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the claim was "unrealistic".[18] It amounted to about 11% of the father's gross income. It cannot be concluded, therefore, that "pet" expenses will never be included as special or extraordinary expenses, but that the expenses themselves may have to be reasonable.

People are increasingly considering their pets as part of the family. There is little doubt, therefore, that the issues of support and custody of pets, both in the family law and wills and estates contexts will become more common (and contentious) in the coming years.

Tips:

- Determine early on in the case whether the issue of a pet may become contentious.
- Ask your client to produce back-up documentation to prove who purchased the pet (and whether it was purchased before the marriage or jointly during the marriage).
- If your client intends to keep the pet, encourage them to establish a "status quo" in terms of where the pet resides. While physical custody of the pet may not be determinative, it may assist a court (if it reaches that stage) in finding an ownership interest (as in the *Warnica v. Gering* case).
- Add pet "expenses" to the Expenses section (Part 2) on his or her financial statement for spousal support purposes!

18 *Ibid.* at para. 18.

Remarriages and Common Law Arrangements: Estate Claims by 'Spouses'

*By Kim Whaley**

Introduction

It is trite to say that our growing aging population is having a marked impact on the ways in which our estate laws are being developed and applied. This, combined with changes in the way families are constituted (with remarriages, blended families, and "common law" relationships on the rise) means estate and family laws are colliding in ways never before anticipated. With life expectancy, estate and family law practitioners are increasingly likely to see a significant growth in cases involving competing post-mortem claims made by surviving spouses, former spouses, children of combined fractured families, and other dependants against the estate of deceased spouses/former spouses.

There are various legal avenues available to surviving spouses upon the death of a spouse or former spouse, and in light of recent case law, these potential claims can now be approached with greater clarity.

Recourse for Surviving Spouses under the Family Law Act

The *Family Law Act* (the "FLA")[1] provides surviving spouses and even former spouses with various means to access and, in some instances, equalize the assets of a deceased spouse's estate.

Family Law Act *Elections – Part I of the* FLA

One of the ways in which a surviving spouse can ensure they are adequately financially protected after the demise of their spouse is by making a '*Family Law Act* Election.' For the purposes of Part 1 of the FLA only a 'spouse' may file an election and that 'spouse' means a married spouse not a 'common law' spouse(at least in Ontario, and at least for the time being).

In addition to married spouses, a number of individuals are able to make a *FLA* Election: the Public Guardian and Trustee who acts as statutory guardian of property of a surviving spouse pursuant to a certificate issued under section 63 of the *Mental Health Act*; a mentally incompetent surviving spouse's guardian of property appointed under section 15(k) of the old *Mental Incompetency*

* Kimberly Whaley and Erin Cowling, Whaley Estate Litigation, August 3, 2012.

1 R.S.O. 1990, c. F.3 [*FLA*].

Act[2]; either a "statutory guardian of property" or a "court-appointed guardian of property" (subject to any restrictions imposed by the surviving spouse in the relevant empowering document or by court order); an attorney under a Continuing Power of Attorney for Property[3]; and if the surviving spouse is incapable of managing her property, the personal representative may exercise the election under the *FLA* on her behalf.

The Effects of Electing

Pursuant to subsections 6(1) and (2) of the *FLA*, upon the death of a spouse, a surviving spouse is entitled to either a) make an equalization claim, on the one hand, or b) take under the Will, if there is one, or, if there is not one, take pursuant to the provincial intestacy laws set out in Part II of the *Succession Law Reform Act*[4] (the "*SLRA*"). Notably, a surviving spouse is not permitted to do both, unless the Will expressly permits them to do so.[5]

Choosing to elect in favour of an equalization claim does not forfeit any entitlement to dependant's support pursuant to Part V of the *SLRA*. However a dependant support claim will only be heard after the equalization claim is settled and it takes priority over an order made against the estate under Part V of the *SLRA*, except an order in favour of a child of the deceased spouse.

The importance of properly advising a surviving spouse of their rights pursuant to the *FLA* and the deadlines for exercising those rights (within 6 months of the date of death) cannot be underestimated. In *Slaven v. Slaven Estate*[6] a widow filed her election within 6 months of the death of her husband but did not bring her application. The Court allowed her application to continue because the delay was incurred in good faith with no ulterior motives and the respondent children were aware of the filing of the election and that the wife was in financial need.

