfortunately, unlike *Re Day*,⁶¹ the initial order did not include a suspension of the administration of at least part of the estate to enable the court to do what was being requested. Since the rest of the estate had long since been distributed the court had to dismiss the application.

30. *Krokosh v. Krokosh Estate*⁶²

This case involved an application by a widow and two adult children. The widow's *T.F.M. Act* application was dismissed because of her *Dower Act* entitlement. Like the Court of Appeal decision in *Sloane v. Bartley*⁶³ and against the grain of cases such as *Re Steinberg*,⁶⁴ *Barr v. Barr*,⁶⁵ *Re Bartel*⁶⁶ and *Menrad v. Blowers*,⁶⁷ the court dismissed the application of the children because they were neither dependant on the deceased nor in financial need. While another judge solely coming to a different conclusion on the facts might come to a favourable decision for the widow under *The D.R. Act*, the children would not even qualify to apply under *The D.R. Act*.

⁶⁰ (1984), 30 Man. R. (2d) 128 (Q.B.).

⁶¹ *Supra* note 24.

⁶² (1985), 34 Man. R. (2d) 121 (Q.B.).

⁶³ *Supra* note 49.

⁶⁴ *Supra* note 38.

⁶⁵ *Supra* note 6.

⁶⁶ *Supra* note 56.

⁶⁷ *Supra* note 57.

31. Linden v. Linden's Estate⁶⁸

In *Linden v. Linden's Estate* an application was made by an adult mentally challenged daughter who would qualify as a child dependant under *The D.R. Act*. Her mother left her one-third of her estate in a discretionary trust with her brother as trustee; he was left the other two thirds of the estate and the balance of his sister's trust fund on her death. Not surprisingly the court awarded the applicant one-third of the estate unconditionally. The court would make the same decision pursuant to *The D.R. Act*.

32. Daniel v. Daniel⁶⁹

This decision involved an application within the limitation period, but after the estate had been distributed. The court entertained the application with reference to *Gilles v. Althouse*,⁷⁰ and *Mazur & Boreski v. Mazur & Boyko*.⁷¹ The applicant was a minor daughter of the deceased. Since the estate was less than the widow's primary entitlement under *The Devolution of Estates Act*⁷² it was argued that the application should be dismissed. In line with decisions in other jurisdictions the court rejected intestate entitlement as a relevant factor respecting a dependant's relief application. The court awarded the daughter \$7 500 of a \$35 000 estate, which had been given solely to the widow, a second wife.

Also, the court decided that the proceeds of non-insurance R.S.P.'s designating a person a beneficiary were not assets of the estate.

33. Michalyshen v. Michalyshen Estate⁷³

This decision involved was an application by a widow for the whole of her husband's \$75 000 estate. By *The Devolution of Estates Act* she was to receive \$62 500, and an adult, estranged son, by the deceased's first wife, who was in poor health, unemployed, and deeply in debt was to receive \$12 500. The application was dismissed. A court might well come to the same decision under *The D.R. Act*.

The case also is of continuing relevance as an example of the court inferring the testator's intention to include his son in the distribution of his estate by his failure to execute two wills, which would have left his estate entirely to his widow.

⁶⁸ (1985), 35 Man. R. (2d) 73 (Q.B.).

⁶⁹ (1986), 41 Man. R. (2d) 66 (Q.B.).

⁷⁰ *Supra* note 52.

⁷¹ *Supra* note 51.

⁷² *Supra* note 56.

⁷³ (1986), 41 Man. R. (2d) 178 (Q.B.).

Again the court made reference to the contribution the widow made to the creation of the deceased's estate, but offset against that wealth which she was receiving as a result of the deceased's death otherwise than through the estate.

34. *Kennedy v. McIntyre Estate*⁷⁴

This case held that a child to whom the deceased stood in *loco parentis* did not qualify to apply. This decision has been superseded by the definition of "child" in *The D.R. Act*. The case continues to be of interest for the court's refusal to recognise the child in question as qualifying by having been "adopted de facto" by the deceased. *Re Lawther Estate*,⁷⁵ where the Court expressly rejected as supporting the submissions, and *Re Brown Estate*⁷⁶ are comparable cases.

35. *Ritchot v. Ritchot Estate*⁷⁷

This decision involved a request for an extension of the limitation period. In view of a letter written to the executor shortly after probate was granted advising of the likelihood of the application and the estate being undistributed, the extension was granted.

36. *Zajic v. Chomiak Estate*⁷⁸

This case concerned an application by an estranged adult daughter, not in any financial need. As in *Sloane v. Bartley*,⁷⁹ the court dismissed the application. Much of the estate had been gifted *inter vivos* beyond the reach of *The T.F.M. Act* just before death. The case would be decided the same under *The D.R. Act*.

