



STHI LEGAL NOTES

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Securing Support Payments

One of the realities of divorce are orders for child and/or spousal support. But what happens in the case where the payor dies prior to the support obligation legally coming to an end. The solution is generally for the payor to maintain a life insurance policy naming the payee as the beneficiary. A recent Ontario Court of Appeal case reaffirmed this method of securing support orders.

The Facts

Anastasia and Stephen were married for eight years and had two children. When they separated, the parties entered into an agreement whereby Stephen would pay monthly child support of \$2,000 and spousal support of \$2,500. In addition, Stephen was required to maintain Anastasia as the irrevocable beneficiary on his Canada Life insurance policy.

Stephen became involved with Evangeline, who became pregnant. Shortly after, Stephen was diagnosed with cancer. Stephen made a new will and amended the beneficiary designation on his life insurance. He gave Anastasia 10%, his son 17%, his daughter 19.4% and Evangeline 53.6%.

When Anastasia became aware of the change she brought a motion to order Canada Life to change the designation back to her alone. Stephen died and left an insolvent estate. Evangeline gave birth three months after Stephen's death. Shortly after her baby was born, Evangeline brought an application for dependant's relief.

The Law

The *Succession Law Reform Act* is the main law that oversees the area of wills and estates in Ontario. Part V of

the Act allows dependants, who have been left out of the will or who have not had adequate provision made for them, to apply for financial relief.

In some circumstances, to satisfy a dependant's claim, the court can order, among other things, that insurance proceeds be "clawed back" into the estate. This is an exception to the general rule that the proceeds of a life insurance policy will pass outside the estate and be paid directly to a named beneficiary.

The Issue

Anastasia and Evangeline ultimately agreed that the insurance proceeds were deemed to form part of Stephen's estate. However, Anastasia maintained that since she was the named beneficiary of the policy this made her a creditor of the estate and she was entitled to the full proceeds since creditors were protected from such a "claw back".

The Decision

Both the Superior Court of Justice and the Divisional Court concluded that Anastasia was not a secured creditor and was therefore not protected and did not have first right to the insurance proceeds. They further found that Stephen had not made adequate provision for Evangeline and their son and that she was entitled to support. Anastasia appealed to the Ontario Court of Appeal, who reversed the decisions.

The appellate court confirmed firstly that whether operating under the *Family Law Act* or the *Divorce Act*, a court can order a support payor to designate the support recipient as the irrevocable beneficiary of a life insurance policy to ensure funds exist at the time of the payor's death sufficient to satisfy his support obligations specified in the support order.

While the Court of Appeal agreed that the proceeds of Stephen's insurance policy should be clawed back into the estate, it disagreed with the lower courts that Anastasia was not a creditor entitled to protection. It stated,

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The articles in STHI Legal Notes are necessarily of a general nature and cannot be regarded as legal advice. Our firm will be pleased to provide additional details on request.

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Proposed Changes to Employment Standards

Although it has yet to become law, *Bill 148, Fair Workplaces, Better Jobs Act, 2017*, has garnered a great deal of discussion. If you are an employee you may be excited at the prospect of changes such as a higher minimum wage and extended personal emergency leave. On the other hand, if you are an employer you may be scrambling to figure out how these increased costs will affect your bottom line.

Bill 148 is currently at *Second Reading Debate*. Although there are still several steps to go, it is more likely than not that this bill will soon become law in Ontario. The balance of this article provides an overview of the main changes¹ to Ontario's employment standards. Unless otherwise indicated, these changes will come into force on January 1, 2018.

MONETARY COMPENSATION

A number of changes that are being proposed affect the amount of monetary compensation that employees will be entitled to, including the following.

