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Family Law Newsletters
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— Epstein's This Week in Family Law

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Life Insurance - *Succession Law Reform Act* - SPOILER Number 3

Dagg v. Cameron Estate, 2016 CarswellOnt 4876 (Ont. Div. Ct.) - Aston J., Swinton J., Pattillo J. This is the third time I have written about *Dagg v. Cameron Estate* (see volume 2016-1 for the last comment), and the more I write about this particular case, the more I am concerned that there are serious reasons to doubt the correctness of the decision. However, I must confess that my office now has a role in this case as we are co-counsel for the appellant.

Those of you that have followed this case and are faithful readers of the *Newsletter* will recall that this is about life insurance, irrevocable beneficiaries, and the *Succession Law Reform Act* in Ontario.

The deceased, by consent (confirmed in a consent order) was to maintain his first wife as irrevocable beneficiary of his life insurance policy. He did that. However, by the time he died, he had another child and another spouse.

On his death, his first wife claimed the proceeds of the policy in accordance with the consent, but the second spouse claimed the proceeds or at least a good share of them pursuant to section 72(1)(f) of the *Succession Law Reform Act*. This clawback section of the SLRA would put the insurance policy back into the husband's estate notwithstanding the irrevocable designation to his first wife, and as a result, make the proceeds available to a *Succession Law Reform Act* claim.

Two courts below have interpreted this section as not permitting the first wife to claim all the insurance proceeds notwithstanding the fact that she was the irrevocable beneficiary, and notwithstanding the fact that at the time of the husband's death she was entitled to receive child and spousal support.

The wife appealed to the Divisional Court, and the Divisional Court, in what appears to me to be a rather hasty judgment, dismissed the appeal. I deal only with the creditor's rights issue as argued before them.

The Divisional Court recognized that section 72(1)(f) of the SLRA captures the insurance proceeds because the deceased owned the policy at the time of his death, but the issue is whether under section 72(7) the first wife can avoid the clawback because section 72(1)(f) does not affect "the rights of creditors of the deceased in any transaction with respect to which a creditor has rights".

The Divisional Court analysed whether the first wife had rights "in a transaction as a creditor." The Court and

counsel recognized there was no jurisprudence applying this section, but the respondent submitted that the words "creditor", "transaction", and "right" are not defined in the SLRA and general dictionary definitions do not assist. I would have thought that the words should have been given their ordinary meaning, and that the wife was indeed a creditor of the deceased because she was legally entitled to receive child and spousal support from him at the time of his death pursuant to the consent and consent order. She was a support creditor.

I accept that the Divisional Court is probably correct in finding that the wife was not a secured creditor just because she was an irrevocable beneficiary. However, even the respondent conceded that the wife was a general unsecured creditor of the estate because of her right to support. But if she was a creditor of the estate, she was also a creditor of the deceased. The respondent argued that since she is not a secured creditor, she is not entitled to claim the protection of section 72(7). Respectfully, it is here that the Divisional Court goes wrong. The Divisional Court says this:

> Anastasia is a creditor of the estate in the sense that she has a claim for future child and spousal support. However, her claim in that regard has no priority over the claims of other dependents, unless she is a secured creditor with a right to realize on her security. If Anastasia is to receive any or all of the insurance proceeds as a creditor, the onus is on her to prove that the irrevocable beneficiary designation created a security interest in the Policy. That onus has not been satisfied.

Respectfully, nowhere in the statute, and in the particular section, is there a discussion of being a "secured creditor". If the legislature wanted to say that, it could easily have done so.

The Divisional Court then goes on to discuss section 34(1)(i) and (k) of the *Family Law Act* and section 15.2 of the *Divorce Act* and notes that the trial judge did not go so far as to say that an order for security can only be made under section 34(1)(k). I have no idea what that finding is supposed to mean. The life insurance was clearly security for spousal support. What other possible basis in statute would there be for the husband making the wife an irrevocable beneficiary?

The Divisional Court says this:

> Though orders under s.34(1)(i) [under the FLA] are commonly made for the specific purpose of securing future support, such orders are not necessarily an order for security.

