

Wills, Trusts & Estates

Getting pre-retirement death benefits when left out of the will

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(August 21, 2018, 8:34 AM EDT) -- At a time when mourning is already the prevailing emotion, it is not uncommon for clients to find out in the face of the death of their loved one that they have not been provided for in the deceased's will or considered with respect to the deceased's assets that pass outside the estate. Fortunately, the *Succession Law Reform Act* (SLRA) provides a statutory mechanism for a dependant to commence a dependant's relief claim against the deceased's estate and assets that pass outside the estate, for support where the deceased has not adequately provided for a dependant's needs.

One of the most important considerations in launching a dependant's relief claim is to determine the assets of the estate, including the assets that may have passed outside the estate as covered by s. 72 of the SLRA. Section 72 provides a list of assets and transactions effected by a deceased before their death that should be included and deemed part of their net estate for the purposes of ascertaining the value of the estate and which would be available to be charged for payment by an order for support on a dependant's relief claim.

What has been affirmed recently by the court is that a pre-retirement death benefit — a benefit available pursuant to a retirement/pension plan the deceased was a member of — that is passed on to a spouse outside the estate, is to be included in the assessment of the assets available to satisfy a Dependant's Relief Claim. This is an interesting addition to the pool of available assets for such claims.

In *Cotnam v. Rousseau* 2018 ONSC 216, the court has confirmed that a pre-retirement death benefit could be clawed back into the estate and fall under s. 72 of the SLRA such that it is available for consideration of a dependant's relief claim. Furthermore, the court found that s. 72 of the SLRA permits the court to attribute to the estate *the capital value* of assets designated to beneficiaries under a retirement plan or policy.

In *Cotnam*, the applicant, a dependant child, sought to have the deceased's pre-retirement death benefit which had been passed to the deceased's spouse, included in the estate under s. 72(1)(g) of the SLRA as an amount payable under a "*designation of beneficiary*". The respondent, the deceased's spouse, had received a lump-sum payment being the death benefit under the deceased's plan as his spouse pursuant to s. 48(6) of the *Pension Benefits Act* (PBA). She however resisted the pre-retirement death benefit being included as part of the assets of the estate. Section 48(6) of the PBA restricts the ability of a pension holder to designate an operable beneficiary designation if the member has a spouse at the time of his/her death. The respondent argued that she received the pre-retirement death benefit as a "spouse", not as a "designate beneficiary". As a result, she argued that s. 72(1)(g) of the SLRA had no application.

The court however disagreed with the respondent's interpretation of the interaction between s. 48 of the PBA and s. 72 of the SLRA. The court stated: "While subsection 48(6) clearly creates a statutory priority between a 'spouse' and other designated beneficiaries with respect to pre-retirement death benefits, I do not agree that this spousal priority shelters pre-retirement death benefits paid to a spouse from the 'claw back' provisions of the SLRA. If Parliament intended such an exception to apply to the pre-retirement death benefit, they would have been explicit in this regard."

The effect of this was that the value of the pre-retirement death benefit was included as an asset of the estate available for the dependant's relief claim. The court ordered that one half of the pre-retirement death benefit was to be assigned to the applicant and was to be maintained in a trust account on her behalf. The court's disposition in this regard was to ensure that the respondent did not have to bear the tax consequences of a transfer and that the applicant would retain any tax benefits properly accruing to her.

In considering the dependant's relief claim of the applicant, the court did confirm that the respondent as the deceased's spouse too was a dependant and awarded a fair allocation of support between the applicant and the respondent. There is a balancing of interests exercise that the court is required to go through to ensure that a fair determination is made with respect to the allocation of the assets of an estate and respecting the wishes of the testator at the same time. This should always be kept in mind in proceeding with dependant's relief claims.

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