



WHALEY ESTATE LITIGATION PARTNERS

WHALEY ESTATE LITIGATION PARTNERS ON DEPENDANTS' SUPPORT

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FOREWORD

By: Albert H. Oosterhoff

It is my great pleasure to introduce this book. It is yet another in a series of books on important legal topics Whaley Estate Litigation has been publishing for the benefit of the general public and the legal profession for the last several years.

This book examines the topic of Dependants' Support in detail. Its focus is Part V of Ontario's *Succession Law Reform Act*, which is concerned with support obligations on the death of a testator or intestate. The book examines the statutory provisions and the case law that has grown up around them in more than a dozen chapters, each of which considers a discrete aspect of the law.

Although the focus is on Ontario law, the book also summarizes dependants' support in other Canadian jurisdictions, where this type of support is variously referred to as dependants' relief, testator's family maintenance, and similar terms. And it also briefly examines the support obligations of spouses imposed by Ontario's *Family Law Act*, as well as other available claims.

The book concludes with three helpful and practical chapters for lawyers bringing or responding to dependants' support claims, for estate trustees, and for settling dependants' support claims.

I am confident that the reader will find the book to be a helpful guide in finding his or her way in this complex area of law. Heartily recommended.

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ACKNOWLEDGEMENTS

The members of Whaley Estate Litigation Partners have contributed to the materials compiled herein on Dependants' Support to provide a resource to clients and professionals alike.

This book is intended for the purposes of providing information only and is to be used only for the purposes of guidance and is not intended to be relied upon as the giving of legal advice and does not purport to be exhaustive.

Enjoy.

Kimberly A. Whaley

Whaley Estate Litigation Partners

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INTRODUCTORY COMMENTS: AN OVERVIEW

As family dynamics in Canada have shifted away from the previous norm of a single “traditional” marriage towards an increasing number of blended families and common law relationships, the need for comprehensive (and adequate) estate planning has become a complex concern.¹ As a result, the relationship between family law and estate litigation has also become increasingly dynamic. Where a deceased person fails to adhere to their statutory obligations, surviving spouses and/or dependants may seek to enforce on their legal rights as against their deceased spouse’s estate pursuant to the *Family Law Act* (“**FLA**”) and the *Succession Law Reform Act* (the “**SLRA**”), or, if access to the provincial legislation is denied or provides an inadequate remedy, a variety of equitable claims can be made pursuant to the common law.

The *SLRA* is a powerful tool. At first blush Part V of the *SLRA*, may seem to provide a remedy akin to spousal support, which is guided by the payor’s means and the recipient’s needs. However, the Ontario Court of Appeal has clarified that in determining claims for dependants’ support under the *SLRA*, the court must consider not just the applicant’s bare needs, or legal claims, but also the applicant’s moral or ethical claims.² Arguably, the moral claim always existed under the statutory factors but has become more entrenched as part of a legal claim.³

A dependant support claim is a claim made against the estate of a deceased person by a dependant who meets the definition of a dependant under the *SLRA*. Dependants’ support claim can be commenced by issuing a Notice of Application pursuant to the *SLRA* and Rules 14.05, 74.15 and 75.06 of the *Rules of Civil Procedure* with supporting affidavit evidence from the dependant claimant. Section 67 of the *SLRA* provides for the freezing of the distribution of the assets of the estate until determination of the dependants’ support claim. Subject to the exception in subsection 61(2) of the *SLRA*, an applicant has six months from the grant of letters probate of the will or of letters of administration to bring an application. In most circumstances, the phrase “grant of letters probate of the will” in subsection 61(1) is the equivalent of issuing the Certificate of Appointment of an Estate Trustee With a Will as referred to in Rule 74.04.

1 Popovic-Montag, S., & Hull, I. (2013, September 3). The “Marriage” of Estate and Family Law. Retrieved from http://www.huffingtonpost.ca/suzana-popovicmontag/estate-law_b_3546132.html.

2 *Cummings v. Cummings* (2004), 2004 CarswellOnt 99, 235 D.L.R. (4th) 474, (sub nom. *Cummings Estate*, Re) 181 O.A.C. 98, 5 E.T.R. (3d) 97, 69 O.R. (3d) 397 (Ont. C.A.).

3 *Tataryn v. Tataryn*, [1994] 2 SCR 807; *Cummings v Cummings*, 2003 CanLII 64218 (On SC) – 2003-02-21.

This book will provide an overview of several aspects of dependants' support; it is not a substitute for legal advice, especially considering the complex and fact-driven nature of claims against an estate.

We will discuss who qualifies as a dependant under the Ontario legislation, as well as examine related court rules and procedure. Generally, the deceased must have been actively providing support, or under an obligation to provide support, in order for a claimant to qualify as a dependant.

We will discuss funding orders for dependants' support claims, which may be obtained from the court in particular circumstances to fund the expenses of a claimant.

We will discuss suspensory orders and injunctive relief, which may be essentially in dependants' support claims with time-sensitive matters or where assets may be dissipated prior to the resolution of the claim.

We will discuss "Section 72 assets", which, pursuant to section 72 of the *Succession Law Reform Act*, may be "clawed back" into the estate in order to fund orders for dependants' support. Section 72 assets are assets that would otherwise pass outside of an estate (e.g., life insurance proceeds and jointly-held assets), and are an essential element of dependants' support claims, as through planning or inadvertence, a testator may have minimized the assets of his or her estate such that there are no estate assets to fund a dependant's support order.

We will examine dependants' support in the context of family law, as children, spouses, and especially common law spouses, are frequent dependants' support claimants.

We will discuss cases involving multiple support claims, sometimes by multiple "spouses" or by both children and spouses of the deceased. Such cases often arise when the deceased has had two or more marriages or common law relationships in their lifetime.

We will discuss attempts to dissipate the estate – often in order to circumvent a claim or avoid paying support – by way of fraudulent conveyances or other attempts to hide assets.

We will take a look at the quantum of dependants' support awards. Dependants' support awards vary greatly, and are dependent on the specific facts of a given matter, taking into account factors such as the relationship between the parties, the age and ability of the dependant, and the dependant's capacity to earn for themselves, among other things.

We will examine certain companion or alternative claims to dependants' support under the *Family Law Act* and *Succession Law Reform Act*, such as the equalization of net family property, which is available to married spouses.

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On a related note, we will discuss dependants' support in relation to domestic contracts, which may preclude a dependant from making a claim against a deceased's estate.

We will touch on certain options that are available in negotiated settlements to dependants' support claims. In negotiated settlements, lawyers and claimants may have the opportunity to enter into tax-effective agreements to satisfy dependants' support claims that limit financial losses to the estate.

We discuss dependants' support (and its variants) across Canada, with reference to the applicable legislation in each jurisdiction.

We briefly address limitation periods that apply to dependants' support claims. It is advisable for would-be claimants to file their claims as quickly as is practicable in order to avoid a situation where certain assets of the estate have already been distributed to beneficiaries.

We examine a changing area of law, namely, who qualifies as a legal parent and the implications for dependants' support. In the wake of the changing family structures due to changing social and scientific norms, Ontario has adopted legislation that focuses on intention rather than biology, to determine who is the parent of a given child (and therefore have an obligation to provide for that child as a dependant).

Finally, we briefly discuss considerations and best practices for estate trustees and lawyers, respectively, when dealing with dependants' support claims.

CHAPTER 1: QUALIFYING AS A DEPENDANT UNDER THE *SUCCESSION LAW REFORM ACT*, R.S.O. 1990, C. S.26 - ONTARIO.CA

WHO QUALIFIES AS A DEPENDANT?

When looking for the definition of a “dependant”, we look to Section 57 of Part V of the *Succession Law Reform Act* (“**SLRA**”).¹ According to the *SLRA*, a “dependant” means the deceased’s spouse, parent, child or the brother or sister of the deceased to whom the deceased was providing support or was under a legal obligation to provide support immediately before his or her death. When assessing the validity of a dependant’s support claim under the *SLRA*, it is important to consider the definition of each relationship in the context of the law, which may differ from conventional meanings.

WHO IS A SPOUSE?

The definition of a spouse according to section 57 of the *SLRA* goes well beyond conventional married spouses. The term “spouse”, according to the *SLRA*, is to have the same meaning as Section 29 of the *Family Law Act* (“**FLA**”) which reads as follows:²

“spouse” means a spouse as defined in subsection 1 (1), and in addition includes either of two persons who are not married to each other and have cohabited,

(a) continuously for a period of not less than three years, or

(b) in a relationship of some permanence, if they are the parents of a child as set out in section 4 of the *Children’s Law Reform Act*.

The *SLRA* then expands upon this definition to include “*either of two persons who were married to each other by a marriage that was terminated by divorce.*”³

In summary, a spouse includes a common-law or same-sex partner as well as a married spouse.

1 RSO 1990, c S.26.

2 *Family Law Act*, RSO 1990, c F.3, s 29.

3 *SLRA, supra*, at s 57(1).

WHO IS A PARENT?

A “parent”, according to the *SLRA*, includes a grandparent as well as a person who demonstrates a settled intention to treat the deceased as a child of his or her family, except in a situation that involves foster care. It is important to consider that this relationship can encompass any person who demonstrates the requisite “settled intention”, regardless of whether they are biological parents or not.

WHO IS A CHILD?

A “child”, according to the *SLRA*, includes a grandchild as well as any person whom the deceased has demonstrated a settled intention to treat as a child of his or her family, except under situation which involves foster care.

WHAT IS MEANT BY “SUPPORT”?

According to the *SLRA* and case law, support is not necessarily a “cash” transaction. Support can take many forms depending upon what was agreed to. Common forms of support include paying for housing, transportation, utilities, food, clothing, education, and the like. In fact, the word “support” in the *SLRA* extends that meaning to include what might by some be considered as non-essentials or luxuries.⁴ The 1994 Supreme Court of Canada case *Tataryn v. Tataryn*⁵ (“*Tataryn*”) and the 2001 Ontario Court of Appeal in *Cummings v. Cummings*⁶ (“*Cummings*”) affirmed that moral considerations are a relevant factor for courts to consider in dependants’ support claims. *Tataryn* articulated a two-stage test, which focuses first on the legal duties and second on the moral duties that the deceased owed to the dependant applicant. Meanwhile, *Cummings* affirmed that moral considerations are a relevant factor for courts to consider in dependants’ support claims. In short, when examining all of the circumstances of an application for dependant’s support, the court must consider:

1. What legal obligations would have been imposed on the deceased had the question of provision of support arisen during his lifetime; and
2. What moral obligations arise between the deceased and his or her dependants as a result of society’s expectations of what a judicious person would do in the circumstances?

Section 63 of the *SLRA* sets out where an order for payment of support can be drawn from. The court can order payment from either income or capital of the estate, or both, and the court has

⁴ *Re Davies*, 1979 CarswellOnt 605 (Surr Ct) at para 15.

⁵ *Tataryn v. Tataryn Estate*, (1994) 2 S.C.R. 807 [*Tataryn*].

⁶ *Cummings v. Cummings*, (2004), 69 O.R. (3d) 397, 235 D.L.R. (4th) 474, 181 O.A.C. 98, 5 E.T.R. (3d) 97 (C.A.).

broad powers to impose such conditions and restrictions as it deems appropriate with respect to such payments. Where an application is made under Part V of the *SLRA* and the applicant is in need of and entitled to support but any or all of the matters referred to in section 62 or 63 have not been ascertained by the court, the court may make an order for interim support. It is important to note that the deceased must have been providing support immediately before death, or must have been under a legal obligation to provide support either through statute, court order or at common law.

Notably, in respect of legislation entitling a parent to claim support from a child, both the *FLA* and the *SLRA* provide for parental support in prescribed circumstances. Where a child is still living, the parent's claim for support must be made under the *FLA*. Where a child has predeceased a parent, the parent's claim for support against a child is pursuant to the *SLRA*.

SIMPLY QUALIFYING AS ONE OF THE ABOVE DOES NOT ENTITLE YOU TO SUPPORT

Meeting the definition of a child, spouse or parent is only the first step in determining eligibility for dependants' support. In order to meet the requirement, one must have either been receiving or entitled to receive support from the deceased immediately prior to his or her death. Often this falls to whether the claimant was legally entitled to support.

Section 58 of the *SLRA* requires an analysis of whether or not the deceased has made adequate provision for the proper support of his or her dependants. A court must evaluate what has been given under the terms of the deceased's Will, or on intestacy, and then determine what adequate support is in the circumstances. The definition of what constitutes adequate support is a factual inquiry based upon the circumstances of each individual case. The courts have legislative guidance pursuant to section 62 of the *SLRA* and the enumerated 19 factors thereunder from (a) through (s) to consider in determining what support would be adequate.

In considering what constitutes adequate and/or proper support, the courts have identified that the provision made by the deceased must not only be adequate today, but also adequate in the future. In determining the amount and duration of support, the court shall consider all the circumstances of the applicant. A crucial component of the definition of a dependant is that the deceased was providing support immediately before his or her death. Dependants' relief legislation does not create a vested interest in any dependant and merely gives a dependant the right to apply for maintenance when adequate provision has not been made in a will for that dependant. It does not permit an original order being made for maintenance of a deceased dependant. In determining the amount and duration of support, section 62 of the *SLRA* sets out a myriad of circumstances for the court to consider.

A basic principle of support is borne under Section 30 of the *FLA*, which states that every spouse has an obligation to support the other spouse in accordance with what is required to the extent that he or she is capable of doing so. This, of course, can be subject to the terms of a domestic contract, most often seen in the context of separation and divorce.

As for children, parents have a legal obligation to support their minor children. This is seen in a variety of legislation such as the *FLA*, *SLRA* and even the *Criminal Code of Canada*. Note, however, that this specifically speaks to minor children. What about adult children? There are a number of cases that speak to the issue of dependant adult children as well as independent adult children.

One such case is *Tataryn*. In *Tataryn*, the deceased and his wife had been married for 43 years. They had a home (in the deceased's name), a rental property and other financial assets. There were two adult sons: J and E. The deceased disliked J and feared that if he left his estate to his wife, she would then pass it on to J. In accordance with his will, the deceased gave E full title to the rental property and created a discretionary trust dealing with the residue of the estate, including the home. E was the trustee and residuary beneficiary, taking full title to the home upon the wife's death. J was to receive nothing.

The trial judge revoked the bequest of the rental property to E and granted the wife a life interest in the property. The trial judge further directed that upon the wife's death, the residue of the estate including the home and rental property was to be divided among J and E.

On appeal to the Supreme Court of Canada, it was observed that dependant adult children are entitled to such consideration as the size of the estate and testator's other obligations may allow. However, with respect to independent adult children the court stated "*While the moral claim of independent adult children may be more tenuous, a large body of case law exists suggesting that, if the size of the estate permits and in the absence of circumstances which negate the existence of such an obligation, some provision for such children should be made...*"⁷

CONCLUSION

As a general rule, testators have freedom to decide who gets what after they die. But the law in Ontario does not necessarily view the concept of testamentary freedom as absolute. There are responsibilities that flow from relationships and individuals borne from them. Legislation such as the Succession Law Reform Act and the Family Law Act provide protection to these individuals and therefore may override testamentary freedom.

⁷ *Tataryn, supra*, at paras 822-23.

CHAPTER 2: DEPENDANTS' SUPPORT ACROSS CANADA

This chapter will explore the various dependants' support legislation across Canada, and discuss important similarities and differences that may exist. A chart setting out the specific legislation by province and the relevant provisions is included.

OVERVIEW: THRESHOLD LANGUAGE

While all provinces and territories have some form of dependants' support legislation, the wording is not identical, which may lead to different results depending on the province in which the claim is brought. One of those differences is the threshold language used for when a support payment will be ordered.

In the majority of Canadian jurisdictions, applicants are entitled to apply for dependants' support from an estate if the deceased does not make "adequate provision" for their proper maintenance or support. See the legislation in Ontario, Alberta, Nova Scotia, Prince Edward Island, Newfoundland and Labrador, Yukon, Northwest Territories, and Nunavut.¹

In British Columbia, 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."²

Similarly, in Saskatchewan, dependants can apply for a "reasonable" amount of maintenance from an estate if the deceased did not make "reasonable" provision for their maintenance.³

New Brunswick's legislation uses slightly different language, providing 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.⁴

1 *Succession Law Reform Act*, RSO 1990 c S 26; *Wills and Succession Act*, SA 2010, c-W 12.2; *Testators' Family Maintenance Act*, RSNS 1989, c 465; *Dependants of a Deceased Person Relief Act*, RS PEI 1988, c D-7; *Family Relief Act*, RSNL 1990, c F-3; *Dependants Relief Act*, RSY 2002, c 56 *Dependants Relief Act*, RSNWT 1988, c D-4; *Dependants Relief Act*, RSNWT (Nu) 1988, c D-4.

2 *Wills, Estates and Succession Act*, SBC 2009, c 13.

3 *The Dependants' Relief Act*, 1996, SS 1996 c D-25.01.

4 *Provision for Dependants Act*, RSNB 2012, c 111.

In Quebec, dependants' support is referred to as "survival of the obligation to provide support." An estate may be ordered to pay "alimentary support" under articles 684-688 of the *Civil Code of Quebec*.⁵ Some case law shows Quebec courts interpreting the *Code* as requiring an examination of the dependant's "needs, means and circumstances" when determining such support; however, the *Code* also imposes a maximum limit on the amount of support that can be provided, based on a mathematical calculation.⁶

And finally, compared to other Canadian common-law provinces and the territories, the approach taken by the Manitoba Legislature is distinct. No other Canadian jurisdiction's statute uses the language of "financial need" which appears in Manitoba's *Dependants Relief Act*.⁷ The Manitoba *Act* uses financial need as a threshold for entitlement and does not use words such as "discretion" and "adequate, just and equitable".⁸

PROVINCIAL LEGISLATION

British Columbia

In British Columbia, under the *Wills, Estates and Succession Act*⁹ ("**WESA**") (formerly the *Wills Variation Act*), 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."

WESA allows a spouse or child (both biological and adopted children) to seek an order from the court to increase the amount they are entitled to receive under the Will by bringing a "wills variation lawsuit". A dependant can only make an application for support if the deceased dies with a Will.

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.

Section 60 of WESA provides for variation of a will in favour of the testator's spouse or children:

60 Despite any law or enactment to the contrary, if a will-maker dies leaving a will that does not, in the court's opinion, make adequate provision for the proper maintenance and support of the will-maker's spouse or children, the court may, in a proceeding by

5 CQLR c CCQ-1991.

6 *Civil Code of Quebec* Articles 684-685.

7 CCSM c D 37.

8 2017 MBCA 69 at para 54.

9 SBC 2009, c 13.

or on behalf of the spouse or children, order that the provision that it thinks adequate, just and equitable in the circumstances be made out of the will-maker's estate for the spouse or children.

*Tataryn v. Tataryn Estate*¹⁰ remains the seminal authority for dependant support claims in British Columbia, and stands for the proposition that, in the context of a wills variation action, the court must first determine whether the testator has made adequate provision for his or her spouse and children. If the court concludes that the testator has not, the court must then determine what is "adequate, just and equitable" (see *Tataryn*, at pp. 815-816).

In the case of *Eckford v. Vanderwood*,¹¹ the British Columbia Court of Appeal confirmed that:

[39] The phrase "adequate, just and equitable" is to be viewed in light of current societal norms. In determining what is adequate, just and equitable, the court must consider both legal and moral obligations. The first consideration is a testator's legal responsibilities during his or her lifetime. Maintenance and property obligations which the law would support during the testator's moral duties towards a spouse and children. While there is no clear legal standard by which to judge moral duties, the jurisprudence suggests that subject to such considerations as the size of the estate and the absence of circumstances that may negate such moral obligations, a testator should make provision for both a spouse and children. *Tataryn* recognizes that in any particular situation there may be a number of ways of dividing the assets which are adequate, just and equitable, and provided the testator has chosen an option within the range, the will should not be disturbed. *Tataryn*, at 823-824.

Eckford v. Vanderwood involved competing moral claims of a second common law spouse and independent adult children of a previous marriage to the deceased's estate. In his Will the testator had divided 80% of his estate equally between his two adult children from a previous marriage and 20% to his mother. The testator's common law spouse received his half interest in their home by right of survivorship. The surviving spouse sought a claim for variation of her deceased spouse's Will, making her the only beneficiary of the estate. The applicant had become disabled following her spouse's death. The trial judge dismissed the action finding that the testator's disposition of his assets made adequate provision for the proper maintenance and support of the common law spouse. He held that he could not take into account her current medical condition and inability to work in determining whether or not the testator had made adequate provision for her maintenance and support. The surviving spouse appealed.

10 [1994] 2 SCR 807.

11 2014 BCCA 261.

The British Columbia Court of Appeal found that in deciding whether a testator made adequate provision, a court should take into consideration the circumstances existing and reasonably foreseeable *at the death of the testator*. The surviving spouse's decline in health was not reasonably foreseeable. The concept of "adequate provision" will depend upon all the circumstances, including the circumstances of the other parties to whom the testator owed a moral obligation and their expectations. Given the financial circumstances of the testator's children and mother, the size of the estate, and the comparative value of the testator's half interest in the couple's home, the testator made adequate provision for his common law spouse.

Alberta

Alberta's *Dependants Relief Act*,¹² was repealed in 2012 and replaced with the *Wills and Succession Act*.¹³ A claim for dependants' support can be brought under Part 5, Division 2 "Maintenance and Support" of the *Wills and Succession Act*, specifically section 88(1).

Order for maintenance and support of family member

88(1) If a person

- (a) dies testate without making adequate provision in the person's will for the proper maintenance and support of a family member, or
- (b) dies either wholly or partly intestate and the share to which a family member is entitled under a will or Part 3 or both is inadequate for the proper maintenance and support of the family member,

the Court may, on application, order that any provision **the Court considers adequate be made out of the deceased's estate for the proper maintenance and support of the family member.**[emphasis added]

A claim for dependants' support in Alberta is available to:

- A spouse;
- An adult interdependent partner (common law partner of at least 3 years or in a relationship of some permanence if there is a child of the relationship or if they have entered into an "adult interdependent partner agreement" under section 7 of the *Adult Interdependent Relationship Act*¹⁴);

¹² RSA 2000, c D-10.5.

¹³ RSA 2010, c W 12.2.

¹⁴ SA 2002 c A-4.5.

- A child under the age of 18;
- A child 18 or over who is unable by mental or physical disability to earn a livelihood;
- A child over 18 but younger than 22, who is unable to withdraw from his or her parents' charge because he or she is a fulltime student as determined in accordance with Alberta's *Family Law Act* and its regulations; and
- A grandchild or great-grandchild who is under the age of 18 and in respect of whom the deceased stood in the place of a parent at the time of the deceased's death (see definition of "family member" under Part V, section 75(b)).

The claim must be brought within 6 months of grant of probate or administration (see section 89 (1)).

The leading Supreme Court of Canada decision of *Tataryn* was adopted and summarized by the Alberta Court of Appeal in *Koma v. Tomich Estate*:

- What is "adequate" goes beyond the bare "necessities", and the statute does not contemplate a "needs-based" test. An award under the Act can take account of the family's lifestyle and the claimant's realistic expectations;
- The statute attempts to balance the interests of testamentary autonomy with the need to provide economic protection to surviving family members. Neither of these values can outweigh the other. Where possible, the court should attempt to recognize both interests;
- An award under the Act should not only consider the legal obligations of the deceased towards the family, but should also have regard to the moral obligations of the deceased. The law recognizes a moral obligation to a surviving spouse and dependant children, and a less obligation to adult children;
- What is "adequate" must be measured against contemporary community standards, having regard to what a "judicious person would do in the circumstances, by reference to contemporary community standards";
- The extent to which all the legal and moral claims can be met will depend on the size of the estate. On the other hand, because there is no longer any need to provide support for the deceased, the surviving family members may be entitled to more than the support they would have received during the deceased's lifetime;
- The statute gives the court a wide-ranging discretion.¹⁵

15 *Koma* at para. 17.

The Court in *Koma* also went on to note that:

Tataryn was decided under British Columbia legislation that empowers the court to make “provision that it thinks adequate, just and equitable in the circumstances”. The Alberta statute empowers the court to make “any provision that the judge considers adequate”. This subtly different wording may somewhat restrain the ability of Alberta courts to grant relief, but the decision in *Tataryn* nevertheless lays out many applicable principles.¹⁶

While the *Koma* decision was based on an interpretation of the repealed *Dependants Relief Act*, Justice Bensler, in *Re McKenna Estate*,¹⁷ affirms that the relevant wording with respect to a claimant’s entitled to maintenance and support remains “substantially the same”.¹⁸ Further, Justice Pentelechuk in *Parchen Estate (Re)*,¹⁹ found that the “principles enumerated in *Tataryn* and *Koma* remain instructive when determining maintenance and support entitlements under the present legislative framework.”²⁰

Saskatchewan

In Saskatchewan, a dependants’ support claim is brought under *The Dependants’ Relief Act, 1996*.²¹ Section 6(1) of the Act states:

Maintenance order

6(1) Subject to subsections (2) to (3) and to sections 7 to 9, if on an application the court is of the opinion that the deceased has disposed of real or personal property in a manner that **reasonable provision** has not been made for the maintenance of the dependant to whom the application relates, the court may order that provision be made from the deceased’s estate for maintenance of the dependant in an amount that the court considers reasonable.

(2) The court may order that the provision of maintenance be made out of and charged against the whole or any part of the deceased’s estate in the proportion and in the amount that the **court considers reasonable**. [emphasis added]

The Saskatchewan Court of Appeal’s most recent decision opining on dependants’ relief is *Scott v.*

¹⁶ *Koma* at para. 23.

¹⁷ 2015 ABQB 37, 5 ETR (4th) 144.

¹⁸ *Re McKenna Estate*, 2015 ABQB 37 at para. 16.

¹⁹ 2016 ABQB 345.

²⁰ *Re Parchen*, 2016 ABQB 345 at para. 25.

²¹ SS 1996 c D-25.01.

Seier Estate.²² In that case the Court of Appeal equated the term “reasonable” (which is found in the legislation) with “adequate”:

. . .under s.6(1) of *The Dependants' Relief Act* and *Tataryn Estate*, the first order of inquiry for the judge was to determine whether those bequests were *adequate*, in the sense that the will made reasonable provision for Ms. Scott's maintenance in light of her financial circumstances. The judge determined the bequests were adequate and denied Ms. Scott the dependants' relief she had sought. [emphasis in original]²³

The Court of Appeal went on to comment on the judge's discretionary power under s.6(1) of *The Dependants' Relief Act, 1996*:

That power is discretionary because it falls to be exercised where the court “is of the opinion” that “reasonable” provision has not been made for the maintenance of a dependant and because the court, if it holds that opinion, “may” then order that dependants' relief maintenance be paid by the estate “in an amount the court considers reasonable”. By framing the court's power in these terms, the Legislature has directed that the power be exercised as the court thinks fit.²⁴

The Court of Appeal in *Scott* concluded that there was no reason to interfere with the chambers judge's findings that the spouse of the testator was not entitled to a dependant's relief award and that the chambers judge correctly analysed the testator's legal and moral obligations when coming to his conclusions. No order for costs was made for the appeal “given the social policy goals of dependants' relief legislation, the history of this matter and the nature of the grounds of appeal.”²⁵

Manitoba

Compared to other Canadian common-law provinces and the territories, the approach taken by the Manitoba Legislature is distinct. No other Canadian common law jurisdiction's statute uses the language of “financial need” which appears in Manitoba's *Dependants Relief Act*.²⁶

Unlike other legislation, the Manitoba Act uses financial need as a threshold for entitlement, and does not use words such as “discretion” and “adequate, just and equitable”.²⁷

Section 2(1) of the Act provides:

22 2016 SKCA 76.

23 *Scott v. Seier Estate*, 2016 SKCA 76 at para. 12.

24 *Scott v. Seier Estate*, 2016 SKCA 76 at para. 19.

25 *Scott v. Seier Estate*, 2016 SKCA 76 at para. 54.

26 CCSM c D 37.

27 *McAuley v. Genaille*, 2017 MBCA 69 at para. 54.

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.

Furthermore, as noted in *McAuley v. Genaille*,²⁸ 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 Court observed that the “history and language of the *Act* clearly reflects a needs-maintenance approach to dependants relief”.²⁹

The Court of Appeal went on to apply a threshold test and concluded that threshold eligibility for relief is *solely* assessed on the dependant’s financial need:

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.³⁰

The Court found that:

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*) have not been embraced by the Manitoba courts.

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.³¹

Once the threshold of financial need is met, the factors for a court to consider in determining the amount and duration of the support are found at section 8(1)(a) to (k) of the legislation and include such factors as the size and nature of the estate; age and physical and mental health of the

28 2017 MBCA 69, leave to appeal to the Supreme Court of Canada dismissed 2018 CanLII 26069 (SCC).

29 *McAuley v. Genaille*, 2017 MBCA 69 at para. 54.

30 *McAuley v. Genaille*, 2017 MBCA 69 at para. 55.

31 *McAuley v. Genaille*, 2017 MBCA 69 at para. 58.

dependant; ability of dependant to become financially independent; capacity of the dependant to provide for his or her own support etc.

A “dependant” in Manitoba is defined under section 1 of the Act as: a married spouse; divorced spouse with support agreement; common-law spouse; a minor child; child unable by reason of disability to support themselves; and grandchild, parent, grandparent, adult child or sibling “substantially dependent” on the deceased at the time of death.

Quebec

In Quebec, dependants' support or relief is referred to as “survival of the obligation to provide support.” A dependant is called a “creditor of support”. Every creditor of support (which includes a surviving spouse, children and/or parents of the deceased) must make a claim against the estate (called the “succession”) within six months after the death of the deceased.

Articles 684 and 685 of the *Civil Code of Quebec* state:

CHAPTER V

The Survival Of The Obligation To Provide Support

684. Every creditor of support may within six months after the death claim a financial contribution from the succession as support.

The right exists even where the creditor is an heir or a legatee by particular title or where the right to support was not exercised before the date of the death, but does not exist in favour of a person unworthy of inheriting from the deceased. 1991, c. 64, a. 684.

685. The contribution is made in the form of a lump sum payable all at once or by instalments.

The contribution made to the creditors of support, with the exception of that made to the former spouse of the deceased who was in fact receiving support at the time of the death, is fixed with the concurrence of the liquidator of the succession acting with the consent of the heirs and legatees by particular title or, failing agreement, by the court. 1991, c. 64, a. 685; 2016, c. 4, s. 92.

These provisions came into force in 1989. Prior to their enactment, a person's obligation to provide “alimentary support” (i.e. alimony, support payments) for a spouse or child ceased with his or her death. Prior to 1989, a testator was legally free to dispose of her property by will as he or she saw

fit and without regard to the continuing needs of her spouse or children. These new provisions were intended by the legislature to remedy that injustice and to provide continuing support for “alimentary creditors” after the death of an “alimentary debtor”.³²

In *Droit de la Famille* 2310,³³ Rothman J.A. on behalf of the Court of Appeal concluded that:

In my view, it is clear from the text of these articles that the claim of any creditor for support from the estate of a deceased is an alimentary claim and not merely a claim for a reserved portion or share of the estate. Art. 686 makes it plain that, in fixing the amount of the contribution for support, **the needs, means and circumstances of the claimant or creditor must be taken into account.**

If the creditor has no need for support, the estate will have no obligation to contribute. And, conversely, the greater the need for support, the greater will normally be the contribution, regard being had, however, to the needs and means of other persons having the right to claim support. (Art. 686, par. 2) [emphasis added]³⁴

In Quebec, there are maximum amounts that can be awarded under article 688 for dependants' support. The share granted to a surviving spouse or child cannot exceed one-half of what she would have been entitled to receive on intestacy, less what she actually received. This results in a maximum of 1/6 of the succession (estate) for the surviving spouse and 1/3 of the succession for all surviving children. The maximum claim of an ex-spouse cannot exceed the lesser of 12 months' support or 10% of the succession's value. The maximum share to the deceased's parents cannot exceed the lesser of 6 months' support or 10% of the succession's value.³⁵

The *Droit de la Famille* – 2310, Rothman J.A. of the Quebec Court of Appeal commented that:

[T]here is no doubt, in my view, from the text and the context of Art. 688 that the granting of the maximum under that formula will be conditional upon proof by the claimant of needs that are at least equal to the maximum calculated under the formula.

...

In short, the support contribution must be assessed equitably, in the light of all of the present circumstances as well as those future circumstances that can reasonably be projected. In my view, the approach must be liberal, flexible, sensitive and calculated to protect the present and future needs of the child.

32 See *Droit de la famille* – 2310, 1997 CanLII 10425 (QCCA).

33 1997 CanLII 10425 (QCCA).

34 *Droit de la famille* – 2310, 1997 CanLII 10425 (QCCA).

35 See Article 688 of the *Civil Code du Quebec*.

In that case the child's needs were not proved before the trial judge. The Court of Appeal found that the trial judge erred by fixing support simply by applying the formula under Article 688 to arrive at the *maximum* contribution. The Court allowed the matter to return to the Quebec Superior Court to enable the parties to complete their proof of relevant needs, means and circumstances.

New Brunswick

Dependants' support can be ordered under the *Provision for Dependants Act*³⁶ in New Brunswick. The Act came into force in 2013 and replaced the *Provision for Dependants Act*,. Section 2(1) of the legislation states:

Order for maintenance and support of dependant

2(1)If a person dies and is survived by a dependant or dependants **whose resources**, taking into consideration everything to which the dependant or dependants are entitled under a will, on intestacy or otherwise on the death of the deceased, **are not sufficient** to provide adequately for the dependant or dependants, a judge, on application by or on behalf of any or all of those dependants, may, in the judge's discretion and taking into consideration all the circumstances of the case, order that such provision as the judge considers adequate be made out of the estate of the deceased for the maintenance and support of the dependant or dependants.[emphasis added]

A dependant includes a spouse, a child, and any person who at the time of death was a dependant of the deceased as defined in section 111 of the New Brunswick *Family Services Act* (a person to whom another has an obligation to provide support under that Act).

The New Brunswick Court of Appeal applied *Tataryn* in the leading case of *Currie v. Currie Estate*.³⁷ In that case a father excluded his two adult children from his Will and they brought a dependant's support claim. The trial judge awarded a lump sum equivalent to one-third of the estate to be paid to the adult children, upon finding that the testator did not support his children financially for their education and had not provided them much "guidance, affection and companionship" in their youth. The Court of Appeal disagreed and allowed the appeal noting that the proper test was to consider the circumstances at the *time of the testator's death*:

The proper test is not to look into the past and decide who was right or wrong; it is to look at the situation at the time of the death of the testator and determine whether, at that time, the children can show a special need or other special claim to establish that they are eligible "dependants" under the Act.³⁸

36 RSNB 2012, c 111.

37 [1999] NBJ 305 (CA).

38 *Currie v. Currie Estate* [1999] NBJ 305 (CA) at para. 25.

The Court went on to confirm that the common law right to dispose of one's assets by Will is "deeply rooted" and "must only be avoided where there is a clear case made by the claimant."³⁹ The Court conclude that "there was **no moral wrong** to be corrected in this case" [emphasis added].⁴⁰

A New Brunswick court's reluctance to order dependant support when the dependant was also a beneficiary under a Will, was seen in *Branch v. Estate of Herbert Ernest Branch*.⁴¹ A daughter received \$27,000 under her deceased father's Will, was denied the \$300 a month support order she was seeking to help pay for her university education. Justice Leger commented:

If the applicant were not a beneficiary under the will, it appears clear in the circumstances that she would be entitled to a remedy by virtue of section 2(1) of the Act. However, the applicant is an equal beneficiary under the will of Herbert Branch.

If the applicant's claim is successful in obtaining relief under the Act, it results in the testator's will being changed . . . clearly the freedom of testamentary dispositions of a testator's property cannot be interfered with lightly.

...

In my view, the applicant has not presented a clear case warranting a change in the deceased testamentary disposition. **I can find no moral wrong that needs to be corrected in this matter.**[emphasis added]⁴²

Therefore, if no "moral wrong" needs to be corrected, no dependant support claim will be ordered.⁴³

Nova Scotia

Like in British Columbia, a dependant in Nova Scotia can only bring a claim for dependants' support if the deceased died testate (with a will). A dependants' support claim can be brought under Nova Scotia's *Testator's Family Maintenance Act*.⁴⁴ Section 3(1) of the Act states:

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

39 *Ibid* at para 27.

40 *Ibid* at para 28.

41 2004 NBQB 258.

42 *Branch v. Branch Estate*, 2004 NBQB 258 at p.6.

43 See also *Lawrence v. Johnston*, 1999 CanLII 3958 (NBQB).

44 RSNS 1989, c 465.

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.

Section 5 (1) of the Act, sets out the factors the Court will consider on such an application, including: whether the character or conduct of the dependant is such as should disentitle the dependant to the benefit of an order under the Act; the financial circumstances of the dependant; any services rendered by the dependant to the testator; and the relations of the dependant and testator at the time of death.

A “dependant” includes a widow, widower or child.

In the Supreme Court of Nova Scotia case of *Irving v. Irving Estate*,⁴⁵ Justice Scaravelli summarized dependants' support law in that province:

The issue of adequate provision for family members in a testator's will has been judicially considered on many occasions over the past number of years. Cases submitted by counsel and considered include: *Zwicker Estate v. Garrett* [1976] N.S.J. 20 (NSCA); *Tataryn V. vs. Tataryn Estate* 1994 CanLII 51 (SCC), [1994] 2 S.C.R. 807; *David v. Beals Estate* 2015 NSSC 288 (CanLII). These authorities and cases referred to therein establish that:

1. Testators have the absolute freedom to dispose of their property in a manner they choose subject to any statutory limitations.
2. The court should not, except in clear and definite cases, prevent testators from disposing of their estates as they please. In this regard an applicant bears the civil burden of proof on a balance of probabilities.
3. No one factor listed in section 5(1) of the Act is to be looked at in isolation. The court must look at all relevant facts and surrounding circumstances to determine whether a testator breached a moral duty to make adequate provision for an adult child.
4. The imposition of a moral duty does not require that all family members be treated equally.

