

The Advocates' Society

CONDUCTING A DEPENDANT SUPPORT TRIAL

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*The Secrets of Successful Examination in Chief and Cross-Examination
at a Dependant Support Trial*

CROSS-EXAMINATION IN A DEPENDANT SUPPORT TRIAL

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1. To be asked to participate on a panel such as this by seasoned litigators Clare Burns and Justin de Vries, is flattering indeed. I am very grateful for the invitation.
2. What I hope to achieve in these notes is to give the reader practical guidance on cross-examination in general, and cross-examination at trial in a dependant support claim, in particular. When read in conjunction with the excellent paper by my co-panellist Kelly Charlebois on examination-in-chief, I hope the reader will find themselves in a good position to begin preparation to conduct a dependant support trial.

Cross-examination in general

3. Top English barrister (subsequently a member of the UK Supreme Court) Jonathan Sumption listed the following 3 things as the key to good cross-examination:
 - a) know your material backwards, preferably better than the witness;
 - b) know exactly what it is that you are trying to prove; and
 - c) spot your opportunities when they arise.
4. You can watch his five-minute interview here <https://www.youtube.com/watch?v=I8DlcexQiPw>. You can read part of his inspiring cross-examination of Boris Berezovsky in the famous 2011 UK Abramovich trial here - https://pravo.ru/store/interdoc/doc/298/Day_4.pdf. Required reading for those who wish to be good cross-examiners is the superb account of Geoffrey Lawrence's cross-examinations in the 1957 Adams trial The Best We Can Do by Sybille Bedford, and Easing the Passing by the trial judge Patrick Devlin.
5. An efficient method of preparing cross-examination is to begin with a list of the discreet points you must prove. Put each point in bold at the top of a clean page. Beneath list the evidence that supports proof of that point, with page references to the record. This is preferable to writing out the questions

to be asked. It enables the cross-examiner to keep their eyes on the witness and focus on the answers given. It tethers the examiner to the point to be proven so that in the storm of cross-examination the examiner can easily find their way back to the point until either the answers have established it, or the witness has acknowledged and been confronted with inconsistent evidence. The examiner can then satisfy the rule in *Browne v. Dun*, turn the page and move on to the next point.

6. Listing the point to be proven clearly at the top of separate pages also permits the examiner to go with the flow of answers and “take their opportunities as they arise”. Answers do not always come in the order you might expect.
7. In my experience, in order to achieve the necessary depth of familiarity with the record, as a rule of thumb, the examiner needs to spend about ten times the time preparing for cross-examination, as the time the cross-examination itself takes.
8. There are several considerations peculiar to trial as opposed to out of court cross-examinations. Everything done in the presence of the trier of fact must be done with two things in mind:
 - a) You have to work out what the judge is going to find appealing;
 - b) The key to persuading is to reduce your argument to the simplest dimensions. (Per Jonathan Sumption, “Law is just common sense with knobs on.”)
9. Nowhere are these principles more true than in cross-examination. If the Court sees you deal with a witness unfairly or aggressively, the Court will be less inclined to want your help in coming to its decision, and less willing to find against the witness you cross-examined on issues of credibility. Both things will probably be fatal to your case.
10. If you fight with the witness on points you cannot clearly win, the Court will become impatient. Your case will not be appealing. Pick your battles. Concede what should be conceded.

Cross-examination: dependant support trial

11. The “goal posts” – *i.e.* exactly what must be proven in a dependant support trial – are contained in Part V of the *Succession Law Reform Act*. The key provisions which prescribe eligibility for support and determination of appropriate quantum, are set out in Sch “A” to these notes, for your ease of reference.
12. Onus is borne by the applicant. What the cross-examiner of the applicant must establish is that the claimant has not met the burden of proving either dependency or inadequate support. (The applicant must prove both.)
13. When cross-examining the respondent estate’s representative on behalf of the applicant, the cross-examiner naturally has a different task: he or she must obtain admissions that neutralize evidence adduced by the estate to deny dependency and inadequate provision.
14. A critical role of counsel for the applicant is to accurately assess whether the respondent has adduced such evidence. If not, there must be no cross-examination.
15. While there will sometimes be issues about whether the applicant is biologically a “child” of the deceased, or a person whom the deceased demonstrated a settled intention to treat as a child of his or her family, these notes address only the following (more typical) questions:
 - a) Is the applicant a ‘dependant’?
 - b) Did the deceased make adequate provision for the dependant’s proper support? and
 - c) How is the appropriate quantum of support determined?

Issues for cross-examination re dependency

16. Was the deceased providing support (or under a legal obligation to) immediately before death?
17. What was the nature of the support? With what frequency was it given? Note the meaning of “support”: it is not limited to the bare necessities of existence (*Michael v. Thomas* 2018 ONSC 3125); nor is it limited to financial support.
18. What legal obligations would have been imposed on the deceased had the question of provision arisen during his or her life?
19. What moral obligations if any arise between the deceased and the dependant as a result of society’s expectations of what a judicious person would do? (*Cummings v. Cummings* [2004] O.J. No 90)
20. Where dependency is alleged based on cohabitation and free housing expenses, distinguish between dependency, mutual cohabitation and a cost-sharing arrangement between the claimant and the deceased.

