



Lawen Estate v Nova Scotia
(Attorney General),
2019 NSSC 162:
A Case Commentary

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Roadmap

- **Part 1:** Why is this case important?
- **Part 2:** Background –
 - *Testators' Family Maintenance Act*
 - *Tataryn v Tataryn Estate*
- **Part 3:** The decision in *Lawen Estate* –
 - Background facts
 - *Charter* analysis
 - Appeal
- **Part 4:** Implications for estate planners
- **Part 5:** Discussion



Part 1:
Why is this case important?

Why is this case important?

- Justice Bodurtha found that there is a **Charter right to testamentary autonomy**
- Appears to be the first case in Canada to reach this conclusion
- Two provisions of the *Testators' Family Maintenance Act*, RSNS 1989, c 465 (“**TFMA**”) held to be unconstitutional, to the extent they allowed non-dependent adult children to make a claim for support



Part 2: Background

Key TFMA Provisions

- **Section 2(b)** – Defines “dependant” as “the widow or widower or the child of a testator”
- **Section 3(1)** – Enables judge to make provision for a “dependant” out of the estate [*see next slide*] – **No need requirement, but...**
- **Section 5(1)** – Requires judge to “inquire into and consider all matters that should be fairly taken into account”, including “the financial circumstances of the dependant”
- **Section 6(1)** – Permits judge to “impose conditions and restrictions” on an order for maintenance and support
- **Section 7** – Allows for variation, suspension, or discharge of order

Section 3(1) of the TFMA

Order for adequate maintenance and support

3 (1) Where a testator dies without having made adequate provision in his will for the proper maintenance and support of a dependant, a judge, on application by or on behalf of the dependant, has power, in his discretion and taking into consideration all relevant circumstances of the case, to order that whatever provision the judge deems adequate be made out of the estate of the testator for the proper maintenance and support of the dependant.

Tataryn v Tataryn Estate, [1994] 2 SCR 807

- Unanimous decision of SCC, written by Justice McLachlin (as she then was)
- Not a *Charter* case
- Court varied trial judge's order under BC's *Wills Variation Act* to better provide for deceased's wife
- Court discussed –
 - Feminist origins of legislation
 - Difference between “legal” vs “moral” obligations

Notable quote from *Tataryn*

“there is nothing to suggest that the women’s groups who lobbied for [the Act] or the legislators who adopted it intended that it be confined to cases of need”



Part 3:
The *Lawen Estate* Decision

Background Facts

- Testator Jack Lawen died in 2016, leaving four adult children: Catherine, Samia, Mary, and Michael (the only son)
- Jack's will left \$50,000 each to Catherine and Samia, nothing to Mary, and the balance to Michael (amount of estate unclear)
- Daughters started TFMA action alleging that will failed to make adequate provision for them
- Michael and Executor (Jack's brother) brought constitutional challenge, arguing that certain TFMA provisions violated section 2(a) and/or section 7 of the *Charter* by allowing court to bypass testamentary decisions
 - Granted public interest standing

Section 7 of the *Charter*

LEGAL RIGHTS

Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Section 7: Life, liberty, security of the person

- **Liberty** interest engaged
- *Carter v Canada*, 2015 SCC 5: “Liberty protects ‘the right to make fundamental personal choices free from state interference’”
- *Lawen Estate*: “A testamentary decision is a fundamental personal decision that is protected under section 7”
- TFMA provisions found to undermine testamentary decisions by allowing “purely ‘moral’ claims” by independent adult children

Section 7: PFJs

- Deprivation of liberty interest had to be in accordance with **principles of fundamental justice**
- Usually court will consider whether impugned law is overbroad, arbitrary, and/or grossly disproportionate to its objective
- Justice Bodurtha did not conduct PFJ analysis, stating that Attorney General had not made submissions on the issue and inferring that AG must have agreed that any violation of liberty interest would not accord with PFJs
- **Result: Section 7 infringement found**

Section 2(a): Freedom of conscience

- Justice Bodurtha did not need to determine differences, if any, between *freedom of religion* and *freedom of conscience*
- In any event, Applicants' argument that a testator's decision is a matter of conscience was insufficient to prove that TFMA infringed section 2(a)
- **Result: No section 2(a) infringement**

Section 1: Justification

- Section 7 infringements difficult to justify under section 1
- Unusually, however, the justification failed at the first stage of *Oakes* – Court found no “pressing and substantial objective”
- **Result: TFMA provisions unconstitutional – not a reasonable limit on section 7 right to testamentary autonomy**

Remedy for *Charter* violation

- Justice Bodurtha applied section 52(1) of *Constitution Act, 1982* to “read down” section 2(b) and section 3(1) of TFMA to exclude non-dependent adult children
- Declaration of unconstitutionality had immediate effect

Appeal (CA No. 492910)

- Attorney General has filed **Notice of Appeal**, alleging that the Court erred in –
 - finding a section 7 infringement;
 - placing burden on AG to show infringement was in accordance with PFJs; and
 - holding that section 7 infringement was not justified under section 1
- Respondents (Applicants) have filed **Notice of Contention**, alleging that testamentary autonomy is protected under section 2(a)



Part 4:
Implications for estate planning

What does this mean for estate planners?

- Remember: TFMA only applies to assets that pass through a testator's will
- Estate planners can continue to use other structures to avoid possible TFMA challenges by adult independent children, like:
 - Alter ego, joint partner, and other types of *inter vivos* trusts
 - Beneficiary designations
 - Joint ownership
 - Etc.
- ***Uncertainty is not your friend!***

What does this mean for estate planners?

- Remains to be seen if factually dependent children would be successful in challenging these avoidance tools (BC case law suggests they won't be)
- If estate not large or complex, maybe no need to plan (i.e. rely on the decision?)



Part 5: Discussion

Topics for discussion

- Whether / when a difference in legislative choice is evidence of a constitutional problem
 - Institutional competence issues
 - Principles of federalism
- Role of “morals” in wills legislation
- What value judgments we make in prioritizing ***freedom of testator*** over ***need of dependants***
- Whether this was an appropriate expansion of section 7 outside the “administration of justice” context and into the context of economic / property rights – Is testamentary autonomy a “fundamental personal decision” worthy of section 7 protection from state interference?
- Other topics?



Questions?



Thank you!

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