

February 29, 2000

The Hon. Anne McLellan, P.C. M.P.
Minister of Justice and Attorney General of Canada
284 Wellington Street
Ottawa, ON K1A 0H8

Dear Minister,

Re: Proposed amendment to section 15 of the *Divorce Act* to allow child support orders to bind a payor's estate

I am writing on behalf of the National Family Law Section of the Canadian Bar Association to request that section 15 of the *Divorce Act* be amended to provide that orders for child support bind a payor's estate, unless the Court is satisfied that reasonable arrangements have been made for the support of the child to whom the Order relates in the event of the death of the payor.

Legislation in Prince Edward Island and Ontario stipulates that support orders continue after the death of the payor against the payor's estate, unless the order provides otherwise. Our proposed amendment would ensure consistency in treatment for people who move from one province to another.

Currently, the *Divorce Act* is silent on the effect of the death of a payor on a child support order. If an order made under the *Act* provides that the support is binding on the payor's estate, support will continue. If the order does not provide that support is binding on the estate, all support terminates on the payor's death. A separate application must then be brought on behalf of the former recipient for support under provincial or territorial dependants' relief legislation. This legislation may have different criteria than family law legislation for awarding support and normally limits the period within which a person may apply. At best, support recipients will be faced with legal expenses for the application together with a delay in reinstating support. In the worst case, they may miss the limitation period or fail to qualify under the different criteria and lose their right to support entirely.

Slightly different considerations apply where the child support order arises from a negotiated settlement of a proceeding or where provisions of a separation agreement are incorporated into a divorce order. In such circumstances, parties often provide for insurance to replace the ongoing support obligation in the event of the death of the payor. Allowing support to continue in such circumstances could constitute a double payment to the recipient at the expense of other beneficiaries of the estate who may also be in financial need. The presence of such an insurance provision in the settlement or agreement should therefore be considered by a court in assessing whether the support order should continue after the payor's death.

We also recommend that section 15 be amended to put the onus on the payor's estate to apply to reduce or eliminate the support payments and to provide early financial disclosure. Currently, the onus is on the former recipient to seek relief. We believe that this is inappropriate, given the usually limited financial resources of recipients. Courts considering such variation applications should consider, among other things, the tax consequences, if any, of making the order as well as the extent to which the recipients have been provided for in the deceased's will.

The National Family Law Section is comprised of family law practitioners from across Canada. Members of the CBA's National Wills, Estates and Trusts Section, Legislation and Law Reform Committee and Executive Officers have also reviewed this letter and provided input.

We thank you for your consideration of this proposal and look forward to your positive response.

Yours truly,

Eugene Raponi,
Chair, National Family Law Section