In *Irving* the testator left \$1,000.00 bequest to one of her children (the applicant) and the residue of her estate (approx. \$100,000.00) to be split among her remaining four children. The applicant was self-sufficient, he owned his own home, he had unilaterally ceased contact with his family, had been out of their lives since 2001, and did not offer comfort or support to his dying parents despite being requested to do so. The Court dismissed the applicant's claim as he did not establish relevant

45 2016 NSSC 188.

circumstances which could allow the Court to intervene and deviate from the testator's expressed intentions.

Prince Edward Island

An order for dependants' support can be made in PEI under s. 2 of the *Dependants of a Deceased Person Relief Act*,⁴⁶ which states:

Order for maintenance

Where a deceased has not made adequate provision for the proper maintenance and support of his dependants or any of them, a court, on application by or on behalf of the dependants or any of them, may order that such provision as it considers adequate be made out of the estate of the deceased for the proper maintenance and support of the dependants or any of them. R.S.P.E.I. 1974, Cap. D-6, s.2.

A dependant under the Act means:

- (i) the surviving spouse of the deceased,
- (ii) a child of the deceased who is under the age of eighteen years at the time of the deceased's death,
- (iii) a child of the deceased who is eighteen years of age or over at the time of the deceased's death and unable by reason of mental or physical disability to earn a livelihood,
- (iv) a grandparent, parent or descendant of the deceased who, for a period of at least three years immediately prior to the date of the death of the deceased, was dependant upon him for maintenance and support, or
- (v) a person divorced from the deceased who, for a period of at least three years immediately prior to the date of death of the deceased, was dependant upon the deceased for maintenance and support;

In the case of *McDonald Estate*,⁴⁷ after applying and referring to *Tataryn* in assessing and approving a spouse's dependant's support claim, Justice Campbell commented on the growing number of later in life and second marriages or common law relationships:

Assessing the testator's moral obligations involves consideration of society's reasonable

46 RSPEI 1988 c D-7.

47 2014 PESC 7.

expectations and contemporary community standards. In the past two or three decades, second marriages have become commonplace. Often older adults are entering new relationships in which they maintain their financial independence. They frequently make arrangements for the bulk of their property to pass on their death to their children from their first relationship. That is a natural and completely understandable desire. However, the relationship of marriage, whether common law or otherwise, imposes new primary obligations which must be addressed in priority to other worthy, but still secondary, objectives. Society reasonably expects that a dependent person from a primary relationship will, subject to the capacity of the estate, be supported to a reasonable extent from the available assets of the estate.⁴⁸

Newfoundland & Labrador

Dependants' support can be sought under section 3 of the *Family Relief Act*,⁴⁹ in Newfoundland and Labrador:

Application to court

3. (1) Where a person

(a) dies testate without having made in his or her will adequate provision for the proper maintenance and support of his or her dependants or 1 of them; or

(b) dies intestate and the share under the *Intestate Succession Act* of the intestate's dependants or 1 of them in the estate is inadequate for their or his or her proper maintenance and support,

a judge, on application by or on behalf of those dependants, or 1 of them, may in his or her discretion and taking into consideration all relevant circumstances of the case, notwithstanding the provisions of the will or the *Intestate Succession Act*, order that **adequate provision** shall be made out of the estate of the deceased for the proper maintenance and support of the dependants or 1 of them. [emphasis added]

Only a widow, widower, or a child can be dependants under the Newfoundland legislation.⁵⁰

In the case of *Downton v. Downton Estate*,⁵¹ the Supreme Court of Canada overturned the Newfoundland Court of Appeal decision in a dependant support claim and restored the trial judge's decision which ordered the applicant to receive a lump sum \$20,000 support payment. In this

48 *McDonald Estate* 2014 PESC 7 at para. 49.

49 RSNL 1990, c F3.

50 *Family Relief Act*, RSNL 1990, c F-3 Section 2(c).

51 [1972] SCJ No 94.

case the applicant and the deceased were married in St. John's in 1948 and in 1965 the husband flew to Nevada to obtain a divorce. On the very day the divorce was granted, the deceased married his second wife in Nevada and they returned to Newfoundland. The deceased agreed to pay the applicant a lump sum of \$2800 and monthly support sum of \$350, however, this agreement did not bind his estate, nor did it specify any terminal date for the monthly payments.

The applicant brought a claim for dependants' relief on behalf of herself and her daughters, as the deceased had left his entire estate to his second wife and the second wife was also the beneficiary of some insurance policies.

While only widows, widowers, and children are "dependants" under the *Act*, the trial judge concluded that the Nevada divorce decree was without effect in Newfoundland and therefore the applicant was a "widow" and had dependant status under the *Family Relief Act*. The Newfoundland Supreme Court of Appeal rejected this approach and found that as the applicant accepted the jurisdiction of the Nevada Court and having her separation agreement rights and obligations incorporated in the Nevada divorce decree, was precluded from denying the effect of the decree. As she could not claim she was the deceased's widow she could not qualify as a dependant. The Court of Appeal also, on an alternative ground, would have set aside the trial judgment, even if the applicant was a dependant, under section 5(1)(a) of the *Act* which provides that the conduct or character of the dependant would disentitle the applicant from an order under the *Act*.

On appeal, the Supreme Court found that the:

lawful wife submitted to the foreign court as she did to protect her existing benefits which were given as a result of her separation from her husband in Newfoundland. Her submission was, accordingly, a special one and could have no effect against her in Newfoundland in enforcing separation terms, since she would not have to rely there upon the foreign decree in order to enforce them. This is not a case where the appellant's maintenance benefits rested on the foreign divorce decree alone and where she had taken those benefits until the deceased's death, and then sought to assert that she was the lawful wife in order to gain additional benefits.⁵²

The Supreme Court also found there was no basis for the Court of Appeal's finding that the applicant would have been denied an order under the *Act* based on conduct or character. The Court allowed the appeal and restored the order of the trial judge.

The case of *Collins v. J. Collins Estate*,⁵³ addressed the balancing of making a necessary support award with avoiding bankrupting the Estate. The Court concluded that:

⁵² *Downton v. Downton Estate* [1972] SCJ No. 94 at p.8.

⁵³ [1981] N.J. No. 128 (NSCTD).

While the spirit of the Act is to ensure that a dependant is not left destitute, it is necessary and in the best interest of all, that an order made under the act against an estate be not so onerous as to force an unnecessary winding-up of the estate or to dilute its viable assets.⁵⁴

Northwest Territories

Dependants Relief Act,⁵⁵ governs dependants' support claims in the NWT.

In the case of *Re Albert Lee Estate*,⁵⁶ Justice Rouse observed that:

Although the *Dependants Relief Act*, by its title and its provisions generally, is clearly intended to provide for the maintenance and support of persons whom the testator was bound to maintain and support, **there is, oddly, no specific requirement or prerequisite that the applicant had been in fact dependant upon the testator.** [emphasis added]⁵⁷

Justice Rouse went on to deny the dependant support claim brought stating that:

I remind myself that the statute refers to the word “dependant” in its title, and in its operative section, being s.2. By contrast, see the statute at issue in the Supreme Court of Canada decision in *Tataryn Estate* 1994 CanLII 51 (SCC), [1994] 2 S.C.R. 807. That British Columbia statute is entitled *Wills Variation Act* and contains no reference to dependants. Its operative section, s.2, requires the Court to determine whether the testator has made adequate provision not for dependants but rather for the testator's spouse and children. I find that the words used by the NWT Legislature in enacting the *Dependants Relief Act* are significant. I do not view the NWT statute as merely a vehicle for redistribution of the capital of the testator's estate. The statute is intended to provide for the maintenance and support of persons whom the testator was bound to maintain.

The applicant is not a dependant child but rather an independent adult child. With the greatest of respect, I find that the applicant does not come within the purview or intent of the Act.⁵⁸

In the case of *In Re Camsell Estate*,⁵⁹ a father of six children (three adults, three minors) died intestate. He had one life insurance policy of which four of his children were beneficiaries (two adult children and two minor children). The Public Guardian and Trustee brought an application under

54 *Collins v. J. Collins Estate* [1981] N.J. No. 128 at para. 23.

55 RNWT 1988, c D-4.

56 2006 NWTSC 13.

57 *Re Albert Lee Estate* 2006 NWTSC 13 at para. 17.

58 *Ibid* at para. 25.

59 2016 NWTSC 62.

the *Dependants Relief Act* for dependant's relief on behalf of the minor children. At this time, the insurance proceeds had already been paid out to the two adult children, who already spent the proceeds.

Justice Shaner noted that:

Judges have wide discretion in determining what is “adequate” for the proper maintenance and support of dependants. There is no specific list of factors set out in the *Dependants Relief Act* which must be considered; however, the judge who hears the application may, among other things, “inquire into and consider all matters that the judge considers should be fairly taken into account in deciding on the application” (*Dependants Relief Act*, s. 4(1)(a)).⁶⁰

Under the *Act*, unless the Estate is the beneficiary, proceeds of a life insurance policy do not form part of an estate. However, section 19(1)(f) of the *Act* allows money from a life insurance policy to be treated as a testamentary disposition for the purposes of a dependants' relief claim (similar to section 72 of Ontario's *Succession Law Reform Act*).

Relying on the Ontario case of *Moore v. Hughes*,⁶¹ Justice Shaner agreed that as a general proposition, funds already paid out under an insurance policy may be included in what is available for distribution in a dependants' support claim. However, this does not mean it is appropriate to force recipients to repay such proceeds in every case. Justice Shaner noted that this question was not “black and white” and must be addressed on a case by case basis. The two beneficiaries were young adults who received the funds almost two years before they were served with the claim. It was unjust and inequitable to ask the adult children to repay the monies. The Court ordered a division of the insurance proceeds that had been designated for the two minor children to be split among all three minor children.

Nunavut

A claim for dependants' support can be brought in Nunavut under section 2 of the *Dependants Relief Act*,⁶² which states:

Order for maintenance and support

2. (1) On application by or on behalf of one or more dependants of a deceased, a judge may, despite the provisions of the deceased's will or the *Intestate Succession*

⁶⁰ *Re Camsell Estate*, 2016 NWTSC 62, at para. 13.

⁶¹ 1981 CarswellOnt 493, (191) 11 ETR 213 (OHCJ).

⁶² RSNWT (Nu) 1988, c D-4.

Act, order that such provision as the judge considers appropriate be made out of the deceased's estate for the proper maintenance and support of one or more dependants of the deceased whose share in the estate, whether pursuant to the deceased's will or the *Intestate Succession Act*, would otherwise be inadequate for their proper maintenance and support.

A "dependant" is defined as:

- (a) the surviving spouse of the deceased;
- (b) a child of the deceased who is under the age of 19 years at the time of the death of the deceased;
- (c) a child of the deceased who has attained the age of 19 years at the time of the death of the deceased and unable by reason of mental or physical disability to earn a livelihood,
- (d) a person who immediately before the death of the deceased
 - i. had lived in a conjugal relationship outside marriage with the deceased for at least one year, and
 - ii. was dependent on the deceased for maintenance and support, or
- (e) repealed, S.Nu. 2011,c.25,s.6(3),
- (f) a person who at the time of the death of the deceased was acting as a foster parent of the children of the deceased in the same household and who was dependent on the deceased for maintenance and support; (personne à charge).

To date, there are no reported decision applying or interpreting this legislation.

Yukon Territories

Yukon's *Dependants Relief Act*,⁶³ section 2 provides for dependants' support claims:

Order for support

2. If a deceased has not made adequate provision for the proper maintenance and support of the deceased's dependants or any of them, the Supreme Court, on application by or on behalf of the dependants or any of them, may order that any provision it considers adequate be made out of the estate of the deceased for the proper maintenance and support of the dependants or any of them.

63 RSY 2002, c 56.

A "dependant" means:

- a) a widow or widower;
- b) child under 16 years;
- c) child over 16 years but unable to earn a livelihood due to mental or physical disability;
- d) grandparent, parent or descendent of the deceased who, for a period of at least three years immediately before the date of the death of the deceased, was dependant on the deceased for maintenance and support;
- e) a person divorced from the deceased who, for a period of at least three years immediately before the death of the deceased was dependant on the deceased for maintenance and support; or
- f) the common law spouse of the deceased.⁶⁴

In *GK v HK Estate*,⁶⁵ a litigation guardian applied for an order for interim special costs (payment in full of fees and disbursements) on behalf of the two adult children (both severely disabled) to be paid from the estate of their father in the context of a dependant's support claim. The executor and widow of the deceased opposed the motion.

The Court applied the three conditions enumerated by LeBel J. in *British Columbia v. Okanagan Indian Band* for interim costs:⁶⁶

- 1) Is the party seeking the interim cost impecunious to the extent they would not be able to proceed with the case without the order?
- 2) Has the party seeking the interim costs established a case of sufficient merit to warrant pursuit?
- 3) Are there special circumstances sufficient to satisfy the court that the case is within the narrow class of cases where this extraordinary exercise of power is appropriate?

Justice Veale answered "yes" to all three questions based on the facts and evidence provided and awarded the full legal fees and disbursement to be paid by the estate, noting that:

I make this order because of the unequal circumstances of these dependants and the inherently unequal power relationship that dependant children have in claiming against a parental estate. I do not make this order of interim costs on a special costs basis to punish the executrix. It is the inherently unequal power relationship that drives my decision.⁶⁷

64 See section 1 of the *Dependants Relief Act*, RSY 2002 c- 56.

65 2005 YKSC 47.

66 2003 SCC 71.

67 *Ibid* at para 46.

CONCLUSION

Each provincial legislature has approached solving dependants' support claims in different ways. It is important to make sure you review the legislation and interpreting case law that applies in the province or territory the claim or application is brought.

PROVINCE / TERRITORY	LEGISLATION	SECTIONS	DEPENDANT? (see "Definitions" section of the legislation)
ALBERTA	<i>Wills and Succession Act</i> , SA 2010, c-W 12.2	Part 5 Division 2 "Maintenance and Support" s.88	<ul style="list-style-type: none"> • Spouse • Adult interdependent partner • Child under age 18 • Child 18 or over unable by mental or physical disability to earn a livelihood • Child over 18, under 22 unable to withdraw from parents' charge because they are a full-time student • Grandchild or great-grandchild, under 18 where deceased stood in the place of a parent
BRITISH COLUMBIA	<i>Wills, Estates and Succession Act</i> , SBC 2009, c 13	Division 6 s.60	<ul style="list-style-type: none"> • Spouse (married, or person of same or opposite sex living in a marriage-like relationship and cohabiting for at least 2 years) • Child or Children

PROVINCE / TERRITORY	LEGISLATION	SECTIONS	DEPENDANT? (see “Definitions” section of the legislation)
MANITOBA	<i>Dependants Relief Act, CCSM c D37</i>	Section 2(1)	<ul style="list-style-type: none"> • Spouse • Divorced spouse who has a maintenance / support agreement • Common-law partner (where co-habiting at death or had ceased in 3 years prior to death or common-law partner was being paid or entitled to maintenance / support by agreement) • Minor child • Child unable by reason of disability, etc. to support self • Grandchild, parent, grandparent, adult child, or sibling substantially dependant on deceased at time of deceased's death
NEW BRUNSWICK	<i>Provision for Dependants Act, RSNB 2012, c 111</i>	Section 2(1)	<ul style="list-style-type: none"> • Spouse • Child • Any other person who at the time of death was a dependant of the deceased as defined in section 111 of the <i>Family Services Act</i> (a person to whom another has an obligation to provide support under the Act)
NEWFOUNDLAND AND LABRADOR	<i>Family Relief Act, RSNL 1990, c F-3</i>	Section 3(1)	<ul style="list-style-type: none"> • Widow/Widower • Child

PROVINCE / TERRITORY	LEGISLATION	SECTIONS	DEPENDANT? (see “Definitions” section of the legislation)
NORTHWEST TERRITORIES	<i>Dependants Relief Act</i> , RSNWT 1988, c D-4	Section 2(1)	<ul style="list-style-type: none"> • Married spouse / Common-Law spouse • Child under age 19 • Child 19 or over unable by mental or physical disability to earn a livelihood • Person cohabiting with deceased for 1 year before death of deceased and was dependant on deceased for support • Person cohabiting with deceased at time of deceased's death and between whom one or more children were born • Person who at time of death of deceased was acting as foster parent of children of deceased in same household and who was dependant on deceased for support
NOVA SCOTIA	<i>Testators' Family Maintenance Act</i> , RSNS 1989, c 465	Section 3(1)	<ul style="list-style-type: none"> • Widow/Widower • Child

PROVINCE / TERRITORY	LEGISLATION	SECTIONS	DEPENDANT? (see “Definitions” section of the legislation)
NUNAVUT	<i>Dependants Relief Act</i> , RSNWT (Nu) 1988, c D-4	Section 2(1)	<ul style="list-style-type: none"> • Spouse (married or common law) • Child under age 19 (child includes stepchild, adopted, and conceived before and born alive after deceased’s death) • Child 19 or over unable by mental or physical disability to earn a livelihood • Person cohabiting with deceased for 1 year before death of deceased and was dependant on deceased for support • Person cohabiting with deceased at time of deceased’s death and between whom one or more children were born • Person who at time of death of deceased was acting as foster parent of children of deceased in same household and who was dependant on deceased for support

PROVINCE / TERRITORY	LEGISLATION	SECTIONS	DEPENDANT? (see “Definitions” section of the legislation)
ONTARIO	<i>Succession Law Reform Act</i> , RSO 1990 c S 26	PART V	<ul style="list-style-type: none"> • Spouse • Ex-spouse • Common-law partner who cohabited continuously for 3 years, or in a relationship of some permanence if they are the natural or adoptive parents of a child • Parent, grandparent, sibling, child or grandchild • All of the above must be someone to whom the deceased was under a legal obligation to provide support immediately before death
PRINCE EDWARD ISLAND	<i>Dependants of a Deceased Person Relief Act</i> , RS PEI 1988, c D-7	Section 2	<ul style="list-style-type: none"> • Spouse • Child under age 18 • Child 18 or over unable by mental or physical disability to earn a livelihood • Grandparent, parent, descendant or divorced spouse who, for at least 3 years immediately before deceased's death, was dependant on deceased for support
QUEBEC	<i>Civil Code of Quebec</i>	Articles 684-685	<ul style="list-style-type: none"> • Spouse • Former spouse • Child • Parent <p>(a dependant is called a “creditor of support”)</p>

PROVINCE / TERRITORY	LEGISLATION	SECTIONS	DEPENDANT? (see “Definitions” section of the legislation)
SASKATCHEWAN	<i>The Dependants’ Relief Act, 1996,</i> SS 1996 c D-25.01	Section 6(1)	<ul style="list-style-type: none"> • Spouse • Common-law partner who cohabited with deceased as a spouse continuously for at least 2 years, or in a relationship of some permanence if they were parents of a child • Child under age 18 • Child 18 or over (a) unable by mental or physical disability to earn a livelihood; or (b) by reason of need or other circumstances, who ought to receive a greater share of the estate
YUKON TERRITORIES	<i>Dependants Relief Act, RSY 2002, c 56</i>	Section 2	<ul style="list-style-type: none"> • Spouse or common-law spouse (relationship valid at common law or person cohabited with deceased for at least 12 months before deceased’s death) • Child under age 16 • Child 16 or over unable by mental or physical disability to earn a livelihood • Grandparent, parent, descendant, or divorced spouse who, for at least 3 years immediately before death of deceased, was dependant on deceased for support

CHAPTER 3: SPOUSAL SUPPORT AND RELATED CLAIMS AGAINST ESTATES

INTRODUCTION¹

Although marriage is often regarded as a rite of passage that carries with it intense personal, familial and societal significance, a recent survey reported by *Statistics Canada* has revealed that 38% of all married couples in Canada will either separate or divorce before their 30th anniversary.² Results from the *2011 Census of Population* have also demonstrated that common-law relationships are the fastest growing family structure in Canada.³ Between 2006 and 2011, the number of common-law couples rose 13.9%, almost four times the increase for married couples in the same period of time. In Ontario alone, almost 11% of all families surveyed defined themselves as common-law couples.⁴ Clearly, more and more Canadians are deciding to forego the legal formalities that accompany marriage and are instead choosing to live together outside of marriage as common-law partners. Unfortunately, despite this growing trend, many people in common law relationships are unaware that they *may* still have legal obligations to one another.

With so many marriages now ending in divorce, as well as the recent influx in common law relationships that now give rise to legal rights and obligations in Canada, it appears that the chances of one encountering the judicial system as a result of a failed personal relationship are at an all-time high.⁵ As a result, it is highly likely that the majority of those living in Canada will still be touched either directly or indirectly by the *Family Law Act* (“**FLA**”)⁶ or the *Succession Law Reform Act* (“**SLRA**”) as a result of a relationship breakdown throughout the course of their life. With people also living longer than they used to, estate and family law practitioners are likely to see a significant growth in

- 1 Authored by Kimberly A. Whaley, principal of WEL Partners, excerpted from papers originally prepared for the Osgoode Professional Development Conference, *Advising the Elderly*, 2011, 2012, 2013, 2014, as updated from “*Spousal Claims Against Estates and Other Claims Arising Out of Remarriages and Common Law Arrangements: Estates Claims by Spouses*,” prepared for the LSUC Estates and Trusts Summit Nov 14, 2012, updated and edited with the assistance of her Associate, Alexander Swabuk. Also note publication, *The Advocates Quarterly*, Volume 40, Number 1, June 2012. “*The Intersection of Family Law and Estates Law: Post-Mortem Claims Made by Modern Day ‘Spouses’*”.
- 2 <http://www.statcan.gc.ca/pub/85-002-x/2012001/article/11634-eng.htm>.
- 3 Statistics Canada, *Portrait of Families and Living Arrangements in Canada* (Ottawa: StatCan, 1 January 2014).
- 4 Statistics Canada, *Focus on Geography Series, 2011 Census* (Ottawa: StatCan, 17 April 2014).
- 5 Benotto, M. L. (1995, December 2). *Ethics in Family Law*. Retrieved from <https://www.fact.on.ca/judiciary/benotto.htm>.
- 6 R.S.O. 1990, c. F.3 [FLA].

cases involving competing post-mortem claims made by surviving spouses, former spouses, and dependants against the estate of deceased spouses/former spouses. As such, estate practitioners should prepare themselves to see more and more cases where competing claims are made by surviving spouses as against the estate of their spouse/former spouse.

This paper aims to assist estate practitioners by providing a summary of the legal avenues available to surviving spouses upon the death of a spouse or former spouse, in light of some of the recent case law on the subject.

RECOURSE UNDER THE FAMILY LAW ACT

Historically, there were very few rights that a surviving spouse could assert against the estate of a deceased person. The main protection however, was the common-law rule that marriage revoked a Will.⁷ This allowed a surviving spouse to inherit on intestacy as long as the other spouse did not make a new Will. Fortunately, the *FLA* (and in particular Parts I, III, and VI), now provides surviving spouses (and even former spouses) with various means to access and, in some instances, equalize the assets of a deceased spouse's estate.

FLA Elections

One of the primary ways in which a surviving spouse can ensure they are adequately financially protected after the death of their spouse is by making a '*Family Law Act Election*.' Essentially, a *FLA* election provides a surviving spouse with the right to file an election and to bring an application against the estate of their deceased spouse so as to elect in favour of equalization of the couples' net family property ("**NFP**") and forego their entitlement, if any, under the deceased's will and/or on intestacy.⁸ The governing provisions of the *FLA* are subsections 5(2), 6(1), (2), (3), and (4), which provide as follows:

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.

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.

6(2). When a spouse dies intestate, the surviving spouse shall elect to receive the

⁷ Professor Albert H. Oosterhoff, "Predatory Marriages", Law Society of Upper Canada, 14th Annual Estates and Trust Summit at p. 29., and his article published in the ETPJ, Albert H. Oosterhoff, "Predatory Marriages" (2013), 33 E.T.P.J. 24.

⁸ *FLA*, s. 6(1).

entitlement under Part II of the *Succession Law Reform Act* or to receive the entitlement under section 5.

6(3). When a spouse dies testate as to some property and intestate as to other property, the surviving spouse shall elect to take under the will and to receive the entitlement under Part II of the *Succession Law Reform Act*, or to receive the entitlement under section 5.

6(4). A surviving spouse who elects to take under the will or to receive the entitlement under Part II of the *Succession Law Reform Act*, or both in the case of a partial intestacy, shall also receive the other property to which he or she is entitled because of the first spouse's death.

For the purposes of Part I of the *FLA* only a 'spouse' may file an election and that 'spouse' means a married spouse not 'common law' (at least in Ontario, and at least for the time being). There are three key concepts that need to be considered when making a *FLA* Election: (i) NFP; (ii) equalization; and (iii) the valuation date. The NFP of a spouse is essentially an individual's net worth, less any premarital deductions and after the following types of property are excluded pursuant to section 4(2) of the *FLA*:⁹

1. Property, other than a matrimonial home, that was acquired by gift or inheritance from a third person after the date of the marriage. [Note that gifts given by the spouses to each other are not excluded];
2. Income from property referred to in paragraph 1, if the donor or testator has expressly stated that it is to be excluded from the spouse's net family property;
3. Damages or a right to damages for personal injuries, nervous shock, mental distress or loss of guidance, care and companionship, or the part of a settlement that represents those damages;
4. Proceeds or a right to proceeds of a policy of life insurance, as defined under the Insurance Act, that are payable on the death of the life insured;
5. Property, other than a matrimonial home, into which property referred to in paragraphs 1 to 4 can be traced;
6. Property that the spouses have agreed by a domestic contract is not to be included in the spouse's net family property; and

9 *FLA*, s. 4(1).

7. Unadjusted pensionable earnings under the Canada Pension Plan.

Although title governs, it is important to note that a spouse is prohibited from deducting the value of the matrimonial home purchased before marriage from their NFP.¹⁰ Essentially, this means that the equalization payment owed to the spouse with the lesser NFP will be higher, if it includes the value of the house.

In most estate cases, the spouses' NFP is calculated on the day before one of the spouses dies.¹¹ However, a prudent estate practitioner should note this is not always the case. If, for example, the spouses had separated prior to one of their deaths, the valuation date will be the date of separation, and not the date of death. If both spouses die simultaneously, neither spouse's estate will have a claim against the estate of the other, as there will be no surviving spouse. If both spouses die in circumstances rendering it uncertain which survived the other, neither of the spouse's respective estate trustees will be able to discharge the burden of establishing entitlement to an equalization claim. Subsection 5(1) of the *FLA* addresses equalization. Equalization essentially works as follows: the spouse with the greater NFP pays the other one-half of the difference between them. Equalization flows one way only, and that is in favour of the surviving spouse with the lesser NFP. Even if the surviving spouse has the larger NFP, the estate of a deceased spouse has no right of election in favour of equalization.

In addition to married spouses, a number of individuals are also able to make a *FLA* Election:

- i. the Public Guardian and Trustee who acts as statutory guardian of property of a surviving spouse pursuant to a certificate issued under section 63 of the *Mental Health Act*;
- ii. a mentally incompetent surviving spouse's guardian of property appointed under section 15(k) of the old *Mental Incompetency Act*¹²;
- iii. a "statutory guardian of property" or a "court-appointed guardian of property" (subject to any restrictions imposed by the surviving spouse in the relevant empowering document or by court order);
- iv. an attorney under a continuing Power of Attorney for Property¹³; and
- v. if the surviving spouse is incapable of managing her property, the personal representative may exercise the election under the *FLA* on her behalf.

¹⁰ *FLA*, s. 4(1). The definition of NFP does not permit a deduction for the matrimonial home].

¹¹ *FLA*, s. 4(1)(5).

¹² R.S.O. 1990, c. M.9 [repealed].

¹³ *Anderson v. Anderson Estate*, 1990 CarswellOnt 260 (Ont. H.C.J.) and *Cronkwright Estate v. Maltby* [1988] O.J. No.686 (H.C.J.).

The Effect of Electing

Pursuant to subsections 6(1) and (2) of the *FLA*, upon the death of a spouse, a surviving spouse is entitled to either a) make an equalization claim, on the one hand, or b) take under the will, if there is one, or, if there is not one, taking pursuant to the provincial intestacy laws set out in Part II of the *SLRA*. Notably, a surviving spouse is not permitted to do both, unless the will expressly permits them to do so.¹⁴

Choosing to elect in favour of an equalization claim does not forfeit any entitlement to dependants' support pursuant to Part V of the *SLRA*. However, it is important to remember that a dependant support claim will only be heard after the equalization claim is settled. An equalization claim also has priority over an order made against the estate under Part V of the *SLRA*, except an order in favour of a child of the deceased spouse.

Accordingly, the importance of properly advising a surviving spouse of their rights pursuant to the *FLA* and the deadlines for exercising those rights cannot be understated. In *Slaven v. Slaven Estate*¹⁵ a widow filed her election within 6 months of the death of her husband but did not bring her application. The Court allowed her application to continue because the delay was incurred in good faith with no ulterior motives and the respondent children were aware of the filing of the election and that the wife was in financial need. The case of *Carrigan v. Quinn*,¹⁶ dealt with multiple 'spouses' and the importance of filing within the deadline. The deceased was married for many years when he died. However, at the time of death he was living with another woman in a condominium that was owned by him and his wife. The wife brought a claim for, among other things, a declaration that she was entitled to the deceased's death benefit. The Court found that both women were "spouses" under the *Pension Benefit Act*, however, it also found that the deceased and his wife had been separated and the Ms. Quinn, the woman he was living with was the proper recipient of the deceased's pension. The Court held at para. 74:

Prior to Mr. Carrigan's death, Mrs. Carrigan could have settled the pension issue by obtaining a direct equalization payment in a domestic contract or court order. Mrs. Carrigan and Mr. Carrigan's separation date was (at the latest) 2000; by 2006 Mrs. Carrigan was at the end of the six year period within which to bring a claim for equalization as stipulated in section 7(3) of the *Family Law Act*. However, despite being outside of the limitation period, Mrs. Carrigan could have applied to the court for an extension under section 2(8) and attempted to obtain an equalization claim. This she never did and the right expired on Mr. Carrigan's death.

14 *FLA*, s. 6(5).

15 2011 CarswellOnt 7973 (S.C.J.).

16 2011 CarswellOnt 774 (Ont. S.C.J.).

A surviving spouse has six (6) months from the date of death of the deceased spouse to file an election in the form prescribed by the regulations,¹⁷ failing which the spouse will be deemed to take under the will (if there is one) or pursuant to the intestacy provisions of the *SLRA*, unless the court, on application, orders otherwise.

If an application is needed to determine a surviving spouse's entitlement under subsection 5(2) of *FLA*, the spouse must bring the application within this six-month deadline.¹⁸ In certain circumstances, the court will extend the time period to elect and apply pursuant to section 2(8) of the *FLA*, if the court is satisfied that: (a) there are apparent grounds for relief; (b) relief is unavailable because of delay that has been incurred in good faith; and (c) no person will suffer substantial prejudice by reason of the delay.

It is prudent to obtain an extension where the assets of a deceased are not known, or disclosed, thereby preventing a spouse from the ability to assess or analyze the merits of an election. Often where there is threatened litigation, or in cases where there is no estate trustee appointed or willing to act, or even perhaps clear of conflict, discovering the assets and liabilities of an estate may be delayed. Should a surviving spouse move for an order extending the time to make an election, a motion to extend the time period in respect of a potential dependant support claim should also be considered to be brought at the same time under section 61(2) of the *SLRA*.

Domestic Contracts Made Pursuant to Part IV of the FLA

According to the *FLA*, there are three types of domestic contracts: cohabitation agreements;¹⁹ marriage contracts;²⁰ and separation agreements.²¹ Cohabitation agreements are utilized by unmarried partners who, at the time of execution, are either cohabiting or intend to cohabit. Cohabitation agreements generally deal with each partner's respective rights and obligations during cohabitation, on ceasing to cohabit, or on death. A marriage agreement or what are commonly referred to as a "pre-nuptial contract" is used by those persons that are legally married or intend to be. Such contracts are intended to govern the rights and obligations of the parties regarding property division, support, the education of children and other matters in the event of separation, divorce or death (s. 52).²²

¹⁷ *FLA*, R.S.O. 1990, c. F.3, s. 6(10).

¹⁸ *FLA*, R.S.O. 1990, c. F.3, s. 7(3)(c) [note that the six-month deadline to bring an application does not apply in situations where the spouses were already divorced, in which case the deadline is two years from the date of divorce. Likewise, if the spouses have separated, the deadline to elect is six years after the date of separation].

¹⁹ *FLA*, s. 52.

²⁰ *FLA*, s. 53.

²¹ *FLA*, s. 54.

²² Wagner – Domestic contracts that go the distance.

For the most part, under the *FLA*, spouses are free to agree to whatever they wish about the rights and obligations that are to flow from their union, subject only to a few exceptions, such as contracts regarding the education, moral training or custody/access of children.²³ Indeed, domestic contracts may address property rights in the event of separation, divorce, or death, and may specifically opt out of equalization, or exclude certain assets from equalization, or provide for a different means of property division.²⁴ The same applies to spousal support, which can be waived altogether (should the couple so decide).²⁵

While not an estate case, *McCain v. McCain*²⁶ is instructive on the enforcement of domestic contracts. It concerns a wealthy businessman, Wallace McCain, who told his adult children that he required all of them to sign domestic contracts with their spouses to protect the extensive assets he wanted to pass on to his children either in his lifetime or on his death. If his children refused, he would disown them. Accordingly, his son Michael presented his wife of 16 years (at the time) with a marriage contract. The contract was drafted by the husband's family law lawyer who also arranged for the wife to meet with an independent family law lawyer for legal advice. Under the contract, should the parties separate or the husband predecease her, the wife waived all of her property rights, keeping only the assets in her name, and waived her right to an equalization claim under the *Family Law Act*.

Fourteen years after signing the contract the couple sought a divorce. In the intervening years between the execution of the contract and the divorce, the husband's wealth grew significantly, while the assets solely in the wife's name only represented a very small portion of that wealth. At dispute in the divorce proceeding was, among other things, the validity of the marriage contract. The wife argued that the terms of the contract were "unconscionable" and did "not comply with the overall objectives of the *Divorce Act*." She claimed she did not understand what she was giving up by signing the contract, that the husband's financial disclosure under the contract was insufficient and that her husband took advantage of her "vulnerability and she entered into the contract under duress".²⁷

Justice Greer reviewed and applied the relevant case law, including the two part test in *Miglin v. Miglin*.²⁸ The first part of the test required the Court to look at the circumstances in which the agreement was negotiated and see whether it should be discounted in those circumstances. The second part requires the court to assess whether the agreement still reflects the original intention

²³ *FLA*, s. 56(1).

²⁴ Martha McCarthy, "Family Law for Estates Lawyers," Blending Family Estate Planning, LSUC Continuing Professional Development (June 14, 2011), at 19.

²⁵ *Ibid.* at 19.

²⁶ 2012 ONSC 7344.

²⁷ *McCain v. McCain*, 2012 ONSC 7344 at para. 20.

²⁸ *Miglin v. Miglin*, 2003 SCC 24.

of the parties and the extent to which it is still in compliance with the objectives of the *Divorce Act*. In analysing the circumstances under which the wife signed the contract, Justice Greer asked: "How could the Wife possibly take on the burden of not signing the contract for her own personal gain, knowing that her Husband's father would cut her Husband out of receiving his inheritance?" Her Honour concluded that the contract:

*was not acceptable in a long term marriage, that went on for another 15 years after the [c]ontract was signed. There were no projections of what the Husband would be earning in the future. There were no projections of lifestyle changes, which took place as the years went on . . . An agreement, which may have appeared as fair to the Husband when it was signed, can through time become unconscionable. In my view this is what happened, and this leaves the Wife with very little. The circumstances regarding its execution, the improvident result for the Wife and the extent of the Husband's now wealth, are sufficient to have the spousal support provision of the [c]ontract set aside."*²⁹

Accordingly, all sections of the marriage contract respecting spousal support were severed from the balance of the contract and the wife was awarded both interim and retroactive spousal support.³⁰

Separation Agreements and Waivers of Rights

Separation agreements are entered into by spouses who have decided to live separate and apart following a period of cohabitation. It is not uncommon, after the breakdown of a relationship, for former spouses to enter into a separation agreement, in an effort to settle various issues, including spousal support and the equalization and division of family property. These agreements generally include mutual releases, which incorporate renunciations by the parties to all possible (present, future, contingent) claims in the other spouse's estate.³¹ The separating spouses may even attempt to obtain a general waiver from their former spouse to any rights they may have in a pension plan or life insurance policy.³² However, in these circumstances, attention must be had by drafting solicitors and the contracting parties to the specific legislation governing these types of plans and policies, since, again, in some cases, the rights and obligations bestowed under the governing legislation trump any attempt by the parties to contractually bar each other from access to the others' funds on death.

In *Richardson Estate v. Mew*³³, the Ontario Court of Appeal found that the former spouse of the

29 *McCain v. McCain*, 2012 ONSC 7344 at paras. 87-88.

30 *McCain v. McCain*, 2012 ONSC 7344 at para. 108.

31 Corina Weigl, "Making Sure You Play with Your Best Hand," All About Estates (July 13, 2011).

32 *Ibid.*

33 *Richardson Estate v. Mew*, 2009 CarswellOnt 2576 (Ont. C.A.).

deceased was entitled to take the death benefit under the deceased's life insurance policy simply on the basis that the deceased had never changed the designation. This was so despite the fact that the former spouse and the deceased had entered into a separation agreement which contained a mutual release of claims to property. As well, the deceased had remarried, with the second spouse making some of the payments on the policy under the mistaken assumption that the policy named her as a beneficiary. The Court's analysis and conclusion:

55 ...A former spouse is entitled to proceeds of a life insurance policy if his or her designation as beneficiary has not changed. This result follows even where there is a separation agreement in which the parties exchange mutual releases and renounce all rights and claims in the other's estate. General expressions of the sort contained in releases do not deprive a beneficiary of rights under an insurance policy because loss of status as a beneficiary is accomplished only by compliance with the legislation. The general language used in waivers and releases does not amount to a declaration within the meaning of the *Insurance Act*.³⁴

A similar outcome was demonstrated in the case of *King v. King*.³⁵ In this case, Mr. King and his former wife executed a separation agreement that contained a general release regarding his pension, including his OMERS Pension Plan. Section 44 of the *Pension Benefits Act*³⁶ contains a mandatory provision which establishes a joint and survivor pension where a former member has a spouse on the date that the payment of the first installment of the pension is due. Mr. King was still married to his first wife when he received his first payment. As such, when he wrote to OMERS to attempt to appoint his new wife as the beneficiary of his OMERS plan, OMERS replied that the separation agreement was not sufficient evidence that his former wife had relinquished her right to the survivor benefit. OMERS continued that if the former wife completed the OMERS Form 156, it would be accepted as sufficient evidence of her relinquishment. The former wife, however, refused to sign the form and Mr. King brought this application.

