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Estate Planning & Fraudulent Conveyance: When Does Estate Planning Cross the Line and Become a Fraudulent Preference?

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FRAUD AND ESTATE LITIGATION: WHEN DOES ESTATE PLANNING CROSS THE LINE AND BECOME A FRAUDULENT PREFERENCE?[1]

A. INTRODUCTION

An estate plan intent on depleting one's assets and therefore one's estate prior to death so as to avoid providing for a dependant spouse, child, creditor or other may amount to a fraudulent preference or conveyance. Remedies in that event may include the use of the *Fraudulent Conveyances* Act[2] (the "*FCA*"), and the *Succession Law Reform Act* [3] (the "*SLRA*") to claw back into the Estate those assets that the testator/debtor may have gifted/transferred away. Fairly recent court decisions suggest that certain transfers of real or personal property may be set aside as void under Section 2 of the *FCA* which provides as follows:

> *2. Every conveyance of real property or personal property and every bond, suit, judgment and execution heretofore or hereafter made with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures are void as against such persons and their assigns.*

B. OVERVIEW OF APPLICABLE LEGISLATION

Improvident transfers of property may attract the remedies set out in the *FCA*, in particular Section 2, in circumstances where estate planning ousts the statutory rights of certain beneficiaries and/or dependants, protected under the provisions of the *Family Law Act*[4] *(the "FLA")* and the *SLRA*. The relevant sections of this legislation are discussed in more detail below.

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[2] *Fraudulent Conveyances Act,* R.S.O. 1990, c.F.29

[3] *Succession Law Reform Act*, R.S.O. 1990, c. S.26 [*SLRA*].

[4] *Family Law Act* R.S.O. 1990 c.F.3

i. The Family Law Act

The *FLA* frames marriage as a form of partnership, which permits spouses "*to provide in law for the orderly and equitable settlement of the affairs of the spouses upon the breakdown of the partnership*".[5] This 'breakdown' can occur as a result of separation, divorce, or death on the day one of the spouses dies, leaving the other spouse surviving.[6] The calculation of the equitable settlement is set out in sections 4(1), 5(1), 5(2), 5(3) and 7:

> *4(1) Net family property is "the value of all the property, except property described in subsection (2), [excluded property] that a spouse owns on the valuation date, after [various prescribed deductions including the value of most property owned at marriage]"*
>
> *5(1) When a divorce is granted or a marriage is declared a nullity, or when the spouses are separated and there is no reasonable prospect that they will resume cohabitation, the spouse whose net family property is the lesser of the two net family properties is entitled to one-half the difference between them.*
>
> *5(2) When a spouse dies, if the net family property of the deceased spouse exceeds the net family property of the surviving spouse, the surviving spouse is entitled to one-half the difference between them.*
>
> *5(3) When spouses are cohabiting, if there is a serious danger that one spouse may improvidently deplete his or her net family property, the other spouse may on an application under section 7 have the difference between the net family properties divided as if the spouses were separated and there were no reasonable prospect that they would resume cohabitation.*
>
> *7(1) The court may, on the application of a spouse, former spouse or deceased spouse's personal representative, determine any matter respecting the spouses' entitlement under section 5.*
>
> *(2) Entitlement under subsections 5 (1), (2) and (3) is personal as between the spouses but,*
>
> *(a) an application based on subsection 5 (1) or (3) and commenced before a spouse's death may be continued by or against the deceased spouse's estate; and*
>
> *(b) an application based on subsection 5 (2) may be made by or against a deceased spouse's estate.*
>
> *(3) An application based on subsection 5 (1) or (2) shall not be brought after the earliest of,*
>
> *(a) two years after the day the marriage is terminated by divorce or judgment of nullity;*
>
> *(b) six years after the day the spouses separate and there is no reasonable prospect that they will resume cohabitation;*
>
> *(c) six months after the first spouse's death.*

[5] *FLA supra* note 4 preamble.
[6] S.4(1) *FLA* – "valuation date"

The *FLA* stops short of providing each spouse with an ownership interest in all of the other spouse's assets. Instead, it provides for a "*simple calculation to determine how much one spouse may be called upon to pay to the other spouse to ensure, with some defined exceptions, that each will benefit equally from increases in the combined net worth of the spouses which occurred during the course of the marriage or partnership*."[7]

In circumstances where a spouse depletes his or her net family property, section 5(3) of the *FLA* provides a spouse with the ability to seek an equalization payment in the absence of marital breakdown.

