

Memo To: Doble & Doble LLP, Daniel Diamond

File: TEST

Research ID: #40001893e4122b

Jurisdiction: Ontario, Canada

Date: July 9, 2020

Regarding: Dependency Support Award for Ex-Wife

Issue

What factors do Ontario courts consider when determining a dependency support award for the ex-wife of a testator?

Facts

63 year-old ex-wife of testator married to the testator for 38 years and had 2 children together. She received \$500 a month in spousal support upon their divorce. She also received \$12,000 per year in disability support and is in poor health. She was advised by her ex-husband that she was the beneficiary of a \$175,000 group life insurance policy. Estate has \$70,000 in assets. Ex-wife claimant has \$7,000 in assets. Testator left his entire estate to his 2 children, excluding his ex-wife from the will.

Conclusion

Section 62 of the [Succession Law Reform Act](#) sets out how a court is to determine the amount and duration, if any, of an award for support of a dependant. In determining the amount and duration the court shall consider all the circumstances of the application including factors (a) through (s) as listed in the SLRA.

Section 62 sets out a non-exhaustive list of circumstances that the court must consider in

determining the amount and duration, if any, of support. In addition to s.62, the Court considers not only a needs-based or economic analysis, but must also consider the moral or ethical obligations of the deceased with regard to all dependents. The moral obligation stems from society's expectations of what a judicious person would do in the circumstances. Over and above the additional moral obligations of the deceased towards the dependent, the court must also consider the moral obligations of the deceased toward his independent child. Further, the court must also consider the deceased's intentions, if available. The court must attempt to balance the competing claims to the estate by taking into account the size of the estate, the strength of the claims, and the intentions of the deceased in order to arrive at a judicious distribution of the estate. This exercise may involve the prioritization of competing claims ([Webb v. Belway](#)).

Section 62 confers a wide discretion on the court in determining the dependent support award, and sets out a variety of factors that the court shall consider in the circumstances. Caselaw is of limited use in this determination and each case is highly fact-specific. In determining what constitutes "adequate provision for proper support" the case law is clear that it does not mean at a subsistence level ([Batchelor v Radawez](#)). In *Batchelor*, the Court awarded less than the sum calculated as necessary to fund the applicant's lifestyle until her death, but an appropriate amount to enable the applicant to live independently, enjoy a comfortable life, and take care of her medical needs.

Dependants' relief legislation is designed to enforce the moral obligation of a testator to make adequate provision for his wife and children. The Court must examine the claims of all dependants, whether based on need, or on legal, moral or ethical obligations. When examining all of the circumstances of an application for dependants relief the court must consider:

- 1) what legal obligations would have been imposed on the deceased had the question of provision arisen during his lifetime; and,
- 2) what moral obligations arise between the deceased and his dependants as a result of society's expectations of what a judicious person would do in the circumstances.

Where adequate provision is not made for the proper support of dependants, the court has a wide discretion to make provision out of the estate for whatever support it considers adequate, just and

equitable in the circumstances. Moral obligations are a relevant consideration but are not something to be contemplated in addition or, or in isolation from, subsection 62(1) ([*Fernandez v. Fernandez*](#)).

One of the objectives of the SLRA was to ensure that the spouses and children receive a fair share of family wealth. The court should use the "judicious father and husband" test in determining the appropriate disposition, as opposed to a needs-based analysis. The court must first identify all dependants who have a claim on the estate, and then tentatively value their claims by considering the legislated factors as well as legal and moral obligations of the estate. Thereafter, the court must identify non-dependant persons who may have a legal or moral claim to a share. Lastly, the court must balance the competing claims to the estate by taking into account the size of the estate, the strength of the claims, and the intentions of the deceased in order to arrive at a judicious distribution thereof ([*Stevens v. Fisher*](#)).

Similar facts were before the Court in [*Bormans v Estate of Bormans et al.*](#) In *Bormans* the applicant was 63 years of age, and was the surviving spouse of the deceased. The couple had been married for 38 years prior to divorcing. There were two children of the marriage. At the time of the divorce, the deceased warranted to the applicant that she was the beneficiary of his \$175,000 life insurance policy. After being divorced, the deceased was ordered to pay spousal support to the applicant in the amount of \$500 per month based on their relative annual incomes. No provision for the applicant was made in the will. The testator owed \$4,500 in support arrears at the time of his death. Due to health problems, the applicant was unable to work, and received only \$1,000 per month, or \$12,000 annually, in CPP disability benefits. She had approximately \$7,000 in assets. The Court noted that the ex-wife was living well below the poverty line, and that she remained entitled to ongoing support from the estate. The Court held that the \$175,000 policy was supposed to take the place of the ongoing spousal support obligation on death. The Court noted that there was a legal obligation to provide for the ex-wife, whereas there was no legal or moral obligation to provide for the deceased's daughters. Even if there were, the warranty regarding life insurance took precedence over any alleged moral claim. The Court awarded dependant support. The main factors considered were:

- 1) that there were support arrears;

- 2) that the applicant had minimal assets and could not make ends meet on her \$12,000 yearly income and made regular use of the food bank which was unlike the standard of living she enjoyed while married to the deceased;
- 3) that she was 63, in poor health and permanently disabled;
- 4) that there was a 38-year marriage in which she significantly contributed to the deceased's welfare, business, and career;
- 5) that the deceased had no obligation to support his child; and,
- 6) that the deceased warranted to provide life insurance coverage to take the place of his support obligation.

