CITATION: Linseman v. Linseman, 2024 ONSC 5127
DIVISIONAL COURT FILE NO.: 2867/24
DATE: 20241202

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

J.A. Ramsay, O'Brien, and Leiper JJ

BETWEEN:	
HEATH BARRETT LINSEMAN AND SHELBY DIANA LINSEMAN, IN THEIR CAPACITY AS ESTATE TRUSTEES FOR THE ESTATE OF RAYMOND EDWARD LINSEMAN Appellants	*C. Hammond,* Counsel for the Appellants
– and –	
ERIC LINSEMAN Respondent	*J. Collings,* Counsel for the Respondent
	HEARD in Ottawa: by videoconference on November 12, 2024

O'BRIEN J.

REASONS FOR DECISION

Overview

[1] The central question on this appeal is whether the application judge erred in finding Eric Linseman to be a dependant of his grandfather, Ray Linseman, and entitled to support under the *Succession Law Reform Act*, R.S.O. 1990, c. S. 26 (the Act). The appeal also raises the question of the appropriate remedy if Eric is a dependant.

[2] Eric's mother was 16 years-old when Eric was born. He left her care when he was around age 15. He has no relationship with his father. In his reasons, the application judge, Carey J., found Eric had faced serious physical, behavioural and cognitive challenges: *Linseman v. Linseman*, 2024 ONSC 1114. As a result, he lived with and was assisted by his grandfather.

[3] The application judge concluded Eric was Ray's "dependant." The application judge relied on Eric's evidence that he had mostly lived at Ray's house until he was removed by the estate trustees when Ray died on January 30, 2021. The estate trustees are Eric's mother Shelby Linseman and her brother, Heath Linseman. The application judge accepted that Ray acted as a loving parent toward Eric. He also relied on Ray's designation of Eric as a beneficiary for investments of roughly $285,000 (which he described as a trust fund). In determining the amount of support that was appropriate, the application judge found there was a need to supplement the funds provided by Ray. He concluded the appropriate remedy was to transfer Ray's house into Eric's name.

[4] The estate trustees challenge these conclusions. They submit the application judge erred in finding Eric to be a "dependant." They argue that the application judge's findings were undermined by his misdescription of Ray's gift to Eric on death as a "trust fund." In any event, they say Ray's beneficiary designation of $285K provided Eric with adequate support. They also submit that an order transferring the house was not the appropriate remedy.

[5] For the following reasons, the appeal is allowed on the issue of remedy and otherwise dismissed. In my view, there was no error in finding Eric to be Ray's dependant. However, I do find an error in the decision to transfer Ray's home into Eric's name. Eric shall instead receive a monetary award from the estate.

Standard of Review

[6] The question for this court is whether the application judge reasonably exercised his discretion under the Act. The application judge is entitled to deference. In the absence of an error in principle, a failure to consider material evidence, or the giving of too much weight to one relevant consideration over others, this court will not interfere with the exercise of discretion. The court should not overturn a support order simply because it would have made a different decision or balanced the factors differently: *Quinn v. Carrigan*, 2014 ONSC 5682, at para. 68.

Was it an error to find Eric was Ray's dependant?

[7] The appellants submit it was an error to find Eric to be a dependant when Ray did not financially support Eric before his death. They say the application judge made a palpable and overriding error in relying on what he incorrectly described as a trust fund that Ray had established for Eric. He also failed to consider s. 13 of the *Evidence Act*, R.S.O. 1990, c. E. 23, which required corroborating evidence to support Eric's position that Ray had provided financial support.

[8] Under s. 58(1) of the Act, where a deceased has not made adequate provision for the proper support of his dependants, the court may order "that such provision as it considers adequate" be made out of the estate.

[9] Ontario courts have adopted the following steps from *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807 when considering an application for support by a dependant:

a. The applicant must show he or she was a dependant of the deceased;

b. The applicant must show the deceased did not make adequate provision of proper support for the applicant; and
c. The court will determine the amount of support the applicant should receive.

[10] It is necessary to consider both legal and moral grounds for a dependant's claim to support: *Charles v. Junior Estate*, 2018 ONSC 7327, at paras. 23-24.

