

TAB 8

**Trust and Estates
Is There Support After Death?**

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The Six-Minute Family Law Lawyer



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SIX MINUTE FAMILY LAW LAWYER



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**ADVISING EXECUTORS AND TESTATORS ON SPOUSAL AND
DEPENDANTS' CLAIMS**

1. Family Law Act Claims

Given the right of a surviving spouse, subject to a contract to the contrary, section 6(1) of the *Family Law Act* provides for the right of the surviving spouse to make an equalization claim against the assets of the estate.

Since the 1970s, a general statutory proposition prevails that the value of "family property" should be split up equally when the marriage ends, regardless of which spouse holds to the property.

With the coming into force of the *Family Law Reform Act*, 1986¹ Ontario established a deferred community of property regime which adds a new dimension in relation to its impact upon surviving spouses and estates of deceased spouses and other persons who have an interest in their estates.

While the deferred community of property regime² did not change the substantive law of succession, it had the effect of adding to or taking away property and rights to property previously thought to be those assets of a testator and surviving spouses.

The impact affected the rights of the estates of a deceased spouse and a surviving spouses and had a serious impact upon the entitlement of other persons interested under estates of a deceased spouse.

2. Support of Dependants under Part V of the Succession Law Reform Act

1. RESTRICTION ON TESTAMENTARY POWER

Since the early 1900s, legislators in the common law jurisdictions began to give to the court a discretionary power to order proper maintenance and support out of the assets of an estate in circumstances where the testatrix had failed to make an adequate provision for support of dependants. In Ontario, the *Dependants' Relief Act*, R.S.O. 1970, c.126 and the successor provisions in the *Succession Law Reform Act*, R.S.O. 1990, c.S.26, set out the statutory provisions whereby a testator's power to do what they wish with their assets was restricted.

Some of those persons that may make dependants' relief claims are:

¹ R.S.O. 1980, c. 152 [Repealed and replaced by the *Family Law Act* 1986, S.O. 1986, c. 4.]

² Alberta: *Matrimonial Property Act*, R.S.A. 1980, c.M-9, British Columbia: *Family Relations Act*, R.S.B.C., c. 121, Pt. 3 (Sections 43-55), Manitoba: *Marital Property Act*, R.S.M. 1987, c.M 45, Saskatchewan: *Matrimonial Property Act*, S.S. 1979, c. M-6.1.

- the deceased's wife or husband;
- a brother or sister of the deceased;
- a former wife or husband of the deceased;
- a child or grandchild of the deceased;
- a person treated by the deceased as a child of the family in relation to any marriage of the deceased.

The limits set out by the legislators on testamentary power are not firmly entrenched; however, there is still a struggle between the choice of providing a reasonable level of support for dependants and the enforcement of a moral duty of the deceased to divide his or her estate amongst his or her dependants.

2. THE POWER OF THE COURT

Section 58 (1) of the Succession Law Reform Act confers on the Court the power to make an order for support as follows:

58. (1) 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.
- a) Testate or Intestate
 - b) Proper Support - see also 5 below
 - c) The Court means The Superior Court of Justice
 - d) On Application
 - e) Adequate Provision - see also 4 below
 - f) Out of the Estate
 - i) Estate assets in the usual sense
 - ii) Claw Back
 - g) Section 72 (1) includes or claws back certain assets and provides as follows:
 - (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 deceased and another person or persons and payable on death under the terms of the deposit or by operation of law to the 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 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; and
- (g) any amount payable under a designation of beneficiary under Part III.

This enabling provision has been written using very broad language to allow the court a great deal of discretion. For example, the term "proper support" gives the court a considerable amount of flexibility.

3. WHO IS A DEPENDANT

One of the first considerations that must be carefully reviewed is the question of "Who is a Dependant"? Dependant is defined as the spouse, the common law spouse, a parent, a child or brother or sister of the deceased to whom, in each case, the deceased was providing support or was under a legal obligation to provide support immediately before his or her death.

Section 57 of the Act defines a Dependant as:

- a) the spouse or same-sex partner of the deceased,
- b) a parent of the deceased,
- c) a child of the deceased, or
- d) a 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;

Each of the terms "child", "parent" and "spouse" is further defined by Section 57 as follows:

Definitions:

"child" means a child as defined in subsection 1(1) and includes a grandchild and a person whom the deceased has demonstrated a settled intention to treat as a child of his or her family, except under an arrangement where the child is placed for valuable consideration in a foster home by a person having lawful custody;

"parent" includes a grandparent and a person who has demonstrated a settled intention to treat the deceased as a child of his or her family, except under an arrangement where the deceased was placed for valuable consideration in a foster home by a person having lawful custody;

"spouse" means a spouse as defined in subsection 1(1) and in addition includes either of a man or woman who,

- (a) were married to each other by a marriage that was terminated or declared a nullity, or

- (b) are not married to each other and have cohabited,
 - (i) continuously for a period of not less than three years, or
 - (ii) in a relationship of some permanence, if they are the natural or adoptive parents of a child.

