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"Dependant's Relief: Cummings and Beyond"

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Overview

The *Succession Law Reform Act*[1] ("SLRA") governs the right of beneficiaries to receive support and other benefits on death. More specifically, section 58(1) of the SLRA enables dependants of a deceased who have been inadequately provided for to apply to the Court for support. Section 58(1) states:

> Where a deceased, whether intestate or intestate, has not made adequate provisions for the proper support of his dependents 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.

As noted by the Ontario Court of Appeal in *Cummings v. Cummings*[2], "Prior to 1978 it was well accepted in Canadian jurisprudence that moral and ethical considerations were important in the application of dependent's relief legislation" but noted that 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."[3]

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[1] R.S.O. 1990, c. S. 26.
[2] *Cummings v. Cummings*, [2003] 5 E.T.R (3d) 81 (Ont. S.C.J.), [2003] O.J. No. 601 (Ont. S.C.J.); affirmed [2004] 69 O.R. (3d) 398 (Ont. C.A.), [2004] O.J. No. 90 (Ont. C.A.).
[3] *Ibid.*, [2004] 69 O.R. (3d) 398 (Ont. C.A.) at para 34 and 35.

In Cummings, the Court of Appeal, in affirming the Application Judge's decision, found that when examining all of the circumstances of an application for dependant's 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 and her dependants as a result of society's expectations of what a judicious person would do in the circumstances." [4]

The Court of Appeal, in reviewing the jurisprudence, considered the decision of the Supreme Court of Canada in *Tataryn v. Tataryn*[5]. In *Tataryn*, the Supreme Court held that "a deceased's moral duty towards his or her dependants is a relevant consideration on a dependant's relief application, and that judges are not limited to conducting a needs-based economic analysis in determining what disposition to make."

While the *Tataryn* case dealt with British Columbia's Wills Variation Act, the language in which is somewhat different from the SLRA, the Ontario Court of Appeal held that the disparities in the British Columbia and Ontario statutes were not sufficient to preclude the application of *Tataryn* in Ontario.

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[4] Ibid., [2004] O.J. No. 90 (Ont. C.A.) para 50.
[5] *Tataryn v. Tataryn*, [1994] 2 S.C.R. 807.

With the decision in *Cummings*, the Court is entitled to take into account not only the needs of the dependants, but the moral obligations of the deceased to those dependants. [6]

The aftermath of *Cummings* is not yet conclusive. The caselaw appears to be developing cautiously. Having said that, in *Perilli v. Foley Estate*[7], the Court seemed to expand on the principles in *Cummings*, to include consideration of any moral claims of non-dependant persons. In *Perilli*, Justice Henderson stated:

> "Therefore, in a claim under section 58 of the SLRA in Ontario, I find that the court must first identify all of the dependants who may have a claim on the estate. Then, the court must tentatively value the claims of those dependants by considering the factors set out in the legislation and the legal and moral obligations of the estate to the dependants. Thereafter, the court must identify those non-dependant persons who may have a legal or moral claim to a share of the estate. Lastly, the court must attempt to balance the competing claims to the estate by taking into account the size of the estate, the strength of the claims, and the intentions of the deceased in order to arrive at a judicious distribution of the estate. This exercise may involve the prioritization of the competing claims." [underlining added] [8]

This following references portions of Part V of the SLRA, the facts in Cummings and a selection of cases post *Cummings* for discussion.

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[6] *Cummings v. Cummings*, [2004] O.J. No. 90 (Ont. C.A.) at para 26.
[7] Perilli v. Foley Estate, [2006] 23 E.T.R. (3d) 245.
[8] Ibid., at para 61.

Succession Law Reform Act

Who is a Dependant?

Section 57 of the SLRA defines "dependant" as:

a) the spouse of a deceased,
b) a parent of the deceased,
c) a child of the deceased, or
d) a brother or sister of the deceased,

to whom the deceased was providing support or was under a legal obligation to provide support immediately before his or her death.

