

A FAIR SHARE?





ILLUSTRATION BY KAGAN MCLEOD

The Ontario law governing a deceased's "moral obligations" to family members may set the stage for a successful claim by an adult child or spouse to a share of the deceased's estate — even if he or she was left out of the will. **John O'Sullivan** looks at the evolution of dependants relief legislation across Canada and court cases that have supported it

The movie cliché of the red-faced father slamming polished mahogany and declaring his daughter "will get nothing!" because she is marrying an unacceptable suitor may become a thing of the past. In *Canadian* movies, anyhow.

While it would seem that the freedom to dispose of one's property in a will as one sees fit should be the right of every Canadian, each province has its own legislation restricting testamentary freedom. These statutes permit "dependants" — usually defined as spouses and children — to seek support from the deceased's estate. "Dependency" is defined differently in different provinces, but generally means financial need.

Canadian law, however, has been evolving such that even adult children who are not financially dependent may be entitled to a share of family wealth on a parent's death, despite the fact that they have been deliberately left out of the will.

The emerging argument is that the deceased parent owes a "moral obligation" to distribute assets in accordance with society's expectations of what a "judicious person" would do under the same set of circumstances. The development of the law in Ontario illustrates this.

Ontario's Succession Law Reform Act

In Ontario, freedom of testamentary disposition is restricted by the Succession Law Reform Act (SLRA). 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 this 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.

The emphasis on these moral obligations provides a basis for the argument that they are independently enforceable, without recourse to the SLRA.

The 1994 Supreme Court of Canada (SCC) decision in *Tataryn v. Tataryn* may have been the start of this development. Canada's highest court recognized the existence of "moral" obligations owed by a deceased to his spouse and children under British Columbia law. The SCC rejected the suggestion that judges should be limited to conducting a needs-based economic analysis of claims when assessing a dependant's relief claim. Instead, the court endorsed the "judicious father and husband" approach.

The B.C. statute on which the *Tataryn* case was based is much broader than Ontario's SLRA, yet the Ontario Court of Appeal subsequently confirmed a decision that applied the *Tataryn* reasoning to Ontario law. The case was *Cumming v. Cumming*.

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 and the son had a progressive, debilitating illness. There was insufficient money in the estate to provide the care he would need during his life.

Rather than 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.

When making the support order for the children, the judge had the power to treat the deceased's estate as if it included his interest in the matrimonial home, which passed to his wife on his death. This would have made more assets available to the children. However, the judge refused to do so specifically because of the deceased's moral obligation to his wife. Instead, the judge crafted his order for the children's support in such a way that it would not affect the transfer of the deceased's interest in the matrimonial home to his wife, or substantially encumber it.

The Ontario Court of Appeal agreed with the decision in *Cumming*, saying this interpretation of the SLRA was consistent with other Ontario law, including the Divorce Act and the

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Family Law Act, which reflect modern society's expectation that spouses and children should receive a fair share of family wealth. With respect to SLRA support applications, it directed Ontario's courts to consider what legal obligations would have been imposed on the deceased had the question of provision been raised during his or her lifetime, 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 under the same circumstances.

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

Other Canadian Provinces

The Canadian Bar Association has prepared a table, "Claims Against Estates, Trusts and Inheritances," that compares the treatment given to different aspects of estate law in each Canadian province (see page 16).

The chart shows that every Canadian province has some form of dependant's relief legislation. The British Columbia, Alberta and Nova Scotia Acts indicate that moral entitlement is relevant to a dependant's relief claim. In Ontario and Prince Edward Island, it is uncertain, while in the remaining

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Canadian jurisdictions, moral entitlement is not relevant.

There are a number of circumstances to consider when determining what moral obligations arise between the deceased and independent, surviving family members as a result of society's expectations of what a "judicious person" would do. It will obviously be relevant, for example, if there is an agreement between the deceased and an excluded child consistent with the exclusion, or if there has been a previous distribution or gift to that child. Whenever a person is leaving assets in a way that substantially favours some family members over others, it would be wise to leave a clear, written explanation of the reasons for doing this. These reasons should be written with the "judicious person" test in mind.

