

It has been said that equity is equality. When it comes to estate planning, the idea that children must be treated equally is almost sacrosanct. This is true even where the talents and incomes of children vary substantially: The dentist child receives the same treatment in the will as the ne'er-do-well child who drifts from job to job and earns only a meager living.

People in Alberta enjoy a great deal of testamentary freedom. Testamentary freedom is a fancy way of saying, "It's your money. You can do with it what you want when you die." But testamentary freedom is not unlimited and under the *Dependants Relief Act*, the Court can override the deceased person's will in certain circumstances, disturbing if necessary the hallowed principle that children be treated equally.

For example, the *Dependants Relief Act* requires that parents to make adequate provision for a mentally challenged child if that child cannot earn a living. Upon the parent's death, the mentally challenged child has the legal right to ask for a greater share of the estate than that which his or her parents left to them. It sometimes comes as a shock to people to learn that their mentally challenged sibling has the right to challenge the will and to ask for more. They mistakenly assume that all of the children should be treated equally because that is what Mom or Dad wanted. But that's not how the legislation works. Parents cannot exempt their children from the application of the legislation. And whether the surviving children like it or not, their sibling does have the right to ask for more.

Some mentally challenged individuals will be able to make their own decisions about whether to ask for more. Some won't. In these cases, someone has to help them to make the choice whether to ask for more. That "someone" has to be someone independent. Estate distribution is a zero-sum game where one beneficiary's gain is another beneficiary's loss, so immediate family members are usually excluded. Someone from outside of the family has to be brought in to assist and that someone is often the Public Trustee.

In addition to the uncertainty that is introduced when an outside party is introduced to the estate, there is also additional delay and additional expense. Where someone is required to help with the choice of whether to ask for more, a person cannot just volunteer their services to the mentally challenged individual to help. They must first be appointed by the Court. Getting appointed by the Court to act as a limited trustee is an exercise in itself. Once appointed, the person must familiarize themselves with the needs and circumstances of the person they are to assist so they can make an informed decision. Often this requires the person assisting to obtain independent legal advice. The cost of all of this (including an amount for compensation for the person providing the assistance) is typically picked up by the estate. And while all of this careful deliberation and consideration is underway to protect the interests of the dependant, no distribution can be made from the estate.

I hasten to add that there is very little that parents can do to prevent this scenario. Their children have rights under the legislation which are not for the parents to waive. This

scenario does not result from poor planning by the parent. It is a necessary consequence of protecting the interests of those individuals who may require more than just equal treatment.