"Spouse" means a spouse as defined in subsection 1(1) of the SLRA and in addition includes either of two persons who,

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

(b) are not married to each other and have cohabitated

i. continuously for a period of not less than three years, or
ii. in a relationship of some permanence, if they are the natural or adoptive parents of a child.

Subsection 1(1) of the SLRA defines "spouse" as either of two persons who,

(a) are married to each other, or
(b) have together entered into a marriage that is voidable or void, in good faith on the part of the person asserting a right under this Act

"Parent" includes a grandparent, and a person who has demonstrated a settled intention to treat the deceased as a child of his or her family, excluding foster parents.

Child means a child as defined by subsection 1(1) and includes a grandchild and a person whom the deceased has demonstrated a settled intention to treat as a child of his or her family, excluding foster children

Subsection 1(1) provides that the term "child" means a child conceived before and born alive after the parent's death.

Section 62(1) of the SLRA

Section 62(1) of the SLRA states that 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 of her own support, and the length of time and cost involved to enable her 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, and maintenance or improvement of the deceased's property or business;

(j) the contribution made by the dependant to the realization of the deceased's career potential;

(k) whether the deceased 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 dependant and the deceased;

(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) claims that any other person may have as dependants;

(p) if the dependant is a child,
  (i) the child's aptitude for and reasonable prospects of obtaining an education, and

  (ii) the child's need for a stable environment;

(q) if the dependant is a child of the age of sixteen years or more, whether the child has withdrawn from parental control;

(r) if the dependant is a spouse;

  (i) a course of conduct by the spouse during the deceased's lifetime that is so "unconscionable" as to constitute an obvious and gross repudiation of the relationship;

(ii) the length of time the spouses cohabited;

(iii) the effect on the spouse's earning capacity of the responsibilities assumed during cohabitation;

(iv) whether the spouse has undertaken the care of a child who is of the age of eighteen years or over and unable by reason of illness, disability or other cause to withdraw from the charge of his or her parents;

(v) whether the spouse has undertaken to assist in the continuation of a program of education for a child eighteen years of age or over who is unable for that reason to withdraw from the charge of his or her parents;

(vi) any housekeeping, child care or other domestic service performed by the spouse for the family, as if the spouse had devoted the time spent in performing that service in remunerative employment and had contributed the earning's to the family's support;

(vii) the effect of the spouse's earnings and career development of the responsibility of caring for a child;

(viii) the desirability of the spouse remaining at home to care for a child; and

(s) any other legal right to support, other than out of public money;

Facts in *Cummings*

Mr. Cummings (the "Deceased") died leaving a widow, a former spouse (divorced) and two children, Paul and Elizabeth, from his marriage with his former spouse. It was agreed that the children were "dependants" under the SLRA as Elizabeth (18 years old) was still in University and Paul (24 years old) suffered from muscular dystrophy. It was agreed that the costs of Paul's future care would far exceed the value of the Deceased's estate.

The deceased and the widow lived together for approximately 10 years but had only been married for 9 months before the deceased died of cancer.

The widow and the first wife did not make any claim for dependant support.

The Applicants sought a payment of arrears of child support ordered in the judgment for divorce, the establishment of a trust provided for in the terms of the Deceased's will under which payments for the support of Paul and Elizabeth would be made to their mother, and additional payments for support of Paul and Elizabeth pursuant to Part V of the SLRA.

The total estate was comprised of $135,000 and other assets that by virtue of s.72 of the SLRA were deemed to be available for purposes of the dependants' relief claim. These other assets consisted of the matrimonial home of the deceased and widow and a cottage property, both of which were held jointly by the deceased and the widow and proceeds in the deceased's RRSP, of which the widow was the direct beneficiary. The value of the estate for the purposes of the dependant's relief claim was $637,500.

The application Judge, Justice Cullity, held that the deceased had not adequately provided for the proper support of his dependant children by establishing a $125,000 testamentary trust. The Judge concluded that in all of the circumstances that the level of support should be set at $250,000 payable by way of a lump sum to be applied to a maximum of $10,000 for the child in University to complete her Master's degree with the balance for the care of the child with muscular dystrophy.