The narrow issue in this case was whether a general pension release contained in Mr. King's separation agreement was sufficient to constitute a waiver of his former wife's entitlement to his OMERS survivor's pension. The Court held that, as the waiver in the separation agreement did not mirror the requisite OMERS form (which, at the time the agreement was executed, was a Form 3), Mr. King had failed to comply with the strict requirements of the statute and, consequently, the Court refused to make a declaration that Mr. King's former wife had waived her entitlement to the survivor's pension via the separation agreement. As noted by the Court, Mr. King "found himself in

34 *Supra* note 72, at par. 50.

35 *King v. King*, 2010 CarswellOnt 8901.

36 R.S.O. 1990, c. P.8.

the unfortunate position of being caught in a trap for the unwary.”³⁷

Clearly, the message to be taken from these cases is that, in addition to executing a separation agreement, a separating spouse or their drafting solicitor, must be diligent in ensuring that their separation agreements properly deal with their future property rights. As well, where possible, beneficiary designations ought to be promptly changed such that they reflect the outcome intended by the separating spouses in their contractual agreements and the waivers and releases contained therein. After all, as was the case in *King v. King*, application to the court may not produce the most equitable result in light of the clear intention of the parties as evidenced by their agreements. This is compounded by the fact that the setting aside of a domestic contract is no easy feat, as it requires the time and expense involved in commencing proceedings, which may not, in the end, produce the desired result.

Setting Aside a Domestic Contract

When analyzing a domestic contract, it is important to remember that like any other types of contracts, they are subject to the normal principles of contractual interpretation.³⁸ Although, as a general rule, a valid, enforceable contract, will be upheld by the courts, in certain circumstances (whether by the governing legislation or the jurisprudence) the courts will intervene and override the contractual agreements made by spouses.³⁹ Pursuant to subsection 56(4) of the *FLA*, a surviving spouse may apply to the court to have a domestic contract or a provision in it set aside on any or all of the following grounds:

- (a) One of the spouses failed to disclose to the other significant assets, or significant debts or other liabilities, existing when the domestic contract was made;
- (b) One of the spouses did not understand the nature or consequences of the domestic contract; or
- (c) Otherwise in accordance with the law of contract.

Subsection 56(4) has been interpreted by the Ontario Court of Appeal such that setting aside a domestic contract pursuant to it requires a two-part judicial analysis: first, the court must consider whether the party seeking to set aside the agreement can demonstrate that one or more of the circumstances set out within the provision have been engaged; and, second, once that hurdle has

³⁷ *Supra* note 74, at par. 17.

³⁸ Martha McCarthy and Heather Hansen, “Family Issues in Estate Litigation,” *Key Developments in Estates and Trusts Law in Ontario*, 2010 Ed., Melanie A. Yach, (Aurora: Canada Law Book, 2010) at 65.

³⁹ *Ibid.*

been overcome, the court must then consider whether it is appropriate to exercise discretion in favour of setting aside the agreement.⁴⁰

The intersection between domestic contracts and dependant's relief claims made pursuant to the provisions of the *SLRA* is discussed in greater detail below. The point to note here, however, is the fact that one of the factors considered by the Court when a claim is advanced under Part V of the *SLRA* is "any agreement between the deceased and the dependant."⁴¹ Thus, it goes without saying that, for an agreement to be considered by the court for the purposes of a dependant's support claim, *it must be valid*. Prudent estates practitioners should be mindful of the extensive law on the enforceability of domestic contracts, which may not be enforceable if they contain prohibited provisions,⁴² a party failed to make full financial disclosure,⁴³ or if they are unconscionable.⁴⁴

RECOURSE UNDER THE SUCCESSION LAW REFORM ACT

In Ontario, common law spouses do not have the same statutory rights as married spouses on an intestacy. They have no legislated right to a preferential share. Nor do common-law spouses have the ability to make an election for equalization of net family property under the *Family Law Act*. The only legal recourse available to unmarried or common law spouses are the dependant's relief provisions of the *SLRA*, or certain common law/equitable remedies, such as trust, resulting trust, constructive trust, unjust enrichment, *quantum meruit*, and promissory/proprietary estoppel, or a combination of each. It should be noted that these remedies are available to married spouses as well and, as such, the following sections will discuss some of the claims applicable to both married spouses and unmarried cohabitating spouses under the *SLRA*.

Dependant Support Claims under the SLRA

An order for dependant support is made by way of application to the court and may be made in circumstances where there is a will, intestacy, or, as noted, even where there has been a contractual agreement to waive support.⁴⁵ Subject to the exception in subsection 61(2) of the *SLRA*, an applicant has six months from the grant of letters probate of the will or of letters of administration to bring an application. Note that, in most circumstances, the phrase "grant of letters probate of the will"

40 *LeVan v. LeVan* (2009), 90 O.R. (3d) 1, leave to appeal to S.C.C. refused [2008] 3 S.C.R. viii, at par. 51 (C.A.).

41 *SLRA*, s. 62(1)(m).

42 *FLA*, ss. 52(2) and 56(1).

43 *FLA*, s. 56(4). See also *LeVan v. LeVan* (2008), 90 OR (3d) 1; 51 RFL (6th) 237; 239 OAC 1, application for leave refused in 2008 CanLII 54724 (SCC).

44 *FLA*, s. 56(4). See e.g. *Miglin v. Miglin*, 2003 SCC 24, [2003] 1 SCR 303 and *Hartshorne v. Hartshorne*, 2004 SCC 22, [2004] 1 SCR 550.

45 Corina S. Weigl and Jonathan F. Lancaster, "Contracting out of Dependant's Support Obligations," *Key Developments in Estates and Trusts Law in Ontario*, 2010 Ed., Melanie A. Yach, (Aurora: Canada Law Book, 2010) at 98.

in subsection 61(1) is the equivalent of issuing the Certificate of Appointment of an Estate Trustee With a Will as referred to in Rule 74.04.⁴⁶

The underlying rationale for the six-month limitation period is twofold: first, it gives a potential claimant the opportunity to make a claim within a fixed period of time, before the estate can be distributed; and, second, upon the expiry of the limitation period it provides the trustee with the repose of knowing that all potential claims have been received, presupposing of course that probate is obtained. It should be noted that the limitation period in subsection 61(1) of the *SLRA* is not absolute.⁴⁷ The jurisprudence with respect to granting an extension — recently reiterated in the case of *Habberfield v. Sciamonte et al.* - sets out the following principles in relation to an extension under section 61(2) of the *SLRA*:

- (a) The Court has the discretion to allow the application to proceed at any time as to any portion of the estate remaining undistributed at the date of the application.
- (b) The discretion of the Court under section 61(2) to allow an application to proceed although it is brought after the time limit has expired under the *SLRA* must be exercised judicially, with considerations of the delay involved, the reasons for the delay, and the extent of prejudice in the Estate's defence of the claim.
- (c) The Court's discretion to extend the limitation period under section 61(2) is to be exercised in a broad and liberal manner.
- (d) In deciding whether to grant the extension, the court must determine whether the situation bears review of whether or not the Deceased made adequate provision in his Will for the proper maintenance and support of his dependents.
- (e) The question is not whether the Deceased has in fact done so, but whether there is a sufficient basis for review. This requires a consideration of what is equitable (in relation to the "proper" support of dependents as contemplated by the *SLRA*).
- (f) While delay (including the reason for delay) is a factor to consider, a request for an extension is not grounded solely in "good cause" being shown for the delay. The discretion to extend or refuse is a question of what is equitable between the parties, in all the circumstances.
- (g) In the absence of prejudice to the Estate, equity tends to favour granting an extension

⁴⁶ *Balanyk v. Balanyk Estate*, 2008 CarswellOnt 1353 (Ont. S.C.J.) at par. 14.

⁴⁷ *Balanyk v. Balanyk Estate*, 2008 CarswellOnt 1353 (Ont. S.C.J.), at par. 25.

In a situation where an order for the Return of Certificate of Appointment is obtained pursuant to Rule 75.05(1) of the *Rules of Civil Procedure* (the “**Rules**”),⁴⁸ thus requiring that the Certificate be returned to the Registrar, as was the case in *Balanyk v. Balanyk Estate*,⁴⁹ the limitation period set out in subsection 61(1) of the *SLRA* will be suspended until further order releasing the Certificate or otherwise appointing another estate trustee. Clearly a judge is thus given a discretion to be exercised on the principle of promoting justice between those interested in the estate.⁵⁰

Section 57 of the *SLRA* defines a «dependant» as «the spouse of the deceased» or «a child of the deceased». In either case, the dependant must also be a person «to whom the deceased was providing support ...immediately before his death».⁵¹ The meaning of “support” under the *SLRA* includes “not only furnishing food and sustenance and supplying the necessities [sic] of life, but also the secondary meaning of giving physical or moral support. The word “support” in the *SLRA* extends that meaning to include what might by some be considered as non-essentials or luxuries.”⁵² A prudent estate practitioner should be cognizant of the fact that support need not be direct financial support; it can also be providing basic human needs (e.g., shelter).⁵³

As recently reiterated in the case of *Khemraj v. Khemraj*⁵⁴, a testator’s conduct can also suggest an intention to provide support. Part V of the *SLRA* provides for the support of ‘dependants,’ in situations where a deceased spouse, prior to death, was providing support or was under a legal obligation to do so immediately before death,⁵⁵ but failed to make adequate provision for the proper support of his/her dependant spouse on death. In the case of a surviving spouse, the spouse needs to prove that he/she was indeed a spouse, that the deceased had a legal obligation to provide support or was providing support immediately before death, and that the deceased failed to make adequate support. If successful in qualifying as a dependant, the court will consider a list of factors pursuant to s. 62 of the *SLRA* and common law precedent in determining the amount and duration of support.

Part V of the *SLRA* is a powerful tool. At first blush, it may seem to provide a remedy akin to spousal support, which is guided by, the payor’s means and the recipient’s needs. However, the Ontario Court of Appeal has clarified that in determining claims for dependant’s support under the *SLRA* the court must consider not just the applicant’s bare needs, or legal claims, but also the applicant’s

48 R.R.O. 1990, Reg. 194.

49 *Balanyk v. Balanyk Estate*, 2008 CarswellOnt 1353 (Ont. S.C.J.).

50 *Habberfield v. Sciamonte et al.*, 2017 ONSC 4332, 2017 CarswellOnt 11503.

51 *Stajduhar v. Wolfe*, 2017 ONSC 4954, 2017 CarswellOnt 13593.

52 *Re Davies* 1979 CarswellOnt 605 (Surr Ct) at par 15.

53 *Khemraj v. Khemraj*, 2016 ONSC 7796, 2016 CarswellOnt 19706.

54 *Ibid.*

55 *SLRA*, s. 57.

moral or ethical claims.⁵⁶ Arguably, the moral claim has become a legal claim.⁵⁷

The case of *Su v. Lam Estate*⁵⁸ involved a dependant's support claim brought in the context of competing claims made by the spouse and former spouse of the deceased, Ms. Lam. Here, Mr. Su brought an application for dependant's support, on the basis that he was the common law spouse of the deceased. Both Mr. Su and the deceased had been married and had children with their prior spouses, but were never officially divorced from their prior spouses— a fact that the court found did not negate the existence of a common law conjugal relationship as between Mr. Su and the deceased for the purposes of either section 57 of the *SLRA* or section 30 of the *FLA*. The deceased left nothing to Mr. Su out of her \$1.25 million estate. The Court however held that Mr. Su was a dependent of Ms. Lam for the purposes of section 57 of the *SLRA*. A very significant factor was that Mr. Su contributed materially to the physical and financial well-being of the deceased.

Failure to Make Adequate Provision for Proper Support

The finding that a person is a 'spouse' of a deceased does not automatically establish a claim for entitlement to dependant's support. In order to qualify as a 'dependant' under section 57 of the *SLRA*, it is necessary for the applicant to adduce credible evidence supporting the fact that the deceased was providing support to the applicant prior to their death and/or was under a legal obligation to provide support to the applicant, immediately before their death.⁵⁹ Once the applicant has met this evidentiary hurdle, they must then prove that the deceased failed to make adequate provision for their proper support.

In the case of *Perkovic v. McClyment*,⁶⁰ the common law spouse of the deceased was unsuccessful in succeeding in an application under the *SLRA*. According to the applicant, he had cohabitated with the deceased for 14 years, had been financially supported by her, but she had failed to make

56 *Cummings v. Cummings* (2004), 2004 CarswellOnt 99, 235 D.L.R. (4th) 474, (sub nom. *Cummings Estate, Re*) 181 O.A.C. 98, 5 E.T.R. (3d) 97, 69 O.R. (3d) 397 (Ont. C.A.).

57 *Tataryn v. Tataryn*, [1994] 2 SCR 807; *Cummings v Cummings*, 2003 CanLII 64218 (On SC) – 2003-02-21. For an application of this particular moral claim in a situation of complex estate planning, see *Morassut v. Jaczynski Estate*, 2013 ONSC 2856; upheld on appeal 2015 ONSC 502 (Div. Ct): A successful business owner, was diagnosed with breast cancer and she decided to revise her estates plans in the last few months of her life. Two new Wills were produced. The first Will moved many of her assets to holding companies and left the residue of the estate to a family Trust created by the second Will. Her common-law spouse, was not provided for in either new Will, but the estate agreed to give him a \$1,000,000 lump-sum payment. Her previous Will, nullified by her subsequent planning, had provided for her common law spouse a \$1,000,000 payment. The estate argued that this single payment was adequate in itself and that he should not qualify for further dependant support under the *SLRA*. Following *Tataryn v. Tataryn*, however, the court found that the testatrix had "both a legal and moral obligation to continue to support him after her death." He was awarded sole ownership of a property that he and the testatrix had built together; a yearly sum for the rest of his life; and a smaller payment every five years so that he could buy a new automobile

58 *Su v. Lam Estate*, 2011CarswellOnt 1030 (S.C.J.).

59 *Stajduhar v. Wolfe*, 2017 ONSC 4954, 2017 CarswellOnt 13593.

60 *Perkovic v. Marion Estate*, 2008 CarswellOnt 5931 (Ont. S.C.J.) [*Perkovic*].

adequate provision for his proper support. In her will, the deceased left her entire estate to her children and grandchildren, with the estate having a gross value of \$538,999.82. The Court referred to the seminal case of *Cummings v. Cummings*⁶¹ and noted that when judging whether a deceased has made adequate provision for the proper support of her dependants, a court must examine, “the claims of all dependants, whether based on need or on legal or moral or ethical obligations.”⁶² In reaching its conclusion that the surviving spouse had not established that he was a dependant of the deceased, or that he lacked the means to meet his financial needs, the Court focused its attention on the fact that, by his own evidence, the surviving spouse had admitted that he had kept his financial affairs separate and apart from those of the deceased. For this reason, and reasons involving lack of credibility on his part, the Court refused to make an application for support in his favour.

In Ontario, the dependant can reach various assets of the deceased that do not form part of the estate. Certain *inter vivos* transactions can be clawed back into the estate for the purpose of satisfying a support award, including gifts *mortis causa*; property held jointly that passed to another person by right of survivorship; the proceeds of RRSPs and like instruments that pass to designated beneficiaries; property that the deceased settled on/in trust; the proceeds of any life insurance policy owned by the deceased; and others.⁶³ That said, Ontario claimants may also resort to equitable claims or rely on the *Fraudulent Conveyance Act*⁶⁴ to bring assets back into the estate, but these kinds of claims can result in difficult trials.⁶⁵ Prudent estate practitioners should also take into consideration that (as recently reiterated in the case of *Cotnam v. Rousseau*) dependants advancing a claim against assets described in Section 72(1) of the *SLRA* have the burden of establishing that the funds or property, or any portion thereof belong to the deceased.⁶⁶

Domestic Contracts and the SLRA

As noted above, in order for an applicant to meet the definition of “dependant” in the

- 61 *Cummings v. Cummings* (2004), 2004 CarswellOnt 99, 235 D.L.R. (4th) 474, (sub nom. *Cummings Estate, Re*) 181 O.A.C. 98, 5 E.T.R. (3d) 97, 69 O.R. (3d) 397 (Ont. C.A.).
- 62 *Perkovic v. Marion Estate*, 2008 CarswellOnt 5931 (Ont. S.C.J.), at par. 7.
- 63 *SLRA*, s. 72.
- 64 RSBC 1996, c 163.
- 65 See *Mawdsley v. Meshen*, [2012] 5 W.W.R. 1, 2012 CarswellBC 442, 2012 BCCA 91, 211 A.C.W.S. (3d) 877, [2012] B.C.W.L.D. 2187, [2012] B.C.W.L.D. 2188, [2012] B.C.W.L.D. 2212, [2012] B.C.W.L.D. 2213, [2012] B.C.W.L.D. 2214, [2012] B.C.W.L.D. 2215, [2012] B.C.W.L.D. 2216, [2012] B.C.W.L.D. 2217, [2012] B.C.W.L.D. 2224, [2012] B.C.W.L.D. 2279, [2012] B.C.W.L.D. 2310, [2012] B.C.W.L.D. 2357, [2012] W.D.F.L. 1803, [2012] W.D.F.L. 1836, [2012] W.D.F.L. 1875, 74 E.T.R. (3d) 198, 28 B.C.L.R. (5th) 12 (B.C. C.A.) affirming 2010 CarswellBC 2078, 2010 BCSC 1099, [2010] B.C.W.L.D. 7868, [2010] B.C.W.L.D. 7877, [2010] B.C.W.L.D. 7879, [2010] B.C.W.L.D. 7882, [2010] B.C.W.L.D. 7883, [2010] B.C.W.L.D. 7884, [2010] B.C.W.L.D. 7886, [2010] B.C.W.L.D. 7902, [2010] B.C.W.L.D. 8020, [2010] W.D.F.L. 4845, [2010] W.D.F.L. 4904, [2010] W.D.F.L. 4961, 59 E.T.R. (3d) 51 (B.C. S.C.).
- 66 *Cotnam v. Rousseau*, 2018 ONSC 216, 2018 CarswellOnt 69.

SLRA, in addition to being a spouse, parent, child, or sibling of the deceased, they must prove that the deceased was either providing support to them, or was under a legal obligation to provide support to them, immediately before the deceased's death.⁶⁷ As well, one of the factors that the Court is to consider is "any agreement between the deceased and the dependant" (section 62(1)(m)). As a result, a domestic contract has the ability to preclude an applicant from successfully asserting that they are a dependant and that they are entitled to support. Indeed, a domestic contract may bar an application from meeting the dependant criteria, if the following requirements are met:

1. It contains a full and final spousal support release;
2. The deceased was not actually supporting the applicant before death; and
3. The applicant has not brought an application to overturn or vary the contract before the deceased's death.⁶⁸

Where the context surrounding the domestic contract and the contract itself is as set out above, the contract "will effectively oust the Court's jurisdiction to determine dependants' support."⁶⁹ However, should the applicant successfully meet the criteria needed for them to be considered a "dependant," subsection 63(4) of the SLRA authorizes the Court to make an award for support, "despite any agreement or waiver to the contrary."

Unless an application was brought to vary or challenge a separation agreement containing a full and final release of support *before the death of the deceased*, a separation agreement of this nature may completely bar an applicant from making a successful support claim on the basis that he/she has failed to demonstrate that they are a dependant.⁷⁰ This may be the result despite the dire conditions of the surviving spouse after the death of a former spouse. In *Taylor v. Taylor*,⁷¹ for instance, Mr. and Mrs. Taylor executed minutes of settlement following divorce proceedings, wherein Mrs. Taylor agreed to release Mr. Taylor and his estate from any claims in exchange for a monthly support payment. However, Mrs. Taylor found herself destitute following the death of her ex-husband, he having passed away shortly after her support payments ceased. Had the termination of the support payments taken place even a day after the death of Mr. Taylor, Mrs. Taylor would have met the definition of dependant, as set out in the SLRA.⁷²

67 *Supra* note 2, s. 57.

68 Stephan M. Grant, "Can a Person Contract Out of Dependant's Support? Domestic Contracts and the *Succession Law Reform Act*," Ontario Bar Association, 2007 Institute of Continuing Legal Education (February 6, 2007) at page 1.

69 *Ibid.* at 1.

70 *Supra* note 120, at page 2.

71 *Taylor v. Taylor* (1985), 53 O.R. (2d) 174 (Ont. Surr. Ct.).

72 *Supra* note 109, at 101.

Similarly, in the case of *Mealey v. Broadbent*,⁷³ the deceased husband and his wife executed a separation agreement after almost 40 years of marriage, pursuant to which they agreed to divide their assets equally and Mrs. Broadbent agreed to forgo any provision for ongoing support payment. She also relinquished all claims against her husband's estate. At the time of the deceased's death, Mr. Mealey and Mrs. Broadbent were separated, but not formally divorced. Mrs. Broadbent's application for dependant's support was unsuccessful. Although she met the definition of "spouse", the deceased was not providing her with support at the time of his death, nor was he under legal obligation to do so immediately before his death.

In a situation where a domestic contract "keeps the support entitlement alive – even if the payor is paying "zero dollars" or nominal support to the recipient," on the death of the deceased, the recipient may choose from the following options:⁷⁴

1. If the contract is incorporated into a court order, the support obligation binds the estate unless the order provides otherwise, pursuant to section 34(4) of the *FLA*. Thus, the surviving spouse may choose to continue to receipt support pursuant to the order;⁷⁵
2. If the support order or agreement is not binding on the estate, the surviving spouse may apply under the *SLRA* for support, since they would still fit the definition of a "dependant";⁷⁶ or
3. Regardless of whether the Order or agreement is intended to be binding or not on the estate, the surviving spouse can apply under the *SLRA* for a different amount of support if the support they are receiving is inadequate.⁷⁷

Notably, as stated, the domestic contract will only be one of several factors considered by the Court. Whether the deceased made "adequate provision" for the surviving spouse is the first factor that the Court must consider.

In the case of *Butts v. Butts Estate*,⁷⁸ the Court awarded the surviving (former) spouse of the deceased an increased award of support from that agreed to in a separation agreement on the basis that the deceased had not made adequate provision for her. At the date of death of the deceased, the surviving spouse had been sick, her expenses exceeded her income, and she did not have any savings. In making his decision, Justice Kileen held at paragraphs 42 and 43:

⁷³ *Mealey v. Broadbent* (1984), 10 D.L.R. (4th) 762 (H.C.J. (Div. Ct.)).

⁷⁴ *Supra* note 120, at 3.

⁷⁵ *Supra* note 120, at page 3.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ *Butts v. Butts Estate* (1999), 1999 CarswellOnt 1435.

To me, s. 63(4) gives the court a broad judicial discretion to award support to a dependant, as defined in s. 57, notwithstanding the existence of any prior agreement or waiver. The language of s. 63(4) could not be broader or clearer in its purpose and is obviously aimed at achieving justice and equity at the date of the hearing, notwithstanding what the parties might have agreed to earlier on.

In this case, Mrs. Butts has been living below the poverty line in straightened circumstances for at least the past several years and there is no reason why she should be denied a support order under the *SLRA* which would bring her out of such circumstances and enable her to live out her remaining years in some dignity and comfort. In other words, the support which has been paid under the separation agreement is now patently inadequate and must be corrected on any objective approach to the facts of this case.⁷⁹

It is important to remember that unlike separation agreements, marriage and cohabitation agreements do not usually have an impact on whether an applicant meets the criteria of a “dependant,” since it is normally the case that the spouses will be cohabitating and thus “supporting” each other at the date of one of the spouse’s deaths.⁸⁰ Estate practitioners should use caution when advising a spouse who makes the decision to forgo spousal support pursuant to a domestic agreement since one of the messages emerging from cases such as *Mealey v. Broadbent* and *Taylor v. Taylor* is the importance of contracting in such a way to ensure the surviving spouse’s protection should they encounter a change in financial circumstances after the death of their former spouse. A contract that provides for even nominal support payments up to and/or after the date of death will “buttress the applicant’s ability to meet the statutory definition since at the time of death; there will be the requisite legal obligation to support.”⁸¹

Spousal Claims under Constructive and Resulting Trust Principles

As a result of the enactment of comprehensive matrimonial property legislation in the 1970s and 1980s, married spouses today have access to a range of property rights and entitlements upon the breakdown of the marital relationship. The same is not true for common law spouses, since, in most Canadian provinces, like Ontario, unmarried cohabitating spouses are denied access to the property law rights granted to married or separating spouses under the family law legislation. Consequently, restitution for these types of spouses after the breakdown of a relationship (or upon the death of a spouse) is sought by relying on common law as well as equitable remedies, such as the resulting trust, constructive trust, as well as actions in unjust enrichment and quantum meruit.

⁷⁹ *Supra* note 130, at paras. 42 & 43.

⁸⁰ *Supra* note 120, at 4.

⁸¹ *Supra* note 109, at 101.

The resulting trust and constructive trust are different from express trusts. Express trusts arise by way of agreement between a settlor/testator and trustee and, historically, have required perhaps, slightly easier evidentiary thresholds to overcome. Conversely, the requirements for proving and determining both resulting and constructive trust remedies historically proved extremely complicated and hence proved it difficult for unmarried couples to succeed with such claims. That said, in the seminal decisions of *Kerr v. Baranow* and *Vanasse v. Seguin*,⁸² the Supreme Court of Canada clarified the concept of resulting trust, particularly as it relates to the spousal context. And, most importantly of all, the Court created a new judicial avenue for unmarried cohabiting spouses to obtain restitution in circumstances where unjust enrichment can be proven, thus making what was once nothing more than a legal mirage, into an equitable remedy with tangible proprietary and monetary consequences.⁸³

Resulting Trusts

In *Kerr v. Baranow*; *Vanasse v. Seguin*, the Supreme Court radically altered the law with respect to the resulting trust. It held that although traditional resulting trust principles may continue to play a role in the resolution of property disputes between unmarried domestic partners, “the time has come to acknowledge that there is no continuing role of the common intention resulting trust.”⁸⁴ In other words, in domestic situations where there is either a gratuitous transfer of property from one spouse to the other or there is joint contribution by two partners to the acquisition of property, but the title to the property is held solely by one partner, a resulting trust may be imposed, but, in making such a determination, “it is the intention of the *grantor or contributor* alone that counts.”⁸⁵

Applied to the estates context, it is important to note that, provided the transferor had the requisite capacity to make the transfer, if, after they have passed away, title to the property is still held jointly with another, the estate trustee of the transferor will be obliged to seek a declaration that the transferee/defendant holds the property by way of resulting trust on behalf of the estate, such that the property can be included as an asset of the estate and administered.⁸⁶ If the trustee’s claim is disputed by the transferee, it will then be incumbent upon the court to ascertain whether the property ought to result back to the estate, or whether a gift was intended to the recipient. Notably, property is frequently conveyed jointly, often with a right of a survivorship for reasons such as avoiding creditors, probate fees, or certain taxes.

⁸² *Kerr v. Baranow*, 2011 CarswellBC 240 (S.C.C.).

⁸³ Martha McCarthy, “Family Law for Estates Lawyers,” LSUC CPD, Blended Family Estate Planning, June 14, 2011, at 12.

⁸⁴ *Kerr v. Baranow*, 2011 CarswellBC 240 (S.C.C.). at par. 15.

⁸⁵ *Ibid.* at par. 18.

⁸⁶ Jennifer J. Jenkins & H. Mark Scott, *Compensation & Duties of Estate Trustees, Guardians & Attorneys*, looseleaf (Aurora: Canada Law Book, 2008) at 18:40.10.

Unjust Enrichment and the Remedial Constructive Trust

Kerr v. Baranow; Vanasse v. Seguin has not changed the requirements for making an unjust enrichment claim, since the concept was applied in *Becker v. Pettkus*⁸⁷ and affirmed in *Peel (Regional Municipality) v. Canada*.⁸⁸ The law remains that, for a plaintiff to be successful in making such a claim, they must be able to establish the following three elements: (i) an enrichment of or benefit to the defendant by the plaintiff; (ii) a corresponding deprivation of the plaintiff; and (iii) the absence of a juristic reason for the enrichment. As well, it has been consistently held in the case law and has been affirmed in *Kerr v. Baranow; Vanasse v. Seguin*, that “the courts ‘should exercise flexibility and common sense when applying equitable principles to family law issues with due sensitivity to the special circumstances that can arise in such cases’.”⁸⁹

Kerr v. Baranow; Vanasse v. Seguin significantly contributed to how an award for unjust enrichment should be quantified. It did so by rejecting the view that there are only two dichotomous choices of remedy available: 1) monetary award (calculated on a ‘value received’ basis or 2) a proprietary award where the claimant can show a benefit conferred contributed to the acquisition or improvement of a specific property. The Court found that this dichotomy neglects the “joint family venture” where contributions of both parties over time have resulted in an accumulation of wealth. The unjust enrichment occurs here where there is a joint family venture but one party is left with a disproportionate share of the jointly held assets.

The Court identified the following non-exhaustive list of factors to assist in making a determination of whether a joint family venture exists: (i) the mutual effort of the parties and whether they worked collaboratively towards common goals; (ii) economic integration of the couples’ finances; (iii) actual intent or choice of the parties to not have their economic lives intertwined, whether such is expressed or inferred; and (iv) whether the parties have given priority to the family or there is detrimental reliance on the relationship, by one or both of the parties, for the sake of the family.⁹⁰

Provided the claimant can demonstrate (i) that there has been a “joint family venture”, based, in part, on the four factors enumerated below; (ii) that there is a link between their contributions to it and the family’s accumulation of assets and/or wealth; and (iii) upon breakdown of the relationship, one of the parties is left with a disproportionate share of the jointly held assets, a monetary remedy will be awarded. A close reading of *Kerr v. Baranow; Vanasse v. Seguin* seems to suggest that the joint family venture is predicated on the notion that the contribution of one spouse, in the form

87 *Becker v. Pettkus* (1980), 2 S.C.R. 834 (S.C.C.).

88 *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762 (S.C.C.), at p. 788.

89 *Kerr v. Baranow*, 2011 CarswellBC 240 (S.C.C.), at par. 34, citing to: *Peter v. Beblow*, [1993] 1 S.C.R. 980 (S.C.C.), p. 997, per McLachlin J. (as she then was) and also p. 1023, per Cory J.

90 *Kerr v. Baranow*, 2011 CarswellBC 240 (S.C.C.), at paras. 89-100.

of child rearing and household care, enables the spouse employed outside of the home to focus on developing their career, such that the efforts of the former result in a correlative increase in the “wealth” generated by the latter, during the course of their relationship. This raises a number of questions. For example, what if, despite the considerable work and labour of the stay-at-home spouse, the income-earning spouse does not result in a proportionate increase in the couple’s wealth, and, how is the former spouse’s entitlement to be calculated in these circumstances? Is the former’s entitlement to the existing joint family assets, which their efforts in the home have helped secure and maintain, negated? Or, will their compensation be limited to a fee-for-services calculation and, if so, does that not diminish the value of such work?

Claims of Quantum Meruit and Proprietary Estoppel

A *quantum meruit* claim is a claim for services rendered on the basis of a contract having been entered into between two parties where the contract has not been seen to completion and where the contract cannot be proved or is unenforceable. If the unenforceability of the contract would result in unjust enrichment, the claim of quantum meruit is available. Where an assertion that such a claim exists, its terms must be corroborated by additional third party witnesses or by documentary evidence. A court will not award compensation unless the three-part test for a finding of unjust enrichment, as set out by the Supreme Court of Canada in the case of *Pettkus v. Becker*,⁹¹ and as confirmed by the Court in *Kerr v. Baranow*; *Vanasse v. Seguin*, has been satisfied on the evidence adduced. Namely, a claimant must be able to demonstrate: (i) an enrichment enjoyed by the defendant; (ii) a corresponding deprivation suffered by the plaintiff; and (iii) an absence of juristic reason for the enrichment.

With respect to the third criteria, a court will generally examine the reasonable expectations of the parties and moral and public policy considerations, in order to assess whether recovery should be denied, or whether the claimant ought to be reimbursed for the benefit that was provided to the estate.⁹² In the estates context, this raises the issue of the requirement of corroborative evidence imposed on the claimant pursuant to section 13 of the *Evidence Act*.⁹³ As, in cases of this nature, the surviving spouse will usually be the party with the most evidence, and the deceased, the most important witness, is not available to provide evidence, much of the court’s analysis will come down to the credibility of the surviving spouse.⁹⁴

91 *Pettkus v. Becker*, [1980] 2 S.C.R. 834 [Pettkus].

92 Schnurr, *Estate Litigation*, 2nd Ed., 25 — Unjust Enrichment, Constructive Trust and Quantum Meruit Claims in Estates, 25.4 — Quantum Meruit Awards.

93 *Evidence Act*, R.S.O. 1990, c. E.23. Section 13 states: “In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment or decision on his or her own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence.”.

94 *Wright Estate v. Johnston*, 2011 CarswellOnt 960, at par. 122.

Applied to the spousal context, the courts have attributed value to the spousal-type services rendered by one spouse to another during the course of a relationship and, as such, have found such services compensable in law.⁹⁵ In *Albadi v. Greenzveig Estate*,⁹⁶ the plaintiff, an esthetician who was 41 and the deceased was 77 when he died of a heart attack. For about 10 years prior to the deceased's death the plaintiff would provide housekeeping service to him for \$60-\$100 and they would often go to the movies, out for dinner and on vacation. There was not romantic involvement on her part as she was in a committed relationship with another man.

Although the plaintiff alleged that the deceased had promised to leave her his car and "some money" in his will and that he wanted to make some changes to his will, he died before doing so. In applying the three-part test for unjust enrichment, the Court dismissed the plaintiff's *quantum meruit* claim, holding that, "[t]o the extent that the plaintiff might be seen as having conferred a benefit on the [deceased] through the frequent phone calls in later years, there is no corresponding deprivation and, in the context of the relationship and the benefits received by the plaintiff, they are not sufficient to entitle her to compensation."⁹⁷ An additional claim that is available to surviving spouses is that of proprietary estoppel. Essentially, proprietary estoppel is geared to protect an individual who has relied, to his or her detriment, on the action (or inaction) of a property owner that caused them to believe that they are or would be the true owner of certain property to such an extent that it would be unjust to permit the owner to later turn around and assert his title.⁹⁸ The law of proprietary estoppel is well settled and was clarified and confirmed in the Ontario cases of *Schwark Estate v. Cutting*⁹⁹ and *Spadafora v. Gabriele*¹⁰⁰.

CONCLUSION

Both the *FLA* and the *SLRA* provide comprehensive regimes that provide for support rights and obligations to flow to a surviving spouse or dependant of the deceased. As stated above, the *FLA* provides a comprehensive regime that provides for the property and other rights and obligations of spouses towards one another on the breakdown of their relationship or the death of a spouse. Where a deceased person fails to adhere to their statutory obligations, surviving spouses and/or dependants may seek to enforce on their legal rights as against their deceased spouse's estate pursuant to the *FLA* and the *SLRA*, or, if access to the provincial legislation is denied or provides an inadequate remedy, a variety of equitable claims can be made pursuant to the common law.

95 *Wright Estate v. Johnston*, 2011 CarswellOnt 960, at par. 122 [*Wright*], at par. 198.

96 *Albadi v. Greenzveig Estate*, 2011 CarswellOnt 5146.

97 *Ibid.* at par. 13.

98 *Maracle v. Brant*, 2008 CarswellOnt 1753 (S.C.J.) at para.101.

99 2010 CarswellOnt 350 (C.A.).

100 2011 CarswellOnt 14702 (S.C.J.).

As a result of an increase in blended families, remarriages, and other types of spousal relationships combined with the changes in the characteristics of the family unit over the last few decades, and the rapidly aging population, estate practitioners are seeing a correlative increase in the number of such claims being brought against estates not just by spouses of a deceased person, but by their combined children, extended family and other dependants as well. Accordingly, it is vital that Estates lawyers and Family Law lawyers, as well as other planning professionals advising on wealth management, and succession planning, become aware of the intersection of factors applicable to effective planning. It is only through this awareness, that the application of effective, competent planning can be usefully employed so as to protect rights and prevent unnecessary litigation and family break-down.

CHAPTER 4: THE EFFECT OF DOMESTIC CONTRACTS AND DEPENDANTS' SUPPORT CLAIMS

INTRODUCTION

A “dependant” under the *Succession Law Reform Act*¹ (“**SLRA**”) means the deceased’s spouse, parent, child or the brother or sister of the deceased *to whom the deceased was providing support or was under a legal obligation to provide support immediately before his or her death*.

While a “dependant” may include children, siblings, parents and grandparents of the deceased, this chapter focuses primarily on spouses as potential dependants. The within materials will further address the various definitions respecting dependants.

If an applicant does not qualify as a “dependant” as per the definition set out in the *SLRA*, then dependant’s support will not be available to him or her. For example, it is not enough to simply be a spouse of the deceased in order to establish a claim for dependant’s support. The deceased must have either been providing support or legally obligated to provide support to the spouse immediately prior to the deceased’s death in order for the surviving spouse to be deemed a dependant.

A surviving spouse who meets the definition of a “dependant” but has previously agreed not to seek dependant’s support from the deceased spouse will need to consider whether any domestic contracts entered into will impact the surviving spouse’s ability to qualify for dependant’s support from the deceased spouse’s estate. This issue is addressed in the within materials.

LEGAL OBLIGATION TO PROVIDE SUPPORT

Under section 30 of the *Family Law Act* (“**FLA**”)², every spouse has an obligation to provide support for himself or herself and for the other spouse, in accordance with need, to the extent that he or she is capable of doing so.