A surviving spouse can choose to elect under the *FLA*. *Section* 6(1) permits the surviving spouse on death to make application for an equalization of net family property:

> *6.(1). When a spouse dies leaving a will, the surviving spouse shall elect to take under the will or to receive the entitlement under section 5.*

Essentially, the *FLA* election provides a surviving "*spouse*,"[8] with the right to bring an application against the estate of the deceased spouse so as to elect in favour of an equalization of the couples' respective net family properties ("NFP") and to forego entitlement (if any) under the deceased's Will and/or pursuant to the provisions of the *SLRA* respecting intestate succession. While a surviving spouse can pursue equalization after the death of his or her spouse, the relief prescribed under section 5(3) of the *FLA* by contrast can only be pursued during the lifetime of the spouse.

ii. The Succession Law Reform Act

Part V of the *SLRA* provides for the support of "*dependants*," in situations where a deceased, prior to death, was providing support to legislatively prescribed family members, or was under a legal obligation to do so immediately before death, but failed to make adequate provision for the proper support of a dependant spouse, child and/or other dependant(s) on death. Dependants

[7] *Menage v. Hedges* (1987), 8 R.F.L. (3d) 225 (Ont UFC) at p. 243.
[8] as defined in Part 1 of the *FLA*

are defined in the *SLRA* as a spouse, parent, child or sibling to whom the deceased was providing support or was under a legal obligation to provide support immediately before death.[9] An order for support is made by way of application to the Court and may be made even in circumstances where the dependant benefits under a Will, or on an intestacy, and in certain other circumstances, including where there has been a contractual agreement to waive support.

Unlike section 5(3) of the *FLA*, the *SLRA* does not specifically provide dependants' with a legal remedy in circumstances where the testator has recklessly depleted assets and hence the estate during his lifetime. However, section 72 of the *SLRA* provides that the value of certain transactions effected by the deceased before death shall be clawed back in and deemed to form part of the estate for the purpose of satisfying any orders made by the Court directing payments to a dependant.[10]

iii. The Fraudulent Conveyance Act

If a Court determines that a transfer was effected with the "*intent to defeat, hinder, delay or defraud creditors or others….*"[11] it will be declared void as against such creditors. The conveyance can however be saved if the transferee provides consideration for the transfer, and if it can be shown that the transferee was acting in good faith and had no notice of the transferor's intent to defeat the rightful claims of creditors.[12]

The words "*creditors and others*" have been judicially considered by the Courts. The Court has held the words to be interpreted as including not only actual 'judgment creditors', but also persons who have actions pending against the transferor in which it is clear that they are certain to recover damages.[13]

Notably, the *FLA* and *SLRA* provide spouses and dependants alike with certain claims and remedies on marriage breakdown and on death. Certain questions can be considered: Where an individual transfers one's property to others in an effort to defeat such claims, can those who are affected turn to the *FCA to right the wrong suffered;* Are they to be considered "*creditors*

[9] *SLRA* s. 57.
[10] S.63(2) and S.72, *SLRA*
[11] *FCA, supra* note 4, section 2
[12] *FCA, supra* note 4, sections 3 and 4
[13] *Hopkinson v. Westerman* (1919), 45 O.L.R. 208 (C.A.) at 211

and others" within the meaning of the *FCA;* At what point does an individual's right to deal with or dispose of one's property as one chooses cross the line from a valid estate plan and trigger the provisions of the *FCA*?

The application of the *FCA* when used to recapture *inter vivos* dispositions for the benefit of a spouse and/or dependants claiming under the *FLA* and the *SLRA*, respectively, has been regarded as somewhat speculative.[14] However, more recently our Courts have indicated a willingness to apply the *FCA,* to set aside certain transactions where the evidence is clear that the intent of the transferor/testator was to prevent legitimate claimants from having access to such assets (transferred).

As a result of the decisions of the Ontario Court of Appeal in *Stone v. Stone,*[15] and the concept of "*moral claims*" established by the Supreme Court of Canada in *Tataryn,*[16] endorsed by the Ontario Court of Appeal in *Cummings v. Cummings*,[17] our Courts' have sent a clear message that they are prepared to use section 2 of the *FCA* to set aside transfers undertaken with the intent to hinder or defeat *FLA* and *SLRA* claims.