Justice Cullity also directed that support arrears in the amount of $53,256.08, calculated to the date of the deceased's death, be paid to the former spouse.

The Court of Appeal held, amongst other things, that "moral considerations are not something to be contemplated in addition to, or in isolation from, subsection 62(1)...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." [9]

Aftermath – Caselaw

***Simpson v. Leardi*, [2005] O.J. No. 4282 (Ont. S.C.J.)**

- The deceased left a substantial estate and the plaintiff had sought an interim support order to increase the monthly income of $1,000 provided for her in the deceased's Will.

- She had obtained an interim order awarding her $2,750 a month.

- On a motion by the defendant to terminate the order, the plaintiff cited *Cummings* as support for her position but agreed that she had no argument on a "needs based" analysis.

- The estate of the deceased was worth $10 million and the plaintiff's assets were worth approximately $3 million.

- The Judge terminated the interim support, declining to accept the plaintiff's argument that *Cummings* allows a court to take into account the respective wealth of the parties and reapportion that wealth in a "fair" manner.

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[9] *Cummings v. Cummings*, [2004] O.J. No. 90 (Ont. C.A.) at para 46.

***Juffs v. Investors Group Financial Services Inc.*, [2005] O.J. No. 3872 (Ont. S.C.J.), [2005] O.J. No. 5981 (Ont. Div. Ct.)**

- The deceased left her estate to two adult children, excluding her third and only dependant child, an 18-year old daughter (effectively disinheriting her only dependant). The two adult children were from a former marriage.

- At the time of her death, the deceased had been in arrears of child support for her dependant daughter for an extended period and owed the father of the child a total of $14,885.60. The deceased and the father of the dependant daughter were separated but never divorced. The dependant daughter lived with her father and entered University several months following the deceased's death.

- The only asset was a LIRA (locked in retirement account) account valued at $32,127, which had been held by Investors Group Financial Services Inc. ("IGF"); this account was paid by IGF to the two adult children of the deceased who were the named beneficiaries of the account (all of the LIRA proceeds were spent within a few months).

- Although the support arrears were legally owed to the dependant daughter's father, the Court applied the reasoning in *Cummings* to rationalize awarding a portion of the child support arrears (50%) to the dependant daughter by way of her dependant support claim.

- Regarding the father's claim to the child support arrears, the Court found that the caselaw is clear that the child support arrears owing to the father at the time of the deceased's death are a first charge against the estate and can be recovered by the child support recipient if the estate has sufficient funds.

However, the father's claim was that of an estate creditor who is trying to access a LIRA that is not part of the estate. The Court then held that estate creditors cannot make a claim against RSP proceeds that are in the hands of the designated beneficiary. The father's claim against the LIRA proceeds was dismissed.

- On the basis that the deceased was morally obligated to her daughter to provide support, the Judge awarded the dependant daughter Judgment against the two adult children in the amount of $7,442.80 (an amount equivalent to 50% of the child support arrears) together with an additional $15,000 (the deceased's share of the dependant daughter's education costs). This amount of $22,442.80 plus costs on a partial indemnity basis was payable by the two adult children.

- The two adult children sought leave to appeal the costs award from the trial. Justice Greer dismissed the motion for leave.

***Madore- Ogilvie (Litigation Guardian of) v. Ogilvie Estate,* [2005] O.J. No. 5774 (Ont. S.C.J.); affirmed [2006] O.J. No. 4654 (Ont. Div Ct.); appeal on specific issue [2008] O.J. No. 170 (Ont. C.A.)**

- Three children of the deceased, born of three different mothers, brought by their litigation guardians, dependants' relief claims under the SLRA.

- All had varying degrees of need.

- The estate was left to the deceased's widow ("Mary") who was also the mother of one of the dependant children, and made no provision for the other two dependant children.

●The deceased left no estate, but the proceeds from two life insurance policies were potentially available. The deceased was the sole owner of the first policy, which had a value of $60,711. Mary was the named beneficiary of this policy. The second policy was jointly owned by the deceased and Mary and had a value of $109,000. Mary brought a cross-Application which sought an order directing the life insurance company to pay her the proceeds from both policies.

