

LITIGATION

- ESTATE ALERT

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A NEW ENTITLEMENT OF INDEPENDENT ADULT CHILDREN TO A SHARE OF THEIR PARENTS' ESTATE?

By John O'Sullivan

In Ontario freedom of testamentary disposition is restricted by the *Succession Law Reform Act*. It states that where a deceased has not made adequate provision for the proper support of dependants, the court may order that such provision be made out of the deceased's estate. A dependant is defined as the spouse, parent, child or sibling of a deceased to whom the deceased was providing support or was under a legal obligation to provide support immediately before his or her death.

Judicial interpretation of that Act over the years has evolved to the point where today, in making an award under the *SLRA*, the court must take into consideration not only the deceased's legal support obligations as of the date of death, but also what moral obligations exist between the deceased and his or her family as a result of society's expectations of what a "judicious" person would do in the circumstances.

The emphasis on these moral obligations provides a basis for the argument that they are independently enforceable, without recourse to the *SLRA*. If so, in the right factual circumstances, an adult, financially independent child could succeed in claiming a share of a deceased parent's estate even if he or she has been left out of the Will.

In 1994, in *Tataryn v. Tataryn*, the Supreme Court of Canada recognized the existence of "moral" obligations owed by a deceased to his spouse and children under the law of British Columbia. The SCC rejected the suggestion that judges should be limited to conducting a needs-based economic analysis of claims. Instead, the court endorsed the approach of a "judicious father and husband".

The B.C. statute is much broader than the *SLRA* but, nevertheless, 10 years later in *Cumming v. Cumming*, the Ontario Court of Appeal confirmed a lower court decision that applied the *Tataryn* reasoning to Ontario law.

In *Cumming* the deceased's ex-wife and mother of his 24-year old son and 18-year old daughter applied on their behalf for support from their father's estate. The daughter was attending university. The son had a progressive, debilitating illness. There was insufficient money in the estate to provide the care that he would need during his life. Instead of taking a "needs-based" approach and awarding the entire estate to the son, the court took into account the deceased's moral obligation to his second wife, although she was capable of supporting herself and was not seeking support at the time of the hearing. (For this reason she had declined to disclose

information about her financial position in the proceedings.) Despite this, the judge decided that the deceased had a moral responsibility to his wife given the nature and duration of their relationship, and the fact that she had carried the burden of their common expenses during the last two years of the deceased's life. The judge had the power when making the support order for the children under the SLRA to treat the deceased's estate as if it included his interest in the matrimonial home which passed to his wife on his death. However, given the deceased's moral obligation to his wife, the judge refused to do so, and specifically crafted his support order for the children so it would not disturb the transfer of the deceased's interest in the matrimonial home to his wife, or substantially encumber it.

The Ontario Court of Appeal agreed. It said this interpretation of the SLRA was consistent with other Ontario law,

including the *Divorce Act* and the *Family Law Act*, which reflect modern society's expectation that spouses and children should receive a fair share of family wealth. It directed Ontario's courts as follows: in SLRA support applications the court must consider what legal obligations would have been imposed on the deceased had the question of provision been raised during their life, and what moral obligations arise between the deceased and his or her dependants as a result of society's expectations of what a "judicious person" would do in the circumstances.

The moral obligation of a deceased father to his adult, independent children arose in *Perilli v. Foley Estate*, a 2006 Ontario decision. Following *Cumming* the court specifically sought to identify the non-dependent persons who may have a moral claim against the father's estate. The deceased's ex-wife and children were not dependants, but the court recognized they

had moral claims based on the evidence of the deceased's intentions as illustrated by the terms of his Will, and by his contact with them during his life after the divorce. The court balanced these moral claims against the legal support claims of the deceased's common law spouse.

It remains to be seen, but the Ontario law governing a deceased parent's moral obligations, as confirmed in *Perilli* and *Cumming*, may provide the foundation for a successful claim by an adult child without financial need, to a share of a parent's estate if he or she was left out of the Will, or to a larger share than they received under the Will. The court may be more sympathetic to the application if the beneficiaries, other than the applicant, were strangers or charities to whom the deceased owed no legal or moral obligation.

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