The Court found that the appropriate quantum of dependency support was \$40,000, representing payment of the accumulated arrears, plus additional support of between 4-5 years, less a credit for sums paid by the respondents' lawyer. No periodic support payments were awarded ([*Bormans v Estate of Bormans et al*](#)).

Law

Section 62 of the [*Succession Law Reform Act, RSO 1990, c S.26*](#) sets out how a court is to determine the amount and duration, if any, of an award for support of a dependant. In determining the amount and duration the court shall consider all the circumstances of the application including factors (a) through (s) as listed in the SLRA:

Determination of amount

62 (1) In determining the amount and duration, if any, of support, the court shall consider all the circumstances of the application, including,

- (a) the dependant's current assets and means;
- (b) the assets and means that the dependant is likely to have in the future;

- (c) the dependant's capacity to contribute to his or her own support;
- (d) the dependant's age and physical and mental health;
- (e) the dependant's needs, in determining which the court shall have regard to the dependant's accustomed standard of living;
- (f) the measures available for the dependant to become able to provide for his or her own support and the length of time and cost involved to enable the dependant to take those measures;
- (g) the proximity and duration of the dependant's relationship with the deceased;
- (h) the contributions made by the dependant to the deceased's welfare, including indirect and non-financial contributions;
- (i) the contributions made by the dependant to the acquisition, maintenance and improvement of the deceased's property or business;
- (j) a contribution by the dependant to the realization of the deceased's career potential;
- (k) whether the dependant has a legal obligation to provide support for another person;
- (l) the circumstances of the deceased at the time of death;
- (m) any agreement between the deceased and the dependant;
- (n) any previous distribution or division of property made by the deceased in favour of the dependant by gift or agreement or under court order;
- (o) the claims that any other person may have as a dependant;
- (p) if the dependant is a child,

- (i) the child's aptitude for and reasonable prospects of obtaining an education, and
- (ii) the child's need for a stable environment;
- (q) if the dependant is a child of the age of sixteen years or more, whether the child has withdrawn from parental control;
- (r) if the dependant is a spouse,
 - (i) a course of conduct by the spouse during the deceased's lifetime that is so unconscionable as to constitute an obvious and gross repudiation of the relationship,
 - (ii) the length of time the spouses cohabited,
 - (iii) the effect on the spouse's earning capacity of the responsibilities assumed during cohabitation,
 - (iv) whether the spouse has undertaken the care of a child who is of the age of eighteen years or over and unable by reason of illness, disability or other cause to withdraw from the charge of his or her parents,
 - (v) whether the spouse has undertaken to assist in the continuation of a program of education for a child eighteen years of age or over who is unable for that reason to withdraw from the charge of his or her parents,
 - (vi) any housekeeping, child care or other domestic service performed by the spouse for the family, as if the spouse had devoted the time spent in performing that service in remunerative employment and had contributed the earnings to the family's support,
 - (vi.1) Repealed: 2005, c. 5, s. 66 (10).
 - (vii) the effect on the spouse's earnings and career development of the responsibility of caring for a child,
 - (viii) the desirability of the spouse remaining at home to care for a child; and

(s) any other legal right of the dependant to support, other than out of public money. R.S.O. 1990, c. S.26, s. 62 (1); 1999, c. 6, s. 61 (3-5); 2005, c. 5, s. 66 (9-11).

Evidence

(2) In addition to the evidence presented by the parties, the court may direct other evidence to be given as the court considers necessary or proper. R.S.O. 1990, c. S.26, s. 62 (2).

Idem

(3) The court may accept such evidence as it considers proper of the deceased's reasons, so far as ascertainable, for making the dispositions in his or her will, or for not making adequate provision for a dependant, as the case may be, including any statement in writing signed by the deceased. R.S.O. 1990, c. S.26, s. 62 (3).

Idem

(4) In estimating the weight to be given to a statement referred to in subsection (3), the court shall have regard to all the circumstances from which an inference can reasonably be drawn as to the accuracy of the statement. R.S.O. 1990, c. S.26, s. 62 (4).

