

Spousal Dependant Support: Rights of a Surviving Dependant Spouse – Wills & Estates

As detailed in our previous article, *Spousal Election: Rights of a Surviving Spouse*, we are not fully at liberty to simply do with our property anything we wish upon death. There are certain restrictions on our ability to direct how our assets and property will be distributed after death, for example the rights of a surviving spouse to property as set out under the *Family Law Act*, R.S.O 1990, c.F.3 (the "FLA"). Another restriction is that relating to Spousal Dependant Support under the *Succession Law Reform Act*, R.S.O. 1990, s.C.26 (the "SLRA").

The Rights Of A Spousal Dependant Under An Estate

Part V of the SLRA is intended to ensure that certain persons, including spouses, who were financially dependant upon the deceased during his or her lifetime are not put into dire straits by virtue of inadequate provision having been made by the deceased for those persons. With respect to a surviving spouse, the SLRA applies to these two scenarios:

- When a married spouse dies and **there is no will**, the surviving spouse can make an application; or
- When a married spouse dies and **there is a will, but it fails to make "adequate provision" for the surviving spouse**, the surviving spouse can make an application.

In order for a spouse to make a claim under Part V of the SLRA, three criteria must be met. They are as follows:

- The claimant must stand in the right relationship to the deceased, namely, be a legal or common-law spouse or a same sex partner;
- Immediately prior to death, the deceased must have been actually providing support to the claimant or have been under a legal obligation to do so;
- The deceased did not make "adequate provision" for the claimant.

Section 58(1) of the SLRA provides that "where a deceased, whether testate or intestate, has not made adequate provision for the proper support of his dependants or any of them, the court, on application, may order that such provision as it considers adequate be made out of the estate of the deceased for the proper support of the dependants or any of them."

A "dependant" under Part V of the SLRA also includes a parent, child or sibling of the deceased to whom the deceased was either providing support or was under a legal obligation to provide

support immediately before death. "Parent" and "child" are both given extended definitions and can include those holding themselves out as parents although not a natural or adoptive parent and adult children and grandchildren.

Applications for dependant support must be commenced within six months of the issuance of a Certificate of Appointment of Estate Trustee. An application may only be commenced after the six month limitation period has expired with the leave of the court where the court considers it proper to do so and only in respect of property that has not been distributed. An applicant may also move before the court for interim support where merited. An application is typically supported by affidavit evidence which evidence generally includes a detailed explanation of the support that was provided to the applicant during the deceased's lifetime or an explanation of the legal obligation to provide support. Generally, an applicant will also provide a financial statement and budget demonstrating his or her need for support.

The "adequate provision" had been considered to be a reflection of the claimant's budgetary needs. Where the deceased's legal or common-law spouse is the claimant, those budgetary needs would take into account family lifestyle.

As a result of the Ontario Court of Appeal decision in *Cummings v. Cummings*, there are two additional dimensions to be considered in dependant support claims in addition to just whether or not the deceased has made adequate provision for the proper support of his or her dependants. First, moral considerations are now firmly established as being equally as important as financial ones in the exercise of the court's discretion to fashion the appropriate remedy; and second, in so far as a legal or common-law spouse is concerned, an equitable sharing of the family wealth has been established as a legitimate objective of Part V of the statute.

Section 63 of the SLRA provides a list of factors a court will consider when considering a claim under s. 58. These include, but are not limited to:

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- age and physical health,
- assets, liabilities, income and expenses,
- ability to support themselves now and in the future,
- needs, having regard to his or her accustomed standard of living,
- the contributions made to the deceased's financial and emotional welfare, as well as to the deceased's career potential,
- any housekeeping, childcare or other domestic services performed by the dependant for the family,
- legal and/or moral obligations to provide financial support to the dependant,
- financial and/or moral obligations (if any) to other dependants,
- any agreements relating to the providing of support,
- the nature and proximity of the dependant's relationship with the deceased, including the length of time the dependant and the deceased cohabited, together with any course of conduct by the dependant during the deceased's lifetime that was so unconscionable as to constitute an obvious and gross repudiation of the relationship,
- whether the dependant undertook the care of a child who is a minor or an adult but who is unable because of illness,

disability or other cause to withdraw from the charge of his or her parents,

- whether the dependant undertook to assist in the continuation of a program of education for an adult child who is unable for that reason to withdraw from the charge of his or her parents,
- the effect on the dependant's earnings and career development of the responsibility of caring for a child, and the effect on the dependant's earning capacity of the responsibilities assumed during cohabitation, and
- the desirability of the dependant remaining at home to care for a child.

Conclusion

As with Spousal Election under the FLA, a prudent party should consider this issue in any estate where there is a surviving spouse or other surviving dependants. It is suggested that the surviving spouse and other surviving dependants should have proper legal advice to ensure that they fully understand their rights and the implications of the rights available to them from the estate as a potential dependant in order to make any decisions as to the appropriate elections and/or applications to the estate.



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