The case of *Carrigan v. Quinn*,[7] dealt with multiple 'spouses' and the importance of filing within the deadline. The deceased was married for many years when he died. However, at the time of death he was living with another woman in a condominium that was owned by him and his wife. The wife brought a claim for, among other things, a declaration that she was entitled to the deceased's death benefit. The Court found that both women were "spouses" under the *Pension Benefit Act*, however, it also found that the deceased and his wife had been separated and the Ms. Quinn, the woman he was living with was the proper recipient of the deceased's pension. The Court held at para. 74:

> Prior to Mr. Carrigan's death, Mrs. Carrigan could have settled the pension issue by obtaining a direct equalization payment in a domestic contract or court order. Mrs. Carrigan and Mr. Carrigan's separation date was (at the latest) 2000; by 2006 Mrs. Carrigan was at the end of the six year period within which to bring a claim for equalization as stipulated in section 7(3) of the *Family Law Act*. However, despite being outside of the limitation period, Mrs. Carrigan could have applied to the court for an extension under section 2(8) and attempted to obtain an equalization claim. This she never did and the right expired on Mr. Carrigan's death.

Domestic Contracts Made Pursuant to Part IV of the FLA

Part IV of the *FLA* governs domestic contracts. According to the *FLA*, there are three types of domestic contracts: (i) cohabitation agreements;[8] (ii) marriage contracts;[9] and (iii) separation agreements.[10]

In the recent case of *King v. King*,[11] Mr. King and his former wife executed a separation agreement that contained a general release regarding his pension. The narrow issue in this case was whether this general pension release was sufficient to constitute a waiver of his former wife's entitlement to his OMERS pension. The Court held that the waiver in the separation agreement did not mirror the requisite OMERS form and did not comply with the strict requirements of the *Pension Benefits Act* and refused to make the declaration that the former wife waived her entitlement.

The primary importance as demonstrated in this case, is that in addition to executing a separation agreement, a separating spouse must be diligent in ensuring that the separation agreement properly deals with their future property rights.

Recourse for Surviving Spouses under the Succession Law Reform Act

The only legal recourse available to unmarried or common law spouses are the dependant's relief provisions of the *SLRA*, or certain common law/equitable remedies, such as trust, resulting trust, constructive trust, unjust enrichment, *quantum meruit*, and promissory/proprietary estoppel, or a combination of each. Of course, these remedies are available to married spouses as well and, as such, the following sections will discuss some of the claims applicable to both married spouses and unmarried cohabitating spouses under the *SLRA*.

Dependant Support Claims under the Succession Law Reform Act

Part V of the *SLRA* provides for the support of 'dependants,' in situations where a deceased spouse, prior to death, was providing support or was under a legal obligation to do so immediately before death,[12] but failed to make adequate provision for the proper support of his/her dependant spouse on death.

In order to make out a claim for dependant's support, an applicant must establish that they are in fact a 'dependant' of the deceased. 'Dependant' is defined in section 57 of Part V of the *SLRA* as, among others,

> "the spouse 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*" [emphasis added].

2 R.S.O. 1990, c. M.9 [repealed].

3 *Anderson v. Anderson 1990 Carswell Ont 260; and Conkwright Estate v. Maltby [1988] O.J. No. 686.*

4 R.S.O. 1990, c. S.26 [*SLRA*].

5 *FLA*, s. 6(5).

6 2011 CarswellOnt 7973 (S.C.J.).

7 2011 CarswellOnt 774 (Ont. S.C.J.).

8 *FLA*, s. 52.

9 *FLA*, s. 53.

10 *FLA*, s. 54.

11 *King v. King*, 2010 CarswellOnt 8901.

12 *SLRA*, s. 57.

The recent case of *Su v. Lam Estate*[13] involved a dependant's support claim brought in the context of competing claims made by the spouse and former spouse of the deceased, Ms. Lam. Here, Mr. Su brought an application for dependant's support, on the basis that he was the common law spouse of the deceased. Both Mr. Su and the deceased had been married and had children with their prior spouses, but were never officially divorced from their prior spouses — a fact that the court found did not negate the existence of a common law conjugal relationship as between Mr. Su and the deceased for the purposes of either section 57 of the *SLRA* or section 30 of the *FLA*. The deceased left nothing to Mr. Su out of her $1.25 million estate. The Court however held that Mr. Su was a dependent of Ms. Lam for the purposes of section 57 of the *SLRA*. A very significant factor was that Mr. Su contributed materially to the physical and financial well-being of the deceased.