Respectfully, that is also a misstatement of the current law and current practice. Whether the life insurance is intended to be replacement for the ongoing child and spousal support or a free standing obligation providing that the life insurance proceeds are payable on the death of the insured, the life insurance is to replace support. It is, in every sense, security for the spousal and child support. I agree this does not make the wife a "secured" creditor, but certainly makes her a creditor *simpliciter*.

I am loath to comment on cases in which my office is involved, but this is a very significant case that affects literally thousands of separation agreements in Ontario. It potentially renders nugatory thousands of agreements where a first spouse has been named as irrevocable beneficiary in trust for herself and children. It was never intended by drafters of those agreements that a second wife or more children could come along and claim the benefits of the policy and thereby undermine the security provisions of the first agreement.

If the statute is to be interpreted in a common-sense fashion and the words are given their ordinary meaning, it seems to me abundantly clear that the wife and her children were creditors of the deceased at the time of his death, and accordingly, have the protection of section 72(7) of the SLRA and the policy is not subject to clawback.

At the time of publication, a leave to appeal application is being considered. In the meantime, counsel will have to consider the very serious implications of this judgment and how to deal with past and future life insurance clauses. We may not have heard the last of this particular issue.

Calculation of Income for Child Support Purposes - Consideration of Investment Losses

Kohlman v. Bergeron, 2015 CarswellAlta 2352 (Alta. C.A.) - Ronald Berger J.A., Myra Bielby J.A., Barbara Lea Veldhuis J.A. In this dispute about child support, the trial judge was inclined to adjust the father's income in circumstances where the father was repaying monies to cover investment losses in a business that failed. The trial judge found that the decision to invest in the business was a risk which, nevertheless, had been concurred in by the mother. Canada Revenue Agency had accepted the business investment losses against the father's employment income. The father argued that his guideline income should be reduced by the annual repayment of the costs of the loans borrowed in relation to the losses.

The child was 11 years old. Nevertheless, the chambers judge was of the view that ongoing payment to retire the debt could be made "after the child had left the nest". She held that the child is a first charge on the father's income and payments to be made to third parties do not rank in priority.

The father argued in the Court of Appeal that the chambers judge had failed to apply the provisions of section 8 of the schedule of the Guidelines and failed to apply section 17(2) of the Guidelines to adjust his income to take into account the amount of the losses.

The Court of Appeal noted that section 16 of the Guidelines is also engaged since it requires an adjustment of income in accordance with Schedule 3.

There was no dispute in this case that the losses incurred by the father were unrecoverable and had to be repaid. They are distinguishable from a loss occasioned by improvident investment of savings. The chambers judge considered that the father had regular employment income and decided to take a risk and must now repay the money he borrowed. The chambers judge thought that repayment takes second place to his obligation to his children. The Court of Appeal noted that if that was an overriding principle, then section 8 of the Schedule 3 could never operate since the chambers judge's interpretation would mean that a payor could never deduct business losses as expressly permitted by that section.

The Court of Appeal noted, of course, that is not what section 17(2) provides. Excluding business losses does not necessarily provide the fairest determination of annual income.

The Court of Appeal sent the matter back for the appropriate and relevant inquiry which directs the judge to wrestle with the following questions.

a) Was the investment made in good faith in the expectation of profit?

b) Was there a reasonable likelihood of profit being made from the business in which the loss was incurred at the time the investment was made?

c) Documentary proof of the portion of the loan advanced by a family member, the interest rate paid on the loan and proof of actual repayment.

d) Whether the entire loan had been repaid during the years over which retroactive child support is claimed and, if not, what portion was repaid in each relevant year?

e) Whether any portion of the loan remains unpaid and, if so, when it is required to be paid by the underlying loan documentation?

f) The size of the loan in comparison to the payor's income from all other sources.

Evidence on these issues will allow the court below to determine whether it would be fair to allow any or all of the father's business losses by way of assessing the actual quantum and the degree of risk undertaken by the parents at the time of the investment. The Court of Appeal wisely notes that allowing the deduction of some or all of the business losses in setting guideline income is "premised on the proposition that had the business made income, that income would have been added to the father's employment income for the purpose of determining

child support". This case is a brief but useful primer on the role business losses may play in determining income and what factors need to be considered.

