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"Family Law for the Dead: Spousal Claims against Estates"

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I. INTRODUCTION[1]

Although marriage is often regarded as a rite of passage that carries with it intense personal, familial and societal significance, a recent survey reported by *Statistics Canada* has revealed that 38% of all married couples in Canada will either separate or divorce before their 30th anniversary.[2] Results from the *2011 Census of Population* have also demonstrated that common-law relationships are the fastest growing family structure in Canada.[3] Between 2006 and 2011, the number of common-law couples rose 13.9%, almost four times the increase for married couples in the same period of time. In Ontario alone, almost 11% of all families surveyed defined themselves as common-law couples.[4] Clearly, more and more Canadians are deciding to forego the legal formalities that accompany marriage and are instead choosing to live together outside of marriage as common-law partners. Unfortunately, despite this growing trend, many people in common law relationships are unaware that they *may* still have legal obligations to one another.

With so many marriages now ending in divorce, as well as the recent influx in common law relationships that now give rise to legal rights and obligations in Canada, it appears that the chances of one encountering the judicial system as a result of a failed personal relationship are at an all-time high.[5] As a result, it is highly likely that the majority of those living in Canada will still be touched either directly or indirectly by the *Family Law Act* ("**FLA**")[6] or the *Succession Law Reform Act* ("**SLRA**") as a result of a relationship breakdown throughout the course of their life. With people also living longer than they used to, estate and family law practitioners are likely to see a significant growth in cases involving competing post-mortem claims made by surviving spouses, former spouses, and dependants against the estate of deceased spouses/former spouses. As such, estate practitioners should prepare themselves to see more and more cases where competing claims are made by surviving spouses as against the estate of their spouse/former spouse.

This paper aims to assist estate practitioners by providing a summary of the legal avenues available to surviving spouses upon the death of a spouse or former spouse, in light of some of the recent case law on the subject.

II. RECOURSE UNDER THE *FAMILY LAW ACT*

Historically, there were very few rights that a surviving spouse could assert against the estate of a deceased person. The main protection however, was the common-law rule that marriage revoked a Will.[7] This allowed a surviving spouse to inherit on intestacy as long as the other spouse did not make a new Will. Fortunately, the *FLA* (and in particular Parts I, III, and VI), now 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.

A. FLA Elections

One of the primary ways in which a surviving spouse can ensure they are adequately financially protected after the death of their spouse is by making a '*Family Law Act* Election.' Essentially, a *FLA* election provides a

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[1] Authored by Kimberly A. Whaley, principal of WEL Partners, excerpted from papers originally prepared for the Osgoode Professional Development Conference, Advising the Elderly, 2011, 2012, 2013, 2014, as updated from "*Spousal Claims Against Estates and Other Claims Arising Out of Remarriages and Common Law Arrangements: Estates Claims by Spouses*," prepared for the LSUC Estates and Trusts Summit Nov 14, 2012, updated and edited with the assistance of her Associate, Alexander Swabuk. Also note publication, The Advocates Quarterly, Volume 40, Number 1, June 2012. "*The Intersection of Family Law and Estates Law: Post-Mortem Claims Made by Modern Day 'Spouses*'".

[2] http://www.statcan.gc.ca/pub/85-002-x/2012001/article/11634-eng.htm.

[3] Statistics Canada, Portrait of Families and Living Arrangements in Canada (Ottawa: StatCan, 1 January 2014).

[4] Statistics Canada, Focus on Geography Series, 2011 Census (Ottawa: StatCan, 17 April 2014).

[5] https://www.fact.on.ca/judiciary/benotto.htm

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

[7] Professor A. H. Oosterhoff, "Predatory Marriages", Law Society of Upper Canada, 14th Annual Estates and Trust Summit at p. 29., and his article published in the ETPJ, Albert H. Oosterhoff, "Predatory Marriages" (2013), 33 E.T.P.J. 24

surviving spouse with the right to file an election and to bring an application against the estate of their deceased spouse so as to elect in favour of equalization of the couples' net family property ("**NFP**") and forego their entitlement, if any, under the deceased's will and/or on intestacy.[8] The governing provisions of the FLA are subsections 5(2), 6(1), (2), (3), and (4), which provide as follows:

> 5(2). When a spouse dies, if the net family property of the deceased spouse exceeds the net family property of the surviving spouse, the surviving spouse is entitled to one-half the difference between them.
>
> 6(1). When a spouse dies leaving a will, the surviving spouse shall elect to take under the will or to receive the entitlement under section 5.
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> 6(2). When a spouse dies intestate, the surviving spouse shall elect to receive the entitlement under Part II of the *Succession Law Reform Act* or to receive the entitlement under section 5.
>
> 6(3). When a spouse dies testate as to some property and intestate as to other property, the surviving spouse shall elect to take under the will and to receive the entitlement under Part II of the *Succession Law Reform Act*, or to receive the entitlement under section 5.
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> 6(4). A surviving spouse who elects to take under the will or to receive the entitlement under Part II of the *Succession Law Reform Act*, or both in the case of a partial intestacy, shall also receive the other property to which he or she is entitled because of the first spouse's death.

For the purposes of Part I of the FLA only a 'spouse' may file an election and that 'spouse' means a married spouse not 'common law' (at least in Ontario, and at least for the time being). There are three key concepts that need to be considered when making a *FLA* Election: (i) NFP; (ii) equalization; and (iii) the valuation date. The NFP of a spouse is essentially an individual's net worth, less any premarital deductions and after the following types of property are excluded pursuant to section 4(2) of the *FLA*:[9]

1. Property, other than a matrimonial home, that was acquired by gift or inheritance from a third person after the date of the marriage. [Note that gifts given by the spouses to each other are not excluded];

2. Income from property referred to in paragraph 1, if the donor or testator has expressly stated that it is to be excluded from the spouse's net family property;

3. Damages or a right to damages for personal injuries, nervous shock, mental distress or loss of guidance, care and companionship, or the part of a settlement that represents those damages;

4. Proceeds or a right to proceeds of a policy of life insurance, as defined under the Insurance Act, that are payable on the death of the life insured;

[8] *FLA,* s. 6(1).
[9] *FLA,* s. 4(1).