The case of *Blair v. Allair Estate* (2011)[14] is also interesting in that it involved a motion for interim support under the *SLRA* made by one of the deceased's two long-term common law partners. The Court found that, on the evidence, both of the deceased's partners met the definition of 'spouse' in the *SLRA*, and could establish claims for support. The court made this finding in spite of the fact that the other spouse, also the estate trustee appointed in the deceased's will, had maintained a relationship with another man for some time.

Section 44 of the Succession Law Reform Act *and the Impact of Intestacy*

Section 44 of the *SLRA* provides that, where a deceased, who dies intestate, is survived by a spouse and not survived by "issue,"[15] the spouse is entitled to all of the deceased's property absolutely.[16] Where a spouse dies intestate in respect of property having a net value of more than the "preferential share" and is survived by a spouse and issue, the spouse is entitled to the preferential share, absolutely. The preferential share is currently prescribed by regulation as $200,000.00.[17]

The recent case of *Scotia Mortgage Corp. v. Davidson Estate*[18] illustrates the way in which section 44 can produce a harsh result. In this case, two years after his first wife died the deceased remarried but only to pass away less than a year later without leaving a will respecting his testamentary intentions. He had 8 children from his first marriage, none of which stood to benefit upon his death due to section 44. As the Estate had less than $200,000.00 the entire Estate passed to the second wife absolutely.

Spousal Claims under Constructive and Resulting Trust Principles

In most Canadian provinces, like Ontario, unmarried cohabitating spouses are denied access to the property law rights granted to married or separating spouses under the family law legislation. Consequently, the only vehicle for equitable restitution for these types of spouses after the breakdown of a relationship or upon on death of a spouse is by reliance on common law and equitable remedies, with the main legal mechanisms being the resulting trust, constructive trust, and actions in unjust enrichment.

The resulting trust and constructive trust are different from express trusts. Express trusts arise by way of agreement between a settler/testator and trustee and, historically, have required slightly easier evidentiary thresholds to overcome. Conversely, the requirements for proving and determining both resulting and constructive trust remedies historically proved extremely complicated and made it difficult for unmarried couples to succeed with such claims.

Resulting Trusts: New Developments and Clarification of Equitable Remedies

In *Kerr v. Baranow; Vanasse v. Seguin*, the Supreme Court radically altered the law with respect to the laws of resulting trust. It held that although traditional resulting trust principles may continue to play a role in the resolution of property disputes between unmarried domestic partners, "*the time has come to acknowledge that there is no continuing role of the common intention resulting trust.*"[19] In other words, in domestic situations where there is either a gratuitous transfer of property from one spouse to the other or there is joint contribution by two partners to the acquisition of property, but the title to the property is held solely by one partner, a resulting trust may be imposed, but, in making such a determination, "it is the intention of the *grantor or contributor* alone that counts."[20]

Applied to the estates context, it is important to note that, provided the transferor had the requisite capacity to make the transfer, if, after they have passed away, title to the property is still held jointly with another, the estate trustee of the transferor will be obliged to seek a declaration that the transferee/defendant holds the property by way of resulting trust on behalf of the estate, such that the property can be included as an asset of the estate and administered.[21] If the trustee's claim is disputed by the transferee, it will then be incumbent upon the court to ascertain whether the property ought to result back to the estate, or whether a gift was intended to the recipient.

Notably, property is frequently conveyed jointly, often with a right of a survivorship for reasons such as avoiding creditors, probate fees, or certain taxes.

13 *Su v. Lam Estate*, 2011CarswellOnt 1030 (S.C.J.).

14 *Blair v. Allair Estate* (2011), 2011 CarswellOnt 263.

15 Note that "issue" includes a descendant conceived before and born alive after the person's death (*SLRA*, s. 1(1)).

16 *SLRA*, s. 44.

17 *SLRA*, s. 45(5) and O. Reg. 54/95, s. 1.

18 2009 CarswellOnt 2297 (S.C.J) at para. 40.

19 *Kerr v. Baranow*, 2011 CarswellBC 240 (S.C.C.). at par. 15.

20 *Ibid.* at par. 18.

21 Jennifer J. Jenkins & H. Mark Scott, *Compensation & Duties of Estate Trustees, Guardians & Attorneys*, looseleaf (Aurora: Canada Law Book, 2008) at 18:40.10.

