TAB 2

The Fundamentals of Drafting the Will

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Drafting the Will[1]

Drafting a good Will is not simply a matter of transcribing the client's wishes. The lawyer must address potential claims against the estate, tax implications, and contingencies that the client may not have considered in relation to those wishes. Drafting a good Will requires carefully chosen language, some of which will be unfamiliar to the client. Failure of the lawyer to adequately advise the client or properly draft the Will can result in an errors and omissions claim. Some examples of errors that have been made are: no residue clause; no giftover; inadvertently revoking a foreign Will dealing with foreign assets; failing to provide for payment of expenses in a house trust, and typographical errors involving prior dated multiple Wills or legacy amounts.[2]

This paper will address two important legal limitations which can affect a Will, review some issues related to drafting of Wills, and offer some general comments and advice on the use of precedents and preparation of Wills.

1. POTENTIAL CLAIMS AGAINST THE ESTATE

The law imposes two important restrictions on testamentary freedom which allow courts to vary a Will: the provision for a spouse and the provision for a dependant. The lawyer must be aware of potential claimants against the estate and advise the client where he or she is not adequately providing for them.

(a) Family Law Act Claims

In any situation where the client is not leaving his entire estate to a married spouse, the lawyer must consider the possible application of the *Family Law Act*[3]. The Act essentially allows a married surviving spouse to have the same rights upon the death of his or her spouse that he or she would have had if they had separated. If one spouse dies, and the net family property of the deceased spouse is greater than the net family

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[1] Laura Tyrrell, Barrister and Solicitor. This paper was originally prepared for the Ontario Bar Association program "Primer on Succession Planning: Don't get caught in a Draft" held on December 9, 2009.
[2] These examples were provided by Deborah Petch, Counsel at LawPro.
[3] R.S.O. 1990, c. F.3 as amended.

property of the surviving spouse, then the surviving spouse has six months from the date of death to elect to take his or her entitlement under the Act[4]. That entitlement is a right to an equalization payment of one-half the difference between the net family property of the deceased and the net family property of the surviving spouse. Net family property is the value of property on the day before the spouse died, less debts, and less the value of the property on the date of the marriage[5]. The matrimonial home is always included in the net family property and is not deducted from the date of marriage value. Certain property is excluded from a person's net family property, most notably gifts and inheritances from a third party after the date of the marriage. If an election is made, the gifts (if any) to the spouse in the Will are revoked (unless the Will says otherwise) and the Will is interpreted as though the surviving spouse predeceased the testator[6]. The rights of a surviving spouse are in addition to any claim the spouse has to support under Part V of the *Succession Law Reform Act*[7].

One example of where the implications of the *Family Law Act* must be addressed is a second marriage where, for example, a husband has children from a prior marriage and owns the bulk of the assets. The husband might want to leave his assets in a spousal trust for the lifetime of his wife, with the balance going to his children upon the wife's death. This is a tax efficient and effective from the husband's point of view, as his estate will ultimately be left to his children. However, from the wife's point of view, it may not be in her best interests, as she may wish to control the ultimate disposition of the estate. The problem for the lawyer is that he has a joint retainer but may have a conflict insofar as what is good for the husband is not necessarily good for the wife, who needs to be advised that she could overturn the Will with a claim under the *Family Law Act*. Rule 2.04(6) of the Rules of Professional Conduct (attached as Appendix "A" to this paper) provides that where a husband and wife jointly retain a lawyer, no information received in connection with the matter can be treated as confidential so far as either of them is

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[4] Subsections 6(1)) and 6(10).
[5] The Act was recently amended to provide that jointly held property received by a spouse would be credited against the equalization payment. This remedies a problem with the Act, which, because the valuation date is the day before the spouse dies, credited the estate and the surviving spouse with one-half the value of jointly held property when in fact the surviving spouse received the entire property. The amendment is in subsection 6(6)(c) of the Family Law Act.
[6] Subsection 6(8).
[7] R.S.O. 1990, c. S. 26, as amended (the "SLRA").

concerned, and that if a conflict develops, the lawyer cannot act for both of them. In such a situation, the lawyer will need to advise both spouses of the wife's potential claim under the Act. Also, the lawyer may well be in a conflict as he might also advise the husband how to plan his estate to avoid such a claim. In such cases, the lawyer may not want to act for both spouses. This will no doubt be disappointing to the couple, who consider their wishes "simple" and do not want to incur the cost of another lawyer.

(b) Dependant Relief Claims

A second restriction on testamentary autonomy which can impact a Will is potential claims by dependants of the client. Subsection 58(1) of the *Succession Law Reform Act*[8] provides as follows:

> 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.

The principle that underlies dependants' relief is that where a family member has the means to provide for a dependant, he or she should do so before the state provides for him or her. A dependant includes the spouse, parent, child or 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 death[9]. Spouse includes a common law spouse of three years or a person in a relationship of some permanence with another person where the couple are the natural or adoptive parents of a child.[10] Certain assets of the deceased will be deemed part of the net estate for the purposes of determining the support award. These include joint accounts and RRSPs and life insurance proceeds designated to a named beneficiary[11]. In determining the amount and duration of any support, the Act sets out, in subsection 62(1), nineteen factors for the court to consider. In addition, the court

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[8] *Supra*, note 7.
[9] Section 57 of the SLRA.
[10] *Supra,* note 9.
[11] Section 72 of the SLRA.

may accept a statement in writing by the deceased as to his reasons for making dispositions in his Will or not making adequate provision for a dependant.[12]

Since the 2004 decision in *Cummings*, discussed below, Ontario courts have been able to take into account both legal and moral obligations owed by testators to dependants. This makes it more difficult to advise clients about potential claims by dependants.

The consideration of moral obligations was established in the Supreme Court of Canada case *Tataryn* v. *Tataryn Estate*[13], which decided that the words "adequate, just and equitable" in the *Wills Variation Act* of British Columbia encompassed moral obligations.[14] In this case, the testator excluded one of his two sons entirely from his Will, and left his wife of 43 years a life interest in the matrimonial home and a beneficial interest in a trust of which her youngest son was the trustee. In his Will, the testator set out his reasons for excluding his eldest son as a beneficiary of his estate which read, in part:

> I HAVE PURPOSELY excluded my son, **JOHN ALEXANDER TATARYN**, from any share of my Estate and purposely provided for my wife by the trust as set out above for the following reason: My wife Mary and my older son John have acted in various ways to disrupt my attempts to establish harmony in the family[15]...

The court awarded the wife sole title to the matrimonial home, a life interest in a rental property, and the residue of the estate. The life interest in the rental property was ultimately to be divided one-third to the eldest son and two-thirds to the youngest son. The court said that the words "adequate, just and equitable" should be looked at in light of current societal norms based not only a consideration of legal obligations - what a person would be expected to provide during his lifetime - but further, on society's reasonable expectations of what a judicious person would do in the circumstances with reference to current community standards.

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[12] Subsection 62(3) of the SLRA.
[13] 3 E.T.R. (2d) 229, [1994] 2 S.C.R.807 (S.C.C.).
[14] R.S.B.C. 1979, c. 435. Note this is different from the Ontario legislation which provides that a court consider such provision as it considers "adequate".
[15] *Supra*, note 13, paragraph 4 of the Judgment.

The principle in *Tataryn* has now been adopted in Ontario in the *Cummings* decision, which is attached as Appendix "B" to this paper.[16] In that case, the deceased died leaving an estate of approximately $650,000. His Will directed that a testamentary trust of $125,000 be established for his two adult children, his daughter, 24 years of age, and his son, 18 years of age. The son suffered from muscular dystrophy. The residue of his estate went to his second wife. Cullity, J. held that the deceased had not adequately provided for support of his dependant children, and increased the trust to $250,000 to be paid to the deceased's first wife, the mother of the children, in trust for them. Neither the first wife (who was granted judgment for arrears of support) nor the second wife made a claim for support even though they qualified as dependants under the Act. The trial judge indicated that had he decided the case on a strictly needs based analysis, he would have found that the entire estate should be held in trust for the son with muscular dystrophy. However, he stated that he was justified in considering the moral obligations of the testator to his second wife even though she did not claim support. The Court of Appeal agreed with the trial judge's decision. It stated that 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 other dependants who were not asserting need at the time of the application.

It remains to be seen whether the courts will be more inclined to re-write Will provisions on the basis of moral obligation. However, in circumstances where the client has various dependants, the lawyer will need to advise the client carefully and alert him to possible claims. The client might be advised to document his wishes for treating some dependants differently, and perhaps, in appropriate cases, to consider transferring assets to beneficiaries during his lifetime.

2. DRAFTING MATTERS

The next section of this paper reviews some legal principles which the lawyer should be familiar with in preparing Wills. The goal is to have a document that covers a reasonable number of contingencies and avoids a 'gap' that has to be filled in with the laws of intestacy.