Closely similar facts were before the Court in [Bormans v Estate of Bormans et al, 2016 ONSC 428 \(CanLII\)](#). In *Bormans* the applicant sought an order of dependent support under the SLRA and that the respondent estate and a personal defendant were to pay her the proceeds of life insurance received by the person on the testator's death. The applicant was 63 years of age, and was the surviving spouse of the deceased. The couple had been married for 38 years prior to divorcing. There were two children of the marriage, one of which had received the life insurance proceeds and was the personal defendant. At the time of the divorce, the deceased warranted to the applicant that she was the beneficiary of his \$175,000 group life insurance policy. After being divorced, the deceased was ordered to pay spousal support to the applicant in the amount of \$500 per month based on their relative annual incomes. No provision for the applicant was made in the

will, notwithstanding the support order. The testator owed \$4,500 in support arrears at the time of his death. Due to health problems, the applicant was unable to work, and received only \$1,000 per month, or \$12,000 annually, in CPP disability benefits. She had approximately \$7,000 in assets, which was left over from the sale of the matrimonial home during the divorce. The estate was insolvent. The daughter who was named as the beneficiary of the life insurance policy lived with her father until he died. She nursed him and provided care for him daily until his death. The daughter's mental health was such that she could not return to school or work outside the home.

The \$70,000 insurance proceeds were deemed to be part of the estate for the purposes of dependant support. The Court noted that the ex-wife was living well below the poverty line, and that she remained entitled to ongoing support from the estate. The Court held that the \$175,000 policy was supposed to take the place of the ongoing spousal support obligation on death. The Court noted that there was a legal obligation to provide for the ex-wife, whereas there was no legal or moral obligation to provide for the deceased's daughter. Even if there were, the warranty regarding life insurance took precedence over any alleged moral claim. The Court awarded dependant support. The main factors considered were: that there were support arrears; that the applicant had minimal assets and could not make ends meet on her \$12,000 yearly income and made regular use of the food bank which was unlike the standard of living she enjoyed while married to the deceased; that she was 63, in poor health and permanently disabled; that there was a 38-year marriage in which she significantly contributed to the deceased's welfare, business, and career; that the deceased had no obligation to support his child; and that the deceased warranted to provide life insurance coverage to take the place of his support obligation. The Court also considered that the daughter had already spent some of the money, and only \$50,000 was left. The Court found that the appropriate quantum of dependency support was \$40,000, representing payment of the accumulated arrears, plus additional support of between 4-5 years, less a credit paid by the respondent's lawyer. No periodic support payments were awarded:

[23] It appears clear from the evidence and it is not in dispute that the Applicant, because of the court order for support and her financial position, was a dependant of the deceased as defined under section 57 of the SLRA at the time of his death.

[24] As indicated above, the documentary evidence provided by the Applicant at the hearing confirmed she is no longer earning the \$18,000 income imputed to her at

the time of the divorce order but only earns approximately \$1000 a month in CPP disability benefits. She did earn some part-time income in 2014 until she was permanently disabled and continues to live well below the poverty line.

[25] Even though the divorce order for support was not worded to be binding on Mr. Bormans' estate on his death and accordingly was not, she still remains entitled to ongoing support. Again, the uncontradicted evidence is that the deceased warranted she was the beneficiary of the \$175,000 life insurance policy which, as a logical inference, would take the place of the ongoing spousal support obligation on his death.

[26] The evidence does not establish that Jessica Leone at the time of her father's death or now was a dependant of him. She was an adult, married since 2001 with three children and was financially dependent on her own spouse for support. Mr. Bormans provided no shelter or significant financial assistance to her. His small purchases for her family do not indicate any relationship of dependency but rather likely his contributions and gifts when Jessica Leone was caring for him every day. There was no legal obligation for Mr. Bormans to support her financially at the time of his death.

[27] In addition, there was no moral obligation for him to provide for her in his will given these facts. [*Verch Estate v. Weckwerth*, 2014 ONCA 338 \(CanLII\)](#).

[28] Even if there were such a moral obligation, Mr. Bormans' legal obligation to provide for the support of the Applicant, given her personal and financial circumstances and his warranty regarding the life insurance, takes precedence over any alleged moral claim. [*Tataryn v. Tataryn Estate*, \[1994\] 2 SCR 807, 1994 CanLII 51 \(SCC\)](#).

[29] The law is clear that the \$70,000 life insurance proceeds paid to Jessica Leone, even though it passed outside Mr. Bormans' estate to her, nevertheless are deemed to be part of his estate only for the purposes of dependant support under the SLRA for the Applicant. Section 72(1) (f) and (f.1) SLRA; *Amherst Crane Rentals Limited v. Perring* [2002] O.J. No. 2792 affirmed [*Amherst Crane Rentals Ltd. v. Perring*](#).

[2004 CanLII 18104 \(ON CA\)](#).

[30] The main applicable factors for the Court to consider under section 62 (1) of the SLRA in determining the quantum of dependency support for the Applicant against those life insurance funds include the following:

[31] The Applicant has minimal assets of only \$7000 with no likelihood of acquiring additional assets in the future. She cannot make ends meet on her meagre \$12,000 annual disability income and regularly uses the food bank unlike the standard of living she enjoyed while married to Mr. Bormans. She is 63 years old and in poor health and apparently is permanently disabled.