Unjust Enrichment and the Remedial Constructive Trust

Kerr v. Baranow; Vanasse v. Seguin has not changed the requirements for making an unjust enrichment claim, since the concept was applied in *Becker v. Pettkus*[22] and affirmed in *Peel (Regional Municipality) v. Canada*.[23] The law remains that, for a plaintiff to be successful in making such a claim, they must be able to establish the following three elements: (i) an enrichment of or benefit to the defendant by the plaintiff; (ii) a corresponding deprivation of the plaintiff; and (iii) the absence of a juristic reason for the enrichment. As well, it has been consistently held in the case law and has been affirmed in *Kerr v. Baranow; Vanasse v. Seguin*, that "the courts 'should exercise flexibility and common sense when applying equitable principles to family law issues with due sensitivity to the special circumstances that can arise in such cases'."[24]

Kerr v. Baranow; Vanasse v. Seguin however, significantly contributed to how an award for unjust enrichment should be quantified. It did so by rejecting the view that there are only two dichotomous choices of remedy available: 1) monetary award (calculated on a 'value received' basis or 2) a proprietary award where the claimant can show a benefit conferred contributed to the acquisition or improvement of a specific property.

The Court found that this dichotomy neglects the "joint family venture" where contributions of both parties over time have resulted in an accumulation of wealth. The unjust enrichment occurs here where there is a joint family venture but one party is left with a disproportionate share of the jointly held assets.

The Court identified the following non-exhaustive list of factors to assist in making a determination of whether a joint family venture exists: (i) the mutual effort of the parties and whether they worked collaboratively towards common goals; (ii) economic integration of the couples' finances; (iii) actual intent or choice of the parties to not have their economic lives intertwined, whether such is expressed or inferred; and (iv) whether the parties have given priority to the family or there is detrimental reliance on the relationship, by one or both of the parties, for the sake of the family.[25]

Provided the claimant can demonstrate (i) that there has been a "joint family venture", based, in part, on the four factors enumerated below; (ii) that there is a link between their contributions to it and the family's accumulation of assets and/or wealth; and (iii) upon breakdown of the relationship, one of the parties is left with a disproportionate share of the jointly held assets, a monetary remedy will be awarded.

A close reading of *Kerr v. Baranow; Vanasse v. Seguin* seems to suggest that the joint family venture is predicated on the notion that the contribution of one spouse, in the form of child rearing and household care, enables the spouse employed outside of the home to focus on developing their career, such that the efforts of the former result in a correlative increase in the "wealth" generated by the latter, during the course of their relationship.

This raises a number of questions. For example, what if, despite the considerable work and labour of the stay-at-home spouse, the income-earning spouse does not result in a proportionate increase in the couple's wealth, and, how is the former spouse's entitlement to be calculated in these circumstances? Is the former's entitlement to the existing joint family assets, which their efforts in the home have helped secure and maintain, negated? Or, will their compensation be limited to a fee-for-services calculation and, if so, does that not diminish the value of such work?

Spousal Claims for Quantum Meruit

A *quantum meruit* claim is a claim for services rendered on the basis of a contract having been entered into between two parties where the contract has not been seen to completion and where the contract cannot be proved or is unenforceable. If the unenforceability of the contact would result in unjust enrichment, the claim of quantum meruit is available. Where an assertion that such a claim exists, its terms must be corroborated by additional third party witnesses or by documentary evidence. A court will not award compensation unless the three-part test for a finding of unjust enrichment, as set out by the Supreme Court of Canada in the case of *Pettkus v. Becker*,[26] and as confirmed by the Court in *Kerr v. Baranow; Vanasse v. Seguin*, has been satisfied on the evidence adduced. Namely, a claimant must be able to demonstrate: (i) an enrichment enjoyed by the defendant; (ii) a corresponding deprivation suffered by the plaintiff; and (iii) an absence of juristic reason for the enrichment.

With respect to the third criteria, a court will generally examine the reasonable expectations of the parties as well as certain moral and public policy considerations, in order to assess whether recovery should be denied, or whether the claimant ought to be reimbursed for the benefit that was provided to the estate.[27]

In the estates context, this raises the issue of the requirement of corroborative evidence imposed on the claimant pursuant to section 13 of the *Evidence Act*.[28] As, in cases of

22 *Becker v. Pettkus* (1980), 2 S.C.R. 834 (S.C.C.).