5. Property, other than a matrimonial home, into which property referred to in paragraphs 1 to 4 can be traced;

6. Property that the spouses have agreed by a domestic contract is not to be included in the spouse's net family property; and

7. Unadjusted pensionable earnings under the Canada Pension Plan.

Although title governs, it is important to note that a spouse is prohibited from deducting the value of the matrimonial home purchased before marriage from their NFP.[10] Essentially, this means that the equalization payment owed to the spouse with the lesser NFP will be higher, if it includes the value of the house.

In most estate cases, the spouses' NFP is calculated on the day before one of the spouses dies.[11] However, a prudent estate practitioner should note this is not always the case. If, for example, the spouses had separated prior to one of their deaths, the valuation date will be the date of separation, and not the date of death. If both spouses die simultaneously, neither spouse's estate will have a claim against the estate of the other, as there will be no surviving spouse. If both spouses die in circumstances rendering it uncertain which survived the other, neither of the spouse's respective estate trustees will be able to discharge the burden of establishing entitlement to an equalization claim. Subsection 5(1) of the *FLA* addresses equalization. Equalization essentially works as follows: the spouse with the greater NFP pays the other one-half of the difference between them. Equalization flows one way only, and that is in favour of the surviving spouse with the lesser NFP. Even if the surviving spouse has the larger NFP, the estate of a deceased spouse has no right of election in favour of equalization.

In addition to married spouses, a number of individuals are also able to make a *FLA* Election:

i. 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*;

ii. a mentally incompetent surviving spouse's guardian of property appointed under section 15(k) of the old *Mental Incompetency Act*[12];

iii. 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);

iv. an attorney under a continuing Power of Attorney for Property[13]; and

v. if the surviving spouse is incapable of managing her property, the personal representative may exercise the election under the *FLA* on her behalf.

B. The Effect 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, taking pursuant to the provincial intestacy laws set out in Part II of the *SLRA*. Notably, a surviving spouse is not permitted to do both, unless the will expressly permits them to do so.[14]

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[10] *FLA,* s. 4(1). The definition of NFP does not permit a deduction for the matrimonial home].
[11] *FLA,* s. 4(1)(5).
[12] R.S.O. 1990, c. M.9 [repealed].
[13] *Anderson v. Anderson Estate,* 1990 CarswellOnt 260 (Ont. H.C.J.) and *Cronkwright Estate v. Maltby* [1988] O.J. No.686 (H.C.J.)
[14] *FLA,* s. 6(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, it is important to remember that a dependant support claim will only be heard after the equalization claim is settled. An equalization claim also has 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.

Accordingly, the importance of properly advising a surviving spouse of their rights pursuant to the *FLA* and the deadlines for exercising those rights cannot be understated. In *Slaven v. Slaven Estate*[15] 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*,[16] 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.

A surviving spouse has six (6) months from the date of death of the deceased spouse to file an election in the form prescribed by the regulations,[17] failing which the spouse will be deemed to take under the will (if there is one) or pursuant to the intestacy provisions of the *SLRA*, unless the court, on application, orders otherwise.

If an application is needed to determine a surviving spouse's entitlement under subsection 5(2) of *FLA*, the spouse must bring the application within this six-month deadline.[18] In certain circumstances, the court will extend the time period to elect and apply pursuant to section 2(8) of the *FLA*, if the court is satisfied that: (a) there are apparent grounds for relief; (b) relief is unavailable because of delay that has been incurred in good faith; and (c) no person will suffer substantial prejudice by reason of the delay.

It is prudent to obtain an extension where the assets of a deceased are not known, or disclosed, thereby preventing a spouse from the ability to assess or analyze the merits of an election. Often where there is threatened litigation, or in cases where there is no estate trustee appointed or willing to act, or even perhaps clear of conflict, discovering the assets and liabilities of an estate may be delayed. Should a surviving spouse

[15] 2011 CarswellOnt 7973 (S.C.J.)
[16] 2011 CarswellOnt 774 (Ont. S.C.J.).
[17] *FLA*, R.S.O. 1990, c. F.3, s. 6(10).
[18] *FLA*, R.S.O. 1990, c. F.3, s. 7(3)(c) [note that the six-month deadline to bring an application does not apply in situations where the spouses were already divorced, in which case the deadline is two years from the date of divorce. Likewise, if the spouses have separated, the deadline to elect is six years after the date of separation].

move for an order extending the time to make an election, a motion to extend the time period in respect of a potential dependant support claim should also be considered to be brought at the same time under section 61(2) of the *SLRA*.

C. Domestic Contracts Made Pursuant to Part IV of the FLA

According to the *FLA*, there are three types of domestic contracts: cohabitation agreements;[19] marriage contracts;[20] and separation agreements.[21] Cohabitation agreements are utilized by unmarried partners who, at the time of execution, are either cohabiting or intend to cohabit. Cohabitation agreements generally deal with each partner's respective rights and obligations during cohabitation, on ceasing to cohabit, or on death. A marriage agreement or what are commonly referred to as a "pre-nuptial contract" is used by those persons that are legally married or intend to be.