Issues for cross-examination re support

21. How do the claimant’s expenses and income in the period immediately prior to death compare to expenses and income at the time of trial?
22. Support must be determined with regard to accustomed standard of living. (*Michael v. Thomas* 2018 ONSC 3125)
23. The cross-examiner must scrutinize the (non-exhaustive) list of 19 circumstances set out in s. 62(1) which the Court ‘shall consider’ in determining quantum and single out those he or she knows the witness must admit. Isolate out those circumstances. Leave the others alone: do not argue over weak points.

24. NB: the Court is not restricted to the evidence on quantum led by the parties – it may direct “other evidence” to be given as the Court deems necessary and proper (s. 61(2)).
25. Are there other dependants, not parties, who may have a claim on the estate? Are there non-dependants who may have a legal or moral claim? The court must identify and tentatively value these, and balance the competing claims. This may affect the quantum of support available to the claimant. (*Stevens v. Fisher*, 2013 ONSC 2282)
26. The size of the estate is relevant to its ability to pay support. The estate includes assets deemed to belong to the estate by virtue of s. 72.
27. Remember the principle of testamentary freedom still applies in support applications: the Court may accept evidence (including the deceased’s written statements) as to the deceased’s reasons for making dispositions in a will, or for not making adequate support for a dependant (s. 61(3)). For example if the deceased directs that the inheritance of the claimant shall be held in a trust, the Court may conclude if the claimant is entitled to support, it too should be paid through the trust.
28. In assessing the weight to be given to the deceased’s written statements of reasons for dispositions, the Court “shall have regard to all the circumstances from which an inference can reasonably be drawn as to the accuracy of the statement.

Schedule A

Key provisions of SLRA re

Dependancy

“dependant” means,

- (a) the spouse of the deceased,
- (b) a parent of the deceased,
- (c) a child of the deceased, or
- (d) a brother or sister of the deceased,

to whom the deceased was providing support or was under a legal obligation to provide support immediately before his or her death; (“personne à charge”)

“child” means a child as defined in subsection 1 (1) and includes a grandchild and a person whom the deceased has demonstrated a settled intention to treat as a child of his or her family, except under an arrangement where the child is placed for valuable consideration in a foster home by a person having lawful custody;

“child” includes (subsection 1 (1)),

- (a) a child conceived before and born alive after the parent’s death,
and
- (b) a child conceived and born alive after the parent’s death, if the conditions in subsection 1.1 (1) are met; (“enfant”)

Provision

58 (1) Where a deceased, whether testate or intestate, has not made adequate provision for the proper support of his dependants or any of them, the court, on application, 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. R.S.O. 1990, c. S.26, s. 58 (1).

(2)...

(3)...

(4) The adequacy of provision for support under subsection (1) shall be determined as of the date of the hearing of the application. R.S.O. 1990, c. S.26, s. 58 (4).

Determination of amount

62 (1) In determining the amount and duration, if any, of support, the court shall 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;
 - (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;
 - (o) the claims that any other person may have as a dependant;
 - (p) if the dependant is a child,
 - (i) the child's aptitude for and reasonable prospects of obtaining an education, and
 - (ii) the child's need for a stable environment;
 - (q) if the dependant is a child of the age of sixteen years or more, whether the child has withdrawn from parental control;
 - (r) if the dependant is a spouse,
 - (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,
- (vi.1) REPEALED: 2005, c. 5, s. 66 (10).

- (vii) the effect on the spouse's earnings and career development of the responsibility of caring for a child,
- (viii) the desirability of the spouse remaining at home to care for a child; and
- (s) any other legal right of the dependant to support, other than out of public money. R.S.O. 1990, c. S.26, s. 62 (1); 1999, c. 6, s. 61 (3-5); 2005, c. 5, s. 66 (9-11).

Evidence

(2) In addition to the evidence presented by the parties, the court may direct other evidence to be given as the court considers necessary or proper. R.S.O. 1990, c. S.26, s. 62 (2).

Idem

(3) The court may accept such evidence as it considers proper of the deceased's reasons, so far as ascertainable, for making the dispositions in his or her will, or for not making adequate provision for a dependant, as the case may be, including any statement in writing signed by the deceased. R.S.O. 1990, c. S.26, s. 62 (3).

Idem

(4) In estimating the weight to be given to a statement referred to in subsection (3), the court shall have regard to all the circumstances from which an inference can reasonably be drawn as to the accuracy of the statement. R.S.O. 1990, c. S.26, s. 62 (4).

Value of certain transactions deemed part of estate

72 (1) Subject to section 71, for the purpose of this Part, 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 as of the date of the death of the deceased and shall be deemed to be part of his or her net estate for purposes of ascertaining the value of his or her estate,

and being available to be charged for payment by an order under clause 63 (2) (f),

- (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;
- (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. R.S.O. 1990, c. S.26, s. 72 (1); 1999, c. 12, Sched. B, s. 17.

Idem

- (2) The capital value of the transactions referred to in clauses (1) (b), (c) and (d) shall be deemed to be included in the net estate of the

deceased to the extent that the funds on deposit were the property of the deceased immediately before the deposit or the consideration for the property held as joint tenants was furnished by the deceased.

Burden of proof

(3) Dependants claiming under this Part shall have the burden of establishing that the funds or property, or any portion thereof, belonged to the deceased.

Idem

(4) Where the other party to a transaction described in clause (1) (c) or (d) is a dependant, he or she shall have the burden of establishing the amount of his or her contribution, if any.