C. LEGISLATIVE APPLICATION TO ESTATE PLANNING: CASE LAW

In *Stone v. Stone*[18]*,* a husband who learned that he was terminally ill, proceeded to dispose of many of his assets to his children of a prior marriage through *inter vivos* transfers. In doing so, Mr. Stone was hoping to minimize the resulting value of his estate on his death. Mr. Stone anticipated his second wife would make an equalization claim against his estate. Mr. Stone therefore attempted to minimize the value of his estate, so as to minimize the potential amount of his second wife`s claim.

On an application brought by the second wife under section 2 of the *FCA* for an order to set aside the *inter vivos* transactions, the trial judge found that the deceased had effected the transfers in order to defeat his wife`s claim for equalization under section 5 of the *FLA*. The

[14] Berend Hovius & T.G. Youdan, *The Law of Family Property* (Toronto: Carswell, 1991)
[15] *Stone v. Stone,* 2001 CanLII 24110 (ON CA) [*Stone* ONCA] affirming the decision in *Stone v. Stone,* 1999 CanLII 15094(ON SC), 46 O.R. (3d) 31 [*Stone* ON SC].
[16] *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807
[17] *Cummings v. Cummings* [2004] O.J. No. 90
[18] *Stone v. Stone*, 1999 CanLII 15094 (ON SC)

Ontario Court of Appeal upheld the lower Court decision, specifically approving the trial judge`s determination to apply section 2 of the *FCA* to the *inter vivos* dispositions such that they were declared void as against the surviving spouse.[19] In the result, the entire value of the *inter vivos* transaction was clawed back into the deceased`s estate for the purpose of calculating his net family property at the time of his death, which then provided for an equalization payment to the wife.

A key component to the application of Section 2 of the *FCA* in *Stone*, was the finding by the trial judge that the surviving spouse was determined to be a "*creditor or otherwise of the deceased*" at the time that the testator effected the *inter vivos* transfers. This was somewhat novel given that the wife's entitlement to claim an equalization under s.5 of the *FLA* did not seemingly arise until the deceased's death. The court found that it was clear that the purpose of the impugned dispositions was to defeat/defraud the spouse in respect of her right/claim to an equalization payment on death.

The Judge based his finding on two lines of reasoning:[20]

> Firstly, the Court found that the right to equalization under the *FLA* arises at the date of marriage on the basis of an open or running account that can become a settled account on the happening of the earlier of separation or death. Consequently, Mrs. Stone became a potential creditor upon marriage.
>
> Secondly, the Court determined that the depletion of the deceased's net family property through the *inter vivos* transfers to his children served as a "triggering event" under the provisions of the *FLA* which gave rise to the wife's entitlement to seek a financial remedy under section 5(3) of the *FLA.*
>
> The Court of Appeal rejected the first line of reasoning. It held that the wife was not a "*running*" creditor throughout the marriage. Instead, it approved the trial judge's second line of reasoning and found that a debtor/creditor relationship existed at the time of the transfers between Mr. and Mrs. Stone because of the wording of section 5(3) of the *FLA.* The Court of Appeal decision concluded on the evidence that Mr. Stone had kept the

[19] *Stone v. Stone*, 2001 CanLII 24110 (ON CA)

> divestment or depletion of his property secret. The Court concluded that "…*because she [the wife] had the right to apply for equalization at the time of the transfers [due to the wording of section 5(3)], yet was deprived of such ability to exercise that right by the actions of Mr. Stone… she [the wife] was a "creditor or other" within the meaning of the Fraudulent Conveyances Act."*[21]

This raises the question – what "rights" did the wife enjoy at the time of the *inter vivos* transfers? The spouses had not separated or divorced at the time of the transfers, as such the surviving spouse would not have been able to apply under section 5(1) of the *FLA* for equalization based on marital breakdown. Instead, the Court held that at the time of the *inter vivos* transfers, Mrs. Stone could have, had she known, applied for an equalization payment based on section 5(3) of the *FLA*. The court emphasized that the term "*creditors*" was not simply confined to 'judgment creditors'. The non-disclosure deprived the wife of her right to have her claim crystalize.