For the most part, under the *FLA*, spouses are free to agree to whatever they wish about the rights and obligations that are to flow from their union, subject only to a few exceptions, such as contracts regarding the education, moral training or custody/access of children.[22] Indeed, domestic contracts may address property rights in the event of separation, divorce, or death, and may specifically opt out of equalization, or exclude certain assets from equalization, or provide for a different means of property division.[23] The same applies to spousal support, which can be waived altogether (should the couple so decide).[24]

While not an estate case, *McCain v. McCain*[25] is instructive on the enforcement of domestic contracts. It concerns a wealthy businessman, Wallace McCain, who told his adult children that he required all of them to sign domestic contracts with their spouses to protect the extensive assets he wanted to pass on to his children either in his lifetime or on his death. If his children refused, he would disown them. Accordingly, his son Michael presented his wife of 16 years (at the time) with a marriage contract. The contract was drafted by the husband's family law lawyer who also arranged for the wife to meet with an independent family law lawyer for legal advice. Under the contract, should the parties separate or the husband predecease her, the wife waived all of her property rights, keeping only the assets in her name, and waived her right to an equalization claim under the *Family Law Act*.

Fourteen years after signing the contract the couple sought a divorce. In the intervening years between the execution of the contract and the divorce, the husband's wealth grew significantly, while the assets solely in the wife's name only represented a very small portion of that wealth. At dispute in the divorce proceeding was, among other things, the validity of the marriage contract. The wife argued that the terms of the contract were "unconscionable" and did "not comply with the overall objectives of the *Divorce Act*." She claimed she did not understand what she was giving up by signing the contract, that the husband's financial disclosure under the contract was insufficient and that her husband took advantage of her "vulnerability and she entered into the contract under duress".[26]

Justice Greer reviewed and applied the relevant case law, including the two part test in *Miglin v. Miglin*.[27] The first part of the test required the Court to look at the circumstances in which the agreement was negotiated and see whether it should be discounted in those circumstances. The second part requires the court to assess whether the agreement still reflects the original intention of the parties and the extent to which it is still in

[19] *FLA*, s. 52.
[20] *FLA*, s. 53.
[21] *FLA*, s. 54.
[22] *FLA*, s. 56(1).
[23] Martha McCarthy, "Family Law for Estates Lawyers," Blending Family Estate Planning, LSUC Continuing Professional Development (June 14, 2011), at 19.
[24] *Ibid.* at 19.
[25] 2012 ONSC 7344.
[26] *McCain v. McCain*, 2012 ONSC 7344 at para. 20.
[27] *Miglin v. Miglin,* 2003 SCC 24.

compliance with the objectives of the *Divorce Act*. In analysing the circumstances under which the wife signed the contract, Justice Greer asked: "How could the Wife possibly take on the burden of not signing the contract for her own personal gain, knowing that her Husband's father would cut her Husband out of receiving his inheritance?" Her Honour concluded that the contract:

> *was not acceptable in a long term marriage, that went on for another 15 years after the [c]ontract was signed. There were no projections of what the Husband would be earning in the future. There were no projections of lifestyle changes, which took place as the years went on . . . An agreement, which may have appeared as fair to the Husband when it was signed, can through time become unconscionable. In my view this is what happened, and this leaves the Wife with very little. The circumstances regarding its execution, the improvident result for the Wife and the extent of the Husband's now wealth, are sufficient to have the spousal support provision of the [c]ontract set aside*."[28]

Accordingly, all sections of the marriage contract respecting spousal support were severed from the balance of the contract and the wife was awarded both interim and retroactive spousal support.[29]

D. Separation Agreements and Waivers of Rights

Separation agreements are entered into by spouses who have decided to live separate and apart following a period of cohabitation. It is not uncommon, after the breakdown of a relationship, for former spouses to enter into a separation agreement, in an effort to settle various issues, including spousal support and the equalization and division of family property. These agreements generally include mutual releases, which incorporate renunciations by the parties to all possible (present, future, contingent) claims in the other spouse's estate.[30] The separating spouses may even attempt to obtain a general waiver from their former spouse to any rights they may have in a pension plan or life insurance policy.[31] However, in these circumstances, attention must be had by drafting solicitors and the contracting parties to the specific legislation governing these types of plans and policies, since, again, in some cases, the rights and obligations bestowed under the governing legislation trump any attempt by the parties to contractually bar each other from access to the others' funds on death.

In *Richardson Estate v. Mew*[32], the Ontario Court of Appeal found that the former spouse of the deceased was entitled to take the death benefit under the deceased's life insurance policy simply on the basis that the deceased had never changed the designation. This was so despite the fact that the former spouse and the deceased had entered into a separation agreement which contained a mutual release of claims to property. As well, the deceased had remarried, with the second spouse making some of the payments on the policy under the mistaken assumption that the policy named her as a beneficiary. The Court's analysis and conclusion:

> 55 …A former spouse is entitled to proceeds of a life insurance policy if his or her designation as beneficiary has not changed. This result follows even where there is a separation agreement in which the parties exchange mutual releases and renounce all rights and claims in the other's estate. General expressions of the sort contained in releases do not deprive a beneficiary of rights under an insurance policy because loss of status as a beneficiary is accomplished only by compliance with the legislation. The general language used in waivers and releases does not amount to a declaration within the meaning of the *Insurance Act*.[33]

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[28] *McCain v. McCain*, 2012 ONSC 7344 at paras. 87-88.
[29] *McCain v. McCain*, 2012 ONSC 7344 at para. 108.
[30] Corina Weigl, "Making Sure You Play with Your Best Hand," All About Estates (July 13, 2011).
[31] *Ibid.*
[32] *Richardson Estate v. Mew*, 2009 CarswellOnt 2576 (Ont. C.A.).
[33] *Supra* note 72, at par. 50.