[11] In determining the first step, whether Eric was Ray's dependant, I disagree that the application judge's description of the gift to Eric as a trust fund was a palpable and overriding error. A few years before his death, Ray designated Eric as a beneficiary of investments with a value of approximately $285,000. There was some dispute about whether this gift could be described as a resulting trust, but I accept that neither party characterized it before the application judge as a trust fund.

[12] Even if the application judge erred in describing it as a trust fund, the error was not overriding. It did not affect the outcome. The application judge did not rely on the gift to suggest Eric had been receiving payments from a trust while Ray was alive. For example, the application judge recognized that Eric had described this gift as an "inheritance." The application judge considered Ray's decision to provide a fund for Eric after his death as evidence of Ray's desire to support his grandson and an acknowledgment of Eric's ongoing needs. There was therefore no error in how this evidence was used, even if it was incorrectly described.

[13] While the application judge relied on other evidence to support the finding that Eric was Ray's dependant, the appellants submit this evidence demonstrated only moral support and not financial support. They say a finding of moral support is insufficient because the statute requires Ray to have been providing financial support to Eric immediately before his death. Subsection 57(1) of the Act defines "dependant" as including a child (which is defined to include grandchild) of the deceased "to whom the deceased was providing support…immediately before his or her death." According to the appellants, the only evidence of financial support immediately before death was provided by Eric himself. They say this did not meet the requirements of s. 13 of the *Evidence Act* because there was no corroborating material evidence.

[14] I would not interfere in the application judge's finding of dependency. The application judge reached his conclusion on all the evidence, including Eric's vulnerable situation, the relationship between Ray and Eric, and the evidence of Ray's support for Eric.

[15] Eric was diagnosed with a learning disability at age 8 and did not complete high school. He has been prescribed ADD medication as well as Lithium and nerve blockers. Since Ray's death, Eric has been receiving ODSP. There is no dispute that he has a criminal record.

[16] The application judge accepted Eric's evidence that he had mostly lived at Ray's home and that Ray acted as a father figure to him. There were letters and emails before the application judge that showed, among other things: Ray advocating for Eric at medical appointments, with school officials and with Ontario Works case workers; Ray's detailed involvement in Eric's sports; Ray adding Eric to his cell phone bill; that Ray prepared Eric's tax returns; and Ray's application for the child tax benefit. Although Eric paid his grandfather "some rent" from his limited income when

he was working or from his Ontario Works payments, the application judge interpreted this to be evidence of Ray's desire to teach Eric money management and responsibility. He found this approach to be consistent with the guidance Ray provided Eric as a loving parent.

[17] In response to the appellants' submission, I disagree that there was no corroborating material evidence as required by s. 13 of the *Evidence Act*. In Eric's affidavit, he stated that Ray often provided groceries for him and paid for his cell phone. There is a Bell account showing Ray adding Eric to his account in 2015. Text messages from within months of Ray's death show Ray complaining that Eric had increased his bill by exceeding his data usage amount. There are also text messages from just over a month before Ray's death in which Eric asked Ray for "bread and milk."

[18] Although the corroborating evidence was minimal, it was open to the application judge to accept it as meeting the requirements of s. 13, especially given his finding that the estate executors wrongfully burned documents belonging to Ray in a backyard "burn barrel" within a week of his death.

[19] Determining whether a person is a dependant under the Act is highly fact specific. *Reid v. Reid*, 2005 CanLII 20793 has some similarities to the current case. In finding the testator's grandchildren to be dependants, the court in that case relied on factors such as that the grandchildren considered the testator's home to be their home, that she provided housing, transportation, food, nurturing and moral and physical support to them, and that she had had a very active role in their upbringing. The court stated that the support provided by the testator need not be direct financial support and that by providing basic human needs such as shelter, the testator provided financial support. Similarly, here, Eric considered Ray's house to be his home. Ray provided him with shelter, even if Eric paid some rent. Ray also provided him with moral support and guidance as a father figure. Finally, Ray provided some financial support by providing some groceries and paying for cell phone expenses.

[20] The current case is very different from *Bolte v. McDonald, et al.*, 2022 ONSC 1922, which is relied on by the appellants. There, the court found periodic transfers from the deceased to his daughter did not demonstrate a relationship of dependency. But in that case, there was no evidence of cohabitation or the type of moral support that existed between Ray and Eric.

[21] Overall, it was open to the application judge to find a relationship of dependency in the specific circumstances of this case.

