



## Dependant Support Claim Against an Estate

### **1. Review the legislation and case law and identify relevant information and documentation**

- Review Part V of the *Succession Law Reform Act* (the "*SLRA*"), titled "Support of Dependents"
- Review the case law relating to Part V of the *SLRA* and, in particular, *Cummings v. Cummings* (2004), 69 O.R. (3d) 397, 235 D.L.R. (4th) 474, 181 O.A.C. 98, 5 E.T.R. (3d) 97 (C.A.), leave to appeal to S.C.C. refused (2004), 331 N.R. 399, 197 O.A.C. 400 (note). See also *Tataryn v. Tataryn*, [1994] 2 S.C.R. 807.
- If the dependant was married to the deceased as at the date of death, consider whether a claim for an equalization of net family property should be brought pursuant to the *Family Law Act*.
- Secure a copy of the deceased's last will and testament and any codicils thereto.
- Secure particulars of the deceased's financial affairs, including assets/liabilities falling into the estate and assets/liabilities transferred to third parties outside the estate (e.g., life insurance proceeds, pension and similar benefits, and property held in joint tenancy with third parties with a right of survivorship).
- Secure a copy of the deceased's death certificate.
- Secure a detailed "family tree" with legal names and birth dates.
- Secure copies of all relevant domestic contracts (e.g., separation agreements, divorce decrees and marriage contracts) or any other agreement impacting upon the dependant's entitlement to support.
- Secure copies of all court orders impacting upon the dependant's entitlement to support.
- Secure particulars of the dependant's circumstances including, but not limited to
  - age and physical health
  - assets
  - liabilities
  - income
  - expenses
  - ability to support themselves now and in the future
  - ability to contribute to his or her own support
  - needs, having regard to his or her accustomed standard of living
  - the nature and proximity of his or her relationship with the deceased
  - the contributions made to the deceased's financial and emotional welfare
  - the contributions made to the deceased's career potential
- Secure particulars of the deceased's circumstances, including but not limited to
  - legal obligation to provide financial support to the dependant
  - moral obligation to provide financial support to the dependant
  - circumstances as at the date of death

- financial obligations (if any) to other dependants
- moral obligations (if any) to other dependants
- any agreements relating to the providing of support
- If the dependant is a child, secure particulars relating to
  - the child's aptitude for and reasonable prospects of obtaining an education
  - the child's need for a stable environment
- If the dependant is a spouse, secure particulars relating to
  - the nature of the dependant's relationship with the deceased especially 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
  - the length of time the dependant and the deceased cohabited
  - the effect on the dependant's earning capacity of the responsibilities assumed during cohabitation
  - whether the dependant undertook the care of a child who is a minor or an adult but 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
  - any housekeeping, childcare or other domestic services performed by the dependant for the family
  - the effect on the dependant's earnings and career development of the responsibility of caring for a child
  - the desirability of the dependant remaining at home to care for a child

## **2. Determine the status of the administration of the estate and the dependant's immediate needs**

- Identify all of the assets which the deceased owned or had an interest in as at the date of death, whether those assets fell into the estate or they were transferred to a third party outside the estate.
- Determine the status of the foregoing assets (who holds title to the assets, where are they held, etc.).
- Determine whether an application for certificate of appointment has been made and whether a certificate of appointment has been issued. (Pursuant to s. 61(1) of the *SLRA*, a claim for support must be commenced within six months of the issuance of a certificate of appointment of estate trustee whether with or without a will. That said, s. 61(2) provides that the court may, if it considers it advisable, allow an application for support to proceed in respect of any portion of the estate that has not been administered.)
- Determine whether interim orders are required to preserve assets that transferred outside the estate.
- Determine whether the dependant is in need of interim support pending a determination of the application (see s.64 of the *SLRA*) or an interim lump sum support payment to be

applied to the dependant's legal costs (i.e. a funding order) (see *Kalman v. Pick et al*, 2013 ONSC 304).

### **3. Prepare the application materials**

- Draft the notice of application in Form 14E of the *Rules of Civil Procedure*, setting out the precise relief sought, the basis for the claim for support including any statutory provisions or rules relied upon and the evidence to be relied upon (see r. 38.04).
- Draft the supporting affidavit(s) in Form 4D setting out the evidence relied upon in support of the claim for support (see r. 39.01).
- The principal supporting affidavit is typically sworn by the dependant unless he or she is a minor or incapable.
- If the dependant is a minor, the application may be commenced by the dependant's parent (see s. 58(2) of the *SLRA*).
- The supporting affidavit should set out particulars relating to the following:
  - the deceased's
    - date of death
    - assets and liabilities including assets that were transferred outside the estate
    - circumstances as at the date of death
    - relationship with the dependant
  - the dependant's
    - age
    - occupation
    - education
    - current assets, liabilities, income and expenses
    - projected assets, liabilities, income and expenses
    - ability to support himself or herself in the future
    - relationship with the deceased
    - need for support in the short and long term
  - the support the deceased was providing or under a legal obligation to provide to the dependant as at the date of death
  - the deceased's last will and testament and any codicils thereto highlighting relevant provisions
  - provisions actually made by the deceased for the dependant (e.g., life insurance, gifts under the will, etc.)
  - the deceased's other family members
  - other persons to whom the deceased owed a legal or moral obligation to provide support as at the date of death