● The Applications Judge concluded that both policies were caught by s. 72(1)(f) of the SLRA and were deemed part of the deceased's estate. The Applications Judge further held that a "fair and equitable distribution of the estate would be to divide the value of the estate into three equal shares" one to each of the three dependant children.

● Appeals were made in respect of the Judgment to the Divisional Court. The Divisional Court allowed the appeal in part and the second policy was excluded from the deceased's estate (that decision was based on s. 199(1) of the Insurance Act). The proceeds from the first policy were still to be split three between the three dependant children.

●Further appeals were made to the Ontario Court of Appeal; that is as to whether the second life insurance policy fell into the estate, and whether the dependant support order should be disturbed in part because the dependant children could obtain sufficient support from Canada Pension Plan benefits.

● The Court of Appeal affirmed the decision of the Divisional Court on both points of appeal. The court stated that *Cummings* provided that the Court was

not bound by what the minor children of the deceased would have received under child support payments, but that it was able to treat the obligation under s. 62(1) of the *SLRA* and consider many factors to determine the quantum and duration of support.

***Broderick v. Papathanasiou*, [2006] O.J. No. 4707 (Ont.S.C.J.)**

- Ms. Broderick contended that she lived with Mr. Papathanasiou (the "deceased") in a common law relationship for 8 years prior to his death.

- The deceased did not provide for Ms. Broderick in his Will or during his lifetime.

- Ms. Broderick earned more money than the deceased during some of the years they lived together; they lived in residences owned by the deceased.

- Ms. Broderick claimed she was a dependent spouse and asked that the Court make an order for her support under the SLRA.

- The Court held that "adequate provision" under the SLRA has been expansively interpreted by the courts; it was no longer a strictly needs based analysis; the deceased's moral duty towards his dependants was now also a relevant decision, citing *Cummings* and *Tataryn.*

- The Court found that Ms. Broderick's contributions to Mr. Papathanasiou's personal and financial well-being, to the detriment of her own finances, should be recognized by an award from the estate.

●The Court ordered that the deceased's condominium be sold and Ms. Broderick receive one half of the net proceeds in recognition of her contributions to Mr. Papathanasiou's well-being during the last part of his life.

***Perilli v. Foley Estate*, [2006] O.J. No. 465 (Ont. S.C.J.), [2006] O.J. No. 1218 (Ont. S.C.J.)**

● Mr. Foley, the deceased, and Ms. Perilli were common law spouses for 15 years.

●They lived together in a home purchased by Mr. Foley.

●Ms. Perilli took care of Mr. Foley in the last three years of his life when he was suffering from Alzheimer's disease.

●In his Will, Mr. Foley provided for cash bequests to his three children, his ex-wife and grandchild. The Will provided that Ms. Perilli be permitted to occupy the home for a period of five months after Foley's death with all home expenses paid by the estate during the period. She was also to receive household furnishings and a fund of $30,000 was to be set aside from which she as to receive the sum of $500 per month until the fund expired or Ms. Perilli died. The residue was left to Mr. Foley's three children. The Estate was worth approximately $500,000.

●Ms. Perilli brought a claim for dependants' relief and also argued that she had a constructive trust interest in the deceased's house on the basis of her contribution over the years.

●The Court agreed that Ms. Perilli had established unjust enrichment for a period of two years and eight months prior to Mr. Foley's death; which could

compensated by way of monetary compensation. The financial contributions of both Ms. Perilli and Mr. Foley could be offset against one another until that period.

- The Court found that the estate had two separate legal obligations to Ms. Perilli, namely economic support for life valued at $92,000 and an unjust enrichment claim valued at 35,000 ($127,000 in total).