*Minimum Wage*²

Rate	Current	Jan. 2018	January 2019
General	\$11.60	\$14	\$15
Student	\$10.90	\$13.15	\$14.10
Liquor Server	\$10.10	\$12.20	\$13.05
Homeworker	\$12.80	\$15.40	\$16.50

Equal Pay

Full-time, part-time, casual, temporary and seasonal workers who perform the same job for the same employer must all be paid the same wage. However, while an employer cannot base wages on employment status, it can base differences in wages on systems of seniority, of merit and of quantity or quality of production.

Employees will be entitled to inquire about their wage rate without fear of repercussions. (April 1, 2018)

Temporary Help Agency Employees

Temporary help agency employees, also referred to as assignment workers, will have to be paid the same as permanent employees when performing the same job. (April 1, 2018)

¹ Although this bill also makes changes to the Labour Relations Act, this article concentrates only on the changes to the Employment Standards Act.

² Once the increased minimum wage has been reached in 2019, it will then increase each year by the Consumer Price Index.

Overtime Pay

Employees who hold more than one position with an employer and who are working overtime must be paid at the rate for the position they are working during the overtime period.

Scheduling

There are a number of changes being proposed with respect to scheduling. (January 1, 2019) These changes include:

- Employees would have the right to request schedule or location changes after having been employed for three months.
- Employees who regularly work more than three hours per day, but upon reporting to work are given less than three hours, must be paid three hours at their regular rate of pay.
- Employees can refuse to accept shifts without repercussion if their employer asks them to work with less than 96 hours notice. However, this rule will not apply where the work is to deal with an emergency, to remedy or reduce a threat to public safety, or for other prescribed reasons.
- If a shift is cancelled within 48 hours of its start, employees must be paid three hours at their regular rate of pay, unless the nature of the employee's work is weather-dependent and the employer cannot provide work for weather-related reasons, and other cases beyond the employer's control.
- When employees are "on-call" and not called in to work, they must be paid three hours at their regular rate of pay. This would be required for each 24 hour period that employees are on-call. However, this will not apply where the employee was not available to work for at least three hours at the relevant time.
- Employees will be limited to receiving only three hours pay even if they are entitled under more than one provision.

VACATION & LEAVE

Other changes being proposed affect employees time away from work, including the following.

Vacation

After five years of employment with the same employer, employees will be entitled to three weeks paid vacation.

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Public Holidays

The formula for calculating holiday pay for public holidays will be simplified such that employees will be paid their average regular daily wage. This means that for employees who work less than five days a week they will be paid a full day's wage rather than having their pay pro-rated as is the current practice.

For employees who work on a public holiday, they will be paid public holiday pay plus a premium pay for hours worked.

Personal Emergency Leave

Bill 148 will substantially increase the amount of personal emergency leave that an employee may be entitled to as well as expand the scope of employees entitled to personal emergency leave.

The current law applies only to workplaces with 50 or more employees, however the new personal emergency leave rules will apply to all workplaces, regardless of the number of employees.

All employees would be entitled to 10 personal emergency leave days per year with the first two being paid days. An employer would be prohibited from requiring a medical note to substantiate the leave.

Family Medical Leave

Family medical leave will be increased from 8 weeks in a 26-week period to 27 weeks in a 52-week period.

Death of a Child

Currently, the law makes provision for an unpaid leave of absence up to 104 weeks if an employee's child has died as a result of a crime. *Bill 148* would expand this provision to include the death of a child from any cause as well as a crime-related child disappearance.

Domestic or Sexual Violence Leave

This is a new type of leave being introduced in *Bill 148*. This leave will allow an employee, who has been employed for at least 13 consecutive weeks, to an unpaid leave of absence where that employee or the employee's child experiences domestic or sexual violence or the threat of sexual or domestic violence.

Pregnancy and Parental Leave

The length of pregnancy leave for employees who suffer a still-birth or miscarriage will be extended from 6 weeks to 12 weeks.

The length of parental leave will be extended from 35 weeks to 61 weeks for employees who took a pregnancy leave and

from 37 weeks to 63 weeks for employees who did not. These changes will come into effect on a day to be named by proclamation by the Lieutenant Governor in Council.

