

# Law still unclear on dependant support

## Outcomes difficult to predict despite rulings on deceased's moral obligations

BY JULIUS MELNITZER  
For Law Times

**D**o you have a black sheep in the family or someone otherwise not deserving of an inheritance? That might be the case, but testators should think carefully about leaving offspring or other dependants out of the will.

"For example, the case law suggests that parents can't just cut children out of the estate willy-nilly," says Suzana Popovic-Montag, managing partner of Toronto's Hull & Hull LLP.

In 2004, the Ontario Court of Appeal ruled in *Cumming v. Cumming* that moral obligations were relevant in determining entitlement in dependant support applications. Superior Court Justice Maurice Cullity had ruled that moral considerations were "relevant not just to explain the reason for the legislation but also in determining whether the preconditions of the court's jurisdiction had been satisfied."

Evaluating the fate of such applications, however, continues to be a difficult task.

"Unfortunately, court decisions over the past few years, including consideration of the legislation by the Court of Appeal, have not made predicting the potential outcome of a dependant support claim any easier," wrote Jordan Oelbaum of Toronto's Schnurr Kirsh Schnurr Oelbaum Tator LLP in a paper presented at an Ontario Bar Association seminar in September. "Rather,

outcomes have become more difficult to predict both in terms of support orders that are made and dispositions as to costs."

Adding to the complexity of dependant support proceedings is the fact that they arise in conjunction with other claims against the estate, including those related to equalization of net family property and restitution.

"These additional claims tend to increase the unpredictability of the outcomes of these types of proceedings," Oelbaum wrote. "Until such time as the legislation is amended to provide further guidance to counsel or the court to determine whether adequate provision was made by the deceased for the potential claimant, solicitors should continue to temper clients' expectations and cover all bases when first meeting the prospective client and discussing his or her rights."

The legislative basis for dependant support applications is in Part V of the Succession Law Reform Act. To ensure that dependants don't become the responsibility of the state by enforcing a deceased's moral duty to provide for them, the statute empowers a broadly defined class of people, including former spouses, to apply for a support order where a testator has failed to make adequate financial provision for them.

Distribution of the estate is automatically on hold until the court has disposed of the application.

Applicants must prove that they were dependants on the date of death in the sense that the deceased was providing



Parents can't just cut children out of the estate at random, says Suzana Popovic-Montag.

support to them but failed to make "adequate provision" for their "proper support." If an applicant meets this onus, the court "may order 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 case law has made it clear that support goes beyond direct financial assistance to providing certain necessities of life and even nurturing. Adequate provision would allow an applicant to live "neither luxuriously nor miserably, but decently according to his or her station in life."

Section 62(1) of the Succession Law

Reform Act requires the court, when determining what is proper support, to consider all of the relevant circumstances, including the dependants' assets and means currently and in the future; their ability to support themselves; their age and health; and their needs in the context of their accustomed standard of living.

The court must also consider the deceased's circumstances at death; any agreement with the dependants; any previous distribution to them by gift or otherwise; the claims of other dependants; and any other legal right the dependants have to support other than from the public purse.

There are also specific circumstances that the court must take into account if the dependant is a child or spouse.

In another paper written for the Ontario Bar Association's program in September on dependant support claims, Melanie Yach of Toronto's Aird & Berlis LLP noted that generally speaking, the smaller the estate, the greater deference shown to the will; the larger the estate, the greater the risk that the court will ignore the deceased's intentions.

Yach also observed that estrangement is of greater significance if initiated by the dependant.

Ontario's courts also have the power to revisit support orders. On such an application made under s. 65 of the Succession Law Reform Act, the court may inquire into any other source of support to which the dependant may have become entitled as well as the adequacy of the original order. **TL**

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