1 RSO 1990, c S.26.

2 RSO 1990. C F.3, s 30.

Courts in Ontario have supported the view that section 30 of the *FLA* establishes a legal obligation on the deceased spouse to provide dependant's support under the *SLRA*.³ In other words, the terms of section 30 of the *FLA* and the obligation to provide support is sufficient to satisfy the requirement of a legal obligation of support by the deceased spouse for the purpose of Part V of the *SLRA*.⁴

IMPACT OF A DOMESTIC CONTRACT ON ABILITY TO QUALIFY AS A DEPENDANT

A surviving spouse must consider how a domestic contract may impact whether dependant's support is available to him or her. A domestic contract, under the *FLA*, includes a marriage contract, separation agreement, cohabitation agreement, paternity agreement, or family arbitration agreement.⁵

Under section 63(4) of the *SLRA*, a Court has the discretion to make an order for dependant's support "despite any agreement or waiver to the contrary."⁶ However, in order for the Court to be able to exercise this discretion, the applicant spouse must first qualify as a "dependant".

Under the case law in Ontario, it is possible to use domestic contracts to contract out of support obligations under the *SLRA*. The following, together, are circumstances that may lead a Court to find that an applicant does not qualify as a dependant:

1. The spouses signed a domestic contract which contains a clause mutually releasing the parties from an obligation to pay spousal support;
2. The applicant had not brought an application to set aside or vary the waiver of support in the contract before the deceased's death. This is possible under section 33(4) of the *FLA*; and
3. The deceased was not actually supporting the applicant immediately before death.

While the circumstances of every case are different, if the above criteria are met, the domestic contract may likely preclude the applicant from qualifying as a dependant. In such cases, the Court would not have the jurisdiction determine dependants' support for the applicant.

On the other hand, if the applicant does meet the threshold to qualify as a dependant, then the Court may exercise its discretion in determining support and the domestic contract may be given little or no weight.

3 *Su v. Lam*, 2011 ONSC 1086; *Re Cooper* (1980), 1980 CanLII 1928 (ON SC), 30 O.R. (2d) 113; *Theano v. Hinrichsen Estate* (Public Trustee of), [2006] O.T.C. 116, [2006] O.J. No. 458 (Sup. Ct.); *Perkovic v. McClyment* (2008), 2008 CanLII 52315 (ON SC), 57 R.F.L. (6th) 57.

4 *Su v. Lam*, 2011 ONSC 1086, paras. 9-10.

5 *FLA*, s 1(1).

6 *SLRA*, s. 63(4).

Impact of a Domestic Contract is Case Specific

The mere existence of a domestic contract does not in and of itself preclude an applicant from meeting the threshold of a “dependant” under the *SLRA*. There are different types of domestic contracts, each with unique language or terms used. A Court will examine the contract in the context of the circumstances of the case. The impact of the contract on the application for dependant’s support will vary depending on the specific circumstances and the terms of the contract.

Separation Agreements

Full and Final Release: Where the applicant and the deceased have entered into a separation agreement which contains a full and final support release, it may be difficult for the applicant to establish dependency after the other spouse has passed away.⁷ This is particularly so in circumstances where the applicant did not previously bring an application under the *FLA* to vary or set aside the support before the deceased’s death.

Based on the case law, it appears that if the applicant previously consented to a release of support in a domestic contract, and had not brought an application to set that term aside prior to the deceased’s death, then the applicant would have no standing to bring an application for dependant’s support, no matter how much he or she may need support.⁸

Provision of Support in Separation Agreement: Under section 34(4) of the *FLA*, an order for support is binding on an estate unless the order provides otherwise. As such, if the domestic contract is incorporated into a court order, then the recipient can choose to continue to receive the support under the order.⁹ Where the support order or contract is not binding on the estate, then the recipient can apply for support as a dependant under the *SLRA*.

How Does the Court Define ‘Adequate Provision’ of Support?

No matter whether the support order or contract binds the estate or not, the recipient spouse can apply for dependants’ support if the support received is inadequate. As such, the first step to consider is whether the deceased made “adequate provision” for the dependant. If the Court finds that the deceased did not make adequate provision for the proper maintenance of the dependant, then it may utilize its “unfettered discretion” to order such a provision as it considers adequate.¹⁰

7 *Vandervan v. Vandervan Estate* [1998] CarswellOnt 2877 (Gen. Div.).

8 *Re Taylor and Taylor* (1985), 53 O.R. (2d) 174 (Surr. Ct.); *Smith v. Smith Estate*, [1985] O.J. No. 1767 (Surr. Ct.).

9 *Schwartz Estate v. Schwartz* (1998), 36 R.F.L. (4th) 110 (Ont. Gen. Div.).

10 *Swire v. Swire* (1986), 23 E.T.R. 246 (Ont. Surr. Ct.); aff’d. (1987), 28 E.T.R. 206 (Ont. Div. Ct.), at paras 84-85. See also *Goldhar v. Goldhar* (1985), 48 R.F.L. (2d) 1 (Ont. Div. Ct.).

In the case of *Butts v. Butts Estate*,¹¹ the applicant was the former spouse of the deceased. She was receiving \$500 per month pursuant to a separation agreement and the deceased had not left her anything in his Will. At the time of the deceased's death, she was sick, her expenses were double her income and she had no savings. The Court found that the deceased did not make adequate provision for her and awarded her \$1,500 per month. Importantly, the Court held:

To me, s. 63(4) gives the court a broad judicial discretion to award support to a dependant, as defined in s.57, notwithstanding the existence of any prior agreement or waiver. The language of s.63(4) could not be broader or clearer in its purpose and is obviously aimed at achieving justice and equity at the date of the hearing, notwithstanding what the parties might have agreed to earlier on.

In this case, Mrs. Butts has been living below the poverty line in strained circumstances for at least the past several years and there is no reason why she should be denied a support order under the *SLRA* which would bring her out of such circumstances and enable her to live out her remaining years in some dignity and comfort.¹²

Marriage and Cohabitation Contracts

Typically, if two spouses were still married or cohabiting at the time of death of one of the spouses, then any marriage or cohabitation contract previously entered into by the spouses would likely have no impact on the applicant's status as a dependant. This is because the spouses were living together and/or supporting each other at the time of the deceased spouse's death. As such, even if the marriage or cohabitation agreement contains a clause releasing the parties from paying support, the surviving spouse would still be a dependant and the Court could therefore utilize its discretion to make an order for support.

In the case of *Phillips-Renwick v. Renwick Estate*,¹³ the deceased and his wife had a cohabitation agreement where they released each other from any and all rights to share in or divide the other's property before and after death, and from spousal support claims. The surviving spouse received a life interest in their home and \$100,000 upon the deceased's death. The applicant spouse relied on *Butts v. Butts Estate* to support her argument that she should receive a preferential share, or in the alternative, dependant's support from the estate.

The Court found that the provision of support made by the deceased in his Will was adequate. With respect to the cohabitation agreement, the Court found that the weight to be given to it was

11 *Butts v. Butts Estate* (1999), 27 E.T.R. (2d) 871 (Ont. Gen. Div.) [*Butts*].

12 *Butts*, paras 42-43.

13 *Phillips-Renwick v. Renwick Estate* (2003), 41 R.F.L. (5th) 337 (Ont. S.C.J.) [*Phillips-Renwick*].

significant and determinative, in that the agreement represented the mutually acceptable basis upon which the parties agreed to cohabit, and they relied on those terms and never changed them prior to the deceased's death.¹⁴

In the case of *Lehmann v. Lehmann Estate*,¹⁵ the applicant and the deceased signed a cohabitation agreement and later a marriage contract (with several amendments), which included a spousal support release. The applicant commenced an application seeking, among other things, payment of spousal support. After considering the circumstances of the case, the Court had this to say about the marriage contract:

In both *Miglin* and *Hartshorne*, the Supreme Court of Canada recognized the importance of honouring agreements which were fairly negotiated and which do not operate unfairly even though the terms of the particular agreement might not result in exactly the same outcome if the case were left to be decided by a judge. In my view the Marriage Contract was fairly negotiated and its application upon Bill's death does not result in unfairness to Anna. The result of the operation of the Marriage Contract would have been within the reasonable contemplation of Anna and Bill at the time it was executed and throughout the period of the marriage.¹⁶

It appears that Courts do consider and often defer to domestic contracts in determining whether an applicant should succeed in obtaining dependants' support. However, if the deceased does not make adequate provision for the surviving spouse, then it is likely that a Court would not give much weight to a domestic contract in considering whether an order for dependants' support should be made.

Domestic contracts are simply one of the many factors a Court will use to determine whether an order for support should be made, and for what amount and duration. Except where the domestic contract contains a full and final support release and the deceased was not providing support to the applicant before death, the presence of a domestic contract is usually a secondary consideration. One of the main considerations in these cases is whether the deceased made "adequate provision" of support for the applicant. Where adequate provision is made, the Court will likely rely on the domestic contract in making the decision not to order dependants' support.

The within writings are not exhaustive, but, provide considerable guidance when considering the availability and limitations respecting dependants' support, related claims and the equitable and discretionary nature of the relief sought.

14 *Phillips-Renwick*, para 75.

15 *Lehmann v. Lehmann Estate*, 2018 ONSC 3981, 2018 CarswellOnt 10639 [*Lehmann*] (currently under appeal).

16 *Lehmann*, para 74.

CHAPTER 5: SECTION 72 OF THE SUCCESSION LAW REFORM ACT: SECTION 72 ASSETS

The most unique feature of the dependants' support regime is that, when necessary, a successful claim has the potential to override the testamentary freedom of the deceased or the statutory regime for distribution on intestacy under the *Succession Law Reform Act* ("**SLRA**").¹ The mechanism for doing so is section 72 of the *SLRA*, which allows assets that would normally pass outside of the estate – for instance, insurance policies with a designated beneficiary and jointly-held property – to be “clawed back” into the estate for the purpose of determining an appropriate support award and funding that award. These assets are referred to as “section 72 assets” and in some situations, may be the only means available to fund dependants' support.

This Chapter will discuss: (1) the list of assets under section 72 of the *SLRA*; (2) the purpose of including the section 72 claw-back in the *SLRA*; and (3) case law regarding what is (or isn't) a section 72 asset for the purpose of a dependant's support claim.

Section 72(1) provides a list of section 72 assets:

Value of certain transactions deemed part of estate

72 (1) Subject to section 71, for the purpose of this Part, the capital value of the following transactions effected by a deceased before his or her death, whether benefitting his or her dependant or any other person, shall be included as testamentary dispositions as of the date of the death of the deceased and shall be deemed to be part of his or her net estate for purposes of ascertaining the value of his or her estate, and being available to be charged for payment by an order under clause 63 (2) (f),

(a) gifts *mortis causa*;

(b) money deposited, together with interest thereon, in an account in the name of the deceased in trust for another or others with any bank, savings office, credit union or trust corporation, and remaining on deposit at the date of the death of the deceased;

(c) money deposited, together with interest thereon, in an account in the name of the

¹ RSO 1990, c. S.26.

deceased and another person or persons and payable on death under the terms of the deposit or by operation of law to the survivor or survivors of those persons with any bank, savings office, credit union or trust corporation, and remaining on deposit at the date of the death of the deceased;

(d) any disposition of property made by a deceased whereby property is held at the date of his or her death by the deceased and another as joint tenants;

(e) any disposition of property made by the deceased in trust or otherwise, to the extent that the deceased at the date of his or her death retained, either alone or in conjunction with another person or persons by the express provisions of the disposing instrument, a power to revoke such disposition, or a power to consume, invoke or dispose of the principal thereof, but the provisions of this clause do not affect the right of any income beneficiary to the income accrued and undistributed at the date of the death of the deceased;

(f) any amount payable under a policy of insurance effected on the life of the deceased and owned by him or her;

(f.1) any amount payable on the death of the deceased under a policy of group insurance; and

(g) any amount payable under a designation of beneficiary under Part III.

Under section 72(3) of the *SLRA*, the burden is on the dependant making the claim to prove that the money or property they wish to claw back into the estate did in fact belong to the deceased, and falls under one of the asset types listed in section 72(1).

Due to the risk of a party innocently transferring assets that traditionally pass outside of the estate to the intended beneficiary, section 72(5) of the *SLRA* protects from liability any corporation or person that transfers funds or property to the intended beneficiary, provided that the corporation or person was not personally served with an order prohibiting such a transfer. Though this liability protection is only vitiated once an order has been served personally, it is advisable to put any individual or corporation holding potential section 72 assets of the deceased on notice as soon as practicable. Finally, section 72(7) of the *SLRA* provides: "This section does not affect the rights of creditors of the deceased in any transaction with respect to which a creditor has rights."

PURPOSE OF SECTION 72

The reason why certain assets can be clawed back for the purpose of dependants' support is the basic premise that if an individual has a legal or moral obligation to provide for another person while alive, then he or she must provide for that dependant to an appropriate extent after death as well. As a society, we have determined that if the deceased had sufficient funds at the time of his or her death, then the deceased, rather than the state, should be responsible for providing support to a dependant.

Section 72 permits enforcement of societal norm because – either intentionally or by inadvertence – common estate planning practices aimed at minimizing taxes and simplifying the transfer of assets can operate to make an otherwise large estate appear quite small. The classic example is a house held in joint tenancy. A house is often the biggest asset in the estate, and if it passes to a surviving joint owner by right of survivorship, then the value of that major asset would not be available to fund a dependants' support award apart from section 72. This could easily amount to the difference between a \$50,000 estate and a \$500,000 or \$1,000,000 estate to provide for dependants.

In *Dagg v. Cameron Estate* (discussed in detail in the next section) the Court of Appeal provides a detailed overview of the legislative history of section 72 and its policy underpinnings, detailing how the legislation was first conceived because of a defect in the dependants' support regime at the time:

The Proceedings of the Conference's 48th annual meeting in 1966 identified a problem with the then existing dependants' relief statutes, at p. 103: "[U]nder this legislation there is no obstacle to a testator denuding himself of all or the bulk of his assets so that there is at his death no estate out of which an order made under [dependant's relief legislation] can be satisfied." A solution to this problem lay in recapturing all or part of the testator's estate disposed of by pre-death transactions. To that end, the Conference proposed legislative language similar to s. 72(1) of the SLRA.²

Dagg v Cameron goes on to quote the even harsher description of the necessity of section 72 as described by MP Lawlor as the legislation was debated in 1977:

This section is worth its weight in gold. For years lawyers, in their peculiar ingenuity, have set up all kinds of devices whereby to frustrate the operations of the Devolution of Estates Act and the Dependants Relief Act, but particularly the Devolution

² 2017 ONCA 366, at 46. The Conference referred to is the Conference of Commissions on Uniformity of Legislation in Canada. It is now known as the Uniform Law Conference of Canada.

of Estates Act, as to cutting people out to whom they owe obligations during their lifetime. They set up trusts and then they make designations under pension plans, and they make designations under the Insurance Act – there's a whole host of measures which we, in our backward way, always plumed ourselves upon knowing about and on occasion using.³

While these early understandings of the purpose of section 72 focus on those who intentionally dissipate their estate in order to frustrate potential dependant's support claims, such dissipation can just as easily result from inadvertence or a failure to update one's estate plan after a new spousal relationship or the birth of a child. This is reflected in the decision of Robin J., as he then was, in *Moore v. Hughes*, which states:

Manifestly, this section was intended to ensure that the maintenance of a dependant is not jeopardized by the arrangements made, intentionally or otherwise, by a person obligated to provide support in the eventuality of his death. It is designed to alleviate the hardship that can be visited on a dependant by causing money or property to pass directly to a beneficiary (done of joint tenant) and not as part of the estate.⁴

More recently, in *Madore-Ogilvie (Litigation Guardian of) v. Ogilvie Estate*, the Court of Appeal held that section 72 of the SLRA serves to prevent estate planning that “jeopardise[s] the maintenance of the deceased's dependants.”⁵ Thus, while section 72 was developed as a remedy to the intentional dissipation of an estate, it covers situations where this had occurred inadvertently as well. The underlying purpose of the section is therefore best understood as the protection of the dependants of a deceased in circumstances in which valuable assets would traditionally pass outside of the estate.

CASE LAW

Dagg v. Cameron Estate⁶

In *Dagg v. Cameron Estate*, the Ontario Court of Appeal addressed the question whether a life insurance policy that had a designated beneficiary as the result of a court order (in this case, a spousal support order) could be clawed back into the estate pursuant to section 72. The question turned on the interaction between the categorization of life insurance as a section 72 asset by section 72(1)(f), and the protection afforded the rights of the creditors of the deceased by section 72(7).

3 *Ibid*, at 52.

4 (1981), 37 OR (2d) 785 (Ont HC), at p. 789.

5 2008 ONCA 39, at 39.

6 2017 ONCA 366.

In the course of their divorce proceedings, the deceased, Stephen Cameron, had been ordered to maintain his former wife as an irrevocable beneficiary of his life insurance policy. After his divorce, the deceased entered into a relationship with Evangeline Dagg, with whom he conceived a child, James, who was born 3 months after Stephen died of cancer. Evangeline made a dependants' support application on behalf of herself and James, and argued that the \$1 million life insurance policy, of which Stephen's ex-wife was the designated beneficiary, should be available to fund a dependants' support award by the operation of section 72 of the SLRA. The trial judge and the Divisional Court agreed.

However, the Court of Appeal reversed. It held that the section 72(7) protection of creditors applies where the deceased owned a life insurance policy that had a court-ordered irrevocable beneficiary pursuant to a support order. The Court of Appeal held that while the insurance policy clearly formed part of the net estate pursuant to section 72(1), an obligation to pay support creates a debtor-creditor relationship, and the estate was bound by the support order. Thus, the Court of Appeal held that section 72(7) serves to remove from the claw-back the funds necessary to fulfill the deceased's support obligations to his ex-wife.

Madore-Ogilvie (Litigation Guardian of) v. Ogilvie Estate⁷

The deceased and his wife were joint owners of an insurance policy. The policy entitled the survivor to a payment of \$109,000 on the death of the other spouse. The deceased was survived by his wife and six children, 3 of whom were minors. The Court held that the 3 minor children and the deceased's widow, Mary, were dependants of the deceased. All 3 minor children had different mothers, with Mary being the mother of and residing with the oldest child, Novlette.

In addition to the life insurance proceeds, the deceased's matrimonial home was left to Mary by right of survivorship, though mortgages on the property were essentially equal to the value of the home. The deceased had also designated Mary as the beneficiary of a second life insurance policy, valued at \$60,711, which clearly fell under section 72(1) of the SLRA for the purpose of dependants' support. No provision was made for the deceased's two youngest children and there was no estate beyond what could be clawed back under section 72.

The evidence demonstrated that the jointly held life insurance policy was taken out to secure payment of the first mortgage on the matrimonial home shared by Mary and the deceased, and that Mary had made the majority of the payments on the policy. The Court of Appeal held, based on a plain reading of section 72(1)(f) that the deceased did not own the insurance policy, as required

⁷ 2008 ONCA 39.

by the section, because it was jointly owned. Mary was a co-owner of the policy, rather than a beneficiary, and her rights to the funds flowed from that ownership.

Additionally, the Court of Appeal held that excluding the jointly held life insurance policy from section 72(1)(f) conformed with the purpose of section 72, as the purpose or effect of the policy was not to “jeopardise the maintenance of the deceased’s dependants”. Indeed the policy had the potential effect of benefiting the deceased’s dependants had Mary predeceased him and was a reasonable measure given the difficult financial circumstances of the Ogilvies.⁸

Stevens v. Fisher Estate⁹

Stevens v. Fisher Estate also concerns a life insurance policy. In this case it was a group life insurance policy naming Alice, an on-and-off girlfriend (and, briefly, common law spouse) of the deceased, as the designated beneficiary. Alice acknowledged that she was not a dependant of the deceased, but nevertheless claimed entitlement to the full amount of the policy. Additionally, the deceased’s former common law spouse, Debra, was the designated beneficiary of a \$250,000 policy, to be held in trust for the benefit of the deceased’s two children with Debra. The two children were in their early 20s at the time of the deceased’s death.

The applicant, Camille, was the common law spouse of the deceased and had been for approximately 11 years at the time of his sudden death from a heart attack at the age of 52. The deceased also had an ex-wife, Andrea, with whom he had two children. They were divorced in 1988, after which time the deceased cohabitated with Debra, and later, Camille. The deceased did not make any provision for Camille in his will.

The Court held that Camille, as the deceased’s common law spouse, was his dependant and he had provided almost nothing for her. Camille had few assets, and approximately \$21,000 in debts at the time of the hearing. She had contributed significantly to the deceased’s quality of life during his illness, helped out financially with household expenses, and helped the deceased maintain access to his children. Camille worked two jobs at the time of the hearing, but was barely able to meet her minimum expenses.

Despite the arguments by counsel for Alice that the group insurance policy fell outside of the estate by operation of sections 190(2) and 196(1) of the *Insurance Act*, the Court held that the group insurance policy clearly fell within section 72(1)(f.1) of the *SLRA*, which claws back “any amount payable on the death of the deceased under a policy of group insurance”. Any other finding would

⁸ *Ibid*, at 39-40.

⁹ 2013 ONSC 2282.

be absurd, as it would make section 72(1)(f.1) have “no effect whatsoever”.¹⁰ The Court awarded Camille \$75,000 to be paid out of the group life insurance policy, taking into account her actual needs and her moral claim against the estate, with the \$9,000 remaining in the policy to go to Alice.

This case highlights the complexity of dependants’ support applications when a deceased has had several spousal relationships.

Cotnam v. Rousseau¹¹

Cotnam v. Rousseau is a recent case decided by the Superior Court that addressed whether or not a pre-retirement death benefit left to a designated beneficiary spouse can be clawed back into the estate pursuant to section 72.

The deceased had two children with his first wife, Faye. The youngest child of the marriage was an independent adult, but the oldest, Shelly, had developmental issues and remained a dependent. Shelly resided with her mother, who acted as her litigation guardian in her dependant’s support claim. At the time of his death, the deceased paid \$565 per month for Shelly’s support.

While the deceased made some provision for Faye and Shelly, the deceased’s common law spouse at the time of his death, Mabel, received most of his assets upon his death. These included the deceased’s pre-retirement death benefit. It was worth approximately \$368,000 before taxes. and was the deceased’s largest asset. The primary issue in this case was whether or not the benefit should be clawed back into the estate for the purpose of dependants’ support.

The basis of Mabel’s argument was that she received the benefit as a “spouse” rather than a “designated beneficiary” as provided for in section 72(1). Ultimately, the Court held that while the *Pension Benefits Act* creates a priority for spouses over other designated beneficiaries, it does not shelter the pre-retirement death benefit from section 72:

On the contrary, the provisions of the *SLRA* specifically contemplate a balancing of the assets between spouses and other dependants (see section 62 of the *SLRA*). To ignore the pre-retirement death benefit altogether would not only be arbitrary, but it may unduly skew the “balancing” envisioned under section 62 of the *SLRA*. The purposes of the *SLRA* could easily be thwarted altogether if the Respondent’s interpretation were accepted. In many instances, the pre-retirement death benefit may be the only asset available to the deceased at the time of death.¹²

¹⁰ *Ibid*, at 113.

¹¹ 2018 ONSC 216.

¹² *Ibid*, at 35.

Ultimately, the Court awarded one half of the value of the pre-retirement death benefit to be placed into a trust account and managed for Shelly's benefit.

CONCLUSION

Section 72 of the *SLRA* is incredibly important as it gives the dependants of a deceased person access to assets for their support that would not otherwise be available. Section 72 does profoundly limit a person's freedom to dispose of his or her assets. It also changes the statutory formula for the division of an estate on intestacy. Thus, section 72 clearly demonstrates the paramountcy in succession law of the legal, and especially moral, obligations of a deceased person to provide for his or her dependants.

CHAPTER 6: SUSPENSORY ORDERS AND INJUNCTIVE RELIEF

To protect the assets of an estate from dissipation before an order for dependants' support can be made, certain suspensory orders or other injunctive relief may be sought, or automatically arise under applicable legislation upon the death of an individual who may have a legal obligation to support a spouse or other dependant. This chapter will examine suspensory orders, legislated stays, and other available injunctive relief.

STATUTORY AUTOMATIC STAYS

The *Family Law Act*¹ ("**FLA**") protects a dependants' claim by mandating a statutory six-month injunction on distribution of the estate following the death of a spouse. The injunction arises automatically, even in the absence of, or prior to, a dependant bringing an application for relief under the *Succession Law Reform Act*² ("**SLRA**"). Section 6 of the *FLA* states:

Distribution within six months of death restricted

6(14) No distribution shall be made in the administration of a deceased spouse's estate within six months of the spouse's death, unless,

- (a) the surviving spouse gives written consent to the distribution; or
- (b) the court authorizes the distribution.

Once a dependant applies for support, section 67 of the *SLRA* further prohibits the estate trustee from proceeding with the distribution of the estate until the court has disposed of the dependants' support application. The support claim must be commenced and served, not just threatened, before the automatic suspension of distribution under section 67 comes into effect:

Distribution stayed

¹ RSO 1990, c F 13.

² RSO 1990, c S 26.

67(1) Where an application is made and notice thereof is served on the personal representative of the deceased, he or she shall not, after service of the notice upon him or her, unless all persons entitled to apply consent or the court otherwise orders, proceed with the distribution of the estate until the court has disposed of the application.

Nevertheless, this prohibition does not prevent an estate trustee from making reasonable advances for support to dependants who are beneficiaries of the estate (section 67(2)) and *The Estate of Ingrid Loveman, Deceased*³).

An estate trustee will be personally liable for any amount distributed in violation of the stay:

Liability of personal representative

67 (3) Where a personal representative distributes any portion of the estate in violation of subsection (1), if any provision for support is ordered by the court to be made out of the estate, the personal representative is personally liable to pay the amount of the distribution to the extent that such provision or any part thereof ought, pursuant to the order or this Part, to be made out of the portion of the estate distributed.

In *Forrest v. Lacroix Estate*,⁴ an estate trustee was found personally liable for dissipating assets of the estate after the commencement of a dependants' support claim by way of a successful contempt motion brought against the estate trustee. However, the contempt order was overturned at the Court of Appeal.

The estate trustee in *Forrest* was the son of the deceased and the sole beneficiary under the deceased's Will. The deceased had made no provision for the Applicant, or his common law spouse of 19 years. The trial judge found that the Applicant was a dependant, the deceased had not made adequate support, and that the Applicant was entitled to support in the amount of \$2,500 per month.

The trial judge also found that the estate trustee had deliberately dissipated estate assets (in the face of a specific order by the court prohibiting the dissipation of estate assets and after being advised by his solicitor of his obligations) with the intention of frustrating the Applicant from receiving support from the estate. In lieu of monthly support payments, the trial judge ordered that a lump sum of \$300,000 was to be paid by the estate to the Applicant and any shortfall was to be paid by the estate trustee personally.

Justice Bolan noted that Section 67(3) of the *SLRA* imposes personal liability against a personal representative of an estate who violates s. 67(1): "The section is designed to protect dependants

3 2016 ONSC 2687, at 54.

4 (1999) 46 OR (3d) 364 (SC), rev'd (2000) 48 OR (3d) 619 (CA).

from personal representatives of an Estate who egregiously and without colour of right set upon a course of action to plunder the assets of an estate.”

The estate trustee failed to make the required payment, and the Applicant successfully obtained a contempt order. However, the Court of Appeal set aside the order. Morden J.A. clarified that the wording of the rules governing contempt orders (Rules 60.05 and 60.11(1) of the *Rules of Civil Procedure*) were so clear that they could not be interpreted to allow for contempt proceedings against a party in cases of non-payment of monies.

The case of *Su v. Lam*⁵ also touched on Section 67(1) of the *SLRA*. While the Court found that Mr. Su was the spouse of Ms. Lam, and that she was under a legal obligation to support him, the Court did not make an order for support in his favour, noting that there was nothing in her estate available to satisfy such an order. While Section 67(1) stays the distribution of an estate, that stay is not enforceable until an application is commenced and served on the estate trustee.

Mr. Su’s notice of application for dependant’s support was commenced more than six months after the issuance of the Certificate of Appointment. The six-month limitation period under s. 61(1) for dependant’s support claims had expired by that point and, accordingly, any relief available to Mr. Su under the application was limited by s. 61(2) to any portion of the estate that remained undistributed as of the date of his application. All assets of the estate had been distributed before the *SLRA* **application was commenced, and as a result, any support claim by Mr. Su was statute-barred. There was no basis to making a discretionary extension of the six month limitation period.**⁶

SUSPENSORY ORDERS

The *SLRA* also empowers the court to make an order suspending the administration of the estate. Section 59 of the *SLRA* **states:**

Suspensory order

59 (1) On an application by or on behalf of the dependants or any of them, the court may make an order suspending in whole or in part the administration of the deceased’s estate, for such time and to such extent as the court may decide. R.S.O. 1990, c. S.26, s. 59.

⁵ 2012 ONSC 2023.

⁶ See also *Su v. Lam*, 2015 ONSC 6968, where Mr. Su attempted to re-open the trial of the matter on the grounds of fraud and subsequently discovered facts, which was dismissed and *Su v. Lam*, 2017 ONSC 2414, in which Mr. Su unsuccessfully attempted to have a consent order (that dismissed all of his claims against the estate except for his *SLRA* dependant claim) set aside.

Posthumous child not yet conceived

(2) An application may be made under subsection (1) by a surviving spouse who gives notice under paragraph 1 of subsection 1.1(1) on behalf of a child of the deceased that is referred to in the notice and is not yet conceived, if the application is made no later than six months after the death of the deceased.

This suspensory order also applies to certain assets that pass outside of the estate but can be “clawed back” in order to satisfy a dependant’s support award. These assets are enumerated under Section 72 of the *SLRA* (and are accordingly referred to as “Section 72 assets”) and include such assets as gifts *mortis causa* and amounts payable under life insurance policies.⁷ If a suspensory order under Section 59 of the *SLRA* has been obtained, and a certified copy of the suspensory order has been personally served upon the corporation or person holding any funds or property which are Section 72 assets, then no distribution should be made pursuant to any contractual relationship which the corporation or individual had with the deceased (for example, a life insurance company).

However, if that suspensory order has *not* been served on the required corporation or person, under subsection 72(5), a corporation or individual is permitted to make a distribution or transfer funds or property to any person otherwise entitled:

Exception

72(5) This section does not prohibit any corporation or person from paying or transferring any funds or property, or any portion thereof, to any person otherwise entitled thereto unless there has been personally served on the corporation or person a certified copy of a suspensory order made under section 59 enjoining such payment or transfer.

Further, service of such a suspensory order protects the corporation or person holding the funds from any claim that might be brought by someone seeking a payout of the funds:

Suspensory order

72(6) Personal service upon the corporation or person holding any such fund or property of a certified copy of a suspensory order shall be a *defence to any action* or proceeding brought against the corporation or person with respect to the fund or property during the period the order is in force. [emphasis added]

In *Stevens v. Fisher*,⁸ the Court found that the applicant common-law spouse of the deceased was a dependant of the deceased and that the deceased had not made adequate provision for her proper support. The Court went on to find that a group life insurance policy in the amount of \$84,000 was an asset of the estate pursuant to Section 72(1)(f.1). A former common-law spouse of the deceased

⁷ Please see Chapter 5 for an in-depth discussion of section 72 assets.

⁸ 2013 ONSC 2282.

was the sole beneficiary under that policy. The Court ordered a lump sum dependant's support payment of \$75,000 plus accrued interest to be paid out of the insurance funds. The remainder was to be given to the beneficiary under the insurance policy. The Court then suspended payment of any funds pursuant to the judgement in accordance with section 59 of the *SLRA* until further order of the Court.

The applicant subsequently sought her costs to be paid by the former common-law spouse personally.⁹ The former common-law spouse argued the costs should be paid out of the insurance proceeds. Ultimately, the Court found that s.72 assets are available for payment of support orders only, and not for costs. The Court ordered that no costs were to be awarded and that the suspension order made in accordance with section 59 was set aside.

PRESERVATION ORDERS

A Rule 45 Preservation of Assets order could also be available to preserve the assets of the estate pending a claim for dependants' support. Rules 45.01 and 45.02 of the *Rules of Civil Procedure*¹⁰ state:

Interim Order for Preservation or Sale

45.01 (1) The court may make an interim order for the custody or preservation of any property in question in a proceeding or relevant to an issue in a proceeding, and for that purpose may authorize entry on or into any property in the possession of a party or of a person not a party.

(2) Where the property is of a perishable nature or likely to deteriorate or for any other reason ought to be sold, the court may order its sale in such manner and on such terms as are just.

Specific Fund

45.02 Where the right of a party to a specific fund is in question, the court may order the fund to be paid into court or otherwise secured on such terms as are just.

In *Darlington v. Bernard*,¹¹ the common-law spouse of the deceased, Ms. Bernard, sought a

⁹ *Stevens v. Fisher* 2013 ONSC 3112.

¹⁰ RRO 1990, Reg 194.

¹¹ 2018 ONSC 162.

preservation order over the assets of the estate pending determination of her claims against the estate. The main asset of the estate was the deceased's condominium, which was up for sale. Ms. Bernard's claims against the estate were based on breach of contract, *quantum meruit*, and a dependant's support claim under the *SLRA*. Ms. Bernard sought a non-dissipation order under Rule 45.02 and Rule 75.06(3)(g) of the *Rules of Civil Procedure* (which provides that "on a motion for directions a court may direct . . . such other procedures as are just") as well as the inherent jurisdiction of the Court. She did not seek a suspensory order under section 59 of the *SLRA*.

The estate trustee argued that the Court lacked jurisdiction to make the order that Ms. Bernard sought as Ms. Bernard was really seeking a *Mareva* injunction which was inappropriate. Ms. Bernard denied she was seeking a *Mareva* injunction, admitting that she could not meet the high test required for such an order, but that she was seeking a non-dissipation order.

Justice Trimble concluded that while the Court did have jurisdiction to hear the request for the non-dissipation order; the motion was dismissed.

The power of the court to grant a non-dissipation order under Rule 75.06(3)(g) of the *Rules of Civil Procedure* is a residual power not to be used where another rule more specifically applies; and Justice Trimble concluded that Rule 45 specifically addresses interim preservation orders.

However, Rule 45 did not assist Ms. Bernard either. The Court found that the test to be applied to the question of whether a fund will be ordered secured has three elements:

- a) the party must claim an interest in the specific fund (claim for damages will not suffice);
- b) there is a serious issue to be tried; and
- c) the balance of convenience favours granting the order.¹²

Ms. Bernard did not meet this test. Ms. Bernard was seeking a claim in damages under breach of contract and *quantum meruit* which was insufficient to sustain a preservation order under Rule 45.02 as she did not claim any specific right in the fund but sought security in the condominium as security for payment of damages.

The analysis for dependant's support was slightly different. She sought a non-dissipation order under Rule 45.02 on the basis of her status as a spouse with a claim for dependant's relief under s.58(1) of the *SLRA*. The Court held that in order to meet the first part of the *Moranis* test, the Court had to determine that the proceeds from the sale of the condominium were "earmarked to the litigation".

¹² See *Sadie Moranis Realty Corp. v. 1667038 Ontario Inc.* 2011 ONSC 671, aff'd 2012 ONCA 475 ("*Moranis*").

While Ms. Bernard advanced a serious issue to be tried regarding her dependency claim, this was not sufficient to secure all the assets of the estate, because she failed to meet the other two aspects of the *Moranis* test:

[20] Since the *SLRA* says that any dependency claim is to be awarded from the Estate, and since the overwhelming asset in this case is the proceeds from the sale of the condominium, the dependency claim is more than a claim for damages. However, merely because Ms. Bernard advances a serious issue to be tried regarding her dependency claim is not sufficient to secure all assets of the Estate. I was not directed to any case law. Logic dictates, however, that Ms. Bernard must establish, by admissible evidence, at least an approximation of what portion of the value of the estate is reasonably required to satisfy her dependency claim; in other words, what portion of the value in the estate is ‘earmarked to the litigation’. The first aspect of the *Moranis* test is not met as her evidence is insufficient as to the value of her dependency claim.

[21] The third aspect of the *Moranis* test is not met. The balance of convenience test does not favour granting the non-dissipation order. Ms. Bernard has not provided any significant evidence to assist the Court to determine how much her award might be should she be entitled to one. To put it another way, she has not assisted the court to determine how much is ‘earmarked to the litigation’. On the other hand, it is clear that there is prejudice to the beneficiaries in holding up the distribution of all of the Estate’s assets while her claim proceeds.¹³

Finally, Justice Trimble noted that “the power to suspend the operation of an estate or to freeze assets where a dependency claim is made under s.58 is found in s.59 of the *SLRA*. Ms. Bernard does not advance a claim under s.59.”¹⁴

In *Angeloni v. Angeloni*,¹⁵ the Court found that the estate trustee improperly distributed the assets of the estate within six months of the deceased’s death, contrary to s. 6(14) of the *FLA*. Of concern in this case was that the estate’s assets included the deceased’s wife’s share of the net proceeds of sale of their matrimonial home.

Mr. Angeloni had moved his wife of 36 years into a long-term care facility two years before he passed. One month after Ms. Angeloni moved out of the matrimonial home, apparently acting under a Power of Attorney, Mr. Angeloni severed the joint tenancy of their home, converting it to a tenancy-in-common, and shortly before his death, sold the home. Mr. Angeloni made a Will that made

¹³ *Darlington v. Bernard* 2018 ONSC 162 at paras. 20-21.

¹⁴ *Darlington v. Bernard* 2018 ONSC 162 at para. 23.

¹⁵ 2017 ONSC 7344.

no provision for his wife and died 19 days after signing his Will. Ms. Angeloni was still living in a long-term care facility and needed a high level of care. She commenced a dependant's support application.

Four days after Mr. Angeloni's death, TD Canada Trust prepared a statement of his portfolio of holdings that showed \$744,634.07. The family home had been sold for just under \$650,000.00.

According to the estate trustee's former solicitor, the estate trustee (the deceased's niece) had distributed assets from the estate to various beneficiaries, which Ms. Angeloni believed included her share of the proceeds of the sale of the home. However, the estate trustee's new solicitor advised that Mr. Angeloni had *no assets* at the time of his death. Further, there was evidence that before his death Mr. Angeloni had transferred the funds from the proceeds of the sale into a joint account with his niece, the estate trustee.