- The Court also held though that Ms. Perilli had more than simple legal claims against the estate; there was also a moral claim against the estate. As Ms. Perilli was Mr. Foley's intimate companion for 15 years, there was a moral obligation on Mr. Foley to provide Ms. Perilli with more than the bare minimum legal obligation. Ms. Perilli's dependants' relief claim was then valued at approximately $140,000 in total (that is her total claim against the estate was $140,000).

- The Court, in a costs endorsement, awarded costs to Ms. Perilli out of the Estate on a substantial indemnity basis ($29,310.51).

***Reid v. Reid,* [2005] O.J. No. 2359 (Ont.S.C.J.); [2007] O.J. No. 2576 on costs; [2008] O.J. No. 826 (Ont. Div. Ct.)**

- The deceased was survived by her son and her daughter and her daughter's two children (the deceased's grandchildren).

- The deceased's daughter was a 42 year old mentally challenged individual. One of the granddaughters was also mentally challenged with the other being gifted but with behavioural problems.

- The deceased's estate was worth approximately $200,000, consisting primarily of a house.

- The deceased's daughter and her two children resided with the deceased.

- The deceased's Will left her estate equally to her daughter and son.

- The daughter and granddaughters brought an application for support.

- The Court found that there was a relationship of dependency such that the deceased was contributing to the support of her daughter and her two grandchildren.

- The Court held that the son should receive $25,000 and the balance of the estate was to be held for their daughter, and on her death, the proceeds divided between her two children.

- On appeal, the Divisional Court stated:

> "We also agree with the appellant Robert James Reid that the trial judge fell into error by ordering that the residue of the estate pass to Ruby May Reid and Robert James Reid [the grandchildren] without having any evidence before her as to what their needs might be at some unidentified time in the future. Nor was there any evidence before the trial judge that either of these two applicants would still be dependant within the meaning of the *Succession Law*

Reform Act at this unidentified future date, the date of Donna Marie Reid's [the daughter] death."

- The Divisional Court ordered that the son be paid $25,000 from the estate (from a mortgage to be obtained on the house) and that the daughter and her two children may live in the house until 2018, at which time the property will be sold and the proceeds distributed equally between the son and the daughter, provided that the son's share be reduced by the above-noted $25,000.

- At the appeal, the deceased's son (Robert) was ordered to pay the deceased's daughter's legal costs (set at $15,000) to be set off against the $25,000 payable to the son from the mortgage proceeds.

***MacDougall v. MacDougall Estate*, (2008) O.J. No. 2930 (Ont. S.C.J.)**

- The deceased, Mr. MacDougall and his widow, Ms. MacDougall had been married for 23 years. They had no children together. Ms. MacDougall was 56 years old when the deceased died.

- Ms. MacDougall made a dependant support claim against the estate for $57,000 a year for her expenses; the amount needed to top up her financial resources in order to fund the lifestyle to which she claimed she was entitled, at present day value, was $692,000 (which amount would effectively eliminate any distribution to the respondents, being the deceased's two adult children).

- The respondents, the deceased's two adult children, countered that Ms. MacDougall was only in need of $45,000 which amount could be met from her financial resources; the deceased had left over $1,000,000 for Ms. MacDougall

plus she could generate employment income (the children alleged) from which she could maintain her standard of living.

- The Court considered that under *Cummings* it was to put 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".

- The Court found that the deceased gave careful consideration to the needs of Ms. MacDougall and the amount which he left to her. The Court found that the provisions made for her were indeed adequate.

***Perkovic v. McClyment*, [2008] O.J. No. 3976 (Ont. S.C.J.)**

- Mr. Perkovic claims, amongst other things, that Ms. Marion (the deceased) and he cohabited for 14 years prior to Ms. Marion's death, that he is entitled to interim support and support and that she failed to make adequate provision for his support. The deceased's step children opposed Mr. Perkovic's Application.

- Ms. Marion made no provisions for Mr. Perkovic in her Will, leaving everything to her children and grandchildren.

- The Court considered Mr. Perkovic's motion for interim support.

- The Court acknowledged the *Cummings* decision and more specifically the Court of Appeal's comments that when judging whether a deceased has made adequate provision for the proper support of her dependants, a Court