A similar outcome was demonstrated in the case of *King v. King*.[34] In this case, Mr. King and his former wife executed a separation agreement that contained a general release regarding his pension, including his OMERS Pension Plan. Section 44 of the *Pension Benefits Act*[35] contains a mandatory provision which establishes a joint and survivor pension where a former member has a spouse on the date that the payment of the first installment of the pension is due. Mr. King was still married to his first wife when he received his first payment. As such, when he wrote to OMERS to attempt to appoint his new wife as the beneficiary of his OMERS plan, OMERS replied that the separation agreement was not sufficient evidence that his former wife had relinquished her right to the survivor benefit. OMERS continued that if the former wife completed the OMERS Form 156, it would be accepted as sufficient evidence of her relinquishment. The former wife, however, refused to sign the form and Mr. King brought this application.

The narrow issue in this case was whether a general pension release contained in Mr. King's separation agreement was sufficient to constitute a waiver of his former wife's entitlement to his OMERS survivor's pension. The Court held that, as the waiver in the separation agreement did not mirror the requisite OMERS form (which, at the time the agreement was executed, was a Form 3), Mr. King had failed to comply with the strict requirements of the statute and, consequently, the Court refused to make a declaration that Mr. King's former wife had waived her entitlement to the survivor's pension via the separation agreement. As noted by the Court, Mr. King "found himself in the unfortunate position of being caught in a trap for the unwary."[36]

Clearly, the message to be taken from these cases is that, in addition to executing a separation agreement, a separating spouse or their drafting solicitor, must be diligent in ensuring that their separation agreements properly deal with their future property rights. As well, where possible, beneficiary designations ought to be promptly changed such that they reflect the outcome intended by the separating spouses in their contractual agreements and the waivers and releases contained therein. After all, as was the case in *King v. King*, application to the court may not produce the most equitable result in light of the clear intention of the parties as evidenced by their agreements. This is compounded by the fact that the setting aside of a domestic contract is no easy feat, as it requires the time and expense involved in commencing proceedings, which may not, in the end, produce the desired result.

E. Setting Aside a Domestic Contract

When analyzing a domestic contract, it is important to remember that like any other types of contracts, they are subject to the normal principles of contractual interpretation.[37] Although, as a general rule, a valid, enforceable contract, will be upheld by the courts, in certain circumstances (whether by the governing legislation or the jurisprudence) the courts will intervene and override the contractual agreements made by spouses.[38] Pursuant to subsection 56(4) of the *FLA*, a surviving spouse may apply to the court to have a domestic contract or a provision in it set aside on any or all of the following grounds:

(a) One of the spouses failed to disclose to the other significant assets, or significant debts or other liabilities, existing when the domestic contract was made;

(b) One of the spouses did not understand the nature or consequences of the domestic contract; or

(c) Otherwise in accordance with the law of contract.

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[34] *King v. King*, 2010 CarswellOnt 8901.
[35] R.S.O. 1990, c. P.8.
[36] *Supra* note 74, at par. 17.
[37] Martha McCarthy and Heather Hansen, "Family Issues in Estate Litigation," *Key Developments in Estates and Trusts Law in Ontario*, 2010 Ed., Melanie A. Yach, (Aurora: Canada Law Book, 2010) at 65.
[38] *Ibid.*

Subsection 56(4) has been interpreted by the Ontario Court of Appeal such that setting aside a domestic contract pursuant to it requires a two-part judicial analysis: first, the court must consider whether the party seeking to set aside the agreement can demonstrate that one or more of the circumstances set out within the provision have been engaged; and, second, once that hurdle has been overcome, the court must then consider whether it is appropriate to exercise discretion in favour of setting aside the agreement.[39]

The intersection between domestic contracts and dependant's relief claims made pursuant to the provisions of the *SLRA* is discussed in greater detail below. The point to note here, however, is the fact that one of the factors considered by the Court when a claim is advanced under Part V of the *SLRA* is "any agreement between the deceased and the dependant."[40] Thus, it goes without saying that, for an agreement to be considered by the court for the purposes of a dependant's support claim*, it must be valid*. Prudent estates practitioners should be mindful of the extensive law on the enforceability of domestic contracts, which may not be enforceable if they contain prohibited provisions,[41] a party failed to make full financial disclosure,[42] or if they are unconscionable.[43]

III. RECOURSE UNDER THE *SUCCESSION LAW REFORM ACT*

In Ontario, common law spouses do not have the same statutory rights as married spouses on an intestacy. They have no legislated right to a preferential share. Nor do common-law spouses have the ability to make an election for equalization of net family property under the *Family Law 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. It should be noted that 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*.

A. Dependant Support Claims under the *SLRA*

An order for dependant support is made by way of application to the court and may be made in circumstances where there is a will, intestacy, or, as noted, even where there has been a contractual agreement to waive support.[44] Subject to the exception in subsection 61(2) of the *SLRA*, an applicant has six months from the grant of letters probate of the will or of letters of administration to bring an application. Note that, in most circumstances, the phrase "grant of letters probate of the will" in subsection 61(1) is the equivalent of issuing the Certificate of Appointment of an Estate Trustee With a Will as referred to in Rule 74.04.[45]

The underlying rationale for the six-month limitation period is twofold: first, it gives a potential claimant the opportunity to make a claim within a fixed period of time, before the estate can be distributed; and, second, upon the expiry of the limitation period it provides the trustee with the repose of knowing that all potential claims have been received, presupposing of course that probate is obtained. It should be noted that the limitation period in subsection 61(1) of the *SLRA* is not absolute.[46] The jurisprudence with respect to granting