[32] She had a 38 year marriage to Mr. Bormans staying at home raising the children while working as his bookkeeper/ administrator until she was terminated on separation. Those were significant contributions to the deceased's welfare, business and career.

[33] The deceased has no obligation to support Jessica.

[34] The deceased's warranty to provide the life insurance coverage for the Applicant to take the place of his support obligation is significant.

[35] There were \$4500 in support arrears at the time of his death and had the same monthly support been paid, the arrears would now total approximately \$14,500. There may have been, although not necessarily, a potential reduction in his spousal support obligations until his death because of his illness or reduction in income through retirement. However, that likelihood or the amount of any reduction, including a potential termination date of spousal support, is at best speculative especially because of the long-term marriage, the financial dependency of the Applicant on him and her own permanent disability. Moreover, any reduction allowed could have required a condition that he maintain the life insurance coverage for her on his death.

[36] I am mindful that Jessica Leone spent some of the insurance money for her

personal expenditures before being served with this application and would also be required to provide funds for legal fees to cover the administration costs of the estate. The approximate amount that should have been available for the Applicant's dependency support claim after Jessica Leone was served with this application and not expended by her because of her estate trustee's obligations under section 67(1) of the SRA is approximately \$50,000.

[37] Taking all these matters into account, the appropriate quantum of dependency support in my view represents a payment of the accumulated "arrears" of \$14,500 plus additional support of between four and five years less credit for the \$3000 paid to her by the Respondents' lawyer from her retainer funds. This works out to a claim of entitlement of an additional \$40,000 in dependency support for the Applicant.

...

[39] I have considered but I am not prepared to order periodic payments of support by Jessica Leone to the Applicant. Firstly, there is certainly no guarantee and in fact there is little likelihood she would make them especially given her expenditure of the proceeds as she did.

[40] Secondly, the Applicant was required to use her own personal funds to survive because of the failure of the Estate to make any support payments to her except for that \$3000 payment.

[41] Lastly, had the Applicant received the life insurance proceeds, or at least most of them at the outset as she should have, she could have spent or invested them as she wished to provide for her own financial needs.

[42] Accordingly, the Respondents Estate of John Rene Bormans by his Estate Trustee Jessica Lynn Leone and Jessica Lynn Leone shall pay to the Applicant the sum of \$40,000.

In [*Batchelor v Radawez*, 2015 ONSC 6764 \(CanLII\)](#) the deceased's common law spouse brought

a claim for support from the estate. It was resisted by the deceased's daughters. Under the will, all property was bequeathed to the daughters. The applicant required various medical treatments which she was concerned about being able to pay for. The common law couple had been together for 20 years.

The Court held that s.62 confers a wide discretion on the court in determining the dependent support award, and sets out a variety of factors that the court shall consider in the circumstances. The Court agreed that caselaw is of limited use in this determination and each case is highly fact-specific:

[55] Section 62 of the SLRA confers on the court a wide discretion in determining the amount of support and sets out a variety of factor the court shall consider in the circumstances:

62. (1) In determining the amount and duration, if any, of support, the court shall consider all the circumstances of the application, including,

- (a) the dependant's current assets and means;
- (b) the assets and means that the dependant is likely to have in the future;
- (c) the dependant's capacity to contribute to his or her own support;
- (d) the dependant's age and physical and mental health;
- (e) the dependant's needs, in determining which the court shall have regard to the dependant's accustomed standard of living;
- (f) the measures available for the dependant to become able to provide for his or her own support and the length of time and cost involved to enable the dependant to take those measures;
- (g) the proximity and duration of the dependant's relationship with the deceased;
- (h) the contributions made by the dependant to the deceased's welfare, including indirect and non-financial contributions;

- (i) the contributions made by the dependant to the acquisition, maintenance and improvement of the deceased's property or business;
- (j) a contribution by the dependant to the realization of the deceased's career potential;
- (k) whether the dependant has a legal obligation to provide support for another person;
- (l) the circumstances of the deceased at the time of death;
- (m) any agreement between the deceased and the dependant;
- (n) any previous distribution or division of property made by the deceased in favour of the dependant by gift or agreement or under court order;
- (o) the claims that any other person may have as a dependant;
- (p) if the dependant is a child,
 - (i) the child's aptitude for and reasonable prospects of obtaining an education, and
 - (ii) the child's need for a stable environment;
- (q) if the dependant is a child of the age of sixteen years or more, whether the child has withdrawn from parental control;
- (r) if the dependant is a spouse,
 - (i) a course of conduct by the spouse during the deceased's lifetime that is so unconscionable as to constitute an obvious and gross repudiation of the relationship,
 - (ii) the length of time the spouses cohabited,
 - (iii) the effect on the spouse's earning capacity of the responsibilities assumed during cohabitation,

