DEPENDANT SUPPORT CLAIMS

Claim by the Spouse, Common-Law Spouse, Same-Sex Partner or Ex-Spouse

By Justin de Vries[1]

Introduction

Part V of the *Succession Law Reform Act* [2] permits the dependant of a deceased person to apply to the court for an order of support where a deceased person has failed to make adequate provision for the proper support of the dependant.

Who May Apply

Dependants include the following persons:

(1) the spouse of the deceased;

(2) persons who were married to each other by a marriage that was terminated or declared a nullity;

(3) persons not married to each other who have cohabited continuously for a period not less than three years; or

(4) persons not married to each other who have cohabited in a relationship of some permanence, if they are the natural or adoptive parents of a child.[3]

Because same-sex marriage is now permitted in Ontario, same-sex spouses qualify as dependants.[4]

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The author gratefully acknowledges the assistance and contribution of Allan Socken of Hull & Hull LLP
[2] R.S.O. 1990, c. S.26 (the "Act").
[3] Section 57 of the Act. Note that 'dependants' also include a parent, child, brother or sister of the deceased.

A person is *not* a dependant under the Act if the deceased was not providing support or was not under a legal obligation to provide support immediately before his or her death.

What is Adequate Provision?

As noted above, the court may make an order for support where the deceased has failed to make 'adequate provision' for the 'proper support' of the dependant. Before the court can determine whether or not the deceased has made 'adequate provision' for a dependant, the court must determine what is meant by 'proper support'. In a passage taken from an English case, *Bosch v. Perpetual Trustee Co.*, accepted in the Ontario courts, 'proper support' has been characterized as follows:

> The first thing to be noticed is that the powers given to the court only arise when any of the persons mentioned is left without adequate provision for his or her proper maintenance, which word will be used in this judgment where necessary as including education and advancement. The use of the word 'proper' in this connection is of considerable importance. It connotes something different from the word 'adequate.' A small sum may be sufficient for the 'adequate' maintenance of a child, for instance, but, having regard to the child's station in life and the fortune of his father, it may be wholly insufficient for his 'proper' maintenance. So, too, a sum may be quite insufficient for his maintenance on a scale that is 'proper' in all the circumstances. A father with a large family and a small fortune can only afford to leave each of his children a sum insufficient for his 'adequate' maintenance. Nevertheless, such sum cannot be described as not providing for his 'proper' maintenance, taking into consideration 'all the circumstances of the case' as the subsection requires shall be done. In the next place, it is to be observed that, when the condition precedent to the exercise of the powers given by the subsection is shown to be fulfilled, those powers extend to make such provision as the court thinks fit for 'such' maintenance, that is to say, for proper maintenance. The task thus imposed upon the court is obviously one of great difficulty. Upon what

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[4] In *Halpern v. Canada (Attorney General)* 65 O.R. (3d) 161, [2003] O.J. No. 2268, the Court of Appeal reformulated the definition of marraige as a "voluntary union for life of two persons to the exclusion of all others." Such persons, if married, are "spouses" under the Act.

> principles is the Court to act in determining what constitutes proper maintenance?
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> …The amount to be provided is not to be measured solely by the need of maintenance. It would be so if the court were concerned merely with adequacy. But the Court has to consider what is proper maintenance, and therefore the property left by the testator has to be taken into consideration. So, too, in the case of children, a material consideration is their age. If a son is of mature, or nearly mature, age, his needs in both the present and the future can be estimated without much difficulty. In the case, however, of a son of tender age, although his immediate needs can be readily ascertained, it is extraordinarily difficult even to guess what his needs may be in the future. Where, therefore, the testator's estate is a large one the court will be justified in such a case in making provision to meet contingencies that might have to be disregarded where the estate is small.[5]

These words of Lord Romer make it clear that 'proper support' is something more than 'adequate support.' It is not limited to the provision of food and sustenance and the supply of the necessaries of life, but can require the provision of non-essentials or even luxuries.[6] Thus, 'proper support' has been interpreted by the courts as support capable of affording an applicant spouse a standard of living comparable to that which she enjoyed before the death of her husband.[7] It is support that is fitting or appropriate to the circumstances of the dependant.[8]

Generally, the courts have approached the question of what is 'proper support' by conducting a needs-based economic analysis and taking into consideration the moral and ethical duties of the deceased to his or her dependants. In determining what is proper

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[5] Lord Romer in *Bosch v. Perpetual Trustee Co.*, [1938] A.C. 463. See, for example, in the Court of Appeal, *Re Hull Estate* [1943] O.R. 778, *Cummings v. Cummings* [2004] O.J. No. 90.

[6] *Re Davies* (1979), 27 O.R. (2d) 98 (Surr. Ct.) followed in numerous cases: *Re Chellew and Public Trustee* (1983), 45 O.R. (2d) 189 (Surr. Ct.); *Trenton v. Trenton Estate*, [1988] O.J. No. 2919 (Div. Ct.). See also *Kipp v. Buck Estate* [1993] O.J. No. 790 (Gen. Div.).

[7] *De Winter v. De Winter Estate* [2001] O.J. No. 3501 (S.C.J.). See also *Re Dentinger* (1981), 128 D.L.R. (3d) 613 (Ont. Surr. Ct.).

[8] *LaPierre v. LaPierre Estate* [2002] O.J. No. 1275 (S.C.J.) citing *Caluori v. Caluori Estate*, [1992] O.J. No. 1538 (Gen. Div.).

support for the applicant dependant, the court must examine the claims of all dependants.[9] The date on which the adequacy of support is to be determined is the date of the hearing of the application.[10]

The factors to be considered by the court on an application under Section 58 of the Act are set out in Section 62, discussed below. Essentially, these factors look to the needs of the dependant and the degree to which, if any, the dependant has contributed to the welfare, property and/or business of the deceased. However, these are not the only factors; the courts recognize that the deceased may have moral and ethical duties to the claimant and to other dependants including those not presently in need that may also have to be taken into account.[11]

Determination of Amount of Support

Subsection 62(1) of the Act sets out factors the court is required to consider to determine the amount of support. These factors are also relevant to the question of whether the deceased has made adequate provision for the proper support of a dependant, as 'adequate provision' assumes that the deceased has provided for the 'proper support' of the dependant. Thus, the courts look at the factors listed in subsection 62(1) both to determine whether adequate provision has been made, and if it has not, to determine what level of support should be ordered.