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[16] 5 E.T.R. (3d) 97, 235 D.L.R. 4th 474 (Ont. C.A.).

(a) Avoiding Intestacy

Asking "What if"

Because we cannot predict the order in which beneficiaries or testators will die, and because testators may lose capacity, the lawyer must ask the client to consider what happens if a named beneficiary predeceases him. Knowing how far to go with the "what ifs" is a matter of judgment. For example, a couple with small children is likely to travel together and may die in a common accident, which would suggest that a "common disaster" provision in the Will might be appropriate. If the Will did not have such a provision, then the estate would be distributed in accordance with the intestacy rules in the *Succession Law Reform Act.* If the husband and wife died at the same time or in circumstances rendering it uncertain which of them survived the other, the property of each person would be disposed of as if he or she had survived the other, and any jointly held property would be deemed to be held as tenants in common[17]. In the result, the husband's assets would go to his next of kin and the wife's assets to hers. Sometimes clients have such difficulty in choosing alternate beneficiaries that they choose none. In such circumstances the lawyer should confirm the possibility of intestacy in the reporting letter.

The Rule in Saunders and Vautier

It is imperative to name an alternate beneficiary where there is a trust established for a minor until he or she reaches an age that is greater than 18 years. For example, if the testator's Will states: "$10,000 shall be paid to my grandson when he attains age 25", the grandson can claim the gift when he reaches age 18 because the gift is fully vested in him in that the gift does not go to anyone else if he dies before reaching age 25. This is the rule in *Saunders v. Vautier.*[18] To avoid this result, the Will needs to provide that if the grandson dies before reaching age 25, the gift will go to an alternate beneficiary, most

[17] Section 55 of the SLRA.
[18] (1841), 1 Cr. & Ph. 240, [1835-42] All E.R. Rep. 58 (Eng. Ch. Div.)

commonly to any issue the grandson might have, and if none, to any siblings the grandson might have, and if none, to the issue of the testator in equal shares per stirpes.

Anti-Ademption Rules

If a testator wants to leave a specific asset such as a house or a painting to a beneficiary in his Will and does not own that asset at the time of his death, the common law rule is that the beneficiary in the Will receives nothing. The common law rule is modified in the anti-ademption rules found in subsection 36(1) of the *Substitute Decisions Act, 1992*[19] and subsection 20(2) of the *Succession Law Reform Act.* Subsection 36(1) of the *Substitute Decisions Act* provides that if a guardian of property (which includes a person acting under a Continuing Power of Attorney for Property) disposes of property which is the subject of a specific gift in a Will, the beneficiary receives a cash payment equal to the value of the property. Subsection 20(2) of the *Succession Law Reform Act* provides certain rights to the beneficiary of property which the testator has devised but retained certain rights with respect to (e.g. has a mortgage on property that was the subject of the devise).

The importance for Will drafting is to ensure that it is clear what happens if the subject of the gift does not exist. For example, if a father leaves his home to his son in his Will, and the son, acting pursuant to a Continuing Power of Attorney for Property sells the home, the son should receive a cash equivalent if the home pursuant to subsection 36(1) of the Act[20]. However, if that same father, while capacitated, moves from his home into a condominium, the son is not entitled to a gift. The questions to ask are: a) does the gift apply to substitute property (e.g. what if you downsize)? b) does the gift apply if you are no longer living in the home (e.g. what if you move into a retirement residence)? c) is a cash gift substituted if you or your Power of Attorney sell it before you die? d) does the gift go to anyone else if the beneficiary dies before you?

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[19] S.O., 1992 c. 30 as amended.

[20] This section was considered in *McDougald Estate* v. *Gooderham* (2003), 17 E.T.R. (3d) 362 (Ont. C.A.) where the testatrix left a property in Palm Beach Florida to her sister, and the property was sold prior to her death pursuant to power of attorney. The court held that the sister properly received the proceeds of the property even though the property was owned by a corporation.

Anti Lapse Rule

Another rule that avoids intestacy is the anti-lapse rule in section 31 of the *Succession Law Reform Act*. This rule states that unless a contrary intention is shown, if a testator gives a devise or a bequest to a child, grandchild, brother or sister and that individual predeceases him, the gift is given to the beneficiary's next of kin, as though he had died intestate and without regard to the preferential share of the spouse. For example, if a father's Will states "I give $10,000 to my son, Jack" and his son does not survive him, the $10,000 will be distributed to Jack's next of kin as though he had died intestate. This is often not the intention of the client. The way to avoid the application of the rule is to state that the beneficiary receives the gift only if he survives the testator. This would show a contrary intention in the Will, so that the gift would only be paid to the son if he survived the testator. Some lawyers like to add wording for greater certainty such as: "if my son does not survive me, this gift shall lapse".

Fixed Shares or Percentages versus Floating Shares

In residue clauses one common way to avoid intestacy use "floating shares" instead of fixed percentages or shares, the idea being that the number of shares that are required to be divided are not established until the death of the testator when it can be determined who is alive. For example, if the Will says to "divide the residue into three equal shares for each of my three children and to pay one share to each child" then if a child does not survive the testator, there is an intestacy of one third of the residue of the estate. If instead the Will states that the trustees "should set aside the number of equal shares that are necessary to carry out the following provisions and deal with such shares as follows", with one equal share allocated to each child, if a child predeceases the testator, his share collapses and the two remaining shares are established at the testator's death and divided between the surviving two children.

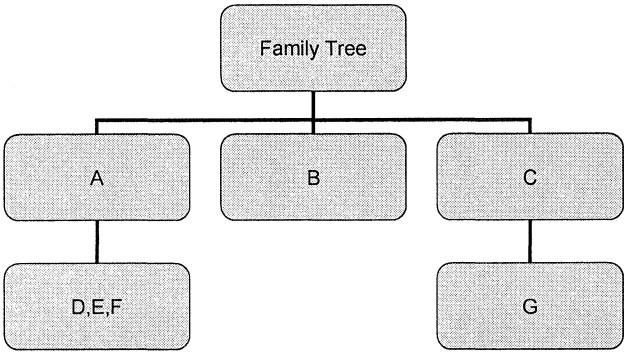
Charitable Gifts

Where the client wishes to give a gift to a charity under their Will, the name of the charity should be confirmed by the client or checked on the CRA website

(http://www.cra-arc.gc.ca/tx/chrts/menu-eng.html) and there should be a provision in the Will that if that charity no longer exists, or exists under a different name at the testator's death, that the trustees can complete the gift as long as the charity reflects similar objects to those of the named charity. Obviously this is more of a concern with smaller charities than the large ones such as Cancer Society or Heart and Stroke.

Per Stirpes and Per Capita

Invariably where a Will has been sent to a client for review, one of the first questions he asks is the meaning of "per stirpes". "Per stirpes" is Latin for by roots or stocks; by representation.[21] In estate distribution, it means that those descendants who are closest in degree to the deceased will take first (i.e. children), but if a descendant has died at the relevant time leaving descendants, those descendants will step up and take their parent's share of the estate. Explaining this term to clients is effectively done with a diagram (which can be adapted to the client's family situation). Consider the following family tree:



The testator has three children, A, B and C. A has three children (D, E and F), B has no children, and C has one child, G. If the Will states "my Trustees shall divide the residue of the estate among my issue alive at my death in equal shares per stirpes", then if all three children are alive at the testator's death, they each take an equal share (1/3 each) of the estate. If A is not alive at the testator's death and his children D, E, and F are alive, then the estate is distributed 1/3 to B, 1/3 to C, and 1/9th to each of D, E, and F. This is because D, E, and F step up and take what would have been their parent A's share of the estate,

[21] Black's Law Dictionary (5th edition) West Publishing Co. 1979.

had A survived the testator. If C is not alive at the testator's death, then the estate is distributed 1/3 to A, 1/3 to B, and 1/3 to G, who steps up and takes his parent C's share of the estate.

Recall that "issue" on its own means all lineal descendants. If in the above example the Will read "my Trustees shall divide the residue of my estate among my issue alive at my death in equal shares" then the estate would be divided into seven equal shares among A, B, C, D, E, F and G. Note that it is incorrect to use the term "my children in equal shares per stirpes" as children refers to the descendants of the testator to the first degree, whereas per stirpes refers to all lineal descendants.

"Per capita" is Latin for by head, which means that the estate is distributed by the number of heads that are referred to without reference to what level of descendant the individual is to the testator, unless the Will indicates otherwise. For example, if the Will reads "my Trustees shall divide the residue of my estate among my grandchildren alive at my death in equal shares per capita", then the estate would be divided in equal shares among D, E, F and G.

(b) Provision for Minors

In times of rising divorce rates and blended families, it is very important to define who the client considers to be his children or grandchildren, where the beneficiaries are referred to by their class as opposed to by name. While naming beneficiaries in a Will provides certainty, it could inadvertently exclude a beneficiary, if, for example, a testator named his three grandchildren to receive a gift and a fourth grandchild was born after the Will was made and at a time that the testator could not amend his Will.