The "*intent*" of the deceased in making the transfers was a key factor in the court's consideration and ultimate determination. The trial judge found that section 2 of the *FCA* applied to the transfers in question because Mr. Stone effected the transfers "…*with intent to defeat, hinder, delay or defraud…*" his spouse. No appeal was made of this finding of fact. Counsel for the estate had argued at trial that Mr. Stone did not intend to defraud Mrs. Stone. It was submitted by the propounder of the estate that the transfers were simply part of the deceased's estate plan which considerations included saving estate administration taxes.

This submission was rejected by the trial judge. The evidence was that Mr. Stone had advised his children not to disclose the fact of the transfers of the assets to them. Further, the evidence established that when Mr. Stone instructed his lawyer with respect to the *inter vivos* dispositions

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[20] *The findings of fact with respect to intentions was not challenged on appeal.*
[21] *Stone v. Stone* ON CA, *supra* note 14, at ¶ 32

he did so because he believed his death was imminent. The transfers were in fact completed within the last month of his life. Mr. Stone was aware that his wife might challenge his Will or make a claim against his estate and he wanted to deplete his assets and therefore his resultant estate in order to frustrate any claims she might make. Mr. Stone did not want the bulk of his assets to pass to his wife as a result of an equalization claim, with the imminent risk that on her death (she was also elderly and not expected to live long) his wealth would ultimately go to the children of her own first marriage, who were the sole beneficiaries of her estate.

It certainly could be argued that the *FCA* should not apply in appropriate circumstances to *inter vivos* transfers. These types of transfers can arguably be implemented as part of an effective estate plan. If an individual learns that he or she has only a short time left to live, it makes sense to transfer assets to intended beneficiaries to allow them to take control over the assets at an earlier date, rather than to perhaps wait for a grant of probate, and, potentially, to reduce or eliminate estate administration taxes. However where it can be shown that the deceased was aware that the effect of the transfers might be to deny or frustrate the claims of "*creditors or others"* who would expect to benefit from the deceased's estate, the application of the *FCA* should be considered as a viable remedy.

Much of course will depend on the deceased's rationale for effecting the transfer(s). Many individuals transfer their assets to an alter ego trust to reduce estate administration tax and to ensure that their estate can be immediately distributed after death. If the consequential result of such a transfer is to prevent a creditor from accessing the deceased's estate to satisfy a claim - this could well be enough to invoke the use of the *FCA* to set aside the transfer of the deceased's assets to an alter ego trust. Questions arise: Does it matter if the creditor is a family member or instead a commercial creditor? There have been no reported cases of creditors

using the *FCA* to challenge the transfer of a deceased's assets to an alter ego trust, but this may be due to the fact that such trusts are more uncommon. It may only be a matter of time before a spouse or dependant asks a Court to set aside such transfer(s), claiming that the "real" purpose was to frustrate and defeat the claims of his creditors.

There are a number of presumptions at law which could assist a creditor who is trying to convince a Court that the deceased knew or ought to have known that the effect of his actions would be to defeat his creditors. For example, Courts have recognized the rebuttable presumption that individuals intend the natural and probable consequences of their actions.[22]

The Courts have also identified certain "*badges of fraud*" from which they have inferred a fraudulent intent.[23] These include transfers to close relatives or friends, undertaken for little or no consideration, or done in secret.[24] The onus in such circumstances is on the defendant to adduce evidence to rebut the presumption.[25] Where there is a greater preponderance of evidence to support the presumption that the deceased knew or ought to have known that the conveyance(s) would clearly deprive, hinder or delay the lawful claims of a "*creditor or other*", the Courts will invoke the provisions of the *FCA* to set aside such transactions.

[22] Ontario Law Reform Commission, "Report on the Enforcement of Judgment Debts and Related Matters", (1981) Toronto: Ministry of the Attorney General at Part IV, pages 129 – 145 [LCO Report]
[23] *Jonas v. Jonas* [2002] O.J. No. 3058 (S.J.) at ¶87; *Beynon v. Beynon,* [2001] OJ No 3653 (SCJ); *Campeau v. Campeau,* [2005] OJ No 1053 (SCJ) ¶. 24-28; *Reisman v. Reisman,* [2012] OJ No 2536 (SCJ); *Easingwood v. Easingwood,* [2011] BCJ No 1630 (SC) ¶. 59.
[24] *Supra,* note 21.
[25] *Beynon v. Beynon*, *supra*, note 21, ¶ 52; *Koop v. Smith,* (1915), 51` S.C.R. 554 at 556; *Re Fancy* (1984), 46 O.R. (2nd) 153 (H.C.) at ¶ 17.