The definitions provided allow for some scope with respect to a class of dependants. There are questions as to the meaning of the requirement that the deceased was "providing support" and the meaning of the phrase "immediately before his or her death". Furthermore there is a new definition of same-sex partner.

4. WHAT IS ADEQUATE PROVISION FOR SUPPORT

Section 62(1) of the Act provides as follows:

- (1) In determining the amount and duration, if any, of support, the Court shall consider all the circumstances of the application, including,
 - 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 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 spouse cohabited,
 - (iii) the effect on the spouse's earning capacity or 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.
- (2) In addition to the evidence presented by the parties, the Court may direct other evidence to be given as the Court considers necessary or proper,
 - (3) The Court may accept such evidence as it considers proper of the deceased's reasons, so far as ascertainable, for making the dispositions in his or her will, or for not making adequate provision for a dependant, as the case may be, including any statement in writing signed by the deceased.
 - (4) In estimating the weight to be given to a statement referred to in subsection (3), the Court shall have regard to all the circumstances from which an inference can reasonably be drawn as to the accuracy of the statement.

5. WHAT IS THE NATURE OF SUPPORT

- a) Dependency
- b) It need not be Monetary
- c) Material Support of Spouses
- d) Beware of Jurisprudence of Other Provinces

6. CONTRACTING OUT OF SUPPORT OBLIGATION

Section 63(4) of the Act provides as follows:

Agreement or waiver - An order under this section may be made despite any agreement or waiver to the contrary.

But see Section 62 1)(m) above.

7. LIMITATION PERIOD

Section 61 of the Act provides as follows:

- (1) Limitation period - Subject to subsection (2), no application for an order under section 58 may be made after six months from the grant of letters probate of the will or of letters of administration.
- (2) Exception - 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.

8. THE COURT'S ORDER

Section 63(1), (2) and (3) of the Act provides as follows:

- (1) Conditions and Restrictions - In any order making provision for support of a dependant, the Court may impose such conditions and restrictions as the Court considers appropriate.
- (2) Contents of Order - Provision may be made out of income or capital or both and an order may provide for one or more of the following, as the Court considers appropriate,
 - a) an amount payable annually or otherwise whether for an indefinite or limited period or until the happening of the specified event;
 - b) a lump sum to be paid or held in trust;
 - c) any specified property to be transferred or assigned to or in trust for the benefit of the dependant, whether absolutely, for life or for a term of years;
 - d) the possession or use of any specified property by the dependant for life or such period as the Court considers appropriate;
 - e) a lump sum payment to supplement or replace periodic payments;
 - f) the securing of payment under an order by a charge on property or otherwise;
 - g) the payment of a lump sum or of increased periodic payments to enable a dependant spouse or child to meet debts reasonably incurred for his or her own support prior to an application under this Part;
 - h) that all or any of the money payable under the order be paid to an appropriate person or agency for the benefit of the dependant;
 - i) the payment to an agency referred to in subsection 58(3) of any amount in reimbursement for an allowance or benefit granted in respect of the support of the dependant, including an amount in reimbursement for an allowance paid or benefit provided before the date of the order.

- (3) Where a transfer or assignment of property is ordered, the Court may,
 - a) give all necessary directions for the execution of the transfer or assignment by the executor or administrator or such other person as the Court may direct; or
 - b) grant a vesting order.

9. INTERIM AND SUSPENSORY ORDERS

Sections 59 and 64 of the Act make provisions for these orders.

- 4. *Cummings v. Cummings* (On the application for support, (2004), 5 E.T.R. (3d) (81) (Ont. S.C) (Cullity, J.) Appeal to the Ontario Court of Appeal, (2004) 5 E.T.R. (3d) (97) (Ont. C.A.)

<http://www.canlii.org/on/cas/onca/2004/2004onca10075.html>

In *Cummings v. Cummings*, the Court has forced the Estate's Bar to reconsider matters of support under Part V of the *Succession Law Reform Act* ("SLRA").

Historically, claims relating to support of dependants under Part V of the *Succession Law Reform Act* were a fundamental restriction on testamentary power.

The power of the Court itself, pursuant to Section 58 (1) of the SLRA, confers in the Court, the ability to make an order for support where a deceased has not made adequate provision for the proper support of his/her dependants. In *McSween v. McSween*³ Justice Carnwarth sets out the appropriate guidelines in considering "adequate provision for the proper support of a dependant".

