Trach v Sorenson (Re Johnson Estate)[1]
Leave to bring a family maintenance and support claim beyond the 6 months
A case commentary

This case involved a minor child's mother bringing an application against the child's father's estate for family maintenance and support outside of the six month limitation period. The decision gives guidance to those bringing such applications including what evidence is needed.

Background

The deceased died, testate, on 10 March 2016. He was survived by his second wife and a minor child from a previous marriage. The personal representative served the grant application notices on all parties on 15 June 2016. The grant issued on 11 July 2016.

The deceased left a substantial trust for his minor child to be administered by the Public Trustee. His widow was the sole residuary beneficiary. The personal representative paid out the full trust gift to the Public Trustee.

On 30 September 2016, the Public Trustee, as litigation representative for the minor child, informed counsel for the personal representative and counsel for the minor child's mother that they did not intend to pursue a family maintenance and support claim (FMS) for the minor child.

Counsel for the mother, acting as litigation representative for the minor child, wrote to counsel for the personal representative seeking an accounting. By letter on 16 June 2017, counsel for the mother wrote:

> ... may be eligible for more funds from the estate than what was bequested to her, if a Court determines that the deceased did not adequately provide for the proper maintenance and support of [the minor

[1] Action No 1714-00292. Decision by Justice Michalyshyn on 23 September 2019

child].

When no accounting was forthcoming, the mother brought an application for an accounting to be heard on 16 October 2017. At this court hearing, there was a discussion that perhaps the mother would bring an application for FMS but that was not the application at bar.

The mother then did bring an application under section 89(2) of the *Wills and Succession Act* (*WSA*) for leave to bring an FMS claim past the six months limitation period. This application was brought 25 May 2018.

The question before the special chambers judge was whether to exercise his discretion and grant leave for the mother to bring an FMS claim as litigation representative of the minor child.

The Judge's Analysis

The judge considered the sparse case law and the analogous section of the *Dependant Relief Act*, section 15(2).

The judge discussed how he should exercise his discretion under s. 89(2):

> Without attempting to be exhaustive, it seems obvious to me that at least some of the factors around how to exercise the discretion under section 89(2) include the reason the limitation - the six-month limitation was missed and what, if anything, has occurred from the time of the limitation expiry to the time of the application under section 89(2) to extend the limitation. I would think also relevant would be the respective interests of the parties in extending the limitations in the circumstances of a claim against an estate generally and this estate in particular. These and perhaps other considerations could all be part of the Court's obligation in exercising its discretion to consider the ends of justice.
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> Transcript page 5, lines 4 - 12

There was a question about whether the *Limitations Act* came into play. The

judge agreed with Justice Belzil in *Tomich (Estate)*[2], and differentiated between notice and actual service of an application:

> I am persuaded by Justice Belzil's reasons in *Koma*, that notice by way of correspondence, which again was the very issue before him in *Koma*, and is an issue to some extent in this application, that that kind of notice, in my view, is of limited if any relevance for limitations purposes including considerations of extending the six-month limitation.
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> Transcript page 5, lines 28 - 32

This decision makes clear that an FMS claimant must actually file an application for leave; notice to the other side by way of correspondence is not sufficient.

The judge discussed two earlier cases and whether the application for leave to bring an FMS claim can be collapsed into the FMS claim determination itself. In *Re GES*[3], Justice Lee dealt with the application for leave to bring an out of time FMS claim and the determination of the FMS claim itself within the same hearing. Whereas in *Racz Estate*[4], Justice Gates took issue with that approach and ruled a party must first be granted leave before bringing the substantive FMS claim itself. In this case, the judge agreed with Justice Gates.

An FMS claimant outside the six months limitation period must first seek leave to bring an FMS claim and then, by way of a further application, have their FMS claim determined.

The application for leave to bring an FMS claim first started as an application for an accounting. The judge determined that, having received her specific gift in full, the minor child was not entitled to pursue an accounting. The minor child may have been entitled to financial disclosure under s. 95(2) but that application

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[2] 2010 ABQB 63 and 2011 ABCA 186

[3] 2003 ABQB 674

[4] 2013 ABQB 668

was not before him:

> Until the 89(2) issue is determined, no disclosure rights or obligations arise under the *Surrogate Rules*.
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> Transcript page 8, lines 6-7.

Evidence Needed

Although the judge does not specifically say it, I extrapolate out of his reasons that one must present a prima facie case of the FMS claimant not having been adequately provided for in order to meet the discretion test.

> There was very little in the May 25, 2018 submissions and evidence regarding the [minor child's] need for maintenance and support. There was simply... the assertion that the ... bequest will be insufficient to provide for the reasonable maintenance and support of [the minor child] through to and including post-secondary education.
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> Transcript page 9, lines 12-16

However, the judge is not convinced that s. 93 WSA factors are relevant to the application for leave to bring an FMS claim.

> I'm aware of no authority, and in the absence of authority, I'm certainly not convinced that Section 93 factors necessarily should be considered when a judge is called on to exercise discretion under Section 89(2) of the same legislation. I'm not saying the Section 93 factors are irrelevant, but I am saying that, in my view, they're certainly not mandatory as they are once the Court has decided that it has a proper application for maintenance and support before it, but I don't get there until the limitation period has been extended. And so to the extent that Section 93 factors give rise to disclosure requirements, then, no, in my view, an application - a mere application for Section 89(2) relief does not entitled the applicant to make demands under Section 93 of the WSA. Only a successful 89(2) application will have that affect.
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> Transcript page 9, lines 26 - 35.

His decision does make clear that the late applicant must provide evidence that "validly explains or excuses the delay from the time the limitation period expired" to the filing of the application for leave.[5]

Conclusion

Re Johnson Estate stands for:

- A s. 89(2) application for leave to bring an FMS claim outside of the limitation period must be granted before the actual substantive merits of the FMS claim can be dealt with.

- A s. 89(2) application must contain an explanation for the delay in bringing the FMS claim.

- A s. 89(2) application must contain some evidence that the FMS claimant has not been adequately provided for.

- The s. 93 factors may not be relevant to determining a s. 89(2) application.

- Until a s. 89(2) application has been granted, accounting and other disclosure rights and obligations do not arise.

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[5] Transcript page 8, lines 18-20