Dependants as "Creditors" under the FCA: Analysis

The Court of Appeal in *Stone v. Stone* expressly acknowledged that the *FCA* was available to spouses within the context of the *FLA*.[26] It also left open the door to claims that could be made in addition to the equalization claim of the parties' net family property under section 5(3) of the *FLA*. This liberal interpretation could also conceivably be used by dependants pursuing support claims under the *SLRA* since it could be demonstrated that dependants fit within the expanded definition of "*creditors and others*" adopted by the Court of Appeal in *Stone*.

Unlike the *FLA*, the *SLRA* does not apply unless and until an individual is deceased. There are no creditors or claimants under the *SLRA* prior to death. In Stone, the Court of Appeal found that for an individual to qualify as a "*creditor or other*" within the meaning of the *FCA* he or she had to have a right to claim "*as of the date of the relevant conveyance(s)"*.

One of the arguments specifically rejected by the Court was that section 2 of the *FCA* could not apply until an order had actually been made under Part 1 of the *FLA*. The Court concluded that such an order "*would not relate back to the date of the transfers and therefore could not provide a basis for setting them [the transfers] aside*".[27] In the words of the Court, Mrs. Stone "…must have had an existing claim against her husband at the time of the impugned conveyance(s), that is a right that she could have asserted in an action."[28]

[26] *Stone v. Stone*, *supra* note 14, at ¶ 34.
[27] *Stone v. Stone* ON CA, *supra* note 14, ¶ 41.
[28] *Stone v. Stone* ON C.A., *supra* note 14, ¶ 25.

The above statement was relied upon by the Court in *Reisman v. Reisman*[29] to deny standing under section 2 of the *FCA* to a surviving spouse who was seeking an equalization payment under the *FLA*. A similar position was taken by the Court in *Robins v. Robins*[30] where it was held that a surviving spouse seeking dependants support under the *SLRA* was not a "*creditor or other*" within the meaning of the *FCA* and accordingly had no standing to request that the Court set aside *inter vivos* transfers made by the deceased.[31] Notably however, neither *Reisman,* nor, *Robins* revealed any evidence of fraudulent intent on the part of the deceased in effecting the transfers in question. This alone arguably distinguishes *Robins* and *Reisman* from the facts and the decision in *Stone v. Stone*. A claimant will likely need to lead evidence of suspicious circumstances of fraudulent intent with respect to questionable transfers, in order to be granted standing as a "*creditor or other*" under the *FCA*.

It is not clear whether the reasoning in *Stone* will apply to those who attempt to avail themselves of the provisions of the *FCA* in the context of dependant support claims under the *SLRA. U*nless a material difference can be established, arguably the findings at law should equally apply to the support provisions under Part I of the FL*A* in addition to any net family property claim. The intention to defeat a claim ought likewise to apply to a support claim under the *SLRA*. The decision in *Stone* was considered in large part on the particular wording founded in section 5(3) of the *FLA.* The Court of Appeal found that the spouses were not in a constant "debtor-creditor" relationship. Under the provisions of the *FLA,* the right to equalization could be triggered by specific and enumerated events.[32] In the absence of one of these prescribed

[29] *Reisman v. Reisman* [2012] O.J. No. 2536 (S.C.J.)
[30] *Robins v. Robins Estate* [2003] O.J. No. 1426 (S.C.J.)
[31] The Court rejected an argument that the surviving spouse's right to support during the marriage qualified her as a creditor for the purpose of the *FCA.*
[32] *Stone v. Stone* ON CA, *supra* note 14, ¶ 26: *However, upon the happening of one of the five triggering events, there is a valuation date. If at that date the net family property of one spouse is less than that of the other, then the spouse with the lesser net family property is "entitled to one-half the difference between them": (s. 5(1)). The five events are outlined in s. 4(1): (1) the date of separation with no reasonable prospect of resuming co-habitation; (2) the date of divorce; (3) the date of declaration of nullity; (4) the date one of the spouses commences an application*

"events" (which the Court found included improvident depletion of assets) a spouse would have no right to initiate a claim for equalization. However, once one of these incidents had occurred, a spouse acquired the status of 'debtor-creditor'.