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[9] *Cummings v. Cummings* [2004] O.J. No. 90 (C.A.).
[10] See Section 58(4) of the Act.
[11] *Ibid*. See also *De Winter v. De Winter Estate*, [2001] O.J. No. 3501 (S.C.J.); *McElligott Estate v. Damecour* [2005] O.J. No. 1663 (S.C.J.); *Cheema v. Cheema Estate* [1989] O.J. No. 359 (Surr. Ct.); *Kipp v. Buck Estate* [1993] O.J. No. 790 (Gen. Div.); *McSween v. McSween Estate* [1985] O.J. No. 1765 (Surr. Ct.).

Where the support of a person who is not a child of the deceased, i.e., a spouse, sibling or parent, is an issue in determining the amount and duration, if any, of support, the court is required to 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;[12]

(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; and

[12] Pursuant to this clause, the courts often look to any pre-existing agreement for support; where such an agreement exists, it is particularly important: *Moores v. Hughes et al.* (1981), 37 O.R. (2d) 785 (H.C.J.); see also *Dyer v. Dyer Estate* [1984] O.J. No. 2353 (Surr. Ct.).

(o) the claims that any other person may have as a dependant.

Additionally, if the claimant is a spouse of the deceased, the court is required to consider the following:

(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;

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

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

The court is also required to consider any other legal right of the dependant to support, other than out of public money.

A reading of the cases makes it clear that there is no "magic formula" by which the court can determine 'proper support.' Each case depends on its own facts. The court must balance the claims or potential claims of all the dependants and take into

consideration the ability of the estate to pay.[13] In addition to the evidence presented by the parties, the court may direct other evidence to be give as the court considers necessary or proper.[14]

Appendix "A" to this paper contains headnotes and quotations reproduced verbatim from judgments in selected recent cases involving claims for spousal support under the Act. An examination of these cases makes it clear that spousal need is the overriding consideration. The courts also look at the ability of the dependant to support him or herself and the resources of the estate. The courts recognize that a claimant is not required to deplete his or her capital before demonstrating need. Where the estate is small, a lump sum payment may be ordered as, in such cases, continuing periodic support is not practical.

Contents of Order

Section 63 of the Act gives the court broad powers to fashion an appropriate order. In particular, the court is empowered to make provision out of either of the income or capital of the deceased's estate or both,[15] 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;

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[13] Numerous cases note that where there is ability to pay and an entitlement to support, support should be ordered. Where there is no ability to pay, there may not be an entitlement to support: *Catherwood v. Young Estate* 27 O.R. (3d) 63, [1995] O.J. No. 3658 (Gen. Div.).
[14] Section 62(2) of the Act.
[15] Section 63(2) of the Act.

(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; and

(i) the payment to an agency referred to in subsection 58(3) [e.g. the Ministry of Community and Social Services] 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.

Variation of the Court Order

Section 65 of the Act permits a court to make inquiries related to a change in circumstances of a dependant benefitted by an earlier dependant support order and to discharge, vary or suspend the order as the court considers appropriate in the circumstances.

Agreements Limiting the Right to Support

It is not uncommon for cohabitation agreements and separation agreements to limit or negate the right of a surviving spouse to make an application under the Act. However, any language purporting to do so may be ineffective since in making an order

for support, the court is empowered to make the order despite any agreement or waiver to the contrary.[16]

In a recent case involving spousal support under the *Divorce Act*, *Miglin v. Miglin*,[17] the Supreme court of Canada was confronted with the question of when a final separation agreement between spouses should be overridden. Although *Miglin* did not deal with dependant's relief, the reasoning in *Miglin* has been applied to agreements in the context of an application for support under Part V of the Act.[18]

In *Miglin*, the Court held an application for spousal support inconsistent with a pre-existing agreement requires a two-stage investigation into all the circumstances surrounding that agreement, first at the time of its formation, and second, at the time of the application.

Unimpeachably negotiated agreements that represent the intentions and expectations of the parties and that substantially comply with the objectives of the *Divorce Act* as a whole should receive considerable weight. In searching for a proper balance between consensus and finality on the one hand, and sensitivity to the unique concerns that arise in the post-divorce context on the other, a court should be guided by the objectives of spousal support listed in the *Divorce Act*, but should also treat the

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[16] Section 63(4) of the Act. Note that a mere property release does not operate as a release of claims under Part V of the Act: *Brant v. Brant* [1997] O.J. No. 215 (Gen. Div.) and the cases cited therein. Also, the terms of a court order under the *Family Law Act* may constitute a waiver for purposes of the Act if properly drafted; *Blago v. Aetna Life Insurance Co.* [1988] O.J. No. 1778 (Surr. Ct.). For examples of an effective estate release, see *Fune v. Hoy* [1995] O.J. No. 3 (Gen. Div.); *Vanderven v. Vanderven Estate* [1998] O.J. No. 2922 (Gen. Div.). See also *Frye v. Frye (Committee of)* [1992] O.J. No. 942 (Gen. Div.).

[17] [2003] S.C.J. No. 21 (S.C.C.).

[18] See *Phillips-Renwick v. Renwick Estate* [2003] O.J. No. 3156 (S.C.J.), *infra*.

parties' reasonable best efforts to meet those objectives as presumptively dispositive of the spousal support issue.

The court should set aside the wishes of the parties as expressed in a pre-existing agreement only where that agreement fails to be in substantial compliance with the overall objectives of the *Divorce Act*, including certainty, finality and autonomy. In particular, the party seeking to set aside the agreement needs to show that any change in circumstances was not reasonably anticipated by the parties, and has led to a situation that cannot be condoned. It is only where the current circumstances represent a significant departure from the range of reasonable outcomes anticipated by the parties, in a manner that puts them at odds with the objectives of the *Divorce Act*, that the court may be persuaded to give the agreement little weight.[19]

In several cases prior to *Miglin*, the court refused to overturn an agreement under subsection 63(4) of the Act where the agreement was clearly intended to impose finality.[20] As well, where the agreement was freely entered into, the claimant received independent legal advice and the deceased was not providing support to the claimant at the time of his death, the court upheld the agreement.[21] Even after *Miglin*, the absence of

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[19] This paragraph and the preceding paragraph with some alterations are taken from the headnote to *Miglin*. A full analysis of the decision is beyond the scope of this paper.

[20] *Fune v. Hoy* [1995] O.J. No. 3 (Gen. Div.); *Vanderven v. Vanderven Estate* [1998] O.J. No. 2922 (Gen. Div.). See also *Frye v. Frye (Committee of)* [1992] O.J. No. 942 (Gen. Div.).