### **4. Issue the application materials and serve the appropriate parties with the notice of application**

- The application is typically brought in the jurisdiction where the deceased was normally resident at the date of death unless permission is sought from the court to issue the application in another jurisdiction.
- The application is brought on notice to all persons with an interest in the estate and/or the outcome of the application (see s. 63(5) of the *SLRA*, which provides that the court shall not make an order for support unless it is satisfied that all persons who are affected by the order were served with notice of the application).
- The notice of application must be issued by the Superior Court of Justice before the materials are served upon the respondents (see r. 38.05).
- Note that most jurisdictions require the dependant to file a Form 14F, Information for Court Use, at the time the notice of application is issued. However, this practice varies by jurisdiction.
- Serve the notice of application upon the respondents at least 10 days before the date of the hearing of the application except where notice is served outside Ontario, in which case it shall be served at least 20 days before the hearing date (see r. 38.06(3)).
- File the notice of application together with proof of service (see Form 16B, Affidavit of Service) with the Superior Court at least seven days before the hearing date in the court office where the application is to be heard (see r. 38.06(4))
- Any respondent who intends to participate in the proceedings must forthwith file a notice of appearance in Form 38A with the Superior Court of Justice (see r. 38.07(1))

## **5. Attend the first court appearance**

- The first attendance in court is typically used to secure an order for directions that addresses the following issues:
  - whether the applicant's claim for support will proceed by way of application or by trial of an issue (if the claim is to proceed by way of application, the order for directions shall be in Form 75.9, whereas if pleadings are directed, it shall be in Form 75.8)
  - if pleadings are not required, the list of issues to be tried on the application
  - the schedule to be followed for the delivery of pleadings/responding materials, documentary production, cross-examinations/examinations for discovery and mediation (if agreed to or mandatory)
  - the manner in which production of relevant documents and information will be secured from parties and non-parties
  - the preservation of estate assets pending a determination of the application
  - the preservation of assets transferring outside the estate pending a determination of the application (e.g., life insurance proceeds, pension benefits, property held jointly with a right of survivorship with third parties)
  - interim support for the dependant pending a determination of the application
  - costs on an interim basis
  - Ensure that copies of the order for directions are served upon interested non-parties (e.g., insurance companies).

## **6. Exchange pleadings or deliver responding materials**

- If the order for directions provides that the matter should proceed by way of an exchange of pleadings, then
  - prepare, serve and file a “statement of claim pursuant to order giving directions” in Form 75.7 containing a concise statement of the material facts on which the dependant relies for his or her claim (see r. 25.06)
  - the defendants (as identified in the order for directions) will thereafter file a statement of defence in Form 18A setting out a concise statement of the material facts on which they rely in defence of the dependant's claim (see r. 25.06, which applies to all pleadings, and r. 25.07, which is strictly applicable to defences)
  - if appropriate and necessary, prepare, serve and file a reply to the statements of defence (see rr. 25.08 and 25.09)
- If the order for directions provides that the matter should proceed by way of application or a trial of the issues, then
  - prepare, serve and file any additional affidavits in Form 4D upon which the dependant relies
  - the respondents will thereafter serve responding affidavits in Form 4D responding to the allegations made in the dependant's materials
  - if necessary and appropriate, prepare, serve and file a reply affidavit (if any) in Form 4 responding to the issues raised by the respondents in their affidavits

## **7. Secure disclosure of relevant information and documentation from parties and non-parties**

- If the order for directions provides that the matter is to proceed by way of pleadings, prepare and serve an affidavit of documents in Form 30A in accordance with r. 30.03.
- If the order for directions provides that the matter is to proceed by way of application or trial of an issue and further requires the parties to provide a list of all documents in their power, possession and control relating to the issues raised in the application, prepare and serve the said list.
- If the order for directions directs non-parties (e.g., accountants, lawyers, insurance companies and the deceased's former employers) to produce copies of documents in their power, possession or control relevant to the issues raised in the application, follow up to secure they comply with the order.

