

Estate Litigation – Dependant Support Claims

By Holly LeValliant

Ontario legislation allows you to leave your estate to whomever you wish in your Will. But, you have a positive obligation to make ‘adequate’ provision for your dependants. Under the *Succession Law Reform Act* (**‘SLRA’**), a dependant may bring a Court Application alleging that they were not properly provided for under the deceased’s Will.

Dependant Support Claim

The purpose of a dependant support claim is to provide support and maintenance to a deceased person’s dependants if the deceased was under a duty to provide support for them and failed to make adequate provision for them on death. A secondary purpose is to relieve the state from the obligation of providing support for such persons.

Once the Application is Served

Once an Application for dependant support is made, and the Executor is served with the claim, distribution of the Estate is stayed under section 67 of the *SLRA*. Creditors take priority over beneficiaries, so the Executor may continue to pay the debts and expenses of the Estate even if distribution is stayed, unless the Court orders that the administration of the Estate, including the payment of debts and expenses, be suspended.ⁱ

Limitation Period

An Application for dependant support must be brought within six months of the grant of the Certificate of Appointment of Estate Trustee.ⁱⁱ

However, the Court has the discretion to extend a limitation period in which an Application for dependant support must be brought, but only in respect of the assets of the Estate that have not been distributed at the time of the Application.ⁱⁱⁱ

Who qualifies as a dependant?

Under section 57(1) of the *SLRA*, a child, parent, spouse, or sibling may be a dependant. A spouse includes common law spouses if they cohabited continuously for no less than three years or were parents of a child.

If the deceased was providing support to that person, or if they were under a legal obligation to provide support to that person immediately before his or her death, that person may be a dependant.

Quantum of Support

The deceased has an obligation to make 'adequate provision for the proper support' of his or her dependants.

In determining the quantum of support, the Court has the jurisdiction to consider not only the financial circumstances of the deceased but also ethical issues. The following excerpt from a New Zealand case is often quoted in Canadian cases:

It is the duty of the Court, so far as is possible, to place itself in all respects in the position of the testator, and to consider whether or not, having regard to all existing facts and surrounding circumstances, the testator has been guilty of a manifest breach of that moral duty which a just, but not a loving, husband or father owes towards his wife or towards his children, as the case may be. If the Court finds that the testator has been plainly guilty of a breach of such moral duty, then it is the duty of the Court to make such an order as appears to be sufficient but not more than sufficient to repair it.^{iv}

Circumstances to be considered pursuant to s. 62(1)(a) of the SLRA

A Court will consider the following circumstances to determine whether support is owed and in what quantum:

1. The dependant's capacity to provide for his or her own support;
2. The proximity and duration of the dependant's relationship with the deceased;
3. The contributions the dependant made to the deceased's welfare, including indirect and non-financial contributions.
4. Whether the deceased had a legal obligation to provide support for another dependant;
5. The needs of the dependant. The Court may have regard to the dependant's accustomed standard of living.
6. The circumstances of the deceased at the time of his or her death. In *Swire v. Swire*, the Court held that 'the only circumstances of the deceased at the time of his death that I consider to be relevant are his financial circumstances.'^v

Needs based vs. Moral duty

The Court may consider whether find the deceased owed a moral duty to the dependant that exceeds the amount of support the deceased provided immediately prior to death.

In *Tataryn v. Tataryn*^{vi}, the Supreme Court held that a deceased's moral duty towards his or her dependants is a relevant consideration in a dependants' support application, and that judges are not limited to conducting a needs-based economic analysis in determining what disposition to make.

Writing for a unanimous Court, McLachlin based her decision on three main principles:

- (a) The court has a wide discretion to make provision out of the Estate for whatever support it considers to be 'adequate, just and equitable in the circumstances' if the deceased has not made adequate support for his or her dependants;

(b) The purpose of dependant's support legislation is to provide for dependants by preventing them from being dependant on the state; and

(c) The principle of testamentary autonomy should not be interfered with lightly.

Outcomes in Dependant Support Claims

Despite many rulings by the Court in dependant support claims, the outcomes are still very difficult to predict.

ⁱ SLRA s. 59

ⁱⁱ SLRA s. 61(1)

ⁱⁱⁱ SLRA, s. 61(2)

^{iv} (1910), 29 NZLR 959 at 972-3 (CA), affirmed [1911] AC 730 (New Zealand PC)

^v 1986 CarswellOnt 665, [1986] OJ No 2023, 23 ETR 246 at para 60

^{vi} [1994] 2 SCR 807, reconsideration refused (1994), 5 ETR (2d) 210n (SCC)