[21] *Gocsei v. Skublak Estate* [1995] O.J. No. 2191 (Gen. Div.). Note that the courts also consider any agreement made by the parties as to what constituted adequate support at the time to be an important guidepost in determining proper support under the *Succession Law Reform Act: Re Dyer* (1994) 18 E.T.R. 44 citing *Moores v. Hughes* (1982), 37 O.R. (2d) 785.

independent legal advice is not necessarily fatal; however, it may be relevant where one of the common law grounds to set aside a contract is alleged.[22]

In *Phillips-Renwick v. Renwick Estate*,[23] the court applied the test set out in *Miglin*. The court held that since the claimant was not in a vulnerable position when signing the agreement such that the deceased took advantage of the claimant and the substance of the agreement did not amount to a significant departure from the applicable general objectives of either matrimonial or succession spousal support legislation, the agreement was valid.[24]

Property Included in the Estate

In addition to the income and capital of the estate, the value of certain transactions may be deemed part of the estate and thus be available for the provision of support.[25] This includes assets that normally pass 'outside' of the estate such as jointly-held property. However, not all jointly held property is caught by the Act. The Act is remedial in nature: it seeks to prevent a testator from frustrating an outstanding support obligation by transferring assets out of his own name. Hence, it is only where the testator has transferred property originally owned by him and then subsequently transferred by the testator to himself and another as joint tenants, thereby taking it outside the estate,

[22] The common law grounds to set aside a contract include fraud, material misrepresentation, duress, undue influence and unconscionability: *Phillips-Renwick v. Renwick Estate* [2003] O.J. No. 3156 (S.C.J.). Also relevant is whether the agreement is improvident on its face: *Rosen v. Rosen*, [1994] O.J. No. 1160 (C.A.).
[23] [2003] O.J. No. 3156 (S.C.J.).
[24] *Phillips-Renwick v. Renwick Estate* [2003] O.J. No. 3156 (S.C.J.) relying on the analysis contained in *Miglin v. Miglin*[2003] S.C.J. No. 21 (S.C.C.).
[25] Section 72(1) of the Act.

that the property will be available to provide support to a dependant.[26] Certain life insurance policies are also caught in this trap.[27]

In particular, pursuant to subsection 72(1) of the Act, the capital value of the following transactions effected by a deceased before his or her death, whether benefitting his or her dependant or any other person, shall be included as testamentary dispositions and shall be deemed to be part of the deceased's net estate for purposes of ascertaining the value of the estate, and being available to be charged for payment by an order:

(a) gifts *mortis causa*;

(b) money deposited, together with interest thereon, in an account in the name of the deceased in trust for another or others with any bank, savings office, credit union or trust corporation, and remaining on deposit at the date of the death of the deceased;

(c) money deposited, together with interest thereon, in an account in the name of the deceased and another person or persons and payable on death under the terms of the deposit or by operation of law to the survivor or survivors of those persons with any bank, savings office, credit union or trust corporation, and remaining on deposit at the date of the death of the deceased;

(d) any disposition of property made by a deceased whereby property is held at the date of his or her death by the deceased and another as joint tenants;

(e) any disposition of property made by the deceased in trust or otherwise, to the extent that the deceased at the date of his or her death retained, either alone or in conjunction with another person or persons by the express provisions of the disposing instrument, a power to revoke such disposition, or a power to consume, invoke or dispose of the principal thereof, but the provisions of this clause do not affect the right of any income beneficiary to the income accrued and undistributed at the date of the death of the deceased;

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[26] It does not include property which from its purchase was held in joint tenancy since the Act recognizes the contractual rights of individuals which are exercised absent the intentional actions contemplated by the Act. *Madore-Ogilvie (Litigation Guardian of) v. Ogilvie Estate* [2006] O.J. No. 4654 (Div. Ct.) citing *Modopoulos v. Breen Estate*, [1996] O.J. No. 2738.

[27] Thus, it is possible that where a deceased uses a corporate vehicle to hold insurance used for estate planning purposes, the policy may be caught notwithstanding that the deceased does not personally own the policy: *Goodis (Litigation guardian of) v. Goodis Estate* [2003] O.J. No. 3564 (Div. Ct.).

(f) any amount payable under a policy of insurance effected on the life of the deceased and owned by him or her;

(f.1) any amount payable on the death of the deceased under a policy of group insurance; and

(g) any amount payable under a designation of beneficiary under Part III.

Paragraph (g) includes, *inter alia*, amounts payable under pension plans, employee benefit plans, annuities, RRSPs, and RRIFs.

Enforcement

An order for support made under Part V of the Act may be enforced against the estate of the deceased in the same way and by the same means as any other judgment or order of the court against the estate may be enforced.[28] Methods of enforcement include a writ of seizure and sale, a writ of possession for the recovery of land, a writ of delivery for personal property other than money, and a writ of sequestration.[29]

Settling Cases

It is always advisable to settle cases if a settlement acceptable to all parties can be achieved. This is especially the case in disputes involving support. Unlike the case of child support, there are no legislated (or judicially-created) formulas that can be used to ascertain the 'correct' level of spousal or dependant's support. Therefore, it is impossible to predict what a court will do in any given case. If both sides can live with a negotiated settlement, it is likely fair to both sides and is certainly less costly to arrive at than

[28] Section 77(1) of the Act.
[29] See generally Rule 60 of the *Rules of Civil Procedure*.

obtaining a judgment in the same amount after trial. The losing party will also avoid the possibility of a costs award.

How does one go about negotiating a settlement? As a first step, one should consider whether there are any previous agreements or court orders that deal with support under Part V of the Act. If so, does the agreement provide for a release of claims? If it does and if the agreement was made after full financial disclosure of all assets and liabilities by both sides, and the agreement was voluntarily made, one should ask whether the potential claimant received a reasonable settlement at the time the agreement was made. If that is the case, and if the present circumstances of the claimant were anticipated at the time the agreement was made, it may be that the claimant is entitled to nothing.

If any of the above conditions are not present, i.e., there was no agreement or the agreement fails to satisfy the test set out in *Miglin*, one must consider what level of support is appropriate. There are *dicta*, as well as the legislated mandate referred to above, to the effect that one factor to be considered is that a spouse is entitled to support similar to his or her accustomed standard of living. However, this is not the only factor, nor does it override any of the other factors. The test is essentially one of need. What does the applicant need having regard to all of the circumstances? Thus, even if it might otherwise be appropriate to grant a level of support that would approximate that received by the claimant while the deceased was alive, one must still consider the ability of the estate to pay any actual or potential needs of other dependants.