In Canadian provinces where moral obligations are either relevant or possible under the governing statute, there is an argument to be made that even a financially independent adult child who has been excluded from the will is entitled to a share in the estate.

Support for those applicants in the jurisdictions whose statutes do not make moral claims relevant may be more difficult; however, even in these provinces, the argument could be made on the basis that there is an emerging "judicious person" common law that stands separate and apart from statute law.

Wherever this argument is made, the court may be more sympathetic to the applicant if those who are named in the will

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are strangers or charities to which the deceased owed no legal or moral obligation.

Perhaps the old movie cliché of the disinherited daughter will be replaced in time by one in which the adult child rescues back the family fortune from the cat home or the new girlfriend. **F**

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Claims Against Estates, Trusts and Inheritances

Dependants Relief Claims

Question	British Columbia	Alberta	Saskatchewan	Manitoba	Ontario	Quebec
Statute governing dependants relief claims?	Wills Variation Act, R.S.B.C. 1996, c. 490.	Dependants Relief Act, R.S.A. 2000, c. D-10.5.	The Dependants' Relief Act, 1996, S.S. 1996, c. D-25.01.	The Dependants Relief Act, C.C.S.M. c. D37.	Succession Law Reform Act, R.S.O. 1990 c. S.26.	Articles 684-695 of the Civil Code of Québec.
Can parties contract out of dependants relief legislation?	Yes, but court has discretion to override agreement.	No.	The law is not clear.	No.	No.	No.
Anti-avoidance provisions in place to catch assets flowing outside of estate?	No.	No.	No.	No.	Yes.	Yes.
Requirement for beneficiary to qualify to bring claim?	The beneficiary must be a spouse or child of the deceased.	Person must be a dependant of deceased as well as a person for whom the deceased did not make adequate provision for maintenance and support.	The claimant must be a dependant.	Must be a familial dependant and in financial need.	Must be a familial dependant.	Yes.
Is moral entitlement relevant to such a claim?	Yes.	Yes.	No.	No.	It can be a consideration.	No.
Deadline or limitation period to bring claim?	Six months from date of issue of grant of probate.	Six months from date of issue of grant of probate.	Six months from date of issue of grant of probate.	Six months from date of issue of grant of probate.	Six months from date of issue of grant of probate.	Six months from date of issue of grant of probate.
Jurisdiction to impose terms of trust over amount awarded to dependant?	Yes.	Yes.	Yes, though law is not clear.	Yes.	Yes.	Yes.

The information in this table is current as of September 28, 2010. Reprinted with the permission of the Canadian Bar Association. The concordance tables are available to CBA members at http://www.cba.org/CBA/sections_wills/main/tables_2010.aspx.

New Brunswick	Prince Edward Island	Newfoundland and Labrador	Nova Scotia	Yukon	Northwest Territories	Nunavut
Provisions of Dependants Act, R.S.N.B. 1973, c. P-22.3.	Dependants of a Deceased Person Relief Act, R.S.P.E.I. 1988, c. D-7.	Family Relief Act, R.S.N.L.1990, c. F-3.	Testators' Family Maintenance Act, R.S.N.S. 1989, c. 465 and Matrimonial Property Act, R.S.N.S. 1989, c. 275.	Dependants Relief Act, R.S.Y. 2002, c. 56.	N/A	N/A
Yes.	No.	N/A	No, under the Testators' Family Maintenance Act, R.S.N.S. 1989, c. 465. Yes, under the Matrimonial Property Act, R.S.N.S. 1989, c. 275.	Yes	N/A	N/A
Yes.	No.	Yes.	No.	Yes.	N/A	N/A
Yes.	Must be a familial dependant.	Must be a dependant — the widow, widower or child of the deceased.	Must be a dependant.	Beneficiary must be a dependant.	N/A	N/A
No.	Possibly.	No.	Yes.	No.	N/A	N/A
Four months after death of deceased or upon consent of judge.	Six months.	Six months from date of issue of grant of probate.	Six months of the date of the grant of probate.	Dependants Relief Act, R.S.Y. 2002, C.56.	N/A	N/A
Yes.	Yes.	N/A	Yes.	Yes, application for an order must be made within six months from the grant of letters of probate, the will or letters of administration.	N/A	N/A