

WILLS, ESTATES, TRUSTS AND CHARITIES

Courts may consider deceased's moral obligation to dependants

By John Jaffey
Toronto

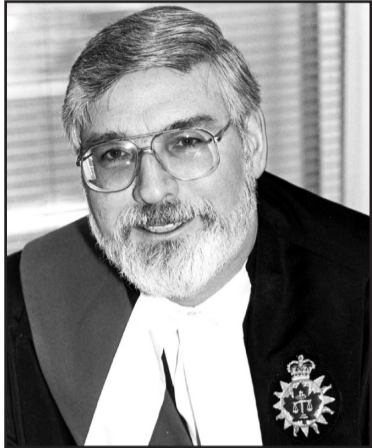
For the first time since Ontario's *Dependants' Relief Act* was replaced by the *Succession Law Reform Act* (SLRA) in 1978, the Ontario Court of Appeal has dealt with the issue of whether and to what extent moral or ethical considerations may be taken into account on a dependants' relief application.

It held that a court may take into account not only the needs and means of dependants but also the moral obligations of the deceased person toward other dependants who are not asserting need at the time.

"When judging whether a deceased has made adequate provision for the proper support of his or her dependants ... a court must examine the claims of all dependants, whether based on need or on legal or moral and ethical obligations," wrote Justice Robert Blair. "This is so by reason of the dictates of the common law and the provisions of sections 57 through 62 of the Act."

Section 58(1) of the SLRA

states that a court "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."



Justice Robert Blair

Justice Blair pointed out that before 1978, the importance of moral or ethical considerations "was well accepted in Canadian jurisprudence." He cited *Walker v. McDermott*, [1931] S.C.R. 94: "What constitutes 'proper maintenance and support' is a question to be determined with refer-

ence to a variety of circumstances. It cannot be limited to the bare necessities of existence. ... [T]he court ... would naturally proceed from the point of view of the judicious father of a family seeking to discharge both his marital and his parental duty. ..."

However, after the SLRA was passed, decisions conflicted as to the role of moral considerations in dependants' relief applications.

Justice Blair found that, in spite of slight differences in the wording of Ontario's SLRA and British Columbia's *Will Variation Act*, the Supreme Court's decision in *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807, established the pre-1978 position.

The case at bar focused on the needs of a severely debilitated adult son.

When Bruce Cummings died in July 1998, leaving a wife, an ex-wife and two dependent children, his testamentary estate was valued at \$135,000.

His "other assets" (deemed by s. 72 of the SLRA to be available for supporting a dependants' relief order) totalled \$515,000: namely, a matrimonial home and

cottage held jointly with his wife, and RRSPs naming his wife as beneficiary.

Bruce's will, dated Dec. 15, 1997, directed the setting up of a testamentary trust of \$125,000 to provide support payments for

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his dependent children in the amount of \$600 per month.

Ruta Cummings was Bruce's wife and executrix. Though they married less than a year before Bruce's death, they had cohabited since 1988. Ruta was employed throughout and was the sole breadwinner from mid-1996 until Bruce's death from cancer. Indeed, she contributed to his support obligations for his children and even paid \$600 per month for them out of her own pocket after Bruce died.

Mary Cummings was Bruce's wife from 1968 to 1986. A separation agreement, later incorporated into their divorce judgment, provided for monthly support payments of \$2,000 for the children and contained a clause saying that the agreement was binding on Bruce's heirs and executors, and that the support provisions would be a first charge on his estate.

Bruce and Mary's children were Elizabeth and Paul. At the time of Bruce's death Elizabeth was an 18-year-old university student, while Paul was a 24-year-old university graduate with Becker's muscular dystrophy, a progressively debilitating neuromuscular disease for which there is no cure.

There was no dispute that both children were dependants and that Paul would remain so until his death.

Paul and Mary (on Elizabeth's behalf) brought an application for dependants' relief pursuant to Part V of the SLRA.

Justice Maurice Cullity agreed with their argument that

see *DEPENDANTS* p.12

CCRA shuts down charitable donation tax shelters

By Robert Hayhoe

On Dec. 5, 2003, at 6:00 p.m., the Federal Department of Finance released draft legislation (effective immediately upon release) designed to eliminate the use of charitable donations as a tax shelter tool.

This Finance release followed closely after a Nov. 25, 2003, release by the Canada Customs and Revenue Agency (CCRA), which implied that, even without a legislative change, the CCRA would be attacking these structures aggressively.

The draft legislation was designed to address two basic shelter programs.

The first could be characterized as "buy low — donate high." It involved programs whereby donors could purchase goods (artwork, basic foodstuffs and medical supplies were popular) from fundraising consultants at wholesale or even fire sale prices.

These goods could then be donated to particular charities, which would issue donation receipts at retail value (backed by professional valuations arranged by the fundraising consultants).

The difference between the wholesale and retail values would be large enough to ensure

that on an after-tax basis the gift would be profitable, even after taking into account the tax on the resulting capital gain.

Although the CCRA had attempted on a number of occasions to challenge profitable



Robert Hayhoe

donations as not involving real gifts, the courts have held consistently that a profitable donation was still a gift.