Once a figure is arrived at, one must determine how the support is to be paid. There are various possibilities including the payment of a lump sum equivalent to the present value of periodic support or some lesser amount, the transfer of estate property to the dependant, and payment of monthly or other periodic support. Estate property can be charged to secure the obligation or be held in trust for the dependant. The parties can agree to permit the claimant to live in the matrimonial home on payment of household expenses or otherwise. What is best in the circumstances depends on all of the surrounding facts. For example, the dependant may want the transfer of specific property, but if the property is a revenue-generating asset, this may affect the estate's ability to provide periodic support to other dependants. If the estate has non-revenue producing assets that are to be held for later distribution, it may be necessary to mortgage them to provide a fund to pay the claimant.

If the parties agree that support should be paid on a periodic basis, it is also important to consider how long support should be paid and what should happen if there is a change in the circumstances of the payee. What if the payee remarries? What if either party's financial circumstances deteriorate or improve? In separation agreements, it is common to include language that permits a review by the court in the case of a material change in circumstances. There does not appear to be any reason why such language could not be included in an agreement for support under Part V of the Act. Such language could provide a basis for the court to discharge, vary or suspend the order under Section 65 of the Act.

Minutes of Settlement or Court Order

Any settlement should, as a matter of course, be contained in minutes of settlement signed by the parties. If an action has already been commenced, it is a good idea to obtain a consent order approving the terms of the minutes of settlement. This has the advantage of permitting one to immediately enforce the order by any of the means discussed above. If no order is obtained and if there is default under the agreement, the innocent party will have to commence an action to enforce the agreement.

Appendix "A"

Selected Cases of Spousal Support under the *Succession Law Reform Act*

Berquist v. Berquist **[1992] O.J. No. 2316**

The parties agree that the value of the estate is $441,812.31. Further, the parties agree that should I rule in her favour on the legal issue that the applicant would be entitled to $1,000.00 support monthly which has an agreed present value (annuity with indexation) of $154,800.00.

The applicant, who works full time as a dental secretary and earns $23,000.00 a year, has meager resources. She needs support not only to pay her day to day expenses, but also to provide for her old age. Although she has about $50,000.00 in R.R.S.P.'s, she had to borrow $4,500.00 from her children for the 1991 contribution. She also had to borrow $19,000.00 from the children to purchase a car which she needs for her work. These debts are still outstanding. She estimates that on retirement at age 65, she will only have between $7,000.00 and $9,000.00, from her old age and Canada pensions, plus, of course, the interest from her R.R.S.P.'s. I find that her income is inadequate to support her even modestly and leaves her without resources to purchase further R.R.S.P's.

In addition, I note that she is presently residing in a triplex owned by her mother-in-law, who is now 90, and pays only minimal rent. Should the mother-in-law die, I find that she would be faced with much higher accommodation expenses. In sum, I find that the applicant is a person in need and equity demands that provision be made for her under the Act. Nor do I believe that such support should be time limited.

In summary, I find that the applicant is entitled to a lump sum payment of $154,800.00.

Boyko v. Boyko Estate [1998] O.J. No. 1434

This was an interim application by the wife, Bernice Boyko, pursuant to section 58 of the *Succession Law Reform Act* for increased support from the estate of the testator, her late husband, Walter Boyko. The husband and wife married in June 1989 when the wife was 80 years old and the husband was 64 years old. Prior to the marriage, they entered into a marriage contract that provided that if the marriage ended in divorce, the wife would receive nothing. However, it also provided that if the husband died first, then the wife would receive $1,500 a month from his estate until she died, cohabited, or remarried. In addition, the husband's estate was to pay all of the wife's medical and dental expenses, including health care professionals, if required. The husband died on June 25, 1997. In 1993 and 1995, the wife suffered strokes. After a third stroke in October 1997, she was rendered functionally blind. She was depressed and lonely and found it hard to adjust to the blindness. During his lifetime, the husband amassed assets of $1 million. In 1989, the wife's estate was valued at $50,000 and had increased to $150,000 by the time of this application. The wife sought increased support so that she could live with her 96-

year-old sister and 73-year old nephew in North Carolina. Her nephew had power of attorney for her and frequently travelled to Toronto at his own expense. Apart from a cousin in Toronto, they were her only family in North America. The residential care costs for the wife in North Carolina were $14,520 US per year. The wife's monthly income was $3,080, which included the $1,500 received from the husband's estate.

HELD: Application allowed. The husband's estate was ordered to increase its support for the wife to $3,000 a month on an interim basis. It was reasonable that the wife should be provided with the means to stay in North Carolina with her sister and nephew. It was not in the public interest that she be forced to live a lonely life in Toronto or delve into capital to finance her move to North Carolina, when her husband left a substantial estate. Proper support meant more than a comfortable existence and would permit the wife to have a better life in her final years.

Butts Estate v. Butts [1999] O.J. No. 1672

Application by the executrix of the estate of Robert Butts for directions regarding the support claim of the respondent Elizabeth Butts. Robert and Elizabeth were married to each other for 19 years. They entered into a separation agreement pursuant to which Robert was to pay Elizabeth monthly support of $500 as long as she did not remarry and Elizabeth agreed to release all claims against Robert or his estate. Robert married twice after the divorce. Elizabeth never remarried. Robert died in 1997 at the age of 69. Elizabeth was 69 and had serious medical problems. Her life expectancy was 12 years. Elizabeth's monthly income was $995 and her monthly expenses were $1,800. She had sold the matrimonial home. She did not have an RRSP. Robert's estate was worth $700,000. The major asset was his pension fund. This was payable to his widow. At issue was whether Elizabeth could claim against the estate under the Succession Law Reform Act when the agreement predated the Act.

HELD: Application allowed. Elizabeth was to receive $1,500 per month from the estate. Elizabeth was a dependent spouse because Robert provided her with lifetime support. Although the parties intended their agreement to be final, this was changed by the Act. The Act gave broad judicial discretion to award support to a dependant, despite the existence of any prior agreement or waiver. Adequate provision was not made for Elizabeth. She was therefore entitled to increased support.

Caluori v. Caluori Estate **[1992] O.J. No. 1538**

It is clear from the evidence that this 72 year old widow is not destitute. Her monthly income from all sources will be between $1,200 and $1,700 a month depending on how this application is determined. The real issue concerns the house in which she and' her husband lived since 1964. It was their matrimonial home for all those years and the house in which the applicant insisted on maintaining and caring for her late husband during his declining years. He was not well in his last 6 years and required close care and attention in his final year or two. The applicant expresses a strong, emotional attachment to the home saying she wants to die there, as did her husband.