37. *Fedon Estate v. Fedon*⁸⁰

Fedon Estate v. Fedon involved an application by a non-needy adult son for a share of a \$300 000 estate. Relying on *Sloane v. Bartley*,⁸¹ the court dismissed the application. The son, whose net worth was \$360 000, would not qualify to apply under *The D.R. Act*.

The case also illustrates the use of evidence respecting a deceased's intentions.

⁷⁴ (1987), 47 Man. R. (2d) 16 (Q.B.).

⁷⁵ *Supra* note 1.

⁷⁶ *Supra* note 20 at 163 *per* McPherson C.J.M., dissenting, and *supra* note 20 at 173 *per* Adamson J.A. (C.A.) regarding one of the children.

⁷⁷ (1989), 58 Man. R. (2d) 61 (C.A.).

⁷⁸ (1990), 63 Man. R. (2d) 178 (Q.B.).

⁷⁹ *Supra* note 49.

⁸⁰ (1991), 74 Man. R. (2d) 84, *aff'd* 78 Man. R. (2d) 103 (C.A.).

⁸¹ *Supra* note 49.

38. Knysh v. Knysh Estate⁸²

This case involved several claims by an adult son including a T.F.M. Act application. The court summarily dismissed the application:

[The son] ... admitted that he had no financial need and that his business as a contractor has always been a success. I am, therefore, of the opinion that this issue does not warrant any further examination.⁸³

B. The Dependants Relief Act Cases**1. King v. King⁸⁴**

Mr. King died leaving no estate. However, there were proceeds payable on his death from a group life insurance policy and a non-insurance pension plan to his mother as the designated beneficiary. The application of his destitute widow was dismissed because the court held that neither proceeds were an asset of the estate.

Regarding the pension proceeds, the decision in this case was the same as *Daniel*,⁸⁵ although the court made no reference to it. As well, the court made no reference to *Waugh Estate v. Waugh*,⁸⁶ an abatement case, not a T.F.M. Act case, in which the court expressly disagreed with *Daniel* holding that such proceeds are payable through the estate to the designated beneficiary. Subsequent to *King*, the Manitoba Court of Appeal agreed with *Waugh* in *Pozniak v. Pozniak Estate*,⁸⁷ adding that such proceeds were payable as if they comprised a specific bequest.

After *Pozniak*, *The Retirement Plan Beneficiaries Act*⁸⁸ was re-enacted. In *Clark Estate v. Clark*.⁸⁹ The Manitoba Court of Appeal decided that one result of this re-enactment is that such proceeds are now payable directly to the designated beneficiary, not through the estate; however, the Court added that "it does not necessarily follow that those moneys are immune from the claims of creditors of the estate."⁹⁰

⁸² (1994), 94 Man. R. (2d) 266 (Q.B.).

⁸³ *Ibid.* at 273.

⁸⁴ (1990), 68 Man. R. (2d) 253 (Q.B.).

⁸⁵ *Supra* note 66.

⁸⁶ (1990), 63 Man. R. (2d) 155 (Q.B.).

⁸⁷ (1993), 88 Man. R. (2d) 136 (C.A.).

⁸⁸ *The Retirement Plan Beneficiaries Act*, S.M. 1992, c. 31.

⁸⁹ (1997), 115 Man. R. (2d) 48 (C.A.).

⁹⁰ *Ibid.* at 53.

2. Hoepfner (Litigation Guardian) v. Misiewicz Estate⁹¹

This case concerned the approval by the court of a settlement. The applicant was the 4 year old illegitimate daughter of the deceased, whose estate, taking into account a *Marital Property Act* accounting for the widow, totalled \$275 000. The deceased left his estate to his widow and two legitimate children.

Pursuant to a court order, the deceased had been paying \$425 per month for the maintenance and support of the applicant, which ceased on his death. The settlement provided for the continuation of the \$425 payment for 15 years. The settlement was opposed in vain by the Public Trustee on the bases that it did not provide for inflation or for the possibility of the applicant going to university. *Inter alia*, the court agreed that a dependants relief claim is not analogous to a *Fatal Accidents Act*⁹² claim for loss of financial support in that under *The D.R. Act* the court must take into account the claims of other dependants.

III. CONCLUSION

WHEN THE *D.R. ACT* was enacted my immediate reaction was that it rendered obsolete practically all of the cases decided pursuant to the *T.F.M. Act* due to the fundamental change in the court's primary jurisdiction. However, upon a re-reading of the *T.F.M. Act* cases in connection with the writing of a book on the law of dependant's relief throughout Canada, I was amazed at how many of the cases continue to be pertinent in so many respects, as I trust this article has demonstrated.

⁹¹ (1995), 106 Man. R. (2d)24 (Q.B.).

⁹² *The Fatal Accidents Act*, R.S.M. 1987 c. F-40.