While the CCRA has been successful in challenging some tax-shelter donations on the basis that the valuation of the donated gifts was inflated, this approach requires the CCRA to challenge each gift separately. Furthermore, many gifts were

backed by very sophisticated valuation reports prepared by recognized independent experts.

Draft *Income Tax Act* subsection 248(35) will operate to prevent a donor from obtaining tax recognition for the portion of the value of a claimed non-cash donation that exceeds the donor's cost for the donated property unless the donated goods were obtained more than three years ago and with an intention other than to donate the goods.

Excluded from these new rules are donations of inventory, public securities, certified cultural property, ecological property, or real property in Canada and gifts at death.

The second type of shelter (known as a "leveraged donation shelter") involves a fundraiser arranging for a loan to a donor to enable the donor to make a charitable gift. At the same time, the donor invests an amount into a fund where it will grow during the loan term to reach an amount equal to the loan payable.

These programs did not give rise to a valuation issue and are recent enough that none of them has yet been considered by the courts.

see *TAX SHELTERS* p.14

Churches should establish their position on same-sex marriage — pro or con

By John Jaffey
Toronto

In response to recent caselaw and impending federal legislation regarding same-sex marriage, churches and religious charities should take steps to establish and protect their position — pro or con — on the issue.

Addressing the annual "Church & the Law" seminar put on by his firm, Carter & Associates, Terrance Carter told a 500-plus audience that if a religious organization fails to articulate its position on same-sex marriage, it is vulnerable to a challenge under human rights legislation or under the proposed *Criminal Code* amendments regarding hate propaganda (Bill C-250).

"It's up to a church, mosque or synagogue how it's going to present itself in a civil law context," he said. "If you don't, the court will make its own interpretation based on whatever evidence it gathers."

The basis of a church's own interpretation of the meaning of marriage is contained in the Ontario Court of Appeal's ruling in *Halpern v. Canada (Attorney General)*, [2003] O.J. No. 2268, which held as follows: "Freedom of religion under s. 2(a) of the

Charter ensures that religious groups have the option of refusing to solemnize same-sex marriages." This position is also contained in Parliament's draft *Proposal for an Act Respecting Certain Aspects of Legal Capacity for Marriage for Civil Purposes* in these words: "s. 2: "Nothing in the Act affects the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs."

Carter, past chair of the Canadian Bar Association's National Charity and Not-For-Profit Law Section, began by defining churches and other religious organizations as "voluntary associations of persons who come together for a collective purpose as reflected in their respective governing agreement, namely their constitution."

He stressed the importance of the constitutional documents, which are the repository of the organization's beliefs, noting, "Since a church is nothing more than what the individuals forming it decide it to be, it is essential for churches to clearly state what they believe and, where possible, relate those beliefs to Scripture."

see *SAME-SEX* p.14

WILLS, ESTATES, TRUSTS AND CHARITIES

Churches should educate clergy about their legal rights

SAME-SEX

—continued from page 9—

The constitution for unincorporated churches usually consists of a single document; for incorporated churches, there are letters patent, general operating bylaws and policy statements.

"You can't say, 'Our constitution is the New Testament,' or 'We have our own laws and traditions,'" said Carter. "You'll be more vulnerable to attack."

He emphasized that a "Statement of Faith" should always be part of a church's constitution. "It is key," he said, "the bedrock of what you are."

If applicable, the Statement of

Faith should reflect a church's theological belief in a literal and/or orthodox interpretation of

'You can't say "Our constitution is the New Testament," or "We have our own laws and traditions." You'll be more vulnerable to attack.'

Scripture. General quotes, such as those contained in the "Apostle's Creed," can be included, but he stressed that

care should be taken not to quote passages that could be construed as promoting hatred against an identifiable group.

Other constitutional documents, such as charitable objects, operating bylaws and policy statements should contain a clear linkage with the Statement of Faith.

If the church does not support same-sex marriage, its policy statements should contain words "recognizing marriage as a holy sacrament of the church and defining marriage as being between one man and one woman in accordance with its Statement of Faith."

In addition, clergy should be required to subscribe to the church's constitution, including its Statement of Faith. The policy statement should include a term requiring marriage to be solemnized only by clergy of the local church or other clergy approved

by the church who have subscribed to the Statement of Faith and the constitution of the church.



Terrance Carter

There could also be a term restricting the use of church facilities to church programs and pur-

poses, which are consistent with the Statement of Faith. Carter cautioned that facility-use policies should use neutral wording and be prepared in a manner consistent with the requirements of the *Human Rights Code*. The wording should not refer to "identifiable groups."

Finally, he recommended that churches review their existing constitutional documents to ensure they are consistent with recent developments in the law.

He also suggested conducting a "legal audit" to examine possible exposure to legal liability. This would also apply, he said, to their liturgies and teaching materials.

"It would be prudent," he noted, "for local churches and/or denominations to educate clergy of their legal rights in relation to the fulfillment of their ministerial duties and the operations of the church as a whole."