The marriage was the second for each of them. It lasted almost 20 years and the Caluoris were close. They shared the burdens and benefits of life equally. Their financial contribution to their overall situation was roughly equal.

Then, in a will created at about the same time, he left his entire estate to the children of his first marriage, making no provision for the applicant. The respondent as executor of the will, seeks an order by way of counter-application to sell the house and divide the proceeds between the estate and the applicant. The house is worth about $130,000 and if sold, the applicant would receive approximately $60,000 for her own use. This would be her sole asset, apart from savings of about $15,000 and pension and old age security income of about $1,200 per month.

Accordingly, under the authority of subsection 58(1) of the *Succession Law Reform Act*, it is the order of the Court that the respondent as executor and trustee of the Will of Eugene Caluori hold the interest of the estate in the house at 1284 Lambeth Walk, more particularly described in the Deed of Land registered as instrument no. 671288 in the Registry Office for the Registry Division of Ottawa on May 30, 1975, in trust for the benefit of the applicant and for her use as long as she wishes to live in that house. Upon her death or upon her no longer residing in the house, the estate's interest therein shall be disposed of as directed in the will. While the applicant resides in the house, she will be responsible for maintaining it and will bear all the expenses necessary therefor.

Re Davies and Davies 27 O.R. (2d) 98

"Proper support" as that term is used in s. 65(1) of the *Succession Law Reform Act*, 1977 (Ont.), c. 40, which empowers the Court, where a deceased has failed to make adequate provision for the proper support of his dependants, to make such provision as it considers adequate, means more than a provision that is sufficient to enable a dependant to live decently and comfortably according to his station in life. It enables the Court, in appropriate circumstances, to make provision for non-essentials or luxuries as well. However, in doing so, the Court should strive to maintain the scheme of the deceased's will as much as possible. Where a wife dies leaving all her property to her son, who is her dependant, but where she and her husband, they having both been twice married, resided together in her house for several years and both supported each other financially and otherwise in a happy marriage, and where the surviving husband is unable to purchase another house, the wife has not made adequate provision for the proper support of her husband. Having regard to the criteria set out in s. 69 of the Act, an order should be made giving the husband a life estate in the house, subject to his paying the taxes, maintaining the house in a clean and tidy state and paying a reasonable amount towards repairs.

De Winter v. De Winter Estate [2001] O.J. No. 3501

Application by the widow De Winter for equalization of net family property and spousal support under the *Succession Law Reform Act*. During the marriage, De Winter and her husband had a combined monthly income of $1,957. The husband's will directed the trustees to invest the residue of the estate and to pay the net income to De Winter until

her death. The estate was valued at $58,000. The value of De Winter's net family property was $2,050. De Winter was not satisfied with the provisions made for her in the will. Her net monthly income was $1,426, with proposed monthly expenses of $2,213. The trustees opposed a spousal support order because De Winter did not have a need for support and because a support order was likely to consume the residue of the estate.

HELD: Application allowed. De Winter was entitled by statute to an equalization payment of half of the difference in the values of the net family properties, or $27,975. Apart from the equalization payment, De Winter had virtually no assets. She was unable to contribute to her own support. Her proposed budget minus her income was a reasonable measure of her needs. She was entitled to support capable of affording her a standard of living comparable to that which she enjoyed before the death of her husband. A life interest in the income earned from the invested residue of the estate was not adequate. In ensuring that De Winter received proper support, the potential disturbance to the husband's testamentary scheme was largely immaterial. After imputed interest income in respect of the equalization payment was taken into account, De Winter was entitled to periodic support in the monthly sum of $670.

Grant v. Grant [2001] O.J. No. 4597

Application by MG, pursuant to Ontario's *Succession Law Reform Act*, for support from JG's estate. MG was married to JG from 1952 to 1977. Their divorce order provided that JG was to pay MG monthly support of $500 until she died or remarried. JG paid the support all through his life, during which he married twice more. In 1998 he died, leaving his current wife and estate trustee, the respondent SG, an estate with no net value. However, SG received pension benefits and income from her own employment, such that she had a yearly income of $46,128. As well, she lived in a property purchased by JG and herself. MG received $4,000 as proceeds from JG's life insurance policy. SG paid MG the $500 support for five months following JG's death, but now argued that the insurance proceeds were meant as provision for MG instead of continuing support. MG was a homemaker during her entire marriage to JG and her income now stood at $16,284 annually. JG was 68 years old when he died. MG was now 73 years old and SG 62.

HELD: Application allowed. MG was declared a dependant of JG. As estate trustee of JG's estate, SG was to pay her a lump sum of $51,000. Section 57 of the Act resulted in MG being JG's dependant. At separation, MG and JG put their minds to the question of her support, and intended that MG receive $500 monthly for life in addition to the insurance proceeds. The proceeds did not provide for her adequately, particularly given the disparity in her standard of living compared to that of SG, and given that she had been a homemaker in a traditional marriage with JG. MG was now of an age when she was not expected to contribute to her own support.

Kipp v. Buck Estate [1993] O.J. No. 790

Application for a declaration that the common law spouse failed to make adequate provision for support and for an order for adequate provision by vesting in the applicant

title to the family home. The applicant and deceased had cohabited from 1949 until 1991. The deceased had made no will. It was agreed that the applicant was a "dependent" under the *Succession Law Reform Act*. The estate had offered to allow her to remain in the home and to maintain it while she did so.

HELD: Order granted that the home vest in the applicant absolutely in order to make adequate provision for her support.

Pusitz v. Pusitz Estate [1981] O.J. No. 299 (quoting directly from the judgment)

The main question is "was there adequate provision for the proper support of Rose Pusitz?" I was quite impressed with the presentation of Mr. Peter D. Vaneck, a chartered accountant, who had prepared a series of financial statements including projections over the next five years of income and expenses of Rose Pusitz. I am satisfied and so find that the income of Rose Pusitz exclusive of any income from her interest in 14 Elway Court is $4,000.00. When 14 Elway Court is sold she will receive a further income, by careful investing of her half of the proceeds, of about $5,000.00, giving then a total of $9,000.00. I am also satisfied from the evidence and particularly that of the chartered accountant noted that the personal expenses, exclusive of rent, of Rose Pusitz are $8,000.00. There is therefore a shortfall of accommodation, which is currently provided by the triplex, equal accommodation or at least that of a one bedroom apartment that would be adequate for Rose Pusitz will cost her about $400.00 a month. There is therefore a short fall of $4,000.00 annually over the next few years. I therefore find that there is not adequate provision made by the deceased for the proper support of his dependant wife.