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[39] *LeVan v. LeVan* (2009), 90 O.R. (3d) 1, leave to appeal to S.C.C. refused [2008] 3 S.C.R. viii, at par. 51 (C.A.).
[40] *SLRA*, s. 62(1)(m).
[41] *FLA*, ss. 52(2) and 56(1).
[42] *FLA*, s. 56(4). See also *LeVan v. LeVan* (2008), 90 OR (3d) 1; 51 RFL (6th) 237; 239 OAC 1, application for leave refused in 2008 CanLII 54724 (SCC).
[43] *FLA*, s. 56(4). See e.g. *Miglin v. Miglin*, 2003 SCC 24, [2003] 1 SCR 303 and *Hartshorne v. Hartshorne*, 2004 SCC 22, [2004] 1 SCR 550.
[44] Corina S. Weigl and Jonathan F. Lancaster, "Contracting out of Dependant's Support Obligations," *Key Developments in Estates and Trusts Law in Ontario,* 2010 Ed., Melanie A. Yach, (Aurora: Canada Law Book, 2010) at 98.
[45] *Balanyk v. Balanyk Estate*, 2008 CarswellOnt 1353 (Ont. S.C.J.) at par. 14.
[46] *Balanyk v. Balanyk Estate*, 2008 CarswellOnt 1353 (Ont. S.C.J.), at par. 25.

an extension — recently reiterated in the case of *Habberfield v. Sciamonte et al.* - sets out the following principles in relation to an extension under section 61(2) of the *SLRA:*

(a) The Court has the discretion to allow the application to proceed at any time as to any portion of the estate remaining undistributed at the date of the application.

(b) The discretion of the Court under section 61(2) to allow an application to proceed although it is brought after the time limit has expired under the *SLRA* must be exercised judicially, with considerations of the delay involved, the reasons for the delay, and the extent of prejudice in the Estate's defence of the claim.

(c) The Court's discretion to extend the limitation period under section 61(2) is to be exercised in a broad and liberal manner.

(d) In deciding whether to grant the extension, the court must determine whether the situation bears review of whether or not the Deceased made adequate provision in his Will for the proper maintenance and support of his dependents.

(e) The question is not whether the Deceased has in fact done so, but whether there is a sufficient basis for review. This requires a consideration of what is equitable (in relation to the "proper" support of dependents as contemplated by the *SLRA*).

(f) While delay (including the reason for delay) is a factor to consider, a request for an extension is not grounded solely in "good cause" being shown for the delay. The discretion to extend or refuse is a question of what is equitable between the parties, in all the circumstances.

(g) In the absence of prejudice to the Estate, equity tends to favour granting an extension.

In a situation where an order for the Return of Certificate of Appointment is obtained pursuant to Rule 75.05(1) of the *Rules of Civil Procedure* (the "***Rules***"),[47] thus requiring that the Certificate be returned to the Registrar, as was the case in *Balanyk v. Balanyk Estate*,[48] the limitation period set out in subsection 61(1) of the *SLRA* will be suspended until further order releasing the Certificate or otherwise appointing another estate trustee. Clearly a judge is thus given a discretion to be exercised on the principle of promoting justice between those interested in the estate.[49]

Section 57 of the *SLRA* defines a "dependant" as "the spouse of the deceased" or "a child of the deceased". In either case, the dependant must also be a person "to whom the deceased was providing support ...immediately before his death".[50] The meaning of "support" under the *SLRA* includes "not only furnishing food and sustenance and supplying the necessaries [sic] of life, but also the secondary meaning of giving physical or moral support. The word "support" in the *SLRA* extends that meaning to include what might by some be considered as non-essentials or luxuries.[51] A prudent estate practitioner should be cognizant of the fact that support need not be direct financial support; it can also be providing basic human needs (e.g., shelter).[52]

As recently reiterated in the case of *Khemraj v. Khemraj*[53], a testator's conduct can also suggest an intention to provide support. Part V of the *SLRA* provides for the support of 'dependants,' in situations where a deceased

[47] R.R.O. 1990, Reg. 194.
[48] *Balanyk v. Balanyk Estate*, 2008 CarswellOnt 1353 (Ont. S.C.J.).
[49] *Habberfield v. Sciamonte et al.*, 2017 ONSC 4332, 2017 CarswellOnt 11503.
[50] *Stajduhar v. Wolfe*, 2017 ONSC 4954, 2017 CarswellOnt 13593.
[51] *Re Davies* 1979 CarswellOnt 605 (Surr Ct) at par 15
[52] *Khemraj v. Khemraj*, 2016 ONSC 7796, 2016 CarswellOnt 19706.
[53] *Ibid.*

spouse, prior to death, was providing support or was under a legal obligation to do so immediately before death,[54] but failed to make adequate provision for the proper support of his/her dependant spouse on death. In the case of a surviving spouse, the spouse needs to prove that he/she was indeed a spouse, that the deceased had a legal obligation to provide support or was providing support immediately before death, and that the deceased failed to make adequate support. If successful in qualifying as a dependant, the court will consider a list of factors pursuant to s. 62 of the *SLRA* and common law precedent in determining the amount and duration of support.

Part V of the *SLRA* is a powerful tool. At first blush, it may seem to provide a remedy akin to spousal support, which is guided by, the payor's means and the recipient's needs. However, the Ontario Court of Appeal has clarified that in determining claims for dependant's support under the *SLRA* the court must consider not just the applicant's bare needs, or legal claims, but also the applicant's moral or ethical claims.[55] Arguably, the moral claim always existed under the statutory factors but has become more entrenched as part of a legal claim.[56]

The case of *Su v. Lam Estate*[57] 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.

B. Failure to Make Adequate Provision for Proper Support

The finding that a person is a 'spouse' of a deceased does not automatically establish a claim for entitlement to dependant's support. In order to qualify as a 'dependant' under section 57 of the *SLRA*, it is necessary for the applicant to adduce credible evidence supporting the fact that the deceased was providing support to the applicant prior to their death and/or was under a legal obligation to provide support to the applicant, immediately before their death.[58] Once the applicant has met this evidentiary hurdle, they must then prove that the deceased failed to make adequate provision for their proper support.