The law defines "child" as a naturally born child, a child born outside marriage, an adopted child, and a child conceived before and born after the death of the testator[22]. It is important to ask the client whether he or any of his or her next of kin have children born outside marriage. If so, such a child would be a potential heir unless a clause is included in the Will which excludes children born outside marriage. The problem with leaving the Will silent as to these definitions is that the executor has an obligation to

[22] Section 1 of the *Children's Law Reform Act*, R.S.O. 1990, c. C. 12, and section 1(1) of the SLRA.

make "reasonable inquiries" as to the existence of children born outside marriage[23] after the person dies. When faced with this, clients often opt for a middle ground – a clause that excludes children born outside marriage, with either an exception for named children or an exception for children that the executor deems to be a child by virtue of the fact that the parent has demonstrated a settled intention to treat the child as his own. Note that although step-children are at common law not included as a "child" of the person, a few cases have held that step-children were entitled to inherit under the Will given the surrounding circumstance. In *Montgomery Estate v. Miller*[24], the Will left the residue of the estate to the testator's nieces and nephews, with a giftover to the "children" of the nieces and nephews who had predeceased the testator. One nephew predeceased the testator leaving two step children who were the natural children of his wife. The court held that the intention was to include such children. This shows the importance of identifying the beneficiaries of the estate, even in the giftovers.

If there is any possibility that a minor child could take under a Will, it is important to include a payment for minors clause.[25] This clause allows the appointed executors to hold the funds in trust for the minor until the minor reaches age 18[26] and to make payments from the fund to a parent, guardian, or person who is *in loco parentis* to the child until that time. Without this clause, if a minor becomes entitled to part of the estate, the trustee must pay the funds into court to the credit of the Accountant for Ontario in order to be discharged[27]. Provided the client is content that any potential beneficiary who is a minor at his death will be entitled to take at age 18, this clause is sufficient and a separate trust does not need to be drafted.

A class gift such as "to my nieces and nephews" can also cause uncertainty. Traditionally, where a Will left gifts to "nieces and nephews", this included the children of the testator's sisters and brothers but not the children of the testator's spouse's sisters and brothers. Most of us assume that our nieces and nephews include the children of our

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[23] Section 24(1) of the *Estates Administration Act*, R.S.O. 1990, c. E.22. as amended.
[24] 24 E.T.R. (3d) 138 (Ont. S.C.J.).
[25] Found in all Will precedents published by legal publishers.
[26] 18 is the legal age of majority as set out in the *Age of Majority and Accountability Act*, R.S.O. 1990, c. A.7 section 1. Previously, the age of majority was 21 and sometimes appears in older Wills.
[27] Section 36 of the *Trustee Act*, R.S.O. 1990, c. T.23 as amended.

spouses. This was reflected in the decision in *Re Homes Estate*[28] where the court interpreted "nieces and nephews" to include those children of the siblings of both the testator and his spouse. In any event, to be clear, the Will might either name the nieces and nephews or provide for the "children of my brother John" and the "children of my wife's brother James".

In many situations, clients think that age 18 is too young for a child to receive an inheritance, and they wish the Will to specify an older age or ages at which the child should receive their inheritance. This requires a testamentary trust to be drafted for the minor child, including a giftover if the child dies before reaching the final age. The following is a list of the questions to ask the client in establishing a trust for a minor:

1. Who are the beneficiaries of the trust.

2. Does each beneficiary have his or own share established on the death of the testator or is the gift set aside in a fund for all the beneficiaries of the class.

3. Who are the trustees of the trust. Is it the executor or perhaps the parent of the minor for whom the gift is set aside.

4. What age(s) should the capital be distributed. If it is a staggered distribution, should a smaller amount be gifted at the younger age, for example e.g. ¼ at ate 25, ½ the remainder at 30 and the rest at 35.

5. How is the income to be dealt with during the period of the trust. Note the *Accumulations Act*[29] states that 21 years from the death of the testator, all the income must be paid out.

6. Does the trustee have the discretion to encroach on capital during the duration of the trust and if so, for what purposes.

7. Who are the alternate beneficiaries if the beneficiary dies before reaching the final age, most commonly the issue of the beneficiary, failing issue, the issue of the testator.

[28] 29 E.T.R. (3d) 67 (BCSC).
[29] R.S.O. 1990, c. A.5 as amended.

3. THE USE OF PRECEDENTS AND GENERAL ADVICE

Lawyers entering into this area of the law should start with one or two sets of professionally drafted precedents, which can be purchased through legal publishers. Here are some of the legal publishers that publish Will precedents or soft cover books:

Canada Law Book – O'Brien's Will Forms (Division V)

Canada Law Book – Preparation of Wills and Powers of Attorney (third edition) by Mary MacGregor (soft cover book)

CCH – Drafting Wills in Ontario by Robyn Solnik and Mary-Alice Thompson (soft cover book)

LSUC – the Annotated Will by Corina Weigl (February 2010)

Thomson Carswell – Will precedents by Lindsay Histrop

Reviewing the precedents word for word will give the lawyer an understanding of the various options he or she can suggest, which avoids being caught in a rut (e.g. always suggesting trusts until age 25). Also, the lawyer might consider hiring a consultant in Microsoft word to develop templates which make the preparation of Wills fast, efficient and professional (it avoids having Mr. Smith's name pop up in the draft for Mr. Jones). Consider your Will precedent to be a living document that you revise from time to time. I have a Will precedent file where I keep cases or precedents that I would like to incorporate into my Wills, and I try to update my Wills a few times a year. I keep a note of what changes were made, when they were made, and in some cases, the rationale for making the change. Over time this allows you to create your own unique Will precedents you will be very comfortable with and that will serve you well.

The following are some miscellaneous tips for preparing Wills:

► When drafting Wills for husband and wife where the Wills are complicated, I set out every possible chronology of death and review the Wills to ensure that they work together:

1. Husband dies, wife survives > 30 days:
   Husband's Will provides…
   Wife's Will provides…

2. Wife dies, husband survives > 30 days:
   Wife's Will provides…
   Husband's Will provides…

3. Husband dies, wife dies < 30 days:
   Husband's Will provides…
   Wife's Will provides…

4. Wife dies, husband dies < 30 days:
   Wife's Will provides…
   Husband's Will provides…

5. Husband and Wife die together when it cannot be determined who survived the other:
   Wife's Will provides…
   Husband's Will provides…

►Whenever possible, I try to review each Will with fresh eyes. This means drafting a Will on one day and reviewing it the next day or a few days later. I also do a final review prior to signing the Will.

►I use headings in my Wills. It makes it easier for the reader and saves time in the signing meeting, especially with respect to the many powers clauses.

►I send every Will in draft to a client for comments and review. This provides an opportunity for clients to identify spelling errors and questions. When the clients come to the signing meeting, I confirm that they received and reviewed the Wills.

►For husband and wife Wills, once the Wills are in a form that they are ready to finalize, I use the compare tool in Word to compare the husband's Will to the wife's Will. This tool highlights the differences between two documents in a contrasting colour, and allows me to catch changes that were made in one Will but not the other.

►At the signing meeting, I have a consistent manner of reviewing the Will. This provides yet another opportunity to correct names and catch any errors or misunderstandings. Having a consistent review practice in the signing meeting is also good defensive practice should the Will ever be challenged.

When I meet with clients to sign a Will, I book sufficient time with them to "present" the Will, going through each clause with them. I prepare for the meeting by reviewing their family tree and my questionnaire so that I can customize my presentation

to their particular situation. This provides good service and shows the clients the depth of knowledge required to prepare a good Will and also demonstrates that this is a "custom" rather than "cookie cutter" piece of work – one that they will appreciate and be prepared to pay for.

(b) the law firm establishes that it is in the interests of justice that it act in the new matter, having regard to all relevant circumstances, including

(i) the adequacy and timing of the measures taken to ensure that no disclosure of the former client's confidential information to the partner or associate having carriage of the new matter will occur,

(ii) the extent of prejudice to any party,

(iii) the good faith of the parties,

(iv) the availability of suitable alternative counsel, and

(v) issues affecting the public interest.

Commentary

The term "client" is defined in rule 1.02 to include a client of the law firm of which the lawyer is a partner or associate, whether or not the lawyer handles the client's work. Therefore, if a member of a law firm has obtained from a former client confidential information that is relevant to a new matter, no member of the law firm may act against the former client in the new matter unless the requirements of subrule (5) have been satisfied. In its effect, subrule (5) extends with necessary modifications the rules and guidelines about conflicts arising from a lawyer transfer between law firms (rule 2.05) to the situation of a law firm acting against a former client.