I am of the view that, at this time, Rose Pusitz is in need of $4,000.00 a year from the estate of Nathan Pusitz and that to satisfy this need a payment should be made immediately and thereafter Mrs. Pusitz should receive semi-annual installments. I am mindful that Mrs. Pusitz' needs may increase or decrease as the cost of living varies, and that interest rates generally bear some relation to the cost of living. I therefore also make the following Orders:

(a) that the property known municipally as 14 Elway Court, North York, be sold at the best possible price by April 10th, 1981 and that the arrangement and Order of The Honourable Mr. Justice Galligan be carried out;

(b) that pursuant to Section 65 of the *Succession Law Reform Act*, the Executrixes of the Estate of Nathan Pusitz:

    (a) pay the just debts of the Estate of Nathan Pusitz, including the costs of the solicitors for Annie Cochen and Gertrude Kruger with respect to these proceedings on a solicitor and client basis and all other solicitor costs with respect to the application for probate, including the first application for probate;

    (b) pay forthwith to Rose Pusitz the sum of $2,000.00;

(c) pay forthwith to each of Tillie Nagy, Dr Julius Smith and Louis Pusitz the sum of $500.00 on account and in reduction of the legacy contained in paragraph 3(c) of the said Last Will and Testament;

(d) invest the balance of the Estate of the late Nathan Pusitz, as and when it becomes available for investment, in investments authorized under the will in such a manner that the said balance shall bear interest at a rate not less than the prevailing five-year term deposit rate on the date of the closing of the said sale, at the bank where the Estate of Nathan Pusitz maintains its account, and that the said executrixes shall continue investing the capital sum thereof, as necessary, from time to time, on the same terms during the lifetime of Rose Pusitz and that the said executrixes shall pay the income from $40,000.00 of such invested capital sum to Rose Pusitz in half-yearly installments commencing the first day of November, 1981, until her death; the balance of the income from the said investment, if any, shall be distributed by the executrixes pro rata among the beneficiaries named in the said Last Will and Testament.

Smallman v. Smallman Estate [1991] O.J. No. 1718 (quoting directly from the judgment)

It is admitted that Allison is a dependant of Smallman within the meaning of Part V of the *Succession Law Reform Act*. She is now 63 years old and because of her own medical problems is unable to work more than two days a week as a nurse in a chronic care institution. She received about $13,840 for this work in 1990. For medical reasons, it is unlikely she will be able to continue to do this work indefinitely. Her total grass monthly income from all sources at April 24, 1990 is $1,601.67 and her estimated expenses are $2,625.05 leaving a monthly deficit of $1,023.38. This income does not include the $750 monthly she had been receiving from Smallman.

Her current assets include a 55% interest in the condominium in which she lives, the other 45% being owed by her children. Her interest in the condominium was valued at $85,000 at April 24, 1990. Her other assets are an RRSP of $75,000, Canada Savings Bonds of $20,000, a car and a bank account. Total assets less current debts are approximately $180,000.

I find that the following constitute the assets of the deceased for purposes of a support order under Part V of the *Succession Law Reform Act*:

1. Canadian bank accounts totaling about $11,800.

2. Bank account in the Cayman Islands of about $80,700 U.S.

3. Mobile Home $12,600 U.S.

4. $3,000 Canadian sent to Betty Jean from the Canadian bank account after death of Smallman.

5. Car and Winnebago $2,100 U.S.

6. Florida National Bank account in Smallman's name alone $5,067.02 U.S.

Betty Jean brings a cross-application for support as a dependant. She is now 68 years old. Her first husband died in 1962 and she was the sole beneficiary of his estate. She owned the mobile home in which she lived and had about $20,000 in savings when she married Smallman in October, 1987. After she received the proceeds of the Cayman Islands account she made large gifts and loans to her children. She also bought herself a new car. She has worked part time and may continue to do so earning about $200 U.S. monthly. Her income totals about $1,002 per month, not including the Air Canada survivor pension, and she estimates her monthly expenses to be about the same amount.

She has benefitted from her marriage to Smallman, which lasted just under two years, by the Air Canada survivor pension of $1,121 (Canadian) per month, the Canada Pension of about $120 (Canadian) per month plus whatever amounts accrued to her from Smallman by his deposits into the joint bank accounts in Florida. She is also entitled to the first $75,000 (Canadian) and one-third of the estate of the deceased. The other two-thirds of the estate will go equally to his two children. I am satisfied that she has been adequately provided for and is not entitled to a support order. In coming to this decision I have also had regard for the effect on her of the order for the support of Allison.

Allison is a dependant within Part V of the *Succession Law Reform Act*. I also find that she is currently in need of support from Smallman's estate assets. After Smallman's death when her monthly payments of $750 ceased she attempted to work five days a week. This was detrimental to her health. She is now 63 years old and must continue to work for two years before becoming entitled to full Old Age Security and Canada Pension Benefits. She apparently received some credit split of Smallman's Canada Pension Benefits but there is no indication of what monthly amount she will receive from it. I am satisfied that she continues to be disadvantaged by having stayed at home at Smallman's request during the marriage in lieu of pursuing a career. She has been unable, therefore, since the divorce to effect any significant capital accumulation on which to now generate additional income except for the RRSP which can provide income but can then not be considered available as capital.

She seeks an order reimbursing her at the rate of $250 per month since the Court of Appeal order in November 1981 on the ground that the Court did not take into account that Smallman failed to disclose all of his assets from the court. The Applicant has withdrawn her position that Smallman deliberately misled the Court of Appeal. Between 1981 and October 1989 the Applicant did not see fit to bring any application for an increase on the basis of changed circumstances and I am of the opinion that the court cannot entertain such an application now.

I do however find that she is facing increasing needs. Having considered all the circumstances, including those set out in section 62 of the *Succession Law Reform Act*, I find it appropriate to increase the amount of her maintenance payment to $1,000 a month commencing February 1, 1991. Such payment will be a charge against all the assets of Smallman's estate and will continue during the lifetime of Allison.

Since Allison has received no monthly payments since Smallman's death, I order that she shall be paid as a lump sum $12,000 representing the 16 months from November 1, 1989 and February 1, 1991 when no payments were made, at the rate of $750 per month. This amount shall be paid first from the bank accounts in Canada so far as possible.