(iv) whether the spouse has undertaken the care of a child who is of the age of eighteen years or over and unable by reason of illness, disability or other cause to withdraw from the charge of his or her parents,

(v) whether the spouse has undertaken to assist in the continuation of a program of education for a child eighteen years of age or over who is unable for that reason to withdraw from the charge of his or her parents,

(vi) any housekeeping, child care or other domestic service performed by the spouse for the family, as if the spouse had devoted the time spent in performing that service in remunerative employment and had contributed the earnings to the family's support,

(vi.1) Repealed

(vii) the effect on the spouse's earnings and career development of the responsibility of caring for a child,

(viii) the desirability of the spouse remaining at home to care for a child; and

(s) any other legal right of the dependant to support, other than out of public money.

[56] In s. 63, the contents of an order are addressed and the legislation stipulates that provision may be made out of income or capital or both, and an order may be an amount payable annually or a lump sum or the transfer of a specific property:

63. (1) In any order making provision for support of a dependant, the court may impose such conditions and restrictions as the court considers appropriate.

(2) Provision may be made out of income or capital or both and an order may provide for one or more of the following, as the court considers appropriate,

(a) an amount payable annually or otherwise whether for an indefinite or limited period or until the happening of a specified event;

- (b) a lump sum to be paid or held in trust;
- (c) any specified property to be transferred or assigned to or in trust for the benefit of the dependant, whether absolutely, for life or for a term of years;
- (d) the possession or use of any specified property by the dependant for life or such period as the court considers appropriate;
- (e) a lump sum payment to supplement or replace periodic payments;
- (f) the securing of payment under an order by a charge on property or otherwise;
- (g) the payment of a lump sum or of increased periodic payments to enable a dependant spouse or child to meet debts reasonably incurred for his or her own support prior to an application under this Part;
- (h) that all or any of the money payable under the order be paid to an appropriate person or agency for the benefit of the dependant;
- (i) the payment to an agency referred to in subsection 58 (3) of any amount in reimbursement for an allowance or benefit granted in respect of the support of the dependant, including an amount in reimbursement for an allowance paid or benefit provided before the date of the order. R.S.O. 1990, c. S.26, s. 63 (2); 1999, c. 6, s. 61 (6); 2005, c. 5, s. 66 (12).

[57] Counsel for the Respondents submitted that case law is of limited use and each case is highly fact specific; I agree. In the case before me, the evidence was disparate on certain critical points and credibility findings must be made.

The Court considered what the proper quantum of support would be. In determining what constitutes "adequate provision for proper support" the case law is clear that it does not mean at a subsistence level. The Court awarded less than the sum calculated as necessary to fund the applicant's lifestyle until her death, but an appropriate amount to enable the applicant to live independently, enjoy a comfortable life, and take care of her medical needs:

[76] I turn now to the consideration of the proper quantum of support. The analysis of Greer J. in [Morassut v. Jaczynski et al., 2013 ONSC 2856 \(CanLII\)](#) [Estates List] aff'd [Morassut v. Jaczynski, 2015 ONSC 502 \(CanLII\)](#) is of much assistance. In that case, Justice Greer found that the deceased had not made adequate provision for her common law spouse in her will. Justice Greer transferred exclusive ownership of the home the parties had built to the common law spouse, noting at para. 100 that such a transfer would give him “sole control over his living arrangements... unfettered by any life interest.” She did so after considering the various factors set out in section 62 of the SLRA and in order to enable the common law spouse to have autonomy over his finances, which is an objective in the case before me, given the acrimonious relationship between the parties.

[77] I reject the submission of the Respondents that the net estate be divided into 3 parts and one third of it be deposited with the Accountant of the Superior Court to be invested until Nancy retires, at which time she would receive \$850 per month. In my mind, that does not constitute adequate support, nor does it make sense given the Applicant’s age and expenses both now and into the future. While Nancy is employed at the present time, her working days are numbered by her various health issues and after she ceases employment, she will have very limited means to support herself. Furthermore, the suggestion that if the “allowance” of \$850 per month was inadequate, Nancy could bring a motion to request a change in the monthly payment is inappropriate. At her stage of life, Nancy is entitled to certainty in terms of her financial well-being. Further litigation is to be avoided; I note that this litigation has been unpleasant and protracted.

[78] In determining what constitutes “adequate provision for proper support” the case law is clear that it does not mean at a subsistence level: [Dentinger \(Re\), 1981 CanLII 2969 \(ON SC\)](#). Nancy does not own a home; she resides in her current accommodation, to a certain extent, due to the goodwill of her son who charges her a reduced rent. The solicitor for the Respondents argued that Nancy has a higher standard of living now than when she was living with the deceased; I do not agree. While the condominium where Nancy resides is large and comfortable, I do not

accept the submission of the Respondents that Nancy moved out of the Wareside home because her son had purchased this condominium for her. That does not accord with the evidence; Nancy was forced to leave because the Respondents insisted she move out, even though both of them had their own homes and had no particular use for the house owned by their father.