In reviewing the facts of *Stone*, the Court noted that had Mrs. Stone been aware that her husband was intentionally depleting his net family property, this would have immediately triggered her entitlement to bring an equalization claim under section 5(3) of the *FLA*, and accordingly establish a debtor-creditor relationship. The fact that she did not do so was only as a result of Mr. Stone's keeping the dispositions intentionally secret from Mrs. Stone.

The Court of Appeal was clearly troubled by the facts in *Stone*. It acknowledged that due to Mr. Stone's terminal illness (and ensuing death) that Mrs. Stone's right to claim equalization was also imminent. Further, the Court noted that Mrs. Stone had indicated her intent to contest Mr. Stone's Will prior to his death, and did in fact commence litigation against his estate shortly after his death. Mr. Stone having been made aware of the intention, secretly disposed of his assets – to artificially deplete the "pot" against which she could make her claims. The Court was able to turn to section 5(3) of the *FLA* to conclude that the improvident depletion of Mr. Stone's property entitled Mrs. Stone to make a claim as of the date of the transactions, and thus determine that she was a creditor for the purposes of section 2 of the *FCA*.

There have been a number of decisions in other jurisdictions as well where the courts have denied creditor standing to individuals claiming relief. In these cases the courts found that the claimants did not have an existing claim at the time the questionable or reviewable transactions

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under s. 5(3) for improvident depletion of net family property, if the application is granted; and (5) the date before the death of the spouse with the greater net family property

were undertaken. However, none of the referenced cases,[33] considered existing judicial interpretations of the *FCA* that permit creditors whose claims crystalize after the challenged transfers, to rely on section 2 of the *FCA*.[34]

If s.5(3) of the *FCA* cannot be relied on for any factual or evidentiary reason such as to establish status under s.2 of the *FCA* as a "*creditor or other"* there may also be a bar to a claim under Part V of the *SLRA* – but there appear to be no decisions on point as yet. If a claim under the *SLRA* is not barred, a creditor claim may be established with perhaps the limitation of status being established as at the date of the impugned transfer. The facts and circumstances of each case may well be determinative of the result in any future court decisions.

Any such arguments could well gain traction from recent high court decisions which have held that moral obligations exist at law between an individual and his or her dependants. In *Tataryn v. Tataryn,* the Supreme Court of Canada upheld a decision of the British Columbia Court of Appeal which concluded that British Columbia's *Wills Variation Act* (very different legislation to that of Ontario) obligates a testator to make adequate provision in his Will for his dependants on moral grounds. Of particular interest in this case was that the dependants were adult children of the deceased.

The B.C. *Wills Variation Act* allows a Court to vary or modify a deceased's Will. This is not permitted under Ontario legislation. In Ontario the only "variation" the Court can make to satisfy those who are not provided for in the Will, is to determine an appropriate equalization payment under the *FLA,* or to make an award to a dependant under the *SLRA* or on other equitable

[33] *Mawdsley v. Meshen,* [2012] BCJ No 377 (CA); *Easingwood v. Easingwood,* [2011] BCJ No 1630 (SC); *Hossay v. Newman,* [1998] BCJ No 3289 (SC)

claims adjudicated. These payments arguably "*re-write*" a deceased's Will since they reduce the amount available for distribution on an intestacy, or to those named as beneficiaries under the testator's Will.

A dependant, as defined in the *SLRA,* is a person who the deceased was either under a legal obligation to support, or who was receiving support from the deceased before his death. The dependant must prove that he or she was not adequately provided for by the deceased. If the Court agrees, it will determine what (equitable) amount should be paid to the dependant from the estate. In making its decision, the Court is to consider a number of factors enumerated in the *SLRA*.[35]

These factors include, amongst others, the age and financial needs of the dependant, the dependant's health and education and his relationship to the deceased, the size of the estate and the entitlement or claims of other dependants. A moral obligation can be gleaned from some of the factors, but it is not set out as clearly as in *Tataryn* and *Cummings*. Notably, a recent 2013 decisions of the Ontario Superior Court of Justice, *Stevens v Fisher* [36] saw Justice DiTomaso awarding $10,000.00 specifically in respect of the moral claim advanced in an SLRA claim. [37] Further quantum was awarded in respect of the claim, but of notable importance was the referenced distinct treatment of the 'moral claim'.

