

**Wills, Trusts & Estates**

## Dependants denied support for misconduct: Death and the 'slayer rule'

By **Peter Neufeld**

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(May 29, 2020, 9:33 AM EDT) -- Ontario's courts and legislature offer an avenue for dependants to challenge how the estate of the deceased is distributed. While a testator generally has the right to dictate what happens to his/her assets upon death, certain relationships create responsibilities that limit this testamentary freedom, and a court might order that the estate pay the dependant support from the estate, over and above what the testator had intended.

But what happens if the dependant mistreated the testator or, in the most egregious cases, caused the testator's death?

This three-part series addresses the question of whether misconduct by a dependant could disentitle that person to support that they might otherwise be entitled to receive. The answer to this requires a review of the *Succession Law Reform Act (SLRA)*, the *Civil Remedies Act*, the "slayer rule," and the doctrine of *ex turpi causa non oritur actio*. These articles also consider how these statutes and common law rules have been applied

to try to disentitle beneficiaries to proceeds of life insurance and through intestacy.

### Assessing conduct in a dependant support application

A dependant may be able to bring a "dependant support application" to seek adequate support from the deceased's estate, despite their exclusion from the will. Section 58(1) of the SLRA provides that, where the deceased has not made adequate provision for the proper support of his or her dependants, the court may order that such adequate provision be made out of the estate to the dependant(s) for their proper support.

Section 62(1) of the SLRA enumerates several factors that the court considers when awarding dependant support, and include the following which are relevant to our discussion:

- Section 62(1)(g) — the proximity and duration of the dependant's relationship with the deceased;
- Section 62(1)(l) — the circumstances of the deceased at the time of death; and
- Section 62(1)(r)(i) — where the dependant is a spouse, the 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.

*Cummings v. Cummings* [2004] O.J. No. 90, confirmed that, in addition to the deceased's legal obligations, the court must also consider the deceased's moral obligations to all of his or her dependants. As noted by the court in *Cummings*, it is the duty of the court, so far as is possible, to place itself in all respects in the position of the testator, and to consider whether or not, having regard to all existing facts and surrounding circumstances, the testator has been guilty of a manifest breach of that moral duty which a just, but not a loving, husband or father owes his wife or towards his children, as the case may be.

*Cummings* further held that these moral considerations are not something to be contemplated in addition to, or in isolation from, s. 62(1). Rather, the legal obligations and moral obligations are reflected, for the most part, in the language of s. 62(1).

Section 62(1)(r)(i) of the SLRA is the most obvious consideration of misconduct when determining the amount of support payable to a dependant spouse. However, denying dependant support on that basis alone is rare. In *Lapierre v. Lapierre Estate* [2002] O.J. No. 1275, the court found that that the conduct referred to in s. 62(1)(r)(i) must "shock one's conscience." In that case, the spouse was alleged to have, among other things, abused her husband and caused him to form bruises. The court noted that these actions may satisfy the threshold under s. 62(1)(r)(i) but that conflicting evidence prevented the judge from making that finding.

Similarly, in *Webb v. Belway* 2019 ONSC 4602, the spouse was accused of misappropriating hundreds of thousands of dollars, prohibiting family members from visiting the deceased during the last months of his life, and was rude, hostile and demanding to the deceased's doctors. Even still, the court held that this was not enough to rise to the level of "unconscionable," nor did the conduct necessarily diminish the spousal relationship, nor override the deceased's legal and moral obligations to the surviving spouse.

### **Causing the death of the deceased**

It may be significantly more difficult for a dependant to seek entitlement to the deceased's estate where that dependant actually caused the death. Not only will causing the deceased's death potentially rise to the level of "unconscionability," but the common law "slayer rule" and the *Civil Remedies Act* provide additional avenues to prevent the dependant from benefiting from their criminal conduct.

### **Slayer rule**

The slayer rule, also known as the "forfeiture rule," is a common law doctrine that bars individuals from benefiting from committing murder (*Gore*, [1972] 1 O.R. 550 (Ont. H.C.J.)). The principle was discussed by the Supreme Court of Canada in *Oldfield v. Transamerica Life Insurance Co. of Canada* 2002 SCC 22. In that decision Justice Claire L'Heureux-Dubé referred to p. 286 in an Australian case *Troja v. Troja* (1994), 33 N.S.W.L.R. 269 (C.A.) to aptly summarize the common law doctrine:

"The forfeiture rule is, in reality, an application to what would otherwise be the operation of law of the equitable principles which deny persons from gaining benefits from their own morally culpable conduct. To prevent that happening, a court of equity is authorized to impose a constructive trust to prevent the perpetrator's gain. The trust will be imposed by the court to achieve a just result and to prevent the unjust enrichment of the wrongdoer."

Causing the death of the deceased, however, may not be enough to bar the dependent's support claim, if the dependant is not morally culpable. In *Dhingra v. Dhingra Estate* 2012 ONCA 261, the Court of Appeal for Ontario considered whether the slayer rule applied to a beneficiary of an insurance policy who had murdered the insuree (his wife). In that case, the beneficiary was found to be not criminally responsible on account of a mental disorder. The court held that the slayer rule did not prevent the beneficiary from receiving the proceeds of the insurance policy since the individual was not held to be morally responsible for the victim's death.

This is the first of a three-part series.

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