Broderick v. Papathanasiou [2006] O.J. No. 4707

Family law — Dependants' relief legislation — Persons entitled to relief — Whether claimant a dependant — Quantum — Relationship to deceased — Spouse — Common law — Length of relationship — 7 to 10 years — Assets of estate — $100,001 to $200,000 — Order — Final — Award — Lump sum or property value — $40,001 to $100,000 — Application for spousal support payable by the estate allowed — The deceased was divorced with two adult daughters — He passed away following an accident — The applicant contended that she was a dependant spouse based on continuous cohabitation — The court held that the applicant and deceased conducted their affairs consistent with a spousal relationship — Dependence was established based on the provision of housing and financial support — A lump-sum award was appropriate given the size of the estate and the hostility between the parties — *Succession Law Reform Ac*t, ss. 58(1) and 62(1).

Wills, estates and trusts law — Devolution of estates — Spouses — Application for spousal support payable by the estate allowed — The deceased was divorced with two adult daughters — He passed away following an accident — The applicant contended that she was a dependant spouse based on continuous cohabitation — The court held that the applicant and deceased conducted their affairs consistent with a spousal relationship — Dependence was established based on the provision of housing and financial support — A lump-sum award was appropriate given the size of the estate and the hostility between the parties — *Succession Law Reform Act*, ss. 58(1) and 62(1).

Application by Broderick for support payable by the estate of her deceased partner, Papathanasiou — The deceased passed away in 2003 at age 62 following an accidental fall — He was divorced with two surviving daughters — His will, made in 1995, was admitted to probate and named the daughters as sole beneficiaries — No provision was made for the applicant — The applicant contended that she was the dependant spouse of the deceased by virtue of their continuous cohabitation for the previous eight years — She sought unspecified periodic support, the transfer to her of a condominium owned by the deceased in which she still resided, or alternatively, a lump sum award — The applicant, age 51, was employed as a room attendant at a hotel — The daughters denied a spousal relationship between the deceased and the applicant, or

alternatively, that the applicant was not dependant — They also submitted that the deceased had no intention of including the applicant in his will — HELD: Application allowed — The testimony of the daughters regarding the relationship between the applicant and the deceased was self-serving, evasive and not credible — Birthday cards and correspondence from the daughters to the applicant was indicative of an awareness that the applicant and the deceased were partners — It was not believable that the deceased and applicant lived in the same residence as landlord and tenant — They enjoyed an exclusive conjugal relationship, undertook recreation, socialized and shared income in a manner consistent with a spousal relationship — The applicant was a dependant by virtue of the housing and financial support provided by the deceased — A lump-sum award was appropriate given the size of the estate and the hostility between the parties — The applicant was awarded half of the net proceeds from the sale of the condominium to support her transition and provide for her relocation.

Perilli v. Foley Estate [2006] O.J. No. 465

Action by the plaintiff, Perilli, against the estate of the deceased, Foley, for a constructive trust in a house owned by Foley and support pursuant to the *Succession Law Reform Act* (the Act) — Perilli was the common-law spouse of the deceased from 1988 to 2003 — The deceased bequeathed $500 per month to Perilli — Foley left $40,000 to each of his three children, $10,000 to his grandchild, and $30,000 to his first wife — Perilli claimed that although the parties contributed equally for several years, when Foley began to succumb to Alzheimer's, she quit her job and cared for Foley and the home — Perilli was 71 years old at the time of trial — Perilli continued to live in the house after Foley died — It was agreed that the rental value on the home was $1,000 per month — Foley's estate was valued at $552,435 and the house was valued at $205,000 — Perilli had assets of $90,000 and an income from pensions of $2,150 per month — Her expenses were $2,753 per month — HELD: Application allowed in part — Between 2000 and 2003, Perilli provided a disproportionate amount of services to Foley and the household — Foley was enriched by Perilli's personal contributions, and there was a corresponding deprivation — There was no juristic reason for the enrichment — A constructive trust was not necessary since an award of money for the value of the services rendered was sufficient — There was an insufficient link between the services rendered and the property — Perilli's services were valued at $15,000 per year, for a total of $40,000 — This was reduced by $5,000 for the benefit Perilli had of living rent free — Perilli was a dependant — The estate had a legal obligation to pay Perilli $600 per month in support, totaling $92,000 for the rest of her life — The total value of Perilli's claim was $127,000 — This was increased to $140,000 due to the estate's moral obligation to support Perilli — The estate adequately provided for its other moral obligations — The $140,000 was reduced for the amount already paid to Perilli and the amount of occupation rent Perilli owed.

Ivanic v. Estate of Ivanic [2005] O.J. No. 2333

Action by the wife against the husband's estate for a declaration that her husband's last will was invalid by reason that the husband lacked testamentary capacity. Alternatively, she sought a declaration that she was a dependant and sought support. Again in the alternative, she sought damages for unjust enrichment and a declaration of constructive trust for $50,000. The wife and husband married in 1953. The wife was born in 1928 and the husband was born in 1929. The wife raised the two children, who were born in 1956 and 1958. The wife and husband were estranged and did not live together after 1958. The husband was mentally ill and was admitted to various psychiatric treatment centres throughout his life. When he was under proper control, however, he operated normally. The husband's lawyer testified that the husband did not want to leave anything to the wife and believed she did not need support. The husband died in 2002 when he was 73 years old. The husband made two wills: one in 1974 and one in 1988. Both wills left all his assets to his two sons, to share equally. The wife located $29,004 that belonged to the husband but that was not received by the trustee.

HELD: Action allowed in part. The sons met the onus of proving that the husband had testamentary capacity when he made his will in 1988. The husband did not have a delusion that his wife was after his money. The wife did not prove her quantum meruit claim for unjust enrichment. There were no services provided for which the wife expected compensation. The money she found for the estate was not subject to a constructive trust. The husband had a legal right to that money and the wife did not suffer any deprivation by locating it. The wife was a dependant. She received health care benefits under her husband's plan up until his death. She demonstrated a need and the Estate had means. By locating the funds, she did contribute to the acquisition, maintenance and improvement of the husband's property. Therefore, the wife was entitled to $29,004.

Miller v. Miller Estate [2004] O.J. No. 4152 (headnote and quoting directly from the judgment)

Application by the wife for an order that the husband's estate pay support. The husband made no provision in his will for his wife of 16 years. Prior to marriage, the husband and wife each owned a home. In 1987, the husband sold his home, deposited the proceeds in a joint investment and moved into the wife's home, which was then held jointly. In 2000, the investment was placed in the husband's sole name and the matrimonial home was re-conveyed to the wife.

HELD: Application allowed. The husband resided rent-free in a home that was effectively owned by the wife, which constituted a significant contribution under the *Succession Law Reform Act*. The wife was a dependent and the husband failed to make an adequate provision for her.