...

[81] After giving consideration to the factors enumerated under s. 62 of the SLRA, I am of the view that proper and adequate support for the Applicant can best be achieved by the transfer of a lump sum payment of \$450,000 tax free from the estate to the Applicant. This amount represents the transfer to Nancy of the value of Bill's RRIF at the time of his death. While it is less than the lump sum Ms. Harvey calculated was necessary to fund Nancy's lifestyle until her death, in my view based on the evidence, it is an appropriate amount in the circumstances and will enable the Applicant to live independently, enjoy a comfortable lifestyle and take care of her medical needs. A lump sum payment is proper, in my view, as it enables the Applicant to deal with her own financial affairs without any tie to the estate and follows the reasoning of the court in *Picketts v. Hall (Estate)*, 2009 BCCA 329, 95 B.C.L.R. (4th) 83 leave to appeal ref'd 2010 CarswellBC 4163.

More generally, the nature and applicability of section 62 was recently discussed by the Court in [Webb v. Belway, 2019 ONSC 4602 \(CanLII\)](#). The Court held that section 62 sets out a non-exhaustive list of circumstances that the court must consider in determining the amount and duration, if any, of support. In addition to s.62, the Court considers not only a needs-based or economic analysis, but must also consider the moral or ethical obligations of the deceased with regard to all dependents. The moral obligation stems from society's expectations of what a judicious person would do in the circumstances. Over and above the additional moral obligations of the deceased towards the dependent, the court must also consider the moral obligations of the deceased toward his independent child. Further, the court must also consider the deceased's intentions, if available. The court must attempt to balance the competing claims to the estate by taking into account the size of the estate, the strength of the claims, and the intentions of the deceased in order to arrive at a judicious distribution of the estate. This exercise may involve the

prioritization of the competing claims:

[17] Section 62 SLRA sets out a non-exhaustive list of circumstances that the court must consider in determining the amount and duration, if any, of support.

[18] In addition to section 62 SLRA, the court must consider not only a needs-based or economic analysis, but also consider the moral or ethical obligations of the deceased with regard to all dependents. The moral obligation stems from society's expectations of what a judicious person would do in the circumstances:

See [Cummings v. Cummings, 2004 CanLII 9339 \(ON CA\)](#), Ontario Court of Appeal, at paras. 37 and 50; *Tataryn v Tataryn Estate*, [1994] SCR 807 at para. 37.

...

[35] As set out above, the court needs to conduct more than a simple needs-based analysis to determine what Ms. Webb should receive as the proper amount of support. (See *Cummings*, supra, and [Perilli v. Foley Estate, 2006 CanLII 3285 \(ON SC\)](#), at para. 56)

[36] Over and above the additional moral obligations of the deceased toward the dependent, the court must also consider the moral obligations of the deceased toward his independent child. Further, the court must also considering the deceased's intentions, if available. (See *Perilli*, supra, at paras. 59 and 60)

[37] As stated in *Perilli*, "the court must attempt to balance the competing claims to the estate by taking into account the size of the estate, the strength of the claims, and the intentions of the deceased in order to arrive at a judicious distribution of the estate. This exercise may involve the prioritization of the competing claims." (*Perilli v. Foley Estate*, supra, at para. 61) Here, the deceased has a legal obligation to support Ms. Webb, and a moral obligation to both Ms. Webb and Ms. Belway.

[38] Regarding Mr. Belway's intentions, sometime soon after Ms. Ena Belway's death (Mr. Belway's mother) in 2005, Mr. Belway expressed to Ms. Gobeil-Gravelle that he wished his grandsons inherit the farm property. However, he never

made any provisions for this wish. Given the comment was approximately 12 years prior to his death, and that he not make a will, I find that Mr. Belway's wishes concerning the distribution of the estate are unexpressed.

In [*Fernandez v. Fernandez*, 2011 ONSC 8023 \(CanLII\)](#) the Court adopted the reasoning in [*Middel v. Vanden Top Estate*, 2010 ONSC 2951 \(CanLII\)](#) as to determining the proper quantum of support. Namely, dependants' relief legislation is designed to enforce the moral obligation of a testator to make adequate provision for his wife and children. The Court must examine the claims of all dependants, whether based on need, or on legal, moral or ethical obligations. When examining all of the circumstances of an application for dependants relief the court must consider (i) what legal obligations would have been imposed on the deceased had the question of provision arisen during his lifetime, and (ii) what moral obligations arise between the deceased and his dependants as a result of society's expectations of what a judicious person would do in the circumstances. Where adequate provision is not made for the proper support of dependants, the court has a wide discretion to make provision out of the estate for whatever support it considers adequate, just and equitable in the circumstances. Moral obligations are a relevant consideration, but are not something to be contemplated in addition or, or in isolation from, subsection 62(1):