Joint Retainer

(6) Except as provided in subrule (8.2), where a lawyer accepts employment from more than one client in a matter or transaction, the lawyer shall advise the clients that

(a) the lawyer has been asked to act for both or all of them,

(b) no information received in connection with the matter from one can be treated as confidential so far as any of the others are concerned, and

(c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

[Amended – February 2007]

Commentary

Although this subrule does not require that, before accepting a joint retainer, a lawyer advise the client to obtain independent legal advice about the joint retainer, in some cases, especially those in which one of the clients is less sophisticated or more vulnerable than the other, the lawyer should recommend such advice to ensure that the client's consent to the joint retainer is informed, genuine, and uncoerced.

A lawyer who receives instructions from spouses or partners as defined in the *Substitute Decisions Act, 1992* S.O. 1992 c. 30 to prepare one or more wills for them based on their shared understanding of what is to be in each will should treat the matter as a joint retainer and comply with subrule (6). Further, at the outset of this joint retainer, the lawyer should advise the spouses or partners that if subsequently only one of them were to communicate new instructions, for example, instructions to change or revoke a will:

(a) the subsequent communication would be treated as a request for a new retainer and not as part of the joint retainer;

(b) in accordance with rule 2.03, the lawyer would be obliged to hold the subsequent communication in strict confidence and not disclose it to the other spouse or partner; but

(c) the lawyer would have a duty to decline the new retainer, unless;

(i) the spouses or partners had annulled their marriage, divorced, permanently ended their conjugal relationship, or permanently ended their close personal relationship, as the case may be;

(ii) the other spouse or partner had died; or

(iii) the other spouse or partner was informed of the subsequent communication and agreed to the lawyer acting on the new instructions.

After advising the spouses or partners in the manner described above, the lawyer should obtain their consent to act in accordance with subrule (8).

[Amended – February, 2005]

(6.1) Where a lawyer acts for both the borrower and the lender in a mortgage or loan transaction, the lawyer shall disclose to the borrower and the lender, in writing, before the advance or release of the mortgage or loan funds, all material information that is relevant to the transaction.

Commentary

What is material is to be determined objectively. Material information would be facts that would be perceived objectively as relevant by any reasonable lender or borrower. An example is a price escalation or "flip" where a property is re-transferred or re-sold on the same day or within a short time period for a significantly higher price. The duty to disclose arises even if the lender or the borrower does not ask for the specific information.

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Cummings v. Cummings

PAUL W. CUMMINGS and MARY ANNE CUMMINGS for the benefit of ELIZABETH A. CUMMINGS (Appellants / Applicants) and RUTA CUMMINGS individually and as Executrix and Trustee of the Estate of Bruce Norman Cummings, deceased (Respondent / Respondent)

Citation:	2004 CarswellOnt 99, 181 O.A.C. 98, 5 E.T.R. (3d) 97, 235 D.L.R. (4th) 474, 69 O.R. (3d) 397
Court:	Ontario Court of Appeal
Judge:	McMurtry C.J.O., Doherty, Blair JJ.A.
Heard:	December 1, 2003
Judgment:	January 15, 2004
Year:	2004
Docket:	CA C40304
Proceedings:	affirming (2003), 2003 CarswellOnt 571, 223 D.L.R. (4th) 732 (Ont. S.C.J.)
Counsel:	Daniel J. Dochylo for Appellants R. Brian Foster, Q.C. for Respondent

Subject:

Family

Estates and Trusts

Family law — Support — Child support — Enforcement of award — General — Deceased was survived by respondent wife, who was his executrix, and applicants, who were his ex-wife and his son and daughter from former marriage — Both wife and ex-wife were self-sufficient while adult son was dependant due to degenerative illness and adult daughter was dependant due to enrolment in higher education — Deceased was obligated to make child support payments under separation agreement incorporated into judgment for divorce from ex-wife — Deceased reduced payments while alive after his employment was terminated — Son and ex-wife on behalf of daughter brought applications for order for payment of arrears of child support out of estate, additional child support under Succession Law Reform Act and establishment of trust fund out of deceased's estate for son and daughter — Application for arrears of support was granted on ground that separation agreement incorporated into judgment for divorce expressly provided that deceased's obligation to pay child support would survive his death and be binding on his executor — Applications judge determined that deceased's obligation to pay arrears was judgment debt and first charge on estate and that arrears were payable to date of deceased's death — Regarding rest of application, applications judge determined that it was

generally accepted in jurisprudence that purpose of Succession Law Reform Act is to enforce moral duty of deceased to provide for dependants — Level of proper support payable for deceased's ill son exceeded amount that would be secured by establishment of testamentary trust — Accordingly, applications judge ordered lump sum of $250,000 paid to ex-wife in trust to honour deceased's support obligations to children — Maximum of $10,000 from trust was ordered to be applied to deceased's daughter's higher education with remainder earmarked by court to provide for care and welfare of deceased's son — Applications judge found that order for lump sum and other payments by estate depleted assets available and precluded creation of support trust provided for in deceased's will — Applicants appealed arrears award on ground that arrears should have been payable to date of application and also appealed on ground that larger amount should have been set for dependants' relief — Appeal dismissed — Regarding arrears, deceased had agreed in separation agreement to pay child support of $2,000 per month but had unilaterally decreased amount to $ 378 per month when he had lost job — Given language of separation agreement and provisions of divorce judgment, estate continued to be subject to ongoing support obligation of $2,000 per month, unless varied by court order — However, applicants elected not to rely on that obligation but to seek dependants' relief for period following deceased's death — In doing so applicants opened it up to applications judge to exercise his discretion in balancing all relevant factors as to how assets of estate should be allocated, given limited resources of deceased's estate — Applications judge in effect took into consideration all of changed circumstances in determining question of arrears, as if application had been one to vary and rescind arrears during deceased's lifetime — Applications judge was entitled on record before him to exercise his discretion in limiting arrears of support to date of death, and to dealing with allocation of assets of estate in post-death period on basis of dependants' relief — Regarding dependants' relief, son's need were large, permanent, and would increase with time — Applications judge was aware that it was not possible to provide adequate support for son, given limited size of estate — Applications judge, as he properly should have, gave consideration to effect of his order on all dependants — Applications judge was correct in determining that second wife's moral claims arising from her contributions during cohabitation with deceased should be recognized by leaving her ownership of matrimonial home substantially unencumbered by order for son and daughter's support — Although another judge may have determined that higher proportion of net estate should have been allocated to son's care, applications judge had not erred in exercise of his discretion in this matter.

Family law — Support — Child support — Enforcement of award — General — Deceased was survived by respondent wife, who was his executrix, and by applicants, who were his ex-wife and his son and daughter from former marriage — Both wife and ex-wife were self-sufficient while adult son was dependant due to degenerative illness and adult daughter was dependant due to enrolment in higher education — Deceased was obligated to make child support payments under separation agreement incorporated into judgment for divorce from ex-wife — Deceased reduced payments while alive after his employment was terminated — Son and ex-wife on behalf of daughter brought applications for order for payment of arrears of child

support out of estate — Application was granted on ground that separation agreement incorporated into judgment for divorce expressly provided that deceased's obligation to pay child support would survive his death and be binding on his executor — Deceased's obligation to pay arrears was judgment debt and first charge on estate and that arrears were payable to date of deceased's death — Applicants appealed on ground that arrears should have been payable to date of application — Appeal dismissed — Deceased had agreed in separation agreement to pay child support of $2,000 per month but had unilaterally decreased amount to $ 378 per month when he had lost job — Given language of separation agreement and provisions of divorce judgment, estate continued to be subject to ongoing support obligation of $2,000 per month, unless varied by court order — However, applicants elected not to rely on that obligation but to seek dependants' relief for period following deceased's death — In doing so, applicants opened it up to applications judge to exercise his discretion in balancing all relevant factors as to how assets of estate should be allocated, given estate's limited resources — Applications judge in effect took into consideration all of changed circumstances in determining question of arrears, as if application had been one to vary and rescind arrears during deceased's lifetime — Applications judge was entitled on record before him to exercise his discretion in limiting arrears of support to date of death, and to deal with allocation of assets of estate in post-death period on basis of dependants' relief.