The applicant alleges a shortfall of more than $900.00 monthly. This position is challenged by the respondents who suggest that it cannot be true because there has been

no significant depletion of the applicant's capital since the death of the testator in April 2003. In addition, it is suggested that the applicant could not support her financial statement when cross-examined in May of this year. On the first point, I am satisfied that the applicant has been merely scraping by since the death of her husband and has made some encroachment on capital for extraordinary expenses such as a new water softener and special hearing aids. I appreciate that these became the subject matter of interim relief. Turning to the second point, I am not persuaded that her financial statement should be ignored as a fair reading of the cross-examination suggests confusion rather than subversion.

The law does not require that an applicant under Part V of the *Succession Law Reform Act* exhaust capital before entitlement to relief: see RE Dentinger (1981), 128 D.L.R. (3d) 613 (Ont. Surr. Ct.). This is merely one of many factors that must be taken into account: see Section 62 (1)(a) *Succession Law Reform Act*. I have considered all of the enumerated factors including the length of this marriage: see Section 62 (1)(r)(ii) *Succession Law Reform Act*.

It is not contested that the applicant is a "dependant" nor that the testator failed to make adequate provision for her. Having considered the law, the evidence and the submissions of counsel, an order will go directing payment out of the estate of $750.00 monthly to the applicant retroactive to April 2003. The applicant can "top up" the $150.00 from her own resources: see Section 62 (1)(c) *Succession Law Reform Act*. I see no reason why such payments should not continue until either her death or the estate has been exhausted by them.

Cox v. Goodfriend Estate [2003] O.J. No. 4291 (quoting directly from the judgment)

Ms. Cox's financial statement sworn October 25, 2002 discloses monthly income, including estate income, of $1,232.11, and actual monthly expenses of $1,509.32 and projected monthly expenses of $2,031.03. The increase in expenses is accounted for by an overall increase in the cost of living and her assuming responsibility for payment of hydro and heat expenses. The present shortfall is $277.21 per month, the projected, $798.92.

Is Theresa Cox required to exhaust her capital before turning to the estate? In spousal support cases, dependants are expected to offset their needs to the extent their assets earn income. Ms. Cox's financial statement discloses bank accounts totaling $18,600. At today's rate of 3% she might earn $46 monthly before tax. The court finds that amount should be taken into consideration, pursuant to s. 62(1) of the Act, when determining her needs.

Taking the assets of the estate and of Ms. Cox into account, the needs of Ms. Cox, the intention of the testator as determined by considering the will as a whole, the court is satisfied Theresa Cox is entitled to $650 per month commencing November 1, 2002 in addition to whatever net income she receives from the estate.

Further, the Trustee is ordered to determine the amount paid by the estate on account of heat and hydro expenses for Theresa Cox to October 31, 2002. The court finds Theresa Cox is entitled to a one-time lump sum payment for the heat and hydro expenses so determined, but directs the Trustee to pay this amount to the residue of the estate. In addition, Theresa Cox is to repay to the account of the residue a sum equal to the heat and hydro expenses paid by the estate on her behalf commencing November 1, 2002 and continuing to September 30, 2003. The Trustee can set off this payment owed by Theresa Cox against the arrears of support accumulated since November 1, 2002 and now owing to Ms. Cox.

O'Donnell v. Richards Estate [2002] O.J. No. 55

Application by O'Donnell for support from the Estate of her deceased common law husband, Richards. O'Donnell and Richards lived together for 22 years. Richards died intestate on April 20, 1998. O'Donnell quit her employment in 1992 at Richards's request to care for him after he was diagnosed with cancer. Her monthly pension income prior to his death was $814. Richards's monthly pension income was $2,400. O'Donnell and Richards kept their finances in separate accounts but lived together. Richards paid most of the household expenses. However, O'Donnell assisted with home renovations. Richards owned the home and two rental properties. Two days before his death, Richards dictated his intentions to O'Donnell. He left one rental property to his sisters and the other property to O'Donnell. The home was to be transferred to one of his sisters. O'Donnell was given a life interest for as long as she wanted to live there. O'Donnell was also to receive Richards's pension, a spouse's allowance from the Canada Pension Plan and the Canada Pension Plan death benefit. Richards refused to sign what O'Donnell wrote out because she felt that she was entitled to more, based on the length of their relationship. O'Donnell's monthly income was reduced to $1,844. She claimed monthly support of $750. She also claimed a constructive trust in the Estate. O'Donnell was 72 years old at the time of the application and was in good health.

HELD: Application allowed. O'Donnell was awarded $220,000. She was also entitled to monthly support of $750. This would enable her to enjoy the lifestyle that she had before Richards's death. This support was made retroactive to April 1998. Retroactive support would reimburse her for expenses that she had incurred for the Estate. She was also awarded future support for ten years, totaling $90,000. This amount was reduced to $80,000 to account for contingencies. O'Donnell was entitled to a half-interest in Richards's estate based on the doctrine of constructive trust. The Estate was valued at $296,000. O'Donnell's share was worth $148,000. The matrimonial home was to be transferred to O'Donnell. The rental properties were to be sold to pay the $70,000 owed to her.

Barrett v. Kouril Estate [2001] O.J. No. 3959

Application by Barrett for spousal support from the respondent Kouril Estate. Barrett separated from her husband and moved to Canada in 1982. She rented an apartment owned jointly by the testator Kouril and his brother. In 1990, Barrett moved

into her current residence. Barrett claimed that she and Kouril had been involved in a common law relationship since 1985, during which time Kouril provided substantial financial support to her. Kouril died in 1993, making no provision in his will for Barrett's support. Kouril's brother, as executor of the estate, conceded that Kouril and Barrett were involved in a conjugal relationship, but submitted that they never cohabited on a continuous basis at any time. He claimed that Kouril maintained a unit at the rental property from 1989 to his death, and that it was his principal residence. The pastor at Barrett's church testified that he removed her from the church on the basis that she had been living with Kouril outside of marriage. Several neighbours testified that they considered Barrett and Kouril to be living as a married couple or in a common law relationship. Barrett sought spousal support under the *Succession Law Reform Act* on the basis of continuous cohabitation for not less than three years.

HELD: Application allowed. The evidence established that Barrett cohabited with Kouril from at least 1989 until Kouril's death, thereby satisfying the statutory requirement. Although Kouril might have continued to maintain a separate residence, it was clear that Barrett's residence was his primary abode. There was little doubt that he contributed to rent, groceries and family outings. Barrett was awarded a lump sum of $75,000.