## **8. Prepare and conduct the cross-examinations/examinations for discovery**

- If the order for directions provides for the conduct of examinations for discovery, prepare for and conduct the examinations for discovery of the defendants in accordance with r. 31. Further, prepare the dependant for his or her examination for discovery and supervise the conduct of the examination.
- If the order for directions provides for the conduct of cross-examinations, prepare for and conduct the cross-examinations of the respondents on their affidavits in accordance with r. 34. Further, prepare the dependant for his or her cross-examination and supervise the conduct of the cross-examination.

- As soon as possible following the examinations for discovery/cross-examinations, provide answers to the undertakings given by the dependant and follow up on the undertakings given by the defendant/respondents. To the extent necessary, also follow up on refusals given.

## **9. Prepare for and attend the mediation (where agreed to or mandatory)**

- As at November 2008, mediation is mandatory in dependant support applications brought pursuant to Part V of the *SLRA* in Toronto, Ottawa and the County of Essex.
- It is also open to the parties to agree at any point to participate in a mediation of a dependant's support claim.
- Accordingly, consideration should be given to whether the dependant's claim should be mediated where mediation is not mandatory.
- If a mediation is held, prepare for and conduct it in accordance with r. 75.1.

## **10. Prepare for and attend the pre-trial conference**

- If the order for directions directs the parties to attend on a pre-trial conference, prepare for and conduct the pre-trial conference in accordance with r. 50.
- Consult with court staff in the applicable jurisdiction to ensure you comply with any local practice directions regarding the confirmation of pre-trial and trial dates, the filing of a trial requirements memorandum, the filing of a compendium of documents, etc.

## **11. Prepare for trial**

- Well in advance of trial, draft and serve the following documents:
  - Form 51A, Request to Admit (see rr. 51.02-51.03), served on opposing parties
  - Notice pursuant to s. 55 of the *Evidence Act*, served on opposing parties
  - Form 53A, Summons to Witness, served upon all witnesses who have indicated that they will not voluntarily attend at trial to give evidence
  - Compendium of documents (prepared in consultation with opposing counsel to the extent possible)
- Meet with and prepare witnesses.
- Update case law and prepare a brief of authorities.
- Secure updated information concerning the status of the estate assets and liabilities.
- Secure updated financial information from the dependant and provide full disclosure of same to the defendants/respondents.

## **12. Conduct the trial**

- Conduct the trial in accordance with rr. 52–53.

### 13. Consider offers to settle

- Given the high cost of litigating dependant support claims, give consideration at various times in the litigation to the advisability of making a written offer to settle the dependant's claim.
- Keep the cost consequences set out in r. 49 in mind and ensure the dependant recognizes the possible cost consequences of rejecting reasonable offers to settle.

### 14. Finalize settlements

- If a settlement is reached and any of the parties is a "party under a disability," court approval of the settlement must be sought. (A "party under a disability" is a general term used to refer to minors, mental incompetents and absentees (see definition of "disability" in r. 1.03).)
- An order approving the settlement can be secured by way of a motion brought by any one of the parties pursuant to r. 7.08.

### Glossary (see s. 57 of the *SLRA*)

- **"Dependant"** means
  - the spouse of the deceased
  - a parent of the deceased
  - a child of the deceased, or
  - a brother or sister of the deceased
- **"Child"** means a child conceived before or born after the deceased's death and includes a grandchild and a person to whom the deceased demonstrated a settled intention to treat as a child of his or her family except under an arrangement where the child is placed for valuable consideration in a foster home by a person having lawful custody.
- **"Spouse"** means either of two persons who
  - are married to each other or have together entered into a marriage which is voidable or void in good faith
  - were married to each other by a marriage that was terminated or declared a nullity, or
  - are not married to each other and have cohabited
    - continuously for a period of not less than three years, or
    - in a relationship of some permanence, if they are natural or adoptive parents of a child
- **"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, except under an arrangement where the deceased was placed for valuable consideration in a foster home by a person having lawful custody.

## Statutes and Rules

- [Succession Law Reform Act, R.S.O. 1990, c. S. 26](#)
- [Rules of Civil Procedure, R.R.O. 1990, Reg. 194, made under the Courts of Justice Act](#)
- [Rules of Civil Procedure Forms](#)
- [Evidence Act, R.S.O. 1990, c. E.23](#)
- [Family Law Act, R.S.O. 1990, c. F. 3](#)

## Cases

- *Cummings v. Cummings* (2004), 69 O.R. (3d) 397, 235 D.L.R. (4th) 474, 181 O.A.C. 98, 5 E.T.R. (3d) 97 (C.A.), leave to appeal to S.C.C. refused (2004), 331 N.R. 399, 197 O.A.C. 400 (note).
- *Tataryn v. Tataryn*, [1994] 2 S.C.R. 807.
- *Kalman v. Pick et al.*, 2013 ONSC 304.