Estates — Dependants' relief legislation — Ontario — Entitlement to relief — Children — Deceased was survived by respondent wife, who was also his executrix, and by applicants, who were his ex-wife and son and daughter from former marriage — Both wife and ex-wife were self-sufficient while adult son was dependant due to degenerative illness and adult daughter was dependant due to enrolment in higher education — In will, deceased had set up testamentary trust in amount of $125,000 to provide support payments for son and daughter — Son and ex-wife on behalf of daughter brought applications for additional child support under Succession Law Reform Act and establishment of trust fund out of deceased's estate for son and daughter — Applications judge determined that it was generally accepted in jurisprudence that purpose of Succession Law Reform Act is to enforce moral duty of deceased to provide for dependants — Level of proper support payable for deceased's ill son exceeded amount that would be secured by establishment of testamentary trust — Accordingly, applications judge ordered lump sum of $250,000 paid to ex-wife in trust to honour deceased's support obligations to children — Maximum of $10,000 from trust was ordered to be applied to deceased's daughter's higher education with remainder earmarked by court to provide for care and welfare of deceased's son — Applications judge found that order for lump sum and other payments by estate depleted assets available and precluded creation of support trust provided for in deceased's will — Applicants appealed on ground that larger amount should have been set for dependants' relief — Appeal dismissed — Son's needs were large, permanent, and would increase with time — Applications judge was aware that it was not possible to provide adequate support for son, given limited size of estate — Applications judge, as he properly should have, gave consideration to effect of his order on all dependants — Applications judge was correct in determining that

second wife's moral claims arising from her contributions during cohabitation with deceased should be recognized by leaving her ownership of matrimonial home substantially unencumbered by order for son and daughter's support — Although another judge may have determined that higher proportion of net estate should have been allocated to son's care, applications judge had not erred in exercise of his discretion in this matter.

Cases considered by *Blair J.A.*:

Allardice v. Allardice (1910), 29 N.Z.L.R. 959, 12 G.L.R. 753 (New Zealand C.A.) — considered

Bosch v. Perpetual Trustee Co. (1938), [1938] A.C. 463, [1938] 2 W.W.R. 320, 107 L.J.P.C. 53, [1938] 2 All E.R. 14, 1938 CarswellFor 2 (New South Wales P.C.) — considered

Currie v. Currie Estate (1995), 9 E.T.R. (2d) 1, 166 N.B.R. (2d) 144, 425 A.P.R. 144, 1995 CarswellNB 155, [1995] N.B.J. No. 305 (N.B. C.A.) — referred to

Gavinchuk v. Mickalyk (2003), 2003 ABQB 849, 2003 CarswellAlta 1461, [2003] A.J. No. 1279 (Alta. Q.B.) — referred to

Hull, Re (1943), [1943] O.R. 778, [1944] 1 D.L.R. 14, 1943 CarswellOnt 45 (Ont. C.A.) — referred to

Kipp v. Buck Estate (1993), 1993 CarswellOnt 1708, [1993] O.J. No. 790 (Ont. Gen. Div.) — referred to

McSween v. McSween Estate (1985), [1985] O.J. No. 1765, 21 E.T.R. 195, 1985 CarswellOnt 710 (Ont. Surr. Ct.) — considered

Ostrander v. Kimble Estate (1996), 146 Sask. R. 64, 13 E.T.R. (2d) 231, [1996] 8 W.W.R. 336, 1996 CarswellSask 445, [1996] S.J. No. 444 (Sask. Q.B.) — referred to

Richer v. Richer (1984), 40 R.F.L. (2d) 217, 17 E.T.R. 102, 1984 CarswellOnt 248 (Ont. Co. Ct.) — referred to

Shemesh v. Shemesh Estate (December 18, 1992), Doc. 12175/86, [1992] O.J. No. 2724 (Ont. Gen. Div.) — referred to

Siegel v. Siegel Estate (1995), 35 Alta. L.R. (3d) 321, 10 E.T.R. (2d) 178, [1996] 3 W.W.R. 247, 177 A.R. 282, 1995 CarswellAlta 775, [1995] A.J. No. 1158 (Alta. Q.B.) — referred to

Swire v. Swire (1986), 23 E.T.R. 246, 1986 CarswellOnt 665, [1986] O.J. No. 2023 (Ont. Surr. Ct.) — referred to

Tataryn v. Tataryn Estate (1994), [1994] 7 W.W.R. 609, 46 B.C.A.C. 255, 75 W.A.C. 255, 116 D.L.R. (4th) 193, [1994] 2 S.C.R. 807, 3 E.T.R. (2d) 229, 169 N.R. 60, 93 B.C.L.R. (2d) 145, 1994 CarswellBC 283, 1994 CarswellBC 1243, [1994] S.C.J. No. 65 (S.C.C.) — followed

Thronberg v. Thronberg Estate (2003), 2003 SKQB 114, 2003 CarswellSask 197, (sub nom. *Thronberg Estate, Re*) 231 Sask. R. 39, (sub nom. *Thronberg v. Thronberg*) [2003] S.J. No. 195 (Sask. Q.B.) — referred to

Walker v. McDermott (1930), [1931] S.C.R. 94, [1931] 1 D.L.R. 662, 1930 CarswellBC 125 (S.C.C.) — considered

Statutes considered:

Ont.*Dependants' Relief Act*, R.S.O. 1970, c. 126
s. 58(1) — referred to
s. 1(b) "dependant" — referred to
Can.*Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.)
Generally — referred to
Ont.*Family Law Act*, R.S.O. 1990, c. F.3
Generally — referred to
Ont.*Succession Law Reform Act*, R.S.O. 1990, c. S.26
Generally — referred to
Pt. V — referred to
ss. 57-62 — referred to
s. 57 "dependant" — considered
s. 58 — referred to
s. 58(1) — considered
s. 58(2) — considered
s. 58(4) — considered
s. 60(2)(a) — considered
s. 62 — considered
s. 62(1) — referred to
s. 62(1)(g) — referred to
s. 62(1)(h) — referred to
s. 62(1)(i) — referred to
s. 62(1)(j) — referred to
s. 62(1)(k) — referred to
s. 62(1)(o) — referred to
s. 62(1)(r)(ii) — referred to
s. 72 — referred to
s. 75 — referred to
B.C.*Wills Variation Act*, R.S.B.C. 1979, c. 435
Generally — referred to
s. 2(1) — referred to

APPEAL from judgment reported at 2003 CarswellOnt 571, 223 D.L.R. (4th) 732, 5 E.T.R. (3d) 81 (Ont. S.C.J.) granting in part application by ex-wife and children of deceased for order for payment of arrears of child support, additional child support and establishment of trust fund out of husband's estate.

Blair J.A.:

1 The task facing a judge who is required to determine whether a deceased person has made adequate provision for the proper support of his or her dependants is a difficult and delicate one when the estate is not large enough to satisfy the competing legal and moral claims of all dependants. This is particularly so where the needs of one dependant far outstrip the capacity of the estate to respond to them fully. The case before us exemplifies this dilemma.

2 The appellants argue that the deceased, Bruce Norton Cummings, did not make adequate provision in his will for the proper support of his dependant adult children, Paul and Elizabeth. They applied to Cullity J. for dependants' relief pursuant to Part V of the *Succession Law Reform Act* R.S.O. 1990, c. s. 26, as amended ("the Act"). They were successful, but not to the extent they had hoped.

3 On this appeal, the appellants seek to have the judgment varied to provide for a greater quantum of dependants' relief and for a larger amount of support arrears. They also seek leave to appeal from the decision of the application judge to award no costs and, if leave be granted, to appeal from that order.

Issues

4 There are three issues to be dealt with:

(a) Did the application judge err in limiting arrears of support to the date of Mr. Cummings death rather than making the arrears payable to the date of the Application?

(b) Did the application judge err in the exercise of his discretion under s. 58 of the *Succession Law Reform Act* by failing to fix a larger amount for dependants' relief, given particularly the needs of his son, Paul?

(c) Did the application judge err in failing to award costs to the applicants?

5 I would answer all three questions in the negative and dismiss the appeal for the reasons that follow.

Background

6 Paul and Elizabeth Cummings were 24 and 18 years of age, respectively, at the time of their father's death. It is agreed they both are "dependants" of Mr. Cummings within the meaning of the Act.

7 At the time of the Application, Elizabeth had graduated from a course in social work at Sheridan College and was in the process of completing a degree course in social welfare at Nipissing University. She hoped to enroll in a graduate program in social work at Wilfred Laurier University, which would take two years to complete.

8 Paul is a university graduate. He has a degree in Business Marketing and Administration and has completed courses in psychology and sociology at Trent University. Sadly, however, he

suffers from a progressively debilitating neuromuscular disease known as Becker's muscular dystrophy, for which there is no known cure. No one contests the serious nature of this disease. It affects every muscle in his body, particularly his heart and lungs. As the application judge described it:

> He suffers from weakness in his joints, including his knees. He is liable to fall and unable to run. He has difficulty rising to his feet from a sitting position and in ascending, and descending, stairs. Paul still drives a motor vehicle but has required - or will soon require - special attachments to enable him to continue to do this. He lives with his mother and it is anticipated that expensive renovations to the house will be required as his illness progresses. Although his life expectancy is considered to be normal, it is anticipated that he will be confined to a wheelchair before he is 40 years of age.