[50] The OCL relies on the case of *Middel v. Vanden Top Estate*, [2010] O.J. No. 2562, 2010 ONSC 2951, wherein the court considered the principles set out in Cummings in determining the proper quantum of support as follows, at para. 41:

- “a. dependants’ relief legislation is designed to enforce the moral obligation of a testator to make adequate provision for his wife and children;
- b. the court must examine the claims of all dependants, whether based on need or on legal, moral or ethical obligations;
- c. when examining all of the circumstances of an application for dependants relief the court must consider i) what legal obligations would have been imposed on the deceased had the question of provision arisen during his lifetime and ii) what moral obligations arise between the deceased and his dependants as a result of society’s expectations of what a judicious person would do in the circumstances;

d. where adequate provision is not made for the proper support of dependants, the court has wide discretion to make provision out of the estate for whatever support it considers adequate, just and equitable in the circumstances.”

...

[56] In *Cummings v. Cummings*, above, the Court of Appeal for Ontario affirmed that a deceased’s moral obligations towards his or her dependants are a relevant consideration on a dependants’ relief application. However, it also held, at para. 46, that:

Moral considerations are not something to be contemplated in addition to, or in isolation from, subsection 62(1).

[57] It was further held, at para. 50 in *Cummings*, that the court must consider:

“a. what legal obligations would have been imposed on the deceased had the question of provision arisen during his lifetime; and,

b. 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.”

...

[61] I agree with the submissions of Ms. Law and OCL. The arguments they have raised provide valid reasons for this Court to find that Maureen has not proven that she is a dependent for whom the Deceased did not provide adequate support for.

This case is similar to the case of *Middel* (referred to above) and I find that the reasoning of that court is applicable. To summarize the arguments, Maureen and the Deceased have been separated for 26 years and Maureen has not received any support payments since 2003. She has not established that she is in need of support and I do not believe that “society’s expectations of what a judicious person would do” would be that Maureen should be entitled to support. Having considered all of

the above-noted factors and jurisprudence and being in agreement with the arguments advanced by Ms. Law and OCL, I find that Maureen has not met her burden of proving that she is entitled to her claim for support.

Pursuant to [*Stevens v. Fisher*, 2013 ONSC 2282 \(CanLII\)](#), while s.62(1) provides a comprehensive framework of factors to be considered by the court, these factors are not exhaustive. Rather, the enumerated factors clearly indicate that the court must go beyond a simple needs-based analysis to determine the issue of "proper support". The need of the dependant is only one factor to be considered. The court should use the "judicious father and husband" test in determining the appropriate disposition, as opposed to a needs-based analysis. The court must consider the legal and moral obligations of the deceased to his or her independent spouses and children. The court must first identify all dependants who have a claim on the estate, and then tentatively value their claims by considering the legislated factors as well as legal and moral obligations of the estate. Thereafter, the court must identify non-dependant persons who may have a legal or moral claim to a share. Lastly, the court must balance the competing claims to the estate by taking into account the size of the estate, the strength of the claims, and the intentions of the deceased in order to arrive at a judicious distribution thereof. The exercise may involve prioritization of competing claims. One of the objectives of the SLRA was to ensure that the spouses and children receive a fair share of family wealth:

[44] In *Cummings v. Cummings* (2004), 69 O.R. (3d) 397, the Ontario Court of Appeal considered the common-law and statutory provisions applicable to claims for dependants' relief brought pursuant to the SLRA.

[45] At para. 27, the court stated:

When judging whether a deceased has made adequate provision for the proper support of his or her dependants and, if not, what order should be made under the Act, a court must examine the claims of all dependants, whether based on need or on legal or moral and ethical obligations. This is so by reason of the dictates of the common law and the provisions of s.57 through 62 of the Act.

[46] In *Cummings*, the Court went on to consider the relevant provisions under Part V of the SLRA as follows - Sections 58 and 60 provide, in part:

58(1) 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.

(2) An application for an order for support of a dependant may be made by the dependant or the dependant's parent.

(4) The adequacy of provision for support under subsection (1) shall be determined as of the date of the hearing of the application.

60(2) Where an application for an order under section 58 is made by or on behalf of any dependant,

a) it may be dealt with by the court as

b) ...

an application made on behalf of all persons who might apply.

[47] In our case, Ms. Stevens brings the application on her own behalf as a dependant common-law spouse. Section 57 sets out the following definitions:

“dependant” means,

(a) the spouse of the deceased,

(b) a parent of the deceased,

(c) a child of the deceased, or

(d) a brother or sister of the deceased,

to whom the deceased was providing support or was under a legal obligation to provide support immediately before his or her death;

“spouse” means a spouse as defined in subsection 1(1) and in addition includes either of two persons who,

(a) were married to each other by a marriage that was terminated or declared a nullity, or

(b) are not married to each other and have cohabited,

(i) Continuously for a period of not less than three years, or

(ii) In a relationship of some permanence, if they are the natural or adoptive parents of a child.

