

Planning and writing a Will can be a daunting task. Finding good counsel is critical to ensuring that it is drafted correctly and that the “testator’s” (the person who is making the Will) wishes are met upon their death. It may come as a surprise to some that in fact, notwithstanding the Testator’s intentions in their Will, the circumstances that existed prior to their death may serve to override the provisions in their Will. One such circumstance that testators should be aware of is a “dependant relief claim”.

Imagine if you will, a father who intends to leave his estate to only two of his three of children. The third child, to whom he provides financial assistance when he has to “bail his son out of trouble”, will not be provided for in the Will as a result of the ongoing family dispute.

These wishes, in fact, could be rendered irrelevant after the father’s death despite his intentions. Dependants have a right to challenge the terms of a Will in court by making a “dependant relief claim.” These types of claims are allowed under the *Succession Law Reform Act* (“**SLRA**”), the legislation governing Wills and estates in Ontario.

Under the SLRA, if a court determines that a Will does not adequately provide for a dependant’s needs, it can make any order it sees fit to support that dependant. If successful, a dependant could potentially receive a share of an estate that the testator had no intention of giving.

This is likely a revelation to most people who are considering how they want to divide up their estate. Therefore individuals planning to write their Wills should be aware of how these claims arise so they can take the necessary preventative measures.

Who can make an application for dependant relief?

The SLRA gives some guidance on who can make a dependant relief claim. In particular, an individual’s right to make a claim will depend on two issues:

- (1) whether the applicant is actually a dependant; and
- (2) whether the dependant was receiving support from the testator.

For the first, the SLRA provides a clear definition. A dependant is a spouse (including an ex-spouse or common law partner), a parent (or legal guardian), a child or sibling of the testator.

The first point is fairly simple to determine. The second is slightly more complicated. To be able to make a claim, the testator must have (a) been actually supporting the dependant at the date of death or (b) been under an obligation to support the dependant at the date of death.

It is the dependant’s responsibility to show that they were receiving actual support at the time of death. This is usually done by producing evidence of payments made by the testator, be it for tuition, rent or any other expense.

To show an obligation, the dependant must to point to a specific requirement of the testator to provide support. There might be legislation that obligates the testator or alternatively, there may

be a moral duty to support the dependant. In either case, the dependant has to show that he or she is entitled to support, even if he or she was not actually receiving any.

An additional point to note is that the timing of the support is also important. If a dependant received financial support years before the date of death, and has not received support since, a court may be less inclined to grant relief. On the other hand, if the dependant was receiving support up to the date of death and was left out of the Will, a court may be more likely to grant relief.

How does a court decide whether the dependant is entitled to relief?

Courts decide whether to award relief on a case-by-case basis. Much of the decision will be based on the dependant's specific situation or circumstances.

A court may start by assessing any legally required obligations not provided for under a testator's Will. If the dependant was a minor when the testator died, he/she would be entitled to receive support under the Will based on the *Family Law Act*.

If there were no legal obligations, a dependant would have to prove that a testator owed a *moral duty of support*. Typically, for a moral duty, a court will look at society's expectations of what a reasonable person would do in similar circumstances.

By way of an example to illustrate this point, if a dependant was under disability and no provision for support was made under the Will, a court would have to make judgment based on what a reasonable person would do. They may look at the type of disability in evidence, whether it prevented the dependant from providing for themselves and whether someone else in the testator's position would have excluded the dependant in similar circumstances.

Simply put, the court has discretion to consider many factors before deciding whether to grant the dependant relief.

What happens once a court grants relief?

If a court decides that the dependant is entitled to support, it then must determine the amount of the award. Here, the court can consider any factors it believes to be relevant.

The SLRA provides a non-exhaustive list that courts have commonly used in the past, such as the dependant's assets at the time of the testator's death, his/her capacity to contribute to their own support, his/her physical and mental health and the nature of his/her relationship to the testator. None of these or other factors are conclusive and, as mentioned, the decision is made based on the dependant's specific situation or circumstances.

So what preventative measures can you take to protect your estate?

- Because courts consider so many factors in a relief claim, estate planners are encouraged to document any support given by the testator. They should also keep these records with the Will.
- Estate planners should also try to detail any reasons the testator had for giving or not giving support. This may give the court a clearer picture of the relationship between the two parties.
- Records of a testator's wishes are also potentially helpful, particularly if he or she has specific requests they want fulfilled. A court may prioritize such requests over other claims.
- Ultimately, these measures are not guaranteed to protect an estate from dependent relief claims, but they may help lessen the amount of support awarded by a court.

If you wish to find out more about these claims or how to best position yourself during the estate planning stage, the members of our firm would be glad to discuss your options with you.

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