9 It is the poignancy and need of Paul's situation that underlies the Application and this appeal. His condition has deteriorated since his father's death. While he was at one time fully employed, he has not been able to sustain that employment and is now attempting to work part time from home, but without much success. His prospects for long-term employment are not good. Expensive modifications to the home will be necessary to accommodate his needs. He will eventually require full-time attention. Everyone agrees that the costs of Paul's future care will far exceed the value of Mr. Cummings' estate.

10 Paul and Elizabeth are the children of Mr. Cummings and his first wife, the appellant Mary Cummings.

11 Bruce and Mary Cummings were married in 1968. They separated in 1986 and were divorced in January 1992. The divorce judgment incorporated the terms of a separation agreement providing, amongst other things, for Mr. Cummings to pay Mary Cummings support for the children in the amount of $2,000 per month, and recognizing that "Paul may continue to be a child of the marriage and in possible need of support throughout the rest of his life, as a result of his disease". The agreement also specified that it would survive the death of a party, was binding on heirs and executors, and, particularly, that Mr. Cummings' obligation to pay support would survive his death and be a first charge on his estate.

12 Mr. Cummings met the respondent, Ruta Cummings, in 1986. In 1988 they began to live together in a common-law relationship. They were married in October 1997. At about the same time Mr. Cummings was diagnosed with terminal cancer, and he died about 9 months later. The relationship between Mr. Cummings and the respondent was an enduring, intimate and loving one.

13 Mr. Cummings was employed in the publishing industry for many years. At the time of the divorce and separation agreement he was earning approximately $300,000 a year. In 1994, however, his employment was terminated, and although he received a handsome severance package of approximately $450,000 his money ran out in 1996. He was never successful thereafter in his attempts to establish a viable consulting business. In 1996 his income was about $12,000, and in 1997 it was $1,473.

14 Ruta Cummings is, and has been, employed in the computer software industry. There is no evidence as to her level of earnings, but she deposed that she was "presently capable of earning an income capable of providing adequately for [her] support". Neither she nor Mary Cummings advanced any claim for dependants' relief. The respondent's evidence is that she and the deceased "contributed approximately equal amounts to the maintenance of the household, including all general household expenses and mortgage, insurance and property taxes on [their] home and [their] cottage and [their] automobiles" from the commencement of their relationship. There is nothing in the record to contradict this. Indeed, from about mid-1996 until Mr. Cummings' death, it was Ruta Cummings who was the breadwinner in the family. She contributed to the support payments made by Mr. Cummings under the divorce judgment. Following his death, she paid the sum of $600 per month for support of the children, out of her own pocket.

15 Mary Cummings is a Vice-Principal at a Junior School. She earns approximately $76,000 per year. Mary Cummings has contributed to her daughter's tuition of about $5,000 for two years at Sheridan College and about $8,200 for two years at Nipissing University.

16 Mr. Cummings' last will and testament was executed on December 15, 1997. The respondent was named his executrix and trustee. A codicil to the will was executed on June 2, 1998. In the will and codicil Mr. Cummings recognized he had obligations to his dependant children after his death. He directed that a testamentary trust in the amount of $125,000 be established to provide support payments in the amount of $600 per month, reducing to $400 when either child ceased to be a dependant. Should the support obligations be terminated, the will provided that any remaining amount was to be split qually between Paul and Elizabeth, or the survivor.

17 The application judge found that the net value of the estate, for purposes of the dependants' relief application, was about $637,500. Counsel now agree the correct figure is approximately $650,000. The total estate, for these purposes, is comprised of the testamentary estate itself, valued at approximately $135,000, and other assets that by virtue of s. 72 of the Act are deemed to be available for purposes of valuing the estate and supporting a charge to secure payment of a dependants' relief order (the "notional assets"). The other assets in question consist of the matrimonial home of Mr. Cummings and the respondent, a cottage property in the Parry Sound area - both held jointly by Mr. Cummings and the respondent - and the proceeds of Mr. Cummings' RRSP, of which the respondent is the direct beneficiary.

18 In his decision the application judge found that Mr. Cummings had not adequately provided for the proper support of his dependant children by establishing the $125,000 testamentary trust. He concluded in all the circumstances that the level of support should be set at $250,000 payable by way of lump sum to Mary Cummings in trust "to be applied to a maximum of $10,000 for Elizabeth's expenses of completing her Master's degree at Wilfred Laurier University and the remaining amount to be held in trust to apply so much of the income, and to the extent it is insufficient, the capital, for the care and welfare of Paul Cummings during his life". He also directed, as previously indicated, that support arrears in the amount of $53,256.08, calculated to

the date of Mr. Cummings' death, be paid to Mary Cummings.

19 It is from these determinations that the applicants appeal.

Analysis

Arrears of Support

20 In 1996 Mr. Cummings reduced the amount of his monthly payments under the divorce judgment and separation agreement from $2000 to $378. The reduction corresponded to the dramatic decrease in his income earning capacity following the termination of his employment in 1994. Mary Cummings never objected to the reduced support payments while Mr. Cummings was alive, nor did she ever indicate she was waiving her rights to any arrears of support.

21 The application judge considered, and rejected, the argument that there had been an express or implied agreement between Mr. Cummings and Mary Cummings reducing the support obligation from $2,000 per month to $378, notwithstanding the previous pattern to that effect following Mr. Cummings' loss of employment. He concluded that if Mr. Cummings had applied to vary the support payments and rescind arrears in 1997, shortly before his diagnosis, he would likely have obtained such an order. However, Mr. Cummings did not do so. In all the circumstances, the application judge found that there were arrears of support, and that the estate was large enough to pay those arrears, which constituted a judgment debt and a first charge against the estate. He granted judgment to Mary Cummings in the amount of $53,255.99 for arrears of support and special expenses to the date of Mr. Cummings' death.

22 In making this order, the application judge recognized that the Separation Agreement was intended by its own language to survive the death of a party, and to be binding on the deceased's heirs, executors, administrators and assigns; moreover, it expressly provided that Mr. Cummings' obligation to pay support would survive his death and would be a first charge on his estate. He therefore correctly held that the support arrears constituted a first charge against the estate.

23 Given the language of the Separation Agreement and the provisions of the divorce judgment, the estate continued to be subject to an ongoing obligation to pay support in the amount of $2,000 per month, unless otherwise varied by court order. The appellants elected not to rely on that obligation, however, but rather to seek dependants' relief under the Act, for the period following Mr. Cummings' death. Having chosen this route, however, the appellants opened it up to the application judge to exercise his discretion in balancing all of the factors relevant to how the assets in the estate were to be allocated, just as he would have been able to do had he been considering an application to vary the support provisions in the Separation Agreement and divorce judgment.

24 Leaving aside Mr. Cummings' death, had there been an application to vary and to rescind arrears, a judge would have been entitled to take into consideration all of the changed circumstances in determining the extent to which arrears should be paid. The application judge in effect did the same thing. He was clearly alive to the limited resources of Mr. Cummings' estate

in providing for his dependants' needs. He declined to grant prejudgment interest on the arrears he did award, undoubtedly with that in mind. It is noteworthy, as counsel for the appellants candidly conceded, that any increase in the arrears payable might well require a downward adjustment in any dependants' relief order made in favour of the children.

25 In my view, 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.

Dependants' Relief under the Succession Law Reform Act

26 In determining the allocation of the testator's estate for dependants' relief purposes, the application judge took into account not only the needs of Paul and Elizabeth but also the moral obligations of Mr. Cummings towards his dependants, including his second wife, Ruta Cummings. He did so even though the Respondent was admittedly not in need of support at the time and was not claiming relief under the Act. In my view, he was entitled to do so.

27 When judging whether a deceased has made adequate provision for the proper support of his or her dependants and, if not, what order should be made under the Act, a court must examine the claims of all dependants, whether based on need or on legal or moral and ethical obligations. This is so by reason of the dictates of the common law and the provisions of sections 57 through 62 of the Act.

28 Sections 58 and 60 of the *Succession Law Reform Act* state, in part:

> 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.
>
> (2) An application for an order for support of a dependant may be made by the dependant or the dependant's parent.
>
> (4) The adequacy of provision for support under subsection (1) shall be determined as of the date of the hearing of the application.
>
> 60(2) Where an application for an order under section 58 is made by or on behalf of any dependant,
>
> a) it may be dealt with by the court as
>
> b)
>
> an application made on behalf of all persons who might apply.

29 Here, the application is made by Paul Cummings on his own behalf and by Mary Cummings on behalf of Elizabeth. It is conceded that Paul and Elizabeth are dependants as that term is defined under section 57 the Act, which states:

> "dependant" means,

(a) the spouse of the deceased,

(b) a parent of the deceased,

(c) a child of the deceased, or

(d) 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.

30 Neither Mary Cummings nor Ruta Cummings sought relief on the application. They are "dependants", however, and their interests may properly be taken into account by the judge hearing the application, in accordance with subsection 60(2)(a) above.