In the case of *Perkovic v. McClyment*,[59] the common law spouse of the deceased was unsuccessful in succeeding in an application under the *SLRA*. According to the applicant, he had cohabitated with the deceased for 14 years, had been financially supported by her, but she had failed to make adequate provision for his proper support. In her will, the deceased left her entire estate to her children and grandchildren, with the estate having

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[54] *SLRA*, s. 57.

[55] *Cummings v. Cummings* (2004), 2004 CarswellOnt 99, 235 D.L.R. (4th) 474, (sub nom. Cummings Estate, Re) 181 O.A.C. 98, 5 E.T.R. (3d) 97, 69 O.R. (3d) 397 (Ont. C.A.).

[56] *Tataryn v. Tataryn*, [1994] 2 SCR 807; *Cummings v Cummings,* 2003 CanLII 64218 (On SC) – 2003-02-21. For an application of this particular moral claim in a situation of complex estate planning, see *Morassut v. Jaczynski Estate*, 2013 ONSC 2856; upheld on appeal 2015 ONSC 502 (Div. Ct): A successful business owner, was diagnosed with breast cancer and she decided to revise her estates plans in the last few months of her life. Two new Wills were produced. The first Will moved many of her assets to holding companies and left the residue of the estate to a family Trust created by the second Will. Her common-law spouse, was not provided for in either new Will, but the estate agreed to give him a $1,000,000 lump-sum payment. Her previous Will, nullified by her subsequent planning, had provided for her common law spouse a $1,000,000 payment. The estate argued that this single payment was adequate in itself and that he should not qualify for further dependant support under the *SLRA*. Following *Tataryn v. Tataryn*, however, the court found that the testatrix had "both a legal and moral obligation to continue to support him after her death." He was awarded sole ownership of a property that he and the testatrix had built together; a yearly sum for the rest of his life; and a smaller payment every five years so that he could buy a new automobile

[57] *Su v. Lam Estate*, 2011CarswellOnt 1030 (S.C.J.)

[58] *Stajduhar v. Wolfe*, 2017 ONSC 4954, 2017 CarswellOnt 13593

[59] *Perkovic v. Marion Estate*, 2008 CarswellOnt 5931 (Ont. S.C.J.) [*Perkovic*].

a gross value of $538,999.82. The Court referred to the seminal case of *Cummings v. Cummings*[60] and noted that when judging whether a deceased has made adequate provision for the proper support of her dependants, a court must examine, "the claims of all dependants, whether based on need or on legal or moral or ethical obligations."[61] In reaching its conclusion that the surviving spouse had not established that he was a dependant of the deceased, or that he lacked the means to meet his financial needs, the Court focused its attention on the fact that, by his own evidence, the surviving spouse had admitted that he had kept his financial affairs separate and apart from those of the deceased. For this reason, and reasons involving lack of credibility on his part, the Court refused to make an application for support in his favour.

In Ontario, the dependant can reach various assets of the deceased that do not form part of the estate. Certain *inter vivos* transactions can be clawed back into the estate for the purpose of satisfying a support award, including gifts *mortis causa*; property held jointly that passed to another person by right of survivorship; the proceeds of RRSPs and like instruments that pass to designated beneficiaries; property that the deceased settled on/in trust; the proceeds of any life insurance policy owned by the deceased; and others.[62] That said, Ontario claimants may also resort to equitable claims or rely on the *Fraudulent Conveyance Act*[63] to bring assets back into the estate, but these kinds of claims can result in difficult trials.[64] Prudent estate practitioners should also take into consideration that (as recently reiterated in the case of *Cotnam v. Rousseau*) dependants advancing a claim against assets described in Section 72(1) of the *SLRA* have the burden of establishing that the funds or property, or any portion thereof belong to the deceased.[65]

C. Domestic Contracts and the SLRA

As noted above, in order for an applicant to meet the definition of "dependant" in the *SLRA*, in addition to being a spouse, parent, child, or sibling of the deceased, they must prove that the deceased was either providing support to them, or was under a legal obligation to provide support to them, immediately before the deceased's death.[66] As well, one of the factors that the Court is to consider is "any agreement between the deceased and the dependant" (section 62(1)(m)). As a result, a domestic contract has the ability to preclude an applicant from successfully asserting that they are a dependant and that they are entitled to support. Indeed, a domestic contract may bar an application from meeting the dependant criteria, if the following requirements are met:

1. It contains a full and final spousal support release;

2. The deceased was not actually supporting the applicant before death; and

3. The applicant has not brought an application to overturn or vary the contract before the deceased's death.[67]

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[60] *Cummings v. Cummings* (2004), 2004 CarswellOnt 99, 235 D.L.R. (4th) 474, (sub nom. Cummings Estate, Re) 181 O.A.C. 98, 5 E.T.R. (3d) 97, 69 O.R. (3d) 397 (Ont. C.A.).
[61] *Perkovic v. Marion Estate*, 2008 CarswellOnt 5931 (Ont. S.C.J.), at par. 7.
[62] *SLRA*, s. 72.
[63] RSBC 1996, c 163.
[64] See *Mawdsley v. Meshen*, [2012] 5 W.W.R. 1, 2012 CarswellBC 442, 2012 BCCA 91, 211 A.C.W.S. (3d) 877, [2012] B.C.W.L.D. 2187, [2012] B.C.W.L.D. 2188, [2012] B.C.W.L.D. 2212, [2012] B.C.W.L.D. 2213, [2012] B.C.W.L.D. 2214, [2012] B.C.W.L.D. 2215, [2012] B.C.W.L.D. 2216, [2012] B.C.W.L.D. 2217, [2012] B.C.W.L.D. 2224, [2012] B.C.W.L.D. 2279, [2012] B.C.W.L.D. 2310, [2012] B.C.W.L.D. 2357, [2012] W.D.F.L. 1803, [2012] W.D.F.L. 1836, [2012] W.D.F.L. 1875, 74 E.T.R. (3d) 198, 28 B.C.L.R. (5th) 12 (B.C. C.A.) affirming 2010 CarswellBC 2078, 2010 BCSC 1099, [2010] B.C.W.L.D. 7868, [2010] B.C.W.L.D. 7877, [2010] B.C.W.L.D. 7879, [2010] B.C.W.L.D. 7882, [2010] B.C.W.L.D. 7883, [2010] B.C.W.L.D. 7884, [2010] B.C.W.L.D. 7886, [2010] B.C.W.L.D. 7902, [2010] B.C.W.L.D. 8020, [2010] W.D.F.L. 4845, [2010] W.D.F.L. 4904, [2010] W.D.F.L. 4961, 59 E.T.R. (3d) 51 (B.C. S.C.)
[65] *Cotnam v. Rousseau*, 2018 ONSC 216, 2018 CarswellOnt 69.
[66] *Supra* note 2, s. 57.
[67] Stephan M. Grant, "Can a Person Contract Out of Dependant's Support? Domestic Contracts and the Succession Law Reform Act," Ontario Bar Association, 2007 Institute of Continuing Legal Education (February 6, 2007) at page 1.

Where the context surrounding the domestic contract and the contract itself is as set out above, the contract "will effectively oust the Court's jurisdiction to determine dependant's support."[68] However, should the applicant successfully meet the criteria needed for them to be considered a "dependant," subsection 63(4) of the *SLRA* authorizes the Court to make an award for support, "despite any agreement or waiver to the contrary."

Unless an application was brought to vary or challenge a separation agreement containing a full and final release of support *before the death of the deceased*, a separation agreement of this nature may completely bar an applicant from making a successful support claim on the basis that he/she has failed to demonstrate that they are a dependant.[69] This may be the result despite the dire conditions of the surviving spouse after the death of a former spouse. In *Taylor v. Taylor*,[70] for instance, Mr. and Mrs. Taylor executed minutes of settlement following divorce proceedings, wherein Mrs. Taylor agreed to release Mr. Taylor and his estate from any claims in exchange for a monthly support payment. However, Mrs. Taylor found herself destitute following the death of her ex-husband, he having passed away shortly after her support payments ceased. Had the termination of the support payments taken place even a day after the death of Mr. Taylor, Mrs. Taylor would have met the definition of dependant, as set out in the *SLRA*.[71]

Similarly, in the case of *Mealey v. Broadbent*,[72] the deceased husband and his wife executed a separation agreement after almost 40 years of marriage, pursuant to which they agreed to divide their assets equally and Mrs. Broadbent agreed to forgo any provision for ongoing support payment. She also relinquished all claims against her husband's estate. At the time of the deceased's death, Mr. Mealey and Mrs. Broadbent were separated, but not formally divorced. Mrs. Broadbent's application for dependant's support was unsuccessful. Although she met the definition of "spouse", the deceased was not providing her with support at the time of his death, nor was he under legal obligation to do so immediately before his death.

In a situation where a domestic contract "keeps the support entitlement alive – even if the payor is paying "zero dollars" or nominal support to the recipient," on the death of the deceased, the recipient may choose from the following options:[73]

1. If the contract is incorporated into a court order, the support obligation binds the estate unless the order provides otherwise, pursuant to section 34(4) of the *FLA*. Thus, the surviving spouse may choose to continue to receipt support pursuant to the order;[74]

2. If the support order or agreement is not binding on the estate, the surviving spouse may apply under the *SLRA* for support, since they would still fit the definition of a "dependant";[75] or

3. Regardless of whether the Order or agreement is intended to be binding or not on the estate, the surviving spouse can apply under the *SLRA* for a different amount of support if the support they are receiving is inadequate.[76]

Notably, as stated, the domestic contract will only be one of several factors considered by the Court. Whether the deceased made "adequate provision" for the surviving spouse is the first factor that the Court must consider.

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[68] *Ibid.* at 1.
[69] *Supra* note 120, at page 2.
[70] *Taylor v. Taylor* (1985), 53 O.R. (2d) 174 (Ont. Surr. Ct.).
[71] *Supra* note 109, at 101.
[72] *Mealey v. Broadbent* (1984), 10 D.L.R. (4th) 762 (H.C.J. (Div. Ct.).
[73] *Supra* note 120, at 3.
[74] *Supra* note 120, at page 3.
[75] *Ibid.*
[76] *Ibid.*

In the case of *Butts v. Butts Estate*,[77] the Court awarded the surviving (former) spouse of the deceased an increased award of support from that agreed to in a separation agreement on the basis that the deceased had not made adequate provision for her. At the date of death of the deceased, the surviving spouse had been sick, her expenses exceeded her income, and she did not have any savings. In making his decision, Justice Kileen held at paragraphs 42 and 43:

> To me, s. 63(4) gives the court a broad judicial discretion to award support to a dependant, as defined in s. 57, notwithstanding the existence of any prior agreement or waiver. The language of s. 63(4) could not be broader or clearer in its purpose and is obviously aimed at achieving justice and equity at the date of the hearing, notwithstanding what the parties might have agreed to earlier on.
>
> In this case, Mrs. Butts has been living below the poverty line in straightened circumstances for at least the past several years and there is no reason why she should be denied a support order under the SLRA which would bring her out of such circumstances and enable her to live out her remaining years in some dignity and comfort. In other words, the support which has been paid under the separation agreement is now patently inadequate and must be corrected on any objective approach to the facts of this case.[78]

