



When is Dependant's Support Paid to an Estranged Spouse?

by David M. Smith

Part V of the *Succession Law Reform Act* (“*SLRA*”) provides remarkable power to the Ontario Superior Court of Justice to remedy the improper exercise of testamentary autonomy. Where a deceased disinherits persons to whom he or she was providing support or was under a legal obligation to provide support immediately before death, the Court has broad power to enquire into the circumstances and fashion an appropriate remedy. The complexion of any particular case will vary based upon: (i) the type of dependant, (ii) the nature of the dependancy, and (iii) the constitution of the estate including so-called “s. 72 assets.”

A particularly volatile breed of support claim is that made by the estranged spouse on the death of a deceased. More often than not, the named executor and the beneficiaries of the deceased may harbour pre-existing hostility towards the estranged spouse who seeks support against the estate. Even in the absence of matrimonial litigation prior to death, the subsequent claim for support under Part V of the *SLRA* inevitably closely mirrors a matrimonial proceeding. Moreover, in evaluating the claim for support made by the estranged spouse, the Court may be forced to consider competing support claims from either a subsequent “common law” spouse or minor children from subsequent relationships.

To the surprise of some, and depending on the circumstances, a support claim by an estranged spouse may in fact be advanced by: (i) a married spouse who was separated (but not divorced) from the deceased at the date of death; and (ii) a married spouse who was divorced from the deceased as at the date of death.

The Claim by the Separated Married Spouse

Married spouses who separate often enter into a Separation Agreement with the assistance of counsel. Properly drafted, a Separation Agreement will seek to contractually oblige the husband and wife to release each other's estate on the death of the other from any claims including a claim for support under Part V of the *SLRA*. While the existence of a Separation Agreement is but one factor for the Court to consider in exercising its jurisdiction under Part V of the *SLRA*, in the absence of the usual contractual defences (*non est factum*, lack of independent legal advice,

misrepresentation, etc.) a Court will likely have grave difficulty with the submission that a separated spouse may advance a claim which he or she knowingly abandoned at the time of separation.

While the existence of a Separation Agreement may be a powerful argument against the separated spouse who advances a support claim, the passage of time may be an even more powerful factor tending to negate such a claim. Under s. 30 of the *Family Law Act* (“*FLA*”), married spouses have a legal obligation to provide support to one another. However, in the absence of a support order, the Court will not enforce this obligation if the spouses have been separated for such a period of time as to effectively waive the need for support. Yet, all cases are dependent on their specific facts and, as discussed below, the expiry of a legal obligation does not preclude a spouse from providing non-compellable support that may underpin a support claim under Part V of the *SLRA*.

The Claim by the Divorced Spouse

In *Middel v. Vanden Top Estate*¹ (“*Middel*”), the applicant was the ex-wife of the deceased who had divorced him thirty-five years before his death. For some thirty years of complete separation from each other, the applicant took no steps to seek support from her husband. Only after learning of his cancer diagnosis in 2003, did the applicant write to her ex-husband expressing her need for assistance whereafter he voluntarily began providing support to his ex-wife, initially in the form of annual lump sum payments of \$5,000 and \$10,000 then culminating in the purchase of a life-lease at a retirement home and an annuity generating \$700 per month. Having found that the applicant was a spouse to whom the deceased was providing support prior to his death (but not “under a legal obligation to provide support”), the Court then considered the principles set out in *Cummings v. Cummings Estate* to evaluate the proper quantum of support:

- (i) dependants' relief legislation is designed to enforce the moral obligation of a testator to make adequate provision for his wife and children;
- (ii) the court must examine the claims of all dependants, whether based on need or on legal, moral or ethical obligations;

¹ *Middel v. Vanden Top Estate*, 2010 ONSC 2951 (CanLII)

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(iii) when examining all of the circumstances of an application for dependants relief the court must consider i) what legal obligations would have been imposed on the deceased had the question of provision arisen during his lifetime and ii) what moral obligations arise between the deceased and his dependants as a result of society's expectations of what a judicious person would do in the circumstances;

(iv) where adequate provision is not made for the proper support of dependants, the court has wide discretion to make provision out of the estate for whatever support it considers adequate, just and equitable in the circumstances.

The Court determined that the applicant failed to show on the facts that the deceased had failed to make adequate provision for her support as he had provided her with a significant benefit that fairly provided for her in all of the circumstances. The combined evidence that: (i) the deceased had gratuitously commenced supporting the applicant and (ii) the applicant had not sought nor received support for the prior thirty years seemed to factor prominently in the Court's decision.

In *Ivanic v. Ivanic Estate*², the Ontario Superior Court of Justice considered the dependant support claim of a wife who had been separated from the deceased for 33 years, but never divorced. The court went to great lengths to find that she was a dependant in spite of the fact that she had never claimed or received monetary support from the deceased during his lifetime. The court found that the provision of health benefits

to the plaintiff from the deceased's employer's health plan was a form of support sufficient to satisfy the requirements of the *SLRA*.

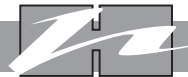
In determining quantum, the court in *Ivanic v. Ivanic Estate* quoted subsections 62(1)(h) & (i) of the *SLRA* to arrive at an award of \$29,004.00 for dependant support based on the contributions made by the dependant to the deceased's welfare, including indirect and non-financial contributions, and the contributions made by the dependant to the acquisition, maintenance and improvement of the deceased's property or business. The court concluded that, on a balance of probability, by locating funds owing to the estate that were over-looked by the Public Guardian and Trustee, the plaintiff contributed to the acquisition, maintenance and improvement of the deceased's property to the extent of \$29,004.00 and that amount was awarded to her in dependant support.

Summary

Like all litigation, support claims under Part V of the *SLRA* are assessed on a case by case basis having regard to the specific facts of each case. What is clear is that estranged spouses may well meet the first branch of dependency (i.e. that the deceased was supporting them before death or was under a legal obligation to do so). But, of course, it is the determination of quantum of support on which such claims may flounder. Although it is still early days, it will be interesting to see to what extent and in what fashion the Courts apply the analysis in *Cummings* to remedy the grievances of the disappointed estranged spouse.

² *Ivanic v. Ivanic Estate*, 2005 CanLII 19805 (ON S.C.)

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