Some changes will have unintended consequences

TAX SHELTER

—continued from page 9—

These leveraged donation shelters were addressed previously by the Department of Finance by proposed statutory changes. The new draft legislation follows this previous release and clarifies that, effective February 18, the amount of the gift is reduced by the amount of the sum borrowed to make the gift if the borrowing is limited recourse (defined broadly).

An amount owing is deemed by subsection 143.2(7) to be limited recourse unless there are bona fide written arrangements to repay the debt within 10 years and interest is paid annually within 60 days of the donor's year end at least at the CCRA's prescribed rate.

Proposed new subsection 248(37) contains a very broad anti-avoidance provision which is designed to allow CCRA to ignore transactions designed to inflate the cost of property which a donor intends to donate.

Charities, which have been involved with donation programs of the types described above, are at an increased risk of CCRA audit and should consider obtaining preventative legal advice in preparation for this possibility.

While individuals who have donated through these programs will also likely see their dona-

tions challenged, some may take comfort from the proposed changes — the existence of these amendments could be viewed as an admission that the previous rules did not prevent the operation of some donation programs.

From a taxpayer's perspective it may not be surprising that the Department of Finance announced the changes that it did.

However, some of the changes will have serious (presumably unintended) negative consequences for donors in other contexts.

For example, if an owner-manager owns shares in her company, these could become caught by the new rules if she exchanges her shares for shares of another class.

A passionate art collector who has some continuing intention to donate his collection before death could also be caught by the proposed rules.

While submissions are being made to the Department of Finance requesting that these situations be revisited, donors and advisors need to operate on the assumption that the proposed amendments will become law and will, in the ordinary course, do so with retroactive effect.

Robert Hayhoe practises charity tax law at Miller Thomson LLP in Toronto.

Sask. Q.B. orders couple to repay \$220,000 to incompetent nonagenarian

By John Jaffey
Toronto

The Saskatchewan Court of Queen's Bench has ordered a B.C.

couple to repay more than \$220,000 to their incompetent, 94-year-old aunt.

The court found that in 1999, the couple dominated the nona-

genarian, by making her completely dependent on them, moving her from her Saskatchewan home, first to Calgary, Alta., then to Kamloops, B.C., and withholding contact with her relatives and friends.

Secondly, it found that they had failed to rebut the presumption of undue influence.

Justice Mona Lynn Dovell held that the gift and trusts purportedly made by the elderly woman were void *ab initio*, due to her lack of required mental capacity.

The court was told that in 1929, 20-year-old Alice Stadnyk, the youngest of seven children, married Mike Kapacila in Alvena, Sask. The Ukrainian couple worked hard, moved to Toronto in the mid-'40s and continued to work hard. They had no children.

When Mike died in 1986, Alice returned, well-heeled, to Saskatchewan, to a two-bedroom apartment in Saskatoon.

Until 1998, she was independent, capable, healthy and sociable.

But then senility began to overtake her. One of her nephews took her to live with him in his shack in Hudson Bay, Sask. — it did not even have running water — and he began to cajole her into transferring her assets to him.

He had obtained about \$120,000 when Anne and Earl Otto, the B.C. niece and her husband, found out what was happening. They "rescued" Alice, hired a lawyer to sue the nephew — then began to do the same thing.

see NONAGENARIAN p.17

Low interest rates lead to disbursement quota problems

FOUNDATIONS

—continued from page 12—

For the privilege of giving charitable receipts to donors, charitable organizations must, with a few exceptions, spend 80 per cent of receipted donations on charitable activities (including salaries paid to those in the organization and disbursements for equipment used in the charitable activity). Hoffman said the purpose of the disbursement quota is "to discourage charities from spending excessive amounts on fund raising and from accumulating excessive funds."

She noted that there are different disbursement quotas for the three categories of registered charities, namely, charitable organizations, public foundations and private foundations.

Foundations, both public and private, are also bound by an additional disbursement quota equal to 4.5 per cent of the average value of their investment property. This amount was hardly a consideration a few years ago, when higher interest rates provided a greater return on investments. Hoffman said, "Low interest rates have recently revealed a technical problem with the drafting of the disbursement quota requirements in the Act."

She illustrated by referring to "10-year gifts," which are endowments exempted from the disbursement quota yet still subject to the 4.5 per cent disbursement. These gifts cannot support themselves if they yield an investment return smaller than 4.5 per cent, in which case, foundations may not, without collapsing the entire gift, be able to realize capital gains in order to meet this disbursement requirement.

But CCRA takes the position that even a tiny encroachment into a 10-year gift means the entire amount must be brought into the 80 per cent regime. She said CCRA has been made aware of this problem and is looking into it.

Hoffstein said that the CCRA is increasingly willing to reduce an organization's disbursement obligations if it makes an application pursuant to s. 149.1(5) of the Act to have its disbursement quota reduced for that year.

The success of the application depends on the disbursement shortfall being caused by "extraordinary circumstances beyond the charity's control" — such as inordinately low interest rates.

It is a complicated area of the law, but knowing there is some leeway may make it possible for a charity to continue its work.

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