23 *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762 (S.C.C.), at p. 788.

24 *Kerr v. Baranow*, 2011 CarswellBC 240 (S.C.C.), at par. 34, citing to: *Peter v. Beblow*, [1993] 1 S.C.R. 980 (S.C.C.), p. 997, per McLachlin J. (as she then was) and also p. 1023, per Cory J.

25 *Kerr v. Baranow*, 2011 CarswellBC 240 (S.C.C.). at paras. 89-100.

26 *Pettkus v. Becker*, [1980] 2 S.C.R. 834 [*Pettkus*].

27 Schnurr, Estate Litigation, 2nd Ed., 25 — Unjust Enrichment, Constructive Trust and Quantum Meruit Claims in Estates, 25.4 — Quantum Meruit Awards.

28 *Evidence Act*, R.S.O. 1990, c. E.23. Section 13 states: "In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment or decision on his or her own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence."

this nature, the surviving spouse will usually be the party with the most evidence, and the deceased, the most important witness, is not available to provide evidence, much of the court's analysis will come down to the credibility of the surviving spouse.[29]

Applied to the spousal context, the courts have attributed value to the spousal-type services rendered by one spouse to another during the course of a relationship and, as such, have found such services compensable in law.[30]

In *Albadi v. Greenzveig Estate*,[31] the plaintiff, an esthetician who was 41 and the deceased was 77 when he died of a heart attack. For about 10 years prior to the deceased's death the plaintiff would provide housekeeping service to him for $60-$100 and they would often go to the movies, out for dinner and on vacation. There was not romantic involvement on her part as she was in a committed relationship with another man.

Although the plaintiff alleged that the deceased had promised to leave her his car and "some money" in his will and that he wanted to make some changes to his will, he died before doing so. In applying the three-part test for unjust enrichment, the Court dismissed the plaintiff's *quantum meruit* claim, holding that, "[t]o the extent that the plaintiff might be seen as having conferred a benefit on the [deceased] through the frequent phone calls in later years, there is no corresponding deprivation and, in the context of the relationship and the benefits received by the plaintiff, they are not sufficient to entitle her to compensation."[32]

Spousal Claims for Proprietary Estoppel

An additional claim that is available to surviving spouses is that of proprietary estoppel. Essentially, proprietary estoppel is geared to protect an individual who has relied, to his or her detriment, on the action (or inaction) of a property owner that caused them to believe that they are or would be the true owner of certain property to such an extent that it would be unjust to permit the owner to later turn around and assert his title.[33]

The law of proprietary estoppel is well settled and was recently clarified and confirmed in the recent Ontario cases of *Schwark Estate v. Cutting*[34] and *Spadafora v. Gabriele*[35].

Conclusion

As can be seen, the *FLA* provides a comprehensive regime that provides for the property and other rights and obligations of spouses towards one another on the death of a spouse or otherwise on the breakdown of relationship. Where a deceased person fails to adhere to their statutory obligations, surviving spouses and/or dependants may seek to enforce on their legal rights as against their deceased spouse's estate pursuant to the *FLA* and the *SLRA*, or, if access to the provincial legislation is denied or provides an inadequate remedy, a variety of equitable claims can be made pursuant to the common law.

As a result of the societal and demographic changes as a result of blended families, remarriages, and other types of spousal relationships over the last few decades, combined with a rapidly aging population, estate litigators are seeing a correlative increase in the number of such claims being brought against estates not just by spouses or former spouses of a deceased person, but by their combined children and other dependants.

Of primary importance, we recognize that the types of cases being decided and their result, demonstrate the need for comprehensive and careful planning for asset protection and the succession of wealth. The overlap of family and estate planning is of significant prevalence given the changes to the family unit itself, which is increasingly complex.

29 *Wright Estate v. Johnston*, 2011 CarswellOnt 960, at par. 122.

30 *Wright Estate v. Johnston*, 2011 CarswellOnt 960, at par. 122 [*Wright*], at par. 198.

31 *Albadi v. Greenzveig Estate*, 2011 CarswellOnt 5146.

32 *Ibid.* at par. 13.

33 *Maracle v. Brant*, 2008 CarswellOnt 1753 (S.C.J.) at para.101.

34 2010 CarswellOnt 350 (C.A.).

35 2011 CarswellOnt 14702 (S.C.J.).