OTHER

Termination of Assignment

An assignment employee will be entitled to at least one week's notice when an assignment, scheduled to last longer than three months, is terminated early. If notice is not given, the employer must be paid for the difference, unless the assignment employee is offered at least one week's worth of reasonable work during the notice period.

Record Keeping

In addition to the records that employers are currently required to keep with respect to their employees, they will now be required to keep the following additional records:

- the dates and times an employee was scheduled to work or to be on-call for work, and any changes to the on-call schedule;
- the dates and times an employee worked;
- where an employer has two or more regular rates of pay, the dates and times an employee worked in excess of the overtime threshold at each rate of pay;
- any cancellations of a scheduled day of work or a scheduled on-call period and the date and time of the cancellation;
- any written notice provided to employees regarding substitute holidays; and
- the amount of vacation pay an employee earned during a vacation entitlement year and how the amount was calculated.

The retention period for records of vacation time and vacation pay will increase from three years to five years.

Despite the controversy that *Bill 148* has created, the Standing Committee on Finance and Economic Affairs rejected a proposal by the Progressive Conservative members of the Committee which would have required the government to commit to an economic impact analysis of the Bill and its effects, as conducted by an independent financial analyst.

Bill 148 may be subject to further amendments before it becomes law. We will keep you apprised of the progress of *Bill 148* in future editions of our newsletter. 

The Rental Fairness Act

The Ontario Government recently passed into law the *Rental Fairness Act, 2017*. The three major changes are as follows.

Rent Control

The general rule regarding rents is that landlords can increase the rent for a unit only once every 12 months, on 90 days written notice to the tenant and by not more than the annual guideline. Until now, units built after November 1991 were exempt from the annual guideline such that a landlord could increase the rent by any amount. As of April 20, 2017, all units, regardless of when they were built, are now limited to the annual guideline increase, which for 2017 is 1.5 per cent and for 2018 is 1.8 per cent. It should be noted that when a tenant moves out of a unit, the landlord can set the rent at whatever the landlord chooses.

Above-Guideline Increases

In certain circumstances, landlords can apply for an increase greater than the annual guideline amount. Landlords who have outstanding elevator maintenance orders will not be able to apply for an above-guideline increase. Further, landlords will no longer be entitled to apply for an above-guideline increase on the grounds of utility costs. These changes have not yet come into force.

Personal Use

A landlord can terminate a tenancy, subject to a written lease, if he or she in good faith requires possession of the unit for the use of the landlord, the landlord's spouse, child, parent, parent-in-law or care giver of one of these people. Unfortunately, there are landlords who have abused this section. Effective September 1, 2017, the Act requires that the possession be for at least one year. Further, the landlord must compensate the tenant with an amount equal to one month's rent or offer the tenant another unit acceptable to the tenant.

In future issues of the newsletter we will provide you with additional information about the *Residential Tenancies Act*. In the meantime if you are unsure of the new requirements please contact our firm and a member of our real estate team will be pleased to assist you. ☞

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"I conclude that where, at the time of his death, a spousal or child support payor owns a policy of insurance that is subject to a court order requiring the designation of the support recipient as the irrevocable beneficiary of the policy, s. 72(7) protects from the claw back of s. 72(1) **that part of a policy's proceeds needed to satisfy the deceased's obligations to the spousal and child support recipients**, calculated in accordance with the support orders in place at the time of his death."

However, while the court was prepared to recognize Anastasia's rights to the proceeds of the insurance policy, those rights extended only to the amount necessary to satisfy the support obligations. Any monies exceeding the amount required to satisfy the support obligations, past and future, of Anastasia and her children, were not a windfall for them, rather the excess money was rightly available to satisfy Evangeline's application for dependant relief.

While there are various laws in place to regulate the dealings of parties in relationship and family situations, in most cases, parties can structure their affairs to avoid the effects of these laws. For this reason, it is always important to seek professional legal advice. ☞

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