



Case Comment – *Su v. Lam*, 2011 ONSC 1086 (CanLII):

Obligation to provide support to a common-law spouse can be found by referring to the *Family Law Act*

*Elizabeth Bozek**

Background Facts

The Plaintiff in this case was an unrepresented party who claimed to be the common-law spouse of the deceased. The Defendant was the deceased's former husband in his capacity as the Estate Trustee of her Estate, and he alleged that the Plaintiff and the deceased had not been in a conjugal relationship at the time of the deceased's death but in fact had only been business partners. The deceased had executed a Will one year before her death, wherein she bequeathed "plan benefits" to the Defendant and the residue to be shared by their two adult children. She did not leave anything to the Plaintiff.

At the time of the deceased's death, both the Plaintiff and the deceased were still married to their respective former spouses (and in both cases, divorce proceedings had been commenced but neither had been completed). The Plaintiff asserted that from 1993 until the deceased's death in 2004, they had lived together in a conjugal relationship; however, their living arrangements were not traditional. When they first began their relationship, the deceased and Plaintiff lived in an apartment on Parliament Street in Toronto. They then moved into the Plaintiff's house in Scarborough and lived there until his wife and daughter arrived from China and moved in; the plaintiff and the defendant then moved into a house that the deceased had purchased close by. The deceased and Plaintiff also lived together for some time in an apartment above a Chinese restaurant they had purchased and ran in Picton. Once the deceased became ill, she sometimes remained in Toronto, and the Plaintiff visited her from Picton when he could. Interestingly, the deceased also resided a few nights a week with the Defendant and their two children (likely due to the fact that the deceased and the Defendant had not revealed to their children that they had in fact separated).

The Plaintiff and the deceased also entered into numerous business ventures together, including the Chinese restaurant.

Legal Analysis

Section 57 of the *Succession Law Reform Act* defines a dependant as

“the spouse of the deceased ... to whom the deceased was providing support or was under an obligation to provide support immediately before his or her death”.

In finding the Plaintiff was the common-law spouse of the deceased, Justice Stinson considered whether they had been in a conjugal relationship at the time of her death for at least the requisite period of three years. The court reviewed the seven factors set out in *Molodowich v. Pettinen* (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.), to be taken into account in determining whether a conjugal relationship existed between two individuals (namely, shelter, sexual and personal behaviour, services, social activities, societal integration, economic support and children of the relationship). While there was limited evidence provided regarding the attitude and conduct of the community to the deceased and Plaintiff as a couple, of their participation in community activities, and their sexual relationship, the court nevertheless found the Plaintiff and the deceased had been in a conjugal relationship.

Most interesting was the Plaintiff’s argument that an obligation for support existed, as he asked the court to refer to section 30 of the *Family Law Act*:

“Every spouse has an obligation to provide support for himself or herself and for the other spouse, in accordance with need, to the extent that he or she is capable of doing so.”

Justice Stinson rejected the Defendant’s argument that the *Family Law Act* could not supplement the interpretation of the *Succession Law Reform Act*. Instead, he held that because section 29 of the *Family Law Act* has the same definition of “spouse” as section 57 of the *Succession Law Reform Act*, section 30 of the *Family Law Act* could be referred to in finding an obligation to provide support for the purposes of the *Succession Law Reform Act*. As such, an obligation for support was found to exist by the deceased to the Plaintiff.

Commentary

Despite the success of the Plaintiff, no order for support was made because there was unsatisfactory evidence regarding the assets of the estate. Instead, Justice Stinson ordered that the parties re-file evidence so that the issue of quantum of support could be considered.

Nevertheless, this case may open the door for dependant support claims in which there may not be strong evidence that the deceased had been under an obligation to provide support to the Plaintiff. Of note is the evidence of the Plaintiff regarding the finances of the couple: he advised the court that he had lent money to the deceased to support her in property investments she had been involved in with the Defendant, and that their finances were integrated and interdependent. While there had been mutual support provided by the parties, it seems that the obligation for support was found solely from reliance on section 30 of the *Family Law Act*.

Another interesting element of this case is that a lawyer did not represent the Plaintiff. Unrepresented parties are becoming a more prevalent occurrence in our courts and, while the court noted that the Plaintiff in this case was not always organized in presenting his case, he nevertheless made a reasonably sophisticated argument. Cases against unrepresented parties require special attention by a solicitor to ensure the rights of the unrepresented party are protected. At the same time, this case reminds us that a file against an unrepresented litigant is not necessarily a “slam dunk” due to the unrepresented party’s lack of legal expertise.

**Elizabeth Bozek - Schnurr Kirsh Schnurr Oelbaum Tator LLP*