31 The factors to be considered by the court on an application under section 58 are set out in section 62:

62.(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 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 or same-sex partner,

(i) a course of conduct by the spouse or same-sex partner 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 or same-sex partners cohabited,

(iii) the effect on the spouse's or same-sex partner's earning capacity of the responsibilities assumed during cohabitation,

(iv) whether the spouse or same-sex partner 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 or same-sex partner 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) in the case of a spouse, 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,

(vi.1) in the case of a same-sex partner, any housekeeping, child care or other domestic service performed by the same-sex partner for the deceased or the deceased's family, as if the same-sex partner had devoted the time spent in performing that service in remunerative employment and had contributed the earnings to the support of the deceased or the deceased's family,

(vii) the effect on the spouse's or same-sex partner's earnings and career development of the responsibility of caring for a child,

(viii) the desirability of the spouse or same-sex partner 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. R.S.O. 1990, c. S.26, s. 62 (1); 1999, c. 6, s. 61 (1-3).

32 After an analysis of various competing authorities, Cullity J. concluded that an Ontario court is entitled under s. 58(1) of the Act to take into account not only needs but, as well, the moral duties of a testator or testatrix towards spouses and children, in arriving at an appropriate support

order. He said (Reasons, paragraph 48):

> The issue of the weight to be given to moral considerations is relevant in this case: it is posed quite directly by the Respondent's concession that she is not in need of support. On a strictly needs-based approach, I might well be justified in ordering that the entirety of the net testamentary estate be transferred for the support of Paul and for the assets of the notional estate to be charged for their full value. I do not think this would be a correct disposition of the case. I believe that, apart from any residual value that is to be attributed to freedom of testamentary disposition, and the direction in section 62(1)(k) to consider the existence of a legal obligation to support another person, moral considerations continue to have a part to play in the analysis although, if due consideration is given to the differences in the wording of the legislation of this province and that of British Columbia, they may not be given the same significance as in the courts of the latter.

33 Counsel accepted that the foregoing statement represents an accurate summary of the law in Ontario. I agree, although I do not think the caveat that moral considerations are of less significance in Ontario than in British Columbia is necessary.

34 The issue 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 appellate level since the enactment of subsection 58(1) in its present form in 1978, when the provisions of Part V of the Act replaced the provisions of the former *Dependants' Relief Act* R.S.O. 1970, c. 126. 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. It is for this reason that the legislation permits the court to treat the application as one brought on behalf of all dependants (paragraph 60(2)(a)) and why, in subsection 62(1), the factors listed are a mélange of criteria based not only on needs and means but also on legal and moral or ethical claims.

35 Prior to 1978 it was well accepted in Canadian jurisprudence that moral or ethical considerations were important in the application of dependants' relief legislation. In *Walker v. McDermott* (1930), [1931] S.C.R. 94 (S.C.C.), Duff J observed:

> What constitutes "proper maintenance and support" is a question to be determined with reference to a variety of circumstances. It cannot be limited to the bare necessities of existence. For the purpose of arriving at a conclusion, the court on whom devolves the responsibility of giving effect to the statute, would naturally proceed from the point of view of the judicious father of a family seeking to discharge both his marital and his parental duty; and would of course (looking at the matter from that point of view), consider the situation of the child, wife or husband, and the standard of living to which, having regard to this and the other circumstances, reference ought to be had.

36 When analyzing the court's task in determining what is appropriate support, many courts, including this one in *Hull, Re*, [1943] O.R. 778 (Ont. C.A.), have followed *Bosch v. Perpetual Trustee Co.*, [1938] A.C. 463 (New South Wales P.C.) in which Lord Romer adopted the proposition that dependants' relief legislation is

> designed to enforce the moral obligation of a testator to use his testamentary powers for the purpose of making proper and adequate provision after his death for the support of his wife and children, having regard to his means, to the means and deserts of the several claimants, and to the relative urgency of the various moral claims upon his bounty.

37 Lord Romer relied as well on *Allardice v. Allardice* (1910), 29 N.Z.L.R. 959 (New Zealand C.A.) in support of his view that the Court's responsibility is to consider whether there has been a breach of the testator's moral duty to his dependants. In conclusion, he stated (at pp. 478-479) that:

> . . . in every case the Court must place itself in the position of the testator and consider what he ought to have done in all the circumstances of the case, treating the testator for that purpose as a wise and just, rather than a fond and foolish, husband or father.

38 Following the legislative changes in 1978, however, there have been conflicting decisions in Ontario as to the role of moral considerations in dependants' relief applications. Authorities such as *Richer v. Richer* (1984), 17 E.T.R. 102 (Ont. Co. Ct.), *Shemesh v. Shemesh Estate*, [1992] O.J. No. 2724 (Ont. Gen. Div.) and *Kipp v. Buck Estate*, [1993] O.J. No. 790 (Ont. Gen. Div.) concluded such considerations remain relevant. Earlier Surrogate Court cases took a different approach, however: see *McSween v. McSween Estate*, [1985] O.J. No. 1765 (Ont. Surr. Ct.), and *Swire v. Swire*, [1986] O.J. No. 2023 (Ont. Surr. Ct.). In *McSween v. McSween Estate*, Carnwath J. said:

> I therefore conclude that in seeking the correct meaning to be ascribed to the words "proper support", in Ontario, under the Succession Law Reform Act, primary importance must be attached to the economic situation of the dependant at the time of the hearing as opposed to ethical or moral obligations to be imputed to the deceased at whatever point in time. That is not to say that the opening words of s. 62(1)(a) of the Act should be ignored; there is a requirement to "inquire into and consider all the circumstances of the application". I find, however, that in determining the adequacy of proper support as a prerequisite to the making of an order under s. 58(1) of the Act, that moral or ethical obligations on the part of the deceased are subsidiary to the primary consideration of the economic circumstances of all the parties who would be affected by any order made pursuant to s. 58.

39 Carnwath J. also suggested that a re-examination of the "time-honoured precept" of directing the judge to "put himself in the place of the testator" might be justified as well.

40 In my view these questions have been resolved by the decision of the Supreme Court of Canada in *Tataryn v Tataryn Estate*, [1994] 2 S.C.R. 807 (S.C.C.). There, the Court held that a deceased's moral duty towards his or her dependants is a relevant consideration on a dependants'

relief application, and that judges are not limited to conducting a needs-based economic analysis in determining what disposition to make. In doing so, it rejected the argument that the "judicious father and husband" test should be replaced with a needs-based analysis: see para. 23. I see no reason why the principles of *Tataryn* should not apply equally in Ontario, even though they were enunciated in the context of the British Columbia *Wills Variation* Act R.S.B.C. 1979, c. 435, in which the language is somewhat different from that of the *Succession Law Reform Act*.

41 Writing for a unanimous Court in that case, McLachlin J. based her decision on three main underpinnings:

(a) First, she relied upon the broad wording of the British Columbia legislation itself (which gives the court 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 testator has not made "adequate provision for the proper maintenance and support of the testator's wife, husband or children").

(b) Secondly, she examined the origins and objects of the statute as dependants' relief legislation (designed to provide for the needs of spouses and children by preventing them from becoming a charge on the state *and* by ensuring that they receive an "adequate, just and equitable" share of the family wealth on the death of the person who held it).

(c) Thirdly, she applied the principle of testamentary autonomy (i.e., the exercise by a testator or testatrix of his or her freedom to dispose of property, which is to be interfered with not lightly, but only in so far as the statute requires).

42 There are three differences of note between the British Columbia and the Ontario legislation. First, subsection 58(1) of the *Succession Law Reform Act* stipulates that if a deceased "has not made adequate provision for the proper support of his dependants", the court may "order that such provisions as it considers *adequate*" be made, whereas subsection 2(1) of the British Columbia statute uses the language of not making "adequate provision for the proper maintenance and support" permitting the court to order what it considers "*adequate, just and equitable in the circumstances*". Secondly, the beneficiaries of the British Columbia statute are not limited to dependant spouses and children, whereas that is the case in Ontario. Finally, the British Columbia legislation does not contain the long list of enumerated factors to be taken into account by the court, as found in subsection 62(1) of the Ontario Act.

43 I do not think the difference in phraseology between the two statutes is significant. The language of sections 58(1) and 62 of the *Succession Law Reform Act* is broad enough itself. It provides the court with a discretion that is to be exercised upon a consideration of all the circumstances of the application. Nor am I persuaded that the disparity in language between "adequate" and "adequate, just and equitable in the circumstances" is important. As I have already noted, an Ontario court is mandated by the opening wording of subsection 62(1) to "consider all the circumstances of the application". Moreover, as McLachlin J. observed in *Tataryn*, at para. 13, the making of "adequate" provision and the ordering of what is "adequate,

just and equitable" are "two sides of the same coin".