³*McSween v. McSween* (1985), 21 E.T.R. 195 (Surr.Ct..)

The case of *Cummings* was a most difficult one for the judges to determine as the facts were somewhat unusual and were as follows:

Bruce Norman Cummings (the "deceased") died on June 22 1998, survived by his first wife, Mary Anne, whom he married in 1968, and from whom he was separated in 1986 and from whom he was divorced in 1992.

They had two adult children, Paul, 28, and Elizabeth, 22, both of whom were dependants.

Paul was 24 years of age at his father's death and was seriously and permanently disabled to the extent that it would take many times the value of all of the assets of the estate, both real and notional (as clawed back pursuant to section 72(1) (d) of the SLRA), to properly support him for the rest of his life and to whom the deceased was under an obligation to provide support by court order and both he and his sister were dependants of the deceased.

His daughter Elizabeth was eighteen years of age at her father's death and was attending university and was entitled to support under the court order.

The deceased and his second wife, Ruta, commenced to live together in 1988 and were married in 1997.

At the time of the divorce from his first wife, the deceased was earning approximately \$300,000 per year and his employment was terminated in 1994.

After the termination of his employment, the deceased's attempts to establish a consulting business for the most part failed, and he fell into arrears of his support payments ordered by the court.

His second wife, Ruta, paid for a portion of the support order from her own funds, contributed to the payments on the matrimonial home and otherwise contributed financially to the relationship.

The deceased drew a will dated December 15, 1997 and a codicil thereto dated June 2, 1998 naming his second wife, Ruta, as his executor and trustee and providing a \$125,000 trust fund for the support of his son and daughter with remainder to his second wife.

The deceased never denied his obligation to provide support for his children and his will and codicil providing for the trust fund of \$125,000 was intended to cover his support obligations to his children, including arrears of support and they were acknowledged to be dependants of the deceased.

An application for additional support from that provided by the will and codicil was brought by the first wife on behalf of her two adult children as dependants of the deceased.

It should be noted that neither the first wife nor the second wife, who were both clearly dependants, made any claim for support.

The first wife brought the matter before the court on behalf of her son and daughter claiming for dependant's support pursuant to the provisions of section 58(1) of the SLRA and for arrears of support for the children of the first marriage previously ordered by the court be paid.

It was agreed that the net total amount available from the testamentary and notional estates for support was \$650,000 after deducting all appropriate amounts charged on the testamentary and notional assets clawed back under s.72(1) of the SLRA.

From this amount the learned applications judge deducted the value of the matrimonial home, \$422,500, which he allowed to remain with the second wife as she had contributed to its value and otherwise contributed to that marriage and the previous common law relationship, with the remainder of \$250,000 plus arrears of support in trust for the son and daughter of the first marriage, \$10,000 of which was earmarked for the daughter and the rest to the wife in trust for the son.

Basically, the Court of Appeal affirmed the Application judge.

In coming to this conclusion, the Court of Appeal was strongly influenced by the concepts set out in the Supreme Court of Canada's decision of *Tataryn v. Tataryn Estate*.⁴

The decision in the *Tataryn* case held that moral considerations were applicable to a determination as to the amount of a dependants' support claim in the context of the British Columbia statute (*The Wills Variation Act*), R.S.B.C. (1979) (c. 435).

Until the *Cummings v. Cummings* decision, the approach to quantifying dependants' relief claims in Ontario was to essentially ignore the *Tataryn* moral consideration approach, as a result of the fact that the *Tataryn* decision was an appeal from the

⁴[1994] 2 S.C.R. 807 (S.C.C.)

British Columbia Court of Appeal and was in respect to Section 2 (1) of the *Wills Variation Act* which included substantially different wording than that of the SLRA. *The Rules Variation Act*, assists dependants where there is a will which does not “in the Court’s opinion, make adequate provision for the proper maintenance and support of the testator’s wife, husband or children.

It is this language that has allowed the British Columbia Courts to approach the whole question of quantifying dependant’s relief on a very different basis and on a moral conviction approach. The language in the *Wills of Variation Act* is broadly drafted and essentially allows the Court to do what it thinks is adequate, just and equitable in the circumstances.

With the *Cummings* decision essentially embracing the decision of *Tataryn v. Tataryn* a very different approach must be considered in respect of quantifying dependants relief claims in Ontario.