Stay of Proceedings Pending Leave Application to the Supreme Court of Canada - *Hague Application*

Solis v. Tibbo Lenoski, 2015 CarswellBC 3918 (B.C. C.A.) - Harris J.A. In an earlier *Newsletter*, I commented on this *Hague* decision wherein the Court of Appeal for British Columbia ordered the return to Mexico, in particular of the child D that suffered autism, and the evidence was that there was no appropriate available treatment for him in Mexico, but there was in Vancouver.

The trial judge had concluded that the father could not meet the test of grave harm, notwithstanding the fact that the child is going to be deprived of the intensive treatment in Vancouver.

The father appealed to the Court of Appeal which held that the trial judge correctly interpreted Article 13(b) of the *Convention*.

The father, undaunted, sought leave to the Supreme Court of Canada and, while that leave application was pending, the stay application was before the Court of Appeal. While the Supreme Court of Canada has jurisdiction to hear the stay motion, they routinely send those motions back to the Court of Appeal to the province from which the appeal emanated.

That process makes the applicant counsel quite nervous since they have to seek leave from the very court that just denied the appeal. Nevertheless, this is one of the few cases in which the same Court of Appeal grants a stay. Justice Harris of the British Columbia Court of Appeal accepted that there was a serious issue here in that it involved the interpretation of Article 13(b) of the *Hague Convention* and the test for the grave risk of harm. That is, can the fact that the child is going to be deprived of much needed treatment in Mexico meet the threshold test under Article 13(b)? Justice Harris considered that this is a serious issue and that there is a reasonable possibility that the Supreme Court of Canada will grant leave, and provide some further clarification to lower courts as to the full extent of Article 13(b). The other tests for a stay were easily met, since there is a serious issue to be tried and the balance of inconvenience favours the father, and there will be irreparable harm if the order is not stayed. Thus, the stay is granted and, in the meantime, the Supreme Court of Canada continues to ponder the leave application.

Contempt - Appropriate Punishment

Perna v. Foss, 2015 CarswellOnt 13749 (Ont. S.C.J.) - Ontario Family Court - R.E. Charney J. The paternal grandmother brings a motion for contempt against the child's mother for refusing access in accordance with the previous court order.

The motion was heard on affidavit evidence. In setting out the specific dates in which access was denied, the applicant included some text messages in which the mother made it clear that she was not going to comply with the court order. It reminds me that hearings these days of just about any sort that involve affidavit evidence are not generally based on "he said, she said", but rather "he wrote, she wrote", whether it be by email or text. Clients need to be reminded, particularly in high-conflict cases, that what they put in any form of social media may well appear in subsequent court proceedings.

Justice Charney recognizes that contempt is not to be found lightly and reviews some of the leading cases about contempt proceedings in family law cases. He finds that there is no doubt at all in this case that the mother was in contempt of the court order. Justice Charney is aware of the wide variety of remedies available under Rule 31(5) of the Family Law Rules and recognizes that having found the mother guilty of contempt, he needs to move to the second stage approach in order to award the appropriate remedy.

However, the usual approach in family law cases is to adjourn the matter after the finding of contempt and give the contemptor the opportunity to purge the contempt or indicate that the behaviour will change. Justice Charney

does not follow that path for very good reasons in this particular case.

> In my opinion, it is an abuse of process to assert a right to be heard by the court and at the same time refuse to undertake to obey the order of the court so long as it remains in force . . . It is a general rule that a party in contempt will not be heard in the proceedings until the contempt is purged: *Hadkinson v. Hadkinson*, [1952] 2 All E.R. 567, [1952] 2 T.L.R. 416 (C.A.), at p. 569 All E.R.; *Newfoundland (Treasury Board) v. Newfoundland Association of Public Employees* (1986), 1986 CanLII 2399 (NL CA), 59 Nfld. & P.E.I.R. 93 (Nfld, C.A.), at p. 95.

The mother has an outstanding motion seeking an order that she be permitted to travel with the child and remain in the Dominican Republic for half the year. Obviously, this is a motion of very significant importance to the mother.

Justice Charney determines that the appropriate penalty in this case is to refuse to hear the mother's outstanding motion to change or any other motion brought by her until she brings herself into compliance with the access provisions of the previous court order. It would be hard to fashion a more appropriate penalty or send a clearer message to the mother about the importance of respecting court orders.