44 The fact that the British Columbia legislation does not exclude adult independant children was weighed as a factor militating against a "needs only" test by McLachlin J. in *Tataryn*. However, it was only one factor of many, and was not dispositive. In any event, the definition of "dependant" in the *Succession Law Reform Act* is broader than that of its predecessor, the *Dependants' Relief Act*, and Ontario courts readily applied the "moral duty" analysis to applications under the latter legislation: see, for example, *Re Hull Estate, supra*.

45 Finally, I do not think the enumerated list of factors the court is required to consider under subsection 62(1) militates against the examination of moral duties. To the contrary, many of the factors outlined invoke such considerations and, as Misener J. noted in *Kipp v. Buck Estate, supra*,*(1) reinforce the notion that moral obligations of the deceased cannot be ignored. I note, for example, the provisions in paragraphs 62(1)(g) [the proximity and duration of the dependant's relationship with the deceased]; (h) [contributions made by the dependant to the deceased's welfare], (i) [contributions by the dependant to the acquisition, maintenance and improvement of the deceased's property and business], (j) [contribution to the deceased's career potential], (k) [legal support obligations by the deceased to other persons], (o) [the claims any other person may have as a dependant], and (r)(ii) [the length of time the spouses cohabited]. Thus, in spite of other listed factors that relate, directly or indirectly, to needs and means, the provisions of subsection 62(1) of the Act are not limited to economic considerations alone. Moral considerations are relevant to the exercise.

46 Moral considerations are not something to be contemplated in addition to, or in isolation from, subsection 62(1), however. The legal obligations and moral obligations referred to in *Tataryn* are reflected, for the most part, in the language of that lengthy provision. Thus, the principles of *Tataryn* are to be applied in the context of considering the factors listed and the general direction to consider all the circumstances.

47 I conclude, therefore, that the disparities between the British Columbia and Ontario statutes are not sufficiently telling to preclude the application of *Tataryn* in this province.

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 dependants (thus preventing them from becoming a charge on the state) but also to ensure that spouses and children receive a fair share of family wealth, was also important to the Court's analysis in that case. Society's values and expectations change. In earlier times, the prevailing view was that on termination of a marriage the husband was obliged to maintain the wife, and nothing more. At present, however, the provisions of the *Divorce Act**(2), family property and family support legislation, and the law relating to constructive trusts, all reflect society's expectations that children will be properly supported and that spouses are entitled not only to proper support but also to a share in each other's estate when a marriage is over. These expectations are not confined to British Columbia. They are mirrored in Ontario as well through the provisions of the *Divorce Act* and the *Family Law Act**(3).

49 As Justice McLachlin remarked in *Tataryn*, the Act must be interpreted through the prism of modern values. At paragraphs 15 and 28 she said:

> 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. (underlining added)
>
> 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.

50 In short, when examining all of the circumstances of an application for dependants' relief, the court must consider,

a) what legal obligations would have been imposed on the deceased had the question of provision arisen during his lifetime; and,

b) 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.

51 Either or both of these types of obligations fit nicely into the lengthy list of factors already articulated in subsection 62(1), as I have mentioned.

52 Finally, I note - as Cullity J. observed - that *Tataryn* has been applied in other provinces, such as Alberta, Saskatchewan, and New Brunswick, where the legislation is more similar to Ontario's statute than to the *Wills Variation Act* in British Columbia. See, for example *Siegel v. Siegel Estate*, [1995] A.J. No. 1158 (Alta. Q.B.); *Gavinchuk v. Mickalyk*, [2003] A.J. No. 1279 (Alta. Q.B.); *Ostrander v. Kimble Estate*, [1996] S.J. No. 444 (Sask. Q.B.); *Thronberg v. Thronberg Estate*, [2003] S.J. No. 195 (Sask. Q.B.); *Currie v. Currie Estate*, [1995] N.B.J. No. 305 (N.B. C.A.).

53 The application judge was correct in concluding that moral considerations continue to be relevant to applications under Part V of the *Succession Law Reform Act* in Ontario. I do not see the need to qualify this principle by suggesting that those considerations may be of "less

significance" here than under the British Columbia legislation. In practical terms I do not know how one would apply such a distinction.

The Quantum of Dependants' Relief Support Awarded

54 The next question to be determined is whether the application judge reasonably exercised his discretion in applying the foregoing principles, and the provisions of sections 58 and 62, in arriving at his disposition in the circumstances of this case. In my opinion, he did.

55 The appellants argue that the application judge failed to give proper weight to the needs of Paul, in particular, in arriving at his decision. Those needs are large, permanent, and will increase with time. The appellants do not submit that all of Mr. Cummings' assets should have gone to support the children, but contend for a two-thirds/one-third distribution.

56 The application judge was exercising a discretion, however. In the absence of an error in principle, a failure to consider material evidence, or the giving of too much weight to one relevant consideration over others, this Court will not interfere with the exercise of that discretion.

57 Here, the application judge considered at length the evidence concerning the needs and means of Paul and Elizabeth, the size of the testamentary and notional estates, the meaning of "proper" support, and the legal and moral claims of the children as well as those of Mary Cummings and Ruta Cummings to support. He recognized that the determination of proper support for Paul was a matter of considerable difficulty and, indeed, that it was not possible to provide adequate support for him, given the limited size of the estate. He properly concluded that Mr. Cummings had recognized his obligations to his children by setting up the $125,000 testamentary trust, but that the trust nonetheless did not provide adequate provision for the proper support of his son. While he did not find the establishment of the trust was necessarily inadequate for the proper support of Elizabeth, he concluded that the provisions made for her should be respected in the order he made.

58 In short, the application judge - as he properly should have done - gave consideration to the effect of his order on *all* dependants. If all, or substantially more of Mr. Cummings' estate had been allocated to or charged with the support of Paul, the respondent Ruta Cummings would arguably be in need. The application judge found that "the moral claims of the Respondent 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 of the matrimonial home should not be disturbed, or substantially encumbered, by the order [to be made] for the support of Paul and Elizabeth". He therefore interfered with Mr. Cummings' testamentary autonomy to the extent of replacing the $125,000 testamentary trust with a lump sum payment of $250,000 to Mary Cummings, to be held in trust to be applied to the extent of $10,000 for Elizabeth's expenses of completing her education and the balance to be applied for the care and welfare of Paul Cummings during his life. This order was justified in law and on the record, in my opinion.

59 The matrimonial home had a net equity of about $422,500. The RRSP's had a value of $375,000 (subject to unspecified amounts of tax, if distributed). The total net value of the estate, for dependants' relief purposes was approximately $650,000. In effect, what the application judge did was to deduct the equivalent of one-half the value of the matrimonial home ($211,250) and distribute or charge the balance ($438,750) on roughly a 57%/43% basis in favour of the children. This is consistent with the approach in *Tataryn*, both because of Mr. Cummings' legal obligations respecting the respondent regarding the equalization of net family properties on death and because of the respondent's moral claims arising from financial and other contributions that she had made to the relationship over its 12-year duration. While another judge may have concluded that a higher proportion of the net estate should have been allocated to Paul's care, I can find no error in the exercise by the application judge of his discretion in this regard.

60 I would not interfere with the exercise of that discretion in the circumstances of this case.

The Costs Order

61 The appellants also seek leave to appeal, and if leave be granted, to appeal from the order of the application judge that there should be no costs of the application.

62 In practice, where the Court has concluded that the deceased's distribution should be reviewed in favour of a dependant, costs of all parties are generally ordered to be paid out of the estate on a substantial indemnity basis: MacDonnell, Sheard, and Hull, *Probate Practice*, 4th ed., at p. 149. However, the Court has the power under section 75 of the Act to "direct that the costs of the application be paid out of the estate *or otherwise* as it thinks proper". Here, the application judge exercised his discretion to order otherwise.

63 In doing so, he considered and weighed a number of relevant factors, including,

a) the measure of success enjoyed by the applicants;

b) a more favourable offer to settle that had been made by the respondent;

c) certain conduct on the part of the respondent that had protracted the proceedings;

d) the difficulties of the case;

e) the size of the estate and the impact of a cost award on the respondent; and,

f) the bills of costs provided by the parties.

64 The application judge recognized that "the task of weighing these considerations was not an easy one", but in the end concluded that the appropriate exercise of his discretion in the circumstances was for the parties to bear their own costs. I see no error on his part in doing so.

65 I would therefore grant leave to appeal from the order as to costs but dismiss the appeal in that regard.

Disposition

66 For the foregoing reasons I would dismiss the appeal.

67 Counsel for the respondent did not seek costs if the appeal were dismissed. There will therefore be no costs of the appeal.

McMurtry C.J.O.:

I agree.

Doherty J.A.:

I agree.

Appeal dismissed.

Endnotes

1 (Popup - Popup)
At para. 14.
2 (Popup - Popup)
R.S.C., 1985, c. 3.
3 (Popup - Popup)
R.S.O. 1990, c. F.3.