In *Cummings v. Cummings*, at the lower court level, Cullity, J. specifically refers to important provisions in the *Tataryn*’s decision, and at paragraphs 46 and 49 of the Reasons of the Ontario Court of Appeal the basic guidelines for these matters are as follows:

(1) “For further guidance in determining what is ‘adequate, just and equitable’, the court should next turn to the testator’s moral duties toward spouse and children. It is to the determination of these moral duties that the concerns about uncertainty are usually addressed. There being no clear legal standard by which to judge moral duties, these obligations are admittedly more susceptible of being viewed differently by different people. Nevertheless, the uncertainty, even in this area, may not be so great as has been sometimes thought. For example, most people would agree that though the law may not require a supporting spouse to make provision for a dependant spouse after his death, a strong moral obligation to do so exists if the size of the estate permits.

Similarly, most people would agree that an adult dependant child is entitled to such consideration as the size of the estate and the testator’s other obligations may allow. While the moral claim of independent adult children may be more tenuous, a large body of

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: ...”

(2) “The language of the Act confers a broad discretion on the court. The generosity of the language suggests that the legislature was attempting to craft a formula which would permit the courts to make orders which are just in the specific circumstances and in light of contemporary standards. This, combined with the rule that a statute is always speaking (Interpretation Act, R.S.B.C. 1979, c. 206, s.7), means that the Act must be read in light of modern values and expectations. What was thought to be adequate, just and equitable in the 1920’s may be quite different from what is considered adequate, just and equitable in the 1990’s.

If the phrase “adequate, just and equitable is viewed in light of current societal norms, much of the uncertainty [about the lack of clear legal standards by which to judge moral duties] disappears. Furthermore, two sorts of norms are available and both must be addressed . The first are the obligations which the law would impose on a person during his or her life were the question of provision for the claimant to arise. These might be described as legal obligations. The second type of norms are found in society’s reasonable expectations of what a judicious person would do in the circumstances, by reference to contemporary community standards. These might be called moral obligations, following the language traditionally used by the courts. Together, these two norms provide a guide to what is ‘adequate, just and equitable’ in the circumstances.”

The historic hurdle with regard to establishing moral claims in Ontario was that the Courts previously approached a dependant’s relief claim on a “needs” test basis. The Court first considered if the individual qualified as a dependant and then determined the individual dependant’s financial need.

In *Cummings v. Cummings*, if the Court had approached the claim of the son on a strictly legal or “needs” approach to assessing what was “adequate” provision for the support as provided under Section 51(1) of the SLRA, the calculation of the son’s claim for support during his lifetime was far in excess of the total value of the Estate.

Rather than awarding the entire Estate to the dependant son, the Court held that moral considerations were applicable in determining the amount of dependants' support to be awarded.

The moral claim of the second wife was considered by the Court. In paragraph 53 of Cullity, J's judgment, he states that he believes the moral claims of the Respondent (second wife) arising from the financial, and other, contributions to their relationship during her period of cohabitation with the deceased should be recognized to the extent that her beneficial ownership in the matrimonial home should not be disturbed, or substantially encumbered, by an order for support of the son and daughter of the deceased.

The Court of Appeal quite properly noted (at paragraph 34 of its decision) that the issue of whether, and, if so to what extent, moral or ethical considerations may be taken into account on a dependant's relief application in Ontario has not been dealt with at the Appellant level since the enactment of Section 58(1) of the SLRA.

In coming to its conclusion that moral obligation is a factor, the Court stated that,⁵ in this case, the question is whether, in considering an application for relief on behalf of one or more dependants, the Court may take into account not only the needs and means of those dependants but also the moral obligations of the deceased person to another dependant who is not asserting need at the time.

The answer to this question must be "yes"; otherwise, the Court might well make an order that would put the other dependant "in need" and therefore trigger not only an injustice but also another series of court proceedings to determine that issue.

The Court went on to conclude (at paragraph 47) that the disparities between the British Columbia and Ontario statutes are not sufficiently telling to preclude the application of *Tataryn* in this province.

⁵ At paragraph 34.

In considering the quantum of support to be awarded, the Court gave effect and consideration to all dependants.

Perhaps, most notably, in determining the quantum of the Ontario Court of Appeal endorsed the concept of dependants' support as a re-distribution of family wealth or property. The view of dependants' relief legislation as a vehicle to provide not only for the needs of the dependants (thus preventing them from becoming a charge to the Estate) but also to ensure that spouses and children receive a **fair share of family wealth**, was very important in the Court's analysis.

The Court states (at paragraph 48):

There is another reason why the *Tataryn* approach fits in Ontario as well. The view of dependants' relief legislation as a vehicle to provide not only for the needs of the dependants (thus preventing them from becoming a charge on the Estate) but also to ensure the spouses and children receive a fair share of family wealth, was also important to the Court's analysis in that case.

Just how awards for support under the *Family Law Act* will be affected by the *Cummings v. Cummings* decision, remains to be seen. In resolving that problem, consideration of both the *Tataryn* and the *Cummings* cases must be given to the problem.

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