The Court noted that if the niece improperly distributed the assets of Mr. Angeloni's estate within six months of his death, contrary to s.6(14) of the *FLA*, especially if the distribution included Ms. Angeloni's share of the net proceeds of sale of the matrimonial home, those funds should be preserved pending a determination of the issues.

The Court went on to apply the test for preservation of an estate's assets under Rule 45.01 of the *Rules of Civil Procedure*, noting that it is the same as the test for granting interim injunctive relief under Rule 45.02 set out above:

- Ms. Angeloni claimed a right to the funds in the Estate as well as her share of the proceeds of sale of the matrimonial home;
- The serious issues to be tried were Ms. Angeloni's dependant's relief claim for her future care needs and damages sought by her against the Estate; and
- The respondents had not provided any evidence that they would suffer prejudice as a result of a non-dissipation order, which favoured granting the order that Ms. Angeloni sought.

The estate trustee was ordered to produce an informal accounting and both the estate trustee *and* the beneficiaries who received the estate assets, were ordered "not to dissipate, transfer, encumber, waste, sell, dispose of, or otherwise deal with any of the assets of the Estate of Mr. Angeloni or any monies gifted to them or received by them for four years before Mr. Angeloni's death or from the Estate after his death, pending the resolution of the proceedings subject to any further Order of the Court or agreement in writing between all of the parties to this proceeding".

In *Lukic v. Zaban*,¹⁶ the Court made an order for interim preservation of an automobile under Rule 45 during a motion for interim support against the estate. The Plaintiff alleged she was in a romantic relationship with the deceased and was a dependant. She also claimed that the deceased gifted a BMW and a home to her when he was alive. The defendants, the adult children of the deceased, denied the plaintiff was a dependant and reported the car as stolen to the police, had the car seized, and transferred the ownership of the car.

While there was insufficient evidence for an order for interim support under section 64 of the *SLRA*, there was sufficient evidence to show that it was probable that the deceased had gifted the BMW to the plaintiff: the plaintiff had exclusive use of the vehicle, the deceased signed the transfer portion of the ownership certificate and there was a recording of the deceased in which he says the BMW belongs to the plaintiff.

The Court noted that there were two different types of orders the Court could make with respect to preserving personal property pending the hearing of the dependants' support claim. The first being under s.104 of the *Courts of Justice Act*: An order for recovery of personal property that appears to have been unlawfully taken from the possession of the plaintiff.¹⁷ Under this type of Order, the Plaintiff would be entitled to possession but would also be responsible to pay the necessary fees and expenses associated with transfer, licencing, insurance and maintenance. Further the Plaintiff would be liable for any loss suffered by the estate if the estate is ultimately found to be entitled to possession.

Rule 44 of the *Rules of Civil Procedure* is the Rule giving effect to s.104. Rule 44.03(1) provides for the Court to order the party retaining the possession of the property to pay twice the value of the property into Court as security or to make such order as may appear just.

Rule 45 is a separate power to order interim preservation of personal property. That is an order for custody or preservation of property pending the outcome of the litigation. For example, the Court could order the estate to store the vehicle safely, to maintain it in good repair and not to permit it to be used or sold. Or if the goods in question are likely to deteriorate, the Court may order them sold to preserve the value.

In *Lukic*, the Plaintiff was found to have established a strong *prima facie* case to ownership and possession of the car. The Court noted that it "seems fair" to permit the plaintiff to make an election. She could either choose to demand possession of the vehicle and pay security into Court by cash, bond, or letter of credit in the amount of \$35,000.00, in which case the estate was to surrender the vehicle to her and transfer the ownership. Alternatively, the Plaintiff had the option of having the

¹⁶ 2012 ONSC 6078.

¹⁷ RSO 1990, c C.43.

estate retain possession of the vehicle but pay \$35,000.00 into Court. Or as a further alternative, if the parties agreed, the BMW could be sold, and the proceeds of sale paid into Court.

As set out in the costs endorsement,¹⁸ the Plaintiff elected for the estate to pay \$35,000 into Court rather than give her possession of the vehicle.

MAREVA INJUNCTION AND NORWICH ORDERS

Under section 101 of the *Courts of Justice Act*, a *Mareva* injunction (or “freezing order”) may be acquired to preserve assets that could be used to pay a dependant’s support award.

The jurisdiction of Ontario Courts to grant *Mareva* injunctions was confirmed by the Court of Appeal in *Chitel v. Rothbart*.¹⁹ The Court referred to and adopted Lord Denning’s five “guidelines” for granting *Mareva* injunctions set out in *Third Chandris Shipping Corp. v. Unimarine S.A.; The Pythis*.²⁰ They are:

- i. The plaintiff should make full and frank disclosure of all matters in his knowledge which are material for the judge to know.
- ii. The plaintiff should give particulars of his claim against the defendant, stating the ground of his claim and the amount thereof, and fairly stating the points made against it by the defendant.
- iii. The plaintiff should give some grounds for believing that the defendants have assets in the jurisdiction.
- iv. The plaintiff should give some grounds for believing that there is a risk of the assets being removed before the judgment or award is satisfied.
- v. The plaintiff must give an undertaking as to damages.

Recently the Divisional Court in *SFC Litigation Trust (Trustee of) v. Chan*²¹ clarified that courts have wide discretion in awarding *Mareva* injunctions or freezing orders and are not constrained by these “guidelines”. In particular, the majority held that the guideline that the defendant have assets in Ontario in order to obtain a *Mareva* injunction is not a strict requirement.

Further a Norwich Order may be appropriate. A Norwich Order is a pre-action discovery mechanism

¹⁸ *Lukic v. Zaban*, 2013 ONSC 93.

¹⁹ 32 OR (2d) 513.

²⁰ [1979] QB 645 (CA).

²¹ 2017 ONSC 1815 (Div Ct).

that compels a third party to preserve and provide evidence in its possession to a potential plaintiff for use in litigation. Such an order might be sought where a bank is in receipt of funds allegedly procured by fraud. Such orders are only granted in exceptional cases, see *GEA Group AG v. Flex-N-Gate Corporation*.²²

In *Pavao v. Ferreira*,²³ a wife and husband separated, and subsequently the wife commenced an application under the *FLA* for support and equalization a few months before the husband's death. Following the husband's death, the wife continued the *FLA* application by way of a Notice of Application under the *SLRA* and commenced a dependants' support application.

In the context of the *FLA* and *SLRA* proceedings, the wife discovered that the husband's bookkeeper had signing authority on many of the husband's bank accounts; was in possession of many of his financial records; and that the bookkeeper's home address was the mailing address for many of the deceased's records, including income tax returns.

The wife also discovered that shortly before the date of separation, the husband had sold a restaurant property and deposited the proceeds of sale into a joint account with his wife. While the bank account was held jointly, the wife did not know it existed. She only discovered it existed after the Court issued an order compelling the bank to disclose all accounts belonging to the husband.

The wife also discovered that the bookkeeper made questionable withdrawals from the deceased's accounts. Notably, the bookkeeper had transferred significant funds out of the joint account. Some transfers happened after the deceased's sons had been appointed as attorneys for property for the deceased and in at least one case, after his death.

The wife brought an urgent motion seeking a *Mareva* injunction for the purposes of freezing the bookkeeper's accounts and/or the return of the money the bookkeeper had drawn on the joint account. The wife also sought a *Norwich* order for disclosure of information from the bookkeeper's accounts.

The Court noted that Section 101 of the *Courts of Justice Act* authorizes the Court to grant an interlocutory or mandatory order, and in order to claim a mandatory order on an interlocutory basis, the wife would have to satisfy the test for a *Mareva* injunction showing: 1) a strong *prima facie* case; 2) that the defendant has assets in the jurisdiction; and 3) that there is serious risk that the defendant will remove property or dissipate assets before the judgment.

The Court was satisfied that the wife met the test for a *Mareva* injunction, as she had a strong *prima*

²² 2009 ONCA 619.

²³ 2017 ONSC 542.

facie case that the bookkeeper had converted the funds from the joint account, there was a serious risk of removal or dissipation of such assets, and the 81-year-old wife was in poor health and would suffer irreparable harm if the assets were dissipated. The Court also found that this was an appropriate case for a *Norwich* order compelling disclosure from the bank. In a later court decision, the Court continued the *Mareva* injunction order but denied a further *Norwich* order.²⁴

CONCLUSION

If there is a risk that the assets of the estate will be dissipated before an order for dependants' support can be made, it is important to review the options available to preserve the assets of the estate.

For illustrative purposes, a non-dissipation order or suspensory order under Section 59 of the *SLRA* could issue as follows:

THIS COURT ORDERS that the Estate Trustee shall not dissipate, transfer, encumber, waste, sell, dispose of, or otherwise deal with any of the assets of the Estate pending the resolution of these proceedings, subject to any further Order of this Court or agreement in writing between all of the parties to this proceeding.

THIS COURT ORDERS that pursuant to section 59 of the *Succession Law Reform Act*, the Respondents are hereby restrained from dealing with any of the assets that form part of the Estate pursuant to section 72 of the *Succession Law Reform Act* pending the agreement of the parties or further Order of the Court.

24 *Pavao v. Ferreira* 2018 ONSC 1573.

CHAPTER 7: INTERIM DEPENDANTS' SUPPORT AND FUNDING ORDERS

The very nature of a dependants' support claim from the perspective of a claimant is premised on the contention that the deceased has not provided adequate support to meet the claimant's needs. If the claimant has minimal assets other than those sought from the estate, the claimant may have difficulty meeting expenses, including legal expenses, while the claim makes its way through the courts. It may be appropriate for a claimant to seek interim relief for support in order to fund such expenses while the litigation is ongoing.

THE TEST FOR INTERIM SUPPORT

Granting interim dependants' support is not granted by the court lightly. The courts have long established that it is not enough to simply establish impecuniosity.¹ Where an application is made under Part V of the Section 58 of the *Succession Law Reform Act*² (the "**SLRA**"), and the Applicant is in need of (and entitled to) support but any or all of the matters referred to in section 62 or 63 have not been ascertained by the court, the court may make such interim order as it considers appropriate.

A motion for interim support is governed by section 64 of the *SLRA* which provides:

Where an application is made under this part and the applicant is in need of and entitled to support but any or all of the matters referred to in sections 62 and 63 have not been ascertained by the court, the court may make such interim order under section 63 as it considers appropriate.³

This section conveys broad discretion on the court, and a judge may make an order for interim support such as deemed appropriate. In *Perkovic v. McClyment et al*, the court held that an applicant must demonstrate "some degree of entitlement to, and the need for, interim support."⁴ The party seeking interim relief must establish three things:

1 *Ly v. Chiofalo*, 2017 ONSC 2444, 2017 CarswellOnt 5762 (Ont. S.C.J.).

2 RSO 1990, c S.26.

3 *Zavet v. Herzog*, 2018 ONSC 3398 (CanLII), <<http://canlii.ca/t/hskb3>>.

4 2008 CanLII 52315 (ON SC), at para 9.

1. Impecuniosity or financial difficulties such that the party would otherwise not be able to proceed with the case;
2. A *prima facie* case of sufficient merit to warrant pursuit; and
3. Special circumstances to satisfy the court that the case is within the narrow class of cases where such an extraordinary exercise of its powers is appropriate.

The court can weigh and assess the evidence (to the extent permitted by the nature of the evidence) as well as any pre-hearing testing of the evidence. If after such assessment, the court concludes that the record contains credible evidence from which one could rationally conclude that the applicant could establish a claim for support, then an interim support order may be issued.⁵

While a party seeking an interim cost order must have a strong *prima facie* case, the fact that issues remain in dispute does not preclude an interim cost order. The onus is on the moving party to provide the necessary information upon which the court can decide to exercise discretion. With adequate financial disclosure, the court may order interim costs as a component of support for impecunious applicants under the *SLRA*. In *Kraus v. Valentini Estate*, the applicant under section V of the *SLRA* sought interim disbursements for previously incurred legal fees as well as projected future legal fees. The applicant had been previously awarded interim support. The Honourable Justice Kurisko ordered the payment of “interim disbursements” to the applicant equalling one-half of her legal fees incurred to date. Justice Kurisko, in making the decision, noted that without an interim order, the Plaintiff’s ability to proceed to trial would be severely impeded.⁶

Similarly in *Kalman v. Pick*, the Applicant clearly set forth evidence of her financial status and her ongoing monthly income and expenses.⁷ Based on this evidence, Justice Brown was satisfied that, given her current financial circumstances and the limited resources and monthly obligations that she had, were an interim order not made, the applicant’s ability to prosecute her case would be prejudiced, or would depend on the generosity of her counsel. Justice Brown was satisfied that there would be no prejudice occasioned by anyone by an interim order.

WHAT CONSTITUTES A “PRIMA FACIE” CASE?

A *prima facie* case is a claim which appears capable of succeeding on its face. The determination of whether a *prima facie* case has been made out involves a consideration of the merits of the claim to determine whether it can be established. It is incumbent on the court to examine the entire

⁵ *Perkovic v. McClyment*, *supra*.

⁶ *Kraus v. Valentini Estate*, 1993 CarswellOnt 2128, 1993 OJ No 3276 (Gen Div), at para 15.

⁷ 2013 ONSC 304.

record before determining whether a *prima facie* case for dependants' support has been made out. In *Perkovic v. McClyment Estate*, Justice Brown stated that:

On an interim motion a court can weigh and assess the evidence, to the extent permitted by the nature of the evidence and any pre-hearing testing of it. If, after such assessment, the motions court concludes that the record contains credible evidence from which one could rationally conclude that the applicant could establish his claim for support, then an order for interim support may issue.⁸

DETERMINING PROVISIONS FOR ADEQUATE SUPPORT

When determining entitlement to support from a spouse's estate pursuant to the *SLRA*, Part V, such support does not simply provide for bare necessities. It should provide proper support which will permit the dependant to continue to enjoy the same or similar standard of living to which the dependant had been accustomed while supported by the spouse.⁹ The meaning of "support" under the *SLRA* includes "not only furnishing food and sustenance and supplying the necessities of life, but also the secondary meaning of giving physical or moral support. The word 'support' in the *SLRA* extends that meaning to include what might by some be considered as non-essentials or luxuries."¹⁰

The definition of what constitutes adequate support is a factual inquiry based upon the circumstances of each individual case. The courts have legislative guidance pursuant to Section 62 of the *SLRA* and the enumerated factors thereunder to consider in determining what support would be adequate. The courts, in considering what constitutes adequate and/or proper support have identified that the provision made by the deceased must not only be adequate today, but adequate in the future. Where a deceased has not made adequate provision for the proper support of his dependant, the court may order such provision as it considers adequate be made out of the estate for the proper support of the dependant. In determining the amount and duration of support, the court shall consider all the circumstances of the applicant.

As a result of an increase in blended families, remarriages, and other types of spousal relationships there has been a general change in the characteristics of the family unit over the last few decades, and with the rapidly aging population, estate practitioners are seeing a correlative increase in the number of claims being brought against estates not just by spouses of a deceased person, but by their combined children, extended family and other dependants as well. It is important to take

⁸ *Perkovic v. McClyment et al*, *supra*, at para 9.

⁹ *Kipp v. Buck Estate*, 1993 CarswellOnt 1708 (Ont Gen Div).

¹⁰ *Re Davies* 1979 CarswellOnt 605 (Surr Ct) at para 15.

note that when dealing with applications for a support order, the court will undoubtedly take into account: what legal obligations would have been imposed on the deceased had the question of provision arisen during his lifetime; and, what moral obligations have arisen between the deceased and dependants as a result of society's expectations of what a judicious person would do in the circumstances.¹¹ The Ontario Court of Appeal has also affirmed that the court must consider the legal and moral obligations of the deceased to independent spouses and children.

Generally, the type of information a court expects to receive from an Applicant in order to make a *prima facie* case for interim dependant support, includes statements of income and expenses for the years before and after the passing of the deceased, verified and supported by relevant documents, including income tax returns and pay stubs to demonstrate employment income, as well as net worth statements for that period of time.¹² The financial statements published under Rule 13 of the *Family Law Rules* also provide useful guides for organizing and presenting this type of evidence.¹³

11 *Cummings v. Cummings* (2004), 69 O.R. (3d) 397 (Ont.C.A.) at para 40.

12 *Romero* at para 59.

13 *Ibid.*

CHAPTER 8: RIGHTS AND REMEDIES WHERE FRAUDULENT CONVEYANCES/HIDDEN ASSETS

Depleting assets and therefore an estate prior to death – so as to avoid providing for dependants – may amount to a fraudulent conveyance. Remedies may include the use of the *Fraudulent Conveyances Act*¹ (the “**FCA**”), and the *Succession Law Reform Act*² (the “**SLRA**”) to return to the Estate, those assets that the testator may have gifted or transferred away. For example, it is well settled 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.

Such transfers of property may attract remedies set out in the *FCA*, in particular Section 2, in circumstances where estate planning blatantly disregards the statutory rights of beneficiaries and/or dependants, protected under the provisions of the *Family Law Act*³ (the “**FLA**”) and *SLRA*.

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.”⁴ 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.⁵

The *FLA* does not provide 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

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

2 *Succession Law reform Act*, R.S.O. 1990, c. S.26 [SLRA].

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

4 *FLA supra* note 4 preamble.

5 *FLA* s.4(1) – “valuation date”.

from increases in the combined net worth of the spouses which occurred during the course of the marriage or partnership.”⁶

If a situation arises 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. A surviving spouse may choose to elect under *FLA* Section 6(1), which permits the surviving spouse on death to make an application for an equalization of net family property: “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.”

The *FLA* election provides a surviving “spouse”, as defined in Part I of the *FLA*, 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’ net family properties (“**NFP**”). However, to do this foregoes entitlement, if any, under the deceased’s Will and/or 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* can only be pursued during the lifetime of the spouse.

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 prior to death, but failed to make adequate provisions for said support. The *SLRA* defines dependants 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.⁷

An order for support is made by way of application to the Court and can be made in circumstances where the dependant benefits under a Will, or on an intestacy, and even 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/her lifetime. However, section 72 of the *SLRA* provides that the value of certain transactions effected by the deceased before death shall be returned and deemed to form part of the estate for the purpose of satisfying any orders made by the Court directing payments to a dependant.⁸

⁶ *Menage v. Hedges* (1987), 8 R.F.L. (3d) 225 (Ont UFC) at p. 243.

⁷ *SLRA* s. 57.

⁸ *SLRA* s.63(2) and s.72. See Chapter 5.

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”⁹ it will be declared void. This conveyance can be saved if the transferee can provide 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.¹⁰

The courts have considered the words “creditors and others”. The Court has held the words to be interpreted as including not just judgment creditors, but also persons who have actions pending against the transferor where it is clear that they are certain to recover damages.¹¹

The *FLA* and *SLRA* provide spouses and dependants 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 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*?

It has become more common for courts to apply the *FCA*, and 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. As a result of the decision of the Ontario Court of Appeal in *Stone v Stone*,¹² and the concept of “moral claims” established by the Supreme Court in *Tataryn v Tataryn Estate*,¹³ and further endorsed by the Ontario Court of Appeal in *Cummings v Cummings*,¹⁴ our courts established that they are prepared to use section 2 of the *FCA* to set aside these transfers.

LEGISLATIVE APPLICATION TO CASE LAW

In *Stone v Stone*, 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. By doing so, Mr. Stone was hoping to minimize the resulting value of his estate on his death in the anticipation that his second wife would make an equalization claim against his estate. Essentially, he attempted to minimize the value of his estate in order to minimize the potential amount of his second wife’s claim.

9 *FCA*, *supra* note 4, section 2.

10 *FCA*, *supra* note 4, sections 3 and 4.

11 *Hopkinson v. Westerman* (1919), 45 O.L.R. 208 (C.A.) at 211.

12 *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*].

13 *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807.

14 *Cummings v. Cummings* [2004] O.J. No. 90.

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 second wife's claim for equalization under section 5 of the *FLA*. The Ontario Court of Appeal upheld this decision, specifically approving the trial judge's determination to apply section 2 of the *FCA* to the *inter vivos* disposition such that they were declared void as against the surviving spouse. This resulted in the entire value of the *inter vivos* transaction being returned to the deceased's estate for the purpose of calculating his net family property at the time of death, which then provided for an equalization payment to his wife.

A key component to the application of section 2 of the *FCA* in *Stone* was the determination of the trial judge that the surviving spouse was a "creditor or otherwise of the deceased" at the time that the deceased made the *inter vivos* transfers. The Court reasoned 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 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.¹⁵

The Court recognized that the purpose of the dispositions was to defeat/defraud the spouse in respect of her right to an equalization payment on death.

The intent of the deceased with regards to making the transfers was integral in the Court's ultimate decision. The trial judge found that section 2 of the *FCA* applied to the transfers in question because they were made "with intent to defeat, hinder, delay or defraud" the spouse.

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 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.

15 *Stone v. Stone* ON CA, *supra* note 14, at para 32.

THE SLRA AND DONATIO MORTIS CAUSA

In *Snitzler v. Snitzler*,¹⁶ Mrs. Snitzler, an elderly woman, lived at home with her husband and her adult son, William. After she was diagnosed with cancer and shortly prior to her death, Mrs. Snitzler transferred title to the home from herself alone to herself, her husband and her two children as joint tenants. Following her death, William brought a claim against her estate for support as a dependant. Despite being an adult child, he claimed that he was entitled to support from Mrs. Snitzler's estate.

William brought a motion seeking an order that the proceeds from the sale of the house were to form part of Mrs. Snitzler's estate and therefore constituted a gift *mortis causa* pursuant to Section 72(1)(a) of the *SLRA*. Pursuant to the *SLRA*, a gift can be clawed back into the estate of the deceased in order to pay support to a dependant. A gift *mortis causa* is one that is made in contemplation of death. If the court determined this to be the case, then William could rely on the proceeds of the house to pay his support provided he was successful.

The Court reviewed established three essential components required in order to have a valid *donatio mortis causa*:

1. The gift must be made in contemplation but not necessarily in expectation of death;
2. There must have been delivery to the donee of the subject matter of the gift; and
3. The gift must be under such circumstances to show that it is to revert to the donor in such a case that he or she should recover.

The Court's application of these components lead them to the conclusion that because Mrs. Snitzler still retained some legal right in the property, given that she still maintained possession on title, this did not constitute a valid gift *mortis causa* and thus Section 72(1)(a) could not apply.

THE DOCTRINE OF SECRET TRUSTS

A fully secret trust is a trust that a court imposes on a person who has obtained title to property obliging him to hold it for the benefit of another person which he or she knew that it was given or allowed to pass to. This arises outside the will. A common argument among potential beneficiaries of an estate is to say something along the lines of "he told me I could have it" thus trying to form a secret trust.

However, it is well settled in law that there are conditions that must be satisfied in order to have

¹⁶ *Snitzler v. Snitzler*, 2015 ONSC 2539.

a valid secret trust. The Ontario Superior Court of Justice confirmed that without communication of the terms of the trust to the trustee, there can be no secret trust.¹⁷ This was confirmed by the British Columbia Court of Appeal in the case of *Peters v. Peters Estate*.¹⁸

Both the OSCJ and the BCCA relied on *Jankowski v. Pelek Estate*¹⁹, a Manitoba Court of Appeal decision in which the court concluded that in order for there to be a valid secret trust:

- The settlor must communicate his or her intentions in respect of the trust to the trustee; and
- The trustee must acquiesce to hold the property on trust for the specified beneficiaries.

CONCLUSION

There are many reasons that individuals may wish to transfer or make gifts of their assets later in life. Generally, these transfers and gifts will be respected in accordance with an individual's right to dispose of his or her assets as he or she sees fit. However, where such transfers or gifts are effected in order to defeat a moral claim against the estate, a claimant may utilize the *FCA* and the *SLRA* to seek appropriate compensation.

17 *Ziomek v. Miokovic*, 2014 CarswellOnt 12550, 2014 ONSC 5126, 244 A.C.W.S. (3d) 505.

18 *Peters v Peters Estate*, 2015 ABCA 301 (CanLII).

19 *Jankowski v. Pelek Estate*, 1995 CarswellMan 447, 131 D.L.R. (4th) 717, 60 A.C.W.S. (3d) 216.

CHAPTER 9: COMPETING DEPENDANTS' SUPPORT CLAIMS AND COURT TREATMENT

INTRODUCTION

Nowadays the rate of separation and divorce is on the rise, which has contributed to an increase in the number of unmarried/cohabitating partners. Combine this with the modern day interpretation of “common law”, the relatively recent recognition of equality among same-sex partnerships, and, let’s not forget children, stepchildren, adopted children and even genetically procured children. What results are a number of issues and considerations for estate and succession planners. Though relationships may come and go, those born out of them who rely on support need to be accounted for. As society has taken an increasingly liberal view towards “relationships” so too, has the law. This leaves open the possibility of numerous support related claims in the context of estate litigation.

Suffice it to say, that with our aging population, it is more important than ever to consider these relationships from the perspective of effective estate planning and litigation prevention. This chapter considers a sampling of decisions from the perspective of both the deceased and the estate-planning lawyer as a means of presenting the common issues resulting in competing support claims under Section V of the *Succession Law Reform Act*¹ (the “**SLRA**”).

THE LAW

Who can be a Dependant?

Section 57 of the *SLRA* defines a dependant for the purposes of Part V of the *SLRA* as a spouse, parent, child, or brother or sister to whom the deceased was providing support or was under a legal obligation to provide support immediately before his or her death. This definition can be broken down into two parts: First, the requirement that the applicant be of a particular relation to the deceased; and, second, the requirement that the deceased had a legal obligation to provide support to the applicant at the time of death.

1 *Succession Law Reform Act*, RSO 1990, c S.26.

With respect to multiple support claims, those which arise most frequently are “spouse” and “child”. These are defined broadly for the purposes of Part V of the *SLRA*.

Child

The definition of child includes naturally born children of the deceased in addition to grandchildren, and someone who the deceased has demonstrated a settled intention to treat as a child of his or her family.² This means that children that are born out of a relationship which subsequently falls apart are eligible for dependant support from both their natural parents as well as from those who subsequently demonstrate an intention to treat them as a child. This is common in the context of a second marriage or common law relationship.

Spouse

The definition of spouse includes not only currently married spouses and common law spouses (whether they be same-sex or heterosexual), but also encompasses couples who were married but whose marriage was subsequently terminated or was declared a nullity. The definition also includes unwed spouses, meaning two people who have cohabitated for a period of not less than three years, or are in a relationship of some permanence and are the natural or adoptive parents of a child.³ A question arises with regard to the requirement of cohabitation for a period not less than three years. Does this mean at the time of death or any three-year period throughout the lifetime of the deceased?

In *Radziwilko v. Seef Estate*⁴ the court provided clarification and interpreted the definition to mean that the applicant and the deceased must only have been cohabitating for three consecutive years at some point in time and not necessarily at the time of death.

A Legal Obligation

Section 31 of the *Family Law Act*⁵ (“**FLA**”) provides an obligation upon parents to support their children. Under the *FLA*, a parent includes a person who has demonstrated a settled intention to treat a child as a child of his or her family with an exception provided for foster homes. This provides that children from broken marriages are fully entitled to apply for dependants’ support even if an estranged parent has failed to fulfill a legal obligation to provide support.

² *SLRA*, s.57(1).

³ *Ibid.*

⁴ [2003] OJ No 884 (Div Ct).

⁵ *Family Law Act*, R.S.O. 1990, c. F. 3. [*FLA*].

Section 30 of the *FLA* provides an obligation on spouses to support one another. Under the *FLA* a spouse includes one of two people who are married, as well as one of two people who have cohabitated continuously for a period of not less than three years or are in a relationship of some permanence if they are the natural or adoptive parents of a child. This provides that estranged spouses may be eligible to apply for dependants' support where the legal obligation to support one another has continued. An issue arises in that former spouses may be required to prove that they have received continuous support up until the death of the deceased, whereas a current spouses likely qualifies as a dependant regardless of whether receiving support at the time of death or not.

Unwed Spouses

Unwed spouses face an additional burden in that they must demonstrate that the relationship was conjugal. Section 1(1) of the *FLA* defines cohabitation as living together in a conjugal relationship. This principle was best interpreted in *Molodowich v. Penttinen*⁶ where the court established seven factors that need to be considered when establishing conjugal relationship:

1. Shelter;
2. Sexual and personal behavior;
3. Services;
4. Social;
5. Societal;
6. Support (economic); and
7. Children

In *Theano v. Ontario (Public Guardian & Trustee)*⁷ these factors were applied. The applicant brought a dependant's support application. Though unwed, the applicant and the deceased had been in a relationship for at least twelve years and lasted until the death of the deceased. Between 1991 and 2002, the applicant and the deceased lived together for various periods of time. In 2002, the deceased was diagnosed with cancer. The applicant stated that she cared for deceased from the time of diagnosis until his death.

In his decision, Spence J concluded that when assessing the merits of the relationship by applying the above noted factors, it did not satisfy the requirements of a conjugal relationship. Based on the evidence presented by the applicant, all that could be shown is that they lived together for various periods of time but kept their financial affairs separate. This was insufficient to establish that the

⁶ 1980 CarswellOnt 274.

⁷ [2006] O.J. No. 458 (Sup. Ct. J.).

applicant and the deceased met the definition of spouses under section 1 (1) of the *FLA* and thus precluded the applicant from claiming support under section 58 of the *SLRA*.

This case serves as one example of how a court can determine whether a relation qualifies as conjugal under section 1(1) of the *FLA*. This determination is made on a case-by-case basis and is entirely dependent on the facts.

CASE LAW

There are multiple scenarios in which there can be competing claims for dependant support under Section V of the *SLRA*. How these claims are treated differ from case to case. Anyone who was receiving support or was legally entitled to support immediately prior to the death of the deceased can bring a claim for dependant's support. In *Perilli v. Foley Estate*⁸ Justice Henderson states the process in which courts shall approach multiple support claims:

Therefore, in a claim under section 58 of the *SLRA* in Ontario, I find that the court must first identify all of the dependants who may have a claim on the estate. Then, the court must tentatively value the claims of those dependants by considering the factors set out in the legislation and the legal and moral obligations of the estate to the dependants. Thereafter, the court must identify those non-dependant persons who may have a legal or moral claim to a share of the estate. Lastly, the court must attempt to balance the competing claims to the estate by taking into account the size of the estate, the strength of the claims, and the intentions of the deceased in order to arrive at a judicious distribution of the estate. This exercise may involve the prioritization of the competing claims.⁹

Cummings v. Cummings

In *Perilli*, Justice Henderson expands upon the rule from *Cummings v. Cummings*,¹⁰ a leading case from the Ontario Court of Appeal. In *Cummings*, the deceased died leaving a widow, a divorced spouse, and two children, Paul and Elizabeth, from his marriage with his divorced spouse.¹¹ It was not disputed that Paul and Elizabeth qualified as dependants under the *SLRA*.¹² Elizabeth was 18 years old and hoped to pursue a Master's degree in social work.¹³ Paul, a university graduate, was 24 years old and suffered from a progressively debilitating form of muscular dystrophy. It was

8 *Perilli v. Foley Estate*, [2006] 23 E.T.R. (3d) 245 [*Perilli*].

9 *Ibid* at para 61.

10 *Cummings v. Cummings*, [2004], O.J. No. 90 (Ont. C.A.) [*Cummings*].

11 *Ibid* at paras 11-12.

12 *Ibid* at para 6.

13 *Ibid* at para 7.

determined that the cost of Paul's future care alone would exceed the value of the deceased's estate.¹⁴

The deceased lived with the widow for approximately 10 years but had only been married for 9 months before he passed away.¹⁵ Only Elizabeth and Paul (the "Applicants") made claims for dependant's support. They sought payment for child support ordered in the judgment for the divorce, as well as an establishment of a trust provided for in the deceased's will under which payments for the support of Paul and Elizabeth would be made to their mother, and additional payments for support of Paul and Elizabeth pursuant to Part V of the *SLRA*.

Initially, the total value of the estate comprised \$135,000, the matrimonial home and a cottage property (which were both held jointly by the deceased and his widow), as well as a RRSP that named the widow the designated beneficiary. When factoring in these additional assets, which were deemed available for a dependant's support order pursuant to section 72 of the *SLRA*, the total value of the estate for the purposes of the Applicant's claim was \$637,500.¹⁶

Justice Cullity determined that the deceased did not adequately provide for his dependant children by way of the testamentary trust. The court determined that support should be paid in the amount of \$250,000 in lump sum, \$10,000 of which was to go to Elizabeth to complete her Master's degree with the balance going to Paul in order to provide for his necessary care.¹⁷

The Court of Appeal agreed with Justice Cullity, stating that "the application judge was entitled, on the record before him, to exercise his discretion in limiting the arrears of support to the date of death, and to deal with the allocation of the assets of the estate in the post-death era on the basis of dependants' relief principles."¹⁸

Dagg v. Cameron

Another case that continues to expand upon the interpretation of Section 72 of the *SLRA* is *Dagg v. Cameron*.¹⁹ In this case, the appellant and the deceased were married in September 2003. They had two children together. In 2010, the deceased took out a \$1 million policy of insurance (the "Policy") on his life, in which he named the appellant as the beneficiary. In January 2012, the appellant and the deceased separated and shortly thereafter, the appellant commenced a matrimonial proceeding against the deceased.

¹⁴ *Ibid* at paras 8-9.

¹⁵ *Ibid* at para 12.

¹⁶ *Ibid* at para 17.

¹⁷ *Ibid* at para 18.

¹⁸ *Ibid* at para 25.

¹⁹ *Dagg v. Cameron*, 2017 ONTARIO COURT OF APPEAL 366.

In February 2013, Justice Rowsell made a consent order requiring the deceased to pay interim child support and spousal support payments.²⁰ Justice Roswell's order further stated that the deceased would maintain the appellant as the irrevocable beneficiary on any life insurance policy. In July 2013, the Order was varied to adjust the amounts that the deceased was required to pay in terms of child and spousal support, while "All other terms of the order of Justice Rowsell dated February 27, 2013 shall remain in full force and effect."²¹

Following the separation with his wife, the deceased became involved with the respondent. In July 2013, the respondent told the deceased that she was pregnant with his child. Their son was born in February 2014, three months after the deceased passed away.²²

Shortly after having been diagnosed with cancer in November 2013, the deceased executed his Last Will and Testament and a Canada Life Title form. These documents amended the beneficiary designation on the Policy to include the respondent and his son and daughter from his marriage with the appellant.²³ Upon learning of the deceased's beneficiary changes under the Policy, while the deceased was in the hospital, the appellant brought a motion seeking to restore her designation as the sole beneficiary.²⁴ Justice Nelson, who heard the motion on November 20, 2013, found that the deceased breached the Rowsell Order, and ordered that the insurance company amend the beneficiary designation such that the appellant be named the sole and irrevocable beneficiary on the Policy.²⁵ Three days later, the deceased passed away leaving an insolvent estate.²⁶

In March 2014, the respondent brought an application under Part V of the *SLRA* for dependant's support. Incorporated in her application was a request for a determination that section 72 of the *SLRA* applied to the \$1 million in proceeds from the Policy, "the value of which form part of the Estate and is available to satisfy the claim for support."²⁷

In reviewing the relevant jurisprudence, the Ontario Court of Appeal found that courts have recognized that the obligation to make a support payment under the *Divorce Act* or the *Family Law Act* creates a debtor-creditor relationship.²⁸ Thus, when a support payor dies their estate may be liable for past and future support obligations, depending on the terms and duration of the support order and the act under which the order is made.²⁹

20 *Ibid* at para 10.

21 *Ibid* at para 11.

22 *Ibid* at paras 12-14.

23 *Ibid* at paras 15-16.

24 *Ibid* at para 17.

25 *Ibid* at para 18.

26 *Ibid* at para 20.

27 *Ibid* at para 21.

28 *Ibid* at para 66.

29 *Ibid* at para 67.

Justice Brown went on to find that the Divisional Court erred in finding that the appellant did not fall under section 72(7) of the *SLRA* because she was not a secured creditor with a secured interest in the Policy. He reasoned that a proper interpretation of section 72(7) encompasses any creditor of the deceased so long as the transaction falls under those described in section 72(1),³⁰ including “a policy of insurance effected on the life of the deceased and owned by him.”³¹

The Ontario Court of Appeal concluded that in a situation where the deceased owns a life insurance policy in which he or she was previously ordered by a court to designate a support recipient as the irrevocable beneficiary of the policy, the support recipient's rights to the policy are protected through section 72(7) from being deemed part of the deceased's estate through the operation of section 72(1). In other words, upon the death of the support payor, the support recipient becomes a creditor of the deceased by virtue of the court order which vests a legal right in the recipient to satisfy the deceased's support obligations as calculated at the time of his or her death through the policy's proceeds.³²

The judgment of the Ontario Court of Appeal reverses the lower courts' decisions which held that a court-ordered irrevocable designation on a life insurance policy was subject to section 72 of the *SLRA*, to the extent that a life insurance policy's proceeds may be used to satisfy an award for support under the *SLRA*.

This decision arguably affords greater protection for support recipients who previously may not have been aware of the powerful effect that a *SLRA* claim could have on their incoming support payments. Moreover, this case highlights the need for parties to structure their affairs appropriately in the event of a matrimonial dispute if the parties wish to exclude life insurance policy proceeds from the grasp of the *SLRA*.³³

Cowderoy v. Sorkos Estate

While designated beneficiaries of insurance policies and legal obligations enforced by legislation tend to grab the spotlight in terms of competing support claims, it may take something much less than that to create a problem. *Cowderoy v. Sorkos Estate*³⁴ illustrates how a simple promise to convey property in exchange for labour, made prior to death, created significant implications with regards to competing dependant support claims. In this case, Gus Sorkos and Victoria Cowderoy

30 *Ibid* at para 73.

31 *Ibid* at para 74; *SLRA* at s 72(1)(f).

32 *Ibid* at para 75, 77.

33 *Ibid* at para 84.