It is important to remember that unlike separation agreements, marriage and cohabitation agreements do not usually have an impact on whether an applicant meets the criteria of a "dependant," since it is normally the case that the spouses will be cohabitating and thus "supporting" each other at the date of one of the spouse's deaths.[79] Estate practitioners should use caution when advising a spouse who makes the decision to forgo spousal support pursuant to a domestic agreement since one of the messages emerging from cases such as *Mealey v. Broadbent* and *Taylor v. Taylor* is the importance of contracting in such a way to ensure the surviving spouse's protection should they encounter a change in financial circumstances after the death of their former spouse. A contract that provides for even nominal support payments up to and/or after the date of death will "buttress the applicant's ability to meet the statutory definition since at the time of death; there will be the requisite legal obligation to support."[80]

IV. Spousal Claims under Constructive and Resulting Trust Principles

As a result of the enactment of comprehensive matrimonial property legislation in the 1970s and 1980s, married spouses today have access to a range of property rights and entitlements upon the breakdown of the marital relationship. The same is not true for common law spouses, since, 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, restitution for these types of spouses after the breakdown of a relationship (or upon the death of a spouse) is sought by relying on common law as well as equitable remedies, such as the resulting trust, constructive trust, as well as actions in unjust enrichment and quantum meruit.

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 perhaps, slightly easier evidentiary thresholds to overcome. Conversely, the requirements for proving and determining both resulting

[77] *Butts v. Butts Estate* (1999), 1999 CarswellOnt 1435.
[78] *Supra* note 130, at paras. 42 & 43.
[79] *Supra* note 120, at 4.
[80] *Supra* note 109, at 101.

and constructive trust remedies historically proved extremely complicated and hence proved it difficult for unmarried couples to succeed with such claims. That said, in the seminal decisions of *Kerr v. Baranow and Vanasse v. Seguin,*[81] the Supreme Court of Canada clarified the concept of resulting trust, particularly as it relates to the spousal context. And, most importantly of all, the Court created a new judicial avenue for unmarried cohabiting spouses to obtain restitution in circumstances where unjust enrichment can be proven, thus making what was once nothing more than a legal mirage, into an equitable remedy with tangible proprietary and monetary consequences.[82]

A. Resulting Trusts

In *Kerr v. Baranow; Vanasse v. Seguin*, the Supreme Court radically altered the law with respect to the 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."[83] 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."[84]

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.[85] 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.

B. 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*[86] and affirmed in *Peel (Regional Municipality) v. Canada*.[87] 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'."[88]

Kerr v. Baranow; Vanasse v. Seguin 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

[81] *Kerr v. Baranow,* 2011 CarswellBC 240 (S.C.C.).
[82] Martha McCarthy, "Family Law for Estates Lawyers," LSUC CPD, Blended Family Estate Planning, June 14, 2011, at 12.
[83] *Kerr v. Baranow,* 2011 CarswellBC 240 (S.C.C.). at par. 15.
[84] *Ibid.* at par. 18.
[85] Jennifer J. Jenkins & H. Mark Scott, *Compensation & Duties of Estate Trustees, Guardians & Attorneys*, looseleaf (Aurora: Canada Law Book, 2008) at 18:40.10.
[86] *Becker v. Pettkus* (1980), 2 S.C.R. 834 (S.C.C.).
[87] *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762 (S.C.C.), at p. 788.
[88] *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.

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.[89]

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?

C. Claims of *Quantum Meruit* and Proprietary Estoppel

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 contract 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*,[90] 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 and 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.[91] 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*.[92] As, in cases of this nature, the surviving spouse will usually be the party with the most

[89] *Kerr v. Baranow,* 2011 CarswellBC 240 (S.C.C.). at paras. 89-100.
[90] *Pettkus v. Becker*, [1980] 2 S.C.R. 834 [*Pettkus*].
[91] Schnurr, Estate Litigation, 2nd Ed., 25 — Unjust Enrichment, Constructive Trust and Quantum Meruit Claims in Estates, 25.4 — Quantum Meruit Awards.
[92] *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, 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.[93]

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.[94] In *Albadi v. Greenzveig Estate*,[95] 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."[96] 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.[97] The law of proprietary estoppel is well settled and was clarified and confirmed in the Ontario cases of *Schwark Estate v. Cutting*[98] and *Spadafora v. Gabriele*[99].

V. CONCLUSION

Both the *FLA* and the *SLRA* provide comprehensive regimes that provide for support rights and obligations to flow to a surviving spouse or dependant of the deceased. As stated above, the *FLA* provides a comprehensive regime that provides for the property and other rights and obligations of spouses towards one another on the breakdown of their relationship or the death of a spouse. 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 an increase in blended families, remarriages, and other types of spousal relationships combined with the changes in the characteristics of the family unit over the last few decades, and the rapidly aging population, estate practitioners are seeing a correlative increase in the number of such claims being brought against estates not just by spouses of a deceased person, but by their combined children, extended family and other dependants as well. Accordingly, it is vital that Estates lawyers and Family Law lawyers, as well as other planning professionals advising on wealth management, and succession planning, become aware of the intersection of factors applicable to effective planning. It is only through this awareness, that the application of effective, competent planning can be usefully employed so as to protect rights and prevent unnecessary litigation and family break-down.

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evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence."

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

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

[95] *Albadi v. Greenzveig Estate*, 2011 CarswellOnt 5146.

[96] *Ibid.* at par. 13.

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

[98] 2010 CarswellOnt 350 (C.A.)

[99] 2011 CarswellOnt 14702 (S.C.J.)