“cohabit” means to live together in a conjugal relationship, whether within or outside marriage.

[48] Ms. Eagles admits she is neither a dependant nor does she make a claim as a dependant under the SLRA. The evidence is that she was Mr. Fisher’s common-law spouse for 13 months some 12 years ago.

[49] In determining the amount and duration, if any, of support, a court shall consider all of the circumstances of the application including a wide variety of factors provided in s.62(1) of the SLRA. That section details a lengthy list of factors to be considered.

[50] While s.62(1) provides a comprehensive framework of factors to be considered by the court, these factors are by no means exhaustive. Rather, the enumerated factors clearly indicate that the court must go beyond a simple needs-based analysis to determine the issue of “proper support”.

[51] In *Perilli v. Foley Estate* (2006), 2006 CanLII 3285 (ON SC), 23 E.T.R. (3d) 245 (S.C.J.) Henderson J. at para. 56 considered Cummings with approval:

It is clear from that long list that the court must do more than conduct a simple needs-based analysis to determine the issue of “proper support”. The need of the

dependant is only one factor to be considered. Moreover, the Ontario Court of Appeal has held that the court should use the “judicious father and husband” test in determining the appropriate disposition, as opposed to a needs-based analysis. See the case of *Cummings v. Cummings* (2004), 69 O.R. (3d) 397 (Ont.C.A.) at paragraph 40.

[52] Further, in *Cummings* at para. 40, the Ontario Court of Appeal adopted the reasoning of the Supreme Court of Canada in *Tataryn v. Tataryn Estate* (1994), 1994 CanLII 51 (SCC), 116 D.L.R. (4th) 193 wherein it was held that a deceased’s moral duty towards his or her dependants is a relevant consideration on a dependants’ relief application.

[53] At para. 50 in *Cummings*, the court took into account:

- (a) what legal obligations would have been imposed on the deceased had the question of provision arisen during his lifetime; and,
- (b) 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.

[54] Also in *Cummings*, the Ontario Court of Appeal held that the court must also consider the legal and moral obligations of the deceased to his or her independent spouses and children. The court confirmed that one of the objectives of the SLRA was to ensure that the spouses and children receive a fair share of family wealth. See *Cummings* (supra) at paras. 26 to 53, *Perilli* (supra) at para. 59.

[55] I adopt the reasoning of Henderson J. in *Perilli* at para. 61 where he describes the procedural steps involved when dealing with a claim under s.58 of the SLRA:

Therefore, in a claim under section 58 of the SLRA in Ontario, I find that the court must first identify all of the dependants who may have a claim on the estate. Then, the court must tentatively value the claims of those dependants by considering the factors set out in the legislation and the legal and moral obligations of the estate to

the dependants. Thereafter, the court must identify those non-dependant persons who may have a legal or moral claim to a share of the estate. Lastly, the court must attempt to balance the competing claims to the estate by taking into account the size of the estate, the strength of the claims, and the intentions of the deceased in order to arrive at a judicious distribution of the estate. This exercise may involve the prioritization of the competing claims.

Authorities

[*Webb v. Belway*, 2019 ONSC 4602 \(CanLII\)](#)

[*Succession Law Reform Act*, RSO 1990, c S.26](#)

[*Bormans v Estate of Bormans et al*, 2016 ONSC 428 \(CanLII\)](#)

[*Webb v. Belway*, 2019 ONSC 4602 \(CanLII\)](#)

[*Verch Estate v. Weckwerth*, 2014 ONCA 338 \(CanLII\)](#)

[*Tataryn v. Tataryn Estate*, \[1994\] 2 SCR 807, 1994 CanLII 51 \(SCC\)](#)

[*Amherst Crane Rentals Ltd. v. Perring*, 2004 CanLII 18104 \(ON CA\)](#)

[*Cummings v. Cummings*, 2004 CanLII 9339 \(ON CA\)](#)

[*Perilli v. Foley Estate*, 2006 CanLII 3285 \(ON SC\)](#)

[*Batchelor v Radawez*, 2015 ONSC 6764 \(CanLII\)](#)

[*Morassut v. Jaczynski*, 2015 ONSC 502 \(CanLII\)](#)

[*Morassut v. Jaczynski et al.*, 2013 ONSC 2856 \(CanLII\)](#)

[*Dentinger \(Re\)*, 1981 CanLII 2969 \(ON SC\)](#)

[*Fernandez v. Fernandez*, 2011 ONSC 8023 \(CanLII\)](#)

Middel v. Vanden Top Estate, 2010 ONSC 2951 (CanLII)

Stevens v. Fisher, 2013 ONSC 2282 (CanLII)