34 *Cowderoy v. Sorkos Estate*, 2014 ONTARIO COURT OF APPEAL 618.

were in a common-law relationship prior to Victoria's death.³⁵ During that time, Gus developed a relationship with Mark and Paul Cowderoy, Victoria's grandchildren.³⁶ Following Victoria's death, Gus re-married to a lifelong acquaintance named Rena.³⁷

Gus passed away in 2008. In his will, he left Rena a number of bequests. Most notably, \$250,000, the contents of their residence and a RRIF.³⁸ The rest of the estate was left to Gus's siblings. Rena brought a claim for dependant's support against Gus's estate as did Mark and Paul Cowderoy. Notably, Mark and Paul sought to enforce specific promises made to them by Gus prior to his death.³⁹

The trial judge elected to hear these claims separately, with the Mark and Paul's action being heard first. At that trial, the judge found that Gus had promised to give them his farm and cottage properties after he died in exchange for their help while he was alive. The judge held that the Cowderoys were entitled to the farm and cottage properties and ordered that the properties be transferred to them immediately.⁴⁰

As for Rena's claim, the judge granted her some additional support from the estate but calculated the amount of support based on the estimated value of the estate less the value of the cottage and farm properties that were given to Mark and Paul. These two properties made up the majority of the estate, which left Rena with nothing. She appealed.⁴¹

On appeal, new evidence was introduced showing that the liabilities of the estate exceeded the assets once the properties were removed leaving nothing for Rena by way of support.⁴²

The Court of Appeal held that although it was proper for the trial judge to recognize the promise made by Gus to gift the property to Mark and Paul, it was a mistake not to hear the Cowderoys' action together with Rena's application for support. The agreement between them was for the properties to be given in Gus's will, and not simply transferred on his death. Thus, pursuant to s. 71 of the *SLRA*, the court ought to have still considered the properties as part of the estate when calculating the amount of dependant's support.⁴³

As previously discussed, Section 71 allows the court to claw back into the estate the value of the property gifted by contract up to the amount of actual consideration received. It allows the court to

35 *Ibid* at para 1.

36 *Ibid* at para 2.

37 *Ibid* at para 3.

38 *Ibid* at para 4.

39 *Ibid*.

40 *Ibid* at paras 6-7.

41 *Ibid* at para 9.

42 *Ibid* at para 10.

43 *Ibid* at paras 14-15.

strike a balance the deceased's contractual obligations, which in this case was the agreement to give the properties to Mark and Paul, with a dependant's right to receive support.

Most literature on this case tends to focus on the implications of promising to make testamentary gifts and the subsequent detrimental reliance. Courts typically consider these to be valid promises especially when they are made in respect to land. However, for the purposes of this chapter, it is interesting to see how the Court of Appeal proposed a balance between the deceased's promise to Mark and Paul with the obligation to support Rena.

CONCLUSION

Addressing multiple support claims is a challenge for any court. There is a great deal to consider when assessing their validity and how to balance them. Support is not simply a monetary obligation. There are moral considerations that arise out of promises, contracts, agreements and the like. Conflict between a deceased's testamentary freedom, and moral claims advanced are challenging for a court. Courts approach these issues cautiously, as testamentary freedom is a fundamental right.

CHAPTER 10: DEPENDANTS' SUPPORT CLAIMS VS OTHER AVAILABLE CLAIMS

Bringing a dependants' support claim may not be the only remedy available to a surviving spouse seeking a support (or other type of) payment from an estate. This chapter will examine other options under the *Family Law Act*¹ ("**FLA**"), and the *Succession Law Reform Act*² ("**SLRA**"), and how they compare to a dependant's support claim.

FAMILY LAW ACT OPTIONS

A surviving "spouse" has certain claims available under the *FLA* that they can bring against their deceased spouse's estate. Parts I, III and VI of the legislation have remedies and recourses available to them, provided they meet the differing definitions of "spouse" in each of those Parts.

FLA Elections

The first option can be found under Part 1 of the *FLA* and deals with a surviving spouse's property rights. Before the *FLA* was enacted, Part V of the *SLRA* was the only available option for a spouse who was treated less than generously by his or her deceased spouse.

Under previous marital property legislation, family property division was only applied upon separation or divorce. When the *FLA* was enacted, an "election" for property division upon death was added, with the theory that a person living with a spouse who died should be at least as well treated as one who had decided to end the marital relationship.

Therefore, a surviving *married* spouse has the right to make an "election", within six months of the date of death of their spouse, to bring court proceedings by action or application against the estate of their deceased spouse for an equalization of the couples' net family property, thus forfeiting their entitlement, if any, under the deceased's will and/or on intestacy.³ Part I applies only to spouses who are legally married, even if they were separated or were in the process of separation prior to the deceased spouse's death.

1 RSO 1990 c F.3.

2 RSO 1990 c S.26.

3 *FLA*, section 6(1).

The *FLA* election is set out in section 6(1) of the *FLA*: “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”. That entitlement is an equalization payment.

An equalization payment is a non-discretionary entitlement based on a specific mathematical calculation. 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.

The calculation involves taking the deceased spouse's assets on the day *before* the date of death and subtracting the value of his or her property on the date of marriage to calculate the Net Family Property or NFP. The same calculation would be made with the surviving spouse's assets. If the surviving spouse's amount is lower, the estate has to pay $\frac{1}{2}$ of the difference to the surviving spouse. An equalization of net family property ensures that married spouses share the value of all assets that were acquired during the marriage.

As noted, the valuation date for deceased spouses is the *day before* one of the spouses dies leaving the other spouse surviving and can be found in section 4(1) of the *FLA*. This valuation date allows a surviving spouse to share in property jointly owned by the deceased spouse and third person. Otherwise the third person would acquire title to the property previously owned by the deceased spouse by survivorship and its value would not be included in the equalization.

Further, sections 6(6)-(7) of the *FLA* require the value of certain property (i.e. insurance policies, pensions) be credited against the surviving spouse's entitlement to an equalization payment.

While the Court has discretion pursuant to section 5(6) of the *FLA* to award a higher or lower equalization payment, the Court can only do so if the equalization payment as calculated would be unconscionable. This is a very narrow discretion. Not just inequitable, it must be shocking to the conscience of the Court. *Rivett v. Rivett Estate*⁴ is one of the rare cases where an unequal division of net family property was ordered against the estate of the wife. However, in this case there was ample evidence of bad faith and intent to deceive on the part of the deceased when she took over \$170,000 from joint accounts without her husband's knowledge.

By electing in favour of an equalization, the surviving spouse forfeits any entitlement to take under the Will or on under the intestacy legislation. She or he does not give up the right to receive proceeds under an insurance policy or pensions, but the estate is entitled to a credit for those amounts in the equalization calculation (see ss. 6(6)-6(7) of the *FLA*).

4 (1992), 40 RFL (3d) 73, 45 ETR 266 (Ont Gen Div).

While both an equalization claim under the *FLA* and a dependant's support claim under the *SLRA* are subject to a six-month limitation period, the limitation period is triggered by different events.

Under subsection 61(1) of the *SLRA*, no application for dependant's support can be made more than six months after probate has been granted (although subsection 61(2) provides the Court with the discretion to allow an application to be made at any time "as to any portion of the estate remaining undistributed at the date of the application.").

Under the *FLA*, the six-month limitation period for the election runs from the date of death (section 7(3) (c)). The surviving spouse must file an election in the prescribed form and start an application to the Court within this time. The *FLA* provides protection against distribution of the estate prior to the expiry of this limitation period (see section 6(14)).

Section 2(8) of the *FLA* provides that the Court may extend the time for filing an election if the Court is satisfied that there are apparent grounds for relief; relief is unavailable because of delay that has been incurred in good faith; and no person will suffer substantial prejudice by reason of the delay.

If it is possible, such a motion to extend the time for filing is best brought within the original six-month period, as section 6(16) states:

If the court extends the time for a spouse's application based on subsection 5(2), any property of the deceased spouse that is distributed before the date of the order and without notice of the application shall not be brought into the calculation of the deceased spouse's net family property.

There are several reasons why an election application may be brought late. It could be inadvertence, or the claimant was late learning about his or her rights, or a Will is being challenged, or perhaps the estate is complex, and the claimant is unable to do the necessary calculation to determine whether it is in his or her best interest to make the election. If there is any hesitation at all, a prudent choice would be to request an extension of the time limit.

If the surviving spouse does *not* file the election within six months, he or she shall be deemed to have elected to take under the Will or to receive the intestacy entitlement under the *SLRA* or both, as the case may be, unless the Court, on application, orders otherwise (see s. 6(11)).

A surviving spouse should make every effort to determine any entitlement under the *FLA* *prior* to making an election, as there is no guarantee that once it has been made it can be revoked. There are conflicting authorities on the issue of when an election is irrevocable or when the court may have a residual discretion to set aside the election to avoid an injustice.⁵

⁵ See *Varga Estate v. Varga*, [1987] OJ No 437 (HCJ); *Re Van der Wyngaard* (1987), 1987 CanLII 4347 (ON SC), 59 O.R. (2d) 195 (Surr Ct); and *Re Bolfan Estate* (1992), 1992 CanLII 8634 (ON SC), 87 DLR (4th) 119 (Ont Gen Div).

In *Iasenza v. Iasenza Estate*,⁶ an election was set aside as the election was based on a material misunderstanding or lack of knowledge about the assets that had formed part of the estate and the estate bore some responsibility for the misunderstanding. Also, the application to revoke was timely and there was no prejudice to the other beneficiaries. There is no prohibition against a spouse electing in favour of an equalization pursuant to section 6 of the *FLA* and subsequently bringing a dependant support claim pursuant to section 58 of the *SLRA* on the basis that he/she is not adequately provided for.⁷

Enforcement of Spousal Support

A surviving spouse can also enforce an already existing support order. The *FLA* sets out a spouse's obligation to not only support him or herself but also their spouse under Part III Support Obligations:

Obligation of spouses for support

30 Every spouse has an obligation to provide support for himself or herself and for the other spouse, in accordance with need, to the extent that he or she is capable of doing so. R.S.O. 1990, c. F.3, s. 30; 1999, c. 6, s. 25 (3); 2005, c. 5, s. 27 (7).

"Spouse" in this section refers to both married and common law spouses.

When a common law or married spouse, who is under an order to provide support pursuant to the *FLA*, dies, the estate of the deceased is bound by that order. Part III, subsection 34(4) of the *FLA* is explicit on this point: "An order for support binds the estate of the person having the support obligation unless the order provides otherwise." It is unlikely for a Court to order otherwise.

The surviving spouse may take steps to enforce a spousal support order against the estate of a deceased spouse. Courts have held that support payments owed by a deceased spouse constitute a debt of the estate pursuant to subsection 34(4) of the *FLA*.

The personal representative of a support payor can apply to vary a support order under section 37(1)(c) of the *FLA*, however they also owe a fiduciary duty to the recipient of the support in the same way they owe a fiduciary duty to the beneficiaries and creditors of an estate.⁸

Subsequent spouses who act as estate trustees must acknowledge existing, and therefore, competing spousal support obligations. Failure to do so could result in a breach of their fiduciary obligations.

⁶ 2007 CanLII 23351 (ON SC).

⁷ See *Clarke v. Read Estate* (2000), 12 RFL (5th) 305; and *De Winter v. De Winter Estate* 2001 OJ No 3501 (SCJ) 41 ETR (2d) 190.

⁸ *Re Welin Estate*, 2003 CarswellOnt 2869 (SCJ).

Enforcement of Domestic Agreements

Another potential source of support rights after death can be found in domestic agreements.

Part IV of the *FLA* governs domestic contracts. There are three types: 1) cohabitation agreements; 2) marriage contracts (or what are commonly referred to as 'pre-nuptial agreements'); and 3) separation agreements.⁹ The parties to such agreements have reasonably wide latitude to agree to terms of division of property and support.

A domestic contract may be filed with the court under section 35 of the *FLA* and the spousal support provisions can be enforced accordingly. As such, a surviving spouse can enforce a spousal support provision in a domestic contract in the same way as a support order. A provision for support contained in a domestic contract filed with the Court may also be varied under section 37 (an application for variation); may be increased under section 38 (except in the case of a provision for child support); and, if in the case of child support, may be recalculated under section 39.1 of the *FLA*.

A surviving spouse can seek to enforce the terms of a domestic agreement and seek support under a dependant support claim, however, it should be noted that one of the factors considered by the Court when a claim is advanced under Part V of the *SLRA* is "any agreement between the deceased and the dependant".¹⁰ This would include any domestic agreement.

SUCCESSION LAW REFORM ACT: INTESTACY PROVISIONS

The *SLRA* is divided into five parts: Part I Testate Succession; Part II Intestate Succession; Part III Designation of Beneficiaries; Part IV Survivorship; and finally, Part V: Support of Dependents.

A surviving married spouse may seek to enforce rights under the intestacy provisions of Part II of the *SLRA*.

Intestacies or partial intestacies exist for a number of reasons: a person dies having never executed a will; a person executes a will, but it is revoked due to marriage or the testator chooses to revoke it by destroying it; or a person to whom a residuary gift is made predeceases the testator; or a person executes a will with the intention that it has dealt with one's entire estate but after the testator's death the will (or a portion of the will) is declared invalid due to a drafting error, undue influence, lack of capacity, or other reasons.

⁹ *FLA* ss.52-54.

¹⁰ *SLRA* s. 62(1)(m).

Historically, there were few rights that a surviving spouse could assert against the estate of a deceased person. The main protection was the common-law rule that marriage revoked a will. This allowed a surviving spouse to inherit under intestacy legislation as long as the deceased spouse had not made a subsequent will. This common-law rule has been codified in many provinces, including in Ontario under section 15 of the *SLRA*. Section 16 sets out exceptions to this rule, the most commonly applicable of which is that the will is not revoked by marriage if it contains a declaration that it was made in contemplation of marriage.

An intestacy can create a windfall situation for a surviving spouse. In Ontario, where a married person dies intestate in respect of property and is survived by a spouse and not survived by issue, the spouse is entitled to the property absolutely. The preferential share is currently prescribed by regulation as \$200,000. The remaining one-third to one-half of the residue will also be paid to the spouse according to the formula set out in the *SLRA*.

The rules of intestacy are strict in Ontario. The case of *Scotia Mortgage Corp. v. Davidson Estate*¹¹ illustrates just how intestacy can produce a harsh, and as in this case, seemingly unjust, result in situations involving relatively small estates. The deceased remarried two years after his first wife died, but then passed away less than a year later without executing a will. The deceased had eight children from his first marriage. The estate was worth less than \$200,000.00 so the new wife inherited her preferential share and the children received nothing. The Court was powerless to avoid this result in the face of the clear statutory language.

In Ontario, common law spouses do not have the same statutory rights as married spouses on an intestacy. They have no legislated right to a preferential share. Nor do common-law spouses have the ability to make an election for equalization of net family property under the *FLA*. However, as noted, a common law spouse does have the statutory right to seek dependant's support under the *SLRA* if meeting the definition of "spouse".

Also, important to note, if the deceased spouse dies intestate, the surviving married spouse loses his or her right to share on intestacy upon filing a *FLA* election for equalization.

DEPENDANTS' SUPPORT VS. OTHER OPTIONS: A COMPARISON

This section will briefly examine the differences between pursuing a support claim and the other options available to a surviving spouse.

Unlike the *FLA* election option available only to married spouses, both married *and* common-law

¹¹ 2009 OJ No. 1781 (SCJ).

spouses have legal recourse available to them under the dependant's support provisions of the *SLRA*.

However, it should be noted that section 6(12) of the *FLA* provides that a spouse's equalization payment has priority over dependants' support claims under the *SLRA*, unless the dependant is a child. This is important where the deceased may not have divorced a first spouse (who is seeking an equalization payment) and was in a common law relationship with a second spouse (who is seeking a support claim).

As noted above, the six-month limitation period to commence a dependant's support claim runs from the date that a Certificate of Appointment is granted (see section 61(1) of the *SLRA*). If a claimant is aware of her rights within the six months, there is little or no downside in bringing a support claim, since the claimant is not required to forego or give up any other entitlement she or he may have. As the time limit under the *SLRA* runs from the date that a Certificate is granted, time will usually not start running in the event of a will challenge until the validity of the Will has been resolved.

As noted above, there is no prohibition against a surviving spouse making a claim for dependants' support *and* electing to take an equalization payment under the *FLA*. However, the amount received for the equalization payment will be taken into account on the application for support.

Another significant consideration or difference between a dependant's support claim under the *SLRA* and other options, is that the *SLRA* requires an examination of the deceased's legal and moral duty to support the dependant and Courts have very broad powers in terms of the types of orders that can be made.

On the other hand, an *FLA* election or an inheritance under the intestacy legislation are mathematical calculations providing the Court with little discretion. An *FLA* election calculation may produce a modest payment (or no payment at all) if the estate is small or if there is significant excluded or deducted property, which is very common in second or later-in-life marriages.

In addition, a support claim under the *SLRA* does not mean the spouse has to give up any gifts in the Will. Further, where there is a provision of any significance in the Will, some may choose to seek a "top up" with a support claim rather than risk that entitlement with an *FLA* election.

When seeking both (electing under the *FLA* and bringing a dependant's support claim) the *FLA* equalization should be calculated first. The spouse may obtain an equalization payment that might affect the adequacy threshold for the *SLRA* dependant support claim and should affect the needs and means of the claimant.

Also, query whether a spouse must account for any interim support payments under the *SLRA* in an eventual *FLA* equalization. If an estate is being depleted by interim support payments, but the equalization claim is being calculated on the estate's value as of the day before the date of death, an inequity may arise.

Further, where multiple claims are brought, including a claim for equalization as well as a support claim and perhaps a will challenge, the proper rules of procedure to follow may also be in question. In *Campbell v. Campbell*,¹² Justice MacLeod ruled that the issue of the interpretation of the Will would proceed under the *Rules of Civil Procedure* and be severed from certain other contingent claims which would proceed under the *Family Law Rules*, which included claims for equalization of net family property, dependants' support, and a constructive trust claim.

CONCLUSION

As can be seen, both the *FLA* and the *SLRA* provide comprehensive regimes that provide for support rights and obligations to flow to a surviving spouse or dependant of the deceased. Where a deceased person fails to adhere to these obligations, surviving spouses and/or dependants may seek to enforce their legal support rights as against their deceased spouse's estate pursuant to the *FLA* and the *SLRA*.

12 (2017), 27 ETR (4th) 118 (ON SCJ).

CHAPTER 11: DETERMINING PARENTAGE IN THE CONTEXT OF DEPENDANTS' SUPPORT CLAIMS

Today's definitions of "family", "child" and "parent" have evolved significantly as our societal values shift from only recognizing the "traditional" idea of a "family" that only included one mother, one father, and biological children. This chapter will address how societal changes and recognition of the need for equality have resulted in updates to the *Succession Law Reform Act*,¹ ("**SLRA**") made pursuant to the amending legislation, *All Families Are Equal Act*² (the "**AFAEA**"); as well as examine the implications of DNA testing to determine parentage in the estates context and in the context of dependants' support claims.

CHANGES TO THE SLRA: ALL FAMILIES ARE EQUAL ACT, 2016

The Ontario government introduced the AFAEA in 2016, which came into force on January 1, 2017. The AFAEA amended various statutes to reflect a more modern idea of what a "family" is today. The AFAEA recognizes the legal status of all parents, whether they are LGBTQ2+ or straight, and whether their children were conceived with or without reproductive assistance. Previously, parentage laws had not been updated since 1978.

The AFAEA, through amendments to the *Children's Law Reform Act*,³ ("**CLRA**") represents a new way to determine parentage when a child is conceived through surrogacy, whether the child is genetically related to both intended parents or not. Also, the AFAEA now provides an out-of-court process for same-sex partners to establish parentage and register themselves as legal parents of their child. Previously, two gay men or the female partner of a woman who gave birth, could only become "parents" to their children through the adoption process.

The AFAEA goes on to confirm that genetic material donors (sperm and ovum donors) are not necessarily "parents" of a child; however, the intended parents and the donors must execute a

1 RSO 1990 c S.26.

2 (*Parentage and Related Registrations Statute Law Amendment*), 2016, SO 2016, c 23 (Bill 28).

3 RSO 1990 c C12.

written pre-conception agreement to outline the legal status of intended parents.

The *AFAEA* also amended the *CLRA* to allow for up to four people to be registered on a child's birth certificate.

In addition to the *CLRA*, the *Vital Statistics Act* and the *SLRA* were amended by the *AFAEA*. For example, the terms "father" and "mother" have now been removed from the *SLRA* by the *AFAEA*. The amendments also include changes to the sections of the *SLRA* dealing with dependant's support claims.

Subsections 71(1-5) of the *AFAEA* amended the definitions of child, issue, parent and spouse found in section 1(1) of the *SLRA* to include children *conceived posthumously* via assisted reproduction, and to broaden the definition of parent to include arrangements other than that of one father and one mother. Therefore this amendment changes who may bring a dependant's support application and who may share in the deceased's estate.

The *AFAEA* also amended the *SLRA* to outline detailed conditions under which a posthumously born infant may be legally recognized as the child of the deceased:

Posthumous conception, conditions

1.1 (1) The following conditions respecting a child conceived and born alive after a person's death apply for the purposes of this Act:

1. The person who, at the time of the death of the deceased person, was his or her spouse, must give written notice to the Estate Registrar for Ontario that the person may use reproductive material or an embryo to attempt to conceive, through assisted reproduction and with or without a surrogate, a child in relation to which the deceased person intended to be a parent.
2. The notice under paragraph 1 must be in the form provided by the Ministry of the Attorney General and given no later than six months after the deceased person's death.
3. The posthumously-conceived child must be born no later than the third anniversary of the deceased person's death, or such later time as may be specified by the Superior Court of Justice under subsection (3).
4. A court has made a declaration under section 12 of the *Children's Law Reform Act* establishing the deceased person's parentage of the posthumously-conceived child.

Interpretation

(2) For the purposes of paragraph 1 of subsection (1), “assisted reproduction”, “embryo”, “reproductive material”, “spouse” and “surrogate” have the same meaning as in section 1 of the *Children’s Law Reform Act*.

Extension of time

(3) On motion or application, as the case may be, by a surviving spouse who gives notice under paragraph 1 of subsection (1), the Superior Court of Justice may make an order extending the period referred to in paragraph 3 of that subsection, if the Court considers it appropriate in the circumstances.

Specifically dealing with dependants’ support claims, section 57 of the *SLRA* was amended to add:

Dependant posthumously-conceived child

(2) For the purposes of clause (c) of the definition of “dependant” in subsection (1), where the conditions in subsection 1.1 (1) are met in relation to a child conceived and born alive after the death of the deceased, **the deceased is deemed to have been, immediately before his or her death, under a legal obligation to provide support to the child.** [emphasis added]

Further, section 59 of the *SLRA* was also amended so that it now states:

(2) An application may be made under subsection (1) by a surviving spouse who gives notice under paragraph 1 of subsection 1.1 (1) on behalf of a child of the deceased that is referred to in the notice and is not yet conceived, if the application is made no later than six months after the death of the deceased.

These amendments allow a posthumously born child to bring an application for support as a dependant of a deceased parent’s estate and creates a presumption that the child is a legitimate heir to the estate.

At the time of publication there were no cases examining or citing these new amendments to the legislation.

The new definitions apply to an individual’s will, drafted after January 1, 2017, unless a contrary intention is clearly expressed. A lawyer should inquire if their client or their children or other beneficiaries under their Will have stored or intend to store any reproductive material and whether they want posthumously conceived children and issue to inherit under their Will.

CHAPTER 11: DETERMINING PARENTAGE IN THE CONTEXT OF DEPENDANTS' SUPPORT CLAIMS

The Federal law, the *Assisted Human Reproduction Act*⁴ regulates the donation of genetic material. Donor consent is required under section 8 before any materials can be removed from the body or used for any specific purpose. In estate planning, if sperm, ova, or embryos have been stored the testator should specifically address and provide instructions to the estate trustee on whether he or she would consent to the posthumous use of this stored material.

Other countries have addressed or attempted to address posthumous conception or posthumous reproduction from genetic material as well. For example, the law of England and Wales does not recognize any property in a dead body, with the result that a deceased's body cannot form part of their estate.⁵ Further, unless the deceased gives clear written consent to posthumous donation or use of their body, the testator has no binding say over such decisions. Someone standing in a 'qualifying relationship' may be able to give or refuse the necessary consent. In a 2008 case, a wife was granted permission for sperm to be retrieved from her husband within 24 hours of his sudden and unexpected death.⁶

In France, posthumous reproduction from genetic material is prohibited as both parties need to consent to procreation with medical assistance and if one of them is deceased consent is impossible.⁷ Although France has recently allowed the exportation of frozen sperm to other countries to be used in insemination abroad.⁸ This prohibition on posthumous reproduction means that in France, children born as a result of posthumous recreation do not legally exist and therefore do not have inheritance rights. Further, surrogacy agreements and the act of surrogacy are not lawful in that country. If the child is born through surrogacy in another country, whether or not a legal parent-child relationship will be recognized in France may be determined on a case-by-case basis. In two cases, France refused to grant legal recognition to a parent-child relationship between children who were born in a legal surrogacy relationship in the United States. The children were not legal offspring.⁹ However, in a more recent case, France allowed two children born in Russia through surrogacy to have civil status in France.¹⁰

In the United States, authority over the deceased's body rests with the surviving family members.¹¹ The right to use frozen genetic material is a contractual right and not property right. The wording in the contract will dictate what happens to the genetic material upon divorce or death, etc. Genetic

4 SC 2004, c 2.

5 Simon Weil, Jean-Marc Tirard, & Joshua S Rubenstein, "The Gene is Out of the Bottle", STEP Journal, May 2017 at p.55. ["Weil"].

6 *L v The Human Fertilisation and Embryology Authority* [2008] EWHC 2149 (Fam) at para. 110., cited in Weil.

7 Weil at p.57.

8 *Ibid.*

9 *Mennesson v France* 26 June 2014 No 65192/11 and *Labassee v France* 26 June 2014 No 6594/11 as cited in Weil at p. 57.

10 Weil at p.57.

11 Weil at p.57.

material cannot be bequeathed by Will nor does it pass by intestacy. With respect to posthumously conceived children, individual US states have taken different approaches. For example, some require that the birth or implantation occur within a stated timeframe or a consent to inheritance on the part of the deceased parent.¹²

DETERMINING PARENTAGE THROUGH DNA

There are numerous companies advertising their DNA services - from finding information on your ancestors and heritage, to learning about any indicators of potential health conditions. Companies that provide paternity testing; "relationship testing" (siblings, aunts, uncles); health care, skin care, and diet testing; infidelity DNA testing; etc., are all easily accessible online with a simple Google search.

DNA testing analyzes deoxyribonucleic acid, which is the genetic material present in most cells in any living organism. In humans, 99.9% of the DNA from two people will be identical. It is the important 0.1% of DNA code sequences that varies from person to person. This is what makes us unique. These DNA code sequences are called genetic markers. Forensic scientists use this part of the code when completing a DNA test. The more closely related two people are, the more likely it is that some of their genetic markers will be similar.

Not only has DNA testing become more widespread and popular in our personal lives, DNA testing has become widely known and utilized in both criminal and family law court cases.

There have been several changes in Canadian legislation with the advances of forensic sciences. Jurisprudence in Canadian criminal law has involved cases determining the right to order and obtain DNA samples with reference to the *Charter of Rights and Freedoms* (the "**Charter**"). Issues have arisen surrounding the reliability or integrity of DNA testing. In criminal law matters, DNA testing orders are normally made in accordance with the provisions of the *Criminal Code*. However, in determining whether to make such an order, the Court will evaluate whether such an order would serve the administration of justice, having due regard for the individual protections afforded under the *Charter*. The *DNA Identification Act*¹³ established the national DNA data bank to help law enforcement agencies identify persons alleged to have committed certain offences and allows law enforcement agencies, as well as coroners, medical examiners to find missing persons or identify human remains.

On May 4, 2017, the *Genetic Non-Discrimination Act*¹⁴ received Royal Assent. The legislation

¹² Weil at p.57.

¹³ SC 1998, c 37.

¹⁴ SC 2017, c 3.

prohibits an individual from having to undergo genetic testing or disclosing genetic test results as a condition of: a) providing goods and services; b) entering into or continuing a contract or agreement with that individual; or c) offering or continuing specific terms or conditions in a contract or agreement with that individual. This legislation protects individuals from discrimination in the insurance and employment context. This Act also amends the *Canada Labour Code* prohibiting employers from requiring employees to take a genetic test or to reveal the results of such testing.

In contrast to the numerous decisions in criminal law and family law matters across Canada, where DNA testing has been ordered by the courts, there is little such jurisprudence in estate matters. In Ontario, there has been little legislation to which the courts can turn to for guidance in making an order for DNA testing. Such an order in estate cases will often be complicated by the fact that an order sought may involve DNA analysis and testing to be conducted on the remains of a deceased person.

In the context of estate planning, a person who is concerned over potential claims being brought against his or her estate could consider providing a written direction regarding the authorization of DNA testing, either in his or her will or in a separate document that is incorporated by reference into the will.

Pursuant to s. 105 of the *Courts of Justice Act* (“**CJA**”) the Court is authorized to order a medical examination, physical or mental of a party to a proceeding. Section 105(2) provides:

105(2) Where the physical or mental condition of a party to a proceeding is in question, the court, on motion, may order the party to undergo a physical or mental examination by one or more health practitioners.

Case law has provided clarification that the composition of a person's blood is a medical condition.¹⁵ Other cases have questioned whether DNA testing is related to a person's “mental or physical condition” as DNA is not a condition but a “trait”.¹⁶

Rule 33 of the Ontario *Rules of Civil Procedure* regarding medical examinations of parties serves as a supplement to s. 105 of the *CJA*, empowering the Court to order physical or mental examinations of any party whose physical or mental condition is in question in any proceeding.

Under section 17 of the *CLRA* (formerly section 10) the court may grant leave to a party to obtain blood tests or DNA testing, where parentage is in dispute:

15 *Bauman v. Kovacs* (1986) 10 BCLR (2d) 218 (CA); *M v. H* [1999] OJ No. 4360 (SCJ).

16 *Branson Estate (Re)* 2015 ABQB 227.

Blood, DNA tests

17.2 (1) On the application of a party in a proceeding in which the court is called on to determine a child's parentage, the court may give the party leave to obtain a blood test, DNA test or any other test the court considers appropriate of a person named in the order granting leave, and to submit the results in evidence. 2016, c. 23, s. 1 (1).

Conditions

(2) The court may impose conditions, as it thinks proper, on an order under subsection (1). 2016, c. 23, s. 1 (1).

DNA TESTING IN ESTATES LAW

Proof of parentage may be important for certain estate claims, such as when an individual seeks to inherit under intestacy legislation or a Will as "issue" of the deceased. DNA testing may not be as significant in dependants' support claims. This is because, under the *SLRA*, even before the amendments from the *AFAEA*, the entitlement to dependant support could be based on a *social relationship* as opposed to a *biological or genetic one*, as the definition of dependant includes "a person whom the deceased has demonstrated a settled intention to treat as a child of his or her family."¹⁷

Below are some cases, across Canada, that have dealt with DNA testing in an estates context:

In *Kochan v. Hyrcoy (Estate)*,¹⁸ the Surrogate Court of Alberta dismissed a motion for the disinterment of the remains of the deceased to permit DNA testing for use in determining the parentage of an alleged son of the deceased who could inherit under intestacy. The Court held that the motion was premature and there was "no point in disturbing the remains in the present circumstances" as it had not yet been determined that the deceased died intestate.

In *Miller v. Staples Estate*,¹⁹ Justice Scanlon examined the issue of whether the Supreme Court of Nova Scotia had jurisdiction to order DNA testing pursuant to Nova Scotia's *Civil Procedure Rules* or pursuant to the inherent jurisdiction of the Court.

The deceased had died intestate. The plaintiff submitted that the defendant, a Ms. Hanes, was not the biological daughter of the deceased and wanted her to undergo DNA testing to determine whether she was a lawful heir of the estate under the intestacy legislation. Ms. Hanes sought a one-half share of the deceased's estate as his biological daughter.

¹⁷ Section 57(1), *SLRA*.

¹⁸ 1999 ABQB 279.

¹⁹ 2006 NSSC 183.

The defendant refused to submit a DNA sample as there is no requirement to do so, claiming that she was the deceased's biological daughter, relying on the presumption of legitimacy and sought a declaration that she was the deceased's daughter.

The plaintiff brought an application pursuant to Nova Scotia Rule 22 (which has similar wording to s.105 of the CJA in Ontario) which states:

Where the **physical or mental condition of a party is in issue**, the Court may, at any time on the application of an opposing party or on its own motion, order the party to submit to a physical or mental examination by a qualified medical practitioner. [emphasis added]

The mother did not participate in the court proceedings at all. The brother of the deceased agreed to provide a sample to assist in the DNA profiling. Both parties agreed that DNA testing would be determinative of the issue of paternity.

Justice Scanlon dismissed the application for DNA testing, finding that paternity is not a medical or physical condition required for Rule 22 to be applicable and that there should be no automatic right to DNA testing of potential heirs-at-law. He also concluded that the Court had inherent jurisdiction to order DNA testing, however, that the decision as to whether such testing should be ordered will depend on the circumstances of each case.

For example in situations where, a complete stranger, upon the death of a person, comes forward alleging they are a child of the deceased person the court may see fit to order DNA testing. I do not suggest this is the only case where testing would be ordered. I am satisfied however the discretion to order DNA testing should be exercised very sparingly in the absence of legislative direction to do otherwise.²⁰

The plaintiff appealed.²¹ The Court of Appeal noted that at that time there were very few reported Canadian cases where DNA testing was ordered to determine paternity in an estate matter. In *Schubert v. Cahoon Estate*,²² Preston J. allowed an application to compel three parties to provide blood samples for DNA testing pursuant to British Columbia's Rule 30. The plaintiff believed he was the illegitimate son of the deceased and sought DNA testing of the deceased's brother and his two nephews who were the sole beneficiaries in the will. The judge stated:

R. 30 is part of a scheme of discovery process which is created by the *Rules of Court*. The affidavit evidence submitted in support of this application establishes that the analysis of blood samples taken from the defendants will provide cogent evidence for

20 *Miller v. Staples Estate*, 2006 NSSC 183 at para. 20.

21 *Miller v. Staples Estate*, 2006 NSCA 140.

22 [1994] BCJ No. 2752 (QL).

or against the contention advanced by the plaintiff that James Cahoon was his father. Once matters are put in issue in litigation before the courts the avenues for discovery provided by the Rules should be employed to ensure that all litigants obtain access to all relevant evidence and information in order to allow the litigation process to provide answers to the questions in issue between the parties.

The Nova Scotia Court of Appeal asked: Given this jurisprudence, should Rule 22.01 be interpreted to allow the ordering of DNA testing when the entitlement of a claimant in an intestacy is the question before the courts?

The Court agreed with the reason in *Bauman* and *Schubert* that the “composition of a person’s blood is a physical condition in issue in this type of case.”

The Court of Appeal did not accept the premise that allowing an application for a DNA test in this particular case would open the proverbial floodgates leading to the “automatic” request for blood tests in every probate matter. Before using Rule 22 to order DNA testing in a contested estate, the Court should be satisfied that there is a clear and factual foundation or some plausible evidence supporting the proposition that the person is, or is not, as the case may be, a lawful lineal descendent.

In this case, there was substantial evidence which questioned the paternity of the defendant, Ms. Hanes. The Court noted the glaring lack of information from the one person who likely had the best evidence: her mother. The Court concluded:

As noted in *Bauman*, *Schuh* and *IM v. KM, supra*, DNA profiling is such a highly reliable method of determining parentage that the interests of justice will generally best be served by obtaining the evidence so that the truth may be ascertained in an efficient and effective manner.²³

The appeal was allowed, and an order was granted compelling the DNA testing.

In *Turner v. Irwin*,²⁴ an application for a declaration of parentage was brought under both Manitoba’s *Family Maintenance Act* and *The Intestate Succession Act*. Under section 23 of Manitoba’s *Family Maintenance Act*, certain “presumptions of paternity” are codified, including that a “man” shall be presumed to be the father of a child if he was married to the mother at the time of the child’s birth, he was married to the mother after the child’s birth but acknowledged he was the father, etc. The Court disallowed a request for the release of existing blood and tissue samples for DNA testing in

²³ Appeal decision at para. 32.

²⁴ 2003 MBCA 146.

this case where the alleged father was deceased. It did so on the basis that testing would serve no purpose because none of the presumptions in s. 23 of the *FMA* had been established such that, even with testing, the claim of paternity was no further ahead.

In *Barnes v. Barnes Estate*,²⁵ the deceased made a will that divided the residue of her estate between her two sons. However, if either son were to die before her, the deceased son's share would be taken "in equal shares *per stirpes*" among the "issue" of the deceased son alive at the deceased mother's death. Both sons died before their mother. The child of one son argued that the children of the other son, Kenneth, were not his "biological" children and wanted DNA tests to be provided.

The applicant who was seeking the DNA tests "understood" that his deceased uncle's DNA may have been retained by a medical facility and was available for testing. The grandsons were ordered to submit to DNA testing. Only one of the grandchildren submitted a sample for testing. The other refused. Samples of DNA "purportedly" from their deceased father were obtained from a hospital that had been collected during surgical procedures Kenneth underwent in 1987, 2003 and 2005. DNA testing was conducted by a Quebec company. The conclusion of the DNA testing was that the grandson could not be the biological son of Kenneth.

The Court however, determined that the children were "issue" within the meaning of their grandmother's will regardless of their *biological* paternity. They had always been assumed by the family to be biological children and the grandmother must have intended that they would inherit. Therefore, the court's finding with respect to the meaning of issue rendered the DNA question moot.

Two brothers were in a dispute over their father's estate in *Branson Estate (Re)*.²⁶ One brother was appointed executor of the estate and told his brother that there was no money. The other brother brought an application for a declaration that he was a 50% beneficiary of the estate. The executor brother brought a cross-application seeking his brother to undergo a DNA test as he disputed the fact that he was the son of the deceased. The parties agreed that the Court could order DNA testing pursuant to rule 5.41 of the *Alberta Rules of Court* which provided that on application, the Court may in an action in which the mental or physical condition of a person is at issue order that a person submit to a mental or physical examination. However, the Court was not as convinced.

The Court noted that it was not entirely clear that the Alberta legislature created Rule 5.41 to allow a court to order an individual to undergo DNA testing as the rule talks about a person's "mental or physical condition" and a person's DNA is not a condition but a "trait".²⁷ The Court preferred to

25 2013 BCSC 1848.

26 2015 ABQB 227.