Was it an error to fail to consider whether Ray had provided adequate support for Eric?

[22] The appellants submit the application judge failed to address the second part of the *Tataryn* test, whether Ray had already provided adequate support by giving Eric $285,000.

[23] I do not find there to have been an error. While the application judge did not expressly lay out the *Tataryn* test, he addressed the inadequacy of the support. In reviewing the considerations under s. 62 of the Act, which outlines the factors for determining the amount and duration of support, the application judge implicitly found that the amount of support was insufficient. He

noted first that Eric had few assets of his own, that Eric's employment prospects were dim, and that Eric's current income source is ODSP.

[24] He also found the expert opinion filed by Eric was evidence that $285,000 would not meet Eric's future needs. The expert had opined that the assets provided by Ray would be depleted by age 47 at the latest. He also expressly found that the expert opinion accurately reflected the need to "supplement the trust fund" to allow for increases in the cost of living since 2017 and into the foreseeable future.

[25] There is no basis to interfere in the application judge's conclusion that the expert's report was unbiased. There was no competing expert report. I do not find any error in the application judge's conclusion that Ray did not provide adequate support for Eric.

Was it an error to fail to consider Ray's testamentary plan in transferring the home?

[26] I accept the appellant's submission that the application judge erred in the remedy he granted, which was to transfer Ray's home from Shelby's name to Eric's name. In his application, Eric only requested the transfer of the home as an alternative remedy. The application judge justified the transfer on the basis that the undistributed cash in the estate was under $50,000 and would not be able to satisfy the estimated shortfall for Eric's continued support. He also noted that transferring the home would benefit Eric's shelter, security, and future financial stability.

[27] However, in making this order, there was no consideration of Ray's testamentary intentions. In adjudicating a dependant's claim for relief, some weight must be placed on the testator's autonomy and intentions: *Quinn v. Carrigan*, at para. 81. Ray intended to provide funds to help support Eric and the application judge found these were insufficient. But Ray also expressed specific intentions in his will regarding his property and the family home. Ray left his estate to be divided between his children. In his will, he also asked the trustees to consider "the possibility of retaining the family home as a residence for my children and providing supervisory care." Alternatively, he wanted the trustees to consider his children's wishes with respect to the family home. Ray could have left his home to Eric but did not do so. The application judge did not consider this factor, nor that Eric only claimed the transfer as an alternative remedy.

[28] On this appeal, both parties seek a monetary award as an alternative remedy. The court is able to order a monetary award on the record before it. It would not be in the interests of justice to remit the matter to the application judge on this narrow issue. The value of the home at the time of probate was $152,000. Rather than transferring the home into Eric's name, the estate shall instead pay funds to Eric in the amount of $152,000. However, if the estate is not able to pay Eric this amount, and given the home is currently in Shelby's name, she shall be personally liable for any amounts exceeding the remaining assets in the estate.

Final Issues: Costs Award and Freezing of the Estate

[29] The appellants submit the application judge erred in ordering what amounted to full indemnity costs against them. They say they were not given an opportunity to provide submissions on costs.

[30] I would not interfere with the application judge's discretion in awarding costs. He received costs outlines from the parties, which gave the parties an opportunity to provide their positions on the relevant factors. The amount awarded, which was $26,201.05, fell squarely within the reasonable range given that the appellants' partial indemnity costs were themselves slightly more than the amount awarded. In coming to his award, the application judge relied on Eric's lack of resources and on in his finding that the executors of the estate had wrongfully transferred the home into Shelby's name while Eric's claim was outstanding. There was no error in principle that would justify this court's intervention in the costs award.

[31] The parties agree that with the resolution of Eric's application, there is no need for an ongoing order freezing the estate. This order therefore is lifted.

Disposition

[32] The appeal is allowed on the issue of remedy and is otherwise dismissed. Shelby shall pay Eric funds in the amount of $152,000 and shall be personally liable for the amounts owed. It remains open to her to transfer the home into Eric's name in satisfaction of her obligation. The order suspending the administration of the estate is lifted.

[33] I consider Eric to have been substantially successful on the appeal. As agreed between the parties, the appellants shall pay him costs of $6,500.

_____
O'Brien, J

I agree _____
J.A. Ramsay, J.

I agree _____
Leiper, J

Released: December 2, 2024

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– and –

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Respondent

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