In *Cummings v. Cummings,* Justice Cullity held that a deceased's moral obligations should be taken into account when determining claims for dependant's support. The Ontario Court of

[34] LCO Report *supra* note 20 at pages 153-156; and see *Buckland v. Rose,* [1879] OJ No 331 (C) ¶ 11; *Campbell v. Chapman,* [1879] OJ No 152 (C) ¶ 15.
[35] *SLRA,* section 62.
[36] *Stevens v Fisher,* 2013 ONSC 2282 (CanLII) ("*Stevens")*
[37] *Stevens*, at paras 139-140

Appeal upheld the ruling and it has since become standard application to include this as a factor in assessing a dependant's entitlement.

The *FCA* "…cannot receive too liberal a construction, or be too loosely extended, in suppression of a fraud…".[38] Assuming that the moral obligation of the deceased exists before his death, and even in the absence of the triggering event as is the case with *FLA* claims, the *SLRA* may permit dependant relief claimants the right to rely on the *FCA* where there is evidence that the deceased disposed of assets during his lifetime with the specific intent to defeat his moral, and legal obligations.

Fortunately, the *SLRA* contains unique provisions which allow a dependant to include as assets of a deceased's estate, property which does not actually form part of the deceased's estate at death.[39] These provisions allow for the inclusion of assets such as those passing to others by rights of survivorship (assets held jointly with the deceased) and those which have beneficiary designations (and thus are paid directly to the beneficiary). Notably, the relevant provisions also include '*gifts mortis causa'.*

Gifts mortis causa are defined as "*a gift of personal property made in expectation of [the] donor's death and on [the] condition that [the] donor dies as anticipated.*"[40] There is no obligation to prove that such gifts were undertaken by the deceased with the intent to defeat the claims of his dependants. It need only be shown that the deceased made the gift at a time when the deceased was aware that his death was imminent.

[38] Lord Mansfield, C.J. in *Cadogan v. Kennett* (1776), 2 Cowp. 432, 98 ER 1171 as quoted by Miller J. in *Sembaliuk v. Sembaliuk* 1983 CanLII 1077 (AB QB), (1983), 35 RFL (2d) 415 at p. 425, 150 DLR (3d) 556 (Q.B.) and cited in *Stone* ON SC *supra* note 14 ¶ 47.
[39] *SLRA,* section 72.
[40] Black's Law Dictionary, 6th edition.

Accordingly, while the reasoning in *Stone* may well permit a dependant to be regarded as a creditor at the time of the impugned *inter vivos* transfers, and thus avail himself of section 2 of the *FCA,* as well as section 72 of the *SLRA* which provides the dependant with the necessary statutory authority to challenge *inter vivos* transfers as constituting '*gifts mortis causa'.* As a result, the *FCA* may be of less practical or necessary use and application to a dependant claiming under the *SLRA*.

D. CONCLUSIONS

Our government and courts have, by legislation and developing case law, ensured that an individual cannot avoid his moral and financial obligations to spouses and dependants. The decision of the Court of Appeal in *Stone* with respect to the applicability of the *FCA* and its interplay with certain *FLA* claims, may well extend to *SLRA* claimants in appropriate circumstances.

The *FCA* is an available tool that can be used to assist where it is able to be shown that the deceased intended to divest/deplete assets in anticipation of death, so as to defraud a spouse/dependant.

While testamentary freedom remains a fundamental principal of estate law in Ontario, such freedom is perhaps more appropriately considered as part of a social contract by a testator. Such freedom is a right that obviously must be balanced by one's obligations. Where a testator fails to appreciate and deal with financial obligations, the consequential estate planning may cross the line and become a fraudulent conveyance or preference, where there is evidence of a

deliberate intent to deplete assets. If it can be shown that there was a deliberate intent to deplete assets in order to defeat the proper claims of spouses or dependants, that spouse or dependant may be successful in voiding certain transactions by employing the FCA as a remedial tool.