27 *Branson Estate (Re)* 2015 ABQB 227 at paras. 18-20.

consider the request under the Court's inherent jurisdiction which gives it discretion to control its own process to ensure the fairness of the trial. The Court determined that the brother did not satisfy his onus that the Court should exercise its discretion to order that his brother submit to a DNA test.

DNA testing was mentioned peripherally in one dependant's support claim In *Khemraj v. Khemraj*.²⁸ There was contradictory evidence related to whether the deceased and the applicant were living in a spousal relationship on the date of his death and whether two children were dependants of the deceased. The respondents were the parents and brothers of the deceased. During the litigation of the case, the respondents disputed the paternity of one of the children. The only commentary by the Court dealing with this allegation was that: "[t]he Respondents disputed Tyler's paternity. A DNA report dated September 16, 2015 confirms [the deceased] is his father." The only issue left for trial was whether the spouse was a dependant, and the Court found that she was.

CONCLUSION

Legislation in Ontario is catching up to our societal changes when it comes to family, with the result being that biological parentage is ceding ground to the intentions of the parties in determining who is or isn't a parent or child for the purpose of estates and family law cases. It will be interesting to see if the new *SLRA* sections amended by the *AFAEA* will be utilized by more parties to estate litigation or dependants' support claims, and if there will be a growing number of DNA test cases in the estates context, despite the move away from biological determinants of parentage, as these types of tests continue to become more and more popular.

28 2016 ONSC 7796.

CHAPTER 12: LIMITATION PERIODS APPLICABLE TO DEPENDANTS' SUPPORT CLAIMS

INTRODUCTION

This chapter discusses the law in Ontario pertaining to limitation periods for dependants' support claims, and the application of those limitation periods with respect to claims made on behalf of minors and persons who are incapable of commencing such proceedings. This chapter first reviews the governing legislation for limitation periods with respect to dependant support claims and then examines how such legislation has been applied by the courts in Ontario.

LEGISLATION

Limitations Act, 2002

In Ontario, all limitation periods are governed by the *Limitations Act, 2002*.¹ The legislation provides for a basic two-year limitation period for most causes of action. It also prescribes that all other legislated limitation periods are of no effect, unless specifically provided for in the act. In addition, the act sets out exceptions to the basic limitation period for claims by minors and persons who are incapable of commencing a proceeding in respect of a claim.

The following are the relevant provisions of the *Limitations Act, 2002* for the purposes of this chapter:

Basic Limitation Period

Section 4 states that unless this act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.

1 *Limitations Act, 2002*, SO 2002, c 24, Sched B.

Discoverability of a Claim

Section 5 sets out when a claim is discoverable. The issue of discoverability is outside the scope of this chapter.

Limitations with respect to Minors and Persons who are Incapable of Commencing a Proceeding

Section 6 states that the limitation period established by section 4 does not run during any time in which the person with the claim is a minor and is not represented by a litigation guardian in relation to the claim.

Similarly, section 7 states that the limitation period established by section 4 does not run during any time in which the person with the claim is incapable of commencing a proceeding in respect of the claim because of his or her physical, mental or psychological condition and is not represented by a litigation guardian in relation to the claim.

An extension of the limitations period as it applies to incapable persons is set out under subsection 7(4) of the act. This provision allows for a six month extension of the limitation period if that period had been postponed or suspended less than six months before its two year anniversary.

Discoverability of a Claim by a Litigation Guardian

Section 8 states that if a person is represented by a litigation guardian in relation to the claim, section 5 applies as if the litigation guardian were the person with the claim.

Ultimate Limitation Periods

Subsection 15(1) sets out the general rule that no proceeding shall be commenced in respect of any claim after the 15th anniversary of the day on which the act or omission on which the claim is based took place.

Application to other Acts?

Subsection 19(1) of the *Limitations Act, 2002* states that a limitation period set out in another act that applies to a claim to which this act applies is of no effect unless the provision establishing it is listed in the Schedule to this act, or the provision is in existence before January 1, 2004 and incorporates by reference a provision listed in the Schedule to this Act.

Subsection 19(5) of the *Limitations Act, 2002* states that sections 6, 7 and 11 apply, with necessary modifications, to a limitation period established by a provision referred to in subsection (1).

Former Limitation Periods

Section 24(1) of the *Limitations Act, 2002* defines a “former limitation period” to mean the limitation period that applied in respect of the claim before January 1, 2004. Exceptions to this rule are claims that are not considered to have a limitation period under this act.

Pursuant to section 24(5) of the *Limitations Act*, if the former limitation period did not expire before January 1, 2004 and the claim was not discovered before that date, this act applies as if the act or omission had taken place on that date.

Section 24(5) of the *Limitations Act, 2002* is important with respect to the ultimate limitations period. Since all discoverable claims before January 1, 2004, where this act would apply, are deemed to have been discoverable as of January 1, 2004, the ultimate limitation period for such claims will expire as of January 1, 2019. As stated above, exceptions to this rule are claims that are not considered to have a limitation period under this act.

Succession Law Reform Act

Orders for dependant support are governed by section 58 of the *Succession Law Reform Act*.² An analysis of who is eligible to bring a claim for dependant support is outside the scope of this chapter. Please refer to Chapter 10 for a discussion of orders for dependant support.

The limitation period for a claim for dependant support is prescribed under section 61 of the *SLRA*. This section also bestows power upon the court to grant an extension of the prescribed limitation period.

Limitation Period for a claim for Dependant Support

Subsection 61(1) of the *SLRA* defines the general rule for limitation periods for dependant support claims as six months from the grant of letters probate of the will or letters of administration.

² *Succession Law Reform Act*, RSO 1990, c S 26 (“*SLRA*”).

Power of the Court to Extend the Limitation Period for a claim for Dependant Support

Subsection 61(2) of the *SLRA* sets out the exception to the limitation period as one that is discretionary by the court. The section reads that, “The court, if it considers it proper, may allow an application to be made at any time as to any portion of the estate remaining undistributed at the date of the application.”

JURISPRUDENCE

The enactment of the *Limitations Act, 2002* has largely done away with the need for the court in Ontario to interpret conflicting limitation periods in other acts. With respect to claims for dependant support, it is clear that the limitation period under subsection 61(1) of the *SLRA* applies, as it is expressly included within the schedule to the *Limitations Act, 2002*.

This chapter will examine how the court has applied the limitation period under section 61 of the *SLRA* subject to any limits under the *Limitations Act, 2002*, with respect to minors or persons who are incapable of commencing a proceeding with respect to a claim for dependant support. In addition, this chapter will examine how the court has exercised the discretion bestowed upon it under the section 61 of the *SLRA* to extend the six-month limitation period for a claim for dependant support.

Extension of the Limitation Period for a Claim for Dependant Support

In *Habberfield v Sciamonte*³, the court summarized the principles that govern its discretion to allow an application for dependant support to be made following the expiration of the six-month limitation period under section 61 of *SLRA*.

In *Habberfield*, Justice Lofchik of the Ontario Superior Court of Justice granted an extension of time for the commencement of a dependant support claim to a spouse who was not adequately provided for by her deceased common-law spouse.

Donald Sciamonte (the “Deceased”) died with a will on April 11, 2012. He was survived by the applicant, Joan Habberfield, who was his common-law spouse of 31 years. A Certificate of Appointment of Estate Trustee with a Will was issued to the Respondents, the estate trustees of the Estate of Donald Sciamonte (the “Estate”), on October 30, 2012. The applicant brought her claim for dependant support from the Estate after the expiration of the limitation period (i.e. six months after the grant of letters probate being April 30, 2013). Consequently, the applicant was required

3 *Habberfield v Sciamonte et al.*, 2017 ONSC 4332 (“*Habberfield*”).

to seek a grant of an extension of the limitation period under subsection 61(2) of the *SLRA* to bring her claim for dependant support.

The facts of this case are unlike those of most dependant support claims brought by a common-law spouse. In most of those scenarios, a common-law spouse will bring a dependant support claim because either: the deceased died intestate (i.e. as common-law spouses do not take on an intestacy under the *SLRA*) and the deceased didn't adequately provide for their spouse's support by making testamentary dispositions of assets outside of the estate; or, the deceased died with a will which did not provide for the support of their common-law spouse adequately or at all.

In this case, not only was the applicant provided for under the Deceased's will, but she received property outside of the Estate by way of a beneficiary designation. Herein lay the reason for why the applicant failed to bring her claim for dependant support within the prescribed six-month limitation period. The applicant argued that at such time as the limitation period expired, she had not yet been required to consider whether her interest in the Estate was adequate for her future support. As such, she was not aware at the time that the limitation period expired of any rights that she had to protect with respect to her claim for support from the Estate.⁴

The Deceased had established two life trusts under his will for the applicant's support and made a specific gift to her of \$25,000.00. The first trust held the Deceased's home in Burlington, Ontario, which he had resided at with the applicant. The second trust held an adjacent property to the Deceased's home, which he rented out as an income producing property. The terms of the trusts permitted to applicant to occupy either of the properties and receive any rental income earned therefrom until the earlier of either: (i) the applicant's death; (ii) the applicant no longer being able to reside at either of the properties and requiring a nursing home; (iii) the applicant advising the estate trustees that she no longer wish to reside at either of the properties; or (iv) the applicant marriage or cohabitation with another man. At the earliest of these instances, the properties were to be sold and \$50,000.00 from each property to be set aside and held in trust to provide for the applicant's need as the estate trustees, in their sole discretion, determine advisable. The balance of the proceeds are then to be divided between the Deceased's four children and six grandchildren. In the interim, the will provided that the applicant was responsible for all taxes, insurance, repairs, mortgage interest and other charges or amounts necessary for the general upkeep of the two properties.

The only other financial assistance that the Deceased provided for the applicant's support was the payment to her of the income earned on a RRIF in the approximate amount of \$140,000.00 (approximately \$1,200 to \$1,450 per month to the applicant). The RRIF was to be completely drawn

⁴ *Ibid* at para 13.

down by the summer of 2017, in part because the applicant was required to withdraw funds from it to fund renovations to the two properties held in trust; as those were her responsibilities under the terms of the will.

At the time that this application was heard in June 2017, the applicant was 78 years old and had limited assets and income. Consequently, she was left with two problematic options: (a) if she stays in her own home she has no access to support and lacks sufficient income and assets to support herself; or (b) if she moves from the home into a seniors' or nursing home, or otherwise, the will provides her only \$100,000.00, not outright but in a trust, and subject to the discretion of the estate trustees with which to support herself for the rest of her life.⁵

Justice Lofchik opened his reasons by declaring that subsection 61(2) of the *SLRA* provides the court with a "broad jurisdiction to extend the limitation period" with respect to any estate assets remaining undistributed at the time of an application.⁶ In considering the jurisprudence⁷, his Honour noted that the following principles are to guide the court with respect to granting an extension under subsection 61(2) of the *SLRA*:

- (a.) The Court has the discretion to allow the application to proceed at any time as to any portion of the estate remaining undistributed at the date of the application.
- (b.) The discretion of the Court under section 61(2) to allow an application to proceed although it is brought after the time limit has expired under the *SLRA* must be exercised judicially, with consideration of the delay involved, the reasons for the delay, and the extent of prejudice in the Estate's defence of the claim.
- (c.) The Court's discretion to extend the time limitation period under section 61(2) is to be exercised in a broad and liberal manner.
- (d.) In deciding whether to grant the extension, the court must determine whether the situation bears review of whether or not the deceased made adequate provisions in his will for the proper maintenance and support of his dependants.
- (e.) The question is not whether the Deceased has in fact done so, but whether there is a sufficient basis for review. This requires a consideration of what is equitable (in relation to the "proper" support of dependants as contemplated by the *SLRA*).
- (f.) While delay (including the reason for delay) is a factor to consider, a request for an

5 *Ibid* at para 14.

6 *Ibid* at para 1.

7 *Blatchford v Blatchford Estate*, [1999] OJ No 3748 (SCJ); *Re Assaf*, 2007 CanLII 50869 (SCJ); *Weigand v. Weigand Estate*, [2016] OJ No 5096 (SCJ).

extension is not grounded solely in “good cause” being shown for the delay. The discretion to extend or refuse is a question of what is equitable between the parties, in all the circumstances.

(g.) In the absence of prejudice to the estate, equity tends to favour granting an extension:

The judge is thus given a discretion to be exercised on the principle of promoting justice between those interested in the estate. It is clear that he must refuse an application if the delay in applying would work an injustice. Further that it would seem that he must find that justice, in so far as the principle of the Act defines the kind of justice that the Legislature had in mind, requires that the application should be heard. “⁸

Justice Lofchik further explained that while the general position of the court is not to restrain a person’s right to dispose of his or her estate, the legislature imposed liberal authority upon the court through the *SLRA* to consider the intentions of a testator who may have overlooked a legitimate interest and need of a dependant.⁹

In applying the court’s jurisdiction to extend the limitation period, Justice Lofchik considered the applicant’s circumstances, which were that the terms of the Deceased’s will left her with two problematic choices, both resulting in her inadequate support from the Estate. His Honour also considered that the need for the applicant to make such decisions had only recently become apparent to her. Lastly, his Honour considered that the bulk of the Estate, being the two properties, remained undistributed, as they could not be sold and distributed until the applicant died, moved, and/or desired to sell them. Ultimately, Justice Lofchik found that although there had been a delay by the applicant in bringing her claim for dependant support, there was no prejudice to the Estate or its beneficiaries due to such delay. Thus, his Honour granted the extension to the applicant for her claim to be heard on its merits.

Refusal for an Extension of the Limitation Period for a Claim for Dependant Support

As set out above, the court will use its broad and liberal discretion to allow an application for dependant support following the expiration of the six-month limitation period under subsection 61(1) of the *SLRA* upon proportionately weighing all of the circumstances of a case. In the case of *Gocsei v Skublak Estate*¹⁰, the court determined that it was not appropriate to use its discretion to allow for an application to proceed following the expiration of the six-month limitation period.

⁸ *Supra* note 2 at para 24.

⁹ *Ibid* at para 26.

¹⁰ *Gocsei v Skublak Estate*, [1995] OJ No 2191 (“*Sakublak Estate*”).

Sakublak Estate concerned an application for dependant support by the deceased's common-law spouse of approximately 14 years. The deceased made no provision for the applicant in her will. During their relationship, the applicant and the deceased had entered into a cohabitation agreement. The agreement evidenced their intention to remain financially independent. The applicant received independent legal advice as to the cohabitation agreement.

The applicant applied for a declaration pursuant to section 58 of the *SLRA* that the deceased failed to make adequate provision for his support. As a preliminary matter, the applicant sought an order permitting his application to proceed notwithstanding that it was made after the six months of the grant of letters probate of the will.

Justice Webber held that the limitation period under subsection 61(1) of the *SLRA* applied, and that the application should not be allowed to continue. Justice Webber noted that the applicant acknowledged that he did not need support at cross-examination. His Honour further determined that the applicant knew that he received nothing under the will and that the cohabitation agreement, for which he had received independent legal advice before executing, denied him an interest in the assets of the deceased.

Claims for Dependant Support with respect to Section 72 Assets

As explained in chapter 5 of this book, the capital values of those assets that fall into the prescribed categories under section 72 of the *SLRA* are to be included within the net valuation of the estate and be made available for purposes of satisfying an order for dependant support. It is largely for this reason that the limitation period under subsection 61(1) of the *SLRA* is so important. Should an estate trustee distribute section 72 assets prior to the expiration of the six-month limitation period under subsection 61(1) of the *SLRA*, then he or she will be personally liable should insufficient assets remain in the estate to satisfy an order dependant support.¹¹ On the other hand, the Divisional Court explained in the case of *Re Dolan*,¹² that the capital values of those assets that fall into the prescribed categories under section 72 of the *SLRA* will not be included within the net valuation of the estate following the expiration of the six-month limitation period.

In *Re Dolan*, the deceased died with a will that named his second wife as executor and sole beneficiary. An application for dependant support was made by the deceased's first wife, on her behalf and on behalf of her two children, more than six months after the grant of letters probate of the will.

At the time of the application, all of the property of the estate had been distributed to the deceased's

¹¹ *Re Deringer* (1981), 128 DLR (3d) 613 (Ont Surr Ct).

¹² *Re Dolan*, 1983 CarswellOnt 618.

second wife, except for two parcels of realty that were held in joint tenancy between the deceased and his second wife at the time of his death.

The issue on appeal to the Divisional Court was whether the jointly held realty remained as an “undistributed asset of the estate” at the time of the application for purposes of ascertaining the value of the estate and being available to be charged for payment by an order for dependant support.

The Divisional Court determined that the joint realty had been distributed by law of survivorship upon death and is not to be brought back into the estate by virtue of section 72 of the *SLRA* for the purpose of an application that was not brought within time. Justice Steele stated on behalf of the court that:

Once the six-month time-limit expires, unless an application under s. 58 has been previously brought, s. 72 must cease to have any effect; and the automatic distribution by operation of the law of joint tenancy must be given its usual full effect. If it were otherwise, then s. 72 would mean that those classes of assets referred to in the section would remain subject to an application under s. 58 forever. This unusual and impractical result cannot be what the Legislature intended.¹³

The decision in *Re Dolan* was confirmed by the Ontario Superior Court of Justice in *Su v Lam*.¹⁴

Limitation Periods for Litigation Guardians for claims for Dependant Support

Pursuant to subsection 19(5) of the *Limitations Act, 2002*, limitation period under subsection 61(1) of the *SLRA* is to be subject to sections 6 and 7 of *Limitations Act, 2002*. The issue of whether the limitation period prescribed under subsection 61(1) of the *SLRA* is subject to section 6 of the *Limitations Act, 2002* was considered by the court in *Serban Estate*.¹⁵

Serban Estate concerned an application brought by the Office of the Children's Lawyer (OCL) on behalf of a six-year old minor. The application was for, amongst other things, the OCL's appointment as the minor's litigation guardian, an order for dependant support under section 58 of the *SLRA*, and an order that the proceeds of a policy of insurance be included in the value of the estate for the purposes of section 72 of the *SLRA* and be available to satisfy an order for dependant support.

The deceased died intestate and was survived by his wife. Excluding the value of the \$67,000 insurance policy designating the deceased's brother as beneficiary, the estate was worth less than \$200,000.00. The application was brought nearly a year after the issuance of a certificate of appointment of an estate trustee without a will to the deceased's wife. The deceased's brother

¹³ *Ibid* at para 9.

¹⁴ *Su v Lam* (2012), 2012 ONSC 2023.

¹⁵ *Serban Estate*, 2009 CarswellOnt 797.

argued that the OCL had knowledge of the minor's claim throughout this period but took no action. As such, section 61(1) of the *SLRA* should apply to bar the claim and prevent the proceeds of the insurance policy from being included in the value of the estate and not be available to satisfy a claim for support.

Justice Strathy held that the plain language of section 6 of the *Limitations Act, 2002* suspends the application of section 61(1) of the *SLRA*. As such, a litigation guardian cannot be deemed to have discovered a minor's claim prior to being appointed as litigation guardian. His Honour explained that any other interpretation would "impose an intolerable burden on the OCL and would defeat the entire purpose of s. 6 of the [*Limitations Act, 2002*] – to protect minors."¹⁶ Thus, his Honour did not bar the application and ordered that the proceeds of the insurance policy form part of the assets of the estate to satisfy an order for dependant support.

There are no reported decisions in Ontario where the court suspended the application of section 61(1) of the *SLRA* by virtue of section 7 of the *Limitations Act, 2002*. However, it is only logical that the reasons of the court in *Serban Estate* also apply to section 7 of the *Limitations Act, 2002*. This ought to be so, particularly in light of Justice Strathy's comment that "notice to anyone other than a duly appointed litigation guardian is entirely irrelevant."¹⁷

There is persuasive law from the Manitoba, however, where the Manitoba Court of Queen's Bench suspended the operation of a limitation period for a dependant support claim under *The Dependants Relief Act*¹⁸, which was brought by a litigation guardian on behalf of a person whom was incapable of commencing their claim.

In *Jowett (Litigation Guardian of) v Jowett Estate*¹⁹, a claim for dependant support was brought by the litigation guardian of the deceased's 55 year-old son who suffered from various physical and mental disabilities. The estate trustee objected to the application for dependant support as being statute barred, as it was made nearly two months after the issuing of letters probate. Justice Dewar concluded that section 7 of the *Limitations Act (Manitoba)*²⁰ creates a "moratorium of the time in the case of a disabled person."²¹

Justice Dewar also commented on section 6 of the *Limitations Act (Manitoba)*, which is a similar provision to that of subsection 61(2) of the *SLRA*, as it permits the court to allow an application for dependant support as to the portion of the estate remaining undistributed if the court is satisfied

16 *Ibid* at para 14.

17 *Ibid* at para 13.

18 *The Dependants Relief Act*, CCSM c D 37.

19 *Jowett (Litigation Guardian of) v Jowett Estate*, 2015 MBQB 179 ("*Jowett Estate*").

20 *Limitations Act*, CCSM c L150.

21 *Supra* note 19 at para 19.

of one of three criteria. One of the criteria is that the circumstances beyond the control of the dependant prevented the dependant from making an application within the limitation period.²² Justice Dewar interpreted this section as referring to circumstances that are beyond the control of the dependant and not his or her caregiver.²³

A comparison can be drawn between the ruling of the court in *Serban Estate* and *Jowett Estate*. In both decisions, the court determined that the running of a limitation period for a claim for dependant support before the appointment of a litigation guardian would prejudice the rights of the minor and the incapable person. As such, it is reasonable to suspect that section 7 of the *Limitations Act, 2002* will apply to suspend the limitation period for a dependant support claim made on behalf of a dependant who is incapable of commencing such a proceeding and not represented by a litigation guardian in Ontario.

Discoverability of a Claim for Dependant Support with respect to Section 7 of the Limitations Act, 2002

Section 7 of the *Limitations Act, 2002* applies with respect to persons who are incapable of commencing a proceeding and who are not represented by a litigation guardian. The issue of discoverability of a claim by such persons was considered by Justice Perell in *Landrie v Congregation of the Most Holy Redeemer*.²⁴

Justice Perell clarified that section 7 of the *Limitations Act, 2002*, does not require that the plaintiff be mentally incompetent to stop the running of a limitation period but that the plaintiff be “incapable of commencing a proceeding in respect of the claim because of a physical, mental or psychological condition.”²⁵ His Honour further clarified that the onus to demonstrate incapacity to commence a proceeding for section 7 of the *Limitations Act, 2002* to apply is on the party relying on this provision. The requirement for a party to discharge their onus for the application of section 7 of the *Limitations Act, 2002* is outside the scope of this chapter. However, it is important to note that Justice Perell stated that, “...in other cases, plaintiffs have failed to toll the running of the limitation period when they have failed to provide evidence, particularly medical evidence, to establish capacity.”²⁶

CONCLUSION

The case law highlights that the court has broad discretion to allow for such an application for

22 *Supra* note 20 at s 6(3)(c).

23 *Ibid* at para 17.

24 *Landrie v Congregation of the Most Holy Redeemer*, 2014 ONSC 4008 (Ont SCJ).

25 *Ibid* at para 32.

26 *Ibid* at para 35.

dependant support to proceed against those assets of the estate not yet distributed, should it be brought after the expiration of the six-month limitation period under section 61 of the *SLRA*. The court's discretion is to be exercised on the principle of promoting justice between those interested in the estate. However, such discretion does not apply to those assets subject to charge under section 72 of the *SLRA*, unless a claim is undiscoverable due to section 6 (and likely section 7) of the *Limitations Act, 2002*.

A dependant should be vigilant in protecting their rights to all assets of an estate by acting within the prescribed limitation period. This will ensure that all assets of an estate are included in the net valuation for an order for dependant support, and removes the need and costs associated with seeking an order permitting an application to proceed notwithstanding that it was made after the expiration of the six-month limitation period. Conversely, an estate trustee ought to be cautious when distributing assets of an estate prior to the six-month limitation period or after that time if any beneficiaries, or potential beneficiaries, have claims to section 72 assets under the *SLRA* that are not yet discoverable by virtue of sections 6 (and likely section 7) of the *Limitations Act, 2002*.

CHAPTER 13: QUANTUM OF DEPENDANTS' SUPPORT

In Ontario, a testator has the freedom to choose the beneficiaries of his/her estate with the notable exception that pursuant to the provisions of the *SLRA* a testator has a positive obligation to make adequate support for his/her dependants. As explained within these materials, Part V of the *SLRA* enables a dependant to commence a claim against an estate if he/she has not been adequately provided for.

Again, section 58 of the *SLRA* provides that:

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.

Now, we address the question of what is “adequate support”. Unfortunately, this question is not easily answered. An award of dependants’ support is discretionary and made on the particular facts of a case. As a result, it is inherently difficult to predict the quantum of any award for support that a Court may make.

Moral Duty to Dependants’

It is clear from the case law that a Court may consider not just the financial circumstances of the deceased when making an award for support, but also whether the deceased owed a moral duty to the dependant that exceeds the amount of support the deceased provided immediately prior to death.

The leading case on this issue is *Tataryn v. Tataryn Estate*.¹ In *Tataryn*, the Supreme Court of Canada held that a deceased’s moral duty to his/her dependants is a relevant consideration on a dependants’ support application. In that regard, the Supreme Court held that judges are not limited to conducting a needs-based analysis in determining what award to make.

¹ [1994] 2 SCR 807 at para 23 [*Tataryn*].

In *Cummings v. Cummings*,² the Ontario Court of Appeal, citing *Tataryn*, held that when examining all of the circumstances of an application for dependant support, the court must consider,

- i. what legal obligations would have been imposed on the deceased had the question of provision arisen during his lifetime; and,
- ii. what moral obligations arise between the deceased and his/her dependants as a result of society's expectations of what a judicious person would do in the circumstances.

What is Adequate Support?

As mentioned, what a Court will decide is adequate support is difficult to predict in any particular case. It may be interpreted in different ways in different contexts. In one context it may be enough to keep the dependant off welfare, and in another to make an award consistent with the lifestyle and aspirations of the dependants.³

It is important to remember that a dependant support claim brought by one dependant, is a dependant support claim brought by all.⁴ In that regard, when judging whether a deceased has made adequate provisions for the proper support of his/her dependants and, if not, what order should be made under the *SLRA*, the Ontario Court of Appeal has found that a court must examine the claims of all dependants, whether based on need or on legal or moral and ethical obligations.⁵

In considering what constitutes adequate and/or proper support, the courts have identified that the provision made by the deceased must not only be adequate today, but adequate in the future. Moreover, the meaning of "support" under the *SLRA* includes "not only furnishing food and sustenance and supplying the necessities [sic] of life, but also the secondary meaning of giving physical or moral support. The word "support" in the *SLRA* extends that meaning to include what might by some be considered as non-essentials or luxuries."⁶

The *SLRA* provides that the adequacy of provision for support is to be determined as of the date of the hearing.⁷

2 2004 OJ No. 90 at para 50.

3 *Tataryn* at paras 18-33.

4 *SLRA* s. 60(2).

5 *Cummings* at para 27.

6 *Re Davies* 1979 CarswellOnt 605 (Surr Ct) at para 15.

7 *SLRA* s. 58(4).

Factors to Consider

In addition to the moral obligation of the deceased, in determining the amount and duration of support, section 62 of the *SLRA* sets out the following factors a court must consider, as follows:

- a) the dependant's current assets and means;
- b) the assets and means that the dependant is likely to have in the future;
- c) the dependant's capacity to contribute to his or her own support;
- d) the dependant's age and physical and mental health;
- e) the dependant's needs, in determining which the court shall have regard to the dependant's accustomed standard of living;
- f) the measures available for the dependant to become able to provide for his or her own support and the length of time and cost involved to enable the dependant to take those measures;
- g) the proximity and duration of the dependant's relationship with the deceased;
- h) the contributions made by the dependant to the deceased's welfare, including indirect and non-financial contributions;
- i) the contributions made by the dependant to the acquisition, maintenance and improvement of the deceased's property or business;
- j) a contribution by the dependant to the realization of the deceased's career potential;
- k) whether the dependant has a legal obligation to provide support for another person;
- l) the circumstances of the deceased at the time of death;
- m) any agreement between the deceased and the dependant;
- n) any previous distribution or division of property made by the deceased in favour of the dependant by gift or agreement or under court order;
- o) the claims that any other person may have as a dependant;
- p) if the dependant is a child,
 - i. the child's aptitude for and reasonable prospects of obtaining an education, and
 - ii. the child's need for a stable environment;

- q) if the dependant is a child of the age of sixteen years or more, whether the child has withdrawn from parental control;
- r) if the dependant is a spouse,
 - i. a course of conduct by the spouse during the deceased's lifetime that is so unconscionable as to constitute an obvious and gross repudiation of the relationship,
 - ii. the length of time the spouses cohabited,
 - iii. the effect on the spouse's earning capacity of the responsibilities assumed during cohabitation,
 - iv. whether the spouse has undertaken the care of a child who is of the age of eighteen years or over and unable by reason of illness, disability or other cause to withdraw from the charge of his or her parents,
 - v. whether the spouse has undertaken to assist in the continuation of a program of education for a child eighteen years of age or over who is unable for that reason to withdraw from the charge of his or her parents,
 - vi. any housekeeping, child care or other domestic service performed by the spouse for the family, as if the spouse had devoted the time spent in performing that service in remunerative employment and had contributed the earnings to the family's support,
 - vii. the effect on the spouse's earnings and career development of the responsibility of caring for a child,
 - viii. the desirability of the spouse remaining at home to care for a child; and
- s) any other legal right of the dependant to support, other than out of public money.

No one factor is determinative of the issue and the Court may look specifically to the vulnerability of the applicant as a factor.⁸

Size of the Estate

The size of an estate is a factor to be considered by the court in determining the quantum of any award for dependant support. In *Walker v. McDermott* the Supreme Court of Canada held that

⁸ *Quinn v. Carrigan*, (2014) ONSC 5682 (Div. Ct.)[*Quinn*].

in determining what would be “adequate, just and equitable” in terms of support, the size of the estate must be taken into account.⁹ The Supreme Court has also stressed the importance of the size of the estate in assessing the moral obligation of the Deceased.¹⁰ A small estate does not disentitle an application but will impact the quantum of any award. In the same vein, a large estate does not guarantee a successful application.¹¹

In *Sammon v. Stabler et al.*, the British Columbia Court of Appeal explained why the size of the estate matters, as follows:

First, it will matter where a claim might have the result of reducing the share available to a dependant child or surviving spouse to an unacceptably low level. Second, it will matter where the costs of litigation are disproportionate to what is at stake in that litigation. This is because there should be incentives for, and there should probably be disincentives against, adult independent children embarking on litigation regarding their particular share of their parents' estates. Third, the size of the estate will matter where there are numerous potential beneficiaries.¹²

Competing Claims

A difficult question in any dependants' support application is how are competing claims to be balanced? Generally, where the estate is large enough to permit it, all claims should be met. In *Tataryn*, the Supreme Court held that where priorities must be considered, claims which would have been recognized during the testator's life – claims not based just on moral obligations but legal obligations – should generally take precedence over moral claims. It is the Court's responsibility to weigh the strength of each claim and prioritize them.¹³

In *Quinn*, the Divisional Court explained that the objective in balancing competing claims is to “arrive at a judicious distribution of the estate.”¹⁴ The Court went on to explain that the analysis should weigh the following factors:¹⁵

- i. the size of the estate;
- ii. the strength of the claims; and
- iii. the intentions of the deceased.

9 *Walker v. McDermott*, [1931] SCR 94 at 95-96.

10 *Tataryn*, *supra* note 1 at para 31.

11 See for example *Lobe v. Lobe Estate*, 1997 CanLii 2834 (BCCA).

12 *Sammon v. Stabler et al.*, 2000 BCSC 1048 at para 42.

13 *Tataryn* at 823.

14 *Quinn* at para 149.

15 *Quinn* at para 149.

The balancing analysis is simpler for the Court where there are significant assets available to fulfill all legal and moral claims. The Court of Appeal for Ontario has held that it is particularly difficult to determine whether the deceased has made adequate provision for support when competing dependant claims exist and where the needs of one dependant far outstrip the assets of the estate.¹⁶ They note that the Court has a difficult and delicate task in this regard.

Evidence Required

More recently, the Courts have held that sufficient evidence with respect to the quantum of support is required. An applicant for dependant support could prepare a Form 13.1 Financial Statement with respect to their finances, and provide affidavit evidence with a budget supported by well-organized supporting documentation as an indicator of their needs.¹⁷ In addition, it may be worthwhile to obtain an expert report evidencing the lifestyle and corresponding financial needs of the dependant.

CONCLUSION

It is difficult to predict with any certainty the quantum of support a Court may award in a case. That said, a thorough analysis of the moral and legal obligations of the deceased, the factors set out in 62 of the *SLRA*, and the factors addressed in *Quinn* will be a useful starting point in determining a range of support owing to a dependant in any specific case.

¹⁶ Cummings at para 1.

¹⁷ See for example *Zavet v. Herzog*, 2018 ONSC 3398 (SCJ).

CHAPTER 14: CONSIDERATIONS FOR LAWYERS REPRESENTING CLIENTS BRINGING AND RESPONDING TO DEPENDANTS' SUPPORT CLAIMS

This chapter will explore the lawyer's role in a dependant's support claim, whether representing the dependant, estate trustee or beneficiary responding to such a claim.

REPRESENTING A DEPENDANT BRINGING A DEPENDANTS' SUPPORT CLAIM

Before commencing a claim on behalf of your client, it is always wise for a lawyer to review the legislation, in particular Part V of the *Succession Law Reform Act* (the "**SLRA**"), which is titled "Support of Dependants".¹

Further, it is a good idea to acquaint or reacquaint yourself with the leading case law relating to Part V of the SLRA, in particular: *Cummings v. Cummings*;² *Tataryn v. Tataryn*,³ *Morassut v. Jaczynski et al*,⁴ *Batchelor v. Radawez*,⁵ etc.

First Steps & Information Gathering

One of the first steps to be taken is to determine whether an application for a Certificate of Appointment has been made, and whether a Certificate of Appointment has *been issued*.

Pursuant to section 61(1) of the SLRA, a claim for support must be commenced **within six months** of the issue of a Certificate of Appointment of estate trustee, whether with or without a Will.

Nevertheless, if six months has passed, section 61(2) does provide that a court may, if it considers it advisable, allow an application for support to proceed in respect of any portion of the estate **that has not been distributed**.

1 RSO 1990, c S.26.

2 (2004), 69 OR (3d) 397, 235 DLR (4th) 474, 181 OAC 98, 5 ETR (3d) (CA), leave to appeal to SCC refused (2004), 331 NR 399, 197 OAC 400.

3 [1994] 2 SCR 807.

4 2013 ONSC 2856, aff'd 2015 ONSC 502 (Div. Ct).

5 2015 ONSC 6764.

If the dependant was *married* to the deceased at the date of death you should consider whether a claim for an equalization of net family property should be brought pursuant to the *Family Law Act*⁶ as well. (See Chapter 11 of this book for other options available under the *FLA* and the *SLRA*.)

It is important that you secure relevant information that will be needed for your client to pursue his or her claim, including:

- A copy of the deceased's last will and testament and any codicils;
- Particulars of the deceased's financial affairs, including assets and liabilities that belong to the estate and assets and liabilities that transfer to third parties outside of the estate (for example, life insurance proceeds, pension and similar benefits, and property held in joint tenancy with third parties with a right of survivorship – often referred to as section 72 assets – see section 72 of the *SLRA* and Chapter 5 in this book);
- A copy of the deceased's death certificate;
- A detailed “family tree” with legal names and birth dates; and
- Copies of all relevant domestic contracts (for example, any separation agreements, divorce decrees and marriage contracts) or any other agreement or Court Order impacting upon the dependant's entitlement to support.

It will be important to determine the status of the assets of the estate (or those falling outside the estate, such as the section 72 assets referred to above) including who holds title to those assets and where they are being held, etc..

Section 63 of the *SLRA* provides a list of factors a court will consider when assessing a dependant's support claim. An application should address all of these applicable factors. Therefore, a lawyer representing a dependant should secure particulars and information regarding the dependant's circumstances, including, but not limited to:

- age and physical health;
- assets;
- liabilities;
- income;
- expenses;

6 RSO 1990, c F.6.

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- ability to support themselves, now and in the future;
- ability to contribute to his or her own support;
- needs (having regard to his or her accustomed standard of living);
- the nature and proximity of his or her relationship with the deceased;
- the contributions made to the deceased's financial and emotional welfare; and
- the contributions made to the deceased's career potential.

The deceased's circumstances at the time of death will also be relevant. A lawyer should explore and determine:

- any legal obligation the deceased had to provide financial support to the dependant;
- any moral obligation the deceased had to provide financial support to the dependant;
- his or her financial and personal circumstances at the date of death;
- any financial or moral obligations (if any) owed to other dependants; and
- any agreements relating to the providing of support.

If you are representing a Litigation Guardian on behalf of a minor child who is bringing a dependant's support claim, it would be important to explore any particulars and understand the child's aptitude for and reasonable prospects of obtaining an education, as well as the child's need for a stable environment. Additionally, the lawyer should help the Litigation Guardian determine whether the child suffers from any physical or mental disabilities or conditions that may affect his or her chances of obtaining an education and eventually supporting him or herself.

If you are representing a spouse, explore and confirm details and particulars of the nature of the relationship with the deceased including:

- the length and time of cohabitation;
- whether the dependant's earning capacity was affected by any responsibilities he or she assumed during the cohabitation;
- whether the dependant took care of a child who was a minor or an adult child who was unable, because of illness, disability or other cause, to withdraw from the charge of his or her parents;

- if the dependant undertook to assist in the continuation of a program of education for an adult child who is unable for that reason to withdraw from the charge of his or her parents;
- whether the dependant's earnings and career development were affected by the responsibility of caring for a child or any desirability by the dependant to remain home to care for a child; and
- any housekeeping, childcare or other domestic services performed by the dependant for the family.

The nature of the dependant's relationship should also be explored. If there was any course of conduct by the dependant during the deceased's lifetime that was unconscionable it could constitute an obvious repudiation of the relationship that would affect any dependant's support claim brought.

Before preparing the application materials it would also be prudent to determine whether interim orders are required to preserve assets transferred outside of the estate (insurance proceeds, pension benefits etc.).

Further, a lawyer should consider whether the dependant is in need of interim support pending a determination of the application or an interim lump sum support payment to be applied to the dependant's legal costs, i.e. a funding order, or interim support and the utility of the S.64 of the SLRA.

Drafting the Application

Draft the Notice of Application in the Form of 14E of the *Rules of Civil Procedure* (the "*Rules*") setting out the precise relief sought, the basis for the claim for support, including any statutory provisions or rules relied upon and the evidence to be relied upon (see Rule 38.04). The application must be supported by affidavit evidence. Draft the supporting affidavit(s) in Form 4D setting out the evidence relied upon in support of the claim (see Rule 39.01 of the *Rules*). The main affidavit is usually sworn by the dependant unless he or she is a minor or incapable. If the dependant is a minor, the application may be commenced by the dependant's parent (see section 58(2) of the SLRA).

The affidavit should set out particulars relating to the following:

- The deceased's:
 - o Date of death;

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- Assets and liabilities including assets that were transferred outside of the estate;
- Circumstances as at the date of death; and
- Relationship with the dependant.
- The dependant's:
 - Age;
 - Occupation;
 - Education;
 - Current assets, liabilities, income and expenses;
 - Projected assets, liabilities, income and expenses;
 - Ability to support him or herself in the future;
 - Relationship with the deceased; and
 - Need for support in the short and long term.
- The support the deceased provided (or was under a legal obligation to provide) to the dependant as at the date of death;
- The deceased's last will and testament and any codicils, highlighting relevant provisions;
- Any provisions actually made by the deceased for the dependant (for example, life insurance, gifts under the Will, etc.);
- The deceased's other family members; and
- Other persons to whom the deceased owed a legal or moral obligation to provide support as at the date of death.

Issuing and Serving the Application

The application is typically brought in the jurisdiction where the deceased was normally resident at the date of death unless permission is sought from the court to issue the application in another jurisdiction. The Notice of Application must be issued by the Ontario Superior Court of Justice before

the materials are served. Most jurisdictions require the dependant to file a Form 14F (Information for Court Use) at the time the Notice of Application is issued, however, this practice varies by jurisdiction. Check any relevant practice directions.

The proper respondent of a dependant's support application is the estate trustee. The beneficiaries of the estate do not need to be named respondents. However, the application must be served on all beneficiaries and all persons with an interest in the estate and/or the outcome of the application. Section 63(5) of the *SLRA* provides that the court shall not make an order for support unless it is satisfied that all persons who are affected by the order were served with Notice of the Application.

The Notice must be served on the respondents at least 10 days before the date of the hearing of the application except where the Notice is served outside of Ontario, in which case it shall be served at least 20 days before the hearing date (see Rule 38.06(3)). You must then file the Notice of Application together with proof of service with the Court at least 7 days before the hearing date. In practice, however, the Notice and Application Record is typically served well in advance of the hearing of the dependant's support claim, due to the procedural steps required, including a preliminary appearance to obtain an Order Giving Directions, documentary production, cross-examinations on affidavits, etc.

Once an application is served on the estate trustee, section 67 of the *SLRA* prohibits an estate trustee from making distributions pending the resolution of the dependant's support claim.

It is crucial to be aware that the issuance and service of the application on the estate trustee will have *no effect on section 72 assets* (those assets that pass outside of the estate). There will be no stay of the distribution or disposition of these assets as they are not within the control of the estate trustee. The persons to whom they pass outside of the estate may be aware of, but not be put on notice of or governed by, the dependant's support application.

Therefore, a dependant who is asserting a claim under Part V of the *SLRA* should consider doing the following:

- Requesting that the estate trustee (by court order if necessary) provide a list of all of the deceased's assets which pass outside of his estate, and to whom they pass;
- Moving for an order suspending the disposition or distribution of not only the estate assets, but also the section 72 assets to ensure they can be available to satisfy the dependant's claim; and
- Naming those who benefit from the section 72 assets as respondents to the proceeding and serving them with the dependant's relief application.

First Court Appearance

The first court appearance is not the hearing of the application itself. Become familiar with the usual practices in the Court within which you issue the application. In Toronto, it will typically be used to secure an Order Giving Directions that addresses several issues including:

- Whether the applicant's claim will proceed by way of application or by trial of an issue. If it is to proceed by application the Order Giving Directions must be in Form 75.9. If trial of an issue and pleadings are directed, Form 75.8 must be used;
- If pleadings are not required, the Order will list the issues to be tried on the application;
- The schedule to be followed for the delivery of pleadings/responding materials, documentary production, cross-examinations/examinations for discovery, and mediation (if agreed to or mandatory);
- The manner in which production of relevant documents and information will be secured from parties and non-parties;
- The preservation of estate assets pending a determination of the application;
- The preservation of assets transferring outside the estate pending a determination of the application (section 72 assets);
- Interim support for the dependant pending a determination of the application; and
- Costs on an interim basis.

The lawyer representing the dependant should ensure that copies of the Order are served upon all interested individuals or companies who are not parties to the application (e.g. insurance companies holding insurance proceeds).

Documentary Disclosure and Discovery

If the Order Giving Directions dictates that the matter is to proceed by pleadings, then in addition to an application, it may be required to prepare, serve and file a Statement of Claim pursuant to an Order Giving Directions (Form 75.7). The defendants will file a Statement of Defence. If needed, prepare, serve and file a Reply to the Statement of Defence. Notably, the *SLRA* prescribes the commencement of proceedings by Application.

Also prepare and serve an Affidavit of Documents in Form 30A in accordance with Rule 30.03.

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If the Order Giving Directions provides for an application then prepare, serve and file any additional affidavits upon which the dependant intends to rely. Also provide a list of all documents in the dependant's power, possession, and control relating to the issues raised in the application and serve the list.

If the Order Giving Directions directs non-parties, such as accountants, drafting lawyers, insurance companies or the deceased's former employers, to produce copies of documents in their power, possession, or control relevant to the issues raised in the application, follow-up with them to ensure they comply with the order.

Next steps involve conducting examinations for discovery (if provided for) or cross-examinations (if provided for).

Mediation, Pre-Trial and Trial

Since November 2008, mediation has been mandatory in dependant support applications brought pursuant to Part V of the *SLRA* in Toronto, Ottawa and the County of Essex. As of January 1, 2016, Rule 75.06 of the *Rules* was amended to provide that, in jurisdictions where mediation is not mandatory on these applications, the court may nevertheless order mediation and may make any orders for directions as to mediation that a court could make where mediation is mandatory.

Of course, it is always open to the parties to agree at any point to participate in a mediation of a dependant's support claim. As a lawyer representing a dependant, you should always give consideration to whether the dependant's claim should be mediated where mediation is not mandatory.

If the Order Giving Directions directs the parties attend a pre-trial conference then you must prepare for and conduct the pre-trial in accordance with Rule 50. Be aware of local practice directions or local procedures regarding the confirmation of pre-trial and trial dates, filing of trial memoranda, compendia of documents, etc., and consult with court staff in the applicable jurisdiction.

Well in advance of trial, draft and serve: a Form 51A, Request to Admit on the opposing parties; a Notice pursuant to section 55 of the *Evidence Act*; a Form 53A, Summons to Witness; and a compendium of documents (prepared in consultation with opposing counsel to the extent possible).

You should also meet with and prepare your witnesses and update your case law, as well as prepare your brief of authorities. Also, make sure you obtain the most up to date information concerning the status of the estate assets and liabilities as well as the dependant's updated financial information. Provide full disclosure of the same to the defendants / respondents.

Then conduct the trial in accordance with Rules 52-53.

Offers to Settle

Throughout all of this, you should keep in mind any potential to settle the claim and whether a written offer to settle should be made. This should be revisited regularly throughout the litigation. Offers to settle can be made at any time; it is not necessary to wait until the matter is proceeding to trial. Keep the cost consequences set out in Rule 49 in mind and ensure the dependant recognizes the possible cost consequences of rejecting reasonable offers to settle.

If a settlement is reached and any of the parties is a “party under a disability”, court approval of the settlement must be sought in accordance with the *Rules of Civil Procedure*. A “party under a disability” is a general term used to refer to minors, mental incompetents and absentees. See the definition of “disability” in Rule 1.03. An Order approving settlement can be secured by way of a motion brought by any one of the parties pursuant to Rule 7.08.

REPRESENTING THE ESTATE TRUSTEE OR BENEFICIARY RESPONDING TO A CLAIM

As a lawyer representing the respondent in a dependant's support claim, the process is the same as set out above, however, there are other issues for consideration in your role.

First, it is important to remember that a dependant's support claim is brought against the estate trustee or personal representative and not against the estate itself. While often people refer to an “estate” as if it were a person or legal entity (like a corporation), an estate is only property and cannot sue or be sued.

Lawyers representing an estate trustee who is also a beneficiary in a dependant's support claim should consider for whom he or she is acting. Is the lawyer representing the estate trustee in his or her role as estate trustee and not personally? Or is the lawyer representing the estate trustee in his or her personal capacity as a beneficiary? This becomes complex when there are multiple estate trustees, or where some or all are also beneficiaries, or where the applicant is also a beneficiary under the Will.

When served with a Notice of Application, any party or respondent who intends to participate in the proceedings must file a Notice of Appearance in Form 38A with the Court forthwith (see Rule 38.07(1)).

If you are acting for an estate trustee, and a potential claimant requests details of when the application for the Certificate is granted, it is appropriate to provide such information. Failure to do so will likely result in an order for extension and may affect the estate trustee's liability, or costs.

Once a dependant's support claim is issued and served on the estate trustee, the distribution of the estate is stayed pursuant to section 67 of the *SLRA*. It is critical that the lawyer advise his or her estate trustee client to not distribute any portion of the estate once a claim has been served on them. The lawyer should advise the estate trustee of his or her potential personal liability, under section 67(3) of the *SLRA*, if they distribute assets in contravention of this stay and a support payment is ordered.

In responding to a dependants' support claim, a lawyer representing an estate trustee should also advise and assist their client in determining whether the claimant is in fact a "dependant" within the meaning of Part V of the *SLRA*.

Further, a lawyer should assist the estate trustee in determining what provisions the deceased already made to the applicant (including those that might fall outside of the estate, such as insurance proceeds). Such provisions will affect the amount of support awarded (if any).

An estate trustee should be advised to provide the applicant with all relevant information (including when the Certificate is granted, the nature and value of the assets of the estate, and the nature and value of the deceased's assets which pass outside of his estate (to the extent that the estate trustee can discern them), and to whom they pass).

On the flip side, a lawyer representing a party responding to such a claim must make a request of and require the applicant to produce a financial statement setting out his or her assets, liabilities and income. The applicant can complete this by filing a Form 13 under the Family Law Rules. This is important information needed for defending a claim. A lawyer should also consider the necessity of, and if required, prepare for, the cross-examination of the applicant on his or her affidavit evidence.

The court will consider any relevant fact which might affect the dependant's entitlement to support and which might affect the priority given to one dependant over another, including the deceased's views and wishes. It is the estate trustee's obligation to provide whatever information he or she may have available to assist the court in determining the appropriate amount of support (if any) to be provided. An estate trustee will be seeking an order that will minimize the amount paid out of the estate and maximize the amount paid to the intended beneficiaries under the Will.

Defending dependants' support claims, including those that are negotiated outside of the courtroom, can result in significant legal costs. However, it is likely that costs of the claim will be paid by the estate, since a finding that a dependant has not been adequately provided for by the deceased is a finding that the testator failed to properly distribute his or her estate and support those that he was morally or legally required to support.

The Court may also make interim costs awards in favour of a litigating dependant. These interim costs awards may make it difficult for the estate trustee to administer the estate as provided for in the Will. A lawyer representing an estate trustee should always advise their client to consider any reasonable offer to settle, to ensure the potential cost to the estate is not unreasonable.

CONCLUSION

Whether a lawyer is representing the applicant or respondent in a dependant support claim it is wise to review the legislation and case law and familiarize yourself with the processes and timelines involved.

CHAPTER 15: CONSIDERATIONS FOR ESTATE TRUSTEES DEFENDING A SUPPORT CLAIM

Acting as an estate trustee can be an involved and lengthy affair in some circumstances, especially if the estate is faced with litigation or an ongoing dispute. This chapter will provide an overview of some best practice tips for estate trustees when faced with a dependants' support claim.

ESTATE TRUSTEE: FIDUCIARY

The estate does not belong to the estate trustee; the estate trustee is holding the estate "in trust" for the beneficiaries. Therefore, an estate trustee is a fiduciary who owes the following duties to the *beneficiaries* of the estate:

- Duty to avoid conflicts of interest;
- Duty to not delegate tasks of the estate trustee;
- Duty to invest trust assets in a prudent manner;
- Duty to be even-handed as between beneficiaries (treat the beneficiaries equally and fairly);
- Duty to account;
- Duty to keep the beneficiaries reasonably informed; and
- Duty to administer the estate in a timely manner – receive, administer and distribute the estate.

Taking on the responsibility of a fiduciary is an onerous and challenging task and increasingly one which risks being less than fully compensable. A fiduciary attracts scrutiny by virtue of the appointment itself. The role and responsibilities of an estate trustee are further complicated by surrounding emotion and often litigation commenced by those to whom the fiduciary is accountable. The role demands trust, integrity and transparency and exposes one to professional and personal liability. This should all be kept in mind when acting as an estate trustee for an estate faced with a dependant's support claim.

Many estate trustees turn to the Internet to help them in their role as estate trustee. A simple estate checklist found on the Internet may or may not be sufficient for a quick administration. Importantly, the ultimate responsibility for the exercise of the duties owed by the estate trustee to the beneficiaries rests with the estate trustee and some tasks may be beyond their knowledge or expertise. As such, they are permitted to retain professionals to assist in the fulfillment of their duties. Where there is a claim for dependant's support against the estate, legal advice and representation is strongly advised.

If the estate trustee does retain counsel, the lawyer is the lawyer for the estate trustee not the estate.¹ While sometimes, colloquially, we refer to the "estate" as if it is a person or legal entity (like a corporation), an estate is only property, the assets of the deceased, which cannot sue or be sued. A dependant's support claim is always commenced against the estate trustee or administrator of the estate (in their role as a representative, not personally). If the estate trustee retains a lawyer to represent him or her in a dependant's support claim, generally the costs of that lawyer (if the need was reasonable and the costs are reasonable) will come out of the estate and are not paid by the estate trustee personally. However, if the costs or steps taken by the estate trustee in the litigation are not considered reasonable, a court has discretion to award costs against the estate trustee *personally*, as opposed to out of the estate.

An estate trustee has a general duty to put his or her own interests aside and to act exclusively for the benefit of the beneficiaries. If an estate trustee acts in a way that is contrary to his or her duties, then he or she may be in a conflict of interest, and either the beneficiaries or a co-estate trustee or any person with a financial interest in the estate may apply to the court to have that estate trustee removed pursuant to section 37 of the *Trustee Act*.²

The primary duty of an estate trustee is to preserve the assets of the estate, pay the debts and distribute the balance to the beneficiaries entitled under the will, or, in accordance with any order of the court. The law expects the estate trustee to remain impartial between opposing beneficiaries.

A DEPENDANT'S SUPPORT CLAIM IS COMMENCED: NOW WHAT?

One of the first steps all estate trustees should take when appointed is to consider any claims or potential claims (including dependant's support claims) against the estate and obtain legal advice as necessary. A lawyer will be able to assess the rights of any "dependants" who were financially dependant on the deceased or those of a surviving spouse. Notably, the estate trustee will defend the estate and is authorized to do so.

1 See *Sharp v Lush*, (1879), 10 CH D 468). See also *Bott Estate (Trustee of) v. Macaulay* (2005), 76 ORD (3d) 422 (ONSC).

2 RSO 1990, c T23.

The estate trustee should not take a position or comment on the legality or fairness of the distribution of the estate or lack of bequests or lack of gifts under the Will. The estate trustee is required to distribute the estate in accordance with the testator's Will, or under the intestacy legislation, or by court order. However, things can get complicated in dependant's support litigation where the estate trustee is also a beneficiary under the Will and often in an adverse role, or acrimonious relationship, with the dependant claimant (for example, where the estate trustee is the adult child of the deceased from a first marriage and the claimant is the second spouse of the deceased and also perhaps a beneficiary under the Will).

It is the estate trustee's responsibility to respond to the dependant's support application. The estate trustee must make sure that the beneficiaries whom the testator intended to benefit under his or her Will will be provided for to the greatest extent possible, notwithstanding that a dependant's support claim has been commenced. This is consistent with the estate trustee's duty to administer the estate in accordance with the deceased's Will or on intestacy.

If an estate trustee wishes to bring their own dependant's support claim, he or she must resign as estate trustee, as he or she cannot administer the estate at the same time as commencing an action against him or herself as estate trustee.³

Not only should estate trustees consider who might be/qualify as a "dependant" under the *Succession Law Reform Act*⁴ (the "**SLRA**") and might have a claim, they should also be mindful of the limitation period for commencing such a claim. Section 61(1) of the *SLRA* provides that the application for dependant's support must be made within **six months** from the issuance of a Certificate of Appointment of Estate Trustee with or without a Will, unless otherwise ordered by the court.

Estate trustees should also be aware that notwithstanding that six months may have passed, section 61(2) of the *SLRA* permits the court – "if it considers it proper" – to allow an application to be made "at any time as to any portion of the estate remaining undistributed at the date of the application".

If a potential claimant requests details of when the application for the Certificate is granted, an estate trustee should provide this information. Failure to do so will likely result in an order for extension and may affect an estate trustee's liability, or costs.

It is also very important to note that section 67 of the *SLRA* prohibits an estate trustee from making distributions pending the resolution of the support claim:

³ See *Mohammed v. Heer*, 2008 CanLII 54317 and *Mahon v. Costa* 2013 ONSC 914 (discussed in detail below).

⁴ RSO 1990, c S.26.

67 (1) Where an application is made and notice thereof is served on the personal representative of the deceased, he or she shall not, after service of the notice upon him or her, unless all persons entitled to apply consent or the court otherwise orders, proceed with the distribution of the estate until the court has disposed of the application.

The applicant in a dependant's support claim may seek an Order Giving Directions to reinforce this statutory prohibition on distributions and to provide additional restrictions on the use of estate assets. For example, the applicant might ask the court for an order requiring his or her consent to the payment of any expense over a certain amount, for example \$2,000. This would mean that an estate trustee may only use estate assets to pay estate expenses, and that the applicant would have to consent to payment of any expense over \$2,000.

An Order Giving Directions freezing or restricting access to the estate assets, can also include those assets captured by section 72 of the *SLRA* (insurance proceeds, pension benefits etc. that pass outside of the estate and are not caught by the section 67 stay) pending resolution of the *SLRA* claim. When this occurs, it is important for the estate trustee to deal with the dependant support claim in a timely manner so the intended recipient of those assets may receive them unencumbered.

Nevertheless, this prohibition on distribution does not prevent an estate trustee from making reasonable advance for support to dependants who are beneficiaries (see section 67(2) of the *SLRA* and *The Estate of Ingrid Loveman, Deceased*, 2016 ONSC 2687 at para. 54).

It is important to be aware that an estate trustee will be personally liable for any amount distributed in violation of the stay:

Liability of personal representative

67 (3) Where a personal representative distributes any portion of the estate in violation of subsection (1), if any provision for support is ordered by the court to be made out of the estate, **the personal representative is personally liable to pay** the amount of the distribution to the extent that such provision or any part thereof ought, pursuant to the order or this Part, to be made out of the portion of the estate distributed. R.S.O. 1990, c. S.26, s. 67. [emphasis added]

While the distribution of the estate is halted once an application for dependant's support is served on the estate trustee, until the estate trustee has been served with an application for dependant's support, they are free to distribute the estate property to the beneficiaries.

Another reminder: an estate trustee has an obligation to insure and safeguard all estate property that comes into the estate trustee's hands by virtue of the appointment. This means safeguarding

the property while a dependant's support claim is being litigated.

Often houses are the most valuable asset of an estate. While property if to be sold, should be sold for fair market value and converted to cash in a timely manner, litigation or a dependant's support claim may delay the sale where there is a dispute over the property, or how the sale will take place, etc. A prudent estate trustee will ensure that the value of the property does not decline during the litigation. In order to do this, the estate trustee should make sure that the property is insured adequately, protected from the elements, monitored, and maintained appropriately; this is especially true for cottages or other country properties. If anyone is occupying the house owned by the estate, that person should pay occupation rent unless the will clearly provides an exemption.

In responding to a dependant's support claim, the estate trustee should determine what provisions (if any) the deceased made for the applicant's support, including those benefits that might fall outside of the estate (such as insurance proceeds, pension benefits, etc.).

The estate trustee should not hesitate to provide the applicant with all the relevant information when asked (including when the Certificate is granted, the nature and value of the assets of the estate, and the nature and value of the deceased's assets which pass outside of his estate - to the extent that the estate trustee can discern them - and to whom they pass).

On the flip side, the estate trustee should require the applicant to produce a financial statement setting out his or her assets, liabilities and income. An applicant can provide this information in a Form 13 under the *Family Law Act*.⁵ This is an important step for defending or responding to a dependant's support claim successfully. After obtaining this information from the applicant, the applicant may be cross-examined on her evidence.

The court will consider any relevant fact which might affect the dependant's entitlement to support and which might affect the priority given to one dependant over another, including the deceased's views and wishes. The estate trustee must provide whatever information he or she may have available to assist the court in determining the appropriate amount of support (if any) to be provided. An estate trustee will be seeking an order that will minimize the amount paid out of the estate and maximize the amount paid to the intended beneficiaries under the Will.

Defending dependants' support claims, including those that are negotiated outside of the courtroom, can result in significant legal costs. Often, but not always, costs of the claim will paid by the estate, since a finding that a dependant has not been adequately provided for by the deceased is a finding that the testator failed to properly distribute his or her estate and support those that he was morally or legally required to support.

⁵ RSO 1990, c. F.3.

The Court may also make interim costs awards in favour of a litigating dependant. These interim costs awards may make it difficult for the estate trustee to administer the estate as provided for in the Will. An estate trustee should always consider any reasonable offer to settle, to ensure the potential cost to the estate is not unreasonable.

CASE LAW: ESTATE TRUSTEE'S ROLE IN DEPENDANTS' SUPPORT CLAIMS

As noted above, if an estate trustee wishes to bring a claim for dependants' support, he or she must resign as estate trustee first. In *Mohammed v. Heera*,⁶ the parties brought a motion for directions to determine the appropriate person to be appointed as estate trustee of the estate of the deceased, who died without a Will. The Applicants (the surviving children of the deceased) and the Respondent (the common law partner of the deceased) each claimed priority over the other to apply for a Certificate of Appointment of Estate Trustee Without a Will. The Court noted that the Respondent intended to commence proceedings against the estate under the *SLRA* as a dependant of the deceased, thus precluding her from applying to administer the estate. The Court confirmed that "by virtue of advancing such a claim [a dependant's support claim], the person is not entitled to also administer the estate for the obvious reason that he or she cannot act both as Estate Trustee and commence an action against the estate."⁷

The Respondent took the position that she should be entitled to name an individual in her stead to administer the estate, in priority to the next of kin (the Applicants) and nominated her sister. The Court found that there was no prioritized list of individuals who were entitled to apply, and that the Respondent's sister was not suitable as she had shown that she was partial to the Respondent. The Applicants were appointed as estate trustees. However, the Court noted that there was nothing precluding the Respondent from applying to remove the Applicants if there were grounds that the Applicants should not continue as estate trustees.

In *Mahon v. Costa*,⁸ the deceased died without a will, leaving behind a common law spouse and four adult children (three of whom were from a previous marriage, the fourth being the child of the common law spouse and deceased). The common law spouse brought an application for dependant's support as against the four adult children *personally*, the only beneficiaries under the intestate distribution of the deceased's assets. The three adult children from the deceased's previous marriage opposed the application and sought its dismissal as the common law spouse should have brought the dependant's support claim as against the administrator of the deceased's estate. However, one had not been appointed.

6 2008 CanLII 54317 (ON SC).

7 *Ibid*, at para. 31.

8 2013 ONSC 914.

Meanwhile, the common law spouse unilaterally, and according to the Court, “unlawfully” wound up and disposed of the deceased’s estate or at least portions of it, including the sale of the deceased’s construction equipment and two of the deceased’s vehicles (for cash, without any bills of sale or other documentation) and provided no accounting for the appliances, furniture and household goods in the house. Further, she provided no reliable financial information with respect to the deceased’s investment account or other banking information.

The common law spouse argued that she did not seek to be appointed estate administrator as she would have had to bring an application as against herself. The Court was not swayed by this excuse, noting that the Court has powers under ss.28 and 29 of the *Estates Act*,⁹ and rule 74.10 of the *Rules of Civil Procedure*,¹⁰ to appoint third parties as administrators pending litigation or to deal with other circumstances as required.

The Court dismissed the claim as against the beneficiaries personally, noting that the *Rules of Civil Procedure* do not provide for any circumstances allowing a claim for an interest in a deceased person’s property to be brought other than against an executor or administrator of the estate. An applicant would have to first apply to obtain the permission of the court to proceed against anyone other than the estate administrator or trustee.¹¹ However, the claim was dismissed without prejudice to the applicant to reapply against the administrator of the deceased’s estate once one was appointed by the Court. Further, the Court ordered that the applicant common-law spouse have carriage of the procedure for the appointment of a satisfactory estate administrator for the purpose of the conduct of any renewed application.

In *Forrest v. Lacroix Estate*,¹² an estate trustee was found personally liable for dissipating assets of the estate after a dependant’s support claim was brought and a contempt motion was also successfully brought against the estate trustee, however, the contempt order was overturned at the Court of Appeal.

The estate trustee in *Forrest* was the son of the deceased and the sole beneficiary under the deceased’s Will. The deceased had made no provision for the Applicant, his common law spouse of 19 years. The trial judge found that the Applicant was a dependant, the deceased had not made adequate support, and that the Applicant was entitled to support in the amount of \$2,500/month.

The trial judge also found that the estate trustee had deliberately dissipated estate assets (in the face of a specific order by the court prohibiting the dissipation of estate assets and after being

9 RSO c E.21.

10 RRO 1990, Reg 194.

11 *Mahon v Costa*, *supra*, at para. 11.

12 (1999) 46 OR (3d) 364 (SC), rev’d (2000) 48 OR (3d) 619 (CA).

advised by his solicitor of his obligations) with the intention of frustrating the Applicant from receiving support from the estate. In lieu of monthly support payments, the trial judge ordered that a lump sum of \$300,000 was to be paid by the estate and any shortfall was to be paid by the estate trustee personally.

Justice Bolan noted that section 67(3) of the *SLRA* imposes personal liability against a personal representative of an estate who violates s.67(1): “The section is designed to protect dependants from personal representatives of an Estate who egregiously and without colour of right set upon a course of action to plunder the assets of an estate.”

The estate trustee failed to make the required payment, and the Applicant successfully obtained a contempt order. However, the Court of Appeal set aside the order. Morden J.A. clarified that the wording of the rules governing contempt orders (Rules 60.05 and 60.11(1) of the *Rules of Civil Procedure*) were so clear that they could not be interpreted to allow for contempt proceedings against a party in cases of non-payment of monies.

In *Weigand v. Mohammed*,¹³ the claimants (the children of the deceased) were late commencing their dependant’s support claim. The children’s reason for not filing within the prescribed time was that they alleged that they were misled by the estate trustee, the deceased’s common-law wife. The children’s grandfather filed an affidavit saying that he had specifically purchased a house for the deceased and his family. After the death, the wife told the children that she would sell the house that was in the deceased’s name and equally distribute the proceeds to all three children. But as time went on it became clear that, despite her multiple assurances, the house would never be put up for sale. The house was transferred into the name of the wife. The wife denied that she ever made this promise.

Ultimately, Justice George concluded:

In circumstances like these, to refuse leave and not grant an extension, I would have to conclude that the prejudicial effect of an extension upon the respondent would outweigh the need to engage in a review and determine entitlement to support under s.58. I can’t reach that conclusion.¹⁴

CONCLUSION

Ultimately, if you are acting as an estate trustee and are faced with a dependants’ support claim, best practices dictate that you seek out the advice of a lawyer and have him or her represent you in

¹³ 2016 ONSC 6201.

¹⁴ *Ibid*, at para 45.

the proceedings. Below is a short summary of some other best practices for estate trustees faced with a dependant's support claim:

- Be mindful of your fiduciary duties as an estate trustee;
- Consult with a lawyer and retain a lawyer to represent you in your role as estate trustee for the dependant's support litigation;
- Follow and abide by all Court Orders;
- Once served with a dependant's support claim stop all distribution of the estate's assets;
- Preserve the property of the estate;
- Complete an accurate list of the estate's assets to be used for the dependant's support litigation and assist with documentary production;
- Resign as estate trustee if you wish to bring a dependant's support claim; and
- Be mindful of your duty to act in the best interests of the beneficiaries and estate.

CHAPTER 16: TIPS & TOOLS IN SETTLING DEPENDANTS' SUPPORT CLAIMS

For this chapter, we begin with the premise that the claimant qualifies as a dependant, has need, and has not been adequately provided for by the deceased. The question then is how much should be paid or transferred to the dependant, and how? If the parties to the litigation are aware of all of the tools and options available, this can positively affect the negotiations, and result in a successful and creative settlement. While it is not possible to delineate all of the options that could be used to further a resolution of the claim, a number of the more common ones will be reviewed in this chapter.

The starting point is to examine the assets of the estate, and the Section 72 assets (collectively the “**Assets**”)¹. It is crucial to understand how each Asset will be taxed and to ensure (to the extent possible) that no assets are liquidated or transferred until the negotiations are complete.

TAX-DRIVEN SETTLEMENTS

Capital Gains

A tax-driven resolution should always be considered, particularly if the claimant is a spouse. This includes both a married and common law spouse, provided the common law spouse meets the definition for same under the *Income Tax Act*² (the “**Act**”). Any gains on capital property owned by the deceased at death will be taxed in the deceased’s terminal tax return, based on the deemed disposition provisions of the Act. If the parties are able to agree on a transfer of the capital property to the claimant spouse on a “rollover” basis, this will defer capital gains tax until the recipient spouse disposes of the property or dies, whichever first occurs. While the estate is still giving up capital property to resolve the claim, it is doing so knowing that part of the value of the property (if left in the estate and thus taxed on the terminal return) would otherwise have been reduced by the tax liability on the deemed disposition.

1 Section 72 assets are discussed in detail in Chapter 5.

2 RSC 1985, c 1 (5th Supp).

Consider a situation where the deceased owned and occupied both a cottage and a condominium in Ontario, both of which had increased significantly in value since they were acquired. Of course, only one of the properties would be eligible for the principal residence exemption under the Act. The other would have the gain fully taxed in the deceased's terminal tax return. If the estate (as part of resolving the dependants' support claim) transferred the condominium to the claimant spouse on a "rollover" basis, the estate would certainly "lose" the value of the condominium, but avoiding tax on the gain would reduce the amount of the loss. For example, if the condominium had a value of \$1 million at death, and a gain of \$500,000, the tax liability to the estate on the deceased's terminal return would be about \$125,000. The net effect of the transfer would be a reduction of \$875,000 and not \$1 million.

Portfolio Investments

Portfolio investments can yield the same and frequently an even better opportunity for a tax driven settlement. If the deceased held stocks at the time of death which had appreciated in value significantly since they were purchased, the transfer of some or all of the stock should be considered to satisfy the spouse's claim for dependants' support. Again, if the stock is transferred to the spouse as a tax deferred "rollover"; it would not result in any tax liability to the estate on the property so transferred. The spouse would have the ongoing dividend income from the stocks, which could be taxed at favorable rates depending on the spouse's income. In addition, the spouse could liquidate the stocks over time as his/her needs required and, again depending on the applicable tax rate, pay little or no tax on their disposition. From the estate's point of view, publicly-traded stocks transferred to the spouse could, if desired, simply be purchased again on the open market.

RRSPs and RRIFs

The taxation of Registered Retirement Savings Plans ("**RRSPs**") and Registered Retirement Income Funds ("**RRIFs**") provide another real opportunity to negotiate the settlement of a dependants' support claim. For example, if the deceased left a sizeable RRSP/RRIF with no designated beneficiary, and the claimant was a spouse, an election could be made (with the consent of both parties) to roll the RRSP/RRIF over to an RRSP/RRIF for the spouse. This would save the estate significant tax as the RRSP/RRIF would otherwise be fully taxable in the deceased's terminal tax return. The spouse could liquidate the RRSP/RRIF over time, usually at a lower tax rate than would be in effect if the RRSP/RRIF were taxed in the terminal return. Of course the claimant spouse would no doubt argue that the value of the RRSP/RRIF should be discounted to take into account his/her future tax liability on liquidation, but this again could be part of the negotiations.

However, if the estate trustee had already liquidated (technically de-registered) the RRSP/RRIF, effecting a rollover to the spouse thereafter might not be impossible, but would surely be more complicated and would likely require the co-operation of the Canada Revenue Agency (the “**CRA**”). Accordingly, as noted above, no dispositions or liquidations should be effected once a claim for dependants' support is made, until negotiations have been exhausted.

ANNUITIES

Annuities are another financial tool available to resolve dependants' support claims. If the claimant is an older second spouse, simply transferring a lump sum to the spouse may not offer sufficient protection to the beneficiaries of the estate (usually the children of the deceased's first marriage). This is particularly so if the spouse is quite elderly and/or in poor health. The needs of the spouse may be significant, but there is a real likelihood (if the spouse dies earlier than expected) that a large portion of the lump sum will devolve to the spouse's own children, to the detriment of the beneficiaries of the estate. Instead, having the estate use a lump sum to purchase an annuity for the benefit of the spouse can achieve a reasonable balancing of the needs and interests of the parties.

An annuity provides the annuitant (in this case the spouse) with a monthly or yearly payment for the duration of his/her lifetime. The amount of the payment is dependent on the age and health of the annuitant, (an actuarial calculation) and other factors such as the annuity's guarantee period, the applicable interest rates, and the needs of the annuitant. It should also be noted that the payments can be adjusted to take into account increases in the cost of living, or inflation.

The guarantee period can be five, ten or more years. If the annuitant dies before the guarantee period expires, there will be a payment to the named beneficiaries of remaining any capital amount. In the above scenario, this could be the children of the first marriage. In this way the balance of any unpaid capital in the annuity will not result in a windfall for the spouse and her estate. Conversely, if the annuitant dies after the guarantee period there will be no capital payment to the designated beneficiaries of the annuity. It should be noted however that the annuity payments will be taxed to the estate as owner of the annuity, unless there is an agreement to have the annuity income allocated to the annuitant spouse, and taxed in her/his hands. The latter approach will typically be more tax-effective as the spouse will often be in a lower tax bracket than the estate, especially where the estate is not a “graduated rate estate” for purposes of the Act. It is appropriate to ensure that when undertaking negotiations of this nature, the estate has access to a tax lawyer or accountant to assist in advising on the repercussions of the proposed settlement.

An annuity can also be used to deal with other situations that arise. It is not uncommon to find a provision in a will permitting a spouse to remain in the deceased's home for his/her lifetime, with the home being sold on the death of the spouse, with the proceeds of sale to be divided among the deceased's children. However, many spouses do not have the ability to fund the ongoing expenses of occupying, much less maintaining the home. An annuity or trust (see later in this chapter) could be used to deal with such expenses. Again any capital remaining on the death of the spouse could be designated to be paid to the children of the deceased.

If the annuitant spouse has an underlying illness or disability, an "impaired" annuity should also be considered. An insurance company/broker quoting on the amount required to fund the annuity will require specific information on the nature of the illness or disability. The information will affect the actuarial calculation of the lump sum required resulting in a reduced capital sum required to purchase the annuity. The information may also impact the potential to choose a longer guarantee period.

TRUSTS

Creating a trust for the benefit of the claimant could also be considered. The trust could require that the beneficiary of the trust receive all of the income of the trust, and that the income would be taxed in his/her hands. It could also provide the trustee with the ability to encroach on capital for general or specific needs of the beneficiary. On the termination of the trust (dependent on the beneficiary attaining a certain age or dying, whichever first occurred) the capital remaining in the trust would be paid to the beneficiaries of the deceased's estate. This would again allow for a balancing of the interests of the claimant and the deceased's beneficiaries.

There are however disadvantages to resolving the claim through the creation of an *inter vivos* trust. Firstly, the parties would have to agree on the trustee(s). Secondly, the trustee(s) would likely want to be compensated which would require additional capital from the estate to fund such an expense. The expense of preparing trust income tax returns would further erode the capital of the trust. The anticipated requests for capital encroachments and the potential for disputes, whether related to this or a passing of accounts, could create the prospect and cost of litigation. In comparison, an annuity would provide certainty of payments, no need to manage the money, and would likely cost less in the long run.

There are, however, situations where a trust could be an effective way of resolving the claim. This could involve the support of children of the deceased until they completed their post-secondary education. There could be monthly payments from the trust to provide for the ongoing expenses for

the children, with the ability to encroach on capital for extraordinary needs. Any amount remaining when the children were no longer in need of support could be paid to the beneficiaries of the estate. An annuity would not be practical for such claimants as it would not provide the flexibility to modify the payments to reflect changes in the children's needs and expenses, including but not limited to tuition, medical or orthodontic expenses.

Trusts for Parties under Disability

A trust might also be considered for a disabled adult, particularly one who receives payments or services from the Ontario Disability Support Programme ("**ODSP**"). A trust of \$100,000 or more could be established for medical expenses.

There are, however, additional opportunities to consider when attempting to resolve a dependants' support claim by a person in receipt of ODSP benefits. This could include the estate contributing to the acquisition of a house for the claimant, a car, an annuity which would limit the amount paid to the claimant each year to ensure the continuity of ODSP payments and services, and/or a registered disability support plan. While it is not possible to address all of the options available here, a careful review of the ODSP legislation and regulations would be required to ensure that the settlement did not result in the ODSP recipient/claimant losing any services or funding.

CONCLUSION

These examples are just some of the options and tools available to the parties to achieve a cost and tax effective resolution to a claim for dependants' support. Knowledge of the Assets, tax and other implications, and a flexible and create approach to the negotiations can result in a positive and early settlement.

